**ORDER BELOW EXH.5**
**(Decided on 17/10/2015)**

This is an application for restraining defendants from alienating or creating third party interest in the properties bearing Gat No.113/1 admeasuring 1H 63R, Gat No.130 admeasuring 82.5R, and Gat No.131 admeasuring 3H 46R, situated at Parandwadi, Tal.-Maval, Dist.-Pune, which are hereinafter referred to as “suit properties”.

2. Plaintiff has contended that defendants are the owners of suit properties. Plaintiff intended to purchase the suit properties and therefore, approached defendants through agent namely Mr. Sanjay Pawar. On 28/01/2010 negotiations took place in between the parties. Plaintiff agreed to purchase suit properties for consideration of Rs.1,15,000/- per acre totaling to Rs.16,19,00,000/-. It was also decided to pay Rs.3,00,000/- Mr.Sanjay Pawar. The time period and schedule of payment was decided by the parties. It was decided that plaintiff will raise loan amount from the bank for completing said transaction before December, 2013. Plaintiff agreed to pay Rs.2,50,00,000/- on or before December, 2010 towards part payment. However, particular time was not the essence of the contract. Plaintiff had paid Rs.25,00,000/- as part payment to the defendants which was duly acknowledged by them. Defendants also allowed the plaintiff to issue public notice in Daily News papers calling the objections from public at large. Thereafter, plaintiff had paid Rs.1,75,00,000/- till October, 2010. Plaintiff had issued two cheques towards part

payment, but those were dishonoured. However, immediately on 27/11/2010 plaintiff had paid amount of Rs.18,00,000/- and Rs.30,00,000/- through R.T.G.S. Plaintiff had issued nine post dated cheques of Rs.13,68,00,000/- to defendants. Plaintiff has also paid Rs.3,00,000/- to middle man Mr. Sanjay Pawar. However, defendants did not deposit said cheques for clearance. In the meantime, one public notice dated 25/02/2012 was published in daily Sakal through Adv. Krishna Dabhole for calling objections of public at large in respect of proposed sale transaction in between his client and defendants. Plaintiff objected said notice by reply dated 05/03/2012. Thereafter, meeting held in between the parties in the month of August, 2013 in which defendants agreed to execute Sale Deed on 05/09/2013. However, defendants avoided to execute sale deed. Plaintiff issued notice to defendants calling upon them to execute sale deed, but they did not comply said notice. Hence, plaintiff constrained to institute present suit inter alia claiming relief of specific performance of the contract. Plaintiff has also claimed possession of the suit properties. In the meantime, plaintiff has moved subject application for claiming relief which is set out in Para-1 above.

3. Defendants have filed their say/reply at Exh.25 and denied all material allegations against them. Defendants have challenged the suit on the ground of non-joinder of necessary parties and valuation of the suit. It is the contention of the defendants that no conclusive or concluded contract either oral or written came to be entered by and between the parties. It is their contention that Gat No.131 is owned by defendant No.1. So also, Gat No.113/1/3 and Gat No.130 are owned by defendant Nos.2 & 3 in their individual capacity.

Defendants were intended to sell suit properties. One Mr. Sanjay Pawar introduced them to the plaintiff, but said Mr. Sanjay Pawar never participated in between negotiations. Defendant No.2 expressed his intention to sell suit property @ Rs.1,50,00,000/- per acre. Plaintiff expressed desire to visit the suit properties and verify their title. Hence, without their being any concluded contract and conclusion regarding valuation of suit properties, defendants permitted the plaintiff to publish notice for verification of marketable title. Said letter is without consideration and without their being conclusive and concluded agreement with reference to right in the suit properties. Thereafter, plaintiff did not approach to the defendants till July, 2010. In the month of July, 2010 plaintiff called the defendants and expressed his desire to purchase the suit properties @ Rs.1,50,00,000/- per acre. At the said time defendants informed the plaintiff that they will execute such conclusive agreement only after payment of entire consideration. Plaintiff agreed to conclude the transaction within the period of six months from July, 2010. Thereafter, plaintiff issued cheque of Rs.4,00,00,000/- and it returned unpaid on 03/08/2010. On redepositing said cheque, it again returned unpaid with remark that “payment stopped by drawer.” Thereafter, in the month of November, 2010 plaintiff transferred amount of Rs.30,00,000/- and Rs.18,00,000/- in the account of defendant No.1 with an agreement that he will pay remaining amount till 31/03/2011. Despite repeated calls being made, plaintiff failed to pay said amount within stipulated time and therefore, said amount of Rs.48,00,000/- was forfeited by defendants. Thereafter, defendants decided to develop suit properties on their own. Defendants executed Joint Venture Agreement in respect of suit properties with one M/s.

Sancon Realtors and executed special power of attorney as well. Said M/s. Sancon Realtors was put in the possession of the suit properties and it also created interest of third person in the portion of suit properties. It is also the case of defendants that in the month March, 2011 they have returned said deposited amount to the plaintiff in three installments viz.Rs.18,00,000/- on 10/12/2013, Rs.18,00,000/- on 02/06/2014 and Rs.12,00,000/- on 15/07/2014. It is the contention of the defendants that plaintiff has not come with the clean hands and therefore, it is not entitle for the relief of injunction. Defendants have, therefore, requested to reject the application.

4. Points for consideration and findings recorded against those points along with reasons are as follows :

| **Sr. No.** | **POINTS** | **FINDINGS** |
|---|---|---|
| 1 | Whether plaintiff has made out prima facie case ? | **No...** |
| 2 | Whether balance of convenience tilts in favour of plaintiff ? | **No...** |
| 3 | Whether plaintiff will suffer irreparable loss if interim injunction as prayed is refused ? | **No...** |
| 4 | What order ? | **According to final order..** |

## REASONS

**AS TO POINT Nos.1 to 3 :**

5. Shri. S. N. Patil, appearing on behalf of plaintiff has submitted that oral agreement of sale is enforceable and suit for specific performance can be maintained against erring vendor. He

submitted that on 28/01/2010 defendants agreed to sell suit properties for Rs.1,15,000/- per acre. At the said time part payment of Rs.25,00,000/- was paid to the defendants. Plaintiff had paid Rs.2,00,00,000/- before December, 2010. Plaintiff had also paid Rs.48,00,000/- to defendant No.1 through R.T.G.S. and also handed over post dated cheques of remaining consideration to defendants. According to him, plaintiff has shown that he was ready and willing to perform his part of the contract. At this juncture, he has claimed restraining order against defendants from alienating or creating third party interest in the suit properties.

6. Per contra, Shri. Limaye, appearing on behalf of defendants has submitted that pleadings of the plaintiff is not showing clear and definite terms and conditions of alleged agreement. According to him, there was no conclusive and complete agreement in between the parties. Hence, specific performance of such agreement cannot be enforced and in that background, interim injunction application is not maintainable. To buttress his said contention he relied on the case of **Shri. Sharad Pandharinath Mote V/s. Prakash Madhavrao Yadav** **[Manu./Mh.1401/2000],** **Naresh Bhutani V/s. Vijaykumar Khurana and another** **[Manu/DE/8171/2007]**, **Kumari. Anandan V/s. T. Balmukund Rao and others** **[AIR 2002 Mad.472].**

7. In the first case of Sharad (supra) Hon'ble Bombay High court had considered the case of oral agreement of sale. In the said case one receipt for payment of advance was passed. In the said case Hon'ble High Court has relied on the case **Ganesh Shet V/s. C.S.G.K. Shetty** **[Manu/SC/0383/1998]** wherein, it was held that in the suit for specific performance, evidence and proof of agreement must be

absolutely clear and certain. Hon'ble Bombay High Court relying on said ratio further held that to grant a decree for specific performance, the Court has to be satisfied about the terms of the understanding and they have to be cleared and definite. In the second case of Naresh Bhutani (supra) decided by Hon'ble Delhi High Court and case of Kumari Anandan (supra) decided by Hon'ble Madras High Court, reliance was kept on the case of Ganesh Shet (supra) and laid down that the evidence and proof of the agreement must be absolutely clear and certain.

8. It is the further submission of Shri. Limaye, appearing on behalf of defendants is that in the absence of the document in writing which is duly stamped and registered a specific performance cannot be enforced. According to him, mere letter of defendants allowing the plaintiff to issue public notice will not sufficient to infer that an agreement of sale was executed in between parties. To buttress his said contention, he kept reliance on the case of **Hansa V. Gandhi V/s. Dipshankar Roy** **[AIR 2013 Supreme Court 2873]** and case of **Rafique Barkatulla Khan V/s. Shahenshah Hussain Iqbal Munshi** **[Appeal from order No.977/2011 with Civil Application No.1299/2011]**. In the first case of Hansa (supra) Hon'ble Supreme Court has laid down that relief of specific performance of the contract on the basis of letter of intend cannot be granted. In the later case of Rafique (supra) Hon'ble Bombay High Court confirmed the order of Trial Court to place reliance on unregistered insufficiently stamped document executed in favour of plaintiff for the purpose of refusing temporary injunction.

9. Law laid down in aforesaid cited cases leads to draw an inference that it is not necessary under law that every contract must be in writing. There can be equally binding contract between the parties on the basis of oral agreement unless there is law which requires an agreement to be in writing. Such an agreement can be specifically enforced. However, when such agreements are required greater amount of degree of certainty in the terms of an agreement. Such an agreement must be clear and certain. The burden of proof naturally lies heavily on plaintiffs to prove agreement of sale by reliable, cogent and convincing evidence. He must show that existence of valid and enforceable contract for seeking specific performance of such contract or any other relief. In the backdrop of said legal preposition it is necessary to examine pleadings and evidence of the parties.

10. It is the case of plaintiff that on 28/01/2010, negotiations took place in between him and defendants and at the said time defendants agreed to sell suit properties to him @ Rs.1,15,00,000/- per acre totaling to Rs.16,19,00,000/-. At the said time he paid Rs.25,00,000/- towards part payment of said contract. It is his contention that it was agreed that he will pay amount of Rs.2,50,00,000/- till December, 2010 and complete the transaction till December, 2013. According to him, time was not the essence of the contract. Plaintiff has relied on the letter of defendants dated 28/01/2010 produced at Exh.3/2. Said letter has been written on the letterhead of defendant No.1 and signed by its director. In the said letter defendant No.1 has contended that since negotiations of sale of

suit properties are going on, they have no objection in publishing the details in the news paper. Said letter is only the permission given to the plaintiff for publishing public notice in respect of suit properties. There are no averments in respect of agreement of sale or terms and conditions alleged by agreed in between the parties.

11. As stated earlier, it is the case of plaintiff that on 28/01/2010 defendants accepted Rs.25,00,000/- and agreed to sell suit properties to him. However, letter of defendant No.1 at Exh.3/3 is not disclosing terms and conditions of the alleged agreement of sale in between the parties. After having scrutinized entire plaint and other material produced before the Court, it is difficult to decide what were the terms and the conditions of the said alleged agreement of sale. From the material produced before the Court it cannot be inferred as to when plaintiff has to make payments ? When defendants have to execute sale deed ? What was the time schedule for payment of consideration ? There is also controversy in between parties regarding rate of suit properties because plaintiff come with the case that defendants had agreed to sell suit properties to him @ Rs.1,15,00,000/- per acre and on the other hand defendants come with the case that rate of Rs.1,50,00,000/- per acre was proposed to the plaintiff. In sum, material produced before the Court is not indicating concrete terms and conditions in between the parties.

12. Ld. counsel appearing on behalf of plaintiff has submitted that huge amount has been paid by the plaintiff to defendants. According to him, Rs.2,00,00,000/- were paid in cash and Rs.48,00,000/- were paid by R.T.G.S. So also, plaintiff has given nine

post dated cheques of Rs.13,68,00,000/- to the defendants. Hence, he submitted that plaintiff was/is ready and willing to perform his part of the contract. According to him, if interim injunction as prayed is refused then plaintiff will suffer great loss and injury. On the other hand defendants has denied such payment in cash. Defendants have admitted the payment of Rs.48,00,000/- by R.T.G.S. However, defendants come with the case that they have refunded said amount of Rs.18,00,000/- on 10/12/2013, Rs.18,00,000/- on 02/06/2014 and Rs.12,00,000/- on 15/07/2014. Hence, defendants have contended that no such an agreement was executed in between them and plaintiff.

13. Plaintiff had produced alleged receipts at Exh.30/2/1 to 30/2/6. On perusal of first receipt, it appears that date 28/01/2010 is mentioned thereon. Thereafter, it has been stated like “received Rs.25L in cash on 28/01/2010 at 01.53 p.m.” and it follows by one signature. Second receipt bears date as 12/03/2010 and it reads thus, “received Rs.5L in cash on today i.e. 12/03/2010 at 04.30 p.m.” and it followed by one signature. Third receipt bears date as 08/04/2010 and it reads thus, “received 15L” followed by one signature. Forth receipt doesn't bears date which reads “received 10L ” followed by signature. Fifth receipt also doesn't bears date which reads “40L received”, followed by signature. Last receipt also does not date and it reads “received cash by hand Rs.10L” and it followed by one signature. After having scrutinized said receipts it can be inferred that those does not bears name of payer or payee. If it is assumed that by virtue of said receipts cash amount was passed from one party to another party then certainly it would violation of Income Tax Act. Despite such huge

amounts were paid, no detail description of the transaction has been made on the said receipts nor those are duly stamped. In sum, even if, it is assume that amounts were paid by virtue of said receipts then, it is not only violation of law, it amounts to an offence under the provisions of Income Tax Act.

14. Plaintiff has strongly relied on the affidavit of Mr. Sanjay Pawar which is produced at Exh.36. He has stated that defendants agreed to sell suit properties to the plaintiff for Rs.16,19,00,000/- and paid Rs.25,00,000/- towards part payment of the contract. He has also contended that he received Rs.3,00,000/- from the plaintiff towards commission. So also, he contended that by virtue of above said receipts defendants accepted part payment and issued receipts. In this regard, it is necessary to mention that affidavit of the witness can be taken into the consideration while deciding application under order XXXIX, rule 1 of CPC. However, while considering such affidavits it is necessary to bear in mind that such witnesses are not subject to the cross-examination and therefore, while relying on such affidavits it is necessary to have close scrutiny of the same. In the case in hand after having scanned affidavit of said witness, it can be inferred that it is not disclosing definite terms and conditions of the agreement. In the said background, his contention regarding oral agreement of the same cannot be taken into consideration at this juncture. Moreover, his version regarding cash payment of huge amount is required to be discarded because such act of cash payment is itself contravention on Income Tax Act.

15. On the other hand defendants come with the case that amount of Rs. 48,00,000/- received by them has been repaid. Defendants have produced statement of account at dated 10/12/2013, 02/07/2014 and 15/07/2014 at Exh.27/4. By way of R.T.G.S. defendant No.1 has repaid Rs.18,00,000/-, Rs.18,00,000/- and Rs.12,00,000/- to the plaintiff. In the said background, theory put forth by the defendants regarding repayment of the amount is appears to be believable and acceptable.

16. Shri.Limaye, appearing on behalf of defendants has submitted that defendants have come with the different story and filed their reply. Contentions in the said reply are not challenged by the plaintiff by filing counter affidavit and therefore, he submitted that contention of the defendants are required to be accepted. To substantiate his contention he relied on the case of **Town Area committee V/s. Buddha Sen [AIR 1962 Allahabad 438].**

17. Per contra, Shri. Patil, appearing on behalf of plaintiff has submitted that non filing of counter affidavit dose not mean that there was admission of the facts pleaded in the written statement. On the said point he relied on the case of **K. Laxman V./s. Pheyakil Padmini and others [2009(1) Supreme cases 254].** In the case of Town Area Committee (supra) issue of non filing of counter affidavit in writ petition was before Hon'ble Allahabad High Court. It was held that allegations being un-controverted and not challenged must be accepted. However, Hon'ble Apex Court in case of K.Laxman (supra) has specifically laid down that non denial would not amount to admission. Hence, contention of the ld. counsel appearing on behalf of defendants cannot be accepted at this stage.

18. Subject application is for injunction restraining the defendants from alienating or creating third party interest in the suit properties. Needless to state that plaintiff must establish prima facie case to get reliefs claimed in the application. As stated earlier, oral agreement for sale is not prohibited, but such an agreement must be concluded agreement. Terms and conditions of the agreement must be explicitly clear and definite. In the case in hand neither pleading nor other material produced before the Court is indicating such clear and definite terms and conditions of oral agreement. Material produced before the Court is suggesting that plaintiff has failed to show that he has paid part payment of the contract. If at all, receipts produced by the plaintiff taken into the consideration, then, those are violation of Income Tax Act. A person who contravenes the provision of the law is not entitle to claim any relief at the hands of the Court. It is also pertinent to note that plaintiff has concealed repayment of the amount made by the defendant No.1. It also suggesting that plaintiff has not come with the clean hands before this Court. Said circumstances leads to draw an inference that plaintiff has failed to establish prima facie case.

19. Pending the hearing and trial of the suit if at all, defendants creates or alienates third party interest in the suit properties then such transaction would hit by principle of lis pendency. Such transferee pendent lite would be bound by decree passed in the present suit. In the said background, if interim injunction as prayed is refused then, plaintiff will not suffer any irreparable loss or injury. Balance of convenience also does not tilts in

favour of plaintiff. In the said background, it is concluded that plaintiff is not entitle for interim relief as prayed. Accordingly, **point Nos.1 to 3 are answered in negative**.

20. In the result, proceed to pass following order :

1] Application is rejected.

2] Costs will follow the event.

3] Suit to proceed further.

Sd/-

Date : 17/10/2015

Jaydip J. Mohite
7th Jt.Civil Judge, Sr.Divn., Pune.

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

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|---|---|
| Name of Steno | : Miss. P. K. Kocharekar. |
| Court Name | : Shri. Jaydip J. Mohite |
| | : 7th Jt. Civil Judge Sr. Dvn., Pune. |
| Date of PDF | : 27/10/2015 |
| Order signed by P.O. On | : 27/10/2015 |
| Order uploaded on | : 27/10/2015 |