

(2019) 10 BOM CK 0090

In the Bombay High Court

Case No : Appeal Against Order No. 04 Of 2019

M/s Sharma Construction Company And Ors

APPELLANT

Vs

Ramdas Govinda Wagde (Dead) And Ors

RESPONDENT

Date of Decision : 22-10-2019

Acts Referred:

Transfer Of Property Act, 1882 — Section 52, 54
Specific Relief Act, 1963 — Section 19, 19(b), 41, 41(a), 41(b), 41(j)
Code Of Civil Procedure, 1908 — Order 39 Rule 1, Order 39 Rule 5, Order 39 Rule 1(a), Order 39 Rule 1(b), Order 39 Rule 1(c), Order 21 Rule 102, Order 21 Rule 97

Citation : (2019) 10 BOM CK 0090

Hon'ble Judges : S.M. Modak, J

Bench : Single Bench

Advocate : Yash Maheshwari, S. Bhutada, V.J. Dharkar, P.K. Mohta

Final Decision : Party Allowed

Judgement

1] The members of the family of Ramdas Wagde and Eknath Wagde owns a land bearing Khasara No.40, PH No. 73, mouza Zari, District Nagpur. It admeasures about 2.43 H of land. Two sets of parties claim that on different occasions they have agreed to purchase/purchased some portion or entire portion of the said land from those family members. One set of such parties/purchasers are plaintiff nos. 1 to 6 of Special Civil Suit No.874/2017, (hereinafter referred to as 'subsequently instituted suit i.e. second suit'). Whereas, present respondent nos. 7 and 8 are another set of purchasers from the family members of Wagde.

2] There are two versions about purchase/sale transaction with the plaintiffs of the second suit. According to the plaintiffs, there was a oral agreement to purchase the land and payment was made on 30-12-2004 whereas, the family members of Wagde family i.e. defendant nos. 1 to 6 of the second suit have pleaded two written agreements to sell. One is dated 30-12-2004 and another is undated but having stamp papers dated 28-12-2005. Whereas, present respondent nos. 7 and 8 pleaded about two written agreements to sell dated

16-10-1998.

3] The present plaintiffs were successful in getting executed two registered Sale Deeds of the suit land dated 02-01-2006 and 22-10-2007. Whereas, present respondent nos. 7 and 8 could not get executed Sale Deeds from the family members of Wagde family (on the basis of 1998 agreements). They were compelled to file Special Civil Suit No.185/2005 for specific performance (hereinafter referred to as 'prior suit'). It was against the family members of Wagde family. They were successful in getting a favourable decision from the trial Court. They were also successful in getting confirmation of the said decision from the First Appellate Court and even from the Second Appellate Court.

4] On one hand, the present appellants have got registered Sale Deeds and possession with them over the suit land whereas on the other hand, respondent nos. 7 and 8 are fighting legal battles. When the decree was confirmed in Second Appeal, they have filed execution proceedings. The present plaintiffs suo motu appeared in it and applied for intervention. The Executing Court has not favoured them as per order dated 26-07-2018. They were also not successful before the Writ Court and the decision was confirmed on 10-04-2019. Even they failed before the Hon'ble Supreme Court.

5] By quoting the cause of action dated 06-08-2017, the present plaintiffs have chosen to file a Special Civil Suit No.184/2017 (second suit). On that date the certain persons came on the suit land and their acts were found detrimental to their interest. By not disclosing about 1998 agreement by the family members of Wagde family, they have played fraud on them. It was at the time of entering oral agreement and while accepting part consideration. During enquiry, they revealed about filing of 2005 suit and decree. They have labelled the earlier suit and decree obtained therein is the outcome of a collusion in between the parties thereto i.e. defendant nos. 7 and 8 (as plaintiffs of that suit) and defendant nos. 1 to 6 (as defendants therein). Hence, the relief of declaration as to ownership and declaration about the nature of decree is being sought. During pendency of the suit, they have sought for two kinds of injunction in respect of a suit land i.e. Schedule 'A' land and one kind of injunction in respect of Schedule 'B' land.

6] The plaintiffs were not successful in getting temporary injunction in their favour i.e. how they are before this Court by way of an appeal.

7] I had the occasion to hear learned Advocates Shri Bhutada and Shri Maheshwari for the appellants and learned Advocate Shri Dharkar for respondent nos. 2 to 6 and learned Advocate Shri Mohta for respondent nos. 7 and 8. On one hand, learned Advocate Shri Maheshwari commented on the impugned order on the ground of non application of mind and principles of law whereas, both the learned Advocates Shri Dharkar and Shri Mohta supported the impugned order on facts and on law.

Scope of Enquiry

8] As we know the temporary injunction application is governed by the provisions of Order XXXIX Rule 1 of the Code of Civil Procedure (CPC). The application needs to be decided on the touchstone of three principles :-

- (a) existence of prima facie case.
- (b) tilting of balance of convenience.
- (c) suffering of irreparable loss.

9] These principles have been evolved out of judicial interpretation. Whereas, Order XXXIX Rule 1 of CPC lays down three contingencies wherein injunction can be granted. When the property in dispute is in danger or when there is threat to the possession of the plaintiff for defrauding the creditors or defendants is likely to dispossess the plaintiff of his property, injunction can be granted pending suit. The three kinds of injunction sought by the plaintiff falls within (a), (b) and (c) of Order XXXIX Rule 1 of CPC.

10] It is a settled law that the nature of enquiry at this stage is different from the same which is to be carried out at the time of disposal of the suit. The Court is required to see all the pros and cons of the matter while deciding the suit finally. Whereas, while deciding interim application, Court has to undergo a delicate job i.e. to say looking at the merits of the case on one hand and at the same time not to adjudicate the rights of the parties finally. It is one thing to say that limited enquiry is contemplated and it is another thing to say that the Court is avoiding its responsibility while deciding the lis.

11] When I have heard the arguments and when I have read the findings, I find that the learned trial Judge has failed/overlooked to give its opinion particularly on the averments in the plaint pertaining to a decree being obtained on collusion and entering into sale transaction by playing fraud. One may not overlook the difference in between deciding the lis by giving findings on one hand and disposing of the application without expressing opinion on the material issues. What I find is, that the learned trial Judge has omitted in giving its observations on certain material issues. Now whether such omission results into reversing the order or not will be decided in later part of my order.

Scope of enquiry in an appeal

12] The appellate Court gets the benefit of reading the observations of the trial Court. The appellate Court is not required to deal with the issues since beginning. While deciding the appeal, the appellate Court has got two responsibilities. One is, to consider three basic principles for granting injunction and secondly, to ascertain whether the trial Court has wrongly considered the material or failed to consider the material. While doing this exercise, it is said that the interference by the appellate Court should be minimum.

Kinds of Enquiry

13] At any stage (that is to say interim or final) every Court is required to decide

the question of facts and application of the principles of law to those facts. Amongst these questions, there is a difference in extent of deciding two of these questions (of facts and of law). One may face the contingency when case is mainly based on facts with less scope for application of principles of law. One may face a case involving deciding both the kinds of questions equally. However, one may face a case involving questions of law more when minimum facts to be considered. I think, the case before this Court falls within the 3rd category.

Issues involved

14] On this background, when the prayers made in the application are perused, I find this Court is required to decide the entitlement of the plaintiffs to get the stay to the execution of a decree passed in earlier suit. This Court is required to decide whether the defendants can be restrained from interfering the possession of the plaintiffs. These two prayers pertain to the land described in Scheduled 'A' of the plaint. Whereas, 3rd kind of injunction pertains to the land described in Scheduled 'B' of the plaint. That injunction is restricted against defendant nos. 1 to 6 (inadvertently defendant nos. 1 is not mentioned) from creating third party interest in that land. As said above, these three injunctions are required to be decided on the touchstone of three basic principles. At the same time, the provisions of law related to the rights of the parties need to be looked into.

Provisions of substantive law

15] In order to substantiate their claim as to maintainability of the suit, the appellants heavily relied upon two built exceptions, contemplated in Section 52 of the T.P. Act. It is true that law prohibits a litigating party from transferring rights in the property pending suit without authority of the Court. In spite of this prohibition, if it is done then it is against the provisions of law. However, law permits a person to come out of the clutches of this prohibition in following two contingencies :-

(a) when the pending or decided suit is the outcome of collusion,

(b) when there is no involvement of right to immovable property directly and specifically in this suit.

16] I will consider the averments in the plaint in support of this contention at later stage. There is also reliance on the provisions of Section 19 of the Specific Relief Act on behalf of the appellants.

17] Section 19 deals with enforceability of Specific Performance of Contract. Clause (b) lays down one of such category, it reads thus:-

"19(b) Any other person claiming under his by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract."

18] The appellants contend that this Clause cannot be invoked against them. The reasons are, they are the transferees of Schedule 'A' land without having notice

of 1998 agreement (in between respondent nos. 1 to 6 as vendors and respondent nos. 7 and 8 as purchasers) and secondly, they claim themselves to have purchased Schedule 'A' land vide two registered Sale Deeds by paying the consideration in good faith.

19] Injunction can be granted at an interim stage/finally. Order XXXIX of C.P.C. deals with interim injunction whereas Specific Relief Act contain provisions for granting injunction by way of final relief. So also there are other provisions of Specific Relief Act, which applies generally. Learned Advocate Shri Mohata relied upon the provisions of Section 41 of the Specific Relief Act. Relevant provisions are-

(i) Injunction to restrain any person from prosecuting any proceeding in a Court which is superior to its own hierarchy - cannot be granted (clause (b)).

(ii) When there is no personal interest for plaintiff and injunction cannot be granted (clause (c)).

Respondent nos. 2 to 6 have challenged the apprehensions of the appellants on two grounds. One is, denial of the averments on concealment at the time of executing documents and secondly, by pleading a specific case and knowledge as well as participation [by remaining behind the curtain] by the appellants by funding the three proceedings arising out of 2005 suit.

20] Before expressing any opinion on merits of the matter, it will be material to note down the important dates of transaction entered into between the parties/ events that took place/litigation fought. They are as follows :-

SR. No.

Date

Events

1

16-10-1998

Agreement to sell in between defendant nos. 7 and 8 (purchasers) and defendant nos. 1 to 6 (vendors). (as claimed by the defendants/vendors)

2

16-10-1998

Agreement to sell in between defendant nos. 7 and 8 (purchasers) and deceased defendant no. 1 (as claimed by the defendants/vendors).

3

30-12-2004 cheque payment

Oral agreement in between the appellants (purchasers) and Eknath Wagde

(vendor) (as claimed by the plaintiffs).

4

30-12-2004

Written Agreement to sell executed in between plaintiff no.4 Ritesh and deceased Ramdas and defendant nos. 2 to 6. (as claimed by the defendants/vendors)

5

No date but on stamp paper of 28-12-2005

Written Agreement to sell executed in between plaintiff no.4 Ritesh and deceased Ramdas, defendant nos. 2 to 6. (as claimed by the defendants/vendors)

Execution Sale Deeds with present appellants as purchasers

1

02-01-2006 (Registered)

Sale Deed in between defendant nos. 1 to 6 and the present plaintiffs.

2

22-10-2007 (Registered)

Sale Deed in between defendant nos. 1 to 6 and the present plaintiffs.

21] In nut shell the appellants relied upon oral agreement to purchase whereas respondent nos. 2 to 6 pleads two written agreements to sell. It is difficult at this stage to opine why such controversy is there in between them about the modes of agreements that to say oral or written. At this stage it will be material to consider the averments of the appellants in their plaint pertaining to fraud played at the time of execution of these agreements. The introductory pleadings are as follows:

(a) Oral agreement to purchase entire area of the suit land for total consideration of Rs. 23 Lakhs.

(b) Earnest money paid by way of two cheques dated 30-12-2004 of Rs. 5 Lakhs each.

(c) The defendant nos. 1 to 6 failed to execute the sale Deeds as orally agreed.

(d) Telegraphic notice dated 23-12-2005 to deceased Ramdas Wagde and other defendants to execute a sale deed.

(e) Reply by the defendants on 26-12-2005.

(f) Second agreement to purchase the suit land was executed on a stamp paper

bearing the date 26-12-2005.

(g) Sale deed registered on 02-01-2006 with defendant nos 2 to 6 and deceased Ramdas in respect of a land admeasuring 1.22 HR.

(h) Second Sale Deed was registered on 22-10-2007 in respect of rest of the area of land admeasuring 1.21 HR. Material pleadings

22] The material pleadings which suggests the grievance about concealment at the time of entering into 2004 agreement and at the time of execution of a sale deed and the pleadings which suggests about a decree obtained by way of collusion in 2005 suit are as follows:-

(a) At the time of execution of these Sale Deeds, it was not disclosed about 1998 agreement.

(b) The defendants have not disclosed about 1998 agreement alleged to be executed with respondent nos. 7 and 8.

(c) not disclosed certain facts to the Court while contesting 2005 suit. It pertains to receipt of Rs. 10 lakhs by way of two cheques of Rs. 5 Lakhs each.

(d) and hence, the decree is obtained by playing fraud upon the Court and by colluding with defendant nos. 7 and 8.

Reply by defendant nos. 2 to 6 to these averments

(a) Sending of reply to telegraphic notice is denied.

(b) Present plaintiffs were told about 1998 agreement and in fact they were supplied with their copies.

(c) There is positive assurance by plaintiff no.4 to purchase the land and assurance to take care of a future litigation if any filed by Bansal brothers on the basis of 1998 agreement.

(d) Further assurance to meet all kind of litigation expenses.

(e) On this understanding only written agreement dated 30-12-2004 was executed.

(f) Second agreement for sale was executed on stamp papers dated 28-12-2005 without mentioning the date of execution of the agreement.

(g) Receipt of consideration of Rs. 5 Lakhs is admitted as per the acknowledgment in the sale deed registered on 02-01-2006. (page 59) and Receipt of consideration of Rs. 18 Lakhs is admitted as per the acknowledgment in the sale deed registered on 22-10-2007. (page 60),

(h) Sale deed was executed for a meager amount of Rs. 23 lakhs of which the answering respondents nos. 2 to 5 received Rs.11,50,000/- only. (para 16 page 64 of the paper book).

- (i) Incurring of expenses of the three proceedings by plaintiff no.4 (para 11).
- (j) Plaintiff no.4 has taken calculated risk in executing two agreements and two Sale Deeds.
- (k) Action on the basis of 1998 agreement was time barred and hence plaintiff no.4 executed two agreements.
- (l) Defendant no. 2 to 5 have received only Rs. 11.50 Lakhs (whereas valuation of the suit land is Rs. 5.78,44,626/-) (para 27 pg 67).

Reply by defendant nos. 7 to 8 to these averments

- (a) The judgment of Civil Suit, First Appeal and Second Appeal was on the basis of merits of the matter.
- (b) Defendant nos. 1 to 6 have hotly contested the litigation by resorting to all the remedies.
- (c) The two Sale Deeds executed in the year 2006 and 2007 were hit by the provisions of Section 52 of the T.P. Act.
- (d) If there is a defect in the title of vendors (defendant nos. 1 to 6), the purchasers i.e the appellants have agreed to compensate them (referred in para 3 page 3 of the sale deed)
- (e) The plaintiffs themselves have filed the present suit in order to defeat legitimate claim of these defendants.

Filing of suit by present respondent nos. 7 and 8 for specific performance

1

24-02-2005

Filing of Special Civil Suit No.185/2005 by present defendant Nos. 7 and 8 against defendant nos. 1 to 6 for specific performance and for possession.

2

02-01-2006 (Registered)

Sale Deed in between defendant nos. 1 to 6 and the present plaintiffs.

3

22-10-2007 (Registered)

Sale Deed in between defendant nos. 1 to 6 and the present plaintiffs.

4

05-01-2009

Decision in Special Civil Suit No.185/2005, thereby decreeing the suit in toto.

5

Reg.C.A. No.263/12 13-12-2016

Decision of Regular Civil Appeal preferred by the defendants/vendors, thereby dismissing the First Appeal.

6

04-08-2017

Dismissal of Second Appeal No.23/2017, preferred by the defendants nos. 1 to 6/vendors

Litigation involving all the present parties

1

26-06-2018

Rejection of the appellant application for joining in execution proceeding. It was filed by the present appellant.

2

10-04-2019

Dismissal of Writ Petition preferred by the present appellants against the said order.

Filing of suit by the appellants

3

25-10-2017

Special Civil Suit No.874/2017 filed by the present appellants against all the respondents.

4

07-09-2018

Rejection of application for temporary injunction.

Submissions

23] The impugned order is challenged before this Court on various grounds. The learned trial Court answered one of the principles about prima facie case against the appellants without considering two registered Sale Deeds in favour of the appellants. Furthermore, the learned trial Court overlooked the longstanding, settled and peaceful possession over Schedule-'A' lands of the appellants since 2006. The learned trial Court overlooked the difference in between the scope of objections to be decided in an execution of a decree and the scope of enquiry of a substantive suit. The learned trial Judge overlooked the difference in the

grounds and scope of a Writ Petition as against the scope of a substantive suit.

24] As against this, all the contesting respondents have supported the impugned order. According to them, the grievances of the appellants are adjudicated by the Executing Court while rejecting their application on 26-06-2018 and by the Writ Court while dismissing it on 10-04-2019. The learned trial Judge has rightly refused injunction no.3 in respect of Schedule 'B' lands. The rejection of a prayer pertaining to stay to the execution of decree is supported by them by taking support of the provision of Section 41 (b) and (j) of the Specific Relief Act, 1963.

Findings of Trial Court

25] Trial Court rejected Exhibit-5 application. The findings are as follows :-

a] ABOUT STAYING THE EXECUTION OF DECREE TRIAL COURT HELD THUS :

"furthermore as per submission of learned counsel for the plaintiffs the effect of execution of decree in S.C.S. No.185/2005 is already stayed. Therefore as the order is granted by Hon'ble High Court the question does not arise for this Court to pass any further order in this respect."

That is why while writing final order, the trial Court only said "prayer II & III is rejected". There is no comment on prayer I.

26] Trial Court mean to say that when the decree (in earlier suit) was stayed there is no need to stay it afresh. At that time it was not disputed that the said decree was stayed at the instance of present appellants.

27] Execution proceeding is filed by present respondent No.7 and 8 against present respondent No.1 to 6 and they are pending before the Court of 4th Jt C.J.J,D, Nagpur. Present appellants on their own filed an application therein for impleadment and it was rejected on 26-06-2018. Against the said order appellants filed Writ petition and said execution was stayed therein.

b] ABOUT INJUNCTING DEFENDANTS FROM DISTURBING POSSESSION OF PRESENT APPELLANTS TRIAL COURT OBSERVED THUS :-

"Therefore, it can not be said that defendant Nos. 7 & 8 without having any right and title is trying to dispossess the plaintiffs from the suit property. The right of defendant Nos. 7 & 8 over the suit property is established by the Court of law".

It is further observed thus -

".....as already mentioned, defendant Nos. 7 & 8 are having the legal right over the suit property. Therefore, at this stage it can not be said that the plaintiffs have proved the prima facie case in their favour. Ultimately, the question of irreparable loss or the balance of convenience does not arise."

It is further observed -

"The application does not disclose that plaintiffs are having any apprehension of

dispossession at the hands of defendants No.1 to 6".

c] ABOUT INJUNCTION SOUGHT IN RESPECT OF SCHEDULE B PROPERTY TRIAL COURT HELD THUS -

"There is no agreement between the parties in respect of property described in Scheduled B of the plaint. Mere by assuming that the plaintiff will succeed in the suit, it would not be proper to grant the injunction in respect of property which is not part of the agreement."

d] The operative order reads thus-

"i) The Prayer II and III in the application (Exh.5) is rejected".

Conclusion

Stay of proceedings in Superior Court

28] Learned Advocate for respondent nos. 7 and 8 heavily relied upon a criterion laid down in Clause (b) and Clause (j) of Section 41 of the said Act. According to him, the Court seized of the new suit [as per Section 41(a)] cannot injunct the Court seized of the execution proceeding because the decree under execution was affirmed up to this Court (in a Second Appeal) and as such the said decree is said to have been passed by superior Court. He relied upon judgment in the case of Suresh D. Sanghvi vs Mohasinali H. Merchant, reported in 1981 Mh.L.J. 276 and Cotton Corporation of India Limited vs United Industrial Bank Limited and others, reported in (1983)4 SCC 625.

Absence of personal interest

29] He also laid emphasis on absence of personal interest (as contemplated under section 41(j)) in favour of the plaintiffs. On this point, he relied upon a judgment in the case of Premji Ratansey Shah and others vs Union of India and others, reported in (1994) 5 SCC 547.

30] According to learned Advocate Shri Mohata, the status of appellants is nothing more than that of a trespasser. Because according to him, the appellants foundation is on two Sale Deeds and admittedly they are executed in the year 2006 & 2007 when the suit of 2005 was already pending. He relied upon the provisions of Section 52 of the Transfer of Property Act. When the decree after being confirmed by two Courts was put to execution, the purchaser pending litigation does not acquire any independent rights and whatever claim he can make is through his vendor/judgment debtor only. For that purpose he relied upon the provisions of Order XXI Rule 102 of CPC. Hon'ble Supreme Court had an occasion to interpret the rights of obstructionist in case of Usha Sinha vs Dina Ram and others, reported in (2008) 7 SCC 144.

31] The respondent nos. 7 and 8 considers the appellants as a trespassers. According to them, there cannot be an injunction in favour of such trespasser and against a true owner. In order to buttress this submission he relied upon

judgments in case of Mahadeo Savlaram Shelke and others vs Pune Municipal Corporation and another, reported in (1995) 3 SCC 33.

32] To counter this argument about non grant of stay to the execution of decree, learned Advocate Shri Bhutada relied upon a judgment in case of Modi Entertainment Network and another vs W.S.G. Cricket Pte Ltd., reported in (2003) 4 SCC 341.

33] Whereas, according to learned Advocate Shri Bhutada the ratio laid down in these judgments will not be applicable because, the decree put in execution was obtained by way of fraud and by filing collusive suit. He relied upon natural exceptions contained in the provisions of Section 52 of Transfer of Property Act. He has taken assistance of two of such exceptions. They are as follows :-

a] The suit should not be collusive. &

b] Right to immovable property was not directly and specifically involved in that suit.

34] According to him, the bar contained in Section 52 of the T.P. Act from prohibiting the transfer during pendency of proceedings will not be applicable in view of above said two exceptions. To buttress his submission he relied upon the provisions of Section 54 of the T.P. Act and particularly the meaning of the phrase "Contract for Sale". According to him, the two agreements dated 16-10-1998 relied upon by respondent nos. 7 and 8 in the earlier suit does not create any interest in the property and as such no right to property was directly and specifically involved in the 2005 suit. So also, he had taken assistance to the provisions of Section 19 (b) of the Specific Relief Act and claimed that these appellants are transferees for value and they were unaware about the 1998 agreement and as such there cannot be specific performance against them by way of creating a situation favourable to the execution of the decree.

35] To counter these arguments, learned Advocate for respondent nos. 7 and 8 relied upon the observations in case of Vithabai w/o Sayanna Battin and others vs Daljitsingh s/o Dilipsingh Ramgadiya and another (passed in Second Appeal No.438/2010 at Aurangabad Bench). This Court had an occasion to decide in which case the suit can be said to be a collusive suit. So also, he relied upon the observations in Writ Petition No.4406/2018 in the order dated 10-04-2019 passed by this Court, and in which all the parties before this Court were the parties. He specifically relied upon observations:-

"The events clearly show that the decree was passed and later confirmed after contest between the respondent nos. 1 and 2 on the one hand and respondent nos. 3 to 8 on the other. Therefore, there is no substance in the contention relied on behalf of the petitioners that the decree was collusive. (emphasis supplied to para 7 of order dated 10-04-2019)"

About trial Court observations About Writ Court order

36] It is but natural for the trial Court to take cognizance of the interim protection given by this Court in Writ Petition No.4406/2018. But trial Court lost sight of the fact that it was interim protection which is liable to be modified, discontinued or confirmed too. Trial Court cannot presuppose the contingency that the interim protection will be confirmed only. In that view of the matter, trial Court ought to have given findings on the entitlement of the appellants to the interim relief No.1 that is to injunct respondent No. 7 and 8 from executing the decree.

37] Now the challenge to these observations on behalf of appellants are fortified because of refusal to continue the said interim order. This Court while dismissing the Writ Petition was pleased to observe thus:-

"Upon pronouncement of order, the learned counsel for the petitioners made a request for continuing the interim relief for further period of four weeks. For the reasons stated in the judgment dismissing the writ petition, this Court is of the opinion that the interim relief does not deserve to be continued. Hence the request is rejected."

So, this Court will have to decide the said prayer independently on the basis of the pleadings and documents on record.

Examination of Prayer I

38] So, there are two views/claims before the Court. On the basis of facts, whether this Court should -

a) confirm the order by applying the prohibition contained in the provisions of Section 52 of the Transfer of Property Act and treat the appellants as pendente lite purchaser/trespassers of Schedule 'A' lands;

OR

b) accept the grievances of the appellants that the decree was obtained in a collusive suit and treats the appellants being bonafide purchasers for value and without notice of the earlier transactions.

39] There cannot be any dispute about execution of the two Sale Deeds during the pendency of the suit. There may be dispute as to whether these appellants were aware about 2005 suit (because it is contended on behalf of respondent nos. 2 to 6 that appellants were aware) or not.

40] There cannot be any dispute about the status of pendente lite purchaser. There are various judgments on this issue. The proposition of law have been reiterated in Usha Sinha's case as referred above.

"There is a presumption that pendente lite purchaser is aware about the proceedings pending in between his vendor and a third person. It is based on justice, equity and good conscious."

41] Ultimately the law favours a person who is in lawful possession So the

person who cannot show title as to his possession over the property cannot be successful in getting injunction in his favour. It is considered as existence of a personal interest in favour of the plaintiff as contemplated under Section 41(j) of the Specific Relief Act. It is also true that injunction should not be given merely because it is asked for. So also, it is true that there cannot be an injunction against a settled owner.

Findings of trial Court

42] The learned trial Judge had given two categorical findings against the appellants. They are (a) "defendant nos. 7 and 8 are having a legal right over the property and (b) their rights are being established by Court of law".

43] It will be material to consider on the basis of which materials, these findings were given by the trial Court. The trial Court considered three decisions in favour of respondent nos. 7 and 8. They are by the trial Court (in Special Civil Suit No.185/2005), decision by the First Appellate Court and in Second Appeal (paragraph 10).

Opinion of this Court

44] The three decisions are a matter of record. It is an admitted fact that the appellants were not party to these proceedings. The two Sale Deeds relied upon by the appellants were filed in the trial of that suit. They were at Exhibits-80 and 81 (paragraph 24 of the trial Court judgment dated 05-01-2008 in Special Civil Suit No.185/2005). Even Pravin kumar Bansal (plaintiff no.1 in Special Civil Suit No.185/2005) has admitted in his cross examination that he was aware about selling of land to M/s Sharma Construction Company (plaintiff no.1 in a subsequent suit) (as pleaded in paragraph 10 of the subsequent suit). However, now dispute is raised by present appellants about the earlier suit being a collusive suit. So also, the appellants by way of arguments are disputing the allegation in the written statement/reply on behalf of defendant nos. 2 to 6 about the plaintiffs being aware of earlier litigation and its funding by them.

45] The recognition of the rights of respondent nos. 7 and 8 was in the proceedings in between them and their vendors in earlier proceedings. While giving weightage to the Writ Court stay, the trial Court has overlooked the two inbuilt exceptions provided in Section 52 of the Transfer of Property Act. One is, about collusive suit and second is about right to property not being involved. There was no whisper in the impugned order about allegations of collusive suit and fraud. When learned trial Judge had chosen to overlook those allegations, it cannot be expected from him to give his findings on them.

46] There can be a dispute about second exception. Admittedly, the 2005 suit was for specific performance on the basis of two 1998 agreements. Even though contract for sale does not create any interest, it can be a basis for filing specific performance suit. So there is a reason to believe at interim stage that right to property was involved in 2005 suit. Admittedly, there is no observation by the

trial Court on this aspect. This is true even for second exception about collusive suit.

Collusive suit and fraud

47] The trial Court has got every right to reject the injunction prayer but while doing that exercise there need to have observation about the issues involved. Unfortunately, I do not find any observation about the grievance about collusive suit and its effects on the Sale Deeds executed in favour of the appellants in the year 2006.

Ratio in Usha Sinha's Case

48] One cannot deny about the status of an obstructionist who is not having an independent title apart from the judgment debtor. I have minutely perused the observations in case of Usha Sinha as referred above. But, the appellant therein (plaintiff in Title Suit No.226/2001) has not alleged the decree in the earlier suit (Title Suit No.140/1999) being obtained collusively. In fact, simply he has pleaded about his status as a purchaser from the judgment debtor. So, whether the ratio laid down in the said judgment will be applicable to the facts involved before this Court is an issue. Ultimately, the facts involved in the particular case and then application of law and then findings are important.

Application of Observation in W.P. 4406/18

49] I have also minutely perused the observations in a Writ Petition No.4406/2018 given by this Court. Admittedly, the parties in this proceedings were parties in that proceedings. The appellants intervention application filed in execution proceedings (R.D. No.1184/2012) came to be dismissed. This Court considered the fact that the two 2006 (2007) Sale Deeds were considered by the trial Court who decided 2005 suit. As there was a contest in between present respondent nos. 7 and 8 (being plaintiffs) on one hand and present respondent nos. 1 to 6 (being defendants), Writ Court observed that "there is no room for the allegations that 2005 suit was a collusive suit". There is also no dispute that the decision in the Writ Petition was not interfered by Hon'ble Supreme Court in a Special Leave Petition filed on behalf of the present appellants.

50] I have read the Writ Court judgment very minutely. What I find is that contesting the suit, filing of first and second appeal were the only factors which were considered by the writ court while dismissing the appellants writ petition. But there may be other factors also which may suggest collusion amongst the parties. For example in this suit there is an averment of concealment at the time of execution of agreement and at the time of conduct of the suit. But unfortunately these averments were either not brought to the notice of the writ court or else they might not have been considered of importance to be taken cognizance as compared to the factor of 'contesting the litigation'.

51] On this background I feel that still the appellants are entitled to plead and agitate the factor of 'averments in the plaint' in support of their grievance of

collusion and fraud. And this Court is bound to decide them.

52] As said earlier, the learned trial Judge has not at all touched these aspects and restricted himself only to the fact of staying execution of a decree by the Writ Court. Considering long standing pending dispute, I do not feel it proper to remand the matter for deciding this prayer. But I intend to deal with it.

Provisions of Section 19(b) of Specific Relief Act

53] On the point of enforceability of a contract against transferees pendente lite Writ Court observed thus:-

'Proper reading of the judgments of Hon'ble Supreme Court in case of Usha Sinha vs Dina Ram, (supra) and Silverline Forum Pvt. Ltd Vs Rajit Trust (supra) would show that a presumption referred to therein is not a presumption in the sense of it being rebuttable, but a situation where a transferee who purchases property during the pendency of the suit, is deemed to be aware of a litigation pertaining to the said property pending before the competent Court."

54] For the reasons stated above, the above observations seems to have been given only on the background of not agitating the issue about concealment of facts at the time of executing agreements and from the Court. So there is a scope for present appellant to agitate the in built exception to Section 19 of the Specific Relief Act before this Court.

Observations of Aurangabad Bench

55] Now it will be material to consider the observations in a Writ Petition given by Aurangabad Bench of this Court. In that proceeding also there was a contest in between the plaintiff and Nanded Municipal Council. The issue was about demolition of the construction by the Municipal Council. After losing before the trial Court the Municipal Council went to First Appellate Court and Second Appellate Court. Before the both forum they have lost. During the pendency of the suit, the petitioner of the Writ Petition took the land on a lease from a judgment debtor Municipal Council. On this background, his objection Petition was turned down by the Executing Court. The said decision was confirmed by the First Appellate Court and affirmed by this Court vide judgment dated 13-10-2010.

56] In view of the contest in those proceedings, Aurangabad Bench of this Court refused to treat the earlier proceeding being collusive in nature. Once there is a contest there is no room for making a grievance that it is a collusive litigation. But, there is another view for looking to the issues involved before us. It is material to consider that in that proceedings the petitioner therein was permitted to exhaust all the remedies which are available to an obstructionist under the provisions of Order XXI Rule 97 onward of the CPC.

57] Still I feel that there is a one factor which distinguishes a case before us and case before Aurangabad Bench. The objectors/ petitioners in Writ petition were given an opportunity to agitate their grievance before executing Court. So also

they took a chance by way of First Appeal and by way of Writ Petition. So they were not denied an opportunity to agitate their grievance. Whereas in the case before us the appellants were denied of an opportunity to participate in execution and it is confirmed by Writ Court. So also the appellants were refused reliefs at an interim stage. The decisions on two kinds of injunctions pertaining to Schedule 'A' land is going to material affect the prospect of the appellants to contest the suit. So what I feel is that the facts before Aurangabad Bench and facts before us can be differentiated.

Trial Court findings

58] It will be material to consider the observations of a trial Court in the impugned order on the point of availability of the forum of executing Court as

"in the present matter, the execution proceeding filed by defendant nos. 7 & 8 is pending, therefore, the plaintiffs can take the objection in the execution proceedings about their right, title and interest."

59] These observations reflects total non application of mind. The reason is the learned trial Judge passed impugned order on 07-09-2018 whereas an application for intervention was rejected on 26-06-2018 by the executed Court. It means earlier to passing of the impugned order. Still how can the learned trial Judge can opine about "taking objection by the appellants in the execution proceedings" (date is taken from Writ Court judgment dated 10-04-2019). It is assumed that order dated 26-06-2018 must have brought to the notice of trial Court.

Final conclusion

60] I do agree that Court seized of later proceeding needs to refuse prayer for injunction against the party from executing/prosecuting suit or proceeding pending in a Court who is superior in the rank. That is what contemplated by Section 41(b) of the Specific Relief Act. In this case, the decree which is under execution was earlier confirmed in First and Second Appeal. In that sense of the matter respondents plead that the Court dealing with execution was executing a decree of a superior Court.

61] There is different angle to look to this issue. If there is a grievance that decree is obtained by collusion (as contemplated by the Section 52 of the T.P. Act), I think that the restriction mentioned above will not come in to play. Because there is no occasion for Courts seized of earlier proceeding to go into the issues of decree obtained due to collusion. Hence, it is not expected from the earlier Court to give findings on those issues on this background if you refuse to entertain the grievance to stay the execution of a decree by applying the provisions of Section 41(b) of the said Act, it will amount to injustice to an aggrieved person. So the hierarchy of Courts (superior and not superior) seized of earlier and later on instituted proceedings/suit will not come into play.

62] For the reasons stated above, I have undertaken the exercise of enquiring

into the grievances of the appellants I found that the grievances of the appellants need to be inquired into. But when I have done that exercise for ascertaining the merits of the grievances, I feel that the averments in the petitions falls short to make out a prima facie case of injunction to stay the execution of a decree. The appellants have pleaded about not disclosing the receipt of consideration by respondent nos. 2 to 6 when they contested the first suit, whereas these defendants come with the case of giving details of the consideration. I have narrated it in earlier part of my order.

63] I do not agree that the issues of "funding the previous 3 litigations by the appellants" can be decided at this stage. Except the allegations in the written statement/reply, respondent nos. 2 to 6 have not filed any supporting materials. This issue has to be left open for decision at the time of trial. Hence, I have not considered it in either way.

64] If you enter into oral agreement/written agreements (2004/2005) and if you makes grievance about concealment of that time after a gap of 13 years, no Court will believe this story at least not at an interim stage.

65] So, from such pleadings we can certainly infer that the appellants have got no prima facie case. The possibility of adducing evidence during trial does not persuades me from answering this issue in their favour. Ultimately, the issue of balance of convenience has to be answered against them.

Injunction not to dispossess the appellants

66] I am not inclined to answer the issue of prima facie case in favour of the appellant simply for two reasons. Plain visit to the suit land on 06-08-2017 is no sufficient apprehension of the dispossession that too by taking law in to their hands. Secondly, the respondent nos. 7 and 8 are pursuing their legal remedies of getting possession through execution. So it will be unprudent to believe that either they or other defendants will engage in such activities. I agree with the reasoning given by the trial Court. Hence, the issue of balance of convenience has to be answered against the appellants.

Issue of irreparable loss

67] The fact that the respondent nos. 7 and 8 are pursuing for taking possession itself suggest that they are not in possession. The appellants contend their possession since 2006 and 2007. As said above I do not find any possibility of taking law into their own hands by these respondents so as as to dispossess the appellants. In that sense of the matter, I do not find there will be irreparable loss to the appellants. If the executing Court will execute the decree that will be by following the procedure of the law. So, in that eventuality I do not think that there will be irreparable loss to the appellants. Irreparable loss is such loss which cannot be compensated in terms of money. The appellants took their chance before the executing Court, before Writ Court and before the trial Court so they have exhausted though not all but certainly adequate number of remedies.

68] So, on certain aspects even though I feel that the trial Court has failed to deal with certain material issues, for the reason stated above I agree with the conclusion reached by the trial Court and I am not inclined to interfere in the decision.

Relief as to Schedule 'B' land

69] It does not require a second opinion about absence of an agreement in between the appellants (as a purchasers) on one hand and respondent no. 1 to 6 (as vendors) on the other hand in respect of this land. These factual observations of the trial Court is correct. During arguments it was submitted that the prayer to that effect is just like a prayer about attachment before judgment as contemplated under Order XXXVIII of Code of Civil Procedure. There is also an alternative submission on behalf of learned Advocate Shri Bhutada to grant a liberty to file a fresh application before the trial Court, if this Court is not inclined to grant the said injunction.

70] The findings of the trial Court are supported on behalf of respondent nos. 2 to 6 on the basis of facts and law. There is no question of granting specific liberty as it is always available.

71] For considering the issue about granting the prayer by this Court or granting liberty, I have perused the pleadings and documents. The following facts emerges -

a. The respondent nos. 2 to 6 in their written statements have tried to explain the circumstances in which two written agreement to sale and two registered sale-deeds were executed. But the facts remains that they are admitting their execution.

b. Vide oral/written agreement and two sale-deeds, the appellants contend about payment of Rs.23,00,000/-, whereas respondent no.2 to 5 have admitted receipt of consideration of Rs. 23,00,000/- with further clarification about receipt of Rs. 11,50,000/- only to the share. Whereas respondent no.6 admits acknowledgment of receipt of consideration of Rs. 5 Lakhs in Sale Deed dated 02-01-2006.

c. It will be a matter of evidence to prove how much exactly the amount of consideration was being paid to which of these respondents.

d. The appellants have asked for granting damages to the extent of Rs.4,06,25,000/-. There is an alternate prayer to execute the sale-deed for an area admeasuring 3.46 HR from similarly situated land, if there is failure to pay the damages.

e. They have described the similarly situated land as Khasra No.14 out of PH No.73 Schedule B land.

f. The respondent nos. 2 to 5 does not dispute their ownership over Schedule B land (because they have only said that for such meagre amount land costing Rs.

5,78,44,626/- should not be injunctioned.)

Provisions of law

72] On the set of these facts, it will be material to consider the provisions of Order XXXIX Rule 1 of Code of Civil Procedure. Clause (b) is relevant. It reads as follows :-

"that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors".

Disposition for defrauding creditors

73] So if a debtor intends to dispose of the property and it is then with a view to defraud his creditors, temporary injunction can be granted. Now, question arises whether there is a relationship of creditor and a debtor in between the appellants and respondent nos. 1 to 6. In ordinary parlance debtor is the person who has borrowed a money and he owes that money to a creditor. Admittedly, there is no borrowing by respondent nos. 1 to 6. But these respondents admit receipt of amount towards consideration. Now they will be holding this amount till the time, trial Court will on merits decides the alternative prayer and alternative prayer in that alternative prayer. This amount of consideration may comprise in the quantum of damages that may (may not) be granted. On this background, I think that the "relationship in between creditor and debtor" has to be interpreted in a wider sense and not in a narrower sense.

74] It will be a matter of evidence whether the appellants will succeed in their claim of getting damages. Damages are of two kinds. One is ascertained and another unascertained. No doubt, an amount of Rs.4,06,25,000/- is an unascertained damages. However, at this stage it can certainly be said that defendant nos 1 to 6 owes to appellants at least Rs. 23,00,000/-. So at least for that amount the appellants will going to succeed to get a money decree against respondent nos. 1 to 6.

Attachment before judgment

75] The criteria for attaching the property before judgment is under Order XXXIX Rule 5 of C.P.C.

(a) design in the mind of defendant to dispose of or to remove the property.

(b) it is done for the purpose of obstructing execution of decree that may be passed against him.

76] There also the decree is not passed still attachment can be ordered in a case of possible decision in favour of the plaintiff. So the rational behind granting injunction under clause (b) of Order XXXIX Rule 1 and rational behind attaching the property prior to judgment under XXXVIII Rule 5 of Code of Civil Procedure are nothing but the same.

77] The plaint is drafted on behalf of the litigant. There may be oversight in

asking a wrong relief or making incorrect submissions during argument. However, it is the job of the Court to mould the reliefs as per the circumstances for meeting the ends of justice.

78] There is an objection on behalf of respondent nos. 2 to 5 about harassment to be caused if such injunction is granted. On one hand they have received total consideration of Rs.23,00,000/- and to their share only Rs.11,50,000/- only whereas on the other hand appellants want restraint on Schedule B land which values to Rs.5,78,44,626/- (according to appellants only). These respondents cannot think of share of their consideration only. The respondent no.1 and respondent no.6 have also received consideration. I do not find merit in this objection. Because it is not a question of monetary consideration. But it is a question of defeating the rights of appellants in getting executed the decree which may (or may not) be passed at the conclusion of the trial.

79] I do find the apprehension of the appellants about "possibility of transferring Schedule "B" land by respondent nos. 1 to 6 during pendency of the suit" as well founded. It is on the basis of past experience of the appellants about entering into the transaction with two sets of parties. No convincing reason / inconvenience so as sufficient to refuse the prayer is pointed out by respondent nos. 2 to 6 if the injunction is granted. As against this the appellants may be denied of executing the decree, if passed in their favour. Because if Schedule B land is not available at that time then there may be difficulty in execution of possible decree. So I feel that there is a prima facie case in favour of the appellants. Hence, balance of convenience tilts in their favour. It is the appellants only who suffers irreparable loss, if the relief is refused. I find that relief can be granted here only.

80] That apart the Court has to take a judicial approach by balancing the rights and conflicting claims made by the litigants against each other. This Court is conscious of the fact that it will take time for final disposal of the suit and one cannot say when the decree will be fully satisfied. So this Court do not want Schedule 'B' land to be put under restraint for long period and that too entirely. So also this Court feels that the injunction to be granted against these respondents to be made operational only on non fulfillment of certain conditions.

81] So, this Court intends to put a condition on these respondents to furnish a bank guarantee to the tune of Rs. 1 Crore within 2 months from today. This bank guarantee can be materialized in case of breach of the order by these respondents. This Court has quantified the amount by considering the consideration of Rs. 23 Lakhs, other possible head of damages that may be accepted by the trial Court at the time of final decree. This is only a tentative calculation.

82] The learned trial Judge has mechanically rejected the order and has not considered the available undisputed materials properly. So there is a need to interfere at least in that part of order.

ORDER

(a) The appeal is party allowed.

(b) The respondent nos. 1a to 1f and respondent nos. 2 to 6 are directed to furnish bank guarantee to the tune of Rs. 1 Crore issued by any nationalized bank within two months from today before the trial Court.

(c) The trial Court is at liberty to extend the two months period by further one month period only after hearing the appellants.

(d) In case of failure to furnish it within that period, the injunction will become operational which is as follows:

i. The respondent nos. 1a to 1f and respondent nos. 2 to 6, their agents, representatives etc. are restrained from creating third party interest in any manner in respect of Kh.No.14, situated at mouza Zari, PH No.73, Taluka and District Nagpur, as described in Schedule 'B' of the plaint till final disposal of Special Civil Suit No.874/2017, pending before the Nagpur Court.

(e) The trial Court is directed to decide about this bank guarantee at the time of final disposal of the suit or on earlier occasion, if there is need.

(f) The parties to bear their own costs.

After pronouncement of the order, learned Advocate Shri Bhutada requested to extend the order of status quo granted by this Court. It is for the reason that the appellants want to take a chance before the Hon'ble Apex Court so far as the refusal of two prayers in respect of Schedule 'A' land.

It is opposed on behalf of respondent nos. 7 and 8. When I have already held that the appellants are not entitled for interim protection, I do not think that now the status quo order can be extended. The status quo order was passed by this Court under the assumption that the appellants will be protected and the appeal can be disposed of on a priority basis. This situation has not remained now. Hence, the prayer is rejected.