

(1986) 10 MP CK 0021

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 37 of 1986

Mukesh

APPELLANT

Vs

Deonarayan and Others

RESPONDENT

Date of Decision : 30-10-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 4(1), Order 39 Rule 1, Order 39 Rule 2
Hindu Minority and Guardianship Act, 1956 — Section 6, 8
Madhya Pradesh Co-operative Societies Act, 1960 — Section 2(3), 64, 94
Specific Relief Act, 1963 — Section 10

Citation : AIR 1987 MP 85 : (1987) JLJ 572

Hon'ble Judges : V.D. Gyani, J

Bench : Single Bench

Advocate : R.S. Waghmare, for the Appellant; A.K. Jain, for the Respondent

Final Decision : Allowed

Judgement

V.D. Gyani, J.—This Miscellaneous appeal arises out of order dt. 12-2-1986, refusing ad interim injunction as prayed for by the plaintiff-appellant restraining defendant-respondent 1 from transferring his 1/9th share in the suit land to defendant 10 and restraining defendant-respondents 2 to 9 from consenting to any such transfer or parting with its possession or altering the situation of the suit land as it existed on the date of the suit, seeking further injunction to restrain the defendant 10 from altering or changing or making construction on the 1/9th share of the land agreed to be sold to the plaintiff and also praying for a direction to maintain the status quo.

2. Brief facts of the case are that the plaintiff-appellant, who is a minor, through his natural guardian the mother, Laxmibai, filed a suit for specific performance of the agreement dt. 14-12-1982, entered into by defendant 1 to sell the 1/9th share of the suit land, bearing survey No. 3842, situated in Kasba Ujjain, for Rs. 35,000/- out of which Rs. 4000/- were paid by the plaintiff-appellant as earnest money. The other co-sharers, defendants 2 to 9 also consented to this

agreement by signing the same. One of the terms of the agreement provided that on a breach committed by defendant 1, the plaintiff will be entitled to claim specific performance of the agreement. It is also stated that defendant 1 obtained Rs. 2000/- from the plaintiff-appellant on 16-6-1984. Thus, the total amount received by him under the agreement is Rs. 6000/-. It is the plaintiff-appellant's case that as a result of a public-notice published in the local press on 17-9-1984, he came to know that the suit land was being purchased by defendant 10. He, therefore, served a notice dt. 19-9-1984 on the defendants reminding them of the agreement dt. 14-12-1982 and called upon them for specific performance of the contract. Defendants Kesharbai, Satyanarayan and Kailash executed a sale deed in favour of defendant-respondent 10 on 3-10-1985. The plaintiff-appellant, therefore, filed a suit for specific performance of the agreement and applied for an ad interim injunction, which was opposed by the defendant-respondent on the ground that there was a prior agreement made in favour of Rameshchandra by defendants 1 to 9 on 17-11-1982 and that being the prior agreement, the plaintiff could not enforce his agreement against defendant-respondents. It was also contended that the contract being by a minor, whose natural guardian being his father, the contract entered into by the mother Laxmibai, was not a valid contract. It was also alleged that the plaintiff-appellant committed breach as he failed in getting the NOC from the Competent Authority under the Ceiling Act.

3. The trial Court dismissed the plaintiff-appellant's application for an ad interim injunction upholding the objection raised by the defendant-respondent. It is in these circumstances that the present appeal has been filed by the plaintiff-appellant.

4. Shri Waghmare, learned counsel appearing for the appellant submitted that the trial Court erred in refusing to grant injunction without due application of mind to the nature of the claim advanced by the plaintiff, being a claim for specific performance of the contract, the question of plaintiffs possession of the suit land was irrelevant. The finding arrived at by the trial Court that the agreement dt. 7-11-1982 in favour of Rameshchandra, who in turn entered into an agreement on 14-7-1984 with Dr. Mrs Asha Joshi, with whom respondent 10 claimed to have entered into an agreement. on 11-9-84. The finding arrived at by the trial Court that the agreement dt. 7-11-1982 is a prior agreement stands vitiated in view of the fact that defendant 1 Deonarayan obtained Rs. 2000/- from the plaintiff-appellant on 16-7-1984 under the agreement dt. 14-12-1982, on which the plaintiffs suit is based. It was contended that merely because Rameshchandra entered into an agreement with Dr. Mrs. Asha Joshi, the subsequent agreement with respondent 10, such agreements do not in any manner affect the plaintiffs right. In any case and at any rate it constitutes a serious controvertial matter, which needs to be investigated in the trial of the suit. Learned counsel further added that the trial Court failed to make a correct appraisal of the term "prima facie case" which judicially means that there is a serious question, which has got to be examined by the Court and it is not

necessary for the plaintiff to prove that he has a fool-proof case. It is clear that the trial Court misdirected itself and at the initial stage itself, held the agreement dt. 7-11-1982 to be a prior agreement. The approach of the trial Court as regards enforceability of plaintiffs agreement dt. 14-12-1982, the observation made by the trial Court that instead of specific performance he could be awarded damages is also criticised by the learned counsel. Shri Waghmare also submitted that the trial Court erred in holding against the plaintiff-appellant that allotment of plots to members of respondent 10 would be stayed and thereby injustice would be caused. According to him this is no reason for refusing an injunction to the plaintiff. The trial Court also overlooked the fact that refusal of interim injunction, as prayed, would result in complications and multiplicity of proceedings, virtually frustrating the decree for specific performance. The trial Court also made much, of the fact that the plaintiffs father was Aam Mukhtiyar appointed by defendants 1 to 9. According to the learned counsel, it would not affect the plaintiffs rights arising out of the contract.

5. Shri Sanghi, learned counsel for the respondent 1 has supported the impugned order. Shri Jain for respondent 10, while supporting the order further submitted that the suit was not maintainable as against respondent 10 in view of Section 64 of the Cooperative Societies Act and want of a valid notice under the Act to respondent 12.

6. Before taking up the case on merits, it would be better to deal with the legal objections raised by the respondents. The first objection raised by Shri Jain, learned counsel appearing for the respondent 10, is that the suit was not maintainable in view of Section 94 of the M.P. Co-operative Societies Act, 1960 (hereinafter referred to as the Societies Act), which lays down that no suit shall be instituted against a Society or any of its officers in respect of any act touching the constitution, management or business of the Society, until the expiration of two months next after notice in writing has been delivered to the Registrar or left at his office stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims and the plaint shall contain the statement that such notice has been so delivered or left. As per the registration certificate, filed by the respondent 10, the Society was registered on 6-9-1985 and the Society entered into an agreement with Smt. Asha Joshi, on 11-9-1984 apparently before its registration and it is this agreement on which the Society's case rests. This agreement filed by the respondent 10 clearly recites that the Society at the time of agreement was merely "proposed" and had not come into legal existence. The term. "Society" has also been defined u/s 2(z) of the Societies Act. This definition reads as follows :

"Society" means -- a Co-operative Society, registered or deemed to be registered under this Act."

Thus, the Society referred to in Sections 64 and 94 of the Societies Act, is a Society as defined under the Act. It is not the case of respondent 10 that it should be deemed to be a Society under the Act.

7. Learned counsel appearing for the respondent 10 was pointedly asked during the course of his arguments whether the business of proposed Society would also be covered u/s 64 of the Societies Act and whether a subsequent registration would relate back or given a retrospective effect so as to cover up the business done by a proposed Society. Indisputably on facts, it is not the pleaded case of respondent 10 and on general principles there can be no retrospective effect of the registration of a Society. The objection, therefore, has no force and is accordingly rejected.

8. The next objection about the maintainability of the suit by Laxmibai, the mother, natural guardian of Mukesh, has been Raised by the respondents. The father of Mukesh being alive, it is contended that in view of Section 6(a) of the Hindu Minority and Guardianship Act, 1956, the father being a natural guardian in respect of minor persons and their property, Laxmibai, the mother, could not legally act as a guardian of her son, Mukesh, nor could she maintain the present suit, as the contract itself is void.

9. Counsel for the respondents have vehemently opposed the maintainability of the suit itself, as Laxmibai, the mother of minor plaintiff Mukesh cannot legally act as his guardian and maintain the suit as she is incompetent to act as such, in view of Section 6(a) of the Hindu Minority and Guardianship Act.

10. Before proceeding further to deal with this objection, it would be proper to note a few facts, as they emerge from the record. Laxmibai in her application under Order 32, Rule 4, CPC has stated that there is no conflict of interest between the two i.e. the mother and the son. She has also sworn an affidavit that she is the natural guardian being mother of Mukesh and as such capable of acting as next friend for and on behalf of her minor son Mukesh. Tarachand, the father has also sworn an affidavit stating that his relations with his son Mukesh have not been cordial, rather they are strained for the last 4-5 years, as the son is disobedient to his father and has been working under the guidance of his mother, who has been maintaining him (Mukesh) as his natural guardian. There is no counter-affidavit to controvert these facts. The agreement sought to have been forced is not against the minor, but it is being sought to be enforced for him and on his behalf. It may also be noted that it is not an agreement, which if specifically enforced, would result in alienation or transfer of minor's property. On the other hand it is an agreement for acquiring property and the minor's interest is in no way jeopardised.

11. The trial Court without adverting to the above stated facts, placing reliance on a decision in Smt. Surinder Kaur Sandhu Vs. Harbax Singh Sandhu and Another, , held that Mukesh's mother Laxmibai was incompetent to enter into any contract on behalf of minor Mukesh and consequently the agreement dt. 14-12-1982 was invalid and unenforceable. It was on this basis that the trial Court further found that the plaintiff had no prima facie case. The case of Surinder Kaur (supra) relates to the custody of a minor son and its facts are glaringly different. No question of contract entered into by the mother on behalf

of a Hindu minor son was involved in that case. The Supreme Court has, however, held that " Section 6 of the Hindu Minority and Guardianship Act, 1956, could not supersede the paramount consideration as to what was conducive to the welfare of the minor. The trial Court has not considered the facts stated by the plaintiff-appellant in his application under Order 32, Rule 4, CPC and in the affidavit filed by Laxmibai and there is no reference to the affidavit sworn by Tarachand. These facts should have been considered by the trial Court before reaching the conclusion that the suit as filed by Laxmibai was not maintainable, as she had no capacity to contract on behalf of her minor son Mukesh, while his father is still alive.

12. Under Order 32, Rule 4, CPC next friend need not necessarily be one of guardians enumerated in Section 6 of the Hindu Minority and Guardianship Act. Rule 4 of Order 32 in its application to the State of Madhya Pradesh has been amended. Rule 4(1) lays down that any person, who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit, provided that the interest of such person is not adverse to that of the minor. The affidavit, as sworn by Laxmibai, clearly brings out her case within the purview of Rule 4(1) of Order 32, CPC. It is only in case where a minor's guardian is appointed or declared by a competent authority that other persons are excluded to act as a guardian or next friend. "Guardian" has been defined u/s 4(b) of the Hindu Minority and Guardianship Act, 1956. Clause (c) thereof defines the "natural guardian", which means any of the guardians mentioned in Section 6. The definition of "guardian" referred to in Section 4(b) (i) to (iv) is an inclusive definition and there is no reason why the person who acts as a de facto guardian, should not be included within the definition of a "guardian" as was recognised for certain purposes under the old law. There are two conflicting views on the point: one is represented by a decision of the Bombay High Court in Ratan and Another Vs. Bisan Ramchandra Pardeshi, , which takes a different view from another decision of the Kerala High Court in P.N. Ramachandra Iyer Vs. S.V. Annapurni Ammal Iyer, . There is yet another case where the Supreme Court in Shri Manik Chand and Another Vs. Shri Ramchandra, , where the plaintiffs 1 and 2, Hindu minors, entered into an agreement through their mother and guardian Smt. Phulibai with the respondent in that case to purchase a house, has held that the contract entered into by the guardian on behalf of the minors is enforceable.

13. Shri Sanghi, learned counsel appearing for respondent 1 submitted that in view of Section 8 of the Hindu Minority and Guardianship Act, the contract entered into by Smt. Laxmibai could be held to be unenforceable. This point was also raised before the Supreme Court in the case of Manik Chand (supra) wherein repelling the contention it held :

"Finding himself faced with these insurmountable difficulties, Dr. Chitale sought to plead that in any event Section 8 of the Hindu Minority Act specifically prohibits the guardian from binding the minor by his personal covenant. The

submission was that the contract by the guardian which binds the minor to make a payment, would be in the nature of a personal covenant and as such is excluded by Section 8. In support of his plea, the learned counsel relied on Section 55(5)(b) of the T.P. Act and submitted that so far as the payment of the purchase price is concerned, there is personal covenant. We are unable to accept this contention for it cannot be said that the guardian by the contract was binding the minor by his personal covenant. As it is within the competence of the guardian, the contract is entered into effectively on behalf of the minor and the liability to pay the money is the liability of the minor under the Transfer of Property Act. We are unable to accept the plea that in a contract for purchase of property, the guardian would be binding the minor by his personal covenant. In the result we find that the contract entered into by the guardian on behalf of the minors is enforceable."

The object and purpose of the Hindu Minority and Guardianship Act was to protect the minor's estate and his welfare. In Section 8 of the Act the powers of a natural guardian of a Hindu minor have been purposefully restricted to all such acts, which are necessary or reasonable or proper for the benefit of the minor or for realisation, protection or benefit of the minor's estate.

14. It may be noted at this stage that specific performance of agreement is to the benefit of the minor's estate. At the time when the plaintiffs agreement was executed on 14-12-82, price of land per Bigha was agreed to be at Rs. 35,000/-, while the agreement dt. 11-9-1984, entered with Smt. Asha Joshi, reveals that the price of land had increased to Rs. 45,000/- per Bigha and Smt. Asha Joshi in turn agreed to sell the land at Rs. 75,000/-per Bigha. Apparently the enforcement of the contract is in favour of the minor and the respondents are opposing its specific performance for obvious reasons. The minor's benefit and interest lies in specific performance of the contract. The Supreme Court in the case of Shri Manik Chand and Another Vs. Shri Ramchandra, , while taking a note of such a situation observed:

"It appears quite strange that the respondent should plead that the transaction is not for the benefit of the minor when the minor is convinced it is in his benefit and that it is worth pursuing the litigation up to this Court. It is common knowledge that the prices of immovable property have been on the rise and there can be no doubt that the transaction is for the benefit of the minor,"

15. Shri Sanghi, learned counsel for respondent 1, with reference to the facts stated in the judgment in the case of Manik Chand (supra) pointed out that the facts therein do not disclose whether the minor's father in that case was alive. True it is, but the propositions laid down by the Supreme Court in that case cannot be ignored merely for such a non-mention of a fact, as pointed out by Shri Sanghi.

16. The trial Court has concluded that the plaintiff had no prima facie case. The trial Court on the basis of the case of Smt. Surinder Kaur Sandhu Vs. Harbax

Singh Sandhu and Another, concluded that the plaintiff had no prima facie case. What constitutes prima facie case is by now well settled.

17. The principles on which the Court grants or confirms a temporary injunction pending the disposal of a suit are now well settled. An interlocutory injunction is merely provisional in its nature. It does not conclude or purport to conclude a right, but is intended to keep the matters open pending further orders based on inquiry. All that the plaintiffs are required to show is firstly that they have a strong prima facie case in support of the right which they assert. When the Court is called upon to examine whether the plaintiff has a prima facie case in a suit for the purpose of determining whether a temporary injunction should be granted, the Court must perforce examine the merits of the case and it will be compelled to consider whether there is a likelihood of the suit being decreed. The depth of investigation which the Court must necessarily pursue for that purpose will vary with each case. Where the determination must be made with reference to factual material, the scope of examination must be confined to the evidence on the record, including affidavit evidence, available at that stage. The circumstances under which temporary injunction may be granted have by now been more or less crystallised. Where in any suit it is proved by affidavit or otherwise that any property in dispute is in danger of being wasted, damaged or alienated by any party to the suit, or to restrain the defendant from committing injury of any kind relating to the same property or right, the Court may grant a temporary injunction at its discretion on such terms as to the duration of the injunction, and subject to conditions as the Court thinks fit. While considering the question of prima facie case what the Court is required to see is whether there is a fair question involved in the suit for decision and it will suffice if it is found that the plaintiff has a strong probability of ultimate success. All that the plaintiff is required to show is that he has a fair and serious question to be tried. In view of the foregoing discussion, the finding arrived at by the trial Court that the plaintiff has no prima facie case, cannot be allowed to stand. It is accordingly set aside.

18. Curiously enough the trial Court at the initial stage concluded that the plaintiff had no prima facie case. This finding deserves to be set aside and is accordingly set aside. However, it is made clear that the trial Court is free to come to its own conclusions on merits in accordance with law on conclusion of trial of the case,

19. The agreement, which the plaintiff entered into, cannot be held to be void at this stage. It is also not the respondents' case that the said agreement if enforced, would harm or damage the minor's interest. Placing reliance on a decision in *Shambhudayal v. State of M.P.* 1986 MPLJ 32, it was contended by the respondents that where an agreement is void, no prima facie case can be said to be existing in the light of the decisions in the case of *Shri Manik Chand and Another Vs. Shri Ramchandra*, and the case of *Ratan and Another Vs. Bisan Ramchandra Pardeshi*, . The agreement cannot be said to be a void agreement.

20. Respondents also contended that as the land was not partitioned, the 1/9th

share of the whole land has not been determined and as such no specific performance in respect of such an undefined share of land can be ordered. Admittedly, respondents 1 to 9 have entered into an agreement to sell their respective shares in the land and respondents 2 to 9 have signed the agreement entered into by respondent 1. Thus, consent of respondents 1 to 9 is on record. The submission, therefore, that in absence of partition of land no specific performance of contract can be granted, has no force, particularly in view of the fact that three of the respondents have separately got their respective shares transferred by registered sale in favour of respondent 10. The argument advanced by the respondents loses its force in view of this factual position.

21. It was also contended that so long as the exemption under the Urban Land Ceiling Act is not granted, the plaintiff is not entitled to any interim injunction. The power to obtain exemption and transfer of vacant land in excess of the ceiling limit is undoubtedly with the owner and the only rider to that power is obtaining of exemption u/s 20 of the Urban Land Ceiling Act. If the grounds of exemption exist, the owner can obtain such an exemption and there is no reason why any such owner should not be restrained from committing breach of an agreement. In this context a Full Bench of the Gujarat High Court in *Shah Jitendra Nanlal Vs. Patel Lallubhai Ishverbhai*, , has held that:

"So long as the provision declaring the transfer of vacant land in excess of ceiling limit u/s 5(3) as void is subject to the right to move for exemption, obtain exemption and transfer the property, the power of an owner of vacant land in excess of the ceiling limit to "alienate" such land is dormant in him and such power could be exercised by him in case he seeks exemption, satisfies the Government that the grounds for exemption exist and obtains such exemption. That being the case, a decree cannot be defeated on the ground that "transfer" inter-partes would not be possible. The possibility of obtaining exemption survives till the notification u/s 10(2) of the Act is issued. That being the situation until then, a plaintiff seeking specific performance cannot be told that the terms of the contract cannot be fulfilled. The passing of a conditional decree for specific performance of the obligation of the holder to transfer vacant land in excess of ceiling limit held by him subject to exemption being obtained u/s 20 is permissible.

22. Another objection raised by the respondents is that Section 52 of the T.P. Act affords sufficient protection to the plaintiff-appellant even in the event he succeeds in the suit. It was on this basis that it was submitted that no interim injunction could be granted to the plaintiff. This point came up for consideration before this Court in *Khubi v. Gulab* (C.R. No. 246/1980(C) decided on 18-2-1981 : 1983 M.P.W.N. Note No. 331) and this Court held :

"Before me it is submitted by the learned counsel for the petitioner that to protect the rights of the parties, Section 52 of the Transfer of Property Act is sufficient. But, in my opinion Section 52 of the Transfer of Property Act even though is sufficient to safeguard the possibility that there will be multiplicity of

the suits and so many parties will be involved in the litigation for nothing. Therefore, in my opinion to avoid this position the injunction granted by the learned trial Court and affirmed by the appellate Court. I see no reason to discharge."

23. Complications which would arise in the event the injunction is withheld can well be envisaged. Property is passing hands and the Society will further allot the suit land to its members for construction of houses. Shri Sanghi, placing reliance on a decision in Mohd. Ismail Vs. Ashiq Husain, , contended that even if a superstructure is raised and construction made, the respondents cannot claim advantage out of the building wrongfully put up. Section 52 of the T.P. Act would afford protection to the plaintiff in the event of his success, but while making this submission learned counsel has not taken note of the fact that the plaintiff, who is a Gardner (Mali) by caste, had entered into an agreement to purchase 1/9th share of the suit land for raising a garden in order to augment his income and it would In no way be possible for the plaintiff to use the land for the purpose he has agreed to purchase. Thus, the doctrine of lis pendens would not afford any real protection to the plaintiff.

24. Shri Sanghi stressed that there is no apprehended injury to the plaintiff. He placed reliance on the decisions in the case of Mohd. Ismail (supra) and on Anil Kumar v. Kashinath 1982 M.P.W.N 247. . The case of Mohd. Ismail (supra) relates to. construction of a house on a building site. It is clear from the facts stated in para 3 of the said judgment that at the time of institution of the suit no construction stood on the land in dispute. The judgment-debtor therein had merely dug the foundation and this was the reason why reliefs of possession and permanent injunction were sought and there was no prayer, for removal or demolition of construction. The judgment-debtor, however had completed the groundfloor before the matter of temporary injunction could be finally decided. The other case of Anil Kumar (supra) relates to alienation of property forming subject-matter of partition suit. In that case a house was agreed to be sold by the Receiver in favour of one Rampal for Rs. 2 lacs, out of which Rs. 50,000/- had been paid to the Receiver. Thus, the subject-matter of suits in these two cases are materially different. In the instant case agricultural land is purchased by the plaintiff for the purpose of gardening and if a building is allowed to be raised and constructed thereon, the very purpose of purchase would be defeated. In such a situation, Section 52 T.P. Act would not afford any protection to the plaintiff.

25. The apprehended injury is apparent. Shri Sanghi, placing reliance on a decision in Jamnabai v. Narmadashankar 1957 Jab LJ 914, submitted that it is only in cases where the property is in danger of being wasted, destroyed or damaged or kept beyond the power of the Court that the Court should interfere and grant injunction. According to the learned counsel, no such danger of waste, damage or destruction of property is imminent. The submission cannot be accepted as the avowed purpose of respondent 10 is to provide residential

accommodation while that of the plaintiff is to raise a garden. There is an apparent conflict of purpose and resultant injury to the plaintiff is also equally apparent. To say that the building can be removed in the case the plaintiff succeeded in his suit, but the question is whether it would remain useful to the plaintiff for the purpose he intends to purchase it. It is, therefore, necessary to keep it in a "status quo".

26. The trial Court has refused to grant injunction on the ground that the plaintiff was not in possession of the suit land. Admittedly, the plaintiff has based his claim on an agreement and not on possession. It is only, when an interim relief is claimed on the basis of possession that the question of possession assumes importance. Where a plaintiff-applicant comes forth with a case for specific performance of contract, based on an agreement, what the Court should see is the enforceability of an agreement and not actual possession of the land agreed to be transferred or sold. The case relied upon by the trial Court and as referred to in para 10 of the impugned judgment has no bearing to the facts of this case. The Court below has further relied upon a judgment of this Court in *Gulab Bai v. Shyamlal* 1982 Jab LJ 23, holding that even if prima facie case is proved, unless the plaintiff-applicant establishes irreparable injury to him and the balance of convenience in his favour, he cannot claim an ad interim injunction. As a matter of legal proposition, there can be no dispute about it. The trial Court in order to determine apprehended or irreparable injury, should have considered the purpose for which the plaintiff had agreed to purchase the land and the avowed purpose of the respondents to change the very nature of user of the land. The resultant injury by change of such user of land can well be imagined. In the circumstances, the plaintiff is not merely found to have a prima facie case but also an apprehended irreparable injury to his interest and rights flowing from the contract, in the event the injunction, as prayed for by him, is withheld.

27. Considering the question of balance of convenience Shri Waghmare, learned counsel for respondent 10 submitted that respondent 10 has over-reached its activities even prior to its registration, that too in face of notices being served by the plaintiff on other respondents. In arriving at the balance of convenience, the Court has to weigh the mischief which is likely to be caused to the applicant if the injunction is refused and weigh it with that which is likely to be caused to the other side, if the injunction is granted. In this case so far as respondents 1 to 9 are concerned. Respondent 10 has based its case on the basis of an agreement dt. 11-9-1984, entered into by the society with Dr. Asha Joshi, whose base, is the agreement dt. 14-7-1984, which she has entered into with Rameshchandra, who in turn had entered into an agreement with respondents 1 to 9 on 7-11-82, as claimed by the respondents. The trial Court has found that the whole land is in occupation of respondent 10 and in case of injunction being granted, the Society respondent 10 would suffer most. In this connection the trial Court has also taken note of the fact that prices of land and cost of construction is increasing day by day and on this account as well refused injunction to the plaintiff. The trial Court has further observed that Laxmibai, the wife of Tarachand, should

have had knowledge of the earlier agreement dt. 7-11-1982, which the respondents 1 to 9 had entered into with Rameshchandra. The important facts, which the trial Court has not considered are the affidavit which Rameshchandra had sworn and secondly the payment of Rs. 2000/- on 16-6-84, made by the plaintiff to the defendant 1. Which of the two agreements is prior in point of time is a matter of inquiry and cannot at this stage be decided on their respective face value and the material available on record. It needs investigation. The trial Court appears to have been impressed by the fact that no objection-certificates from the Competent Authority have been obtained in favour of the Society.

28. President of the respondent 10-Society and Deonarayan in their affidavits dt. 4-1-86 and 6-1-86, sworn before the trial Court, have very clearly deposed about the partition of land in nine equal parts amongst the-nine co- sharers, each taking one plot admeasuring one Bigha. They have further stated that out of these nine co-sharers, three (Kesharbai, Satyanarayan and Kailash) have already executed sale deeds in favour of respondent 10 and these sale deeds have been registered on 3-10-85. The other six could not sell as a result of ex parte injunction order granted by the Court. The trial Court has omitted to consider this pleaded case and these affidavits while passing the impugned order. Had it been taken into consideration, at least the trial Court would not have said as to which particular part or parcel of the land would come to the share of respondent No. 1- Deonarayan-(See para 9 of the impugned judgment). The finding recorded by the trial Court in this para stands vitiated as a result of non-consideration of the pleaded case and of affidavits sworn by Deonarayan on 6-1-1986.

29. It is also the case of respondent 1 and respondent 10 that sale deeds have been executed in favour of respondent 10, as a result of non-exercise of the option by the competent Authority to purchase the land in respect of which notice is given before transfer of vacant land in accordance with Section 26 of the Urban Land (Ceiling and Regulation) Act, 1976. From the affidavits sworn by both the President of the Society as well as Deonarayan, respondent 1, two facts are very clear : (i) the sale deeds were executed on 3-10-85 and (ii) the notice of intended transfer, as required by Section 26(1), to be given to the Competent Authority could not have been in favour of respondent 10, the Society. Sub-section (2) of Section 26 prescribes sixty days period for exercise of option by the Competent Authority to purchase the land intended to be transferred and the intended transferee in this case by no stretch of imagination could be the Society as it came into being only on 6-9-1985, as per the registration certificate, produced by the Society. The intended transferee could be only one (none?) but the Society. If the respondents intended to transfer the land to the Society, they would have mentioned the Society's name as intended transferee or purchaser and if not the Society at least Rameshchandra -- with whom they claim to have entered into an agreement to sell. The respondent have not produced any such document in support of their case so as to reveal the intention of the land-owners -- as to whose contract they were abiding by while agitating their claim before the Competent Authority. The respondent Society while pleading sale in its

favour, on the basis of N.O.Cs obtained by other respondents, has assiduously avoided to state as to who were the intended transferees and for obvious reasons neither the Society nor Rameshchandra nor even Dr. Asha Joshi are to be found as intended transferees or purchasers. The trial Court has not adverted to this aspect of the matter at all.

30. The respondents 1 and 10 do not dispute obtaining of N.O.Cs by all the co-sharers of the land-respondents 1 to 9-on the other hand they admit that such N.O.Cs have in fact been obtained by them. In view of legal position explained above the Society, respondent 10-could not be the intended transferee.

31. The appellant has filed five different N.O.Cs issued by the Competent Authority. The name of the intended transferee or purchaser required to be mentioned therein against the heading "KRETA KA NAAM" Name of the purchaser the names mentioned are, those of Tar"achand, Omprakash. Ishwarchandra, Mangilal and lastly in N.O.C. dt. 18-10-85 it is Mukeshkumar s/o Tarachand, whose name has been mentioned as purchaser. These N.O.Cs are clearly indicative of the intention of the land-owners. If it was an agreement to sell the land to Rameshchandra, as pleaded by the respondents, one would legitimately expect his name to be mentioned in place of those stated above. If there was no contract at all with the plaintiff Mukesh, as pleaded and contended by the respondents, his name would not have occurred in the N.O.Cs dt. 18-10-1985, as the purchaser.

32. In view of these facts, what is the balance of convenience in favour of respondent 10 except that it is a registered co-operative Housing Society. It is evident that the Society-respondent 10 made its appearance on the stage while the last scene was being enacted. The trial Court has found the balance of convenience in favour of respondent 10, who had no legal existence prior to 6-9-1985., when it was registered.

33. The trial Court has referred to two decisions in support of the Society's case. The first is *Amirchand v. Devidas*, AIR 1973 Madh Pra 15. The plaintiff in this case purported to have sold two houses for Rs. 3000/- to Amirchand, the defendant, who was also put in possession. The sale deed contained an agreement of reconveyance within three years of payment of Rs. 3000/-. Nanhelal, the plaintiff sold the two houses to one Devidas. Both of them filed a suit, which was resisted by the defendant Amirchand. The trial Court held that the transaction was of usufructuary mortgage with a condition of sale, The defendant-appellant (appealed) but lost. In a second appeal by the defendant it was contended that the transaction was not a mortgage but it was really a sale out and out. This Court in the above set of facts held that if a sale and an agreement to repurchase are embodied in a separate document, the transaction cannot be a mortgage, even though the two documents may be contemporaneously executed and the second contention was that the right to repurchase was not really a right but a privilege and that could be exercised only by the person to whom that privilege or concession was given, but not by any

one else. Considering the conditions of the sale deed it was found that the right was reserved by the vendor and an obligation was accepted by the vendee to reconvey the suit houses and it was in this context that this Court held that an agreement to resell can be enforced by the assignee of the vendor against the vendee unless the agreement prohibits such an assignment. The trial Court has overlooked that a decree for redemption in favour of Devidas was passed. There was an out-right sale by Nanhelal in favour of Devidas and Nanhelal had executed the sale deeds, which contained an agreement of reconveyance. These facts have escaped notice of the trial Court. In the instant case it is nothing but a mere agreement of sale. This authority, therefore, does not help the respondent No. 10 in any manner. The other case, which the learned Judge has relied upon is that of *Gulab Bai v. Shyamlal* 1982 Jab LJ . 23. The view propounded in this decision is that even if a prima facie case is made out, the plaintiff is not entitled to an injunction, where there is no irreparable injury and balance of convenience is in favour of the defendant. This was a case where a sale deed was executed and a declaration was sought that it was illegal and sham. The plaintiff also asked for an injunction that the defendant should not take possession of the property and he should not dispossess the tenants. The facts stated in this Short-Note further reveal that the dispute related to a room in which respondent 1 had installed his family idol and an assurance was given by his counsel that if the suit was decreed then he would take away his family idol and install the same in a portion of the house in his possession. It was an admitted position that the plaintiff owned half share of the house and the other half belonged to defendant 2. It was also urged that mere installation of a family idol in a room would not change the nature of the house and further pointed out that the defendant had at least some share in the house and no irreparable injury would be suffered by the plaintiff, particularly in view of the assurance given by the learned counsel for the defendant before the trial Court as well as before this Court and it was in this context held that even if the plaintiff had a prima facie case, there was no irreparable injury to the plaintiff and the balance of convenience found in favour of defendant 1. The facts as stated above are materially different and the case relied upon by the trial Court has absolutely no bearing on the facts of the instant case.

34. Where injunctions are sought to prevent breach of contract, the balance of convenience is in favour of the plaintiff-applicant, who seeks specific performance of contract and makes out a prima facie case. Kerr on Injunctions observes :

"In cases of covenant or agreement, where the breach is clear and covenant or agreement is of such a nature that it can, consistently with the rules and principles of the Court, be specifically enforced, the Court will not, unless under exceptional circumstances, take into consideration at the hearing the comparative injury to the parties from granting or withholding the injunction. The mere fact that there has been a breach of covenant is as a general rule, sufficient ground for the interference of the Court by injunction, for a covenantor has the right to have the actual enjoyment of property *modo et forma* as stipulated for

by him and is entitled, as a general rule, to have his right enforced by injunction without the necessity of showing damage."

See ROW'S Law of Injunctions (4th Ed) P. 477.

35. For the foregoing reasons, this appeal deserves to be allowed and is accordingly allowed. The interim injunction, as prayed for by the plaintiff-appellant, in the circumstances is granted. It is ordered that defendant-respondent No. 1 shall not transfer his 1/9th share in the land in suit to anyone, including respondent No. 10 and parting with possession in any manner or altering the situation and character as it is existing on the date of filing of the suit. Respondent 10 is further restrained from altering the nature, changing or making any construction on the 1/9th share of the land in suit.