

B.M. KARUNESH,
.....

... RESPONDENTS

(BY SRI UDAY HOLLA, SENIOR COUNSEL A/W.
SRI V.B.SHIVAKUMAR, ADVOCATE FOR C/R1 TO R21)

THIS M.F.A. IS FILED UNDER ORDER 43 RULE 1(r) OF CPC, AGAINST THE ORDER DATED 14.03.2023 PASSED ON I.A. NO. 1 IN O.S.NO.7245/2022 ON THE FILE OF THE XXII ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, BENGALURU CITY (CCH-7), ALLOWING THE I.A. NO.1 FILED UNDER ORDER 39 RULE 1 AND 2 OF CPC.

THIS M.F.A. HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 13.07.2023 THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

J U D G M E N T

This appeal is listed for admission. With the consent of the learned counsel appearing for the respective parties, heard the matter on main itself though the matter is listed for considering the application for vacating the interim order granted by this Court.

2. The factual matrix of the case of the respondents/plaintiffs herein in the suit in O.S.No.7245/2022 is

that plaintiffs are the absolute owners of the property bearing Sy.No.32 measuring 2 acres 7 guntas of Puttenahalli village, Uttarahalli Hobli, Bangalore South Taluk, Bangalore morefully described in the schedule and the relief sought is for permanent injunction restraining the defendants from interfering or attempting to interfere with the plaintiffs' right, title, interest and ownership of the property and also restraining the defendants from interfering with the commencement and completion of the project on the schedule property described in the schedule. The schedule property is bearing No.32/1, 32/3, 32/4 measuring 5 acres 35 guntas situated at Puttenahalli village, Uttarahalli hobli, Bangalore South Taluk. In the plaint it is contended that the plaintiffs have executed the Power of Attorney in favour of Sri B M Karunesh and also executed registered Joint Development Agreement on 01.07.2005 for the purposes of development of the property. It is also contended that the plaintiffs are the owners of the property of land bearing Sy.No.32 measuring 7 acres 9 guntas including 18 guntas of karab situated at Puttenahalli village, Uttarahalli hobli, Bangalore South taluk and the same was purchased by late Kadirappa under a sale deed

dated 16.01.1918. The said late Kadirappa was cultivating the said land and was in joint possession along with joint family property together with his children. Kadirappa and his seven sons have effected family registered partition on 15.06.1954. Under the aforesaid partition, the land in Sy.No.32 of Puttenahalli village measuring 7 acres 9 guntas was divided into three equal shares to M. Bramhananda, Dr. M. Gurudas and Narayanadas and M.Bramhananda became the absolute owner of 2 acres 10.33 guntas, M.Narayanadas became the absolute owner of 2 acres 10.33 guntas and Dr. M.Gurudas became absolute owner of 2 acres 10.33 guntas in Sy.No.32 situated at Puttenahalli village.

3. It is further contended that M.Bramhananda along with his sons have entered into the partition on 10.11.1975 and subsequently, the same was partitioned on 08.03.1992 which had been recorded on 10.06.2004. Under the said partition, plaintiff Nos.9 and 13 were allotted 40379.50 square feet each and both plaintiff Nos.9 and 13 have left 4560 square feet for widening of the road on the western side of the property.

Subsequent to the partition, plaintiff Nos.9 and 13 have transferred the katha and other revenue records in their names and they are paying taxes regularly. M.Narayanadas, his wife and children have effected Memorandum of partition on 28.03.1974 and M.Gurudas, his wife and children have allotted the share under the Memorandum of partition dated 15.06.1954 and they are the absolute owners and they entered into a Joint Development Agreement. All the plaintiffs approached plaintiff No.21 - M/s. Adarsh Developers and entered into a Joint Development Agreement with plaintiff No.21 on 01.07.2005 and also executed Power of Attorney. Subsequently, the plaintiffs got converted the suit schedule property from agricultural to non-agricultural property. In paragraph 8, they have pleaded that the defendants who are utter stranger to suit schedule property had filed original suit in O.S.No.8033/2014 and the same came to be dismissed by the Trial Court in coming to the conclusion that based on fabricated, concocted and created documents, the suit for permanent injunction was filed. Against the said order, an appeal was filed before the High Court and the said appeal

was pending and interim order has not been granted in the said appeal.

4. It is also the contention of petitioner No.21 – M/s. Adarsh Developers that they have invested crores of rupees for commencement of the project and the project is a housing project for the purpose of developing the entire extent of property as mentioned in the schedule for the purpose of undertaking multistoried apartments. An allegation is made that when they started the work, when the defendants were unsuccessful in getting the relief in O.S.No.8033/2014 and also in R.F.A.No.1060/2020, they made an attempt to interfere with the work undertaken by the plaintiffs and hence, they filed the suit seeking the relief of injunction.

5. Inter alia, the plaintiffs have also sought for an order of temporary injunction and an ex parte order of temporary injunction was granted by the Trial Court restraining the defendants from commencement and completion of the project in the suit schedule property i.e., to the extent of 5 acres 35 guntas and reiterated the plaint averments and the same is also

resisted by the defendants by filing an objection statement and also filed the written statement and the Trial Court having considered the contention of the plaintiffs as well as the defendants, granted an order of injunction restraining the defendants from interfering with the possession of the plaintiffs over the suit schedule property in any manner till the disposal of the case. Hence, the present appeal is filed before this Court.

6. The main contention urged in this appeal is that the Trial Court has committed an error in granting an interim order without application of mind and also without understanding of the case of the parties and wrongly exercised the powers and simply proceeded to grant an order of injunction which resulted in substantial failure of justice hence, the same has to be set aside. The counsel also would vehemently contend that injunction should be granted on undisputed facts and material. In support of his argument, he relied upon the judgment of the Apex Court in the case of **N R DONGRE AND OTHERS vs WHIRLPOOL CORPORATION** reported in **(1996) 5 SCC 714** and brought to notice of this Court paragraph 2 of the said

judgment wherein the Apex Court discussed with regard to that injunction has to be granted in respect of undisputed facts and the material which can legitimately be taken into account at the interlocutory stage. The counsel also relied upon the judgment of the Apex Court in the case of **SKYLINE EDUCATIONAL INSTITUTE (INDIA) PVT. LTD vs S L VASWANI** reported in **(2010) 2 SCC 142** and brought to notice of this Court paragraph 19 wherein also the Apex Court made an observation that there will be no warrant for exercise of powers under Article 136 of the Constitution and comes to the conclusion that High Court, in refusing to entertain the appellant's prayer for temporary injunction is vitiated by an error apparent or perversity.

7. The counsel referring these judgments would vehemently contend that while considering the application for an injunction in the present case, the learned Trial Judge should have considered the admitted statement of the erstwhile owners i.e., Brahmananda and Narayanadas including the Tahsildar and other persons who gave the statements before the authority but

the same was not considered and passed an order in discarding the statements. The very Brahmananda and Narayanadas who claims that they are the owners of the property also given the statements in the year 1975 itself. The counsel also would vehemently contend that the Trial Judge has discarded the statement made before the Deputy Commissioner on the ground that the effect of such a statement is not explained. Thus, the very approach of the Trial Court is nothing but material irregularity committed by the Trial Judge. The counsel also in his arguments would vehemently contend that the Deputy Commissioner while granting the land even mentioned that the sale deed dated 30.06.1958 is being undisputed fact.

8. The counsel also relied upon the judgment of the Apex Court reported in **(2004) 8 SCC 488** in the case of **MAHARWAL KHEWAJI TRUST (REGD.) vs BALDEV DASS** and brought to notice of this Court paragraph 10 and contended that unless and until a case of irreparable loss or damage is made out by a party to the suit, the Court should not permit the nature of the property being changed which also includes

alienation or transfer of property which may lead to loss or damage being caused to the party who may ultimately succeed. The counsel also vehemently contends that there is a presumption under Section 47 of the Registration Act, 1908. The respondents herein claim their right through the sale deed dated 30.06.1958 which was executed by Brahmananda and Narayanadas who are also the vendors of the appellants herein and by virtue of the said sale deed, there is a presumption under Section 47 of the Registration Act and the same is also not taken note by the Trial Court. The counsel also vehemently contend that certified copy of the sale deed dated 30.06.1958 has already been marked as an exhibit in the earlier suit between the same parties i.e., in O.S.No.8033/2014 and the Trial Court in the earlier proceedings held that the sale deed is not valid in the eyes of law and the said issue is subjudice before this Court in R.F.A.No.1060/2020 and the Trial Court considered the finding of the said appeal and when the appeal is pending and the matter is subjudice, the Trial Court ought not to have considered the same.

9. The counsel also in his argument vehemently contends that second suit is not maintainable and the interim relief granted is not sustainable in the eye of law. The counsel would vehemently contend that when there was a sale deed of 30.06.1958 read with re-grant order dated 30.07.1975, there is a prima facie divesting of the title in favour of the appellants and presumption under Section 47 of the Registration Act ought to have been taken note of by the Trial Court but fails to take note of the same. The counsel also relied upon the judgment of the Apex Court in the case of **ANATHULA SUDHAKAR vs P BUCHI REDDY** reported in **(2008) 4 SCC 594** and brought to notice of this Court paragraph 14 wherein it is held that when a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to the plaintiff's title raises a cloud on the title of the plaintiff to the property. A cloud is said to rise over a person's title, when some apparent defect in his title to a property. The counsel also would vehemently contend that there is no cause of action for the second suit and in the earlier suit also the issues involved between the parties are with regard to the same cause of action.

10. The counsel would vehemently contend that in the earlier suit filed by the appellants herein in O.S.No.8033/2014, the prayer is for the relief of permanent injunction against the defendants who are the plaintiffs in O.S.No.7245/2022 and the counsel brought to notice of this Court paragraph 21 of the plaint wherein cause of action is stated and the counsel brought to notice of this Court in cause of action specifically stated that in the month of January 2014 when the defendants along with defendant No.21 were found near the suit schedule property and also in the month of January 2021 when the copies of the JDU's were obtained and also in the February 2014 when the order of the Assistant Commissioner was obtained and the same challenged before the Deputy Commissioner and the cause of action mentioned in the earlier suit and in the present suit is also similar.

11. The counsel brought to notice of this Court that the cause of action mentioned in the present suit that is with regard to the dismissal of the suit and filing of R.F.A.No.1060/2020. The counsel would vehemently contend that a false averment made

in the cause of action that High Court of Karnataka refused to grant the injunction but the fact that the injunction application was not dismissed wherein the High Court passed an order that the said application will be considered along with the main appeal. But suppressing the truth, the plaintiffs/respondents herein have obtained an order of injunction fraudulently and cause of action is very clear that the defendants became active and started interfering with the work of construction including commencement of excavation of the project work. Hence, it is clear that when the appeal was pending before the Court, they made an attempt to take up the construction and the same is also subject matter of the earlier suit.

12. The counsel in support of his arguments relied upon several judgments contending that the suit itself is not maintainable and the Court cannot grant any such relief. The counsel also brought to notice of this Court to the judgment reported in **(2018) 16 SCC 228** and brought to notice of this Court paragraph 23 wherein the Apex Court contend that there is no cause of action to the second suit since the subject matter

of the earlier suit and the present suit is one and the same and clever drafting will not create any cause of action and cause of action cannot be substantially improved.

13. The counsel also would vehemently contend that when the very same relief is sought, Section 10 of CPC attracts and second suit between the same parties is not maintainable and hence, injunction renders infructuous and no material to constitute a fresh cause of action it is nothing but an abuse of process of law and the suit itself is not maintainable. The counsel would vehemently contend that when there is no cause of action to file a separate suit, the Trial Court ought not to have granted any relief. The counsel also vehemently contend that regrant order has attained its finality and the same is not challenged and after regrant also katha has been effected and the fact finding of regrant cannot be dis-aggrieved by the Court. The counsel in support of his argument also relied upon the several judgments particularly in his written submission reiterated the principles laid down in the judgments which have been furnished in three volumes. The main contention of the counsel is that in the

absence of any challenge to the sale deed dated 30.06.1958 and regrant order dated 30.07.1975, the suit for injunction is not maintainable.

14. The counsel mainly relied upon the judgment reported in **(2009) 10 SCC 338** in the case of **AENIT MATAPLAST (P) LTD. vs STATE OF MAHARASHTRA** and brought to notice of this Court paragraphs 30 and 31 wherein the Apex Court held that if any construction is made and the same would amount to change the nature of the property that cannot be done when the appeal is pending before the Court. The counsel relied upon the judgment reported in **(2004) 8 SCC 488** in the case of **MAHARWAL KHEWAJI TRUST (REGD.) FARIDKOT vs BALDEV DASS** and brought to notice of this Court paragraph 10 wherein it is held that changing the nature of the property by putting up construction requires to be restrained since the appeal is pending.

15. The counsel also relied upon the judgment reported in **(2007) 14 SCC 721** in the case of **SHRIDEVI AND ANOTHER vs MURALIDHAR AND ANOTHER** and brought to

notice of this Court paragraph 30 and the judgment reported in **(1983) 4 SCC 31** and brought to notice of this Court paragraphs 6 and 7 and the judgment reported in **AIR 1975 AP 187** in the case of **NAWAB MIR BARKAT ALI KHAN vs NAWAB ZULFIQUAR JAH BAHADUR AND OTHERS** and brought to notice of this Court paragraph 5 wherein it is held that possession of the parties become irretrievable if construction is permitted and trespasser cannot be granted an order of injunction and ought to have protected the property till the disposal of the appeal in R.F.A.

16. The counsel also in his argument relied upon the Apex Court judgment reported in **(2013) 4 SCC 333** in the case of **ASPI JAL AND ANOTHER vs KHUSHROO RUSTOM DADYBURJOR** and brought to notice of this Court paragraph 9 wherein it is observed that basic purpose of Section 10 of CPC to prevent the Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action. The counsel referring this judgment would contend that even the Court can invoke Section

10 of CPC and there cannot be two suits for the same cause of action.

17. The counsel relied upon the judgment reported in **(2020) 5 SCC 410** in the case of **AMBALAL SARABHAI ENTERPRISE LIMITED vs K S INFRASPACE LLP LIMITED AND ANOTHER** and contend that injunction is obtained falsely stating that the High Court has rejected an injunction application when the same was not decided on merits and the High Court order is very clear that the application will be considered along with main appeal and hence, suppressed the facts and obtained the order thus, the said judgment is aptly applicable to the case on hand. When injunction order is obtained by suppressing the truth, there cannot be any injunction order and the plaintiffs have to approach the Court with clean hands.

18. The counsel also in support of his arguments relied upon the judgment reported in **AIR 1966 SCR 1332** in the case of **SHEODAN SINGH vs DARYAO KUNWAR** and brought to notice of this Court paragraph 14 wherein Apex Court held that it is well settled where a decree on merits is appealed from, the

decision of the Trial Court loses its character of finality and what was once res judicata again becomes res sub-judice and it is the decree of the appeal Court which will then be res judicata. The counsel also in support of his argument relied upon the judgment reported in **(2018) 16 SCC 228** in the case of **CANARA BANK vs N G SUBBARAYA SETTY AND ANOTHER** and brought to notice of this Court paragraphs 19 to 23, wherein it is observed that hearing of second case may be adjourned or may be stayed in order to avoid the outcome of the appeal in the first case and filing of an appeal would render the res sub-judice and res judicata. The counsel also relied upon the judgment reported in **(2020) 15 SCC 681** in the case of **STATE OF ANDHRA PRADESH AND ANOTHERS vs B RANGA REDDY (DEAD) BY LEGAL REPRESENTATIVES AND OTHERS** and brought to notice of this Court paragraph 24 wherein it is held that when an appeal is pending, decree including findings on issues does not attain its finality hence, it is res sub-judice and not res judicata. The counsel referring these judgments would vehemently contend that the Trial Court ought not to have granted the relief when the appeal is pending before the High

Court and the cause of action for both the suits is one and the same.

19. Per contra, the learned counsel appearing for the respondents in his argument would vehemently contend that the appellants have not produced any documents with regard to the grant of land and an endorsement was also given on Sunday i.e., on 10.08.1975 and the same is also observed by the Trial Court. The counsel also would vehemently contend that no original documents of grant are produced before the Court and the same is also discussed by the Trial Court. The counsel in his argument also brought to notice of this Court page 638 of the order passed in O.S.No.8033/2014 wherein in paragraph 12 the Trial Court considered that the document of sale deed which is marked as Ex.P1 dated 30.06.1958 and also Ex.P2 that is the order dated 30.07.1975 and taken note that to disprove the execution of Ex.P1 sale deed, the defendants have produced Ex.D10 that is also the sale deed bearing registration No.1379/1957-58 and in the said number, different sale deed has been registered and opined that there cannot be two sale

deeds in one number. The counsel also brought to notice of this Court to the discussion made in paragraphs 14 and 16 wherein considered the issues involved between the parties and when there is no merit in the suit filed by him, filing of an appeal will not take away the right of the respondents to file a separate suit. The counsel in his argument vehemently contend that the cause of action pleaded in the suit is different.

20. The counsel in support of his argument, relied upon the judgment of this Court reported in **ILR 2014 KAR 6025** in the case of **SMT. SHAKUNTHALAMMA AND OTHERS vs SMT.KANTHAMMA AND OTHERS** and brought to notice of this Court paragraph 33 wherein this Court held that insofar as relief under Order XXXIX Rule 1(b) and 1(c) is concerned, such a relief is available only to the plaintiff and the defendant cannot maintain an application for the said reliefs in a suit filed by the plaintiff, irrespective of the fact that his right to such relief arises either from the same cause of action or a cause of action that arise subsequent to filing of the suit. However, it is open to the defendant to maintain a separate suit against the plaintiff and

seek the relief provided under Order XXXIX Rule 1(b) and 1(c) of the Code and hence, filing of second suit is not barred by law and second suit is maintainable.

21. The counsel also in support of his arguments he vehemently contend that no preservation is required to maintain either status quo or setting aside the order of temporary injunction. The counsel would vehemently contend that the documents which have been produced voluminously before the Trial Court discloses that there was a partition in the year 1960 and subsequently, RTC also found standing in the name of the respondents and no such grant and grant is also created and tax paid receipts which have been produced before the Court clearly establishes that the respondents have got the title over the suit schedule property and the Trial Court having taken note of the facts, considered the same while passing an interim order. Hence, prayed this Court to dismiss the appeal.

22. The counsel also in support of his arguments relied upon the judgment reported in **1968 (1) MYS L.J 552** in the case of **RANGAMMA vs KRISHNAPPA** and brought to notice

the head note wherein observed with regard to discretion of Trial Court with regard to interference on an appeal. Granting or refusal of temporary injunction rests on the sound exercise of discretion by the Court. Such exercise of discretion cannot be lightly interfered with by the Appellate Court, unless it is shown that such exercise of discretion is unreasonable or capricious. The counsel also relied upon the judgment reported in **(1996) 5 SCC 714** in the case of **N R DONGRE AND OTHERS vs WHIRLPOOL CORPORATION AND ANOTHER** and brought to notice of this Court paragraph 8 wherein also the Apex Court observed that interference in the appeal by the Appellate Court in respect of the orders and temporary injunction passed by the Trial Court is limited and such interference is permissible only if the order is perverse or capricious. Merely because the appellate court might take a different view is not a ground to interfere with the discretionary orders passed by the Trial Court.

23. The counsel also relied upon the judgment reported in **1990 (SUPP) SCC 727** in the case of **WANDER LTD., AND ANOTHER vs ANTOX INDIA P. LTD** and brought to notice of

this Court paragraphs 14 and 16 wherein it is held that merely because the Appellate Court might take a different view is not a ground to interfere with the discretionary orders of injunction passed by the Trial Court. The appellate Court will not interfere with the discretion of the Trial Court and substitute its discretion. The counsel also relied upon the judgment reported in **ILR 1995 KAR 22** in the case of **UTTARADHIMATH vs SRI SRI RAGHAVENDRASWAMY MATH** wherein it is held that the orders does not become perverse by merely branding it. Higher Court will have to see whether Trial Court has willfully disregarded material pleadings or consciously violated rule of law or procedure. The counsel also vehemently contend that conduct of parties to be taken into account while granting or refusing injunction. The counsel also relied upon the judgment reported in **(2012) 1 SCC 735** in the case of **MAKERS DEVELOPMENT SERVICES PRIVATE LIMITED vs. M. VISVESVARAYA INDUSTRIAL RESEARCH AND DEVELOPMENT CENTRE** and brought to notice of this Court paragraph 11 wherein observed that conduct of parties must be taken into account while granting or refusing injunction. The

counsel relied upon the judgments reported in **ILR 1973 KAR 1264** and **ILR 1997 KAR 3223** wherein an observation is made that in a suit for injunction, the only question that arise for consideration is possession. The counsel also relied upon the judgment reported in **(1973) 2 SCC 358** in the case of **M KALLAPPA SETTY vs M V LAKSHMINARAYANA RAO** and contend that the plaintiff can on the strength of the possession resists interference of the defendant who has no better title than himself and get an injunction to restrain disturbance of his possession. The counsel in his argument vehemently contend that second suit is maintainable when different cause of action is set out in the plaint and the appellate Court should be very slow in reversing the same and contend that appeal is liable to be dismissed.

24. Having heard the learned counsel appearing for the respective parties and also having considered the principles laid down in the judgments referred supra by the respective counsel the point that would arise for the consideration of this Court that:

(i) Whether the Trial Court has committed an error in granting an order of injunction when the appeal is pending and whether the cause of action is different in the present suit?

(ii) What order?

25. Having considered the pleadings of the parties it is not in dispute that the appellants herein have filed a suit earlier for the relief of permanent injunction in O.S.No.8033/2014 wherein cause of action set out in paragraph 21 is with regard to 23.04.2008 when plaintiff No.7 got the copy of the order dated 30.07.1975 and also in the month of January 2014 when the defendants along with defendant No.21 were found on the schedule property and also in the month of January 2014 when the copies of JDUs were obtained and also in the month of February 2014, when an order of the Assistant Commissioner was obtained and also this Court has to look into the averments of the present plaint and prayer. In the present suit the relief sought is for the relief of permanent injunction restraining the defendants from interfering or attempting to interfere with the

plaintiff's right, title and interest and ownership of the property and also restraining the defendants from interfering with the commencement and completion of the project on the schedule property described in the schedule. The cause of action to file the suit set out that the same was arose on several dates as indicated in the petition and subsequently when O.S.No.8033/2014 was dismissed and on dismissal order, R.F.A.No.1060/2020 came to be filed and the High Court of Karnataka refused to grant injunction as a result the defendants became active and started interfering with the work of construction including commencement of excavation of the project work and subsequently repeatedly on several dates.

26. The cause of action set out in the earlier suit as well as in the present suit is with regard to that defendant No.21 was found near the schedule property and also a JDU was obtained in February 2014 and subject matter of the present suit is also not distinct but cause of action set out was arisen in view of the dismissal of the suit in O.S.No.8033/2014 and also specifically stated that RFA was filed and filing of RFA also is a cause of

action and the same has been stated. It is also stated that the High Court refused to grant injunction. But on perusal of material on record, no such refusal is found as rightly pointed out by the counsel for the appellants, wherein this Court ordered to consider the said application along with main appeal. The cause of action is also stated with regard to the construction work, when the JDU was disputed in the earlier suit and the same is also subject matter in the earlier suit and cause of action also stated in the earlier suit with regard to on the basis of JDU found the persons in the spot. It is contended that defendant No.21 is found near the suit schedule property in the earlier suit. The present suit is also, no doubt, filed by the other defendants of O.S.No.8033/2014 but defendant No.21 is also made as plaintiff in the present suit as plaintiff No.21 and the issue is with regard to completion of project work and included defendant No.21 as a party to the suit in the present suit as plaintiff. When such relief is sought and when the appeal is admitted, first of all, the present respondents have suppressed the fact that injunction application would be considered along with the main appeal and it is mentioned in cause of action that injunction was refused by

this Court in RFA and hence, it is clear that respondents herein have not approached the Court with clean hand and with an intention to seek interim relief stated that the High Court has refused to grant the injunction.

27. Apart from that, cause of action set out in O.S.No.8033/2014 and also in the present suit is also interconnected with regard to the construction work undertaken by defendant No.21 and in O.S.No. 8033/2014 and in the present suit seeks only for the relief of injunction. Hence, it is clear that cause of action is one and the same and appeal is also pending before the Court for consideration. The appeal is also a continuation of the suit. No doubt the counsel for the respondents/plaintiffs contend that the Trial Court has given the finding in paragraphs 12, 41, 42 and 43 with regard to the prima facie case of the appellants herein and when the said finding was questioned before this Court and when the appeal also admitted, the Trial Court ought not to have considered while passing an interim order. No doubt, the Trial Court while considering I.A. taken note of non-production of the original document based on

which the appellants are claiming their right. The reasoning is that the plaintiffs have made out prima facie case. When the appeal is pending before the High Court, another suit was filed making false submission that High Court has refused to grant any interim order, though the same was not considered on merits in the appeal and the same is pending for consideration and when this Court ordered that the same would be considered along with merits. The present respondents/plaintiffs have not approached the Court with clean hands and the discretionary relief for granting injunction invoking Order XXXIX Rule 1 and 2 of CPC is a discretionary relief and discretion should not be exercised when the material facts are suppressed before the Trial Court. No doubt, there is a dispute with regard to the title of the properties and both of them claimed their title.

28. It is also important to note that in both the suits that is O.S.No.8033/2014 and O.S.No.7245/2022 (the present suit) they sought for only the relief of permanent injunction and the crux of the issue is with regard to that the plaintiffs are claiming that the suit schedule property is an ancestral property and

there was a partition. On the other hand, it is the claim of the appellants herein that earlier they have purchased the property in the year 1958 by the *Brahmanand and Narayandas and Others* and the same is also reflected in the grant order and grant also made in the year 1975. Before granting the order also statements of some of the witnesses were recorded before the Deputy Commissioner and same is also placed on record and the same includes the said Brahmanand and Narayandas and the same is also produced before the Court and they are also parties to the earlier sale deed of the year 1958 and the issue involved between the parties is not finally adjudicated. As contended by the counsel for the appellants, the matter is sub-judice before this Court but a suit is filed by the respondents herein seeking for an order of injunction knowingly well that the appeal is admitted and the matter is pending for consideration and a statutory appeal is filed before this Court and when the appellants have a right of statutory appeal, the same has to be considered by this Court.

29. It is also not in dispute that the appeal is pending for consideration and under the statutory appeal, this Court has to consider both factual aspects as well as question of law and re-appreciate both mixed question of fact and law. Though suits are filed by both the appellants as well as the respondents herein, I have already pointed out that both the suits for the relief of injunction and both of them have not claimed title in the respective suits and when such being the case, when the issue is pending before the Court under the statutory appeal, matter has to be reanalyzed by this Court. The relief is also sought before the Trial Court by the present respondents not to interfere with the construction work. The judgment relied upon by the appellants in the case of *AENIT MATAPLAST (P) LTD.* referred supra, the Apex court held that if any construction is made and the same would amounts to change the nature of the property that cannot be done when the appeal is pending before the Court. The material discloses that based on the interim order obtained by the respondents before the Trial Court they started construction work and before this Court also they have given an undertaking that they are not going to continue the same and

thereafter when such an undertaking was given, in spite of it, when they continued the work and the same is brought to the notice of this Court and this Court directed not to put up any construction. In the other judgment the Apex Court held in *Maharwal Khewaji Trust* case that changing the nature of the property by putting up construction requires to be restrained since the appeal is pending and if the construction is permitted, it will lead to multiplicity of proceedings among the parties. No doubt the counsel for the respondents vehemently contend that the appellants are not having any case at all and the very grant is disputed and the very earlier sale deed is disputed and the sale deed bears the different registration number and the same is also in respect of not the said sale and the same is in respect of different sale and the same has to be adjudicated in a statutory appeal. It is also important to note that the Apex Court in the case of *Shridevi and another* and in the other case *Nawab Mir Barkat Ali Khan* referred supra held that possession of the parties become irretrievable if construction is permitted and when such ratio is held that construction cannot be permitted when the appeal is pending. The Trial Court also ought not to

have granted the relief of injunction when the appeal is pending and matter is subjudice before the Court. In the judgment of the Apex Court referred supra in *Ambalal case*, the Apex Court held that if an injunction is obtained falsely stating that High Court has refused to grant an injunction and when the same is also not considered on main and it will be considered along with main and the very suppression of facts in obtaining the order also not sustainable in the eye of law and the said judgment is apply applicable to the case on hand as contended by the appellants counsel.

30. It is also settled law that where a decree on merits is appealed, the decision of the Trial Court loses its character of finality and what was once resjudicata again become res-subjudice and it is the decree of the appellate Court which will then be resjudicata and the same is also held in the judgment of the Apex Court in *Sheodan Singh* case. It is also important to note that recently the Apex Court held in the case of *Canara Bank* case particularly in paragraph Nos.19 to 23 held that hearing of second case may be adjourned or may be stayed in order to

avoid the outcome of the appeal in the first case or otherwise filing of appeal would render res sub-judice and res judicata. No doubt the counsel appearing for the respondent in his argument vehemently contend referring the judgment of *Rangamma* case and also *N.R.Dongre* case of the Appellate Court and also in the case of *Wander Ltd.* referred supra that Appellate Court might take a different view is not a ground to interfere with the discretionary orders of injunction passed by the Trial Court and exercise of discretion cannot be the lightly interfered with by the Apex Court unless it is shown such exercise of discretion is unreasonable and capricious and these judgments will not come to the aid of the respondents since while obtaining an order in the cause of action it is stated that High Court has refused to grant injunction and the said pleading is against the material on record and the IA has not been considered on merits and it discloses that the said IA would be considered along with the main appeal. When such being the case, the very exercise of discretion is nothing but unreasonable and capricious, since the Trial Court also while granting an order taken note of earlier findings and the same is questioned before this Court and not

attained its finality and Trial Court ought not to have comes to such a conclusion and I have already pointed out that the cause of action pleaded in both the suits are similar and not different. No doubt the counsel appearing for the respondent also relied upon the judgment of this Court that second suit is maintainable i.e. *Smt.Shakuntalamma's* case, wherein the Court considering order 39 Rule a, b and c held that, both plaintiff and defendant can seek for the relief under Order 39 Rule 1(a), but in respect of Order 39 Rule 1(a) and 1(c), the suit is not barred and it is open to the defendant to maintain a separate suit and the same is also subject to the different cause of action. I have already pointed out that having perused the cause of action set out in both the suits are in respect of the same cause of action and no new cause of action that arise subsequent to filing of the suit and hence, the said judgment is also not comes to the aid of the respondents to maintain a separate suit and seek for an order of injunction. No doubt in the earlier suit injunction was refused to the appellants herein and Trial Court also discussed in length with regard to the claim made by the appellants and the same has not yet attained its finality and finality will be attained only

on consideration of appeal which is pending before the Court and when the judgment and decree of dismissal of suit is appealed before the Court, the Trial Court ought not to have considered the relief sought and the fact that appeal is pending before this Court is also brought to the notice of the Trial Court while considering the application filed under Order 39 Rule 1 and 2 and I have already pointed out that in the earlier suit also sought for restraining the respondents herein from putting up any construction and in the present suit filed by the respondents herein seeking the relief not to interfere with the construction work undertaken by the respondents and when such being the case, the Trial Court ought to have considered the said fact into consideration. If construction is continued it changes the very nature of the property and also it leads to multiplicity of proceedings. The respondents herein ought to have waited till disposal of the appeal which is pending before this Court i.e. R.F.A.No.1060/2020 and thereafter ought to have taken up the construction after the result of the appeal which is pending before this Court. It is nothing but suppressing the truth, the plaintiffs/respondents have obtained an order of injunction

stating that this Court has refused to grant an order of injunction and also relief sought is very clear that defendants/appellants herein became very active and started interfering with the work of construction including commencement of excavation of the project work. It has to be noted that in the earlier suit also the present appellants have sought for the relief of restraining the respondents herein to put up any construction and the same is subject matter of the earlier suit and sought relief against the defendant No.21 and in the present suit, the said defendant No.21 is also a plaintiff in the suit and when such materials are available before the Court, even though they dispute the grant contending that the grant of land an endorsement was given on Sunday i.e. on 10.8.1975 and the same is also observed in Trial Court in appreciating the earlier suit. But it is the contention of the appellants that only they have received endorsement on that day, but grant order is not on Sunday and unless the appeal which is pending before the Court is determined, it is nothing but amounts to sub-judice and the same is held in the judgment of the Apex Court in the *State of Andhra Pradesh and others* and in paragraph No.24 it is held that when an appeal is pending,

decree including findings on issues does not attained its finality, it amount to res-judice and not res judicata, since the same has not attained its finality to invoke the principles of res judicata and it amounts to res subjudice and I have already pointed out that cause of actions for both the suits are one and the same and when such being the case, the very approach of the Trial Court in granting an order of injunction is nothing but capricious and it amounts to perversity and the same is unreasonable and ought not to have granted the relief when the appeal was admitted before this Court is brought to the notice of the Trial Court and hence, the order impugned is liable to be set aside. The Trial Court has committed an error in granting an order of injunction when the appeal is pending, since the cause of action is not different and the same is similar in both the suits and the Trial Court ought to have taken note of pendency of the appeal which is pending before this Court and the very finding of the Trial Court in the earlier suit was questioned before this Court. I have already pointed out that the appeal filed before this Court is a statutory appeal and this Court has to consider both question of fact and question of law. Hence, the very approach of the Trial

Court is erroneous and it requires interference and as a result, the application filed before the Trial Court seeking the relief of temporary injunction in O.S.No.7245/2022 under Order 39 Rule 1 and 2 of CPC is liable to be rejected and hence, I answer the point as affirmative.

31. In view of the discussions made above, I pass the following:

ORDER

The appeal is allowed.

The impugned order passed on I.A.No.1 filed under Order 39 Rule 1 and 2 in O.S.No.7245/2022 is hereby set aside. The appellants are directed to pursue the appeal R.F.A.No.1060/2020 forthwith.

**Sd/-
JUDGE**

AP/SN