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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.217 OF 2013

**WITH
CIVIL APPLICATION NO.916 OF 2013
IN
SECOND APPEAL NO.217 OF 2013**

Shri Mallappa Shivling Nandani	)	
Age 71 years, Occupation Agriculture	)	
Resident of Arag, Taluka Miraj,	)	
District Sangli	)	...Appellant
		..Ori.Defendant

....Versus....

1. Shri Bhushan Prakash Risbud	)	
Age 32 years, Occupation Agriculture	)	
and business	)	
	)	
2. Shri Kapil Prakash Risbud,	)	
Age 27 years, Occupation Agriculture	)	
and Business	)	
	)	
Both resident of Mira Malgaon Road,	)	
Subhashnagar, Taluka Miraj,	)	
District Sangli	)	...Respondents
		...Ori. Plaintiffs

Mr.Sandesh Patil for the Appellant.

Mr.Murlidhar L. Patil for the Respondent Nos.1 and 2.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 5TH FEBRUARY, 2016
PRONOUNCED ON : 11TH MARCH, 2016

JUDGMENT :-

1. By this second appeal filed under section 100 of the Code of Civil Procedure, 1908 the appellant (original defendant) has impugned the oral judgment delivered on 29th November, 2012 by the Principal District Judge, Sangli (hereinafter referred to as the “lower appellate Court”), allowing the appeal filed by the respondents herein (original plaintiffs) and thereby setting aside the judgment and decree passed by the learned Civil Judge, Junior Division, Miraj on 25th January, 2006 dismissing the suit filed by the plaintiffs and has decreed the said suit. The lower appellate Court has also granted permanent injunction against the appellant (original defendant) from disturbing the possession of the respondents herein over the suit property. For the sake of convenience, the parties in this judgment are described as they were described in the proceedings before the learned trial Judge.

2. By an order dated 10th June, 2015, passed by this Court, this Court has formulated two substantial questions of law in this second appeal and directed that the matter might be disposed of finally on the returnable date. The substantial questions of law formulated by this Court are as under :-

(1) Whether the lower Appellate Court was right in holding that the bar created for entertaining a fresh suit under Section 47 read with Order XXI, Rule 101 of the Civil Procedure Code would operate in passing a decree for possession in favour of the plaintiffs after holding that the plaintiffs are not bound by the decree passed in Regular Civil Suit No.4 of 1984 ? and

(2) Whether the lower Appellate Court was right in passing a decree for grant of permanent injunction without there being any adjudication on the question of the effect of the decree passed in Regular Civil Suit No.4 of 1984 on the rights of the plaintiffs in the suit in question ?

3. The land bearing gat no.375 admeasuring 1 Hector, 41 Ares situated at village Agar, taluka Miraj, district Sangli is the suit property. The said suit property was originally owned by Vyankatesh Risbud. After his death, his legal heirs inherited the said land. On 30th November, 1983 Prakash Risbud, son of Vyankatesh Risbud alienated the suit property by a sale deed which was registered to Shankar Dharma Khot and had alleged to have handed over possession of the suit property to him. It was alleged by the plaintiffs that the said Shankar Dharma Khot had allotted the suit property to his son Ishwara Shankar Khot in a family partition. It was however the case of the defendant that the said Vyankatesh Risbud had entered into an agreement for sale with the defendant in respect of the suit property on 5th February, 1974. The defendant had issued a notice to the legal heirs of the said Vyankatesh Risbud calling upon them to comply with their part of obligation under the said agreement for sale dated 5th February, 1974, which was entered into between the defendant with the said Vyankatesh Risbud.

4. It was the case of the defendant that the said Vyankatesh Risbud during his life time and the legal heirs of the said Vyankatesh Risbud after his demise did not comply with their obligations under the said agreement for sale dated 5th February, 1974, the defendant filed a suit being R.C.S. No.4 of 1984 against the father of the

plaintiffs and others for seeking specific performance of the said agreement for sale and for possession of the suit property. The said suit being R.C.S. No.4 of 1984 for specific performance was decreed on 30th March, 1991. Mr.Prakash Risbud, son of Vyankatesh Risbud died some time in the year 2000.

5. It was the case of the plaintiffs that on 25th April, 2001, the plaintiffs who are sons of Prakash Risbud purchased the suit property from Ishwara Shankar Khot.

6. Mr.Prakash Risbud filed an appeal being R.C.A. No.369 of 1991 thereby impugning the decree dated 30th March, 1991. The said appeal was dismissed for default on 16th April, 1999. Neither the said Prakash Risbud nor his legal heirs, who are sons of the plaintiffs filed any application for restoration of the said appeal.

7. Some time in the year 2000, the defendant filed a Darkhast Application (Execution Application) for executing the decree dated 30th March, 1991 before the Executing Court. It was the case of the defendant that when he applied for recording his name in the revenue record, he came to know that the name of Ishwara Shankar Khot was recorded in the revenue record in respect of the suit property, the defendant on 28th September, 2001 impleaded the said Ishwara Shankar Khot as a party to the execution application. It was not in dispute that subsequently on 8th September, 2005 the plaintiffs were also impleaded as parties in the said execution application.

8. In the meantime in the said execution application, pursuant to an order passed by the Executing Court, the sale deed came to be executed in favour of the defendant (decree holder) in respect of the

suit property through the Court Officer appointed by the Executing Court. The defendant has also filed a separate application in the said proceedings for seeking possession of the suit property. The plaintiffs were served with the notices of the said execution proceedings and were aware of the decree passed in R.C.S. No.4 of 1984 and also the execution application filed by the defendant in respect of the suit property,

9. Some time in the year 2001, the plaintiffs, who were sons of Prakash Risbud filed a suit in the Court of Civil Judge, Junior Division, Miraj, Sangli (R.C.S. No.269 of 2001) against the defendant *inter-alia* praying for perpetual injunction in respect of the suit property simplicitor. The plaintiffs did not apply for a declaration of their alleged title in the suit property.

10. It was the case of the plaintiffs in the said suit that the suit property was originally owned by Vyankatesh Risbud and after his death, his heirs inherited the said land. Mr.Prakash Risbud had alienated the suit property on 30th November, 1983 by a registered sale deed to Shankar Khot and had handed over possession of the suit property to him. The suit property was thereafter allotted to the sons of Shankar Khot i.e. Ishwara Shankar Khot in the family partnership. It was the case of the plaintiffs that the plaintiffs had purchased the suit property from Ishwara Shankar Khot by a registered sale deed dated 25th April, 2001 and had become the owner of the said land. The plaintiffs were alleged that they were in possession of the suit property and were cultivating the suit land as the owners thereof.

11. In the said plaint filed by the plaintiffs, the plaintiffs had

disclosed about their knowledge of the suit filed by the defendant for specific performance, parties thereto the said suit, decree passed by the learned trial Judge, about filing of the appeal by the legal heirs of Prakash Risbud and about dismissal of the said appeal by default on 16th September, 1991. It was however the case of the plaintiffs that the said Shankar Dharma Khot, to whom the said Prakash Risbud had sold the property on 30th November, 1983 was a necessary party in that suit and thus the said decree passed in favour of the defendant was thus not binding on the plaintiffs.

12. Before the learned trial Judge, the defendant filed the written statement and denied all the contentions in the plaint. It was averred by the defendant that the said Vyankatesh Risbud had agreed to sell the suit property to the defendant by an agreement to sale dated 5th February, 1974 for a consideration of Rs.2500/- in favour of the defendant and had handed over possession of the suit property to him. The defendant also alleged that he was in continuous possession of the suit property without any obstruction. The defendant also brought on record the details of the suit filed by him, decree passed in that suit and also about the dismissal of the appeal filed by the legal heirs of Prakash Risbud for default on 16th April 1999. It was urged by the defendant that the said decree passed by the learned trial Court in the suit filed by the defendant i.e. R.C.S. No.4 of 1984 had attained finality and was binding on the plaintiffs also. The defendant denied that the plaintiffs were in possession of the suit property. The learned trial Judge framed six issues. The issues framed by the learned trial Judge and the conclusions drawn on each of the issues are extracted as under :-

Issues :

Findings

- | | | |
|------|--|---------------------|
| 1. | Do plaintiffs prove that they are owner of the suit property by way of registered sale deed dated 25.04.2001 ? | In the negative. |
| 2. | Do they further prove that they are having lawful possession over suit Property ? | In the Negative. |
| 3. | Do they further prove the obstruction of their lawful possession over suit Property by defendant ? | In Negative. |
| 4. | Whether plaintiffs are entitled for perpetual injunction as prayer for ? | In the Negative. |
| 4-A. | Whether defendant is entitled for compensatory costs as prayed ? | In the Affirmative. |
| 5. | What order and decree ? | As per final order. |

13. On behalf of the plaintiffs, the plaintiff no.1, i.e. Bhushan Prakash Risbud filed his affidavit of evidence and produced some of the documents. The defendant filed his affidavit of evidence as one of the witness and also examined one Shivprakash Gangadhar Swami, a photographer. All the three witnesses before the learned trial Court were cross-examined.

14. Learned trial Judge by an order and judgment dated 25th January 2006 dismissed the said suit filed by the original plaintiffs *inter-alia* praying for an injunction with compensatory costs of Rs.3,000/-. Being aggrieved by the the said order and judgment dated 25th January 2006, the original plaintiffs filed an appeal in the Court of Principal District Judge at Sangli in R.C.S. No.84 of 2006. The Principal District Judge, Sangli (the Lower Appellate Court)

framed four points for determination and held that the plaintiffs had proved their possession over the suit property and that the defendant had obstructed possession of the plaintiffs over the suit property and accordingly allowed the said appeal filed by the original plaintiffs and has set aside the judgment and decree passed by the learned trial Judge and has decreed the said suit filed by the original plaintiffs. By the said order and judgment dated 29th November 2012, the Lower Appellate Court granted permanent injunction against the defendant from disturbing the possession of the plaintiffs over the suit property. This order and judgment of the Lower Appellate Court has been impugned by the original defendant in this second appeal filed under Section 100 of the Code of Civil Procedure, 1908.

15. Mr.Sandesh Patil, learned counsel appearing for the appellant (original defendant) invited my attention to the pleadings, oral evidence and also to the findings and conclusions drawn by the two Courts below. It is submitted that admittedly in the suit for specific performance filed by the appellant (original defendant) i.e. Regular Civil Suit No.4 of 1984, the learned trial Judge had also passed a decree for possession which decree for possession had attained finality in view of dismissal of the appeal filed by the plaintiffs herein who were also the appellants in an appeal filed against the said order which was passed in favour of the defendant herein. He submits that since the entitlement of the defendant in the suit property was proved in the said proceedings *inter-alia* praying for specific performance of the agreement, the Lower Appellate Court could not have granted any injunction in favour of the plaintiffs in these proceedings against the true owner. He submits that even otherwise the Lower Appellate Court could not have

granted any injunction since there was no substantive relief claimed by the plaintiffs in the suit.

16. It is submitted that though the plaintiffs herein were impleaded as parties to the execution application filed by the defendant herein in the execution proceedings and were fully aware of the execution proceedings, the plaintiffs herein did not raise any objection in execution of the said decree. He submits that the plaintiffs had also filed an appeal against the said decree for specific performance which was passed in favour of the defendant herein and were fully aware of the said proceedings. He submits that in the plaint filed in the suit for injunction by the plaintiffs herein, there was an averment about the knowledge of the plaintiffs in respect of the suit filed by the defendant for specific performance in respect of the suit property, decree passed therein by the learned trial Judge, the appeal filed by the plaintiffs in the said proceedings as the legal heirs of Mr.Vyankatesh Risbud and about the dismissal of the said appeal filed by them.

17. It is submitted that the plaintiffs could not have filed any separate suit for injunction in respect of the suit property. The plaintiffs ought to have agitated all these issues which were raised in the separate suit in the execution proceedings under Order XXI Rules 98 and 101 of the Code of Civil Procedure, 1908. He submits that the proceedings under Order XXI Rule 98 are tried as suit and all these contentions raised by the plaintiffs in the separate suit ought to have and could have been raised only in the execution proceedings filed by the defendant herein.

18. Reliance is placed on Section 47 of the Code of Civil

Procedure, 1908 also in support of the submission that there is a bar against filing of a separate suit. In support of this submission, he placed reliance on the judgment of the Supreme Court in the case of **Shreenath & Anr. Vs. Rajesh & Ors., AIR 1998 SC 1827** and in particular paragraph 5 thereof. Reliance is also placed on the judgment of the Supreme Court in the case of **Vithalbai Pvt. Ltd. Vs. Union of India, (2005) 4 SCC 315** and in particular paragraph 20 thereof.

19. Learned counsel appearing for the defendant invited my attention to the examination-in-chief of the plaintiff no.1 and also his cross-examination. He submits that in the cross-examination, the plaintiff no.1 had categorically admitted that he had knowledge about filing of the suit but he did not make any further enquiry in the matter.

20. It is submitted submits that no injunction could have been granted by the Lower Appellate Court against the defendant herein being the true owner of the suit property and that also in absence of any substantive prayer in the suit. In support of this submission, he placed reliance on the judgment of the Supreme Court in the case of **Anathula Sudhakar Vs. P. Buchi Reddy (Dead) By LRs & Ors., (2008) 4 SCC 594** and in particular paragraph 21 thereof.

21. It is submitted that pursuant to the decree passed by the learned trial Judge in favour of the defendant herein for specific performance of the agreement for sale in respect of the suit property, sale deed in respect of the suit property has already been executed in favour of the defendant through an Officer of the Court. He submits that admittedly an application for possession of the suit

property filed by the defendant is pending before the Executing Court. He submits that in view of the injunction granted by the Lower Appellate Court against the defendant herein, the defendant would not be able to execute the decree for possession though the said decree has attained finality.

22. It is submitted that in the suit (R.C.S. No.4 of 1984) filed by the defendant herein for specific performance of the suit agreement, the defendant to the suit had filed a written statement. In the said written statement, it was not disclosed by the defendant to the said suit about the sale deed of the suit property by the said defendant in favour of Mr.Shankar Dharma Khot. He submits that the appeal was filed by Mr.Prakash Risbud himself challenging the decree passed in the suit filed by the defendant herein which appeal was pending till 1991 and was thereafter, dismissed for default. He submits that the defendant herein had filed a Darkhast Application in the year 2000. The plaintiffs who are sons of Mr.Prakash Risbud who were fully aware about filing of the suit and about dismissal of the appeal filed by them alleged to have been entered into an agreement of sale on 25th April 2001 with Mr.Ishwara Shankar Khot. The plaintiffs were impleaded as party to the execution application on 28th September 2001. The plaintiffs filed a false and frivolous suit for injunction on the same day against the defendant in respect of the suit property.

23. It is submitted that the parties who are not telling the truth before the Court of law are not entitled to seek any interim or final relief in the suit filed by them. In support of this submission, learned counsel for the appellant placed reliance on the judgment of the Supreme Court in the case of **Dalip Singh Vs. State of Uttar**

Pradesh and Ors.,(2010) 2 SCC 114.

24. It is submitted that since the plaintiffs had not come to this Court with clean hands and has suppressed various true and correct facts. The plaintiffs had deliberately purchased the suit property though the suit for specific performance filed by the defendant was decreed and the appeal filed by Mr. Prakash Risbud, father of the plaintiffs came to be dismissed in the year 1999 and were aware of the execution application filed in the year 2000, their such conduct had made them disentitled for seeking any interim or final relief under Section 41(i) of the Specific Relief Act, 1963.

25. Learned counsel for the defendant then submits that since there was a cloud on title of the plaintiffs in view of the decree for specific performance already having been granted in favour of the defendant which decree had attained finality, no injunction could be granted by the Lower Appellate Court in favour of the plaintiffs herein. In support of this submission, learned counsel for the appellant placed reliance on the judgment of the Supreme Court in the case of **Krishnadevo Malchand Kamathia & Ors. Vs. Bombay Environmental Action Group & Ors., AIR 2011 SC 1140** and in particular paragraph 17 thereof.

26. It is submitted that the Lower Appellate Court could not have declared the decree passed by the learned trial Judge in favour of the defendant herein for specific performance as nullity or not binding on the plaintiffs herein or could not have decided about validity of the execution proceedings in which the plaintiffs had not participated though were made parties and were served with notices. He submits that the Lower Appellate Court has virtually

granted injunction against the defendant from executing the decree for possession though the said decree for possession granted by the learned trial Judge in favour of the defendant had attained finality. He submits that the Lower Appellate Court had acted without jurisdiction in declaring the decree for specific performance as nullity or not binding on the plaintiffs herein. He submits that even if the said judgment and decree passed by the learned trial Judge for specific performance in favour of the defendant herein was void or was not binding upon the plaintiffs, such declaration could be made only by a Competent Court and not in the appeal filed by the plaintiffs challenging the order passed by the learned trial Judge refusing to grant injunction.

27. Mr.Murlidhar L. Patil, learned counsel for the respondents (original plaintiffs), on the other hand, invited my attention to the pleadings, oral evidence and also to various paragraphs of the orders passed by the learned trial Judge and the Lower Appellate Court. It is submitted by the learned counsel that the agreement dated 5th February 1974 between the defendant herein and Mr.Vyankatesh Risbud was admittedly not a registered document. He submits that under the said unregistered agreement dated 5th February 1974, the defendant was not given possession of the suit property by Mr.Prakash Vyankatesh Risbud. He submits that on the other hand, Mr.Prakash Risbud who was the son of the said Mr.Vyankatesh Risbud had executed an agreement for sale in favour of Mr.Shankar Dharma Khot which was duly registered on 30th November 1983.

28. It is submitted that though the defendant herein had filed a suit *inter-alia* praying for specific performance (R.C.S. No.4 of 1984), Mr.Prakash Risbud was not the owner on the date of filing

the said R.C.S. No.4 of 1984. He submits that on the date of filing the said suit, Mr.Shankar Dharma Khot was the owner of the said property. There was a partition in the family of Mr.Shankar Dharma Khot and in the partition, the suit property was allotted to Mr.Ishwara Shankar Khot who was the son of Mr.Shankar Dharma Khot. He submits that on 25th April 2001, the said Mr.Ishwara Khot had sold the suit property to the plaintiffs namely Mr.Bhusan Prakash Risbud and Mr. Kapil Prakash Risbud for consideration. The said agreement for sale was also duly registered.

29. It is submitted that upon execution of the said agreement for sale on 25th April 2001 by Mr.Ishwara Shankar Khot in favour of the plaintiffs, the plaintiffs derived the title in respect of the suit property in their individual capacity and were placed in possession by the said Mr.Ishwara Khot. He submits that merely because the plaintiffs are the grandsons of Mr.Vyankatesh Risbud, on that ground the decree for injunction granted in favour of the plaintiffs cannot be set aside. Their status is totally changed. They are claiming to be in possession as the owners of the suit property and not on behalf of Mr.Vyankatesh Risbud or Mr.Prakash V. Risbud. In support of this submission, learned counsel placed reliance on the judgment of the Supreme Court in the case of **Vishwanthath Bapurao Sabale Vs.Shalinibai Nagappa Sabale, (2009) 12 SCC 101** and more particularly paragraph 18 thereof.

30. It is submitted by the learned counsel for the plaintiffs that on the date of the plaintiffs filing the said suit for injunction, the plaintiffs were admittedly not made parties to the execution application. He submits that in any event, the execution application filed by the defendant and the suit filed by the plaintiffs were before

the same Court and could have been tried if any application would have been made by the defendant for clubbing both the proceedings.

31. It is submitted by the learned counsel for the plaintiffs that though in the suit filed by the plaintiffs, the defendant herein had filed a written statement, the defendant did not raise any objection in the said written statement that the said suit filed by the plaintiffs was barred and the issues raised in the said suit could be raised only before the Executing Court under Order XXI Rule 98 read with Rule 101 and Section 47 of the Code of Civil Procedure, 1908. The defendant herein did not raise any issue of jurisdiction in the suit filed by the plaintiffs. It is submitted that in any event, since the trial Court has erroneously dismissed the suit, the Lower Appellate Court rightly allowed the appeal filed by the plaintiffs.

32. It is submitted by the learned counsel for the plaintiffs that though the defendant herein did not raise any issue of maintainability of an independent suit under Order XXI Rule 98 read with Rule 101 and Section 47 of the Code of Civil Procedure, 1908, the Lower Appellate Court on its own raised that issue and decided the same. He submits that in any event, the Lower Appellate Court rightly took a view that the decree passed by the learned trial Judge in the suit for specific performance filed by the defendant herein was nullity and was not binding on the plaintiffs herein.

33. Learned counsel for the plaintiffs placed reliance on the judgment of the Supreme Court in the case of **Vithalbhai (P) Ltd. Vs. Union Bank of India, (2005) 4 SCC 315** and in particular paragraphs 15, 20 and 22 thereof and also the judgment of the full

bench of this Court in the case of **Bhartiben Shah Vs. Smt.Gracy Thomas & Ors., (2013) 2 Mh.L.J. 25** and in particular paragraph 88 thereof. It is submitted by the learned counsel that even if there was any breach of non-compliance of any provisions of the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872, the same will not be a ground for interfering with the impugned order passed by the Lower Appellate Court. He submits that in any event, the plaintiffs had followed the requisite procedure and the suit filed by the plaintiffs for injunction was maintainable in law. In his alternate submission, he submits that the decree in favour of the defendant herein itself was not executable.

34. Learned counsel appearing for the plaintiffs placed reliance on Section 54 of the Transfer of Property Act, 1882 and would submit that mere agreement to sale does not create any interest in the property. He submits that the agreement to sale relied upon by the defendant was admittedly not registered. He submits that since there was no interest created in the suit property in favour of the defendant, no decree could have been passed by the learned trial Judge in favour of the defendant in his suit for specific performance and possession at all. In support of this submission, learned counsel for the plaintiffs placed reliance on the judgment of the Calcutta High Court in the case of **Hiralal Agarwala Vs. Bhagirathi Gore & Ors., AIR 1975 Calcutta 445.**

35. It is submitted that the agreement to sale between Mr.Vyankatesh Risbud and Mr.Shankar Dharma Khot was a registered document. The said Mr.Shankar Dharma Khot was a *bona-fide* purchaser of the suit property. He submits that since the said agreement was a registered agreement, in view of Section 3 of

the Transfer of Property Act, 1882, there was a constructive notice to all the members of the public about sale of such property and thus in view of Section 50 of the Registration Act, 1908 read with Section 3 of the Transfer of Property Act, 1882, the registered document will be effective against all the unregistered documents.

36. In so far as the issue raised by the original defendant that he was in possession of the suit property is concerned, it is submitted by the learned counsel for the respondents that the defendant was never given any possession of the suit property by the said Mr.Vyankatesh Risbud and on the contrary, the defendant has applied for possession of the suit property before the Executing Court. He submits that the Lower Appellate Court has rightly rendered a finding that the decree for specific performance obtained by the defendant herein cannot be executed. He submits that the suit filed by the plaintiffs herein for injunction simplicitor was maintainable in view of the fact that the plaintiffs were not impleaded as party to the execution application on the date of the plaintiffs filing the suit.

37. Mr.Sandesh Patil, learned counsel for the appellant (original defendant) in rejoinder distinguishes the judgment of the Supreme Court in the case of **Hansa V. Gandhi Vs. Deep Shankar Roy & Ors., (2013) 12 SCC 776** on the ground that the Supreme Court was considering the Letter of Intent and not an agreement for sale which was the document entered into between the defendant herein and the original owner.

38. In so far as the judgment of the Supreme Court in the case of **Vithalbhai (P) Ltd.** (supra) relied upon by the plaintiffs is

concerned, it is submitted that in the said judgment, Supreme Court had considered the case of premature suit in respect of which no objection was raised by the defendant when the same was filed and in that context, it was held that it amounted to waiver. He submits that in this case, the suit filed by the plaintiffs for injunction simplicitor itself was not maintainable in view of the provisions of Order XXI Rule 98 read with Rule 101 of the Code of Civil Procedure, 1908. The said judgment of the Supreme Court in the case of **Vithalbhai (P) Ltd.** (supra) is distinguishable in the facts of this case. Learned counsel also placed heavy reliance on paragraph 20 of the said judgment of the Supreme Court in the case of **Vithalbhai (P) Ltd.** (supra) in which, it is held that no amount of waiver can confer jurisdiction on which the Court does not have jurisdiction. He submits that even if the appellant did not raise any objection before the learned trial Judge in the suit filed by the plaintiffs for injunction about the issue of jurisdiction on the ground that the provisions of Order XXI Rule 98 read with Rule 101 of the Code of Civil Procedure, 1908 that would not confer jurisdiction on the trial Court which did not have jurisdiction to hear a separate suit in respect of the issue which was required to be dealt with only by the Executing Court.

39. Learned counsel for the appellant also distinguishes the judgment of the Supreme Court in the case of **Vishwanath Bapurao Sabale** (supra) on the ground that the facts before the Supreme Court in the said judgment were totally different than the facts in this case. He submits that paragraph 49 of the said judgment has to be read with paragraph 31.

REASONS & CONCLUSIONS :

40. A perusal of the order passed by the learned trial Judge indicates that in the suit for injunction filed by the plaintiffs, the learned trial Judge also considered the issue whether the plaintiffs were the owners of the suit property under a registered sale-deed dated 25th April, 2001 and whether they were having any lawful possession over the suit property. The learned trial Judge also decided whether the plaintiffs had proved their obstruction to the lawful possession of the defendant over the suit property.

41. Insofar as the issue whether the plaintiffs were having lawful possession over the suit property is concerned, the learned trial Judge answered the said issue in the negative. The learned trial Judge also considered the issue as to whether the plaintiffs had proved the obstruction to the lawful possession over the suit property by the defendant and answered the same in the negative.

42. In the cross-examination of the plaintiff no.1 before the learned trial Judge, he admitted that his grant-father Vyankatesh Risbud had executed the agreement to sell in respect of the suit property in favour of the defendant and after the death of Vyankatesh Risbud, the defendant had issued notices to the legal heirs of Vyankatesh Risbud and had asked for specific performance of the agreement. He also admitted that in the year 1992-1993, his father had told him about the suit filed against him by the defendant herein concerning the suit property. He had not asked his predecessor Ishwari Shankar Khot regarding *lis-pendence* of the proceedings regarding the suit land. The learned trial Judge accordingly held that all those admissions by the plaintiff no.1 in his cross-examination were against the plaintiffs and it clearly appeared that the plaintiffs had deliberately purchased the suit land of defective title.

43. The learned trial Judge also considered the fact that in the written statement filed by Prakash Risbud in the said suit for specific performance filed by the defendant herein he had not disclosed the alleged alienation of the suit property by him to Shankar Khot prior to the suit. The said Prakash Risbud and other legal heirs had filed an appeal against the decree for specific performance passed by the learned trial Judge in the said suit being R.C.S. No.4 of 1984 bearing R.C.A. No.369 of 1991, which was dismissed for default on 16th April, 1991. Even in the said appeal proceedings, the said Prakash Risbud and others did not disclose about the alleged alienation of the suit property by Prakash Risbud in favour of Shankar Khot. The learned trial Judge also considered that at the time of execution proceedings, the name of Ishwara Khot was recorded as the owner of the land and therefore, he was joined as the judgment debtor in the execution proceedings. The execution proceedings were filed on 1st March, 2001 against Prakash Risbud and Ishwara Khot. The learned trial Judge noticed that the said Ishwara Khot could not have alienated the suit property in favour of the plaintiffs on 25th April, 2001 and therefore, all those alienations were during the pendency of the suit filed by the defendant herein i.e. R.C.S. No. 4 of 1984 was not valid.

44. The learned trial Judge held that after the death of Vyankatesh Risbud, his sons Prakash and his other legal heirs were bound to perform their part of obligation as per the agreement. Instead of executing the sale-deed in favour of the defendant, Prakash Risbud alienated the land in favour of Shankar Khot and thereafter contested the suit by filing the written statement. It is held that first alienation in favour of Shankar Khot was thus against the provisions of law. Though the decree was passed against Prakash

Risbud to alienate the suit property in favour of the defendant, he illegally alienated the suit property in favour of Shankar Khot. It is held that all subsequent transfers were accordingly defective and thus the title of the plaintiffs was not lawful. It is held by the learned trial Judge that since the suit was decreed in favour of the defendant herein, all alienations made in respect of the suit property in favour of the plaintiffs or in favour of Shankar Khot would not get any valid and legal title in respect of the suit property and thus the transaction of sale deed in favour of Shankar Khot was *void-ab-initio* and accordingly all subsequent transfers also became void.

45. Insofar as the possession of the plaintiffs is concerned, it is held by the learned trial Judge that the plaintiffs had failed to prove their lawful possession in respect of the suit property and at the same time the defendant also had failed to prove his possession. The learned trial Judge accordingly dismissed the said suit filed by the plaintiffs herein *inter-alia* praying for perpetual injunction against the defendant herein.

46. Insofar as the order and judgment of the lower appellate Court is concerned, a perusal of the said judgment clearly indicates that the lower appellate Court has reversed the findings recorded by the learned trial Judge and has held that the plaintiffs had proved their possession over the suit property and had also proved that the defendant had obstructed the possession of the plaintiffs over the suit property and accordingly granted injunction. The lower appellate Court held that since it was the case of the defendant in the written statement that he was in possession of the suit property, which was clear that the defendant had obstructed possession of the plaintiffs over the suit property.

47. The lower appellate Court held that though the sale deed of the suit property was executed by Ishwara Khot in favour of the plaintiffs on 25th April, 2001, the said transaction could not be hit by *lis-pendence*. A perusal of the judgment delivered by the lower appellate Court indicates that the learned Judge held that in the present matter, Shankar Khot was not made a party to the suit for specific performance of the contract and he had thus no opportunity to establish that the transfer was for value and without notice and hence the said decree for specific performance could not be executed against the said transferee. It is held that the said decree could not be passed against the son of Ishwara Khot who had got the suit property from his father by way of partition. The lower appellate Court held that the plaintiffs who had purchased the suit property from Ishwara Khot was thus not bound by the said decree and the said decree could not be executed against them.

48. The lower appellate Court also accepted the submission of the plaintiffs that the registered sale deed was a notice to the public at large and thus the defendant who had filed the said suit for specific performance had notice of the said sale deed of the suit property. The lower appellate Court held that since Ishwara Khot and the plaintiffs were not the parties to the suit for specific performance, they could not be added as the parties in the execution application and the said decree for specific performance was not binding on the plaintiffs.

49. On the submission as to whether the plaintiffs were claiming any rights in the said property as legal heirs of their father Prakash Risbud or had independently acquired the title in respect of the suit property is concerned, the lower appellate Court accepted the

submission of the plaintiffs that the suit property was acquired not as legal heirs of Prakash Risbud but was acquired by way of the registered sale deed and in their individual capacity. It is held that since the suit property was already sold by Shankar Bodhidharma Khot even before filing of the suit for specific performance by the defendant and since he was not impleaded as a party to the suit for specific performance, the subsequent purchaser was not bound by the said decree. The lower appellate Court held that the said decree for specific performance could not be executed against the plaintiffs and hence the possession of the plaintiffs over the suit property could not be taken away on the basis of such decree and thus based on such decree in favour of the defendant, the possession of the plaintiff could not be obstructed by the defendant.

50. In paragraph 45 of the impugned order passed by the lower appellate Court, it is held that though the defendant had not raised an issue that when the execution proceedings were pending before the Executing Court, the plaintiffs could not have filed separate suit, the lower appellate Court decided the said issue on its own and declared that decree in suit for specific performance filed by the defendant was not executable against the plaintiffs.

51. It is not in dispute that the defendants herein had filed a suit for specific performance in respect of the suit property in which the learned trial judge had passed a decree for specific performance and also for possession. The appeal filed by the plaintiffs herein arising out of the said order and decree passed in the said R.C.S. No.4 of 1984 came to be dismissed for default. No application had been made by the plaintiffs for restoration of the said appeal. It is also not in dispute that in the execution application filed by the

defendant herein for execution of the decree passed in the said R.C.S. No.4 of 1984, the sale deed is already executed in favour of the defendant through an officer of the court. The said sale deed executed in favour of the defendant has not been set aside by any competent court of law.

52. There is also no dispute that the defendant had also applied for execution of the decree for possession before the same executing court which application for possession is still pending. A perusal of the plaint filed by the plaintiffs insofar as suit bearing R.C.S. No.269 of 2001 indicates that the plaintiffs had *inter-alia* prayed for perpetual injunction in respect of the suit property simplicitor against the defendant and had not applied for declaration of title in respect of the suit property. The record produced by the parties before the learned trial judge as well as by this court clearly indicates that the plaintiffs were fully aware of the suit filed by the defendant for specific performance of the agreement in respect of the suit property and a decree was passed by the trial court in the said suit which decree had attained finality in view of the dismissal of the appeal filed by some of the plaintiffs herein. The record also clearly indicates that the plaintiff no.1 was also impleaded as the party to the execution application and was served notices by the executing court. The plaintiffs had themselves made such averments in the suit filed by the plaintiffs *inter-alia* praying for a perpetual injunction. The plaintiffs however did not appear before the executing court inspite of the service of the notices and inspite of their impleadment in the execution proceedings.

53. The question that arises for consideration of this court is whether the plaintiffs herein could have filed a separate suit *inter-alia*

praying for perpetual injunction against the defendant whose rights of ownership were already adjudicated in the suit bearing R.C.S. No. 4 of 1984 or the plaintiffs ought to have applied for adjudication of all their claims in respect of the suit property only in the said execution proceedings filed by the defendant in the said suit bearing R.C.S. No.4 of 1984. There is no dispute that the defendant did not raise any issue of jurisdiction before the trial court insofar as suit bearing R.C.S. No.269 of 2001 on the ground that the execution application in respect of the suit bearing R.C.S. No.4 of 1984 in respect of the same property was already pending and the plaintiff no.1 was already impleaded as parties to the execution proceedings. There is no dispute that the lower appellate court however decided this issue and held that the said decree passed by the trial judge in R.C.S. No.4 of 1984 was not binding on the plaintiffs herein and also Mr.Shankar Dharma Khot or Ishwara Shankar Khot. It is not the case of the plaintiffs that the lower appellate court could have decided the issue of maintainability of the suit for the first time in the appeal filed by the plaintiffs though the same was decided in their favour.

54. Learned counsel for both the parties have made their rival submissions on the issue of maintainability of a separate suit filed by the plaintiffs inter alia praying for perpetual injunction inspite of their being an application for execution of decree in respect of the same property was pending before the executing court in view of Order 21 Rules 97, 98 and 101 of the Code of Civil Procedure, 1908.

55. The question that arises for consideration of this court is whether the lower appellate court while hearing an appeal filed by the plaintiffs in which the plaintiffs had challenged the order and decree passed by the learned trial judge dismissing the suit for perpetual

injunction, whether could decide about the validity of the decree passed by the learned trial judge in suit bearing R.C.S. No.4 of 1984 which had attained finality.

56. The Supreme Court in case of **Sameer Singh and another vs. Abdul Rab and others, (2015) 1 SCC 379** has held that the order 21 Rule 97 deals with the resistance or obstruction to possession by the holder of a decree for possession or the purchaser of any such property sold in execution of a decree. It is held that the said provision empowers such a person to file an application to the Court complaining of such resistance or obstruction and requires the Court under sub-rule (2) to adjudicate upon the application in accordance with the provisions provided therein. Rule 99 deals with dispossession by decree-holder or purchaser of any property sold in execution of decree. It is held that the said provisions empower such a person to file an application to the court complaining of such resistance or obstruction and requires the Court under sub-rule (2) to adjudicate upon the application in accordance with the provisions provided therein. It is held that under rule 101 of order 21, all questions including questions relating to right, title or interest in the property arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application shall be determined by the Court dealing with an application and not by a separate suit and for the said purpose, the executing court has been conferred the jurisdiction to decide the same.

57. The Supreme Court in the said judgment has adverted to the another judgment of Supreme Court in case of **Brahmdeo**

Chaudhary v. Rishikesh Prasad Jaiswal and another, AIR 1997 SC 856 in which it was held that a stranger to the decree who claims an independent right, title and interest in the decreetal property can offer his resistance before getting actually dispossessed and he can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decreetal property even after losing possession as per Order XXI, Rule 99. It is held that the court has the authority to adjudicate all the questions pertaining to right, title or interest in the property arising between the parties which includes the claim of a stranger who apprehends dispossession or has already been dispossessed from the immovable property. It is held that the self-contained Code, as has been emphasized by this Court, enjoins the executing court to adjudicate the lis and the purpose is to avoid multiplicity of proceedings. It is held that when the application is adjudicated upon Rule 98 or Rule 100 of Order 21, the said order shall have the same force as if it were a decree. In my view, the principles of law laid down by the Supreme Court in case of **Sameer Singh** (supra) and **Brahmdeo Chaudhary** (supra) squarely applies to the facts of this case.

58. The plaintiffs in this case claims to be in possession by virtue of a sale deed dated 25th April, 2001 executed in their favour by Ishwara Shankar Khot. It was the case of the plaintiffs that they had not claimed title as legal heirs of Mr. Prakash Risbud but were claiming to be in possession of the suit property by virtue of such sale deed. In my view even if the plaintiffs were claiming to be a third party and had claimed interest in the suit property which was already a subject matter of the suit bearing R.C.S. No. 4 of 1984 in which the decree for specific performance and possession had attained finality,

the plaintiffs even if considered as third party claiming rights or possession under a sale deed dated 25th April, 2001 which was admittedly after passing of the decree passed by the learned trial judge in suit bearing R.C.S. No. 4 of 1984, all their claims including for injunction in respect of the suit property could be determined only by executing court under Order 21, Rules 97 to 101 of the Code of Civil Procedure, 1908. In my view, the plaintiffs could not have filed a separate suit for perpetual injunction in respect of the same property. The said suit itself was not maintainable being contrary to Order 21, Rule 98 and Rule 101 of the Code of Civil Procedure, 1908.

59. The Supreme Court in case of **Shreenath & Another vs. Rajesh & others, AIR 1998 SC 1827** has dealt with at length the provisions of Order 21 Rule 97, Rule 99, Rule 101 read with Rule 35 of Order 21 and has held that all disputes between decree holder and any person which includes all persons resisting the delivery of possession, claiming right in the property even those not bound by the decree, including tenants or other persons claiming right in their own including a stranger has to be adjudicated by the executing court. A party is not thrown out to relegate itself to the long drawn out arduous procedure of a fresh suit. It is held that this is to salvage the possible hardship both to the decree-holder and other person claiming title on their own right to get it adjudicated in the very execution proceedings. The Supreme Court also considered Order 21 Rule 35 which deals with a case of delivery of possession of immovable property and held that Order 21, Rule 97 conceives of cases where delivery of possession to decree-holder or purchaser is resisted by any person and the expression 'Any person' is wider enough including even a person not bound by a decree or claiming right in the property on his own including that of a tenant including

stranger.

60. In my view even if the plaintiffs or the said Ishwara Shankar Khot were not made parties to the said suit R.C.S. No.4 of 1984 but were only made a party to the execution proceedings by the defendants herein, the plaintiffs could not have filed a suit for injunction in respect of the suit property even if they could be considered as strangers to the lis between the defendants herein and not the parties to the said suit bearing R.C.S. No.4 of 1984. In my view the purpose and intent of Order 21 Rules 97, 98 to 101 of the Code of Civil Procedure is to avoid the multiplicity of the proceedings and thus all the issues raised by various parties and even stranger in respect of the same cause of action could be agitated only in the execution proceedings and not by a separate suit. I am respectfully bound by the principles laid down by the Supreme Court in case of **Shreenath & Another** (supra) which squarely applies to the facts of this case.

61. Insofar as submission of the learned counsel for the plaintiffs that the defendants did not raise any objection of jurisdiction before the learned trial judge in the suit bearing R.C.S. No.269 of 2001 filed by the plaintiffs for perpetual injunction on the ground that the application for execution of the decree passed in suit bearing R.C.S. No.4 of 1984 was pending before the executing court is concerned, there is no waiver against the statute. The plaintiffs themselves had made an averment in the plaint in the suit bearing R.C.S. No.269 of 2001 about filing of the suit R.C.S. No.4 of 1984, the decree passed therein and the dismissal of the appeal filed by the plaintiffs. In my view even if no specific issue of jurisdiction was raised by the defendants in the said suit No.269 of 2001, the learned

trial judge could not have decided the said suit for perpetual injunction in view of the mandatory provisions of Order 21, Rules 97, 98 read with Rule 101 of the Code of Civil Procedure, 1908. Supreme Court in case of **Vithalbhai (P) Ltd.** (supra) has held that no amount of waiver or consent can confer jurisdiction on a court which it inherently lacks or where none exists.

62. Even otherwise the plaint filed by the original plaintiffs clearly indicates that the plaintiffs had disclosed about filing of the suit for specific performance by the defendants, the decree passed therein against the father of the plaintiffs and other defendants thereto, the appeal filed by the father of the plaintiffs and about the execution application filed by the defendants. A perusal of the order passed by the learned trial judge clearly indicates that the learned trial judge had discussed this issue at length in the impugned order and has rightly rejected the suit for perpetual injunction filed by the plaintiffs. The learned trial judge also considered the oral evidence of the plaintiff no.1 and more particularly his cross examination in which he had admitted that he was informed about the proceedings filed by the defendants in the year 1992 but he did not make any further enquiry in the matter.

63. The next question that arises for consideration of this court is whether the lower appellate court could have passed order and decree of perpetual injunction against the defendants though the title in respect of the suit property was in dispute and was under cloud. The plaintiffs themselves had referred to various proceedings in respect of the title in respect of the suit property in the plaint. The defendants had also in the written statement had disclosed about the pendency of the execution proceedings. Be that as it may, in my view

the lower appellate court thus could not have interfered with the finding recorded by the learned trial judge and the decree refusing to grant perpetual injunction and could not have granted an order of perpetual injunction in favour of the original plaintiffs and against the defendants in a suit for perpetual injunction simplicitor and in absence of the plaintiffs seeking a declaration of title even if any such suit for injunction could have been maintained.

64. The Supreme Court in case of **Krishnadevi Malchand Kamathia & Ors.** (supra) has held that even if any order is void, it is required to be so declared by a competent forum and it is not permissible for any person to ignore the same merely because in his opinion the order is void. It is held that if according to a person an order is void, the party aggrieved by the same cannot decide that the said order is not binding upon it but has to approach the court for seeking such declaration. It is held that the order can be void for one purpose or for one person, it may not be so for another purpose or another person. The plaintiffs therefore could not have raised a plea before the lower appellate court that the decree for specific performance in favour of the defendants was not binding upon the plaintiffs on one or the other ground and more particularly after the appeal filed by their predecessor in title challenging the said decree came to be dismissed and the said decree had attained finality.

65. Supreme Court in case of **Anathula Sudhakar** (supra) has held that where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction. In my view the plaintiffs thus could not have filed a suit for injunction against the defendants whose

ownership was established in the said suit for specific performance and a decree passed therein had attained finality. The judgment of Supreme Court in case of **Anathula Sudhakar** (supra) squarely applies to the facts of this case. I am respectfully bound by the said judgment.

66. A perusal of the record indicates that in the said suit (R.C.S. NO.4 of 1984) filed by the defendants *inter-alia* praying for specific performance of the suit agreement, Mr.Prakash Risbud and others who were parties to the said suit did not disclose about the alleged sale deed of the suit property in favour of Mr.Shankar Dharma Khot. Since the plaintiffs were fully aware of the proceedings filed by the defendants for specific performance of the such agreement and the decree passed by the trial court and that the appeal against the said decree having been dismissed, it is clear that the plaintiffs who had alleged to have purchased the suit property could not have been considered as the *bona-fide* purchaser without notice. The submission of the learned counsel for the plaintiffs that the agreement for sale in favour of the plaintiffs being a registered agreement will prevail upon the unregistered agreement for sale in favour of the defendants has no merits in the facts and circumstances of this case. The lower appellate court could not have gone into the validity of the decree passed by the trial court in the said suit R.C.S. No.4 of 1984 in the suit for injunction filed by the plaintiffs which decree has attained finality. No injunction in favour of the plaintiffs who were not the *bona-fide* purchasers and were having sufficient notice of the earlier decree passed in favour of the defendants and that the same had attained finality could be granted by the lower appellate court.

67. Insofar as submission of the learned counsel for the

plaintiffs that there was a constructive notice to all the members of the public about the sale of the suit property in view of section 3 of the Transfer of Property Act, 1882 read with section 50 of the Registration Act, 1902 is concerned, there is no dispute that in view of section 3 of the Transfer of Property Act, 1882 read with section 50 of the Registration Act, there would be a constructive notice to all the members of the public about sale of a property. However, in view of the fact that there was no dispute that the agreement for sale was already entered into in favour of the defendants by the predecessor in title of the plaintiffs and in a suit for specific performance filed by the defendants, there was a decree passed by the competent court which decree has attained finality. The provisions of Section 3 of the Transfer of Property Act, 1882 read with section 50 of the Registration Act, 1902 would not assist the case of the plaintiffs.

68. The plaintiffs were fully aware of the decree passed in favour of the defendants and were even impleaded as parties to the execution application cannot be allowed to raise this issue. Be that as it may, the lower appellate court could not have gone into the validity of the decree passed by the learned trial judge in the independent proceedings filed by the defendants for specific performance or about the validity of the execution proceedings filed by the defendants for possession and other reliefs.

69. There was no dispute that pursuant to the decree for specific performance granted in favour of the defendants, the trial court in the execution proceedings filed by the defendants in the said suit had already directed the execution of the sale deed in favour of the defendants and that part of the decree was already executed. The lower appellate court in my view thus could not have passed any

order contrary to the order passed by the executing court in the independent proceedings which order had attained finality and to make the said order unexecutable. In my view the lower appellate court has exceeded its jurisdiction by granting order of perpetual injunction in favour of the plaintiffs and against the defendants thereby restraining the defendants from obtaining possession of the suit property in execution of the decree which decree had attained finality.

70. Supreme Court in case of **Dalip Singh** (supra) has held that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final. The Supreme Court has in the said judgment approved the principles that the litigant who has not come to the court with clean hands and has not candidly disclosed all the facts that he was aware of and he intends to delay the proceedings, then the Court, will non-suit him on the ground of contumacious conduct. It is held that if a party is guilty of misleading the Court and has not disclosed relevant and material facts, his proceedings may be dismissed at the threshold without considering the merits of the claim. A perusal of the record in this matter clearly indicates that the said Mr. Prakash Risbud who was a party defendants to the suit for specific performance filed by the defendants did not disclose about the alleged sale deed executed in favour of the alleged subsequent purchaser. The predecessor of title of the plaintiffs and the plaintiffs themselves having not disclosed true and correct facts before the court were liable to be non-suited by the lower appellate court instead of granting a decree of perpetual injunction in their favour.

71. Insofar as submission of the learned counsel for the

plaintiffs that on the date of the filing of suit bearing R.C.S. No. 4 of 1984, Mr.Prakash Risbud was not the owner of the suit property but Mr.Shankar Dharma Khot was the owner of the suit property is concerned, the defendants in the said suit including Mr.Prakash Risbud did not disclose about the alleged sale transaction in respect of the suit property in favour of Mr.Shankar Khot. When the defendants herein came to know about the name of Ishwara Shankar Khot in the mutation entries, he was impleaded as the party to the execution proceedings. After demise of the said Prakash Risbud even the plaintiffs herein were impleaded as party to the execution application by the defendants.

72. Insofar as submission of the learned counsel for the plaintiffs that the plaintiffs had not claimed right, title or interest in the suit property as legal heirs of Mr.Prakash Risbud but were claiming to be owner of the suit property by virtue of agreement for sale on 25th April, 2001 by Ishwara Shankar Khot in favour of the plaintiffs and as a result thereof, their status was totally changed is concerned, in my view there is no merit in this submission of the learned counsel for the plaintiffs. The said suit filed by the defendants for specific performance was already decreed which decree had attained finality much prior to the date of the said agreement for sale dated 25th April 2001 i.e. on 30th March 1991 and the appeal having been dismissed on 16th April, 1999. The execution of such agreement for sale on 25th April, 2001 by Ishwara Shankar Khot in favour of the plaintiffs during the pendency of execution application in my *prima-facie* view would not create any right, title or interest in the said property in favour of the plaintiffs. A perusal of the record indicates that though the father of the plaintiffs was impleaded as a party defendant to the said suit bearing R.C.S. No.4 of 1984 and the plaintiffs themselves were

impleaded as party to the execution application, the plaintiffs though were fully aware of the decree and pending execution application in respect of the suit property entered into agreement for sale. The plaintiffs thus could not have been considered as a *bona-fide* purchaser without notice. Merely because they had entered into an agreement for sale in the facts and circumstances of this case, no title could be derived by them under the said agreement for sale dated 24th January, 2001.

73. Insofar as judgment of Supreme Court in case of **Vishwanath Bapurao Sabale** (supra) relied upon by the learned counsel for the plaintiffs is concerned, the facts before the Supreme Court in the said judgment were totally different. In this case, the plaintiffs were fully aware of the proceedings filed by the defendants against the father of the plaintiffs and they being party to the execution proceedings could not have derived any title even if had entered into an agreement for sale in a different capacity. In my view the action on the part of the plaintiffs to enter into an agreement for sale at such a late stage after fully knowing well about the decree passed by the trial court and the dismissal of the appeal filed by the father of the plaintiffs and during the pendency of execution application would not change the character of the possession of the plaintiffs in the suit property.

74. Insofar as judgment of Supreme Court in case of **Vithalbhai (P) Ltd.** (supra) relied upon by the learned counsel for the plaintiffs in support of the submissions that since no issue of maintainability of suit filed by the plaintiffs was raised by the defendants, the learned trial judge could not have dismissed the suit or that there was no bar against the lower appellate court from

passing a decree for perpetual injunction is concerned, Supreme Court in the case of Vithalbhai (P) Ltd. (supra) had considered a case where no objection about the maintainability of the suit was raised on the ground of the suit being premature and has held that if the suit is proceeded ahead and at a much later stage the Court is called upon to decide the plea as to non-maintainability of the suit on account of its being premature, then the Court shall not necessarily dismiss the suit. The Court would examine if any prejudice has been caused to the defendant or any manifest injustice would result to the defendant if the suit was to be decreed.

75. The Supreme Court in the said judgment also held that the Court shall not exercise its discretion in favour of decreeing a premature suit in a case when there is a mandatory bar created by a statute which disables the plaintiff from filing the suit on or before a particular date or the occurrence of a particular event which would have the effect of defeating a public policy or public purpose or if such premature institution renders the presentation itself patently void and the invalidity is incurable such as when it goes to the root of the jurisdiction of the court. Supreme Court also held that no amount of waiver or consent can confer jurisdiction on a Court which it inherently lacks or where none exists. In my view the said judgment of Supreme Court assist the case of the defendants and not the plaintiffs. Even if no objection about jurisdiction was raised specifically by the defendants in the suit for perpetual injunction filed by the defendants, both the parties had specifically pleaded about the existence of the decree in respect of the same suit property and pendency of the execution application in respect thereof.

76. Insofar as judgment of Full Bench of this court in case of

Bhartiben Shah (supra), relied upon by the learned counsel for the plaintiffs is concerned, it is not held in the said judgment that even if a separate suit is not maintainable and is barred and inspite of such provisions in the Code of Civil Procedure, 1908, the suit is entertained, the court will have no power to interfere with such an order or decree of the lower court. The said judgment in my view does not assist the case of the plaintiffs.

77. Insofar as submission of the learned counsel for the plaintiffs that the decree for specific performance granted by the learned trial judge in a suit bearing R.C.S. No.4 of 1984 was not executable against the plaintiffs is concerned, even this issue could not have been decided by the lower appellate court in the appeal filed by the plaintiffs impugning the decree passed against the plaintiffs by the learned trial judge in a suit for perpetual injunction. The plaintiffs having failed to raise this issue in the execution proceedings, could not have been allowed to raise this issue in the proceedings before the lower appellate court arising out of the proceedings dismissing the suit for perpetual injunction.

78. Insofar as submission of the learned counsel for the plaintiffs that mere agreement to sale in favour of the defendants by the erstwhile owner would not create any interest in the suit property in view of section 54 of the Transfer of Property Act, 1882 is concerned, the fact remain that the said suit for specific performance was admittedly decreed and the appeal against the said decree was dismissed. The existence of such unregistered agreement for sale was proved. Merely because subsequently an agreement for sale is executed by the original owner which agreement is subsequently registered would not nullify the effect of the decree passed by the

competent court. The reliance placed on the judgment of Calcutta High Court in case of **Hiralal Agarwala** (supra) by the learned counsel for the plaintiffs is thus totally misplaced.

79. Insofar as submission of the learned counsel for the plaintiffs that the defendants were never given possession of the suit property by Vyankatesh Risbud is concerned, there is no dispute that an application for possession is already filed by the defendants before the executing court and the same is pending. The sale deed executed in favour of the defendants pursuant to an order of the executing court indicates that he was put in possession. Be that as it may, the lower appellate court could not have passed an order of perpetual injunction against the defendants from executing a decree for possession which has attained finality.

80. In my view, the order and judgment of the lower appellate court is totally erroneous and is contrary to the well settled principles of law summarized aforesaid and is in gross violation of the provisions of Code of Civil Procedure referred to aforesaid and thus deserves to be set aside.

81. Insofar as substantial question of law no.1 formulated by this court is concerned, the question is answered in negative. The findings of the lower appellate court is totally inconsistent and contradictory.

82. Insofar as substantial question of law no.2 is concerned, the said question is answered in negative. In my view the decree passed by the learned trial judge in R.C.S. No.4 of 1984 was binding on the plaintiffs also by which decree the right, title and interest of the

defendants herein in the suit property were crystallized in his favour and thus the lower appellate court in my view could not have passed a decree for grant of permanent injunction contrary to such decree passed by the learned trial judge in R.C.S. No.4 of 1984 for specific performance and possession which decree had attained finality.

83. I, therefore, pass the following order :-

a). The impugned oral judgment delivered by the Principal District Judge, Sangli (Lower Appellate Court) in Regular Civil Appeal No. 84 of 2006 is set aside. Judgment and decree dated 25th January, 2006 passed by the learned Civil Judge, Junior Division, Miraj dismissing the Regular Civil Suit No. 269 of 2001 is upheld. Regular Civil Suit No. 269 of 2001 filed by the plaintiffs is dismissed.

84. Second Appeal No. 217 of 2013 is allowed in the aforesaid terms.

85. In view of the disposal of the second appeal, Civil Application No.916 of 2013 does not survive and is accordingly disposed of. No order as to costs.

(R.D. DHANUKA, J.)

At the request of the learned counsel appearing for the respondents (original plaintiffs), operation of this order is stayed for a period of eight weeks from today.

(R.D. DHANUKA, J.)