

(2009) 11 BOM CK 0076

In the Bombay High Court

Case No : Appeal From Order No. 81 of 2008

Mannalal Agrawal through Power of Attorney Holder Jagdish Joshi APPELLANT

Vs

Upendrakumar Saharia, Devendrakumar Shaharia and Umesh Saharia RESPONDENT

Date of Decision : 20-11-2009

Acts Referred:

Transfer of Property Act, 1882 — Section 52

Citation : (2009) 11 BOM CK 0076

Hon'ble Judges : R.K. Deshpande, J

Bench : Single Bench

Advocate : A.S. Bajaj, for the Appellant; S.V. Gangapurwala and R.N. Dhorde and N.K. Chaudhary for Respondent Nos. 2 and 3, for the Respondent

Judgement

R.K. Deshpande, J.—This appeal is preferred by the original plaintiff, who has filed the special civil suit No. 483/2007 against the respondents, who are the original defendants, for specific performance of contract and possession of the suit land. The suit land admeasures 4 Acres and 20 Gunthas which is the total 1/4th share of each of the respondents-defendants in Gat No. 17 which admeasures total 5 Acres and 29 Gunthas situated at Nakshatrawadi, Aurangabad. Along with this special civil suit No. 483/2007, the plaintiff filed an application under Order 39 Rule 1 and 2 of the CPC for grant of injunction restraining the respondents-defendants and/or anybody claiming through them, by an order of injunction, from alienating by way of sell and or creating third party interest over the suit property i.e. part of the Gat No. 17 situated at Nakshatrawadi, Tq. & Dist. Aurangabad to the extent of 4 acre 20 gunthas, till the disposal of the suit. The respondents-defendants filed their written statement and reply to the application under Order 39 Rule 1 and 2 of the Civil Procedure Code. The learned II Joint Civil Judge, Senior Division, Aurangabad, who considered the application for temporary injunction (Exhibit-5), rejected the same by his order dated 04.07.2008. Against this, the present appeal has been

preferred.

2. The Trial Court has recorded a finding that there was no agreement in writing and decree is claimed on the basis of the oral agreement of sale and after going through the submissions and evidence on record, did not find prima facie case, in favour of the plaintiff. It has been further observed that whether oral agreement took place or not, is a matter of evidence and in these circumstances, the balance of convenience does not lie in favour of the plaintiff and no inconvenience shall be caused to the plaintiff, if injunction is refused.

3. This Court, by speaking order dated 08.10.2008, issued notice to the respondent No. 1, which was made returnable on 20th November, 2008 and considering the submissions advanced by the parties and alleged transactions of 1st September, 2008, the parties were directed to maintain statusquo regarding alienation of the suit property till 25th November, 2008. The parties were granted liberty to file additional documents on record. The notices on behalf of the respondent Nos. 2 and 3 were waived. Thereafter, the interim order granted by this Court, was continued from time to time. The parties agreed that the matter may be disposed of finally at the stage of admission.

4. Heard Shri. A.S. Bajaj, the learned Counsel for the appellant. Shri. S.V. Gangapurwala, the learned Counsel appearing for the respondent No. 1 and Shri. R.N. Dhorde along with Shri. N.K. Chaudhary, the learned Counsel appearing for the respondent Nos. 2 and 3. Admit. Heard, by consent, finally.

5. The appellant-plaintiff filed a suit for specific performance of contract based upon the oral agreement. It is alleged that the suit property consists of 4 acres and 20 gunthas, which total of 1/4th share of each of the defendants in land gat No. 17 admeasuring totally 5 acres and 29 gunthas situated at Nakshtrowadi, Aurangabad. The plaintiff has alleged in plaint that one Mr. Sadashiv Bhaurao Patil and another Mr. Balaprasad Hiralal Pandit, both residents of Aurangabad approached the plaintiff, in the month of first week of January, 2003 and expressed that the defendants are desirous to sell the suit land. The plaintiff had shown his willingness to purchase the property and therefore, the aforesaid persons handed over the plaintiff, the title documents of the suit land. It is further alleged in the plaint that Shri. Sadashiv Patil informed the plaintiff that the defendants have authorised him to talk with the prospective purchaser about the sale of the said property and also with regard to the consideration etc. Shri. Patil also assured to arrange for talk of the plaintiff with the defendants in respect of sale price of the land.

6. It is further averred in plaint that there was talk with the defendant No. 1 Upendra from time to time, as he represented that he had an authority to negotiate and finalise deal on behalf of other defendants. It is also averred that even other defendants on phone, confirmed the authority given to the defendant Upendra. It is alleged that defendant Upendra further informed that Smt. Vimaladevi, the mother of the defendants died on 01.01.1996 as such the

defendants represented that they are ready to sale their share i.e. 4 acres 20 gunthas considering the share as 1/4th each. It is alleged that Mr. Upendra fixed the sale consideration as Rs. 69,87,500/ and it was agreed between the plaintiff and the defendants that towards earnest money, an amount of Rs. 1,00,000/ is to be paid and accordingly, the plaintiff on 22.02.2003 purchased the three Demand Drafts from State Bank of India, out of which two were of Rs. 30,000/ each and one of Rs. 40,000/. The two Demand Drafts of Rs. 30,000/ were in the name of defendant Nos. 3 and 2 respectively whereas, the demand draft of Rs. 40,000/ was in the name of defendant No. 1. It is further alleged that the said demand drafts were sent at Channai by courier, according to the instruction of the defendant No. 1, Upendra. It is further alleged that after entering into agreement, it was interalia agreed in between the parties as under:

a) The plaintiff to pay Rs. 69,87,500/ (Rs. Sixty Nine eighty seven thousand five hundred) inclusive of earnest amount of Rs. 1.00 Lac.

b) the defendants to keep the plaintiff indemnified that the suit land agreed to be transferred in favour of the plaintiff is free, clear and marketable.

c) The plaintiff to pay 25% of the balance sale price of Rs. 68,87,500/ (Rupees sixty eight lacs eighty seven thousand five hundred) only to the defendants as and when he will visit Mumbai probably in April 2003 and the remaining balance amount on the day of execution of conveyance deed.

d) The defendants to put the plaintiff in vacant and peaceful possession of the suit land on the day of execution of such sale deed.

e) The defendants to execute and sign all other necessary documents, applications to effectual transfer the suit land in favour of the plaintiff.

7. The plaintiff further alleged that the defendant No. 1 visited Mumbai and at that time disclosed that there is dispute as regards to the share of the mother, as she has executed will in favour of two sons and this is not acceptable to Surendrakumar, who has initiated proceedings in that regard. It is further alleged that at that time though the defendant No. 1 promised, he could not produce the power of attorney of other two defendants and the plaintiff insisted that 25% amount will be paid only thereafter. It is further averred that the defendant No. 1 thereafter sent the copy of the application made to the Talathi, Aurangabad dated 15.04.2004, for deleting the name of the deceased mother and other two defendants have expressed the view, that there are chances of settling the dispute with brother Surendra and as such to wait till then for execution of sale deed. It is averred that the plaintiff has expressed his willingness to make the balance amount of consideration, to get the sale deed executed. It is further alleged that that the plaintiff came across the paper notice in daily news paper in Dainik Lokmat dated 29.07.2007, about the sale of the suit property, which was immediately replied on 03.08.2007, through Advocate, pointing out that the agreement to sale was entered into between the plaintiff and the defendants and no one should deal with the transaction of the suit land. It is further alleged that

a public notice was given in Dainik Lokmat dated 12.08.2007 informing the public at large about the transactions between the plaintiff and the defendants. The plaintiff alleged that though he is ready and willing to perform his part of contract, the defendants have refused to execute the sale deed. The cause of action is shown to have arisen in 1st week of January, 2003 and on 22.02.2003, when the agreement was concluded and the plaintiff paid an amount of Rs. 1,00,000/-, as an earnest money. It is further alleged that finally, the cause of action arose on 29.07.2007, when the defendants showed their intention to sell the property and refused to execute the sale deed.

8. In the background of aforesaid facts, the plaintiff alleged in the application under Order 39 Rule 1 and 2 of CPC that the defendants are likely to create third party interest in the suit property, to defeat the right of the plaintiff. It is alleged that he has made out a strong prima facie case, the balance of convenience lies in favour of the plaintiff and if the injunction restraining the defendants from creating third party interest or alienating the suit property is not granted, the plaintiff would be put to suffer an irreparable loss and hence, temporary injunction was asked for on Exhibit-5 Application, restraining the defendants from creating third party interest or alienating the suit property pending the decision of the suit.

9. The defendant Nos. 2 and 3 have by filing their written statement denied all the allegations made in the plaint. It is submitted that the allegations are all vague and unspecific and the suit is liable to be dismissed on that sole ground. It is further the stand taken that the suit is barred by limitation. The defendants have denied to have given any authority to the defendant No. 1, to negotiate with the plaintiff. They have also denied that they had any talk with the defendant No. 1 on phone. They have denied any connection with Mr. Sadashiv Patil and Balaprasad Pandit. They have denied the terms and conditions mentioned in the plaint and have also denied the knowledge of alleged talks, between the defendant No. 1 and plaintiff. Apart from the stand, that oral contract of specific performance is not enforceable, it is also the stand that it was not a concluded contract. They have denied the alleged authority given to defendant No. 1, to deal with the plaintiff or for that matter with any one else, in respect of sale of the suit property. They have specifically stated that they have neither personally entered into any agreement with the plaintiff on 22.02.2003 nor have authorised anybody to represent them, on their behalf, to enter into an agreement of sale with the plaintiff. They have stated that there is no prima facie case and the balance of convenience does not lie in favour of the plaintiff and if the injunction is refused, no irreparable loss shall be caused to the plaintiff. Apart from that, other objections are also raised regarding nonjoinder of necessary party and the frivolous nature of the suit.

10. In order to consider the question of grant of temporary injunction under Order 39 Rule 1 and 2, it is well settled that three tests are required to be applied, viz. (i) whether the plaintiff has made out prima facie case, (ii) whether

the balance of convenience lies in favour of the plaintiff and (iii) if the injunction is refused, whether the plaintiff is likely to suffer an irreparable loss. These principles are restated by the Apex Court in its decision reported in Dalpat Kumar and Another Vs. Prahlad Singh and Others, . The para 5 of the said judgment which is relevant is reproduced below:

5. 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 infringement 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 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 noninterference 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 which 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.

11. Similarly, the Apex Court in its another decision reported in Seema Arshad Zaheer and Others Vs. Municipal Corpn. of Greater Mumbai and Others, has observed in para 30 of the Judgment as under:

30. The discretion of the court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff: (i) existence of a prima facie case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction; (ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's rights or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and (iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct

is free from blame and he approaches the court with clean hands.

Keeping in mind, the aforesaid law laid down by Apex Court, the facts are required to be judged.

12. In some cases, making out a prima facie case or failing to make out a prima facie case may tilt the balance of convenience, either in favour of the plaintiff or in favour of the defendants. It is a discretionary relief. Similarly, grant of injunction or its refusal, depends upon the nature of the case, the facts and circumstances of the case and the nature of injunction asked for. Even in cases where the nature of injunction asked for, is the same, the considerations may differ. For instance, an order of injunction restraining the defendants from creating third party interest can be claimed in a suit for partition or in a suit based upon title or in a suit for specific performance of contract or in a suit for declaration that the alienations are void etc. However, whether prima facie case is made out or not, to protect the rights of plaintiff, by grant of relief of temporary injunction, depends upon the nature of suit, the facts pleaded and the circumstances of case, including the conduct of plaintiff and his bonafides.

13. In the instant case, it is a suit for specific performance of contract based upon the oral agreement to sale dated 22.02.2003 of the suit land. It can not be disputed that even oral agreement to sale of immovable property, can be specifically enforced. However, assessment of prima facie case, in a suit for specific performance of contract, based upon the oral agreement, has to be different than such a suit, based upon the written agreement. In a suit based upon the written agreement, the agreement placed on record and its contents, become significant and the same can be read along with the averments made in the plaint. The written agreement placed on record, discloses the names of parties, their place of residence, the place of agreement, consideration, the description of the property and other terms and conditions of contract, which the parties have entered into. Normally, in such a suit, what is required to be seen, is the interpretation of the terms of contract and compliance of it. It becomes easier for the Court to reduce the controversial position. This is not the advantage, in case of suit based upon the oral agreement. The court is at loss to know the prima facie, undisputed factual position, which can only be ascertained, by reading the averments made in the plaint and the stand taken in written statement. In a suit for specific performance of contract based upon the oral agreement, the averments made in the plaint carry great weight and significance in ascertaining even a prima facie case. The averments are required to be strictly construed and heavy burden lies upon the plaintiff to establish the consensus ad idem. The Court has to proceed cautiously and read the averments minutely, to understand the exact nature of case, to find out, whether prima facie case is made out or not. The averments in the plaint, must inspire the confidence of the court, as to credibility of the plaintiff and truthfulness of the averments. The inconsistency in the averments made in the plaint, lack of material facts and particulars or vagueness and unspecific averments in plaint etc, would be the

instances, which shall be considered against the plaintiff, while judging the prima facie case. The very first thing to find out the prima facie case is whether, the plaint averments contain the material facts and particulars establishing the complete chain of events disclosing the cause of action. It has to be borne in mind that even the absence of single material fact, entails the consequences of rejection of plaint, leave apart the question of making out prima facie case. Even if the material facts are pleaded and material particulars are absent or if the averments in the plaint are inconsistent, it can be said that the plaint averments do not make out a prima facie case.

14. Now, turning to the averments made in the plaint, what is not in dispute in the present case, is that the suit property is located at Aurangabad. The plaintiff resides at Juhu, Vile Parle (West), Mumbai and the suit has been filed at Aurangabad, through general power of attorney one Shri. Jagdish Dwarkadas Joshi, the resident of Aurangabad. The defendant No. 1 Upendrakumar S/o Sowarmal Saharia is shown to be resident of Wood Street, Calcutta-16 (W.B.). The defendant No. 2 Devendrakumar S/o Sowarmal Saharia is shown to be the resident of Boat Club, Chennai (W.B.). The third defendant Umeshchandra S/o Sowarmal Saharia is shown to be the resident "as above". Thus, although the property is located at Aurangabad, none of the parties resides at Aurangabad, including the plaintiff. That apart, none of the parties are residing at one place, the plaintiff is at Mumbai, defendant No. 1 at Calcutta, defendant No. 2 is at Chennai and the place of residence of defendant No. 3 is not clear (as it is shown "as above"). It is not disputed that the suit property is owned by defendants, who are having 1/4th share in it and the remaining 1/4th share belonged to their mother Smt. Vimaladevi, who died on 01.01.1996.

15. In the light of aforesaid undisputed factual position, the absence of specific averments is required to be considered. There is no averments in the plaint that the alleged contract was entered into between the plaintiff and/or his power of attorney holder directly with all the defendants. It is also not the case that any of the defendants or all of them informed the plaintiff or the defendant No. 1 that Shri. Patil or Shri. Pandit were authorised to settle a deal for sale of property and consideration, for and on behalf of all of the defendants or any one of them. There is no specific averment that the terms and conditions of the alleged contract dated 22.02.2003 were settled between the plaintiff and/or his power of attorney holder, with each one of the defendants directly.

16. Now, vagueness and inconsistency in the averment is to be considered. The suit is filed through power of attorney holder and when the plaintiff alleges that he had talk either with Mr. Sadashiv Bhaurao Patil and Mr. Balaprasad Hiralal Pandit, it is not understood as to whether he intends to relate such talks to himself or to his power of attorney holder. So called authority of Mr. Sadashiv Bhaurao Patil and Mr. Balaprasad Hiralal Pandit and that of the defendant No. 1, to enter into an agreement of sale, to settle the terms and conditions of the contract and receive consideration of it, in part or in full, for and on behalf of all

the defendants has been denied and there is no document placed on record from which, it can be inferred that such an authority was conferred upon the said persons, by all the defendants.

17. Now, coming to the averments made in para No. 2 of the plaint, it is averred that Mr. Sadashiv Bhaurao Patil and Balaprasad Hiralal Pandit, resident of Aurangabad approached to the plaintiff in 1st week of January, 2003 and gave information about the suit land. It is not clear as to whether these persons have approached general power attorney holder of the plaintiff or to the plaintiff himself, who resides at Mumbai. The place, the name of the person to whom the said persons approached; whether to plaintiff or his power of attorney holder, is conspicuously absent. In para No. 3, it is averred that Mr. Patil informed the plaintiff that the defendants have authorised him to talk with prospective purchasers, about the sale of the said property and in regard to the consideration etc. Shri. Patil is from Aurangabad, the defendants are residing at Calcutta and Chennai, the other places. The averments fail to establish the link between Shri. Patil and the defendants, either on telephone or personally, leave apart the question of even prima facie proof of authority of Shri. Patil, to project himself as an authoritative agent. In para No. 4 of the plaint, it is averred that there was talk with the defendant No. 1 Upendra from time to time, as he had authority to negotiate and finalise the deed on behalf of other defendants. This averment fails to make out a link of the alleged talk, either with the plaintiff or his power of attorney holder or with the aforesaid agents, because of vagueness of averment. The date and time of the alleged talk, is also absent. It is further averred that even other defendants on phone confirmed the authority given to the defendant-Upendra. Again this averment is also short to establish the link of alleged confirmation to the plaintiff, his power of attorney holder or the said agents. The date and time of such confirmation, the phone numbers etc. are all the material particulars which are absent. It is further alleged that the other defendants represented that they are ready to sale their share i.e. 4 acres 20 gunthas considering the share as 1/4th each. To whom such representation was made, when was it made, whether on telephone or personally, all these material facts and particulars are absent. It is further averred that Mr. Upendrakumar fixed the sale consideration as Rs. 69,87,500/, however it is not known whether the alleged consideration was only for sale of share of Upendra or for all and whether it was with the consent, knowledge and authority of other defendants.

18. In para No. 5 of the plaint, it is alleged that it was also further agreed in between the plaintiff and defendants that towards the earnest amount, an amount of Rs. 1,00,000/ is to be paid and accordingly, the plaintiff on 22.02.2003, purchased three Demand Drafts from the State Bank of India. The numbers of demand drafts are given, the dates of each of Demand draft is shown as 22.02.2003 and the amount of demand drafts in the name of defendant Nos. 2 and 3 is shown as Rs. 30,000/ whereas in the name of defendant No. 1, it is shown as Rs. 40,000/. When the case of the plaintiff is that the entire talks were with the defendant No. 1 Upendra, there was no question of agreement between

the plaintiff and other defendants to settle the earnest money at Rs. 1,00,000/, as alleged in para No. 5. In absence of there being any specific averments in the plaint that the defendant No. 1 after consulting the other defendants settled the earnest money of Rs. 1,00,000/, there is total failure to establish the link. In para No. 6 of the plaint, it is averred that the demand drafts were sent at Chennai by currier, according the instructions of the defendant No. 1 Upendra. As pointed out earlier, the defendant No. 1 Upendra resides at Calcutta and the defendant No. 2 resides at Chennai. The demand drafts are in the name of all there persons. Undisputedly, there is no averment in the plaint that, demand drafts were encashed by the any or all of the defendant. As a matter of act, those are not encashed.

19. In para No. 9 of the plaint it is averred that the defendant No. 1 visited Mumbai and at that time disclosed that there is dispute as regards to the share of the mother, as she has executed will in favour of two sons and this is not acceptable to Surendrakumar who has initiated the proceedings in that regard. The date and time of alleged visit of the defendant No. 1 is not stated. Apparently, the alleged agreement to sale was not in respect of the share of mother but in regard to the 1/4th share of each of the defendant. Thus, there appears to be inconsistency on material aspect in the plaint. It is further averred that at that time though promised, he could not produce the power of attorney of other two defendants. It means that without power of attorney, the defendant No. 1 was not authorised to deal with the property. It is further averred that the plaintiff insisted that an amount of Rs. 25% will be paid only thereafter. It means that the plaintiff was not ready and willing to pay the balance consideration to the extent of 25% without production of power of attorney of the two defendants.

20. Although, it is averred in the plaint that an agreement was entered into between the plaintiff and the defendants, on 22.02.2003, on which date, three demand drafts dated 22.02.2003 were taken out, infact the xerox copies of the demand drafts produced on record indicate the date as 27.01.2003. Although, it is averred that the demand drafts were sent by currier at Channai on the instructions of the defendant No. 1 Upendra, the currier receipt produced on record shows the address of the defendant No. 2 Devendrakumar as Chennai, without any further details. On the 2nd envelope, even Chennai has not been written. The date of seal of currier, appears to be 30.01.2003. Thus, the very basis, which is material fact, that on 22.02.2003, the agreement was entered into and terms and conditions were settled, is washed out by the documents particularly, the demand drafts which are dated 27.01.2003, placed on record. The plaintiff seems to have taken out an application for amendment of plaint for alteration of the dates of demand drafts, which seems to have been allowed, however, the amendment proposed for alteration of date of entering into agreement, which is 22.02.2003, has been rejected. The position is that if the agreement was entered into on 22.02.2003, there was no question of sending demand drafts dated 27.01.2003, which seems to have been sent on 30.01.2003.

21. Thus, from the scanning of the entire averments made in the plaint, it is apparent that there is absence of some material facts as well as material particulars. The averments in the plaint are totally vague and unspecific. There is total inconsistency in the case put forth in the plaint, if looked into, in the light of documents placed on record. The undisputed factual position pointed out earlier, particularly the fact that none of the parties are the residents of one place, the quantum of amount of earnest money offered, the price of property etc. makes the complete case improbable to succeed. The averments made in the plaint, do not inspire the confidence, either as to the credibility of the plaintiff or as to the truthfulness of the said averments. The plaintiff has failed to establish a complete chain of events by pleading material facts and particulars. Prima facie, there is no concluded contract, which is established. Thus, in my opinion, the plaintiff has failed to make out prima facie case.

22. Shri. Bajaj, the learned Counsel appearing for the appellant-plaintiff has pointed out that the defendant No. 1 failed to file his written statement and has not replied to the application under Order 39 Rule 1 and 2 of the Civil Procedure Code. It is his contention that the averments are made in the plaint against the defendant No. 1, who has chosen to remain absent though served, it should be presumed that the said averments are not denied by the defendant No. 1. It is now well settled that the plaintiff has to stand on his own legs. Leave apart the fact that no documents are placed on record even to indirectly support the case of the plaintiff, the averments made in the plaint itself, have failed to make out a prima facie case. In view of this non filing of reply by the defendant, loses its significance. Shri. Bajaj, the learned Counsel for the appellant-plaintiff has further argued that the defendants have filed an application under Order 7 Rule 11 of the Civil Procedure Code, for dismissal of the plaint on the ground that the plaint has failed to make out a cause of action, for filing the instant suit. Shri. Bajaj submitted that such application was rejected by the Trial Court, as a result it can not be said that the plaint averments failed to give rise to cause of action. It is true that Exhibit-14 was the application filed under Order 7 Rule 11 of the Civil Procedure Code, for rejection of plaint. The order dated 04.07.2008 rejecting the application is placed on record. There is no discussion about the failure to disclose the cause of action in order. Be that as it may, the exercise in the present order is only for the purpose of ascertaining the prima facie case and not for the purpose of finding out whether the averments made in the plaint disclose the cause of action or not. Hence, it is made clear that any observations in this order shall not come in the way of the appellant, in proceeding with the suit to establish his case in accordance with law.

23. Shri. Bajaj, the learned Counsel appearing for the appellant-plaintiff has pointed out the sale deeds placed on record, by which the property in question was purchased, to show that it was the defendant No. 1 Upendrakumar, who acted as power of attorney holder, for and on behalf of other defendants. He has further relied upon the copy of application dated 15.04.2004 said to have been forwarded by Upendrakumar addressed to the Talathi, Aurangabad, for deleting

the name of Smt. Vimaladevi. However, none of these documents, even if taken to be at their face value, establish or prima facie show that the defendant No. 1, in any way, was authorised to enter into the transaction in question. Shri. Bajaj has further relied upon the fact that the plaintiff was in possession of all the documents relating to the title of the suit property, which were delivered to him by the said agents namely; Shri. Patil and Shri. Pandit, however, in my opinion, these documents prima facie, have no bearing on the controversy involved in the case nor plaintiff's possession of said document establish the contract. The plaintiff has referred to reply dated 03.08.2007 sent to the public notice through his Advocate Shri. Dhananjay R. Kore, however, the copy of the same is not produced on record. Shri. Bajaj further relied upon the affidavit of broker Shri. Patil, which also indicate the date of agreement, as 22.02.2003. There is no privity of contract established, even on the basis of the averments made in the plaint. The contentions therefore raised by Shri. Bajaj can not be accepted.

24. The next question is, regarding the balance of convenience and irreparable loss. The application for injunction at Exhibit-5 claiming relief that the respondents and/or anybody claiming through them be restrained, by an order of temporary injunction from alienating by way of sell and/or creating any third party interest over the suit property i.e. part of the land gat No. 17 situated at Nakshatrawadi, Tq. & Dist. Aurangabad to the extent of 4 acre 20 gunthas till the disposal of the suit. Once it is found that there is no prima facie case made out by the plaintiff then if the injunction is refused, the consequences would be that the defendants may create third party interest by alienating the suit property. Such an act on the part of the defendants would always be hit by doctrine of Lispendens u/s 52 of the Transfer of Property Act. There is no injunction claimed against the defendants restraining them from changing the nature of the suit property. In view of all these facts, the balance of convenience does not lie in favour of the plaintiff and if the injunction is refused, the plaintiff shall not be put to suffer an irreparable loss. As against this, the prices of land are on rise. The plaintiff would ultimately be benefited, if he succeeds. At any rate, the Trial Court has discretion to grant liquidated damages, if so claimed in a suit as an alternate relief for the relief of specific performance of contract. On the contrary, when there is no prima facie case, the balance of convenience shall tilt in favour of defendants and if injunction is granted, the defendants would suffer an irreparable loss. In view of this, there is no substance in the instant Appeal from Order.

25. Shri. Bajaj has relied upon the decision of the Apex Court reported in Maharwal Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass, . It was the case where civil suit was filed for possession of the suit property with an application under Order 39 Rule 1 and 2 of the Civil Procedure Code, seeking injunction restraining the respondents from alienating the suit property and putting up any construction thereon. The Trial Court granted an order of temporary injunction, however District Court allowed the appeal and rejected the claim for injunction on the ground that the alienation made, if any, will be subject to the law of

Lispendens and construction, if any, put by the respondents will have to be removed, it is at his own risk and cost in the event of the suit being decreed. The High Court dismissed the revision petition, by recording certain statements that the alienation shall be at the risk of defendants. This order was subject matter of challenge before the Apex Court. The Apex Court allowed the appeal and set aside the orders passed by the Lower Appellate Court as well as the High Court and restored the order of injunction passed by the Trial Court. In para 10 of the said Judgment, the Apex Court observed as under:

10 Be that as it may, Mr. Sachar is right in contending that unless and until a case of irreparable loss or damage is made out by a party to the suit, the court should not permit the nature of the property being changed which also includes alienation or transfer of the property which may lead to loss or damage being caused to the party who may ultimately succeed and may further lead to multiplicity of proceedings. In the instant case no such case of irreparable loss is made out expect contending that the legal proceedings are likely to take a long time, therefore, the respondent should be permitted to put the scheduled property to better use. We do not think in the facts and circumstances of this case, the lower appellate court and the High Court were justified in permitting the respondent to change the nature of the property by putting up construction as also by permitting the alienation of the property, whatever may be the conditions on which the same is done. In the event of the appellant's claim being found baseless ultimately, it is always open to the respondent to claim damages or, in an appropriate case, the court may itself award damages for the loss suffered, if any, in this regard. Since the facts of this case did not make out any extraordinary ground for permitting the respondent to put up construction and alienate the same, we think both the courts below, namely, the lower appellate court and the High Court erred in making the impugned orders. The said orders are set aside and the order of the trial court is restored.

Shri. Bajaj relied upon the aforesaid portion to urge that the application of doctrine of Lispendens is not the only consideration to reject the application for grant of injunction. The aforesaid judgment of the Apex Court can be distinguished on several aspects. It was the suit for possession but it is not clear as to whether, it was based upon the title to the property or on the basis of specific performance of contract. The question of prima facie case was neither gone into in an appeal nor in the revision by the High Court. There was no case of an irreparable loss made out by the respondents. The order was passed in the facts and circumstances of the case. Thus, for all these reasons, the judgment does not apply to the facts of the present case. In this case, I have held that plaintiff has failed to make out prima facie case. The balance of convenience, tilts in favour of defendants and if an injunction, as prayed for is not granted, then the plaintiff would not suffer an irreparable loss.

26. Shri. Bajaj, the learned Counsel appearing for the appellant-plaintiff submits that the Trial Court has failed to record the reasons on all the three aspects

namely; (i) prima facie case, (ii) balance of convenience and (iii) irreparable loss. The Trial Court has however observed in order impugned, that after going through the submissions and evidence on record, the plaintiff has failed to make out a prima facie case. It has also considered the question of balance of convenience and irreparable loss. May be that detailed reasons are not recorded, the fact remains that the plaintiff has failed to make out a prima facie case, balance of convenience does not lie in favour of the plaintiff and if injunction is refused, the plaintiff would not suffer any loss, much less an irreparable loss.

27. In the result, the Appeal from Order is dismissed. No order as to costs.

At this stage, Bajaj, the learned Counsel for the appellant prays for continuation of status quo order for a period of six weeks. The learned Counsel for respondents No. 2 and 3 opposes the prayer for continuation of status quo. He states that when the appeal itself is dismissed, the appellants are not entitled to further protection, as is sought. After considering the rival submissions, I am of the view that, if the interim order is continued for a period of four weeks, no prejudice will be caused to the respondents as the status quo order passed has been operative. In view of this, status quo shall continue for a period of four weeks from today after expiry of which, the status quo shall stand automatically vacated.