

MHKO070008572024

**Special Civil Suit No.40/2024.**

Kumar Baburao Koli.

Vs.

Lobhaji Dada Koli.

Order below Exh.5 in Special Civil Suit No.40/2024.

The plaintiff has instituted a suit for specific performance of contract, for declaration and for permanent injunction wherein he has filed the present application under Order XXXIX, Rule 1, 2 of the Civil Procedure Code for a temporary injunction restraining the defendants from causing obstruction to his possession over the suit property, for temporary injunction restraining the defendants from alienating the suit property and for temporary injunction restraining the defendants from executing the Darkhast No.01/2022.

2. Facts of the plaintiff's case are as under :-

Description of the suit property- The agricultural land bearing Gat No.527, ad-measuring 3 hectare 60 Are, out of which the land ad-measuring 44 Are is owned by defendant no.1, and out of which 20 Are of land, which is bounded as follows:-

- Towards East :- The property of Satish Baburao Koli,
- Towards West :- Remaining property of defendant no.1,
- Toward South :- Remaining property of defendant no.1,
- Toward North :- Road,

which is situated in the village Udgaon, Tal. Shirol, Dist. Kolhapur is the disputed property in the present suit. (Hereinafter, referred to as "the suit property")

3. According to the plaintiff, defendant no.1 is the owner of the suit property. On 29.04.2014, he executed a registered deed of 'mortgage by conditional sale' bearing deed no.1779/2014 in favour of the plaintiff

for mortgage money of Rs.4,08,000/- and transferred possession of the suit property to the plaintiff. Defendant no.1 agreed to repay the said amount within the period of one year from the date of execution of the said deed. Defendant no.1 also agreed that if he fails to repay the said amount, then he will sell the suit property to the plaintiff for the consideration of Rs.7,00,000/-. However, defendant no.1 neither repaid the said amount nor executed the sale deed. On the contrary, on 23.06.2020 he demanded an additional amount of Rs.1,60,000/- to the plaintiff. The plaintiff paid the said amount to defendant no.1. In addition to the said amount, on the same day, the plaintiff paid amount of Rs.25,000/- to defendant no.1. According to the plaintiff, out of the amount of Rs.7,00,000/- only the amount of Rs.1,07,000/- remains to be paid to defendant no.1. He is/was ready and willing to perform his part of contract.

4. It is further alleged by the plaintiff that on 25.04.2015, defendant no.1 executed an agreement to sell of the suit property in favour of defendant no.2. On the basis of the said agreement, defendant no.2 filed Special Civil Suit No.35/2016 against defendant no.1 for specific performance of the contract. Therefore, the plaintiff filed an application in the said suit to join him as a defendant. However, on 24.07.2019, the said application was rejected. Thereafter, Special Civil Suit No.35/2016 was decreed and defendant no.1 was directed to execute the sale deed of the suit property in favour of defendant no.2. Defendant no.1 failed to prefer an appeal against the said decree. Therefore, defendant no.2 has filed Regular Darkhast No.01/2022 for executing the decree passed in Special Civil Suit No.35/2016. The plaintiff again filed an application in the said darkhast to join him as a party. However, on 03.04.2024, the said application was rejected.

5. The plaintiff has filed the present suit for specific performance of the agreement to sell and for a declaration that the agreement to sell dt.25.04.2015 executed by defendant no.1 in favour of defendant no.2 is not binding on him. Moreover, the plaintiff has sought the relief of a permanent injunction restraining the defendants from causing obstruction to his possession over the suit property and for restraining defendant no.1 from alienating the suit property, as well as for restraining defendant no.2 from executing the Regular Darkhast No.01/2022.

6. The defendant no.1 has not appeared before the Court inspite of service of summons. Hence, the suit proceeded ex-parte against him.

7. The defendant no.2 has appeared before the Court and filed his say and written statement (Exh.11) and objected to the application. He has denied all the adverse allegations made by the plaintiff. According to him, on 25.04.2015, defendant no.1 executed an agreement to sell of the suit property in his favour. Thereafter, he filed Special Civil Suit No.35/2016 against defendant no.1 for specific performance of the said contract. The said suit was decreed. Thereafter, he has filed Regular Darkhast No.01/2022 for executing the said decree. Defendant no.2 has further alleged that during the pendency of Special Civil Suit No.35/2016 as well as in Regular Darkhast No.01/2022, the plaintiff had applied to add him as a necessary party. However, both applications were rejected. According to him, the plaintiff has prima facie failed to prove that he is/was ready and willing to perform his part of the contract. He has also alleged that the present suit is not filed within the period of limitation. On these grounds, defendant no.2 has prayed to reject the application.

8. Heard Shri. P. S. Kale, learned Advocate for the plaintiff and Shri.U.M. Kulkarni, learned advocate for defendant no.2.

9. Perused the application of the plaintiff, say filed by the defendant no.2 as well as documents filed on record. The following points arise for my determination, and I have recorded my findings thereon for reasons mentioned herein.

Sr. No.	Points	Findings
1.	Whether prima-facie case is in favour of the plaintiff ?	No.
2.	Whether balance of convenience lies in favour of the plaintiff?	No.
3.	Whether irreparable loss will be caused to the plaintiff if the injunction is not granted ?	No.
4.	What order ?	As per final order.

REASONS

AS TO POINTS NO.1 TO 4: -

10. On perusal of the record, it appears that the plaintiff has filed the present suit for specific performance and for permanent injunction based on the deed dt. 29.04.2014, which was executed by defendant no.1 in his favour. It appears that in the said deed, it is mentioned that if the mortgage money is not returned within one year, then defendant no.1 shall execute a sale deed of the suit property in favour of the plaintiff for a consideration of Rs.7,00,000/-. It is pleaded by the plaintiff that the deed dated 29.04.2014 is a deed of 'mortgage by conditional sale'. However, in the said deed, it is not mentioned that if defendant no.1 fails to repay the mortgage money, then the sale will become absolute, or on repayment of the mortgage money, the sale will become void. It is also not pleaded by him that, due to the failure of

repayment of mortgage money, the sale has become absolute. Therefore, it is clear that it is not a deed of mortgage by conditional sale. However, it appears that by way of the said deed, defendant no.1 transferred interest in the suit property for the purpose of securing the payment of money advanced by the plaintiff. Therefore, it is a mortgage deed.

11. Before going into other contentions of the parties, it is necessary to consider whether a condition to sell the property on default of repayment of the mortgage money can be legally inserted in the mortgage deed, and whether such a condition is valid? It is well settled that the primary purpose of a mortgage is to secure repayment of the debt. The said security is redeemable by the transferrer when he pays back the loan or on discharging his obligation. The right of redemption of a mortgage is conferred under Section 60 of the Transfer of Property Act, 1882. Therefore, it is clear that the right of redemption of a mortgage is a statutory right. The said right is based on a doctrine, "Once a mortgage, always a mortgage". This means that there cannot be any condition or covenant that modifies the character of the mortgage that would bar the mortgagor from redeeming his property on payment of the loan. If any act is done, or any condition is inserted which obstructs the right of redemption on payment of debt or performance of the obligation, then it acts as a clog on the equity of redemption, and it will be invalid. The said doctrine of clog on redemption is based on the principle of justice, equity and good conscience.

12. In the present case, as discussed above, a condition to sell the suit property on default of repayment of the mortgage money within the period of one year is inserted in the mortgage deed. It means that

by inserting the said condition, the plaintiff is restrained from redeeming the suit property after a lapse of one year, even on repayment of the mortgage money. Therefore, the said condition creates a clog on the redemption of the suit property. Hence, the said condition is invalid. The plaintiff has filed the present suit for specific performance of the contract based on said clause of the mortgage deed. As the said clause/condition appears to be invalid, the plaintiff is not entitled to claim any relief based on said clause. Hence, prima facie it appears that the plaintiff is not entitled to claim the relief of specific performance of the contract based on the alleged clause inserted in the mortgage deed.

13. Even if, for a moment, it is presumed that the alleged condition is valid, the plaintiff has to prima facie establish that he is and was ready and willing to perform his part of the contract, to grant an injunction. In that regard, the learned advocate for the defendant has submitted that in the plaint, it is mentioned that due to insufficient money with him on 23.06.2021, the plaintiff had paid only an amount of Rs.25,000/-. Therefore, his economic condition was not sound enough to perform his part of the contract. Hence, he was not ready to perform his part of the contract. Therefore, he is not entitled to get the interim relief of an injunction. In support of the said contention, he has relied on **Nitin Marutrao Kale and Anr. Vs. Manikrao Bajirao Malgunde, 2025(2) Mh.L.J. 375**. On the other hand, the learned advocate for the plaintiff has submitted that he has already paid more than 2/3rd amount out of the consideration amount. It discloses his readiness and willingness to perform his part of the contract. In support of his contention, he has relied on **Siddamsetty Infra Projects Pvt.Ltd. Vs. Katta Sujatha Reddy and anr., 2025(2) Mh.L.J. (S.C.) 644** and **Vishnu Ramkrishna Doiphode Vs Vittal Bhau Doiphode, 2025(3) MH.L.J. 388**.

14. In the plaint, the plaintiff has mentioned that the consideration amount of the alleged sale deed was Rs.7,00,000/-, and out of which only the amount of Rs.1,07,000/- remains to be paid. It is alleged by the plaintiff on 23.06.2020, he paid an amount of Rs.1,60,000/- as well as an amount of Rs.25,000/- to defendant no.1. However, he has not produced any documentary evidence to prove this fact. On perusal of the record, it appears that the plaintiff has filed a copy of the agreement to sell dt.23.06.2020 taken place between him and defendant no.1. However, in the said agreement, the plaintiff had not mentioned about the mortgage deed dt.29.04.2014. Moreover, in the said agreement to sale, it is not mentioned that in addition to the mortgage money, the plaintiff has paid an amount of Rs.1,60,000/- to the defendant as a consideration of sale. It appears that the agreement to sell dt.23.06.2020 is an independent agreement and document. Therefore, it is clear that the plaintiff has failed to bring on record a document to show that after executing the deed dt.29.04.2014 he had paid any consideration amount to defendant no.1. On the contrary, he himself has mentioned in the plaint that due to insufficient money, he had paid only the amount of Rs.25,000/- to defendant no.1. Moreover, he has mentioned that due to his bad economic condition, he had not preferred an appeal against the order passed on the application (Exh.39), filed in Special Civil Suit No.35/2016. It means that the plaintiff himself pleaded that his economic condition was not sound after the execution of the deed dt.29.04.2014. Moreover, the plaintiff has failed to produce on record a document to show that his economic condition is/was sound. Therefore, prima facie it appears that the plaintiff has failed to prove his readiness to perform his part of the contract.

15. On perusal of record, it appears that after executing the deed

dt.29.04.2014, till the filing of the present suit, the plaintiff has not issued any written notice to the defendant requesting him to execute the sale deed as per the alleged agreement. It appears that on 25.04.2015, defendant no.1 executed an agreement to sell of the suit property in favour of defendant no.2 and filed Special Civil Suit No.35/2016 for specific performance of the said contract. The said suit was decreed on 29.01.2020. Even thereafter, the plaintiff has not issued any written notice to the defendant requesting him to execute the sale deed. It appears that he had only filed an application in Special Civil Suit No.35/2016 and thereafter in an execution petition to join him as a party. The filing of such applications discloses that the plaintiff wants to restrain defendant no.1 from executing sale deed as per the contract between him and defendant no.2. The said act does not reveal that he was willing to perform his part of contract. To show his willingness, he could have issued notice to defendant no.1 requesting him to execute the sale deed or could have filed the suit for the same. However, the plaintiff has not done any positive act to perform the contract. Therefore, it is clear that the plaintiff has failed to prima facie show that he is/was willing to perform his part of the contract. Hence, prima facie it appears that the plaintiff is/was not ready and willing to perform his part of the contract. In such circumstances, the hon'ble Bombay High Court in Nitin Marutrao Kale's case (cited supra), the plaintiff is not entitled to get a temporary injunction.

16. The learned advocate for the defendant has submitted that the relief of specific performance of the contract is barred by the limitation. Therefore, the plaintiff is not entitled to get the final relief of specific performance of the contract. In such circumstances, the consequential relief cannot be granted to the plaintiff. In support of the said contention he has relied on **Nikhila Divyang Mehta and Anr. Vs. Hitesh**

P. Sanghvi and others, 2025 DGLS (SC) 545. On the other hand, the learned advocate for the plaintiff has submitted that the suit is filed within the period of limitation. He has further submitted that it is a mixed question of fact and law. Therefore, it cannot be considered at the time of deciding the interim application. However, recently the hon'ble Supreme Court in the case of Asama Lateef Vs Shabbir Ahmad, 2024 INSC 36 it is held that -

Where interim relief is claimed in a suit before a civil court and the party to be affected by grant of such relief, or any other party to the suit, raises a point of maintainability thereof or that it is barred by law and also contends on that basis that interim relief should not to be granted, grant of relief in whatever form, if at all, ought to be preceded by formation and recording of at least a prima facie satisfaction that the suit is maintainable or that it is not barred by law. Such a satisfaction resting on appreciation of the averments in the plaint, the application for interim relief and the written objection thereto, as well as the relevant law that is cited in support of the objection, would be a part of the court's reasoning of a prima facie case having been set up for interim relief, that the balance of convenience is in favour of the grant and non-grant would cause irreparable harm and prejudice. It would be inappropriate for a court to abstain from recording its prima facie satisfaction on the question of maintainability, yet, proceed to grant protection pro tem on the assumption that the question of maintainability has to be decided as a preliminary issue under Rule 2 of Order XIV, CPC. That could amount to an improper exercise of power. If the court is of the opinion at the stage of hearing the application for interim relief that the suit is barred by law or is otherwise not maintainable, it cannot dismiss it without framing a preliminary issue after the written statement is filed but can most certainly assign such opinion for refusing interim relief.

17. In view of the ratio laid down in the case (cited supra), it is clear that the point that the suit is barred by limitation can be considered while granting the interim relief. The main relief in the present suit is specific performance of the contract. Therefore, Article 54 of the

Schedule of the Limitation Act, 1963 is applicable to determine the period of limitation. As per the said provision, the suit for specific performance shall be filed within the period of three years from the date fixed for performance of the contract or, if no specific date is fixed, then from the date when the plaintiff has notice that performance has been refused. In the present case, on perusal of deed dt.29.04.2014, it appears that no date was fixed for specific performance of the contract. Therefore, the limitation to file the present suit commences from the date when the plaintiff has notice of the refusal of the specific performance.

18. In the plaint, the plaintiff has specifically mentioned that on 25.04.2015, defendant no.1 executed agreement to sell of the suit property in favour of defendant no.2. Thereafter, defendant no.2 had filed Special Civil Suit No.35/2016 for specific performance of the said contract against defendant no.1. In the said suit, the plaintiff applied for joining him as a defendant on 28.02.2019. However, on 24.07.2019 the said application was rejected. It means that the plaintiff got knowledge about the transaction between defendant no.1 and 2 on or before 28/02/2019. The execution of the said agreement to sell by defendant no.1 in favour of defendant no.2 itself shows that defendant no.1 refused to perform the contract between the plaintiff and him. It was noticed by the plaintiff on or before 28.02.2019. Therefore, the limitation to file the present suit prima facie appears to have commenced on 28.02.2019. The present suit was filed on 03.05.2024. It means that prima-facie the suit is not filed within the period of three years from the date of notice of refusal of the specific performance. Special Civil Suit No.35/2016 was decreed on 29.01.2020. Even the plaintiff has not filed the present suit within the period of three years from the date of passing of the said judgment and decree. Therefore,

prima facie it appears that the present suit is not filed within the period of limitation.

19. Learned Advocate for the plaintiff has submitted that the plaintiff is in possession of the suit property. Therefore, it is required to be protected. In that regard, on perusal of the mortgage deed and the affidavits of the witnesses, namely Laxman Bandgar, Sachin Sutar, Satish Koli, Sachin Londhe and Yunus Attar, it appears that the plaintiff is in possession of the suit property. Based on the said possession, the plaintiff has claimed a temporary injunction against the defendants to protect his possession. However, as discussed above, the plaintiff has filed the present suit for specific performance of the contract and not for foreclosure or sale of mortgage property, as the case may be, based on the clause mentioned in the mortgage deed dt.29.04.2014, which is invalid. Moreover, it appears that the plaintiff has prima facie failed to prove that he is/was ready and willing to perform his part of the contract. So also, prima facie it appears that the suit is not filed within the period of limitation. Hence, it appears that the plaintiff is not entitled to get the final relief of specific performance of the contract, which is the main relief of the plaintiff. In Nikhila Mehta's case (cited supra) the Hon'ble Supreme Court has held that :-

The other reliefs are dependent upon the first relief and cannot be granted until and unless the plaintiff succeeds in first relief. Therefore, once the plaint or the suit in respect of main relief stands barred by time, the other ancillary relief claimed therein also falls down.

20. In view of the ratio laid down in the case (cited supra), it is clear that if the plaintiff is not entitled to get the final relief of specific performance of the contract, then he will also not be entitled to get the ancillary relief of permanent injunction as claimed in the plaint. In such circumstances, in view of the ratio laid down in Asama Lateef's case

(cited supra), the plaintiff is also not entitled to claim the interim relief such as a temporary injunction. It is well settled that the interim reliefs are granted in aid of the final reliefs. However, in the present case, as discussed above, the plaintiff is not entitled to the final relief. In such a situation, though the plaintiff is in possession of the suit property, it is not legal and proper to grant a temporary injunction as prayed by him to protect his possession, particularly in the present suit. No purpose will be served by granting such a temporary injunction in favour of the plaintiff if he is not entitled to the final relief.

21. The learned advocate for the plaintiff has relied on **Firm Kedar Nath Babu Lal Vs. Prabhu Narayan Sahu and ors. AIR 1958 Pat. 130;** and **Fatima Fouzia Vs. Walashan Prince Moazzam Jah Bahadur, AIR 1980 AP 315** and submitted that this Court can grant a temporary injunction to restrain the defendant from executing Darkhast No.01/2022. Therefore, he has prayed to grant such an injunction. However, as discussed above, Special Civil Suit No.35/2016 was decreed by the Court. Moreover, the condition regarding the sale of the suit property mentioned in the mortgage deed dt.29.04.2014 itself is invalid. In such circumstances, it is not legal and proper to restrain the defendant from executing the Darkhast No.01/2022.

22. The plaintiff has also sought a temporary injunction restraining the defendant from alienating the suit property. The learned advocate for the plaintiff has submitted that in a suit for specific performance of a contract, a temporary injunction restraining the defendants from alienating the suit property can be granted. In support of the said contention, he has relied on **Nalluri Sai Vasavi Vs. Kolluri Nageswara Rao, C.M.A.No.120 of 2022 decided on 13.09.2022,** wherein it is held that :-

As seen from the above, it is clear that if any property which is in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or if the defendant threatens or intends to dispose of the property the Court may grant temporary injunction.

The ratio laid down in the case (cited supra), it is clear that in a suit for specific performance, a temporary injunction restraining the defendant from alienating the suit property can be granted. However, as discussed above, the plaintiff is only the mortgagee of the suit property. Moreover, the plaintiff is not entitled to get the final relief. On the contrary, the Competent Court in Special Civil Suit No.35/2016 has directed defendant no.1 to execute the sale deed of the suit property in favour of defendant no.2. In such circumstances, it is not legal and proper to grant the temporary injunction as prayed by the plaintiff.

23. The plaintiff has relied on Anil Chhabildas Chaudhari Vs. Mamata Sudhakar Sananse, 2025(4) Mh.L.J. 340. However, the facts of the present case and that case are different. In that case, the defendant had pleaded that the sale deed with respect to the suit shop is a false and fabricated document. Moreover, he had taken the plea of fraud. However, in the present case, no such plea is taken by the defendant. Therefore, the ratio laid down in that case is not helpful to the plaintiff.

24. Learned advocate for the defendant has also relied on Nitin Bharat Savale Vs State of Maharashtra, 2025(3) Mh.L.J. 522 wherein, it is held that the court while granting temporary injunction shall consider trinity test of prima facie case, balance of convenience and irreparable injury. In the present case, as discussed above, it is clear that the prima facie case and balance of convenience do not lie in favour of the plaintiff. The plaintiff is not entitled to the final relief as prayed in the plaint. In such circumstances, if the interim reliefs as

prayed by the plaintiff are not granted, no prejudice will be caused to him. Hence, the application is liable to be rejected. Hence, I answer points no.1 to 3 in the negative and for point no.4, I pass following order.

ORDER

1. The application (Exh.5) is rejected.
2. Cost in cause.

Date: 04.09.2025.

(P. A. Patil)
Jt. Civil Judge Senior Division,
Jaysingpur.