



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**APPEAL FROM ORDER NO. 72 OF 2022
WITH
CIVIL APPLICATION NO. 1234 OF 2023**

1. Ashok s/o Bhaurao Patil,
Age : 72 Years, Occ. Agri & Business,
R/o. 243, Samartha Nagar,
Aurangabad.
2. Jayram S/o Nathuji Salunke,
Age : 72 Years, Occ. Agri & Business,
R/o. 243, Samadhan Colony,
Aurangabad.
3. Santosh s/o Wamanrao Patil,
Age : 67 Years, Occ. Agriculture &
Business,
R/o. D-68, Balaji Nagar, Aurangabad. ..APPELLANTS
(Ori. Defendant
Nos. 3,4 & 5)

VERSUS

1. Rajendrakumar Madanlal Kala
since deceased through his L.Rs.
- 1a) Meena W/o Rajendrakumar Kala,
Age : 50 Years, Occ. Household,
R/o. C/o Vijay Madanlal Kala,
R/o. Plot No. 30, Gupta Lay Out,
Near Dighe Farm House, Chikhali Road,
Near IUDP, Pusad Naka, Washim
- 1b) Mahek D/o Rajendrakumar Kala,
(Now married -Mahek W/o Ayush Jain)
Age : 26 Years, Occ. Household,
R/o. Plot No.8, Vallah Bhai Patel Marg
West Manavar, District Dhar,
(Madhya Pradesh)
2. Vijay S/o Madanlal Kala,
Age : 55 Years, Occ. Business
R/o. Vikas Nagar Housing Society,
House No. 167, Tilaknagar, Aurangabad.

3. Jijabai Nana Pagore,
Age : 72 Years, Occ. Agriculture,
R/o. Village Pandharpur,
Dist. Aurangabad.
4. Subhash s/o Vishwasrao Bhamare,
Age : 60 Years, Occ. Nil
R/o. Village Pandharpur, Dist. Aurangabad
At present residing at Giriraj Housing
Society, House No.8/5, Aurangabad. ..Respondents
(Res. No.1 & 2 Orig. Plaintiffs
Res.No.3 & 4 Def. No.1&2)

.....
Mr. Rajendra Deshmukh, Senior Advocate a/w
Mr. Shriram Deshmukh, Advocate i/b Shri. Devang
Deshmukh, Advocate for the Appellants
Shri. S. V. Adwant, Advocate for Respondent No.1-A,
1B & 2.

.....

CORAM : SANDIPKUMAR C. MORE, J.
Reserved for Judgment : 26.06.2024
Pronounced on : 29.07.2024

JUDGMENT :

1. The present appellants, who are the original defendant Nos. 3,4 and 5 have challenged the order dated 18.01.2019, passed by the learned Civil Judge, Senior Division, Aurangabad (herein after referred to as “ learned trial Court) below Exh. 292 in Special Civil Suit No. 160 of 2001. Under the impugned order, the learned trial Court, by partially allowing the aforesaid application below Exh. 292, has struck off the defence of the present appellants in the said suit as per Order XXXIX Rule 11 of the Code of Civil Procedure.

2. The brief facts giving rise to the present appeal are as under :-

The present respondent Nos. 1 and 2 have filed Special Civil Suit No. 160 of 2001 against the present appellants as well as respondent No.3 for specific performance of contract in respect of agricultural lands bearing Gut Nos. 117 and 117/1, admeasuring 9 Acres 15 Gunthas situated at Nakshtrwadi, Aurangabad. According to respondent Nos. 1 and 2/plaintiffs, the present respondent Nos. 3 and 4, who are the original defendant Nos. 1 and 2, had failed to perform their contractual obligations towards them under the agreement for sale dated 06.12.1999 and therefore, the aforesaid suit was filed. During the pendency of the aforesaid suit, the original plaintiffs came to know that the original defendant Nos. 1 and 2 entered into an agreement to sale with the present appellants i.e. defendant Nos. 3 to 5 and sold the area of 6 Acres 7 Gunthas out of the suit lands to them. As such, the present appellants were made party to the suit and then respondent Nos. 1 and 2 filed application (Exh.68) for getting temporary injunction against all the defendants.

3. The learned trial Court, vide, order dated 20.07.2002, decided the said application (Exh.68) and restrained all the defendants, who are the present appellants and respondent

Nos. 3 and 4 from selling, alienating or creating any third party interest over the suit land till disposal of the main suit.

4. Being aggrieved with the said order dated 20.07.2002, the present appellants had preferred Appeal from Oder No. 391 of 2003 before this Court on 01.12.2003. However, the said appeal was disposed of on 14.12.2004, in view of undertaking given by the present appellants before this Court assuring thereby that they would not sell, transfer or alienate the suit property without prior permission of the Court. By accepting the said undertaking, this Court had set-aside the order passed by the learned trial Court dated 20.07.2002, below Exh. 68.

5. However, despite such undertaking given by the present appellants before this Court, they entered into an agreement to sale with third party i.e. M/s Aishwarya Constructions in respect of sale of land admeasuring 6 Acres 7 Gunthas out of suit property without prior permission of the Court. As such, the original plaintiff Nos. 1 and 2 were constrained to file application at Exh. 292 against the appellants under Order 39 Rule 11 of the Code of Civil Procedure for striking out their defence and also for taking action against them as per Section 94 (c) (d) and (e) of Code of Civil Procedure.

6. Feeling aggrieved with the said order dated 18.01.2019, below Exh. 292, the appellants have preferred this Appeal.

7. The learned Senior counsel for the appellants submits that the learned trial Court has passed complete erroneous order of striking out the defence of appellants by holding that they committed breach of undertaking given to this Court only on the basis of alleged agreement to sale executed by them in favour of one M/s Aishwaraya Constructions. According to him, the undertaking was given by the appellants to this Court for not to sell or alienate the suit property, however merely by executing the agreement to sale with M/s Aishwarya Constructions, no actual alienation or transfer of interest in the suit property was made. He pointed out that even the said agreement of sale was cancelled by the appellants, and therefore, no sale-deed was executed in favour of M/s Aishwarya Constructions on the basis of said agreement to sale. He further contended that M/s Aishwarya Constructions, despite cancellation of the agreement of sale by the present appellants, has filed separate suit for specific performance of contract bearing Special Civil Suit No. 290 of 2014 against the appellants which is still pending. He further submitted that

there was no breach of undertaking given by the appellants, as no alienation or sale of suit property was made by the appellants. Moreover, possession of the suit property was also not handed over by the appellants to M/s Aishwarya Constructions by accepting certain additional consideration. He pointed out that had it been a case of handing over of possession by the appellants to the M/s Aishwarya Constructions, then M/s Aishwarya Constructions would not have prayed for possession of the part of suit property in their suit. He further submitted that the action of striking out the defence of the appellants is drastic one and not proper on the part of learned trial Court, when the cross-examination of plaintiffs had already been completed. He also pointed out that after execution of agreement to sale with M/s Aishwarya Constructions, the appellants had in fact filed application before the learned trial Court for seeking permission to sell the part of suit land as per the undertaking given by them to this Court, but after rejection of that application for permission to sell the land, the appellants never proceeded further to execute the sale deed in favour of M/s Aishwarya Constructions.

8. In short, it is contended by the learned Senior counsel for the appellants that since there was no actual sale or

alienation of the property in favour of M/s Aishwarya Constructions by these appellants, there can be no breach of undertaking and therefore, the impugned order needs to be set aside.

9. In support of his submissions, the learned Senior counsel relied on following judgments :-

- (I) **Kapilaben And Others Vs. Ashok Kumar Jayantilal Sheth Through POA Gopalbhai Madhusudan Patel And Others 2010 DGLS(SC)1516 (Supreme Court)**
- (II) **Ramavatar Surajmal Modi Vs. Mulchand Surajmal Modi 2004 (Supp.2) Bom.C.R. 298 (Bombay High Court)**
- (III) **Rekha Bhaskar Kadam Vs. Bhaskar Arjun Kadam 2002 (2) ALL MR 642 (Bombay High Court)**
- (IV) **Rampyaribai Vs/ Niladevi 2007(4) Mh.L.J.**
- (V) **Ganpat Shankar Waghmare Vs. Anjalibai Rao Waghmare (Smt.) and Another 2001 (3) Bom.C.R. 31 (Bombay High Court)**
- (VI) **Gopikabai Nathuram Malewar and Another Vs. Bapurao Mahadeorao Surkar 1996 BCI 5 (Bombay High Court)**
- (VII) **Taherbhoy Feeda Ally And Others Vs. State of West Bengal And Others AIR 1977 Calcutta 361.**
- (VIII) **Justice C.K. Thakker (Judicial Officer's Law lexicon) Volume 1 A-C 2008**
- (IX) **Justice C.K. Thakker (Judicial Officer's Law lexicon) Volume 4 G-Z 2008**

10. On the contrary, the learned counsel for respondent Nos. 1 and 2/ plaintiffs strongly opposed the submissions made on behalf of the appellants. He pointed out the definition of 'sale' as per Section 54 of the Transfer of Property Act and the dictionary meanings of words 'transfer and alienation', and claimed that when the appellants had accepted the part consideration from M/s Aishwarya Constructions and also handed over the possession, then there was certainly breach of undertaking given by them to this Court. According to him, the recitals of copy of agreement to sale annexed by him along with application at Exh. 292 clearly indicated that after receiving part consideration amount, the appellants also handed over the possession of suit property to the extent of area admeasuring 6 Acres 7 Gunthas to M/s. Aishwarya Constructions and therefore, it amounts to breach of the aforesaid undertaking. He further argued that the documents which are produced before the learned Appellate Court subsequently without following mandate of Order 41 Rule 27 of the Code of Civil Procedure cannot be gone into.

11. As such, the learned counsel for respondent Nos. 1 and 2/plaintiffs supported the impugned order and prayed for

dismissal of the appeal. He has relied upon the following judgments :-

- (I) **Union of India Vs. Ibrahim Uddin And Another (2012) 8 Supreme Court Cases 148**
- (II) **Balwantbhai Somabhai Bhandari Vs. Hiralal Somabhai Contractor (Deceased) rep. By Lrs. And others 2023 SCC OnLine SC 1139**
- (III) **Pralhad Nagorao Bodkhe Vs. Sulochanna Ramchandra Kawarkhe 2021(4) Mh.L.J. 419**
- (IV) **Kedu Ratan Aher through L.Rs Uday kedarnath Aher Vs. Bhausahab Bapurao Deshmukh through L.Rs Shalinibai Deshmukh and Others 2021SCC OnLine Bom 11788**
- (V) **Shivaji Fakira Bhambare Vs. Dashrath Baburao Naik 2022 SCC OnLine Bom 210**
- (VI) **Jehal Tanti & others Vs. Nageshwar Singh 2013 (4) SCC 689**
- (VII) **Vidhur Impex & Traders Vs. Tosh Apartment Pvt. Ltd 2012 (8) SCC 384**
- (VIII) **Bhasin Tabccos Ltd and Others Vs. Gambraro Nexim (India) Medical Ltd and others 2019 Scc OnLine Del 7163**
- (IX) **Asha Madhusudhan Joshi Vs. Ashok H. Bhide 2003(1) ALL MR 31.**
- (X) **Smt. Sudheshkumari alias Santoshkumari Rathanlal Agrawal Vs. Bombay Alloy Steel Industries Pvt. Ltd. 2000 (4) All MR 602**
- (XI) **Rajnikant Dhulabhai Patel & another Vs. Chandrakant Dhulabhai Patel & Others 2008(5) All MR 409**

- (XII) **C.K. Thakker Escorts Ltd Vs. Commissioner of Central Excise 2004 CJ(SC) 173.**
- (XIII) **Bank of India and another Vs. K. Mohandas and others 2009 (5) SCC 313.**
- (XIV) **Ratnakar D Patade Vs. Smita Pandurang Dalvi and Others 1996(1) ALL MR 31**

12. Heard rival submissions and also perused the entire document on record and also considered the citations relied upon by the rival parties, wherever applicable.

13. It is significant to note that the present appellants are the original defendant Nos. 3 to 5, whereas present respondent Nos. 1 and 2 are the original plaintiffs in Special Civil Suit No. 160 of 2001, and respondent Nos. 3 and 4 are the original defendant Nos. 1 and 2. As such, for the purpose of avoiding ambiguity, the parties are hereinafter referred to as per their original status in the suit. The background facts clearly indicate that after filing the suit for specific performance by the plaintiffs against defendant Nos. 1 and 2 based on the agreement to sale dated 06.12.1999, the plaintiffs got the knowledge that defendant Nos. 1 and 2 sold certain portion admeasuring 6 Acres 7 Gunthas out of the suit land to defendant Nos. 3 to 5 and therefore, they were added as party to the suit. It is not in dispute that the plaintiffs then filed an

application (Exh.68) for getting temporary injunction against all the defendants. Further, the said application at (Exh.68) was allowed by the learned trial Court under order dated 20.07.2002 and it restrained all the defendants from selling, alienating or creating any third party interest in respect of the disputed land, till disposal of the main suit. Further, it is evident that defendant Nos. 3 to 5 had carried the said order to this Court in Appeal from Order No. 391 of 2003 and in that appeal, the learned counsel for the defendant Nos. 3 to 5 made a statement that defendant Nos. 3 to 5 would not sell, transfer or alienate the suit property without prior permission of the Court. Thus, on the basis of said statement in form of undertaking, this Court recorded the same in its order dated 14.12.2004 as follows :-

“4. The learned counsel for the appellants stated that presently they have no intention of selling the suit property. However, after they desire to sell or alienate the suit property, they would apply to the Court under Section 52 of the Transfer of Property Act. The appellants through their counsel undertake to this Court that they would not sell, transfer or alienate the suit property without prior permission of the Court. “

14. In view of this undertaking, the learned counsel for respondent Nos. 1 and 2 states that it is not necessary to have

any injunction, hence the appeal was allowed. The impugned order was set-aside and undertaking given by the appellants was recorded and accepted. This order was passed in presence of appellant No.3, who was personally present in the Court. Thus, under the aforesaid order, an undertaking has been given to this Court by defendant Nos. 3 to 5 accepting that they would not sell, transfer or alienate the suit property without prior permission of the Court.

15. However, it is not in dispute that defendant Nos. 3 to 5 then executed agreement to sale in respect of the disputed land with one M/s Aishwarya Constructions by accepting certain earnest amount. Therefore, the plaintiffs filed application (Exh. 292) for striking out the defence of defendant Nos. 3 to 5 and for taking action against them as per Section 94 read with Section 151 of the Code of Civil Procedure. According to the learned senior counsel for defendant Nos. 3 to 5, the execution of mere agreement to sale does not amount to sale, transfer or alienation of the suit property and therefore, it cannot be said that defendant Nos. 3 to 5 have committed breach of undertaking given to this Court. He also contended that after execution of the said agreement, the defendant Nos. 3 to 5 had in fact sought permission from the

learned trial Court to sell the disputed land by filing application (Exh.119), but when such application was rejected on 04.09.2009, defendant Nos. 3 to 5 had in fact cancelled the agreement to sale executed by them in favour of M/s Aishwarya Constructions on 27.06.2007. As against this, the learned counsel for the plaintiffs vehemently argued that the act of executing agreement to sale by defendant Nos. 3 to 5 does amount to breach of undertaking. On this background, it has to be ascertained what is the effect of agreement executed by defendant Nos. 3 to 5 in favour of M/s. Aishwarya Constructions and whether it has caused any breach of undertaking.

16. The learned senior counsel, by relying on the judgments as mentioned above, submitted that mere execution of agreement to sale does not amount to sale, transfer or alienation as reflected from the order of this Court in respect of undertaking.

17 The learned counsel for the plaintiffs relied upon the judgment in the case of **Asha Madhusudhan Joshi Vs. Ashok H. Bhide 2003 (1) ALL MR 31**. and submitted that if any party to the proceedings, after giving undertaking to the

Court commits any default or contravenes or commits a breach of such undertaking and if such breach or default is committed by the defendants, then the necessary consequences shall be to strike out the defences of the defendants. There cannot be any dispute what is observed in the aforesaid case. Moreover, as per observations in the case of **Ranjinikant Dhulabhai Patel & another Vs. Chandrakant Dhulabhai Patel and others 2008 (5) All MR 409** (supra) one has to obey and implement any direction issued by a competent Court without any reservations and if it is ignored then there will be an end of rule of law. Moreover, the Hon'ble Apex Court in the case of **Balwantbhai Somabhai Bhandari Vs. Hiralal Somabhai Contractor(Deceased) represented by Lrs and others 2023 SCC ONLine SC 1139** (supra) has discussed the concept of willful disobedience and held that the willful breach of an assurance in the form of an undertaking given by a counsel/advocate on behalf of his client to the Court would amount to the "civil contempt". Moreover, it has also held that the proposition is well settled and self evident that there cannot be both justification and an apology in case of willful disobedience. Obviously, nobody will dispute about the aforesaid propositions or observations. However, whether

there is a breach of undertaking by defendant Nos. 3 to 5 is to be ascertained from the facts of this case only and by considering whether the execution of agreement to sale amounts to breach of undertaking for not to sale, transfer or alienation of the suit property.

18. According to learned Senior counsel Mr. Deshmukh, mere execution of agreement to sale does not amount to sale, transfer or alienation of the suit property. For that purpose he relied on the observations of Hon'ble Apex Court in the case of **Kapilaben And Others Vs. Ashok Kumar Jayantilal Sheth Through POA Gopalbhai Madhusudan Patel And Others 2019 DGLS (SC) 1516 (Supreme Court)** wherein it is observed that

“ It is a settled position that such a contract does not by itself create any interest in or charge on the property.

The buyer only obtains a right to get the sale deed executed, upon fulfillment of the applicable terms and conditions as consented to by all the parties.”

19, Further in the case of **Gopikabai Nathuram Malewar and Another Vs. Bapurao Mahadeorao Surkar 1996 BCI 5 (Bombay High Court)** it is observed that merely because

agreement to sell is executed by a person, it cannot be said that any title has been created in his favour regarding the property in question. Thus, he wants to convey that agreement to sale does not create any right, title and interest in the property. On the contrary, the learned counsel for the plaintiffs also relied on the observations in the case of **Smt. Sudheshkumari alias Santoshkumari Rshanlal Agrawal Vs. Bombay Alloy Steel Industries Pvt. Ltd 2000 (4) ALL MR 602** wherein it is observed that defendant violating order by entering into leave and licence agreement with third party gives rise to strong case for appointing Court receiver. He also pointed out the definition of sale as per Section 54 of the Transfer of Property Act 1882 which is reproduced herein below :-

Section 54 “ Sale” defined – “Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made – Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale – A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

20. The learned counsel for the respondents thus submitted that defendant Nos. 3 to 5 not only executed the agreement to sale in favour of M/s Aishwarya Constructions despite given such undertaking, but also transferred the possession of the disputed property by accepting part consideration. However, in the aforesaid section itself it is mentioned that a contract for the sale of immovable property is a contract that sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property. Thus, from the language of Section 54 itself it is clearly evident that an agreement to sale does not create any interest or charge on the property.

21. Further, the learned Senior counsel Mr. Deshmukh produced copy of Judicial Officer's Law Lexicon wherein the meanings of words, Phrases, Legal Maxims, Latin Terms are

given. It is extremely important to note that the undertaking given to this Court consists of three words, i.e. sale, transfer and alienation. We have already dealt with the word “sale” and the act of selling involves execution of registered instrument. To that effect, a mere contract for sale does not amount to act of selling. So far as term “transfer” is concerned, the meaning of word “transfer” includes sale, purchase, exchange, mortgage, pledge, gifts, loan or any other form of transfer of right, title, possession or lien. Thus, the execution of agreement to sale is not included in the meaning of transfer.

22. The learned counsel Mr. Adwant for the plaintiffs vehemently argued that the recitals of agreement to sale dated 27.06.2007 executed by defendant Nos. 3 to 5 in favour of M/s. Aishwarya Constructions clearly indicate about the transfer of possession on accepting certain part consideration. However, this aspect has been dealt in the later part of this judgment. Further, the word “Alienation” means transfer of ownership of property to a person. The word applies to absolute conveyances of immovable property and imports an actual transfer of title. It does not include a lease. Thus, on going through meanings of all these three words mentioned above namely sale, transfer or alienation, it is nowhere reflected that

these words include an act of execution of agreement which as per Section 54 of the Transfer of Property Act, does not create any interest or charge on the property. Therefore, on execution of such agreement to sale there appears no *prima facie* breach of the aforesaid undertaking.

23. The learned counsel Mr. Adwant for the plaintiffs pointed out that the recitals of the copy of agreement to sale annexed with the application (Exh. 292) clearly indicate that defendant Nos. 3 to 5 not only accepted part consideration of the total consideration mentioned in the said agreement dated 27.06.2007, but also handed over possession of the disputed land to M/s. Aishwarya constructions, as per writing dated 20.12.2007. For confirming the same, the record and proceedings of Special Civil Suit No.290 of 2014 has been called. Admittedly, the writing appears to be written on 20.12.2007. The copy of said agreement to sale indicates that defendant no.3 had accepted part consideration of Rs. 20,00,000/- through cheque No. 3420 dated 20.12.2007 drawn on Malkapur Urban Co-operative Bank Limited, Branch at Jawahar Colony, Aurangabad. Further, in the said writing it is also mentioned that since such part consideration is received, the possession of disputed land is handed over to

M/s Aishwarya Constructions. It is extremely important to note that the learned trial Court has partly allowed the application (Exh.292) mainly on the basis of such writing.

24. However, the learned senior counsel Mr. Deshmukh raised suspicion about the said writing and submitted that such writing was never part of original agreement to sale dated 27.06.2007 executed by defendant Nos. 3 to 5 in favour of M/s. Aishwarya Constructions which was also notarized. He pointed out that the plaintiffs have produced fabricated agreement to sale in form of *Isar Pawati* by showing that on accepting part consideration, the possession of the disputed land was also handed over by defendant Nos. 3 to 5. Thus, he requested to verify the said fact from the suit filed by M/s. Aishwarya Constructions for specific performance of the said contract which is numbered as Special Civil Suit No. 290 of 2014. Thus, it appears that a dispute has been arisen between the parties during the course of argument as to which is original agreement to sale dated 27.06.2007. Whether it is the copy of agreement annexed to the application at (Exh. 292) or the one, which according to learned senior counsel is notarized. The learned senior counsel, after verification, produced certain documents on record and the same were

taken on record vide order dated 21st March 2024. Thus, from the documents produced by the learned Senior counsel on 21st March 2024, and on going through the original record and proceedings of the Special Civil Suit No. 160 of 2001 it appears that there are three different copies of the same agreement dated 27.06.2007. The application (Exh.292) itself indicates that the plaintiffs got the copy of agreement to sale dated 27.06.2007 when they came across the Special Civil Suit No. 290 of 2014 filed by M/s Aishwar Constructions against defendant Nos. 3 to 5 for specific performance of the same. Moreover, the learned Senior counsel Mr. Deshmukh has also placed on record certified copies which he had obtained from the aforesaid suit of M/s. Aishwarya Constructions.

25. The learned counsel Mr. Adwant for the plaintiffs vehemently argued that this an Appeal from Order and therefore, the documents which are produced by the learned Senior counsel inclusive certified copies of the document filed in the suit filed by M/s. Aishwarya Constructions, cannot be considered as the same are taken on record in contravention of Order XLI Rule 27 of the Code of Civil Procedure. According to him, without following procedure under the aforesaid order, these documents cannot be considered. For that purpose he

relied on the judgment of Hon'ble Apex Court in the case of **Union of India Vs. Ibrahim Uddin And Another (2012) 8 Supreme Court Cases 148** wherein it is observed that the appellate Court may permit additional evidence only if the conditions laid down in Order XLI Rule 27 of the C.P.C are found existing and that a decision of the case cannot be based on the grounds outside the pleadings of the parties and no evidence is permissible to be taken on record in absence of the pleadings in that respect.

26. Thus, the learned counsel Mr. Adwant submits that the Court cannot consider the documents produced by learned Senior Counsel Mr. Deshmukh. Admittedly, an additional evidence at appellate stage is allowed to be adduced under Order XLI Rule 27 of the Code of Civil Procedure. For quick reference the same is reproduced herein below :-

***Order XLI Rule 27 of the Code of Civil Procedure
Production of additional evidence in Appellate Court-***

- (1) *The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, But if-*
- (a) *the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or*

- (aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed or*
- (b) the Appellate Court requires any documents to be produced or any witnesses to be examined to enable it to pronounce judgment, or for any other substantial cause.*

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

- (2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.*

27. On going through the aforesaid rules, it appears that the Court may allow additional evidence at appellate stage in three circumstances ; Firstly, if the trial Court has refused to admit the evidence on record which ought to have been admitted. Secondly, a party seeking to produce additional evidence failed to produce the same before the learned trial Court even after exercising due diligence or such evidence was not within its knowledge and thirdly such evidence can be allowed to be produced if the appellate Court requires the same to enable it to pronounce a judgment or for any other substantial cause.

28. In the instant case we are not concerned with first two circumstances. Therefore, only third circumstance is available for production of such additional evidence in the present matter. It is to be noted here that the plaintiffs, while filing application (Exh. 292) before the learned trial Court, had relied upon the copy of agreement to sale dated 27.06.2007 and on perusal of the record and proceedings there appears two additional lines at the bottom of page No.2 as follows :-

तसेच काही कारणास्तव आम्हास खरेदीखताअगोदर पैशाची गरज
भासल्यास जमिनीचा ताबा दिला आहे असे गृहीत धरून रक्कम स्विकारत
असे ठरले.

29. Further, at the bottom of page No.3 of the said agreement, hand written contents are mentioned as follows :-

आज रोजी वरील व्यवहारापोटी (इसार पावती) भरणा रक्कम रुपये
२०,००,०००/-चेक क्रमांक ३४२० दिनांक २०.१२.२००७ दि. मलकापूर
अर्बन को-ऑपरेटीव्ह बँक लि. शाखा जवाहर कॉलनी, औरंगाबाद चा लिहून
देणार नंबर ३ यांना मिळाला व आमच्या इच्छेप्रमाणे रक्कम मिळाल्यामुळे आम्ही
जमिनीचा ताबा दिलेला आहे.

30. However, the learned Senior counsel Mr. Deshmukh pointed out that the aforesaid agreement to sale appears to be fabricated and it is also not notarized. He contended that the plaintiff M/s Aishwarya Constructions in its Special Civil Suit No. 290 of 2014 had in fact filed three copies of the aforesaid

agreement and one of them is the original notarized copy. It is significant to note that the learned trial Court based on the recitals mentioned in hand writing and the additional recitals at bottom of page No.2, has taken drastic action of striking out the defence of defendant Nos. 3 to 5. However, as per defendant Nos. 3 to 5 no such recitals were there in the original agreement. In view of this, the documents filed by learned Senior counsel are accepted by this Court since it has to be ascertained as to what was the original agreement between the parties. Thus, the third circumstance mentioned in Order XLI Rule 27 of the Code Code of Civil Procedure definitely applies here and it is power of the Court to call for any document for proper adjudication of the dispute and to ascertain the truth. Thus, since such power of the Court is for doing substantial justice, the submission made by the learned counsel Mr. Adwant that there is limitation for filing additional evidence at appellate stage, has no force and therefore, such submission is liable to be discarded, as proper adjudication of the dispute needs to be done in the light of true facts. Therefore, the judgment relied by the learned counsel for the plaintiffs in respect of filing additional evidence at appellate stage is not helpful in the instant case. There should not be any suppression of facts or misrepresentation of the facts while

making substantial justice.

31. From the documents produced by the learned Senior counsel on behalf of defendant Nos. 3 to 5, it appears that M/s Aishwarya Constructions has filed three different copies of the aforesaid agreement to sale dated 27.06.2007, in the form of *Isar Pawati*. They are at Serial Nos. 5 and 10 of the document list at Exh.4 in the Special Civil Suit No. 290 of 2014 of Aishwarya Constructions. On going through document at Sr. No. 5, it is the copy of said *Isar Pawati* wherein only additional contents at the bottom of page No.2 as mentioned above are appearing, but hand written contents in respect of accepting certain consideration and handing over the possession at the bottom of page No.3 as mentioned above, are missing. Further, the document at Sr. No. 10 is also copy of said *Isar Pawati* wherein both the contents at the bottom of page Nos. 2 and 3 as mentioned above, are appearing. However, the documents list at (Exh.35) filed in the said suit before the learned trial Court contains third copy of the said *Isar Pawati* which is also marked (Exh.37) and it is actually a original copy. On perusal of the same, it is evident that there are no additional contents either at the bottom of page Nos. 2 or Page No. 3 as mentioned above. On the contrary, it appears

to be a notarized document, whereas earlier two copies are not notarized. Thus, it appears that all these copies are filed by M/s Aishwarya Constructions only and on going through the original copy, there are no additional recitals as appearing in the earlier copies or in the copy relied by the plaintiffs before the learned trial Court for filing application at (Exh. 292).

32. If we consider the aforesaid additional contents, it gives an impression that defendant No.3 on 20.12.2007, had accepted an additional consideration of Rs. 20,00,000/- through cheque and on the receipt of the said amount, he also handed over the disputed land to M/s Aishwarya Constructions. Probably because of this handing over of possession, the learned trial Court has observed that defendant Nos. 3 to 5 committed willful disobedience of the undertaking given by them. In the impugned order, the learned trial Court in paragraph No. 10 has made following observations which is reproduced herein below :-

“10. The third objection raised by learned advocate Mr. S.R. Nehari for defendant that” the contract for sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties and such contract does not itself creates any interest in or charge on the suit property.” On this point, I am of the opinion that, filing of Spl.C.S. No. 290

of 2014 by M/s Aishwarya Construction in respect of suit property itself creates the third party interest in the suit property. On perusal of the copy of agreement to sale executed by defendant Nos. 3 to 5 in favour of M/s Aishwarya Construction, it is to be seen that, there is additional contents written on 20.12.2007 which show that defendants have already delivered the possession of suit property to M/s Aishwarya Construction by accepting Rs. 20 Lac vide Cheque No. 3420 dated 20.12.2007 drawn on The Malkapur Urban Co-operative Bank Branch at Jawaharnagar, Aurangabad. Despite transfer of possession of suit property to third party how defendants can say that they have not created the third party interest in the suit property ? But the fact is that due to execution of agreement to sale and by delivering possession of suit property in favour of third party, defendant No. 3 to 5 have provided substantial cause to M/s Aishwarya Construction to file Spl. Civil Suit No. 290/2014 and thereby created third party interest in the suit property which is nothing but the flouting of Court orders which is passed by the Hon'ble High Court after relying upon the undertaking given by defendant Nos. 3 to 5. M/s Aishwarya Construction has filed Spl. Civil Suit No. 290/2014 against defendant No. 3 to 5 in which they have prayed to award the decree of Specific Performance of Contract by directing defendants to execute sale deed of suit property in its favour by accepting the remaining consideration amount. The decision of said suit definitely affect the rights of plaintiff in the present matter regarding the suit property and therefore I have

no hitch to hold that it is nothing but creation of third party interest by the defendant No.3 to 5 by entering into agreement of sale dated 27.06.2007 with M/s Aishwarya Construction, and therefore, objection raised by learned advocate Mr. S.R. Nehari can not be taken into consideration. “

33. On going through the aforesaid observation, it appears that the learned trial Court, based on the aforesaid additional contents in the agreement to sale dated 27.06.2007, has taken a drastic step of striking out the defence of defendant Nos. 3 to 5 under Order XXXIX Rule 11 of the Code of Civil Procedure. However, on going through the original copy of *Isar Pawati*, it is evident that such additional contents are clearly missing and the same is exhibited by the learned trial Court in the said civil suit. Thus, in absence of any reliable evidence as to who had incorporated those additional contents in the original *Isar Pawati*, it is rather harmful to form any opinion about the alleged disobedience of defendant Nos. 3 to 5 in respect of their undertaking before this Court.

34. Even otherwise also, it has come on record that defendant Nos 3 to 5 based on their defence in special Civil Suit No. 160 of 2001 has sufficiently cross-examined witnesses of the plaintiffs by relying upon their defence in the written

statement. Therefore, after such cross-examination is over, if the defence of the defendant nos. 3 to 5 is struck off, then it will give rise to unnecessary technical complication as to what should be done with such cross-examination wherein the story of defendant Nos. 3 to 5 is already put up to the witnesses of the plaintiffs. This Court in the case of **Ramavatar Surajmal Modi Vs. Mulchand Surajmal Mode 2004 (Supp.2) Bom. C.R. 298 (supra)** has already opined that provision under Order XXXIX Rule 11 (1) of the Code of Civil Procedure merely vests power in the Court to dismiss the suit or proceeding where default is by plaintiff and strike off defence of defendant where defaulter is defendant. It does not obligate to do so in every case of default and therefore, it is held that provision under Order XXXIX Rule 11 (1) of the Code of Civil Procedure as applicable in Maharashtra is not mandatory, but directory. From the observation of this Court, it is made clear that for taking such drastic steps of striking out the defence, the Court must resort to facts of each case carefully. In the instant matter, there is ambiguity in respect of the recitals of the *Isar Pawati* dated 27.06.2007, as mentioned above and therefore the act of discarding evidence of defendant Nos. 3 to 5 relying upon the aforesaid additional recitals of the said *Isar Pawati* definitely appears erroneous and at such belated stage, when

the said defence has been put to the witness of plaintiff in the cross-examination.

35. Thus, considering all these aspects, the impugned order is definitely harsh upon defendant Nos. 3 to 5. On the contrary, the dispute between parties has to be decided on the basis of true facts which are to be ascertained from the evidence and trustworthy documents on record. Thus, impugned order needs to be set aside at this juncture. Therefore, the present Appeal from Order is hereby allowed and the impugned order dated 18.01.2019 below Exh. 292 in Special Civil Suit No.160 of 2001 is hereby quashed and set aside. The record and proceedings of the Special Civil Suit No. 160 of 2001 be sent to the learned trial Court forthwith and the learned trial Court is directed to decide the aforesaid civil suit on its own merit as early as possible. The appeal along with pending civil application is accordingly disposed of.

(SANDIPKUMAR C. MORE, J.)

YSK/