



CNR. No. MHAK110017242022



COMMON ORDER BELOW EXH-05
IN R.C.S. No. 63/2022 AND IN R.C.S.NO. 1/2023
(Passed On 6th September 2023)

The suit bearing number RCS 63/2022 is instituted by the plaintiff (Arun @ Gajanan Damodar Nirmal) against the defendant (Yogesh Haribhau Tivhane) for specific performance of contract whereas the cross-suit for permanent injunction barring number RCS 01/2023 is filed by the defendant against the plaintiff (the parties for the sake of convenience hereafter refer to as per the nomenclature of RCS no. 63/2022). As dispute involved in both suits confine to same subject matter and being prejudiced between same parties, by consent of parties' the applications in both suits filed for temporary injunction by respective parties in their respective suits have been taken for adjudication. The following described property is the subject matter of suit and hereinafter for brevity refer to as "the suit-property"

Description of suit-property; -

Property Number	Area	Mauja
Malmatta number 284	1980 Sq. Ft.	Wadi, Adempur

Plaintiffs case in R.C.S. No. 63/2022 (Arun v/s Yogesh); -

- i. On 04.08.2003 the defendant entered into an agreement to sell with the plaintiff whereby he agreed to sale the suit-property for total consideration of **Rs. 21,000/- (Twenty-one thousand)**. The entire consideration has been paid to the defendant. The defendant promised to execute sale-deed whenever he would be called upon. The possession of the suit-property has been



delivered to the plaintiff and since then he has been in its continuous and peaceful possession. As the defendant is the good friend of plaintiff, he reposed confidence in him due to which the sale-deed was not executed.

- ii. As the prices of properties being rise the defendant demanding the suit-property back. It is pleaded that the plaintiff is ready to get the sale-deed executed. On the contrary the defendant has avoided to execute the sale-deed. Henceforth, by way of notice on 15.11.2022 the plaintiff called upon him to remain present at Sub-Registrar Office, Telhara for executing sale-deed. However, the defendant failed to abide the notice. Hence, the suit for specific performance of contract.
- iii. Since, the possession of the suit-property is invaded the temporary injunction is sought to protect the possession.

Reply of defendant (Exh-12)

- i. The plea of limitation has been raised by the defendant.
- ii. It is his case that in the year 2003 the father of defendant had developed medical ailments. Hence, he was in need of money. Therefore, the defendant borrowed Rs.21,000/- (Twenty-One thousand) and on accord of plaintiff he gave blank signed stamp paper. In the year 2004 the defendant has repaid the borrowed sum along with interest. However, the plaintiff on one or another pretext avoided to return blank stamp. To the utter surprise the plaintiff issued false notice to which the defendant replied.
- iii. According to defendant the plaintiff has misused the said blank stamp and, on its basis, claiming the execution of alleged



agreement to sell. In short, the defendant has raised the defence of money lending transaction.

- iv. The defendant denied the fact of delivery of possession. According to defendant he has never parted the possession of suit-property.
- v. It is asserted that since, the defendant is the true owner of suit-property as it is settled law that such application cannot be allowed.

R.C.S. No. 01/2023 (Yogesh v/s Arun); -

- i. A suit for perpetual injunction is instituted by the defendant on the ground that on 17.10.1988 the suit property is allotted to him under the Government Scheme and since then he has been the owner and possessor. The defence which is raised in R.C.S. No 63/2023 has been made the ground of the suit. Hence, I do not find it imperative to reiterate the same.
- ii. The plaintiff claiming to be in peaceful possession of the suit-property. Hence, temporary injunction is prayed to protect the possession from invasion by the defendant.

Written-statement-cum-reply of plaintiff (Exh-13).

- i. The pleas which are raised in **R.C.S. No. 63/2023 (Arun v/s Yogesh)** have been introduced as defence. Hence, no need to replicate.
2. The learned counsel for the plaintiff in R.C.S. no. 63/2023 argued that the agreement to sell filed on record specifically contains the stipulation which recognizes the possession of the plaintiff. He further argued that defendant has not denied the receipt of amount and only the contents of agreement have been denied. It is further argued that the



report by defendant is lodged after issuing notice by plaintiff. He further argued that the word 'फरोक्त' appearing in agreement to sell connotes the meaning of possession. In support of his argument, he has relied upon the following authorities;

- i. **Ram Kishan and another v/s Bijender Mann**
- ii. **Prakash Sahu v/s Saulal**
- iii. **S.Kaladevi v/s VR. Somasundaram**

3. Per contra the learned counsel for the defendant by way of his argument invited attention to para no. 1 of plaint. He further argued that the suit is not within limitation. Furthermore he questioned the word "फरोक्त" as substitution for possession. According to him the span of 20 years has been consumed to institute the suit which does not show the readiness and willingness of the plaintiff. He further argued that the alleged agreement is not registered and as such the bar provided under section 17 (1-A) of the Registration Act, does not give any protection to the plaintiff. According to him injunction cannot be henceforth granted against the true owner and therefore prayed to reject the application.

4. The following points have been taken for discussion. I have recorded my findings along with reasons thereof.

Sr.No	Points	Findings
1.	Who has made out prima-facie case?	Defendant herein/ plaintiff in RCS No.01/2023
2.	In whose favor balance of convenience lies?	Defendant herein / plaintiff in RCS N.01/2023
3.	Who would suffer irreparable loss if injunction will be refused?	Defendant herein / plaintiff in RCS No. 01/2023
4.	What order?	As per final order.



...REASONS...

5. Since R.C.S. No. 63/2022 is for specific performance of contract and another suit R.C.S. No. 01/2023 is for perpetual injunction the prima-facie case requires to be considered on basis of nature of respective suit of parties. In a suit for specific performance of contract the readiness and willingness are the decisive factor whereas in a suit for permanent injunction the factor of possession of the plaintiff is sine quo non for granting perpetual injunction Henceforth, I opt to discuss the points by giving due consideration to above aspects.

As to point no.1 and 2

6. The very first point assailed by the defendant is regarding the limitation of suit. Since, the same point has been assailed during argument the same needs to be considered. Needless to mention that the limitation is a mixed question of fact and law and for giving due consideration to said aspect the evidence at trial is warranted. In absence of evidence the factor of limitation cannot be decided efficiently. Still the factor is formed part of argument it is necessary to mention here that article 54 of the Limitation Act 1963 (**hereinafter refer to as “the act 1963”**) provides the limitation for suit for specific performance of contract. What this article provides is that the limitation to institute suit for specific performance is three years and the cause of action to institute such suit arises when the date on which performance was due and if no such due date is fixed then within three years when the refusal of performance noticed by the plaintiff. If the alleged agreement is perused what this prima-facie reflects that no such date of performance is fixed and the sale-deed agreed to be executed at the instance of plaintiff. Resultantly, without evidence the fact of refusal of performance cannot



be looked into. Henceforth, such submission does not appear to be helpful to the defendant.

7. Adverting to the readiness and willingness of the plaintiff. It is pertinent to note that the execution and contents of agreement to sell itself is in question. According to defendant the agreement is colored with transaction of sell. In fact, the defendant has not executed such agreement and he merely gave a black signed stamp to the plaintiff. The learned counsel for the defendant argued that the pleadings of plaintiff do not constitute the transaction of sell. Suffice to mention mere **inserting the fact that due to financial reason defendant decided to sell suit property does not in itself given reason to look the transaction with suspicious**. On the contrary for the purpose of entering into contract the promise, consideration and lawful object are only essential elements. Henceforth, I do not find any sustainability in this submission.

8. According to defendant he has borrowed money from the plaintiff in the year 2003 and he has repaid the same in the year 2004 and thereafter the defendant demanded to return the said stamp. At this juncture, it is pertinent to note that since the year 2004 till the issuance of notice by the plaintiff the defendant has remained mum and he gave the report to police station on 06.12.2022 (filed in R.C.S. No 01/2023) that too after issuing notice by the plaintiff. Henceforth such silence of the defendant for such long period certainly prima facie do not show any reason to discredit the agreement to sell. Resultantly, prima-facie I do find any reason to hold the agreement to sell as a transaction of money lending.

9. Now coming to readiness and willingness of the plaintiff. The agreement to sell is alleged to be executed on 04.08.2023. The suit is instituted in the year 2022 which is more than after 19 years. What the



agreement to sell transpires is that the entire consideration was paid to the defendant. The defendant was not remained to perform any obligation under the contract except the obligation of executing the deed of sale in favor of the plaintiff. What the contents of said agreement further reflects is that the sale-deed was agreed to be executed at the desire of plaintiff himself. What exactly has been agreed is that the defendant was bound to execute the sale-deed in favor of the plaintiff whenever the plaintiff will ask the defendant. Suffice to mention it is not even the case of plaintiff that before cause of action he has ever asked the defendant for completing or executing the sale-deed. Certainly, such unexplained period of more than 19 years prima facie cannot be construed as readiness and willingness on the part of the plaintiff.

10. It is pertinent to note that the real controversy that arises for determination in both these applications is regarding the factum of possession. The suit bearing number 01/2023 is instituted by the defendant herein for perpetual injunction. In said suit prima-facie the question of possession is decisive factor whereas in this suit the plaintiff herein claimed protection of possession on the basis of alleged agreement to sell. Resultantly, the answer of this question would be helpful to decide the fate of both applications filed in these suits. According to plaintiff herein the possession of the suit property has been given to him on the date of execution of agreement itself. Per contra as per defendant he has never parted with the possession of suit-property. Since, the written document is filed on record and as the prima-facie findings regarding its execution has been recorded in favor of the plaintiff herein I am of the considered opinion that the best evidence rules require to be applied in the case.



11. The learned counsel for the plaintiff argued that the delivery of possession is evidenced in the agreement itself. According to him the word "फरोक्त" recited in agreement connotes the meaning of delivery of possession. I took search of the word "फरोक्त" which implies the sale. Here sale means completed sale and not agreement to sell. What the plaintiff has claimed is that the contract to sell is executed by the defendant and the sale-deed was agreed to be executed at the instance of plaintiff. I have minutely perused the agreement in question. What it transpires is that the document is titled as Sale-deed and contents therein reflects the entering of contract for sell. The stipulation embodied in said document presupposes that the contract would be completed when the deed of sale will be executed. Henceforth, the construction & interpretation of such document would certainly show the completed contract except the execution of sale-deed. However, the said document does not contain any specific stipulation that the possession has been delivered to the plaintiff. The word "फरोक्त" henceforth cannot be substituted for delivering possession and it simply means completed sale. Therefore, the document prima-facie do not show that possession was delivered to the plaintiff.

12. As the argument on the point of section 53-A of the Transfer of Property Act is advanced, if for appreciating said contentions the document in view of word "फरोक्त" is taken as completed sale and even by giving effect of Sec. 54 of the T.P. Act, if it is assumed that under said contract the possession has been delivered to the plaintiff still the question that form part of consideration is that whether on the basis of such unregistered deed the plaintiff can protect his possession. At this juncture, section 53-A of the Transfer of Property Act 1882 along with section 17(1-A) R/w Sec. 49 of the Registration Act 1908 if conjointly



read in concurrence it abundantly makes clear that if in part performance of contract the transferee of the property has been put in possession and the transferee has performed or is willing to perform his part of contract then the transferor can only ask for performance of contract and he is disallowed under said section to take back the possession of property. Here it is pertinent to note that if such agreement or written document is unregistered then as per section 17 (1-A) of the Registration Act the possession of the plaintiff cannot be protected.

13. The learned counsel for the plaintiff placed on record the supra referred authority. In the case of **Ram Kishan and another v/s Bijender Mann** the Hon`ble *Punjab- Haryana High court observed that if the agreement is unregistered claiming to be covered under section 53A of the Transfer of Property Act,1882 then section 17 (1A) does not debar the institution of the suit for specific performance of contract.* I have carefully gone through ration laid down under supra citation answering on reference. The only question that arose before the Hon`ble Court was that whether on the basis of unregistered agreement the suit for specific performance can be instituted. The Hon`ble Court has answered the point in affirmative. In this case the question of maintainability of suit for specific performance is not the question before me. Resultantly, the supra- authority pressed into service is not helpful to the plaintiff. Another citation which is relied upon by the plaintiff is in the case of **Prakash Sahu v/s Saulal** wherein the *Hon`ble Apex court while considering the question whether an unregistered agreement of sale can be seen for the collateral purposes under the proviso of the section 49 of the Registration Act 1908 to which the Hon`ble Apex Court answered in affirmative and held that for collateral purpose such document can be seen.*



14. Furthermore, the plaintiff has also filed the authority of the Hon`ble Apex Court in the case of **S.Kaladevi v/s VR. Somasundaram** wherein the Hon`ble Apex Court observed that the unregistered document can be admitted in evidence in view of proviso to section 49 of the Registration Act. I have carefully gone through the supra-authority. In said judgment the only question for determination is that whether the unregistered document can be tendered and accepted in evidence where the suit is for specific performance of contract. Accordingly, the Hon`ble Apex Court observed therein that in a suit for specific performance of contract the unregistered document is admissible to the extent or recognizing oral terms of contract between the parties. In this case the question of admissibility of document is not in issue. Henceforth, the supra authority is also not helpful to the plaintiff. The question which at this stage arose for determination is that when the plaintiff is asserting to be in possession of suit-property whether on the basis of such unregistered deed the plaintiff can claim protection of his possession.

15. In view of section 17(1-A) and section 49 of the Registration Act the answered would certainly be in negative. What exception has been carved out by section 49 of the Registration Act is that only in a suit for specific performance of contract the unregistered agreement can be accepted and relied upon only for the collateral purpose and nothing besides this would by such unregistered confirm upon the person claiming interest on it. Resultantly, I am of the considered opinion that besides maintaining a suit for specific performance the plaintiff is not entitled to claim any interest derived under said agreement to sell. Henceforth the plaintiff otherwise also is not entitled to protect his possession.



16. Now, advertent to the claim of defendant who is plaintiff in RCS No. 01/2023 and sought relief to restrain the plaintiff herein (defendant in RCS no.01/2023) from disturbing the possession over suit property. So far as the factum of possession of defendant herein over the suit-property is concerned I have already observed while determining the factum of possession of the plaintiff that the word “ फरोक्त ” embodied in agreement to sell does not connote the delivery of possession. Said document prima-facie does not specifically contain recital regarding delivery of possession. Moreover, the Assessment copy filed with list Exh-04 (in RCS No. 01/2023) on record which is from the year 2018-2017, 2019-2020 by the defendant herein reflects his name in occupancy right. Furthermore, the photographs filed by the defendant in RCS no. 01/2023 do somewhere supports his case as regards to possession. Hence, in a suit for perpetual injunction the possession of the defendant herein prima-facie appears to be probable. So far as the question of balance of convenience is cornered the plaintiff herein prima-facie fails to establish his possession over the suit-property. When the plaintiff fails to show his prima-facie case and the possession appears to be of defendant the mischief or greater hardship certainly be caused to the party who is in possession. Resultantly, balance of convenience lies in favor of the defendant herein. Accordingly, I answered these points in favor of the defendant herein who is plaintiff in RCS No. 01/2023.

As to point no.3

17. As the defendant herein has prima-facie succeeded in establishing his possession over the suit property and as the title to the property still lies with the defendant and the plaintiff also asserting his possession the defendant needs to be protected. If the defendant will not be protected



then certainly, he will suffer irreparable injuries if the plaintiff invades his possession. Hence, I answered this point in favor of defendant.

As to point no.4

18. So far as question of cost is concerned both parties have filed the separate application in their respective suit. Hence, I am of the view that the cost of application needs to be put in cause.

19. Resultantly, the following order.

-----ORDER-----

- I. The application of plaintiff in R.C.S No.63/2022 is hereby rejected.
- II. The application of defendant herein in RCS No. 01/2023 is hereby allowed.
- III. The plaintiff herein Arun @ Gajanan Damodar Nirmal or any person on his behalf is hereby temporarily restraint from disturbing or causing obstruction to the possession of defendant i.e Yogesh Haribhau Tivhane over the suit-property.
- IV. Cost of both application is in cause.
- V. True copy of this order be placed on record of RCS No. 01/2023 (Yogesh v/s Arun).

Telhara.
Date 06.09.2023

Rahul A Rannaware
(Jt. Civil Judge Junior Division, Telhara)



Certificate

I affirm that the contents of this P.D.F. file are same word for word as per original .

Name of Stenographer	:	V. M. Nawle
Court Name	:	Jt.C.J.J.D. & J.M.F.C.,Telhara
Date	:	06.09.2023.
Signed by presiding officer on	:	06.09.2023.
Uploaded on	:	11.09.2023.