

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/APPEAL FROM ORDER NO. 235 of 2019

With

**CIVIL APPLICATION (FOR INTERIM RELIEF) NO. 1 of 2019
In R/APPEAL FROM ORDER NO. 235 of 2019**

=====

MOHAMMAD IQBALBHAI ABDULKARIM

Versus

CHHAGANBHAI SHAMBHUBHAI RADADIYA

=====

Appearance:

for the Appellant(s) No. 4,5

MR. R.S.SANJANWALA, SR. ADVOCATE WITH MR TARAK DAMANI(6089)

for the Appellant(s) No. 1,2,3,6

MR DHAVAL M BAROT(2723) for the Respondent(s) No. 1

=====

CORAM: HONOURABLE DR. JUSTICE A. P. THAKER

Date : 03/02/2022

ORAL ORDER

1. The appellant herein has filed this Appeal being aggrieved by the order dated 29.6.2019 passed by the Principal Senior Civil Judge, Mandvi, Surat below Exh-5 in Special Civil Suit No. 262 of 2016, whereby Notice of Motion application preferred by the respondent herein has been partly allowed whereby the part interim injunction application filed by the respondent, came to be partly allowed restraining the appellant from selling, transferring or creating any kind of encumbrances on the suit land property. The appellant is a defendant and the respondent is the plaintiff before the trial Court. For the brevity and convenience, the parties are referred in this matter as per the character assigned to them before the trial Court.
2. The plaintiff has filed the suit against the defendant-appellant for specific performance of contract as well as

permanent injunction on the ground that there was an agreement to sell entered into between the parties way back in the year 2008. It is alleged that the plaintiff has paid almost Rs.15 lakh out of Rs. 1,11,96,000/- and odd amount. It is alleged that the defendant had to get the title cleared within 40 days from the date of execution of the Agreement to Sell and at that time, the plaintiff to pay the remaining amount as agreed between the parties. It is alleged by the plaintiff that he was ready and willing to perform his part of Contract and had repeatedly call upon the respondent to execute the sale-deed but they were asking huge amount over and above the consideration prices and not ready to perform their part of the Contract. It is alleged that it has come to the knowledge of the plaintiff that the respondents are trying to create third party in the Suit land and, therefore, he has prayed the Court for relief of specific performance as well as declaration of permanent injunction as well as for interim injunction during the pendency of the Suit. It was one of the grounds that the possession was handed over to the plaintiff at the time of execution of agreement to sell.

- 2.1 It emerges from the papers that other respondents have resisted the Suit by contending that the plaintiff has filed to perform his part of Contract though he was served with Notice way back in the year 2008 for execution of the sale-deed. Of course, defendant has admitted the fact of execution of sale and had also accepted the part payment of Rs. 15 Lakh. But the stand of the defendant is that in the

year 2008, they had issued notice for performance of the Contract and asked the plaintiff to re-pay the consideration amount and get the registration deed executed in his favour. But the Plaintiff did not complied with the notice. It is also contended that during the interregnum period, third party has been created on the Suit land. The defendant has also raised the ground of delay in filing the Suit contending that though the agreement to sell was of the year 2008, the plaintiff has filed the Suit in the year 2016 and, therefore, there was almost delay of 8 years. On this ground, the defendant has prayed to dismiss the Suit as well as the application for interim injunction.

3. Heard Mr. R.S. Sanjanwala, learned Senior Counsel assisted by Mr. Tarak Damani, learned advocate for the appellant-defendant and Mr. Dhaval Barot, learned counsel for the plaintiff- respondent through video-conferencing.
4. Mr. Sanjanwala, learned Senior Counsel for the appellant-defendant has vehemently submitted that the plaintiff has not performed his part agreement to sell and though he was served with notice for execution of the sale-deed, the plaintiff did not turned up. He has submitted that the plaintiff has paid Rs.10 Lakh only and thereafter he has not paid anything to the defendant. He has also submitted that the notice sent to the plaintiff came to be received with an endorsement of "refused". While inviting the attention of this Court towards the observation of th trial Court that there is no signature of the plaintiff on the receipt of the

said Notice, the learned Senior Counsel Mr. Sanjanwala has vehemently submitted that when the notice was returned back with endorsement 'refused" , there is no question of any signature of plaintiff on the receipt.

- 4.1 Mr. Sanjanwala, learned Senior Counsel has also submitted that during the period from 2008 to 2016 nothing has happened and during this period, the plots have been sold to the third party and right of third party have been created in the Suit land whom the plaintiff has not joined. He has also submitted that there is a delay of 8 years in instituting the suit for specific performance. He has also submitted that the plaintiff has not taken any step to get the sale-deed executed in his favour though he was served with legal notice which he refused. Mr. Sanjanwala, learned Senior Counsel also submitted that the relief of interim injunction being an equitable relief, the delay in filing of the suit for almost 8 years is one of the grounds for refusal of the interim relief. He has also submitted that even if the plaintiff succeeds, he can be compensated by way of damages. He has submitted that trial Court has not considered the Panchnama wherein the possession is with the defendant and the change of nature of the Suit land. He has also contended that trial Court has mis-read the documentary evidence produced on record and has also not considered basic principles of law in respect to granting or refusing of the interim relief. He has prayed to allow the appeal.

- 4.2 On the ground of delay, Mr. Sanjanwala, learned Senior Counsel has relied upon the decision of this Court rendered in the case of Veetrag Holdings Co. Ltd v. Gujarat State Textile Corporation Ltd., reported in 1996 (3) GLR 536, wherein in Para-8, this Court has observed that when it comes to grant of equitable relief when the suit is filed after such a lapse of time, it cannot be said that the remedy of interim injunction was the necessary remedy and there was no other remedy available to the party concerned in this behalf.
5. Per contra, Mr. Dhaval Barot, learned Counsel for the plaintiff has vehemently submitted that the order of the trial Court is proper and there is no need of any interference at this stage. He has submitted that till today, there is no termination of the agreement to sell and the defendant side has accepted the execution of the agreement to sell and also accepted part payment. He has also submitted that as per the condition of the agreement to sell, title of the property was to be got cleared by the defendant within 40 days and thereafter he had to execute the sale-deed in favour of the defendant. He has submitted that the defendant has not got cleared the title and, therefore, there was no execution of the agreement to sell. He has submitted that as per agreement to sell, possession was handed over to the plaintiff and he is in possession of the suit land. Regarding the endorsement of refusal on the notice, he has submitted that there is no evidence that the plaintiff has refused the same. He has submitted that since

the plaintiff has denied of having receipt of such notice, the issuance of notice by the defendant and refusal thereof by the plaintiff, is a question which needs to be decided on the evidence led by the party. He has submitted that the trial Court has considered each and every aspect of the matter and the defence taken by the defendant and has rightly passed the impugned order which is discretionary one, this Court, as an Appellate Court, should not interfere with the discretionary order even if the second view of the matter is possible. He has submitted to dismiss the present appeal.

6. Having considered the submission made on behalf of both the sides and upon perusal of the impugned order and the material placed on record, it is undisputed fact that there was an agreement to sell between the parties, which was entered into way back in the year 2008. It is also admitted that part payment has been received by the defendant from the plaintiff. It also appears that agreement to sell is of the year 2008 whereas the plaintiff has filed the Suit in the year 2016. The stand of the plaintiff is that he is in possession in view of the averment made in the agreement to sell. At this juncture, it is worthwhile to refer to the copy of the Panchnama which has been produced during the time of argument, and it emerges that there is some sort of construction over the suit land and on certain part of the land there are bushes and some plots are there and on one side there is a compound wall. It also reveals from the Panchnama that there is one stop-gap office of temporary nature showing proposed residential construction to be

carried out on the land. These facts suggest that the averment made by the plaintiff that he is in possession is prima-facie not believable. Had he been in possession of the land from 2008, then the nature of the land might not have been changed as reflected from the Panchnama.

- 6.1 It also reveals that there is no averment made by the plaintiff regarding the payment of more amount than the earlier amount paid to the defendant. It also reveals from the record that during the period from 2008 to 2016, some third party interest have been created in the land. Since the plaintiff has kept silence for almost 8 years in instituting the Suit after execution of the agreement to sell, the equitable relief of interim injunction at a belated stage is not proper one to be granted in the facts and circumstances of the case. On perusal of the impugned order, it clearly transpires that the trial Court has not considered all these aspects. At this juncture, it also needs to be observed that the defendant has raised point of issuance of notice to the plaintiff way back in the year 2008, which is alleged to be refused by the plaintiff. However, the plaintiff has denied that he has received such notice and he has refused the same. Thus, this fact needs to be agitated before the trial Court by leading evidence but the fact remains that though the agreement to sell was of the year 2008, the plaintiff has kept silence till 2016 i.e. for almost 8 years. Under the circumstances, the exercise of discretion by the trial Court, in the peculiar facts of this case, is not proper one and the same deserves to be

interfered with. Further, even if the plaintiff succeeds in the Suit then he can be compensated in terms of money by way of granting damages along with interest thereof.

7. In view of the above, the present appeal is allowed. The impugned order dated 29.6.2019 passed by the Principal Senior Civil Judge, Mandvi, Surat below Exh-5 in Special Civil Suit No. 262 of 2016, is hereby set-aside. However, it is made clear that the observation made hereinabove are on the basis of facts and circumstances and when it comes to hearing of the Suit, the learned Judge will certainly decide the matter on the basis of evidence that will be placed before him and will not be influenced by these observations if the same have no bearing on the evidence produced before him.
8. However, considering the facts that Suit is of the year 2016, the parties will be at liberty to apply to the learned Judge for early disposal of the said suit and the learned Judge shall try to fix up the same at the earliest and dispose it of preferably by the end of August, 2022. The parties are directed to cooperate the trial Court for its endeavour to dispose it of in time bound manner. No order as to costs.

Civil Application, if any, stands disposed of accordingly.

(DR. A. P. THAKER, J)

SAJ GEORGE