

Shakuntala

**IN THE HIGH COURT OF BOMBAY AT GOA**

**APPEAL FROM ORDER NO.23 OF 2023  
WITH  
CIVIL APPLICATION NO. 98 OF 2023**

1. Mr. Ashwin R. Khalap  
S/o Shri Ramakant Khalap,  
Aged 41 years, Unmarried, Indian National,  
R/o House No. 188, Altinho,  
Mapusa, Goa
2. Mr. Ashish Kapur,  
S/o Mr. Ashok Kapur,  
Aged 44 years, Married, Indian National,  
R/o 111-A, Tower 1, DLF Aralias, Phase 5,  
Gurgaon, 122009, Haryan. ... APPELLANTS

Versus

1. Mr. Cyrus Dinyar Oshidar,  
S/o Dinyar Rustom Oshidar,  
Aged 57 years, Indian Habitant and British National,  
R/o Shireen Mansions, B Block, 2nd Floor,  
Gamadia Colony, Tardeo, Mumbai, 400007.

2. Mrs. Rita K. Mehta  
Widow of Karl Mehta, Aged 68 years,  
Indian National,  
R/o 25, Framroze Court, Marine Drive,  
Mumbai - 400020.

3. Red Villas and Resorts Pvt. Ltd.  
A company incorporated under the provisions of the  
Companies Act, 2013, having registered address at  
8-8-412, Rock Castle, Road No. 6,  
Banjara Hills, Hyderabad – 500034  
Represented by its Director Mrs. Mala Paropkari,  
D/o Komala Ratnam James, Aged 55 years,  
Married, Businesswoman, Indian National,

R/0 10-2-289/71, Flat No. 302,  
Shantinagar Road No.3, Hyderabad,  
Telangana - 500028 ... RESPONDENTS

Mr. Nitin Sardessai, with Mr. Kabir Sabnis and Mr. Tarun Rebello, learned Advocates for the Appellants.

Mr. D. Lawande with Mr. G. Nadkarni, learned Advocates for Respondent No. 2.

Mr. Y. V. Nadkarni with Mr. Neville Mukerji, Ms. Simran Khadilkar and Mr. Nilay Naik, learned Advocates for Respondent No. 3.

**CORAM: BHARAT P. DESHPANDE, J.**

**RESERVED ON: 11<sup>th</sup> January, 2024**

**PRONOUNCED ON: 06<sup>th</sup> February, 2024**

## JUDGEMENT

1. Admit.
  2. Heard with the consent of the learned Counsel appearing for the parties for the final disposal at the admission stage itself.
  3. The Appellants/Plaintiffs are challenging an impugned order dated 05.05.2023, passed below exhibit-3 by the learned Trial Court thereby rejecting temporary injunction application.
  4. Mr. Nitin Sardessai, learned Senior Counsel appearing for the Appellants would submit that the impugned order needs

interference as learned Trial Court failed to consider relevant aspects such as concluded oral contract between the parties, irreparable loss which would be caused to the Plaintiffs, if the injunction is refused and thirdly, the balance of convenience tilting in favour of the Plaintiff. He would submit that rejection of the temporary injunction application is mostly on the aspect of delay in filing the suit, not establishing an oral concluded contract and thirdly, the compensation which could be awarded to the Plaintiff as the transaction is commercial in nature.

5. Mr. Sardessai would submit that there are various and numerous documents placed on record along with WhatsApp messages which prima facie show that there was an oral and concluded contract between the plaintiffs and the original owner of the suit property. He would submit that the original owner since deceased, took a loan of around Rs.50,00,000/- (Rupees Fifty Lakhs only) from the Plaintiffs which is clearly separate from the amount advanced by the Plaintiffs towards part consideration. He would submit that the Plaintiffs and one more person by name Raja Gopalkrishna agreed to purchase a plot of land admeasuring 2500 sq.mts. for a total consideration of Rs.6.05crores. He submits that

both the Plaintiffs and the third person by name Raja Gopalkrishna were supposed to purchase 3 plots, admeasuring 833 sq.mts.(2 plots) and 834sq.mts., somewhere in February, 2020. Accordingly, public notice was also issued calling for the objections. Even draft sale deeds were exchanged. Such draft sale deeds were uploaded on the website. A copy of draft sale deed was forwarded to Ramkrishna Parsekar, the person who was looking after all the affairs of deceased Mr. Jimmy Gazdar, the original owner. The only objection was in connection with “indemnity clause”.

6. Mr. Sardessai would submit that there was no dispute with regard to the Sale price and infact the Plaintiffs from time to time paid an amount of Rs.38,50,000/- (Rupees Thirty Eight Lakhs Fifty Thousand only) to the original owner, Mr. Gazdar. After the expiry of the owner Mr. Gazdar somewhere in August 2020, the Plaintiffs were dealing with Mr. Ramkrishna Parsekar and also with the defendants who are the Beneficiaries/Executors, according to the Will of Gazdar.

7. Mr. Sardessai would submit that the property of Gazdar consists of huge land, out of which 18,481 sq.mts. was sold to the Defendant no. 3 somewhere in September, 2021. He submits that

the plot which Plaintiffs agreed to purchase was adjacent to the land sold to Defendant No. 3. Plaintiffs immediately published a notice in the newspaper stating that they had a concluded contract with the original owner and called upon objections, if any.

8. Mr. Sardessai would then submit that Defendant No. 1 and 2 clandestinely sold the remaining portion of 2500 sq.mts. to Defendant no. 3 somewhere in December, 2021 for amount of Rs.8 crores. The Plaintiffs were supposed to purchase this land as per their concluded contract. Once the Plaintiffs got this knowledge, they filed the suit for specific performance and an injunction application praying to maintain status quo with regard to area of 2500 sq.mts.

9. Mr. Sardessai would submit that Defendant No. 3 cannot be considered as bonafide purchaser as the Plaintiffs published a notice in the newspaper stating that they had a concluded contract with Mr. Jimmy Gazdar and therefore they are intending to purchase such land.

10. Mr. Sardessai would submit that since there is a concluded oral contract including price to be paid, the question was only to execute the Sale Deed but since Mr. Jimmy Gazdar expired,

Defendant Nos. 1 and 2 being appointed executors and the legal heirs of Mr. Jimmy Gazdar, are duty bound to execute the Sale Deed in favour of the Plaintiffs.

11. Mr. Sardessai would submit that the Will executed by Mr. Jimmy Gazdar shows the names of the Creditors, however, list of such names is not disclosed by the Defendants. Mr. Ramkrishna Parsekar who was employee of Mr. Jimmy Gazdar is one of the Beneficiary and knew everything about the contract. He submits that the Plaintiffs will examine Mr. Ramkrishna Parsekar as their witness during the trial to prove oral concluded contract. He submits that loan granted by the Plaintiffs to Mr. Jimmy Gazdar is not part and parcel of the part payment made by the Plaintiffs towards the sale consideration. He would then submit that even the Bank Statement produced by the Plaintiffs shows the trail of money transfer from the Plaintiffs to the account of Mr. Jimmy Gazdar. He submits that such transaction cannot be termed only as loan though claimed by the Defendants since the list of Beneficiaries in the Will of Mr. Jimmy Gazdar and the names of Creditors are not reflecting about such transaction.

**12.** Mr. Sardessai would then submit that Defendant nos. 1 and 2 being the Executors are in possession of the list appended to the Will showing the names of the Creditors, however, they deliberately avoided to place such lists along with their written statement and documents for the simple reason that names of the Plaintiffs are not reflected as Creditors except earlier loan of Rs.50,00,000/- (Rupees Fifty Lakhs only).

**13.** Mr. Sardessai would submit that the draft sale deed was sent to Mr. Ramakrishna Parsekar and thereafter the WhatsApp chats only refers to the objection to indemnity clause but not against the price mentioned therein. Similarly, the draft was forwarded to the Defendant, however, there were no objections from their side.

**14.** Mr. Sardessai would submit that oral concluded contract could be proved and since there was no dispute about the price, only other modalities of the contract were discussed. He submits that no party will move forward without first discussing with the price of the land.

**15.** Mr. Sardessai would then submit that Mr. Jimmy Gazdar had even applied for no objection certificate from the Planning and Development Authorities for sale of 3 plots. Such certificates were

issued, however, same were cancelled when the Defendant nos. 1 and 2 agreed to sell the property to Defendant No. 3. He would submit that the no objection certificates issued for sale of the remaining plots refers to 3 No Objection Certificates for 3 separate plots issued earlier and cancelled subsequently. This goes to show that the Defendants had knowledge of oral concluded contract.

**16.** Mr. Sardessai would submit that the learned Trial Court completely misconstrued the facts and documents and arrived at an incorrect conclusion. He submits that there are no delay and latches on the part of the Plaintiffs as attempts were made to discuss with the officers of Defendant No. 3 and only when the Plaintiffs got the knowledge that the Defendants are refusing to perform their part, suit was filed.

**17.** Mr. Sardessai in the alternative submit that he is ready and willing to deposit the remaining amount in the Court. He also submitted that incase this Court comes to the conclusion as that of the Trial Court, the Defendants be directed to deposit damages which the Plaintiff would cause incase he succeeds in the suit.

**18.** Per Contra, learned Counsel Shri Nadkarni appearing for Respondent No. 3 would submit that the prayer in the suit is only

against the Respondent No. 3 since said Respondent is the owner in possession of the entire property of Mr. Jimmy Gazdar which includes the plot claimed by the Plaintiffs. Mr. Nadkarni would submit that Defendant No. 3 has purchased the land vide a registered Sale Deed for consideration of Rs. 8 Crores. The said Respondent is in possession of the suit property and therefore he is having an unfettered right over the suit property, which cannot be curtailed by granting any temporary relief as prayed by the Plaintiffs. He submits that Defendant No. 3 is not an agent of Defendant No. 1 and 2 and therefore, the question of specific performance of alleged oral contract cannot be asked for. He submits that at the most the Plaintiff can claim damages and that too from the Original owner.

**19.** Mr. Nadkarni would then submit that Mr. Jimmy Gazdar expired in the year 2020 and there is no any other person whom the Plaintiffs are claiming to be the witness of the so called concluded contract between them and Mr. Jimmy Gazdar. He submits that there are only two documents signed by Mr. Jimmy Gazdar. All other documents are not at all connected with the so called agreement/contract and at the most would show that some

negotiations were going on which cannot be termed as concluded contract.

**20.** Mr. Nadkarni would submit that the prayers in the plaint are vague and Plaintiffs have failed to disclose about the details of the Sale Deed which they are asking to be performed for and on behalf of Mr. Jimmy Gazdar by Defendant No. 1, 2 and 3 in favour of the Plaintiffs.

**21.** Mr. Nadkarni would then submit that the plaint itself is contradicting to the stand of the Plaintiff and each para in the plaint shows novation of earlier terms and conditions. He submits that there is no clarity about the third person by name Raja Gopalkrishna and how the Plaintiffs are going to share the 3 plots amongst themselves. He submits that the documents of the Plaintiffs would go to show that they wanted to demolish the structure existing in the suit property to construct Villas for commercial use and thus Plaintiffs are not entitled for temporary injunction but can claim damages.

**22.** Mr. Nadkarni would then submit that the basic question in the suit is whether there is an oral concluded contract. Since the Defendants are disputing about any concluded contract and more

specifically oral concluded contract, an issue will have to be framed to that effect putting burden on the Plaintiff to justify while leading evidence. At present there is no material to show that there was an oral concluded contract for sale of three plots by Mr. Jimmy Gazdar to the Plaintiffs and one person by name Raja Gopalkrishna. He therefore submits that even for drawing prima facie case this Court will have to conclude that there exists an oral concluded contract.

**23.** Mr. Nadkarni would then submit that making some payment in the bank account of Mr. Jimmy Gazdar would not entitle the Plaintiffs to claim any concluded oral contract. At the most Plaintiffs may ask for refund of such an amount. In the past Plaintiffs admitted that they advanced money to Mr. Jimmy Gazdar on various occasions amounting to Rs.50,00,000/- (Rupees Fifty Lakhs only). It goes to show subsequent amount could also be considered as loan. Since only negotiations could be considered, the aspect of concluded oral contract will have to be gone into only during the trial.

**24.** Mr. Nadkarni would then submit that unilateral uploading of draft sale deeds by the Plaintiffs on the website would not help the Plaintiffs to prove the concluded contract. Payment of some

amount by the third person by name Mr. Raja Gopalkrishna allegedly for the stamp duty is again not established. The said person then backed up immediately which again needs to be gone into during trial.

**25.** Mr. Nadkarni would submit that the Defendant no. 3 purchased a plot in December 2021, the Plaintiffs approached the Officer of Defendant no. 3 and tried to pressurise them only to extract money. When the Plaintiff was unsuccessful, the suit was filed after much delay which has not been explained properly.

**26.** Mr. Nadkarni would then submit that though chats referred by the Plaintiffs would go to show that they were desirous of selling the third plot/villa which is clearly amounting to commercial transaction. He submits that there are various inconsistencies in the pleadings itself. The documents though could be considered as some negotiations between Plaintiffs and Mr. Jimmy Gazdar or Mr. Ramakrishna Parsekar cannot be construed as concluded oral contract. He submits that Mr. Ramakrishna had no authority on behalf of Mr. Jimmy Gazdar to discuss with the Plaintiffs about any aspect.

**27.** Mr. Nadkarni would then submit that there are various other

discrepancies in the pleadings and the documents which makes the case of the Plaintiffs most inconsistent. According to him, the pleadings itself show variation in the so called terms of contract and therefore it is clear that it cannot be termed as a concluded oral contract.

**28.** Mr. Lawande, learned Counsel for Respondent no. 1 and 2 claimed that first of all the Plaintiffs are trying to enforce an oral contract against a dead person. He submits that after death of Mr. Jimmy Gazdar, there is no person to testify about such oral concluded contract. The contentions of the Plaintiffs cannot be considered as gospel truth as such averment in the plaint are required to be proved during trial.

**29.** Mr. Lawande would submit the Defendant No. 1 is only appointed as an Executor of the Will, whereas Defendant No. 2 is the Beneficiary. He submits that the averment in the plaint nowhere discloses as to on what date there was an oral concluded contract arrived at between the parties. Thus the Plaintiffs are not entitled for any relief as claimed in the injunction application. He would submit that Mr. Jimmy Gazdar was in the habit of taking loans from different persons which the Plaintiffs also admit. He

submits that there is no any material to show that amount paid by the Plaintiffs as part consideration as alleged in the plaint is infact consideration towards the sale price. He would submit that even cause of action in the plaint is not clear because the Plaintiff nowhere discloses as to when there was refusal to execute the Sale Deed by Mr. Jimmy Gazdar or whether part performance was refused. He would submit that there is delay in filing the suit and since the transaction is commercial one, the Plaintiffs may be entitled for compensation, if they succeed in the suit.

**30.** Rival contentions fall for determination is under.

**31.** Admittedly, the present appeal is against the Order passed by the Trial Court refusing to grant temporary injunction. The Order of the Trial Court is exhaustive and elaborative. It discusses all the aspects of the matter.

**32.** Admittedly, the powers under Order XXXIX Rule 1 and 2 of Civil Procedure Code are discretionary. Once such discretion is exercised by a Court on the basic concept of grant or refusal of injunction during pendency of the suit, the scope of appeal is limited only on the observations that the findings of the Trial Court are against the settled proposition of law, arbitrary, capricious or

perverse.

**33.** In the case of **Wander Ltd. And Another Vs. Antox India P. Ltd.**, 1990 (Supp) Supreme Court Cases 727, the Apex Court while considering powers of the Appellate Court against an interlocutory injunction Order observed that the prayer for grant of an interlocutory injunction is at a stage when the existence of legal rights asserted by the Plaintiffs and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The Court at that stage acts on certain well settled Principles of Administration of this form of interlocutory remedy which is both temporary and discretionary. The object of interlocutory injunction is to protect the Plaintiff against injury by violation of his rights for which he would not adequately be compensated in damages recoverable in action, if the uncertainty were resolved in his favour at the trial.

**34.** The need for such protection must be awarded against the corresponding need of the Defendant to be protected against injury resulting in his having been prevented from exercising his own legal rights for which he would not be adequately compensated. The Court must weigh one need against another and determine where

the balance of convenience lies. The interlocutory remedy is needed to preserve status quo, the rights of parties which may appear on a prima facie case. While doing so, the Court also in restraining the Defendant from exercising what he considers is his legal right, but what the Plaintiff would like to be prevented, puts into the skills as a relevant consideration as the Defendant is yet to commence his Enterprise or whether he already has been doing so in which later case, consideration is somewhat difficult from those that apply to a case where the defendant is yet to commence his enterprise are attracted.

35. The Apex Court further observed that in such appeals the Appellate Court will not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, capriciously, perversely, or where the Court had ignored settled proposition of law regulating grant or refusal of interlocutory injunction. Such an appeal against exercise of discretion is said to be an appeal on principle. The Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the Court below if the one

reached by that Court was reasonably possible on the material. The Appellate Court would normally not be justified in interfering with the exercise of discretion of the appeal solely on the ground that if it had considered the matter at the trial stage, it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicious manner, the fact that the Appellate Court would have taken different view may not justify interference with the Trial Court's exercise of discretion.

**36.** In the case of **Kanaiyabhai Lalbhai Contractor Vs. Kalpesh Patel & Anr.**, 2020 2 SCC online Bombay 695, the Division Bench of this Court after considering **Wander Ltd (supra)** observed that the scope of the appeal is very limited and only in case if Order is found to be against the settled proposition of law, arbitrary or perverse. Only because any other view is possible, the Appellate Court is not supposed to interfere with such discretionary power.

**37.** In the case of **Maharwal Khewaji Trust Vs. Baldev Dass** (2004) 8 SCC 488, the Apex Court observed that while considering the discretionary reliefs, unless and until the case of irreparable loss or damages is made out by the party to the suit, the

Court should not permit nature of property being changed which also includes alienation and transfer of the property which may lead to loss or damage to the parties who may ultimately succeed and may further lead to multiplicity of the proceedings.

**38.** Keeping in mind above settled propositions and the fact that though claim of the Plaintiff is regarding oral concluded contract, it is necessary to look into the plaint so as to find out whether the ingredients of concluded contract are discussed or disclosed and when such oral agreement concluded between the Plaintiff and deceased Mr. Jimmy Gazdar.

**39.** Admittedly, there could be a specific performance of an oral concluded contract. However, burden is certainly heavy on the Plaintiff to establish that there is oral concluded contract.

**40.** In the present matter it is a fact that the Plaintiffs are claiming that there is oral concluded contract between both the Plaintiffs and the third person by name Raja Gopalakrishna and the deceased by name Jimmy Gazdar. It is their contention that both the Plaintiffs and Mr. Raja Gopalakrishna agreed somewhere in November, 2019 to purchase land admeasuring 2500sq.mts. as described in the plaint in para no. 5 identified as plot B - A, B - B

and B – C in survey No. 88/0 of village Candolim, consisting of 3 different plots from Mr. Jimmy Gazdar for an amount of Rs.6.05Crores. Para no. 8 of the plaint show that such discussion took place somewhere in the last week of November, 2019 between Plaintiffs, Mr. Raja Gopalakrishna and Mr. Jimmy Gazdar. Thus, it is clear from these pleadings that except Mr. Jimmy Gazdar, the original owner and Plaintiffs with Raja Gopalakrishna, no other person was present to witness such discussion. Even Mr.Ramkrishna Parsekar who is considered to be one of the Beneficiaries and a very close associate of Mr. Jimmy Gazdar was not present.

**41.** Admittedly, said Mr. Jimmy Gazdar expired on 9<sup>th</sup> August, 2020. Thus, from November 2019 till the death of Mr. Jimmy Gazdar in August 2020, there is no any document executed between the parties to show about concluded oral contract.

**42.** Late Mr. Mr. Jimmy Gazdar executed a Will on 24<sup>th</sup> June, 2019 and appointed Defendant No. 1 as its Executor. According to the said Will, Mr. Ramakrishna Parsekar is one of the Beneficiaries. The Will clearly goes to show that Mr. Jimmy Gazdar was in the habit of taking loan from various persons. He intended to sell his

entire property for the purpose of paying the beneficiaries and the creditors. Admittedly, the Will was executed somewhere in June 2019, however, the Plaintiff in the plaint in para no. 7 claimed that they met Mr. Jimmy Gazdar for the first time in the month of June 2019 at his residence. It is their contention that during their subsequent meetings with Mr. Jimmy Gazdar, they developed a good relation and bond and accordingly on the request of late Mr. Jimmy Gazdar, the Plaintiffs advanced a loan of Rs.50,00,000/- (Rupees Fifty Lakhs only) in cash, which late Mr. Jimmy Gazdar acknowledged wide receipt dated 17.10.2019. The contention of Plaintiff that such amount of Rs.50,00,000/- (Rupees Fifty Lakhs only) given to late Mr. Jimmy Gazdar in cash is not part and parcel of the sale consideration.

**43.** The contention of Mr. Nadkarni and Mr Lawande would therefore be required to be appreciated regarding improbabilities and inconsistencies in the plaint for the simple reason that Plaintiffs claimed that the advanced cash of Rs.50,00,000/- (Rupees Fifty Lakhs only) as loan to Mr. Jimmy Gazdar, Why they failed to consider it as part of sale consideration which according to them was finalised in November 2019, itself. Admittedly, there is

no proceedings filed by the Plaintiff against late Mr. Jimmy Gazdar for recovery of such loan. No such statement is made in the present proceedings. It is hard to believe that a businessman as claimed by the Plaintiff in the plaint would simply not consider to include such a huge amount towards part consideration and keep quiet about recovery of such amount.

44. Further, the plaint shows that both the Plaintiffs along with their associates Mr. Raja Gopalakrishna decided to purchase 3 plots for an amount of Rs.6.05crores. The contention of the Plaintiff in the para no. 8 of the plaint that since late Mr. Jimmy Gazdar had already taken interest free loan of Rs.50,00,000/- (Rupees Fifty Lakhs only) from the Plaintiff, it was agreed that entire consideration towards the sale of the suit property would be paid on the date of the registration of Sale Deed which was fixed somewhere in February 2020. Further late Jimmy Gazdar agreed that he would repay loan of Rs.50,00,000/- (Rupees Fifty Lakhs only) and that should not be treated as consideration. The statement in the plaint seems to be unbecoming of a business person as the amount was paid to late Jimmy Gazdar in cash which he acknowledged as the loan. A prudent man or a businessman

would normally adjust such amount towards part consideration instead of refunding it later on.

**45.** Though the Plaintiffs claimed in para no. 8 that it was decided in the last week of November, 2019 that the entire consideration of Rs.6.05 crores shall be paid only on the date of execution of Sale Deed which was fixed in February 2020, admittedly, such Sale Deed was not executed in February, 2020. It is admitted fact that late Mr. Jimmy Gazdar expired on 9<sup>th</sup> August 2020 i.e., after a period of six months from the date fixed for execution of Sale Deed.

**46.** There are several such averments in the plaint which show that after so called agreement with Mr. Jimmy Gazdar in November 2019, which was not in presence of any third person including Mr.Ramakrishna Parsekar, no material has been placed on record to conclude and that too from the side of Mr. Jimmy Gazdar that there was such agreement finalised by such parties.

**47.** All other averments in the plaint are showing the correspondence between Mr. Ramakrishna Parsekar and the Plaintiffs. It is no doubt true that the Plaintiffs claimed in the plaint that some correspondence was with Mr.Ramakrishna Parsekar

wherein the price was mentioned. However, there is no affidavit appended to the application of temporary injunction of said Ramakrishna Parsekar to confirm about it. Mr. Sardesai while arguing claimed that Ramakrishna Parsekar would be one of the star witness during trial and that said Ramkrishna is not required to be made a party to the suit. He is right in saying that said Ramakrishna Parsekar cannot be made party to the suit. However, when it is claimed that said Ramakrishna Parsekar will be the star witness, a question arises as to why no affidavit of said Ramakrishna Parsekar is enclosed along with the temporary injunction application to fortify the contentions of the Plaintiffs.

**48.** The provisions of Order XXXIX Rule 1 and 2 of the Civil Procedure Code provides that in the cases in which temporary injunction may be granted the Court can look into the suit wherein it is proved, by affidavit or otherwise, that the property in dispute is in danger of being wasted or damaged or alienate it by any party to the suit or there is threat of dispossession of the Plaintiff, the Court may by order grant temporary injunction to restrain such acts.

**49.** Thus the word “affidavit” appearing in Rule 1 of Order XXXIX Civil Procedure Code refers to the affidavits of witnesses

also. When the Plaintiff claimed that Mr. Ramakrishna Parsekar with whom they discussed in detail about the concluded contract, is their star witness, if that is so, then nothing prevented the Plaintiffs from filing affidavit of Mr. Ramakrishna along with the application.

**50.** The contentions raised that Mr. Ramakrishna did not object to the draft Sale Deed except the indemnity clause, cannot conclude even at the is prima facie stage that he admits of any oral concluded contract. First of all, there is nothing in the pleadings to show that such Mr. Ramakrishna was present during the talks between the Plaintiffs and late Jimmy Gazdar. It is no doubt true that said Mr. Ramakrishna was working for late Jimmy Gazdar . However, said Ramakrishna is neither the power of attorney holder or authorised representative of late Jimmy Gazdar, either to accept or object to the draft sale deeds. Thus, even if said Ramakrishna in his chats with the Plaintiffs only objected to indemnity clause, it cannot be prima facie concluded that there was no objection with regard to the price mentioned in the draft Sale Deed. Basically for this purpose affidavit from Mr. Ramakrishna Parsekar would have benefited the Court in coming to prima facie conclusion about the

concluded oral contract.

**51.** The learned Trial Court on the basis of the pleadings and the documents arrived at a finding that though there were some negotiations going on between the parties, there was no concluded oral contract between late Jimmy Gazdar and the Plaintiffs. The learned Trial Court also observed that payment of Rs.38,50,000/- (Rupees Thirty Eight Lakhs Fifty Thousand only) from the Plaintiff's account into the account of late Jimmy could be a friendly loan transaction as the Plaintiffs admitted that earlier he handed over Rs. 50,00,000/- (Rupees Fifty Lakhs only) in cash as a friendly loan.

**52.** Mr. Sardessai would submit that neither late Jimmy nor Mr. Ramakrishna objected to notice issued by the Plaintiff in the newspaper and later on uploading of the draft Sale Deeds on the website. First of all, such contention of Mr. Sardessai is drawing findings on certain facts. At the stage of grant or refusal of temporary injunction, it is difficult to draw such findings on the basis of averments made in the plaint and the documents of the parties, so as to arrive at a prima facie case in favour of Plaintiffs. The concept of prima facie case needs to be appreciated on the

basis of certain material which would lead to a conclusion in favour of the Plaintiffs. The matter in hand would go to show that since Mr. Jimmy Gazdar expired in August 2020, no other person including Mr. Ramakrishna Parsekar is certifying about such oral contract. The conclusions which the Plaintiffs are trying to draw from the pleadings and the documents will have to be testified during evidence. Only after leading evidence, the Court at the first instance will be able to draw certain conclusions.

**53.** The learned Trial Court has observed that the title report was prepared only on 23.12.2019. It further observed that in normal circumstances title report is prepared before the contract is concluded so as to confirm the title of the owner. Only thereafter other aspects of a contract could be discussed. To my mind, there cannot be any fault with such findings of the Trial Court though Mr. Sardessai would submit that the Plaintiffs were having full faith in late Jimmy Gazdar and only for the purpose of obtaining loan from the Bank the title report was prepared subsequently. The contentions of Mr. Sardessai could be accepted, however, observations of the learned Trial Court in para 34 of the impugned order cannot be considered as perverse or illegal. Such findings are

also possible.

54. The learned Trial Court then observed in para 35 that there is no single document placed on record by the Plaintiffs to show that late Jimmy Gazdar agreed to sell an area of 2500sq.mts to the Plaintiffs and Mr. Raja Gopalakrishna for a sum of Rs. 6.05 crores. In the same breath, the learned Trial Court observed that there were negotiations between Plaintiffs and late Jimmy Gazdar for sale of the property cannot be ruled out. However, vital requirement is about concluded oral contract including the price which the Plaintiff failed to establish.

55. Mr. Sardesai strongly objected to such observations on the ground that when entire case of the Plaintiffs is about oral concluded contract, the question of placing single document to prove could not have been demanded by the Trail Court. The observations of the learned Trial Court is to the effect that apart from such oral concluded contract as alleged, the Plaintiffs failed to show the single document between them and late Jimmy to prove such concluded oral contract.

56. Such observations of the Trial Court will have to be looked into by considering the pleadings and various documents. It is no

doubt true that Plaintiff relied upon various documents including the chats between him and Mr. Ramakrishna. However, all these documents even considered together would not at this *prima facie* stage prove concluded oral contract. Such oral contract will have to be established only after leading evidence and examining the relevant witnesses. The Trial Court by observing in para 35 wanted to convey that apart from such averments, there is no single documents produced by the Plaintiff to show that late Jimmy agreed to sell the suit property to the Plaintiffs. It is admitted by the Plaintiffs that there is no single document executed by Jimmy Gazdar with the Plaintiffs to show such concluded oral contract. No doubt there are various documents placed on record by the Plaintiffs including chats, emails and the draft Sale Deeds, all these documents will have to be tested during trial and only thereafter inference could be drawn on the basis of preponderance of probabilities. It is no doubt true that public notice was issued by the Plaintiffs somewhere on 23.12.2019 claiming that there is a concluded contract, however, further action was not taken up by the Plaintiffs till filing of the suit.

57. During exhaustive arguments, attention of this Court to

various documents were invited including the chats, messages and the notices, however, at the most and at this stage, such documents would go to show that some negotiations were going on between the parties. Whether there was concluded oral contract between the Plaintiffs and Jimmy Gazdar will have to be gone into during trial. Similarly, various aspects which were pointed out during submissions across bar will only lead to prima facie conclusion that some talks were going on between the parties. However, it would be difficult to conclude at this prima facie stage and that too in absence of specific admission on the part of late Jimmy or by his employees including Mr. Ramakrishna that there was concluded oral contract.

58. It is no doubt true that averment and the documents placed by the Plaintiffs prima facie show that some negotiations were going on, however, the fact remains that the property was already sold to Defendant no. 3 on 13.12.2021, whereas the suit was filed on 01.06.2022 i.e. after 6 months, will have to be considered for the purpose of discretionary relief. The contentions of Mr. Sardessai that the Plaintiffs were negotiating with Defendant No. 3 and only when it was confirmed that they were only delaying the matter,

they filed a suit, will have to be tested at the time of trial, however such arguments at this stage would be difficult to accept for the simple reason that the party who is vigilant of his rights would approach the Court with utmost urgency.

**59.** The contentions of Mr. Sardessai that the prayer of the Plaintiff is only to restrain Defendants from creating third party interests, since the Defendants are already in possession will have to be looked into by considering Section 52 of the Transfer of Property Act. Defendant No. 3 is admittedly the registered owner and in possession of the suit property. The said Defendant is a party to the present proceedings. Therefore, even if Defendant No.3 enters into any third party transaction with regard to the suit property, right of the Plaintiff could be considered as protected under Section 52 of the Transfer of Property Act.

**60.** The learned Trial Court has further observed that there are some material to show that the Plaintiffs want to construct Villas and use it for commercial transaction. In this respect, some correspondence between the Plaintiff and other person has been pointed out to show that the third plot which the Partner of the Plaintiffs by name Raja Gopalakrishna was supposed to purchase

was intending to be sold to the third party. Mr. Sardessai would submit that the pleadings show that oral discussion was to the effect that either Plaintiff no. 1 and 2 or their partner Raja Gopalakrishna would purchase 3 plots and sharing of the amount would be left to the Plaintiff and said Raja Gopalakrishna. He submits that the Plaintiff no. 1 and 2 are entitled to share the third plot amongst themselves. No doubt such submission could be considered, however, at present it is clear that that third partner by name Raja backed up which is clear from the pleadings itself and there is no clarity as how third plot would be divided amongst the Plaintiffs. All above aspects will have to be tested during trial.

**61.** From the sum and substance, the observations of the learned trial Court in the impugned order cannot be termed as perverse or arbitrary and more so against the settled principles of law.

**62.** In the case of **Kollipara Sriramulu (dead) by his legal representatives Vs. Aswatha Narayana (dead) by his legal representatives and others**, AIR 1968 SC 1028, the Apex Court while discussing appeals against Judgments and Decrees, considered the question of oral concluded contract. In that matter after a detailed trial/evidence of the parties, the question was

raised about oral concluded contract. Thus observations of the Apex Court which are on the basis of evidence of the parties, cannot be looked into for the purpose of deciding temporary injunction application.

**63.** The possession of the Suit property is admittedly with Defendant No. 3. Defendant No. 1 is the Executor of the Will whereas Defendant No. 2 is one of the Beneficiary. The prayer in the injunction application is to restrain all the Defendants from creating any third party interest. Since the Plaintiffs failed *prima facie* to prove about concluded oral contract, the balance of convenience tilts in favour of the Defendants. No irreparable loss will be caused to the Plaintiffs as remedy to demand compensation is still available to the Plaintiffs.

**64.** The Appeal stands rejected. Civil Application No. 98/2023 stands disposed of. Parties shall bear their own costs.

**BHARAT P. DESHPANDE, J.**