

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

APPEAL AGAINST ORDER NO.19 OF 2020

Appellants

(Original Defendant Nos.
1 to 9 except Sr. No.8)

- : 1] Sunita wd/o Rajesh Tambe,
Aged about 46 years., Occ. Household,
R/o Plot No.106, Juna Bagadganj,
Besides Suman Marble Shop, Nagpur.
- 2] Ajay s/o Natthuji Kawre,
Aged about 40 years, Occ. Business,
R/o Gujri Chowk, Juni Mangalwari, Nagpur.
- 3] Archana wd/o Anand Rode,
Aged about 41 years, Occ. Household,
R/o Plot No.85, Ganga Vihar Colony,
Middle Ring Road, In front of Uday Lawn,
Wathoda, Nagpur.
- 4] Kavita w/o Sachin Kirpane,
Aged about 38 years, Occ. Household,
R/o Kendriya Vidyalaya, Nawabpura,
Aglawe Chawl, Behind Natraj Cinema,
Mahal, Nagpur.
- 5] Ekadashibai wd/o Natthuji Kawre,
Aged about 55 years, Occ. Household,
R/o Plot No.26, Ganga Vihar Colony,
Wathoda Middle Ring Road, Nagpur.
- 6] Gendlal s/o Natthuji Kawre,
Aged about 26 years, Occ. Household,
R/o Plot No.26, Ganga Vihar Colony,
Wathoda Middle Ring Road, Nagpur.
- 7] Pawan s/o Natthuji Kawre,
Aged about 24 years, Occ. Business,
R/o Plot No.26, Ganga Vihar Colony,
Wathoda Middle Ring Road, Nagpur.
- 8] Shakuntalabai wd/o Krushnarao Kumbhalkar,
Aged about 82 years, Occ. Household,
R/o 305, Mahatma Gandhi Nagar,
Ward No.131, Hudkeshwar Road, Nagpur
(presently dead as died on 25/02/2020).

- 9] Vimal wd/o Tarachand Waghulkar,
Aged about 76 years, Occ. Household,
R/o Telipura, Pevtha,
Near Temple of Mirchiwali, Itwari, Nagpur.

-- Versus --

Respondents

(Original Plaintiff No.1)

- : 1] Dilip s/o Namdeorao Tupkar,
Aged about 53 years,
Occ. Business & Agriculturist,
R/o E-100, MHADA Colony, Hiwri Nagar,
Nagpur.

(Original Defendant No.14)

- 2] Sachin s/o Ramkrushna Durugkar,
Aged about 51 years, Occ. Business,
R/o Plot No.17, Pitravaibhav Apartment,
Flat No.201, Besides Das Jewellers,
North Ambazari Road, Shivaji Nagar,
Nagpur - 10.

(Original Defendant
Nos.11 to 13)

- 3] Smt. Tarabai wd/o Sevakramji Padole,
Aged about 66 years, Occ. Household,
R/o Shiv Nagar, Near Gnyaneshwar Mandir,
Tumsar, Tah. Tumsar, Distt. Bhandara.
- 4] Sau. Pushpa w/o Devidasji Sakure,
Aged about 49 years, Occ. Household,
R/o Shivaji Nagar, Lane of Sunil Gachke,
Tumsar, Tah. Tumsar, Distt. Bhandara.
- 5] Sau. Archana w/o Lalit Sakharwade,
Aged about 45 years, Occ. Household,
R/o Dattatraya Ward, Tumsar,
Tah. Tumsar, Distt. Bhandara.

(Original Defendant No.2)

- 6] Anita w/o Vinod Kumbhalkar,
Aged about 44 years, Occ. Household,
R/o 305, Mahatma Gandhi Nagar,
Ward No.131, Hudkeshwar Road, Nagpur.
- 7] Shri Vinod s/o Krushnarao Kumbhalkar,
Aged 55 years, Occ. Private.
- 8] Shri Pramod s/o Krushnarao Kumbhalkar,
Aged 51 years, Occ. Service.

Both r/o 305-306, Mahatma Gandhi Nagar,
Mahalgi Nagar, Nagpur - 440009.

WITH

APPEAL AGAINST ORDER NO.22 OF 2020

Appellants : 1] Sachin s/o Ramkrushna Durugkar,
(Original Defendant No.14) Aged about 51 Years, Occ. Business,
R/o Plot No.17, Pitravaibhav Apartments,
Flat No.201, Besides Das Jewellers,
North Ambazari Road, Nagpur - 10.

-- Versus -

Respondent : 1] Dilip s/o Namdeorao Tupkar,
(Original Plaintiff) Aged about 53 Years,
Occ. Business & Agriculturist.

(Original Defendant No.1) 2] Sunita wd/o Rajesh Tambe,
Aged about 46 Years, Occ. Household,
R/o Plot No.106, Juna Bagadganj,
Besides Suman Marble Shop, Nagpur.

(Original Defendant No.2) 3] Anita w/o Vinod Kumbhalkar,
Aged about 44 Years, Occ. Household,
R/o 305, Mahatma Gandhi Nagar,
Ward No.131, Hudkeshwar Road, Nagpur.

(Original Defendant No.3) 4] Ajay s/o Natthuji Kaware,
Aged about 40 years, Occ. Business,
R/o Gujri Chowk, Juni Mangalwari, Nagpur.

(Original Defendant No.4) 5] Archana wd/o Anand Rode,
Aged about 41 years, Occ. Household,
R/o Plot No.85, Ganga Vihar Colony,
Middle Ring Road, In front of Uday Lawn,
Wathoda, Nagpur.

(Original Defendant No.5) 6] Kavita w/o Sachin Kirpane,
Aged about 38 years, Occ. Household,
R/o Kendriya Vidyalaya, Nawabpura,
Aglawe Chawl, Behind Natraj Cinema,
Mahal, Nagpur.

(Original Defendant No.6) 7] Ekadashibai wd/o Natthuji Kawre,
Aged about 55 years, Occ. Household,

R/o Plot No.26, Ganga Vihar Colony,
Wathoda Middle Ring Road, Nagpur.

(Original Defendant No.7)

8] Gendlal s/o Natthuji Kawre,
Aged about 26 years, Occ. Household,
R/o Plot No.26, Ganga Vihar Colony,
Wathoda Middle Ring Road, Nagpur.

(Original Defendant No.8)

9] Pawan s/o Natthuji Kawre,
Aged about 24 years, Occ. Business,
R/o Plot No.26, Ganga Vihar Colony,
Wathoda Middle Ring Road, Nagpur.

(Original Defendant No.9)

10] ~~Shakuntalabai wd/o Krushnarao Kumbhalkar,
Aged about 82 years, Occ. Household,
R/o 305, Mahatma Gandhi Nagar,
Ward No.131, Hudkeshwar Road, Nagpur.~~

**Amendments
have been
carried out as
per Court's
Order dated
19/10/2020.**

Through Legal Heirs.

10(1) Shri Vinod s/o Krushnarao Kumbhalkar,
Aged 55 years, Occupation - Private.

10(2) Shri Pramod s/o Krushnarao Kumbhalkar,
Aged 51 years, Occupation - Service.

Both are r/o 305-306, Mahatma Gandhi Nagar,
Mahalgi Nagar, Nagpur - 440009.

(Original Defendant No.10)

11] Vimal wd/o Tarachand Waghulkar,
Aged about 76 years, Occ. Household,
R/o Telipura, Pevtha,
Near Temple of Mirchiwali, Itwari, Nagpur.

(Original Defendant No.11)

12] Smt. Tarabai wd/o Sevakramji Padole,
Aged about 66 Years, Occ. Household,
R/o Shiv Nagar, Near Gnyaneshwar Mandir,
Tumsar, Tah. Tumsar, Distt. Bhandara.

(Original Defendant No.12)

13] Sau. Pushpa w/o Devidasji Sakure,
Aged about 49 Years, Occ. Household,
R/o Shavaji Nagar, Lane of Sunil Gachke,
Tumsar, Tah. Tumsar, Distt. Bhandara.

(Original Defendant No.13)

14] Sau. Archana w/o Lalit Sakharwade,
Aged about 45 Years, Occ. Household,
R/o Dattatraya Ward, Tumsar,
Tah. Tumsar, Distt. Bhandara.

*Shri D.T. Shinde, Advocate for the Appellants in AO No.19/2020 and for
 Respondent Nos.3, 5 to 10 & 12 in AO No.22/2020*
Shri A.C. Dharmadhikari, Advocate for the Appellant in AO No.22/2020
Shri M.R. Joharapurkar, Advocate for Respondent No.1 in AO No.19/2020
Shri S.A. Dutonde, Advocate for Respondent Nos.3 to 6 in AO No.19/2020

CORAM : **S.M. MODAK, J.**
RESERVED ON : **27th NOVEMBER, 2020.**
PRONOUNCED ON : **25th MARCH, 2021.**

J U D G M E N T :-

The dispute has triggered due to giving of a direction by the Government to the Collector vide letter date 11-01-2018. Land admeasuring 8480 Sq.mtrs. of land from Survey No.43, 44/2 from village Wathoda, Nagpur. The said land was released as per the provisions of Section 20 of the Urban Land Ceiling Act. The defendant No.14 as a Power of Attorney holder was the recipient of the said letter. That has made the present plaintiff panic and he got disturbed due to reference of name of defendant No.14 in the said letter. According to plaintiff, it is he who made all the correspondence and follow up for release of surplus land and the defendant No.14 unauthorizedly wanted to take benefit from the Government officials.

02] The plaintiff rests his claim on the unregistered agreement dated 04-05-2013 with defendant Nos. 1 to 13. They are the legal representatives of common ancestor Chindhuji Kaware.

The details are not given because there is no dispute amongst the legal representatives (except the L.Rs. of defendant No.9-Shakuntalabai Kumbhalkar). As per this agreement, there was an arrangement in between the plaintiff on one hand and the original owners on the other hand about distribution of land which will be released as per Talegaon Dabhade Scheme. The distribution was 2/3 and 1/3 to the plaintiff and original owners respectively. The plaintiff did follow up with the government authorities. But he could not succeed in getting land released.

03] In the meantime, the original owners entered into Memorandum of Understanding dated 02-11-2016 (and dated 01-11-2018) and a Power of Attorney dated 02-11-2016 in favour of defendant No.14. He also did the follow up for release of land and ultimately was successful in getting a letter dated 11-01-2018.

04] Plaintiff being disturbed by the name of defendant No.14 called upon the original owners by notice dated 12-10-2018. It was neither replied nor complied. It prompted the plaintiff to file a specific performance suit of the agreement dated 04-05-2013. Out of 8480 sq.mtrs of land plaintiff claimed right over 4601.1918 sq.mtrs of land. The original owners and new purchasers were defendant Nos. 1 to 13 and defendant No.14 respectively. There was an interim injunction application filed.

05] All the defendants appeared before the trial Court. Defendant Nos. 1 to 13 have denied the averments in the plaint and also denied execution of the unregistered agreement dated 04-05-2013. In addition to that, they have challenged the agreement on the basis of consent terms dated 20-04-2013 executed in earlier instituted Special Civil Suit No.996/2007. Defendant No.14 also resisted the suit and denied the averments. He took various defences including limitation, non-specification of the property, absence of consideration and incompetence of the plaintiff to enter into the agreement in question in view of the consent terms.

06] The trial Court was pleased to grant the injunction and restrained all the defendants from creating third party interest in any manner as per the order dated 21-12-2019. This order is challenged before us by two sets of defendants. Appeal Against Order No. 19/2020 is filed by defendant Nos. 1 to 9 (except defendant No.8) whereas Appeal Against Order No. 22/2020 is filed by defendant No.14.

07] Learned Advocate Shri Shinde and learned Advocate Shri Dharmadhikari argued on behalf of respective appellants (AO Nos. 19/20 and 22/20 respectively). Learned Advocate Shri Shinde also relied upon certain documents in the form of private Handwriting

Expert's opinion on the point of signatures of original owner on the agreement in question. We will decide the same in this appeal itself. Whereas, learned Advocate Shri Joharapurkar argued for the original plaintiff and learned Advocate Shri Dutonde argued for legal representatives of deceased Defendant No.8. The following points arise for my determination.

<u>Points</u>	<u>Findings</u>
1. Whether <i>prima facie</i> case exists in favour of the plaintiff for granting injunction against both the set of defendants? ..	Not totally in favour of plaintiff.
2. Whether the plaintiff will suffer irreparable loss, if the injunction is not granted? ..	Not totally in favour of plaintiff.
3. Balance of convenience tilts in whose favour? ..	Not totally in favour of plaintiff.
4. Whether the trial Court was wrong in granting injunction in favour of the plaintiff? ..	Not totally.
5. Whether the appellants in A.O. No.19/2020 can be permitted to adduce additional evidence in the form of handwriting expert's opinion? ..	No.
6. Whether order requires interference? ..	No, but certain conditions are imposed.
7. What order? ..	As per final order.

SCOPE OF APPEAL

08] Prior to dealing with these issues, it will be necessary to consider what is the scope of an appeal under Order 43 Rule 1 of the Code of Civil Procedure (CPC). The Division Bench of this Court (Principal Seat) in the case of Chetak Co-operative Housing Society Limited, Mumbai vs. Sandhu Builders, Mumbai, reported in 2019(4) ALL.M.R.326, has dealt with this issue. Considering the facts of that case, the Division Bench expressed its opinion on the powers of the appellate court vis-a-vis power of the writ court. The Division Bench felt it improper to go into the contentious issue in view of the limitations (paragraph 15).

09] So also, this Court in the case of Abidbhai Ibrahimhai & another vs. Mohammed Ejaz Mohd. Bashir & another, reported in 2019(3) ALL.M.R. 299, also dealt with the similar issue. This Court considered the scope of such an appeal and basically it is against the exercise of discretion. So, this Court refused to interfere in the exercise of discretion while rejecting temporary injunction application. All these observations need to be considered.

GENERAL OBSERVATIONS

10] It will be relevant to consider the observations of the trial Court in the order impugned before this Court. When we have perused the order we find that we agree to some of the findings of

the trial Court whereas we disagree to some other findings. *“When consideration is not mentioned in the agreement and hence it is unenforceable”* is the observation of the trial Court. On this observation the trial Court could have refused to grant injunction. Whereas the observations *“the agreement in question being subsequent to consent terms will prevail”* is the observation given without considering the terms of the consent terms. *“The land is not released only due to the efforts of defendant No.14”* is another observation. So also observation *“about possession”* does not appeal to our conscious. We will deal with all the observations hereinafter.

NON-ENFORCEABILITY OF THE AGREEMENT

11] The trial Court considered it appropriate to decide the objections about enforceability of the agreement due to non-specification of the property in the agreement (paragraph 14) during trial stage. The trial Court felt the said question to be the complex question of law, which is inappropriate to decide at an interim stage. Because according to trial Court, if the property is not specified in the agreement in question then difficulty may arise for execution of the order. In spite of this, trial Court has granted injunction.

12] Both the learned Advocates for the appellants emphasized on the lacunae in the agreement in question. So far as

the factual aspect is concerned, they may be right to certain extent that is to say, there is no description of the property in the agreement, just like when the property is described by survey number or by house number and its measurement. Learned Advocate Shri Joharapurkar invited my attention to the averments made in the agreement. On its perusal, what we can find is :

“Original owners have authorized the plaintiff to get release the land as per Talegaon Dabhade Scheme in full. After release, the original owners will be given 1/3rd share and plaintiff was given 2/3rd share”.

13] What we find is, such apportionment of share was permissible only after retention order by the Government will be passed. The apportionment has been described in clear terms. The apportionment will be effective only when the retention order will be passed. It may happen or it may not happen. However, the happening is not important. So, even if the property was not in existence at the time of execution of the agreement, one can find clear-cut indication. All other requirements including exact identification of property and its boundaries can be looked into, when the suit will be put to trial and at the time of final disposal. So, what I feel is that the trial Court then ought to have dismissed the injunction application. I neither subscribe that view nor put a seal of approval or “not giving opinion”.

ABSENCE OF CONSIDERATION

14] Our attention is brought by learned Advocate Shri Shinde to one factual mistake committed by the trial Court. At one stage, the trial Court has given wrong factual finding as *“it appears on perusal of agreement of plaintiff that defendants received consideration of Rs.40,00,000/- (rupees forty lakh only)”* (para 16). Even plaintiff agrees that it is wrong factual finding. In fact, there is no consideration. According to learned Advocate Shri Johrapurkar, the consideration was not a money consideration but it was a consideration in kind. In other sense *“when the plaintiff has agreed to do everything for release of land”* it amounts to consideration in kind. It is submitted that consideration is mentioned is of registered agreement dated 04-05-2013 (which is not subject matter of agreement).

15] I am also not inclined to accept the objection of the appellants regarding agreement in question without consideration. It is taken in view of the provisions of Section 25 of the Indian Contract Act. This issue was considered by the Hon'ble Supreme Court in case of Narayanrao Jagobaji Gowande Public Trust vs. State of Maharashtra & others, reported 2016 (4) SCC 443. The order of Nagpur Bench was upheld. Even if a clause to transfer the development land in favour of the Government was held as a valid

consideration. In this case also, the signatories to the agreement in question have agreed for apportionment of shares to be released and the plaintiff has agreed to incur all expenditure. In certain contingency, the agreement without consideration is treated as a void under Section 25 of the Indian Contract Act. The consideration is not defined.

16] So, the arrangement made as per the agreement in question can have within the meaning of consideration. Even the Hon'ble Supreme Court in the case of Nirmala Anand vs. Advent Corporation Private Limited, reported in 2002 (5) SCC 481, was pleased to approve declaratory suit for specific performance subject to fulfillment of the conditions. The conditions in Section 25 of Indian Contract Act are not fulfilled. The consideration mentioned in the agreement can be said to be a valid consideration.

CONSENT TERMS

17] There was an argument that the contents of the agreement in question dated 04-05-2013 on one hand and the averments of the consent terms on the other hand are contrary to each other. The observations of the trial Court are as follows :

“Even considering that the terms in agreement are contrary to compromise, the agreement thereby being subsequent in time seem to prevail (paragraph 16).”

18] The consent terms in the compromise suit was executed on 20/04/2013. If we read clause No.18 of the same, we can find the following arrangements.

(i) The signatories, ie. M/s. Ganga Developers, the original owners and the present plaintiff, have agreed about execution of a sale-deed by the owners in favour of M/s. Ganga Developers in respect of land admeasuring 7800 sq.mtrs. (reserved for MSEB and parking, on paper 9025 sq.mtrs, but actually found 7800 sq.mtrs.). The sale-deed was also executed on 04/05/2013.

(ii) The signatories have agreed to apportion the land to be released admeasuring 0.12 HR by the ULC Authorities. The present plaintiff would get 85% and 15% was agreed to be allotted to Archana Rode, Ajay Kaware and Kavita Kirpane. This was the land other than the land allotted to BRO.

(iii) Land to be retained from the land allotted to BRO and released by the Government as per the order of the High Court, the present plaintiff has agreed to cancel his claim over such land [Clause 18(c)].

19] The trial Court has interpreted the facts. The consent terms was executed on 20/04/2013, whereas the agreement in

question was executed on 04-05-2013. Both the set of appellants emphasized that in view of this clause the present plaintiff will have no claim over any of the land released by the Government as per the letter dated 11/01/2018 (8480 sq.mtrs.). So, their contention is two fold. One is denial of the execution along with the forgery and one is entitlement to land released as per the said letter.

20] So, we need to see, whether the trial Court has exercised the discretion (in observing that the agreement dated 04/05/2013 will prevail over the clause in a consent terms being subsequent in time) properly. There are parameters for ascertaining, whether the discretion has been used properly. The exercise of discretion can be challenged firstly on the ground of non-consideration of materials and secondly on the ground of wrong interpretation of the materials. It is also true that the opinion expressed by the trial Court cannot be set aside merely because second view is possible. We have to see, whether the observations are perverse or not.

21] One can very well say that the agreement in question is certainly subsequent in time, that is to say after execution of the consent terms, but the issue about, which will prevail, needs to be looked into. The trial Court has not given any findings on an objection on the basis of clause 18 (c) in the consent terms. Instead, the trial Court had chosen to give go-bye and had given preference to the

agreement dated 04-05-2013. What the trial Court has said “*even considering that the terms in the agreement are contrary to compromise, the agreement thereby being subsequent in time seem to prevail.*” (Para 16). They are inconsistent. Except this, there are no reasons why trial Court has preferred to agreement in question. Because if consent terms are in existence, then they are binding on signatories. Party may come out of the terms by giving some explanation. Plaintiff has not given any explanation why Clause 18(c) is not binding and under what circumstances, he executed agreement in question (which is disputed). The trial Court has not answered to these issues.

CHANGE IN STAND

22] It may be true that the original owners by way of common written statement have denied the execution and has alleged forgery. There is an objection on behalf of contesting original owners that the appellants in A.O. No.19/2020 has deviated from averments in the written statement. My attention is brought to the averments in the memo of appeal and averments in the written statement. So also, there is an emphasis on defective pleadings in the written statement. On this background, I have read the written statement and particularly paragraph 34. They have denied execution and they have also alleged forgery by the plaintiff or through his representative. Whereas, in the memo of appeal and during oral arguments also, the appellant has

tried to explain use of three stamp papers. According to them, the stamp papers were used in following manner by the original plaintiff :

- (a) One was used for registered agreement, dated 04/05/2013;
- (b) one was used for executing power of attorney and
- (c) the third was used for execution of the agreement in question (containing forged signatures).

23] My attention is brought to the fact that the suit notice dated 12/10/2018 was not replied by any of the defendants. This fact is not disputed. So, one fact is clear that the defence about “denying execution and alleging forgery” was taken for the first time through written statement. No document is pointed out to me that such defence was taken earlier to the written statement. Learned Advocate Shri Joharapurkar is right in his submission that the defendants have not protested earlier to filing of written statement. Learned Advocate Shri Shinde submitted that his clients got knowledge about execution of the agreement, in question, only when they received suit summons. But the fact remains and it is that the suit notice was already issued. It is also true that (though defence of denial and forgery was taken in the written statement) in what manner stamp paper was misused and shown for agreement in question, was not pleaded in the written statement. So, at a *prima facie* stage, there is every reason to believe that defence of forgery is after thought.

CORRESPONDENCE

24] On the point of persuasion/follow up for getting the land released either by the plaintiff or by defendant No.14, the trial Court gave the following findings.

“The plaintiff has filed on record the correspondence and applications made by him. Defendant No.14 has also produced on record documents to show efforts made by him. (paragraph 17).

The trial Court gave its findings as *“it do not appear that the lands are released due to exclusive efforts of defendant No.14”*.

25] It is pertinent to note that the original owners on several occasions were successful in getting the land released from the Government under the provisions of the Urban Land (Ceiling and Regulation) Act. They are the parts of pleadings. It is difficult to enumerate them. As we know that there are correspondence made by the plaintiff as well as by defendant No.14 on behalf of the original owners. It is for releasing more and more land from the Government under the provisions of the Urban Land (Ceiling and Regulation) Act. It is important to note that the Additional Secretary to the Government has directed the Collector as per the letter dated 11/01/2018 to take appropriate action so far as the land admeasuring 8480 sq.mtrs. is concerned. It is true that copy of the said letter is addressed to

defendant No.14 on behalf of the owners. It is also true that the plaintiff has protested the address of said letter to defendant No.14, through his protest letter dated 16/01/2018.

26] It will be material to consider the correspondence made earlier to that. Vide letter dated 17/03/2015, the Additional Collector has proposed to Urban Land Department for giving 'no objection' for 8480.50 sq.mtrs. of land. In paragraph 9, there is a reference of taking back the possession by the Tahsildar from BRO over the area of the land admeasuring 24053.50 sq.mtrs. Whereas, there are correspondence made by the plaintiff on behalf of the original owners thereby demanding back the land reserved to BRO. One of such letter appears the date of 15/01/2014. Whereas, in some of the letters written by the original owners addressed to the Additional Collector, the address of defendant No.14 is also mentioned. There is a reference of returning back the land admeasuring 24053.50 sq.mtrs., allotted to BRO. The letter bears the date as 05/05/2012. There is a reference that out of 13454 sq.mtrs. of land, 7800 was returned back and there is a demand for 5654 sq.mtrs. of land.

27] From the above correspondence, one can very well say that the plaintiff has also followed up the issue with the Government about returning back the land allotted to BRO. The trial Court had chosen not to go into these correspondence and restricted himself by observing that "*lands are not released due to exclusive efforts of defendant*

No.14". However, no one can deny this fact (even if, it is presumed that execution is admitted without prejudice). By doing that the issue is not over. So, there may be correspondence made by the plaintiff on one hand and defendant No.14 on the other hand, it can be used only as a corroborative piece of evidence. Ultimately, the foundation, on which their case rests, is more important and needs to be seen.

28] It is true that the observation about making correspondence, as referred above, is on the basis of documents filed by both the plaintiff and defendant No.14. The question of enforceability of the agreement in favour of defendant No.14 is not a question. The question is, whether the plaintiff can be protected at an interim stage on the basis of the execution of the agreement in question (which is disputed by the contesting owners). It need to be looked into, Whether the defence of non-execution of the agreement in question by the contesting owners is strong enough to deny the interim relief? and Whether discretion was exercised wrongly in favour of the plaintiff? It will be material to consider the findings of the trial Court on this aspect. The trial Court has referred to the defence about denial of execution by defendant Nos. 1 to 13 (para 12), any positive findings on this issue is not brought to my notice.

FINDINGS ABOUT POSSESSION

29] In paragraph 20 of the judgment, the trial Court has observed that, "defendant No.14 on strength of subsequent

memorandum of understanding claims to be in possession. In view of that, the plaintiff needs to be protected". Though, there is no clear cut observation about possession of defendant No.14, indirectly, the trial Court has considered defendant No.14 to be in possession. Some of the correspondence was also pointed out to me on behalf of the appellant in A.O. No.19/20. But, what I find is that it is difficult to give any opinion at this stage as to who is in possession of the suit land. The reason is, the suit land admeasuring about 4601.1918 sq.mtrs. and it is part of 8480 sq. mtrs. of land released by the Government. Neither the plaintiff nor defendant No.1 to 13 and also defendant No.14 have pointed out convincing documents and type of activities they have initiated and continued on the suit land. The observation about possession seems to have been given by the trial Court in order to justify his decision, as to how the interest of plaintiff needs to be protected.

ADDITIONAL EVIDENCE

30] I am not inclined to consider the additional evidence sought to be produced by the appellants in A.O. No.19/2020 by way of the opinion of the private handwriting expert Shri Athale. It is for several reasons. Firstly, proper procedure for adducing additional evidence, as contemplated under Order 41 Rule 27 of CPC, is not followed. These provisions can also be looked into when there is an appeal under Order 43 of CPC. The appellants could have pursued with the expert and could have obtained such opinion earlier. But they have not taken

adequate precaution. So also, such opinion could have been obtained by those appellants when Exh.5 application was pending before the trial Court. So, I am restricting myself to the material, which was available before the trial Court.

GRIEVANCE OF DEFENDANT NO.8

31] Even though, the legal representatives of defendant No.8 during this appeal proceedings have disowned signature of their predecessor in title on the written statement, this Court cannot give its findings on that grievance. This issue has to be left open for the trial Court.

SUMMARY OF TRIAL COURT'S FINDINGS

32] Predominantly, the trial Court has given importance to the agreement, in question, being prior to execution of agreement with defendant no.14, suppression of the said agreement from defendant No.14. The agreement in question being executed subsequent to consent terms it will override the terms of the consent terms. The trial Court has given one factual finding that "it appears that earlier agreement with the plaintiff is suppressed from defendant No.14 (paragraph 18). As said earlier the suit does not involve specific performance of the agreement with defendant No.14 but specific performance of the agreement with the plaintiff. The issue of suppression from defendant No.14 will arise only when defendant No.14

will ask for specific performance. For the above discussion, I agree to some of the findings of the trial Court, whereas I differ on some of the observations. But, what I find is that the trial Court has overlooked the main aspect. The crux of the matter is the scope of the consent terms and, particularly, Clauses 18 (a), (b) & (c). In the present appeals, we are not concerned with the execution of the sale-deed in between M/s. Ganga Developers as a purchaser and defendant Nos.1 to 13 as original owners. The controversy is centered around sub-clauses (b) & (c) of Clause (18). It will be material to consider it again. It is as follows :

- (a) There was a distribution of 85% to the plaintiff and 15% to Archand Rode, Ajay Kaware and Kavita Kirpane. This was in respect of remaining land i.e. 0.12 HR. In addition to that, the land allotted to BRO is excluded.
- (b) Sub-clause (c) specifically deals with the land allotted to BRO or land released by the Government in view of the order passed by the High Court. The present plaintiff has agreed to cancel/relinquish the claim over this land.

We need to address the issue by considering all these aspects. Clause (c) specifically refers to the land allotted to BRO. There is a specific reference that the plaintiff has cancelled his claim over the land described in Clause (c). Even if, we presume the said clause, at this stage, there is a correspondence, which suggests that the plaintiff has followed up the matter with the Government. It is important to note

that irrespective of Clause 18(c), there is also Clause 18(b). Regarding to this clause, there is an agreement about apportionment as 85% and 15%. Probably, connected suit filed before the Senior Division Court may relate to this land.

33] Considering all these controversies, it is a vexed question, that is to say the land released admeasuring 7840 sq. mtrs. relates to the arrangement noted down in Clause 18(b) or in Clause 18(c). So, this Court is of the opinion that neither of the parties have come with the case that either one of them is to be believed totally, because once the land is released, further steps regarding development of that land will follow. It will include submission of the plan for development, sanction of the plan, erecting construction and creating third party interest. So, what this Court feels is that, in order to avoid further complications, it will be in the fitness of the things to injunct both the sets of defendants from creating third party interest in respect of the suit land. Defendant No.14 needs to be injuncted, because in the released letter, copy is addressed to him. So also, there is an agreement in his favour, which is not disputed by the contesting owners (though disputed by the plaintiff and legal representatives of defendant No.8). The trial Court is right that "*agreement in question and Power of Attorney*" is not cancelled by the original owners.

34] Non-explanation by the plaintiff about execution of the agreement in question in spite of Clause 18(c) of the Consent Terms is considered as a factor against the plaintiff. Whether signatures are genuine or not can be decided during trial only. But, this Court also feels that the plaintiff also needs to be put to conditions, because if the plaintiff will lose in the suit, unnecessarily it amounts to halting the development activities. So, this Court feels that the plaintiff needs to be given direction to furnish, though not bank guarantee, but an undertaking that he will reimburse the loss to the contesting owners and defendant No.14. It is difficult to quantify the loss. It will also be difficult to predict that the plaintiff will lose or he may succeed also. It is true that the land is situated in Nagpur Tahsil. The area of the suit land is 4601.1918 Sq. mtrs sq.mtrs. It will be subject to development as per the FSI available. This Court is aware that valuation of the flat in the city is not less than Rs.50,00,000/- (for two BHK). Everything cannot be predicted at this stage. So, this Court feels that the plaintiff needs to be directed to give an undertaking to reimburse the loss if the suit is dismissed. To ensure this the plaintiff can be directed to give an undertaking to the tune of Rs. 3 Crores. Court do not want to opine that the suit will be dismissed definitely or that defendants will suffer loss only. Defendants may suffer and may succeed or may not succeed in proving the loss/damage due to confirmation of injunction. So the figure of Rs.3 Crore is tentative figure. It may or may not increase Rs.3 Crore. Even there may be a contingency that defendants may

forgo to give evidence or may not succeed after giving evidence. So this Court has kept all options open. This condition is imposed so as to protect the interest of defendants.

35] So, *prima facie*, balance of convenience and irreparable loss are not totally cent percent in favour of the plaintiff. But, this Court has protected the plaintiff for the reason of avoiding further complications. The order of the trial Court needs to be modified to certain extent.

36] At this stage, I am not impressed by the objection of learned Advocate Shri Dharmadhikari about belated filing of the suit. The agreement in question may be of the year 2013, but suit is filed on the basis of release of the land as per letter dated 11/01/2018. The observations in the case of Sopanrao & another vs. Syed Mehmood & others, reported in 2019 (7) SCC 76, are in respect of a suit for declaration. These observations are after full-fledged trial. It is on the point of grant of not full, but lesser relief. It falls within the domain of the Court. Hence, the following order is passed :-

ORDER

- (i) Both the appeals are partly allowed.
- (ii) The order dated 21/12/2019 passed in Special Civil Suit No.843/2018 is modified as follows :

- (a) Defendant Nos.1 to 14 are hereby restrained from selling or creating any third party interest and from changing the nature of the suit property subject to furnishing an undertaking by the plaintiff to reimburse loss, damage or compensation ensued to the appellants in A.O. Nos.19 & 22 of 2020, if the suit will be dismissed on any count.
- (b) To ensure that plaintiff will reimburse loss/damage/compensation, he is directed to give an undertaking to the tune of Rs. 3 Crores.
- (c) While disposing of the suit trial Court may decide the loss/compensation/damage to the appellants, if any, if the suit is dismissed.
- (d) Appellants are at liberty to amend written statement if any and also at liberty to adduce evidence.
- (e) The plaintiff is given one month time to furnish the undertaking.

(S.M. MODAK, J.)