

CNR No. MHPU020039582014



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Duration : 07Y.08M.12D.

IN THE COURT OF CIVIL JUDGE, SENIOR DIVISION, PUNE

[Presided over by S.M.A.Sayyed, 7th Jt.Civil Judge Sr. Div., Pune]

Spl. Civil Suit No.1055/2014

Exh.No.66

1) **Shri. Chandrashekhar Ramchandra Datir**

Age: 61 Years, Occupation: Business,

2) **Sou. Sumitra Chandrashekhar Datir**

Age: 57 Years, Occupation: Business,

Both are R/at- Flat No.903/904,
9th Floor, Sharmad Residency, CTS No.291,
Erandwane, Pune 411038.

... Plaintiffs.

Versus

1) **Shri. Ajit Vasantrao Ghag**

Age: 48 Years, Occupation: Business,
R/at – Flat No.902, 9th Floor,
Sharmad Residency, CTS No.291,
Erandwane, Pune 411038.

2) **Shri. Umesh Balvant Inamdar**

Age: 47 years, Occupation: Agriculture & Business,
R/at – 2160, Sadashiv Peth, Pune 411030.

...Defendants.

Claim: Suit for Specific Performance and Injunction.

Advocate for Plaintiffs – Mr. A. D. Phulpagar
Advocate for Defendant No.1 – Mr. H. P. Shinde
Advocate for Defendant No.2 – No W.S.

J U D G M E N T

(Delivered on 13th day of April, 2022)

At the outset, it is necessary to mention that the Memorandum of Understanding (MoU) dated 14/02/2013 which is involved in the present suit is also subject matter of Special Civil Suit No.1403/2013. Parties to these suits are same. However, in present suit plaintiffs sought specific performance of MoU for allotment of 12 meter wide access road from Survey No.1361/1/B and Gat No.2358 whereas, the present defendant No.1 by filing Special Civil Suit No.1403/2013 prayed to declare the clause No.5 (c) and (d) of said MoU as unenforceable and forbidden by law.

2. Pleadings of plaintiffs in a nutshell is as under:

That, the plaintiffs do business of development under the head of M/s.Datir Construction Pvt. Ltd. The defendant No.1 was tenant of plaintiffs and the plaintiffs used to reside in the same building adjacent to the flat given to defendant No.1 therefore, there was cordial relationship between them. The defendant No.1 told plaintiffs that Mahindra and Mahindra Company wanted to sell their land at Wagholi, Pune. The total land is admeasuring five Acres and that he will purchase two Acres and if the plaintiffs are interested then he will manage and see that these plaintiffs can purchase remaining three Acres. He further told there is no approach road or there is no access to the said land, however, if these plaintiffs are purchasing the land, then he would manage to give them 12 meter wide access road and for that they have to pay handsome amount. Actually, Gat No.2359 and 2360 being a lock land its market value was not more than 50 Lakh rupees. However, Mahindra and Mahindra Company quoted an amount of Rs.3,20,00,000/- for five acres of land of entire Gat No.2358 to

2360. As the defendant No.1 agreed to give road for the access to Gat No.2359 and 2360 the plaintiffs purchased these Gat numbers for Rs.2 Crore. The plaintiffs have also paid consideration amount of Rs.1,20,00,000/- for the purchase of Gat No.2358 in the name of defendant Nos.1 and 2. The consideration amount paid to defendant Nos.1 and 2 was with respect to granting access to Gat No.2359 and 2360. Said amount was paid to defendant No.1 vide cheque bearing No.546366 dated 30/08/2012. The plaintiffs have also paid Rs.10,12,500/- to defendant No.1 towards other miscellaneous charges. The defendant No.1 also executed memorandum of understanding (MoU) dated 14/02/2013 with respect to grant of 12 meter wide access road to Gat No.2359 and 2360. Said MoU was notarized. The defendant No.1 failed to comply the terms and conditions mentioned in said MoU. The terms and conditions of said MoU was to be performed within six months from the date of execution of said document and 12 meter wide access road to Gat No.2359 and 2360 was to be given from Gat No.1361/1/B by proper demarcation. The defendant No.1 also pledge title deed of Gat No.2358 with plaintiffs towards actionable security. It is agreed that if the defendant No.1 failed to comply with respect to 12 meter wide access road then the plaintiffs are entitled to encash said title deed. However, the defendant failed to comply terms and conditions of said MoU.

3. Prior to execution of MoU defendant No.1 was very well aware regarding RCS No.977/2011, however, in spite of that he had executed MoU in favour of plaintiffs. Therefore, now the defendant No.1 cannot turn away by saying that the terms and conditions of MoU are not enforceable. The refusal to perform terms and conditions of MoU is

nothing but cheating on the part of defendant No.1. Therefore, this suit for specific performance of MoU for allotment of 12 meter wide access road from Gat No.1361/1/B and Gat No.2358. If the defendant No.1 failed to perform said MoU, then alternatively, he be directed to pay Rs.3,72,07,500/- towards damages, compensation and interest. Hence, this suit.

4. The defendant No.1 filed written statement at Exh.22. By denying all the pleadings of plaintiffs, contended that, he is a businessman and work as consultant in property matters. The plaintiffs are investors and carry business of promoter and developers. The defendant No.2 is having technical knowledge in respect land scrutiny and land dealing. The plaintiffs approached him as they required land for development to form a company in Wagholi area. As many known builders have launched and having launching their projects in Wagholi area as it upcoming IT hub. He is having contact with many companies which are situated in Wagholi and one of them companies are Mahindra and Mahindra and one M/s.Usha Enterprises. Mahindra and Mahindra company was interested to sell its property as there was no access road to said property and one civil suit is pending of adjacent owner with respect to said property. The plaintiffs were interested to purchase said properties. However, due to hectic work and lack of other knowledge and other properties it was not possible for them to continue the deal in respect of suit properties therefore they appointed defendant No.1 and 2 as executors of deal to decide first price and to deal with the persons for sale deed. The defendant No.1 was having good rapo with M/s.Usha Enterprises, the original land holder who could give access to the suit properties. He was having total control on the execution part of

solving litigation regarding title. Defendant No.1 gave proposal to Mahindra and Mahindra company to purchase its property. Said company agreed to sell suit properties on 'as is where is' basis. Defendant No.1 confirmed this aspect with plaintiffs. However, they rejected said proposal to purchase land involved in litigation. At that point it was decided that plaintiffs shall pay defendant No.1 and 2 considerations inform of land i.e., Gat No.2358, if they can bring access road from M/s.Usha Enterprises. On physical verification, it appears that Gat No.2358 is admeasuring 75 Are and minimum 5 Are of land is required for construction of road or access from main road via Survey No.1361/1B. Therefore, after discussion plaintiffs promised that Gat No.2358 be considered as a consideration to the defendant No.1 and 2 jointly for getting access from said survey number. As Gat No.2358 was less to 5 Are to complete 80 Are the plaintiffs agreed to pay additional consideration amount to defendant No.1 and 2.

5. On 17/05/2012, plaintiffs gave an amount of Rs.50 Lakh to defendant No.1 for miscellaneous and other expenses and access road. He made efforts and work hard in the period from the month of December 2011 to get the access road by visiting and having discussion with the partners of M/s.Usha Enterprises and got the required NOC for the access road. As promised to give Gat No.2358 to defendant No.1 and 2 towards their participation and efforts from getting access road, the plaintiffs gave Rs.1,20,00,000/- to them to purchase said land from Mahindra and Mahindra company. It took much period to draft and prepare the document of sale deed which was affirmed and confirmed by both the parties. However, surprisingly the plaintiffs with ulterior motive suddenly changed their mind and attitude, especially after the NOC of access road was

obtained. They took different stands on the point of consideration paid to the defendant No.1 and 2. Therefore, he sent email dated 23/09/2012 to plaintiffs and informed that sale deed of Gat No.2359 and 2360 was to be executed by Mahindra and Mahindra company in favour of plaintiffs on 20/09/2012. It was also informed that out of 200 Are land, 80 Are land will belong to defendant No.1 and 2. An option was given by him to plaintiffs that in case they desire to record their names then an amount equivalent to cost of the land be paid to him by postdated cheques and by execution of MoU. Similarly, the different of 5 Are land and its costs was also informed. It is also informed that easement right and NOC of M/s.Usha Enterprises will be provided by the defendant No.1 and 2. The costs of 5 Are land was agreed to Rs.31,25,000/- out of which the defendant No.1 received Rs.15,30,000/- and balance of Rs.15,95,000/- is still outstanding.

6. After several negotiations at last on 31/12/2012 sale deeds of suit properties were executed and same were registered on 20/02/2013. Before execution of sale deed as per the mutual understanding MoU dated 14/02/2013 was executed between the plaintiff and defendant No.1 to 3 which was Notarized through public notary. The highlights of the said agreements are as under;

(5) That the sums paid in three (3) above is pure non-refundable on consideration/compensation paid by the party of the Second Part to the Party of First Part provided and in pursuance of performing the following act;

- a) To ensure the smooth execution of sale deed mentioned in (1) and (2) above.*
- b) To ensure the names of the Party of Second Part are entered on the property card in respect of Gat No.2359 and 2360 village Wagholi,*

Taluka Haveli, District Pune.

- c) *To ensure that proper legal access along with duly demarcated access for existing road admeasuring 12 (Twelve) meters wide as demarcated in the plan annexed hereto through Gat No.1361/1/B to Gat No.2359 and Gat No.2360, village Wagholi, Taluka Haveli, District Pune, to the satisfaction of the Party of the Second Part at no additional cost to the Party of Second Part.*
- d) *To ensure that a proper physical access of the road as mentioned in (5-c) above is given to the Gat No.2359 and Gat No.2360 village Wagholi, Taluka Haveli, District Pune.*
- (7) *That the Party of First Part shall deposit the Original Title Deeds of its land purchased as mentioned in (4) above with the Party of Second Part. As encashable security in the event of non-performance of acts as mentioned in clauses (5a, 5b, 5c, 5d) above.*
- (8) *That the Party of First Part assures the Party of Second Part that they shall not deal with the land of Gat No.2368 village Wagholi, Taluka Haveli, District Pune in any manner whatsoever till and until they ensure total completion of the acts and assurances as mentioned in clauses (5a, 5b, 5c, 5d) above.*
- (9) *That the Party of Second Part shall immediately handover the documents in its possession as per clause (8) above to the Party of First Part immediately on total completion of the acts and assurances as mentioned in clauses (5a, 5b, 5c, 5d) above.*

7. Accordingly, defendant No.1 has complied his part of contract except clause No.5 (c) and (d). He also provided 12 meter wide access road from western side of Survey No.1361/1/B and written NOC has been handed over to the plaintiffs. It was also made it clear that an amount of Rs.1,20,00,000/- paid by the plaintiffs on 30/08/2012 is non-refundable as the work has been done. The defendant No.1 as part of duty cast in the MoU has kept his original title deed as security in the event of non-performance of clause No.5 (a) to (d) of MoU. As per the Contract Act,

1872 any contingent contract which is to do a particular act upon uncertain future event (as per MoU 12 meter wide access road was an act to be done in the future). Similarly, defendant No.1 was under impression that dispute in RCS No.977/2011 between M/s.Usha Enterprises, Mahindra and Mahindra company and other owners will be solved in future. The conditions of giving access of 12 meter wide access road was written as per clause 5 (c) and (d) of the MoU. On the date of filing of suit there was injunction against the original owners and Mahindra and Mahindra company. The defendant No.1 cannot do any act which is forbidden by law. The uncertainty is such that original owners may or may not succeed in future in respect of access of road. If they succeed then they will give duly demarcated access as per the clause 5 (c) and (d) of MoU and if they failed then defendant No.1 is unable to perform the act mentioned in MoU. Therefore, the performance of his part of contract become forbidden by law. However, entire MoU cannot be terminated as other part has been complied. Lastly, prayed for dismissal of suit.

8. Defendant No.2 though appeared in the suit but failed to file say and written statement therefore, suit proceeded without written statement against him.

9. Following issues are framed at Exh.24 to which I record my findings along with reasons as under;

SR. NO.	ISSUES	FINDINGS
1)	Do plaintiffs prove that MoU dated 14/02/2013 executed between themselves and defendants is an enforceable contract?	Yes

- | | |
|---|---|
| 2) Whether plaintiffs are entitled for specific performance of MoU? | As per final order |
| 3) Whether plaintiffs are entitled for refund of Rs.1,30,12,500/- along with interest @24% per annum along with damages and compensation? | As per final order |
| 4) What order and decree? | Suit is partly decreed with costs. |

REASONS

10. The plaintiffs to substantiate their claim examined plaintiff No.1 Chandrashekhar Ramchandra Datir as PW-1 at Exh.25 and 42 and produced following documents viz- office copy of Notice dated 16/07/2014 at Exh.32, Sale Deeds dated 31/12/2012 registered at Sr. No.1394,1395,1396/12 at Exh.33 to 35, MoU dated 14/02/2013 at Exh.36, letter dated 12/06/2012 sent by defendant No.1 to plaintiff at Exh.37, postal receipts collectively at Exh.43, sealed envelope of notice sent by plaintiffs to defendant No.2 at Exh.44 and notice reply sent by defendant No.1 to plaintiffs at Exh.45. The Plaintiffs closed their evidence by filing pursis at Exh.51.

11. On the other hand, the defendant No.1 himself as DW-1 at Exh.54 and filed following documents i.e., certified copy of Gift Deed dated 20/10/2016 at Exh.60, copy of Exh.1 in Special Civil Suit No.1403/2013 at Exh.61, certified copies of documents filed in Special Civil Suit No.1403/2013 collectively at Exh.62, certified copies of say and judgment in Case No.1291/2013 at Exh.48 to 50. He closed his evidence by filing pursis at Exh.65.

As to Issue No.1:

12. Before touching the merits of case, it is necessary to have a look at admitted facts. Execution of MoU dated 14/02/2013 and its contents are admitted. It is also an admitted fact that plaintiffs purchased Gat No.2359 and 2360 for consideration from Mahindra and Mahindra Company whereas, Gat No.2358 was purchased by defendants jointly from said Company. Though, the defendant No.1 during cross-examination has denied that the consideration amount of Rs.1,20,00,000/- for purchase of Gat No.2358 has been paid by the plaintiffs. However, there is specific admission in written statement that plaintiffs gave an amount of Rs.1,20,00,000/- to defendants to pay Mahindra and Mahindra Company to purchase Gat No.2358. Further, it is also an admitted fact that as per MoU the defendants are required to give 12 meter wide access road from Survey No.1361/1/B and Gat No.2358 to proceed towards the properties of plaintiffs.

13. PW-1 deposed that defendant No.1 approached plaintiffs and stated that Mahindra and Mahindra Company wanted to sell their land at Wagholi, Pune. The total land is admeasuring five Acres and that he will purchase two Acres and if the plaintiffs are interested then he will manage and see that these plaintiffs can purchase remaining three Acres. He further told there is no approach road or there is no access to the said land, however, if these plaintiffs are purchasing the land, then he would manage to give them 12 meter wide access road and for that they have to pay handsome amount. Actually, Gat No.2359 and 2360 being a lock land its market value was not more than 50 Lakh rupees. However, Mahindra and Mahindra Company quoted an amount of Rs.3,20,00,000/- for five acres of

land of entire Gat No.2358 to 2360. As the defendant No.1 agreed to give road for the access to Gat No.2359 and 2360 the plaintiffs purchased these Gat numbers for Rs.2 Crore. The plaintiffs have also paid consideration amount of Rs.1,20,00,000/- for the purchase of Gat No.2358 in the name of defendant Nos.1 and 2. The consideration amount paid to defendant Nos.1 and 2 was with respect to granting access to Gat No.2359 and 2360. Said amount was paid to defendant No.1 vide cheque bearing No.546366 dated 30/08/2012. The plaintiffs have also paid Rs.10,12,500/- to defendant No.1 towards other miscellaneous charges. The defendant No.1 also executed memorandum of understanding (MoU) dated 14/02/2013 with respect to grant of 12 meter wide access road to Gat No.2359 and 2360. Said MoU was notarized. The defendant No.1 failed to comply the terms and conditions mentioned in said MoU. The terms and conditions of said MoU was to be performed within six months from the date of execution of said document and 12 meter wide access road to Gat No.2359 and 2360 was to be given from Gat No.1361/1/B by proper demarcation. The defendant No.1 also pledge title deed of Gat No.2358 with plaintiffs towards actionable security. It is agreed that if the defendant No.1 failed to comply with respect to 12 meter wide access road then the plaintiffs are entitled to encash said title deed. However, the defendant failed to comply terms and conditions of said MoU. Prior to execution of MoU defendant No.1 was very well aware regarding RCS No.977/2011, however, in spite of that he had executed MoU in favour of plaintiffs. Therefore, now the defendant No.1 cannot turn away by saying that the terms and conditions of MoU are not enforceable. The refusal to perform terms and conditions of MoU is nothing but cheating on the part of defendant No.1.

14. Plaintiffs have come with a positive case that the terms and conditions with respect to allotment of 12 meter wide access road in MoU dated 14/02/2013 is an enforceable contract whereas, the defendant No.1 come with negative assertion that clause No.5 (c) and (d) of MoU are unenforceable and forbidden by law. Therefore, I hold that though the burden is cast on the plaintiffs to prove the terms and conditions of MoU are enforceable however, it is the defendant No.1 who has to prove or discharge the burden that how the clause No.5 (c) and (d) of MoU is unenforceable and forbidden by law.

15. Learned Advocate for plaintiffs submitted that the defendant No.1 putforth the only reason for not enforcing the MoU is pending of litigation. There is no specific pleading that how pendency of RCS No.977/2011 is an obstacle or hurdle in performing contract. Said suit is for injunction simplicitor. Moreover, the defendant No.1 failed to prove that terms and conditions of MoU are forbidden by law. Even, he failed to make out any inquiry as to whether RCS No.977/2011 is still pending or has been disposed of.

16. Per contra, learned Advocate for defendant No.1 submitted that MoU dated 14/02/2013 is the crux of matter and the only question that arise is whether said document is fit in the eye of law to be enforced. The clause 5 (c) and (d) of MoU which are under consideration cannot be performed lawfully. The main condition of MoU was to grant 12 meter wide access road to plaintiffs to proceed towards their property. The defendant No.1 has obtained NOC from M/s.Usha Enterprises on 09/01/2012 with respect to access road. Prior to execution of sale deeds of

Gat No.2359 and 2360, access road was made available by the defendant No.1 to plaintiffs. Furthermore, as per Section 23 of the Contract Act, 1872 the terms and conditions mentioned in clause 5 (c) and (d) of MoU cannot be enforced. The plaintiff No.1 during cross-examination admitted that he has gifted his share to plaintiff No.2 during the pendency of suit. It means that plaintiff No.1 is not the owner of suit properties therefore, he is entitled to give evidence on behalf of owner i.e., plaintiff No.2. Hence, his evidence cannot be considered in the light of settled law that the power of attorney cannot depose on behalf of his master. In support of his contentions, he relied on following judgments;

- 1) Punjabrao Ramrao Ingle & ors Vs. Himmatrao Devrao Dhondge & Ors, 2014(4) Bom.C.R.716.
- 2) Vidhaydhar Vs. Manikrao, 1999 DGLS (SC)304
- 3) Prakash Ramkrishna Khadse & Ors Vs. Manikrao Ramaji Sonwane & Ors, 2010(2) Bom.C.R.384.

17. It is pertinent to note that defendant No.1 tried to make out a case of coercion and undue influence by stating that plaintiffs influenced him to execute MoU dated 14/02/2013. However, no any oral or documentary evidence has been placed on record to show that said MoU was executed under coercion or undue influence. Had it been the case of defendant No.1 that said MoU was executed under coercion or undue influence then he ought to have claimed cancellation of entire MoU and did not have sought declaration only with respect to clause 5 (c) and (d) of MoU by filing Spl.Civil Suit No.1403/2013. Therefore, the submission of learned Advocate with respect to coercion and undue influence cannot be considered and it holds no substance.

18. As far as the plaintiff No.1 tendering evidence for himself and plaintiff No.2 is concerned. The learned Advocate for defendant No.1 submitted that plaintiff No.1 cannot depose on behalf of plaintiff No.2 as the suit properties i.e Gat No.2359 and 2360 has been gifted in favour of plaintiff No.2 therefore, she has become absolute owner of entire properties. Therefore, the plaintiff No.1 being power of attorney cannot depose for plaintiff No.2. Admittedly, Gift Deed is executed during the pendency of suit and plaintiff No.1 has transferred his half share in the suit properties in favour of his wife i.e., plaintiff No.2. It is important to note that, present suit is filed by plaintiff No.1 and 2 in individual capacity. Plaintiff No.1 deposed in capacity of one of the plaintiffs and with respect to facts known to him personally. He did not depose as power of attorney holder of plaintiff No.2. Even, no power of attorney has been filed on record. Gift Deed was executed during the pendency of suit that too, in the year 2016 but all the facts mentioned in the suit are prior to the year 2013-14 of which plaintiff No.1 has every knowledge. Moreover, the disputed MoU is executed in favour of plaintiff No.1 and 2 therefore, I hold that plaintiff No.1 can certainly depose on his behalf as well as on behalf of plaintiff No.2. Hence, considering the above mentioned reasons, I hold that the case laws relied by defendant No.1 is of no help as they differ from the facts and circumstances of present case and have no bearing at all.

19. The defendant No.1 not only pleaded and deposed that 12 meter wide access road as per MoU has not only been made available to the plaintiffs but NOC to use said road has also been obtained from M/s.Usha Enterprises. It is pertinent to note that the perusal of terms and conditions of clause 5 (c) and (d) reveal that these conditions are with respect to

providing 12 meter wide access road. If the contention of defendant No.1 is accepted and it is believed that 12 meter wide access road has been provided long back in the year 2012 by giving NOC then the question of execution of MoU and not complying its clause 5 (c) and (d) does not arise. The defendant No.1, on one hand submits that NOC to use road has been obtained from M/s.Usha Enterprises and on the other, contended that clause 5 (c) and (d) of MoU with respect to providing of 12 meter wide access road cannot be performed due to pending litigation. The aforesaid contentions of defendant No.1 are self-sufficient to show that he is trying to blow hot and cold in one breath and wanted to sail on two boats at a time, which cannot be done or even permitted.

20. Even if, the defendant No.1 is believed that he has obtained NOC from M/s.Usha Enterprises with respect 12 meter wide access road vide Exh.75. Now the question arises, whether Exh.75 is in accordance with the terms and conditions mentioned in clause 5 of MoU. It is pertinent to note that as per clause 5 of MoU said 12 meter wide access road should be having proper physical and legal access duly demarcated to the satisfaction of plaintiffs. The perusal of said Exh.75 reveals that said NOC has been issued on 09/01/2012 by M/s.Usha Enterprises to use road from their land for access. Firstly, in Exh.75 there is no mention of 12 meter wide access road. Secondly, whether a single piece of paper (NOC) is sufficient to create right of way or access road legally. The answer would be obviously 'No'. It is important to note that plaintiffs have paid a huge amount of Rs.1,20,00,000/- for proper access road and not for single piece of paper in form of NOC. Furthermore, if NOC was issued and access road has been granted to plaintiffs on 09/01/2012 then there was no need to

execute MoU with respect to 12 meter wide access road. It is worth to note that, on 09/01/2012 so called NOC was issued by M/s.Usha Enterprises thereafter defendant No.1 issued emails dated 23/09/2012 and 01/10/2012 (Exh.64 and Exh.65) to plaintiffs with respect to execution of MoU and 12 meter wide access road. The defendant No.1 failed to put forth any explanation as to why emails regarding MoU and 12 meter wide access road has been issued when NOC has already been obtained. Therefore, considering the above mentioned reasons and perusal of Exh.64 and 65 it is clear that NOC (Exh.75) was not admitted either to the plaintiffs or even to defendants therefore, MoU was executed for compliance of 12 meter wide access road.

21. Entire suit revolves around MoU dated 14/02/2013. As above mentioned, contents as well as execution of MoU is not denied by executing party. The defendant No.1 contended that clause 5 (c) and (d) of MoU are not enforceable and forbidden by law as these terms depend upon uncertain future event. Grant of 12 meter wide access road was an act to be done in future. He was under impression that dispute between M/s.Usha Enterprises, Mahindra and Mahindra Company and other owners in RCS No.977/2011 will be solved in future.

22. In the light of above-mentioned facts, it is necessary to peruse the terms and conditions of clause 5 (c) and (d) of MoU to ascertain whether said clause is enforceable or not. Clause 5 (c) and (d) of MoU are reproduced below for the sake convenience;

(5)

c) *To ensure that proper legal access along with duly demarcated*

access for existing road admeasuring 12 (Twelve) meters wide as demarcated in the plan annexed hereto through Gat No.1361/1/B to Gat No.2359 and Gat No.2360, village Wagholi, Taluka Haveli, District Pune, to the satisfaction of the Party of the Second Part at no additional cost to the Party of Second Part.

- d) *To ensure that a proper physical access of the road as mentioned in (5-c) above is given to the Gat No.2359 and Gat No.2360 village Wagholi, Taluka Haveli, District Pune.*

23. The learned Advocate for defendant No.1 submitted that main condition of MoU was to grant 12 meter wide access road to plaintiffs to proceed towards their Gat No.2359 and 2360. However, as per Section 23 of the Indian Contract Act, 1872 the terms and conditions mentioned in clause 5 (c) and (d) of MoU cannot be enforced and lawfully performed.

24. Section 23 of the Indian Contract Act is reproduced below for the sake of brevity;

“Section 23. What consideration and objects are lawful, and what not;

The consideration or object of an agreement is lawful, unless -It is forbidden by law; or is of such nature that, if permitted it would defeat the provisions of any law or is fraudulent; of involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.”

25. As per the submission of learned Advocate of defendant No.1, case of defendant No.1 falls under the head of, '*injury to the person or property of another*' of Section 23 of the Indian Contract Act. The terms and conditions mentioned in clause 5 (c) and (d) of MoU involve injury to the property of M/s.Usha Enterprises therefore, said terms and conditions cannot be performed lawfully. It is worth to note that if any injury to the property of M/s.Usha Enterprises could be caused by performing terms and conditions of MoU then objection has to be raised by said Enterprises. However, no such objection has been raised by M/s.Usha Enterprises. On the contrary, as per the defendant No.1, M/s.Usha Enterprises had issued NOC to use its land for free access. Therefore, the submission that as per Section 23 of the Contract Act, the terms and conditions mentioned in clause 5 (c) and (d) of MoU cannot be enforced and lawfully performed is baseless and cannot be sustained.

26. Pertinent to note that defendant No.1 has cited only one reason for non-performance of clause 5 (c) and (d) of MoU and that is pendency of RCS No.977/2011. The record reflects that said RCS No.977/2011 was filed on 18/07/2011 by M/s.Usha Enterprises and its partners through power of attorney i.e., present defendant No.2 for injunction simplicitor. Said suit was not with respect to suit properties. Admittedly, MoU was executed by defendant No.1 and 2 on 14/02/2013 and they have knowledge of litigation pending and said fact is mentioned in MoU. Defendant No.1 during cross-examination admitted that the reference in Exh.80 (letter written by defendant No.1 to Mahindra and Mahindra Company) the word 'our company' means M/s.Usha Enterprises. Exh.80 was written by defendant No.1 to said Company stating that the suit properties are lock

land and access road can only be provided from M/s.Usha Enterprises. It means that defendant No.1 is related with M/s.Usha Enterprises but, he denied any relationship with M/s.Usha Enterprises in cross-examination. However, it is an admitted fact that defendant No.2 is power of attorney holder of M/s.Usha Enterprises and one thing is clear that defendant No.1 has joined hands with defendant No.2 to obtain 12 meter wide road access from the land of M/s.Usha Enterprises for the properties of plaintiffs. The record also reflects that the defendant No.1 has not only joined hands with defendant No.2 but has also parted equal share in Gat No.2358 which they purchased from the consideration received from plaintiffs for providing 12 meter wide access road.

27. Moreover, on one hand the defendant No.1 took defence of pending litigation being a hurdle in execution of MoU and on the other, vide email dated 01/10/2012 (Exh.65) insisted the plaintiffs to hurry up or to complete the transaction with Mahindra and Mahindra Company pending the litigation by contending that if RCS No.977/2011 will be decided in favour said Company then they will not continue with sale transaction. It means that defendant No.1 is the only person who forced the plaintiffs to purchase the suit properties without bothering about pending litigation and now wanted to shrug off his responsibility to comply the clause 5 (c) and (d) of MoU by stating the reason of pending litigation.

28. Another contention raised by defendant No.1 is that, as there was injunction against the Mahindra and Mahindra Company therefore, he was forbidden by law to do any act with respect to 12 meter wide access road. Even, there is uncertainty that M/s.Usha Enterprises may or may not

succeed in future in the said suit. When M/s.Usha Enterprises wins the case up to the Hon'ble Supreme Court then only he can provide duly demarcated 12 meter wide access road. However, if it failed then it is not possible to provide any access road as agreed. As I have already mentioned in foregoing paragraphs that defendant No.2 is power of attorney holder of M/s.Usha Enterprises. It means that defendant No.2 has total control over the litigation and grant of 12 meter wide access road and for that purpose only defendant No.1 has joined hand with him and made co-sharer in suit property 1 (A). Moreover, neither the suit properties are subject matter of said RCS No.977/2011 nor the plaintiffs and defendant No.1 are party to said suit. It means that the order of injunction runs against the Mahindra and Mahindra Company who has nothing to do with MoU. So also, the defendant No.2 who is plaintiff in that suit is nowhere restrained from entering into any transaction with respect to suit properties. Therefore, it appears that there was no hurdle and the defendant No.1 and 2 are not forbidden or restricted by the order of injunction passed in that suit.

29. Pertinent to note that RCS No.977/2011 was decreed on 20/09/2019 in favour of M/s.Usha Enterprises. It means the alleged hurdle, contingency and obstacle to perform clause 5 (c) and (d) of MoU has been removed. Which goes to show that the terms and conditions of MoU are enforceable. Therefore, consideration the above mentioned reasons and oral and documentary evidence, I hold that plaintiffs proved that clause 5 (c) and (d) of MoU dated 14/02/2013 are enforceable by law. Hence, I answer issue No.1 in affirmative.

As to Issue No.2 to 4 :

30. In view of findings recorded to issue No.1, I hold that plaintiffs are entitled for specific performance of MoU. However, the record reflects that defendant No.1 by filing Spl.Civil Suit No.1403/2013 specifically contended that the terms and conditions of MoU related to allotment/grant of 12 meter wide access road cannot be performed. During cross-examination of defendant No.1, a question has posed to him that as no litigation is pending whether he can perform his part of contract as per the MoU, to which he answered that already 12 meter wide access road has been given to plaintiffs. It means that the defendant No.1 has made his intention clear that clause 5 (c) and (d) of MoU related to access road cannot be performed. Therefore, even if, a decree of specific performance is passed with respect to MoU then also it appears difficult to be got executed. Therefore, considering the submission and intention of defendant No.1, I am of the considered opinion that plaintiffs are entitled to get the earnest amount refunded which they have paid for allotment/grant of 12 meter wide access road along with interest.

31. The learned Advocate for plaintiffs submitted that Gat No.2359 and 2360 are having no access road therefore its value was not more than Rs.50 lakhs. However, on the say and assurance of defendant No.1 to provide 12 meter wide access road the plaintiffs paid Rs.1,50,00,000/-. Therefore, the plaintiffs are entitled for Rs.1,50,00,000/- along with interest @ 24 % on said amount summing to Rs.51 lakhs. It is important to note that the plaintiffs failed to lead any oral or documentary evidence to show that the value of Gat No.2359 and 2360 was not more than Rs.50 lakhs when they have purchased said properties. On the

contrary, the letter issued by Mahindra and Mahindra Company reveals that specific amount has been quoted by said Company to the tune of Rs.3,20,00,000/- for all the Gat Nos.2358 to 2360. Therefore, considering the above mentioned reasons I hold that neither the plaintiffs are entitled for Rs.1,50,00,000/- nor for Rs.51 lakhs towards interest and damages.

32. Plaintiffs have claimed refund of earnest amount of Rs.1,20,00,000/- and Rs.10,12,500/- in case of non-performance of MoU dated 14/02/2013 from defendants along with interest and compensation to the tune of Rs.40,80,000/-. It is an admitted fact that plaintiffs have tendered an amount of Rs.1,20,00,000/- and Rs.10,12,500/- to the defendants and said fact has been admitted by the defendant No.1 in cross-examination. Therefore, I hold that in view of Section 22 of Specific Relief Act (In short, the Act) the plaintiffs are entitled for refund of said earnest amount of Rs. Rs.1,20,00,000/- and Rs.10,12,500/- paid under said MoU. The plaintiffs have claimed interest @ of 24 % on the earnest amount. It is pertinent to note that there is not a single document placed on record to show that an interest @ of 24% was agreed between the parties. Moreover, the rate of interest claimed by the plaintiffs appears to be exorbitant therefore, I hold that an interest @ of 8% on earnest amount of Rs.1,30,12,500/- will do justice and will neither cause prejudice to either party.

33. As mentioned above, the plaintiffs have claimed compensation in lieu of interest on earnest amount of Rs.1,30,12,500/- (Rs.1,20,00,000/- and Rs.10,12,500/-) @ of 24% on the said amount to the tune of Rs.40,80,000/-. Sub-section (2) of Section 21 of the Act states that, if

specific performance is not granted and the contract between the parties has been broken by the defendant then the plaintiff is entitled to compensation for that breach. In determining the amount of compensation, the court shall be guided by the principles specified in Section 73 of the Indian Contract Act. The foregoing paragraphs clearly reflects that the terms and condition, especially clause 5 (c) and (d) of MoU has been broken by the defendant No.1. therefore, I hold that in the light of provisions of Section 21 of the Act and Section 73 of the Indian Contract Act, the plaintiffs are entitled compensation from the defendants.

34. It is an admitted fact that MoU dated 14/02/2013 has been executed by defendant No.1 and 2 in favour of plaintiffs. However, defendant No.1 filed Spl.Civil Suit No.1403/2013 and made present defendant No.2 as defendant No.3 in that suit. So also, in present suit said defendant No.3 is defendant No.2. In Spl.Civil Suit No.1403/2013 said defendant did not appear and suit proceed ex-parte against him whereas, in present suit though he appeared but failed to file written statement. It means that the defendant No.2 inspite of having knowledge of both the suit failed to appear and contest the suits and remained silent from commenting on the point of terms and conditions of MoU. Therefore, in such scenario, remaining silent amounts to refusal. Therefore, I hold that it is the responsibility of defendant No.1 and 2 to perform the terms and conditions of MoU related to 12 meter wide access road which they failed to do so hence, I hold that they are liable to pay compensation of Rs.40,80,000/- jointly to the plaintiffs. Therefore, considering the above mentioned reasons and fact and circumstances of the case issue No.2 to 4 are answer accordingly.

ORDER

- 1) Suit is partly decreed with costs.
- 2) The defendants are directed to refund earnest amount of Rs.1,30,12,500/- (Rs.1,20,00,000/- and Rs.10,12,500/-) jointly and severally received under MoU to the plaintiffs along with interest @ of 8 % p.a from the date of filing of suit.
- 3) The defendants are further directed to pay an amount of Rs.40,80,000/- jointly and severally to the plaintiffs towards compensation.
- 4) The defendants are hereby permanently restrained from transferring, alienating or creating third party interest and charge on Gat No.2358 till the decretal and compensation amount is not paid to the plaintiffs.
- 5) If the defendants failed to pay the aforementioned earnest amount and compensation then the plaintiffs are at liberty to sell Gat No.2358 and recover said amount.
- 6) Decree be drawn accordingly.

Place : Pune
Date : 13/04/2022

(S. M. A. Sayyed)
7th Jt. Civil Judge Senior Division, Pune

CERTIFICATE

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

Name of Steno : Mr.Kailas V. Marathe, Stenographer (Grade-II)
Court Name : Shri. S. M. A. Sayyed
: 7th Jt. Civil Judge Sr. Dvn., Pune.
Date of judgement : 13/04/2022
Judgement signed by P.O. On : 19/04/2022
Judgement uploaded on : 19/04/2022