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REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 13 OF 2022
IN
INTERIM APPLICATION (L) NO 13158 OF 2021
IN
SUIT NO. 78 OF 2022
WITH
INTERIM APPLICATION (L) NO. 25334 OF 2021
IN
APPEAL NO. 13 OF 2022

KANAIYABHAI LALBHAI
CONTRACTOR,
 of Indian Inhabitant residing at
 “Suvas” Bungalow, Behind Aarya
 Samaj Mandir, Off Linking Road,
 Santacruz (W), Mumbai 400 054

And

A/4/1 “Kalash” Somnath Mahadev
 Society, Athwa Umara Road,
 Athwalines, Surat (Gujarat)-395007

...

Appellant/
(Orgl. Plaintiff/
Orgl. Applicant)

versus

KALPESH PATEL,

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 PATIL
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**SEASONS ENTERPRISES
PRIVATE LIMITED,**

VISHWAS PATEL,

VARINI PATEL,

Defendant Nos. 1 to 5 being the
partners of Seasons Avenues
Properties, a partnership firm
carrying on business at 701, Seasons
Avenue, Linking Road, Khar (West),
Mumbai 400 052

HEMANT LALBHAI

CONTRACTOR,

of Indian Inhabitant residing at
25, "Leher", Adarsh Society, Near
Gokulam Dairy, Athwalines, Surat
(Gurajar) 395001

... Respondents/
(Orgl. Defendants/
Orgl. Respondents)

APPEARANCES

**FOR THE APPELLANT/
APPLICANT**

**Ms Ferzana Behramkamdin, with
Shlesha Sheth, i/b FZB &
Associates.**

**FOR RESPONDENTS
NOS. 1 TO 5**

**Dr VV Tulzapurkar, Senior
Advocate, with Mandar Soman, Sean
Wassoodew & Rupesh Mandhare.**

FOR RESPONDENT NO. 6

**Mr SC Naidu, with Divya Yajurvedi
& Pradeep Kumar, i/b CR Naidu & Co**

**CORAM : G.S.Patel &
Madhav J Jamdar, JJ**

DATED : 1st April 2022

ORAL JUDGMENT (Per GS Patel J):-

1. The Appeal assails an order dated 25th October 2021 by a learned Single Judge made on the Appellant's Interim Application for injunction and other reliefs in a suit for declaration and partition of immovable property.¹

2. We have heard Ms Behramkamdin for the Appellant at some considerable length. We have considered the material on record and studied the impugned judgment and order declining interim relief. Having considered all the material on record and the submissions on behalf of the Appellant, we are of the view that the learned Single Judge's careful and elaborate judgment requires no interference. Indeed, we believe the view the learned Single Judge took is not only a plausible view; it is the *only* possible view in the circumstances of the case. We have held that the Interim Application was correctly dismissed. Our reasons follow.

3. We begin this judgment by first referring to the decision of the Supreme Court in *Wander Limited v Antox India Pvt Ltd*.² In paragraph 14, the three-Judge Bench of the Supreme Court said:

"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

¹ Interim Application (L) No 13158 of 2021 in Suit No. 78 of 2022. 21990 (SUPP) SC 727.

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 possible 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 Joseph*: (SCR 721) :

“... These principles are well established, but as has been observed by *Viscount Simon in Charles Oseption & Co. v. Johnston* ‘...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 an individual case.’”

The appellate judgment does not seem to defer to this principle.”

(Emphasis added)

4. It is also well settled that when considering an application for interim relief, a Single Judge is not expected and is in fact not permitted to conduct mini-trial. It is the prima facie case that is to be assessed.³

5. Further, as the Supreme Court said in *Monsanto Technology LLC v Nuziveedu Seeds Ltd*,⁴ the appeals court must not ‘usurp the jurisdiction of the Single Judge’; it must confine itself to an adjudication of whether the impugned order was or was not justified in the facts and circumstances of the case. Where there are complicated mixed questions of law and fact, these cannot be dealt with in a summary adjudication, but must be examined on evidence led in the suit.

6. It is also settled, as the Supreme Court said in paragraph 31 of *Alka Gupta v Narendra Kumar Gupta*,⁵ that it is not open to a court of first instance (in that case, a learned single Judge of the Delhi High Court) to decide questions of fact and render a judgment without evidence tested by cross-examination. In *Alka Gupta*, the matter arose not from an interlocutory order but at a stage when, after issues had been struck, the trial court was hearing parties on a preliminary issue.

3 *SM Dyechem Ltd v Cadbury India Ltd*, (2000) 5 SCC 573; *Anand Prasad Agarwalla v Tarkeshwar Prasad & Ors*, (2001) 5 SCC 568; *Zenit Mataplast Pvt Ltd v State of Maharashtra & Ors*, (2009) 10 SCC 388.

4 (2019) 3 SCC 381.

5 (2010) 10 SCC 141.

7. The usual determinants for any Interim Application must be borne in mind namely whether the Plaintiff has made out a prima facie case, the question of balance of convenience and where lies the greater and more irreparable injury. These prima facie findings are tentative, to preserve the status quo until the matter is decided finally.⁶

8. In *Colgate Palmolive (India) Ltd v Hindustan Lever Ltd*,⁷ the Supreme Court set out some of the other considerations that ought to weigh with a court hearing an application for the grant of an injunction:

24. We, however, think it fit to note herein below certain specific considerations in the matter of grant of interlocutory injunction, the basic being non-expression of opinion as to the merits of the matter by the court, since the issue of grant of injunction, usually, is at the earliest possible stage so far as the time-frame is concerned. The other considerations which ought to weigh with the court hearing the application or petition for the grant of injunctions are as below:

- (i) **extent of damages being an adequate remedy;**
- (ii) protect the plaintiff's interest for violation of his rights though, however, having regard to the injury that may be suffered by the defendants by reason thereof;
- (iii) **the court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the other's;**

⁶ *Zenit Matapalst*, supra, paragraphs 30 and 31.

⁷ (1999) 7 SCC 1.

(iv) **no fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case — the relief being kept flexible;**

(v) the issue is to be looked at from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;

(vi) **balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;**

(vii) whether the grant or refusal of injunction will adversely affect the interest of the general public which can or cannot be compensated otherwise.

(Emphasis added)

9. In the very recent decision of 14th March 2022 in *Shyam Sel & Power Ltd & Anr v Shyam Steel Industries Ltd*,⁸ the Supreme Court had before it a challenge to an appellate order from an interim or interlocutory order of a learned single Judge of the Calcutta High Court.⁹ The Supreme Court first addressed the question of what is a 'judgment' within the meaning of the Code of Civil Procedure, 1908 and the Letters Patent, analysing *Shah Babulal Khimji v Jayaben D Kania*.¹⁰ The Supreme Court in *Shyam Sel* reiterated the law in *Wander Ltd* and *Monsanto*.¹¹

8 2022 SCC OnLine SC 313.

9 Like *Wander Ltd* and *Monsanto*, this was also an intellectual property case.

10 (1981) 4 SCC 8.

11 Paragraphs 11, 29, 31, 34, 35, 36.

10. At this stage, we may profitably reproduce paragraphs 31 and to 37 of the *Shyam Sel* decision:

31. Though the Division Bench of the High Court, referring to the judgment of this Court in the case of *Wander Ltd. (supra)*, observes that the appellate court will not substitute its opinion with that of the trial court in an interim application unless there is a perversity in the order, **it fails to discuss as to how the view taken by the trial judge was either perverse or impossible.**

33. **We ask a question to ourselves that, in an appeal against the order of a Single Judge, if the Division Bench of the High Court is not required to evaluate the question as to whether the discretion exercised by the trial court was right or wrong, what else is it required to do. We are unable to trace the source of the duty of the appellate court which makes it bound to pass a suitable interim order pending the trial of the suit.**

34. **The Division Bench of the High Court further observes that for doing so, it has to put itself in a position as if it was moved to pass an interim order in the suit. At the cost of repetition, we reiterate that if the approach of the Division Bench of the High Court is to be upheld, then there would be no necessity to have the trial courts at all.** Thereafter, the Division Bench of the High Court observes that the case was different from *Wander Ltd. (supra)*. **The Division Bench of the High Court stops at that. It does not even take the trouble to observe as to how the scope of the appeal before it was different from the scope as defined by this Court in *Wander Ltd. (supra)*. In a line thereafter, the Division Bench of the High Court observes that prima facie case on facts theoretically is in favour of the appellant therein (plaintiff) and thereafter, passes various directions**

including the injunction. Though, in fact, it allows the appeal in entirety by allowing an application under Order XXXIX Rules 1 and 2 CPC pendente lite the suit, it graciously observes in the ultimate para that it was only modifying the order dated 2nd April 2019 passed by the learned Single Judge.

35. The learned Judges of the Division Bench of the High Court have taken pains to make a mention of the judgment of this Court in the case of *Wander Ltd. (supra)*. **This judgment has been guiding the appellate courts in the country for decades while exercising their appellate jurisdiction considering the correctness of the discretion and jurisdiction exercised by the trial courts for grant or refusal of interlocutory injunctions.** In the said case, the learned Single Judge had refused an order of temporary injunction in favour of the plaintiff who was claiming to be a registered proprietor of the registered trade mark. The Division Bench of the High Court had reversed the order passed by the learned Single Judge and granted interim injunction. Reversing the order of the Division Bench of the High Court and maintaining the order of the learned Single Judge, this Court observed thus:

[paragraph 14 of Wander Ltd is then set out; extracted above]

36. Though the learned Judges of the Division Bench of the High Court have on more than one occasion referred to the judgment of this Court in *Wander Ltd. (supra)*, **they have not even, for namesake, observed as to how the discretion exercised by the learned Single Judge was exercised arbitrarily, capriciously or perversely.** In our view, having waited for 8–9 months after the learned Single Judge had passed the order, all that ought to have been done by the learned Judges of the Division Bench of the High Court was to request the learned Single Judge to decide the

application for ad-interim injunction, which in fact, the learned Single Judge had scheduled to do after three weeks from 2nd April 2019. In our view, it was not even necessary for the Division Bench of the High Court to have waited till 24th December 2019 and taken the pains of deciding the application at first instance. It could have very well, in the month of April, 2019 itself, done the exercise of requesting the learned Single Judge to decide the application as scheduled.

37. **In any event, though the Division Bench of the High Court observes that for deciding the question with regard to grant of interim injunction, it has to put itself in a position as if it was moved to pass an interim order in the suit, it even fails to take into consideration the principles which a court is required to take into consideration while deciding such an application. It is a settled principle of law that while considering the question of grant of interim injunction, the courts are required to consider the three tests of prima facie case, balance of convenience and irreparable injury. Besides a stray observation that the respondent-plaintiff has made out a prima facie case, there is no discussion as to how a prima facie case was made out by the respondent-plaintiff. In any case, insofar as the tests of balance of convenience and irreparable injury are concerned, there is not even a mention with regard to these in the impugned judgment and order of the Division Bench of the High Court. In our view, the approach of the Division Bench of the High Court was totally unwarranted and uncalled for. We refrain ourselves from using any stronger words.**

38. **We find that it is high time that this Court should take note of frivolous appeals being filed against unappealable orders wasting precious judicial time. As it is, the courts in India are already over-burdened with**

huge pendency. Such unwarranted proceedings at the behest of the parties who can afford to bear the expenses of such litigations, must be discouraged. We therefore find that the present appeal deserves to be allowed with token costs. The respondent-plaintiff shall pay a token cost of Rs. 5 lakhs to the Supreme Court Middle Income Group Legal Aid Society (MIG).

(Emphasis added)

11. The Plaintiff's family and its commercial entity are no strangers to the law. The family company, Ramji Dayawala Sons (P) Ltd, was the appellant in the legendary Supreme Court decision that bears its name: *Ramji Dayawala & Sons (P) Ltd v Invest Import*,¹² a locus classicus inter alia on contract law. Incidentally, it may not be out of place to note the following passage from paragraph 20 of *Ramji Dayawala* itself regarding interim injunctions and appeals:

20. The important question is whether the court was justified in the facts and circumstances of the case in exercising its discretion in favour of the respondent. **Before examining this aspect, a minor contention raised by Mr Majumdar that when the motion is addressed to the discretion of the court and the court has exercised its discretion one way, the appellate court should be slow to interfere with the discretionary order and substitute its own discretion in place of the discretion of the court before which the motion was addressed** and as in this case both the learned Single Judge and the appellant Bench have exercised the discretion in favour of the respondent, in exercise of its extraordinary jurisdiction this Court should not interfere with the same, may be disposed of. **It is well settled that where the trial court has a discretion in the**

12 (1981) 1 SCC 80.

matter, the appellate court would not ordinarily substitute its discretion in place of the discretion exercised by the trial court. But it is equally well settled that where the trial court ignoring the relevant evidence, side tracking the approach to be adopted in the matter and overlooking various relevant considerations, has exercised its discretion one way, the appellate court keeping in view the fundamental principle can and ought to interfere because when it is said that a matter is within the discretion of the court it is to be exercised according to well established judicial principles, according to reason and fair play, and not according to whim and caprice. “Discretion”, said Lord Mansfield in *R. v. Wilkes* [(1770) 4 Burr 2527] “when applied to a Court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular” (see *Craies Statute Law*, 6th Edn., p. 273). In the course of this judgment we would be constrained to point out that both the learned Single Judge and the Judges of the Division Bench completely overlooked the well established principles in granting stay of suit in a case where reliance is placed upon a subsisting arbitration agreement.

(Emphasis added)

12. With these principles in mind, we repeatedly asked Ms Behramkamdin for the Appellant to demonstrate how the impugned order fell afoul of these well-established standards, that is to say, to show how, without conducting a mini-trial, the learned single Judge’s order was perverse, arbitrary, contrary to law, one arrived at ignoring the three standard determinants, and not even a possible view. Despite all efforts, she was unable to do so, as we shall presently see.

13. The Respondents to the appeal are the Defendants in the suit. Respondents Nos. 1, 3, 4 and 5 are individuals, and Respondent No. 2 is a private limited company. All are partners of a firm called “Seasons Avenues Properties”, a real estate developer. Defendant No.6 (“**Hemant**”) and the Plaintiff (“**Kanhaiya**”) are brothers. Ramji Dayawala was their grandfather. He started the family business that bears his name. Kanhaiya claims to have joined this family business. Hemant apparently also entered that business, though much later, around 1977. The two are still partners of Ramji Dayawala Sons with other family members. The company does business at various places, including Surat.

14. The suit itself was for declaration and partition. The prayers in the suit are at page 350 of the Appeal paper book. This has a reference to “the suit property”. That is described in the first annexure to the plaint, (Appeal paper book page 363), and is said to be a tract of land at VP Road, Santacruz (West), Mumbai of about 1275.9 sq mtrs on which there stands a bungalow called ‘*Suvas*’. We will refer to this as the Suvas property, and to give this a somewhat more understandable description, it is a plot of land and a bungalow at Bandra-Khar.

15. The prayers in the suit are, first, for a declaration that Kanhaiya and Hemant are the “joint owners” of the property.¹³ The

¹³ This may be somewhat loosely used in the plaint, for it is at present unclear whether Kanhaiya pleads rights in the form of a ‘joint tenancy’ with the four unities known to law (possession, interest, title and time), and the consequential issue of survivorship, or in the form of a ‘tenancy-in-common’. This may, conceivably, have some bearing at a much later stage at the trial of the suit.

second prayer is for partition and *separate* possession such that Kanhaiya and Hemant each get a 50% share right, title and interest in the property. Then there is the usual prayer for a division by metes and bounds. There follows a prayer for a disclosure for any agreement that Hemant may have executed. A similar prayer is made against Seasons Avenues Properties. A declaration is sought that Seasons Avenues Properties has no right, title and interest in the Suvas property. Development Agreements, Powers of Attorney and other documents are impeached and are sought to be ordered to be delivered up for a cancellation. Prayer clause (xi) seeks possession of the suit property. Then there are prayers for permanent injunctions. Prayer clause (xiv) asks for a permanent injunction “after possession of the suit property is handed back to the Plaintiff”. Prayer clause (xv) then asks for a delivery of the original title deeds to the property. Then there are the interim prayers. These are reproduced in the Interim Application from pages 89 to 90.

16. According to Kanhaiya, around 14th June 2019, Hemant prevented Kanhaiya from using the Suvas property. In early May 2021, Kanhaiya says he was told by neighbours of security guards being posted on the plot. There was some development work going on. He issued a public notice on 10th May 2021 asserting his ownership rights to the Suvas property. He therefore asserts that Hemant could not deal with the Suvas property to his (Kanhaiya’s) exclusion and without his express consent; and, therefore, any rights in favour of Seasons Avenues Properties (including any Power of Attorney and Development Agreement) are non-est, not binding, in

breach of the alleged oral family arrangement and liable to be ignored. Therefore the suit and the Interim Application.

17. Kanhaiya and Hemant's father, Lalbhai, bought the Suvas property in July 1962. Lalbhai and his wife Dahiben had seven children: five daughters and two sons (Kanhaiya and Hemant). Kanhaiya says that in 1968 Lalbhai wanted to gift the property to his sons, and to exclude his five daughters. The plaint then goes on to say that in August 1968 there was an 'oral family arrangement' between Lalbhai, Dahiben, Kanhaiya and Hemant, though Hemant was then still a minor. The purpose of this alleged oral family arrangement was that the Suvas property could always be used as family home in Mumbai. It is also alleged that the oral arrangement was that Lalbhai, Dahiben and the two sons would at all times be the "joint owners" with rights of occupation, possession and use along with their respective family members. It is at this stage that the Plaint speaks of a Gift Deed of 4th September 1968. This is important even for our purposes today because it is still the principal plank of Kanhaiya's attack on the impugned order. A copy of that Gift Deed is at page 121. Ms Behramkamdin invites our attention to Recital 3 at page 123. This makes reference to a registered indenture of mortgage of 18th August 1977 in respect of the Suvas property. At page 125, the Gift Deeds says that the Suvas property is already mortgaged. The Gift Deed was subject to the mortgage. Ms Behramkamdin would have it that the mortgage debt was then unpaid and there was an imminent danger of the debt being enforced. She contends that legal advice was obtained to the effect that a 'Release Deed' in favour of Hemant would save and secure the Suvas property from being recovered in payment of the unpaid

mortgage debt. It is for this reason, Kanhaiya says, that a Release Deed of 8th September 1970 was got executed. A copy is at page 115.

18. Now this is an important document from either perspective. The ‘Releasor’ in this is Kanhaiya himself, the Plaintiff. The ‘Releasee’ is Hemant, Defendant No.6, Kanhaiya’s brother.

19. Evidently, and on any reasonable prima facie view, this one document would come in Kanhaiya’s way in establishing a sound prima facie case. At a minimum, it is an obstacle for Kanhaiya to overcome. The reason is plain: for, as we have seen, the first prayer in the suit is for a declaration of joint ownership of that property. If there is a document that prima facie indicates that the Plaintiff, Kanhaiya, had released his rights in the property in favour of his younger brother Hemant, Defendant No.6, then it would be very difficult at an interim stage — at least without later admitted documentation reversing this — to accept the argument Kanhaiya made before the learned Single Judge and reiterates before us, viz., that the Release Deed—

“was a sham document, not to be relied on or acted on and only meant to defeat the rights of the secured lender”.

20. The case Kanhaiya presented before the learned Single Judge was that the family business had contracts with the Maharashtra State Electricity Board (“MSEB”) and with various private companies. One of these was an entity named Advance Insurance Company Ltd, the mortgagee of the Suvas property. It was then

alleged that MSEB had threatened to invoke one of Advance Insurance Company's bank guarantee, which would, presumably, have triggered Advance Insurance Co moving against the security it held, viz., the Suvas property. It is for this reason, Kanhaiya alleges, that the family solicitors advised execution of this allegedly sham and bogus Release Deed. The Release Deed has a stated consideration of Rs.1,000/-. It is, as the learned Single Judge noted in paragraph 6 at the forefront of the impugned order, itself a registered document. There is no denial of this fact.

21. Kanhaiya then contends that when Hemant attained majority, sometime in 1975, he was told of this oral family arrangement and he agreed to be bound at all times by this. Even the sisters agreed. This is unsupported by any contemporaneous record. The learned Single Judge was asked to infer from this allegation that the Releasee Deed was — or must have been — a sham and bogus document because, amongst other things, Kanhaiya and his family members all had their passports, ration cards and business cards showing the address of the Suvas property.

22. So far, therefore, regarding the Suvas property, the story is of (i) an alleged oral agreement; (2) a mortgage; (3) a gift Deed; (4) a Release Deed and (5) documents with addresses. Kanhaiya's case is that (5) establishes that (4) is bogus, sham and a not-to-be-acted on document; thus reaffirming (3), which is subject to (2), and therefore (1) stands proved. This syllogism is inherently flawed. Even showing (5) does not inevitably yield the result that is (4); and, as we have noted, unless Kanhaiya shows a very strong prima facie

case on (4), that the Release Deed was indeed a shadow, sham document not to be acted on, he cannot be said to have made out a prima facie case of joint title.

23. Lalbhai, Kanhaiya's and Hemant's father, died in London on 15th November 1984. Some family businesses, firms and the Ramji Dayawala Sons entity continued to have their address at the Suvas property. Kanhaiya said that Hemant joined the family business in 1978. He shifted out of Mumbai in 1986 and went to Surat to look after the business there, while Kanhaiya continue to use Suvas property. Hemant used the Suvas property whenever he came to Mumbai. According to Kanhaiya, in 1984, after Lalbhai's death, he, Dahiben and Hemant reaffirmed the oral family arrangement between them. Dahiben herself died on 7th March 2012. Their oral family arrangement was allegedly once again reaffirmed as Kanhaiya and Hemant continued to use the Suvas property.

24. We will pass over the other allegations regarding the security guards and personal belongings because that in our view will not be determinative. The submission that was made before the learned Single Judge is that after the death of their parents the Suvas property was hold jointly by Kanhaiya and Hemant and their respective family.

25. There is a reference to a particular Will made by Lalbhai, which Kanhaiya does not admit. This, as the learned single Judge noted, says that Lalbhai had transferred the Suvas property from Hemant to himself and Dahiben; and, in the Will, apparently

bequeathed it to Dahiben and the two sons. But Kanhaiya does not claim rights as a legatee. He claims that the Will reaffirms the oral family arrangement; but yet he cannot explain, as the learned single Judge noted, the statement in the Will that Lalbhai had transferred the Suvas property *from* Hemant to himself (Lalbhai) and Dahiben. We do not see how a party can rely on a document in part and disavow it in part. In any case, that will not bolster a *prima facie* case.

26. Seasons Avenues Properties' contentions were considered by the learned single Judge, as were the contentions raised by Mr Naidu on behalf of Hemant. He refuted all the allegations made by Kanhaiya regarding the Release Deed. Principally, Mr Naidu led with the argument that there was never any oral agreement at all. He maintained that unless it was shown that the oral agreement was either reflected in some document or was unequivocally shown to have been admitted, its existence could not be *presumed* at an interlocutory stage — and Kanhaiya's entire case was based on a presumption. He pointed out that Kanhaiya had done nothing at all by way of seeking specific performance of the oral agreement (the answer to which, presumably, is that by seeking a joint declaration of title that is precisely what Kanhaiya was doing because that was the limit of the oral agreement). But, more importantly, according to Mr Naidu, the Complaint *contains no challenge to the Release Deed or the Gift Deed*. It sought to put in an *explanation* to these documents. Kanhaiya proceeded on the footing that he could, in law, lead oral evidence in variance of the terms of a written document — to show that the Release Deed was a sham document — despite the provisions of Sections 91 and 92 of the Evidence Act to lead such

evidence. There may also have a question under Section 99 of the Evidence Act as to whether an outsider to a transaction could lead evidence, a matter fully covered by the celebrated decision of the Supreme Court in *Bai Hira Devi & Ors v Official Assignee of Bombay*.¹⁴

27. It is on this basis that the learned Single Judge was urged to grant the interim relief sought. There was considerable material before the learned Single Judge on both sides regarding who used the property when and how. The Learned Single Judge considered this. Questions of law under Sections 91, 92 and 99 were considered from paragraphs 41 to 43.

28. The learned Single Judge then concluded that once a document pertaining to dispossession of the property was shown to have been prepared in accordance with law (namely the Release Deed), no evidence could be given in proof of the terms of the such documents except the document itself or secondary evidence of the contents of the document. Any attempt at contradicting, varying, adding to a subtracting from its terms was, the learned Single Judge held, impermissible.

29. In our view, this is a completely correct assessment both on facts and law.

30. In paragraph 46, the learned Single Judge also considered the effect of Section 99.

141958 SCR 1384: AIR 1958 SC 448.

31. One of the other aspects to which the learned Single Judge applied his mind was that Kanhaiya inevitably had to make a case of having been dispossessed. In paragraph 49, the learned Single Judge held that on the material before him, Kanhaiya had failed to establish any dispossession. Any allegation of dispossession requires material particulars. These, the learned Single Judge found, were missing.

32. In the course of his submissions, Kanhaiya relied upon a handwritten letter of 6th March 2006 in Gujarati from Hemant to Kanhaiya. Both sides had contrasting interpretations in translation. The learned Single Judge took the extremely prudent and circumspect step of asking for an official translation from the Court department. He then proceeded to consider this document in its official translation in paragraph 55 of the impugned order. The Suvas property is mentioned at item 7. Paragraph 7 says that

“whatever arrangement father, mother and you have made, I do not wish to make any change therein. At present we should not make any development and sale therein. When anything would have to be done, we will decide at that time.”

This is supposed to be ‘irrefutable proof’ of Kanhaiya’s joint ownership interest in the property — and the learned Single Judge was asked to so infer. He dealt with this facially in paragraph 56 and said that while a certain reference was made “alluding to the author of the letter, i.e. Hemant” having suggested that “we” meaning, he and Kanhaiya, would decide the cause of action in relation to Suvas property, this was insufficient to indicate the existence of the oral arrangement as pleaded in the Plaint.

33. We find this is an entirely accurate, careful and incisive analysis. The learned Single Judge did not lose sight of the fact, despite a welter of material coming at him from all sides, that the focus of the case was a pleaded *oral* agreement regarding joint ownership of the property and a Release Deed admittedly executed by the Plaintiff himself giving up his rights in the property by saying only that the Release Deed was sham.

34. But the crucial factor at the interim stage was this: that the Release Deed, though alleged to be sham and ‘not-to-be-acted on’ was *in fact acted on* and *was acted on by the Plaintiff himself*, for the Plaintiff agreed to changes in the record of rights for the Suvas property deleting his name from it.

35. The question was whether the Plaintiff had put before the learned Single Judge enough material to unequivocally establish his case. We reproduce now paragraph 57 of the impugned judgment because in our view, that succinctly summarises the entirety of the case. It reads thus:

“57. There is absolutely no explanation as to why the plaintiff agreed to the changes being made in the record of rights. In fact, he raised no objections and consented to his name being deleted. These are acts which have not been explained by the plaintiff. In fact there is no attempt to explain his conduct except to state that the record of rights is not evidence of title. The import of having supported an application for deletion of his name and having stood by that till date of suit is immense and has not been explained satisfactorily. All other contentions in support of the plaint pales into

insignificance in the absence of a challenge to the Release Deed and the implementation of it.”

36. Before us, Ms Behramkamdin argues exactly the same thing: that the record of rights is not evidence of title. But that is an inaccurate formulation: the law is that revenue records do not *confer* title and are not *documents* of title. But they do reflect changes in title by *other* documents. Thus, for instance, a change in the record of rights deleting the name of the Plaintiff cannot be wholly ignored. By itself, that change in the record of rights does not extinguish title; but it can certainly be used to show (particularly at an interim stage) that title stood extinguished by some other document, act, deed or thing. In other words, but for that other document, there could not have been such a change in the record of rights.

37. At this stage, therefore, the Plaintiff’s case before the learned single Judge was: (i) that there was an alleged family arrangement that gave him and his brother, Defendant No.6, equal rights in the Suvas property; and (ii) that the registered Release Deed by which the Plaintiff *gave up* his rights in the Suvas property should be held, on the basis of material yet to be formally proved, and though there was no challenge to the Release Deed itself, to be simply a ‘sham document not to be acted on’. We believe it was simply impossible for the learned single Judge to have returned a finding for the Plaintiff on this showing; and, had he done so, we would have been inclined to interfere.

38. The learned Single Judge then considered briefly the law cited before him. He proceeded to dismiss the Interim Application, did

not award costs but continued the ad-interim protection until 30th October 2021.

39. We are unable to find a single reason warranting our interference with this elaborate, cautious and balanced order. It is not shown that the impugned order is contrary to law, arbitrary, capricious or perverse, or that it is not even a plausible view. Indeed, as we have noted, it is the only possible view given the circumstances and the material before the court even today. The prima facie case is not established. The balance of convenience is clearly against the plaintiff on his own formulation of the case; and the case of irreparable prejudice answers itself against the plaintiff too. Development of the property cannot be held up for years together on a case by the plaintiff that is entirely speculative and invites nothing but conjecture and surmise by convoluted reasoning. There is documentary material against the Plaintiff, and his own conduct does not substantiate his case. There is no material on facts nor any law cited that could persuade us to interfere.

40. There is no substance whatsoever in the Appeal. It is dismissed.

41. In view of dismissal of the Appeal, the Interim Application does not survive and it is disposed of as infructuous.

42. Ms Behramkamdin applies for a continuation of the ad-interim stay against demolition that has continued since 27th August 2021, and which the learned single Judge continued from the date of

the impugned order (25th October 2021) until 30th October 2021. It has continued since until today. Dr Tulzapurkar and Mr Naidu oppose the application. They maintain that the mere fact that an ad-interim order has continued because the Court could not take up the matter earlier is no reason to continue it. Had the Plaintiff been able to show some vestige of a case, perhaps things might have been different. But having been able to show no prima facie case at all, they submit, it would be wholly unfair to continue the ad-interim stay any further. Notably, they point out, the Plaintiff does not offer any security for the loss or damage caused by continuing the stay (leave alone the damage already caused). We are inclined to agree with Dr Tulzapurkar and Mr Naidu. We find no reason to continue the ad-interim stay. The application for stay is rejected.

43. There will be no order as to costs.

(Madhav J. Jamdar, J)

(G. S. Patel, J)