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IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****APPEAL FROM ORDER NO.712 OF 2016****WITH****CIVIL APPLICATION NO.902 OF 2016**

Shivajirao Anandrao Powar

...Appellant

Versus

Vasant Rao Chaugule Nagari Sahakari
and Ors.

...Respondents

.....

Mr. Rajesh Datar a/w Mr. Dushyant S. Pagare for the
Appellant.Mr. Bhooshan Mandlik i/b Mr. S. S. Patwardhan for the
Respondent No.1.**CORAM : SMT. ANUJA PRABHUDESSAI, J.****DATED: 5th July, 2017.****P.C.:-**

1. Challenge in this Appeal is to the order dated 25.11.2014 whereby the learned Civil Judge, Senior Division, Kolhapur allowed the application for temporary injunction filed by the Respondent No.1/Plaintiff and thereby restrained the Appellant/Defendant No.1 from transferring, alienating or creating any third party interest in the suit property till the disposal of the suit.

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2. The Respondent No.1 was the Plaintiff, the Appellant was the Defendant No.1, the Respondent No.2-Bank was the Defendant No.2 and the Respondent Nos.3 to 7 were the Defendant Nos.3 to 7 in the Suit. The parties shall be hereinafter referred to as per their status in the Suit.

3. The subject matter of the suit is the property situated at Kasba, Wadgaon, Hathkanangle, District Kolhapur. The said property is more particularly described in the paragraph one of the plaint and the same shall be herein after referred to as the "suit property". It is not in dispute that the Defendant No.2 had held an auction in respect of the suit property. The Defendant No.1 had purchased the suit property in the said auction and the sale deed dated 28.03.2012 has been registered in favour of the Defendant No.1. The Plaintiff claims that it had secured charge over the suit property and hence the Defendant No.2 Bank could not have sold the suit property in the auction. The Plaintiff therefore, filed a suit for declaration that the sale deed dated 28.3.2012 is null and void and not binding on it. The Plaintiff also filed an application for temporary injunction seeking to restrain the Defendant No.1 from transferring alienating or creating third party

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right in respect of the suit property till the disposal of the suit on merits.

4. The learned Trial Judge held that Defendant No.1 had issued a public notice in Daily Newspaper "Pudhari" dated 01/01/2010 disclosing his intention to sell the suit property. The learned Judge has further held that it has been brought to his notice that a criminal action has been initiated against the Defendant No.2 for illegal transactions. In view of the above, the learned Judge held that the Plaintiff had established prima facie case and that the balance of convenience was also in its favour. The learned Trial Judge therefore granted the application for temporary injunction and restrained the Defendant no.1 from transferring, alienating, or creating third party right in respect of the suit property. Being aggrieved by the said order the Defendant No.1 has preferred this Appeal.

5. Shri. Rajesh Datar, the learned Counsel for the Defendant No.1 has submitted that the learned Trial Judge has allowed the application for temporary injunction without considering the basic principles governing grant of temporary injunction. He has submitted that the

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order is cryptic and reflects total non-application of mind. Hence, the order cannot be sustained.

6. Shri Bhushan Mandlik, the learned counsel for the Plaintiff, while supporting the impugned order, has submitted that the Plaintiff had a charge over the suit property. He has contended that the Defendant No.2-Bank has sold the suit property in auction despite being informed about the same. The learned counsel for the Plaintiff has further submitted that the sale deed dated 20th March, 2012 executed in favour of the Defendant No.1 is null and void. He submits that the Defendant No.1 had disclosed his intention to transfer the suit property. He contends that sale or transfer of the suit property would infringe upon the right of the Plaintiff to recover the legal dues. Transfer of property pendente lite will also lead to multiplicity of proceedings as such the learned Trial Judge was justified in exercising discretion in favour of the Plaintiff.

7. At the outset it may be mentioned that the interim relief under Order XXXIX Rule 1 and 2 of Civil Procedure Code is a discretionary relief and such discretion has to be exercised judiciously, keeping in

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mind the basic principles governing grant of injunction viz. existence of a prima facie case, balance of convenience and irreparable injury. In ***Kashi Math Samsthan & Anr vs Srimad Sudhindra Thirtha Swamy & Anr. 2010 (1) SCC 689*** the Apex Court has held that

"It is well settled that in order to obtain an order of injunction, the party who seeks for grant of such injunction has to prove that he has made out a prima facie case to go for trial, the balance of convenience is also in his favour and he will suffer irreparable loss and injury if injunction is not granted. But it is equally well settled that when a party fails to prove prima facie case to go for trial, question of considering the balance of convenience or irreparable loss and injury to the party concerned would not be material at all, that is to say, if that party fails to prove prima facie case to go for trial, it is not open to the Court to grant injunction in his favour even if, he has made out a case of balance of convenience being in his favour and would suffer irreparable loss and injury if no injunction order is granted."

8. In ***Dalpatkumar Vs. Pralhad Singh and Ors, AIR 1993 SC 276***

the Apex Court has held as under :-

"Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favour which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be

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established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit".

9. In the instant case, the learned trial Judge has not considered whether the plaintiff had established prima facie case, but has granted the application for injunction solely on the ground that the defendant no.1 had published a notice expressing his desire to sell the suit

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property. The learned trial Judge has vaguely observed that it was brought to his notice that some criminal proceedings are initiated against the defendant no.2. There are no averments in the plaint that the defendant no.2 had indulged in any illegal transactions in respect to the suit property. The learned Judge has granted the application for injunction in a most casual manner, without considering the relevant factors and the principles governing the grant of interim relief.

10. Now coming to the merits of the case, the Plaintiff claims that the defendant no.4 to 7 had created an equitable mortgage in its favour to secure the loan availed by the defendant no.3. The defendant no 3 to 7 failed to repay the loan. The Plaintiff therefore initiated proceedings under Maharashtra Co-operative Societies Act, wherein the Defendant Nos.3 to 7 were directed to pay to the Plaintiff jointly and severally a sum of Rs.1,05,33,505/- with interest @ of Rs.12% p.a. from 1.7.2010. The Plaintiff had averred that since the defendants had not paid the said amount, it was entitled to recover the same by sale of the said mortgaged property.

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11. The records prima facie reveal that the Defendant Nos.3 had also availed loan from the Defendant No.2. The Defendant Nos.4 to 7, who were the guarantors, had secured the loan by executing a deed of mortgage in favour of the Defendant No.2. The Defendant Nos.3 to 7 failed to repay the loan. Hence, the defendant no.2 had issued a notice of public auction. The plaintiff claims that vide letter dated 2.1.2010 it had objected to the public auction of the suit property. The Plaintiff contends that despite the said objection the Defendant No.2 proceeded with the auction and sold the suit property to the defendant no.1. The Plaintiff therefore filed a suit seeking a declaration that the sale deed dated 20th March, 2012 executed by the Defendant No.2 in favour of Defendant No.1 is null and void and not binding on him.

12. During the pendency of the suit the plaintiff filed an application for temporary injunction seeking to restrain the Defendant No.1 from alienating or transferring the suit property. It is not in dispute that the Defendant No.2 had sold the suit property to the defendant no.1 in a public auction held on 20th March 2012. The sale deed in respect of the suit property has been registered in favour of the Defendant No.1. As seen from the plaint the plaintiff has sought the relief of injunction

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against the defendant no.1 mainly on the ground that the auction conducted by the Defendant No.2-Bank was illegal. It is pertinent to note that the suit against the defendant no.2, which was a necessary party to determine the issue of the legality of the public auction, was already dismissed prior to filing of the application for injunction. Hence, the issue of the validity of auction could not be decided in the absence of the Defendant No.2. Consequently, the Defendant No.1, who is the auction purchaser of the suit property, could not be restrained from enjoying or exercising his rights in respect of the suit property without there being any prima facie material to prove that the auction was illegal or that the sale deed executed in favour of the Defendant No.1, was null and void. The plaintiff having failed to establish prima facie case, was not entitled for interim relief. The learned trial Judge was therefore not justified in granting the interim relief. The impugned order is perverse, illegal and is nothing but an arbitrary exercise of discretion.

13. Under the circumstances and in view of discussion supra the Appeal is allowed. The impugned order is hereby quashed and set aside.

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14. In view of disposal of Appeal, the Civil Application does not survive and hence stands disposed of.

(ANUJA PRABHUDESSAI, J.)