

(2011) 04 BOM CK 0119

In the Bombay High Court

Case No : Appeal From Order No's. 884 and 857 of 2010

Pralhad Jaganath Jawale and Others

APPELLANT

Vs

Sau. Sitabai Chander Nikam and Others
 Maheshwari
Panch Trust and Others Vs Vilas Jainarayan Laddha and
Others

RESPONDENT

Date of Decision : 08-04-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 10, Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 2A
Constitution of India, 1950 — Article 141
Registration Act, 1908 — Section 17, 18
Transfer of Property Act, 1882 — Section 2, 52, 53A

Citation : (2011) 7 ALLMR 355 : (2011) 6 BomCR 619 : (2011) 4 MhLj 137

Hon'ble Judges : A.S. Oka, J

Bench : Single Bench

Advocate : Sandeep D. Shinde, in AO No. 884 of 2010 and M.M. Sathaye, in AO No. 857 of 2010, for the Appellant; V.V. Pai, for Respondent Nos. 1 to 8 in AO No. 884 of 2010 and M.M. Sathaye, for Respondent Nos. 9 and 10 in AO No. 884 of 2010, for the Respondent

Judgement

A.S. Oka, J.—I have heard the learned Counsel appearing for the Appellants in Appeal from Order No. 884 of 2010. I have heard the learned Counsel appearing for the Respondent Nos. 1 to 8 and the learned Counsel appearing for the Respondent Nos. 9 and 10 in Appeal from Order No. 884 of 2010. I have heard the learned Counsel appearing for the Appellants in Appeal from order No. 857 of 2010. I have heard Mr. Uday Warunjikar, learned Counsel who had requested that he should be heard on the legal question involved.

2. The Appeal from Order No. 884 of 2010 takes an exception to the judgment and order dated 4th December, 2009 passed by the learned trial Judge by which the application made by the Appellants (the Plaintiffs) at Exhibit - 61 for temporary injunction has been rejected. In Appeal from Order No. 857 of 2010, the challenge is to the judgment and order dated 22nd July 2009 by which the

application made by the Appellants Plaintiffs at Exhibit 5 for temporary injunction has been rejected.

3. These two appeals are taken up together for hearing as to admission as both involve the question of interpretation of the judgment of this Court in the case of Kachhi Properties, Satara v. Ganpatrao Shankarrao Kadam 2010 (5) Mh. L.J. 903. As far as Appeal from Order No. 857 of 2010 is concerned, the same will have to be admitted and ad interim relief will have to be continued. Therefore, I am dealing in detail only with the facts of the case in Appeal from Order No. 884 of 2010. The suit is filed by the Appellants for declaration that compromise decree passed in Special Civil Suit No. 379 of 1996 is void and that on the basis of the compromise decree, no rights have been acquired by the Respondent Nos. 1 to 10. The second prayer is for perpetual injunction. The third prayer is for declaration that the possession of the Appellants over the suit property has been protected by Section 53A of the Transfer of Properties Act, 1882 (hereinafter referred to as "the Act of 1882"). The Appellants - Plaintiffs are relying upon the sale deed dated 27th April, 1998 obtained by them from the Respondent Nos. 1 to 8 and the Respondent No. 11. The Appellants are placing reliance on a decree passed in Special Civil Suit No. 155 of 1996 in which the Respondent No. 11 was the Plaintiff. It is a decree for specific performance directing the Respondent Nos. 1 to 8 herein to execute a sale deed in favour of the Respondent No. 11. By the impugned order, the application at Exhibit 61 for temporary injunction made by the Appellants has been rejected. The learned Counsel appearing for the Appellants submitted that though there may have been an order of injunction operating against Respondent Nos. 1 to 8 when they executed the sale deed dated 27th April, 1998, the Respondent No. 11 was the title holder and therefore, the title has been passed to the Appellants on the basis of sale deed dated 27th April 1998. He submitted that only a limited interim relief of restraining the Respondents from creating third party interests was sought, which ought to have been granted. His submission is that the decision in the case of Kachhi Properties (supra) does not lay down any proposition of law.

4. The learned Counsel appearing for the Appellants in Appeal from Order No. 857 of 2010 has made detailed submission. His submission is that apart from the fact that the decision in the case of Kachhi Properties (supra) does not lay down any proposition of law, the said decision will not bind this Court as the same has been delivered by ignoring the binding precedents and specific provisions of law. He has placed reliance on several decisions of the Apex Court and this Court.

5. Mr. Warunjikar, the learned Counsel, sought permission of this Court to make submissions on the decision in the case of Kachhi Properties (supra). As he submitted that there are large numbers of matters in which this issue is involved, I have heard his submissions. Mr. Warunjikar, the learned Counsel pointed out that SLP preferred against the judgment of this Court in the case of Kachhi Properties (supra) has been summarily dismissed by a non speaking order. He has placed on record a copy of the order passed in the Special Leave Petition. He

submitted that the said decision in the case of Kachhi Properties (supra) is per incuriam. He relied upon a decision of the Apex Court in the case of Kunhayammed and Others Vs. State of Kerala and Another, .

6. Thus, in short, the submission is that the decision of this Court in the case of Kachhi Properties (supra) cannot be read as a binding precedent. By order dated 1st October 2010, the Apex Court dismissed the SLP against the said decision by passing the following order:

Special Leave Petitions are dismissed.

In the case of Kunhayammed and Others Vs. State of Kerala and Another, , the Apex Court observed thus:

27. A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non speaking order, i.e., it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared.

(Emphasis added)

7. In view of the aforesaid principles of law, the submissions made before this Court can be considered on merits. It will be necessary to make a reference to the judgment of this Court in the case of Kachhi Properties (supra). The question which was considered by this Court while dealing with several appeals from order was of the power of the Court of grant of temporary injunction pending a suit to restrain a Defendant from creating third party interests in respect of the suit property and from alienating the suit property. The issue considered by this Court was whether the Section 52 of the said Act of 1882 affects the power of the Court to grant such temporary injunction preventing alienation of the suit property pending the disposal of the suit. This Court considered various decisions of the Apex Court and other High Courts. Paragraph No. 15 of the decision of this Court reads thus:

15. There can be no doubt that there could always be cases where rule of lis pendens may be inadequate to prevent the mischief and a temporary injunction to prevent such mischief would be warranted. This would imply that a person claiming injunction in such a situation would have to show that protection u/s 52 of the TP Act is not adequate. Merely because there is a power, its exercise could not be sought as a matter of course; or simply because its exercise is unlikely to hurt the Defendant; for, while granting injunction the Court must see that Plaintiff makes out a case of irreparable loss and it is not for the Defendant to prove that he would suffer if an injunction is issued. After Plaintiff proves irreparable loss comes the question of balance of convenience or rather balance of inconvenience, when the Court would enquire as to who would suffer greater

inconvenience and decide whether injunction ought to be granted.

8. This Court has summarized the conclusions in paragraph No. 30 of the said decision, which read thus:

30. To sum up:

(a) Section 52 of the TP Act provides adequate protection to the parties from transfers pendente lite and such transferees are neither required to be impleaded nor can claim impleadment. They cannot even resist execution proceedings.

(b) In Mumbai (as also elsewhere as and when amended provisions are made applicable) Plaintiffs could (or rather ought to) have notices of their suits registered u/s 18 of the Indian Registration Act, in view of the amended provision of the TP Act and the Registration Act. They cannot seek to restrain adversary by an injunction by refusing to go in for registration of the lis.

(c) Rule 1 of Order XXXIX of the CPC enabling Court to grant temporary injunctions to restrain transfers pendente lite is only an enabling provision, recognizing the power in the Court to issue such injunction and does not imply that because there is power, it must be exercised. The provision could be invoked only if protection provided by Section 52 of the TP Act is shown to be inadequate.

(d) In the face of protection provided by Section 52 of the TP Act, Courts should be cautious in examining the claims by Plaintiffs of irreparable loss if injunction to restrain alienations is refused.

(e) In suits for specific performance/right to develop against the recorded/rightful owners, Courts may consider if an injunction would cause greater inconvenience to a rightful owner by being deprived the right to deal with his property for the sake of a claim which is yet to mature into right and which metamorphosis rests in the discretion of the Court and is not certain.

(f) Courts may consider necessity of imposing suitable conditions to protect Plaintiffs' interests short of granting injunction - like seeking undertaking that no equities would be claimed, on account of sale/development of properties; effecting sales only after putting transferees to notice that their rights would be subject to suit etc. Interests of prospective purchasers would also be protected if Plaintiffs in such cases register the lis, though it may be optional.

9. For dealing with the submissions canvassed before this Court by the learned Counsel appearing for the Appellants and the learned Counsel Mr. Warunjikar, it will be necessary to make a reference to Section 52 of the said Act of 1882. As far as the State of Bombay is concerned, by Bombay Act XIV of 1939, Section 52 was substituted. The amended section reads thus:

52. Transfer of property pending suit relating thereto.-

(1) During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir established beyond such limits by the

Central Government, of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, if a notice of the pendency of such suit or proceeding is registered u/s 18 of the Indian Registration Act, 1908, the property after the notice is so registered cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

(2) Every notice of pendency of a suit or proceeding referred to in Sub-section (1) shall contain the following particulars, namely: -

(a) the name and address of the owner of immovable property or other person whose right to the immovable property is in question ;

(b) the description of the immovable property the right to which is in question ;

(c) The Court in which the suit or proceeding is pending ;

(d) the nature and title of the suit or proceeding; and (e) the date on which the suit or proceeding was instituted.

Explanation.- For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

10. The portion highlighted and printed in italics above is the amendment made by Bombay Act XIV of 1939. It will be also material to note the other provisions of Bombay Act XIV of 1939. Section 2 of the said Act provides that the provisions of the said Amending Act shall apply to the property situated wholly or partly only in the city of Bombay from the date of publication of the notification in official gazette. It is further provided therein that the substituted Section 52 will apply to the other areas provided there is a notification issued extending applicability of the said provision to the other areas. It is not in dispute as noted in the decision in the case of Kachhi Properties (supra) that there is no notification issued making applicable the substituted Section 52 to other parts of the State of Maharashtra. Therefore, the substituted Section 52 is applicable only to the suits filed in relation to the immovable property in the city of Bombay, which consists of two revenue districts. Till a notification extending the substituted provisions to other parts of the State is issued, the other parts of the State will be still governed by unamended Section 52 of the said Act of 1882 as it existed prior to coming into force of Bombay Act XIV of 1939. Therefore, as far as Clause (b) of paragraph No. 30 of the said decision is concerned, it applies

only to the suits filed relating to the immovable property in the city of Mumbai inasmuch as substituted Section 52 is not applicable to the suits in which the property in dispute is not situated in Mumbai. In the circumstances, ratio, if any, laid down by Clause (b) of paragraph No. 30 of the said decision will not have any application to the suits relating to the properties situated outside the city of Mumbai. In the present case, this Court is dealing with the suits in respect of properties situated in Nasik District. Therefore, in absence of any notification issued under the Bombay Act XIV of 1939, Clause (b) of paragraph No. 30 of the said decision will have no application to the present cases.

11. However, there are some submissions made as regards the Clause (b). The effect of substituted Section 52 is that the provisions of Section 52 will apply only in a case where notice of the pendency of suit or proceedings is registered under the Indian Registration Act, 1908 (hereinafter referred to as "the Registration Act"). The substituted Section 52 contemplated registration of notice of lis pendens in accordance with Section 18 of the Registration Act, 1908. By the provisions of the same Bombay Act XIV of 1939, after Clause (e) of Section 18 of the Registration Act, Clause (ee) was added, which provides that registration of notices of pending suits or proceedings referred to in Section 52 of the Act of 1882 is optional. Thus, the legislature while amending the Section 52 of the said Act of 1882 by the same amending Act amended 18 of the Registration Act. But, the legislature did not make registration of the notice of lis pendens compulsory under the Registration Act.

12. Section 17 of the Registration Act deals with the documents, which are compulsory registrable. The consequences of non registration of the documents which are compulsorily registrable are provided in the Registration Act. Section 18 of the Registration Act deals with the documents of which the registration is optional. As far as Registration Act is concerned, non registration of a document governed by Section 18 will not visit a person with any adverse consequences as the registration of the document is itself optional. As far as substituted Section 52 is concerned, the only consequence of failure to register notice of lis pendens is that the constraint imposed by Section 52 will not apply. On conjoint reading of the provisions of the said Act of 1882 and the Registration Act, in so far as the property in city of Bombay is concerned, even if notice of lis pendens is not registered, no other consequence is provided except the fact that Section 52 will have no application to the transaction effected during the pendency of the suits and the proceedings in respect of the property concerned. As far as the properties situated in the other parts of the State of Maharashtra are concerned, Section 52 does not require registration of notice of lis pendens.

13. The legal effect of Section 52 of the said Act of 1882 will have to be considered. In the case of Sanjay Verma Vs. Manik Roy and Others, , which is considered in the case of Kachhi Properties (supra) in paragraph No. 12, the Apex Court has held thus:

12. The principles specified in Section 52 of the TP Act are in accordance with

equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. A transferee pendente lite is bound by the decree just as much as he was a party to the suit. The principle of lis pendens embodied in Section 52 of the TP Act being a principle of public policy, no question of good faith or bona fide arises. The principle underlying Section 52 is that a litigating party is exempted from taking notice of a title acquired during the pendency of the litigation. The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject matter of the suit. The section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the Court.

(Emphasis added)

14 The Apex Court has reiterated that mere pendency of the suit does not prevent the parties to the suit from dealing with the property constituting the subject matter of the suit. Only consequence of such alienation which has been effected during the pendency of the suit is that the alienation will in no manner affect the rights of any party under any decree which may be passed in the suit. In the case of Hardev Singh Vs. Gurmail Singh (Dead) by LRs., the view taken by the Apex Court in paragraph No. 18 of the judgment reads thus:

Section 52 of the Act merely prohibits a transfer. It does not state that the same would result in an illegality. Only the purchaser during the pendency of a suit would be bound by the result of the litigation. The transaction, therefore, was not rendered void and/or of no effect.

(Emphasis added)

Thus, as far as Section 52 of the said Act of 1882 is concerned, it is apparent that the same does not put any restraint on a party to the suit from alienating the suit property, but it provides for the legal effect of the transfer pendente lite. Such pendente lite transfer without permission of the Court is neither illegal nor void.

15. As far as the scope of Section 52 of the said Act of 1882 is concerned, the Apex Court had an occasion to consider the same in a very recent decision, in the case of T.G. Ashok Kumar v. Govindammal and Anr. (2011) (1) All MR 462. In fact, in this decision, the Apex Court has again reiterated that Section 52 of the said Act of 1882 does not declare a pendente lite transfer by a party to the suit as void or illegal and the only effect of such transfer is that the transferee is bound by the decision in the pending litigation. The Apex Court has noted certain deficiencies in Section 52 and the Apex Court has made several suggestions including a suggestion that registration of notice of lis pendens should be made compulsory. The Apex Court has suggested that even the registration of an agreement for sale should be made compulsory to avoid large number of

property litigations. Paragraph Nos. 13 to 15 of the said decision contain various suggestions to the law makers. As far as effect of Section 52 is concerned, in paragraph No. 10, the Apex Court has observed thus:

10. The principle underlying Section 52 is clear. If during the pendency of any suit in a court of competent jurisdiction which is not collusive, in which any right of an immovable property is directly and specifically in question, such property cannot be transferred by any party to the suit so as to effect the rights of any other party to the suit under any decree that may be made in such suit. If ultimately the title of the pendente lite transferor is upheld in regard to the transferred property, the transferee's title will not be affected. On the other hand, if the title of the pendente lite transferor is recognized or accepted only in regard to a part of the transferred property, then the transferee's title will be saved only in regard to that extent and the transfer in regard to the remaining portion of the transferred property to which the transferor is found not entitled, will be invalid and the transferee will not get any right, title or interest in that portion. If the property transferred pendente lite, is allotted in entirety to some other party or parties or if the transferor is held to have no right or title in that property, the transferee will not have any title to the property. Where a co owner alienates a property or a portion of a property representing to be the absolute owner, equities can no doubt be adjusted while making the division during the final decree proceedings, if feasible and practical (that is without causing loss or hardship or inconvenience to other parties) by allotting the property or portion of the property transferred pendente lite, to the share of the transferor, so that the bonafide transferee's right and title are saved fully or partially.

Thus, even this decision does not hold that a transfer pendente lite is either illegal or void.

16. At this stage, a reference to another decision of this Court may be necessary, which deals with the effect of transfer of immovable property made by a party to the suit in breach of order of temporary injunction restraining him from alienating the suit property. The said decision is of the Division Bench of this Court in the case of Keshrimal Jivji Shah and Another Vs. Bank of Maharashtra and Others, . In paragraph No. 26, the Division Bench of this Court held thus:

26 We cannot accept Shri Naphade's contention that observations of the Supreme Court in the case of Surjeet Singh should be as restricted to proceedings under Order 22, Rule 10 of CPC and the same cannot be extended to defiance of injunction order issued under Order 39, Rule 1 of CPC Code. Once the issue is placed on the pedestal of public policy and the very faith of litigants in Rule of law and administration of justice, then it is not possible to make the distinction or bifurcation suggested by Shri Naphade. It would mean that consequences of nullifying such transaction not being provided by the Statute, it would not lose its legal efficacy even if it is in utter disregard to or in violation of or breach of prohibitory order or order of injunction issued by a Court of law. It would mean that parties can breach and violate Court orders openly and with

impunity and neither they nor the beneficiaries suffer any consequences. It is time that we recognise the principle that transfer of immovable property in violation of an order of injunction or prohibition issued by Court of law, confers no right, title or interest in the transferee, as it is no transfer at all. The transferee cannot be allowed to reap advantage or benefit from such transfer merely because he is not party to the proceedings in which order of injunction or other prohibitory direction or restraint came to be issued. It is enough that the transfers is a party and the order was in force. These two conditions being satisfied, the transfer must not be upheld. If this course is not adopted then the tendency to flout orders of Courts which is increasing day by day can never be curbed. The Court exercises its powers on the foundation of respect and regard for its authority by litigating public. People would loose faith and respect completely if the Court does not curb and prevent this tendency. The note of caution of the Supreme Court must be consistently at the back of everybody's mind. Therefore, Shri Naphade is not right in the distinction which he is trying to make.

(Emphasis added)

17. Therefore, the law laid down by the Division Bench is that transfer of immovable property made in violation of order of injunction issued by the Court of law confers no right, title or interest on the transferee as it is no transfer in the eyes of law. Thus, the effect of the order of prohibitory injunction restraining the alienation during the pendency of the suit is that any transaction or alienation made in violation of the said order is rendered illegal and as held by the Division Bench, it is no transaction at all. This has to be distinguished from the effect of Section 52 of the said Act of 1882, which does not attach any illegality to a transaction, which has taken place pendente lite. Thus, the order of prohibitory injunction grants protection which is not available u/s 52 in the event of a transfer pending a suit. Moreover, the party who breaches the order of temporary injunction may have to face the drastic consequences provided in Rules 2A and 11 of Order XXXIX of the said Code. The consequences are in the nature of an order of detention or striking out the defence.

18. Now turning to Clause (a) of paragraph No. 30 of the judgment in the case of Kachhi Properties (supra), the same will have to be read with paragraph No. 15 of the said decision. All that is observed in paragraph No. 15 is that powers under Rules 1 and 2 of Order XXXIX of the Code of Civil Procedure, 1908 (hereinafter referred to as "the said Code") cannot be exercised as a matter of course or simply because its exercise is unlikely to hurt a Defendant. Even Clause (c) of the paragraph No. 30 has to be read with paragraph No. 15.

19. Clause (a) of paragraph No. 30 records that transferees pendente lite are neither required to be impleaded nor can claim impleadment. On this aspect, it appears that the attention of the learned Judge of this Court was not invited to a decision of the Apex Court in the case of Amit Kumar Shaw and Another Vs. Farida Khatoon and Another, . The Apex Court had an occasion to consider the

effect of Section 52 of the said Act of 1882 in the context of the provisions of Rule 10 of Order I, Rule 10 of Order XXII and Section 146 of the said Code. The Apex Court has reiterated that an alienee pendente lite is bound by the final decree that may be passed in the suit. In paragraph No. 14 of the said decision, the Apex Court has observed that such an alienee can be brought on record both under Rule 10 of Order XXII as well as Rule 10 of Order I. In paragraph No. 14, the Apex Court has observed that since under the doctrine of lis pendens, a decree passed in the suit during the pendency of which a transfer is made binds the transferee, his application to be brought on record of the suit ordinarily has to be allowed. The said principle is reiterated by the Apex Court in paragraph No. 15. The said paragraph 15 along paragraph 16 read thus:

15. Section 52 of the Transfer of Property Act is an expression of the principle "pending litigation nothing new should be introduced". It provides that pendente lite, neither party to the litigation, in which any right to immovable property is in question, can alienate or otherwise deal with such property so as to affect his appointment. This section is based on equity and good conscience and is intended to protect the parties to litigation against alienations by their opponent during the pendency of the suit. In order to constitute a lis pendens, the following elements must be present:

1. There must be a suit or proceeding pending in a court of competent jurisdiction.
2. The suit or proceeding must not be collusive.
3. The litigation must be one in which right to immovable property is directly and specifically in question.
4. There must be a transfer of or otherwise dealing with the property in dispute by any party to the litigation.
5. Such transfer must affect the rights of the other party that may ultimately accrue under the terms of the decree or order.

16. ? The doctrine of lis pendens applies only where the lis is pending before a court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the court has discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the Defendant is vitally interested in the litigation, where the transfer is of the entire interest of the Defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the Plaintiff. Hence, though the Plaintiff is under no obligation to make a lis pendens transferee a party, under Order 22 Rule 10 an alienee pendente lite may be joined as party. As already noticed, the court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his

interests. The court has held that a transferee pendente lite of an interest in immovable property is a representative in interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where his predecessor in interest is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case.

(Emphasis and underlines supplied)

20. No doubt, the Apex Court has observed that as far as joining of the parties is concerned, it is the discretion of the Court. But again, the Apex Court has reiterated that an alienee pendente lite would ordinarily be joined as party to enable him to protect his interest as he is bound by the decree passed in the suit. The Apex Court has noted a possibility that a Defendant, who has effected the transfer pendente lite may not contest the litigation and the result will be that the alienee who is not a party to the suit will be bound by the decree. In fact, the Apex Court has categorically observed that under Rule 10 of Order XXII, the alienee is entitled to be impleaded in the suit or other proceedings where his predecessor in interest has been made party to the litigation. In Clause (a) of paragraph No. 30 of the decision in the case of Kachhi Properties (*supra*), this Court has observed that "such transferees are neither required to be impleaded nor can claim impleadment". In view of what is held by the Apex Court in the aforesaid decision in the case of Amit Kumar Shaw and Anr. (*supra*), the last part of the observation of this Court that such transferee pendente lite cannot claim the impleadment cannot read as a binding precedent. There cannot be any dispute about the proposition of law that transferee pendente lite is not required to be impleaded as a party by the Plaintiff and that he is bound by the decree, which will be eventually passed in the suit. However, as far as right of impleadment of such transferee is concerned, what will bind this Court is what is held by the Apex Court in the case of Amit Kumar Shaw and Anr. (*supra*).

21. The other question which is raised is whether Section 52 provides adequate protection to the parties from transfers pendente lite. The first part of Clause (a) of paragraph No. 30 does not lay down an absolute proposition of law that in every case, a Plaintiff will be adequately protected by Section 52 of the said Act of 1882. The power to grant relief of temporary injunction under Rules 1 Rules 1 and 2 of Order XXXIX of the said Code is always discretionary and therefore, in a given case, considering the facts of the case, the Court can always come to the conclusion that the Plaintiff may get adequate protection by virtue of Section 52.

22. Rule 1 of Order XXXIX of the said Code confers power on the Court to grant temporary injunction preventing alienation during the pendency of the suit. In Clause (c) of paragraph No. 30, this Court has observed that merely because there is a power, it does not imply that it must be exercised in every case. There cannot be any debate over this proposition which is laid down in first part of Clause (c). It is well settled that the Court is required to consider the three ingredients namely the existence of *prima facie* case, irreparable loss and balance of convenience before the grant of temporary injunction. There are well

settled rules which govern the exercise of power of granting temporary injunction and it is therefore, obvious that the power under Rules 1 and 2 of Order XXXIX of the said Code cannot be mechanically exercised unless existence of three ingredients is established.

23. In the first part of Clause (a) of paragraph No. 30 it is observed that Section 52 provides adequate protection to the parties. The last part of Clause (c) of paragraph No. 30 records that Rule 1 of Order XXXIX of the said Code can be invoked only if protection provided by Section 52 of the Act of 1882 is shown to be inadequate. As far as this aspect is concerned, I find that the attention of this Court was not invited to the decision of the Apex Court in the case of *Maharwal Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass*, . This was a case where original Plaintiff had approached the Apex Court, who had sought temporary injunction restraining the Defendant from alienating the suit property and from putting up any construction thereon. The trial Court held in favour of the Plaintiff, but in appeal, the District Court interfered and held that alienation made during the pendency of the suit will be subject to law of *lis pendens* and construction carried out will be at the risk of the Defendant and the same will have to be removed in case of suit is decreed. The order of the District Court was confirmed in revision. Thus, this was a case where the District Court declined to grant equitable relief of temporary injunction preventing alienation on the ground that the Plaintiff will be adequately protected from alienation during the pendency of the suit by the law of *lis pendens*. The submission before the Apex Court was that generally, during the pendency of a substantive suit, the Courts are required to protect the status quo existing on the date of the suit and it is only in exceptional circumstances, the Court can permit alteration of status quo. This submission made on behalf of the original Plaintiff before the Apex Court seems to have been accepted by the Apex Court. What is held in paragraph No. 10 of the said decision read thus:

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

and alienate the same, we think both the courts below, namely, the lower appellate court and the High Court erred in making the impugned orders. The said orders are set aside and the order of the trial court is restored.

(Emphasis added)

24. It must be noted here that in the subsequent decision in the case of N. Srinivasa Vs. Kuttukaran Machine Tools Ltd., , the Apex Court has quoted with approval what is held by the said Court in paragraph No. 10 of its earlier decision in the case of Maharwal Khewaji Trust (supra). After quoting the said earlier decision with approval, the Apex Court observed thus:

Going by the ratio of the abovementioned decision, it is clear that the VIth Additional City Civil Judge, Bangalore, was justified in directing the parties to maintain status quo in the matter of transferring, alienating or creating any third party interest as prima facie it has been proved that the Respondent was trying to sell the property in dispute to a third party thus alienating the rights of the property in dispute, which would have caused irreparable damage to the Appellant.

(Emphasis added)

Looking to the law laid down by the Apex Court, it is apparent that the Apex Court has not accepted the proposition that the principles incorporated in Section 52 of the said Act of 1882 offer adequate protection to the parties to a substantive civil suit or other proceedings. What is held by the Apex Court is that normally during the pendency of a substantive suit where rights to immovable properties are in dispute, status quo cannot be allowed to be altered which includes creation of third party interests. In fact, the Apex Court in the case of Maharwal Khewaji Trust (supra) has observed that a Defendant is required to make out a case that irreparable loss or damage will be caused to him during the pendency of the suit, if he is not allowed to alter the status quo. It is a well settled requirement of law that while exercising the powers under Rules 1 Rules 1 and 2 of Order XXXIX of the said Code, the Court has to consider the issues of prima facie case, irreparable loss and balance of convenience. In the circumstances, in view of the aforesaid binding precedents of the Apex Court, the observation in Clause (c) of paragraph No. 30 that the provision of Rule 1 of Order XXXIX could be invoked only if protection provided by Section 52 is shown to be inadequate cannot bind this Court. Therefore, even the observation in first part of Clause (a) that Section 52 provides adequate protection to the parties from transfers pendent lite cannot be read as a binding precedent. In any event, in view of the law laid down by the Apex Court, it cannot be said that provisions of Section 52 of the said Act of 1882 in any manner put fetters on the powers of Civil Court conferred by Rules 1 Rules 1 and 2 of Order XXXIX of the said Code. As stated earlier, in a given case, while exercising discretionary powers, the Court can always come to the conclusion in peculiar facts of the given case, that in view of provisions of Section 52 of the said Act of 1882, equitable relief of

temporary injunction need not be granted.

25. Where there is an apprehension shown that the Defendant may transfer or alienate the suit property, where all three ingredients are satisfied, the applicability of Section 52 of the said Act of 1882 will not take away power of the Court to grant temporary injunction. As noted earlier, a transaction effected in breach of Section 52 is not rendered illegal or void, but a transaction entered into in breach of order of temporary injunction is held as illegal by the Division Bench of this Court. Apart from this, the breach of injunction can visit the offending party with very serious consequences under Rule 2 A of Order XXXIX and Rule 11 of Order XXXIX of the said Code.

26. Where there is an apprehension established that the Defendant may create third party rights and all three ingredients are satisfied, if temporary injunction is not granted, it may result into multiplicity of proceedings inasmuch as the alienee pendente lite may apply for impleadment, which will result in delay in proceedings of the suit.

27. It must be observed that Clauses (d) to (f) of paragraph No. 30 of the said decision lay down mere guidelines. It is obvious that the guidelines cannot affect the powers of the Court, which are conferred by Rules 1 Rules 1 and 2 of Order XXXIX of the said Code.

28. The conclusion drawn from the aforesaid discussion are:

(i) as far as right of impleadment of transferee pendente lite is concerned, what will bind this Court is what is held by the Apex Court in the case of Amit Kumar Shaw and Anr. (supra) ;

(ii) in view of the binding precedents of the Apex Court, the observation in Clause (c) of paragraph No. 30 that the provision of Rule 1 of Order XXXIX could be invoked only if protection provided by Section 52 is shown to be inadequate cannot bind this Court. Even the observation in first part of Clause (a) of paragraph No. 30 that Section 52 provides adequate protection to the parties from transfers pendent lite cannot be read as a binding precedent. In any event, in view of the law laid down by the Apex Court, it cannot be said that provisions of Section 52 of the said Act of 1882 in any manner put fetters on the powers of Civil Court conferred by Rules 1 Rules 1 and 2 of Order XXXIX of the said Code. As stated earlier, in a given case, while exercising discretionary powers, the Court can always come to the conclusion in peculiar facts of the given case, that in view of provisions of Section 52 of the said Act of 1882, equitable relief of temporary injunction need not be granted.

29. Now turning to the facts of the Appeal from Order No. 884 of 2010, as reflected from the admitted facts, the Appellants - Plaintiffs are claiming on the basis of the conveyance executed on 27th April, 1998 by the Respondent Nos. 1 to 8 and the Respondent No. 11. It is also seems to be an admitted position that when the said conveyance was executed, there was an interim injunction

operating against the Respondent Nos. 1 to 8 restraining them from alienating the property. As far as alienation made by Respondent Nos. 1 to 8 is concerned, prima facie, it will have no legal effect as it will not transfer any right, title or interest. The learned Counsel appearing for the Appellants relied upon the decree for specific performance dated 18th October, 1996 passed in favour of the Respondent No. 11. When the conveyance was executed, admittedly, the said decree was not executed and there was no conveyance executed in favour of the Respondent No. 11. So, as of that day, what was in existence was only an agreement for sale in favour of the Respondent No. 11 to which the seal of the Civil Court was superimposed. Though, there was a legal right created in favour of the Respondent No. 1 to get the sale deed executed, admittedly, the same was not got executed. Therefore, in view of Section 54 of the said Act of 1882, as of that day, the Respondent No. 11 could not have claimed any interest in the suit property except a right to get the conveyance executed. These admitted facts have been taken into consideration by the trial Court and the trial Court has declined to grant equitable and discretionary relief of injunction. This, apart from the fact that earlier attempt of the Appellants to secure an order of injunction had failed.

30. The powers of the Appellate Court while dealing with an Appeal under Clause (r) of Rule 1 of Order XLIII of the said Code are limited. It cannot be said that the impugned order is perverse and in fact, the grounds on which equitable relief has been denied are certainly relevant. Hence, on facts, this is not the case where interference can be made with the impugned order. Appeal from Order No. 884 of 2010 is accordingly dismissed with no order as to costs.

31. Civil Application No. 1095 of 2010 does not survive and the same is disposed of.

32. It is obvious that the suit will be decided on its own merits without being influenced by the tentative observations made by the trial Court and confirmation thereof by this Court.

33. Hearing of the suit is expedited and the trial Court shall endeavour to conclude the hearing before 31st March, 2012.

34. Appeal from Order No. 857 of 2010 is admitted.

35. Pendency of Appeal from Order No. 857 of 2010 in this Court will not operate as stay of the proceedings of the suit and the trial Court is free to proceed with the hearing of the suit.