

(2010) 03 BOM CK 0025

Bombay High Court

Case No: Appeal (Lodging) No. 626 of 2009 in Notice of Motion No. 659 of 2007 in Suit No. 119 of 2007 and Appeal No. 2 of 2010 in Notice of Motion No. 659 of 2007 in Suit No. 119 of 2007

Prakash Jagannath  
Shiveshwerkar

APPELLANT

Vs

Prasad Gurjar and  
Another <BR> Prasad  
Gurjar Vs Prakash J.  
Shiveshwarkar and  
Another

RESPONDENT

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Date of Decision: March 23, 2010

Hon'ble Judges: Anil R. Dave, C.J; S.C. Dharmadhikari, J

Bench: Division Bench

Advocate: Sharan Jagtiani, instructed by Bharat Joshi, in Appeal L No. 626 of 2009, C.S. Balsara, Usha R. Gadagkar and Anuradha Bhawe, instructed by Divya Shah Associate in Appeal L No. 2 of 2010, for the Appellant; Sharan Jagtiani, instructed by Bharat Joshi in Appeal (L) No. 2 of 2010, for the Respondent

Final Decision: Dismissed

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### Judgement

@JUDGMENTTAG-ORDER

Anil R. Dave, C.J.

As both the Appeals have been filed against an order dated 4th September 2009 passed in Notice of Motion No. 659 of 2007 in Suit No. 119 of 2007, at the request of the learned Advocates both the Appeals have been taken up for hearing.

2. Parties to the litigation have been described herein as arrayed in the Suit.

3. The facts giving rise in the aforestated Appeals in a nutshell are as under:

The Plaintiff has filed a Suit for specific performance of contained in an Agreement for Sale dated 3rd April 2006. It is the case of the Plaintiff that out of consideration

of Rs. 24.50 lakhs, Rs. 4.50 lakhs had already been paid to the original Defendant No. 1 and the balance sum of Rs. 20 lakhs was to be paid against the delivery of vacant and peaceful possession of the flat in question.

4. During the pendency of the Suit, the original Defendant No. 1 had expired and, therefore, son of Defendant No. 1 has been brought on record as Defendant No. 1(a).

5. After hearing the learned Advocates, the learned Single Judge came to the conclusion that it would not be just and proper to give directions to original Defendant No. 1 as prayed for. However, looking to the facts of the case by virtue of the impugned order the learned Single Judge has restrained Defendant No. 1 from disposing of, alienating, encumbering or parting with possession of the flat in question or from creating any third party right in the property in question. Defendant No. 2, which is a Cooperative Society where the property is situated, has also been directed not to register any transaction in relation to the property in question.

6. It has been submitted on behalf of the learned Advocate appearing for the Plaintiff that the Plaintiff was ready and willing to give the balance amount of consideration of Rs. 20 lakhs to Defendant No. 1 as per the Agreement for Sale entered into between the Plaintiff and original Defendant No. 1. Yet, Defendant No. 1 did not hand over possession of the property in question as he had not complied with the conditions which had been incorporated in the Agreement for Sale referred to hereinabove. It has been submitted that as per the terms and conditions of the Agreement referred to hereinabove, Defendant No. 1 was bound to furnish No Objection Certificate and only upon handing over vacant possession of the property in question the balance amount of Rs. 20 lakhs was to be paid. Thus, it has been stated that as the Plaintiff was ready and willing to discharge his duty, Defendant No. 1 was bound to handover peaceful possession of the property in question and as the property in question had not been handed over to the Plaintiff, Defendant No. 1 should be directed to hand over the possession of the property in question to the Plaintiff.

7. On the other hand, it has been submitted on behalf of Defendant No. 1 that the Plaintiff had to pay a sum of Rs. 20 lakhs on or before 5th May 2006 and as the said amount had not been paid as agreed upon by the Plaintiff, Defendant No. 1 was not bound to hand over possession of the suit property. It has been submitted that according to the terms of the Agreement, there was no obligation on Defendant No. 1 to hand over the possession, but the possession was to be given only upon payment of the balance amount of Rs. 20 lakhs which had admittedly not been paid by the Plaintiff on or before 5th May 2006 and, therefore, Defendant No. 1 was not bound to hand over possession of the flat in question and Defendant No. 1 was also entitled to forfeit the amount which had already been paid by the Plaintiff.

8. Upon hearing the learned Advocates and upon perusal of the impugned order and the Agreement for Sale, in our opinion, the learned Single Judge has rightly passed an interim order whereby Defendant No. 1 has been restrained from disposing of the suit property.

9. We have also perused the Agreement for Sale and upon to interpretation of the Agreement for Sale would arise while deciding the Suit finally. It is an admitted fact that Rs. 20 lakhs had not been paid or tendered by the Plaintiff on or before 5th May 2006 and it is also an admitted fact that requisite No Objection Certificate was not furnished by Defendant No. 1 to the Plaintiff as per one of the terms and conditions in the Agreement for Sale.

10. Looking to the aforestated factual position, in our opinion, the learned Single Judge has rightly restrained Defendant No. 1 from dealing with the property during the pendency of the Suit, because only while deciding the Suit, the trial Court would come to the conclusion whether Clause 6(e) of the Agreement for Sale was being properly understood by the parties to the litigation. In the course of the trial, it will also have to be decided by leading evidence whether time was of essence in the Agreement referred to in the impugned order.

11. For the aforesaid reasons, in our opinion, the impugned order passed by the learned Single Judge is just and proper which does not call for any interference.

12. As a result, both the Appeals are dismissed with no order as to costs.