Special Civil Suit No.: 25/2022/B

CNR No.: GANG040008972022

O R D E R (Below Exhibit D-3)

(Delivered on this the 4th day of the month of January of the Year 2023)

This is an application filed by the plaintiff under Order 39 read with Section 151 of Civil Procedure Code for temporary injunction seeking to restrain the defendants and/or their agents, servants or any other persons claiming through them or acting on their behalf from carrying on any construction or changing the status quo and/or creating any third party rights in respect of the suit properties pending the final disposal of the suit.

2. Reply is filed by defendant no.1 at exh 27, defendant no.2 at exhibit 32 and defendant no.3 at exh 33 objecting to the application.

3. Heard Ld. Sr. Adv. N. Sardessai for the plaintiff, Ld. Adv. P. Rao for defendant nos.1 and 2 and Ld. Adv. S. Karpe for defendant no.3. The plaintiff also filed written arguments at exhibit 55. Perused the records and considered the arguments of the learned counsels.

4. The following points arise for my determination and my reasons and findings to the same are as under:-

Sr.No	**Points for determination**	**Findings**
1.	Whether the plaintiff has made out a prima facie case in his favour?	In the negative.
2.	Whether balance of convenience tilts in favour of the plaintiff?	In the negative.
3.	Whether irreparable loss and injury will be caused to the plaintiff if temporary injunction is not granted?	In the negative.

R E A S O N S

5. **Point No.1**:- This suit is filed by the plaintiff for specific performance, permanent injunction and

cancellation of sale deed under Section 10, 31 and 38 of The Specific Relief Act, 1963. The plaintiff has prayed for the following reliefs: (a) to declare the deed of sale dated 07.09.2021 as null and void, (b) for cancellation of the deed of sale dated 07.09.2021 registered in the office of the Sub-Registrar, (c) for specific performance of the agreement between the plaintiff and the defendant nos.1 and 2 and to direct the defendant nos.1 and 2 to comply with their part of the agreement entered into in July 2020 and to execute a deed of sale in favour of the plaintiff in relation to a 3 bedroom villa in the 11 villa development project alongwith corresponding built up area to be constructed in the first suit property and a 400 sq. mtrs. partitioned plot in the second suit property, (d) permanent injunction restraining the defendants and/or their agents, servants or any other persons claiming through them or acting on their behalf from carrying on any construction or changing the status quo and/or creating any third party rights in respect of the suit properties pending the final disposal of the present suit

6. The question before me is whether the plaintiff has been able to prove that there was a concluded oral agreement between the parties in the third week of July 2020 in order to seek the relief of injunction his favour.

7. There is no doubt that a party is entitled to specific performance based on oral contract for sale. However the burden lies heavily upon the plaintiff to establish the same.

8. In the case of ***Brij Mohan and Ors. Vs. Sugra Begum and Ors. MANU/SC/0492/1990*** the Hon'ble Supreme Court has held that there is no requirement of law that an agreement or contract of sale of immovable property should only be in writing. However, in a case where the plaintiffs come forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement alone, heavy burden lies on the plaintiffs to prove that there was consensus ad idem between the parties for a concluded oral contract for sale of immovable property. Whether there was such a concluded oral contract or not would be a question

of fact to be determined in the facts and circumstances of each individual case. It has to be established by the plaintiffs that vital and fundamental terms for sale of immovable property were concluded between the parties orally and a written agreement if any to be executed subsequently would only be a formal agreement incorporating such terms which had already been settled and concluded in the oral agreement.

9. It is not in dispute that the plaintiff and the defendant no.1 was having a business relation. The nature of agreement pleaded by the plaintiff in brief is as follows: the plaintiff and defendant no.1 jointly purchased Mapusa property vide Deed of Sale dated 18.11.2011 for Rs.45 lakhs out of which plaintiff contributed an amount of Rs.25 lakhs and defendant no.1 contributed Rs.20 lakhs. Thereafter, the plaintiff purchased a property in Nachinola bearing survey no.21/1 for Rs.1.5 crore and defendant no.1 was paid brokerage/commission. On 24.12.2012, the plaintiff and defendant nos. 1 and 2 entered into Development

Agreement with the developer for MICASA project wherein the plaintiff was to get 2 regular flats and one studio flat and a monetary consideration of Rs.30 lakhs. Thereafter the plaintiff and defendant nos. 1 and 2 signed a Memorandum of Understanding dated 21.01.2013 with the owner Mr. Julian Nazareth with respect to two properties situated at village Nachinola bearing survey nos.34/10 and 67/10 and plaintiff made part payment of Rs.15 lakhs to Christopher Nazareth.

10. Thereafter the parties decided to revise the terms of the Development Agreement of MICASA project dated 24.12.2012 and in the year 2013, Agreement for Development dated 31.08.2013 was executed whereby it was mutually agreed upon that the monetary consideration of Rs.60 lakhs would be reduced to Rs.45 lakhs and the built-up area and flats were increased from 4 flats with 370 sq.mts. super built up area to 5 flats with 480 sq.mts. super built-up area. The defendant no.1 represented the plaintiff in the said Agreement for Development dated 31.08.2013

as his attorney. The defendant nos.1 and 2 sold the entire ownership of the plaintiff in the flats in MICASA project. The defendant nos.1 and 2 took over the rights of the plaintiff in the MOU dated 21.01.2013 in respect of the Nachinola property and subsequently sold the same as confirming parties to M/s. Takshila Educational Society.

11. In the year 2018 the defendant no.1 alongwith his associate Mr. Umesh Kambli attempted to purchase the first Nachinola property and by entering into MOU dated 18.07.2018 after paying a consideration of Rs.30 lakhs out of which the defendant no.1 paid a sum of Rs.10 lakhs. Both the defendant no.1 and his associate, failed to pay anything, thereby abandoning the MOU dated 18.07.2018.

12. In the year 2019, the defendant no.1 along with his two partners Mayur Sawkar and Tukaram Salgaonkar came to the plaintiff to purchase the property bearing survey no.21/1 that was under litigation for consideration of Rs.5.40 crores. A Memorandum of Understanding dated 09.11.2019 was executed by advancing a sum of Rs.90 lakhs

to the plaintiff. On account of their inability to handle the pending litigation and failure to pay the balance consideration, they abandoned the MOU in March 2020 and in the month of July 2020 asked for a refund of the sum of Rs.90 lakhs paid to the plaintiff.

13. The plaintiff claims that since the defendant no.1 had taken a lot of money from him and sold his shares without giving anything in return and only constant promises/assurances were given, the plaintiff informed the defendant no.1 that the plaintiff would refund the amount of Rs.90 lakhs only when the defendant nos. 1 and 2 would execute a written document defining in clear terms what properties would be given to the plaintiff in exchange for all the earlier sales of the plaintiff's' share and appropriation of the sale proceeds by the defendant nos. 1 and 2. The defendant nos. 1 and 2 and his partners agreed to the same and offered the plaintiff the following (a) a 3 bed room Villa in the development project consisting of 11 identical villas which was to come up in the first suit property with

corresponding undivided rights in that property and (b) a plot admeasuring 400 sq. mts. surveyed under no.54/15-A in the second suit property. According to the plaintiff the offer was in full and final settlement, superseding all previous offers. The plaintiff claims that the defendant no.1 then handed over a copy of the gift deed dated 01.07.2013, approval plan showing 11 identical villas with respect to the first suit property and the Deed of Sale dated 14.02.2018 with respect to the second suit property thus confirming that there was consensus ad-idem with respect to the concluded contract. According to the plaintiff this contract was finalized in the 3rd week of July 2020, in a meeting held at the residence of the plaintiff in the presence of the defendant nos.1 and 2. Based on the said oral agreement the plaintiff is seeking specific performance of the oral contract concluded in July 2020.

14. On the other hand, the claim of the defendant no.1 is that the plaintiff had borrowed a sum of Rs.9.25 lakhs from the defendant no.1 in the year 2008. On 03.10.2008, the

defendant no.1 advanced a sum of Rs.9.25 lakhs to the plaintiff, which the plaintiff was yet to return when the investment was jointly made by the plaintiff and defendant no.1 in purchasing the property at Cuchelim, Mapusa, wherein the project MICASA has come up.

15. The defendant no.1 claims that he and the other persons party to the MOU dated 08.07.2008 were entitled to a commission of total Rs.30 lakhs in respect of the property belonging to one Mrs. Emilia, admeasuring 2500 sq.mts. situated at Colvale. The defendant no.1 was entitled to a payment of Rs.7 lakhs on the sale of Colvale property. The plaintiff by keeping the defendant no.1 and the other three persons in the dark, organized the sale of the Colvale property to a third party, on the strength of the MOU dated 08.07.2008 and appropriated approximately a sum of Rs.35 lakhs. When the defendant realized the devious manner in which the plaintiff had organized the sale of Colvale property, the defendant no.1 and the said three persons confronted the plaintiff. The plaintiff promised the

defendant no.1 and the said three persons that the plaintiff shall give due credit to the account of the defendant no.1 and the said three persons in future transactions. The plaintiff had also promised to give Rs.25 lakhs each to the defendant no.1 and one Sanjay Lal who both had slogged for bringing about the sale of the first Nachinola property in favour of the plaintiff in the year 2011.

16. The defendant no.1 claims that when he requested the plaintiff to pay a sum of Rs.41.25 lakhs immediately, the plaintiff started giving sob stories, however acknowledged the amounts due and payable to the defendant no.1 since the year 2008, informed that he will give him a Power of Attorney to deal with all the apartments which would come to his share and to appropriate the cash consideration after making necessary adjustments in respect of MICASA project by paying a sum of Rs.15 lakh to the plaintiff in cash and that upon the defendant appropriating the balance amounts from project MICASA, their account would stand squared off. Therefore considering the fact that the plaintiff

was due and liable to pay a sum of Rs.16.25 lakhs to the defendant no.1 since the year 2008, a sum of Rs.25 lakhs towards first Nachinola property since the year 2011 and considering the golden opportunity lost by the defendant no.1 on the Mapusa property, which he could not purchase on account of failure of the plaintiff to repay the sum of Rs.41.25 lakhs to the defendant no.1, upon payment of Rs.15 lakhs in cash to the plaintiff, the entire account between the plaintiff and the defendant no.1 was squared off in the year 2013 itself.

17. Ld. Sr. Adv. N. Sardessai for the plaintiff contended that the vital and fundamental terms settled between the plaintiff and defendant nos. 1 and 2 are as follows: (i) Property description i.e. a three bedroom villa in the development project consisting of 11 identical villas to be constructed in the first suit property along with undivided proportionate rights in the first suit property and a 400 sq. mts. in the second suit property situated at Nachinola bearing survey no.54/15-A (ii) Area description i.e. the area

of the three bedroom villa is described in detail in the approval plan wherein the area calculations are mentioned in detail, all 11 villas were identical. The area of the plot was 400sq.mts. (iii) ownership- the defendant nos. 1 and 2 are the owners of the first and second suit properties. The defendant no.2 acquired ownership rights in the first suit property by virtue of the deed of gift dated 01.07.2013 and the defendant no.1 acquired ownership rights to the second suit property vide deed of sale dated 14.02.2018. (iv) consideration - the sale proceeds appropriated by the defendant nos. 1 and 2 by selling the plaintiff's right and share in the MICASA project and second Nachinola property and for utilising these sale proceeds for a considerable time by investing in property giving exponential returns formed the basis of consideration for the three bedroom villa and 400 sq. mts. plot given in exchange. (v) time limit - the time limit was upon the defendant nos. 1 and 2 obtaining construction licence from the Village Panchayat of Siolim in relation to the first suit

property and upon the defendant nos. 1 and 2 obtaining the partition in relation to the second suit property.

18. Per contra, it is the contention of Ld. Adv. P. Rao for defendant nos.1 and 2 that the plaintiff claims entitlement of a villa and a plot of land 400 sq.mts., the value whereof together would be about Rs.3.50 crores on a conservative estimate. He further contended that in a commercial project of 11 villas whose specifications, areas and the types differ, the plaintiff has not even specified the particular number of the villa out of the said 11 villas. Further it is contended that the plans came to be approved only on 10.03.2021, therefore the claim of the plaintiff in respect of a villa in a 11 villa project in suit property no.1 without the approval or sanction for 11 villas being there, is on the face of it preposterous. There could never have been a concluded contract in respect of a project which had not received the technical clearance, much less a concluded contract with specific terms. It is further contended that by deed of sale dated 07.09.2021 the entire suit property 1 is

sold to the defendant no.3 with no condition for retention of a villa even for defendant no.1 and the defendant no.2 leave alone the plaintiff.

19. It is the contention of Ld. Adv. Karpe for defendant no.3 that there are no pleadings in the plaint to establish oral contract or that the parties were at ad idem consensus. He further contended that the villa in the first suit property could not have been agreed to be allotted at the time when the plaintiff claims that such a transaction was entered, as in fact the approvals for the villas came to be granted by the competent authority on 10.03.2021 and without approvals from the competent authority the question of concluded contract for allotment of any villa in first suit property would not arise.

20. The plaintiff claims that 50% of the sale proceeds of MICASA project and 50% of Rs.15 lakhs due and payable, i.e. Rs.1.83 crores + Rs.15 lakhs = Rs.1.98 crores, of which 50% is Rs.99 lakhs and 50% of Rs.57.50 lakhs being sale proceeds of second Nachinola property totals Rs.28.75

lakhs. Therefore Rs.99 lakhs + Rs.28.75 lakhs = Rs.1,27,75,000/- is the plaintiff's share which sale proceeds were used by defendant nos. 1 and 2 to invest in property giving them exponential returns for which the defendant nos.1 and 2 promised good clear title property/plots in return. Thus the claim of the plaintiff is for an amount of Rs. 1,27,75,000/- from the defendant no.1.

21. If that be so, how can the plaintiff claim a villa and a plot, the cost of which is approximately to the tune of Rs.4 crores. The defendant no.3 is marketing the villas in the first suit property for a consideration of Rs.3.75 crores and has already got four purchasers for four of the villas. It cannot be believed that the defendant no. 1 would agree to allot properties worth Rs. 4 crores to the plaintiff, even if some amount was due and payable to the plaintiff. Thus with respect to the price there is no consensus ad item between the parties.

22. There is no pleading in the plaint as to which villa out of the 11 villas was to be given to the plaintiff, the area of

the villa, the location of the villa in the first suit property, amenities to be provided, time frame for completion of the villa.

23. With respect to the project of 11 villas in the first suit property, the technical clearance order granted by the office of the Senior Town Planner Mapusa is dated 10.03.2021. Thereafter the construction licence was granted by the Village Panchayat in respect of the said construction on 07.08.2021. Without getting the approvals and permissions from the concerned authorities in respect of the construction of the villas in the first suit property, there could not have been any concluded contract between the parties. Likewise without partition of the plot of 400 sq.mts. from the second suit property, there could be no concluded contract. As such the plea of the plaintiff that the oral contract was concluded in third week of July 2020 fails.

24. With respect to the time for executing the written document, the plaintiff claims that defendant nos.1 and 2

requested for time to draw up the written agreement as they were awaiting construction license from Village Panchayat of Siolim in relation to the first suit property and paperwork was remaining to be completed with respect to the partition of the second suit property. The defendant nos.1 and 2 assured the plaintiff that they would complete the necessary documentation required to convey the properties to the plaintiff and requested for time till October 2021. As discussed earlier without approvals/ permissions from the concerned authorities with respect to the construction of the villas in the first suit property and the partition of the plot in the second suit property, there could be no concluded contract as the identity of the villa and the plot could not have been ascertained in July 2020. At the most it could be said that there were negotiations between the parties but definitely no concluded contract between the parties.

25. Ld. Sr. Adv. for the plaintiff has relied upon the case of ***Smt. Sohbatdei v/s. Deviplal and Others; (1972)***

3 Supreme Court Cases 495. In the said case from the agreement pleaded by the plaintiff the following facts are clear: (a) price is fixed at Rs.10,000/-; (b) items of properties to be sold are definite; (c) plaintiff being put in possession in pursuance of the agreement; (d) the entire sale consideration to be paid by the plaintiff by January, 1956; and (e) any amount that is paid by the plaintiff before January 1956 is to be adjusted towards the sale price and the balance alone is to be paid by January towards the sale price and the balance or the full amount of Rs.10,000/- as the case may be, the first defendant was to execute the sale deed in January, 1956. The Hon'ble Allahabad High Court held that there is no ambiguity or uncertainty in any of the terms pleaded by the plaintiff.

26. In the present case there was no certainty with respect to the items of properties to be sold in July 2020, the price is at variance and the plaintiff was not put in possession of the properties. Therefore the aforesaid case of *Sohbatdei (supra)* does not aid the plaintiff.

27. Reliance is also placed upon the case of ***Kollipara Sriramulu (Dead) by his legal representative v/s. Aswatha Narayana (dead) by his legal representative and others; (1968) 3 SCR 387*** wherein the Hon'ble Supreme Court held that there are important circumstances indicating that the case of the first respondent with regard to the oral agreement is highly probable. Respondent no.1 had built a valuable cinema theatre building on the disputed site and he had very strong reasons to make an outright purchase of the site, otherwise he would be placed in a precarious legal position. Negotiations for purchase were going on for several years. The witnesses had given evidence which corroborated the case of respondent no.1 with regard to the conclusion of the oral agreement. 20 out of 30 shareholders executed sale deeds in favour of the first respondent after the date of the alleged oral agreement. The fact that the shareholders sold their shares at the identical price to the first respondent and the others sold at the same price to the appellant is only explicable on the hypothesis that the price was fixed

by agreement between all the shareholders willing to sell i.e all those other than the appellant. The next question was whether the oral agreement was ineffective because the parties contemplated the execution of a formal document or because the mode of payment of the purchase money was not actually agreed upon. The Court held that it is well-established that a mere reference to a future formal contract will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case. The Court further observed that the evidence adduced on behalf of respondent no.1 does not show that the drawing up of a written agreement was a pre-requisite to the coming into effect of the oral agreement. It

is therefore not possible to accept the contention of the appellant that the oral agreement was ineffective in law because there is no execution of any formal written document. It is true that there is no specific agreement with regard to the mode of payment but this does not necessarily make the agreement ineffective. The mere omission to settle the mode of payment does not affect the completeness of the contract because the vital terms of the contract like the price and area of the land and the time for completion of the sale were all fixed.

28. Ld. Adv. for the defendant no.3 has relied upon the case of ***IG Builders & Promoters Pvt. Ltd., Vs. Dr. Ajit Singh and Ors. ILR (2011) IV Delhi 724*** wherein it is held by the Hon'ble Delhi High Court that the four ingredients necessary to make an agreement to sell are: (i) particulars of consideration; (ii) certainty as to party i.e. the vendor and the vendee; (iii) certainty as to the property to be sold; and (iv) certainty as to other terms relating to probable cost of conveyance to be borne by the parties,

time etc. The first fundamental which must be proved beyond all reasonable doubt is the existence of a valid and enforceable contract. It is further held that the stipulations and terms of the contract have to be certain and the parties must have been consensus ad idem. The burden of showing the stipulations and terms of the contract and that the minds were ad idem is on the plaintiff. If the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all. Where there are negotiations, the court has to determine at what point, if at all, the parties have reached agreement.

29. In the present case there is no certainty with respect to the terms of the contract. The plaintiff has prima facie failed to prove the existence of a concluded contract.

30. As rightly contended by Ld. Adv. for defendant no. 1 the plaintiff did not react to the sales of the apartments made by the defendant no.1 since the year 2016 and never made a claim for any amounts due to him in the MICASA

project, until 13.08.2021. The plaintiff's claim that a sum of Rs.99 lakhs was due and payable by him on account of sale of apartment in the MICASA project was made for the first time by the plaintiff only on 13.08.2021. In the MOU dated 18.07.2018 or in the MOU dated 19.11.2019 or at any time prior to the communication of 13.08.2021, issued by the plaintiff to the defendant no.1 no reference has been made to any amounts due on account of sale of apartments in the MICASA project. Between 2016 to 2021 i.e. for a period of five years, there is no any written demand or communication of any amount due and payable by the defendant no.1 to the plaintiff. Any prudent man would have made communication if any such huge amount was due and payable to him.

31. The plaintiff objected to the public notice dated 07.03.2021 by Adv. Aditya Naik with respect to first and second suit property. In March 2021 the plaintiff had objected to the sale of the first and second suit property. The letter dated 10.05.2021 of M/s Bennett and Bernard

states that the plaintiff has objected on the grounds of having concluded oral contract with the defendant nos. 1 and 2 with respect to 3 bedroom villa along with corresponding undivided proportionate share in the first suit property and 400 sq.mts. plot in the second suit property. The plaintiff claims that upon coming to know of the attempted sale of the first and second suit properties, contacted the plaintiff and upon meeting requested for six months time to complete all the paperwork related to permissions and partition and the defendant no.1 assured the plaintiff that the written agreement would be signed latest by October 2021.

32. It is the contention of the plaintiff that when the advocate of the defendant no.3 received the objection on 14.08.2021, the defendant no.3 got prepared demand drafts of Rs.2.5 crores on 16.08.2021, which proves that defendant no.3 showed undue haste to buy the first suit property without any due diligence and without taking legal advice and without asking the defendant nos. 1 and 2 to

rebut the plaintiff's categorical assertion of a concluded contract. This establishes that all the defendants colluded to defeat the rights of the plaintiff. It is contended that the copy of the notice dated 30.08.2021 was also issued to advocate for defendant no.3, but despite that there is a mention in the sale deed that no objections were received in response to a notice of intent to purchase the first suit property, which proves that the defendant no.3 is a malafide purchaser.

33. In the public notice dated 09.07.2021 issued by defendant no.3, objections were invited within 14 days along with supporting documents and if no objections were received within the stipulated time, the defendant no.3 would proceed with the sale in respect of the first suit property. Within the stipulated time, no objections were received from any party. It is only by letter dated 13.08.2021 the plaintiff raised the plea of oral contract, however no supporting documents were produced thereof. It is claimed by the defendant no.3 that upon receipt of the

letter from plaintiff, the defendant no.3 contacted the defendant nos.1 and 2 who informed that there is no oral contract entered between defendant nos.1 and 2 with the plaintiff and that the apartments in the MICASA project were sold at the behest and with the consent of the plaintiff and for this purpose Power of Attorney was issued by the plaintiff in favour of defendant no.1 and 2 to sell the apartments in MICASA project. Therefore the defendant no.3 went ahead and executed the conveyance deed in respect of the first suit property. There was no documentary evidence or concrete evidence produced by the plaintiff in support of his claim of concluded oral contract and therefore it cannot be said that the defendant no.3 is a malafide purchaser.

34. Ld. Sr. Adv. for the plaintiff has relied upon the case of ***Vijay A. Mittal and others Vs. Kulwant Rai (dead) through legal representatives and Another; (2013) 3 Supreme Court Cases 520*** where there was a sale in favour of subsequent purchasers who

had notice of prior agreement to sell, after the execution of agreement to sell. D-1 instead of selling the suit property to the plaintiffs in terms of agreement dated 12.06.1979 sold it to D-2 and D-3 on 27.11.1981 It was held that the sale deed made in favour of D-2 and D-3 by D-1 was bad in law and collusive sale made to avoid the agreement of the plaintiffs. The sale deed was declared as null and void. The Hon'ble Supreme Court has held that applying the law laid down in Durga Prasad, AIR 1954 SC 75, the proper form of decree in such cases is to direct specific performance of the contract between the vendor (D-1) and prior transferee (plaintiffs) and direct the subsequent transferee (D-2 and D-3) to join in the conveyance, directed accordingly.

35. Ld. Sr. Adv. for the plaintiff has also relied upon the case of ***M.M.S. Investments, Madurai and Others Vs. V. Veerappan and Others; (2007) 9 Supreme Court Cases 660*** wherein the Hon'ble Supreme Court held that after the conveyance, the only question to be adjudicated is whether the purchaser was a bona fide

purchaser for value without notice. The question whether the appellants were ready and willing is really of no consequence. Once there is a conveyance the concept would be different and the primary relief could be only cancellation.

36. Ld. Sr. Adv. for the plaintiff has also relied upon the case of ***Bharatbhai Parshotambhai Gohel Vs. Niravkumar Jintendrabhai Jethva & 1; 2018 SCC OnLine Guj 2340*** wherein reference is made to the case of Ghanshyambhai Dhirubhai Barvallya v/s Rasikbhai Dhirubhai Amballya; [Appeal from Order No.457/2016 decided on 10.01.2017] to the following observation "it is the case of the appellant i.e. subsequent purchaser that he has no knowledge about execution of sale agreement inter se between plaintiff and defendant no.1 and therefore, they have bonafidely entered into the registered sale deed dated 03.09.2014 without notice of prior sale agreements and paid full value in good faith. Upon re-appreciation of the events, which occurred before and after registered sale

deed dated 03.09.2014, it shows that the defendants with unusual haste, carried out the sale deed. It requires to be considered here that the defendants with unusual haste, carried out the sale deed, where such transactions, as a rule, are carried out with appropriate inquiry and, more particularly, after obtaining title clearance certificate and also by publishing notice in newspaper before purchase.

37. Ld. Sr. Adv. for the plaintiff has also relied upon the case of ***Dr. Govinddas and Another Vs. Shrimati Shantibai and Others; (1973) 3 Supreme Court Cases 418***. The said suit was for specific performance of the agreement wherein the point involved in the appeal is whether the appellants had notice of the agreement to sell between the plaintiff and the vendor. The Hon'ble Supreme Court observed that all the parties are residents or have shops in the same vicinity and in places like this it is not probable that the appellants would not come to know of the execution of the agreement of the plaintiff. Secondly, the haste with which the sale deed in favour of the appellants

was executed was unusual. It is more usual for an agreement to be executed in such cases rather than arrive at an oral agreement on one day and have the sale deed executed the next day and registered the following day. For some reason the appellants were in a hurry to get the deed registered What was the reason? In view of all the circumstances the evidence of Hem Raj Chouhan was accepted and the same was corroborated by Hayat, that Goverdhandas knew of the execution of the agreement with the plaintiff on March 1, 1960.

38. In the present case, there was no concluded oral contract between the parties and therefore the conveyance in favour of defendant no.3 by defendant nos. 1 and 2 cannot be said to be bad in law.

39. Ld. Sr. Adv. for the plaintiff has relied upon the case of ***Rathnavathi and Another Vs. Kavita Ganashamdas; (2015) 5 Supreme Court Cases 223*** wherein it is held that in a contract for sale of immovable property for consideration, if a seller fails to transfer the

title to the purchaser, for any reason, on receipt of consideration towards the sale price then a seller has no right to retain the sale consideration to himself and he has to refund the same to the purchaser.

40. Ld. Sr. Adv. for the plaintiff has relied upon the case of ***Julien Educational Trust Vs. Sourendra Kumar Roy and Others; (2010) 1 Supreme Court Cases 379*** where the appellant Educational Trust sought specific performance of agreement for purchase of land for extension of school run by it and injunction restraining respondent from changing nature and character of suit property. In the said case talks of sale proceeded to an extent where the respondents made over certified copies of their title deeds to the appellant Trust. Separate draft deeds of conveyance were sent by the appellant to the respondents in respect of their undivided shares in the suit property for approval. The appellant applied to Inspector General and Commissioner of Stamp Revenue for exemption from payment of stamp duty in registering the

deeds of conveyance in respect of the suit property. Respondent 1 approved the draft deed sent to him by putting his signatures thereon, subject to some rectifications made by him in the said draft. The final deed of conveyance in respect of share of respondent no.1 was engrossed on stamp paper. Thereafter defendant 2 to 6 also approved their respective draft deeds of conveyance which were also engrossed on stamp paper. The Hon'ble Supreme Court held that from the materials on record it is clear that a prima facie case has been made out by the appellant Trust as to the agreement for sale, which has to go to trial. Whether there was a concluded contract or not between the appellant Trust and respondents 1 to 8 is a matter of evidence and can only be gone into during the trial of the suit. The all important question as to whether the balance of convenience and inconvenience lay in favour of the grant of an interim order of injunction in favour of the appellant Trust and as to whether the appellant Trust would suffer irreparable loss and injury, if no such interim order was passed. Although, loss, if any, to the appellant Trust could

be compensated in terms of money, the said submission does not appear to hold good in the instant case. Equally important is the question of balance of convenience and inconvenience since the principal object of the appellant Trust in wanting to acquire the suit property was to extend its school unit at Kolkata. If the suit property is allowed to be commercially exploited by raising multi-storeyed structures thereupon, the entire object of the suit filed by the appellant Trust will be rendered meaningless and the purpose for which the suit had been filed would be completely defeated.

41. In the present case no prima facie case has been made out by the plaintiff with respect to the concluded contract.

42. Ld. Adv. for defendant no.3 has relied upon the case of ***Ouseph Varghese v/s. Joseph Aley and Ors.; MANU/SC/0493/1969*** wherein the Hon'ble Supreme Court has held that before a court can grant a decree for specific performance, the contract pleaded must be a

specific one and the same must be established by convincing evidence. Rarely a decree for specific performance is granted on the basis of an agreement supported solely by oral evidence. The Court noted that the agreement pleaded by the defendant is wholly different from that pleaded by the plaintiff. They do not refer to the same transaction. The plaintiff did not at any stage accept the agreement pleaded by the defendant as true. The agreement pleaded by the plaintiff is said to have been entered into at the time of the execution of Exh. P-1 whereas the agreement put forward by the defendant is one that is said to have been arrived at just before the filing of the suit. The two are totally different agreements. The plaintiff did not plead either in the plaint or at any subsequent stage that he was ready and willing to perform the agreement pleaded in the written statement of defendant. In a suit for specific performance it is incumbent on the plaintiff not only to set out the agreement on the basis of which he sues in all its details, he must go further and plead that he has applied to the

defendant specifically to perform the agreement pleaded by him but the defendant has not done so. He must further plead that he has been and is still ready and willing to specifically perform his part of the agreement. Neither in the plaint nor at any subsequent stage of the suit the plaintiff has taken those pleas.

43. Ld. Adv. for the defendant no.3 has relied upon the case of ***Pravin D. Thakker and Ors. Vs. Rita J. Shah and Ors; MANU/MH/0289/2020***. In the said case the plaintiff has vaguely stated that the agreement was entered sometime in the year 1988. The relevant averments in the plaint are that the defendant no.1 had agreed to sell the suit shop for price of Rs.2,58,000/- and accepted Rs.10,000/- as booking amount. It is also averred that the balance sale consideration was agreed to be paid on the date of handing over of possession of the suit shop, which was to be within one year from the date of the agreement. These are the only averments on which the contract allegedly stood confirmed. The Hon'ble Bombay High Court observed that the plaint

lacks other material particulars as to the nature of title of the defendant No.1, details of the plan, license and location of the suit shop, amenities to be provided, payment of earnest money, mode of and time frame of payment of sale consideration, liability of each party to pay probable cost of conveyance/registration charges or stamp duty, consequences of non payment of consideration or breach of terms and conditions of the agreement etc. The pleadings also do not spell out whether the alleged oral agreement was preceded by negotiations or whether the terms and conditions of the agreement were finalized in presence of any witness. The averments in the plaint are vague, ambiguous and do not contain material particulars.

44. Ld. Adv. for defendant no.3 has also relied upon the case of ***Mannalal v/s Upendrakumar & ors.; MANU/MH/1325/2009*** wherein the Hon'ble Bombay High Court has held that it cannot be disputed that even oral agreement to sale of immovable property, can be specifically enforced. However, assessment of prima facie

case, in a suit for specific performance of contract, based upon the oral agreement, has to be different than such a suit, based upon the written agreement. In a suit based upon the written agreement, the agreement placed on record and its contents, become significant and the same can be read along with the averments made in the plaint. The written agreement placed on record, discloses the names of parties, their place of residence, the place of agreement, consideration, the description of the property and other terms and conditions of contract, which the parties have entered into. Normally, in such a suit, what is required to be seen, is the interpretation of the terms of contract and compliance of it. It becomes easier for the Court to reduce the controversial position. This is not the advantage, in case of suit based upon the oral agreement. The court is at loss to know the prima facie, undisputed factual position, which can only be ascertained, by reading the averments made in the plaint and the stand taken in written statement. In a suit for specific performance of contract based upon the oral agreement, the averments

made in the plaint carry great weight and significance in ascertaining even a prima facie case. The averments are required to be strictly construed and heavy burden lies upon the plaintiff to establish the consensus ad idem. The Court has to proceed cautiously and read the averments minutely, to understand the exact nature of case, to find out, whether prima facie case is made out or not. The averments in the plaint, must inspire the confidence of the court, as to credibility of the plaintiff and truthfulness of the averments. The inconsistency in the averments made in the plaint, lack of material facts and particulars or vagueness and unspecific averments in plaint etc, would be the instances, which shall be considered against the plaintiff, while judging the prima facie case. The very first thing to find out the prima facie case is whether, the plaint averments contain the material facts and particulars establishing the complete chain of events disclosing the cause of action. It has to be borne in mind that even the absence of single material fact, entails the consequences of rejection of plaint, leave apart the question of making out

prima facie case. Even if the material facts are pleaded and material particulars are absent or if the averments in the plaint are inconsistent, it can be said that the plaint averments do not make out a prima facie case. It is further held that from the scanning of the entire averments made in the plaint, it is apparent that there is absence of some material facts as well as material particulars. The averments in the plaint are totally vague and unspecific. There is total inconsistency in the case put forth in the plaint, if looked into, in the light of documents placed on record. The undisputed factual position pointed out earlier, particularly the fact that none of the parties are the residents of one place, the quantum of amount of earnest money offered, the price of property etc. makes the complete case improbable to succeed. The averments made in the plaint, do not inspire the confidence, either as to the credibility of the plaintiff or as to the truthfulness of the said averments. The plaintiff has failed to establish a complete chain of events by pleading material facts and particulars. Prima facie, there is no concluded contract,

which is established. Thus, the plaintiff has failed to make out prima facie case.

45. In the present case the plaintiff has failed to establish a concluded oral contract. In the absence of a concluded oral contract, the affidavits of the witnesses relied upon by the plaintiff does not aid his case. Thus the plaintiff has failed to make out a prima facie case for grant of injunction. Hence point No.1 is answered in the negative.

46. **Point No.2**: Balance of convenience does not tilt in favour of the plaintiff as the plaintiff has failed to establish existence of a concluded oral contract. Therefore point No.2 is answered in the negative.

47. **Point No.3**: Ld. Sr. Adv. for the plaintiff has relied upon the case of ***Maharwal Khewaji Trust (Regd.) Faridkot Vs. Baldev Dass; (2004) 8 Supreme Court Cases 488*** wherein it is held that unless and until a case of irreparable loss or damage is made out by a party to the suit, the court should not permit the nature of the

property being changed which also includes alienation or transfer of the property which may lead to loss or damage being caused to the party who may ultimately succeed and may further lead to multiplicity of proceedings. In any event, it is always open to the other party to claim damages if the case of the party pleading a maintenance of the status quo is ultimately found to be baseless, in an appropriate case, the court may itself award damages for the loss suffered, if any, in this regard. On facts, no such case of irreparable loss made out. The contention that the legal proceedings are likely to take a long time, therefore the suit property should be permitted to be put to good one, is not good enough.

48. No irreparable loss and injury will be caused to the plaintiff if temporary injunction is not granted as the plaintiff has failed to establish concluded oral contract. Secondly in case the defendant nos.1 and 2 owe any money to the plaintiff then the plaintiff can be adequately compensated in terms of money.

49. On the other hand, the defendant no.3 has commenced the project of construction of villas in the name and style of 'Zed Point by Zaavi" in the suit property no.1 upon obtaining necessary approvals and licenses from the competent authorities. The defendant no.3 has spent substantial amount on the construction. The defendant no.3 has commitment to sell 4 villas in respect of which the purchasers have made advance payments. The defendant no.3 is required to complete the project within the stipulated time. Therefore irreparable loss and injury will be caused to the defendant no.3 if injunction is granted. Hence point No.3 is answered in the negative.

50. In the result, I pass the following :

ORDER

Application for temporary injunction at exhibit 3 is dismissed.

Pronounced in the open Court.

(**Reina S. Fernandes**)
Civil Judge Senior Division,
'B' Court Mapusa.

rpn*