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N. SRINIVASA

v.

M/S KUTTUKARAN MACHINE TOOLS LTD.

Civil Appeal Nos. 1098 of 2009

FEBRUARY 18, 2009

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[TARUN CHATTERJEE AND DALVEER BHANDARI, JJ]

Arbitration and Conciliation Act, 1996/Code of Civil Procedure, 1908 :

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s. 9/O.39 rr. 1 and 2 – Agreement for sale of immovable property – Sale deed not executed within stipulated time – Vendor seeking time from the vendee – Thereafter, vendor refusing to perform its part of contract – On apprehension of creation of third party interest in disputed property, applications by vendee for injunction and interim injunction from transfer, alienation and creation of third party interest – Plea of vendor that time being essence of the contract, it was not bound to execute the deed – Grant of interim injunction by trial court – Denied by High Court – On appeal, held: Trial Court rightly granted interim injunction – Issues in respect of the contract were to be decided in arbitration proceedings – Interim measures were necessary till the conclusion of arbitration proceedings in order to prevent irreparable loss and injury to vendee – In a contract relating to immovable property, time cannot be essence of contract – Direction to the vendee to deposit the balance amount in fixed deposit in favour of vendor to be kept with the arbitrator – Contract.

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Respondent entered into agreement to sell a plot of land with the appellant. Amount towards advance was paid to the respondent at the time of execution of the agreement. Balance amount was to be paid at the time of registration of the sale deed. When the appellant came to know that the respondent was trying to sell off the property to some other party, he approached the respondent for

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execution of the deed. Respondent refused to perform its part of the contract until and unless the appellant paid the sale consideration higher than as was initially agreed upon. A

Appellant filed an application u/s 9 of Arbitration and Conciliation Act, 1996 for injunction and under O. 39 r. 1 and 2 r/w s. 151 CPC for temporary injunction seeking restraint to the respondent from alienating, altering or creating any third party interest in respect of the property. Respondent took the plea that since time was essence of the contract and the appellant having failed to perform his part of the obligation of the contract, respondent was not bound to execute the sale deed. Trial Court allowed the applications on the ground that there were serious issues required to be tried before the arbitrator; and that the appellant had successfully made out prima facie case for grant of injunction sought by him. Appeal was filed before High Court. In the meantime, arbitrator was also appointed. High Court set aside the order of trial court subject to condition that the respondent deposited the amount received as advance in fixed deposit, till the disposal of the dispute before the arbitrator. Hence the present appeal. B C D E

Partly allowing the appeal, the Court

HELD 1.1 The appellant, in the facts and circumstances of the case, had successfully made out a prima facie case for grant of injunction in the manner granted by the trial court. The respondent has not denied the agreement for sale. The only ground taken by the respondent is that since time was the essence of the contract and the appellant had failed to perform his part of the contract within the time specified in the said agreement for sale, the question of grant of injunction from transferring, alienating or creating any third party interest in respect of the property in dispute would not arise at all. [Para 11] [861-B] F G H

A 1.2 Trial Court was justified in directing the parties to
maintain status quo in the matter of transferring, alienating
or creating any third party interest as prima facie it has
been proved that the respondent was trying to sell the
property in dispute to a third party, thus alienating the
rights of the property in dispute, which would have caused
irreparable damage to the appellant. [Para 12] [863-D]

B 1.3 High Court by vacating the order of status quo
granted by the trial court, practically, had limited the scope
of the arbitration to the extent that the right of the appellant
to receive back the amount with or without compensation
would be taken away, if ultimately his allegations are found
to be true. Though, the appellant has been denied the
benefit of injunction but since the application was u/s. 9
of Arbitration and Conciliation Act, 1996 for interim
measure, to secure the interest of the appellant in the event
of his succeeding to an award before the arbitrator, it
would be in the interest of justice to put the appellant on
terms. [Para 11] [861-F]

C 1.4 If an order restraining the respondent from
creating any third party interest or from transferring the
property in dispute is not granted till an award is passed,
the appellant shall suffer irreparable loss and injury and
the entire award if passed in his favour, would become
totally negated. [Para 11] [862-E]

D *Maharwal Khewaji Trust (Regd.), Faridkot vs. Baldev
Dass AIR 2005 SC 104 – relied on.*

E 2.1 In a contract for sale of immovable property,
normally it is presumed that time is not the essence of the
contract. Even if there is an express stipulation to that
effect, the said presumption can be rebutted. To find out
whether time was essence of the contract, it is better to
refer to the terms and conditions of the contract itself.
[Para 11] [862-D-E]

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2.2 The High Court had failed to appreciate that in the contract relating to immovable property, time cannot be the essence of contract. In any event even in such a case, the arbitration clause would survive and the dispute would be required to be resolved. That being the position, pending disposal of the arbitration proceeding, interim measure to safeguard the interest was required to be taken. Since the appellant was required to furnish the nil encumbrance certificate till the date of transaction to show that there was no charge over the property and further since the property was to be kept vacant at the time of the execution of the sale deed, time cannot be held to be the essence of the contract in the facts and circumstances of the case and accordingly, the interim measure was necessary to prevent irreparable loss and injury. [Para 13] [864-B-D]

2.3 The disputes raised by the parties can only be determined by the sole arbitrator and when admittedly, an arbitrator has been appointed to decide such dispute, the parties should be directed to maintain status quo in the matter of transferring, alienating or creating any third party interest in the same till the award is passed by the sole arbitrator. [Para 17] [866-E]

3. Considering the fact that some time would be required for the arbitrator to pronounce his award wherein the question whether time was the essence of the contract or not would be required to be determined and if the parties are directed to maintain status quo in respect of the property in dispute, till such award is passed, and for that reasons, the respondent would not be entitled to transfer, alienate the property in dispute during the pendency of the Arbitration proceeding and considering the balance of convenience and inconvenience of the parties, it is proper to direct the appellant to deposit the balance amount in fixed deposit for a minimum period of six months initially in favour of the respondent and renew the same till the disposal of dispute before the Arbitrator.

- A The original fixed deposit receipt shall be kept with the arbitrator. In the event of failure of deposit of the aforesaid amount, the order of status quo, shall automatically stand vacated and the order of the High Court, vacating the order of status quo, shall immediately come into operation.
- B [Para 18] [866-F-H; 867-A-B]

Case Law Reference

AIR 2005 SC 104 Relied on. Para 11

- C CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1098 of 2009

D From the Judgement and Order dated 16.04.2007 passed by the Hon'ble High Court of Karnatak at Bangalore in M.F.A. No. 12014 of 2006 (AA) wherein the Hon'ble High Court partly allowed the appeal

R.F. Nariman, Joseph Pookkatt, Nikhil Majithia, Prashant Kumar, (M/S AP & J Chambers) for the Appellant.

Dushyant A. Dave T. Raja, Gopal Singh, for the Respondent.

- E The Judgement of the Court was delivered by

TARUN CHATTERJEE, J.

1. Leave granted.

- F 2. This appeal has been filed at the instance of the appellant by special leave against the judgment and final order of the High Court of Karnataka at Bangalore in M.F.A No. 12014/2006 (AA), dated 16th of April 2007, setting aside the order dated 23rd of September, 2006 passed by the VI Additional City Civil Judge, Bangalore, and vacating the order of status quo
- G granted on condition that the respondent shall deposit a sum of Rs.2,50,000,00/- [Rupees two crores fifty lacs] within the time specified in the impugned order.

- H 3. The facts leading to the filing of this appeal may be summarized as follows :

The respondent became the owner of Plot No.19-A, II Phase, Industrial Area, (carved Survey No. 40 and 41, Chokkasandra Village, Yeshwanthpur Hobli, Bangalore North Taluk), measuring about 10568 square meters (hereinafter referred to as the 'property in dispute') by a sale-deed dated 11th of November 2001 executed by the Karnataka Industrial Area Development Board. The appellant and the respondent entered into an agreement for sale of the property in dispute on 21st of December 2005 for a sum of Rs.6,99,04,079/- in which an advance of Rs.2,00,00,250/- (Two Crore Two Hundred Fifty Only) was paid to the respondent at the time of executing the agreement for sale. One of the stipulation in the agreement for sale was that the balance amount of the consideration money shall be paid to the respondent at the time of registration of the Sale Deed which shall be executed within sixty days from the date of execution of the agreement for sale. The agreement for sale specifically mentioned that it was the obligation of the respondent to keep the title good till the execution and registration of the sale deed and further to keep the property in dispute free from all encumbrances or charges. It was also agreed that the respondent shall pay all rates, taxes and cesses in regard to the property in dispute upto the date of sale and all dues prior to the Sale Deed. It was further agreed that in case of dispute, the same should be referred to Arbitration under the provisions of Arbitration and Conciliation Act, 1996 (in short the 'Act'). The respondent borrowed funds from KSIIDC and various other financial institutions for installation of various kinds of machineries in the factory thereby created equitable mortgage by way of deposit of title deeds with various financial institutions. It was clearly understood that at the time of registration of the sale deed, vacant and peaceful physical possession of property in dispute would be delivered by the respondent to the appellant and that the respondent would be bound to remove all plants and machineries from their factory in order to deliver possession to the appellant after clearing all its dues to the various financial institutions and keep the title deed ready. For the purpose of execution of the sale deed, the appellant started doubting its

A bona-fide and, therefore, by a letter/notice dated 18th of February 2006 called upon the respondent to execute the sale deed so that the vacant possession of the property in dispute could be delivered to him. On 20th of February 2006, the appellant received a letter from the respondent asking him to complete the sale transaction on the very next day i.e. on 21st of February 2006. After the receipt of the letter mentioned above, the appellant approached the respondent and requested the respondent to perform their part of the obligation. The respondent assured the appellant that they would require some more time to remove the machineries from the property in dispute as they were in large numbers and very huge in size. They also informed the appellant that they required some more time to make alternative arrangement of other premises where their plants and machineries could be kept as they were very expensive and involved a lot of money. As the appellant had already paid an amount of Rs.2,00,00,250/- to the respondent, he had no choice but to keep quiet. The appellant, however, having believed the version of the respondent that they had difficulty in shifting all the machineries within a short notice kept quiet till he realized that the intention of the respondent was not honest as he found that the respondent was trying to sell the property in dispute to some other party at a much higher price. Having found that the respondent was not interested to execute the sale deed as agreed upon, he approached the respondent on 21st of June, 2006 to execute the sale deed, when he also intimated the respondent that he was ready and willing to perform his part of the contract to execute the sale deed, the respondent refused to perform its part of the contract and informed that they would not execute the sale deed until and unless the appellant agreed to pay a higher sale consideration over and above what was agreed to between the parties. Having found that the respondent was trying to sell the property in dispute to a third party at a higher price, the appellant filed an application under Section 9 of the Act on 23rd of June 2006, before the City Civil Judge, Bangalore, for injunction restraining the respondent from alienating, altering or creating any third party interest in

respect of the property in dispute. With the application, the appellant also filed an application under Order 39 Rule 1 and 2 read with Section 151 CPC for temporary injunction restraining the respondent from transferring, alienating or creating any third party interest in the same. A

4. The respondent entered appearance and denied the material allegations made in the application for injunction. It was the specific case of the respondent that since time was the essence of the contract and the appellant having failed to perform his part of the obligation of the contract, the respondent was not bound to execute the sale deed and therefore, the agreement for sale was cancelled by the respondent. Accordingly, it was alleged by the respondent that the application for injunction must be rejected. B C

5. The Addl. City Civil Judge at Bangalore by his order dated 23rd of September 2006 allowed the application filed by the appellant, *inter alia*, on a finding that "there are serious issues to be tried before the arbitrator and that the appellant has successfully made out a prima facie case for grant of injunction in the manner prayed for in the application." The learned Addl. City Civil Judge, Bangalore, while disposing of the application for injunction, came to a finding prima facie that the respondent intended to sell the property in dispute to some other persons at a higher price as it was found that the intending purchasers were frequently visiting for the purpose of purchasing the property in dispute. The Addl. City Civil Judge, Bangalore, therefore, held prima facie that the respondent was likely to sell the property in dispute and if it was sold, it would make the award of the learned Arbitrator infructuous for which, the appellant shall suffer irreparable loss and injury. Accordingly, upon the aforesaid findings, the Addl. City Civil Judge, Bangalore disposed of the application for injunction directing the parties to maintain status quo in the matter of transferring, alienating and creating any third party interest in respect of the property in dispute. D E F G

6. It is against this order of Addl. City Civil Judge, H

A Bangalore, an appeal was filed by the respondent under Section 34 (1) of the Act before the High Court.

B 7. Before proceeding further, it may be kept on record that in the meantime, an application was filed under Section 11 of the Act by the appellant before the High Court for appointment of an Arbitrator. The High Court by its order dated 27th of February 2007 appointed a retired Judge of the High Court as the sole Arbitrator to decide the disputes raised by the parties.

C 8. The appeal filed by the respondent against the order of the Addl. City Civil Judge, Bangalore directing the parties to maintain status quo, was taken up for hearing by the High Court and the High Court, by its impugned order, set aside the order of the Addl. City Civil Judge, Bangalore and made a final order in the following manner :

D "1. Appeal is allowed in part.

E 2. The order dated 23.9.2006 passed by the VI Addl. City Civil Judge, Bangalore City in A.A.No.48/06 is set aside subject to the condition that the appellant deposits a sum of RS.2,50,00,000/- (Rupees two crores and fifty lakhs) only in fixed deposit for a minimum period of six months initially in a nationalized bank and renew the same till the disposal of dispute before the Arbitrator. The original fixed deposit receipt shall be surrendered to the arbitrator.

F 3. In the facts and circumstances, there shall be no order as to costs."

G 9. It is this order of the High Court, which was challenged by way of a Special Leave Petition, which on grant of leave, was heard in the presence of the learned counsel for the parties.

H 10. We have heard the learned counsel for the parties and examined the impugned order as well as the order of the trial court and also the allegations made in the application for injunction and the objections thereto in depth and in detail. The impugned order of the High Court would show that if the

respondent deposits a sum of Rs.2,50,00,000/-, the order of status quo granted by the Addl. City Civil Judge, Bangalore in the matter of transferring, alienating, altering and creating any third party interest, shall stand vacated and the application for injunction filed by the appellatant shall stand rejected. A

11. In our view, the appellatant, in the facts and circumstances of the case, had successfully made out a prima facie case for grant of injunction in the manner granted by the Addl. City Civil Judge, Bangalore. It is not in dispute that the appellatant and the respondent had entered into an agreement for sale of the property in dispute inter alia on the terms and conditions already mentioned herein earlier. The respondent has not denied such agreement for sale. The only ground taken by the respondent is that since time was the essence of the contract and the appellatant had failed to perform his part of the contract within the time specified in the said agreement for sale, the question of grant of injunction from transferring, alienating or creating any third party interest in respect of the property in dispute would not arise at all. At the same time, it must be kept in mind that it would be open to the respondent to transfer, alienate or create any third party interest in respect of the property in dispute before passing the award by the sole Arbitrator in which one of the main issues would be whether time was the essence of the contract or not. It is evident from the impugned order of the High Court that by vacating the order of status quo granted by the trial court, practically, the High Court had limited the scope of the arbitration to the extent that the right of the appellatant to receive back the amount with or without compensation would be taken away, if ultimately his allegations are found to be true. Though, the appellatant has been denied the benefit of injunction but since the application was under Section 9 of the Act for interim measure, to secure the interest of the appellatant in the event of his succeeding to an award before the arbitrator, it would be in the interest of justice to put the appellatant on terms. It is also evident from the impugned order that the High Court has made it clear that the observations in the same shall not be understood B
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A to have limited the power of the arbitrator to consider the disputes on all its aspects including grant of specific performance of the contract, but by vacating the interim relief to the appellant, the High Court had made the entire arbitration proceeding infructuous and by dint of vacation of the interim

B order of the trial Court, the respondent shall be in a position to transfer, alienate the property in dispute to a third party by which third party right shall be created and the appellant shall suffer enormous injury. Furthermore, if, at this stage, the respondent is permitted to transfer, alienate or create any third party interest

C in respect of the property in dispute, then the award, if passed in favour of the appellant by the Arbitrator, would become nugatory and it would be difficult for the appellant to ask the respondent to execute the sale deed when a third party interest has already been created by sale of the property in dispute and

D by possession delivered to the third party. In a contract for sale of immovable property, normally it is presumed that time is not the essence of the contract. Even if there is an express stipulation to that effect, the said presumption can be rebutted. It is well settled that to find out whether time was essence of the contract,

E it is better to refer to the terms and conditions of the contract itself. Further more, the High Court, in our view, has failed to appreciate that by the impugned order they have also limited the scope of arbitration if ultimately the allegations made by the appellant are found to be true. That is to say, if an order restraining the respondent from creating any third party interest

F or from transferring the property in dispute is not granted till an award is passed, the appellant shall suffer irreparable loss and injury and the entire award if passed in his favour, would become totally negated. In this connection, it is imperative to refer to a judgment of this Court in the case of **Maharwal Khewaji Trust (Regd.), Faridkot vs. Baldev Dass** [AIR 2005 SC 104 in para

G 10], which observed as follows:

H *“Unless and until a case of irreparable loss or damage is made out by a party to a suit, the court should not permit the nature of the property being changed which*

also includes alienation or transfer of the property which may lead to loss or damage being caused to the party who may ultimately succeed and may further lead to multiplicity of proceedings. In the instant case no such case of irreparable loss is made out except contending that the legal proceedings are likely to take a long time, therefore, the respondent should be permitted to put the scheduled property to better use. We do not think that in the facts and circumstances of this case, the lower appellate court and the High Court were justified in permitting the respondent to change the nature of the property by putting up construction as also by permitting the alienation of the property, whatever may be conditions on which the same is done."

12. Going by the ratio of the abovementioned decision, it is clear that the VI Addl. City Civil Judge, Bangalore, was justified in directing the parties to maintain status quo in the matter of transferring, alienating or creating any third party interest as prima facie it has been proved that the respondent was trying to sell the property in dispute to a third party, thus alienating the rights of the property in dispute, which would have caused irreparable damage to the appellant.

13. From a bare perusal of the findings of the High Court reversing the order of the trial Court and rejecting the application for injunction, it would be evident that the appellant had failed to make out a prima facie case for grant of an order of injunction in his favour. But in view of our discussions made hereinabove, we are of the view that the Additional City Civil Judge, Bangalore was fully justified in directing the parties to maintain status quo as to the nature and character of the property in dispute till the award is passed by the Sole Arbitrator as we have already held that if the order of the status quo is not granted and respondent is permitted to sell the property in dispute to a third party, complications will arise and the third party interest will be created, for which the award, if any, passed in favour of the appellant ultimately, would become nugatory. As noted herein earlier, one

A of the main issues for the purpose of deciding the application
for injunction was whether time was the essence of the contract
or not. By the impugned order, the High Court had failed to
appreciate that in the contract relating to immoveable property,
time cannot be the essence of contract. In any event even in
B such a case, the arbitration clause would survive and the dispute
would be required to be resolved. That being the position,
pending disposal of the arbitration proceeding, interim measure
to safeguard the interest was required to be taken. The High
Court also, in our view, had failed to appreciate the material on
C record as the agreement and the correspondences produced
by the parties to the effect that since the appellant was required
to furnish the nil encumbrance certificate till the date of
transaction to show that there was no charge over the property
and further since the property was to be kept vacant at the time
D of the execution of the sale deed, time cannot be held to be the
essence of the contract in the facts and circumstances of the
case and accordingly, the interim measure was necessary to
prevent irreparable loss and injury. However, the question
whether the time was the essence of the contract or not is to be
E decided by the Arbitrator in the arbitration proceeding and for
that reason only the High Court had also left open such issue to
be decided by the learned Arbitrator and in this connection, the
High Court observed as follows :-

F *"As such the contentions with regard to survivability of
the arbitration clause and the dispute as to whether time
is the essence of the contract are issues which are within
the realm of the Arbitrator and accordingly, we do not
wish to pronounce on the same and therefore, we do not
see reason to refer to the arguments and case law referred
in this regard."*

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H 14. Since the High Court had not at all gone into the question
regarding whether time was the essence of the contract or not,
it is not necessary for us to go into the question as the same
shall be decided by the Arbitrator while passing the award. As
noted herein earlier, the respondent while opposing the

application for grant of injunction, pleaded that the prayer of the A
appellant for grant of injunction in respect of the property in
dispute should be refused because admittedly, the time to
execute the deed by the appellant had expired in the meantime.
As we have already held that one of the main issues to be B
decided by the Arbitrator is whether time was the essence of
the contract or not, which was not decided by the High Court
while reversing the order of the Additional City Civil Judge,
Bangalore and in view of the fact that there is no dispute that a
sum of Rs. 2,00,00,250/- (Two Crores and Two Hundred Fifty)
has been paid by the appellant to the respondent at the time of C
execution of the agreement for sale and in view of the fact that
there is no dispute that the parties had entered into an agreement
for sale on certain terms and conditions, out of which one of the
conditions was whether the time was the essence of the contract
or not which shall be decided by the Sole Arbitrator, we do not D
find any ground as to why the order directing the status quo in
the matter of transferring, alienating or creating any third party
interest passed by the Additional City Civil Judge, Bangalore
shall not be maintained till the award is passed by the Arbitrator.
That apart, the survivability of the Arbitration clause in the
agreement was also questioned by the respondent in their
objection to the application for injunction but since that question
has also been kept open for the decision of the Arbitrator by the
High Court as well, we have no hesitation in our mind to hold
that since the said question shall also be decided by the
Arbitrator while deciding the disputes between the parties, there
is no ground why the order of status quo granted by the trial
court shall not be maintained till the award is passed by the
Arbitrator. E
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15. It is well settled that even if an agreement ceases to
exist, the Arbitration clause remains in force and any dispute
pertaining to the agreement ought to be resolved according to
the conditions mentioned in the Arbitration clause. Therefore,
in our view, the High Court was not justified in setting aside the
order of the trial Court directing the parties to maintain status
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A quo in the matter of transferring, alienating or creating any third
party interest in the same till the award is passed by the sole
Arbitrator.

B 16. It was not disputed by the High Court in the impugned
order that the respondent was trying to sell off the property in
dispute to some other third party which, in our view, would also
cause enormous loss and hardship to the appellant. It is not in
dispute that the appellant had paid a sum of Rs.2,00,00,250/-
(Two Crores and Two Hundred Fifty) as advance to the
C respondent at the time of executing the agreement for sale. At
the same time, it may not be out of place to mention that it was
the specific case of the appellant that the respondent had failed
to hand over vacant possession of the property in dispute within
the period specified in the agreement and for that reason only,
he could not perform his part of the contract.

D 17. In view of our discussions made herein above, we are
of the view that the disputes raised by the parties can only be
determined by the sole Arbitrator and when admittedly, an
Arbitrator has been appointed to decide such dispute, the
parties should be directed to maintain status quo in the matter
E of transferring, alienating or creating any third party interest in
the same till the award is passed by the sole Arbitrator.

F 18. At the same time, considering the fact that some time
would be required for the Arbitrator to pronounce his award
wherein the question whether time was the essence of the
contract or not would be required to be determined and if the
parties are directed to maintain status quo in respect of the
property in dispute, till such award is passed, and for that
reasons, the respondent would not be entitled to transfer, alienate
G the property in dispute during the pendency of the Arbitration
proceeding and considering the balance of convenience and
inconvenience of the parties, we feel it proper to direct the
appellant to deposit the balance amount of Rs.4,99,03,829/-
(Four Crores Ninety Nine Lacs Three Thousand Eight Hundred
H Twenty Nine) within a period of three months from the date of

supply of a copy of this order to the VI Additional City Civil Judge, Bangalore, in fixed deposit for a minimum period of six months initially in a nationalized bank in favour of the respondent and renew the same till the disposal of dispute before the Arbitrator. The original fixed deposit receipt shall be kept with the arbitrator. In the event of failure of deposit of the aforesaid amount, the order of status quo, as granted by the VI Additional City Civil Judge, Bangalore and affirmed by us, shall automatically stand vacated and the order of the High Court, vacating the order of status quo, shall immediately come into operation.

19. In the light of the discussions made hereinabove, we set aside the order of the High Court and restore the order of the VI Additional City Civil Judge, Bangalore subject to the conditions mentioned hereinabove.

20. For the reasons aforesaid, the appeal is allowed to the extent indicated above. There will be no order as to costs.

K.K.T.

Appeal party allowed