

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY BENCH AT
AURANGABAD**

**APPEAL FROM ORDER NO. 112 OF 2014
WITH
CIVIL APPLICATION NO. 11986 OF 2014**

Dipesh Suresh Ostwal .. Appellant

Versus

Vijay Raghunath Kedari and Others .. Respondents

Shri Abhaykumar D. Ostwal, Advocate for the Appellant.
Shri N. V. Gaware and R. R. Jadhav, Advocate for Respondent Nos. 1 to 7.

**CORAM : S. V. GANGAPURWALA, J.
DATE : 08TH SEPTEMBER, 2015.**

PER COURT :

1. The present appellant is the original plaintiff. The plaintiff has filed suit for specific performance of contract alongwith an application for temporary injunction restraining the defendants from alienating, creating third party interest in respect of the suit property. The said application is rejected. Aggrieved thereby the present appeal.

2. Mr. Ostwal, the learned counsel for the appellant submits that, the execution of agreement is a matter of record. Even, the Trial Court has accepted the execution of agreement but has rejected the application only on the ground that, protection under Section 52 of the Transfer of Property Act, is available to the plaintiff. The learned counsel for the appellant further submits that, the plaintiff has parted with the amount of Rs. 16,21,000/- (Rs. Sixteen Lacs Twenty One Thousand Only) to the defendants. The said amount is paid by the demand drafts also. According to the learned counsel if, the

respondents are not restrained from alienating or creating third party interest then, the plaintiff would suffer irreparable loss and injury and would also give rise to multiplicity of litigation. The learned counsel submits that, since inception the order of status-quo was in force and here also the respondents have undertaken to maintain status-quo.

3. Mr. Gaware, the learned counsel for the defendants submits that, the property is owned by the various co-sharers and only three persons are said to have executed the agreement. The conduct of the plaintiff needs to be considered. Time was essence of contract. The plaintiff has failed to perform his part of the promise within the stipulated time. The plaintiff did not get the time extended. The plaintiff has disentitled himself from any relief. The learned counsel further submits that, if injunction is clamped the same would amount to clog on the property. The rights of other co-sharers who are not parties to the agreement will also be affected. The value of the land would diminish. The learned counsel relies on the judgment of the learned Single Judge of this Court in a case of **Kachhi Properties V/s. Ganpatrao Shankarrao Kadam and Others** reported in **2010 (5) Bom. C. R. 43.**

4. I have considered the submissions, so also, I have gone through the order. The Trial Court prima facie has observed about execution of agreement by respondent Nos. 1, 2 and 3 in favour of plaintiff. I have also gone through the agreement. Except respondent Nos. 1, 2 and 3 the other parties do not appear to be signatories to the agreement. At least, prima facie, there does not appear to be privity of contract between the plaintiff and other defendants except defendant Nos. 1, 2 and 3. Whether time was an essence of contract or not will have to be considered on the basis of evidence adduced by the parties. It would be too premature at this stage to give any finding on the same. The presumption in respect of transaction of an immovable property is that, time is not essence of

contract unless otherwise proved. Reliance will have to be placed on Section 55 of the Indian Contract Act.

5. Considering the fact that, even the Trial Court has prima facie come to the conclusion about existence of agreement between plaintiff and defendant Nos. 1, 2 and 3 and that the plaintiff has parted with some part of the consideration amount, I am inclined to grant injunction to the extent of defendant Nos. 1, 2 and 3 i.e. respondent Nos. 1, 2 and 3 in the present appeal from order.

6. As such, the impugned order is modified to the extent that, during the pendency and the final disposal of the suit filed by the plaintiff bearing Special Civil Suit No. 16 of 2014, present respondent Nos. 1, 2 and 3 shall not alienate, create third party interest in respect of the suit property. The plaintiff / appellant shall deposit Rs. 28,39,250/- (Rs. Twenty Eight Lacs Thirty Nine Thousand Two Hundred and Fifty Only) with the Trial Court in the pending suit within four (4) weeks from today. In case, the amount as directed above is not deposited the injunction shall stand vacated. The prayer for injunction as against present respondent Nos. 4 to 12 stands rejected. The Trial Court shall endeavour to decide the suit expeditiously and preferably within one (1) year. The observations made by the Trial Court and this Court are only prima facie in nature and the Court shall decide the suit on its own merits, according to the evidence led by the parties dehors the observations made herein. The deposit of the amount as directed would be without prejudice to the rights of either parties.

6. Appeal from order is partly allowed. Civil application also stands disposed of. No costs.

[S. V. GANGAPURWALA, J.]

sam/Sep. 15