

MHAH13000

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**COMMON ORDER BELOW EXHS.5, 39 & 44 IN RCA
No.27/2022.**

(Shri. Sant Nagebaba Multi State Urban Co-op. Society
Ltd. Ahmednagar Branch Newasa Kh. Vs. Shri. Renukadas
Laxmanrao Gholap & ors.)

This appeal is preferred against the judgment and decree passed in RCS No.5/2015 by the Civil Judge, Senior Division, Newasa, whereby it has rejected appellant's prayer for specific performance of the contract.

2] Appellant was the plaintiff before the trial Court and respondents were defendants.

3] For the sake of convenience parties are referred to as they stood before the trial Court.

4] Defendant No.1, i.e., respondent No.1 herein is owner of land Gat No.112/1C adm. 19 R situated at Newasa. On 08.10.2013, defendant No.1 executed document titled as 'Agreement to Sell' in plaintiff's favour for Rs.60,00,000/- in respect of suit land adm. 0.14 R. In its pursuance, the plaintiff has paid Rs.50,00,000/- to the defendant No.1. There was charge of defendant No.4 on the suit land. The document stipulates that the transaction of sale is to be completed within a year after removing encroachment on the suit land and clearing charge of defendant No.4 by the defendant No.1. Defendant Nos.2 and 3 stood guarantors to the said transaction. They executed deed of guarantee stipulating that if the transaction is not completed within one year between the plaintiff and defendant no.1, then they will pay Rs.50,00,000/- to the plaintiff.

5] Plaintiff laid the suit for specific performance of contract *inter alia* contending that it was and is ready and willing to perform its part of contract. In alternate, plaintiff prayed for refund of amount of Rs.50,00,000/- with interest @ of Rs. 36% p.a.

6] Defendant Nos.1 to 3 resisted the suit *inter alia* contending that the transaction is in fact a loan transaction and not agreement to sell.

7] Defendant No.4 resisted the suit contending that the suit lands is already mortgaged to it by the defendant No.1, and therefore, no decree for specific performance of contract can be passed.

8] Parties went on trial. Considering the evidence of the parties, trial Court has concluded that the transaction between plaintiff and defendant No.1 is loan transaction and not agreement to sell. Holding so, by the impugned decree the trial Court has directed the defendant Nos.1 to 3 to refund amount of Rs.50,00,000/- to the plaintiff with interest @ 15% p.a. The charge of decretal amount is kept on the suit land as well as the lands owned by the defendant Nos.2 and 3. In the present appeal, the plaintiff has assailed correctness of the decree. As per the plaintiff, the trial Court ought to have decreed the suit for specific performance of contract.

9] By the application Exh.5, the plaintiff has prayed for restraining the defendant No.1 from alienating the suit land Gat No.112/1C, land Gat No.22 situated at Khunegaon by the defendant

No.2 and Gat No.382/2 situated at Bhanashiware by the defendant No.3.

10] By the application Exh.39, the plaintiff has contended that pending this appeal, defendant No.1 is hurriedly raising construction on land Gat No.112/1C. For that construction, defendant No.1 has borrowed loan of Rs.1,31,00,000/- and has mortgaged land Gat No.112/1C on 06.11.2025 to Cholamandalam Investment and Finance Company Ltd., Branch Erandvane, Pune. By making construction on land Gat No.112/1C, defendant No.1 is changing nature of suit land. Defendant No.3 has borrowed loan of Rs.28,70,000/- from Yes Bank on 25.09.2023 on his land Gat No.382/2. Therefore, the plaintiff has prayed for restraining defendant Nos.1 to 3 from making construction on their lands or alienating the lands or raising loans on the lands.

11] By the application Exh.44, the plaintiff has prayed for directing the defendant No.1 to stop the ongoing construction on land Gat No.112/1C.

12] Respondent No.1 has filed his say at Exh.53 and reiterated that the transaction between him and plaintiff is of loan transaction and not agreement to sell.

13] The heirs of respondent No.2 are served with the notice of application Exh.39, but they failed to appear.

14] Adv. Shri. D. M. Jadhav for the plaintiff has submitted

that transaction between the plaintiff and defendant No.1 is agreement to sell. The trial Court has committed error in holding that it is a loan transaction. The judgment and decree passed by the trial Court is impugned in this appeal. During pendency of this appeal, defendant No.1 is making construction in the suit land and defendant Nos.2 and 3 are raising loans on the lands. Therefore, if defendant Nos.1 to 3 are not restrained from making construction on the suit land or raising loans on their lands, then the plaintiff will suffer irreparable loss and decree passed against it, will become fruitless.

15] He further submitted that though as per section 52 of the Transfer of Property Act, transactions during pendency of the suit/appeal are hit by the principles of *lis pendens*. But, that section does not provide complete remedy, therefore, injunction under Order XXXIX Rule 1 & 2 of CPC can be granted. He further submitted that purchasing land is not business of the plaintiff, therefore, notice before the suit by the plaintiff is not required. Status of the property should be maintained till decision of the appeal. To lend support to his submissions, adv. Shri. D. M. Jadhav has relied on (i) *Ramakant Ambalal Choksi Vs. Harish Ambalal Choksi & ors., Civil Appeal No.13001 of 2024 decided on 22nd November, 2024 (SC)*, (ii) *Maharwal Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass, Appeal (Civil) 6792 of 2004, decided on 15.10.2004 (SC)*, (iii) *Shilpa Co-operative Housing Society Vs. Smt. Janabai Gulabrao Wangal & ors., Second Appeal No.417/2010 decided on 11.08.2014 (Bom. H.C.)*, and (iv) *Deccan Merchants Co-operative Bank Ltd., Vs. M/s.*

Dalichand Jugraj Jain and Ors., decided on 29th August, 1968.

16] *Per contra*, adv. Shri. R. D. Khiladkar for defendant No.1 has submitted that the transaction between plaintiff and defendant No.1 is loan transaction and not agreement to sell. Therefore, plaintiff is not entitled for decree for specific performance, and consequently, he is not entitled for relief of injunction as sought for. So, he prayed for rejecting of the applications.

17] Adv. Shri. N. S. Joshi for the defendant No.3 also made similar submissions as made by adv. Shri. R. D. Khiladkar.

18] Adv. Shri. R. D. Ghawate for the defendant No.4 has submitted that defendant No.1 has availed loan on 23.09.2009 from defendant No.4 and has mortgaged the suit land. On 16.01.2024, suit land is already seized. Defendant No.4 is co-operative society holding public money, therefore, if the injunction is granted as sought for by the plaintiff, it will prejudice interest of the defendant No.4. So, he prayed for rejecting the applications.

19] It is undisputed between the parties that before the transaction between defendant No.1 and plaintiff, defendant No.1 had already mortgaged suit land Gat No.112/1C to the defendant No.4, who is co-operative society. As per Secs. 47 & 48 of the Maharashtra Co-operative Societies Act, an alienation of the property having charge of co-operative society, is void. As per the plaintiff himself, defendant No.1 had agreed to clear the loan of defendant No.4 before execution of sale deed. The plaintiff itself says that

defendant No.1 has not complied that term. Means on the day of suit and till passing the decree by the trial Court, there was charge of defendant No.4 on the suit land Gat No.112/1C. Therefore, no decree for specific performance of contract as sought for by the plaintiff can be granted by the Court.

20] The crux of the matter is whether the transaction between plaintiff and defendant No.1 is of loan or agreement to sell. Adv. Shri. R. D. Khiladkar for the defendant No.1 has adverted my attention towards the agreement to sell and more particularly the stipulations in clause Nos.13 & 14 therein and submitted that these stipulations make it clear that the transaction is not agreement to sell. He further adverted my attention towards the legal opinion given by adv. Shri. S. G. Kakade to the plaintiff. Worth to be noted that the legal advice given to the plaintiff by its advocate is dtd. 26.09.2013. The agreement to sell is dtd. 08.10.2013. In the legal advice, plaintiff's advocate has unequivocally advised the plaintiff to not to advance loan to the defendant No.1 on land Gat No.112/1C because the land is already having encumbrance of another co-operative society.

21] Furthermore, obtaining two guarantors i.e. defendant Nos.2 & 3 by the plaintiff to the transaction between it and defendant No.1 is unusual in the transaction like agreement to sell. Generally, guarantors are taken in the loan transactions. This also makes plaintiff's case doubtful that the transaction between it and defendant No.1 is agreement to sell. So, in the light of legal advice

given by the plaintiff's advocate and obtaining two guarantors by the plaintiff to the transaction, the conclusion drawn by the trial Court that the transaction between plaintiff and defendant No.1 is not agreement to sell, but it is loan transaction, cannot be faulted at this stage.

22] Plaintiff fails to *prima facie* make out a case that the transaction between it and defendant No.1 is agreement to sell, therefore, it cannot seek the relief of injunction to restrain the defendant No.1 from making construction on the land Gat No.112/1C. Nor it is entitled for injunction against defendant Nos.2 and 3, as charge of decretal amount is already kept on their lands and it will protect plaintiff's interest for recovery of decretal amount. Therefore, I am of the opinion that plaintiff is not entitled for the relief of injunction as sought for against defendant Nos.1 to 3. Therefore, application Exhs.5, 39 & 44 deserve to be rejected.

In the result, I pass the following order :

:: ORDER ::

1. Applications Exhs. 5, 39 & 44 stand rejected.
2. Original order be kept in application Exh.5 and its copies be kept with applications Exhs.39 & 44.

Date : 11.03.2026

(Haribhau R. Waghmare)
District Judge-1, Newasa
JO Code : MH001652