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**(2006) 12 BOM CK 0006**

**In the Bombay High Court**

**Case No :** Appeal Against Order No"s. 67 and 82 of 2006

Khamgaon Urban Co-op. Bank Ltd., Amravati

APPELLANT

Vs

Karunashankar Ramkishore Tiwari and others

RESPONDENT

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**Date of Decision :** 01-12-2006

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 9  
Registration Act, 1908 — Section 17, 49

**Citation :** (2006) 12 BOM CK 0006

**Hon'ble Judges :** A.H. Joshi, J

**Bench :** Single Bench

**Advocate :** Sanjeev P. Deshpande and B.M. Waranashiwar in Appeal Against Order No. 67 of 2006, R.T. Anthony, V.N. Kite and Ms. R.P. Shrivastava in Appeal Against Order No. 82 of 2006, for the Appellant; R.S. Vyas for respondent Nos. 1, 3, 4 and 5 in Appeal Against Order No. 67 of 2006, R.T. Anthony for respondent No. 2 and V. Kite in Appeal Against Order No. 67 of 2006, R.S. Vyas for respondent Nos. 1 to 4 in Appeal Against Order No. 82 of 2006, S.P. Deshpande for respondent No. 5 in Appeal Against Order No. 82 of 2006, for the Respondent

**Final Decision :** Dismissed

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**Judgement**

A.H. Joshi, J.—Appeal No. 67/2006 is filed by the defendant No. 5, while Appeal No. 82 of 2006 is filed by the defendant No. 1 in Special Civil Suit No. 253 of 2005.

2. It is a suit for specific performance of building constructed over the plot of 40" x 50" = 2000 sq.ft. (185.80 sq. mtrs.) along with construction standing thereon of about 1250 sq. ft. having RCC structure consisting of five shops, four rooms, three electric meters, latrine, bathroom, water tap connection, three electric meters etc. This suit property is owned by the defendant No. 1.

In this Judgment parties are referred to by their status in suit.

3. According to the plaintiff:-

(a) He had entered into an agreement of sale in favour of defendant Nos. 3 and 4 on 16-3-2000 and had executed a power of attorney in favour of the defendant No. 2 for transferring the suit property.

(b) Thereafter, the defendant No. 1 had with the consent of the defendants No. 3 and 4 and in presence of defendant No. 2, entered into an agreement of sale of entire suit property with the plaintiff for a total consideration of Rs. 14,00,000/- and the plaintiff paid advance of Rs. 12,50,000/- for which the defendant No. 1 executed Bharna Pavati dated 15-6-2002.

(c) He is in possession of the suit property on the basis of said agreement of sale and Bharna Pavti.

(d) The execution of the sale deed was deferred up to 18 months.

(e) In the morning of 19-5-2004, the Branch Manager of the defendant No. 5 Bank accompanied by the Recovery Officer, visited the suit site for seizure of the said property on the ground that it was mortgaged by the defendant No. 1 in favour of the Bank to secure the loan.

(f) The plaintiff then discovered that the defendant No. 1 Borrower had cheated the plaintiff.

(g) The defendant No. 2 who was power of attorney holder of the defendant No. 1 executed in favour of defendant No. 3, a sale deed of suit property on 17-9-2004 which was lodged for registration at Sr. No. 2106 instead of executing the sale deed in favour of the plaintiff, in order to defeat the claim of the plaintiff based on agreement of sale dated 10-4-2003.

(h) The plaintiff was ready to make the payment of balance consideration.

(i) The plaintiff, therefore, prayed in the suit the relief of decree of specific performance of the contract and in the alternative for refund of earnest money and for interest and damages. Though the defendant No. 5 Bank is put in the array of the defendants, no relief or decree is prayed for against the defendant No. 5.

4. In the said suit, the plaintiff filed an application for temporary injunction and prayed for relief which reads as follows:-

"a) to restrain the defendants, their servants, labourers or any persons on their behalf to create third party interest into the suit site or to make any attempts to disturb the peaceful possession over the suit site of the applicant, till the decision of the suit by way of granting the temporary injunction in favour of the applicant and further be pleased restrained the non-applicant No. 3/defendant No. 3 any other person claiming on behalf of herself alienating or creating any third party interest in the suit property on the alleged sale-deed dated 17-9-2004 registered at serial No. 2106 executed by defendant No. 2 in her favour and further be pleased restrained defendant No. 3 from making any attempts to disturb the peaceful possession over the suit property of the plaintiff/applicant

under the garb of the said alleged sale-deed till disposal of the main suit." (Quoted from page 53 of paper book of A.O. No. 67 of 2006)

5. The defendant No. 1 opposed the application for temporary injunction raising various objections and factual pleas, which are summarized as below:-

(a) According to defendant No. 1, he and defendant No. 2 jointly purchased premises at Kaveri Complex in the name of their respective wives. The defendant No. 2 stood guarantor for the vehicle purchased by defendant No. 1.

(b) The defendant No. 1 since 2002 was in financial crisis, defendant No. 2 had taken loan from Khamgaon Urban Co-operative Bank by mortgaging suit property. The defendant No. 2 had full knowledge that the defendant No. 1 executed power of attorney on 28-6-2002 for searching buyer and nothing more. The defendant No. 2 took two signature of defendant No. 1 on some papers for this purpose only.

(c) Since the attitude of defendant No. 2 was changed, the defendant No. 1 had cancelled said power of attorney on 19-7-2004.

(d) Being annoyed with cancellation of power of attorney defendant No. 2 started hatching conspiracy to grab the suit property.

(e) Defendant No. 1 is in possession of suit property except front room, and that the plaintiff is unauthorisedly asserting possession though not in legal possession.

(f) Admittedly alleged Bharna and Taba Pavati purported to be dated 14-4-2003 is not signed by defendant No. 1 but signed by plaintiff and defendant No. 2 only and that it does not bind the defendant No. 1.

(g) The market value of the suit property is not 14 lakhs which is represented in the alleged agreement of sale.

(h) The agreement of sale in question as is compulsorily registrable under the amended section 17 of Registration Act, and it is not admissible in evidence for want of registration, (i) In view of the plaintiff's possession, being illegal injunction could not be granted.

6. The application for temporary injunction was opposed by the defendant No. 5. The plea of the defendant No. 5 is recorded in reply Exh.59. The part of para No. 16 to 17 which constitutes summary of submissions of defendant No. 5 is as follows :

"15. The suit property is mortgaged to the defendant No. 5 Bank by the defendant No. 1 by way of equitable mortgage by deposit of title deeds on 3-4-2002 as a security for the cash credit limit of Rs. 30,00,000/-given to the partnership firm M/s Swastik Enterprises of which the defendant No. 1 is one of the partners. The fact about the mortgage is an admitted fact and not disputed by the plaintiff.

Plaintiff is not entitled to claim the specific performance for transfer of the

property from the defendant No. 1 by way of sale as the defendant No. 1 is no more absolute owner of the suit property. The plaintiff has not made any claim against the N. A. No. 5 in the plaint. The suit against the defendant No. 5 is not tenable and is liable to be dismissed. 16. The defendant is a secured creditor for the consideration paid. A huge amount of Rs. 44,90,157/- as on 5-12-2005 is due and payable by the defendant No. 1 and his partnership firm to the Bank. A huge amount of public money is at stake and blocked due to alleged illegal transactions between the plaintiff and the defendants No. 1 to 4. Moreover, the alleged documents such as Bhama Chithi and possession receipt dated 15-6-2005 executed by the defendant No. 1 in favour of the defendant No. 3 and 4 and alleged Bhama Chithi and possession receipt dated 10-4-2003 executed by the defendant No. 1 in favour of the plaintiff are such documents which are not known to law.

Such agreements where possession of the property is given are conveyances in the eye of the law and are compulsorily registrable and full stamp duty payable on conveyance is payable on it. In the absence of these legal requirements, the alleged documents, which are on inadequate stamp and are not registered, are not admissible in evidence and no relief of any kind can be granted on the basis of such documents. 17. There is no legal conveyance executed in favour of the plaintiff. Hence the plaintiff is not a bona fide purchaser unless a conveyance is executed in his favour. From the sequence of transactions in respect of the suit property it is clear that there is collusion between the plaintiff and the defendants No. 1 to 4 with an intention to defeat the claim of the defendant No. 5 Bank. The defendant No. 5 Bank has every right under the law to sell the mortgaged property for realization of its dues, which is public money, and filing such collusive suits cannot restrict the right of the Bank."

7. Insofar as the reply of the respondents No. 2 to 4 is concerned, it is seen that though their interest seems to be hostile to the defendant No. Vs interest, yet these defendants did not file separate reply, but filed pursis Exh.33 and 77 and adopted the defendant No. I's say to application for temporary injunction.

8. It is seen that the learned trial Court after hearing the parties, allowed the application Exh.5.

After taking brief resume of facts, the learned Trial Judge jumped upon the conclusion that a party in possession requires to be protected. Relying upon Madhukar R. Javle Vs. Baskar Ramnath Shibad, , Rania Vs. Jagdish Chandra, , the learned Trial Judge did not deal with the plea of the defendant No. 1 as well as defendant No. 5 and clamped injunction against all the defendants.

9. The order below Exh.5 is under challenge in this appeal.

10. Heard learned Advocate Mr. Sanjeev Deshpande for the defendant No. 5 the appellant in A.O. No. 67 of 2006 and learned Advocate Mr. R. K. Anthony for original defendant No. 1 the appellant in A. O. 82 of 2006, and learned Advocate Mr. R. S. Vyas for original plaintiff the contesting respondent No. 1 as well as

defendants No. 2 to 4.

11. The submissions of the learned Advocate Mr. Sanjeev Deshpande appearing for Bank need not be reiterated as those are based on the bar of suit created u/s 34 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. On facts, the learned Advocate Mr. Deshpande has urged that the transactions inter se the plaintiff and defendants are fraudulent, and no cognizance thereof can be taken. Execution of mortgage and the property being available for action under Securitization Act, are undisputed facts.

Learned Advocate Mr. Sanjeev Deshpande placed reliance on the following judgments:

(1) Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., , (2) 2000 Supreme Appeals Reporter (Civil) 478 (SC), State of Andhra Pradesh vs. Manjeti Laxmi Kantha Road (D) by L.Rs. and Ors., (3) Ishwar Dass Malhotra Vs. Dhanwant Singh and Others, , (4) Bisseswar Poddar Vs. Nabadwip Chandra Poddar and Another, , (5) Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others, , (6) 2005 (3) Civil LJ 553, Madhya Pradesh High Court, Hanuman Prasad Gupta vs. Jagya Bhan Gupta and another.

12. Learned Advocate Mr. Rajnish Vyas for the contesting respondent original plaintiff urged that

(a) the plaintiff is a bona fide purchaser for valuable consideration without notice, and is entitled to retain the possession of the suit property; and

(b) further that the suit for specific performance is not barred.

Learned Advocate Mr. Vyas placed reliance on the following judgments :

(i) 1983 Mh.L.J. 284, Venkat Dharmaji vs. Vishwanath, (ii) Smt. Sarladevi Bandawar Vs. Shailesh Namdeo, , (iii) Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others, , (iv) M. Kallappa Setty Vs. M.V. Lakshminarayana Rao, , (v) Karthiyayani Amma Vs. Govindan, , (vi) Ishwar Dass Malhotra Vs. Dhanwant Singh and Others, .

13. In the midst of hearing, this Court had directed the contesting parties to place on record market value of the suit property, which is brought on record by the plaintiff and defendant No. 5.

According to the plaintiff, the value of the suit property is Rs. 11,89,967/-, as per index fixed by State Government for levy of stamp duty for conveyance. As per the affidavit of defendant No. 5 the valuation given by Maharashtra Valuers and Consultants, the value of the suit property is Rs. 30,00,000/-.

The affidavit filed by the Bank giving valuation, is in the form of reply to plaintiffs affidavit about valuation. This affidavit which is at page 79 to 84 has not been challenged by the plaintiff. Other defendants have kept silence on the point of valuation.

14. This Court also desired to ascertain the wishes of the plaintiff as to how much amount would plaintiff deposit in Court or with bank in order to retain the possession, while the interest of the Bank could be protected in view of the vast margins of assessment of the market value of the suit property done by contesting parties.

This Court, therefore, called upon the plaintiff to state how much amount of money would the plaintiff deposit if the Court would decide to maintain the impugned order and protect plaintiff's possession. Learned Advocate Mr. Vyas submitted in reply to query by Court that as a condition for protecting the plaintiffs possession and maintaining injunction which is impugned in this appeal, the plaintiff was willing to deposit a sum of Rs. 2,00,000/- only.

15. After hearing the parties, the points on which the Court is called upon to address emerge as follows :

- (1) Is plaintiff's suit for decree of specific performance maintainable?
- (2) Has plaintiff made out a prima facie case for grant of relief of temporary injunction?
- (3) In whose favour the balance of convenience lies?
- (4) Does the plaintiff prove that he shall suffer irreparable loss if temporary injunction is not granted?
- (5) Does the order passed by the trial Court below Exh. 5 call for interference?

16. After giving peaceful consideration to rival submissions, this Court finds that insofar as the provisions of SRFAESI Act, 2002 are concerned, the jurisdiction of Civil Court is barred to the extent to which the powers have been vested in DRT or the appellate Tribunal constituted under RDB and FI Act, 1993 for entertaining an appeal u/s 17 and section 18 of the SRFAESI Act, 2002. This is clear from section 34 of the SRFAESI Act, 2002, which reads as follows:

"34. Civil Court not to have jurisdiction. - No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993(51 of 1993)."

17. The jurisdiction of the Debts Recovery Tribunal under the SRFAESI Act, 2002 is spelt out from sub-section (2) of section 17 of said Act, for hearing and deciding the appeal against the action taken by financial institution in relation to the security under sub-section (4) of section 13 thereof. The compass of jurisdiction of the Debts Recovery Tribunal u/s 17 is eloquent and can be gathered from sub-sections (2) and (3) thereof which sub-sections read as follows:

"17(1).....

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more as invalid and restore the possession of the secured assets to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the secured assets to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under subsection (4) of section 13."

18. It is thus, clear that any person who is aggrieved by the measures taken under sub-section (4) of section 13 by the financial institution can prefer an appeal, and the DRT as a forum of challenge will consider the question as to whether "any measures taken by the financial institution under SRFAESI 2002 and enforcement under sub-section (4) of section 13 of the SRFAESI Act," are in accordance with the provisions of SRFAESI Act and rules made thereunder.

19. The constitution of Debt Recovery Tribunal is not done by law by carving out the existing wide jurisdiction of Civil Court u/s 9 of Civil Procedure Code. The scheme of sub-section (4) of section 13 read with subsection (2) and (3) of section 17 of SRFAESI Act, is a complete code. By said SRFAESI Act, the rights of secured creditor, which were not uniform re-enacted and crystallized have been denovo and special powers have been vested in the secured creditor. Secured creditor's powers have been magnified with statutory authority and recognition for dealing with securities without intervention of Court and without waiting for crystallization of claim through adjudication and decree based thereon.

20. For judicial scrutiny of enforcement of those rights, and for creating any wrongs therein against affected persons, right of appeal with further right of appeal to DRAT is created. The compass and extent of jurisdiction has been defined under sub-section (2) and sub-section (3) of section 17 of the SRFAESI Act. Thus, in a challenge u/s 17 of SRFAESI Act, the action of Secured Creditor under sub-section (4) of section 13 of the SRFAESI Act, can be shown to be transgressing the limits and powers available to the secured creditor. Thus, the

DRT as a Tribunal under SRFAESI Act is a tribunal with specified jurisdiction, only.

21. In the aforesaid background, the question arises for consideration is as to whether a suit for specific performance of contract in relation to any property which is subject-matter of action under sub-section (4) of section 13 of the SRFAESI Act, would be barred by express provision contained in section 34 or by necessary implication.

22. In order to infer that the jurisdiction is barred by necessary implication, it would be necessary for the Court to arrive at a conclusion that a right which was erstwhile available which was a matter of jurisdiction of Civil Court u/s 9 of Civil Procedure Code, is either abolished or while the right is retained in law, a forum effectively equipped with the powers and jurisdiction which was formerly exercised by the Civil Court is created. In either of these eventualities, it will have to be held that where plaintiff seeks any restraint against any action taken by secured creditor under sub-section (4) of section 13 of said Act, the jurisdiction of the Civil Court scrutiny of such action on grounds and reasons whatsoever, is ousted.

23. In the present case, the situation that emerges as to facts is as follows:

The Bank has taken an action as a secured creditor against the borrower under sub-section (4) of section 13 of SRFAESI Act, and has given a notice for taking the possession which is dated 10-4-2003.

(ii) None amongst the borrower/guarantor of present plaintiff have preferred an appeal u/s 17(1) of SRFAESI Act, before the Debt Recovery Tribunal.

(iii) The notice issued by the Bank became absolute and action under subsection (4) of section 13.

(iv) The plaintiff who claims that the defendant No. 1 has committed a breach of contract has filed a Special Civil Suit No. 253 of 2004 on 27-10-2004.

(v) The above referred Special Civil Suit does not contain any prayer against the defendant No. 5 Bank secured creditor who is the appellant seeking injunction against action under sub-section (4) of section 13 of SRFAESI Act.

24. Further this Court finds that:-

(a) The market value of the suit property as claimed by defendant No. 5 is Rs. 30 lakhs.

(b) As per the story pleaded by the defendant No. 1, defendant No. 2 is a Broker by business. Power of attorney was executed in favour of the defendant No. 3.

(c) The agreement of sale was executed on financial compulsion and the amount disclosed in the agreement of sale is not paid.

(d) Though agreed consideration is shown by the plaintiff to be Rs. 14 lakhs and a sum of Rs. 12,50,000/- is said to be paid in cash i.e. not by cheque or Demand

Draft for any other mode of transfer through Banks.

(e) Grounds to delay the execution of sale deed if any are not coming forward explaining circumstances in which the possession is said to have been delivered on payment of Rs. 12,50,000/- which is almost 90% of the amount of consideration, and only against Bharna Pavti agreement.

(f) The conduct of the parties with such pleadings is contrary to the normal behaviour of parties in transactions of such nature.

(g) Plaintiff and defendants 1 to 4 have brought before this Court such stories that only conclusion that can be arrived is that all of them have hidden the truth from the Court and, therefore, plea of any one amongst them does not inspire confidence.

(h) Any claim for compensation is even not made against the defendants No. 3 and 4. The defendants No. 3 and 4 in whose favour sale deed is executed have not preferred any appeal before this Court.

(i) Though interest of defendant No. 1 is seen to be conflicting to that of defendant Nos. 2 to 4, amazingly enough, they chose to be represented through one Advocate as is seen from the record.

25. In a suit for specific performance where no relief is sought against a secured creditor, and where action under sub-section (4) of section 13 of said Act is not being hindered can always be seen to be maintainable. However, the prayer for specific performance of agreement to sell would get frustrated once the action under sub-section (4) of section 13 is complete, and reaches finality. Keeping this aspect in mind, suit for damages against the promiser would certainly continue with full right and life in it towards breach of promise. This Court finds even on what is shown by plaintiff the action under sub-section (4) of section 13 of the Act, was complete on the date of suit, and has become final for want of challenge before DRT. The prayer relief for decree for specific performance was frustrated much before the date when suit was filed.

Moreover, the plaint does not disclose any cause of action against bank. The plaintiff has also prayed for damages as alternate relief against the defendant No. 1. The secured creditor was, therefore, not a necessary party in such a suit, however, has been arrayed only in order to enable the plaintiff to secure an order of injunction against it. The plaintiff has even failed to pray cancellation of sale in favour of defendant Nos. 3 and 4. While suit for relief of decree for specific performance and alternatively for damages against owner is not seen barred by any express provision of SRFAESI Act, there are no grounds to array secured creditor as defendant in such suit. This Court is convinced that whole transaction as pleaded by parties who are purportedly adversary is not just gravely suspicious, but it points to falsity in the transaction claimed by the plaintiff on one hand and defendant No. 2 on the other hand.

26. There are no averments of any abetment of breach of contract against the

bank and, therefore, insofar the suit relief of decree for damages is concerned, as well as on what is averred and shown by the plaintiff Bank is a neither necessary nor a proper party.

Therefore, for the above reasons, this Court finds that prima facie plaintiffs suit, so far as the claim for specific performance is concerned, is not maintainable. In the result, this Court finds that the secured Creditor's right is superior and needs to be respected. Prima facie, therefore, this Court finds that neither suit for specific performance was maintainable against the Bank nor was bank a necessary party to suit for decree of said relief.

27. In view of the discussion contained in the foregoing paras, this Court has arrived at the conclusion that considering stronger statutory rights and powers vested in the secured creditor the defendant No. 5, the case made out by the plaintiff is so extremely weak and lame that his pleas are not strong enough to militate against the case of the defendant No. 5. All aspects namely prima facie good case, balance of convenience and irreparable loss are adverse to the plaintiff.

28. Points (1) to (4) framed by this Court i.e. against plaintiff and in favour of the defendant No. 5 are liable, and are hereby answered in negative.

29. The manner in which the learned Trial Judge has disregarded the question which related to the defence and pleadings raised by the defendant No. 5 directs this Court to a conclusion that the trial Court has in patent disregard of the settled principles of grant of temporary injunction decided the case on sole fact of plaintiff's possession which the trial Court ought never have done. In this case who is in physical possession was in fact, not a question in issue at all, since hidden but visible object was to injunct the secured creditor's action under subsection (4) of section 13 of SRFAESI Act. This Court sitting in appeal would certainly, scrutinize the legality and correctness of the order, however, the act of the trial Court exhibits total lack of advertence to crucial questions which were involved. It shall suffice to say that the learned Trial Judge shall be vigilant while deciding such matters in future.

30. This Court has, therefore, reached the conclusion that learned trial Court was in grave error of law in perceiving the rights and obligations of respective parties and discovering real object, and untruthful conduct of the plaintiff. The fact borne on record were so obvious and patent that plaintiffs story did not inspire confidence. Documents relied upon were not admissible in evidence in view of section 17 read with section 49 of Registration Act. The order of injunction passed by trial Court is wholly unjustified. The trial Court Judge was expected to perceive from the plaint and pleadings of the defendant No. 1 and conduct of defendant No. 2 to 4 that their conduct is not natural and the manner in which all transactions were done reveal nothing except that all of them are keen to defeat secured creditor's rights which have rather been crystallized and enacted/re-enacted by a special statute namely SRFAESI Act.

The order impugned, therefore, deserves to be set aside.

31. Assuming that the plaintiff is in possession of property and if he wants to protect his possession, considering that truth is withheld from the Court, no indulgence in his favour is necessary. Yet, nobody comes in the way of plaintiff if by paying the dues demanded by the Bank, the plaintiff can protect his possession.

32. In the result, this Court passes following order:-

(I) Appeal No. 67 of 2006 is allowed in following terms :-

(a) Order below Exh.5 passed by trial Court on 28-4-2006 in Special Civil Suit No. 253 of 2004 is hereby set aside, and Exh.5 in Special Civil Suit No. 253 of 2005 is hereby dismissed.

(b) Appellant defendant No. 5 is awarded quantified costs of Rs. 10,000/-which it can recover from the plaintiff.

(II) Though order impugned is set aside, it is in appeal by defendant No. 5. The defendant No. 1 does not deserve any indulgence. Appeal No. 82 of 2006 is, therefore, dismissed with costs, which are quantified to Rs. 5000/- is favour of defendant No. 5 against appellant therein i.e. the defendant No. 1.