

IN THE HIGH COURT OF BOMBAY AT GOA.

APPEAL FROM ORDER NO.30 OF 2016

M/s. Mercedes Builders Private Limited
 Company duly constituted under the
 Indian Companies Act, 1956,
 Having its registered office at
 10, Mapusa Trade Centre,
 Morod, Mapusa, Bardez, Goa,
 represented by its Director Mr. I.J.Virani,
 aged 82 years, son of Mr. Jusab Virani,
 Indian National, resident of Altinho,
 Mapusa, Bardez, Goa.

Appellants

Versus

- 1] Mr. Shaikh Mohammad Hanif Bepari
 Son of Late Shaikh Ibrahim Lalsab Bepari,
 aged 62 years, married, businessman, and his,
- 2] Mrs. Anjumara Shaikh Mohammad Hanif Bepari,
 wife of Shaikh Mohammad Hanif Bepari,
 aged 47 years, married, housewife,
 both resident of H.No.253,
 Donjoao, Mercedes, Tiswadi, Goa and
 Shop no.2/81, Panaji Municipal Market,
 Panaji, Goa,

(which address has been given by the
 Respondents for the purpose of
 Correspondence in the suit agreement).

Respondents.

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Shri Iftikhar Agha, Advocate for the appellant.
 Shri M.M. Shaikh, Advocate with Shri V. Parsekar,
 Advocate for the respondents no.1 and 2.

**CORAM : NUTAN D.SARDESSAI, J.
 RESERVED ON :27/02/2017.
 PRONOUNCED ON :05.05.2017**

JUDGMENT:

1. Heard Shri Iftikhar Agha, learned Advocate for the
 appellant and Shri M.M. Shaikh, learned Advocate for the

respondents no.1 and 2.

2. Admit. Shri Shaikh, learned Advocate waives notice on behalf of the respondents no. 1 and 2.

3. This appeal takes an exception to the order dated 16.4.2016 passed by the learned Senior Civil Judge, Panaji whereby he dismissed the application for temporary injunction filed by the plaintiffs who are in appeal against the respondents being the original defendants.

4. Shri I. Agha, learned Advocate for the appellants came to be heard who submitted at the outset that the property in question was put to auction on 3.1.2012 in the Inventory Proceedings whereby the respondents were declared as the highest bidder and the property came to be allotted to them who had to pay owelty money to the other family members. A Memorandum of Understanding dated 21.5.2011 came to be executed between the respondents and one Khalil Ahmed whereby it was agreed to sell 3050 sq.mts. to Khalil for the consideration of ₹2,50,000,00/-. The said Memorandum of Understanding however came to be cancelled by the Deed of Development dated 27.1.2012. A Declaration was executed on 23.5.2011 between the said Khalil and the respondents to the

effect that the Memorandum of Understanding was only for the collateral purposes. A Declaration dated 27.1.2012 came to be executed between the appellants, the respondents and Khalil Ahmed pursuant to which the Memorandum of Understanding stood cancelled and Khalil was paid an amount of ₹ 1,00,000,00/- by the appellants. A Development Agreement was executed between the appellants and the defendants on 28.3.2012 and an additional sum of ₹1,75,000,00/- was paid by the appellants to the respondents and thereafter a Power of Attorney came to be executed by the respondents in favour of the appellants on 27.4.2012. The appellants had obtained all the permissions for the development starting from 25.3.2013 onwards and on 11.12.2013 a notice came to be issued to the respondents calling upon them to execute an Addendum Agreement in discharge of their obligations. The respondents however repudiated the averments contained in the notice by their reply dated 23.3.2013 and finally the suit came to be filed in April 2014 for the reliefs of the declaration, specific performance, damages, injunction and consequential reliefs.

5. Shri I. Agha, learned Advocate for the appellants invited attention to the Memorandum of Understanding, the Declaration-Cum-Affidavit dated 23.5.2011, the Deed of Declaration, the Development Agreement apart from the

pleadings in the plaint and the written statement and submitted that the impugned order as passed by the learned Senior Civil Judge called for an interference and there was no reason for the trial Court to refuse the documents produced by the appellants which it ought to have accepted at face value. It was not open for the respondents to challenge any of the documents relied upon by the appellants. There was no basis for the learned trial Court to invoke Section 17 of the Registration Act, 1908 and to reject the Development Agreement when the Registration Act was a complete Code in itself. The learned trial Court had to read Section 49 alongwith Section 17 and the proviso thereto and in which event the trial Court would have come to a finding in favour of the appellants. He relied in *S. Kaladevi Vs. V.R. Somasundaram and others* [(2010) 5 SCC 401] to buttress his contention that the trial Court had ignored Section 49 and the proviso thereto while invoking Section 17 of the said Act to reject their documents.

6. Shri I.Igha placed reliance in *Smt. Hilarabai P. Kamat and another Vs. Shri Yeshwant B. Sakhalkar and another* [2003 (1) Goa L.T. 352] in support of his case. The trial Court had failed to consider the equities and that the appellants had paid a substantial amount of ₹ 1,75,00,000/- to the respondents. The aspect of the respondents returning ₹50,00,000/- to the

appellants had to be looked into on merits. The respondents had taken advantage of the documents apart from the consideration and in these circumstances, the appellants ought to have been secured by the order of temporary injunction. He referred to the judgment in Dr. Arjun Sitaram Nitinwar Vs. Mr. Rama Sakharam Parad & Os. [2014(7) ALL MR 574] to submit that it was clearly distinguishable and otherwise per per in curium since it did not consider the proviso to Section 49 and had not considered the judgment of the Apex Court in S.Kaladevi (supra). There was an interim order dated 6.5.2013 pursuant to which the trial Court had directed the parties not to create any third party rights and besides, there was an interim order of this Court "directing the parties to maintain status quo". Thus, considering the factual matrix and the equities, the appellants had to be secured by an order of injunction.

7. Shri M. Sheikh, learned Advocate for the respondents submitted at the outset by reverting to the impugned order that the trial Court had duly considered the documents to see whether the equitable relief could be granted in favour of the appellants. The Declaration-cum-Affidavit was not a Sale Agreement but a Security Document. There was no basis in the appellants' case that the Memorandum of Understanding was to sell the property though he conceded that the Deed of Declaration was executed

between the parties. The Development Agreement was vitiated by fraud and misrepresentation and besides the appellants were guilty of suppression of material facts. The respondents had refunded an amount of ₹50,00,000/- by account payee cheques to one Firoz which was not referred to in the plaint and therefore the appellants were guilty of suppression of the material facts. He relied in Dr. Arjun Nitinwar (supra). The Development Agreement on its bare reading clearly indicated that there was a right of the Developer to sell the property. The trial Court had rightly placed reliance on the judgments in Dr. Arjun Nitinwar (supra) and that in S. Kaladevi (supra), was clearly distinguishable. His next plank of argument was that Sections 17 and 49 of the Registration Act, 1908 had to be read in conjunction with Section 35 of the Stamp Act, 1899.

8. Shri M. Sheikh relied in Avinash Kumar Chauhan Vs. Vijay Krishna Mishra [AIR 2009 SC 1489], referred to Sections 33 and 35 of the Stamp Act and placed further reliance in Yellapu Uma Mahesgwari and Anr. Vs. Buddha Jagadheeswararao and Ors. [2015 ALL SCR 3388] and Smt. Dyavamma Alias Sanna Mukkamma Vs. Smt. Dyavamma Alias Sanna Mukkamma Vs. Smt. Balamma and others [ILR 2010 KAR 3280], while wrapping up his argument that the trial Court had rightly considered the effect of Section 17 of the Registration Act and Section 35 of the

Stamp Act and dismissed the application. Shri I. Agha, learned Advocate in reply submitted that the Memorandum of Understanding clearly indicated the intention of the parties to sell the property and therefore a contention to the contrary canvassed on behalf of the respondents was untenable. Insofar as the Declaration-Cum-Affidavit was concerned, he submitted that the respondent no.1 was also a signatory to the same. The trial Court had not given any finding on the aspect of the repayment of ₹50,00,000/- by the respondents to one Firoz but in any event that aspect had to be decided on merits and as it was returned to the said Firoz in his individual capacity and not as a Partner of the Firm.

9. Once again Shri I. Agha distinguished the judgment in Dr. Arjun Nitinwar (supra), as it had not considered the proviso to Section 49 of the Registration Act. Even otherwise, it was the judgment of a learned Single Judge, per incurium and without considering the Apex Court judgment in S. Kalavati (supra). On his part too he distinguished the judgment in Agnesh Kumar (supra), and those in Yellapu Uma Mahesgwari (supra) and Smt. Dyavamma (supra). The Memorandum of Understanding incorporated the intention of the parties and dealt with all eventualities. The respondents could not approbate or reprobate and therefore their plea was untenable that the appellants were

not entitled to the benefits of injunction. Shri Shaikh, learned Advocate for the respondents in further reply clarified that ₹50,00,000/- was paid to Firoz who was the Director of the Company and which fact was not denied by the appellants. Avinash Kumar (supra), considered the relevant provisions of the Registration Act apart from Section 34 of the Stamp Act. On a parting note, he relied in *Wander Limited and another Vs. Antox India P. Ltd.* [1990 (supp) SCC 727] and submitted that no error was committed by the learned trial Court as to justify interference with the impugned order in appeal and pressed for its dismissal.

10. Section 17 of the Registration Act indicates the document in respect of which registration thereof is compulsory and Clause (e) takes within its sweep the non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in the immovable property. The learned trial Court had referred to this provision to conclude that as the document in question related to the creation of a right in the immovable property, it could not be looked into for want of registration as

required in terms of Section 17 (e) of the Registration Act. Section 49 deals with the effect of non-registration of the documents required to be registered and reads as : "no document required by Section 17 or by any provision of the Transfer of the Property Act, 1882 to be registered shall - (a) affect any immovable property comprised therein, or (b) confer any power to adopt, or (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered".

11. The proviso thereto, however, circumscribes the effect of Section 49 and reads: "provided that an unregistered document affecting immovable property and required by this Act of Transfer of the Property Act, 1882 to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 or as evidence of any collateral transaction not required to be effected by registered instrument". Therefore, a reading of Section 17 with the proviso to Section 49 of the Registration Act, 1908 would support the case of the appellants that in a suit for specific performance under the Specific Relief Act, 1963 even an unregistered document affecting the immovable property and otherwise required to be registered under the Registration Act or Transfer of Property Act may be received as evidence of a

contract or as evidence of any collateral transaction not required to be effected by a registered instrument. The appellants as the original plaintiffs had filed a suit not only for declaration and permanent injunction but also for the specific performance, compensation and consequential reliefs and therefore in a suit of this nature, the appellants would be entitled to rely on the unregistered document by invoking Section 17 read with the proviso to Section 49 of the Registration Act, 1908.

12. The appellants had carved a case that the property in dispute admittedly measuring 3050 sq.mts. bearing the distinct Survey no.82/8 of Village Mercas i.e. the suit property was the subject matter of the Inventory Proceedings before the Senior Civil Judge, Panaji and that by an order dated 3.1.2012 the property came to be put up to auction and the respondents being the highest bidder came to be allotted the suit property. It was also their case that a Memorandum Of Understanding dated 21.5.2011 came to be executed between the respondents and one Khalil Ahmed pursuant to which they were required to make out a clean and clear marketable title within 180 days of its execution. The value of the suit property was adjudged at ₹3,51,00,000/- in the Inventory Proceedings and the respondents were required to pay the owelty amounts to the other interested parties. In terms of the said Memorandum of Understanding it

was stipulated therein that in case the sale transaction could not be completed for any reason, the prospective purchaser would be entitled to receive an amount of ₹20,00,000/- as penalty in addition to the sale consideration of ₹80,00,000/-. The consideration amount in the Memorandum of Understanding was fixed at ₹2,80,00,000/- which was below the amount of ₹3,50,00,000/- required to be paid by the respondents to the interested parties in the Inventory Proceedings.

13. The respondents had approached the appellants to develop the property on such terms as may be mutually agreed between them and accordingly the appellants paid an amount of ₹1,00,000,00/- to Khalil Ahmed to relieve him from the Memorandum Of Understanding dated 21.5.2011 and a Deed of Declaration accordingly came to be executed between the appellants, the respondents and the said Khalil Ahmed. The appellants had further advanced an amount of ₹75,00,000/- to the respondents subsequent to the execution of the Deed of Declaration dated 27.1.2012 and agreed to enter into the Development Agreement. It was the case of the appellants further that the Development Agreement dated 28.3.2012 came to be executed between them pursuant to which the appellants were put in possession of the suit property. The parties had also negotiated the modalities of the development of the suit property

pursuant to the Development Agreement and for which a General Power of Attorney was executed by the respondents in favour of the appellants vesting them with all the powers required to develop the said property and sell the built up areas save and except the areas to be allotted and reserved for the respondents. They had incurred all the expenses for procuring the permissions and the licenses from the various statutory authorities after incurring a lot of expenditure. However, the conduct of the respondents was contrary to the terms of the contract amounting to a breach thereof and therefore they were entitled to seek for the specific performance of the Development Agreement dated 28.3.2012. They had accordingly called upon the defendants by a notice to execute the Addendum Agreement failing which they would be constrained to initiate the civil proceedings and accordingly filed the suit for the stated reliefs.

14. The respondents had taken an objection to the relief of specific performance of the Development Agreement on the premise that it was not registered under the Indian Registration Act, 1908 and besides the appellants had acted in fraud of the suit agreement and wilfully at variance with the same or in subversion of the relation intended to be established by the document. It was also brought by fraud perpetrated by the appellants and therefore it was not specifically enforceable. It

was their specific case that they had borrowed ₹80,00,000/- from Khalil Ahmed and for that purpose they had entered into the Security Agreement dated 21.5.2011 styled as the Memorandum of Understanding. Their Architect who was in a position to dominate the Will of the respondent no.1 and more so taking advantage of the fact that that they were in need of money, introduced Shri Firoz to the respondents no.1 and who alongwith the other Director persuaded the respondent no.1 and agreed to pay ₹1,00,000,00/- to Khalil Ahmed and to develop the suit property. The appellants had got executed the Deed of Declaration dated 27.1.2012 without explaining its contents and they were compelled to sign the document to effect the repayment of the said Khalil. Though the appellants had committed the breaches of the said Agreement, however, on their assurance, the respondents had executed the General Power of Attorney dated 24.12.2012 in favour of the appellants to develop the suit property with inclusive powers to obtain all the necessary licenses, permissions and NOCs.

15. The appellants despite committing the breach of the contract suddenly issued a legal notice on 11.12.2013 alleging that they had not executed the Addendum Agreement and claiming compensation of ₹1,75,000,00/- alongwith the interest thereon. The appellants had failed to commence the development

work in the suit property and therefore could not perform their part of the Agreement. They were in possession and enjoyment of the suit property which was never handed over to the appellants at any point of time who were only permitted to enter the suit property for development. The suit as such was not tenable and liable for dismissal.

16. The Indian Stamp Act, 1899 has been enacted to consolidate and amend the law relating to Stamps. Section 33 thereof deals with the examination and impounding of the instruments and empowers every person having authority to receive evidence and in charge of public office before whom an instrument chargeable with duty is produced or comes in the performance of his functions shall if it appears to him that such instrument is not duly stamped impound the same. Section 35 in particular deals with the effect of instruments which are not duly stamped and being inadmissible in evidence reading as, "No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:- and circumscribed by the proviso that any such instrument shall be admitted in evidence on payment of the duty with which the same is

chargeable, or, where the instrument is insufficiently stamped, of the amount required to make up such duty, together with a penalty". Section 37 deals with the admission of improperly stamped instruments and empowers the State Government to make Rules providing that where an instrument bears a stamp of sufficient amount but of improper description, it may, on payment of the duty with which the same is chargeable be certified to be duly stamped, and any instrument so certified shall then be deemed to have been duly stamped as from the date of its execution. It has therefore to be seen in the backdrop of these provisions and those of the Registration Act, 1908 whether the learned trial Court was justified to ignore the document while appreciating the case of the parties.

17. In **S. Kaladevi** (supra), the short question for consideration before the Hon'ble Apex Court was on the admissibility of an unregistered Sale Deed in a suit for specific performance of the contract. In the brief facts the appellant and the respondents who are the plaintiff and the defendants in the suit filed before the Subordinate Judge, Gobichettipalayam was for the relief of directing the defendants to execute a fresh Sale Deed with regard to the suit property in pursuance of an Agreement for Sale dated 27.2.2006. The plaintiff had also prayed for the grant of permanent injunction restraining the defendants from disturbing

her peaceful possession and enjoyment of the suit property. According to her, the first defendant for himself as the guardian of the third defendant and the second defendant jointly entered into an oral Agreement with her on 27.2.2006 to sell the suit property for a consideration of ₹1,83,000/-. It was agreed that the Sale Deed in pursuance of the oral Agreement would be executed and registered on the same day. The plaintiff purchased the stamp papers, paid the entire sale consideration to the defendants who put her in possession of the suit property and also executed the Sale Deed in her favour. However, when the Sale Deed was taken to the Sub-Registrar's Office, he informed that in view of an order of attachment of the suit property, the Sale Deed could not be registered and thus not registered.

18. In **S.Kaladevi** (supra), the defendants promised the plaintiff that they would amicably settle the matter with the party who had obtained the attachment of the suit property and get the Sale Deed registered no sooner the attachment was raised. She had called upon the defendants to get the Sale Deed registered but they had avoided the same by putting forth the reason that the attachment in respect of the suit property was subsisting. The plaintiff had again called upon the defendants to cooperate in getting the Sale Deed registered but instead they attempted to interfere with her possession and enjoyment of the suit property

necessitating action by way of suit. The first defendant denied having entered into an oral Agreement for Sale with the plaintiff for himself and as a guardian father of the third defendant and the second defendant jointly or that he had delivered physical possession of the suit property to the plaintiff. He had set up the defence that he had taken loan from one Subramaniam and when Subramaniam demanded the repayment, he had approached the plaintiff and requested ₹1,75,000/- as loan. Upon her insistence that he should execute an Agreement for Sale, he and the second defendant signed the document believing that to be an Agreement for Sale on 27.2.2006 and went to the Office of the Sub-Registrar to get it registered.

19. In **S.Kaladevi** (supra), however, on being questioned by the Sub-Registrar whether the consideration had been received and the Sale Deed could be registered, he and the second defendant learnt that the plaintiff had fraudulently obtained their signatures on the Sale Deed by falsely stating that it was only an Agreement for Sale and they refused to agree for its registration. During the course of the evidence after the issues were struck, the unregistered Sale Deed dated 27.2.2006 was tendered for being marked, when an objection was raised to its admissibility. The trial Court sustained the objection and refused to admit the Sale Deed in evidence which was challenged before the High

Court in Revision unsuccessfully and thus giving rise to the Appeal by special leave. In that backdrop, Their Lordships of the Apex Court considered Section 49 of the Registration Act, 1908 and the proviso thereto and were of the opinion that the trial Court had erred in not admitting the unregistered Sale Deed in evidence and the High Court ought to have corrected the said error by setting aside the order of the trial Court. Their Lordships had considered Section 49 vis-a-vis Section 17 of the Registration Act, 1908 alongwith the proviso and held that a document required to be registered, if unregistered can be admitted in evidence as an evidence of a contract in a suit for specific performance.

20. **Hirabai Kamat Mhamai** (supra), was the original plaintiff who had filed the suit for permanent injunction with a prayer for temporary injunction claiming to be the co-owners having 1/12th share in the suit property consisting of a structure with the first floor which had been leased to the respondent no.1. The respondents had demolished a part of the suit property prior to the filing of the suit and a day prior to its institution demolished completely the middle wall without the plaintiff's permission. Averring that grave, irreparable loss and injury would be occasioned on account of exposure of the ground floor premises leased by her to the other tenants, she filed the Suit alongwith

the prayer for temporary injunction and interim directions. The trial Court granted the interim reliefs restraining the respondents from constructing anything or raising any structure in place of the demolished suit structure. The respondents as the original defendants in the pending Suit filed an application under Order XXXIX Rule 4 of the Code of Civil Procedure praying for vacation of the ex parte ad-interim relief which was rejected by the trial Court and therefore carried an Appeal to the District Court. The ex parte order was confirmed by the trial Court on 9.5.1997 and being aggrieved by the said order the respondents carried an Appeal to the District Court which by its common judgment allowed both the Appeals giving rise to the Petitions before the High Court after withdrawing the Civil Revision Applications.

21. In **Hirabai Mhamai** (supra), the learned Single Judge found that the learned lower Appellate Court while considering the prima facie case had come to a conclusion that Lease Deed was executed by the head of family and there were receipts showing the payment of rent. The learned lower Appellate court also found that the dissolution of " Casa Social Camotim Mhamai" was never brought to the notice of the respondents and besides, the petitioner had questioned the authority of Soiru when he continued to act as the head of the family by collecting the rents and issuing receipts. The learned lower Appellate Court therefore

found that there was a Lease Agreement, Receipts of payment of Rent and No Objection Certificate in favour of the respondents and therefore the petitioners had not made out a prima facie case and thus irreparable loss would be caused to the respondents if the injunction was granted. The learned Single Judge found from the material on record that the petitioners had established prima facie that the joint family was dissolved and consequent to its dissolution Soiru was not the Karta or head of the family. The respondents had placed certain documents on record which would indicate that some of the Members of the joint family had appointed Soiru as their head and the property was being managed as if the joint family was in existence. The learned Judge found that the petitioners had established that the joint family was no longer in existence and obviously Soiru could not act as a Karta of the joint family and bind the petitioners and he had no right to execute the No Objection Certificate. In that backdrop, it was held that at the time of consideration of a prima facie case, specially when a case rests on documents, the Courts have to accept the documents as they are. An analytical appreciation of the documents is impermissible at that stage.

22. **Dr. Arjun Nitinwar** (supra), was the original plaintiff who had filed the Suit claiming declaration that the Development Agreement is legal, valid and subsisting and duly executed before

the Notary Public and so too the Power of Attorney executed by the defendants in favour of the plaintiff were legal, valid, subsisting and binding on the defendants. A further declaration was sought by the plaintiff that the notice issued by the defendants in the Suit for declaration sworn and executed by the defendant no.1 was illegal, void-ab-initio, not binding and operating against the plaintiff. The Development Agreement was tendered by the plaintiff during the examination-in-chief and sought to prove its contents when the point of its admissibility was raised before the Court. The plaintiff produced a certified copy but the trial Court declined to mark the document as an Exhibit primarily on the ground that it had been executed in breach of Section 36A of the Maharashtra Land Revenue Code and was not properly stamped and this order was challenged in Writ before the High Court.

23. In **Dr. Arjun Nitinwar** (supra), it was contended on his behalf that the document was not compulsorily registrable under Section 17 (1) (b) of the Registration Act as there was no transfer of the property, the covenants of the Development Agreement indicated the nature of the right created in favour of the plaintiff which could not be said to create a right of ownership in his favour, that the trial Court erred in taking into consideration Article 5 (g-a) for the purpose of computing the stamp duty that

was payable by loosing sight of the fact that the said provision had been deleted and that Section 36A of the Act did not provide for its registration and only provided for permission to be sought from the Competent Authority in respect of the purchase of the tribal land and therefore could not impinge upon the admissibility of the document. It was contended on behalf of the respondents that Section 17(1)(b) of the Registration Act does not apply only in cases where a transfer is effected but comes into play as soon as a right is created in any party. The covenants 9, 14 and 15 as well as 26 unmistakably would lead to a conclusion that the document created a right in favour of the plaintiff and it was compulsorily registrable. The trial Court though had held the document to be inadmissible on account of the non-payment of the proper stamp duty, it ought to have impounded the document and sent it to the Superintendent of Stamps for adjudication as mandated in terms of Section 33 of the Stamp Act.

24. In **Dr. Arjun Nitinwar** (supra), the learned Single Judge of this Court considered Section 17 of the Registration Act, 1908 which mandates compulsory registration of certain Clauses of the documents, reproduced Clauses 10, 14, 15 and 26 of the Development Agreement and held in his view that the findings of the trial Court that the document was inadmissible in evidence on account of its non-registration could not be faulted with. On the

other aspect of the document whether the document was being properly stamped or otherwise, the learned Single Judge held that it was not necessary to go into the said aspect on the applicability of the relevant Clause of Article 5 as it was for the adjudicating Authority to decide as to under which provision the document was required to be stamped but held that the trial Court in his view had erred in not impounding the document after it was brought before it. This judgment with respect is clearly distinguishable inasmuch as though it considered Section 17 of the Registration Act, it did not consider Section 49 of the Registration Act dealing with the effect of non-registration of the documents and the proviso thereto apart from being delivered ignoring the judgment of the Apex Court in *S. Kaladevi (supra)*. Moreover, in the facts of our case, the Suit was also for Specific Performance and in that view of the matter too, the proviso to Section 49 of the Registration Act was clearly applicable and therefore unlike the contention of Shri M. Sheikh, the document ought to have been looked into by the learned trial Court while deciding the application for injunction.

25. In **Wander Limited** (supra), the Hon'ble Apex Court held that there was no reason for this Court to interfere with the impugned order unless it was shown that it was fraught with illegality, perversity and/or arbitrariness. Merely because a

different view was possible, there was no reason to interfere with the impugned order. Skyline Education Institute (supra), reiterated the proposition of the law as laid down in Wander Limited (supra), and held that where the discretion was exercised by the High Court in temporary injunction and the order was not vitiated by any apparent error, perversity or resulting in manifest injustice, the Supreme Court interference was not warranted and even if an alternative view was possible.

26. The Trial Judge had rather preserved the said property by passing the impugned order. The parties were ad-idem on the issue and the respondent per se had shown that it was a concluded contract which referred to the details of the transaction in the nature of the details of the parties, that a part consideration had been received, referred to the property in respect of which the said amount had been received and its area and that the balance would be paid as per the Memorandum of Understanding to be executed by the parties within 10 days. What all was left for the parties was to identify the modalities of the balance staggered payment and the execution of the formal agreement.

27. **Smt. Dyavamma** (supra), held that the instruments which are not duly stamped are not only inadmissible in evidence, but

the Court cannot also act upon it. The Court cannot on the basis of the same consider any reliefs by way of temporary injunction till such time both duty and penalty are paid.

28. **Yellapa Mahesgwari** (supra), was an appeal preferred against the order passed by the High Court of the Judicature of Andhra Pradesh wherein and whereby the learned Judge dismissed the Revision Petition preferred by the appellants-defendants no.1 and 2 confirming the orders passed on the file of the Principal Civil Senior Civil Judge, Anakapalle. The first respondent-plaintiff had filed the Suit against the appellants and others for the relief of partition claiming $\frac{1}{4}$ th share in the Item No.1 and $\frac{1}{2}$ share in the Item no.2 of the suit schedule properties. It was specifically the case of the respondent-plaintiff that Jaggaya, his foster father had acquired certain properties during his lifetime and executed a Registered Will dated 22.5.1964 in a sound and disposing state of mind bequeathing his immovable properties in favour of the plaintiff-respondent and the first defendant-appellant no.1 by giving the life-estate in favour of his wife Mahalkshamma and on her death the respondent no.1-plaintiff and the defendant nos.1 and 2-appellants became entitled to the plaint schedule properties in equal shares. However, on demand when the defendants failed to partition the properties by giving him his legitimate right, the

plaintiff had approached the Court by filing the Suit.

29. In **Yellapa Mahesgwari** (supra), the appellants resisted the plaintiff's case taking a plea that the respondent no.1-plaintiff taking advantage of the innocence and helplessness of the appellant no.1 had taken other properties which were not allotted to him and she had kept quiet. They had been enjoying the properties which fell to their respective shares. Besides, the plaintiff-respondent no.1 and the first appellant had executed the Deed of Memorandum of the earlier partition and the plaintiff had even alienated some of his properties. Therefore, as the properties were already partitioned in the year 1969, the question of again partitioning the properties did not arise and the Suit was liable for dismissal. The appellant no.1 filed her affidavit and sought to mark thereof Exhibits B1 to B48 to which objections were raised on the admissibility by the respondent no.1 – the plaintiff no.1 on the ground that the contents referred to in the Memorandum disclosed that the second party had relinquished her right and being Relinquishment Deeds were compulsorily registrable under Section 17(b) of the Registration Act, 1908 and such unregistered documents were not admissible in evidence.

30. In **Yellapu Mahesgwari** (supra), the trial Court and the High Court upheld the objection raised by the plaintiff and

came to a conclusion that the two documents Exhibit B21 and B22 were not evidencing the past transaction but they prima facie disclosed the partition of the property and relinquishment of rights by one of the parties and as such both the documents required stamp duty under the Indian Stamp Act, 1899 and registration under the Registration Act, 1908 and therefore both these documents were not admissible in evidence. The trial Court also gave a specific finding that they were not admissible in evidence even for a collateral purpose giving rise to the appeal. The question which was at large before the Hon'ble Apex Court was whether the Courts below were right in holding that the Exhibits B21 and B22 were not admissible in evidence as they were compulsorily registrable documents and whether they were admissible in evidence for collateral purposes. In that context, Their Lordships of the Apex Court considered Section 17 of the Registration Act, 1908 requiring the categories of the documents to be compulsorily registered, the effect of non-registration in terms of Section 49 of the Registration Act and on consideration of the documents found that Exhibit B22 as per the recitals was an Agreement between the respondent no.1, the appellant no.1 and late Mahalakashamma and that its Clause 1 of the Agreement speaks about relinquishment of rights of Mahalakashamma in favour of the plaintiff and the defendant no.1 and further specified that the stock amount in the shop was

given to Mahalakashamma and the left over amount would be divided between the plaintiff and the defendant.

31. In **Yellapu Mahesgwari** (supra), Their Lordships also considered Exhibit B21, which was an Agreement between Mahalakashamma, the respondent no.1 and the appellant no.1 of which Clauses 4 to 6 pertained to the relinquishment of shares between the parties to the Agreement. Besides, in the Memorandum Exhibit B22 it was stated that each of them had partitioned the properties by good and bad qualities, had been enjoying the respective properties that fell to their shares and executed the Deed of Memorandum in proof thereof. In that backdrop, Their Lordships reiterated that the nomenclature given to the document was not a decisive factor but the nature and substance of the transaction had to be determined with reference to the terms of the documents and that the admissibility of a document was entirely dependent upon the recitals contained in that document and not on the basis of the pleadings set up by the party who seeks to introduce the document in question. A thorough reading of both the Exhibits B-21 and B-22 made it very clear that there was relinquishment of right in respect of the immovable property through a document which was compulsorily registrable document and if the same was not registered, it became inadmissible in terms of Section 49 of the Registration

Act.

32. In **Yellapu Mahesgwari** (supra), Their Lordships also considered the next question whether these documents could be used for any collateral purpose. An unstamped instrument was admissible in evidence even for the collateral purpose, until the same was impounded. Therefore, even if the appellants-defendants wanted to mark these documents for a collateral purpose it was open to them to pay the stamp duty together with penalty and get the document impounded and the trial Court was at liberty to mark the Exhibits for a collateral purpose subject to the proof and relevance. This judgment with respect is clearly distinguishable inasmuch as unlike our case where the Suit was for the specific performance, the proviso to Section 49 of the Registration Act did not come into play in Yellapu (supra).

33. In **Avinash Kumar Chauhan** (supra), the Hon'ble Apex Court considered Section 35 of the Stamp Act, 1899 which rules out the applicability of the proviso under Section 49 of the Registration Act, 1908 as it is categorically provided therein that a document of this nature namely an unregistered Sale Deed shall not be admitted for any purpose whatsoever. If all the purposes for which the document is sought to be brought in evidence are excluded, the document would not be admissible for collateral

purposes. The interpretation of Sections 33 and 35 of the Indian Stamp Act, 1899 fell for consideration in the Appeal before the Hon'ble Apex Court against the judgment and order passed by the learned Single Judge of the High Court of Chhatisgarh at Bilaspur dismissing the appellant's petition filed under Article 227 of the Constitution of India against the order passed by the Additional District Judge, Raipur. In the undisputed facts, the respondent, a member of the Scheduled Tribe, intended to transfer a house and land admeasuring 10150 sq.ft. situated at Gariyaband, Raipur for which a sum of ₹2,70,000/- was fixed by way of consideration and was paid by the appellant. The possession of the property was also delivered to the appellant. Indisputably, for the purpose of effecting the transfer of the said land, the permission of the Collector was required to be obtained in terms of Section 165 (6) of the C.G. Land Revenue Code, 1959 which was applied for but was rejected.

34. In **Avinash Kumar Chauhan** (supra), the appellant filed the Suit for the recovery of ₹2,70,000/- and in support of his case relied on the Agreement dated 4.8.2003 which was sought to be registered as a Sale Deed. It was directed to be impounded by the order dated 9.1.2007 on the premise that under Section 35 (a) of the Stamp Act, there was a provision that for any such instrument to be admitted in evidence, there had to be payment

of the stamp duty with which the same is chargeable or in the case of an instrument insufficiently stamped of the amount required to make up such duty together with penalty. The Agreement of Sale produced on record was valued at ₹2,70,000/- though the stamp duty was mentioned of ₹60/- in the Agreement to Sale. The High Court refused to interfere with the order imposing the penalty on the appellant. It was contended on his behalf that the unregistered Deed of Sale was sought to be put in evidence not for the purpose of enforcement of the contract but only for the purpose of recovery of the amount of consideration which indisputably had been paid to the respondent and being a collateral purpose, the provisions of Sections 33 and 35 of the Stamp Act would not be attracted. The counsel appearing for the respondent supported the impugned judgment.

35. In **Avinash Chauhan** (supra), Their Lordships considered the relevant provisions of the Stamp Act, what was meant by "conveyance" being that defined in Section 2 (10), "Stamp" as defined in Section 2 (26), Section 3 relating to the instruments chargeable with duty as also Sections 33 and 35 of the Act. Indisputably, an instrument was executed pursuant to which not only was the entire amount of consideration paid but the possession of the property had also been transferred. He had thus been exercising some right in or over the land in question. The

unregistered Deed of Sale was an instrument which required the payment of the Stamp Duty applicable to a Deed of Conveyance and admittedly the adequate Stamp Duty was not paid and therefore, the Court was empowered to pass an order in terms of Section 35 of the Stamp Act. The contention on the appellant's behalf that the document was admissible for a collateral purpose, in their opinion, was not correct. Their Lordships also considered the effect of the non-registration of the documents in terms of Section 49 of the Registration Act, 1908 alongwith the proviso. It was held that Section 35 of the Stamp Act, however, ruled out the applicability of such a provision as it was categorically provided therein that the document of this nature shall not be admitted for any purpose whatsoever. If all the purposes for which the document is sought to be brought in evidence is excluded, there was no reason as to how the document would be admissible for collateral purposes and in that context dismissed the Appeal. This judgment with respect is clearly distinguishable inasmuch as the evidentiary value of the documents was considered in a suit for the recovery of money unlike the present proceeding which was for the specific performance of the Agreement.

36. The Memorandum of Understanding dated 21.5.2011 between the respondent no.1 and Khalil Ahmed clearly referred to

the Inventory Proceedings initiated on the demise of Sheikh Ibrahim and accordingly it was agreed between the parties thereto that the owners/vendors would sell the plot to the said Khalil Ahmed for a total consideration of ₹2,80,000,00/- of which he had received ₹80,00,000/- and ₹ 2,00,00,000/- was to be paid on execution of the Conveyance in his favour. It was also agreed between them that in case the said Khalil Ahmed failed to honour the commitments in the matter of effecting the balance payment, the Memorandum of Understanding would stand cancelled automatically and the owners/vendors would refund the amount to him without interest. The Deed of Declaration dated 27.1.2012 between the said Khalil Ahmed, the appellant and the respondent no.1 was whereby it was agreed between them that the Memorandum of Understanding dated 21.5.2011 would be rescinded at the instance of the second party i.e. the respondent no.1 on payment of ₹80,00,000/- and the penalty of ₹20,00,000/-. It was also agreed pursuant to the said Deed of Declaration that in consideration of ₹1,00,00,000/- only being paid to Khalil Ahmed, the Memorandum of Understanding dated 21.5.2011 would stand cancelled, rescinded and revoked for all purposes and effects. The respondent no.1 by his Declaration-Cum-Affidavit revealed that he did not intend to sell the property but only to create a collateral security.

37. The Development Agreement between the appellants and the respondent no.1 was in respect of the suit property which made a specific reference to the Deed of Declaration dated 27.1.2012 whereby the entire payment was paid to Khalil Ahmed as per the Deed of Declaration dated 27.1.2012 and moreover an additional amount of ₹75,00,000/- was also paid to the respondent no.1. The parties had finally agreed between themselves that they would be entitled to the specific performance of each and every term of the Agreement.

38. The judgment in S. Kaladevi (supra), would support the contention of Shri Agha that an unregistered document required to be registered could be admitted in evidence as evidence of a contract in a Suit for specific performance in view of the proviso to Section 49 of the Registration Act 1908. Nonetheless, there is no force in the contention of Shri Shaikh, learned Advocate for the respondents that the learned trial Court had considered the applicability of Section 35 of the Stamp Act and the judgment in Avinash Kumar Chauhan and rightly not looked into the Agreement and hence deemed it appropriate not to consider the question of interpreting or appreciating the document. Besides the judgment in S. Kaladevi (supra) on the matter of the non-registration of an Agreement was not at large before the trial Court which was swayed by the judgment of a

Single Judge of this Court in Dr. Arjun Nitinwar (*supra*). Moreover, the learned trial Court had erroneously held that the Agreement was not only inadmissible in evidence but also could not be looked into for any collateral purposes in view of the bar under Section 35 of the Stamp Act. The Development Agreement conveyed a right in favour of the appellant-plaintiff and therefore not only was the document required to be registered but also duly stamped. The appellants had thus been able to make out a case, but the learned trial Court had held that it could not look into the document even for collateral purposes even though it was in the context of a suit for special performance of the contract. The contention of Shri Agha, learned Advocate for the appellant therefore that the trial Court ought to have accepted the document at face value has to be entertained on the conspectus of facts and law on the point. Shri Agha, learned Advocate for the appellant had otherwise contended that the trial Court had initially directed the parties not to create any third party rights though it had by the impugned order vacated the interim order by the impugned order dated 16.4.2016. This Court too by an interim order dated 6.5.2016 had directed the parties to maintain status quo observing that the appellants were admittedly not in possession of the suit property. However, on a consideration of the material on the other aspects the learned Trial Court ought to have accepted the documents relied upon by the appellants at

their face value and it was not open to the Trial Court that the documents could not be looked into by wrongly interpreting the provisions of the Stamp Act as also Registration Act. It was also lost on the Trial Court that it was not open to the respondents to challenge any of the documents relied upon by them when the Registration Act was a complete Code in itself. Although Shri Shaikh, learned Advocate for the respondents tried to canvass that the trial Court had properly construed the documents in the context of the Registration Act and the Stamp Act, the afore discussion would show to contrary.

39. Shri Shaikh, learned Advocate for the respondents was unable to substantiate the applicability of the judgment of Dr. Arjun Sitaram Nitinwar (supra), unlike his contention to the contrary where it was clearly shown by Shri Agha, learned Advocate for the appellant that the said judgment was of a learned Single Judge of this Court and was per incurium being contrary to the judgment of the Apex Court in S. Kaladevi (supra). Shri Shaikh, learned Advocate for the respondents had pressed into service the judgment in Wander Limited and Skyline Education Institute (supra) to buttress his contention that the impugned order being in exercise of the discretionary relief, there was no scope for interference in appeal being an appeal on principle. However, Shri Agha, learned Advocate for the

appellants has shown based on the material on record that the impugned order was arbitrary, capricious and illegal as to justify interference in appeal. The learned trial Court had considered the pleadings and the relevant provisions of the Registration Act and the Stamp Act but not in the proper context while holding that the appellants-plaintiffs had failed to make out a case. This finding of the learned trial Court warrants interference in appeal applying the principles laid down in Wander Limited (supra) and Skyline Education Institute (India) Private Limited (supra). In view thereof, i pass the following

Order

The appeal is allowed and the impugned order is set aside.

NUTAN D.SARDESSAI, J

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