

ORDER PASSED BELOW EXH. 13

This application is filed by plaintiff under Order 39 Rule 1 and 2 r.w. Section 151 of Civil Procedure Code praying therein to restrain defendant from raising construction over plot bearing No.34 out of R.S.No.107/1 having area 183.9 Sq.Mtrs. situated at village Sambhajipur, Tal.- Shirol, District Kolhapur (which is more particularly described in para No.1 of the application) (hereinafter referred as 'suit property' for the sake of brevity)

2. It is the case of plaintiff that originally suit property was standing in the name of Bhairu Dattatraya Kale, who was restricted owner of said property. After death of Bhairu, said property was mutated in the name of his legal heirs and legal heirs of deceased Bhairu Kale had executed registered power of attorney of suit property in favour of plaintiff for the purpose of obtaining permission of concerned Authority for making plots, converting said land into non-agricultural purpose etc. Accordingly, plaintiff Mohaseen Modi obtained necessary permission and thereafter executed sale deed of suit plot in favour of defendant herein for consideration of Rs.2,35,000/-. However, said consideration amount is not paid by defendant to plaintiff. Without paying consideration, defendant has started construction over suit property without obtaining necessary permission from concerned authority. Hence, plaintiff has filed suit for recovery of amount of Rs.2,35,000/- and by way of this application, he has prayed to restrain defendant from constructing over suit property till disposal of suit.

3. On the other hand, defendant filed his say at Exh.17 and strongly opposed to allow this application contending that plaintiff has no any right to file application for injunction. He has filed suit for recovery of money and in that case if it is presumed that defendant has not paid consideration amount, then also remedy available for plaintiff is only recovery of amount. This dispute is not property dispute. He also contended that already aforesaid amount is paid and same is mentioned in the sale deed. With these submissions, he prayed for rejection of application.

4. Heard both sides and gone through the record. Following points arise for my determination and I have recorded my findings thereon with detailed reasons to follow.

Sr. No.	Points	Findings
1.	Whether plaintiff has made out prima facie case in their favour ?	No.
2.	Whether balance of convenience lies in favour of plaintiff ?	No.
3.	Whether plaintiff will suffer irreparable loss, if injunction as prayed is not granted?	No.
4.	What order ?	As per final order.

REASONS

As to point Nos.1 to 4 : -

5. Heard both sides and gone through the record. At the out

set, it is necessary to mention here that main relief claimed in the suit is recovery of amount of Rs.2,35,000/- and he has not filed suit for perpetual injunction. Second thing, admittedly possession of suit property is handed over to defendant and he is constructing over the suit property. The defendant has filed on record letter issued by Grampanchayat Sambhajipur, which shows that Grampanchayat has given permission to defendant to construct over suit property. At this stage, learned advocate for plaintiff has argued that defendant is not constructing as per permission given to him. He has not left any space towards four sides of his property. In my view, aforesaid thing can not be considered at this stage. Prima facie, it appears that defendant has obtained necessary permission for construction and there is no material to show that he is not constructing as per directions given to him by Grampanchayat. Therefore, on that count injunction can not be granted. So far as non payment of consideration amount is concerned, as per Section 55 of the Transfer of Property Act, remedy of unpaid seller, is to recover the amount from the buyer and he is entitled to have charge upon the property in the hands of buyer. However, in the case at hand, there is no record to show that defendant has not paid any amount to plaintiff. In the sale deed itself it is mentioned that plaintiff received amount of Rs.2,35,000/- from defendant and now he has no any grievance regarding consideration. Thus, prima facie there is no any material to show that defendant has not paid consideration amount to plaintiff. Learned advocate for defendant has filed on record judgment passed by the Hon'ble Madhya Praesh High Court in the case of *Premnarayan Vs. Kunwarji* , 1993 AIR (M.P.) 162, wherein the

Hon'ble Madhya Pradesh High Court has held that -

“The rule is well established that if the price is not paid and its payment was made a condition precedent for passing the title, then the title cannot pass. Where there is no such condition in the sale-deed, if the full price is not paid the seller cannot on the account set aside the conveyance. He can only sue for the price; the payment of price under Section 54, Transfer of Property Act, is not necessarily a sine qua non to the completion of the sale.”

6. On the other hand, the learned advocate for plaintiff has relied upon judgment of the Hon'ble Bombay High Court in the case of **Joaquim L. Dias Vs. Baptist Coelho, 2012 (6) Mh.L.J.929**, wherein the Hon'ble High Court has held that -

“With regard to the next contention of Shri. Sudin Usgaonkar to the effect that relief sought by the appellant is barred under section 41(j) of the Specific Relief Act, I found that the said aspect cannot be a ground to reject the plaint under Order 7 Rule 11 of the Civil Procedure Code. The fact as to whether respondent No.1 has any personal interest in the disputed area is something which will have to be adjudicated by the learned Judge on merits.”

7. I have gone through the arguments of both sides and ratio laid down by the Hon'ble High Courts in the aforesaid rulings. It appears that in the case at hand already in view of sale deed ownership of suit property is transferred in favour of defendant. Suit is filed by plaintiff for recovery of money and, therefore, remedy available to plaintiff is file a suit for recovery of money, which he has done. Therefore, defendant can not be restrained from raising construction over the suit property. There is no prima facie case nor

balance of convenience lies in favour of plaintiff. So also no any loss or prejudice will cause to plaintiff, if application is rejected. In the result, I answer point Nos.1 to 3 in the affirmative and in answer to point No.4, I pass following order.

ORDER

(1) Application is rejected with costs.

Jaysingpur.
Dt.: 09.04.2018

Sd/-
(**K.G. Sawant**)
Jt. Civil Judge Junior Division,
Jaysingpur.