

ORDER BELOW EXH. 5 IN SPL. C. S. NO. 25/2021.

(CNR-MHAH23000353-2021)

01] The plaintiffs have filed this application seeking temporary injunction against defendant restraining him from alienating the suit property to third person till disposal of suit. One strip of land admeasuring 0-97 H.R. + 0-63 *Pot-kharaba* out of agricultural landed property bearing Gat No. 86 situated at village Takali Lonar, Tal. Shrigonda, Dist. Ahmednagar (in short the suit property) is subject matter of present application.

02] The case of the plaintiffs, in short, can be stated as follows-

The suit property was owned by the plaintiffs. In year 2013, the plaintiffs were facing financial trouble for the time being and therefore, they have executed registered sale deed dated 07/11/2013 in favour of defendant. As per agreement, in case the defendant intends to transfer the suit property he has to transfer it only to the plaintiffs. The said term and condition is specifically mentioned in the sale deed. However, the defendant is intending to alienate the suit property to third person behind back of the plaintiffs. The defendant has committed breach of the contract. The defendant has received some token amount on date 06/06/2021. Therefore, the plaintiffs have issued public notice in daily newspaper dated 30/05/2021 and also issued notice to defendant dated 31/05/2021 showing their willingness to purchase the suit property according to contract. However, defendant gave no response. In case, the defendant transfer the suit property, the plaintiffs would suffer irreparable loss. Hence, the application.

03] The defendant has filed say Exh. 17 and contested the application. The defence of defendant, in short, can be stated as

follows:-

The family of plaintiffs and defendant are well acquainted with each other since last several years. The defendant had 16 to 17 acres ancestral property at village Bhose, Tal. Karjat. However, that land was non-irrigated land. Therefore, as per advise given by father of the plaintiffs, the defendant had sold out said land except 2 acres in year 2008-09 and decided to purchase agricultural land at village Takali Lonar. By taking advantage of the simple nature of defendant, the plaintiffs have kept with themselves the amount of consideration of Rs.10,00,000/- to 12,00,000/- of the ancestral land of defendant for the purpose of purchasing land for the defendant at village Talkli Lonar. At that time, the plaintiffs were facing financial trouble. The plaintiffs have utilized the said amount for their own purposes. On repeated insistence of the defendant, the plaintiffs agreed to sale the suit property to him for consideration of Rs. 10,00,000/-. Finally, the plaintiffs have executed sale deed dated 07/11/2013 in which they have shown the amount of consideration as Rs. 5,25,000/- and sold the suit property to the plaintiffs. The plaintiffs have kept with themselves the remaining amount of defendant. On the basis of sale deed, the defendant is owner in possession of suit property. By taking advantage of simple nature of defendant, without knowledge of defendant the plaintiffs have dishonestly inserted one condition in the sale deed that in case the defendant intends to sell the suit property, he shall sell it only to the plaintiffs. The sale deed dated 07/11/2013 is a deed of absolute sale. The defendant has every right to dispose of the suit property as per his wish and will. No condition like present one can be imposed on the defendant. The defendant is facing financial crises and therefore, he decided to sell the suit property and to repay the loan amount and to purchase some landed property at his native place. Accordingly, the defendant proposed to sell the suit land and also

informed the plaintiffs about his intention. As per market value, the prevailing market rate of suit property is Rs. 16,00,000/- per acre. However, the plaintiffs have made demand that the defendant should sell the suit property to them similar to consideration of sale deed dated 07/11/2013 or at the rate of Rs. 8,00,000/- per acre. The plaintiffs are misusing the illegal condition inserted by them in the sale deed dated 07/11/2013. The defendant has entered into an agreement to sale with one Santosh Rajaram Kale for consideration of Rs. 15,70,000/- per Acre and accordingly executed earnest receipt on date 05/07/2021. The defendant is ready to sell the suit property to the plaintiffs according to prevalent market value. However, the plaintiffs denied the same. The defendant has, therefore, prayed for rejection of the application.

04] In view of the rival contentions of the parties, following points are arise for consideration. The points and its findings along with reasons are as follows.

SR. NO.	POINTS	FINDINGS
1	Whether plaintiff proves prima facie case ?	In the Negative.
2	Whether balance of convenience lies in favour of the plaintiff ?	In the Negative.
3	Whether plaintiff will suffer irreparable loss in case the temporary injunction is refused ?	In the Negative.
4	What order ?	As per final order.

05] It is not disputed that the defendant has purchased the suit property from plaintiffs vide registered sale deed dated 07/11/2013.

REASONS

AS TO POINTS NO. 1 to 4 :-

06] The learned advocate for plaintiffs argued that whether the condition that the defendant shall sell the suit property only to the plaintiffs is valid or not will be decided on merits at final hearing of the suit. He argued that the present application is to be decided on the basis of prima facie case. He argued that as far as prima facie case is concerned, it is necessary to consider whether such a condition is imposed in the sale deed and whether the defendant has made breach of term of contract. He argued that though the defendant has contended in his say that the condition has been inserted by the plaintiffs without knowledge to the defendant, the defendant in his say further contends that he had asked the plaintiffs whether they are ready to purchase the suit property. He argued that the said contention of defendant clearly indicates that the defendant had knowledge of the condition mentioned in the sale deed.

07] On the contrary, the learned Advocate for defendant argued that the condition mentioned in the sale deed is void and therefore no injunction can be granted on the basis of void condition in the sale deed.

08] The learned Advocate for plaintiffs placed his reliance on the following case law.

I] **Vathsala Manickavasagam and Ors. Vs. N. Ganesan and Anr.** reported in **2013 SAR (Civil) 851**. In which the Hon'ble Supreme Court has held that, *“as far as the principle to be applied in Section 17 of the Evidence Act is concerned, the Section as it reads is an admission, which constitutes a substantial case of evidence, which can be relied upon*

for proving the veracity of facts incorporated therein. When once, the admission as noted in a statement either oral or documentary is found, then the whole onus would shift to the party who made such an admission and it will become an imperative duty on such party to explain it. In the absence of any satisfactory explanation, it will have to be presumed to be true. It is needless to state that an admission in order to be complete and to have the value and effect referred to therein, should be clear, certain and definite, without any ambiguity, vagueness or confusion.”

II] Sahara India Commercial Corporation Ltd. Vs. B. Jeejeebhoy Vakharia and Associates and Ors. reported in **2007(6) Mh.L.J. 167**. In which as per clause No. 5B of memorandum of understanding, the plaintiff was given right of pre-emption called right of first refusal in respect of bungalows and land to be allotted to the defendant No. 1. It was argued that the right of pre-emption is the right in immovable property and therefore, an agreement giving right of pre-emption is an agreement to transfer right in immovable property and therefore a decree of specific performance of such an agreement can be granted by the Court. The Hon'ble Bombay High Court has held that,

“Perusal of clause 22 of the MOU shows that the plaintiff was entitled to borrow money against the project and for the purpose of the project. The plaintiff was thus, given right to mortgage his rights under the MOU for getting loan. This suggests that rights in immovable property were created in favour of the plaintiff and it is only because of that he could create charge on those rights to get finance from third party. Perusal of MOU shows that it cannot be termed as a pure and simple agreement for development of land. In my opinion it is a composite agreement. It has some features of development agreement. It has some

features of agreement to transfer the land. Perusal of clause No. 5B of MOU shows that right of pre-emption called right of first refusal in respect of bungalows and land to be allotted to the defendant No. 1 is granted in favour of the plaintiff. A pre-emption right is enforceable in court of law. The Supreme Court in its judgment in the case of Shivaji Raghunath (supra) has held that when an agreement creates a pre emptive right it is enforceable as an when an attempt is made by the owner to alienate the land to third party.”

09] On the contrary, the learned advocate for defendant has placed his reliance on following case law.

I] Gayasi Ram and Ors. Vs. Shahabuddin and Ors. reported in **1935 AIR (Allahabad) 493**. In which the father of plaintiff sold house to father of defendant No. 3. In that sale deed there was clause providing that the vendee shall not transfer the house by mortgage, gift or sell to any one excepting the vendor or his heirs and if in contravention of the clause, the property is sold the vendor or his heir would have a right to get back the house by paying Rs. 175.

The Hon'ble Allahabad High Court has referred the ruling in *Aulad Ali Vs. Athar, 1927 All 170* in which transfer was made between parties further providing that if a transfer is made through another person than the opposite party will acquire the property by pre-emption. The Hon'ble Allahabad High Court held that,

“the pre-emption differs from the usual contract of pre-emption because the rate at which the purchase is to be made is fixed by the agreement. In present case, the property in suit is a house property and parties are in no sense co sharers, nor can there be any question of pre-emption by contract. The prohibition contained in Section 10 of the Transfer of Property Act is operative against an absolute restraint on

alienation only and not against partial restraint. But in order to see whether there is absolute restraint or not one has to examine the effect of all conditions and find whether for all practical purposes alienation is prohibited. In the present case, there is an absolute restraint on alienation to any one other than the vendor. In the present case, the sale deed which gave rise to this case is a sale deed between strangers and cannot be considered parallel to a family arrangement. Therefore, the condition in restraint of alienation in the present case is contrary to Section 10 of Transfer of Property Act and therefore void.”

II] Thomas Vs. Dr. A.A. Henry and Ors. reported in 2008(2) I.L.R. (Kerala) 12. In which the Hon'ble Kerala High Court has held that, *“every transfer is not vitiated simply because there may happen to some clauses in the deed which are repugnant to the free transfer and circulation of property. The deprivation of incident of ownership in whatever form is void and unenforceable. Right of transfer is incidental to and inseparable from the beneficial ownership of a property. Under Section 10 of the Transfer of Property Act a condition absolutely restraining a transferee from disposing of property is void. The question as to whether the clauses in a deed are absolute or partial has to be gathered from the contents of deed.”*

The Hon'ble Kerala High Court has referred the decision in *Re Meredith, ex parte Chick (1879) 11 Ch D 731* in which it was observed that,

“ In construing instruments you must have regard not to the presumed intention of the parties, but to the meaning of the words which they have used.”

III] Bhavani Amma Kanakadevi and Ors.,Vs. C.S.I. Dekshina Kerala Maha Idavaka, reported in **2008 AIR (Kerala) 38.** In which the substantial question of law was that whether the finding

of first appellate Court that recitals in exhibit A2 that property will be re-conveyed to the vendor is void under Section 10 of Transfer of Property Act, is sustainable.

The Hon'ble Kerala High Court has referred the provisions of Section 10 and 11 of Transfer of Property Act and held that, '*Exh. A2 is an outright sale whereunder rights of the assigner was transferred to the assignee respondent absolutely. If the assignee is at liberty to sell the property to any third party, the mandate that property shall re-conveyed to the assigner and that two for the same sale consideration is redundant. When an absolute right is transferred in favor of the plaintiff under Exh. A2 and Exh. A2 contains a condition limiting that right restricting the rights of respondent to sell the property except to the assigner, the said clause would definitely come within the mischief of Section 10 of Transfer of Property Act and the said clause is void.*'"

The Hon'ble Kerala High Court has referred the decision in Manohar Shivram Swami Vs. Mahadeo Guruling Swami (AIR 1988 Bombay 116) in which the Hon'ble Bombay High Court has considered the clause in a sale deed prohibiting sale to some one outside the Family and following the Division Bench of Allahabad High Court in Gayashi Ram's case (supra) held that,

"the said clause would amount to absolute restraint on transfer and therefore void as provided under Section 10 of Transfer of Property Act.

IV] Achammal Vs. Rajamanickam Karthikeyan (died) Rep. By his L.R's and Ors. reported in **2010 AIR (Madras) 34**. The Hon'ble Madras High Court has held that, *according to Sections 10 and 11 of Transfer of Property Act, 1882, once an absolute right is vested in a person in respect of property, no condition can be imposed restraining the alienation of the property and no restriction can be repugnant to the*

interest created therein.'

10] Perusal of the sale deed Exh. 3/6 shows that the plaintiffs have sold the suit property to the defendant for consideration of Rs. 5,25,000/-. It is necessary to read the document as a whole. It shows that as the defendant was agreed to pay consideration of Rs. 5,25,000/- which was the highest amount of consideration as per the then prevailing market rate and higher than the amount of consideration which was proposed to be given by other customers, the plaintiffs were ready to sell the suit property to the defendant. In para 4 of the sale deed, it is mentioned that in case the defendant intends to sell the suit property he shall sell it only to the plaintiffs. It is pertinent to note that neither specific time-limit nor specific amount of consideration for purchase of the property by the plaintiffs is mentioned in the said condition. The contention of the sale deed in para 6 and 7 further shows that, the plaintiffs have sold the suit property to the defendant and thereafter they have no concern with the suit property and that the defendant has a right to enjoy the suit property and to alienate the same as per his own will and wish. It shows that the sale deed dated 07/11/2013 is an outright sale.

11] Here, it is necessary to peruse the provisions of Section 10 and 11 of the Transfer of Property Act, 1882, which are reproduced for ready reference as follows.

Section 10 : condition restraining alienation – where property is transferred subject to a condition or a limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of lease where the condition is for the benefit

of the lessor or those claiming under him : provided that property may be transferred to or for the benefit of a woman(not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

Section 11 : Restriction repugnant to interest created – where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner he shall be entitled to receive and dispose of such interest as if there were no such direction. Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferrer may have to enforce such direction or any remedy which he may have in respect of a breach thereof.

12] The very object of Section 10 is to provide that the transferrer shall not be allowed to put a clog or restriction on the right of vendee so as to be repugnant to the property sold.

13] Whether the condition inserted in the sale deed was known to the defendant or not is a question of fact. At present, it is necessary to consider whether the plaintiffs have a prima facie case. For the purpose of consideration of prima facie case, it is necessary to see whether the condition inserted in the sale deed is valid or not. Because where of a decision of suit is based on question of law, very often the decision as to whether a prima facie case exists will be based on consideration substantially similar to those affecting the ultimate

determination of the suit.

14] The plaintiffs and defendant are not family members nor co-sharers. It is not a case where the condition has been imposed in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property. Because no such contention, either express or implied, is appearing in the sale deed dated 07/11/2013. Even it is not the pleading of the plaintiffs. The condition imposed in the sale deed does not speak about right of pre-emption. Because no such contention, either express or implied, is appearing in the sale deed dated 07/11/2013. As per the observations in the decision in *Re Meredith'* case (supra) it is necessary to construe the words used in the sale deed having regard to the meaning of the words which the parties have used and not to the presumed intention of the parties. The sale deed shows that absolute rights in suit property were created in favour of the defendant. No right of alleged pre-emption was created in favour of the plaintiffs. There is no whisper in the sale deed or even in the pleading of the plaintiffs about alleged right of pre-emption of the plaintiffs. The facts in the case of *Sahara India* (supra) are different from facts of present case because the nature of deed of MOU in that case was different than the nature of sale deed in present case. Therefore, the ratio laid down therein is not applicable to the facts of present case.

15] As far as the condition imposed in the sale deed is concerned, even at the stage of considering prima facie case, it appears that it is an absolute restraint on the right of defendant in respect of alienation of the suit property as per his will. Therefore, it is not a case where the condition can be considered as partial condition or restraint put on the defendant to deal with the property. Therefore, the

condition in the sale deed is absolutely restraining the defendant from disposing of the property except to the plaintiffs.

16] Perusal of the contents of sale deed as stated above clearly shows that there was absolute transfer of property in favour of defendant by the plaintiffs. Therefore, when an absolute right is transferred in favor of defendant under the sale deed, a condition limiting that right restricting the rights of defendant to sell the property except to the plaintiffs definitely comes within the provisions of Section 10 of Transfer of Property Act. Therefore, even at the stage of consideration of prima face case, it appears that the condition inserted in the sale deed is void. The argument advanced by learned advocate for the plaintiffs that the validity of condition cannot be decided at prima facie stage cannot be accepted because even at prima facie stage the mandate of legal provisions cannot be overlooked. The mandate of legal provisions cannot be surpassed even at the time of considering prima facie case. When Section 10 of Transfer of Property Act provides that once absolute right is transferred then any condition limiting that right restricting the vendee to sell the property except to the vendor is void then that provision cannot be ignored merely on the pretext of prima facie case. Therefore, the plaintiffs has failed to prove prima facie case.

17] Though, the condition inserted in the sale deed is considered prima facie as an admission given by defendant then also the plaintiffs are not entitled to seek temporary injunction on said admission because as stated above the said admission which is in fact a clause provided in the sale deed is prima facie void. When law provides that any particular act is void, it does not become valid because of admission given by the party or consent of the parties. The facts in the

case of *Vathsala (supra)* are different from facts of present case. Therefore, the ratio laid down therein is not applicable to the facts of present case. On the contrary, the ratio laid down in the case of *Gayasi Ram (supra)*, *Thomas (supra)*, *Bhavani Amma (supra)* and *Achammal (supra)* is applicable to facts of present case because the clause/condition in the sale deed dated 07/11/2013 as produced on record in present case is similar to the clauses/restrictions which were considered as absolute restraint on transfer and therefore declared as void in the cited cases.

18] As far as, the balance of convenience and irreparable loss is concerned, the balance of convenience do not lie in favor of plaintiffs because they are seeking relief of temporary injunction on the basis of a condition in sale deed which is on the face of record void.

19] As far as irreparable loss is concerned, the condition in the sale deed only provides that the defendant shall sell the suit property only to the plaintiffs if he intends to sell it. The rate at which the purchase is to be made at the time of re-conveyance is not fixed by the sale deed in question. The plaintiffs, however, contends in Para 3 page 3 of the plaint that it was agreed between the parties that if the defendant intends to sell the suit property he shall sell it only to the plaintiffs for the same sale consideration as mentioned in the sale deed. It shows that the plaintiffs have not come with clean hands. The defendant in his say specifically contends that he is ready to sell the suit property to the plaintiffs at prevailing market rate, but the plaintiffs are not ready to purchase the property at said rate. The earnest receipt at Exh. 39/2 prima facie shows that one Santosh Kale is ready to purchase the suit property from defendant at the rate of Rs.

20,00,000/- per acre. Therefore, if the plaintiffs are really wants to purchase the suit property they may purchase the suit property as per prevailing market value as determined by the defendant. Therefore, in case of rejection of the application, plaintiffs would not suffer irreparable loss.

20] Considering the above facts, legal position and findings, I answer the points No. 1 to 3 in the **negative**. The application is liable to be rejected. Hence, in order to record finding on point No. 4, I pass following order.

ORDER

- 1] Application Exh. 5 is hereby rejected.
- 2] Costs in cause.

Place : Shrigonda.
Date: 20/09/2022.

(Girish M. Sadhale)
Civil Judge, Senior Division,
Shrigonda.