

MHRG140000892020



Regular Civil Suit No. 20 of 2020

Hasuram Vithoba Patil

Vrs.

Shubhay Developers Partnership

Firm Through Kisan Gajanan

Tandel

ORDER BELOW EXH. 5

This is an application filed by the plaintiffs in accordance with provision of order XXXIX Rule 1 and 2 of the code of civil procedure.

The application in brief is as under

2. It is averred that the landed property specifically described in para no. 1 of the plaint situated at Village Chanje, Tal. Uran is the subject matter of the present suit herein after refer as 'suit property'.

3. It is submitted by Advocate Shri. Anil Nagdeve for plaintiff that, the defendant no. 1 are the builder and promoters who running a construction business under the name & style of 'Shubhay Developers & Partnership Firm'. Whereas defendant no. 2 and 3 are the original owner of the suit land who transfer the same to the defendant no.1 for development vide development agreement dated 27/11/2009. The development agreement disclosed that defendant no. 1 and 2 to 3 agreed to construct tree storey building i.e. 'Gajanan Apartment' over the suit property. Accordingly, requisite permission for no objection certificate had taken by defendant no.1 and construction map was approved by concerned Grampanchayat.

4. Plaintiff approached to the defendant being interested in the propose flat constructed over suit land. He verified the document, building map and after satisfaction decided to purchase flat bearing no. 23, third floor ad-measuring 700 sq. fit over the suit property. consequently, on 20.03.2010 a notarized agreement to sale was executed between them for total consideration amount of Rs. 8,10,000/- out of the said agreed amount, plaintiff had paid earnest amount of Rs. 6,50,000/- by cheque on various date as per the demand of defendant.

5. It is contended that, almost 70% consideration amount was paid by plaintiff, therefore he made demand to execute sale deed in his favor and possession of allotted flat to him. However, at the relevant time in the month April 2019, defendant assured him that he will handover ready possession of the alleged flat within 7 to 8 months. But despite of repeated demand plaintiff come to know that, defendant deliberately circumvent to hand over possession and to execute sale deed in his favour only to grab the extra money from the plaintiff. The plaintiff had sent the notice to the defendant no. 1 on 30.09.2019 said notice has been returned to the plaintiff's counsel on 07.10.2019, hence plaintiff constrained to file present suit.

6. It is submitted that plaintiff is always willing to perform his part performance of agreement. However, there is urgent need of temporary protection to the plaintiff since, he has paid almost 70% amount of total consideration. In the circumstances on refusal on temporary injunction it will cause great hardship to him as there is

huge possibility that, being owner and developer of the suit property defendant may create third party interest therein which ultimately cause irreparable loss to the plaintiff. Moreover, agreement to sale specifically depicted that, defendant was agreed to hand over the possession of alleged flat to the plaintiff. Hence, prima facie case and balance of convenience lies in favor of plaintiff. Therefore, it prayed that defendant be restrained from alienation the suit field or to create third party interest till the conclusion of trail.

7. Per contra, defendant no. 1 has filed written statement cum say at Exh. 25 and denied all adverse contention raised by plaintiffs. Whereas, defendant no. 2 to 3 failed to file say hence, this application proceeded without their say. It is submitted, plaintiff had erroneously paid court fees under section 6(vi)(j) of the Bombay court Fees Act. Therefore, at the threshold suit liable to be dismissed. It is further assailed that, suit ought to have been file within the three years from the date of accrual of cause of action however, caused of action appears to be arise after elapse of 24 months within three years from the date of agreement but plaintiff has erroneously filed present suit delayed after 3 years.

8. It is assailed that, as per the agreement plaintiff is in obligation to pay consideration amount within 24 months from the date of agreement but plaintiff itself sufficiently revealed that, it has paid in the year 2015. Therefore, it come across that, plaintiff himself failed to act as per the stipulation made in the agreement. Hence, he has no right to claim execution of sale deed in his favour. It is further assailed

that, suit property comes under the grampanchyat area thus, there is no requirement for registration under this circumstance plaintiff wrongly sought claim of execution of sale deed.

9. It is submitted that suit has been filed with the ulterior motive only to harass the defendant and to grab alleged flat without paying consideration amount. Further, plaintiff not come with the clean hand and without paying requisite court fees suit came to be filed hence this application is devoid in merit and ought be rejected.

10. After taking into consideration the rival contention of both the parties and perusal of the document filed by the parties. The following issues arise for my determination. I have recorded my findings and reasons thereon, which are as under:

Sr.	Points	Finding
1	Whether the plaintiff proves prima-facie case?	Yes
2	Whether the plaintiff proves that he will suffer irreparable loss, if the application got rejected?	Yes
3	Whether the plaintiff proves that balance of convenience lies in his favour?	Yes
4	What order?	Allowed.

-:- REASONS -:-

AS TO POINT NO. 1 to 3:-

11. To substantiate the case, plaintiff has placed reliance upon copy of agreement to sale executed on dated 20.03.2010., Bank Statement, copy of Notice & acknowledgement post receipt.

12. It is a settled principle of law that for agitating temporary injunction its incumbent upon plaintiff to prove prima facie case, balance of convenience lies in his favour and irreparable loss will cause to him in case of refusal of relief sought by him.

13. The Ld. Advocate for plaintiff strenuously argued that, despite of paying 70% amount of consideration defendant without any sufficient reason has deliberately avoid to execute sale deed in favour of plaintiff which constrained him to file present suit. It is argued that prima facie case and balance of convenience lies in favor of plaintiff and plaint sufficiently discloses arguable case of plaintiff. It is further argued that, plaintiff is belonging to middle class family and had invested from his daily savings. Therefore, if this application got rejected it will cause great hardship to him and may cause irreparable loss which cannot compensated in terms of money.

14. In the other hand Ld. Advocate for defendant Shri. Anurag Thakur argued that, for payment of consideration amount there is stipulation mention in the agreement which sufficiently revealed that plaintiff himself had breached the said stipulation. He required to pay the same one with interest at the rate of 18%. Thus, to circumvent payment of interest amount suit came to file. It is further argued that, not a single document place on record to show that defendants are

going to sell out the alleged suit property to the third person and thereby creating third party interest therein. Moreover, this court has no pecuniary jurisdiction to try the present suit since, plaintiff sought execution of sale deed in respect of consideration amount i.e. Rs. 8,10,000/- and plaintiff is should have value the suit as per the market value of the suit property.

15. At the outset plaintiff has filed present suit for specific performance of agreement dated 20.03.2010 as per the provision of Maharashtra Ownerships of Flats Act, 1963 ("MOFA Act"). On perusal the written statement filed by defendant no.1 at Exh. 25 emerged that, defendant has admitted the contention made in the plaint that, development agreement was taken place between defendant no. 2 and 3. It is further admitted that, he has made construction upon it under the name of Gajanan Apartment. Therefore, there is no dispute about alleged suit field and building construction upon it. It is further emerged that, defendant did not deny about the agreement to sale taken place between plaintiff and him on dated 20.03.2010 and earnest amount Rs. 8,10,000/- received from plaintiff.

16. In the light, section 3 MOFA Act casts onerous responsibilities upon a promoter who constructs a building of flats which are to be taken on ownership basis. Whereas, section 4 of the Act specifically describe that, before accepting any payment as advance payment or deposit from a flat purchaser, the promoter has a liability to execute a written agreement in the prescribed format with ever flat purchaser and get this agreement registered under the Registration

Act. Undoubtedly in the instant case agreement to sale has been executed between the parties and advance amount seems to be paid. Therefore, prima facie it appears that plaintiff has arguable case.

17. It is argued that, at the moment three different wings of building constructed over the suit property therefore plaintiff does not sufficiently disclose the description of flat which intend to give to the plaintiff. Under these circumstances it become difficult to understand in respect of which flat plaintiff seek temporary injunction. It is relevant to state that, nothing has produced on record to surmise that there is three building has constructed by defendant. Moreover, Para 3 of alleged agreement and Para no. 4 of plaintiff sufficiently disclosed about the flat. Therefore, question would not arise about description of property.

18. It is further argued that, suit is proper valued and plaintiff has erroneously paid court fees stamp. Plaintiff has place reliance upon case of **Hon'ble Bombay High Court Civil Revision Application No. 483 of 2017 Krian Suresh Bhagiya V. M/s Kakade Construction Co. Pvt. Ltd :** in which Hon'ble high Court held that, *"when the suit is filed seeking to enforce the statutory obligations which are arising under the MOFA Act, such a relief being incapable of monetary valuation, the valuation made by plaintiff in the said case relying on clause no. 6(iv) (j) of the Court Fees Act is correct"*

19. on perusal the agreement to sale appears that, parties are agreed to pay consideration amount within 24 months Rs. 27,500/-

per months. And if parties failed to pay it continuously for two years defendant has right to revoke the said agreement after issuing notice. However, statement annexed with the plaint shows that, plaintiff had paid sufficient amount through which duly received by defendant without objection. Further, written statement does not reveal that plaintiff had stop payment continuously for two years neither any revocation notice seems to be issued by defendant. Under these circumstances at this juncture, it cannot proper to consider that because of plaintiff's fault defendant circumvent to hand over possession of alleged flat.

20. Undoubtedly agreement sufficiently revealed that defendant had agreed to sale the alleged flat to the plaintiff and for that he had received total amount of Rs. 6,50,000/-. Therefore, prima facie case tilted in favor of plaintiff. Whereas, balance convenience is also lies in favour of plaintiff since, comparative mischief or inconvenience certainly suffered by him only. In the other hand defendant would not suffer any hardship as he had agreed to sale the said flat to the plaintiff. Moreover, on refusal the prayer for temporary injunction possibility of creating third party interest cannot be ruled out which ultimately cause irreparable loss to the plaintiff.

21. Hence, considering the facts and circumstances I am in the view that, there is much arguable case in favour of plaintiff. Resultantly, I have passed following order.

-: ORDER :-

1. Application is allowed.
2. Defendant no 1 to 3 or their agent, assignee or legal heirs are hereby restrained to alienate or create third party interest in the flat bearing No.23, third floor ad-measuring 700 sq fts. built-up area situated at “Gajanan Apartment” Sr. 176 hissa No. 7 village Chanje.

Date :- 24.05.2022
Place:- Uran.

(R. B. Pol)
Jt. Civil Judge Junior Division,
Uran.