

**Vasant Dhawan
Vs. Anant Dhawan**

**ORDER BELOW EXH 05 IN REGULAR CIVIL SUIT NO. 124 OF
2016**
(Decided On 25/04/2017)

The plaintiff presented this application under Order 39 Rule 1 of the Code of Civil Procedure for restraining the defendant Nos. 2 to 4 from creating third party interest and from interfering in their rights in the suit property. Perused the application, say of the defendant Nos. 2 to 4 and other proceedings of the matter.

2. It is a case of the plaintiffs that the property Survey No. 88 Hissa No 2/1 , Survey No. 88 Hissa No.2/3, Survey No. 80 Hissa No. 1A/1 and Survey No.79 Hissa No.1D/9 of mouje-Varchiwadi, Vile belonged to Kondu Hari Dhawan (hereinafter called as “Suit property”). After his death the partition of the suit property took place between his heirs Baliram, Tukaram, Vithhal and Maruti. The property which came to share of Tukaram was recorded in the name of the defendant No. 1 who was the karta of the family.

3. The plaintiffs and the defendant No. 1 wanted to sell the joint family property Survey No. 89 Hissa No. 1A(old Survey No. 184 Hissa No. 1A) and Survey No.75 (old survey No. 349 Hissa No. 3A) for family necessity. They sold these property by the registered sale deeds. The plaintiffs and the defendant Nos. 5 to 8 were included in the sale deed as consenting parties because of their shares in that

property. The plaintiffs have received necessary consideration for the same. Those property were recorded in the name of the defendant No. 1 as the karta of the Hindu joint family. But still from those sale deeds it becomes clear that the plaintiffs were having rights and interest in it.

4. The plaintiffs and the defendant No. 1 executed the agreement to sell bearing No. 1384/2014 in favor of the defendant Nos. 2 to 4 of the suit property Survey No. 88(old Survey No. 348) Hissa No. 2/C. The plaintiffs are having right and share in these property therefore they were added in the agreement to sell as consenting party. The said sale deed shows that the plaintiffs have received the consideration through the cheque. But they have not received any amount of consideration from the defendant Nos. 1 to 4. They asked the defendants about it but they did not answer properly. The defendant No. 1 denied the rights of the plaintiffs in the suit property Survey No. 88 Hissa No. 2/C. The 7/12 extract of Survey No. 88 Hissa No. 2/C bears the name of the defendant No. 1 in the column of cultivators.

5. The agreement to sell No. 1384/2014 shows that the plaintiff No. 1 received Rs. 2,00,000/- and the plaintiff No. 2 received Rs. 4,00,000/- as consideration amount. But in reality they have not received any consideration. Therefore, the agreement to sell No. 1384/2014 is not binding upon the share of the plaintiffs. They have undivided right and share in the suit property Survey No. 88 Hissa

No. 2/C. Now, the plaintiffs have apprehension that the defendant No. 1 may take disadvantage of his name to 7/12 extract of suit property and create third party interest in the same by violating the rights of the plaintiffs in the same. Further, they have apprehension that the defendant Nos. 2 to 4 may try to create third party interest in the suit property survey No. 88, Hissa No. 2/C. Hence, this application.

6. The defendant Nos. 2 to 4 filed their say vide Exh. 38. They denied the allegations made in the plaint and this application. They contended that the plaintiffs have not made clear that in which property the defendant Nos. 2 to 4 started construction. Further, the plaintiffs admitted the Mutation Entry No. 2061. By that entry it is clear that the defendant No. 1 was in possession and an owner of the suit property though it is not mentioned that he was a karta of the joint family property. The plaintiffs are not co-owners in the suit property.

7. The plaintiffs admitted the possession and ownership of the defendant No. 1 in Survey No. 89 1/A and Survey No. 75 3/A. Therefore, those property were transferred in favor of the defendant Nos. 2 to 4 by the registered sale deeds and they are the owners of the same.

8. The suit property Survey No. 88, Hissa No. 2/C is not a joint family property of the plaintiffs and the defendant. But by Mutation Entry No. 2061 the defendant No. 1 became the owner of

the same. The agreement to sell No. 1384/2014 is a valid agreement. That agreement was executed for family necessity and in order to avoid technical errors the plaintiffs were added as consenting parties. At page 10 of the agreement to sell No. 1384/2014 the plaintiffs admitted that the suit property Survey No. 88 Hissa No. 2/C belongs to the defendant No. 1 who is in possession and owner of the same. At page 12 of the said agreement the plaintiffs admitted to receive the consideration from the defendant Nos. 2 to 4. The cheques given to the plaintiffs were honored at Dena Bank, Deccan Gymkhana, Pune. Now, the plaintiffs can not take a defence that they did not receive the consideration amount from the defendant Nos. 2 to 4.

9. Further, they contended that the suit property Survey No. 88, Hissa No. 2/C was tenanted property therefore the plaintiffs and the defendant No. 1 executed a registered power of attorney No. 1385 in favor of the defendant Nos. 2 to 4 in order to obtain necessary permission of sale the property from the concerned authority. The defendant Nos. 2 to 4 obtained the permission the concerned authority. The defendant Nos. 2 to 4 are in possession of the suit property since 2014. The plaintiffs are aware about this facts. Therefore, considering the above facts and circumstances he prayed for rejection of the application.

10. Considering above rival pleadings, following points arose for my consideration. I record my findings thereon as follows,

Sr.	Points	Findings
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No.

1. Whether there is a prima facie case in favour of the plaintiff ? :- In the negative.
2. Whether there is a balance of convenience in favour of the plaintiff ? :- In the negative.
3. Who will suffer irreparable loss if injunction is granted? :- The defendant Nos. 2 to 4.
4. What order ? :- As per final order.

:- REASONS :-

Point Nos. 1 to 3 :-

11. In order to prove the prima facie case the plaintiff relied upon certain documents which will be referred at the relevant time during discussion.

12. The plaintiffs instituted this suit for declaration, partition and separate possession of the suit property. The plaintiffs averred that they are equally entitled to shares in the suit property Survey No. 88, Hissa No. 2/C as that of the defendant No. 1. The plaintiffs have described four suit property in the plaint. Out of which suit property Survey No. 88, Hissa No. 2/C is in question. They produced on record sale deeds of Survey No. 89 Hissa No. 1/A (old Survey No. 184 Hissa No. 1/A) Survey No. 75 (Old Survey No. 349 Hissa No. 3A) Survey No. 89 Hissa No. 2 (old Survey No. 184 Hissa No. 2) which are not suit property. Further, the plaintiff admitted that they executed the

agreement to sell No. 1384/2014 in favor of the defendant Nos. 2 to 4. They claimed that they did not receive the consideration amount from the defendant Nos. 2 to 4.

13. I have gone through the documents produced on record by both the parties. I perused the 7/12 extracts of the suit property. It bears the name of the defendant No. 1 in the column of cultivators. Further, I perused the Mutation Entry No. 2061. It shows that which property were allotted to whose shares at the time of oral partition between the parties. I perused the agreement to sell No. 1384/2014 which shows that the defendant No. 1 executed it in favor of the defendant Nos. 2 to 4 and in the same agreement the plaintiffs were added as consenting parties because they had share and interest in the suit property survey No. 88 Hissa No. 2/C. Further, at page 10 of the same agreement it is mentioned that the consenting parties including the plaintiffs admitted that the suit property Survey No.88 Hissa No. 2/C belonged to the defendant No. 1 and admitted the ownership of the defendant No. 1. It is written that in order to avoid any difficulty for selling the suit property Survey No. 88 Hissa No. 2/C they signed upon the sale deed as consenting parties. In the same document at page No. 12 the plaintiff No. 1 admitted to have obtained a cheque of Rs. 2 lacs and the plaintiff No. 2 admitted to have obtained the cheque of Rs. 4 lacs from the defendant Nos. 2 to 4.

14. The said agreement bears the signature of the plaintiffs as consenting parties. However, the plaintiffs repeatedly claim that they

have not received any consideration amount from the defendant Nos . 2 to 4 hence the agreement is not binding upon them. On the contrary the defendant Nos. 2 to 4 produced on record the registered power of attorney No. 1385/2014. On page seven of the said attorney the plaintiffs admitted that the defendant No. 1 is in possession of and an owner of Survey No. 88, Hissa No. 2/C and by that power of attorney the plaintiffs have given rights to the defendant No. 1 to sale the suit property Survey No. 88 Hissa No. 2/C to the defendant Nos. 2 to 4. This power of attorney No. 1385/2014 also bears the signature of the plaintiffs. Further, the defendant Nos. 2 to 4 produced on record bank statements of the Dena Bank, Deccan branch, Pune which shows that the cheque of Rs. 2 lacs has been honored in the name of the plaintiff No. 1 and the cheque of Rs. 4 lacs has been honored in the name of the plaintiff No. 2. On 24/05/2014 both the cheques seem to have been honored in the name of the plaintiff Nos. 1 and 2 respectively. From the studied scrutiny of the bank statement of Dena Bank, branch Deccan Pune it appears to me that the said statement is original and it shows that the plaintiff Nos. 1 and 2 have received the consideration amount from the defendant Nos. 2 to 4.

15. Further, the Mutation Entry No. 694 shows that the suit property Survey No. 88, Hissa No. 2/C has been recorded in the name of the defendant No. 1. That entry shows the ownership of the defendant No. 1 in the suit property Survey No. 88 Hissa No. 2/C. This documents on record prima facie show that the defendant No. 1

has the ownership in the suit property Survey No. 88 Hissa No. 2/C by specifically both documents i.e. Mutation Entry No. 2061 and Mutation Entry No. 694.

16. The plaintiffs have produced on record sale deeds of Survey No. 89 Hissa No. 1/A, Survey No. 75, Survey No. 88 on record. These sale deeds and the suit property described in the plaint do not resemble with each other. They are not concerned with the suit property. Therefore, they can not be taken into consideration at this stage. The plaintiffs are at liberty to show the relevance of these sale deeds at the stage of hearing but at this stage the transaction made in those sale deeds are remotely related with the relief asked by the plaintiff. The Adv. for the plaintiffs argued that the suit property is ancestral property and the plaintiffs have undivided share in the same but the Mutation Entry No. 2061 shows that the suit property and other property were partitioned between the heirs of Kondu Dhawan. The plaintiff has liberty to prove this fact at the stage of hearing but at this stage it wont to taken into consideration. He further argued that if the plaintiffs have no interest in the suit property then why did the defendants obtain their consent and give consideration to them. By advancing this argument before this Court the plaintiffs are indirectly admit the fact of receiving the consideration.

18. He further argued that there are no details about payments of consideration to the plaintiffs. However the statement of

Dena Bank, Deccan branch Pune produced by the defendant specifically shows that amount and date on which the cheques were honored in favor of the plaintiffs. Therefore, in the light presumption provided in section 3 and 4 of The Bankers Evidence Act this submission does not hold any good.

19. In order to prove prima facie case the plaintiffs have to bring on record that the property is in danger of being wasted or alienated by the party to the suit. The material on record shows that the suit property Survey No. 88 Hissa No. 2/C has already been alienated by the defendant No. 1 in favour of the defendant Nos. 2 to 4 and the plaintiffs are consenting parties to that alienation. The plaintiffs have not brought on record to show that the suit property Survey No. 88 Hissa No. 2/C is in danger of being wasted. The photographs filed by the plaintiffs do not show exactly upon which property the construction has been carried out. Mere oral submission that the defendant Nos. 2 to 4 may try to create third party interest in the suit property Survey No. 88 Hissa No. 2/C without showing irreparable loss to the plaintiff is insufficient.

20. The agreement to sell was executed in the year 2014. The power of attorney No. 1385/2014 also was executed in the year 2014. The plaintiffs came before this court in the year 2016. If they claim that they did not receive the consideration amount then the question arises as why did not they initiate any action against the defendant Nos. 2 to 4 as early as possible. The remedy of injunction is an

equitable relief and it is settled principle of equity that the delay defeats equity. On this ground also the plaintiffs will not be entitled to the relief of temporary injunction.

21. Though, the plaintiffs argued that they have not received any consideration amount or they have not given their possession to the defendants, the registered power of attorney No. 1385/2014, the registered agreement to sell No.1384/2014 and the statements of the Dena Bank, Deccan branch Pune clearly show that the plaintiffs consented the execution of agreement to sell No. 1384/2014 and obtained consideration from the defendants Nos. 2 to 4. The plaintiffs may disprove this fact of parted with the possession and of receiving consideration but at this stage it is clear that the plaintiffs consented the execution and received consideration amount.

22. Considering above facts and circumstances, it is clear that the plaintiffs have not raised a bonafide dispute and there is not a strong case for trial which needs investigation and decision on merit. The plaintiffs have failed to persuade this court that there is apprehension that the defendant Nos. 2 to 4 may create third party interest in the suit property. As far as the balance of convenience is concerned it lies in favor of the defendant Nos. 2 to 4 as more hardship or inconvenience or comparative mischief will be caused to the defendant Nos. 2 to 4 if the injunction is granted in favor of the plaintiff. As far as irreparable loss is concerned it will be the defendant Nos. 2 to 4 who will suffer it if the injunction is granted.

The defendant Nos. 2 to 4 have invested an huge amount of money in the suit property till date. The documents submitted by the defendant Nos. 2 to 4 show that they have obtained different permissions from the different authorities like non-agriculture order etc. If the injunction is refused then no irreparable loss will be caused to the plaintiffs as they may be compensated in terms of money. However, the loss which will be caused to the defendant Nos. 2 to 4 will not be compensated in terms of money. Therefore considering above factual position I am of the opinion that the plaintiffs failed to show the prima facie case in their favor. In the result following order is passed,

ORDER

Application is rejected.

The status quo granted against the defendant Nos. 2 to 4
is hereby vacated.

No costs.

Mangaon.
Date:- 25/04/2017

(G. S. Hange)
Jt. Civil Judge J.D. Mangaon.