
(2008) 05 CAL CK 0025

In the Calcutta High Court

Case No : F.M.A.T. No. 127 of 2008 and C.A.N. 1002 of 2008

Midnight Merchants Private Limited and Others

APPELLANT

Vs

Julien Educational Trust and Others

RESPONDENT

Date of Decision : 15-05-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151
Contract Act, 1872 — Section 2, 25, 3
Criminal Procedure Code, 1973 (CrPC) — Section 144(2)
Specific Relief Act, 1963 — Section 19(b)

Citation : (2009) 3 CALLT 456 : (2010) 6 RCR(Civil) 747

Hon'ble Judges : Subhro Kamal Mukherjee, J; Kalidas Mukherjee, J

Bench : Division Bench

Advocate : Saktinath Mukherjee, Surajit Nath Mitra, Arindam Mukherjee and Binoy Kumar Jain, for the Appellant; Biswajit Basu, Tarun Kumar Banerjee and Susenjit Banik for Respondent No. 1 and Syama Prasanna Roychowdhury, Jahar Lal Dey, Debasish Roy and Niloy Sengupta for Respondent Nos. 2 to 9, for the Respondent

Final Decision : Allowed

Judgement

Kalidas Mukherjee, J.—This is an appeal assailing the order No. 46 dated 16.01.2008 passed by the learned Civil Judge (Senior Division), Fourth Court, Alipore in T.S. No. 10 of 2007, whereby the learned court below allowed the application for temporary injunction in a suit for specific performance of contract, upon hearing both sides, and restrained the added defendants No. 9 to 11, that is, the subsequent purchasers, from selling, encumbering and/or changing the nature and character of the suit property in any manner whatsoever till the disposal of the suit.

2. Both the application for stay bearing CAN No. 1002 of 2008 and the appeal have been heard together by consent of the parties.

3. The plaintiff, Julien Educational Trust, the respondent No. 1, instituted a suit

before the learned court below, inter alia, for specific performance of agreement for sale valued at Rs. 4,15,00,000/- (Rupees four crore fifteen lakh) only against the owners, that is, the defendant Nos. 1 to 8/the respondent Nos. 2 to 9 herein. In the said suit, an application under Order 39, Rules 1 and 2 read with Section 151 of the CPC was filed by the plaintiff contending, inter alia, that the defendant Nos. 1 to 8 have been the joint owners of the suit property situated at 3/1, Heysham Road, Police Station- Bhowanipore, Kolkata 700 020. One Hiranya Prova Ray, the predecessor-in-interest of the defendants Nos. 1 to 8, was the original owner of the suit property.

4. It was alleged that the defendant No. 1/the respondent No. 2 herein, some time in the year 1990, filed a suit for partition being T.S. No. 99 of 1990, which was subsequently re-numbered as T.S. No. 92 of 2002 before the learned Civil Judge (Senior. Division), Eighth Court, Alipore. In the said suit, the defendant No. 1/respondent No. 2 herein, inter alia, prayed for decree of partition of the suit property. The aforesaid partition suit was decreed in preliminary form July 10, 1995. The respondent No. 7 herein preferred an appeal against the said preliminary decree before this Court being F.A. No. 185 of 1996. The defendants took several steps to make the preliminary decree final and to get their separate allotments in the suit property, but actual partition of the suit property could not be finalised. The plaintiff/respondent No. 1 herein, after knowing that defendant Nos. 1 to 8/respondent Nos. 2 to 9 decided to sell the suit property, became interested to purchase the same. Thereafter, the plaintiff on enquiry came to learn that the defendant Nos. 1 to 8 have engaged Jagat Narayan Tewari, the caretaker of the suit property for the last 25 years, to act on their behalf in the matter of sale of the suit property. The said Jagat Narayan Tewari not only confirmed the plaintiff regarding the decision of the defendant Nos. 1 to 8 to sell the suit property, but, also, actively participated in the matter of agreement for sale between the plaintiff and the defendant Nos. 1 to 8. After prolonged discussions between the plaintiff and the defendant Nos. 1 to 8 and, also, through their respective agents and representatives, the proposal of the plaintiff to purchase the suit property was accepted by defendant Nos. 1 to 8 jointly and severally. The final meeting in this regard was held at the registered office of the plaintiff at 2.00 P.M. on June 5, 2006. The said sale transaction was finalized by the second week of June, 2006 and it was agreed that the sale transaction shall be completed in the following manner:

i) That the defendant Nos. 1 to 8 would sell the suit property and the plaintiff would purchase the same on a total consideration of Rs. 4,15,00,000/- (Rupees four crore fifteen lakh) only.

ii) That the defendant No. 1 would get a sum of Rs. 1,55,00,000/- (Rupees one crore fifty five lakh) only towards the full and final consideration for sale of his undivided 1/3rd (one-third) share in the suit property upon execution and registration of deed of conveyance in respect of his undivided share in the suit property.

iii) That the defendant Nos. 2 and 3 would jointly get a sum of Rs. 1,30,00,000/- (Rupees one crore thirty lakh) only towards the full and final consideration for sale of their undivided 1/3rd (one-third) share in the suit property upon execution and registration of deed of conveyance in respect of their undivided share in the suit property.

iv) That the defendant Nos. 4, 5 and 6 would jointly get a sum of Rs. 78,00,000/- (Rupees seventy eight lakh) only towards the full and final consideration for sale of their undivided 3/15th (three-fifteenth) share in the suit property upon execution and registration of deed of conveyance in respect of their undivided share in the suit property.

v) That the defendant Nos. 7 and 8 would jointly get a sum of Rs. 52,00,000/ (Rupees fifty two lakh) only towards the full and final consideration for sale of their undivided 2/15th (two-fifteenth) share in the suit property upon execution and registration of deed of conveyance in respect of their undivided share in the suit property.

5. Upon acceptance of the said terms and conditions regarding sale transaction, the agreement for sale was finalized and became binding upon the parties to the agreement, but the defendant Nos. 1 to 8 expressed their inability to enter into any formal agreement for sale, in writing, in view of the order of injunction passed by learned court in the aforesaid partition suit on February 20, 1996; the parties were, inter alia, directed to maintain status quo in respect of the suit property till the disposal of the said partition suit. The plaintiff being persuaded by the defendant Nos. 1 to 8 did not insist upon the execution of any formal agreement for sale. During the talk of sale, the defendants handed over, to the Managing Trustee of the plaintiff, the certified copies of the title deeds and also the Xerox copies of other documents relating to the said partition suit in support of their right, title and interest over the suit property. Pursuant to the acceptance of the proposal of the plaintiff by the defendant Nos. 1 to 8 to purchase the suit property, the plaintiff adopted a resolution in the special meeting of the members of its Board of Trustees dated May 3, 2006 whereby the Managing Trustee was authorized to approach Allahabad Bank, Elgin Road Branch, to get the loan of Rs. 6,00,00,000/- (Rupees six crore) only for the purchase of the suit property. Allahabad Bank, Elgin Road Branch, on May 19, 2006 sanctioned loan of Rs. 1,49,00,000/- (One crore and forty nine lakh) only; Indian Overseas Bank, Dum Dum Park Branch, on July 14, 2006, sanctioned Rs. 86,50,000/- (Rupees eighty six lakh fifty thousand) only; on June 23, 2006 Allahabad Bank, Kalyani Branch, sanctioned Rs. 1,94,71,000/- (Rupees one crore ninety four lakh seventy one thousand) only in favour of the plaintiff. The plaintiff, thus, by the middle of June, 2006, accumulated the sum of Rs. 4,29,50,000/- (Four crore twenty nine lakh fifty thousand) only for the purpose of purchase of the suit property.

6. Pursuant to the agreement between the parties, separate draft deeds of conveyance were sent to the defendant Nos. 1 to 8 in respect of their undivided shares in the suit property for their approval. Soon after the finalization of the

said sale transaction, the plaintiff applied to the Inspector General and Commissioner of Stamp Revenue, West Bengal, by application dated June 21, 2006. The said office received it on June 22, 2006. By the said application, the plaintiff prayed for exemption from payment of stamp duties in registering the deeds of conveyance in respect of the purchase of the plaintiff. The defendant No. 1 approved the draft deed of conveyance by putting his signature thereon subject to some insignificant rectifications as pointed out in the said draft deed of conveyance. The defendant Nos. 2 and 3, also, approved the draft deed of conveyance in respect of their shares in the suit property by putting their signatures on two copies of the draft deeds on June 5, 2006. The defendant No. 6, Debabrata Roy, for himself and on behalf of the defendant Nos. 4 and 5 approved the draft deed of conveyance by putting his signature thereon. Pursuant to the said approval, the plaintiff purchased stamp paper of Rs. 50,100/- (Rupees fifty thousand one hundred) only by depositing the said amount with the Kolkata Collectorate under T.R. Form No. 7 for the purpose of preparation of the final deed of conveyance. The deeds of conveyance could not be registered because the defendant Nos. 7 and 8 took some time to approve the draft deed of conveyance in respect of their shares. In the second week of January, 2007 the plaintiff heard a rumour that the defendant Nos. 1 to 8 were contemplating to sell the suit property to third parties. In the third week of January 2007 the plaintiff noticed that some unknown persons have accumulated building materials in the suit property to raise boundary wall in front of the school building of the plaintiff. The plaintiff moved an application u/s 144(2) of the Code of Criminal Procedure before the Executive Magistrate being M.P. Case No. 82 of 2007. The Executive Magistrate by order dated January 17, 2007, inter alia, directed the Officer-in-Charge of the Bhowanipore Police Station to see that no untoward incident could occur in the suit premises.

7. The plaintiff was always ready with fund to purchase the suit property from the defendant Nos. 1 to 8 herein. Since the defendant Nos. 1 to 8 unreasonably tried to avoid to perform their obligation under the agreement for sale, inspite of repeated persuasion of the plaintiff, and were trying to dispose of the suit property to third parties, the plaintiff was compelled to file the suit for specific performance of contract against defendant Nos. 1 to 8.

8. The learned Trial Court was pleased to refuse the prayer for ad- interim order of injunction, but, on appeal, this Court in F.M.A.T. No. 490 of 2007 was pleased to pass an ad-interim order of injunction in favour of plaintiff against the defendant Nos. 1 to 8 on March 9, 2007. The defendant Nos. 1 to 6 filed an application for vacating the said order of injunction. In course of hearing of the said application for vacating the interim order, it was disclosed that the suit property has been transferred by the defendants in favour of Midnight Merchant Private Limited, Prime Global Private Limited and Kundan Investment Private Limited, that is, the defendant Nos. 9 to 11, by registered deeds of conveyance dated December 11, 2006 and January 3, 2007. In view of such disclosure, this Court was pleased to vacate the interim order dated May 9, 2007.

9. After disposal of the appeal by this Court, the said subsequent purchasers were added as defendant Nos. 9 to 11 in the said suit. The plaintiff moved an application for temporary injunction to restrain the said defendant Nos. 9 to 11 from selling, encumbering, alienating and changing the nature and character of the suit property in any manner whatsoever during the pendency of the suit.

10. The contentions of the defendant Nos. 1 and 8, that is, the original owners of the suit property, were that being the joint owners they sold the entire property to the said added defendants for valuable consideration prior to institution of this suit. They, however, emphatically denied the allegation that they had ever entered into any agreement with the plaintiff.

11. The added defendant Nos. 9 to 11 in their written objection, inter alia, contended that they purchased the suit property for valuable consideration from the original owners and, thus, became the absolute owners of the suit property. They asserted that they were purchasers of the suit property for value without notice of the alleged agreement between the owners and the plaintiff.

12. The learned court below, by order dated January 16, 2008, allowed the petition for temporary injunction, on hearing both sides, and restrained the subsequent purchasers, that is, the defendant Nos. 9 to 11, from selling, encumbering, alienating and changing the nature and character of the suit property in any manner whatsoever till the disposal of the suit.

13. Being aggrieved by the said order passed by the learned court below, the defendant Nos. 9 to 11 have preferred this appeal.

14. Mr. Mukherjee, learned senior advocate, appearing on behalf of the appellants submits that as per averments made in the plaint and the petition for temporary injunction, the alleged talk for sale was held at the registered office at 2.00 P.M. on June 5, 2006, but, the purported draft deed of conveyance was allegedly signed by one of the defendants on June 5, 2006 and some other defendants without any date being mentioned which, by itself, suggests the absurdity of the alleged agreement for sale. Mr. Mukherjee has, also, drawn our attention to the averment made in the petition for temporary injunction that the sale transaction was finalized by the second week of June, 2006, but, the plaintiff allegedly adopted a resolution on May 3, 2006 whereby the Managing Trustee was authorized to approach the banks for obtaining loan. Mr. Mukherjee submits that long before the alleged talk of sale, this resolution by the board of trustees authorizing the Managing Trustees to approach the banks for securing loan, appears to be the total absurdity. Mr. Mukherjee, further, contends that the signatures appearing in the alleged draft deed have been denied by the defendants.

15. Mr. Mukherjee submits that owners/defendants did not sign and the alleged signatures by some of the defendants cannot be taken to be true. Moreover, there is nothing on record to show that there was concluded agreement for sale of the suit property between the parties. Mr. Mukherjee, further, submits that u/s

25 of the Indian Contract Act an agreement without consideration is void and in the instant case there is no averment in the plaint or in the injunction petition that the plaintiff advanced earnest money as a token payment of consideration for the alleged promise.

16. Mr. Mukherjee submits that the added defendants in the suit are the bonafide purchasers for value without notice and there is no pleading in the plaint and in the injunction petition that the added defendants are not the bonafide purchasers for value without notice or that they are the purchasers with notice of the prior agreement for sale between the plaintiff and the defendant Nos. 1 to 8.

17. Mr. Mukherjee contends that even after the order of status quo in the partition suit was vacated, no attempt was made by the plaintiff to get the written agreement executed by the defendant Nos. 1 to 8. Mr. Mukherjee contends that in absence of any written agreement for sale of the suit property, the alleged approval of the draft deed cannot be treated as the concluded contract for sale of the suit property between the plaintiff and the defendant Nos. 1 to 8.

18. Mr. Mukherjee, further, submits that in the contents of the draft deeds it has been mentioned that the total consideration money was Rs. 3,90,00,000/- (Rupees three crore ninety lakh) only and each branch would get Rs. 1,30,00,000/- (Rupees one crore thirty lakh) only, but, in the plaint and the injunction petition it has been averred that the total consideration was fixed at Rs. 4,15,00,000/ (Rupees four crore fifteen lakh) only. It is, further, contended by Mr. Mukherjee that in the engrossed deed there is no mention of the total consideration money of Rs. 3,90,00,000/- (Rupees three crore ninety lakh) only, but, in the memo of consideration of the engrossed deed the sum of Rs. 1,55,00,000/- (Rupees one crore fifty lakh) only being the total consideration has been mentioned. Mr. Mukherjee, further, contends that in the contents of the draft deeds it has been mentioned that vendors would sell the property free from encumbrances, but, in the engrossed deed it has been mentioned that the purchaser would purchase as is where is basis. Mr. Mukherjee, thus, contends that such discrepancies with regard to the amount of consideration and on other points clearly show that there was no agreement for sale of the suit property between the plaintiff and the defendants.

19. Mr. Mukherjee contends that as per averment made in the plaint and the injunction petition, the contract was one and indefeasible. It is the contention of Mr. Mukherjee that due to non- participation of defendant Nos. 7 and 8 in the alleged conversations or in the alleged draft deeds, the alleged agreement becomes non-enforceable and in this connection Mr. Mukherjee has referred to and relied on the decision reported in 87 CWN 127 Ranjit Kumar Ghosh alias Chandi Charan Ghosh v. Pronab Kumar Bandopadhyaya and Ors., Mr. Mukherjee contends that enforcement of an agreement in part, in the facts and circumstances of this case, is not permissible. A claim for specific performance in respect of a part of the alleged contract against some of the parties is not

maintainable. It is, also, contended that material alteration or change is not permissible as per the ratio of the decision reported in 67 IA 318 Nathu Lal and Ors. v. Musammatt Gomti Kuar and Ors., It is submitted by Mr. Mukherjee that in order No. 205 dated June 7, 2006 passed in the said partition suit, the learned court observed that the two defendants were absent in court since long and no step was taken by them in the proceedings. In this connection Mr. Mukherjee submits that in the present suit the defendant Nos. 7 and 8 did not participate in the alleged transaction even as per the averment made in the plaint and the injunction petition. Such being the position, Mr. Mukherjee contends that there was no scope for the defendant Nos. 7 and 8 of the instant suit to take part in the alleged final talk for sale of the suit property on June 5, 2006. It is admitted that the defendant Nos. 7 and 8 did not approve the alleged draft deed.

20. It appears from the order dated June 7, 2006 passed in the partition suit being Title Suit No. 92 of 2002 that the said defendants were absent in court and took no steps in the partition suit. It is, therefore, unbelievable that the said defendant Nos. 7 and 8 had participated in the alleged meeting on June 5, 2006 in the office of the plaintiff.

21. Mr. Mukherjee contends that the suit is frivolous one and the learned Trial Court was not justified in granting injunction against the appellants. Mr. Mukherjee contends that the appellants being the bona fide purchasers for value without notice, spent huge sums of money for development/construction on the suit property and at this stage if they are restrained by way of injunction, they would suffer irreparable loss and injury. Mr. Mukherjee contends that the balance of convenience and inconvenience is in favour of the added defendants, that is, the appellants herein and the order of injunction passed by the learned Trial Court should be vacated. Mr. Mukherjee contends that in the averments made in the injunction petition, there is uneven distribution of consideration money which, by itself, suggests that there was no concluded contract for sale of the suit property.

22. Mr. Roychowdhury, learned senior advocate, appearing on behalf of the defendant Nos. 1 to 8, that is, the original owners/the respondent Nos. 2 to 9, contends that there is no material in support of the alleged agreement for sale of the suit property. Mr. Roychowdhury contends that there was no agreement for sale of the suit property with the plaintiff. Mr. Roychowdhury has taken us through the pleadings of the parties and submits that there are apparent incongruities in the pleadings of the plaintiffs. Mr. Roychowdhury contends that the finalization of talk for sale on May 5, 2006 and the alleged approval of the draft deed on the same date by one of the defendants is sufficient to prove that there was no concluded contract between the plaintiff and the defendant Nos. 1 to 8 for sale of the suit property. Mr. Roychowdhury contends that there was no agreement at all for sale with the plaintiff, far less a concluded contract between them. It is, also, contended that the averments made in the injunction petition and the plaint are all baseless, manufactured and concocted. Mr. Roychowdhury

contends that there is no prima facie case in favour of the plaintiff and the suit filed by the plaintiff is vexatious one.

23. Mr. Bose, learned advocate, appearing on behalf of the plaintiff/respondent No. 1 herein submits that there are sufficient materials to show that the negotiations between the plaintiff/respondent 1 and the defendants/respondent Nos. 2 to 9 culminated into agreement and it was confirmed by the approval of the draft deed. Mr. Bose contends that in the written objection nothing has been stated that the signatures appearing in the draft deeds were forged and the evasive denial in this regard is not sufficient. Mr. Bose contends that the negotiations started from the last week of January, 2006 and it matured into an agreement marked by the approval of the draft deeds. Mr. Bose contends that because of the order of status quo in the partition suit, the defendants disclosed that they were not in a position to enter into a written agreement and on good faith the plaintiff relied on their verbal assurance of the sale of the suit property and in the month of May, by virtue of a resolution, the Managing Trustee was authorized to make arrangement for securing loans from banks for the purchase of the suit property. Mr. Bose contends that the interim order of status quo in the partition suit was vacated on June 7, 2006 and the plaintiff did not feel the necessity of entering into a written agreement, inasmuch as, the plaintiff on good faith relied on the assurance given by the defendant Nos. 1 to 8 that they would sell the suit property to the plaintiff. Mr. Bose contends that the uneven distribution of the consideration money, as averred in the injunction petition, is not a ground to disbelieve the said agreement for sale. Mr. Bose, by referring to the deeds of conveyance between the defendant Nos. 1 to 8 and the added defendants, submits that Sourendra Kumar Roy was the only co-sharer, who was in the possession of the suit property and the deeds in favour of the added defendants justify the uneven distribution of the consideration money as averred in the petition for temporary injunction. Mr. Bose, further, contends that in the draft deeds it was mentioned that the defendant Nos. 1 to 8 verbally agreed to sell the suit property to the plaintiff. Mr. Bose contends that the approval of the draft deed is a crucial circumstance in this case to decide whether or not there was concluded agreement between the plaintiff and the defendant Nos. 1 to 8 for sale of the suit property.

24. Mr. Bose contends that pursuant to the negotiations, the defendant Nos. 1 to 8 delivered to the plaintiff the certified copies of the deeds relating to their title to the suit property and it significantly proves the existence of the prima facie case in favour of the plaintiff. Mr. Bose contends that the defendant Nos. 1 to 8 obtained the certified copy in the year 1997 and it is absurd to suggest that the plaintiff unilaterally engineered the story of entering into agreement for sale of the suit property.

25. Mr. Bose has referred to and relied on the decisions reported in AIR 1946 97 (Privy Council); Maharwal Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass, ; Anand Prasad Agarwalla Vs. Tarkeshwar Prasad and Others, ; Shri Kihota

Hollohon Vs. Mr. Zachilhu and others, ; AIR 1976 Cal 337 Chotalal Hariram and Anr. v. Dilip Kumar Chatterjee and Ors.; Devinder Singh alias Dalvinder Singh and Others Vs. Mansha Singh and Others, ; R. K. Mohammed Ubaidullah and Others Vs. Hajee C. Abdul Wahab (D) By Lrs. and Others, and Badat and Co. Vs. East India Trading Co., .

26. Admittedly, there is no written agreement for sale of the suit property between the plaintiff and defendant Nos. 1 to 8.

27. Now, on the point whether there was a concluded contract between the said parties for the sale of the suit property, Mr. Bose submits that the surrounding circumstances speak volume for the existence of such agreement, even if it was not reduced into writing. It appears from the averments made in the injunction petition and the plaint that the talk of sale was finalized on June 5, 2006 at 2.00 P.M. The alleged approval made by one of the defendants, namely, B. Pakrashi by putting signature is, also, of the same date, that is, June 5, 2006. The defendant Nos. 1 to 8 denied the alleged approval of the draft deeds. It is their specific contention that they did neither enter into any agreement nor there was any talk of sale with the plaintiff. The alleged approvals on the back of the memo of consideration of the different sets of draft deeds run thus:

1) "Approved Subject to rectification Sourendra Kumar Roy"

2) "Considerations -

(A) Time required for shifting

(B) Shifting expenses"

(C) Exit plan if this indenture is violated and demurrage thereof. Approved by me B. Pakrashi (BIJAYA PAKRASHI) 5.6.2006.

3) "Approved D.R."

4) "Approved Subject to rectification

D. Roy Debabrata Roy"

28. The alleged finalization of the talk of sale, preparing the draft deeds in furtherance thereof and the approval of the same by putting signatures on the same date, all these are not in consonance with the standpoint of probability. Moreover, the alleged approval by one co-sharer, on behalf of others, in absence of explicit lawful authorization, cannot be operative or effective. Mere pleading in the plaint or the injunction petition that the agreement was joint and several will be of no avail in making out a prima facie case for the existence of a concluded agreement for sale. The plaintiff has failed to prove the alleged contract with the defendant Nos. 1 to 8 with its specific terms and conditions. In such circumstances the plaintiff is not entitled to invoke the equitable and discretionary jurisdiction of the court on the basis of such vague and indefinite allegations. The relief of specific performance can be claimed only when there is

a concluded contract. 29. Even if, for the sake of argument, it is accepted that the defendants, excepting defendant Nos. 7 and 8, approved the draft deeds by putting their signatures, the same cannot take the place of a concluded contract, because some conditions have been imposed while putting their alleged signatures in the draft deeds.

29. That apart, the conditions appear to have been written by a different hand in the portion above the alleged signatures in the draft deeds. It, further, appears that defendant Nos. 7 and 8 did not sign on the draft deeds of conveyance at all and their absence goes to signify that the said co-sharers of the property did not agree to the alleged agreement for sale.

30. Mr. Bose emphatically pointed out that the talk of sale originated from the month of January 2006 and on June 5, 2006 there was finalization of the matter. On this score we find that it was the unilateral act of the plaintiff and there is no material to show that the defendants took part in the alleged conversation from the month of January, 2006.

31. It is the case of the plaintiff that in view of the talk of sale with the owners, that is, the defendant Nos. 1 to 8, the plaintiff in its meeting dated May 3, 2006 took a resolution entrusting the Managing Trustee to apply to the bank for obtaining loans. When it is the specific case of the plaintiff that the talk of sale was finalized only on June 5, 2006, the alleged endeavour on the part of the plaintiff, in the month of May, 2006, by taking a resolution, entrusting the Managing Trustee to take steps for securing loans from the bank, is, also, a circumstance, which does not seem to be in conformity with the ordinary human conduct. Before finalization of the talk of sale, the arrangements for securing loans lend support to the view that the steps taken by the plaintiff are unilateral acts of the plaintiff.

32. Mr. Mukherjee submits that the requirement of law is that there must be consideration for a promise and not consideration for a contract. Mr. Mukherjee submits that consideration must be of some real value and it should be at the desire of the promisor. Mr. Mukherjee has referred to and relied on the decisions reported in *Km. Sonia Bhatia Vs. State of U.P. and Others*, ; *M/s. John Tinson and Co. Pvt. Ltd. and others etc. Vs. Mrs. Surjeet Malhan and another etc.*, ; *A.C. Arulappan Vs. Smt. Ahalya Naik*, ; *Lourdu Mari David and others Vs. Louis Chinnaya Arogiaswamy and others*, and *Food Corporation of India Vs. Surana Commercial Co. and Others*,

33. Mr. Mukherjee has drawn our attention to the provisions contained In Section 25 of the Indian Contract Act and has assailed the alleged agreement for sale as frivolous and manufactured one. Section 25 of the Contract Act is quoted hereunder:

25. An agreement made without consideration is void, unless -

1. it is expressed in writing and registered under the law for the time being in

force for the registration of [documents], and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

2. it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless.

3. It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

34. The instant case, evidently, does not come within the three exceptions of the aforesaid section.

35. Mr. Bose, by referring to provision of Sections 2 and 3 of the Indian Contract Act, submits that the promise to sell forms part of consideration. But, in the instant case we find that no cogent material is forthcoming to show, prima facie, that there was any conscious participation of the defendant Nos. 1 to 8 in the said talk of sale. All the acts of the plaintiff, that is, taking resolution authorizing the Managing Trustee to secure loans, applying to the concerned authority for exemption from payment of stamp duties, conducting search etc. are all unilateral acts of the plaintiff.

36. It is clear that, in the instant case, no money was advanced by the plaintiff towards earnest money. In the absence of such payment, the provisions of the Section 25 of the Indian Contract Act stands in the way of holding a prima facie case in favour of the plaintiff. The non-payment of the earnest money being the consideration for the alleged promise, in the absence of a written agreement, assumes much importance. Bilateral talk is singularly absent and it cannot be discerned from the attending circumstances. The alleged promise to sell, in the circumstances of the case, is untraceable.

37. It appears that as per the averment made in the plaint and injunction petition, the consideration money was Rs. 4,15,00,000/- (Rupees four crore fifteen lakh) only, but, as per the recitals made in the draft deeds, the total consideration was Rs. 3,90,00,000/- (Rupees three crore ninety lakh) only and each set of heirs would get in Rs. 1,30,00,000/- (Rupees one crore thirty lakh) only. Again, in the recital of the engrossed deed concerning Soumendra Kumar Roy there is no mention of the total consideration of Rs. 3,90,00,000/- (Rupees three crore ninety lakh) only, but the consideration for his share is shown as Rs. 1,55,00,000/- (Rupees one crore fifty five lakh) only. This discrepancy with regard to the consideration for sale significantly goes to signify the unilateral acts of the plaintiff and the consequent absence of concluded agreement between the parties.

38. In this connection, the non-participation of defendant Nos. 7 and 8 in the

alleged talk of sale and in the approval of the draft deeds coupled with the fact of their long absence and abstinence in taking steps in the partition suit, as observed by the learned court below in the partition suit, is a circumstance, which cannot be considered in favour of the plaintiffs in the matter of making out a prima facie case for the existence of a concluded contract between the parties.

39. It is, also, significant to note that as per the alleged draft deeds, the property was to be sold free from all encumbrances, but, in the engrossed deed it has been mentioned that the property would be sold on as is where is basis.

40. There are discrepancies and improbabilities of serious nature, which have rendered the plaintiff's case of the alleged agreement for sale nugatory and incredible.

41. Mr. Mukherjee submits, in this connection, that the plaintiff has not come with clean hands and, as such, the relief of specific performance of contract being equitable one, no order of injunction can be granted in favour of the plaintiff.

42. Needless to say that the agreement is the basis of a suit for specific performance of contract. In the absence of a written agreement between the parties or any cogent material to show oral promise, as alleged, its enforceability under the law is not a matter to be presumed.

43. Mr. Bose contends that pursuant to the assurance given by the defendants to sell the suit property, the defendants delivered to the plaintiff the certified copies of the deeds relating to the title to the suit property. We are of the considered view that the production of the certified copies of the deeds even in original from the custody of the plaintiff, ipso facto, does not signify the existence of a concluded contract between the parties.

44. It is, also, worth mentioning here that even after the vacation of the order of the status quo in the suit for partition on June 7, 2006, no attempt was made by the plaintiff to get such agreement reduced into writing. The contention of Mr. Bose that the plaintiff did not insist on such written agreement because of the consistent assurance given by the defendants to sell the suit property to the plaintiff, is not acceptable. We are of the considered view that this abstinence of the plaintiff from entering into a written agreement with the defendants is a circumstance, which does not support the plaintiff's case of the existence of a concluded contract between the parties. Even if there was negotiation between the plaintiff and defendant Nos. 1 to 8, there is nothing explicit to hold that there was concluded agreement between them for the sale of the suit property. The alleged approval of the draft deeds, under the circumstances of the case, cannot take the place of a concluded agreement for sale.

45. Mr. Bose submits that the contention of the added defendants that they are bona fide purchasers for value without notice is a matter to be proved by the appellants herein and is not a point to be met by the plaintiff. Mr. Bose, further,

contends that the added defendants are nothing more than trustees with regard to the suit property. Mr. Mukherjee has referred to the provisions contained in Sections 19(b) of the Specific Relief Act and submits that the added defendants/appellants herein are well protected being the bona fide purchasers for value without notice of the alleged prior agreement.

46. Mr. Mukherjee submits that the added defendants purchased the suit property by obtaining loans from the banks by mortgaging the same with the banks and, under such circumstances, if the added defendants/appellants be restrained, by way of injunction, they would suffer irreparable loss and injury.

47. We are of the considered view that the fact of purchase of the suit property by the added defendants/appellants, prior to institution of this suit, coupled with the absence of any written agreement, lend support to the contention of the defendants that there was no agreement between the original owners and the plaintiff.

48. In order to get a temporary injunction in a suit for specific performance of contract the plaintiff must make out a prima facie case. The total failure of the plaintiff, in this case, to make out a prima facie case entails dismissal of the application for temporary injunction.

49. The facts and circumstances of the case, as discussed above, do not come in the aid of the plaintiff in making out the prima facie case in their favour. On the other hand, the provision of Section 19(b) of the Specific Relief Act comes into play in favour of the added defendants, who claim to be the bona fide purchasers for value without notice.

50. Considering the fact that the added defendants purchased the suit property by obtaining loans and mortgaging the property with banks, we find that if they are restrained by way of injunction they would suffer irreparable loss and injury. The balance of convenience and inconvenience, also, speaks in favour of the added defendants/appellants herein.

51. After careful examination of the contentions of the respective parties and after giving anxious consideration to the submissions of the learned Counsels for the parties, we are of the considered view that in view of the provision of Section 19(b) of the Specific Relief Act and the attending circumstances, the learned court below was not justified in allowing the petition for temporary injunction restraining the added defendants/appellants from selling, encumbering, alienating and changing the nature and character of the suit property in any manner whatsoever till the disposal of the suit.

52. The impugned order passed by the learned court below is, therefore, set aside. The petition for injunction filed by the plaintiff is dismissed. The appeal is, thus, allowed.

53. As we have allowed the appeal, we are not passing any separate order in connection with the application for stay. The application for stay, also, stands

disposed of.

54. Before we part with, we clarify that all our findings and observations are for the purpose of disposal of the application for temporary injunction filed by the plaintiff. We have not finally decided the issues involved in the suit. The learned trial judge shall be free to decide the issues involved in the suit independently and in accordance with law.

55. There will be no order as to costs.

56. Urgent Xerox certified copy, if applied for, is to be supplied to the parties, as early as possible, preferably before the commencement of the summer holidays of this Court.

Subhro Kamal Mukherjee, J.

57. I agree.

Later:

58. After pronouncement of the judgement, Mr. Biswajit Basu, learned advocate, appearing for the respondent no. 1, prays for stay of the operation of our judgement.

59. Such prayer is considered and rejected.