

ORDER BELOW EXH.5 IN S.C.S.NO. 517/11.

This is an application for temporary injunction. Perused the application, say, pleadings of the parties, affidavits, documents and entire record. Heard all the sides at length.

02 Following are the points for determination along with my findings thereon for the reasons ensuing:

Sr.No.	Points.	Findings
1	Whether plaintiff has made out prima facie case in his favour?	Only to the extent of property in Schedule A in plaint.
2	Whether balance of convenience lies in his favour?	Yes, to the extent of property in Schedule A in plaint.
3	Whether irreparable loss will be caused to plaintiff if injunction is refused?	Yes, to the extent of property in Schedule A in plaint.
4	What order?	Application is partly allowed in terms of final order.

REASONS

03 There are properties classified in three categories as the subject matter of the suit. Property in schedule A, which, according to the plaintiff, is exclusively belonging to defendants no. 1 to 10. Property in schedule "B" and "C" is not belonging to defendants no. 1 to 10 and several parts of it are belonged to by the several owners from amongst defendants no. 11 to 25.

04 **Plaintiff's case** : Defendants no. 11 to 25 had agreed with

defendants no. 1 to 10 for the sale of their properties amongst schedule B and C constituting a contract for sale of property in schedule B and C in favour of defendants no. 1 to 10. The said contract is a composite contract consisting of several contracts by virtue of sale receipts executed by several owners amongst defendants no. 11 to 25. Defendants no. 1 to 10 have agreed to sell the suit property in schedule A itself as well as the properties in schedule B and C and the agreement mentions that by virtue of authority on account of earlier agreement executed in favour of defendants no. 1 to 10 by defendants no. 11 to 25, they were going to sell the suit property in favour of plaintiff. Plaintiff had paid an amount of Rs. 1 crore as an earnest amount towards the sale consideration and defendants are going to create third party interest in the suit property. Hence, the suit and application.

05 **Case of the defendants no. 13, 23 to 25 :** The property of these defendants which is comprised in schedule B and C is belonging to these defendants and they have never agreed with defendants no. 1 to 10 to sell their property. The said agreement, if, at all, can't confer any right upon defendants no. 1 to 10 to transfer the said property in favour of plaintiff. The agreement executed by defendants no. 1 to 10 in favour of plaintiff itself is an illegal agreement on the face of it and even the sale receipts purported to have been executed by these defendants in favour of defendants no. 1 to 10 are sham the documents in so far as they are in contravention with the stamp law as well as those appear, from the comparison of the signature thereupon with signatures on legal notice issued by defendants, to have been fabricated. Entire suit is false. Hence, the prayer for rejection of the application.

06 Thus, the whole of the case is founded upon the relief of specific performance of contract executed by defendants no. 1 to 10 in favour of plaintiff as regards property in schedule A, B and C coupled with the agreement executed by defendants no. 11 to 25 in favour of defendants no. 1 to 10. At the

outset, it has to be stated that there is no dispute regarding the fact that defendants no. 1 to 10 are the absolute owners of the properties in schedule A as none of defendants no. 1 to 10 has ever contested this fact nor has any other defendant. Therefore, the agreement for the sale of the suit property schedule A in favour of plaintiff holds good in as much as the prima facie considerations of this stage are concerned. Therefore, plaintiff deserves interim injunction as regards the property in schedule A, the crucial facts in this behalf having remained uncontested.

07 In as much as property in schedule B and C is concerned, admittedly, defendants no. 1 to 10 are not the owners of the property in schedule B and C nor is there any mention of there being any interest in their favour. A person can transfer an interest if he holds it. In the law of transfer of property, holding of an interest is of utmost importance as the whole of law transfer of property is based upon the well known maxim "***Nemo-dat-quod-non-habet***" (*No one can give better title than he has*). Thus, for making operate a valid transfer or (making a valid contract for transfer in anticipation of a transfer for being enforced) one should have the title to the suit property i.e. a proprietary interest save a few contingencies prescribed under the Transfer of Property Act like one under Section 43. Here, all that has been urged is that defendants no. 1 to 10 became assignee by virtue of agreement executed by defendants no. 11 to 25 in their favour; whereas no assignment of proprietary interest in law has ever taken place, for, an assignment of an interest in immovable property can take place only by virtue of flowing of interest from assignor to assignee either by act of parties or by virtue of law. The assignment by virtue of law can be illustrated in the eventuality of flowing of interest on account of inheritance, of gaining prescriptive rights by adverse possession, acquiring of property by court sale or statutory transfers like those under Agricultural Tenancy Laws and Land Acquisition Act. However, assignments called "transfer" of interest in immovable property by act of parties i.e

“*transfer intervivos*” can be made only as per the provisions of the Transfer of Property Act. It is the transfer of property in itself which conveys the interest to the transferee for being transferred to someone else by him. In absence of any transfer defined at six instances by the Transfer of Property Act, the person professing to transfer such an interest by way of any document forming a contract for transfer not being the requisite deed of transfer is event less but for the right of transferee to compel transferor to act for completion of the transfer. Therefore, such conveyance cannot be acted upon as no decree for specific performance can be granted in such case as the person like defendant (no.1 and 2) purporting to convey the property by the said conveyance himself has no existing property that may be validly conveyed. At the most, plaintiff, in such case, can have the benefit of the doctrine of “*feeding the estoppel by grant*” mingled under Section 43 of the Transfer of Property Act where the transferor professes to transfer an interest in the property which he has not; but later on acquires the interest or part of it, on the happening of which event, the fraudulent transfer which was not valid at the inception takes the form of valid transfer from the date of happening of the event. However, plaintiff is not claiming the benefit of that interest under Section 43 as the requisite contingency has not occurred for a claim that Section.

08 Reliance upon the judgment of *M/s Advance Home Makers Group Vs. Dnyaneshwar Shama Bhoir and Ors. in Appeal From Order No. 866 of 2006* placed by Mr. Lad, the learned advocate, appears to be correct in so far as there is no privity of contract amongst plaintiff and defendants no. 11 to 25 regarding the transfer of property in schedule B and C. Had it been the case that the original owners (defendants no. 11 to 25) consented the agreement executed by the defendants no. 1 to 10, the case might have been different. Unfortunately, this is not so in the case in hand. The learned advocate for plaintiff has argued that the *M/s Advance Home Makers Group (supra)* case can be distinguished from the case in hand in so far as there is an authority

given by the agreement executed by defendants no.11 to 25 authorizing defendants no. 1 to 10 to transfer the suit property in schedule “B” and “C” in favour of plaintiff. This distinction due to proposed existence of apparent authority would not also be helpful to the plaintiff in the sense that even if, as argued by him, this recital is taken to be an agency created by defendants no. 11 to 25, this being an agency relating to the transfer of immovable property, the agency in the form of power of attorney for transfer, for coming into being, requires registration as per the Registration Act. We need not go into details of agency for the particular reason that by virtue of law of transfer of property itself the contract for sale executed by defendants no. 1 to 10 regarding the property schedule “B” and “C” which is belonged to by someone else cannot be acted upon only because of contracts for sale executed by defendants no. 11 to 25 which do not at all confer any interest in immovable property upon defendants no. 1 to 10 so that defendants no. 1 to 10 have no authority to agree for the transfer of the said property unless that is transferred to them.

09 On the aforesaid ground itself based on law of Transfer of Property, the said agreement cannot be acted upon. The argument that sale receipts relied upon by the plaintiff for supporting agreement in favour of defendants no. 1 to 10 as regards the transfer of property in schedule B and C are inadmissible by virtue of these being improperly stamped is an additional reason, more particularly, when the name for which the stamp is purchased is altogether different from the names of either of vendors or vendees rendering the documents inadmissible for “*improper stamping.*” One can not get impressed by the argument of plaintiff that even an oral contract can be acted upon in so far as plaintiff has particularly come with the case of there being a validly written agreement and it has never been his case that there was an oral agreement independent of agreement found in writing. It is true that the document, even if inadmissible for improper stamping, can always be considered for a collateral purpose, but at this stage of consideration of *prima*

facie case, inadmissibility of evidence, although not the sole factor of itself for outweighing case of plaintiff in this regard, it is a factor assisting the process of outweighing as feather in cap of other major factors constituting reasoning in the foregoing paragraphs. The reliance upon the judgment of M/s KBC Pictures Vs. A.R. Murgadoss & Ors., reported in 2009 (2) ALL MR 108, therefore, is aptly placed here.

10 For the aforesaid reasons, I am of the opinion that plaintiff has established *prima facie* case as regards the apprehended alienation of the suit property in schedule A at the instance of defendants no. 1 to 10 (and also defendants no. 26 to 29 who stepped into the shoes of defendant nos. 1 to 10) the balance of convenience tilts in favour of plaintiff in so far as the apprehended alienation is concerned, because if injunction is not granted, plaintiff may be jeopardised due to multiplicity in litigation. Needless to say, plaintiff has failed to establish *prima facie* case as regards property in schedule nos. "B" and "C" as against rest of defendants. Accordingly, the findings are recorded.

11 In the conclusion, I pass the following order:

ORDER

- (1) Defendants no. 1 to 10 and defendants no. 26 to 29 are hereby temporarily restrained from creating third party interest in part of property described in schedule A in the plaint, till final disposal of the suit.
- (2) Rest of the application stands rejected.
- (2) Costs in cause.

Panvel,
Date : 02-07-2016.

(D.R.Deshpande)
Jt. Civil Judge, S.D.Panvel.