MHAU050015752022

COMMON ORDER PASSED BELOW EXH.05 AND 38 IN Spl.C.S.No.70/2022
(Passed on : 19 August, 2022)

Read the applications. Affidavits of the plaintiff Keshavkumar Babasaheb Kale at Exh.07 and Exh. 39, affidavit of Kiran Raosaheb Kale at Exh.58 and affidavit of Ravindra Fakirrao Pawar at Exh.59. Documents filed by the plaintiff vide list Exh.4, list Exh.52. Say of defendant no.1 at Exh.49 and say of the defendant Nos.2 to 5 at Exh.36. Affidavit of defendant No.2 at Exh.37 and documents field by the defendants vide list Exh. 53 and 56.

2. Heard the learned counsel for the plaintiff Smt. V. P. Barje and learned counsel for defendant Nos.1 to 5 Shri. Amit Vaidya and Shri. V. R. Songire at length.

3. The Ld. counsel for the plaintiff has relied upon the decision of ***Maharwal Khewaji Trust (Regd.) Faridkot V/s. Baldev Dass, Laws (SC) 2004-10-24, decided by the Hon'ble Supreme Court, Great Eastern Energy Corporation Ltd. V/s. Jain Irrigation Systems Ltd. Laws(Bom) 2010-2-98 decided by the Hon'ble Bombay High Court, bench at Aurangabad.***

4. The Ld. counsel for defendant No.1 has relied upon the decision of ***Shri. Prakash Gobindram Ahuja V/s. Ganesh Pandharinath Dhonde**, **Laws (Bom) 2016-10-6 decided by Hon'ble Bombay High Court, Kachhi Properties V/s. Ganpatrao Shankarrao, Laws (Bom) 2010-8-96 decided by the Hon'ble Bombay High Court, Mannalal Bhagwandas Agrawal V/s. Upendrakumar Sawarmal Saharia and others decided by the Hon'ble Bombay High Court, bench at Aurangabad dated 20/11/2009.***

5. Ld. Counsel for defendant Nos.2 to 5 have relied upon the decision of ***V. R. Sudhakara Rao and others V/s. T. V. Kameswari, 2008(1) Mh.L.J.., Chandrahas Narayan Shetty V/s. Misribai Ramkuvar Pandit and others, 2009(4) Mh.L.J. 980, Punit Beriwala V/s. Suva Sanyal and another AIR 1998 Calcutta 44, Mangabhai Jadavbhai Makwana V/s. Tekchand Chhaganlal Shah and others, AIR 2014 Gujrat 12, M/s. Unikol Bottlers Ltd. V/s. M/s. Dhillon Kool Drinks and another, AIR 1995 Delhi 25, Ambalal Sarabhai Enterprise Limited V/s. K. S. Infraspace LLP Limited and anr, AIR 2020 Supreme Court 307, Rohit A. Kapadia and Anr V/s. Perviz J. Modi**, **AIR 2016 Bombay 181.***

6. I have gone through the decisions cited by the Ld. Counsels for the parties.

7. The points for determination alongwith my findings thereon are as under:

	Points	Findings
1	Whether plaintiff has made out *prima-facie* case ?	**No**
2	Whether balance of convenience lies in favour of the plaintiff?	**No**
3	Whether plaintiff will suffer irreparable loss if temporary injunction is refused ?	**No**
4	What order ?	**Applications are rejected**

R E A S O N S

AS TO POINTS NO. 1 To 3 :-

8. The plaintiff has made this applications Under **Order XXXIX Rule 1 and 2 of Civil Procedure Code** for grant of temporary injunction restraining the defendants from alienating or creating third party interest in the suit property, so also restraining them from changing the nature of the suit property or making any construction over it.

9. It is not disputed fact that, defendant No.1 is a company registered under the Indian Companies Act having CINN No.**U17297MH1997PLC107575**, M/s., Shree Swamismarth Sakhar Karkhana LTD., Waluj Aurangabad. It is not disputed fact that, defendant Nos.2 to 5 were the directors of the company. It is also not disputed fact that, at present defendant No.1 a to 1 c are the directors of the company. It is also not disputed fact that, the suit properties are owned and possessed by defendant No.1. It is also not disputed fact that, the company is now taken over by defendant No.1 a to 1 c. It is also not disputed fact that, an oral agreement between the plaintiff and defendant Nos.2 to 5 took place. It is also not disputed fact that, in view of the said oral agreement some amount was transferred i.e. Rs.1,23,14,999/- in the account of defendant No.1, from 26/08/2019 to 20/07/2020 by way of cheques. The only dispute is that, the oral agreement relates to the sale of the suit properties for consideration of Rs.7,99,99,999/- or sale of land Gut No.156 to the extent of 4 Hector for consideration of Rs. 3,00,00,000/- and thereby the plaintiff paid consideration of Rs. 1,23,14,999/- to defendant no. 1.

10. The learned counsel for the plaintiff Mrs. Barje argued that, Zambad Udyog Ltd. decided to commence Sugar Factory at Mahalgaon, Tq. Vaijapur, Dist. Aurangabad in the name and style M/s. Shri Swami Samarth Sakhar Karkhana Ltd. Therefore, purchased 7 H. 99 R portion in Gut No.156 at Mahalgaon by registered sale deed dated 28-06-2011. Also obtained certificate of aerial distance from the Commissioner of Sugar Maharashtra State Pune as well as got registered the said unit with the Ministry of Commerce and Industry new Delhi on 18-02-2011. Defendant Nos.1 to 5 also purchased other pieces of land described in para No.1 A during period of 2011 to 2014. Inspite of this the defendants could not take further steps for the construction of the factory premises, purchase required machinery for Sugar Manufacturing and thereby to commence the actual manufacturing of the sugar till the end of October 2018. Mean time the directors of the company i.e. 2 to 5 change the name of Zambad

Udyog Ltd. as Zambad Udyog Sugar and Power Ltd. with effect from 22-08-2013. She argued that, in the month of November 2018 one of the director namely Subhash Zambad came in contact with plaintiff and his father and express desire to transfer their properties at Mahalgaon and Ghogargaon alongwith the license obtained by them from the concern authorities. As he found difficult to commence the manufacturing sugar, he assured the plaintiff that properties are free from all encumbrances and defendant Nos.1 to 5 are absolute title and possession and authorized to deal with the properties. Accordingly the plaintiff, his father, defendant Nos.2 to 5 as well as mediator Mr. Dwarkadas Pathrikar, Rangnath Kale, Kiran Kale and Ravidnra Pawar assembled together talks and negotiation took place and the sell of the suit properties was finalized. Wherein defendant Nos.2 to 5 agreed to sale and transfer the suit properties which is ad-measuring 50 Acres alongwith the license for total consideration of Rs.7,99,99,999/- and it was agreed that plaintiff to pay immediately amount of Rs.9,99,999/- and balance amount of Rs.7,90,00,000/- to be paid by the plaintiff to defendant No.1 at the time of execution and registration of sale deed on compliance all other terms of agreement. Wherein it was agreed by the parties, to get the land measured provide all necessary documents for verification, issuing paper publication, submitting bank guarantee certificate and execution of the sale deed and bearing its expenses. Handing over possession of the land at the time of sale deed. Seeking of permission for transferring electrical feeder providing necessary documents in that regard.

11. She further argued that, after setting the terms and conditions the initial amount was paid through cheque the account office Proprietary concerned M/s Keshav Dudh Sankalan Kendra in the bank of Baroda, Shrirampur in the presence of all mediators. The said cheque was en-cashed by the defendant No.1. After oral agreement the plaintiff insist for agreement but believing on the words of defendant No.2 the same was not executed. She argued that from time to time from 26-08-2019 to 20-07-2020 an amount of Rs.1,23,14,999/- was paid to defendant No.1 but due to various difficulties the then directors of defendant No.1 did not transfer the suit properties in favour of the plaintiff on account of litigation in respect of mutation. Due to Covid-19 the Government Offices were closed, therefore the suit properties could not be measured. After removal of all restrictions by the State Government, the plaintiff asked Mr. Subhas Zambad for performance of the contract as he was ready and willing to perform the same and pay the remaining consideration. But defendant Nos.2 to 5 refused to perform the same. She argued that, when the plaintiff found refusal on the part of the defendants, he tried to collect the information and came to know the defendant Nos.2 to 5 were selling the suit properties in the marked. On 19-05-2022 surprisingly plaintiff found the names of defendant No.1 a to 1 c came to be inserted as directors of defendant No.1 by virtue of resignation by defendant Nos.2 to 5. She argued that, these defendants played mischief on the part of the plaintiff and Government authorities and transferred the suit properties in favour of defendant Nos.1 a to 1 c. She argued that, defendant No.1 is the registered company under the Indian Companies Act having perpetual seal and independent status. Therefore the transaction entered on behalf of the directors of the company with the third party is binding. The oral agreement of purchase of suit properties also reflected in the account books and income tax returns of both parties. Therefore the said transaction is binding upon the defendants. She argued that, the plaintiff is and was ready and willing to perform the part of the contract by paying balance consideration. Defendant No.1 or its directors were not ready to perform the same. She argued that, the directors of the company are making attempt to transfer the suit properties to third party as well as creating charge of financial institution with intention to create and obstacle and hindrance in execution of the decree, that may be passed in favour of plaintiff. Hence prayed for injunction restraining the defendants from creating third party interest in the suit properties. So also restraining them for making construction over the suit properties.

12. She further argued that, the bank statement filed with list Exh.4 at Sr.No.5, 6 & 7 clearly disclosed that, the plaintiff paid amount of Rs.1,23,14,999/- from his proprietary concern M/s. Keshav Dudh Sankalan Kendra to defendant No.1 upto 20-07-2020. She further argued that, the amount accepted by defendant No.1 itself shows that, it was accepted in view of oral agreement agreed in between plaintiff and defendant Nos.2 to 5. She further argued that, the act of defendant Nos.2 to 5 resigning from the directorship of the company and inserting defendant No.1-a to 1 c as the directors of the company. This itself shows the ill-intention of these defendants depriving the rights of the plaintiff. She further argued that, the admitted fact from defendant Nos.2 to 5 in respect of oral agreement with the plaintiff, accepting the amount of Rs.1,23,14,999/-, resigning from the directorship of the company by defendant Nos.2 to 5 and inserting defendant No.1a to 1 c as the directors of the company, itself shows that, the defendants are trying to keep aloof the plaintiff from performance of part of contract. These show they are not ready and willing to perform the part of contract and trying to alienate the suit properties depriving the rights of the plaintiff. She further argued that, she has satisfied the essential ingredients of Order XXXIX Rule 1 and 2 of C.P.C. If the relief of injunction is not granted the plaintiff will sustained irreparable loss which cannot be compensated in any means. So also sustained damage to the properties. Hence, prayed for injunction.

13. Learned Counsel for defendant No.1 argued that, the suit properties are owned by defendant No.1 company. Defendant Nos.2 to 5 are not owners of the said land. He argued that, there is no documentary evidence on record to show there was any such alleged oral agreement between the plaintiff and defendant Nos.2 to 5 for transfer of properties owned by defendant No.1 alongwith the license. He argued that, defendant No.1 company alongwith immovable properties and the license taken for starting a sugar factory. Defendant Nos.1 a to 1 c showed their interest to purchase the same. Defendant Nos.1 a to 1 c have taken sufficient care and have collected necessary information with respect to the title of the landed properties of defendant No.1 company. Defendant Nos.1 a to 1 c after taking all precautions have entered into the transaction with defendant Nos.2 to 5 and accordingly it was agreed to purchase defendant No.1 company alongwith its immovable properties and license for huge consideration of Rs.6,53,63,358/- and the defendant No.1 a to 1 c have paid major part of consideration of Rs.4,53,29,000/- to defendant Nos.2 to 5, therefore they are bonafide purchaser. He argued that, the plaintiff has no prima facie case nor balance of convenience lies in his favour. Therefore, question of causing injury or damage do not arises. He further argued that, when the suit is based on oral agreement, the heavy burden lies on the plaintiff to show what were the terms and conditions or the agreement and the said terms and averments are required to be strictly proved. There is no material placed on record to show that, since 2018 to 2020 and thereafter the plaintiff was ready and willing to perform the part of contract. He argued that, the plaintiff has already registered lease pendence with the concerned authority. Therefore the question of damage to the properties do not arises. The defendants are also constructing Sugarcane factory and the plaintiff is also alleged to be doing the same. If the plaintiff succeed in the suit automatically it will the property of the plaintiff. Therefore there is no harm to the properties of the plaintiff, if the relief of injunction is refused. He further argued that, from time to time the Hon'ble High Court and Supreme Court has reiterated and considered unless all the three ingredients of Order 39 Rule 1 and 2 are established injunction cannot be granted. In the present case the plaintiff has failed to establish the prima facie case, balance of convenience do not lies in his favour and there is no irreparable loss would cause to plaintiff if injunction is refused. On contrary it will be loss to the defendants. Lastly, prayed to reject the application.

14. Learned Counsel for defendant Nos.2 to 5 argued that, defendant Nos.2 to 5 were the directors of the company, now defendant No.1a to 1c are only the directors of defendant No.1. These defendants have no concerned with defendant No.1, the suit properties belongs to company, except property described in para no.1 A to i.e. land Gut No.156 to the extent of 4 Hector is not under project map of defendant No.1 company and other properties is under proposed project of defendant No.1 company to construct sugar factory. He argued that, the plaintiff came with contact with defendant No.2 as he knows that the defendant No.2 is M.L.C. and Social worker started to erect the big project of sugar factory with an intention to develop the Vaijapur Taluka, approached defendant No.2 only and requested that he is also interested to erect the Dairy project in Vaijpuar Taluka and is in need of at least 10 Acres of land for his proposed project. Therefore being good project for development for farmers of Vaijapur Taluka, defendant No.2 agreed to provide 10 Acres of land adjoining to defendant No.1 sugar factory. The entire land of defendant No.1 factory was / is occupied for Sugar factory project except the land described in plaint para no.1 (A) (2). The said land was purchased by defendant No.1 under the name of proposed Shri. Swami Samarth Sakhar Karkhana Samuh Zambad Udyog Limited, by way of registered sale deed bearing day book No.539/13 on 04/02/2013. The defendant No.2 orally agreed to sell the said 4 H. land to plaintiff in presence of Raju Sawalaram Bachakar, Dwarkadas Pathrikar and Rangnath Kale only on 08-11-2018 for sale above 4 Hector land to plaintiff for running business of Dudh Dairy with manufacturing its ancillary products for the consideration of Rs.30,00,000/- per Acre. The total amount of said land comes to Rs.3,00,00,000/-. It is agreed that, the transaction shall be completed within six months from 08-11-2018. After negotiation said transaction the plaintiff paid earnest amount of Rs.9,99,999/- out of Rs.3,00,00,000/- on 16-11-2018 by cheque in the name of defendant No.1 company and agreed to pay remaining consideration within six months. Time was essence of contract. The contract must be decided and completed within six months. If plaintiff failed to complete the transaction it was decided before above witnesses that amount paid up to six months will be forfeited without any notice. In fact the defendant No.1 was not intended to sale the said property but plaintiff assured to erect the projects of Dairy and its ancillary product which will help in development of Vaijapur Taluka and therefore condition was imposed at the time of transaction.

15. He argued that, there is no any transaction of the suit property except land described in para 1 (A) (2). However even this land was also not decided to be measure by defendant No.2. He argued that, the oral contract is terminated on 15-11-2020. There is no contract or agreement at any point of time to sale the entire project with land and license which was valued more than thirty Crores to the plaintiff in such meager amount. The suit is false based on imaginary theory. He further argued that, in a case of oral agreement discretionary relief of specific performance cannot be granted in the absence of proof of all essential terms and conditions of concluded contract. He argued that, the terms of oral agreement are require to be placed before the Court in the form of evidence. The same is absent in the present case. He argued that, in the absence of concluded contract agreement as alleged cannot be enforced. He argued that, there is nothing on record to show that, from the date of alleged oral agreement till the institution of the suit the plaintiff has taken any steps to perform the part of contract. In the absence of it, the prayer made by the plaintiff cannot be considered. He argued that, defendant No.1 is the registered company under the provisions of the companies Act. He argued that, the dispute in between the parties related to commercial dispute, relating to the immovable property used exclusively in trade or commerce. Therefore the dispute falls under the Commercial Court Act 2015. He argued that, the plaintiff failed to establish the essential ingredients of Order XXXIX Rule 1 and 2 of C.P.C., therefore not entitled for relief as prayed for. Lastly, prayed to reject the application.

16. If considered the submissions made by the Ld. Counsel for both the parties, minutely gone through the pleadings of the parties and undisputed facts between the parties and cited supra decisions, prima facie it has to be seen that, there exists the oral agreement between the parties as alleged by them or not.

17. The Hon'ble Supreme Court in a case of ***V. R. Sudhakara Rao and others V/s. T. V. Kameswari, 2008(1) Mh.L.J..*** held that discretionary, relief of specific performance cannot be granted in absence of proof of all essential terms and conditions of concluded contract. In case of ***Chandrahas Narayan Shetty V/s. Misribai Ramkuvar Pandit and others, 2009(4) Mh.L.J.*** the Hon'ble Bombay High Court held that, in case of oral agreement the terms of oral agreement are required to be placed before the Court in the form of evidence. If minutely gone through the pleadings of the plaintiff it appears that the pleadings are vague in respect of the terms and conditions of alleged oral agreement. The terms and conditions narrated by the plaintiff in his plaint nowhere disclose as to whether time was the essence of contract or not. It nowhere disclose when the possession of the suit property is to be handed over to the plaintiff. It nowhere disclose within what period the license of the company is to be transferred and the manner in which it is going to be transferred or it is to be sold. It nowhere disclose the cause and consequences of failure of specific performance of oral contract. It nowhere disclose if any dispute arises, how the same is going to be resolved and by what mode. In the absence of proof of all essential terms and condition of the concluded contract it cannot be said that there was an oral agreement in between the plaintiff and defendant No.2 to 5 for sale of the suit properties mentioned in claim clause (1-A) and (1-B). Further more, record nowhere disclose the affidavits of Dwarkadas Pathrikar and Rangnath Kale who appears to be the mediators to the alleged oral agreement. Both the parties have conveniently avoided to submit the affidavits of aforesaid persons. The reason known best to them. I am discussing this aspects because both the parties have come to the Court on the basis of oral agreement stating that in presence of the above said two persons the parties have agreed to sale the properties as alleged by them. Their affidavits on record would be of useful to both the parties so as to establish their claim but it appears that they avoided to submit the same. Therefore, doubts create in the mind as to whether any alleged agreement in between the parties occurred or not.

The plaintiff has filed affidavit of Kiran Kale and Ravindra Pawar. The same cannot be relied upon in the absence of affidavit of Dwakadas Pathrikar and Rangnath Kale. So far as transferring the amount as alleged is concerned, the same do not leads to to infer this fact, that the said amount was transferred in lieu of alleged oral agreement in respect of the entire suit properties or to the extent of Gat no. 156, 4 H. Therefore, though the plaintiff and defendants have pleaded the fact of oral agreement, but they have failed to establish the same. Therefore, prima facie it cannot be said that, there was an oral agreement between the plaintiff and defendant nos. 2 to 5 in respect of the suit properties and oral agreement in between defendant nos. 2 to 5 with plaintiff in respect of Gat no. 156 admeasuring 4 H.

18. Further more, the pleadings of the plaintiff and record, nowhere disclose that, since 2018 to 2020 and thereafter, the plaintiff was ready and willing to perform the part of the contract as agreed in between the parties.

19. It is not disputed that, the present suit is instituted for specific performance of contract against the defendants wherein, the plaintiff has claimed the relief of temporary injunction restraining the defendants from creating third party interest in the suit properties. In a suit for specific performance of contract it has to be seen the contract / agreement is valid or not ? It is not disputed defendant No.1 is the company registered under the companies Act., Therefore, it is governed by the provisions of the Companies Act. If consider the submissions made by the Ld. Counsel for both the parties, it appears that the plaintiff as well as defendant No.2 to 5 and defendant No.1- a to c have allegedly acted assuming and presuming the suit properties are their self acquired properties. Defendant No.1 is legal entity and the properties acquired by defendant No.1 are the properties of the legal entity and not the property of any individual or property of defendant nos. 2 to 5 or defendant nos. 1-a to 1-c. I am disusing this aspects because defendant Nos.2 to 5 were the directors of the company and defendant nos. 1-a to 1-c are shown to be the present directors of defendant no. 1. **Section 180 of the Companies Act.**, empower the board of director of the company to pass special resolution for “*sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings*”**.** In the present case the record nowhere disclose the board of directors of defendant no. 1 Company passed a special resolution empowering defendant nos. 2 to 5 to sell or enter into an agreement for sale of the suit properties or sale of Gat no. 156 to the extent of 4 H for alleged consideration. The pleadings of the parties nowhere disclose that both the parties have acted in good faith in the absence of special resolution. In the absence of it the alleged act of defendant no.2 to 5 as well as of defendant nos. 1-a to 1 -c with the plaintiff and defendant No.1 is illegal and contrary to the law. While claiming the relief of specific performance of contract, the agreement should be valid and the parties to the the said contract, should be competent. It appears that the parties to be alleged oral contract are not competent person to entered into contract or agreement in the absence of special resolution passed by the board of directors of the company. Therefore, the alleged oral contract either in between the plaintiff and defendant No.2 to 5 or in between defendant no. 2 to 5, with plaintiff and between defendant No.1 and 1- a to c is illegal and void. It is settled position of law that the illegal and void contract cannot be enforced. Furthermore, defendant No.1 is company in co-operated under the companies Act., formed the purpose of manufacturing sugar. It comes under the categories of Infrastructure project. In view of section 20 A and 41 of the Specific Relief Act, the Courts are restrained from granting injunction against infrastructure projects. If Consider this aspects and above discussion the sum and substance goes to show that prima facie the plaintiff failed to establish the prima facie case and balance of convenience in his favour.

20. So far as irreparable loss is concerned there is no loss or damage to the plaintiff on contrary the loss would be to the defendants. Because, defendant no. 1 is a Company incorporated under the companies act for manufacturing Sugar. It is an infrastructure project. If the order of injunction is granted heavy loss and damage will cause to the stake holders and the same cannot be compensated by any means. On the contrary, the remedy of damages and recovery of amount is available to the plaintiff if he succeeds to prove his case, at the conclusion of the trial. It is settled position of law that, for granting 39 Rule 1 and 2 of C.P.Code., the essential ingredients of the same are required to be establish. The plaintiff failed to establish the same. Therefore, I answer point No.1 to 3 in the negative.

AS TO POINT NO.4

21. The plaintiff prima facie failed to prove that there was an oral agreement between himself and defendant Nos.2 to 5in respect of sale of the suit properties as alleged by him. He failed to prove the essential ingredients of **Order XXXIX Rule 1 and 2 of C.P.Code.** Therefore, the relief of temporary injunction as prayed by the plaintiff cannot be granted. The prayer in that regard is required to be rejected. According, I answer point No.4 and pass following order :

ORDER

1. Applications **Exh.5 and 38** are hereby rejected.

2. No order as to costs.

(Dictated and pronounced in the open Court.)

Digitally signed by RAJESH MADHAVRAO NERLIKAR
Date: 2022.08.22 18:01:10 +0530

(R. M. Nerlikar)
Date : 19-08-2022 Civil Judge (Sr. Div.,)
Vaijapur.

C E R T I F I C A T E

I affirm that the contents of this P.D.F. file of order is same word to word as per the original order.

Name of Stenographer	:	Ganesh Zade.
Court	:	Civil Court, Senior Division, Vaijapur, Dist. Aurangabad.
Date	:	19-08-2022
Order signed by the presiding officer on	:	22-08-2022
Order uploaded on	:	22-08-2022