

R.C.A. No. 4/2016.

Ab. Saeed Vs. Ab. Ajim & others.

Order below Exh. 5.

(Passed on 20.02.2016)

By the present appeal, the appellant is challenging the judgment and decree passed in R.C.S. No. 233/1996 dtd/- 25.11.2015 and has preferred the present application for injunction restraining the respondents from creating any third party rights.

2. It is contended by the plaintiff/appellant herein that late Abdul Samad was father and was survived by plaintiff and original defendant No. 1. It is further contended that he owned the properties described in the suit and defendant usurped the plaintiff from the properties. Defendant is claiming execution of “Hiba-Bil-Ewaj” and claiming property in himself by alleged deeds dtd/- 30.10.1986, 04.11.1986 and 09.02.1988 and these documents were obtained fraudulently and no right was conveyed. Hence, prayed for his share in the property. Pending the suit such interim injunction was granted.

3. It is contended that sale deeds have been executed in favour of defendant No. 4 and others and other rights are likely to be created. Hence, to avoid multiplicity of litigation, such injunction be granted.

4. The said application came to be opposed by the defendants/respondent No. 6 by filing reply at Exh. 9. No reply is preferred by other respondents though served. Cross-objections are filed against the said judgment and decree by the defendants also.

5. It is contended in the reply that “Hiba-Bil-Ewaj” was duly executed in the year 1986 to 1988 and he expired in 1991. The said document was acted upon but no objection was taken in lifetime.

Respondent No. 1 was physically differently abled and tried to take his property by threats. Respondent No. 6 has purchased property for valid consideration and is in possession of the said property. The Id. Trial Court has considered the aspect in its correct prospective and considering the same there is no right in favour of plaintiff. Sec. 52 can amply take care of the so called apprehension of plaintiff/appellant. Hence, application be rejected.

6. Heard Id. counsel for appellant. He submitted that injunction was granted by the Ld. Trial Court and in the appeal mere extension of such protection is prayed for. There is ample document on record to establish plaintiff being owner. The document of “Hiba-Bil-Ewaj” was never proved either by attesting witnesses or by signatory or by person in whose favour it was executed. Considering the same, the right of the plaintiff is prima-facie established. Properties are being conveyed and transferred to oppose the present effect of decree, which would be in favour of plaintiffs. The Id. Trial Court as erred in reading the contents of the document, which is not proved. The document “Hiba-Bil-Ewaj” itself contemplates consideration and the same is not proved. Considering the same such relief be granted.

7. Heard Id. counsel for respondent Nos. 1 to 6 Shri. Puradupadhye and Shri. S.G. Wadalakar. It was vehemently argued that the plaint itself admits existence of such document and its execution by late Abdul Samad. The only aspect of fraud was taken up but there is no evidence led in that regard. Hence, the document be proved as admitted. The document itself mentions payment of consideration. There is ample evidence on record to show that the

documents were acted upon and property transferred to various persons from time to time. The attesting witness had died and the other attesting witness was physically incapable to come to court and subsequently expired. Their handwriting and signature of executor and attesting witnesses was duly proved. The Registrar was duly examined and the documents are registered documents. Hence, considering all these facts, Id. Trial Court has rightly appreciated the facts and dismissed the suit and no rights exist in favour of plaintiff and rights of defendants should not be curtailed. Hence, prayed for rejection of application.

8. Perused the application, reply, documents, impugned order and considered the submissions advanced. Following points arise for my consideration and I answer the same as under for the reasons stated hereinafter -

Sr. No.	Points		Findings.
1	Whether appellant has prima-facie case ?	...	In negative.
2	Whether irreparable loss will be caused to appellant ?	...	In negative.
3	Whether balance of convenience lies in favour of appellant ?	...	In negative.
4	Whether appellant is entitled for any relief ?	...	Yes.
5	What order ?	...	As per final order.

### **- R E A S O N S -**

#### **As to point No. 1:**

9. The entire controversy is about the three documents executed

on 30.10.1986, 04.11.1986 and 09.02.1988 styled as “Hiba-Bil -Ewaj” a gift for consideration , It is contended that the documents are not proved. Hence, it should not be read in evidence. I have considered the pleadings of the plaintiff in this suit and prima-facie it appears that the plaintiff alleges that late Abdul Samad executed those documents by playing fraud. Thus, prima-face at this stage the execution of document by Ab. Samad is seem to be an admitted fact. On perusal of the judgment, it is seen that the aspect of fraud never came in to fore and the evidence of plaintiff does not reveal such supporting of averments. Thus, prima-facie at this stage there is an document executed in favour of defendants and absence of fraud in the evidence of plaintiff. Considering this aspect, the prima-facie case is not established at this stage by the plaintiff. Hence, I answer point No. 1 in negative.

**As to point No. 2 and 3**

10. The ld. counsel for appellant relied upon the ruling of *Harish Tejwani Vs. Nandlal Motwani* reported in *2016 (1) ALL MR 127* wherein the Hon'ble High Court has held that such provision of sec. 52 will not hamper the right of party to claim relief against creation of third party rights. The Hon'ble High Court in the said case has also held that dishonesty of litigant intending to defendant a probable decree can be prevented by appropriate interim order when necessary in the facts and circumstances of the case. Considering the said guidelines, I shall consider the effect. There is no dispute of transfer of properties in favour of defendant No. 6 and others. Considering this

aspect, only an allegation of third party right being created is alleged. Although during the course of argument there was serious contention raised and doubt raised about the intention of respondent No. 6 but it is not substantiated in any manner. Needless to state that sec. 52 of the Transfer of Property Act squarely deals with such situation. Moreover, some conditions can be imposed upon the respondents to answer the fear and avoid multiplicity of proceeding, if any. Hence, I answer point Nos. 2 and 3 in negative and plaintiff is entitled for part relief as granted herein below only to avoid multiplicity of proceeding and fair litigation. Hence, I pass the following order-

- O R D E R -

1. Application is partly allowed.
2. The respondents are hereby directed to disclose to this court any third party rights created by the parties in favour of any other person and to also disclose to such third party pendency of present litigation, pending this appeal. Failure to do so may imply that the said transaction is not legal.
3. It is clarified that by rejection of this application there is no findings that respondents are entitled to sell the property as of right and all the rights and liabilities of the parties are subject to decision of this appeal.
4. Application disposed of accordingly.

(Anil Subramaniam)

Dtd/- 20.02.2016.

District Judge - 1, Akot, Dist. Akola.

- **CERTIFICATE** -

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

Name of Steno	:	A.J. Dharamkar,
Court name	:	District Judge-1 & Addl. Sessions Judge, Akot.
Date of order	:	20.02.2016
Signed by Presiding Officer on	:	20.02.2016
Uploaded on	:	10.03.2016