



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.742 OF 2019
WITH
CONTEMPT PETITION NO.275 OF 2018
WITH
INTERIM APPLICATION NO.2149 OF 2023
WITH
CIVIL APPLICATION NO.884 OF 2019
WITH
CONTEMPT PETITION NO.59 OF 2020

Shr. Kanhaiyalal Nathulal Joshi, of Mumbai	}	
(since Deceased) by his legal heirs and	}	
representatives	}	
1a. Vijay Kanhaiyalal Joshi	}	
1b. Karan Kanhaiyalal Joshi	}	
1c. Pincky Kanhaiyalal Joshi	}	
1d. Damini Kanhaiyalal Joshi	}	
1e. Nirmala Kanhaiyalal Joshi	}	
All having their address at C/2504,	}	
Oberoi Garden, Thakur Village,	}	
Kandivali East, Mumbai-400101.	}	} Appellants/ Orig. Defendants

Versus

Jagdish Harkishan Sharma	}	
Age 60 years, occupation : retired of Mumbai	}	
having his office at D-1/726, Omkar CHS Ltd.,	}	
Sector 7, Charkop, Kandivali (West),	}	
Mumbai-400 067.	}	}Respondent/ Orig. Plaintiff

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Mr. Navroz Seervai, Senior Advocate, Mr. Owen Menezes, Ms. Lizum Wangdi, a/w Ms. Meenakshi Pahuja i/by ANB Legal.

Mr. Simil Purohit a/w Mr. Arshil Shah, Mr. Vishal Raman, Ms. Parisha Shah, Mr. Smita Durve, Mr. Rasesh Shah i/by Mr. Atul Singh, Advocates for Respondent in AO/742/2019 & CP/275/2018.

Mr. Vaibhav Joglekar, Senior Advocate a/w Ms. Mily Ghoshal i/by Mily Ghoshal, Advocates for the Applicant in IA/2149/2023.

Mr. Vishal Kanade i/by Mr. Shashank C. Thatte, Mr. Yuvraj Takale, Advocates for Petitioner in CP/275/2018.

Mr. J.M. D'Silva a/w Ms. Jacqueline D'Silva, Advocates for Petitioner in CP/59/2020.

Ms. Smita Tondwalkar, Advocate for MCGM.

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CORAM : SANDEEP V. MARNE, J.

RESERVED ON : 31 OCTOBER 2023

PRONOUNCED ON : 08 NOVEMBER 2023

JUDGMENT

1. The Appeal challenges the Order dated 24 August 2017 passed by the City Civil Court allowing Notice of Motion No. 3929 of 2016 filed by Plaintiff-Respondent for grant of temporary injunction. By the impugned order, the City Civil Court has restrained the Appellant-Defendant from dealing with, disposing of or creating any third party rights/interests or encumbrances in the suit property or allowing any

third party to enter upon the suit property and from collecting rent from the tenants. The City Civil Court has further restrained the Appellant-Defendant from acting upon the Deed of Assignment and Transfer dated 21 October 2013. The Municipal Corporation is directed to stay the process of issuing development permission in favour of the Appellant- Defendant during the pendency of the suit. The City Civil Court has however recorded an undertaking on behalf of the Plaintiff that he would pay monthly temporary accommodation amounts and other statutory amounts to the tenants during the pendency of the suit.

2. The dispute between the parties is with regard to property bearing Plot No.169, Jawahar Nagar Road No.2 Goregaon (West), Mumbai 400 062 admeasuring 790.90 square meters bearing CTS No. 600, 600/1 to 16 together with building standing thereon known as 'Sharda Niwas' consisting of ground plus one floor having carpet area of 8255 square feet with 5 shops and 23 rooms / tenements in occupation of tenants/occupants (Suit Property). Mr. Shyamlal Ramswaroop Sharma was a registered lessee in respect of the suit property and after his death his legal heirs Smt. Ramrati, Subhash, Navin and Anil had agreed to sell the suit property to the Appellant-Defendant for consideration of Rs. 21,75,000/- and accordingly Articles of Agreement dated 01 March 2000 was executed. Defendant had issued 4 cheques of Rs. 2,50,000/- towards earnest money and according to the Plaintiff, one out of the 4 cheques was dishonoured. It is Plaintiff's case that despite Smt. Ramrati writing to the Defendant to pay the amount of dishonoured cheque and also the balance amount of consideration, Defendant failed to do so. Smt. Ramrati, therefore, terminated the Articles of Agreement dated 01 March 2000 and called

upon Defendant to take back the earnest money of Rs. 7,15,000/-. Later, the heirs of late Shyamlal Ramswaroop Sharma (Ramrati, Subhash, Navin and Anil), who were by then armed with Letters of Administration issued by this Court, executed registered Deed of Conveyance in respect of the suit property in favour of the Plaintiff on 28 August 2001.

3. It is Plaintiff's case that in March 2002, he was abducted by the Defendant and by giving a threat of life, his signatures and initials were taken on blank papers. In similar manner, signatures and initials of Plaintiff's wife were also taken on blank papers. That no consideration was paid to the Plaintiff. In the meantime, Plaintiff applied for transfer of Share Certificate in his name in the records of the society, which issued a Public Notice in the newspapers. Defendant's Advocate raised an objection to the Public Notice stating that Deed of Conveyance-cum-Assignment and Power of Attorney, both dated 15 March 2002, were executed by Plaintiff in Defendant's favour in respect of the suit property. It is Plaintiff's case that despite requisition by the society, Defendant failed to produce Deed of Conveyance-cum-Assignment and Power of Attorney before the society, which therefore transferred the membership in respect of the suit property in the name of the Plaintiff. It is Plaintiff's case that he started collecting rent from the tenants and one of the tenants of Shop no.2 surrendered the tenancy in his favour in April 2005. Plaintiff avers that on 08 September 2005, Defendant's Advocate wrote to the heirs of late Shyamlal Ramswaroop Sharma showing readiness and willingness of the Defendant to perform the obligations under the Agreement dated 01 March 2000 and called upon them to complete the sale transaction. It is Plaintiff's case that if

the Defendant had indeed become owner of the suit property by virtue of alleged Deed of Conveyance-cum-Assignment dated 15 March 2002, there was no need for him to seek specific performance of the earlier Agreement dated 01 March 2000 executed with the heirs of Mr. Shyamlal Ramswaroop Sharma. Plaintiff claims that he started the process of re-development of the suit property by obtaining various NOCs and permissions from society and various other authorities in the year 2006. At this juncture, Plaintiff claims that while carrying out search in the City Survey Office and Registrar of Assurances, he came across Registered Deed of Confirmation dated 08 September 2006 confirming the execution of the Deed of Conveyance-cum-Assignment and Power of Attorney dated 15 March 2002. Plaintiff claims that the Deed of Confirmation was executed and registered by Defendant alone in absence of Plaintiff without payment of any consideration to him.

4. In the above background, Plaintiff instituted Suit No. 3400 of 2006 in this Court against the Defendant seeking following reliefs:

(a) That this Hon'ble Court be pleased to declare that purported Deed of Confirmation dated 8th September 2006 (Ex 'L'), Deed of Conveyance and Assignment dated 15th March 2002 (Ex. 'M') and General Power of Attorney dated 15th March 2002 (Ex. 'N') are illegal, null and void.

(b) Defendant be ordered by this Hon'ble Court to deliver the said documents Exhibits 'L' 'M' and 'N' to this Hon'ble Court for cancellation and the same be ordered and decreed to be cancelled.

b(i) That this Hon'ble Court be pleased to pass an order of permanent injunction thereby restraining the defendant from disturbing the possession of the Plaintiff and/or entering upon the suit property and/or interfering with the

use/occupation of the Plaintiff and/or his representation in respect of the suit promises and/ or obstructing the Plaintiff and his authorized representative from entering or remaining upon or developing the suit property and/or in any manner dealing with or disposing of or creating third party rights/interest in respect of the suit property and/or collecting rent from the tenants. of the suit building and/or accepting any surrender of tenancy and/ or transferring tenancy.

(c) In the alternative to prayer (b) above, it be declared that the purported writings (Exs. 'L', 'M' and 'N') have not been acted upon and will not be acted upon;

(d) That pending the hearing and final disposal of the suit, Defendant by himself, his servants and agents be restrained by an order and injunction of this Hon'ble Court;

(i) from in any manner dealing with, disposing of or creating any third party rights or interest or encumbrance on the suit property or any part thereof or allowing any third party to enter upon and remain in or collecting rent from tenants of the suit building 'Sharda Niwas'

(ii) from in any manner entering upon the suit property or obstructing the Plaintiff and his authorized representatives from entering or remaining upon or developing the suit property.

(e) For ad interim relief in terms of the prayer (d) b (I) above.

(f) For costs of the suit;

(g) Such further and other reliefs be granted to the Plaintiff as this Hon'ble Court deems fit and proper in the nature and circumstances of the case

5. The Plaintiff also took out Notice of Motion No.4275 of 2006 seeking restraint order against Defendant from mutating his name in respect of suit property in the record of rights of the land. By Order dated 18 December 2006, this Court observed that orders passed by the City Survey Officer would be subject to the orders passed by this Court in the Notice of Motion and granted liberty to the Plaintiff to apply for ad-interim reliefs in the event of City Survey Officer passing any order against him. Plaintiff thereafter instituted Notice of Motion No. 4275 of 2006 as City Survey Officer had not passed order in his favour. Defendant filed a written statement in the suit *inter alia* stating that he did not intend to sell/assign or create third party rights in respect of the suit property.

6. On 02 September 2008, Defendant took out the Notice of Motion No.2683 of 2008 challenging the order of City Survey Officer. This Court directed the City Survey Officer to decide the application of the Defendant on merits. By order dated 23 December 2009, the City Survey Officer mutated the name of the Defendant to the suit property. Plaintiff therefore took out Notice of Motion no. 343 of 2009 seeking the following prayers:-

Pending the hearing and final disposal of the suit, defendant by himself, his servants and agents be restrained by an order and injunction of this Hon'ble Court:

(i) from in any manner dealing with, disposing of or creating any third party rights or interest or encumbrance on the suit property or any part thereof and/or collecting rent from tenants of the suit building "Sharda Niwas" and/or accepting surrender of tenancy or transferring tenancy;

(ii) from in any manner entering upon the suit property or obstructing the Plaintiff and his authorized representatives from entering or remaining upon or developing the suit property and/or from in any manner remove the Board of the Plaintiff displayed upon the suit property;"

7. After hearing both the sides, this Court dismissed Notice of Motion No. 343 of 2009 by passing order dated 08 February 2010. Plaintiff filed Appeal No.139 of 2010 challenging the order of learned Single Judge of this Court dated 08 February 2010. However, when the Appeal came up for hearing on 13 July 2010, Plaintiff withdrew the Appeal with liberty take out Notice of Motion after amending the suit. Plaintiff thereafter amended the suit by including a prayer for permanent injunction and possession. The Suit filed by the Plaintiff came to be transferred to the City Civil Court on account of increase of pecuniary jurisdiction of the City Civil Court and came to be numbered as Suit no. 7411 of 2006.

8. On 21 October 2013, Defendant assigned 50% share in the suit property to one Mr. Vallabh V. Italia by way of registered Deed of Assignment and Transfer. In the meantime, the Municipal Corporation of Greater Mumbai (**MCGM**) issued Notice under Section 354 of the Mumbai Municipal Corporation Act, 1888 for vacating the building which had become dilapidated. The tenants building 'Sharada Niwas', who faced threat of eviction, sought to intervene in the Suit to seek relief against eviction. It seems that City Civil Court refused to grant interim relief in favour of the tenants. The tenants therefore filed Appeal from Order No.969 of 2015 dated 14 August 2015 before this Court, which granted 120 days' time to the tenants to vacate the

premises and to hand over possession of tenanted premises to the Defendant. Plaintiff got aggrieved by direction of this Court to hand over possession of tenanted premises to Defendant and filed Civil Application No. 1263 of 2015, which was rejected vide order dated 11 December 2015 as not maintainable. The Defendant claims that the tenants have executed Memorandum of Understanding with him for re-development of the property. Accordingly, the building 'Sharda Niwas' was demolished by MCGM in May 2016. The Defendant submitted plans for construction of building at the Plot and MCGM has issued Intimation of Disapproval (**IOD**) in Defendant's name on 06 August 2016.

9. It is at this juncture that Plaintiff took out Notice of Motion No.3929 of 2016 before the City Civil Court seeking following prayers:-

a. That pending the hearing and final disposal of the Suit, this Hon'ble Court be pleased to pass an order of temporary injunction against the Defendant, his servants and agents from in any manner dealing with, disposing of or creating any third party rights or interest or encumbrance on the Suit Property or any part thereof or allowing any third party to enter upon and remain in or collecting rent from tenants of Suit Property;

b. That Pending the hearing and final disposal of the Suit, the Defendant be restrained from in any manner acting upon the suppressed Deed of Assignment and Transfer dated 21st October, 2013 executed by the Defendant without the permission of this Hon'ble Court;

c. That pending the final hearing and disposal of the present Suit, this Hon'ble Court be pleased to direct the Respondent Corporation to stay the process of the proposal for Redevelopment as submitted by the Defendant and/or his representative and / or agent and/or servant under File No.

CHE/WSII/0887/P/S/337(NEW) as also Stay the effect of I.O.D. Issued in favor of Defendant, if any;

d. That the Defendant be Ordered and Directed to deposit the said account of Rs.50,00,000/- (Rupees Fifty Lakhs Only) received by it under the suppressed Deed of Assignment and Transfer dated 21st October, 2013 executed by the Defendant without the permission of this Hon'ble Court;

10. The Motion was resisted by Defendant by filing Affidavit in Reply. By order dated 09 November 2016, the City Civil Court proceeded to allow the Notice of Motion. Defendant challenged order dated 09 November 2016 before this Court by filing Appeal from Order (stamp) No. 32630 of 2016 (later numbered as Appeal from Order No. 74 of 2017). By Order dated 13 December 2016, this Court stayed the City Civil Court's order while admitting the Appeal. However, when the Appeal from Order No. 74 of 2017 came up for hearing on 16 June 2017, the order dated 09 November 2016 passed by the City Civil Court was set aside with consent and Notice of Motion no.3929 of 2016 was restored on the file of City Civil Court. This Court directed the Motion to be decided on its own merits uninfluenced by the order passed by City Civil Court dated 09 November 2016 or by any order passed in the Appeal.

11. Accordingly, the City Civil Court proceeded to hear Notice of Motion no.3929 of 2016 afresh and decided the same by order dated 24 August 2017, which is subject matter of challenge in the present Appeal. Operative portion of the order dated 24 August 2017 passed by the City Civil Court reads thus:

The Notice of Motion is made absolute in following terms with no order as to costs.

1. *The prayer clause (d) of the Notice of motion stands rejected.*

2. *The Notice of motion is made absolute in terms of prayer clauses (a), (b) and (c) thereby -*

i. *pending the hearing and final disposal of the Suit, the Defendant, his servants and agents are restrained from in any manner dealing with, disposing of or creating any third party rights or interest or encumbrance on the Suit Property or any part thereof or allowing any third party to enter upon and remain in or collecting rent from tenants of Suit Property;*

ii. *pending the hearing and final disposal of the Suit, the Defendant is restrained from in any manner acting upon suppressed Deed of Assignment and Transfer dated 21.10.2013.*

iii. *pending the hearing and disposal of the present Suit, the Respondent MCGM is directed to stay the process of the order in File No. CHE/WSII/0887/P/S/337(NEW) as also Stay the effect of I.O.D. and C.C. issued in favor of Defendant, if any and/or the defendant or any person through the defendant is directed not to act upon the said order till the disposal of the Suit.*

3. *The plaintiff, as undertaken by him, is directed to pay the monthly temporary accommodation amount or other statutory amount, to which the tenants in the suit premises are legally and lawfully entitle for, to the tenants to whom the defendant was paying the said amount as per the list filed by the defendant and also continue to pay the same to the other tenants to whom the plaintiff alleged to have paying the same and file the quarterly report of the compliance of the same.*

12. Mr. Seervai, the learned Senior Advocate would appear on behalf of the Appellant-Defendant and submit that the City Civil Court has committed an egregious error in allowing Notice of Motion

no.3929 of 2016 and has granted same reliefs, which were once rejected by Mohta J. by order dated 08 February 2010. That there was no occasion or good reason for Plaintiff to seek the very same interim relief, which has already been rejected by Mohta J. That the limited liberty granted by this Court by order dated 08 February 2010 was to file fresh Notice of Motion only for the purpose of collection of rent. The order dated 08 February 2010 attained finality in view of withdrawal of the Appeal on 13 July 2010. That this position is confirmed by another Single Judge of this Court by order dated 22 January 2013. That, the since the order dated 08 February 2010 passed by Mohta, J. attained finality, it was not open for Plaintiff to take out one more Notice of Motion seeking reliefs which were already rejected by this Court. That the prayers in Notice of Motion no.3929 of 2016 were clearly barred by the principles of *res judicata*. Mr. Seervai would invite my attention to the order passed by Kulkarni, J. on 13 December 2016 while allowing Civil Application filed in Appeal from Order no.74 of 2017. That stringent observations were made by Kulkarni J. while staying the earlier order dated 09 November 2016 passed by City Civil Court allowing Notice of Motion no. 3929 of 2016. That, despite such strong observations, the learned Judge of the City Civil Court has again shown the audacity to pass the very same order and commit the very same mistake, which was committed by his predecessor while passing order dated 09 November 2016. Mr. Seervai would therefore submit that the order passed by the City Civil Court suffers from judicial impropriety and deserves to be set aside.

13. Mr. Seervai would further submit that the learned Judge of the City Civil Court has incorrectly applied the provisions of Order 39

Rule 4 of the Code of Civil Procedure, 1908 (**the Code**) ignoring the fact that there was never any interim injunction granted in Plaintiff's favour and therefore, there was no question of modifying or varying the same. He would submit that the learned Judge of the City Civil Court erroneously held that that Notice of Motion no. 3929 of 2016 was filed pursuant to the leave granted by Mohta, J. vide judgment dated 08 February 2010. That the finding recorded by the learned Judge about registration of Deed of Confirmation not having the effect of registration of Conveyance Deed is in the teeth of settled legal position in view of Judgments of this Court in ***Mahendra Vajeth Vs. National and Electronic Company*** (2019) 5 MHL.J. 795, ***Nimesh J Patel Vs. MCGM*** (2021) MJ online 6588 and ***Ashapura Ramdev Buildcon LLP Vs. State of Maharashtra*** Manu/2044 M 2023.

14. Mr. Seervai would further submit that the learned Judge of the City Civil Court has virtually conducted mini trial while deciding application for temporary injunction and has reversed the burden of proof on the Defendants. That his findings about prohibition under Section 52 of the Transfer of Property Act with regard to the Assignment Deed executed by Defendant in the year 2013 is totally erroneous as Defendant was free to deal with the property once Notice of Motion filed by Plaintiff was rejected by Mohta, J. vide order dated 08 February 2010. That, the nature of interim relief granted travelled outside the scope of the Suit as the learned Judge has restrained MCGM from processing or issuing development permission, even though MCGM is not party to the suit. Mr. Seervai would also highlight the conduct of the Plaintiff who has breached his undertaking by not paying rent to the tenants after passing of the impugned order.

That therefore the interim protection granted in favour of the Plaintiff deserves to be vacated considering the conduct of Defendant No.1. Mr. Seervai would therefore pray for setting aside the order dated 24 August 2017 passed by the learned Judge of the City Civil Court.

15. Mr. Purohit, the learned counsel would appear for the Plaintiff-Respondent to oppose the Appeal. He would support the Order passed by the City Civil Court by taking me through the factual background under which the Deed of Conveyance is shown to have been executed by Plaintiff in Defendant's favour. That Defendant, who was to purchase the suit property from heirs of late Shyamlal Ramswaroop Sharma for Rs. 21,75,000 in the year 2000, claims to have purchased it from Defendant for Rs. 2,50,000 two years later. That there is no proof of any payment being made to Plaintiff. That Defendant's letter dated 08 September 2005 sent to the heirs of late Shyamlal Ramswaroop Sharma showing readiness and willingness perform the obligations under the Agreement dated 01 March 2000 would leave no manner of doubt that Conveyance Deed with forcible signatures of Plaintiff and his wife, did not have the effect of assignment of the property in Defendant's favour. That no prudent person would do so unless he is certain that no rights are acquired through the alleged Deed of Conveyance executed by Plaintiff.

16. Mr. Purohit would submit that the order passed by the Mohta, J. on 08 February 2010 did not attain finality in view of the Order passed by the Appellate Court granting liberty to the Plaintiff to take out Notice of Motion in the suit after amending it. That though Mohta, J. had restricted the ambit of fresh Notice of Motion only for recovery of

rent, the Appeal Court granted expanded the same by granting liberty to Plaintiff to take out Notice of Motion without any restriction. That if the liberty was to be restricted only for rent liability, the Appeal could have been simply disposed of without any liberty as liberty granted by Mohta J. was already there. He would submit that the fresh Notice of Motion was required to be taken up on account of two factors viz. execution of Assignment Deed contrary to the statement made in the written statement and liberty granted by the Appeal Court.

17. Mr. Purohit would then invite my attention to the Deed of Confirmation, which bears a specific stamp with endorsement that Deed of Conveyance and Power of Attorney are not registered. He would submit that the Deed of Confirmation is executed by Defendant in his own favour and that Plaintiff never confirmed execution of Deed of Conveyance nor has admitted its execution before the Sub-Registrar. That therefore the Deed of Confirmation cannot have the effect of confirmation of the Deed of Conveyance or its registration. That all the three judgments relied upon by Mr. Seervai relate to the case of both parties executing and registering the Deed of Confirmation for confirming the earlier transactions.

18. Mr. Purohit would further submit that the Defendant cannot be permitted to place reliance on order passed by the Kulkarni J. on 13 December 2016 in view of specific clarification issued by the Patel J. in order dated 16 June 2017 directing that the City Civil Court shall not be influenced by 'any order passed in the Appeal'. That, the Appellant-Defendant has not pleaded in the present Appeal that the point of Order 39 Rule 4 was never argued before the City Civil Court. Mr. Purohit

would further submit that fresh Notice of Motion was required to be filed as the Defendant was about to change the nature of property. That when the title of Defendant itself is in dispute, the nature of property is required to be preserved, which is exactly done by the learned Judge of the City Civil Court. He would submit that the suit has progressed substantially, and the Plaintiff's evidence is complete. He would submit that instead of disturbing the injunction order passed on 24 August 2017, this Court may request the City Civil Court decided the suit in an expeditious manner.

19. So far as the undertaking for payment of rent to the tenants is concerned, Mr. Purohit would submit that Plaintiff has obtained eviction decree against 2/3 tenants and the rest of the tenants were called upon to execute Permanent Alternate Accommodation Agreements (**PAAA**) with the Plaintiff and since they did not cooperate for execution of PAAA, the rent could not be paid to them by Plaintiff. That Plaintiff is always ready and willing to pay arrears of rent to the tenants.

20. In rejoinder, Mr. Seervai would submit that except the Deed of Assignment, everything that Mr. Purohit has argued was already argued before the Mohta, J. while passing order dated 08 February 2010 and that there is no change in circumstances. He would submit that Power of Attorney empowered the Defendant to execute the Deed of Confirmation and therefore, the Deed of Confirmation cannot be treated as unilateral as sought to be suggested by Mr. Purohit.

21. I have also heard Mr. Joglekar, the learned senior advocate for Applicants in IA which filed by tenants complaining about breach of undertaking by Plaintiff by not paying rent to them. He would rely on Apex Court judgment in ***Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond and Gem Development Corporation Limited and Another.***¹ Mr. Kanade would appear on behalf of the Petitioner in Contempt Petition No. 275/2018 and submit that the Petitioners, being legal heirs of the deceased tenant are not being recognized by Plaintiff, who has paid no amount to them towards rent. He would rely on Order dated 13 December 2017 passed by this Court directing Plaintiff to pay arrears of rent to all dishoused tenants. I have also heard Mr. D'Silva the learned counsel appearing for Petitioners in Contempt Petition No. 59/2020, who would submit that his clients are not being paid rent.

22. Mr. Purohit would oppose the Interim Application as not maintainable and also by accusing the Defendant of setting up the Applicants for pressurizing the Plaintiff. He would submit that Defendant is deliberately delaying the decision of the Suit to bring Plaintiff to terms. He would however submit that the Plaintiff is willing to pay the arrears of rent to the recognized tenants. To show *bona fides*, he would hand over to the Petitioner in Contempt Petition No. 275/2018 a Pay Order of amount of Rs. 16 odd Lakh.

23. Rival contentions of the parties now fall for my consideration.

¹ (2013) 5 SCC 470.

24. Both Plaintiff and Defendant stake claim to the suit property in their capacity as owners. Plaintiff's claim to ownership of the suit property is premised on Registered Deed of Conveyance dated 28 August 2001 executed by the erstwhile owner (heirs of late Mr. Shyamlal Ramswaroop Sharma). On the other hand, Defendant stakes ownership claim to the suit property on the strength of Deed of Conveyance and General Power of Attorney dated 15 March 2002 executed by the Plaintiff in Defendant's favour the registered Deed of Confirmation dated 08 September 2006 executed by the Defendant on the basis of the Power of Attorney. There is great deal of debate between the parties as to whether Deed of Confirmation dated 08 September 2006 would have the effect of registration of the Conveyance Deed dated 15 March 2002. I shall advert to that debate little later. Thus, Defendant's claim of ownership in respect of the suit property is based on the title passing through the original owners (heirs of late Mr. Shyamlal Ramswaroop Sharma) on to Plaintiff vide registered Deed of Conveyance dated 28 August 2001 and then to the Defendant vide Conveyance Deed dated 15 March 2002 as confirmed vide Confirmation Deed dated 08 September 2006. Plaintiff denies having executed either the Conveyance Deed or Power of Attorney on 15 March 2002. Plaintiff filed Suit No. 3400 of 2006 initially before this Court, which has subsequently been transferred to the City Civil Court and registered as Suit no.7411 of 2006. Plaintiff has sought declaration that the Deed of Confirmation dated 08 September 2006, Deed of Conveyance-cum- Assignment and General Power of Attorney dated 15 March 2002 are illegal, null and void. The Plaintiff has amended the suit by incorporating the prayers for recovery of possession and permanent injunction. However, it appears that after

execution of the Deed of Assignment and transfer dated 21 October 2013 executed by the Defendant assigning 50% share in development rights of the suit property in favour of Mr. Vallabh V. Italia, Plaintiff has not amended the suit to incorporate challenge to the Deed of Assignment and Transfer dated 21 October 2013.

25. Correctness of the order dated 24 August 2017 passed by the learned Judge of the City Civil Court in Notice of Motion No. 3929 of 2016 is the subject matter of challenge in the present appeal. As observed above, this is second order passed in Notice of Motion no.3929 of 2016. The earlier order dated 09 November 2016 passed by the learned Judge of the City Civil Court allowing Notice of Motion no.3929 of 2016 has been set aside by consent and the Notice of Motion was restored for being heard and decided afresh. In the second round, the learned Judge of the City Civil Court as proceeded to make the Notice of Motion absolute in terms of prayer clauses (a), (b) and (c) thereof, while recording undertaking of Plaintiff to pay rent to tenants during pendency of the Suit.

26. It is Appellant's contention that since prayer for temporary injunction was already rejected by Mohta, J by order dated 08 February 2010, it was not open for the learned Judge of the City Civil Court to grant very same reliefs after 7 years without any substantial change of circumstances. Since the learned Judge of the City Civil Court was facing a situation where temporary injunction was denied by this Court on 08 February 2010, he appears to have invoked provisions of Order 39 Rule 4 of the Code while deciding the Notice of Motion No. 3929 of 2016. The learned Judge has held that under provisions of Order 39

Rule 4 of the Code, an order of injunction can be discharged, varied or set aside subject to the satisfaction of the Court. It is by relying on the provisions of Order 39 Rule 4 of the Code that the learned Judge has held the Notice of Motion no.3929 of 2016 to be maintainable and that it was not barred by the principles of *res judicata*. It would be necessary to reproduce provisions of Order 39 Rule 4 of the Code which provide thus:

Order XXXIX

Rule 4: Order for injunction may be discharged, varied or set aside.-

Any Order for an injunction may be discharged, or varied, or set aside by the court, on application made thereto by any party dissatisfied with such order:

Provided that if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice:

Provided further that where an Order for injunction has been passed after giving to a party an opportunity of being heard, the Order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the court is satisfied that the Order has caused undue hardship to that party.

27. Rule 4 of Order 39 begins the word ‘*any order for an injunction*’. Thus, what can be discharged, varied or set aside by the Court is essentially an ‘order for an injunction’. Rule 4 of Order 39 is applicable only in situations where there is already an order of injunction. The Order of injunction already passed can be discharged

or varied either on noticing that the same was obtained by making a false statement or that there is a change in circumstance. However, *sine qua non* for exercising jurisdiction under Order 39 Rule 4 is existence of an order of injunction. In the present case, it is an admitted position that an order of injunction was never granted in Plaintiff's favour at any point of time. Therefore, there was no question of discharging, varying or setting aside a non-existing order of injunction. It therefore incomprehensible as to how the learned Judge of the City Civil Court could have invoked the provisions of Rule 4 of Order 39 of Code for the purposes of entertaining Notice of Motion No. 3929 of 2016 for granting temporary injunction in Plaintiff's favour.

28. While I hold that provisions of Order 39 Rule 4 of the Code could not have been invoked for grant of temporary injunction, which was once rejected, I do not propose to lay down an absolute proposition that once an application for temporary injunction is rejected, Plaintiff is precluded from applying for the same at any point of time during pendency of the suit. It all depends on facts and circumstances of each case. In a given case, the Court may reject the application for temporary injunction to restrain Defendant from dispossessing Plaintiff by recording a finding that no attempt was made by the Defendant to disturb Plaintiff's possession. However, if subsequently Plaintiff files an application and demonstrates before the Court that his possession is indeed disturbed, the Court is not precluded from entertaining a subsequent application for grant of temporary injunction on account of change of circumstances. Under second Proviso to Order 39 Rule 4, it is permissible to vary, modify or discharge an order of injunction already passed on the ground of

change in circumstances. Therefore there can be no impediment in considering the application for temporary injunction filed in view of due change in circumstances after rejection of earlier application. In the present case, Mr. Purohit has submitted that two factors essentially necessitated filing of Notice of Motion No. 3929 of 2016, viz execution of Deed of Assignment and Transfer dated 21 October 2013 and liberty granted by this Court to file a fresh Notice of Motion. Thus, change in circumstances on account of occurrence of a subsequent event in the form of execution of Deed of Assignment and Transfer dated 21 October 2013 is sought to be cited as a reason for filing of Notice of Motion no.3929 of 2016. Perusal of Affidavit filed in support of Notice of Motion No.3929 of 2016 would indicate that the Defendant had applied for permission for re-development of the suit property in association with Mr. Vallabh V. Italia. It appears that the Municipal Corporation had granted IOD on 06 August 2016. Thus the Notice of Motion no.3929 of 2016 was filed by the Plaintiff in view of change in circumstances where the Defendant was about to change the nature of the suit property by carrying out constructions in pursuance of the development permission processed by the Municipal Corporation.

29. In addition to the change in circumstances, liberty granted by this Court to take out a fresh Notice of Motion is also cited as a valid reason for maintainability of fresh application for temporary injunction. Here there is great degree of debate between the parties about what was the scope and ambit of the liberty granted by the learned Single Judge of this Court and Appeal Court. So far as the liberty granted by the Mohta, J. is concerned, there appears to be no

difficulty as that liberty was specifically restricted only in respect of collection of rent. However, when order of Mohta, J. was challenged before the Appeal Court, while permitting withdrawal of the appeal, the Appeal Court granted liberty to take out Notice of Motion in the Suit after amending the suit. The order passed by the Appeal Court on 13 July 2010 is reproduced below:

*On the request of Learned Counsel for the appellant, Appeal allowed to be withdrawn with liberty to take out Notice of Motion in the suit after amending the suit.
Notice of Motion 705 of 2010 disposed of*

30. Mr. Seervai has contended that the liberty granted by the Appeal Court on 13 July 2010 did not envisage taking out fresh Notice of Motion for seeking same reliefs which were rejected by Mohta, J. Mr. Seervai appears to be right in his contention, as withdrawal of the Appeal would mean confirmation the order passed by Mohta, J. On the contrary, Mr. Purohit has contended that even if the appeal was to be simply withdrawn, the liberty granted by Mohta, J. to take out Notice of Motion for collection of rent would have otherwise survived and that therefore, there was no necessity for the Appeal Court to grant another liberty vide order dated 13 July 2010. However, I am not able to accept the contention of Mr. Purohit since acceptance of his contention would tantamount to virtually negating order passed by the Mohta, J. by mere withdrawal of the Appeal. Once the appeal against order of Mohta, J. is withdrawn, the entire order attained finality and Plaintiff got debarred from filing another application seeking same reliefs on same circumstances. As of 13 July 2010, no change in

circumstances had occurred and therefore, fresh Notice of Motion envisaged in Order dated 13 July 2010 did not mean taking out another Notice of Motion seeking same reliefs which were rejected by Mohta, J. on 08 January 2010.

31. It is also required to be borne in mind that the liberty granted by the Appeal Court on 13 July 2010 was to take out Notice of Motion after amending the suit. It is common ground that after Order dated 13 July 2010, the only amendment carried out by Plaintiff was to add a prayer for permanent injunction and possession. After amending the suit on 28 November 2011, Plaintiff did not take out any motion in pursuance of the liberty granted by the Appeal Court for a considerable period of time. Notice of Motion No.3929 of 2016 came to be filed by the Plaintiff on or about 15 October 2016 i.e. 6 years after grant of liberty by the Appeal Court. It is therefore difficult to accept that Notice of Motion No.3929 of 2016 could have been filed in pursuance of liberty granted by the Appeal Court on 13 July 2010.

32. However, since the circumstances changed by the year 2016, when Defendant in association with Mr. Vallabh started the process of re-development of the suit property by obtaining IOD from Municipal Corporation, in my view, Plaintiff was justified in filing Notice of Motion no.3929 of 2016. Therefore, though the filing of Notice of Motion No.3929 of 2016 cannot be justified either by resorting to the provisions of Order 39 Rule 4 of the Code or by relying on the liberty granted by the Appeal Court in order dated 13 July 2010, filing of the said motion was justified on account of change of circumstances in the

year 2016. I therefore held that Notice of Motion No.3929 of 2016 filed by the Plaintiff was maintainable.

33. The next issue is correctness of the injunctive reliefs granted by the learned Judge of the City Civil Court in Notice of Motion no.3929 of 2016. Mr. Seervai has raised strong objection to the approach of the learned Judge of the City Civil Court in deciding very same prayers that were once rejected by Mohta, J. According to Mr. Seervai, such an approach is against propriety. Though prayers in Notice of Motion Nos. are 343 of 2009 and 3929 of 2016 have already reproduced separately, it would be appropriate to place them against each other in chart below, for comparative purposes:-

Notice Of Motion No.343 of 2009

Pending the hearing and final disposal of the suit, defendant by himself, his servants and agents be restrained by an order and injunction of this Hon'ble Court:

(i) from in any manner dealing with, disposing of or creating any third-party rights or interest or encumbrance on the suit property or any part thereof and/or collecting rent from tenants of the suit building "Sharda Niwas" and/or accepting surrender of tenancy or transferring tenancy;

Notice Of Motion No.3929 OF 2016

(a) pending the hearing and final disposal of the Suit, the Defendant, his servants and agents are restrained from in any manner dealing with, disposing of or creating any third party rights or interest or encumbrance on the Suit Property or any part thereof or allowing any third party to enter upon and remain in or collecting rent from tenants of Suit Property;

(b) pending the hearing and final disposal of the Suit, the Defendant is restrained from in any manner acting upon the suppressed Deed of Assignment and Transfer dated 21st October 2013 executed by the

(ii) from in any manner entering upon the suit property or obstructing the Plaintiff and his authorized representatives from entering or remaining upon or developing the suit property and/or from in any manner remove the Board of the Plaintiff displayed upon the suit property;

Defendant without the permission of this Hon'ble Court;

C. That pending the final hearing and disposal of the present Suit, this Hon'ble Court be pleased to direct the Respondent Corporation to stay the process of the proposal for Redevelopment as submitted by the Defendant and/or his representative and / or agent and/or servant under File No. CHE/WSII/0887/P/S/337(NEW) as also Stay the effect of I.O.D. Issued in favor of Defendant, if any;

D. That the Defendant be Ordered and Directed to deposit the said account of Rs.50,00,000/- (Rupees Fifty Lakhs Only) received by it under the suppressed Deed of Assignment and Transfer dated 21st October, 2013 executed by the Defendant without the permission of this Hon'ble Court;

34. It thus clearly appears that both Notice of Motion Nos. 343 of 2009 and 3929 of 2016 sought the relief for restraining the Defendant by an order of temporary injunction from creating third party rights and from developing the suit property. Plaintiff had specifically sought temporary injunction against the Defendant in the year 2009 from developing the suit property. It is Defendant's case that he was free to develop the suit property on account of rejection of that relief sought in Notice of Motion No.343 of 2009. Same applies to the relief of creation of third-party rights. After Plaintiff's Motion No.343 of 2009

got rejected, Defendant was free both to create third party rights in the suit property and also to develop the same. The issue therefore is whether creation of third party right in the form of Deed of Assignment and Transfer dated 21 October 2013 would create a fresh cause of action in favour of Plaintiff to seek very same relief which was once rejected by Mohta J. on 08 February 2010.

35. Mr. Purohit is at pains to point out the manner in which the Deed of Assignment and General Power of Attorney dated 15 March 2002 is shown to have been effected in Defendant's favour and how Deed of Confirmation is unilaterally executed by Defendant in his own favour in the absence of Plaintiff. He has also highlighted the fact that the Defendant had earlier agreed to purchase the suit property from the legal heirs of Shyamlal Ramswaroop Sharma by execution of Articles of Agreement dated 01 March 2000 for consideration of Rs. 21,75,000/-. He has submitted that as against agreed consideration of Rs. 21,75,000/- on 01.03.2000, Defendant has shown to have paid to the Plaintiff of only Rs. 2,25,000/- for purchase of the very same property on 15 March 2002 and that the same is shown to have been paid in cash. He has also invited my attention to notice of Plaintiff's Advocate dated 08 September 2005 by which the Defendant showed readiness and willingness to the heirs of Shyamlal Ramswaroop Sharma to complete the transaction arising out of Articles of Agreement dated 01 March 2000. He has submitted that if the property was already purchased by Deed of Conveyance and General Power of Attorney dated 15 March 2002, no prudent person would have shown willingness to once again purchase the same property to earlier owners. It is on the basis of these submissions that Mr. Purohit has expressed

serious doubts about the authenticity of Deed of Conveyance and Power of Attorney dated 15 March 2002. He has also highlighted the fact that the Deed of Confirmation is unilaterally executed by Defendant in his own favour and that in absence of Plaintiff signing the same or admitting its execution before the Registrar, such Confirmation Deed cannot have the effect of confirming the earlier transaction of Conveyance Deed. These submissions of Mr. Purohit may appear to be attractive in first blush, however there can be no denial to the fact that all these submissions must have been canvassed before Mohta, J. when Notice of Motion No.343 of 2009 was decided. They must have also been canvassed before the Appeal Court, which was determining correctness of Order of Mohta, J. dated 08 February 2010. However, with these submissions, Plaintiff failed to convince this Mohta J. and also the Appeal Court that any temporary injunction to restrain Defendant from creating third party rights and from developing the property ought to have been granted. In this connection, it would be appropriate to reproduce the reasons recorded by Mohta, J. while rejecting Notice of Motion No.343 of 2009. Paragraphs 3 to 11 of Order dated 08 February 2010 passed by Mohta, J read thus:

3. *So far as the correction of the record is concerned based upon the representations, the concerned authorities has passed the order which now under the challenge based upon the alleged Transfer deed and record. The detail aspects of declaration of particular documents, being null an void unless decided finally, at this interim relief stage. No specific order can be passed on that ground, with regard to the said prayer clauses. I am not observing anything on merit as the appeal is pending before the appropriate authority.*

4. *With regard to prayer clauses a(i), considering the prayers, as well as, the averments made in the plaint read with*

written statement and the averments made in the reply to the same, at this prima facie stage, it is sufficient to observe that the averments with regard to the fraud, misrepresentation needs detail inquiry and the trial. The signatures, as well as, initials made on the documents are not in dispute. What is in dispute is the circumstance under which those documents got to be signed, as alleged. Therefore, unless those averments and allegations of fraud and misrepresentation and coercion are proved, I am not inclined to grant the interim relief as prayed.

5. The learned counsel appearing for the Defendant, basically contended, relying upon the various judgments that on face of record, even if it is a question of facts, the suit as filed, is beyond the limitation and therefore, also no question of passing of any interim order and before deciding that issue at this stage, itself. Considering the averments made and in view of the allegations so raised about the coercion, fraud, it need detail evidence/ inquiry and therefore, there is no point in deciding that issue at this stage without permitting the parties to lead evidence.

6. It is not the case that the aspect of the limitation is clear on the face of record and therefore keeping all points upon, accepting the case so far as the ground of delay and laches as observed above, on that ground itself, I am not granted any ad-interim relief in terms of prayer clauses so raised.

7. Apart from ground of limitation, the court needs to consider at this prima facie stage, the reason and background of filing such suit in the year 2006, whereby the challenge is made to the documents of the year 2002.

The aspect of knowledge of the documents as raised and as resisted, by the Plaintiff and as denied by the Defendant is again a matter of trial, I am not inclined to accept the same without due inquiry and evidence. The filing of the suit from the date of knowledge is still subject to the final decision.

8. Once the document is registered the effect of the registration goes to the root of the matter. Why the document was registered at the late stage, it is again the matter of detail inquiry, but at this stage the effect of registration as goes to the root of the matter in favour of the Defendant. The reason for delay for registration also no way sufficient to overlook the registered documents.

9. There are materials on record placed by both the parties to show that, some tenants of the suit premises are paying the rent

to both the parties. Both are collecting rents and disputing their rival rights to collect the same. At this stage, as the motion is taken out by the Plaintiff and in view of the above, unless prayers so raised in the suit is allowed, I am not inclined to grant any order against the Defendant with regard to the collection of the rent. The point of entitlement of rent is kept open. The liberty is granted to both the parties to file Motions for appropriate relief, so far as the collection of rent is concerned.

10. However, the order as already passed by the Court with regard to the City Survey Officer and the effect of the same or final order arising out of the same will remain till the final decision of the suit.

11. The Notice of Motion is, accordingly dismissed with liberty. No costs.

36. Though all the submissions canvassed on Plaintiff's behalf are not elaborately recorded in the order dated 08 February 2010, it appears that submissions with regard to fraud and misrepresentation were noticed while deciding the Motion. Mohta, J. however, held that the signature and initials made in the Deed of Conveyance and Power of Attorney are not disputed by the Plaintiff and what is disputed is only the circumstances in which those documents were executed. He therefore held that unless the averments and allegations of fraud and misrepresentation and coercion are proved, relief of temporary injunction could not be granted. Considering the reasons recorded by Mohta, J in order dated 08 February 2010, I have no hesitation in holding that all submissions which Mr. Purohit has canvassed before me to cast doubt about genuineness of transaction of Deed of Conveyance and General of Power of Attorney dated 15 March 2002 must have been argued while deciding Notice of Motion No.343 of 2009. Judicial propriety requires that parties cannot be permitted to convince the Court to take a different view than the one already taken,

based on same the circumstances and submissions. Change in circumstances in the form of execution of Deed of Assignment and Transfer of 21 October 2013 and attempt to develop the suit property in 2016 may be justifiable reasons for applying again for temporary injunction, but not for having another bite at the cherry by convincing the Court that the Conveyance Deed, Power of Attorney or Confirmation Deed are suspicious. I am therefore of the view that the learned Judge ought not to have again taken into consideration the circumstances which were considered by Mohta J. while rejecting the earlier Motion. His consideration ought to be restricted to changed circumstances which had necessitated filing of fresh Notice of Motion.

37. The next issue is about the effect of the Deed of Confirmation. Here again, the issue had already gone into by the Mohta, J in para 8 of the order dated 08 February 2010. The learned Judge of the City Civil Court has however proceeded to hold that registration of Deed of Confirmation would not mean registration of Deed of Conveyance and Power of Attorney. The learned Judge has taken note of an endorsement on the Deed of Confirmation by the Sub-Registrar that ‘सहपत्र नोंदविण्यात आले नाही’ (accompanying document is not registered) for the purpose of raising a surmise that registration of Deed of Confirmation would not mean registration of Deed of Conveyance and Power of Attorney. He has further proceeded to hold that the entire document of Deed of Confirmation was not placed before this Court while deciding Notice of Motion No.343 of 2009 and that this Court did not notice page no. 6 of Deed of Confirmation while recording its findings in para 8 of order. It is unknown as to what basis the learned Judge of the City Civil Court has recorded this finding.

Mohta J. has taken note of Deed of Confirmation in para 8 of his order dated 8th February 2010. If indeed page no. 6 of Deed of Confirmation was not placed before Mohta J. by Defendant, nothing prevented Plaintiff from producing the same. Even if it is assumed that Plaintiff also omitted to produce page no. 6 of Deed of Confirmation (which according to Plaintiff renders Conveyance Deed unregistered), the same must have been produced before the Appeal Court. Let us go further and assume that Plaintiff could not invite even Appeal Court's attention to page no. 6 of Confirmation Deed, the question is whether the same rendered the effect of orders passed by Mohta J. and by Appeal Court nugatory for the City Civil Court to render finding contrary to the one recorded by Mohta J.? The answer to my mind appears to be in the negative. If indeed anything turned on account of the endorsement made on page no.6 of the Deed of Confirmation, it was for Plaintiff to rely upon the same before Mohta, J. or at least before the Appeal Court. Plaintiff's failure to produce and rely upon the endorsement at page 6 of the Deed of Confirmation could not have been a reason for learned Judge of the City Civil Court to completely ignore the order passed by this Court on 08 February 2010 and record findings contrary to the one recorded by this Court. In my view therefore, the finding recorded by the learned Judge of the City Civil Court in para 28 of the order are totally unsustainable.

38. Mr. Seervai has relied upon the Judgments of this Court in ***Mahendra Valjirathod, Nimesh J. Patel*** and ***Ashapura Ramdev Buildcon LLP*** (supra) in support of his contention that registration of Deed of Confirmation tantamount to registration of confirmed document as well. Mr. Purohit has countered the submission by

highlighting the fact that in all three judgments, both parties to the original document had executed the Deed of Confirmation and admitted its execution before the Sub-Registrar. In view of extensive submissions made by the rival parties on the issue of effect of execution of registration of Deed of Confirmation, I could have heard and decided this point. However, in my view the scope of enquiry in the present appeal is extremely limited and any finding recorded on the effect of execution and registration of Deed of Confirmation at this stage would reflect on final decision of the suit. I would therefore exercise restraint from dealing with that the issue at present. Mohta, J has already recorded *prima facie* finding on the issue in para 8 of the order dated 08 February 2010, which in my view would suffice for determining correctness of the impugned order.

39. As observed above, change of circumstances in view of execution of Deed of Assignment and Transfer dated 21 October 2013 by Defendant in favour of Mr. Vallabh Italia and development permission processed by Municipal Corporation became valid reason for filing Notice of Motion No.3929 of 2016. While deciding the Motion, it was open for the learned Judge of the City Civil Court to taken into consideration changed circumstances for deciding entitlement of the Plaintiff for grant of temporary injunction. However, it was not open for him to brush aside findings recorded by Mohta, J. in order dated 08 February 2010. *Qua* all circumstances which existed on 8 February 2010, the order of Mohta, J. attained finality and it was not at all open for the learned Judge of the City Civil Court to record any contradictory findings only on the ground that Notice of Motion No.3929 of 2016 was maintainable in view of change in circumstances.

He ought to have restricted the consideration only to changed circumstances for determining whether grant of temporary injunction was warranted. Mere change in circumstances would not entitle a Judge to revisit the circumstances considered for rejecting earlier application for temporary injunction. Judicial propriety warrants that findings recorded by the Court while rejecting earlier application for temporary injunction are respected and followed. In my view, therefore, the learned Judge of the City Civil Court had committed an error in assuming that he was given a blank slate for examination of everything all over again.

40. Mr. Seervai has led great stress to the observations made by Kulkarni. J in order dated 13 December 2016 while staying the order dated 09 November 2016 earlier passed allowing Notice of Motion No.3929 of 2016. However, as correctly pointed out that Mr. Purohit this Court has later clarified in order dated 16 June 2017 that the City Civil Court would not be influenced by any orders passed in Appeal from Order no.74 of 2017.

41. The next issue is about the undertaking given Plaintiff before the City Civil Court while applying the test of balance of convenience and irreparable loss. The City Civil Court has recorded following findings:-

29. So also, while considering the aspects as to in whose favour the balance of convenience lies and to whom irreparable loss will be cause by the fate of the present application, the interest of the tenants who were already in the suit property is also to be taken into consideration. Defendant has filed list of the 17 tenants out of whom he is paying the amount of temporary accommodation to 16 tenants. As per said list, the

defendant has paid substantial amount of around Rs.96 lacs to those 16 tenants, as one tenant has already surrendered his rights in his favour. However, the plaintiff in his suit has alleged that there are in all 28 tenants. Plaintiff has also filed the list prepared by the MCGM wherein the number of tenants are shown as 25. The plaintiff has also made statement that he too intends to develop the property and is ready to pay the amount of temporary accommodation to the tenants, to whom defendant alleged to have paying the amount of temporary accommodation. Plaintiff has also made statement that he has also accommodated some of the tenants and is paying temporary accommodation charges to them. He also made statement that some of the tenants have approached him. While entering into the Deed of Assign and Transfer of the undivided 50% share by the defendant in favour of the third party – Vallabhai Vallabh V. Italia, the third party purchaser, has specifically agreed himself to be subject to the fate of the present suit. However, normally the builders has to accommodate the tenants and pay –he temporary accommodation charges. As such, it cannot be said that any irreparable loss will be caused to the defendant if, the temporary injunction is granted against him and in favour of the plaintiff. On the contrary, change in the nature of the property will definitely cause irreparable loss to the plaintiff in the case the injunction is refused. When the plaintiff is ready to take care of all the tenants, then it cannot be said that any inconvenience will be caused to the tenants. In such circumstances, ever the balance of convenience is tilted in favour of the plaintiff and not the defendant. As such, my answer to point nos.2 and 3 are accordingly.

42. The City Civil Court has directed the Plaintiff (as per his undertaking) to pay the monthly accommodation amount to all the tenants in the suit premises to whom Defendant was paying such amount as per the list filed by the Defendant and to continue to pay the same to other tenants to whom Plaintiff was allegedly paying the same. Plaintiff has been directed to file quarterly reports of compliance of the

same. There is no dispute to the position that the Plaintiff has not been able to honor this undertaking given to the City Civil Court. Plaintiff has filed Affidavit dated 02 November 2023 giving details of arrears of rent payable to various tenants. Plaintiff recognises only 9 tenants included in Exhibit-A to the Affidavit. According to the particulars included in the Exhibit-A of the affidavit, total arrears of rent payable to the said 9 tenants since 24 August 2017 till November 2023 is to the tune of Rs. 1,07,44,800/-. Thus even in respect of the 9 tenants, whose tenancy is not disputed by the Plaintiff, the rent has not been paid by him even once since the order of the City Civil Court.

43. Plaintiff claims that he has obtained eviction decree in respect of the two tenants and that one tenant has surrendered the tenancy. Details of the said three tenants are included in Exhibit-B to the Affidavit. According to the Plaintiff, there are trespassers in respect of Room nos. 6 & 7 who are not recognised by him as tenants and that therefore, they are not entitled to payment of any rent. Their particulars are included in Exhibit C to the Affidavit. Exhibit-D to the Affidavit includes names of persons in respect of three tenements, who are apparently legal heirs of the original tenants and according to the Plaintiff they are not being recognised tenants on account of lack of exact information as to whether they are the only legal heirs in respect of the deceased tenants. *Qua* them, the total amount of rent payable since 24 August 2017 till November 2023 is shown to be Rs.29,30,400/- in Exhibit-D to the agreement. Mr. Purohit has submitted that Plaintiff is willing to pay the rent in respect of those three persons included in Exhibit-D also. So far as the Petitioner in Contempt Petition no.275 of 2018 (Amit Durgaprasad Bharadwaj) is

concerned, his name does not appear in any of the 4 Exhibits to the Affidavit. However, Mr. Purohit has submitted that the Plaintiff is willing to pay him the arrears of rent. In fact, during the course of hearing of the present appeal on 01 November 2023, Plaintiff has handed over Pay Order of approximately Rs. 16 odd Lakhs to Mr. Amit Durgaprasad Bharadwaj.

44. From the Affidavit dated 02 November 2023 filed by the Plaintiff it has become apparent that he has violated the undertaking given by him before the City Civil Court about payment of rent to the tenant during pendency of the suit. In fact Plaintiff has not paid even single penny to any of the tenants right after passing of the order dated 24 August 2017. Some of the tenants have filed contempt petitions and several others have filed Interim Application complaining about non-payment of rent by the Plaintiff. In my view, undertaking given by the Plaintiff to pay rent to tenants weighed heavily with the learned Judge of the City Civil Court for granting temporary injunction in his favour. Otherwise, it was the Defendant who was paying transit rent to the tenants after demolition of the building. The Plaintiff has convinced the learned Judge of the City Civil Court to pass an order of temporary injunction in his favour to restrain Defendant from developing the suit property on an express undertaking that he would continue to pay transit rent to the tenants during pendency of the suit. He has however breached that undertaking with impunity. In my view therefore, this conduct of the Plaintiff would clearly disentitle him for continuation of the order of temporary injunction.

45. Plaintiff cannot approbate and reprobate. Having secured an injunction in his favour by placing an undertaking before the City Civil Court, it is not permissible for him to now wriggle out of the undertaking by raising the pretext of failure to executed PAAA or alleged termination or non-recognition of tenancy. In ***Rajasthan State Industrial Development and Investment Corporation (supra)***, the Apex Court has held as under:

I. Approbate and reprobate

15. *A party cannot be permitted to "blow hot-blow cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner so as to violate the principles of what is right and of good conscience. [Vide Nagubai Ammal v. B. Shama Rao, CIT v. V. MR. P. Firm Muar, Ramesh Chandra Sankla v. Vikram Cement, Pradeep Oil Corpn. v. MCD, Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd. 6 and V. Chandrasekaran v. Administrative Officer.]*

46. I am therefore of the view that Plaintiff failed to make out any *prima facie* case for grant of any temporary injunction in his favour. Additionally, he has violated the undertaking given to the City Civil Court which would disentitle him for continuing the temporary injunction.

47. Having arrived at a finding that the order of temporary injunction granted in favour of the Plaintiff deserves to be vacated, the next issue is about the fate of the tenants, to whom no rent is paid for the last

more than 6 years. Though Plaintiff has showed willingness to pay arrears of rent only to $9+3+1=14$ tenants (out of total 26 tenants), even for making that payment, he has requested for time of 6 months. From the past conduct of the Plaintiff, it is difficult to impose any faith in him *qua* his financial capability and intent for fulfilling the promise of paying rent to even those 14 tenants in future. It must be borne in mind that the re-development of the project is stalled on account of temporary injunction granted in favour of Plaintiff. The building has been demolished in June 2015 and it has been more than 8 years that the tenants are deprived of permanent alternate accommodations.

48. The Defendant on the other hand has shown willingness to pay the entire liability of arrears of transit rent to all the tenants in the event of this Court lifting the injunction. Though the liability to pay transit rent from 24 August 2017 onwards rested only on Plaintiff, Defendant has placed on record a statement, under which details arrears of transit rent for the past 73 months in respect of 26 tenanted premises have been worked out. Defendant is recognizing all the occupants in respect of 26 tenanted premises without any reservations and willing to pay them transit rent. As per that statement, the total amount due and payable towards transit rent in respect of 26 tenanted premises for the past 73 months works out to the tune of Rs.2,79,35,640/-. Defendant has shown willingness to pay this amount of Rs.2,79,35,640/- in respect of all the 26 tenanted premises. He however has requested for some time to clear the arrears.

49. Plaintiff has put forth several excuses for non-payment of rent to the tenants. According to him, since the tenants have not

executed PAAA with him, rent cannot be paid to them. This pretext cited by Plaintiff for avoidance of liability to pay rent to tenants as per his undertaking is unacceptable. He has unconditionally undertaken to pay rent to the tenants before the City Civil Court and cannot now be permitted to impose conditions for payment of rent. He has also questioned rights of various tenants and on that count, he is seeking to avoid payment of transit rent to them. This again is in violation of the undertaking and direction of the City Civil Court which had directed Plaintiff to pay transit rent to both the sets of tenants viz. to whom both Defendant and plaintiff were paying the rent. Defendant has placed list of tenants whom he was paying rent before passing of the Order dated 24 August 2017. Plaintiff ought to have paid them rent unconditionally. I have therefore no hesitation in holding that Plaintiff never intended to pay rent to any tenants and filed an undertaking before City Civil Court which he never intended to fulfill.

50. Thus, I have before me Plaintiff who has previously breached undertaking given before the City Civil Court by not paying any rent to even a single tenant since 24 August 2017. Even today, he recognises tenancy in respect of only 10 tenanted premises whereas there appears to be total 26 tenanted premises in the building. On the other hand, Defendant is willing to pay transit rent in respect of all the 26 tenanted premises. In my view, the interests of the tenant would be protected if Defendant is permitted to proceed with development of the suit property by undertaking the burden of paying arrears of transit rent in respect of all 26 tenanted premises, without prejudice his rights and contentions. Defendant has requested for some time for clearing the arrears of rent of Rs 2,79,35,640/-. In my view, the Defendant can be

directed to start payment of transit rent from the month of December 2023 by paying the same regularly to all the tenant on 5th day of each month till disposal of the suit. So far as the arrears of rent in respect of past 73 months are concerned, he shall pay the same to the tenants within a period of next six months.

51. The willingness expressed by Defendant to clear arrears of transit rent for the past 73 months would also take care of contempt petitions and interim application filed by the tenants. It must however be observed that the Plaintiff has clearly violated the order passed by this Court on 19 December 2017 which directed him to pay arrears of rent to Shri. Amit Durgaprasad Bharadwaj on or before 30 December 2017. The order in fact directed payment of rent to all dishoused tenants. There is thus violation of order passed by this Court on the part of the Plaintiff. However, since injunction granted in Defendant's favour is being lifted in my view no further orders need to be passed in the Contempt Petitions. Since Shri. Amit Durgaprasad Bharadwaj would be paid arrears of transit rent by the Defendant, the amount of Rs. 16,00,000/- received by him from Plaintiff by way of Pay Order received on 01 November 2003 shall be refunded by him to the Plaintiff, so as to ensure that he does not receive any excess amount towards transit rent.

52. The next issue is about balancing the equities on account of vacation of the order of temporary injunction. Plaintiff claims ownership in the suit property and denies title of the Defendant by questioning the legality of Conveyance Deed, Power of Attorney and Deed of Confirmation. The Defendant is now made to bear heavy

burden of paying transit rent to the tenants in the suit property, which actually is the responsibility of the Plaintiff on account of undertaking given by him to the City Civil Court. The amount of transit rent which Defendant is made liable to pay to tenants is to the tune of Rs.2,79,35,640/-. Additionally, Defendant will have to continue to pay transit rent to the tenants till disposal of the suit. The redevelopment of the building is delayed on account of interim injunction granted in favour of the Plaintiff and therefore, it is Plaintiff who is responsible for delay in redevelopment of the building. Mr. Seervai has submitted that the current market value of the suit property is approximately Rs. 5.57 Crore. Mr. Purohit disputes the valuation and submits that the redevelopment potential of the suit property is much higher than the amount of Rs. 5.57 crores sought to be projected by Plaintiff. However considering the conduct of Plaintiff, dispute about commercial potential of the suit property cannot be the reason to further delay redevelopment process. Otherwise, the burden of paying transit rent would reach to unbearable level making redevelopment project financially unviable. I am therefore inclined to accept the valuation figure of Rs. 5.57 crores suggested by Plaintiff for limited purpose of undertaking the exercise of balancing the equities. Defendant is already bearing burden of paying of amount of Rs.2,79,35,640/- towards transit rent (which is of Plaintiff's). Therefore, if the Plaintiff succeeds in his Suit, his entitlement in the suit property would remain to the extent approximately of Rs. 2.75 Crore. Mr. Seervai has fairly submitted that Defendant is willing to demarcate and secure residential plot of 1250 sq. ft. or office premises 1000 Sq. ft carpet area in the proposed building at the suit property. This in my view would adequately secure

the interest of the Plaintiff, in case he succeeds in the suit. Beyond this, no further relief can be granted in favour of the Plaintiff.

53. I accordingly proceed to pass the following order:-

i) Order dated 24 August 2017 passed by the City Civil Court in Notice of Motion No.3929 of 2016 is set aside.

ii) Appellant/Defendant shall start paying transit rent to all the tenants in the structure from the month of December 2023 onwards on 5th day of each month till disposal of the Suit.

iii) Defendant shall pay to all the tenants amount of Rs.2,79,35,640/- as indicated in chart at Exhibit-A to the brief Note submitted 02 November 2023 (marked 'X' for identification) within a period of 6 months from today.

iv) The amount paid by Defendant to the tenants shall be without prejudice to his rights and contentions in the suit.

v) Defendant shall demarcate either residential Flat of 1250 sq. feet carpet area or office premises of 1000 sq. feet carpet area in the proposed building to be constructed on the suit property and keep the same unencumbered during pendency of the suit.

vi) City Civil Court shall decide the Suit as expeditiously as possible without being influenced by findings recorded in the present judgment.

54. With the above directions, Appeal from Order No. 742 OF 2019, Contempt Petition No. 275 OF 2018, Contempt Petition No. 59 of 2020 and Interim Application No. 2149 of 2023 are disposed of. There shall be no order as to costs.

SANDEEP V. MARNE, J.

55. After the judgment is pronounced, the learned Counsel appearing for Respondent in Appeal from Order would pray for continuation of the order of injunction passed by the City Civil Court for a period of eight weeks to enable the Respondent to test this judgment before the Apex Court. Considering the conduct of the Respondent in committing breach of the undertaking given to the Supreme Court and also considering the fact that the tenants without any transit rent for a substantial period of time, the request made by the Respondent is rejected.

SANDEEP V. MARNE, J