

**R.C.S. No. 70/2012.****ORDER BELOW EXH. 24.**

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1] This is an application filed by plaintiff under Order 39 Rule 1 & 2 of Civil Procedure Code. He pleaded that initially he filed present suit against defendant No. 1 claiming relief of redemption of mortgage. Then defendant No. 1 alienated suit property to defendant No.2. Therefore, defendant No. 2 was added in the present suit. Later on defendant No. 2 on 24/11/2011 alienated suit property to defendant No.3. He was added in the present suit. Then defendant No. 3 on 4/9/2012 alienated suit property to defendant No. 4 who is added in the present suit. Now defendant No. 4 is also trying to alienate the suit property to third party. So with a view to avoid further complications and to decide the real controversy between the parties, it is just and proper to restrain defendant No. 4 from alienating the suit property till final decision of the suit. Further he pleaded that he made out his *prima facie* case, balance of convenience is also lies in his favour, therefore, he prayed a temporary injunction against defendant No. 4.

2] Defendant No. 4 appeared and filed his say on T.I. application below (EXh.37). He pleaded that suit of the plaintiff is not legal and tenable one. The said transaction dt. 4/4/2001 and 2/8/2002 executed by plaintiff. Therefore, he has to file a

suit for declaration and cancellation of sale-deed. So the suit of the plaintiff is not tenable due to non-joinder of cause of action. The plaintiff also not claimed a declaration in respect of sale-deed executed by defendant No. 1 in favour of defendant No.2, sale-deed of defendant No. 2 executed in favour of defendant No. 3, as well as, present sale-deed dt. 28/09/2012. Further he pleaded that the sale-deeds are the absolute sale-deeds, original sale-deed is not a mortgage. Sale-deeds are absolute one. So he is in possession over the suit property as a owner. So the plaintiff has not made out his prima facie case, balance of convenience is also not lies in favour of plaintiff and therefore plaintiff is not entitled a relief of temporary injunction as prayed for. Further he pleaded that he wants to develop the said land. Therefore, he wants to obtain the loan from the bank therefore if the T.I. is granted, he will not get the loan from the bank and therefore he prayed for rejection of application of plaintiff.

4] On pleading of both parties, following points arise for my determination and I have recorded my findings thereon for the reasons stated herein below :

<u>Points</u>	<u>Findings</u>
1] Whether the plaintiff made out his prima facie case?	In affirmative.
2] Whether the balance of convenience is lies in favour of plaintiff?	In affirmative.

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| 3] | Whether irreparable loss will be caused to the plaintiff? | In affirmative.     |
| 4] | What order?   | As per final order. |

**REASONS**

- 5]           **As to Point No. 1 to 3 :**

I have gone through the application of plaintiff, say of defendant No. 4, their affidavits and documents on record. Heard Shri M.G. Khupsare advocate appearing on behalf of plaintiff and Shri Sumant advocate appearing on behalf of defendant No. 4 at length. It is the contention of the plaintiff that he filed present suit against the original defendant No. 1 Ashok Tate for redemption of mortgage. During the pendency of the suit, suit property alienated by defendant No. 1 in favour of defendant No.2, his application for temporary injunction was pending. During pendency of the suit, defendant No. 2 again alienated suit property to newly added defendant No. 3 and again defendant No. 3 alienated suit property to present defendant No.4. Now the defendant No. 4 is also trying to alienate suit property and trying to create third party interest over the suit property. Further he submitted that plaintiff has a hope to success in this matter. If again defendant No. 4 alienated suit property, it create hurdle to decide the present suit. So with a view to avoid further complications, it is just and proper to restrain defendant No. 4 from alienating the suit property and creating third party interest over the suit property. The learned Counsel appearing on behalf of defendant No. 4 submitted that

the transaction between the plaintiff and defendant No. 1 can not be treated as a mortgage with condition to re-purchase. In view of the proviso to Sec. 58(c) of Transfer of Property Act when the plaintiff specifically pleaded mortgage with condition of re-purchase of the suit land, but the mandatory condition of re-purchase has not been embodied in both registered sale-deeds. So the prima-facie case is not made out to grant temporary injunction against him. Therefore, he relied on a case **Bishwanath Prasad Singh V/s Rajendra Prasad and others** brought from 2006 DGLS(Soft.) 1110 decided on 24/2/06.

6] Further he relied on a reported case **Shankarlal Ganulal Khandelwal V/s Balmukund Surajmal Bharuka ( through L.Rs. ) and others, reported in 2011(4) Bom. C.R. 250.** Herein the Hon'ble High Court held that :

*Specific Relief Act, 1963, Sec. 34- Evidence Act, 1872, Secs. 91 & 92 - Second appeal - Against decision of Lower Appellate Court- Suit for declaration that sale-deed of property was only a security for loan and be declared as mortgage- Was allowed by Lower Court- On appeal District Judge holding it as an out and out sale reversed decision- Plaintiff 2nd appeal was allowed by this Court in 1988 on ground that party could lead evidence to show agreement was not intended to operate as an agreement for sale, but that some other document entered into between parties was to be acted upon. 1982(2) Bom. C.R. 137(S.C.)- But Apex Court on Special Leave Petition reversed High Court judgment and matter remanded back on ground that High Court could only interfere in 2nd appeal if Lower Appellate Court decision was perverse- Held, in Court's view question whether sections 91 and 92 of Evidence Act would be attracted and party could be*

*allowed to lead oral evidence against a document, does not survive in view of Apex Court decision in 1982(2) Bom. C.R. 137(S.C.). Only question of law to be considered is whether Appellate Court decision was perverse. First Appellate Court did not suffer from any perversity and High Court should not have interfered with it. Because trial Court relying on evidence of P.Ws. 2,3 had concluded that there was no reason why they should help plaintiff. Cross-examination of these witnesses has been ignored by trial Court. Defendant having started construction activities on plot after 5 years after getting Municipal sanction etc. does not mean that sale-deed was nominal. Plaintiff had also not asserted any ownership over this open plot of land. Hence present second appeal has no merit and is liable to be dismissed.*

6] Further he relied on a reported case **Kachhi Properties V/s Ganpatrao Shankarrao Kadam, reported in 2010(5) Bom. C.R. 43.** Herein the Hon'ble Lordships of Bombay High Court held that :

*(A) Transfer of Property Act, 1882, Sec. 52- Code of Civil Procedure, 1908, O. 39, Rr. 1 & 2- Necessity of granting temporary injunction- To restrain defendant from creating third party interest/alienating property pending suit- Filed by appellant-plaintiff for specific performance- Application for injunction restraining defendants from creating third party interests- Rejected-Challenged-Held, appellants not shown as to how protection of section 52 of T.P. Act would be inadequate or why injunction would additionally be necessary.*

7] I have gone through the principle and observation laid down in supra cases and facts and circumstances of this case in hand. In the present matter in hand, plaintiff filed a suit for redemption of mortgage of the suit properties initially against

defendant No. 1. It is not much disputed that the defendant No. 1 alienated suit property to defendant No.2. It is also not much disputed again defendant No. 2, during the pendency of suit, alienated suit property to defendant No.3. Then defendant No. 3 also alienated suit landed property to defendant No. 4. In support of the contention of plaintiff, he filed his affidavit on record stating therein the defendant No. 4 also trying to alienate the suit property to anybody else and tried to create third party interest over the suit property. Further I have gone through written statement/say of defendant No. 4 which is on record. He specifically pleaded that he wants to develop the landed property by obtaining the loan from the bank. This fact itself goes to show that the defendant No. 4 wants to mortgage suit property towards the bank for obtaining the loan. Further in view of the principle and observation laid down in supra case *Bishwanath Prasad Singh V/s Rajendra Prasad and others* Said alleged transaction whether it is absolutely sale transaction or a mortgage of suit property with condition to re-purchase, it is to be decided at the time of final hearing of the suit. If there is no any condition in a sale-deed for re-purchase, but there are other factors to be considered and other evidence requires to be considered whether the said transaction was absolutely or it is mortgage with condition to re-purchase. But it is pertinent to note that during the pendency of the suit, near about three sale-deeds are executed in respect of the suit property. So this conduct of the parties itself goes to show that they want to create

hurdle in the present procedure by alienating the suit property or by intent to mortgage the suit property.

8] Further in view of the principle and observation laid down in supra case *Kachhi Properties V/s Ganpatrao Shankarrao Kadam*, no doubt protection under Sec. 52 of Transfer of Property Act is given to the plaintiff. Even though the plaintiff brought on record that during the pendency of suit, very firstly defendant No. 1 alienated suit property to defendant No. 2. Then defendant No. 2 alienated suit property to defendant No. 3 and then defendant No. 3 alienated suit property to defendant No. 4. Not only this, defendant No. 4 pleaded that he wants to develop suit property by obtaining the loan from the bank. So the plaintiff shown the protection of Sec. 52 of T.P. Act is an inadequate and therefore the temporary injunction is additionally necessary. No doubt, protection is available under Sec. 52 of T. P. Act. But the defendant No. 4 wants to mortgage the suit property before the bank by obtaining the loan. So it will be cause hardship to the plaintiff in future if he succeed. So under these set of circumstances, plaintiff made out his prima facie case. The principle and observations laid down in supra cases are not helpful to the defendants, the balance of convenience is also lies in favour of plaintiff and if the T.I. is not granted, irreparable loss will be caused to the plaintiff. So I answer on point No. 1 to 3 in affirmative and proceed to pass the following order.

**ORDER**

- (1) Application below (exhibit 24) is hereby allowed.
- (2) Defendant No. 4 is hereby temporarily restrained from alienating or creating third party interest or mortgaging suit property land Gat No. 90/1, admeasuring 1H.21R,situated at village Manegaon, Taluka : Barshi, District : Solapur to anybody else or bank till final decision of this suit.
- (3) Cost in a cause.

Date : 11/03/2013.

( Vikramaditya K. Mande )  
Jt. Civil Judge, S.D.,  
Barshi.