**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO. 82 OF 2017**
**WITH**
**CIVIL APPLICATION NO. 113 OF 2017**

Mrs. Sheela Sharad Behede … Appellant
Vs.
Mrs. Smita Shreeram Soni & Anr. … Respondents

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Mr. S.C. Wakankar for the Appellant.
None for the Respondents.

….

**CORAM : A.A. SAYED, J.**
**DATE : 27 FEBRUARY 2017**

**P.C.:**

1 This Appeal from Order impugns an order dated 14 October 2016 passed by the trial Court rejecting the Application for interim injunction (Exhibit 5) filed by the Appellant/Original Plaintiff.

2 The Appellant/Original Plaintiff was the owner of the suit property. It is the case of the Appellant that she approached the Defendants, for loan of Rs. 20,00,000/- for medical expenses in relation to the treatment of her son who is 100% physically handicapped. Respondent No. 2 is the brother-in-law (husband's brother) of the Respondent No. 1. She agreed to return the loan alongwith the interest @ 18% p.a.. She executed a Development Agreement dated 10 July 2006 in favour of Respondent No. 1 and a Power of Attorney in favour of the Respondent No. 2 also dated 10 July 2006 only as and by way of

security. Both the documents are registered documents. In 2015, she offered the principal amount alongwith the interest @ 18% p.a. to the Respondent No. 1 and requested the Respondent No. 1 to execute a cancellation deed of the Development Agreement and Power of Attorney. She recently came to know that on the strength of the Power of Attorney the Respondent No. 2 executed a sale deed dated 31 July 2006 of the suit property in favour of Respondent No. 1 and registered the said documents. The case of the Respondents on the other hand is that the sale deed was executed on 31 July 2008 and the suit is barred by limitation. The documents were registered documents and were never intended as to be security. At the relevant time, the value of the suit property was Rs. 16,01,000 /-, however, the Respondents purchased of the suit property for Rs. 20 Lakhs. The Power of Attorney authorized the Respondent No. 2 to execute the conveyance/sale deed in favour of the Respondent No. 1. The Respondent No. 1 is in exclusive possession of the suit property. The documents executed by the Appellant were not cancelled at any time by her.

3 After hearing the learned Counsel for the parties on the interim Application, the trial Court in para 8 of the impugned order has observed as follows:

> "8. The plaintiff is before the Court, claiming herself to be the owner of the suit property. It is admitted that she has received Rs. 20

Lakhs from defendant No. 1. Further, the plaintiff is claiming that the defendants are relatives of each other and money lenders. The relation of the defendants is not disputed. However, the defendants are denying any loan transaction with the plaintiff. The plaintiff is further claiming that at the relevant time, she was advanced the loan for the treatment of her handicapped son. The development agreement was executed as the security for the loan. However, the loan transaction is not record in black and white. However, the security of immovable property against the loan amount to be transaction of mortgage. No such document is on record. The plaintiff relied upon the development agreement and power of attorney. The contents of such documents does not support the case of the plaintiff. The plaintiff cannot plead beyond the written contract by virtue of the principle of exclusion of oral by documentary evidence, as contemplated under Section 92 of the Evidence Act. Further, the development agreement and power of attorney are the registered documents. The same are not disputed by the plaintiff for the length of time. There is nothing on record except the pleadings to show the alleged tendering of the loan are not before the Court. So also, it is the quest as to why no amount of loan was repaid to defendant No. 1 before alleged cause of action for nine years. The issue of want of sufficient stamp or otherwise need not be considered at this stage. Under these circumstances, the documents on record showing contrary to the pleadings, cannot be thrown on thresh hold. It is hard to believe that such documents are the security against the loan. The plaintiff could not make out the prima facie case. Accordingly, point No. 1 decided in the negative".

4 Having regard to the facts and circumstances of the case, I do not find that the discretion exercised by the learned Trial Judge is passing the impugned order refusing to grant interim relief warrants any interference by this Court. The trial Court has decided the injunction Application Exhibit 5 within the framework of law and the discretion exercised by the trial Court cannot be said to be arbitrary or perverse or against settled principles of law.

5 In the case of **Wander Ltd. And Another vs. Antox India P. Ltd. 1990 (Supp) Supreme Court Cases 727** it has been held by the Supreme Court in para 13 and 14 as under:

> *"13. On a consideration of the matter, we are afraid, the Appellate Bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the Appellate Court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocinations as to the quality of Antox's alleged user of the trademark on which the passing-off action is founded. We shall deal with these two separately.*
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> *14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been*

*exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possibly on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Josheph:*

*"... These principles are well established, but as has been observed by Viscourt Simon in* ***Charles Osenton & Co. v. Jhanaton*** *'… the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in a individual case'."*

*The appellate judgment does not seem to defer to this principle."*

6 For the aforesaid reasons, the Appeal from order is dismissed in limine. No order as to costs.

7 The Civil Application does not survive and the same to stand disposed of.

8 Learned Counsel for the Appellant to communicate this order to the Counsel for the Respondents in the Trial Court.

**( A.A. SAYED, J.)**