

**BEFORE THE NATIONAL GREEN TRIBUNAL
WESTERN ZONAL BENCH AT PUNE**

**I.A. NO. 139 OF 2023
IN
ORIGINAL APPLICATION NO. 25 OF 20**

**HARI KRISHNA EXPORTS PVT. LTD.
AND OTHERS**

APPLICANTS

IN THE MATTER BETWEEN:

DILEEP B. NEVATIA

ORG. APPLICANT

VERSUS

UNION OF INDIA & OTHERS

RESPONDENTS

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ORIGINAL APPLICANT IN PERSON

SHASHI DEEP, 5-A, WORLI SEA FACE, MUMBAI 400 030

MUMBAI

DATED: 12.9.2023

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REPLY OF THE ORIGINAL APPLICANT

The Original Applicant above named, begs to state as follows:

1. That the Original Applicant has read the copy of Interim Application No. 139 of 2023 filed by the Applicants/Org. Respondent Nos. 8 to 12 and in reply thereto states as follows:
2. At the outset, the Original Applicant denies each and every statement, allegation, averment and contention made by the Applicants/Org. Respondent Nos. 8 to 12 in their I.A. No. 139 of 2023 parwise ad-seriatim which is contrary to or inconsistent with what is stated by the Original Applicant in O.A. No. 25 of 2023 and its connected Applications and put the true and correct facts before this Hon'ble Tribunal. The Original Applicant prays that nothing should be deemed to be admitted by him by virtue of not having been specifically denied herein. The Original Applicant craves leave to file further Affidavit, if required. That for the sake of convenience, the Applicants and the Original Applicant in the present Application are hereinafter referred to as Respondent Nos. 8 to



12 and Applicant respectively, namely as arrayed in O.A. No. 25 of 2023.

3. At the further outset, the Applicant states that the present I.A. No. 139 of 2023 is filed on or around 15.6.2023 i.e. soon after the BMC having rejected on 9.6.2023 the proposal of Respondent Nos. 8 to 12 for retention of the unauthorized construction of additional area of 3 times the permissible FSI i.e. approximately 3,669 square meters or 39,492 square feet made in serious violation of the CRZ Notifications of the Environment (Protection) Act, 1986, etc. It is clear that the Respondent Nos. 8 to 12 have now approached this Hon'ble Tribunal with unclean hands and have suppressed all the documents recently filed by them with the BMC and other authorities in order to retain the unauthorised construction of market value of almost Rs. 600 crores and has therefore played a fraud on this Hon'ble Tribunal.
4. That in July, 2021 M/s Arkay Holdings Ltd., the erstwhile owner, sold the Pan Har property to Respondent No. 8 - Hari Krishna Exports Pvt. Ltd (HKE). By Indenture of Assignment dated 30th July, 2021, the BMC assigned the said Property in the name of HKE having its registered office at address given in the cause title of the present Application. The said Pan Har property was purchased for use as the personal residence of its promoter Directors, namely Respondent Nos. 9 to 12 and their families.

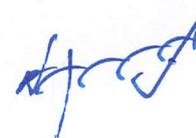
The copy of the aforesaid Indenture of Assignment dated 30th July, 2021, which is annexed to the O.A. as Annexure A-7, for the sake of convenience is annexed hereto and marked as **Annexure A-1**.



5. That the said Indenture of Assignment duly entered into between Arkay Holdings Ltd., BMC and Respondent No. 10 in his capacity as the Managing Director of HKE, specifically states in para (a) that:-

“(a) The Assignor is the lessee in perpetuity respect of Plot No. 5 of the Worli Estate of the Municipal Corporation of Greater Mumbai admeasuring 1,614 square yards equivalent to 1,349.51 square meters and is the sole and absolute owner of the structure standing thereon being residential building known as ‘Panhar’ comprising basement plus stilt/ground plus six (6) upper floors aggregately admeasuring approximately 19,886 square feet or thereabout carpet area (“said Building”).”

6. That soon after purchasing the said property, Respondent Nos. 8 to 12 covered the entire Pan Har building and by taking advantage of the Covid-19 pandemic they started demolishing almost the entire building from inside and also from outside and reconstructed the said property, without obtaining any CRZ and/or DCR Clearance or any other clearances from MoEFCC or MCZMA or BMC.
7. That by Order dated 3.5.2023 passed by this Hon’ble Tribunal in OA No. 25 of 2023, the Respondent authorities were directed to constitute a Committee and visit the suit site and submit a factual and action taken report with regard to the violations complained of.



The copy of the said Order dated 3.5.2023 is annexed hereto and marked as **Annexure A-2**

8. That thereafter on 8.5.2023 the officers of the BMC visited the Pan Har property and inspected the same in consonance with Building Completion plans under Proposal no. EEBPC/3294/GS/A dated 27.9.2001 i.e. the final plans in accordance to which the Pan Har property was constructed. On inspection, the BMC found serious violations of the said plans dated 27.9.2001 and accordingly issued a Notice dated 24.5.2023 u/s 342 of the BMC Act to Respondent No.8, through its Director "Shri. Ghanshyam Dholakia - Owner / Occupier".

The copy of the said Notice dated 24.5.2023 is annexed hereto and marked as **Annexure A-3** and its typed copy is annexed hereto and marked as **Annexure A-4**.

9. That the above Notice dated 24.5.2023 records serious violations of the plans approved by BMC on 27.9.2001 under proposal No. EEBPC/3294/GS/A, namely:-

"Basement Floor.

1. RCC Staircase on North-East side of building is demolished and the space is created into a room.
2. Addition and alterations in Parking space no 9 & 10 & converted into a room adm 4.98m x 3.36m by constructing BM (Brick Masonry) walls.



3. Addition and alterations in Parking space no 15 & 16 & converted into a room adm 5.9m x 2.9m, 2.35m x 2.7m, 3.0m x 2.35m by constructing BM walls.
4. Construction of room adm 4.60m x 4.0m & 4.2m x 2.59m (toilet block) with BM walls in the open space/driveway between parking slot no 9/10 & 15/16.

Ground Floor (Stilt Floor).

1. RCC Staircase (From ground floor to basement) on North-East side of building is demolished and the space is created into a room.
2. Driveway to ground floor is closed by erecting glass panels on both entry and exit on north and south side of building.
3. Two ducts on left and right side of lifts are converted into store room by constructing BM walls and carrying out addition and alterations.
4. Parking slot no 5, 6 & 7 on the west side of building are converted into a hall.
5. Unauthorized construction of pantry adm 4m x 2m by constructing BM walls in place of servants toilet beside parking slot no 5 on southwest of building.
6. **Demolition of existing oval shaped RCC structure of canopy, water body / paddle pool and garden on the front side (seaside) of the building and construction**



of a rectangular shaped regular RCC flat slab with no any water body / paddle pool.

7. Service lift at ground floor beside staircase is extended upto basement.
8. Unauthorized encroachment into the parking slot no 8, by creation of door entry into the building by demolishing the peripheral wall of building.

First Floor

1. Addition and alteration in flat no 1 on west side of building and converted existing bedroom, living room it into a gymnasium.

Construction of swimming pool admeasuring 7.75m x 4.7m in the existing bedroom and toilet area of flat no 1.

Third Floor

1. Addition, alterations in existing flat no 1 & 2 at third floor by demolishing all internal BM partition walls and constructing walls at new locations as per the sketch.

Fourth Floor

1. Addition, alterations in existing flat no 1 & 2 at fourth floor by demolishing all internal BM partition walls and constructing walls at new locations as per the sketch.

Fifth Floor



1. **Demolition of existing RCC ceiling slab above flat no 1 on fifth floor and demolition of all existing internal BM partition walls and converting it into a single big hall with height of two floors.**
2. Demolition of all existing internal BM partition walls in flat no 2 at east side and converting it into a Pooja room, kitchen and dining hall.

Sixth Floor

1. **Demolition of all existing internal BM partition walls of flat no 3 & 4 at east side and converting it into one single room for play area & other room for indoor theatre.**
2. **Demolition of existing RCC floor slab & all existing internal BM partition walls of flat no 1 & 2 on sixth floor and converting it into a single big hall of double floor height including flat no 1 & 2 at fifth floor.**

Terrace Floor

1. **Construction of room (bedroom) admeasuring 8.9m x 5.25m, toilet adm 4.7m x 5.40m, room adm 3.8m x 3.99m, room adm 2.25m x 3.8m, room adm 1.90m x 5.36m on east side on open terrace above sixth floor.**
2. **Construction of room (lounge) admeasuring 6.39m x 11.0m, toilet adm 4.41m x 5.44m, shower room adm 3.95m x 1.76m, wardrobe room adm 5.51m x 3.9m on west side on open terrace above sixth floor.**



3. **Unauthorized casting of slab above Pergola beams on west side of terrace and creating a seating space.**
4. **Unauthorized construction of RCC slab for roofing on terrace above sixth floor and using the same as seventh floor.**

General Observations

1. **Unauthorized encroachment over the existing RCC chhajja on the periphery of the building on all floors from ground floor to sixth floor and merging it into the internal floor area/carpet area of the building.**
 2. Unauthorized erection of glass façade on the periphery of the building from ground floor to existing terrace of the building.
 3. The curved portion on the east and west side of the periphery of the building is made straight by erecting glass façade.”
10. That in pursuance to the BMC Notice dated 24.5.2023, the Respondent No.8 submitted various applications for retention of the unauthorised construction, the copies whereof have also been downloaded by the Applicant from the official portal of BMC, “autodcr.mcgm.gov.in/BPAMSCClient2/Login.aspx”. These are as follows.
11. That on behalf of Respondent Nos. 8 to 12, a Structural Stability Report dated 25.5.2023 prepared by M/s R.H. Mahimtura, Consulting Structural Engineer, was submitted to the BMC, in respect of addition/alteration in existing building



Pan Har, comprises of Basement + Stilt + 1st to 6th Typical Floor + 7th Part Floor. Evidently, the said Structural Engineer had already prepared the report before carrying out the reconstruction from the year 2021 onwards and has proceeded to now falsely claim that the report is for "Proposed addition/alteration".

The copy of the said Structural Stability Report dated 25.5.2023 is annexed hereto and marked as **Annexure A-5**.

12. That on behalf of Respondent Nos. 8 to 12, on or around 29.5.2023, their Architect, Shri Jinish N. Soni, submitted to BMC Form "4A FACT SHEET", for retention of the unauthorised construction, including massive violation of Floor Space Index (FSI), by falsely applying provisions of DCPR 2034 (Development Control and Promotion Regulation-2034).

The copy of the said Fact Sheet dated 29.5.2023 is annexed hereto and marked as **Annexure A-6**.

13. **That in the above Fact Sheet, it is recorded at Item serial No. 18 in respect of FSI that, , retention of the unauthorised construction of Pan Har building is being sought for 5,465.49 square meters i.e. a massive increase of 300%. Thus, admittedly the Respondent Nos. 8 to 12 have reconstructed the Pan Har property with FSI of 4.0 against the approved 1.33.**

14. That it is further recorded at Item serial No. 18 of the Fact Sheet that the Respondent Nos. 8 to 12 propose for retention of additional FSI by resorting to obtain "Transferable Development Rights" (TDR) and provisions of DCR 2034, namely:-



- (a) TDR - 1,120.09 square meter
- (b) Additional FSI as per 50% as per DCR 32 - 1,133.58 square meter
- (c) Fungible FSI under DCR 35(4) - 1,416.98 square meter

15. That on behalf of Respondent Nos. 8 to 12, on or around 5.6.2023, their Architect, Shri Jinish N. Soni, submitted to BMC further information through a "Concession Report" for retention of the unauthorised construction and to regularise work done beyond approval.

The copy of the said "Concession Report" dated 5.6.2023 is annexed hereto and marked as **Annexure A-7**.

16. That it is specifically stated in the above Concession Report that:-

"(a) **Brief History: -**

In this case the plans for the building were approved as per the provisions of DCR 1967 in the year 1993 as the plot was affected by CRZ II.

The Occupation certificate was granted on 27.09.2001 to building comprising of Basement For Parking + silt for parking + 1st to 6th Residential floors + 7th (pt.) for utilities by utilizing plot potential to the tune of 1.33 FSI and staircase, lift & lift lobby are free of FSI.

(b) **All the internal changes have been incorporated in the plan and accordingly the work is completed on**

site. However, there are certain encroachments of elevation features in the building which are earlier approved free of FSI and now are merged with the habitable floor. **The same needs to be regularized under provisions circular u/no. CHE/DP/110/GEN dt. 2019-20 (C-13) by counting the same in FSI and paying premium/penalty as applicable as per regularization penalty as per policy circular u/no. Ch.E./D.P./004477/Gen. dt. 12.05.2021.**

Now, Owner Shri Ghanshyam Bhai Dholakia, Managing Director of M/s. Hari Krishna Exports Pvt. Ltd. has appointed L.S. Shri Jinish Soni of M/s. 3 Dimensional Consultants LLP. as a new L.S for the proposal to regularize the work done beyond approval and process the file for OCC/BCC.

- (c) **3. To regularize the work carried out beyond approval by charging penalty.**

The work of all the internal changes have been incorporated in the plan and accordingly the work is completed on site. There are changes in the internal layouts of the approved with regards to the OCC granted further there are certain encroachments of elevation features in the building which are earlier approved free of FSI and now are merged with the habitable floor. The same needs to be regularized under provisions circular u/no. CHE/DP/110/GEN dt. 2019-20 (C-13) by counting the same in FSI and paying premium/penalty as applicable as per



regularization penalty as per policy circular u/no. Ch.E./D.P./004477/Gen. dt. 12.05.2021.”

17. That on behalf of Respondent Nos. 8 to 12, their Architect, Shri Jinish N. Soni, also submitted to BMC area wise and floor wise plans giving the following particulars vis-à-vis the originally approved areas i.e. approved in September, 2001:-

(a) Basement Floor Plan showing most of the areas that were meant for car parking, etc. and therefore earlier approved free from FSI, being converted into habitable rooms - shown in pink colour.

The copy of the said “Basement Floor Plan” is annexed hereto and marked as **Annexure A-8.**

(b) Ground/Stilt Floor Plan also showing most of the areas that were meant for car parking, etc. and therefore earlier approved free from FSI, being converted into offices and living areas - shown in pink colour.

The copy of the said “Ground/Stilt Floor Plan” is annexed hereto and marked as **Annexure A-9.**

(c) First to Sixth Floor Plans made after demolition of all existing rooms, toilets, etc. and showing reconstructed walls at new locations and for altogether different use - shown in blue colour.

(i) The copy of the said “First Floor Plan” is annexed hereto and marked as **Annexure A-10.**

(ii) The copy of the said “Second Floor Plan” is annexed hereto and marked as **Annexure A-11.**

- (iii) The copy of the said "Third Floor Plan" is annexed hereto and marked as **Annexure A-12**.
 - (iv) The copy of the said "Fourth Floor Plan" is annexed hereto and marked as **Annexure A-13**.
 - (v) The copy of the said "Fifth Floor Plan" is annexed hereto and marked as **Annexure A-14**.
 - (v) The copy of the said "Sixth Floor Plan" is annexed hereto and marked as **Annexure A-15**.
- (d) That the First to Sixth Floor Plans also show the areas that are unauthorisedly added to each and every floor, by converting large areas that were earlier free of FSI into enclosed and usable areas, enclosing ducts and converting them into liveable areas, completely enclosing side balconies, converting front and rear balconies into large terraces, etc. - shown in pink colour.
- (e) Seventh Floor Plan for the unauthorisedly constructed entire seventh floor - shown in pink colour.
- The copy of the said "Seventh Floor Plan" is annexed hereto and marked as **Annexure A-16**.
18. That the revised Basement Floor Plan (**Annexure A-8**) submitted by the Respondent Nos. 8 to 12 for retention of the unauthorised construction shows that the major portion of the Basement, shown in pink colour, is already reconstructed for use as a liveable area and is now sought to be added into FSI. These consist of the following:-



- (a) Servants' and Drivers' Rooms and Toilets
- (b) Pet Room
- (c) Service areas, Pantry
- (d) Mini Supermarket
- (e) Cold Storage, etc.

19. That the revised Ground/Stilt Floor Plan (**Annexure A-9**) submitted for retention of the unauthorised construction shows that the almost entire portion of the Ground/Stilt Floor, shown in pink colour, is already reconstructed for use as a liveable area and is now sought to be added into FSI. These consist of the following:-

- (a) Enclosed Rooms consisting of Office, Shoe Room, Store Room, Toilet, etc.
- (b) Large Hall, etc.

20. That the revised First Floor Plan (**Annexure A-10**) submitted by the Respondent Nos. 8 to 12, made after demolition of all existing rooms, toilets, etc. now reveals reconstructed walls at new locations and for altogether different uses. These consist of the following:-

- (a) **Front Unit (West Side - Sea Side) having Swimming Pool, Gymnasium, Massage Rooms, Steam Room, Saloon, etc. - shown in blue colour**
- (b) Rear Unit (East Side) having Living & Dining Rooms, three Bedrooms and Toilets, Store Room for Cushions and Bed Sheets - shown in blue colour



(c) Unauthorisedly added areas, by converting large areas that were earlier free of FSI into enclosed and usable areas, enclosing ducts and converting them into liveable areas, completely enclosing side balconies, converting front and rear balconies into large terraces, etc. - shown in pink colour

21. That the revised Second Floor Plan (**Annexure A-11**), made after demolition of all existing rooms, toilets, etc. now reveals reconstructed walls at new locations and for altogether different uses. These consist of the following:-

(a) **Front Unit (West Side - Sea Side) having Living & Dining Rooms, three Bedrooms and Toilets, Store Room for Navratri Clothes, etc.** - shown in blue colour

(b) Rear Unit (East Side) having Living & Dining Rooms, three Bedrooms and Toilets, Store Room for Grain Storage - shown in blue colour

(c) Unauthorisedly added areas, by converting large areas that were earlier free of FSI into enclosed and usable areas, enclosing ducts and converting them into liveable areas, completely enclosing side balconies, converting front and rear balconies into large terraces, etc. - shown in pink colour

22. That the revised Third Floor Plan (**Annexure A-12**), made after demolition of all existing rooms, toilets, etc. now reveals reconstructed walls at new locations and for altogether different uses. These consist of the following:-



- (a) **Front Unit (West Side - Sea Side) having Bedroom, Lounge, WIW (Walk In Wardrobes), Toilets, etc. - shown in blue colour**
- (b) Rear Unit (East Side) having 2 nos. each of Bedrooms, WIW and Toilets, a Dining Room and a Kitchen - shown in blue colour
- (c) Unauthorisedly added areas, by converting large areas that were earlier free of FSI into enclosed and usable areas, enclosing ducts and converting them into liveable areas, completely enclosing side balconies, converting front and rear balconies into large terraces, Steam Machine, Shower, Crockery Room, etc. - shown in pink colour

23. That the revised Fourth Floor Plan (**Annexure A-13**), made after demolition of all existing rooms, toilets, etc. now reveals reconstructed walls at new locations and for altogether different uses. These consist of the following:-

- (a) **Front Unit (West Side - Sea Side) having 2 Large Bedrooms, each with WIW, etc. - shown in blue colour**
- (b) Rear Unit (East Side) having 4 nos. of Bedrooms, each with a Toilet, and a Wardrobe for Shoe Store - shown in blue colour
- (c) Unauthorisedly added areas, by converting large areas that were earlier free of FSI into enclosed and usable areas, enclosing ducts and converting them into liveable areas, completely enclosing side balconies, converting



front and rear balconies into large terraces, Housekeeping Room, adding to Bedrooms, WIW, Toilets, etc. - shown in pink colour

24. That the revised Fifth Floor Plan (**Annexure A-14**), made after demolition of all existing rooms, toilets, etc. now reveals reconstructed walls at new locations and for altogether different uses. These consist of the following:-

(a) **Front Unit (West Side - Sea Side) almost entirely consisting of a huge Living Room of Double Height (after demolishing slab between fifth and sixth floors), a small Study and Library - shown in blue colour**

(b) Rear Unit (East Side) having a Maharaj Kitchen, Family Kitchen, Dining area, Pooja Room, Store Rooms, etc. - shown in blue colour

(c) Unauthorisedly added areas, by converting large areas that were earlier free of FSI into enclosed and usable areas, enclosing ducts and converting them into liveable areas, completely enclosing side balconies, converting front and rear balconies into large terraces, Powder Room, adding to Living Room, Pooja Room, Kitchen, etc. - shown in pink colour

25. That the revised Sixth Floor Plan (**Annexure A-15**), made after demolition of all existing rooms, toilets, etc. now reveals reconstructed walls at new locations and for altogether different uses. These consist of the following:-

- (a) **Front Unit (West Side - Sea Side) almost entirely consisting of a huge Living Room of Double Height (after demolishing slab between fifth and sixth floors) - shown in blue colour**
- (b) **Rear Unit (East Side) having only a large Entertainment Room and another Large Room - shown in blue colour**
- (c) Unauthorisedly added areas, by converting large areas that were earlier free of FSI into enclosed and usable areas, enclosing ducts and converting them into liveable areas, completely enclosing side balconies, converting front and rear balconies into large terraces, **additions to Living Room Double Height and also the Entertainment Rooms, new areas of Library, Store Room, Powder Rooms, Pantry, etc. - shown in pink colour**
26. That the freshly prepared Seventh Floor Plan (**Annexure A-16**), for the unauthorisedly constructed entire seventh floor reveals that it is entirely made into a living and bedroom area, with large Terraces on the West and East ends - shown in pink colour.
27. That on or around 9.6.2023 by "Proposal Status Flow" the BMC rejected the proposal submitted by the present Applicant on various grounds, namely:-

"Remarks: Document Rejection : Documents Rejection. Technical Rejection : Technical Rejection. Sir, **various requisite documents such**



as NOC from Estate Department, CRZ NOC, NAVAL NOC, Tax clearance certificate, Stability certificate from structural engineer & report etc as per EODB are not found attached. kindly reconcile & resubmit in consonance with DCPR 2034.”

The copy of the said “Proposal Status Flow” dated 9.6.2023 is annexed hereto and marked as **Annexure A-17**.

28. That from the aforesaid, it is indisputably clear that the Respondent Nos. 8 to 12 have wilfully and deliberately reconstructed the Pan Har property by severally violating the plans approved in September, 2001 and are in serious violation of the CRZ Notifications of the Environment (Protection) Act, 1986, etc. and have thereby unauthorisedly constructed additional area of 3 times the permissible FSI i.e. approximately 3,669 square meters or 39,492 square feet. The Respondent Nos. 8 to 12 are since 2022 wrongfully occupying the Pan Har property without even the mandatory Occupancy Certificate.
29. That by applying the present market rate of around Rs. 1.50 lacs per square feet in Worli Sea Face area, the Respondent Nos. 8 to 12 have made a wrongful gain of around 600 crores at the expense of the exchequer, by violating all applicable laws.
30. That it is evidently clear that under the garb of a regularisation proposal the unauthorised construction in the entire Pan Har property is being sought to be used by the Respondent Nos. 8 to 12.
31. That it is clear from the notice of the Municipal Corporation (Annexures A-2 and A-3 hereto), that the unauthorized

construction as undertaken by the Respondent Nos. 8 to 12 and as objected by the Municipal Corporation is of a substantial nature. This is certainly a brazen illegality as rightly noticed by the officers of the Corporation in issuing the notice in question. It was certainly not permissible for the Respondent Nos. 8 to 12 to undertake such large scale construction activity and that too in an unauthorized manner. Thus, any indulgence to permit usage of such unauthorised construction and to unlawfully gain from the same for amount exceeding Rupees Six Hundred crores would be against the tenets of law. No authority can pass any order which would compound any illegality and that too when the nature of the objected unauthorized construction is admitted on the part of the Respondent Nos. 8 to 12, also by submitting the Retention Application. There is thus no dispute that the Respondent Nos. 8 to 12 have carried out large scale unauthorised construction in blatant violation of the sanctioned plans and the provision of law, including the including the CRZ Notification 1991 and the DCR 1991.

32. That from the aforesaid it is abundantly clear that after the Respondent Nos. 8 to 12 purchased the Pan Har Property in July, 2021, which at that time was comprising of basement plus stilt/ground plus six (6) upper floors aggregately admeasuring approximately 19,886 square feet or thereabout carpet area, by taking advantage of the Covid-19 pandemic they started demolishing almost the entire building from inside and also from outside and reconstructed the said property, without obtaining any CRZ and/or DCR Clearance or any other clearances from MoEFCC or MCZMA or BMC. Pursuant to the Order dated 3.5.2023 passed by this Hon'ble Tribunal in OA



No. 25 of 2023, the Respondent authorities were directed to constitute a Committee and visit the suit site and submit a factual and action taken report with regard to the violations complained of by the Applicant.

33. That pursuant to the above Order, on 8.5.2023 the officers of the BMC visited the Pan Har property and inspected the same in consonance with Building Completion plans under Proposal no. EEBPC/3294/GS/A dated 27.9.2001 i.e. the final plans in accordance to which the Pan Har property was constructed. On inspection, the BMC found serious violations of the said plans dated 27.9.2001 and accordingly issued a Notice dated 24.5.2023 u/s 342 of the BMC Act to Respondent No.8, through its Director, the Respondent No. 10.
34. That pursuant to the above Notice dated 24.5.2023, the Respondent Nos. 8 to 12 submitted various applications for retention of the unauthorised construction totaling 5,465.49 square meters against the maximum FSI of 1794.84 square meters approved under the plans dated 27.9.2001. Thus, admittedly these Respondents have reconstructed the Pan Har property with FSI of 4.0 against the approved 1.33.
35. That on or around 9.6.2023, BMC rejected the proposal submitted by Respondent Nos. 8 to 12 on various grounds, including that requisite permissions and documents such as NOC from BMC Estate Department, CRZ Clearance, NOC from Indian Navy, Income Tax clearance certificate, Stability certificate from structural engineer & report etc are not submitted.



36. That it was only after their applications for retention of the unauthorised construction was rejected by the BMC, on 15.6.2023 the Respondent Nos. 8 to 12 that the Respondent Nos. 8 to 12 have approached this Hon'ble Tribunal and filed the present I.A. No. 139 of 2023 by suppressing all the documents earlier filed by them with the BMC and other authorities in order to retain the unauthorised construction of market value of almost Rs. 600 crores and has therefore played a fraud on this Hon'ble Tribunal.
37. That the Hon'ble Supreme Court in its judgment, as reported in AIR 1994 Supreme Court 853 "S. P. Chengalvaraya Naidu (dead) by L.Rs Appellants v. Jagannath (dead) by L.Rs. and others" has held that:-

Para 7

".... The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. **One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the, illegal-gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be**



summarily thrown out at any stage of the litigation.

Para 8

“The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the Court. **A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage.** Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Exhibit B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Nonproduction and even non-mentioning of the release deed at the trial tantamounts to paying fraud on the Court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Exhibit B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to

produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side than he would be guilty of playing fraud on the Court as well as on the opposite party.”

The copy of Hon'ble Supreme Court judgment, as reported in AIR 1994 Supreme Court 853 "S. P. Chengalvaraya Naidu (dead) by L.Rs Appellants v. Jagannath (dead) by L.Rs. and others" is annexed hereto and marked as **Annexure A-18**.

38. That under the aforesaid circumstances, it leaves no room of doubt that the present I.A. No. 139 of 2023 is filed by playing a fraud on this Hon'ble Tribunal and therefore it deserves to be straightaway dismissed.
39. That, without prejudice to the aforesaid, the Respondent Nos. 8 to 12 are further carrying forward their fraudulent acts in an attempt to dismiss the present O.A., by making one false allegations after another, none of which are maintainable both in facts and in law as more particularly set out hereunder.
40. That it is falsely alleged by Respondent Nos. 8 to 12 that the Original Applicant has allegedly filed several litigations raising almost identical issues as the present O.A. with respect to the subject property. However, except for making false allegations, these Respondents have not produced any documents to substantiate their patently false claim that "*the Original Applicant has allegedly filed several litigations raising almost identical issues as the present O.A. with respect to the subject property*". It is clear that a false statement is made on oath in

order to deliberately mislead this Hon'ble Tribunal and the Respondent Nos. 8 to 12 are guilty of perjury.

41. That it is the further alleged by Respondent Nos. 8 to 12 that the Original Applicant had filed a suit before Hon'ble Bombay High Court being suit No. 5111 of 1994 against the original owner of the subject property wherein the issues which are raised in the present proceeding qua CRZ Notification, DCR, etc. with respect to the subject property were raised. In order to buttress their false allegations, these Respondents have filed the copy of the Judgment and Order dated 5.12.2019 passed in Suit No. 5111 of 1994.
42. That it is the own case of Respondent Nos. 8 to 12 that admittedly they were not even the parties to suit No. 5111 of 1994. The copy of the Judgment dated 5.12.2019 annexed at Exhibit "A" to I.A. No. 139 of 2023 clearly shows that it was not inter parté i.e. the parties in suit No. 5111 of 1994 and in O.A. No. 25 of 2023 are mostly not the same, namely:-

<u>Suit No. 5111 of 1994</u>	<u>O.A. No. 25 of 2023</u>
<u>Plaintiffs:</u> 1. Snehlata Nevatia (later deleted after her death in the year 2011) 2. Dileep Nevatia	<u>Applicant:</u> 1. Dileep Nevatia
<u>Defendants:</u> 1. M/s Arkay Holdings Ltd. 2. Municipal Corporation of Greater Bombay 3. The Dy. Chief Controller of Explosives 4. The Senior Inspector, Worli	<u>Respondents:</u> 1. Union of India 2. Maharashtra Coastal Zone Management Authority 3. District Collector, Mumbai Suburban

Police Station	4. Municipal Corporation of Greater Mumbai
5. The Commissioner of Police	5. Chief Fire Officer
	6. Deleted
	7. Deleted
	8. Hari Krishna Exports Pvt. Ltd.
	9. Hasmukh Thakarshi Dholakia
	10. Ghanshyam Dhanji Dholakia
	11. Savji Dhanji Dholakia
	12. Tulsi Dhanji Dholakia

43. That the records of the above proceedings clearly show that they are not having common parties. The deceased Plaintiff No.1 in the Suit is not a party in the present O.A. Similarly in High Court suit No. 5111 of 1994, there are five Defendants, whereas in O.A. No. 25 of 2023 there are ten Respondents (after deleting two Respondents).
44. That Municipal Corporation of Greater Mumbai is the only common Defendant/Respondent in the two proceedings. The Defendant Nos. 1, 3, 4 and 5 in the suit are not parties in the present O.A. Similarly, Respondent Nos. 1, 2, 3, 5, 8, 9, 10, 11 and 12 were not the parties in the High Court suit.
45. That by relying on the Judgment dated 5.12.2019 passed in Suit No. 5111 of 1994 and the Order dated 10.6.2022 passed in Appeal No. 49 of 2020 in Suit No. 5111 of 1994, the Respondent Nos. 8 to 12 are now alleging that the Original

Applicant is allegedly estopped from filing fresh Petition on the same grounds before another forum.

46. That it is trite that a judgment passed in another proceeding, which is not inter parté is inadmissible to prove the facts as stated therein. The findings of fact arrived at on the evidence in one case are not evidence of that fact in another case and therefore the Judgment and Orders filed by the Respondent Nos. 8 to 12 passed in suit No. 5111 of 1994 cannot be looked into the present proceedings.
47. That the Hon'ble Bombay High in its judgment, as reported in AIR 2008 BOMBAY 155 "*Shamlata Raut v. Vishweshwara Tukaram Giripunje*" has held that:-

Para 5

"The learned counsel for the appellant contended that the Courts below have relied upon the documents on which it could not have. The plaintiff has pleaded that he had instituted a suit for declaration of his ownership against the State of Maharashtra and the suit was decreed in his favour. The plaintiff has placed on record the judgment delivered in that suit and the appeals thereon. The certified copies of the judgments of the Courts have been filed on record. They are Exhs. 51, 53 and 54. Exh. 51 is the copy of the trial Court judgment. Exh. 53 is the copy of the judgment of the first appellate Court while Exh. 54 is the judgment of the High Court. As said, the suit was between the original plaintiff and the



State. It appears that the Nazul Tahsildar had given notice to the plaintiff-tenant to remove the encroachment on the said site and therefore, the suit was filed. The suit was decreed. The question is whether this judgment is at all relevant. The learned counsel for the appellant submitted that this judgment does not fall within the scope of Sections 40 to 44 (of the Evidence Act). The judgment does not fall within the scope of Section 11 of Code of Civil Procedure since the present defendant was not party to that suit. Obviously, therefore, that judgment does not fall within the scope of Section 40 of the Evidence Act. It is not relevant under Section 41 because it is not a judgment delivered in exercise of probate, matrimonial, admiralty, or insolvency jurisdiction. It is no relevant because it does not relate to matter of public nature. It also does not fall within the scope of Section 43 since existence of such judgment is not fact in issue. The learned Judge of the first appellate Court as well as the trial Court could not have, therefore, looked into this judgment for any purpose, for they are irrelevant.”

The copy of Hon'ble Bombay High Court judgment, as reported in reported in AIR 2008 BOMBAY 155 "*Shamlata Raut v. Vishweshwara Tukaram Giripunje*" is annexed hereto and marked as **Annexure A-19**.



48. That it is the further case of Respondent Nos. 8 to 12 that the Applicant is allegedly estopped from filing a fresh petition i.e. the present O.A. on the same grounds as these issues have been agitated by the Applicant before the Hon'ble Bombay High Court and therefore, the present O.A. would allegedly be hit by the principles of Res Judicata, Constructive Res Judicata, Issue Estoppel and principles analogous therewith. Accordingly, these Respondents are falsely claiming that the present O.A. is allegedly not maintainable and therefore be dismissed, as alleged.

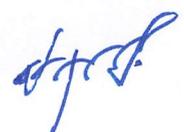
49. That Section 11 of CPC which defines *res judicata* states that:-

"11. Res judicata.—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former **suit between the same parties**, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

50. That as pointed out in the aforesaid paras 42, 43 and 44, the High Court suit No. 5111 of 1995 and O.A. No. 25 of 2023 is between altogether different parties or persons claiming under them, litigating under the same title. Thus, the preliminary requirement of applying principles of Res Judicata, Constructive Res Judicata, etc. do not apply in the present case.



51. Thus, the proceedings relied upon by Respondent Nos. 8 to 12 i.e. High Court suit No. 5111 of 1994 and the present O.A. are clearly not inter partes and a decision not inter partes cannot, even on general principles of *res judicata*, operate as *res judicata* in a subsequent proceedings.
52. That the basic method to decide the question of *res judicata* is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as *res judicata*. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment.
53. That in I.A. No. 139 of 2023 the Applicants/Respondent Nos. 8 to 12 have neither produced the copy of the Complaint nor the Issues framed. These Respondents have also not furnished any particulars of as to what had been decided by the judgment which operates as *res judicata*. Except for mere speculations, nothing is furnished by Respondent Nos. 8 to 12 for the simple reason there is nothing in issue between Suit No. 5111 of 1994 and O.A. No. 25 of 2023 which operates as *res judicata*.
54. That the complaint in High Court suit No. 5111 of 1994 reveals that none of the issues raised in the said suit or the prayers made therein are either raised or prayed for in the present O.A.
- The copy of the Complaint in Bombay High Court suit No. 5111 of 1994, as amended, is annexed hereto and marked as **Annexure A-20**.
55. That the pleading in the complaint of suit No. 5111 of 1994 show that it was mainly in respect of:-



(a) Paras 7 to 27

- (i) Proposed construction multi storeyed apartments, alongwith two floors of basements, by removing the rock in the land to the depth of around 25 feet - This is not in issue in the present O.A.
- (ii) Uncontrolled use of explosives within 5 - 10 ft. of the adjoining Plot No. 5 A of the Plaintiffs, which has endangered both the building foundations and the water tank in the Plaintiffs land - This is not in issue in the present O.A.
- (iii) Total absence of Police personnel and blasting is going on uninterrupted almost every day - This is not in issue in the present O.A.
- (iv) Construction of two storeys of Basement having a combined area of 100 per cent of the plot area, without assessing the structure of the Worli Sea Face area and the danger, this excavation, can cause to the foundations of the neighbouring buildings - This is not in issue in the present O.A.
- (v) The machines used at a very high peak sound and heavy compressors rock drills are continuously run over every day and that in the evening causing extreme distress to the family members of the Plaintiffs - This is not in issue in the present O.A.

(b) Para 28

- (i) Defendant No.2 (BMC) has permitted Defendant No.1 to construct the extra F.S.I. under the false



guise of a basement - This is not in issue in the present O.A.

(c) Paras 28 (a) to 28 (c) - Plaint amended on 9.5.1997

- (i) There is no Basement in the structure and the ground floor is being wrongly termed as a Basement, so as to circumvent both the FSI and the open space requirement - This is not in issue in the present O.A.
- (ii) The minimum open space, as required for a tall structure, is not being maintained due to which the Plaintiffs are being deprived of light and ventilation - This is an issue in the present O.A. for the reconstructed structure
- (iii) The open space on the ground floor covered by ramps and other obstructions have made the site at Plot No. 5 of Defendant No.1 extremely fire hazardous. This has put the lives of the Plaintiffs at a grave risk in case of fire emergencies as the fire engines will not be enter the site on Plot no. 5 of the defendant no. 1 - This is not in issue in the present O.A.
- (iv) The Defendant No. 1 has constructed FSI @ 192% against a maximum permissible FSI of 133% which has come on account of violations of both height and open space requirements - This is not in issue in the present O.A. However, in the present O.A., the copies of the application for retention of unauthorised construction with FSI @



400% made by Respondent Nos. 8 to 12 after purchasing the Pan Har property is filed alongwith this Reply.

(d) Para 34 (a) - Plaint amended on 9.5.1997

(i) Report on use of explosives of Central Mine Planning and Design Institute Ltd. (CMPDI), a Government of India Undertaking - This is not in issue in the present O.A.

56. That even the prayers in High Court suit No. 5111 of 1994 are completely different than what is prayed in O.A. No. 25 of 2023, namely:-

“(a) that this Hon’ble Court be pleased to pass a decree in favour of the Plaintiff and against the Defendant for a sum of Rs. 10,00,00,000/- (Rupees Ten Crore only) with interest at the rate of 24% per annum from the date of filing of the suit till the date of decree and/or payment or realisation thereof as more particularly set out in the Particulars of Claim annexed as Exhibit ‘K’ hereto.

(b) that the Hon’ble Court be pleased to call for the records, papers and files pertaining to the issuance of permission granted by Defendants Nos. 2 to 5 to the Defendants No.1 allowing them to construct a multi-storeyed building two storeyed basements on the Plot No.5 of Worli Sea Face and/or allowing them to use a dynamite for blasting rocks and after going through the validity, legality and propriety thereof be pleased to set aside and cancel the said permission/orders;

- (c) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to pass a mandatory order and injunction directing Defendant Nos. 2 to 5 to immediately produce copies of various permissions and orders granted to Defendant No.1 for carrying on construction on the said Plot No.5 and allowing the use of dynamites and be further pleased to allow the Plaintiffs to make copies thereof;
- (d) that the Defendant No. 1 their servants, agents be restrained by a permanent order and injunction of this Hon'ble Court from in any manner carrying on the construction activities on the plot bearing No.5 situate at Worli Sea Face bearing Cadastral Survey No. 731 of Worli Division.
- (e) that the Hon'ble Court be pleased to appoint a penal or committee of independent Architects/Experts to investigate in the matter and to submit detailed report/opinion to the Hon'ble Court suggesting steps to be taken in the matter forthwith and be further pleased to pass appropriate orders on perusal of such report.
- (f) that this Hon'ble Court be pleased to direct Defendant No.2 to cancel the Lease of Plot No.5 and to obtain forcible possession of the said plot from Defendant No.1, their servants and agents or any other persons found in possession thereof for committing a breach of the lease deed;
- (g) that pending the hearing and final disposal of the suit the Defendant Nos. 2 to 5 be directed by a mandatory



order and injunction of this Hon'ble Court to stop the construction activities of the 1st Defendants the Plot No.5 situate at Worli Sea Face forthwith,"

57. That the Issues that were framed on 3.3.2014 in High Court suit No. 5111 of 1994 are also completely different than the Issues raised in O.A. No. 25 of 2023, namely:-

- “1. Whether defendant no. 1 proves that the suit is barred by law of limitation?
2. Whether the suit is liable to be dismissed on account of non-joinder of necessary parties?
3. Whether the plaintiff proves that the suit is maintainable despite of non-service of statutory notice U/s. 80 of the Code of Civil Procedure?
4. Whether the plaintiff proves that the suit is maintainable despite of non-service of statutory notice U/s. 527 of the Bombay Municipal Corporation Act?
5. Whether the plaintiff proves that defendant no. 1 has committed any illegal construction activity as alleged in the plaint or at all?
6. If the answer to issue no. 5 is in the affirmative, then whether the plaintiff proves that the plaintiff is entitled to make a claim for damages against defendant no. 1 to the tune of Rs. 10 Crore or at all?
7. Whether the plaintiff proves that he is entitled to claim any amount from defendant no. 1 on account of interest at the rate of 24% per annum from the date of filing of the above suit as alleged or at all?

8. Whether the plaintiff proves that he is entitled to claim exclusively the entire amount of damages (including the amount claimed by the original plaintiff no. 1, viz. Late Mrs. Snehalata Nevatia) prayed in prayer clause (a) of the plaint, in view of the suit no. 3598 of 1996 pending before this Hon'ble Court?"

The copy of the Issues framed on 3.3.2014 in Bombay High Court suit No. 5111 of 1994 is annexed hereto and marked as **Annexure A-21**.

58. That on the other hand, in O.A. No. 25 of 2023 the Applicant has specifically pleaded that all the violations that have taken place in the Pan Har property have taken place after the Respondent Nos. 8 to 12 purchased the said property in the year 2021 i.e. by Indenture of Assignment dated 30th July, 2021.
59. That the particulars of the violations that have been committed by Respondent Nos. 8 to 12 in the Pan Har property are set out on paras (23) to (44) of O.A. No. 25 of 2023 and the brief particulars of the unauthorised construction at Pan Har property carried out by Respondent Nos. 8 to 12 is annexed at Annexure A-13 to the O.A.
60. That in paras (65) and (66) of O.A. No. 25 of 2023 it is further stated that:-

“65. That it is evidently clear that for reasons best known to them, the Respondent Nos. 1 to 6 are failing to take any actions against the unauthorised constructions at the Pan Har property by the Respondent Nos. 8 to 12, in

deliberate and wilful violations of the CRZ Notification, 1991, the Mumbai Municipal Corporation Act, Development Control Regulations, etc. At the same time, the unauthorised construction carried out after July, 2021 onwards has resulted in windfall profit personally to Respondent Nos. 8 to 12 of at least Rupees One Hundred Crores.

66. That after purchasing the Pan Har property, the Respondent Nos. 8 to 12 carried out the entire re-construction under the garb of huge covers over the entire building and it was only since 26th June, 2022 onwards i.e. when these covers were being regularly removed and the reconstructed building being exposed, that the Applicant realised the extent of the unauthorised construction that was carried out in the Pan Har property.”
61. That amongst the “**Grounds**” stated in O.A. No. 25 of 2023 that clearly differentiates the issues involved in the High Court suit and the O.A. are:-
- (A) Because the Application raises the issue of substantial question relating to environment and community at large is affected by the non-action of the Respondent Nos. 1 to 7 of the violations of the Coastal Regulation Zone Notification, 1991 of the Environment (Protection) Act, 1986 and of Development Control Regulations for Greater Bombay 1991;

- (B) Because the additional construction, repairs and renovation carried out in Pan Har property situated within 200 meters of the HTL in the CRZ-II coastal area, is without the mandatory clearance from MoEFCC and MCZMA;
- (C) Because the investment in Pan Har property, after its additional construction, repairs and renovation, far exceeds Rupees Five Crores and yet no mandatory Environmental Clearance is obtained from MoEFCC;
- (D) Because the illegal constructions in Pan Har property situated in the CRZ-II coastal area, not only violate the laws relating to the environment but also amount to destruction of our ecosystem;
- (E) Because the illegal constructions in Pan Har property pollute the environment;
- (F) Because allowing such illegal constructions to exist in the coastal areas violate fundamental rights of the citizens under Article 21 of the Constitution of India;
- (G) Because the right to healthy environment has been construed as a part of the right to life under Article 21 by way of judicial pronouncements and this Hon'ble Tribunal has special jurisdiction for enforcement of these rights;
- (H) Because under Section 15(1)(b) and 15(1)(c) of the NGT Act, this Hon'ble Tribunal is empowered to provide for restitution of property damaged and for restitution of the environment for such area or areas;



- (I) Because the cause of filing the present Application is independent from the High Court suit No. 5111 of 1994, as the present violations have taken place after the Respondent Nos. 8 to 12 purchased in Pan Har property in the month of July, 2021;
- (J) Because the construction raised, without permission, within 200 meters of the HTL and in violation of CRZ 1991 Notification cannot be condoned and requires to be demolished;
- (K) Because the unauthorised construction carried out by the Respondent Nos. 8 to 12 on the Pan Har property is blocking light and air to the Applicant, his family members and neighbours and is violative of their right to a healthy life, as guaranteed by Article 21 of Constitution of India and it is the bounden duty of Respondent Nos. 1 to 7 to step-in to protect these rights against the unlawful onslaught by Respondent Nos. 8 to 12;
- (L) Because the Respondent Nos. 8 to 12 have spent huge amounts in the large scale unauthorised construction in the Pan Har property situated in CRZ-II area, without applying for or obtaining the mandated Environmental Clearance from MoEFCC or MCZMA, and have deliberately and wilfully violated the provisions of CRZ Notification, 1991;
- (M) Because the Respondent Nos. 8 to 12 have also failed to apply and obtain any approval from BMC and they have further violated the provisions of Development Control Rules of the BMC Act, MRTP Act, etc.;



- (N) Because for reasons best known to them, the Respondent Nos. 1 to 7 are failing to take any actions against the unauthorised constructions at the Pan Har property by the Respondent Nos. 8 to 12, made in deliberate and wilful violations of the CRZ Notification, 1991, the Mumbai Municipal Corporation Act, Development Control Regulations, etc.;
- (O) Because the unauthorised construction carried out after July, 2021 onwards has resulted in illegal profit to Respondent Nos. 8 to 12 of at least Rupees One Hundred Crores;
- (P) Because the unauthorisedly constructed permanent structure of around 3,000 to 4,000 square feet in the front open space in place of the "Water Body/Paddle Pool" and garden i.e. towards the seaward side of the existing building Pan Har is in clear violation of the CRZ 1991 Notification;
- (Q) Because the Respondent Nos. 8 to 12 have demolished almost the entire Pan Har building from inside and also from outside and reconstructed the said property, without applying for permissions or obtaining any CRZ and/or DCR Clearance and/or any other permissions from MoEFCC or MCZMA or BMC;
- (R) Because the Respondent Nos. 8 to 12 have constructed an unauthorised seventh floor, having huge open terrace on the front side of the building i.e. on the seaward side of the building and also on the back side of the building;



- (S) Because the Respondent Nos. 8 to 12 have constructed unauthorised terraces/balconies on the seaward side of the building on the first to sixth floors;
- (T) Because the Respondent Nos. 8 to 12 have unauthorisedly added areas in the side open spaces of the building, starting from the first floor onwards to the sixth floor;
- (U) Because the Respondent Nos. 8 to 12 have unauthorisedly enclosed the entire stilt floor and converted the same as living areas;
- (V) Because the unauthorised construction at Pan Har property has resulted in further violations and has adversely affected the flow of light and air of the Applicant and his family and other neighbours, exposed them to grave risk against fire, Open Space violations, etc.;
- (W) Because of the unauthorised construction, the revised height of the Pan Har building far exceeds 24 meters and the minimum open space at the ground level is required to be maintained at 9 meter, so as to ensure proper light and ventilation to the occupants and the neighbours;
- (X) Because against the required minimum side open space of 9 meters, the earlier approved open space of 4.8 meters (South side) and 4.65 meters (North side) is further reduced due to added areas in the side open spaces of the building, starting from the first floor onwards to the sixth floor;



- (Y) Because the unauthorised construction carried out by the Respondent Nos. 8 to 12 on the Pan Har property is blocking light and air to the Applicant, his family members and neighbours and is violative of their right to a healthy life, as guaranteed by Article 21 of Constitution and it is the bounden duty of Respondent Nos. 1 to 7 to step-in to protect these rights against the unlawful onslaught by Respondent Nos. 8 to 12;
- (Z) Because the unauthorised construction at Pan Har property has further violated the "Fire Protection Requirements" and has exposed the Applicant, his family and neighbours from grave risk in case of fire in the properties;
- (AA) Because the construction work at Pan Har property, after its re-construction, are neither inspected by the Chief Fire Officer of the BMC nor any clearance given by the Chief Fire Officer;
- (BB) Because no occupancy certificate is given to the Pan Har property, after its unauthorised re-construction, by the Municipal Commissioner and yet the Respondent Nos. 4 to 7 are failing to take any action against the unauthorised construction, which is now being unauthorisedly occupied by Respondent Nos. 8 to 12;
- (CC) Because the construction of work of Pan Har property, after its re-construction, is neither inspected by the Chief Fire Officer of the BMC nor any clearance given by the Chief Fire Officer and no occupancy certificate is given by the Municipal Commissioner and yet the Respondent Nos. 4 to 7 are failing to take any action against the



unauthorised construction, which is now being unauthorisedly occupied by Respondent Nos. 8 to 12;

(DD) Because the occupation of the reconstructed Pan Har property by Respondent Nos. 8 to 12, without occupation certificate, cannot be countenanced and permitted in law;

(EE) Because there does not exist any compulsory "Recreational/Amenity Open Spaces" or garden or trees, etc. on the entire Pan Har land and therefore the Respondent Nos. 8 to 12 have also violated the principle of sustainable development which has been construed by the Hon'ble Supreme Court as an integral part of Article 21 of the Constitution;

62. That the limitation clause and the cause of action in O.A. No. 25 of 2023 further states that:-

"77. That the cause of action for filing the present Application arose sometimes in the month of June, 2022, when the Applicant came to be aware of the unauthorised construction carried out by Respondent Nos. 8 to 12 in the Pan Har property and therefore the present Application, filed under Section 15 of the NGT Act for restitution of property and environment, is within the period of limitation of five years and is within time."



63. The main prayers in O.A. No. 25 of 2023 are again completely different from what was prayed in High Court suit No. 5111 of 1994, namely:-

- “i) Directing the Respondent Nos. 1 to 7 to restore the Pan Har property, including its usage, as per the last plans approved by the Respondent No.4 in or around the month of September, 2001 including the plans at **Annexure A-3** to **Annexure A-6** hereto, with the cost of demolition and restoration to be borne by the Respondent Nos. 8 to 12;
- ii) Directing the Respondent Nos. 2, 4 and 5 to prosecute the Respondent Nos. 8 to 12 and their concerned officers under the provisions of the Environment (Protection) Act, 1986;”

64. That as pointed out in *Syed Mohd. Salie Labbai v. Mohd. Hanifa* [(1976) 4 SCC 780] the basic method to decide the question of *res judicata* is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as *res judicata*. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment.

65. That the Constitution Bench in *Gurbux Singh v. Bhooralal* [AIR 1964 SC 1810 : (1964) 7 SCR 831] placing on a par the plea of *res judicata* and the plea of estoppel under Order 2 Rule 2 of the Code of Civil Procedure, held that proof of the plaint in the previous suit which is set to create the bar, ought to be brought

on record. The plea is basically founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings.

66. That Their Lordships of the Privy Council in *Kali Krishna Tagore v. Secy. of State for India in Council* [(1887-88) 15 IA 186 : ILR 16 Cal 173] pointed out that the plea of res judicata cannot be determined without ascertaining what were the matters in issue in the previous suit and what was heard and decided. Needless to say, these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit.

The copy of the Hon'ble Supreme Court judgment dated 29.3.2023 "*Prem Kishore and others versus Brahm Prakash and others*", whereby recording the above authorities in para (26) of the judgment is annexed hereto and marked as **Annexure A-22**.

67. That the Hon'ble Supreme Court in its judgment, as reported in AIR 2011 Supreme Court 9 "*Alka Gupta v. Narender Kumar Gupta*", has held in para (14) of the judgment that Section 11 of the CPC requires the following essential requirements to be fulfilled, to apply the bar of res judicata to any suit or issue:-

- (i) **The matter must be directly and substantially in issue in the former suit and in the latter suit.**
- (ii) **The prior suit should be between the same parties or persons claiming under them.**



- (iii) **Parties should have litigated under the same title in the earlier suit.**
- (iv) **The matter in issue in the subsequent suit must have been heard and finally decided in the first suit.”**

That none of the above requirements have been fulfilled in the two proceedings where under the Respondent Nos. 8 to 12 are attempting to apply the bar of res judicata, namely High Court suit No. 5111 of 1994 and NGT O.A. No. 25 of 2023.

The copy of the above Hon'ble Supreme Court judgment, as reported in AIR 2011 Supreme Court 9 "*Alka Gupta v. Narender Kumar Gupta*", is annexed hereto and marked as **Annexure A-23**.

68. That in the above authority, the Hon'ble Supreme Court has further held in para (15) that:-

“Explanation IV provides that where any matter which might and ought to have been made a ground of defence or attack in the former suit, even if it was not actually set up as a ground of attack or defence, shall be deemed and regarded as having been constructively in issue directly and substantially in the earlier suit. Therefore, even though a particular ground of defence or attack was not actually taken in the earlier suit, if it was capable of being taken in the earlier suit, it became a bar in regard to the said issue being taken in the second suit in view of the principle of constructive res judicata.”

69. That moreover, the Respondent Nos. 8 to 12 have not even stated what was the ground of attack that Applicant ought to



have raised in suit No. 5111 of 1994 but had failed to raise, which the Applicant has raised in the present O.A. No. 25 of 2023, to attract the principle of constructive res judicata, due to simple reason that the Respondent Nos. 8 to 12 herein were not even parties in suit No. 5111 of 1994. Under the circumstances, it is clear that the present O.A. is also not barred by constructive res judicata, as alleged by Respondent Nos. 8 to 12.

70. That in O.A. No. 222 of 2014 "*The Forward Foundation and others v. The State of Karnataka*" the Full Bench of this Hon'ble Tribunal was seized with the issue of bar of res judicata on grounds that in Writ Petition filed in the Karnataka High Court the issues raised and the reliefs sought are the same as in O.A. No. 222 of 2014. **By Judgment dated 4.5.2016, this Hon'ble Tribunal dismissed the said objections by holding that the parties are not common and also the issues in application and the writ petitions are not directly and substantially the same. After examination of the pleadings, this Hon'ble Tribunal has recorded a finding of fact that there is no commonality of a cause of action or likelihood of a conflict between the judgments and that the prayers and the geneses of the respective proceedings are entirely distinct and different in their scope and relief.**
71. That the said Order was challenged before the Hon'ble Supreme Court and by its judgment, as reported in AIR 2019 (SC) 365 "*Mantri Techzone Pvt. Ltd. v. Forward Foundation and others*". The Hon'ble Supreme Court, after recording in Para (58) of the judgment the conclusion of this Hon'ble Tribunal (supra), upheld the same at para (59) of the judgment, namely:-



“59. We do not find any error in the aforesaid conclusion of the Tribunal. We are of the view that the Tribunal was justified in holding that the objections taken by the respondent Nos. 9 and 10 do not satisfy the basic ingredients to attract the application of res judicata or constructive res judicata.”

The copy of the above judgment, as reported in AIR 2019 (SC) 365 “*Mantri Techzone Pvt. Ltd. v. Forward Foundation and others*” is annexed hereto and marked as **Annexure A-24**.

72. That it is the further case of Respondent Nos. 8 to 12, as stated in paras (8) to (12) of the O.A. that that Applicant has allegedly suppressed the material facts and has only disclosed selected portion of the High Court suit in paras (18), (20) and (68) of O.A. No. 25 of 2023, which is completely false and misleading on part of Respondent Nos. 8 to 12.
73. That as pointed out in the foregoing paras (3) to (36) and **Annexure A-3 to Annexure A-17 hereto**, it was only after their applications for retention of the unauthorised construction was rejected by the BMC, on 15.6.2023 the Respondent Nos. 8 to 12 have approached this Hon'ble Tribunal and filed the present I.A. No. 139 of 2023 by suppressing all the documents earlier filed by them with the BMC and other authorities in order to retain the unauthorised construction of market value of almost Rs. 600 crores and has therefore played a fraud on this Hon'ble Tribunal.
74. That the material background facts, as disclosed in O.A. No. 25 of 2023 are clearly set out in the O.A. are :-



- (a) Paras (7) to (17) - regarding original construction made by the erstwhile owner, Arkay Holdings Ltd.
- (b) Paras (18) to (20) - High Court suit No. 5111 of 1994, the documents and plans marked in evidence and the final Order in the suit.
- (c) Paras (21) to (22) - regarding sale of Pan Har property by Arkay Holdings Ltd. to Respondent No.8 by Indenture of Assignment dated 30th July, 2021 giving particulars of the property as it stood at that time.
- (d) Paras (23) to (47) - regarding Respondent Nos. 8 to 12 having spent huge amounts in the large scale unauthorised construction in the Pan Har property situated in CRZ-II area, without getting the mandated Environmental Clearance from MoEFCC or MCZMA and failing to obtain any approval from BMC and they have further violated the provisions of Development Control Rules of the BMC Act, MRTP Act, etc.
- (e) In Paras (67) and (68), the particulars of the Applicant's meeting with Respondent No. 10 are given as:-

“67. That sometimes in the month of November, 2021 the Respondent No. 10 approached the Applicant and requested that in view of future relationship as good neighbours, the Applicant should withdraw the pending High Court Appeal No. 49 of 2020 in Suit No. 1994 of 1994 and also the pending I.A. in the said



Appeal and also offered him a token amount, which was far less than the damages of Rs. 10 crores claimed in the suit, alongwith interest thereon.

68. **That in the interest of future relationship and as a good neighbour, the Applicant proceeded to withdraw the High Court Appeal No. 49 of 2020, little knowing that while making such assurances, the Respondent No.9 had already started the unauthorised construction and the said Respondent deliberately made false assurances to the Applicant and thereby wilfully misled him to withdraw the Appeal, which the Applicant did on 10th June, 2022.”**
75. That needless to say that for a token amount of Rs. 1.25 crores, which the Applicant accepted to forego his claim of over 10 crores plus interest thereon and for future relationship as a good neighbour, the Respondent Nos. 8 to 12 have constructed completely unauthorised structures and have illegally gained a windfall profit of over 600 crores. Needless to state the Applicant has disclosed all the facts in the O.A.
76. That on the other hand, it is the Respondent Nos. 8 to 12 who have approached this Hon'ble Tribunal and filed the present I.A. No. 139 of 2023 by suppressing all the documents earlier filed by them with the BMC and other authorities in order to retain the unauthorised construction of market value of almost

Rs. 600 crores and has therefore played a fraud on this Hon'ble Tribunal.

77. That it is the further case of Respondent Nos. 8 to 12, as stated in para (13) of the O.A. that that the violations of DCR and MRTTP Act allegedly do not come under the purview of this Hon'ble Tribunal, which is a completely misguided notion.
78. That it is trite that the NGT Act, which is a Central legislation, would override State legislations and any planning law has to yield to the former. The Hon'ble Supreme Court in its judgment as reported in AIR 2019 (SC) 365 "*Mantri Techzone Pvt. Ltd. v. Forward Foundation and others*" (supra), which is annexed as **Annexure A-24** has held in para (47) that:-

"47. Section 33 of the (NGT) Act provides an overriding effect to the provisions of the Act over anything inconsistent contained in any other law or in any instrument having effect by virtue of law other than this Act. This gives the Tribunal overriding powers over anything inconsistent contained in the KIAD Act, Planning Act, Karnataka Municipal Corporations Act, 1976 ("KMC Act"); and the Revised Master Plan of Bengaluru, 2015 ("RMP"). A Central legislation enacted under Entry 13 of List I, Schedule VII of the Constitution of India will have the overriding effect over State legislations. The corollary is that the Tribunal while providing for restoration of environment in an area, can specify buffer

**zones around specific lakes and water bodies
in contradiction with zoning regulations
under these statutes or the RMP.”**

79. That the Hon'ble Bombay High Court, while relying upon the Supreme Court judgment in the matter of "*Mantri Techzone Pvt. Ltd. v. Forward Foundation and others*" (supra) has in its judgment, as reported in AIROnline 2021 Bombay 3851 "*Vanshakti and another versus Union of India and others*" has held in Paras (26) and (28) that:-

"26. In view of the pronouncement that the NGT Act would override State legislations, any planning law has to yield to the former. Equally, section 24 of the Environment Act provides that the provisions thereof and the rules or orders made therein shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the said Act. The MRTTP Act, if it contains any provision inconsistent with the Environment Act, must yield to the latter. Even otherwise, if there is direct violation of a specific statutory environmental obligation by a person affecting the community at large or likely to affect such community, the Tribunal may step in and pass such order as is warranted for settling the dispute."

28. **The Tribunal's jurisdiction to deal with environmental issues is so wide and**



expansive that literally speaking, 'everything under the sun' raising substantial question relating to environment can be dealt with by it. It would matter little that in its pursuit to further the objects for which the Tribunal has been brought into existence as well as to ensure protection of environment and conservation of forests and other natural resources including enforcement of any legal right relating to environment, any other enactment is required to be considered. So long as the basic question remains the same, i.e. the Tribunal is either approached or is duty bound to secure proper implementation of the enactments specified in Schedule I of the NGT Act and a substantial question in relation thereto arises, and the decision of the Tribunal on such question would beneficially impact the environment, merely because in the process of decision making the Tribunal may be required to consider provisions of any other enactment would not denude it of its fundamental and predominant task of taking decisions that would advance the object of the Schedule I enactments as also to secure the ends of justice in any particular case. We may refer in this connection to rule 24 of the National



Green Tribunal (Practice and Procedure) Rules,
2011 framed by the Central Government.”

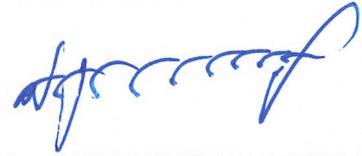
The copy of the above judgment, as reported in AIROnline 2021
Bombay 3851 “*Vanshakti and another versus Union of India and
others*” is annexed hereto and marked as **Annexure A-25**.

80. That it is the further case of Respondent Nos. 8 to 12, as stated
in para (14) of the O.A. that that the violations have taken place
under DCR 1991, which has been superseded by DCPR 2023
and therefore contentions raised under DCR 1991 allegedly
ought to be dismissed.
81. That, without prejudice to the Applicant’s contention that the
provisions DCPR 2023 are not applicable to the present case
which is really a brazen violations of applicable laws,
Regulation (68) of DCPR 2023 states that:-

**“Regulation 68. Coastal Regulation Zone (CRZ)
Notwithstanding anything contained in these
Regulations, any development within CRZ areas
shall be governed by the amended Coastal
Regulation Zone Notification No. S.O. 19(E), dated
6th Jan, 2011 Ministry of Environment and Forest
(MoEF), Government of India as amended from
time to time, wherever applicable.”**

82. That it is abundantly clear that despite all attempts being made
by the Respondent Nos. 8 to 12 to wriggle out of jurisdiction of
this Hon’ble Tribunal by falsely claiming that the CRZ
Notification are not at all maintainable and therefore they
ought to be rejected.

83. In the circumstances, the Applicant respectfully submits that the present I.A. No. 139 of 2023 filed by the Applicants/Respondent Nos. 8 to 12 to dismiss the present O.A. No. 25 of 2023, be dismissed with exemplary costs.



ORIGINAL APPLICANT IN PERSON

SHASHI DEEP, 5-A, WORLI SEA FACE, MUMBAI 400 030

MUMBAI:

DATED: 12.9.2023

**BEFORE THE NATIONAL GREEN TRIBUNAL
WESTERN ZONAL BENCH AT PUNE**

**I.A. NO. 139 OF 2023
IN
ORIGINAL APPLICATION NO. 25 OF 20**

**HARI KRISHNA EXPORTS PVT. LTD.
AND OTHERS**

APPLICANTS

IN THE MATTER BETWEEN:

DILEEP B. NEVATIA

ORG. APPLICANT

VERSUS

UNION OF INDIA & OTHERS

RESPONDENTS

AFFIDAVIT

I, Dileep Nevatia, S/o Shri Balkrishna Nevatia, R/o Shashi Deep, 5-A, Worli Sea Face, Mumbai-400030 aged about 74 years, do hereby solemnly affirm and declare as under:

- 1) That I am the Applicant in the abovementioned Application and I am fully conversant with the facts and circumstances of the case and therefore competent to swear this affidavit.
- 2) That I have read over the contents of the accompanying Reply and same are true and correct.

DEPONENT

VERIFICATION:-

Verified on this the 12th day of September, 2023 that the contents above affidavit are true and correct. No part of it is false and nothing material has been concealed therefrom.



NOTED & REGISTERED
Sr. No. 213...Page No. 20
Date: 12/09/2023

Seen the Driving Licence
No. MH01 - 20090127799
DOI - 6.9.1967

R. R. MISHRA

DEPONENT

ADVOCATE & NOTARY GOVT. OF INDIA
Regd. No. 6226
Resi.: 502, Maruti Tower, 5th Floor,
G. K. Marg, Lower Parel, Mumbai-13.
Mobile: +91-9820276589



**BEFORE THE NATIONAL GREEN TRIBUNAL
WESTERN ZONAL BENCH AT PUNE**

**I.A. NO. 139 OF 2023
IN
ORIGINAL APPLICATION NO. 25 OF 20**

**HARI KRISHNA EXPORTS PVT. LTD.
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VERSUS

UNION OF INDIA & OTHERS

RESPONDENTS

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ORIGINAL APPLICANT IN PERSON

SHASHI DEEP, 5-A, WORLI SEA FACE, MUMBAI 400 030

MUMBAI

DATED: 12.9.2023

ANNEXURE A-1

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TOTAL PAGES	41
MARKET VALUE	51,45,09,500/-
CONSIDERATION AMT.	- 1349.51 Lakhs 47,00,00,000/-
AREA	1349.51 Sqm
CALLAN NO.	MHO 04283748202122

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Certificate of Section 32(1) (b) of the Bombay Stamp Act, 1958

Office of the Collector of Stamps Case No. Adj. LML 888/21/364 Date 21/7/21

मु.ज.म. पंजीकृत माली/आलेख एम्प्लॉय व पि. 30/21 म रोजीच्या दस्तऐवज प्राप्त झालेला दस्तऐवजी खातरजमा करण्यात आला असून ते बरोबर असल्याचे आढळून आले आहे.

Received from Shri. Hari Krishna Exports P. Ltd. stamp duty of Rs. 2,57,254.75

Two crore fifty seven lakh twenty five thousand four hundred seventy five only

Certified under Section 32(1) (b) of the Bombay Stamp Act, 1958 that the full duty of Rs. 2,57,254.75 has been paid vide article No. 25 (b) of schedule

Four hundred seventy five thousand stamp duty A. 69124650/- received on signature of Hari Krishna Exports P. Ltd. as indicated under case no. adj/m/384/2021 studying in the copy held in the previous document

This certificate is subject to the provisions of section 53-A of Bombay Stamp Act, 1958

Place: Mumbai



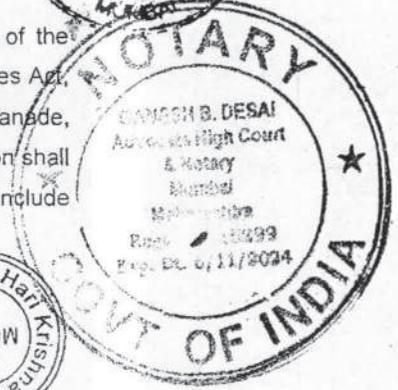
Collector of Stamps Mumbai 30/7/2021

INDENTURE OF ASSIGNMENT

This Indenture of Assignment ("this Indenture") is executed at Mumbai on the 30th day of July 2021



ARKAY HOLDINGS LIMITED, a company incorporated under the provisions of the Companies Act, 1956 and deemed existing under the provisions of the Companies Act, 2013 and having its registered office at Chennai House, 5th Floor, New No. 7, Esplanade, Chennai, Tamil Nadu, hereinafter referred to as "the Assignor" (which expression shall unless it be repugnant to the context or meaning thereof be deemed to mean and include its successors) of the ONE PART



AND



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HARI KRISHNA EXPORTS PRIVATE LIMITED, a company incorporated under the provisions of the Companies Act, 1956 and deemed existing under the provisions of the Companies Act, 2013 and having its registered office at Unit No.1701, "The Capital", 17th Floor, B wing, Plot No.C-70, Bandra Kurla Complex, Bandra East, Mumbai 400051, hereinafter referred to as "the Assignee" (which expression shall unless it be repugnant to the context or meaning thereof be deemed to mean and include its successors and assigns) of the OTHER PART

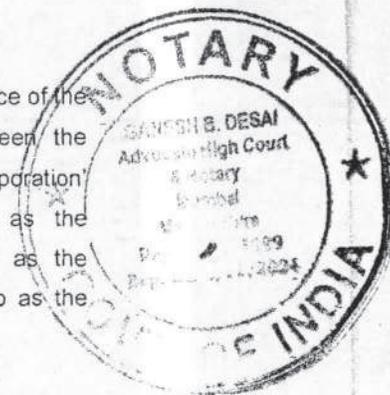
The Assignor and Assignee are hereinafter collectively referred to as "the Parties" and individually as "the Party", as the context shall require.

WHEREAS:

- (a) The Assignor is the lessee in perpetuity respect of the Plot No.5 of the Worli Estate of the Municipal Corporation of Greater Mumbai admeasuring 1,614 square yards equivalent to 1,349.51 square meters square meters bearing New Survey No.3246 and C.S. No.730 of Worli Division in the Registration Sub-District and District of Bombay City and assessed by the Assessor and Collector of Municipal Rates and Taxes under "G" Ward No.399(1) Street No.1 (hereinafter referred to as the "said Land") and more particularly described in the Schedule hereunder written and delineated with red coloured boundary on the plan annexed hereto and marked as Annexure "A" and is sole and absolute owner of the structure standing thereon being residential building known as 'Panhar' comprising basement plus stilt/ground plus six (6) upper floors aggregately admeasuring approximately 19,886 square feet or thereabouts carpet area ("said Building"). A copy of the Property Register Card pertaining to the said Land reflecting the name of the Assignor as the lessee therein is annexed hereto and marked as Annexure "B". The said Land and the said Building standing thereon are hereinafter collectively referred to as "the said Property". The said Property is assessed vide MCGM Account No. GS110336015000.



By an Indenture of Lease dated 5th December, 1951 registered with office of the Sub-Registrar of Assurances under Serial No.285 executed between the Municipal Corporation of Greater Mumbai therein referred to as the 'Corporation' The First Part, Bhailal Kushaldas Patel therein referred to as the 'Commissioner' of Second Part, Kubalaya Raj therein referred to as the 'Confirming Party' of the Third Part and Jaya Raj therein referred to as the



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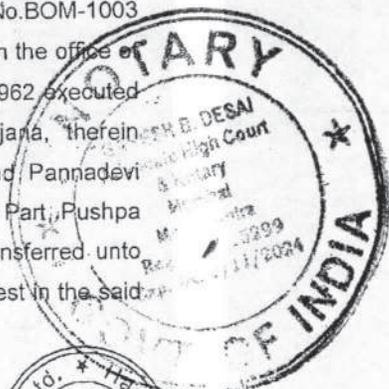
'Lessee' of the Fourth Part, the Municipal Corporation of Greater Mumbai with the confirmation of Kubalaya Raj demised unto Jaya Raj, the said Land in perpetuity with effect from 13th October, 1941 at an annual yearly rent of Re.1/- (Rupee One only) with the authority to the assignee therein to construct structures thereon on the terms and conditions as set out therein ("Indenture of Lease dated 5th December, 1951").

(c) By and under an Indenture / Deed of Assignment dated 24th October, 1958, registered with the office of the Sub-Registrar of Assurances under Serial No.BOM-7707 of 1958 executed between Jaya Raj Kublya Raj alias Jaya Raj therein referred to as 'the Assignor' of the First Part, Hema Priya therein referred to as 'the Confirming Party of the First Part' of the Second Part, Buddhakumari and Lalitakumari, therein referred to as the 'Confirming Parties of the Second Part' of the Third Part, Mantraraj Jayaraj, Chhaya Kumari Jaya Raj, Prabhakumari Jaya Raj and Nirmala Kumari Jaya Raj therein referred to as the 'Confirming Parties of the Third Part' of the Fourth Part (all minors through their father and guardian, the Assignor therein), Shantilal Sunderji Anjaria therein referred to as the 'Confirming Party of the Fourth Part' of the Fifth Part and Pushpa Shantilal Anjaria and Parvati Anjaria, therein referred to as 'the Assignees' of the Sixth Part, Shri. Jaya Raj with the consent and confirmation of the Confirming Parties of the First, Second, Third and Fourth Part as aforesaid, assigned and transferred unto the Pushpa Shantilal Anjaria and Smt. Parvati Anjaria all his leasehold right, title and interest in the said Land subject to the covenants and conditions recorded in the said Indenture of Lease dated 5th December, 1951 for the residue of the unexpired term of lease in perpetuity demised under the said Indenture of Lease dated 5th December 1951 for the consideration and in the manner as set out therein.



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(d) By and under a Deed of Assignment dated 9th February, 1961 registered with the office of the Sub-Registrar of Assurances at Bombay under Serial No.BOM-1003 of 1961 read with Indenture dated 23rd March, 1962 registered with the office of the Sub-Registrar of Assurances under Serial No.BOM-1200 of 1962 executed between Pushpa Shantilal Anjaria and Parvati Jayantilal Anjaria, therein collectively referred to as 'the Assignors' of the One Part and Pannadevi Harikishore Jain therein referred to as 'the Assignee' of the Other Part, Pushpa Shantilal Anjaria and Parvati Jayantilal Anjaria assigned and transferred unto Pannadevi Harikishore Jain all their leasehold right, title and interest in the said



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Land subject to the covenants and conditions recorded in the said Indenture of Lease dated 5th December, 1951 for the residue of the unexpired term of lease in perpetuity demised under the said Indenture of Lease dated 5th December, 1951 for the consideration and in the manner as set out therein.

(e) By and under a Deed of Assignment dated 10th July, 1992 registered with the office of the Sub-Registrar of Assurances Bombay under Serial No. PBBE-1935 of 1992 executed between Pannadevi Harikishor Jain therein referred to as 'the Assignor' of the One Part and Arkay Holdings Ltd. therein referred to as 'the Assignee' the Other Part read with Indenture dated 14th July, 1992 registered with the office of the Sub-Registrar of Assurances Bombay under Serial No. PBBE-1946 of 1992 executed between Smt. Pannadevi Harikishore Jain therein referred to as 'the Assignor' of the One Part and Arkay Holdings Ltd., therein referred to as 'the Purchaser' of the Other Part, Pannadevi Harikishore Jain assigned and transferred unto Arkay Holdings all her leasehold right, title and interest in the said Land subject to the covenants and conditions recorded in the said Indenture of Lease dated 5th December, 1951 for the residue of the unexpired term of lease in perpetuity demised under the said Indenture of Lease dated 5th December, 1951 and further granted and conveyed the structures standing on the said Land for the consideration and in the manner as set out therein.



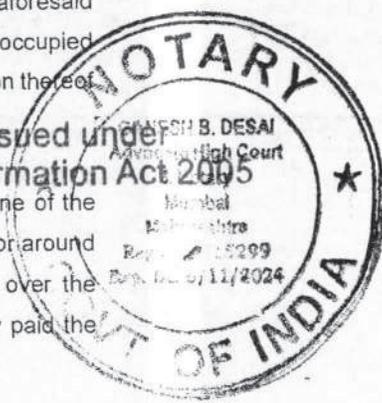
(f) Pursuant to 2 (two) Agreements being (i) Agreement dated 15th July 1992 executed between the Assignor i.e. Arkay Holdings Ltd., therein referred to as 'the Company' of the One Part and Surendra Kumar Jain, therein referred to as 'the Tenant' of the Other Part and (ii) Agreement dated 15th July 1992 executed between Arkay Holdings Ltd., therein referred to as 'the Company' of the One Part and Satish Kumar Jain, therein referred to as 'the Tenant' of the Other Part, the respective Tenants in pursuance to the terms and conditions of the aforesaid Agreement/s vacated and handed over the portion/s of the structure/s occupied by them to the Assignor and the Assignor has duly paid the consideration to the respective Tenants.

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MANESH B. DESAI
Advocate High Court
Mumbai
Maharashtra
Reg. No. 15299
Exp. Date 07/11/2024



The Assignor has also duly settled with Mr. Harikishore Jain, being one of the tenants, occupying the portion of the structure occupied by him and in or around 15th July 1992, Mr. Harikishore Jain has duly vacated and handed over the portions of the structures occupied by him and the Assignor has duly paid the



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consideration thereof.

(h) By virtue of the aforesaid Deed of Assignment dated 10th July, 1992 registered with the office of the Sub-Registrar of Assurances Bombay under Serial No.PBBE-1935 of 1992 and Indenture dated 14th July, 1992 registered with the office of the Sub-Registrar of Assurances Bombay under Serial No.PBBE-1946 of 1992 referred to Recital (e) hereinabove and the diverse agreements both dated 15th July 1992 referred to Recital (f) hereinabove and as stated in Recital (g), the Assignor became well and sufficiently entitled to the leasehold right, title and interest in the said Land and the ownership rights to the structures standing thereon.

(i) Subsequently, the Assignor at its own costs and expenses demolished the structures standing on the said Land and constructed at its own costs and expenses the said Building on the said Land, in pursuance to the authority to construct under the said Indenture of Lease dated 5th December, 1951 and also make payment of charges including increase in rent originally stipulated under the said Indenture of Lease dated 5th December, 1951 to the estate department / Municipal Corporation of Greater Mumbai / concerned authorities. The Municipal Corporation of Greater Mumbai by its Letter dated 27th September 2001 certified the completion of the said Building on the said Land in accordance with sanctioned permissions and approvals.

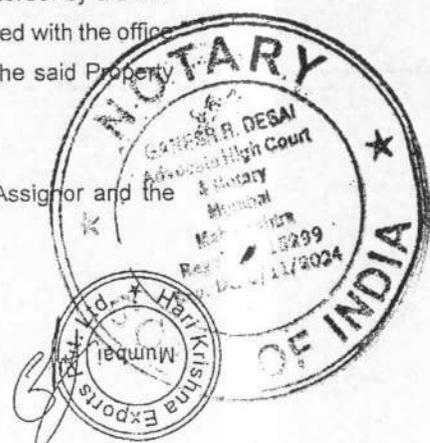


(j) The Assignor had granted the said Property (i.e. the said Land and the said Building) as security/collateral for loan availed of in favour of Indiabulls Housing Finance Limited and executed the documents pertaining thereto (hereinafter referred to as the "Mortgage"). The Assignor has instructed the Assignee to directly make payment of a sum of Rs.36,75,00,000/- (Rupees Thirty Six Crore Seventy-Five Lakh only) to Indiabulls Housing Finance Limited and the Assignee has accordingly made payment thereof in the manner stated herein below and Indiabulls Housing Finance Limited has prior to the execution hereof by a Deed of Re-conveyance / Release of even date executed and registered with the office of the Sub-Registrar of Assurances released its charge over the said Property and reconveyed the said Property in favour of the Assignor.

(k) Pursuant to discussions and negotiations held between the Assignor and the Assignee and subject to what is stated here n: -



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(i) The Assignor has agreed to assign, transfer and assure unto the Assignee all its leasehold right, title and interest in the said Land and the Assignee has agreed to acquire from the Assignor herein, all its leasehold right, title and interest in the said Land for the residue of the unexpired term of lease in perpetuity demised under the said Indenture of Lease dated 5th December, 1951, with a clear and marketable title and free from all encumbrances, save and except as mentioned herein, for the said Consideration (as defined below) in the manner stated herein below by executing this Indenture.

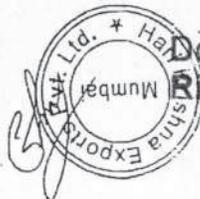
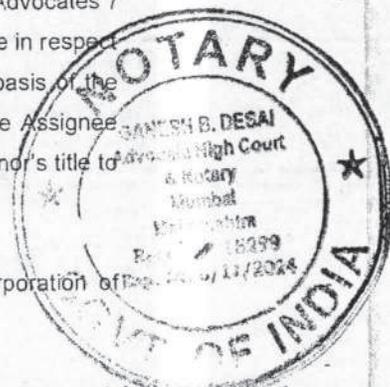
(ii) Simultaneously with the execution of this Indenture, the Assignor has agreed to grant, sell transfer, convey, assign, and assure unto the Assignee the said Building and the Assignee has agreed to purchase and acquire from the Assignor herein, the said Building unto and in its favour, on "as is what is" and "as is where is" as regards physical condition of structure, plans etc. by, executing and registering an Indenture of Conveyance of even date by and between the Parties hereto for the said Building.

(i) The Assignee, through their Advocates and Solicitors published public notices in the Times of India and Lokmat, on 31st March 2021 for inviting objections or claims, if any, inter alia in respect of the said Land. The period stated in the public notice has expired and no objections or claims have been received in respect of the public notice thereof. The Assignor has prior to execution hereof provided copies of the documents of title and other documents to the said Land (as available with the Assignor) to the Assignee and has also provided response/s to the requisitions raised by or on behalf of the Assignee from time to time. The Assignee has prior to the date hereof, independently through its Advocates / Consultants completed technical and legal investigation and diligence in respect of the said Land, visited and inspected the said Land and on the basis of the same and the representations of the Assignor as stated herein, the Assignee herein has satisfied itself in respect thereof, and accepted the Assignor's title to the said Land including the state and condition of the Property.

The Office of the Assistant Commissioner (Estate), Municipal Corporation of



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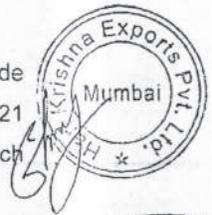
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Greater Mumbai vide its Letter dated 28th July, 2021 bearing, No.AC/Estates/6486/LB-III and the License to Assign dated 28th July 2021 executed by Municipal Corporation of Greater Mumbai, accorded its no-objection and consent to the Assignor for assigning and transferring the Assignor's leasehold right, title and interest in the said Land unto the Assignee (collectively "MCGM NOC") in the manner as stated therein. The payment of the premium/charges by any name called with respect to the assigning and transferring of the Assignor's leasehold right, title and interest in the said Land to the Assignee, as levied by the Municipal Corporation of Greater Mumbai shall be borne and paid as may be mutually agreed between the Parties in writing. A copy of the MCGM NOC is annexed and marked as Annexure "C" hereto.

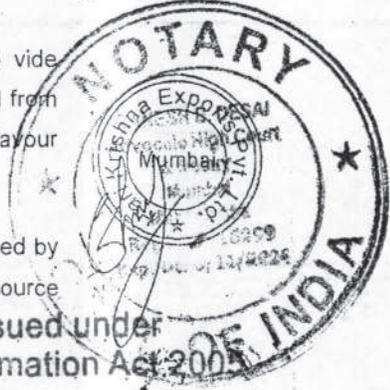
(n) Prior to the execution hereof, the Assignee has paid the full consideration of a sum of Rs.47,00,00,000/- (Rupees Forty Seven Crore Only) ("said Consideration") to the Assignor or as per the request / instructions of the Assignor directly to Indiabulls Housing Finance Limited, in full and final discharge of the said Consideration, towards the assignment and transfer of the Assignee's leasehold right, title and interest in the said Land for the residue of the unexpired term of the Indenture of Lease dated 5th December 1951, in the following manner:-



(i) Rs.36,75,00,000/- (Rupees Thirty Six Crore Seventy Five Lakh only) vide Pay Order bearing No. 023827.00 dated 30th July 2021 issued by Bank of India Bank, BKC Branch in favour of 'Indiabulls Housing Finance Limited';



(ii) Rs.9,78,00,000/- (Rupees Nine Crore Seventy Eight Lakh only) vide RTGS bearing UTR No. BKIDH2121159321 on 30th July 2021 from Bank of India Bank, BKC Branch in favour of 'Arkay Holdings Limited; and



(iii) Rs.47,00,000/- (Rupees Forty Seven Lakh only) has been deposited by the Assignee with the tax authorities towards tax deductible at source under the Income Tax Act, 1961.

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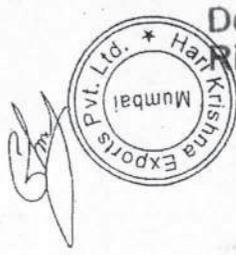
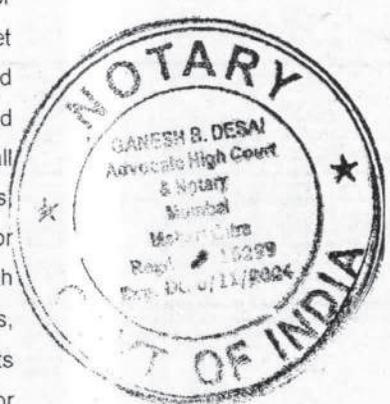
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(iv) The Assignee shall provide to the Assignor, the TDS Certificate for the aforesaid within a period of 14 (fourteen) days from the date of execution hereof.

(o) In pursuance of the above, the Parties are desirous of reducing the terms of the aforesaid understanding in writing in the manner as set out herein.

NOW THIS INDENTURE WITNESSETH AS UNDER:

1. In pursuance of the recitals hereinabove and the Schedules and Annexure/s hereto (which form an integral and operative part of these presents, as if the same were reproduced herein verbatim) and in further in pursuance of the aforesaid agreement and in consideration of the said Consideration i.e. Rs.47,00,00,000/- (Rupees Forty Seven Crore only) paid by the Assignee to the Assignor and/or the instruction of the Assignor on or before execution hereof in the manner stated herein, being the full and final consideration payable by the Assignee to the Assignor (the receipt whereof the Assignor doth hereby admit and acknowledge of and from the same and every part thereof doth hereby releases, acquits and discharges the Assignee forever), the Assignor doth hereby assign and transfer, free from all encumbrances unto the Assignee all it's right, title and interest including its leasehold right, title and interest in Plot No.5 of the Worli Estate of the Municipal Corporation of Greater Mumbai, admeasuring 1,614 square yards equivalent to 1,349.51 square meters square meters bearing New Survey No.3246 and C.S. No.730 of Worli Division in the Registration Sub-District and District of Bombay and assessed by the Assessor and Collector of Municipal Rates and Taxes under "G" Ward No.399(1) Street No.1 and more particularly described in the Schedule hereunder written and delineated with red coloured boundary on the plan annexed hereto and marked as Annexure "A" and with a clear and marketable title free from all encumbrances subject to what is stated herein TOGETHER WITH all the rights, privileges, benefits, directly and/or indirectly attached to the said Land, Floor Space Index of any nature whatsoever, if any that may be made available with regard to the said Land and all the estate rights, titles and interests, easements, appurtenances belonging to the Assignor together with all the benefits conditions, covenants of Indenture of Lease dated 5th December, 1951 and/or such conditions as attached to the said Land by the lessor i.e. Municipal



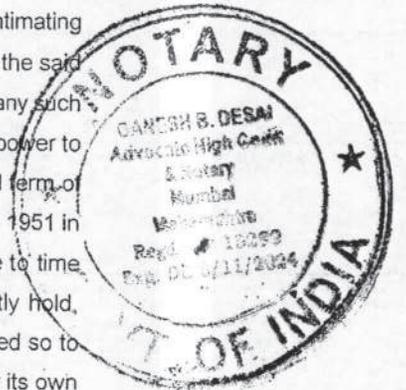
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Corporation of Greater Mumbai and also together with all and singular the houses, outhouses, edifices, buildings, courtyard, ways, compounds, passages, water courses, sewers, ditches, drains, plants, lights, liberties, easements, profits, privileges, advantages, rights and appurtenances whatsoever to the said Land belonging to or in anywise appurtenant to or with the same or any part thereof now or at any time heretofore, usually held, used, occupied or enjoyed or reputed or known as a part or member thereof and also together with all the deeds, documents, writings, vouchers and other evidence of title, relating to the said Land or any part thereof as available with the Assignor and all the estate, right, title, interest, use, inheritance, property possession, benefit, claim and demand whatsoever both at law and equity of the Assignor into, out of or upon the said Land AND TO HAVE AND TO HOLD the said Land hereby granted, released, assigned or assured or intended so to be with their and every of their right and appurtenances unto and to the use and benefit of the Assignee for the residue of the unexpired term of lease in perpetuity demised under the said Indenture of Lease dated 5th December, 1951 SUBJECT TO payment of all rents, taxes, assessments, rates, dues and duties now payable upon the same or which may hereafter become payable in respect thereof to the Municipal Corporation of Greater Mumbai or to the Government and subject to the terms and conditions of the title deeds including the Indenture of Lease dated 5th December, 1951 and / or as may be levied by the Municipal Corporation of Greater Mumbai AND that notwithstanding any such thing as aforesaid, the Assignor hereby covenants that all the rents reserved in the title documents including the said Indenture of Lease dated 5th December, 1951 have been paid, upto the date of these presents and the Assignor further covenants that as on date no notice has been received by the Assignor intimating breach of any of the conditions contained in the title documents including the said Indenture of Lease dated 5th December, 1951 AND that notwithstanding any such thing as aforesaid the Assignor now has in itself good right and absolute power to assign the said Land unto the Assignee for the residue of the unexpired term of the lease demised under the said Indenture of Lease dated 5th December, 1951 in the manner aforesaid AND it shall be lawful for the Assignee from time to time and at all times hereafter during the said term to peaceably and quietly hold, possess and enjoy the said Land hereby assigned, granted or expressed so to be with their appurtenances and receive the rents and profits thereof for its own use and benefit without any eviction, interruption, claim or demand whatsoever from or by the Assignor or from or by any other person or persons lawfully or



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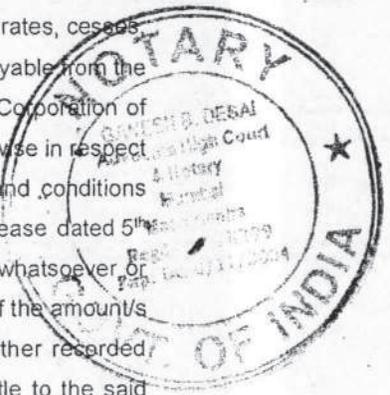
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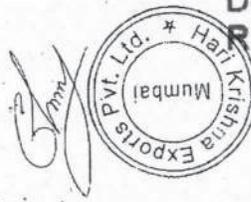
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equitably claiming by, from, under or in trust for them AND that they are freely, clearly and absolutely acquitted exonerated released and forever discharged or otherwise by the Assignor well and sufficiently saved, defended, kept harmless and indemnified of, from and against all estates charges and encumbrances whatever made, executed, occasioned or suffered by the Assignor or by any other person or persons having or lawfully or equitably claiming by, from, under or in trust for them AND FURTHER THAT the Assignor and all persons having or lawfully or equitably claiming by, from, under or in trust for them shall and will from time to time and at all times hereafter during the said term at the requests and costs of the Assignee do and execute or cause to be done and executed all such further and other lawful and reasonable acts, deeds, things, matters and assurances in law whatsoever for further and more perfectly and absolutely assuring the said Land hereby assigned or expressed so to be and every part thereof unto and to the use of the Assignee AND the Assignor does hereby covenant with the Assignee that the Assignor has not done or omitted and knowingly or willingly suffered or been party or privy to any act, deed or thing whereby the Assignor is prevented from assigning and transferring the said Land in the manner aforesaid or whereby the same or any part thereof are, is, can or may be charged encumbered or prejudicially affected in estate, title or otherwise howsoever AND it is hereby agreed between the Parties that the payment of premium/charges (by any name called) levied by the Municipal Corporation of Greater Mumbai in respect of the transfer / assignment of the said Land by the Assignor to the Assignee shall be borne and paid as may be mutually agreed between the Parties in writing and the Assignee doth hereby covenant with the Assignor that the Assignee will henceforth with effect from the date of execution hereof be solely liable for payment and bear and pay all charges and/or outgoings (by any name called) pertaining to the said Land including rents, taxes, assessments, rates, cesses, duties, water charges, electricity dues etc. which may become payable from the date hereof to the Government of Maharashtra or to Municipal Corporation of Greater Mumbai or any other public body and authority or otherwise in respect thereof and perform all the covenants by the Assignee and conditions contained in the title documents including the said Indenture of Lease dated 5th December, 1951 by the Assignee and no claim in any manner whatsoever, or whatsoever shall hereafter be made on the Assignor in respect of the amount/s payable by the Assignee as stated herein AND it is hereby further recorded that the Assignor has represented to the Assignee that it's title to the said



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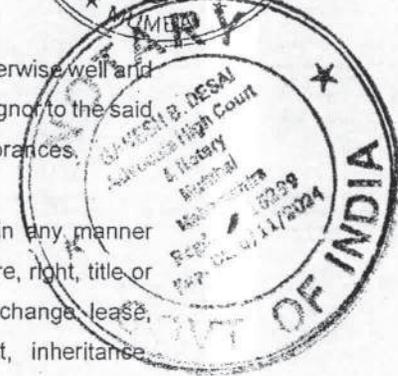
Property is free from all encumbrances and claims of whatsoever nature subject to what is stated herein and in the event it is found that Assignor's title to the said Land is defective or due to statements, declarations, representations and assurances made by the Assignor as regards the title herein being false, in that case the Assignor agrees to indemnify and hereby indemnifies the Assignee against all losses, damages, costs and expenses (save and except legal and attorney costs) which may be suffered by them and the Assignor doth hereby confirms and records that on execution hereof I have put the Assignee in lawful vacant and peaceful possession of the said Land the receipt whereof the Assignee doth hereby confirms and acknowledges.

2. Simultaneously with the execution of this Instrument: -

- (a) The Assignor has handed over quiet, vacant, and peaceful physical possession of the said Land to the Assignee the receipt whereof the Assignee doth hereby confirms and acknowledges.
- (b) The Assignor has executed a Limited Power of Attorney in a mutually agreed form, in favour of the Assignee granting various powers and authorities in relation to the said Land *inter alia* to enable the Assignee to duly transfer and enter their name in the records of the MCGM, City Survey Records, municipal records, the revenue records, etc.; and
- (c) The Assignor has handed over to the Assignee, all the original title deeds and documents pertaining to the said Land as available with the Assignor and more particularly listed out in Annexure 'D' hereto.

3. Subject to what is stated herein, the Assignor doth hereby represent, warrant, declare and state as under:

- (a) The Assignor is absolutely seized and possessed of or otherwise well and sufficiently entitled to the said Land and the title of the Assignor to the said Property is clear and marketable and free from all encumbrances.
- (b) No other person/s is / are interested in the said Land in any manner whatsoever. No other person or entry has any claim, share, right, title or interest of whatsoever nature including by way of sale, exchange, lease, mortgage, (equitable or otherwise), charge, gift, trust, inheritance



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tenancy, license, lien, or otherwise howsoever in the said Land or any part thereof and/or the Assignor has not inducted any person in the said Land or any part thereof and the said Land is free from all encumbrances, charges, claims, liens and/or demands whatsoever.

- (c) The Assignor has the absolute right, and authority to enter into this Indenture.
- (d) There are no government dues, municipal taxes, or lease rent outstanding in respect of the said Land or any part thereof. The Assignor is liable for and has paid all the lease rent, outgoing rates, property taxes, duties, cesses, levies, assessments, water charges, electricity charges or any other amount payable to any authority in respect of the said Land upto the execution of these presents.
- (e) The said Land (or any part thereof) is not affected by any acquisition proceeding. No notice / notices is / are received from either any local authorities or from the State Government or otherwise or under the Epidemic Diseases Act, the Land Acquisition Act, the Town Planning Act, the Defence of India Act, Maharashtra Housing and Development Authority Act, Land Revenue Code, the Maharashtra Agricultural Lands (Ceiling on holdings) Act, 1961, Urban Land (Ceiling and Regulation) Act, 1966 or environmental laws or any other legislative enactment, government ordinance, order or notification (including for requisition and / or acquisitions of the said Land or any part thereof) or any other public body or authority or declared as a surplus of excess ceiling limit.
- (f) No part of the said Land is forest land (either protected forest or reserved forest or private forest).

(g) The said Land (or any part thereof) is not affected by the provisions of the Urban Land (Ceiling and Regulation) Act, 1976.

Save and except the litigations as disclosed in writing, the said Land (or any part thereof) is not a subject matter of any litigation or investigation or any proceedings (including any proceedings under the Income Tax Act, 1961) in any court or tribunal or arbitration or revenue proceedings or



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quasi-judicial proceedings nor are there any prohibitory orders, attachments, acquisition, requisition on the said Land (or any part thereof) either before or after judgment or in custody/symbolic or physical possession of the Court Receiver or any other authority or bank or financial institution and there is no money decree passed against the Assignor in respect of the said Land.

- (i) There is no prohibitory order or any statutory order or otherwise any restrictive order and / or document received by the Assignor whereby the Assignor is restricted from entering into this Indenture.
- (j) There is no prohibitory order or order of attachment of any department of income tax for taxes or of any department of the Government, Central and/or State, local body, public authority for taxes, levies, dues and cesses in respect of the said Land or any part thereof received by the Assignor.
- (k) There are no income tax, wealth tax, sales tax, or other taxation proceedings either for recovery or otherwise initiated by any taxation authorities or local authorities pending whereby the said Land or the right of the Assignor to deal with the said Land (or any part thereof) is in any way affected.
- (l) There are no minors or HUF interested in the said Land (or any part thereof).
- (m) Save and except as stated in the title documents including Indenture of Lease dated 5th December 1951, there are no easementary rights created under any document or any covenant or by prescription in respect of the said Land (or any part thereof).
- (n) There is no dispute with any of the adjoining properties as to boundaries or areas.
- (o) There is no landlocked land owned by any third party within the said Land.
- (p) The said Land is situated in Residential Zone as per Development Plan



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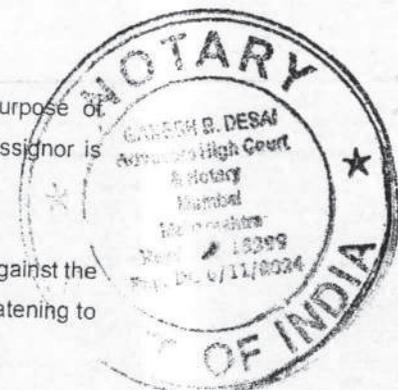


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Remarks dated 25th March, 2021 issued by the MCGM with respect to the said Land, copy whereof has been provided to the Assignee. The said Land is not within a heritage precinct or a heritage site or affected by any restrictions/ prohibitions of heritage regulations applicable for the development of the said Property or any part thereof. The said Land falls under CRZ-II.

- (q) No portion of the said Land has been surrendered towards road set-back.
 - (r) There is no encroachment, trespasser on the said Land and no third-party rights have been created by the Assignor in respect of the said Land or any part thereof which are subsisting as on date.
 - (s) The Assignor has not entered into any memorandum of understanding, agreement or arrangement or understanding (oral or written, formal or informal) with any third party for sale, development, lease, transfer or for creation of third-party rights or interest of any nature whatsoever in respect of the said Land or any part thereof.
 - (t) There is no mortgage, lien, charge, trust, sale, pledge, lease, tenancy, leave and license, easements or other right or any other encumbrances or otherwise howsoever on the said Land (or any part thereof), save and except as stated in the title documents including the Indenture of Lease dated 5th December 1951.
 - (u) No resolution has been passed by the Assignor for the purpose of initiating or filing any winding-up proceedings so far as the Assignor is concerned.
- No winding up proceedings have been initiated or are pending against the Assignor and no notice has been received by the Assignor threatening to initiate or file any winding-up proceedings.
- (w) The Assignor is authorized to assign and transfer unto to the Assignee all its leasehold interest in the said Land for residue of the unexpired term of the lease demised under Indenture of Lease dated 5th December 1951.



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(x) There is no impediment or prohibition under any law or under any agreement whereby the Assignor is in any way prevented or hindered from conveying, granting, transferring, and assigning the rights with respect to the said Land as envisaged in this Indenture.

4. The Assignee doth hereby represent, warrant, declare and state that all necessary corporate approvals/actions including board/member's resolution, to the extent applicable in relation to the execution and consummation of the transaction contemplated herein including payment obligations by the Assignee has been duly complied with by the Assignee and authorised by its directors/ shareholders (as required under Applicable Laws).
5. As stated above, the Assignee shall provide to the Assignor, the respective TDS Certificate/s pertaining to the said Consideration within a period of 14 (fourteen) days from the date of execution hereof.

6. This Indenture supersedes all prior arrangements, negotiations, agreements, and understandings (oral or in writing) between the Parties in respect of the said Land.

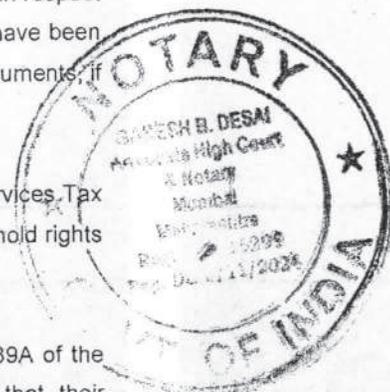
7. The stamp duty and the registration charges and all ancillary charges in respect thereof on this Indenture i.e. Indenture of Assignment are to be and have been borne and paid by the Assignee. The stamp duty on other ancillary documents, if any has been borne and paid by the Assignee.

8. The Assignor alone shall bear and pay the applicable Goods and Services Tax or its equivalent, if any, as regards the transfer / assignment of leasehold rights in respect of the said Land in favour of the Assignee.

9. As required by Rule 114(b) of the Income-Tax Rules and Section 139A of the Income Tax Act, 1961, the Assignor and the Assignee declare that their respective Permanent Account Numbers are as follows: -

(i) Arkay Holdings Limited : AAACA5629A

(ii) Hari Krishna Exports Private Limited : AACCH8430N



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THE SCHEDULE REFERRED HEREINABOVE
(Description of the said Land)

All that piece and parcel of land admeasuring 1,614 square yards equivalent to 1,349.51 square meters or thereabouts situate on and being Plot No.5 of the Worli Estate of the Corporation in the City and Island and Registration Sub-District of Bombay, forming part of New Survey No.3246 and bearing C.S. No.730 of the Worli Division and assessed by the Assessor and Collector of Municipal Rates and Taxes under "G" Ward No.399(1) Street No.1 and bounded as follows:

- On the North by : by Plot No.4A bearing C.S. No.A/729.
- On the South by : by Plot No.5A bearing C.S. No.730-A.
- On the East by : by Pochkhanwala Road.
- On the West by : by Khan Abdul Gaffar Road.

IN WITNESS WHEREOF the parties hereto have hereunto set and subscribed their respective hands and seals on the day and year first hereinabove written.

SIGNED AND DELIVERED by the
withinnamed 'Assignor'
ARKAY HOLDINGS LIMITED
pursuant to the Resolution of its Board of
Directors passed in that behalf on 26th day
of July, 2021
through the hands of
Mr. Kapil Purohit, Director
in the presence of
1. Pooja Sharma
2. Adilija Kedro

Kapil

Arkay Holdings Limited
Mumbai

COLLECTOR OF

NOTARY
GANESH B. DESAI
Advocate High Court
& Notary
Mumbai
Maharashtra
Regd. No. 10999
Exp. Dt. 07/11/2024
GOVT. OF INDIA

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THE SEAL OF THE JOINT SUB-REGISTRAR, MUMBAI CITY
जॉयंट सब रेजिस्ट्रार, मुंबई शहर
10, SEVEN FRANKS, 10, SEVEN FRANKS
MUMBAI

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SIGNED AND DELIVERED by the
 withinamed 'Assignee'
 HARI KRISHNA EXPORTS PRIVATE
 LIMITED
 pursuant to the Resolution of its Board of
 Directors passed in that behalf on 1st day
 of July, 2021
 through the hands of
 Mr. Ghanshyambhai Dholakia, Managing
 Director.....



Ghanshyambhai Dholakia



- in the presence of
1. KETUL MAHENDRABHAI JAIN
 2. YOGESH RAJESH JASANI

Ketul M. Jain

Yogesh Rajesh Jasani

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ANNEXURE A-2

Item No. 1

(Pune Bench)

**BEFORE THE NATIONAL GREEN TRIBUNAL
WESTERN ZONE BENCH, PUNE**

(WITH HYBRID OPTION)

Original Application No. 25/2023 (WZ)
I. A. No. 110/2023(WZ) & I. A. No. 112/2023(WZ)

Dileep B. Nevatia

.....Applicant

Versus

Union of India & Ors.

....Respondent(s)

Date of hearing: 03.05.2023

**CORAM: HON'BLE MR. JUSTICE DINESH KUMAR SINGH, JUDICIAL MEMBER
HON'BLE DR. VIJAY KULKARNI, EXPERT MEMBER**

Applicant : Applicant in-person
 Respondent(s) : Mr. Raghvendra Kulkarni h/f Mr. Rahul Garg, Advocate
 for R-1/MoEF&CC
 Mr. Aniruddha S. Kulkarni, Advocate for R-2/MCZMA
 Mr. Prakash Shejal, Advocate for R-4/MCGM &
 R-7/Chief Fire Officer
 Mr. Saket Mone along-with Mr. Abhishek Salian,
 Advocates for R-8 to 12/PP

ORDER

1. From the side of Applicant, Applicant in-person has appeared, who has filed service affidavit, as per which service of notice upon all the Respondents is found to be sufficient.

2. From the side of Respondent No. 1/MoEF&CC, learned Counsel Mr. Raghvendra Kulkarni holding brief of learned Counsel Mr. Rahul Garg has appeared, who submits that he would seek instruction from the Department and would be filing reply affidavit within a period of two weeks, the same is allowed.

3. From the side of Respondent No. 2/Maharashtra Coastal Zone Management Authority (MCZMA), learned Counsel Mr. Aniruddha S. Kulkarni has appeared, who seeks two weeks' time to file reply affidavit and the same is allowed. He also apprised us that he has not received a copy of Original Application, although the Applicant has apprised us that the same has been served upon him but we cannot ascertain as to whether the copy has been provided or not, therefore, we direct the learned Counsel for the Respondent No. 2 to obtain a copy of Original Application directly from the Applicant.

4. The learned Counsel for the Respondent No. 2 has also pointed out that he has sent an e-mail dated 02.05.2023 to the Respondent No. 4/MCGM asking for a report in the matter in the light of grievances mentioned in the order of NGT. In this regard, the Applicant has pointed out that earlier on 07.10.2022, the Under Secretary, Environment Department had written a letter to the District Collector, Mumbai Suburban & Chairman, DCZMC and the Municipal Commissioner, MCGM, where-in a request was made to verify and take necessary action in the matter of violation of CRZ Notification in repair and reconstruction of building Pan Har Plot No. 5, Khar Abdul Gaffar Khan Road, Worli Sea Face, Mumbai and a request was made to take appropriate action after verification and send a factual report.

5. We are not concerned as to which information is being sought by the Respondent No. 2 from the Maharashtra Coastal Zone Management Authority (MCZMA), but as far as this matter is concerned, we want his reply as regards the relief prayed against him by the Applicant.

6. None has appeared from the side of Respondent No. 3/District Collector Mumbai Suburban despite sufficient service.

7. From the side of Respondent No. 4/MCGM and for Respondent No. 7/Chief Fire Officer, Mumbai fire brigade, learned Counsel Mr. Prakash Shejal has appeared, who prays that two weeks' time may be allowed to file reply affidavit and the same is allowed.

8. The Applicant has deleted the name of Respondent Nos. 5 & 6 because of that reason, the numbering of the said Respondents does not show their names.

9. From the side of Respondent Nos. 8 to 12, learned Counsel Mr. Saket Mone has appeared, who prays that two weeks' time may be allowed to file reply affidavit and the same is allowed.

10. The Applicant has also drawn our attention to two interim applications, which have been filed by him.

11. In I.A. No. 110/2023(WZ), prayer is made for a direction to be issued to Respondent Nos. 8 to 12 to desist from using for any purpose whatsoever the unauthorized construction and the areas of Pan Har (property in question); and further it is prayed that this Tribunal may appoint a Receiver in respect of the unauthorized construction and the areas at Pan Har property in question.

12. When we enquired from the Applicant as to whether a copy of this Interim Application has been served upon all other parties, he says that he has not served the same, therefore, we direct that a copy of the same shall be served upon all the Respondents within a week and reply against the same may be filed by the respective Respondents within a period of two weeks' thereafter,

13. In I.A. No. 112/2023(WZ), prayer is made for appointing an Architect to visit the property in question to ascertain unauthorized

construction carried out by the Respondent Nos. 8 to 12; the representative of Applicant, the Respondent Nos. 1 to 4 & 7 along-with the Applicant's Architect or structural engineer and photographer may also be permitted to accompany Architect to be appointed by NGT for the purpose of inspection of the property in question; in case any resistance is found to be there from the side of Respondent Nos. 8 to 12 to prevent such inspection, police protection should also be allowed. We direct the Applicant to serve a copy of this I.A. also upon all the Respondents within a week, who may file reply affidavit in respect of this application as well within a period two weeks' thereafter.

14. In view of the prayers, which have been made by the Applicant, we deem it appropriate to constitute a Committee comprising one Member each of :-

- (i) The Maharashtra Coastal Zone Management Authority (MCZMA);
- (ii) The Municipal Corporation of Greater Mumbai (MCGM); and
- (iii) District Collector.

15. The Maharashtra Coastal Zone Management Authority (MCZMA) shall be the nodal agency for coordination and logistic support.

16. The Committee is directed to visit the site within a week after giving prior notice to the Applicant and all the concerned parties and submit a factual and action taken report with regard to the violation and if any action is taken thereon, within a period of one month.

17. The report in the matter be filed by the Committee by e-mail at ngt-pune@gov.in preferably in the form of searchable PDF/ OCR Support PDF and not in the form of Image PDF.

18. Applicant is directed to supply the required documents and copy of the application to the Members of the Committee within three days from today.

19. A copy of this order be communicated to the above-mentioned Committee forth-with for compliance.

Put up this matter for further consideration on 02.08.2023

Dinesh Kumar Singh, JM

Dr. Vijay Kulkarni, EM

May 03, 2023

Original Application No. 25/2023 (WZ)

I. A. No. 110/2023(WZ) & I. A. No. 112/2023(WZ)

P.Kr

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ANNEXURE A-3

MUNICIPAL CORPORATION OF GREATER MUMBAI
REMOVAL OF ENCROACHMENT DEPARTMENT

Notice Register Report

Suburb	City
Zone	ZONE II
Ward	9-Ward G/South
From Date	2023-05-24
To Date	2023-05-27

Sr . No.	Complaint No	Notice No	SAC No	Stage	Notice Date	Name And Address	Description	Date Of Detection	Date Of Serving Letter To Police Station In Case of 354/A	Date of Reply from Party	Date of Com m of Speak ing order to Party	Date Of Notice to Party For Recovery	Date of Sending Paper s to A&C for Recovery charges	Date Of Actual Recovery	Date Of Sending Paper s to legal Assist ants for Prosecution	Date Of Prosecution	Detail s of Conviction
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							area/ carpet area of the buildin g. 2. Unauth orized erectio n of glass façade on the periph ery of the buildin g from ground floor to existin g terrace of the buildin g. 3. The curved portion on the east and west side of the periph ery of the buildin g is made straight by erectin g glass façade.										
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ANNEXURE A-4

Sr. No.	Complaint No.	Notice No	SAC No	Stage	Notice Date	Name And Address
2	GS/196/24-05-2023/56	GS/DO1GS/196/53-1-MRTP ACT/GS56N01/ 24-05-2023	GS110 33601 50000	Notice Delivered	2023-05-24 11:52: 20.213	Occupier (Shri. Ghanshyam Dholakia – Owner / Occupier) ----- Aikyam (Formerly known as Panhar) situated at plot no. 5, Worli Sea Face, Worli, Mumbai – 400 030

Description
<p>Site inspected on Dt: 08.05.2023 in consonance with Building Completion plans under Proposal no. EEBPC/3294/GS/A DT: 27.09.2001.</p> <p><u>Basement Floor.</u></p> <ol style="list-style-type: none"> 1. RCC Staircase on North-East side of building is demolished and the space is created into a room. 2. Addition and alterations in Parking space no 9 & 10 & converted into a room adm 4.98m x 3.36m by constructing BM walls. 3. Addition and alterations in Parking space no 15 & 16 & converted into a room adm 5.9m x 2.9m, 2.35m x 2.7m, 3.0m x 2.35m by constructing BM walls. 4. Construction of room adm 4.60m x 4.0m & 4.2m x 2.59m (toilet block) with BM walls in the open space/driveway between parking slot no 9/10 & 15/16. <p><u>Ground Floor.</u></p> <ol style="list-style-type: none"> 1. RCC Staircase (From ground floor to basement) on North-East side of building is demolished and the space is created into a room. 2. Driveway to ground floor is closed by erecting glass panels on both entry and exit on north and south side of building. 3. Two ducts on left and right side of lifts are converted into store room by constructing BM walls and carrying out addition and alterations. 4. Parking slot no 5, 6 & 7 on the west side of building are converted into a hall. 5. Unauthorized construction of pantry adm 4m x 2m by constructing BM walls in place of servants toilet beside parking slot no 5 on southwest of building. 6. Demolition of existing oval shaped RCC structure of canopy, water body / paddle pool and garden on the front side (seaside) of the building and construction of a rectangular shaped regular RCC flat slab with no any water body / paddle pool. 7. Service lift at ground floor beside staircase is extended upto basement.

8. Unauthorized encroachment into the parking slot no 8, by creation of door entry into the building by demolishing the peripheral wall of building.

First Floor

1. Addition and alteration in flat no 1 on west side of building and converted existing bedroom, living room it into a gymnasium.

Construction of swimming pool admeasuring 7.75m x 4.7m in the existing bedroom and toilet area of flat no 1.

Third Floor

1. Addition, alterations in existing flat no 1 & 2 at third floor by demolishing all internal BM partition walls and constructing walls at new locations as per the sketch.

Fourth Floor

1. Addition, alterations in existing flat no 1 & 2 at fourth floor by demolishing all internal BM partition walls and constructing walls at new locations as per the sketch.

Fifth Floor

1. Demolition of existing RCC ceiling slab above flat no 1 on fifth floor and demolition of all existing internal BM partition walls and converting it into a single big hall with height of two floors.

2. Demolition of all existing internal BM partition walls in flat no 2 at east side and converting it into a Pooja room, kitchen and dining hall.

Sixth Floor

1. Demolition of all existing internal BM partition walls of flat no 3 & 4 at east side and converting it into one single room for play area & other room for indoor theatre.

2. Demolition of existing RCC floor slab & all existing internal BM partition walls of flat no 1 & 2 on sixth floor and converting it into a single big hall of double floor height including flat no 1 & 2 at fifth floor.

Terrace Floor

1. Construction of room (bedroom) admeasuring 8.9m x 5.25m, toilet adm 4.7m x 5.40m, room adm 3.8m x 3.99m, room adm 2.25m x 3.8m, room adm 1.90m x 5.36m on east side on open terrace above sixth floor.

2. Construction of room (lounge) admeasuring 6.39m x 11.0m, toilet adm 4.41m x 5.44m, shower room adm 3.95m x 1.76m, wardrobe room adm 5.51m x 3.9m on west side on open terrace above sixth floor.

3. Unauthorized casting of slab above Pergola beams on west side of

terrace and creating a seating space.

4. Unauthorized construction of RCC slab for roofing on terrace above sixth floor and using the same as seventh floor.

General Observations

1. Unauthorized encroachment over the existing RCC chhajja on the periphery of the building on all floors from ground floor to sixth floor and merging it into the internal floor area/carpet area of the building.

2. Unauthorized erection of glass façade on the periphery of the building from ground floor to existing terrace of the building.

3. The curved portion on the east and west side of the periphery of the building is made straight by erecting glass façade.

Column 9

24-05-2023 11:34:35

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ANNEXURE A-5

R H MAHIMTURA
CONSULTING STRUCTURAL ENGINEER

Tel : 2266 12 12 / 2266 1245
2266 1241 / 22664228
Fax : 22662227

UNIQUE HOUSE, 5TH FLOOR, 25, S.A. BRELVI ROAD, FORT, MUMBAI – 400 001.

R. H.MAHIMTURA B.E.,F.I.E.,
H. R.MAHIMTURA B.E., M.S. (U.S.A.),F.I.E.

C/Misc/2023

To,
The Executive Engineer
Building Proposal – City II
New Municipal Building C.S. No. 355 – B,
Municipal Corporation of Greater Mumbai
Bhagwan Walmiki Chowk, Opp. Hanuman Mandir
Vidhyalankar Marg, Salt Pan Road, Antop Hill
Wadala (East), Mumbai – 400 037.

Date: 25th May, 2023

Dear Sir,

Sub. : **Proposed Interior Addition / Alteration in the existing building (known as Panhar) on plot bearing C.S. No. 730 of Village Worli, Khan Abdul Gaffar Khan Road, Opp. Worli Sea Face, Worli, Mumbai – 400 018**

Ref. : **1.CHE/BP/108355/23**
2) BMC File No. P-16330/2023/(730)/G/South/WORLI

This to certify that Proposed Additional / Alteration Interior Work on existing building comprises of Basement + Stilt + 1st to 6th Typical Floor + 7th Part Floor on plot bearing C.S. No. 730 of Village Worli, Khan Abdul Gaffar Khan Road, Opp. Worli Sea Face, Worli, Mumbai – 400 018, shall not affect the existing structural stability of the building, if carried out as per our structural design and details, to the best of my knowledge and belief today.

Thanking You,
Yours faithfully



H. R. Mahimtura
Consulting Structural Engineer
Registration No.: **STR/M/63.**
Online Registration No. **STR:840003532**

e-mail :info@mahimtura.net

Website: www.mahimtura.com

Administrative Office : Unique House, 5th Floor, 25, S.A. Brelvi Road, Fort, Mumbai – 400 001.

Branch Office : 326, Kailash Plaza, Near Odeon Cinema, Vallabhbaug Lane, Ghatkopar (East), Mumbai – 400 077. Tel : 2501 6271

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ANNEXURE A-6

MUNICIPAL CORPORATION OF GREATER MUMBAI
P-16330/2023/ (730)/G/South/WORLI

Sub:- Proposed addition/alteration to the Existing building on Plot Bering CS No. 730, Village Worli, Division at Khan Abdul Gaffar Khan Road, Worli Mumbai – 400 018. G/south Ward.

L.S: - Shri. Jinish N. Soni of M/s 3Dimensional Consultants LLP

Ref: - Plans for Amendment attached in Console.

4A FACT SHEET

Sr. No.	ITEM	REMARKS	OFFICE REMARKS
1.	Notice under section 342 of B.M.C. Act 1888.	Attached in additional documents	
2.	Scrutiny Fees	Attached in additional documents	
3.	Application for C.C. u/s. 44/69 of M.R.T.P. Act	N.A.	
4.	OWNERSHIP		
	Documentary evidence regarding ownership of the plot		
	a. Title Certificate from Advocate.	N.A.	Seen
	b. P.R. Cards	Attached in additional Documents	
	c. Any other documents Lease Agreement	N.A.	
	d. Power of Attorney	N.A.	
	e. Estates plot/T.P. Scheme plot	N.A.	
	f. Whether the Notice Applications are signed by C.A./Lessee/Owner as per title certificate & whether Plans are submitted in that Name?	Lessee Attached in additional Documents	
	g. Whether plot is under acquisition.	N.A.	

5.	<p>PLOT AREA</p> <p>Documentary evidence regarding area of the holding /plot</p> <p>a. As per Conveyance Deed as mentioned in title certificate.</p> <p>b. As per P.R. Cards signed by S.L.R./CTSO</p> <p>c. As per Owner's Affidavit.</p> <p>d. As per Architect/L.S's certificate & triangulation Calculation with plot dimensions.</p> <p>e. As per N.O.C. W.O. (Estates)</p> <p>f. Area certified in 'B' Form.</p> <p>g. The area accepted.</p> <p>h. Plan showing existing features on land under reference along with boundaries</p> <p>i. Area certified by MHADA as per its NOC.</p>	<p>N.A.</p> <p>1349.51Sq.Mtr.</p> <p>1349.51 Sq.Mtr.</p> <p>1349.51 Sq.mt</p> <p>N.A.</p> <p>N.A.</p> <p>1349.51 sq mt</p> <p>Yes</p> <p>N.A.</p>	<p>Verified</p> <p>Verified</p>
6.	Is the entire contiguous holding of the owner declared and shown on the plan.	Yes	Seen
8.	<p>Existing Structures/Trees /Wells.</p> <p>a. Whether all are shown on the plan?</p> <p>b. Whether are proposed to be demolished /cut/filled in?</p> <p>c. Whether required details are shown?</p> <p>d. Authentic proof submitted.</p> <p>i. CTS Plan</p> <p>ii. Old Assessment bill</p> <p>iii. Approved plans of existing buildings</p> <p>iv. Any other proof.</p>	<p>Yes</p> <p>N.A.</p> <p>Yes</p> <p>Yes, attached in additional documents.</p> <p>Yes, Attached in additional Documents</p> <p>Yes, Attached in additional Documents (OCC)</p> <p>N.A.</p>	Verified.
9.	Whether plan showing existing structure & proposed tenement in new building showing area is submitted?	Yes plan showing structures already submitted in console.	Verified.
10.	R.L. of street sanctioned /proposed North South East West	<p>East – 13.40 mtrs.</p> <p>West – 27.45 mtrs.</p>	
11.	SET BACK LAND		

	z. PCO aa. Jail bb. Forest cc. NBWL dd. Any other	N.A. N.A. N.A. Attached in additional Documents N.A. N.A.			
14.	SELF CERTIFICATION BY OWNER /ARCHITECT				
	a. Debris b. Assessment c. No Trees Affected d. Vermiculture Bin e. Any Other	N.A. On Completion N.A. N.A. N.A.	Verified.		
15.	REMARKS BY CONSULTANTS				
	a. Parking Layout b. Internal SWD c. Internal Drainage d. STP. e. Mechanical Ventilation and Air-conditioning f. Specifications for construction of Internal Road/Setback D.P. Road g. Water Works	N.A. N.A. N.A. N.A. N.A. N.A. N.A.	Verified.		
16.	RESERVATIONS				
	YEAR	1967 if applicable	1991	2034	
	RESERVATION/DESIGNATION	N.A.	N.A.	No.	
	ZONE	N.A.	Residential Zone	Residential Zone	
	SPECIFIC REMARKS	N.A.	N.A.	N.A.	
17.	USER (D.C. Regulation 51 to 57, 60, Proposed as per D.C.P.R. No. Is the proposal is in conformity with its zone.	Yes			
18.	F.S.I. PERMISSIBLE AS PER D.C. REGULATION				
	Plot potential	TDR	Additional FSI 50% as per	Fungible F.S.I. under DCR	Total

	(sq.mt.)	(sq.mt.)	DCR 32 (sq.mt.)	35(4) (sq.mt.)	(sq.mt.)	
	1794.84	1120.09	1133.58	1416.98	5465.49	
19.	TYPE OF BUILDING					
	Industrial /Commercial / Residential Multistoried /Special Type / Mixed Use				Residential.	
20.	DESCRIPTION OF BUILDING					
	1. No. of Basements /User /height 2. Stilt/ ground floor 3. No. of Podium/User /height 4. No. of Floors /User /height 5. Refuge floor provided /level 6. Fire Check Floor /level 7. Service Floor /level				1/Residential /24.85mt. Ground floor N.A. 7/residential/ 24.85mt N.A. N.A. N.A.	Verified
21.	TENEMENT STATEMENT					
	Carpet Area					
	Below 60		--			
	60-130		--			
	Above 130		--			
	Total		--			
					Single owner building hence not applicable	
22.	PARKING STATEMENT					
	Residential					
	Carpet Area	Nos. of Flats	Parking by Rule	Parking provided	Reference plan Attached in additional documents.	
	Total for Residential		4	4		
	Non-Residential		NIL	NIL		
	Transport Vehicles		NIL	NIL		

	Total	4	4		
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**Jinish
Narendra
Soni**

Digitally signed by Jinish Narendra Soni
DN: c=IN, o=Personal, title=6236,
pseudonym=14683132f33648068462de2
076c255f7,
2.5.4.20=50473298b30040426a9340aa95
6d85970a624ca4b8587dbd493d71aa6c1
feeac, postalCode=400056,
st=Maharashtra,
serialNumber=4b0a153b24b4e63ccf062a
1372e085396f8db6278aed227238460b5
1fe16b18a, cn=Jinish Narendra Soni
Date: 2023.05.29 12:48:30 +05'30'

Shri. Jinish N. Soni
(Lic. Surveyor)
(Lic No. S/588/LS)

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ANNEXURE A-7

**MUNICIPAL CORPORATION OF GREATER MUMBAI
P-16330/2023/(730)/G/South/WORLI**

Subject:- Proposed Addition & Alteration of existing building on Plot Bering CS No. 730, Village Worli, Division at Khan Abdul Gaffar Khan Road, Worli Mumbai – 400 018. G/south Ward.

Architect: Shri Jinish Soni of M/s. 3 Dimensional Consultants LLP.

Owner: Shri Ghanshyambhai Dholakia, Managing Director of M/s. Hari Krishna Exports Pvt. Ltd.

Reference: File No: - P-16330/2023/(730)/G/South/Worli.

.....
Brief History: -

In this case the plans for the building were approved as per the provisions of DCR 1967 in the year 1993 as the plot was affected by CRZ II.

The Occupation certificate was granted on 27.09.2001 to building comprising of Basement For Parking + silt for parking + 1st to 6th Residential floors + 7th (pt.) for utilities by utilizing plot potential to the tune of 1.33 FSI and staircase, lift & lift lobby are free of FSI.

Since the plot is affected by CRZ II and as per the revised Notification issued by Central Govt. of India dated 18th January 2019 wherein it is stated that for the plots affected by CRZ II the development shall be governed by the local town and country planning regulation as applicable from time to time and norms for the floor space index (FSI) or Floor Area Ratio (FAR) prevailing as on date of this notification shall be applicable.

As per the CRZ remarks issued by the Development plan department in consonance with the CZMP sanctioned by the Govt of India dated 18th January 2019, the plot under reference falls in CRZ II on the land ward side of the existing road. And thus, as per the provision of the said notification the applicable regulations for development of the said plot are governed by the Provisions of Regulation of DCPR 2034 for Mumbai.

As per the provisions of Reg 2034, we have proposed to amend the plans for buildings already constructed with some internal changes with respect to the room sizes and uses as the entire building is now purchased by a single owner. Thus, now the building which was constructed earlier is proposed to be amended as per the permissible FSI and provision of DCPR 2034 which is now comprising as tabulated below

Floor	As per Approved plans	Description Of Changes
Basement	Consisted of parking, Store rooms underground water tanks, lift, lift machine room and pump rooms	Basement is now counted into FSI and user from Storage to Servant room and other ancillary users are

	Separate Staircase from ground floor to Basement	claimed in FSI Existing staircase from ground floor to basement is removed and additional lift from basement to top floor is installed and the same is claimed free of FSI.
Ground	Consisted of lift, staircase, society office, Meter rooms, toilets, driveway, parking and swimming pool in the front open space	Earlier shown drive way is converted into hall and silt is now turned into ground floor by counting earlier features free of FSI into FSI. The swimming pool in the FOS is demolished and additional R G area instead of pool over the porch is constructed.
First Floor	Consisted of staircase, lift and two nos of flat with balconies and elevation features.	New balconies in place of elevation features are constructed and same are proposed to be counted in FSI. A new gymnasium, pool, salon, steam room and massage room are added replacing the existing components and same are proposed to be counted in FSI.
Second Floor	Consisted of staircase, lift and two nos of flat with balconies and elevation features.	New balconies in place of elevation features are added and counted in FSI
Third Floor	Consisted of staircase, lift and two nos of flat with balconies and elevation features.	New balconies in place of elevation features are added and counted in FSI, steam and shower added.
Fourth Floor	Consisted of staircase, lift and two nos of flat with balconies and elevation features.	New balconies in place of elevation features are added and counted in FSI
Fifth Floor	Consisted of staircase, lift and two nos of flat with balconies and elevation features.	New balconies in place of elevation features are added and counted in FSI and one side is constructed with double height living room by demolishing the existing slab and the same is proposed to be counted 1.5 times into FSI
Sixth Floor	Consisted of staircase, lift and two nos of flat with balconies and elevation features.	New balconies in place of elevation features are added and counted in FSI, one part is converted into entertainment room
Seventh Floor	Consisted of Overhead Water tank, A/C unit's rooms and other utilities.	Now bedrooms are constructed in place of existing utility rooms and new balconies in place of elevation features and pergola are added and counted in FSI

- b. Some of the earlier approved elevation features are merged into habitable floors in certain portion of the building, same are now proposed to be regularized by counting in FSI as per (C-13) circular u/no CHE/DP/110/Gen 2019-20.
- c. A double height hall is proposed to be counted 1.5 times into FSI on the fifth floor. The same is constructed by demolishing the part sixth floor slab.
- d. Extension in balcony is proposed and counted in FSI as shown in plans.

All the above changes are incorporated in the residential floors as a single owner owned building by utilizing plot potential + additional FSI on payment of premium + Admissible TDR as per the road width and by claiming area of staircase, lift, lift lobby free of FSI as per the provisions of DCPR 2034 and as per the circular / policy in force amended up to date.

Further some of the areas which were claimed free of FSI (elevation features / parking area, Entrance lobby areas etc.) as per the then policy are now proposed to be counted in FSI as per the Provision of DCPR 2034 and as per the provision of the circular u/no CHE/DP/110/Gen dated 2019-2020 to be read with earlier circular u/no CHE/23227/DP/Gen 21/11/2017. And also, as per the provisions of Circular u/no DYCHE/3757/(BP) City dated 11/03/2022.

All the internal changes have been incorporated in the plan and accordingly the work is completed on site. However, there are certain encroachments of elevation features in the building which are earlier approved free of FSI and now are merged with the habitable floor. The same needs to be regularized under provisions circular u/no. CHE/DP/110/GEN dt. 2019-20 (C-13) by counting the same in FSI and paying premium/penalty as applicable as per regularization penalty as per policy circular u/no. Ch.E./D.P./004477/Gen. dt. 12.05.2021.

Now, Owner Shri Ghanshyam Bhai Dholakia, Managing Director of M/s. Hari Krishna Exports Pvt. Ltd. has appointed L.S. Shri Jinish Soni of M/s. 3 Dimensional Consultants LLP. as a new L.S for the proposal to regularize the work done beyond approval and process the file for OCC/BCC.

The proposal is now submitted as per Reg. No. 9(6)(b) of DCPR 2034 and Transitional policies in force. Moreover, there is no substantial change in planning of the building with respect to earlier approvals. However, the previously approved free of FSI elevation features which are now merged with habitable floor level are proposed to be regularized by counting in FSI and charges applicable for regularization by paying the necessary penalty as per policy in light of circular and in consonance with transition policies in force

DP Remarks 2034:-

As per DP 2034 Remarks, plot under/ref. falls in Residential Zone and is not reserved for public purpose. It is accessible and abutting 24.50 mts. wide Existing Road on west Side and affected by the R.L of the 13.40 mts width on the East side. Thus, the plot is affected by roads on two sides. The plot under reference is affected by CRZ II.

Applicability of Hon'ble Supreme court's order in Kohinoor case: -

The OCC plans were approved on 27/09/2001 i.e. prior to Hon'ble S.C. order i.e. 17/12/2013 in Kohinoor case. Hence, the Hon'ble S.C. order in Kohinoor case

is not applicable to the proposal under reference. Moreover, the plot is affected by existing road on the west and east side.

Applicability of directives of Hon'ble Supreme Court's order dated 15/03/2018 in Dumping ground case: -

The C & D waste generated shall be disposed of as per Hon'ble Supreme Court order as per SLP (Civil no. D23708/2017) dated 15.03.2018 shall be incorporated in conditions and will be complied along with the conditions incorporated by MCGM from time to time. The requisite bank guarantee and undertaking to that affect will be submitted before approval of plans.

Auto DCR Scrutiny: -

For proposal under reference O.C.C. was issued on dtd. 27/09/2001 i.e. prior to 15-05-2015. Therefore, as per Circular u/no. CHE/DP/27163/Gen Dtd 30-11-2016 Auto D.C.R. scrutiny is not applicable to the proposal under reference.

Applicability of regulation 14(A) :-

The Net plots area of plot under reference is 1349.51sq.mts. Hence Reg. 14(A) is not applicable to the proposal under reference.

Applicability of regulation 15:-

The Net plots area of plot under reference is 1349.51sq.mts. Hence Reg. 15 is not applicable to the proposal under reference.

CFO NOC:-

The NOC from CFO was granted for OCC for the entire building u/no. FBM/S/507/190 dated 27.06.2007 and thereafter the final fire NOC (completion) is also obtained. However, the revised CFO remarks with the reference No: FLSA/32/AVK23/May/06 from the consultant has been issued for the building height of less than 32 mts has been submitted and attached herewith.

Parking consultant Remarks:-

The remarks of Parking consultant dated 08.07.2021 has been uploaded with regards to parking spaces now proposed with respect to its maneuverability.

Parking requirement table: -

As per Reg. No. 44 Table No. 21 of DCPR 2034.

Carpet Area (In Sq. Mts.)	Total Flats	Parking Permissible as Per D.C. Rule.	Parking Required
For Residential Tenements			
Below 45.00	00 Nos	1 Parking For 4 Tenements	0.00 Nos.
45.00 To 60.00	00 Nos	1 Parking For 2 Tenements	0.00 Nos.
60.00 To 90.00	00 Nos	1 Parking For 1 Tenements	0.00 Nos
Above 90.00	01 Nos	2 Parking For 1 Tenements	2.00 Nos.
Total			2 Nos.
10 % Additional Parking for Visitors (Resi.)			0.2 Nos.
50% Additional Permissible Free of Fsi As Per Reg. 31 (1) (Vi)			1
Total Residential Parking Required			3.20 Nos.

	Say 4.00 Nos
Total Parking Required	4 Nos.
Total Parking Provided	4 Nos.

FSI permissible as per DCPR 2034: -

The FSI for the plot under reference permissible as per regulation 30(A) Table 12 is 1.33 (Plot potential) + 0.64 (TDR as per road width) + 0.73 (Additional FSI by paying premium) totaling to 2.70 + proportionate FCFSI.

Comparison of Concession Points as per DCR 1991 & DCPR 2034

Sr. No.	Concession points	DCR 1991 Provision	DCPR 2034 Provision	Remarks
1	To condone the open space deficiency maximum up to the tune of 30.90% for Light and ventilation by charging premium as per policy.	DCR 29 DCR 43(1) DCR 33(7) DCR 64(b).	DCPR 41 DCPR 47 (1) DCPR 6(b)	Submitted for further concessions is required.
2	To allow retaining the common staircase, staircase lobby, lift, and lift lobby area free of FSI for habitable floors as the same has been paid earlier and there are no changes in the orientation and use of the same. As per the earlier approved plan	DCR 35(2)(iii) DCR 35(2)(iv) Circular U/No. CHE/ 14548/DP/ Gen/ dated 22/08/ 2017	DCPR 31(1)(iv)	Only Reg. No. is changed. Hence no further concessions is required.

In continuation to earlier approvals, the proposal needs consideration of Ch.E. (DP)/ Hon'ble M.C. on the following points:-

1. To condone Open space deficiency by charging premium as per Reg 6(b) of DCPR 2034.

Tabulation for open space as per DCR 1991

Building is proposed with basement + ground floor + 1st to 7th upper residential floors with total height of 24.75 mtrs.

Since the building under reference is a non-composite building, the open spaces worked out are as per D.C.P.Reg. 41 read with D.C.P.Reg. 47(1) as under:

Height of building 24.75 mtrs.

$H/4 = 6.18$ mtrs.

As per table 10-A front open space required = 4.50 mtrs.

As per table 10-B Front open space required:

From Abdul Gaffar Khan Road = $10.50 - (24.50/2) = \text{Nil}$.

From Sir Poch Khan Wall Road = $10.50 - (13.40/2) = 3.80$ mtrs.

The open spaces are tabulated as below.

Side	Open Space required In mts. W.R.T DCPR 2034	Open Space proposed in mts. W.R.T DCPR 2034	Def. In mts.	Def. In %	Remarks
North	6.4	1.52	4.88	76.25 %	Outermost edge of balcony is considered
East	3.00	1.50	1.50	50%	F.O.S.as per DCPR
West	6.4	1.50	4.90	76.56 %	Outermost edge of balcony is considered
South	6.4	1.50	4.90	76.56 %	F.O.S. as per DCPR

From above table it is observed that there were no deficiency in open spaces for the building under reference as per the provisions of DCR 1991.

However as per DCPR 2034 it can be seen that the outer most face of the building i.e balcony is considered to calculate the deficiency in open spaces which is tabulated in the above table which requires condonation as per reg 6 (b) of DCPR 2034.

As per Reg. 6(b) of DCPR 2034, in specific cases where a clearly demonstrable hardship is caused, the Commissioner may for reasons to be recorded in writing, by special permission permit any of the dimension prescribed by these regulations to be modified, except those relating to floor space indices unless otherwise permitted under these regulations, provided that the relaxation will not affect the health safety, fire safety, structural safety and public safety of the inhabitant of the building and neighborhood.

Accordingly, I have presented the following demonstrable hardship regarding this deficiency in open spaces and requested to condone the same.

A) Hardship:

- i. In this case, the construction of the building is already completed on site as per the C.C. granted in consonance with DCR 1991. However, due to regularization and proposing additional FSI the open spaces are taken as per DCPR 2034 from edge of the cantilever.

B) Health Safety:

Owner has appointed licensed plumber to supervise and carry out the drainage work. The drainage work will be carried out as per provision of drainage and sanitary code. Further, the completion certificate of drainage arrangement will be submitted before requesting Occupation permissions to the bldg. under reference by verifying that conveyance of foul/waste is achieved speedily and effectively without risk of nuisance to the health of the occupants of the bldg. and neighborhood.

Moreover, effective disposal of rain water will be achieved as per consultant remarks obtained and by providing paving around the bldg. with slope, so that there will not be any water logging S.W.D. completion certificate will be submitted before Occupation certificate.

In view of providing above arrangement, it is felt that due care will be taken towards the health safety of the occupants & neighborhood.

C) Fire Safety:

The CFO NOC for the proposed bldg. is submitted online for a building ht. of 24.85mt. The Owner/Developer has to fulfill the requirement of C.F.O. N.O.C. from the safety point of view and Completion Certificate from C.F.O. will be insisted before Occupation permission. Thus, safety of the inhabitable and neighbourhood from fire point of view will take care.

D) Structural Safety:

The proposed building under reference has been designed by Licensed Structural Engineer having registration with M.C.G.M. and the work will be carried out under his supervision. Also, a Structural Engineer's letter taking relevant I.S. code into consideration and provision for seismic forces for earthquake resistance is attached in console. The stability Certificate from registered structural Engineer will be taken at Plinth completion and O.C.C.

stage. Thus, the structural stability of the building and safety of inhabitants of building and neighbourhood is not likely to be affected.

E) Neighbourhood Safety (Plan attached in additional document)

From the location plan attached in additional documents, it can be seen that the building under reference is abutting 27.45mt Road on West side and Existing 13.40mts wide road on East side of the plot.

Description	Bldg. Ht In mts.	O.S. for L/V In mts.	O.S. for D/W In mts.
North	Existing bldg. with ground + seven upper floors 3.6+ 3.6	7.2	3.6
South	Existing bldg. with ground + one	Nil	Nil

Description:	Bldg. Ht. In mts	O.S. for L/V In mts	O.S. for D/W In mts
On East side	Existing 13.40mt wide road	--	--
On West side	Existing 24.50mt wide road	--	--
On South	Existing bldg. with ground + seven upper floors (24 mtr)	8	3.6
On North	Existing bldg. with ground + one (7.5 mtr)	--	3.6

Side	J.O.S. reqd. in mts.	J.O.S. Prop. in mts.	Def. in mts.	Def. %	Remarks
North	3.60 + 6.19 =9.79	3.60 + 4.28 = 7.88	1.91	19.51	
South	3.60 + 6.19 =9.79	3.60 + 5.18 =8.78	1.01	10.31	

However, a condition will be incorporated in IOD to submit reg. undertaking from the owner will not object the development of the adjoining plots

in future. By providing this arrangement, the safety of the inhabitant & neighbourhood will not be affected.

In view of above, Ch. E. Eng. (D.P.)/Hon'ble M.C.'s approval is requested to condone deficiency in open space to the tune of 19.51% in JOS and 30.80% in SOS as per Reg. No. 43(1) of DCPR 2034 by charging premium as per policy due to hardship, planning constraints and as per Reg. No. 6(b) of DCPR 2034.

2. To apply the provisions of the circular under no CHE/DP/110/Gen dated 2019-2020 to be read with earlier circular CHE/23227/DP/Gen 21/11/2017.

Reference is requested to the circular issued circular under no CHE/DP/110/Gen dated 2019-2020 to be read with earlier circular u/no CHE/23227/DP/Gen dated 21/11/2017, about applicability for buildings approved as per DC Reg. prior to 06/01/2012 and clause no15 a) of the same is reproduced as below: - "In case of Building proposals approved as per D.C Regulation prior to 06/01/2012and /or occupation permission granted (part/full), if the owner/developers/co-op hsg society comes forward to count (partly or fully) certain features or users permitted free of FSI as per DC regulation prior to 06/01/2012, the same may be allowed by counting such features (fully/partly)from the balance /additional FSI potential along with the fungible FSI proportionate to balance /additional FSI without making applicable DC regulation modified as on 06/01/2012 to entire floor/s of the building. The same may be allowed without construing it to be change in foot print."

In view of the above, Ch.E.(D.P.)/ Hon'ble M.C. is requested to allow to apply the provisions of the circular under no CHE/DP/110/Gen dated 2019-2020 to be read with earlier circular CHE/23227/DP/Gen 21/11/2017.

3. To regularize the work carried out beyond approval by charging penalty.

The work of all the internal changes have been incorporated in the plan and accordingly the work is completed on site. There are changes in the internal layouts of the approved with regards to the OCC granted further there are certain encroachments of elevation features in the building which

are earlier approved free of FSI and now are merged with the habitable floor. The same needs to be regularized under provisions circular u/no. CHE/DP/110/GEN dt. 2019-20 (C-13) by counting the same in FSI and paying premium/penalty as applicable as per regularization penalty as per policy circular u/no. Ch.E./D.P./004477/Gen. dt. 12.05.2021.

In view of the above, Ch.E.(D.P.)/ Hon'ble M.C. is requested to allow to regularize the work carried out beyond approval by charging penalty as per policy.

4. To submit the proposal to MCZMA for clearance in CRZ II

The plot is affected by CRZ II and as per the revised Notification issued by Central Govt. of India dated 18th January 2019 wherein it is stated that for the plots affected by CRZ II the development shall be governed by the local town and country planning regulation as applicable from time to time and norms for the floor space index (FSI) or Floor Area Ratio (FAR) prevailing as on date of this notification shall be applicable subject to various conditions mentioned in the said notification.

As per the CRZ remarks issued by the Development plan in correspondence with the CZMP sanction by the Govt of India dated 18th January 2019, the plot under reference falls in CRZ II on the land ward side of the existing road. And thus, as per the provision of the said notification the applicable regulations for development of the said plot are governed by the Provisions of Regulation of DCPR 2034 for Mumbai.

Submitted please.

Jinish
Narendra
Soni

Digitally signed by Jinish Narendra Soni
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pseudoym=146831323364808462de207
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b18a, cn=Jinish Narendra Soni
Date: 2023.06.05 18:07:23 +05'30'

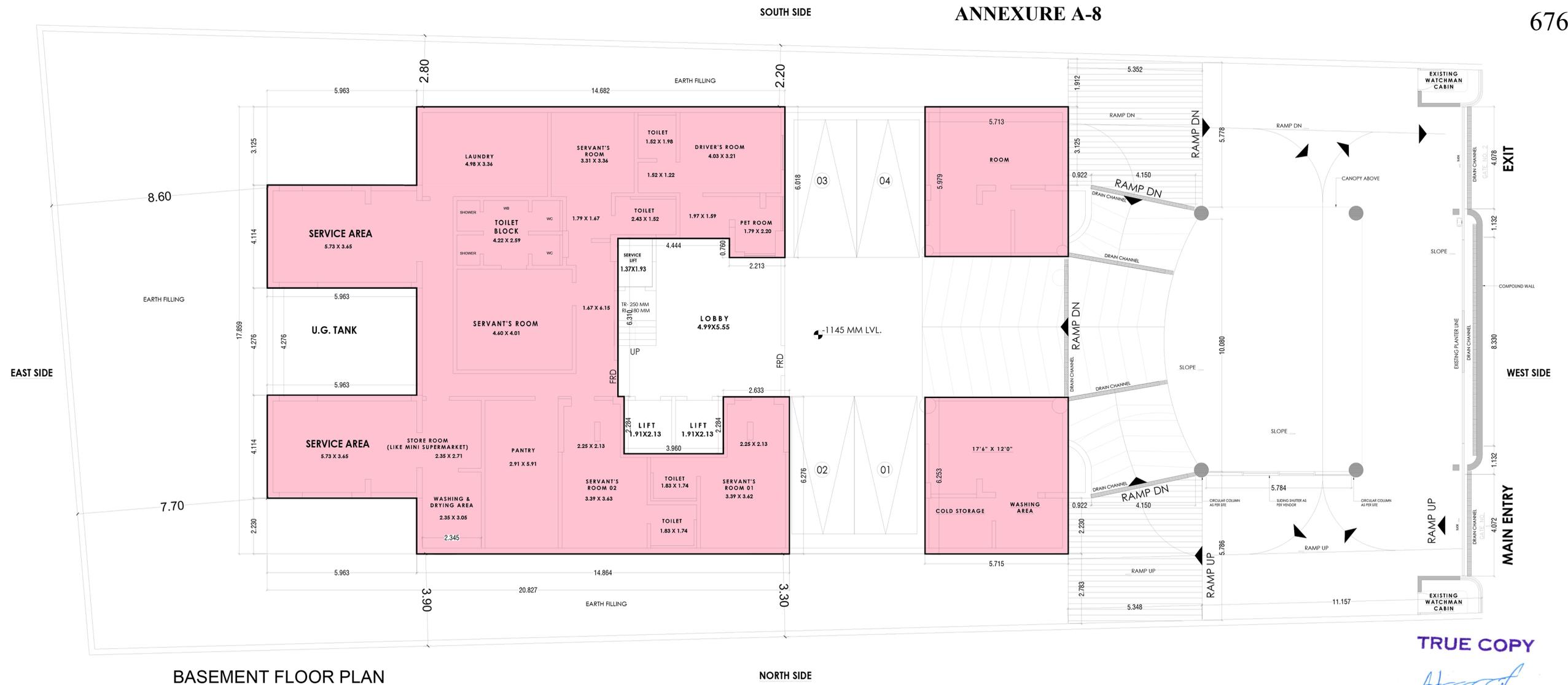
L.S. Shri. Jinish N. Soni

Lic. No. S/558/LS

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ANNEXURE A-8



BASEMENT FLOOR PLAN
SCALE :- 1:100

SOUTH SIDE

ANNEXURE A-9

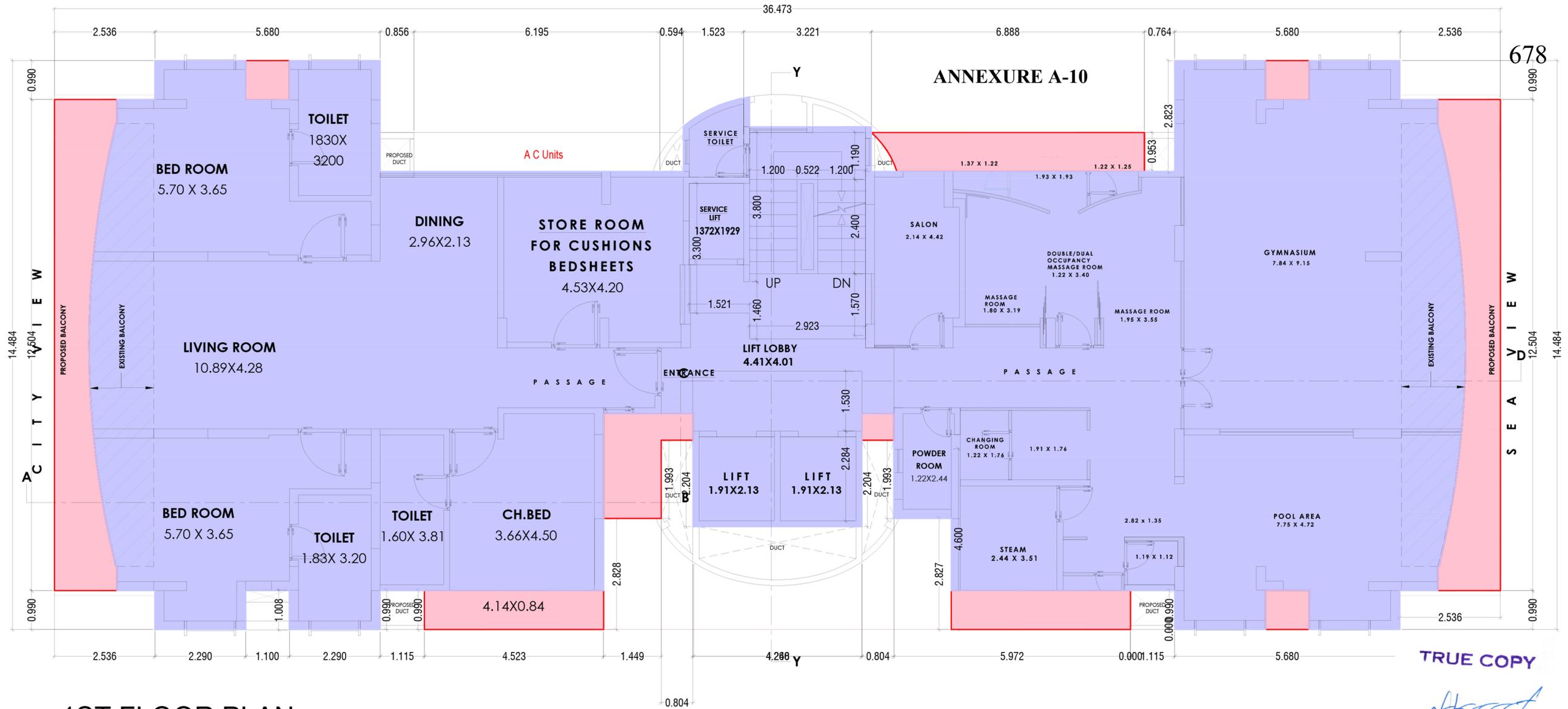
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GROUND FLOOR PLAN
SCALE :- 1:100

NORTH SIDE

TRUE COPY
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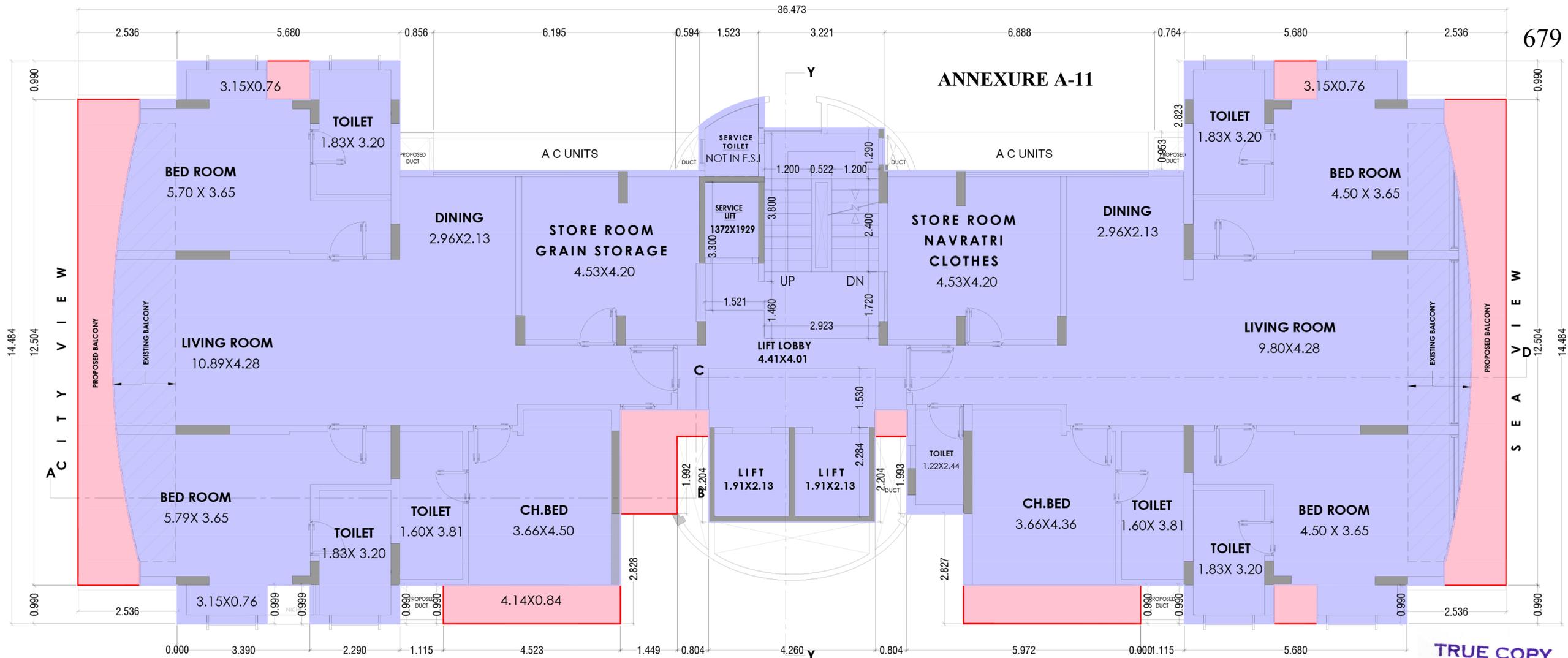
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ANNEXURE A-10

1ST FLOOR PLAN

SCALE :- 1:100

TRUE COPY



2ND FLOOR PLAN

SCALE :- 1:100

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ANNEXURE A-17

29/06/2023, 13:28

Proposal Status Flow

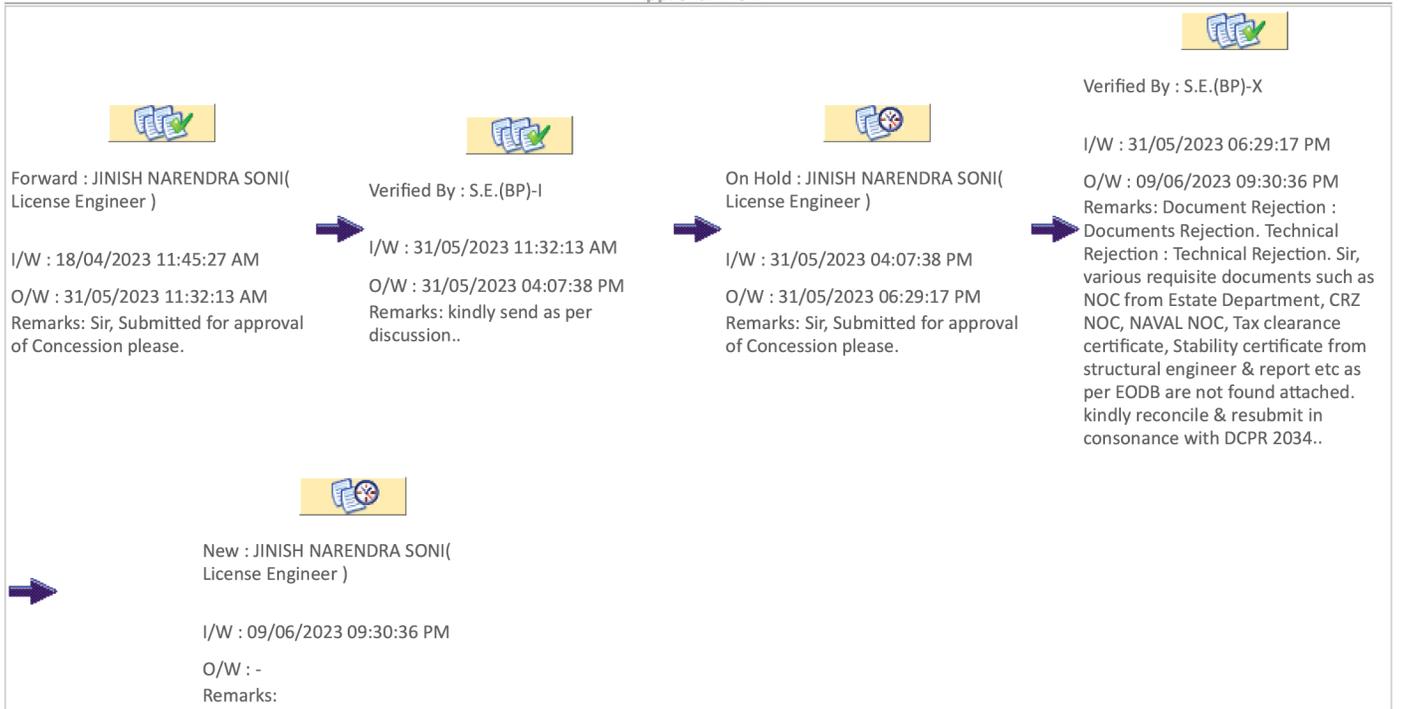
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Application Details



File No. : **P-16330/2023/(730)/G/South/WORLI/342/1/New**
 SAC No. : **NA,**
 Title/Subject : **Proposed Addition & Alteration of existing Residential building on plot bearing CS No. 730 of Village Worli, Division at Khan Abdul Gaffar Khan Road, Worli (Mumbai), 400 018, G/South Ward.**
 Zone Name : **City** Ward Name : **G/South**
 Plot No. : **730** CS No./ CTS No. : **730**
 Road/Street Name : **Khan Abdul Guffar Khan Road** TP Scheme : **0**
 Division / Village : **2045** Gut No. :
 CTS No. : **730**
 Architect/LE/SE Name : **JINISH NARENDRA SONI** Inward Date : **7/4/2023**
 Notice Letter No. : **342/1172/23**
 Structural Engineer : **Hiten R Mahimtura**

Approval Flow



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ANNEXURE A-18



All India Reporter

AIR 1994 SUPREME COURT 853

SUPREME COURT

KULDIP SINGH, J. and P. B. SAWANT, J.

Civil Appeal No. 994 of 1972, D/- 27 - 10 - 1993

S. P. Chengalvaraya Naidu (dead) by L.Rs
Appellants v. Jagannath (dead) by L.Rs. and
others Respondents.

Civil P.C. (5 of 1908), S.2(2) - Evidence Act (1 of 1872), S.44 - Proceeding in court - Fraud by litigant - Withholding of vital document relevant to litigation - It is fraud on Court - Guilty party is liable to be thrown out at any stage - Litigant obtaining preliminary decree for partition of property - Not mentioning at trial as to his having executed before filing of suit release deed in respect of property in favour of his employer - Decree is vitiated by fraud.

Decision of High Court, Reversed.

The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. It can be said without hesitation that a person whose case is based on falsehood has no right to approach the Court. He can be summarily thrown out at any stage of the litigation. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.

Decision of High Court, Reversed.

(Paras 7 8)

Where a person obtaining preliminary decree for partition in respect of certain property had, before filing suit, after purchasing the property benami for his employer in Court auction, had

relinquished his rights in it by executing release deed in favour of employer, the non-production and non-mentioning of the release deed at the trial tantamounted to playing fraud on the court vitiating the decree.

(Para 8)

Judgement

1. KULDIP SINGH, J.:—"Fraud-avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment / decree -- by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.

2. Predecessor-in-interest of the respondents-plaintiffs filed application for final decree for partition and separate possession of the plaint properties and for mesne profits. The appellants defendants contested the application on the ground that the preliminary decree, which was sought to be made final, was obtained by fraud and, as such, the application was liable to be dismissed. The trial Judge accepted the contention and dismissed the application for grant of final decree. The respondents-plaintiffs went in appeal before the High Court. A Division Bench of the High Court went through plethora of case law and finally allowed the appeal and set aside the order of the trial Court. This appeal is by way of certificate granted by the High Court.

3. One Jagannath was the predecessor-in interest of the respondents. He was working as a clerk with one Chunilal Sowcar. Jagannath purchased at court auction the properties in dispute which belonged to the appellants. Chunilal Sowcar



had obtained a decree and the court sale was made in execution of the said decree. Jagannath had purchased the property in the court auction on behalf of Chunilal Sowcar, the decree-holder. By a registered deed dated November 25, 1945, Jagannath relinquished all his rights in the property in favour of Chunilal Sowcar. Meanwhile, the appellants who were the judgment-debtors had paid the total decretal amount to Chunilal Sowcar. Thereafter, Chunilal Sowcar, having received the decretal amount, was no longer entitled to the

@page-SC854

property which he had purchased through Jagannath. Without disclosing that he had executed a release deed in favour of Chunilal Sowcar Jagannath filed a suit for partition of the property and obtained a preliminary decree. During the pendency of the suit, the appellants did not know that Jagannath had no locus standi to file the suit because he had already executed a registered release deed, relinquishing all his rights in respect of the property in dispute, in favour of Chunilal Sowcar. It was only at the hearing of the application for final decree that the appellants came to know about the release deed and, as such, they challenged the application on the ground that non-disclosure on the part of Jagannath that he was left with no right in the property in dispute, vitiated the proceedings and, as such, the preliminary decree obtained by Jagannath by playing fraud on the court was a nullity. The appellants produced the release deed (Ex. B- 15) before the trial Court. The relevant part of the release deed is as under:-

"Out of your accretions and out of trust vested on me, purchased the schedule mentioned properties benami in my name through court auction and had the said sale confirmed, The said properties are in your possession and enjoyment the said properties should henceforth be held and enjoyed with all rights by you as had been done;

"So far. If any civil or criminal proceedings have to be conducted in respect of the said properties or instituted by others in respect of the said properties you shall conduct the said proceedings without reference to me and shall be held liable for the profits or losses you incur thereby. All the records pertaining the aforesaid properties are already remaining with you."

4. The High Court reversed the findings of the trial Court on the following reasonings :-

"Let us assume for the purpose of argument that this document, Exhibit B-15, was of the latter category and the plaintiff, the benamidar, had completely divested himself of all rights of every description. Even so, it cannot be held that his failure to disclose the execution of Exhibit B-15 would amount to collateral or extrinsic fraud. The utmost that can be said in favour of the defendants is that a plaintiff who had no title (at the time when the suit was filed) to the properties has falsely asserted title and one of the questions that would arise either expressly or by necessary implication is whether the plaintiff had a subsisting title to the properties. It was up to the defendants, to plead and establish by gathering all the necessary materials, oral and documentary, that the plaintiff had no title to the suit properties. It is their duty to obtain an encumbrance certificate and find out whether the plaintiff had still a subsisting title at the time of the suit. The plaintiff did not prevent the defendants, did not use any contrivance, nor any trick nor any deceit by which the defendants were prevented from raising proper pleas and adducing the necessary evidence. The parties were fighting at arm's length and it is the duty of each to traverse or question the allegations made by the other and to adduce all available evidence regarding the basis of the plaintiff's claim or the defence of the defendants and the truth or falsehood concerning the same. A party litigant cannot be indifferent, and negligent in his duty to place the materials in support of his contention



and afterwards seek to show that the case of his opponent was false. The position would be entirely different if a party litigant could establish that in a prior litigation his opponent prevented him by an independent, collateral wrongful act such as keeping his witnesses in wrongful or secret confinement, stealing his documents to prevent him from adducing any evidence, conducting his case by tricks and misrepresentation resulting in his misleading of the Court. Here, nothing of the kind had happened and the contesting defendants could have easily produced a certified registration copy of Exhibit B- 15 and non-suited the plaintiff; and, it is absurd for them to take advantage of or make a point of their own acts of omission or negligence or carelessness in the conduct of their own defence."

5. The High Court further held as under :-

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"From this decision it follows that except proceedings for probate and other proceedings where a duty is cast upon a party litigant to disclose all the facts, in all other cases, there is no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence. It would cut at the root of the fundamental principle of law of finality of litigation enunciated in the maxim 'interest republicaent sit finis litium ' if it should be held that a judgment obtained by a plaintiff in a false case, false to his knowledge, could be set aside on the ground of fraud, in a subsequent litigation. "

6. Finally, the High Court held a under:-

"The principle of his decision governs the instant case. At the worst the plaintiff is guilty of fraud in having falsely alleged, at the time when he filed the suit for partition, he had subsisting interest in the property though he had already executed Exhibit B-15. Even so that would not amount

to extrinsic fraud because that is a matter which could well have been traversed and established to be false by the appellant by adducing the necessary evidence. The preliminary decree in the partition suit necessarily involves an adjudication though impliedly that the plaintiff has a subsisting Interest in the property."

7. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the, illegal-gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation.

8. The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the Court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to got an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of



Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Exhibit B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Nonproduction and even non-mentioning of the release deed at the trial tantamounts to paying fraud on the Court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Exhibit B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side than he would be guilty of playing fraud on the Court as well as on the opposite party.

9. We, therefore, allow the appeal, set aside the impugned judgment of the High Court and restore that of the trial Court. The appellants shall be entitled to their costs which we quantify as Rs. 11,000 / -.

Appeal Allowed .

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A handwritten signature in blue ink, appearing to be 'S. S. S.', is written below the 'TRUE COPY' stamp.

ANNEXURE A-19



AIR High Courts Software 1950-2013(till March'13)

AIR 2008 BOMBAY 155

(NAGPUR BENCH)

C. L. PANGARKAR, J.

Smt. Shamlata wd/o Manohar Raut and Ors. v. Vishweshwara Tukaram Giripunje and Anr.

Second Appeal No. 67 of 1996, D/-29 -1 -2008.

(A) Evidence Act (1 of 1872) , S.74 , S.76 -Public document - Certified copy of plaint - Is not a public document - It requires proof.

The certified copy of the plaint is not a public document. Hence, it requires proof. For proving such document, the original plaint should have been called in the Court. That is not done, hence the certified copy of the plaint could not be said to be proved at all. (Para 5)

(B) Evidence Act (1 of 1872) , S.40 -Judgment of Court - Relevancy - Present defendant was not party to that suit - That judgment would neither fall within scope of S.40 nor provisions of S.11 of Civil P.C. would be applicable.

Civil P.C. (5 of 1908) , S.11 . (Para 5)

(C) Civil P.C. (5 of 1908) , O.26 , R.9 -Appointment of Commissioner - To measure site of plaintiff - Allegations of plaintiff that defendant encroached upon land of plaintiff - Measurement map prepared by retired Talathi was not reliable as site was not measured scientifically and after notice to opposite party - Appointment of Commissioner to measure plots of plaintiff and defendant, necessary. (Para 6)

J. J. Chandurkar, for Appellant.

Judgement

JUDGMENT :-This is a defendant's second appeal. The facts giving rise to this appeal are as follows -

The suit was initially instituted by one Surendrasing Ramarao Naik through his constituted attorney Shri Vishveshwar Tukaramji Giripunje. Subsequently, the original plaintiff Surendrasing sold the suit property to his constituted attorney Vishvesh-war. Both now are

plaintiffs in this suit. The defendant Manohar is the neighbour of plaintiff. The plaintiff is the owner of open land in ward No. 26, Circle No. 6 Zilla Road, Mahal Nagpur.

The defendant has his house towards

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North of the said land bearing Municipal Corporation No. 342/1. The plaintiff submits that the defendant has committed encroachment shown by letters HBCDNPT as shown in the plaint map, and the encroachment is to the extent of 159 sq. ft. It is alleged that the defendant committed the encroachment by constructing a Well in the year 1980. The plaintiff further contends that there was a dispute regarding the land ABCDEFGH covered by the lines in the plaint map with the Nazul department, who claimed that the land belonged to the nazul department. The plaintiff had, therefore, instituted Civil Suit No. 312/95 against the Collector of Nagpur. The suit came to be decreed in favour of the plaintiff and plaintiff was declared to be the owner. The appeals preferred by the State before the District Judge and the High Court were rejected. The plaintiff submits that since the plaintiff was out of Nagpur for quite some time on account of the fact that he had shifted his residence to village Kawatha, the defendant took disadvantage of the fact and committed encroachment. The plaintiff seeks to remove this encroachment and prays for a decree for possession of the site.

2. The defendant has filed the written statement. The defendant does not dispute that the plaintiff is the owner of area known as Naikwadi and he owns landed property in Nagpur. The defendant denies that the plaintiff is the owner of the plot shown by letters ABCDEFGH. He also denies that he has committed encroachment on the site as contended by the plaintiff. The defendant also denies that there was any dispute between plaintiff and the Government over the suit land and that the proceedings ended in favour of the plaintiff. The defendant submits that his house was purchased in the year 1935 from one Sitabai Giripunje. The defendant has been in possession of the property since more than 40 years adversely, and, to the knowledge of the plaintiff uninterruptedly. It is contended that, therefore, the suit is barred by limitation. It is further contention of the defendant that in the year 1982 there was a measurement by the City Survey Department in which it was found that the defendant has not committed any encroachment and



plaintiff did not prefer any appeal against the said measurement. The defendant, therefore, prayed that the suit be dismissed.

3. The learned Judge of the trial Court framed issues and found that the plaintiff is the owner of the site ABCD EFGH and defendant had committed encroachment. He has also found that the defendant was not in adverse possession. Holding so, he decreed the suit in favour of the plaintiff. The appellate Court concurred with the findings recorded by the trial Court. The second appeal was admitted by Patel, J. on ground No. 2, which reads as follows -

"That as a matter of fact the entire burden to establish that the title to the property in suit vested originally in plaintiff No. 1 and on his alleged transfer in favour of the plaintiff No. 2 in the plaintiff No. 2 and there being no evidence whatsoever to establish the transaction as result of which title was said to have been created in favour of the said plaintiff, merely putting on record certain irrelevant judgments which were clearly inadmissible in view of the mandatory provisions of Section 43 of the Indian Evidence Act, the Courts below have passed a decree in favour of the plaintiffs for which there is no foundation on the record."

4. I have heard the learned counsel for the appellant. None appears for the respondents.

5. The learned counsel for the appellant contended that the Courts below have relied upon the documents on which it could not have. The plaintiff has pleaded that he had instituted a suit for declaration of his ownership against the State of Maharashtra and the suit was decreed in his favour. The plaintiff has placed on record the judgment delivered in that suit and the appeals thereon. The certified copies of the judgments of the Courts have been filed on record. They are Exhs. 51, 53 and 54. Exh. 51 is the copy of the trial Court judgment. Exh. 53 is the copy of the judgment of the first appellate Court while Exh. 54 is the judgment of the High Court. As said, the suit was between the original plaintiff and the State. It appears that the Nazul Tahsildar had given notice to the plaintiff-tenant to remove the encroachment on the said site and therefore, the suit was filed. The suit was decreed. The question is whether this judgment is at all relevant. The learned counsel for the appellant submitted that this judgment does not fall within the scope of Sections 40 to 44. The judgment does not fall within the scope of Section 11 of Code of Civil

Procedure since the present defendant was not party to that suit. Obviously,

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therefore, that judgment does not fall within the scope of Section 40 of the Evidence Act. It is not relevant under Section 41 because it is not a judgment delivered in exercise of probate, matrimonial, admiralty, or insolvency jurisdiction. It is no relevant because it does not relate to matter of public nature. It also does not fall within the scope of Section 43 since existence of such judgment is not fact in issue. The learned Judge of the first appellate Court as well as the trial Court could not have, therefore, looked into this judgment for any purpose, for they are irrelevant. It appears that the learned Judge of the trial Court as well as the appellate Court have relied upon the certified copy of the plaint in Civil Suit No. 312 of 1965 (Exh. 52). Both the Judges have held that the document i.e. plaint can be read as it is a public document. Both seem to be under misconception. The certified copy of the plaint is not a public document. Hence, it requires proof. For proving such document, the original plaint should have been called in the Court. That is not done, hence the certified copy of the plaint could not be said to be proved at all. The Courts below, therefore, were not justified in putting reliance on this copy of the plaint. The conclusions of the Courts below, however, are not based on the judgment alone between plaintiff and Government, but independently the Courts below have concurrently found that there is an encroachment on plaintiffs land. In this regard, it is seen that this land house of original plaintiff No. 1 is ancestral and hence there is no document of title with the plaintiffs. Plaintiff No. 2 has purchased the property during the pendency of the suit hence that sale deed carries no importance. But the defendant's title to his house is derivative, in as much as his mother has purchased the house and land in 1935. This sale-deed has been placed on record at Exh. 65. Although the plaintiffs do not have sale-deed and land is claimed to be an ancestral, plaintiffs have placed on record two important documents. They are Exh.60 - the record of rights. The area of the plaintiffs' land is shown to be 124.2 sq. meter in the said record of right. Second document is Exh. 61 - the map of City Survey Department. The map shows that the land was measured by department in presence of plaintiffs as well as defendant and other adjoining owners. The area of the plaintiffs plot No. 504 is shown to be 124.2 sq.mtr. in this map also. This measurement was done



on 15-5-1982.

6. Although these two documents are on record, the material thing that needs consideration is whether the plaint map prepared by PW 3 Balwant - retired Talathi - could be relied upon to hold that there is an encroachment on plaintiffs land and if there is one, what is the extent. This is the only map (Exh. 76) on record, as far as measurement of the site is concerned. It appears to me that it would not be proper to rely on this measurement map, for the site does not seem to have been measured scientifically and after notice to the defendant. PW 3 Balwant in examination-in-chief says that he measured the site on the basis of 1920 map and it was shown to him by Surendrasing - the plaintiff. It is not clear if it was a Survey map drawn by Government agency or department or a private map. Whatever that was, that too should have been placed on record. He admits in cross-examination that he had not seen the title-deed of either party. He also states that the map is drawn as told by Surendrasing. He says that he does not know the number of the map and he did not bring those notes of measurement before the Court. It is obvious that the map was drawn as suggested by Surendrasing - the plaintiff. It is not a measurement done independently and on basis of authenticated documents. He does not say if he had seen any document before he measured. One, therefore, wonders as to how then he could determine the boundaries of the plots of the plaintiff as well that of the defendant. He does not say if he found any fixed mark of survey department at any spot and that he measured it taking that point as base point. It is, therefore, clear that the measurement map (Exh. 26) cannot be taken as a correct map. The Courts below, therefore, should have appointed a Commissioner to measure not only the plot of the plaintiff but that of defendant also with reference to defendant's sale deed (Exh. 65) and also with reference to survey map (Exh. 61). It also appears that plaintiff had filed on record a certified copy of the sanction plan of house of plaintiff and it is at Article 'B'. This sanction plan of plaintiffs house is of the year 1923. Obviously, it is a very old document and material document to determine the exact extent of the land of plaintiffs site. Since sale deed of the plaintiffs site is not available, this document would be of immense

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help at the time of the measurement. In fact, therefore, the above documents would certainly have helped the

measurer to measure the land and for the Court to determine the question of encroachment correctly. To my mind, therefore, the Courts below erred in not appointing a Commissioner to measure the site of the plaintiff and defendant both with reference to these documents. In order that the suit is finally and effectually decided, it is, therefore, desirable to have measurement of both the sites which measurement can be undertaken by Surveyor from the City Survey Department. It is, therefore, now necessary to remand the matter back to the trial Court.

1) The appeal is, therefore, allowed.

2) The judgments and decrees passed by the Courts below are set aside.

3) The matter stands remanded to the trial for fresh decision. The trial Court shall appoint Surveyor/Commissioner from the City Survey Department to measure the sites of plaintiff and defendant both.

4) While making an appointment of the Commissioner, the trial Court shall issue instructions to the measurer to measure the land according to the observations in the preceding paragraph of this judgment and obtain the correct measurement map showing encroachment, if any, from the said Commissioner.

5) The parties are given liberty to tender evidence as they may choose in the matter. The trial Court shall then decide the suit afresh within period of six months positively.

6) The parties shall bear their own costs.

Order accordingly.

TRUE COPY

ANNEXURE A-20

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 5111 OF 1994

Amended this 9th day of May 1997 pursuant to Court's Order dated 25th day of April 1997 passed by Hon'ble Mr. Justice Lodha

~~1. Mrs. Snehlata Nevatia,~~)
 2. Mr. Dileep Nevatia,)
 of Bombay, Indian Inhabitants,)
 residing at Shashi Deep,)
 5 A, Worli Sea Face, Bombay)
 400 025.) ... Plaintiffs

Versus

1. Messrs. Arkay Holdings Ltd.,)
 a Company incorporated under)
 the provisions of the Companies)
 Act, 1956 and having its registered)
 office at Maker Chambers-IV,)
 Nariman Point, Bombay 400 021.)
 2. Municipal Corporation of Greater)
 Bombay, a statutory corporation)
 incorporated under the provisions)
 of the Companies Act, 1956 and)
 having its office at Mahanagar)
 Palika Marg, Bombay 400 001.)
 3. The Dy. Chief Controller of)
 Explosives, Explosives Department)
 of Ministry of Industry, Industrial)
 Insurance Building, Opp. Churchgate)
 Station, Bombay 400 020.)

Amended this 7th day of February 2014 pursuant to Court's Order dated 29th day of January 2014 passed by Hon'ble G.S. Patel

4. The Senior Inspector, Worli Police)
 Station, BDD Chawls, Bombay)
 400 018.)
5. The Commissioner of Police,)
 Office of the Commissioner of)
 Police, D. N. Road, Bombay 400 001.) ... Defendants

THE PLAINTIFFS ABOVE NAMED STATE AS UNDER

1. The Plaintiffs are the owners and occupants of a bungalow constructed on Plot No. 5 A bearing Survey No. 399 (1A), Street No. 301AA, situated at Worli Sea Face, Bombay 400 025. The Plaintiff No. 1 had taken possession of the said leased plot sometime in the year 1953. The Defendant No. 1 is the present lessee of the adjoining Plot No. 5 having survey No. 399 (1) and 399 (1B). The Defendant No. 2 is a Municipal Corporation incorporated under the provisions of the Bombay Municipal Corporation Act and is empowered to grant permission to carry out the construction under the provisions of the Bombay Municipal Corporation Act and Development Control Regulations. The Defendant No. 3 is the Dy. Chief Controller of Explosives. The Defendant No. 4 is Senior Inspector of the Worli Police Station, Defendant No.5 is the Commissioner of Police.

2. The Plaintiffs say that prior to 1954, the original Plot No. 5 was admeasuring 3,500 square yards. Sometime in the year 1954, the said Plot No. 5 was bifurcated into two halves and was leased to the Plaintiff No. 1 as bearing Plot No. 5A and to one Mrs. Pannadevi Harkishore Jain bearing Plot No. 5. The Plaintiffs say that in the year 1960-61 both the said owners built their houses on their

respective plots. The Plaintiffs crave leave to refer to and rely upon the said Lease Deed when produced.

3. The Plaintiff No.1 executed the final Lease Deed with the Defendant No.2, regarding Plot No. 5-A, on the 10th day of December, 1969. This was in continuation of the original Lease Deed excavation on the 11th day of June, 1937, for a period of 999 years between the then Municipal Corporation of Greater Bombay with the 1st Lessee of the undivided Plot no.5, which was subsequently bifurcated and now in individual possession of the Plaintiff No.1 and the Defendant No.1. One of the terms of the original Lease Deed dated the 11th day of June, 1937, was that the Lessee was not to make any excavation upon any 1 part of the land hereby demised nor remove any stone sand gravel clay earth or other materials therefrom. Thus, the conditions of the original Lease Deed dated 11th June, 1937, which granted a lease of the land to the lessee for a period of 999 years continue to be binding to subsequent Lessee after the land is transferred in their favour. It can be well understand that as far as the year 1937, the Government authorities had recognized the special condition of the solid rock structure of Worli Sea Face area and hence in order to prevent the execution of this rock structure, which would otherwise create danger to the surrounding areas, this special condition was made as a part of the original Lease Deed. Permission was only granted for minimum excavation of the rock base for making the foundations of the building. Almost the entire stretch of Worli Sea Face is a leasehold land and a similar condition has been prescribed by the Defendant No.2, to all the Lessees of lands on Worli Sea Face area.

4. The Plaintiffs say that the entire Worli Sea Face area is situated on a block of rock and hence there was no necessity to go

deep into the foundation and the entire construction of both the houses was done on the rock foundation by going four to five feet deep for the foundation.

5. The Plaintiffs say that all the buildings constructed on the Worli Sea Face are constructed on a similar basis and following the profile of the hill. The houses including the multi storeyed apartments are constructed directly on the rock with the minimum depth of foundation, hence all the structures of the Worli Sea Face are dependent on the rock which supports them.

6. The Plaintiffs say that sometime in the year 1989-90, one Bank of Maharashtra took over the possession of the said land bearing Plot No. 5 with structures which was finally transferred to the Defendant No. 1.

7. The Plaintiffs say that sometimes in the year 1993, the Defendant No. 1 fully demolished the old structure of predecessor-in-title. The Defendant No. 1 immediately thereafter shifted heavy construction machinery on the site for constructing a multi storeyed apartments on the said plot, alongwith two floors of basements, by removing the rock in their land to the depth of around 25 feet.

8. The Plaintiffs say that since January 1994 brisk construction activities are going by the 1st Defendants with large number of workers and with heavy construction equipments, the Defendant No.1 has been blasting rock by rock drills and are breaking and chipping the rock to excavate the same from the earth. In some of the area the excavation has already gone upto approximately 15 to 16 feet wherein in other areas the depth is even lower.

9. The Plaintiffs says that Defendant No.1 has now started blasting dynamite at site and it appears that the Defendant Nos. 3 and 5 has granted some permission in favour of the Defendant No.1 for carrying out the construction, subject however, without causing any harm and danger to the adjoining structures.

10. When the Plaintiff No.2 got aware of the proposed construction activities, there was great apprehension in his mind regarding the adverse effect of the construction activity to his building situated on Plot No. 5 A. This is due to the fact that Worli Sea Face consists of a continuous rock structures, which extends right into the sea, and it is necessary to ensure that any disturbances on account of construction activities in one of the plots, do not disturb this rock structure and cause danger to the foundations of the surrounding buildings, especially if we take into consideration the current seismic activities in the state of Maharashtra, which are causing earthquake problems.

11. On a complaint made by Plaintiff No. 2 to Defendant No.1 about the danger to their building and on account of excavation of the single rock structure and also due to heavy duty construction equipments, representatives of Defendant No. 1 represented by Mr. B. Vishwanath of Essar Projects Limited met the Plaintiff No. 2 and assured him of the following:

- (a) The excavation will be confined to only the middle of the plot and adequate distance will be maintained between the boundary of Plot No. 5 A and the excavation.
- (b) The Defendant No.1 have received permission from Defendant Nos. 3 and 5 for use of explosives to excavate

the solid rock in Plot No. 5. Adequate supervision and regular check will be done by Defendant No. 3, so as to ensure that the cracks do not develop and spread to the foundation of adjoining buildings.

- (c) Adequate presence of Police personnel will be maintained during transportation and handling of explosives, so as to ensure that there is no misappropriation of the deadly explosives.
- (d) Adequate safeguards will be taken and heavy duty iron cowls will be provided on the rock drills, so as to dampen the sound and protect the neighbours from flying debris.
- (e) Use of equipment generating very high level of sound like Compressors, etc. would be minimised and these Compressors will be housed in a sound proof structure.

12. On the basis of the above assurances given by Defendant No. 1 and on the further assurance given by Defendant No. 1 that they are a part of the ESSAR group of Companies, which is a highly responsible group, who will take all steps to ensure the safety and security of the neighbours, Plaintiff No.2 was assured by Defendant No.1 that all will be well during construction.

13. Sometimes in the month of January, 1994 trials of use of explosives were carried out by Defendant Nos. 1 & 3 subsequent to the above discussions. During these trials, instruments called 'Vibrometers' were placed in the compound of the Plaintiffs, and the effects of the blasting were recorded on these instruments. Both Defendant Nos. 1 & 3 assured the Plaintiffs, that these measurements with Vibrometers will be continuously done during each and every

blasting that takes place in the solid rock in Plot No. 5 of the Defendant No.1, so as to ensure no excessive charge is used, which may damage the foundations of the structure on the land of the Plaintiffs. Both Defendant Nos. 1 & 3 assured that on this basis, the permission has been granted to them for use of explosives with continuous monitoring, so as to safeguard the adjoining structures.

14. However, the Defendant No.1 has reneged on all the assurances given to the Plaintiffs at the time of the meeting and has blatantly indulged in the following:-

- (a) The excavation is not confined to the middle of the plot of the Defendant No. 1, but has almost reached a distance of within 5 - 10 ft. of the adjoining Plot No. 5 A of the Plaintiffs. This has endangered both the building foundations and the water tank in the Plaintiffs land.
- (b) No subsequent monitoring and checking the effect of the blasting was done with the help of Vibrometers in the Plaintiff's land. Hence, there has been continuous and un-controlled use of explosives, which has fully exposed to grave dangers, the foundations of the building on the Plaintiffs' land.
- (c) For the earlier period there always used to be Police personnel deputed by the Worli Police Station, who were present each and every time the explosives were brought to the site and blasting took place. However, for the last few months, there has been a total absence of Police personnel and blasting is going on uninterrupted almost every day.

- (d) No safeguards are being provided on the rock drills to protect the neighbours from flying debris.
- (e) No dampers are provided to reduce the sound from equipments generating high levels of sound and diesel pollution.

15. On an enquiry made by the Plaintiffs with the Defendant No. 2, it has been found that the Defendant No. 2 has given permission to Defendant No. 1 to construct two storeys of Basement having a combined area of 100 per cent of the plot area. This permission has been given by the Defendant No. 2 without assessing the structure of the Worli Sea Face area and the danger, this excavation, can cause to the foundations of the neighbouring buildings.

16. The Plaintiffs say that by their Advocates letter dated 28th October, 1993, the Plaintiffs made representations to the Executive Engineer, Building Proposals (City) of the Defendant No.2 inviting his attention to the activities of the Defendant No. 1 and called upon him to direct the first Defendant to stop the work and not to do so in such a manner so as to adversely damage the property of the Plaintiff. There was no reply to the said letter from the 2nd Defendants. Hereto annexed and marked **EXHIBIT 'A'** is a copy of the said letter dated 28th October, 1993.

<p>Ex. "A"</p>

17. The Plaintiffs say that the Plaintiffs also requested Shri A. Vishwanathan a leading Chartered Engineer to visit the site and to make a detail opinion on the activities of the 1st Defendants. The Plaintiffs say that the said Shri A. Vishwanathan after visiting the site and after making a detailed study of the building has prepared a

technical opinion dated 30th October, 1993. In the said opinion the said Shri Vishwanathan has observed that the entire area including hill consisting of a continuous rock structures are extended right into the sea and the structures of the Plaintiffs is situate at the Plot No. 5A which is directly situate on the single rock base of the entire Worli Sea Face areas. In the said opinion, he opined that in any case any damage happening to this rock structures there is great danger of the foundation of the building going weak and the building structures may collapse. In the said opinion, he also observed that in the adjoining plot bearing No.5, he found that a very brisk large number of workers and solid construction activities. He also observed that the rock structures was attempted to be blasted by rock drills and broken chipped to excavate from the earth. He also observed that excavation had already gone upto 15 to 16 feets in some areas and whereas in other areas the depth was even lower. He also observed that he was given to understand that the 1st Defendant were planning to excavate the rock structure in a major portion of land in 20 to 25 feets in order to excavate two storey basements. In the said opinion, he has opined that by carrying out the said activities there is likely to be strong possibilities of some cracks being developed on the single rock structure of the whole contour rock which would extend to the adjoining plots and areas. He has further opined that since the building occupied by the Plaintiffs is situate at Plot No. 5A which is adjacent to Plot No.5 there are all possibilities of those cracks extending below the building and foundations. He has further opined that the danger can be further aggravated on account of seismic earthquake problem in Maharashtra State and any strong tremours in these areas again may cause further danger to the structures and occupants situated on the neighbouring plots due to weakening of the structures. Hereto annexed and marked **EXHIBIT 'B'** is a copy of the

Ex. "B"

said opinion dated 30th October, 1993 given by the said Shri A. Vishwanathan, a leading Chartered Engineer.

18. The Plaintiffs say that by their letter dated 21st October, 1994 and 24th October, 1994, the Plaintiff No.2 invited the kind attention of the Defendant No.4 to the illegal activities carried on by the first Defendants and requested to take appropriate steps against the Defendant No.1 and to stop the said illegal activities. The Plaintiff No.2 also recorded that he was informed by the Defendant No.4 that the Department will ensure that solid, iron coils were over the rocks drills to ensure that the noise level were maintained within the required limits which will ensure the safety of the Plaintiffs against flying debris. The Plaintiffs also invited his attention to the fact that on 21st October, 1994 regular blasting of dynamites was done without the presence of any staff member of the police station. By the said letters the Plaintiff No.2 requested the Senior inspector of Worli Police Station to take up this matter immediately and to help him in maintaining peace and safety in the areas and for the well being of his family members and other members of the family. Hereto annexed and marked **EXHIBITS 'C' and 'D'** are copies of the said letters dated 21st October, 1994 and 24th October, 1994.

Ex. "C"

Ex. "D"

19. The Plaintiffs submit that the construction activities of the 1st Defendant is continuous even after sunset. The machines used at a very high peak sound and heavy compressors rock drills are continuously run over every day and that in the evening causing extreme distress to the family members of the Plaintiffs. The Plaintiffs say that Plaintiff No.1 is a patient of High Blood Pressure and has been seriously affected by the activities of the 1st Defendants. The Plaintiffs say that the 1st Defendants are blasting dynamites at sites every day without any control on its use which has been affecting the

building foundation of the Plaintiffs very badly. The Plaintiffs say that neither the staff members of the 3rd Defendants nor the 4th Defendant remain present at the time of the blasting work done by the 1st Defendants. The Plaintiffs submit that the use of a dynamite cannot be resorted to for drilling the rock and more particularly when the foundation of the adjoining building are only to the depth of 4 to 5 feet. The Plaintiffs feel that the Defendant No.1 has not been granted any permission to use the dynamite for blasting the rocks and therefore the said activities are illegal without any permission and is dangerous to the adjoining buildings and the occupiers including the Plaintiffs.

20. The Plaintiffs submit that after the first Defendant is allowed to excavate the entire rock of land to the depth of 25 feet. It would create a number of fissures and cracks which would extend to the adjoining areas. The Plaintiffs submit that since the building is situated at Plot No.5A the building of the Plaintiff is closest to the said site of the first Defendants and will be greatly weakened and most affected and thus would be highly unsafe. The Plaintiffs submit that nowhere in the entire stretch of Worli Sea Face any basement has been constructed by excavating the rock. However, in the case of Plot No.5 the 2nd Defendants appear to have illegally permitted the first Defendants to build a two storey basements without considering the adverse effects of the construction of the adjoining building and long term stability.

21. The Plaintiffs submit that if the first Defendants are allowed to be ahead with the said activities, there is likely to be strong possibilities of some cracks being developed on the single work structure of the whole counter rock which would extend to the adjoining plots and areas.

22. The Plaintiffs say that on several occasions the Plaintiffs have visited the site and called upon the workers working on the site and one Shri B. Vishwanathan who is a representative of the 1st Defendant to stop the said illegal activities but is of no avail. Mr. B. Vishwanathan assured the Plaintiff No.2 that no dynamite would be blasted on the site and the work will be completed in such a manner that the plot of the Plaintiffs or the structure thereon will not be affected in any manner whatsoever. The Plaintiffs say that inspite of the said assurances the Defendant No.1 has been continuously carrying out its illegal activities and are bent upon to cause the maximum loss to the properties of the Plaintiffs, as well as creating a noise pollution to the Plaintiffs and/or their family members and/or the occupants on the said plot of the Plaintiffs.

23. The Plaintiffs say that by letter dated 29th October, 1994, Plaintiff No.2 invited the attention of the Commissioner of Municipal Corporation of Greater Bombay Plaintiff to the illegal activities of the first Defendants and requested him to direct Defendant No.1 to suspend their construction activities and to permit them further progress only after getting it confirmed from Appropriate Authority that this excavation activity has not endangered the building of the Plaintiffs. Hereto annexed and marked **EXHIBIT 'E'** is a copy of the said letter dated 29th October, 1994.

<p>Ex. "E"</p>

24. The Plaintiffs say that by his letter dated 2nd November, 1994 to Defendant No.5 the Plaintiffs invited his attention to the fact that since last 4 – 5 months there had been total absence of their authorised explosives experts at the time of blasting which was taking place almost every day. The Plaintiffs also pointed out that on most of the occasions of blasting in the last 4 – 5 months no Police personnel had been present on site which may lead to serious consequences.

By the said letter the Plaintiff No.2 requested the Police to make proper enquiry into the uncontrolled and unsupervised blasting taken place on the said plot and take necessary steps. Hereto annexed and marked **EXHIBIT 'F'** is a copy of the said letter dated 2nd November, 1994.

**Ex.
"F"**

25. The Plaintiffs say that by his letter dated 15th November, 1994 to the Defendant No.4 the Plaintiff No.2 invited his attention to the fact that the Pneumatic Rock Drills was once again being used without any heavy duty iron cowls put over it with the result the Plaintiffs were being exposed to danger from the flying debris. The Plaintiffs also informed him that a large size air compressor had been located right next to their building which was not only emitting highly toxic diesel gas, but was also giving a loud continuous noise. By the said letter the Plaintiff No.2 requested him to depute one of his officers to the site immediately and ensure that those illegal activities were stopped henceforth. Hereto annexed and marked **EXHIBIT 'G'** is a copy of the said letter dated 15th November, 1994.

**Ex.
"G"**

26. The Plaintiffs say that by his letter dated 15th November, 1994 to the Defendant No.4, the Plaintiff No.2 invited his attention to the fact that Defendant No.1 has started blasting of ground in the absence of any Police personnel from his Police Station. The Plaintiff No.2 requested him to stop the illegal activities and to take necessary action against the offenders. The Plaintiff No.2 forwarded the copy of the said letter to the Commissioner of Police also. Hereto annexed and marked **EXHIBIT 'H'** is the copy of the said letter dated 15th November, 1994.

**Ex.
"H"**

27. The Plaintiffs say that by his letter dated 16th November, 1994 to the Defendant No.4 the Plaintiff No.2 invited his attention to

the fact that Defendant No.1 had started drilling with compressor that day from 9.30 a.m. without any heavy duty iron cowls put over the drills and blasting of ground from 5.15 p.m. and the same was being done in the absence of any Police personnel from his Police Station. By the said letter Plaintiff No.2 requested him to take proper action in the matter. The Plaintiff No.2 forwarded a copy of the said letter to the Commissioner of Police. Hereto annexed and marked **EXHIBIT 'I'** is the copy of the said letter dater 16th November, 1994.

**Ex.
"I"**

28. As per Regulation 38, Sub-Regulation (9) (v) (a) of the Development Control Regulations for Greater Bombay 1991, issued by the Government of Maharashtra, the ceiling of the upper basement shall be not more than 1.2 meters above the average surrounding ground level. However, as per the topography of Plot No.5 of the Defendant No.1, there is a very heavy slope of the land and the difference in the height of the land on the front side of the plot and the rear of the plot is between 15 to 20 feet. Thus from the way the excavation is being carried out, the major depth is on the rear side of the plot, whereas on the front side of the plot the depth of excavation is very small. Hereto annexed and marked **EXHIBIT 'J'** is the sketch of the topography of Plot No.5 of Defendant No.1. Hence, as per the sketch annexed as Exhibit "J", the construction which will form as the basement on the rear side of the plot will be atleast 15 to 20 feet above the surrounding ground level in front of the plot, i.e. the front side of the so called basements will not be a basement. This means that the Defendant No.2 has permitted Defendant No.1 to construct the extra F.S.I. under the false guise of a basement.

**Ex.
"J"**

Rider A : 28(a) to 28(c)

I Add after para 28 -

“28(a) The Plaintiffs also observed a number of violations under the Development Control (DC) Regulations for Greater Bombay, 1991, mainly regarding a very huge structure that was coming up in the site of Defendant No. 1. Thus, they were therefore forced to obtain a copy of an independent report from the renowned Architect’s firm, viz. M/s. B. D. Sahasrabhojane and Associates, in that respect. The Plaintiffs say and submit that the partners of the said renowned Architects visited the site on 16th December, 1996 to study the violations of various provisions of the Development Control (DC) Regulations for Greater Bombay, 1991 by the first Defendants and to study the construction on the said plot No. 5, Worli Sea Face, Bombay 400025. The Plaintiffs say and submit that the said building being constructed by the first defendant was under final stage of construction. In the said report, the said architect inter alia opined the following major violations of the DC Regulations :

“Preliminary Observations

The said site lies on the slope of the hillock facing the sea and the Worli sea face road. Most of the buildings on this sea face have made use of the natural contours of the site while in this building construction the entire portion of the hillock has been dressed by digging upto a depth of approximately 25 feet at the rear end of the

building, the entire plot thus leveled is more or less in level with the road in the front.

Further Observations with respect to DC Rules

On visit on 16/12/96, it has been observed that a multi-storied building is under final stages of construction at Plot No. 5, situated adjacent to Plot No. 5-A, occupied by Mr. Dileep Nevatia. The following observations were made :

- (1) As already mentioned, the building under construction is being built on a levelled piece of land created by dressing the hill upto a level slightly above the approach road, Khan Abdul Gaffar Khan Road or Worli Seaface road. Mr. Nevatia has asked me to clarify whether the floor directly approachable from the road could be a 'Basement or Cellar' as is being claimed by the builder. In my opinion the said floor is the ground floor. As per definition of the ground floor as given in the DC rules the floor at ground level with a direct access to a street or open space shall be called the ground floor, 1, with the next higher floor being termed as floor 2 and so on upwards. On the said plot of land, a structure consisting of the ground floor and additional 7 floors, viz. floor 1 to floor 7 have been constructed.
- (2) Further, it cannot be called a basement, since the definition of the basement as per DC Regulations No. 3 (10), it is neither fully below or partly below the ground level. This is a floor on the ground level, it is the closest floor to the street and has a direct access to the street

and hence as per the DC Regulations, cannot be termed as a Basement or a Cellar.

- (3) In my opinion the builders have claimed the ground floor to be a basement so as to circumvent the height regulations as specified for the category I of coastal area for Greater Bombay as given in the DC Rule (59). As per this rule the maximum building height permissible in the Island city is 22 Mts. If the lowermost storey of this building is shown as ground floor then as per the preliminary calculation shown below this regulation is violated.

(a)	Ground floor including Plinth	..	3.6 mtrs.
(b)	Floor 1	..	3.0 mtrs.
(c)	Floor 2 to Floor 7 @ 3.0 mtrs.	..	18.0 mtrs.
	each (as built)		

	Total Height	..	24.6 mtrs.

- (4) As the height of the building is thus estimated to be as high as 24.6 mtrs, as per the definition under DC Regulation 3 (11) (i) it is a multi-storied building or a high-rise building. Thus, the minimum open space on all sides, except the front side of the building, shall be 7.0 mtrs. $\{ (24.6 - 3.6) / 3 \}$. However, this minimum open space requirement has been grossly violated on two sides of the building as follows :

- (a) The open spaces on the two sides of the ground floor (North and South sides) is fully covered by

the ramps going to the first floor and construction of other structures thereunder.

- (b) The minimum open space on the first floor of the building is 5.5 mtrs, which is much lower than the minimums required open space of 7.0 mtrs.
- (5) The minimum setback left after construction of the building is not only less than the required 7 mtrs. but also further impediments have been created in the available space by extending the lower storey into the side margins. To reach top of these extensions, ramps are being constructed on either side of the building, going from the ground level to the first floor.

Besides the fact that there is a non-confirming pair of ramps constructed on either side of the building, going from the ground floor to the first floor and is thus blocking the open space around the ground floor, the ramps have not been constructed to meet the safety requirements as per DC Regulation No. 38 (18) (i) (b) which says that 'A ramp shall have a slope of not more than 1 in 10.'

- (6) Fire Protection requirement as per DC Regulation No. 43(1).

As already mentioned, the open space on the ground floor is fully covered by the ramp and extra construction made below the ramp. Thus the ground floor not only violates the open space regulations around the building but also makes it impossible for fire engine to Enter

around the ground floor for emergency. The open space on the first floor and above are less than 6 mtrs. wide and are also full of obstructions. This makes them once again very dangerous for entry of fire fighting equipment. The ramps are having a much higher degree of slope than a minimum of 1 in 10 which will make it impossible for a fire engine to climb up to them. Moreover, portion of ramps as well as slabs over extended portions of the lower storey seen unlikely to take a maximum fire engine weight of 18 tonnes, which again makes them un-safe in emergency.

(9) As per the details given by Mr. Nevatia, the total area of the plot no. 5 is 1614 sq. yards (14,526 sft). Thus, the maximum FSI permissible on all the floors @ 133 percent of the area of the plot comes to 19,320 sft. From the copy of the drawing enclosed, which has been made near about the dimensions of the construction, the areas on various floors are estimated as follows :

(i)	Ground floor and areas constructed under Ramps on ground floor.	..	6250.00 sft.
(ii)	Floor 1	..	2596.00 sft.
(iii)	Floor 2 to Floor 7	..	19071.00 sft.
	Total	..	27917.00 sft.

Thus, from the above report of M/s. B. D. Sahasrabhojane and Associates, it can be said that Defendant No. 1 have indulged in gross violations of Development Control (DC) Regulations for Greater Bombay, 1991, for which they have been fully blessed by the Defendant No.2, inspite of

various letters being written by the Plaintiff to Defendant No.2. The violations, as stated in the above report of M/s. B. D. Sahasrabhojane and Associates can be summarised as under :

- a) There is no Basement in the structure and the ground floor is being wrongly termed as a Basement, so as to circumvent both the FSI and the open space requirement.
- b) The minimum open space, as required for a tall structure, is not being maintained due to which the Plaintiffs are being deprived of light and ventilation.
- c) The open space on the ground floor covered by the ramps and other obstructions have made the site at Plot No. 5 of Defendant No.1 extremely fire hazardous. This has put the lives of the Plaintiffs at a grave risk in case of fire emergencies as the fire engines will not be able to enter the site on Plot no. 5 of the defendant no. 1
- d) The Defendant No. 1 have constructed FSI @ 192% against a maximum permissible FSI of 133% which has come on account of violations of both height and open space requirements.

The Plaintiffs would further like to state that subsequent to the above report of M/s. B. D. Sahasrabhojane and Associates, the Defendant No. 1 has added one more floor, i.e. floor 8 and are making preparation to add yet another Floor 9. This will further increase the extent of violations of all the above mentioned DC Regulations of Greater Bombay, 1991 by the Defendant No. 1.

Hereto annexed and marked **EXHIBIT (1)** is a copy of the report dated 17th December, 1996 from M/s. B. D. Sahasrabhojane and Associates along with report of the violation of the activities carried on by the first defendants with the blessings of the other defendants from time to time.

Add after para 28(a) as 28 (b)

28(b) The Plaintiffs say that by their letter dated 13th January, 1997, the Plaintiffs provided to the 2nd Defendant, that is the Municipal Corporation of Greater Bombay, a summary of the construction activities being carried out by the first defendant which were found to be in violation of the Development Control Regulations for Greater Bombay 1991, violation of environment (Protection) Act 1986 and the Rules thereunder. The Plaintiffs requested Municipal Corporation to stop construction at the said plot and to take necessary steps to demolish the areas of construction whereby the various above violations namely the DC violation and the Environment Protection Act and Rules Violation have taken place, as are more particularly set out in the said letter. The Plaintiff by their letter dated 18th December, 1996 addressed to executive engineer in the Bombay Municipal Corporation regarding inspection of building plans stated that despite various request and attempts made by the plaintiffs for the same and despite the plaintiffs visiting the site and asking for inspection of the approved plans and

Ex. "2"

Ex. "3"

specifications, plaintiffs were not furnished with nor shown the plans nor allowed to enter the site. On the contrary they were threatened with dire consequences. Hereto annexed and marked as **EXHIBIT 2 and 3** are copies of the said letter dated 18/12/96 and 13/1/97 addressed by the Plaintiffs to the Bombay Municipal Corporation.

Add after para 28(b) as 28 (c)

28(c) The Plaintiffs therefore submit that the first defendant has, as opined, committed various breaches and violations to the prejudice of the plaintiffs, on false premises as granted to the first defendant by the Defendant Nos. 2 to 5 and is continuously committing these breaches till today to the prejudice of the Plaintiffs rights with the blessings of the defendant No.2 to 5. The Plaintiffs say and submit that the said report obtained by the Plaintiffs are given by a Government Institute and renowned architects and are given independently. The Plaintiffs therefore pray that this Hon'ble Court be pleased to take these reports into consideration and pass a proper direction further directing the same and granting appropriate reliefs to the Plaintiffs.

29. It is a well understood fact in Bombay, that on account of such high price of constructed property and especially in the prime area like Worli Sea Face, there has been instances of a number of unscrupulous builders who have constructed extra space more than

that is legally provided, under some guise or the other. In this instance the Defendant No.2 has given the permission to construct two storeys of basement to Defendant No.1, either by not being aware of the fact of the topography of the land, or has kept silent on the same.

30. As mentioned earlier, the Defendant No.1, are a part of the Essar Group of Companies who are one of the largest industrial houses in this country. These people have the power and the money to exert influence and get out of the way of other questionable work from the Bureaucracy. A number of complaints made by the Plaintiffs to Defendant No. 2, 4 and 5 and their inaction in the same very strongly supports this view that the Defendant No.1 has exerted very strong influence on Defendant Nos. 2, 4 and 5 not to proceed against them and to stop the dangerous and illegal activity.

31. The Plaintiffs submit to the Hon'ble Court that the conditions of the original Lease Deed dated 11th day of June, 1937, which granted the land on lease to the original Lessee and which is valid for a period of 999 years, is valid and binding on all subsequent Lessees of the said plot. The original Lease Deed of the year 1937 has called upon the Lessees not to make any excavation, hence, the massive excavation work granted by the Defendant No.2 to the Defendant No.1 and the activity of Defendant No. 1 in carrying out the same after getting the approval of Defendant Nos. 2, 3, and 5, is illegal as it does not confirm to the original Lease Deed of 1937 and hence the excavation is illegal and should be stopped immediately.

32. Since the Defendant No.1. who are in collusion with Defendant Nos. 2, 3, 4 and 5, have grossly violated the terms of the original Lease Deed dated 11th June, 1937, which they are

irrevocably bound to observe, the Hon'ble Court may direct Defendant No.2 to cancel the lease of Plot No.5, which is in possession of the Defendant No.1 and the Court may appoint Receiver to take over the possession of Plot No.5 of Defendant No.1.

33. In the premises aforesaid, the Plaintiffs submit that this Hon'ble Court be pleased to call for the records and papers and files pertaining to the issuance of permission granted by the Defendant No.2 in favour of the Defendant No.1 allowing them to construct a multi-storeyed building with two storeyed basements on the Plot No.5 of the Worli Sea Face and allowing them to use the dynamite for blasting rocks and after going through the legality, validity and propriety thereof be pleased to set aside and cancel the said permission/orders.

34. In the premises aforesaid, the Plaintiffs submit that this Hon'ble Court be pleased to call for the records and papers and files pertaining to issuance of permissions granted by the Defendants Nos. 3 and 5 in favour of Defendant No.1 allowing them use of explosives and other equipment to blast the rock structure for construction of two storeyed basements on Plot No.5 of the Worli Sea Face and after going through the legality, validity and propriety thereof be pleased to set aside and cancel the said permission/orders.

Rider B : 34(a)

Add after para 34

II. 34(a) As per the direction of his Lordship, Mr. Justice Bahuguna, Defendant No. 1 produced copies of the 'Licence to Possess Explosives for Own Use', issued under Form 23 by Defendant No. 5 to M/s. Akul

Investment Pvt. Ltd., on behalf of Defendant No. 1. The first licence is dated December 1993 and extensions for the subsequent period for use were granted in March 1994, June 1994, September 1994 and December 1994. The major conditions of the licence which has been issued under Rule 154 (4) and 154 (5) of the Explosives Rules 1983, are as follows :

“Condition No. 11

If this licence is granted as per clause (a) of preamble the total quantity of explosives that can be purchased shall not exceed 5 kgs. of Class 2 and/or Class 3 explosives, 100 Nos. of detonators and 200 metres of safety fuse.”

“Condition No. 12

The licensee shall at the time of purchasing explosives have the following particulars endorsed upon his licence and signed by the person delivering the explosives.

- i) Name and address and licence No. of the person delivering explosives;
- ii) Name and address of the person who takes delivery of the explosives purchases;
- iii) The kind and quantities of explosives purchased;
- iv) The date of purchase.”

Condition No. 18

“(c) The said workshop shall be situated at a distance of _____ metres as shown in plan no. _____ dated _____ attached hereto.”

Condition No. 19- Additional conditions:

“(b) Mild charges will be used for the controlled blasting operations.

(d) Blasting will be done in the presence of police personnel.”

An additional condition was also added in the form of a Note, which says as follows:

“ It should be controlled blasting. They should take all necessary precautions to avoid any mishaps failing which they would be held responsible/liable for action.”

Since the subsequent licences issued by the Defendant No. 5 to Defendant No. 1 were only an extension of the time period of the original licence, the total quantity of the explosives purchased was limited to 5 kgs. of Class 2 and/or Class 3 explosives as per the Condition No. 11 of the licence.

On obtaining the copies of the above licences, the Plaintiffs observed that there seemed to have been a gross misuse of the above mentioned conditions of the licence. In this connection the Plaintiffs were forced to appoint Central Mine Planning and Design Institute Ltd. (CMPDI), a Government of India Undertaking and a leading authority in the country on use of explosives, to make an assessment of effect of blasting

on the site of Defendant No. 1 to the property of the Plaintiffs, situated at adjoining Plot No. 5-A, Worli Sea Face, Bombay. Accordingly, representatives of CMPDI visited the premises of the Plaintiffs on 11/2/1995 and have reported the following in their Preliminary Study Report of February 1995 :

“The above referred report of M/s. Semcons Corporation (appointed by Defendant No. 1) is deficient as it does not define the major site specific parameters which mainly contributes to the effect of blasting on the nearby buildings; these are :

- (a) Pattern of drilling, i.e. depth of hole, burden, spacing and sub-grade drilling;
- (b) Type of explosive to be used;
- (c) Quantity of explosive to be used per hole and per delay;
- (d) Type of Detonators to be used and their delay sequence;
- (e) The pattern of pre-splitting and quantity of charge per hole have not been specified.

“During the inspection, the visit could not be made in the premises having construction activity for pre-splitting line. From the premises of Shri Nevatia, the pre-splitting line was not visible which may be the main and physical mark of the total blasting operation conducted.

During the inspection of bungalow of 5 A, Worli Sea Face and as shown by Shri. Nevatia, some cracks were observed in one room and one bath room located on the

side facing to the plot having construction/blasting activity.

The cracks in the bed room were seen near the window, one crack was running vertical on the side of the window and line cracks were seen in two walls of the room at about 45 centimeters from the roof. The other place was the bath room where the cracks were seen and here also, the cracks were near the window.”

Furthermore, by their subsequent letter Ref. RIN/BLASTING/95/86 dated 20/02/1995, CMPDI has reported the following :

“As calculated from the Plan submitted to us, it appears that total volume of rock which has been removed is approximately 1700 cubic meters (48 x 118 x 11 ft.). For removing this much quantity by blasting operations, the requirement of explosive would be in the range 1200-1400 kg. depending on the type of explosives and pattern of blasting.”

Thus CMPDI has reported gross violations of the explosives licence issued to the Defendant No.1 by the Defendant No. 5, which can be summarised as follows:

- a) Violation of Condition No.11, i.e. against the maximum quantity of explosives that can be purchased (and hence, used on site) not exceeding 5 kgs., the Defendant No. 1 have blasted at site between 1,200 to 1,400 kgs. of explosives, i.e. 240 to 280 times more than the license permission granted.

b) Against Condition No. 19(b), which specifies that mild charges will be used for the controlled blasting operations, Defendant No. 1 have not carried out controlled blasting, viz. no pre-splitting line has been done before the blasting operations were carried out as a result of which cracks have developed in the structure of the Plaintiffs.

c) Defendant Nos. 4 and 5 have also abetted Defendant No. 1 in violating various conditions of the explosives licence issued by Defendant No. 5 to Defendant No. 1 as follows :

Violation of Condition No. 12.

i) As mentioned earlier, this requires particulars of purchases of explosives to be endorsed upon the licence. However, the Defendant No. 5 continued to extend the validity of the explosives licence issued to Defendant No. 1 for a period of over one year, even though such endorsement of purchases of explosives were not made on the licence.

ii) Violation of Condition No. 18 (c), which requires that the licence is issued alongwith an accompanying site plan, showing areas where explosives will be stored and used and it's required safety distances between adjoining structures and roads. This plan was deliberately not submitted by Defendant No. 1 to Defendant No. 5, at the time of making their application for grant of explosive licence, nor was enclosed alongwith the licence at

the time of its granting by Defendant No. 5 to Defendant No. 1, because had this plan been submitted and enclosed, the site of Defendant No. 1 would not have qualified for use of explosives, since minimum safety distances were not available on this site. Thus, the Defendant No. 5 have permitted Defendant No. 1 to use explosives at will, all over the site of Plot No.5, Worli Sea Face, Bombay.

iii) Violation of Condition No. 19 (d)

This requires that blasting will be done in the presence of police personnel. However, for most of the time when blasting were carried out by Defendant No. 1, no police were present and a large number of letters written by the Plaintiffs to Defendant No. 4 and 5 have not resulted in any action being taken by these two Defendants.

Hereto annexed and marked **EXHIBIT 4 and EXHIBIT 5** is the copy of the said report and the said letter.

Ex. "4"

Ex. "5"

35. The Plaintiff submit that it is in the interest of justice that Defendant No.1, their servants, agents be restrained by a permanent order and injunction of this Hon'ble Court from in any manner carrying on the construction activities on the plot bearing No.5 situate at Worli Sea Face bearing Cadastral Survey No. 731 of Worli Division.

36. The Plaintiffs submit that this Hon'ble Court be pleased to appoint a panel or committee of independent Architects/Experts to investigate in the matter and to submit detailed report/opinion to this Hon'ble Court suggesting steps to be taken in the matter forthwith and further pleased to pass appropriate orders on perusal of such report.

Rider C : 36(a) to (b)

III. Add after para 36

36(a) The Plaintiff says that by an order dated 23/12/94 passed by His Lordship the Hon'ble Mr. Justice Bahuguna in terms of prayer (d) as also that the Defendant No. 1 their servants and agents be restrained from carrying on any construction activities on the said Plot No. 5 for four weeks from the date of passing of the order. His Lordship was in accordance with prayer (d) of the Notice of Motion pleased to direct that the Prothonotary & Senior Master, High Court, Bombay to appoint a or a committee of independent Architects or Experts to investigate in the matter and to submit a report or opinion to the Hon'ble Court suggesting steps to be taken in the matter. Such report was to be submitted to the Hon'ble Court within a period of one month from that day. Accordingly, the Prothonotary & Senior Master by a order dated 9th January, 1995 appointed M/s. B. A. Patell & Co., as the Architects to prepare the report. I say that by an order dated 18th January, 1995 this Hon'ble Court permitted Defendant No. 1 to carry out construction work at their own risk and it shall be subject to the orders passed by the Court on the next date of hearing.

The Architect was directed to submit the report within a period of two weeks.

36(b) I say that in accordance with the Orders passed by this Hon'ble Court by the Plaintiffs deposited Rs. 2,500/- with the Prothonotary & Senior Master, High Court, Bombay, towards expenses of the said report. The said report was to be submitted by M/s. B.A. Patell & Co., Architects, on or before 1st February, 1995. I say that several reminders were given to the Prothonotary & Senior Master, regarding submission of the said report including one dated 10th April, 1995, 6th July 1996. I say that by an order dated 4th July, 1996 passed by His Lordship the Hon'ble Mr. Justice J. N. Patel, His Lordship directed the Prothonotary & Senior Master, High Court, Bombay, to submit to the parties a copy of the report made by M/s. B. A. Patel & Co., Architects. However, on inquiry at the office of the Prothonotary & Senior Master, the Plaintiffs were informed that the copy of the above report was missing from the office records. The Plaintiffs therefore requested the Prothonotary & Senior Master, to request to M/s. B. A. Patell & Co., Architects to furnish a duplicate copy of the said report submitted by him in pursuance of the order passed by His Lordship Bahuguna on 12th January, 1995 and to permit them to take copies accordingly. The Plaintiffs say that till date they have not been furnished a copy of the said report submitted by M/s. B. A. Patell & Co.

37. The Plaintiffs submit that because of the illegal activities on the part of the Defendant No.1 with the blessings of Defendant Nos. 2 to 5 the Plaintiffs and their family members have already suffered tremendous mental agony and breach of peace. The Plaintiffs are

therefore entitled to claim a damages Of Rs.10,00,00,000/- (Rupees Ten Crores) from the Defendants as per Particulars of Claim hereto annexed and marked **EXHIBIT 'K'**.

38. The Plaintiffs submit that it is also in the interest of justice that pending the hearing and final disposal of the suit the Defendants Nos. 2 to 5 be directed by a mandatory order and injunction of this Hon'ble Court to stop the construction work of the 1st Defendant on the Plot No.5 situate at Worli Sea Face forthwith.

39. The Plaintiffs submit that it is also in the interest of justice that Defendant No.1 their servants and agents that pending the hearing and final disposal of the suit the Defendant No.1 their servants, agents be restrained by an order and injunction of this Hon'ble Court from carrying on any construction activities on the said plot No.5 situate at Worli Sea Face.

40. The Plaintiffs submit that the Defendant No.1 is a part of the ESSAR Group of Companies which are one of the large industrial houses in this country. The Directors of Defendant No.1 are the employees/agents of various companies of the ESSAR Group and the main shareholders of the Defendant No.1 are principal promoters of the ESSAR Group and their family members. Through these employees/agents of ESSAR Group of Companies the principal promoters of ESSAR Group have indulged in this illegal and dangerous construction activities, which has greatly exposed the Plaintiffs and their family to grave dangers to their lives. These people have the power and the clout to influence other people and the bureaucracy. This can amply be seen by the fact that inspite of the numerous complaints made by the Plaintiffs to the Defendant Nos. 2, 4 and 5 who are supposed to be the Guardians of the Law, the

Defendant Nos. 2, 4 and 5 have not even acknowledged any of their complaints nor taken any action against the Defendant No.1. It is mainly on account of the inaction of the Guardians of the Law that the Plaintiff are constrained to approach this Hon'ble Court for grant of justice.

41. The Plaintiffs fear that Defendant No.1 will use their power and Defendant Nos. 2, 3, 4 and 5 of gross irregularities as on record of the Defendant Nos. 2, 3, 4 and 5. Hence, it is necessary that this Hon'ble Court ask the Defendant Nos. 2, 3, 4, and 5 to immediately produce copies of the various permissions and orders granted to the Defendant No.1 and take necessary action. Once the above documents are received from the Defendant Nos. 2, 3, 4 and 5 the Plaintiffs may be permitted to make suitable amendments to the Plaint.

42. The Plaintiffs submit that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to appoint a panel or committee of independent Architects/Experts to investigate in the matter and to submit detailed report/opinion to the Hon'ble Court suggesting steps to be taken in the matter forthwith and be further pleased to pass appropriate orders on perusal of such report.

43. The Plaintiffs submit that the impugned permission has been granted by the 1st Defendant in Bombay. The illegal construction activities are being carried on in Bombay. The office of the Defendants is situate at Bombay, this Hon'ble Court has therefore jurisdiction to entertain, try and dispose of this suit.

44. The Plaintiffs submit that the illegal construction of the 1st Defendants is going on very fast and if they are not stopped

immediately from construction activities, then grave harm and irreparable loss, injury will be caused to the Plaintiffs and if the reliefs are granted then no grave harm and irreparable loss injury will be caused to the Plaintiffs. The Plaintiffs have therefore filed this suit hurriedly for appropriate reliefs.

45. The Plaintiffs have relied on the documents, a list whereof is hereto annexed.

46. The Plaintiffs submit that since the Municipal Corporation of Greater Bombay has granted the permission to Defendant No.1 illegally Notice under section 527 of the Bombay Municipal Corporation Act is not necessary. In any event the Defendant No.2 has deemed to have waived the said notice. In view of the urgency in the matter Notice under section 80 of the Code of Civil Procedure, 1908 has not been given to the Defendant Nos. 3 to 5. The Plaintiffs cannot wait till the expiry of statutory period under section 80 of the Code of Civil Procedure, 1908. This Hon'ble Court, therefore, be pleased to grant Leave to file the present suit without notice under section 80 of the Code of Civil Procedure, 1908 and be pleased to dispense with the same.

47. The Plaintiffs have relied upon the documents, a list whereof is hereto annexed.

48. No part of the suit is barred by law of limitation and the suit is filed in time.

49. The Plaintiffs value their claim at Rs. 10,00,00,000/- (Rupees Ten Crore) and have accordingly paid the maximum Court Fee of Rs. 15,000/-.

The Plaintiffs therefore pray :-

- (a) that this Hon'ble Court be pleased to pass a decree in favour of the Plaintiff and against the Defendant for a sum of Rs.10,00,00,000/- (Rupees Ten Crore only) with interest at the rate of 24% per annum from the date of filing of the suit till the date of decree and/or payment or realisation thereof as more particularly set out in the Particulars of Claim annexed as Exhibit 'K' hereto.
- (b) that the Hon'ble Court be pleased to call for the records, papers and files pertaining to the issuance of permission granted by Defendants Nos. 2 to 5 to the Defendants No.1 allowing them to construct a multi-storeyed building two storeyed basements on the Plot No.5 of Worli Sea Face and/or allowing them to use a dynamite for blasting rocks and after going through the validity, legality and propriety thereof be pleased to set aside and cancel the said permission/orders;
- (c) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to pass a mandatory order and injunction directing Defendant Nos. 2 to 5 to immediately produce copies of various permissions and orders granted to Defendant No.1 for carrying on construction on the said Plot No.5 and allowing the use of dynamites and be further pleased to allow the Plaintiffs to make copies thereof;
- (d) that the Defendant No. 1 their servants, agents be restrained by a permanent order and injunction of this

Hon'ble Court from in any manner carrying on the construction activities on the plot bearing No.5 situate at Worli Sea Face bearing Cadastral Survey No. 731 of Worli Division.

- (e) that the Hon'ble Court be pleased to appoint a panel or committee of independent Architects/Experts to investigate in the matter and to submit detailed report/opinion to the Hon'ble Court suggesting steps to be taken in the matter forthwith and be further pleased to pass appropriate orders on perusal of such report.
- (f) that this Hon'ble Court be pleased to direct Defendant No.2 to cancel the Lease of Plot No.5 and to obtain forcible possession of the said plot from Defendant No.1, their servants and agents or any other persons found in possession thereof for committing a breach of the lease deed;
- (g) that pending the hearing and final disposal of the suit the Defendant Nos. 2 to 5 be directed by a mandatory order and injunction of this Hon'ble Court to stop the construction activities of the 1st Defendants the Plot No.5 situate at Worli Sea Face forthwith;
- (h) that pending the hearing and final disposal of the suit the Defendant No.1, their servants, agents be restrained by an order and injunction of this Hon'ble Court from carrying on any construction activities on the plot No.5 situate at Worli Sea Face bearing Cadastral Survey No.731 of Worli Division;

- (i) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to appoint a panel or committee of independent Architects/Experts to investigate in the manner and to submit report/opinion to this Hon'ble Court suggesting steps to be taken in the matter forthwith and be further pleased to pass appropriate orders on perusal of such report;
- (j) for ad-interim reliefs in terms of prayers (c) and (e) to (h) above;
- (k) for such further and other reliefs as the nature and circumstances of the case may require.

Plaint drawn by:

MR. R. D. DHANUKA,

Advocate.

GAGRAT & CO.,

(Plaintiff No.1)

Partner,

Advocates for the Plaintiffs.

(Plaintiff No.2)

VERIFICATION

I, DILEEP BALKRISHNA NEVATIA, the Plaintiff No.2 herein, do hereby solemnly re-declare that what is ~~stated~~ amended in the foregoing paragraphs 1 - 27 of the plaint is stated on the knowledge and what is stated in the remaining paragraphs 28 a, b, c, 34 a, 36 a, b is stated on information and belief and I believe the same to be true.

Solemnly re-declared)
 at Bombay aforesaid)
 this 9th day of)
 May 1997.)

Before me,

GAGRAT & CO.,

Partner,
 Advocates for the Plaintiffs.

TRUE COPY



ANNEXURE A-21

16-s-5111-94.DOC

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO. 5111 OF 1994

Mrs. Snehlata Nevatia and another. ...Plaintiffs
Versus
 Arkay Holding Ltd. and others. ...Defendants

Mr. Dileep Nevatia, Plaintiff No.2, present.
Mr. Jaydeep Raut i/b M/s. Crawford Bayley & Co. for Defendant
No.1.
Mr. H. C. Pimple for Defendant No. 2.

CORAM: G.S. PATEL, J
DATED: MARCH 3, 2014

PC:-

1. Pursuant to the order dated 10th February 2014, the 1st Defendant has filed an affidavit dated 12th February 2014 showing service of the writ of summons on defendants nos. 2 to 5. The previous order directed that upon the 1st defendant filing a written statement, the matter would be taken up today for framing of issues. Hence, although the suit is listed for directions and it is taken for framing of issues.

2. Heard. The following issues are framed:

1 of 3

1. Whether defendant no. 1 proves that the suit is barred by law of limitation?
2. Whether the suit is liable to be dismissed on account of non-joinder of necessary parties?
3. Whether the plaintiff proves that the suit is maintainable despite of non-service of statutory notice U/s. 80 of the Code of Civil Procedure?
4. Whether the plaintiff proves that the suit is maintainable despite of non-service of statutory notice U/s. 527 of the Bombay Municipal Corporation Act?
5. Whether the plaintiff proves that defendant no. 1 has committed any illegal construction activity as alleged in the plaint or at all?
6. If the answer to issue no. 5 is in the affirmative, then whether the plaintiff proves that the plaintiff is entitled to make a claim for damages against defendant no. 1 to the tune of Rs.10 Crore or at all?
7. Whether the plaintiff proves that he is entitled to claim any amount from defendant no. 1 on account of interest at the rate of 24% per annum from the date of filing of the above suit as alleged or at all?
8. Whether the plaintiff proves that he is entitled to claim exclusively the entire amount of damages (including the amount claimed by the original plaintiff no. 1, viz. Late Mrs. Snehalata Nevatia) prayed in prayer clause (a) of the plaint, in view of the suit no. 3598 of 1996 pending before this Hon'ble Court?
9. What order?

16-s-5111-94.DOC

3. List the matter on 7th April 2014 for admission and denial of documents. The plaintiffs shall on or before 28th March 2014 file in this court and serve upon the 1st defendant his affidavit in lieu of examination in chief, his affidavit of documents, and a compilation of documents, properly indexed and paginated.

(G. S. PATEL, J.)

TRUE COPY



3 of 3

ANNEXURE A-22

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 1948 OF 2013**

Prem Kishore & Ors.

...Appellant(s)

Versus

Brahm Prakash & Ors.

...Respondent(s)

J U D G M E N TJ.B. PARDIWALA, J. :

This appeal, by special leave, is at the instance of the original plaintiff (landlord) of an eviction petition filed under the provisions of the Delhi Rent Control Act, 1958 (for short, 'the Act 1958') and is directed against the judgment and decree passed by the High Court of Delhi dated 04.05.2010 in the Civil Revision Petition No. 1332 of 2002 by which the High Court allowed the revision petition filed by the defendant (tenant) thereby rejecting the plaint under the provisions of Order 7 Rule 11 of the Code of Civil Procedure (CPC) on the ground that the eviction petition was barred by the principles of *res judicata*.

Factual Matrix

2. The facts giving rise to this appeal may be summarised as under.
3. It is the case of the appellants that the respondents herein were inducted as tenants on 27.12.1987 by the father of the appellants in respect of the property bearing House No. 163 (Old No. 143) situated at Village Dhakka, Kingsway Camp, Delhi on monthly rent of Rs. 1050/- excluding the electricity, water and

house tax. According to the appellants, the tenancy was for residential purpose. It is also their case that the rent was duly paid till February, 1993.

4. The father of the appellants served a demand notice dated 04.03.1996 on the respondents claiming the arrears of rent to the tune of Rs. 27,800/-. According to the appellants, the notice was duly served upon the respondents. However, the arrears of the rent was not cleared.

5. In such circumstances referred to above, the father of the appellants filed an eviction petition on 21.05.1996 bearing Eviction Petition No. 149 of 1996 under Section 14(1)(a) of the Act 1958.

6. In the said eviction petition, the respondents filed their written statement and denied the relationship of landlord and tenant.

7. It appears from the materials on record that after the written statement was filed by the respondents denying the relationship of landlord and the tenant, the plaintiffs failed to appear before the Rent Controller for the purpose of establishing the relationship of landlord and tenant between the parties. The plaintiffs were granted numerous opportunities to adduce evidence to establish the relationship of landlord and tenant. The record reveals that the last such opportunity granted to the plaintiffs to adduce evidence was on 09.09.1997 and again on 01.11.1997.

8. In such circumstances referred to above, the Rent Controller proceeded to pass the following order dated 27.01.1998:-

"27.1.1998

Present: Counsel for the Petitioner Sh. Chander Shekhar.

Cl. For Petitioner submits that no witness has come today nor summoned. No ground for further adjournment. Last opportunity was granted to Petitioner on 9.9.97 & then on 1.11.97. Still the Petitioner has not cared to call witness.

The PE is thus closed.

Since the relationship of Landlord tenant itself is under dispute and the petitioner has failed to adduce any evidence to establish this fact, I am of the opinion that there is no point in fixing the case

further for RE. The petition is thus dismissed as the petitioner has failed to establish his case. File be consigned.

Sd/-

27.1.1998

R. Kiran Nath

RENT CONTROLLER: DELHI"

9. It is not in dispute that no appeal was preferred against the aforesaid order dismissing the eviction petition. During the life time of the original plaintiff, namely, Samey Singh, no fresh eviction petition under Section 14(1)(a) of the Act 1958 was filed.

10. After the demise of Samey Singh (original plaintiff), the appellants herein claiming as successors in interest filed another eviction petition registered as Eviction Petition No. 136 of 2001 against the respondents herein under Section 14(1)(a) of the Act 1958 claiming *inter alia* arrears of rent from 01.03.1993 till the date of issuance of notice i.e. till 18.05.2001. A written statement was filed by the respondents herein taking the stance that Samey Singh (the original plaintiff of the first eviction petition) i.e. the predecessor in interest of the appellants herein had failed to prove the relationship of landlord and tenant between the parties and in such circumstances, the same cannot be permitted to be reopened in the second eviction petition as the same would be barred by the principles of *res judicata*.

11. It appears that the respondents herein preferred an application under the provisions of Order 7 Rule 11 of the CPC stating that the Eviction Petition No. 136 of 2001 was barred by the principles of *res judicata* and the plaint be rejected accordingly.

12. The Additional Rent Controller declined to reject the plaint vide order dated 23.07.2002. The Additional Rent Controller while rejecting the application filed by the respondents for rejecting of the plaint took the view that the second eviction petition filed under Section 14(1)(a) of the Act 1958 was

based on a fresh notice dated 18.05.2001 on separate cause of action and that there was no finding on merits as regards the relationship of landlord and tenant between the parties in the order dated 27.01.1998 referred to above. The Additional Rent Controller in such circumstances took the view that the plea of *res judicata* was not tenable in law. The application under Order 7 Rule 11(d) of the CPC was accordingly rejected.

13. The respondents herein being dissatisfied with the order passed by the Additional Rent Controller challenged the same by filing the Civil Revision Petition No. 1332 of 2002 in the High Court of Delhi.

14. The High Court allowed the civil revision petition and rejected the plaint of the Eviction Petition No. 136 of 2001 on the ground that the same was hit by the principles of *res judicata*. The High Court while allowing the civil revision Petition filed by the respondents herein observed as under:-

“17. In the present case in hand, Sh. Samey Singh, the predecessor-in-interest of the respondents/landlords failed to produce any evidence to establish the relationship of landlord and tenant between the parties in the first eviction petition filed by him under Section 14(1)(a) of the Act. As the said decision was not taken in appeal by any of the parties, the same attained finality. Having been afforded an opportunity to lead evidence and having failed to produce any evidence in the Court, it has to be taken as a decision on merits under Order XVII Rule 3 of the Code of Civil Procedure for the purpose of Section 11 of the Code.

18. By filing a subsequent eviction petition, the respondents cannot be permitted to do directly, what they could not do indirectly. Failure to adduce evidence, resulting in dismissal of the claim of the respondents for want of proof, is in reality, a decision on merits. Just as if the petitioner therein had produced evidence, which the Court had considered as inadequate proof and had dismissed it upon the said ground. Applicable to such a situation is the legal maxim, '*De non apparentibus et non existentibus eadem est ratio*'. It is a rule which applies to those things, which do not appear, and to things which do not exist. So, for maintaining his right to claim arrears of rent, if Sh. Samey Singh

was required to prove that he was the landlord of the petitioner, but he failed to do so, the Rent Controller had no option but to decide the issue against him on account of non-production of evidence. In other words, what does not appear, must be regarded as non-existent.

19. In these circumstances, the decision of the Rent Controller dated 27.01.1998, has to be taken as a decision on the merits of the matter. Merely because a subsequent cause of action has been pleaded by the respondents in the second eviction petition by claiming arrears of rent not only for the period for which the first eviction petition was filed, but also for the subsequent period upto 18.05.2001, cannot be a ground to hold that the second eviction petition was maintainable. The relationship of landlord and tenant between the parties was not established in the earlier proceedings and the same point is directly and substantially in issue in the second petition wherein the foundation to claim the arrears of rent is the stand of the respondents (petitioners therein) that they are the landlords of the petitioner herein. The findings returned by the Rent Controller in his order dated 27.01.1998 passed in the first petition have to be held to be findings on merits and having been adjudicated conclusively, are final in nature and act as a bar of *res judicata* on the second eviction petition preferred by the respondents.

20. In view of the aforesaid facts and circumstances, this Court is of the opinion that the impugned order dated 23.07.2002 is not in accordance with law and cannot be sustained. The said order is therefore set aside and quashed. The application filed by the petitioner under Order VII Rule 11 of the CPC is allowed. It is held that the second eviction petition filed by the respondents under Section 14(1)(a) of the Act is liable to be rejected being barred by the principles of *res judicata*. Ordered accordingly.”

(Emphasis supplied)

15. Being dissatisfied with the aforesaid order passed by the High Court, the appellants, claiming to be the lawful owners and landlord of the property in question, have come up before this Court by way of the present appeal.

Submissions on behalf of the appellants

16. The learned counsel appearing on behalf of the appellants vehemently submitted that the High Court committed a serious error in taking the view that the second Eviction Petition No. 136 of 2001 was not maintainable in law as the same was hit by the principles of *res judicata*. He would submit that the plaint could not have been rejected under the provisions of Order 7 Rule 11(d) of the CPC as the issue of *res judicata* could be said to be a mixed question of law and fact. He would submit that there is no averment in the plaint of the Eviction Petition No. 136 of 2001 on the basis of which it could be said that the eviction petition is barred by any provisions of law.

17. The learned counsel further submitted that the High Court also committed an error in applying the principles of Order 17 Rule 3 of the CPC as the first order passed by the Rent Controller dated 27.01.1998 in the first eviction petition was not on merits and, therefore, no finding could be said to have been rendered as regards the relationship of landlord and tenant which could be said to be binding between the parties in the second eviction petition.

18. In such circumstances referred to above, the learned counsel prays that there being merit in his appeal, the same may be allowed and the impugned order be set aside.

Submissions on behalf of the respondent No. 1

19. The learned counsel appearing for the respondent No. 1, on the other hand, vehemently opposed the present appeal by submitting that no error not to speak of any error of law could be said to have been committed by the High Court in passing the impugned order.

20. He would submit that in the first round of litigation, late Samey Singh (original plaintiff) was given sufficient time and opportunities by the Rent Controller to establish the landlord tenant relationship. However, Samey Singh failed to appear before the court and also failed to lead any evidence in that

regard. In such circumstances, the Rent Controller was justified in dismissing the eviction petition.

21. The learned counsel would submit that the High Court rightly observed that the order dated 27.01.1998 passed by the Rent Controller in the first round of litigation could be said to be under the provisions of Order 17 Rule 3 of the CPC and, if that be so, then the finding that the original plaintiff i.e. Samey Singh was not able to establish the landlord tenant relationship could be said to be on merits. He would submit that once such finding has come on record, the appellants later in point of time claiming through Samey Singh as successors in interest could not have preferred a fresh eviction petition on the very same grounds as the same would be hit by the principles of *res judicata*. He would submit that the High Court rightly rejected the plaint of the eviction petition under the provisions of Order 7 Rule 11(d) of the CPC.

22. Learned counsel appearing for the respondent No. 1 in support of submissions has placed reliance on the following decisions:-

1. ***Union of India v. Nanak Singh*, AIR 1968 SC 1370 : (1968) 2 SCR 887**
2. ***Satyadhan Ghosal & Ors. v. Smt. Deorajin Devi & Anr.*, AIR 1960 SC 941 : (1960) 3 SCR 590**
3. ***Har Dayal v. Ram Ghulam*, AIR (31) 1944 Oudh 39**
4. ***Nila v. Punun*, AIR 1936 Lahore 385**
5. ***Govindoss Krishnadoss v. Rajah of Karvetnagar & Anr.*, AIR 1929 Madras 404**
6. ***Om Prakash Gupta v. Rattan Singh*, (1964) 1 SCR 259**
7. ***Gulabchand Chhotalal Parikh v. State of Gujarat*, AIR 1965 SC 1153**

Analysis

23. Having heard the learned counsel for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court was justified in rejecting the plaint of the eviction

petition on the ground that the second eviction petition was barred by the principles of *res judicata*.

24. Order 7 Rule 11 of the CPC reads as follows:-

“11. Rejection of plaint.— The plaint shall be rejected in the following cases:—

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule 9:

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.” (Emphasis supplied)

25. Order 7 Rule 11(d) of CPC provides that the plaint shall be rejected “where the suit appears from the statement in the plaint to be barred by any law”. Hence, in order to decide whether the suit is barred by any law, it is the

statement in the plaint which will have to be construed. The Court while deciding such an application must have due regard only to the statements in the plaint. Whether the suit is barred by any law must be determined from the statements in the plaint and it is not open to decide the issue on the basis of any other material including the written statement in the case. Before proceeding to refer to precedents on the interpretation of Order 7 Rule 11(d) CPC, we find it imperative to refer to Section 11 of CPC which defines *res judicata*:-

“**11. Res judicata.**—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

26. Section 11 of the CPC enunciates the rule of *res judicata* : a court shall not try any suit or issue in which the matter that is directly in issue has been directly or indirectly heard and decided in a ‘former suit’. Therefore, for the purpose of adjudicating on the issue of *res judicata* it is necessary that the same issue (that is raised in the suit) has been adjudicated in the former suit. It is necessary that we refer to the exercise taken up by this Court while adjudicating on *res judicata*, before referring to *res judicata* as a ground for rejection of the plaint under Order 7 Rule 11. Justice R C Lahoti (as the learned Chief Justice then was), speaking for a two Judge bench in *V. Rajeshwari v. T.C. Saravanabava*, (2004) 1 SCC 551, discussed the plea of *res judicata* and the particulars that would be required to prove the plea. The Court held that it is necessary to refer to the copies of the pleadings, issues and the judgment of the ‘former suit’ while adjudicating on the plea of *res judicata*:-

“11. The rule of *res judicata* does not strike at the root of the jurisdiction of the court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should

be a finality to litigation and no one should be vexed twice for the same cause.

x x x x

13. Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. May be, in a given case only copy of judgment in previous suit is filed in proof of plea of res judicata and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in *Syed Mohd. Salie Labbai v. Mohd. Hanifa* [(1976) 4 SCC 780] the basic method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as res judicata. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in *Gurbux Singh v. Bhooralal* [AIR 1964 SC 1810 : (1964) 7 SCR 831] placing on a par the plea of *res judicata* and the plea of estoppel under Order 2 Rule 2 of the Code of Civil Procedure, held that proof of the plaint in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings. Their Lordships of the Privy Council in *Kali Krishna Tagore v. Secy. of State for India in Council* [(1887-88) 15 IA 186 : ILR 16 Cal 173] pointed out that the plea of res judicata cannot be determined without ascertaining what were the matters in issue in the previous suit and what was heard and decided. Needless to say, these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit.”

(Emphasis supplied)

27. This Court in the case of *V. Rajeshwari* (supra) observed that the rule of *res judicata* does not strike at the root of the jurisdiction of the Court trying the subsequent suit. It is a rule of estoppel based on the public policy of

achieving finality to litigation. The plea of *res judicata* is founded on proof of certain facts and then applying the law to the facts so found. It is, therefore, necessary that the foundation for the belief must be laid in the pleadings and then the issue must be framed and tried.

28. At this stage, it would be necessary to refer to the decisions that particularly deal with the question whether *res judicata* can be the basis or ground for rejection of the plaint. In ***Kamala & others v. K.T. Eshwara Sa, (2008) 12 SCC 661***, the Trial Judge had allowed an application for rejection of the plaint in a suit for partition and this was affirmed by the High Court. Justice S.B. Sinha speaking for the two Judge Bench examined the ambit of Order 7 Rule 11(d) of the CPC and observed:-

“21. Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.

22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision.”

(Emphasis supplied)

The Court further held:-

“23. The principles of *res judicata*, when attracted, would bar another suit in view of Section 12 of the Code. The question

involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a preliminary issue or at the final hearing, but, the said question cannot be determined at that stage.

24. It is one thing to say that the averments made in the plaint on their face discloses no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law.

25. The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law. In the event, the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject-matter thereof, the application for rejection of plaint should be entertained.”

(Emphasis supplied)

29. The above view has been consistently followed in a line of decisions of this Court. In *Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust*, (2012) 8 SCC 706, Justice P. Sathasivam (as the learned Chief Justice then was), speaking for a two judge Bench, observed that:-

“10. [...] It is clear from the above that where the plaint does not disclose a cause of action, the relief claimed is undervalued and not corrected within the time allowed by the court, insufficiently stamped and not rectified within the time fixed by the court, barred by any law, failed to enclose the required copies and the plaintiff fails to comply with the provisions of Rule 9, the court has no other option except to reject the same. A reading of the above provision also makes it clear that power under Order 7 Rule 11 of the Code can be exercised at any stage of the suit either before registering the plaint or after the issuance of summons to the defendants or at any time before the conclusion of the trial.

11. This position was explained by this Court in *Saleem Bhai v. State of Maharashtra* [(2003) 1 SCC 557], in which while considering Order 7 Rule 11 of the Code, it was held as under: (SCC p. 560, para 9)

“9. A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit—before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court.”

It is clear that in order to consider Order 7 Rule 11, the court has to look into the averments in the plaint and the same can be exercised by the trial court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinize the averments/pleas in the plaint. In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averments. These principles have been reiterated in *Raptakos Brett & Co. Ltd. v. Ganesh Property* [(1998) 7 SCC 184] and *Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express* [(2006) 3 SCC 100].”

30. Similarly, in *Soumitra Kumar Sen v. Shyamal Kumar Sen*, (2018) 5 SCC 644, an application was moved under Order 7 Rule 11 of the CPC claiming rejection of the plaint on the ground that the suit was barred by *res judicata*. The Trial Judge dismissed the application and the judgement of the Trial Court was affirmed in revision by the High Court. Justice A.K. Sikri, while affirming the judgment of the High Court, held:-

“9. In the first instance, it can be seen that insofar as relief of permanent and mandatory injunction is concerned that is based on

a different cause of action. At the same time that kind of relief can be considered by the trial court only if the plaintiff is able to establish his locus standi to bring such a suit. If the averments made by the appellant in their written statement are correct, such a suit may not be maintainable inasmuch as, as per the appellant it has already been decided in the previous two suits that Respondent 1-plaintiff retired from the partnership firm much earlier, after taking his share and it is the appellant (or appellant and Respondent 2) who are entitled to manage the affairs of M/s Sen Industries. However, at this stage, as rightly pointed out by the High Court, the defence in the written statement cannot be gone into. One has to only look into the plaint for the purpose of deciding application under Order 7 Rule 11 CPC. It is possible that in a cleverly drafted plaint, the plaintiff has not given the details about Suit No. 268 of 2008 which has been decided against him. He has totally omitted to mention about Suit No. 103 of 1995, the judgment wherein has attained finality. In that sense, the plaintiff-Respondent 1 may be guilty of suppression and concealment, if the averments made by the appellant are ultimately found to be correct. However, as per the established principles of law, such a defence projected in the written statement cannot be looked into while deciding application under Order 7 Rule 11 CPC.” (Emphasis supplied)

Referring to *Kamala* (supra), the Court further observed that:-

“12. ... The appellant has mentioned about the earlier two cases which were filed by Respondent 1 and wherein he failed. These are judicial records. The appellant can easily demonstrate the correctness of his averments by filing certified copies of the pleadings in the earlier two suits as well as copies of the judgments passed by the courts in those proceedings. In fact, copies of the orders passed in judgement and decree dated 31-3-1997 passed by the Civil Judge (Junior Division), copy of the judgment dated 31-3-1998 passed by the Civil Judge (Senior Division) upholding the decree passed by the Civil Judge (Junior Division) as well as copy of the judgment and decree dated 31-7-2014 passed by Civil Judge, Junior Division in Suit No. 268 of 2008 are placed on record by the appellant. While deciding the first suit, the trial court gave a categorical finding that as per MoU signed between the parties, Respondent 1 had accepted a sum of Rs 2,00,000 and, therefore, the said suit was barred by principles of estoppel, waiver and acquiescence. In a case like this, though recourse to

Order 7 Rule 11 CPC by the appellant was not appropriate, at the same time, the trial court may, after framing the issues, take up the issues which pertain to the maintainability of the suit and decide the same in the first instance. In this manner the appellant, or for that matter the parties, can be absolved of unnecessary agony of prolonged proceedings, in case the appellant is ultimately found to be correct in his submissions.” (Emphasis supplied)

31. This Court in the case of *Soumitra Kumar Sen* (supra) was examining a case where the defendant had moved an application before the Trial Court under Order 7 Rule 11 of CPC requesting the Court to reject the plaint on the ground of *res judicata*. The Courts below had rejected such a prayer upon which the defendant had approached this Court. This Court, referring to its various judgements on the point, upheld such orders observing that if the averments made by the appellant in the written statement are correct, the suit may not be maintainable. However, at this stage, as rightly held by this Court, the defence in the written statement cannot be gone into. One has to look into the plaint for the purpose of deciding application under Order 7 Rule 11 of the CPC.

32. While holding that “recourse to Order 7 Rule 11” by the appellant was not appropriate, this Court observed that the Trial Court may, after framing the issues, take up the issues which pertain to the maintainability of the suit and decided them in the first instance. The Court held that this course of action would help the appellant avoid lengthy proceedings.

33. On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11(d) of the CPC can be summarized as follows:-

- (i) To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to;

(ii) The defence made by the defendant in the suit must not be considered while deciding the merits of the application;

(iii) To determine whether a suit is barred by *res judicata*, it is necessary that (i) the ‘previous suit’ is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit; and

(iv) Since an adjudication of the plea of *res judicata* requires consideration of the pleadings, issues and decision in the ‘previous suit’, such a plea will be beyond the scope of Order 7 Rule 11 (d), where only the statements in the plaint will have to be perused.

(See : ***Srihari Hanumandas Totala v. Hemant Vithal Kamat, (2021) 9 SCC 99***)

34. The general principle of *res judicata* under Section 11 of the CPC contain rules of conclusiveness of judgment, but for *res judicata* to apply, the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit. Further, the suit should have been decided on merits and the decision should have attained finality. Where the former suit is dismissed by the trial court for want of jurisdiction, or for default of the plaintiff’s appearance, or on the ground of non-joinder or mis-joinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letter of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper

valuation, or for failure to pay additional court fee on a plaint which was undervalued, or for want of cause of action, or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision, not being on the merits, would not be *res judicata* in a subsequent suit.

35. In the present case, before examining the defendants' ground of *res judicata* to oppose the eviction petition, several aspects may have to be looked into. Whether such an issue was substantively at issue in the previous suit and similar such other questions may crop up. Powers under Order 7 Rule 11 of CPC under such circumstances would not be available. The High Court therefore, committed an error in rejecting the plaint.

36. The seminal question that we need to decide in the present appeal is whether the first suit i.e. the Eviction Petition No. 149 of 1996 filed by late Samey Singh was dismissed on merits. To put it in other words, whether the finding recorded by the Rent Controller while dismissing the Eviction Petition No. 149 of 1996 that the eviction petition deserves to be dismissed as the plaintiff Samey Singh had failed to establish the relation of landlord and tenant between the parties could be said to be on merits so as to render the second Eviction Petition No. 136 of 2001 not maintainable on the principles of *res judicata*.

37. The High Court took the view that the first suit i.e. Eviction Petition No. 149 of 1996 could be said to have been dismissed under the provisions of Order 17 Order 3 of the CPC and, therefore, the finding recorded therein as regards the relationship of landlord and tenant could be said to be on merits and thus binding in the subsequent proceedings.

38. In the aforesaid context, we may look into the provisions of Order 17 Rules 2 and 3 respectively of the CPC which are as follows:-

“Order 17 Rules 2 and 3:

2. Procedure if parties fail to appear on day fixed.—Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

Explanation.—Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.

3. Court may proceed notwithstanding either party fails to produce evidence, etc.— Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default,—

(a) if the parties are present, proceed to decide the suit forthwith; or

(b) if the parties are, or any of them is, absent, proceed under rule 2.”

39. Order 17 Rule 2 of the CPC provides that where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by order IX or make such other order as it thinks fit.

40. The *Explanation* appended to Order 17 Rule 2 of the CPC provides that where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party was present.

41. Order 17 Rule 3 of the CPC, however, provides that where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, (a) if the parties are present, proceed to decide the suit forthwith, or (b) if the parties are, or any of them is, absent, proceed under Rule 2.

42. The scope of Order 17 Rule 2 and Order 17 Rule 3 of the CPC came up for consideration before this Court in the case of *B. Janakiramaiah Chetty v. A.K. Parthasarathi & Ors.*, (2003) 5 SCC 641, wherein Justice Arijit Pasayat speaking for the Bench held in paras 7 to 10 as under:-

“7. In order to determine whether the remedy under Order 9 is lost or not what is necessary to be seen is whether in the first instance the Court had resorted to the Explanation of Rule 2.

8. The Explanation permits the court in its discretion to proceed with a case where substantial portion of evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned. As the provision itself shows, discretionary power given to the court is to be exercised in a given circumstance. For application of the provision, the court has to satisfy itself that:

(a) substantial portion of the evidence of any party has been already recorded; (b) such party has failed to appear on any day; and (c) the day is one to which the hearing of the suit is adjourned. Rule 2 permits the court to adopt any of the modes provided in Order 9 or to make such order as he thinks fit when on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear. The Explanation is in the nature of an exception to the general power given under the rule, conferring discretion on the court to act under the specified circumstance i.e. where evidence or a substantial portion of evidence of any party has been already recorded and such party fails to appear on the date to which hearing of the suit has been adjourned. If such is the factual situation, the court may in its discretion deem as if such party was present. Under Order 9 Rule 3 the court may make an

order directing that the suit be dismissed when neither party appears when the suit is called on for hearing. There are other provisions for dismissal of the suit contained in Rules 2, 6 and 8. We are primarily concerned with a situation covered by Rule 6. The crucial words in the Explanation are “proceed with the case”. Therefore, on the facts it has to be seen in each case as to whether the Explanation was applied by the court or not.

9. In Rule 2, the expression used is “make such order as it thinks fit”, as an alternative to adopting one of the modes directed in that behalf by Order 9. Under Order 17 Rule 3(b), the only course open to the court is to proceed under Rule 2, when a party is absent. Explanation thereto gives a discretion to the court to proceed under Rule 3 even if a party is absent. But such a course can be adopted only when the absentee party has already led evidence or a substantial part thereof. If the position is not so, the court has no option but to proceed as provided in Rule 2. Rules 2 and 3 operate in different and distinct sets of circumstances. Rule 2 applies when an adjournment has been generally granted and not for any special purpose. On the other hand, Rule 3 operates where the adjournment has been given for one of the purposes mentioned in the rule. While Rule 2 speaks of disposal of the suit in one of the specified modes, Rule 3 empowers the court to decide the suit forthwith. The basic distinction between the two rules, however, is that in the former, any party has failed to appear at the hearing, while in the latter the party though present has committed any one or more of the enumerated defaults. Combined effect of the Explanation to Rule 2 and Rule 3 is that a discretion has been conferred on the court. The power conferred is permissive and not mandatory. The Explanation is in the nature of a deeming provision, when under given circumstances, the absentee party is deemed to be present.

10. The crucial expression in the Explanation is “where the evidence or a substantial portion of the evidence of a party”. There is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party’s stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The court while acting under the Explanation may proceed with the case if that prima facie is the position. The court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the court to record its satisfaction in that

perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led for applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need for adjourning the suit or deferring the decision.”

(Emphasis supplied)

43. The Full Bench decision of the Madras High Court in *Prativadi Bhayankaram Pichamma v. K. Sreeramulu*, AIR 1918 Mad 143 (FB) and the decision of the Calcutta High Court in *Mariannissa v. Ramkalpa Gorsin*, ILR 34 Cal 235 fell for consideration of the Full Bench of the Rajasthan High Court in *Gopi Kishan v. Ramu*, AIR 1964 Raj 147, and Bombay High Court in *Shidramappa Irappa Shivangi v. Basalingappa Kushnapa Kumbhar*, AIR 1943 Bom 321 : 1943 SCC Online Bom 16 : ILR 1944 Bom 1 (FB).

44. The full Bench of the Rajasthan High Court in the case of *Gopi Kishan* (supra) observed as under:-

“8. In *Prativadi Bhayankaram Pichamma v. Kamisetti Sreeramulu*, AIR 1918 Mad 143 (FB), the Full Bench of the Madras High Court has held that Rules 2 and 3 of Order XVII of the Code, of Civil Procedure are mutually exclusive. Where the conditions of Rule 2 are fulfilled even if the circumstances envisaged by Rule 3 are existent and applicable, Rule 2 should be applied. The reasons which persuaded the learned Judges to make this preference are that when a party has failed both to appear as well as to produce evidence or to perform an act for which time was granted to it, it will be unjust in the party's absence to assume that its failure to produce evidence or to perform the act was unjustified he being absent and, therefore, unable to offer any explanation for its failure to produce evidence or to do acts in furtherance of the progress of the suit. Equity demanded that the Court should proceed under Order XVII Rule 2 Civil Procedure Code treating the case to be one of mere absence. Wallis, C. J., a member of this Full Bench of the Madras High Court, however, expressed a different view that Rules 2 and 3 were not mutually exclusive. *M. Agaiah v. Mohd. Abdul Kareem*, AIR 1961 Andh Pra 201 is a Full Bench decision of the Andhra Pradesh High Court

which has adopted the view taken by the Madras High Court in Pra-tivadi's case, AIR 1918 Mad 143(2) (FB). The Andhra Pradesh High Court has not referred to the decisions of other High Courts which have taken a contrary view. The High Court of Rangoon in *Ma Hla Nyun v. Ma, Aye Myint*, AIR 1937 Rang 437, the High Court of Nagpur in *Bhioraj Jethmal v. Janardhan Nagorao*; AIR 1933 Nag 370 and Judicial Commissioner's Court of Bhopal in *Hashmat Rai v. Lal Chand*, AIR 1952 Bhopal 43 have adopted the same view as the High Court of Madras.

9. The other view taken by the Calcutta High Court in *Mariannissa v. Ramkalpa Gorsin*, ILR 34 Cal 235 considered the relationship between Section 157 and 158 of the Code of Civil Procedure, 1882, which correspond to Order XVII rules 2 and 3 respectively of the Code of Civil Procedure of 1908 and expressed the view that the existence of material was necessary for the application of Section 158 which corresponds to Rule 3 of Order XVII. In this case issues were framed and after various adjournments the case came up for hearing on 10th March, 1905. The plaintiff had asked for and obtained process for witnesses but as they did not appear on the date fixed for trial the plaintiff prayed for the issue of warrant of arrest for one of them. This application was refused. The pleader for the plaintiff thereupon intimated to the Court that he had no further instructions to appear in the case and the subordinate Judge dismissed the suit, for want of prosecution. When the plaintiff made an application to set aside the order of dismissal under Section 102 (Order IX Rule 8) the defendant took a preliminary objection that the suit had been dismissed not under Section 102 but under Section 158 (Order XVII Rule 3) and consequently the remedy of the plaintiff was by way of review and not for restoration. The plaintiff eventually 'appealed to the High Court. The learned Judges observed,--

"It is obvious that the scope of Section 157 is quite distinct from that of Section 158. Section 158 appears to contemplate a case in which the Court has materials before it to enable it to proceed to a decision of the suit. what Section 158 provides is, that the mere fact of a party making default in the performance of what he was directed to would not lead to the dismissal of the plaintiff's suit, if he was the party in default, or the decreeing of the claim against the defendant, if the defendant was the person, who made the default; the words 'notwithstanding su'ch default' clearly imply that the Court is

to proceed with the disposal of the suit in spite of the default, upon such materials as are before it. Section 157, on the other hand, speaks of the disposal of the suit, and undoubtedly includes cases in which there might not be any materials before the Court to enable it to pronounce a decision on the merits, for instance, if the event contemplated in Sections 97, 98, 99 Clause (a) and 102 happens, although, if the contingency mentioned in Section 100, Clause (a) happens, there would be materials before the Court, and a decision on the merits." (Emphasis supplied)

45. We may also look into the Full Bench decision of the Bombay High Court in the case of *Shidramappa Irappa Shivangi* (supra) wherein the following was held:-

“The general provisions about appearances of parties in Order III, Rule 1, are that a party can appear in person or by a recognized agent or by a pleader appearing, applying or acting on his behalf. These are made subject to any other express provision of law. Such an express provision is in Order V, Rule 1, where the mode of appearance by a defendant is stated to be either (a) in person, or (b) by a pleader duly instructed and able to answer all material questions relating to the suit, or (c) by a pleader accompanied by some person able to answer all such questions. The forms of summons given in forms Nos. 1 and 2 of appx. B to the first schedule also contain the same instructions. Where, therefore, the defendant does not appear in person and there is none else to instruct his pleader, the only person through whom he can be said to appear is a pleader who must be duly instructed and able to answer all material questions. It follows, therefore, that if the pleader is present in Court on any day of hearing but has no instructions as to how to proceed with the case, there is no appearance of the defendant. Whether a pleader is duly instructed is a question of fact, but if he refuses to take part in the trial on the ground that he has no instructions and then withdraws from the case either after, or without making, an application for adjournment, all further proceedings against the defendant become ex parte. If the Court thereafter asks the plaintiff to lead evidence and then passes a decree in his favour, it must be regarded as an ex parte decree. The defendant would then be at liberty to apply to set it aside under Order IX, Rule 13. ...”

46. In *Gopi Kishan* (supra) the Full Bench of the Rajasthan High Court gave an illustration as to when Rule 2 or Rule 3 of Order 17 would apply. We quote the relevant observations of the Full Bench as under:-

“18. Rule 2 confers discretion in the Court, in the event of a party being absent, either to dispose of the suit in one of the modes directed by Order 9 or to make such other order as it thinks fit. Rule 3, however, envisages a situation where a party to whom time has been granted for the production of evidence or for the performance of any other act necessary to the further progress of the suit and such party fails to produce the evidence or to perform the act for which time had been allowed the Court may, notwithstanding such default proceed to decide the suit forthwith. When a party to whom time has been granted for the production of evidence or for the performance of any other act also does not appear it is clearly a case of double default. Not only the party has failed to do that for which time was granted to it but has also failed to appear. In our opinion this double default does not take away the case from the purview of Order XVII Rule 3. We are unable to agree with the interpretation given in the Full Bench Madras case that Rules 2 and 3 are mutually exclusive. There can be cases as the one before us, where time was granted to a party to produce evidence but the party not only failed to produce evidence but also absented itself and it cannot be said that Order XVII Rule 3 cannot apply to such a case.

19. In a long series of decisions adopting the view of the Calcutta High Court for diverse reasons it has been held that the existence of material is necessary for deciding a suit under Order XVII Rule 3. The language of the statute does not expressly indicate the existence of material as an essential condition for its application. This interpretation has been influenced apparently by the word 'decide' to mean decide on merits. In Ramkaran's case, ILR (1953) 3 Raj 798 the learned Judges of this Court felt persuaded by the provisions of Order XX Rule 4 of the Code of Civil Procedure to hold that the existence of material was necessary and because only pleadings and issues were on record they opined that the dismissal should be construed to be one under Order XVII Rule 2. On the other hand in Amarsingh's case, 1953 Raj LW 365, the learned Judges were of the view that where the plaintiff failed to discharge the burden placed on him in the suit, the logical conclusion was that the suit should be dismissed whether material existed or not. No decision has attempted to indicate the exact kind of quantum of material which is requisite for the operation of Order XVII Rule 3. The difficulty of such a task

is easy to appreciate. In the wide varieties of cases and complexities of situation formulation of universal rules, is a task not easy of attainment. The indications," however, are as in Ramkaran's case, ILR (1953) 3 Raj 798 that the material may mean 'evidence' on record. The obvious question which arises next is whether can absence of evidence altogether exclude the applicability of Order XVII Rule 3? It is difficult to lay down such a, wide proposition. The intention of Order XVII Rule 3 as has been noticed is that a party seeks time to produce evidence or do something to further the progress of a suit and makes default in doing either, a Court may decide the suit forthwith. To our mind, it is too wide a proposition to lay that in no case where evidence has not been led Rule 3 would be inapplicable. The test should be whether the Court before whom the suit is pending on the basis of material before it is in a position to decide the suit forthwith, the default of a party notwithstanding. The pleadings, of the parties and issues arising therefrom may in some cases enable a Court to decide the suit forthwith. Suppose in a suit on a promissory note the execution of which has not been denied by the defendant and the defendant pleads want of consideration seeking time to produce evidence. Time is allowed but he makes default in producing evidence. Can the suit be not decided in view of the legal presumption contained in Section 118 of the Negotiable Instruments Act? In a converse case the defendant denies execution and the plaintiff is granted time to prove execution and he makes default. Can the suit be not decided on the ground of the default made by the plaintiff in discharging the burden of proof placed on him? In the first illustration it can perhaps be said that the promissory note execution whereof has been admitted constitutes evidence and there is material on record to attract the applicability of Rule 3. In the second illustration; however, the execution not having been admitted there is obviously no evidence. The plaintiff fails to discharge his duty. Can we say that the suit should be disposed of in accordance with Order IX as per Order XVII Rule 2? The answer is plainly in the negative for the situations envisaged under Order IX are different than the one we have in the illustration. Can it be said that the Court may pass such other order as it thinks fit as laid down in Rule 2 of Order 17? Such an order can be no other than to adjourn the case for plaintiff's absence in a situation such as this. Therefore, if the plaintiff fails to discharge the burden placed on him in view of the pleadings and consequent issues despite the opportunity afforded to him the case cannot be adjourned for his evidence ad infinitum and the Court at some stage or the other has to decide it for want of evidence. Even in a contested suit issues are sometimes decided for want of evidence and so can the whole suit. Therefore, in our opinion the existence of material does not necessarily mean existence of

evidence. If a suit can be decided despite the lack of evidence on the material before it Order XVII Rule 3 can be said to govern the case. Material on record need not be given a technical meaning and equated to evidence. The circumstances of each case will regulate the exercise of discretion vested in a Court. It is for the Court to exercise its discretion and to indicate without ambiguity whether it is exercising its powers under Order XVII Rule 3 or not. It is correct that the application, of Rule 3 restricts the future remedies of a defaulting party and is a stringent provision, and, therefore, it should be applied with circumspect caution and judicial restraint, Ramkaran's case, ILR (1953) 3 Raj 798 therefore, has to be read with the aforesaid modification. No exception can, however, be taken to the reasoning adopted in Amarsing's case, 1953 Raj LW 365.”

(Emphasis supplied)

47. Thus the Full Bench took the view that if the plaintiff fails to discharge the burden placed on him in view of the pleadings and consequent issues despite the opportunity afforded to him, the case may not be adjourned for his evidence *ad infinitum* and the court must at some stage or the other decide for want of evidence. The Full Bench took the view that the existence of material would not necessarily mean existence of evidence. If the suit can be decided despite the lack of evidence on the material before it, then in such circumstances Order 17 Rule 3 of the CPC would govern the case.

48. The aforesaid dictum as laid by the Rajasthan High Court appears to be in conflict with the decision of this Court in the case of ***Prakash Chander Manchanda v. Janki Manchanda***, (1986) 4 SCC 699, wherein this Court observed as under:-

“6. ...It is clear that in cases where a party is absent only course is as mentioned in Order 17(3)(b) to proceed under Rule 2. It is therefore clear that in absence of the defendant, the Court had no option but to proceed under Rule 2, Similarly the language of Rule 2 as now stands also clearly lays down that if any one of the parties fail to appear, the Court has to proceed to dispose of the suit in one of the modes directed under Order 9. The explanation to Rule 2 gives a discretion to the Court to proceed under Rule 3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined

substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been examined upto that date the Court has no option but to proceed to dispose of the matter in accordance with Order 17 Rule 2 in any one of the modes prescribed under Order 9 of the Code of Civil Procedure. It is therefore clear that after this amendment in Order 17 Rules 2 and 3 of the Code of Civil Procedure there remains no doubt and therefore there is no possibility of any controversy. In this view of the matter it is clear that when in the present case on 30th October 1985 when the case was called nobody was present for the defendant. It is also clear that till that date the plaintiffs evidence has been recorded but no evidence for defendant was recorded. The defendant was only to begin on this date or an earlier date when the case was adjourned. It is therefore clear that upto the date i.e. 30th October, 1985 when the trial court closed the case of defendant there was no evidence on record on behalf of the defendant. In this view of the matter therefore the explanation to Order 17 Rule 2 was not applicable at all. Apparently when the defendant was absent Order 17 Rule 2 only permitted the Court to proceed to dispose of the matter in any one of the modes provided under Order 9.

7. It is also clear that Order 17 Rule 3 as it stands was not applicable to the facts of this case as admittedly on the date when the evidence of defendant was closed nobody appeared for the defendant. In this view of the matter it could not' be disputed that the Court when proceeded to dispose of the suit on merits had committed an error. Unfortunately even on the review application, the learned trial Court went on in the controversy about Order 17 Rules 2 and 3 which existed before the amendment and rejected the review application and on appeal, the High Court also unfortunately dismissed the appeal *in limine* by one word.”

(Emphasis supplied)

49. Thus the dictum as laid by this Court in ***Prakash Chander Manchanda*** (supra) is that it will be within the discretion of the Court to proceed under Rule 3 even in the absence of evidence but such discretion is limited only in cases where a party which is opposing has led some evidence or has examined substantial part.

50. Let us apply the aforesaid dictum as laid by this Court to the facts of the present case. In the case on hand, after the first eviction petition was instituted, the defendants therein filed their written statement denying the relationship of landlord and tenant. After the written statement came on record, no further evidence was led by the plaintiffs. All that was on record was in the form of pleadings in the plaint. The Additional Rent Controller took the view that after the written statement came on record, it was the duty of the plaintiffs to establish or prove the landlord tenant relationship and having failed to adduce any evidence, the suit was liable to be dismissed and accordingly was dismissed. The High Court interpreted or rather construed the order of the Additional Rent Controller as one under Rule 3 of Order 17 and, therefore, took the view that the findings as regards the relationship of landlord and tenant could be said to be on merits.

51. We are afraid, the High Court committed an error in taking the view that the order passed by the Additional Rent Controller could be said to be one passed in exercise of powers under Rule 3 of Order 17 of the CPC.

52. The power conferred on Courts under Rule 3 of Order 17 of the CPC to decide the suit on the merits for the default of a party is a drastic power which seriously restricts the remedy of the unsuccessful party for redress. It has to be used only sparingly in exceptional cases. Physical presence without preparedness to co-operate for anything connected with the progress of the case serves no useful purpose in deciding the suit on the merits and it is worse than absence. In any contingency, the discretion is always with the Court to resort to Rule 2 or 3 respectively or to grant an adjournment for deciding the suit in a regular way in spite of default. Rules 2 and 3 respectively are only enabling provisions. In order to decide the suit on the merits, the mere existence of the conditions enumerated in Rule 3 alone will not be sufficient. There must be some materials for a decision on the merits, even though the materials may not be technically interpreted as evidence. Sometimes the decision in such cases

could be on the basis of pleadings, documents and burden of proof. Anyhow, it is appreciable for the Court to indicate by the judgment that the decision is for default or on the merits. The only alternative of the Court in cases covered by Rule 3 or the explanation to Rule 2 is not to decide on the merits alone. If such an interpretation is given, it will amount to an unjustified preference to one who purposely absents than to one who presents but unable to proceed with the case. 'Appearance' and 'presence' have well recognised meanings. They imply presence in person or through pleader properly authorised for the purpose of conducting the case. Rule 3 comes into play only when presence is to proceed with the case, but default is committed in any one of the three ways mentioned in Rule 2 or explanation to Rule 2 is extracted. Those are cases in which some materials are there for the Court to decide the case on the merits and not cases where decision could only be for default. That is clear from a combined reading of Rules 2 and 3 respectively and the explanation. In this case, none of these conditions were present and the decision was evidently for default. Rule 2 alone is attracted. (see : ***R. Ravindran v. M. Rajamanickam*, 2006 SCC Online Mad 169**)

53. The order passed by the Rent Comptroller dated 27.01.1998 referred to in para 8 of this judgment, has a different angle too. Let us once again read the order passed by the Rent Controller closely. The order is in two parts. In the first part, the Rent Controller says that the counsel for the plaintiff is present. Then, he proceeds to observe that the counsel for the plaintiff made a statement that no witness has come today nor they were summoned. The Rent Controller, further, notes that on none of the grounds further adjournment has been prayed for. Thereafter, he states that the last opportunity was granted to the plaintiff on 09.09.1997 and thereafter, on 01.11.1997. However, the plaintiff did not care to call his witnesses. In such circumstances, the Rent Controller closed the eviction petition proceedings.

The exact words used by the Rent Controller in the order dated 27.01.1998 are: “*the PE is thus closed.*” In the second part of the order, the Rent Controller, thereafter, proceeds to observe that since the relationship of Landlord-Tenant is under dispute and the plaintiff has failed to produce any evidence to establish such relationship, he did not find any good reason to fix the case further for recording of evidence. In such circumstances, he dismissed the eviction petition, as the plaintiff could be said to have failed to establish his case. In the last, he observed that the file be consigned.

54. At the stage of hearing of the case, Order 17 of the CPC, applied. Under that Order on a date of adjourned hearing, if a party was absent, the Court either would act under Order 9 or otherwise as it thought fit; or if a party was present but it did not produce evidence, it would proceed to decide the suit forthwith without benefit of evidence. This last thing tantamounts that the Court was to say whether the suit was or was not proved, either wholly or in part and to pass the decree accordingly.

55. The moot question is whether the eviction petition was dismissed for default which dismissal would certainly bar a fresh suit if instituted on the same cause of action. The words, which we have quoted above, certainly do not mean dismissal either on merits or on default. It was argued before us that the order should only be taken to mean what an order under Order 17 can possibly be and nothing else. We are not impressed by such submission. The order did not purport to be one of dismissal for default or on merits and it cannot be taken to mean other than what it purported to be. It is in ordinary phraseology; not legal phraseology and it cannot be divested of its ordinary meaning. Its ordinary meaning is that the proceeding was closed and the suit would not count as a pending one. The later description would be redundant if the order was one of final disposal of the suit. The order did not purport to

be a final disposal of the suit. It merely stopped the proceedings. It did nothing more. This is not final decision of the suit within the meaning of Order 9 Rule 8 and Order 17 Rule 3 resply of the CPC.

56. In the result, the appeal succeeds and is hereby allowed. The impugned judgement and decree is, therefore, set aside. Needless to add two things. First, we have not expressed any opinion on rival contentions regarding the applicability or otherwise of the principle of res judicata or for that matter any other contentious issue in the pending suit. Secondly, nothing stated in this judgment will prevent the concerned defendants from requesting the Court to decide such an issue as a preliminary issue. Such an application would obviously be decided on its merits about which also we expressed no opinion. The suit is revived.

57. There shall be no order as to costs.

58. Pending application, if any, also stands disposed of.

.....**J.**
(SUDHANSHU DHULIA)

.....**J.**
(J.B. PARDIWALA)

NEW DELHI;
MARCH 29, 2023

TRUE COPY



ANNEXURE A-23



AIR SUPREME COURT SOFTWARE 1950-2014

AIR 2011 SUPREME COURT 9

(From : Delhi)*

**R. V. RAVEENDRAN AND H. L. GOKHALE ,
JJ.**

Civil Appeal No.8321 of 2010 (arising out of S.L.P. (C) No. 11328 of 2010), D/-27 -9 -2010.

Alka Gupta v. Narender Kumar Gupta .

(A) Civil P.C. (5 of 1908) , O.2 , R.2 -Bar to suit under - In absence of plea by defendant as to bar under O.2, R.2 and in absence of issue thereon - Suit cannot be dismissed as barred under O.2, R.2.**2009 (162) DLT 593, Reversed.**

Unless the defendant pleads the bar under O. 2, R. 2 and an issue is framed focusing the parties on that bar to suit, obviously the Court cannot examine or reject a suit on that ground. The pleadings in the earlier suit should be exhibited or marked by consent or at least admitted by both parties. The plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action. In the instant case, the defendant did not contend that suit was barred by O. 2, R. 2. No issue was framed as to whether the suit was barred by O. 2, R. 2. Therefore dismissal of suit being barred under O. 2, R. 2 would be illegal.

2009 (162) DLT 593, Reversed. (Paras 7 , 9)

(B) Civil P.C. (5 of 1908) , S.11 , O.2 , R.2 - Res judicata and bar to suit under O.2, R.2 - Pleas as to - Are different and one will not include other.

Res judicata relates to the plaintiff's duty to put forth all the grounds of attack in support of his claim, whereas O. 2, R. 2 of CPC requires the plaintiff to claim all reliefs flowing from the same cause of action in a single suit. The two pleas are different and one will not include the other. (Para 9)

(C) Civil P.C. (5 of 1908) , O.2 , R.2 -Bar to second suit - Cause of action

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in second suit - Completely distinct and different than cause of action in first suit - Bar under O.2, R.2, not attracted.**2009 (162) DLT 593, Reversed.**

In the instant case the cause of action for the first suit was non payment of price under the agreement of sale dated 29-6-2004, whereas the cause of action for the second suit was non-settling of accounts of a dissolved partnership constituted under deed dated 5-4-2000. The two causes of action are distinct and different. O. 2, R. 2 would come into play only when both suits are based on the same cause of action and the plaintiff had failed to seek all the reliefs based on or arising from the cause of action in the first suit without leave of the Court. Merely because the agreement of sale related to an immovable property and the business run therein under the name of 'Takshila Institute' and the second suit referred to a partnership in regard to business run at other place also under the same name of Takshila Institute, it cannot be assumed that the two suits relate to the same cause of action. Further, while considering whether a second suit by a party is barred by O. 2, R. 2 all that is required to be seen is whether the relief's claimed in both suits arose from the same cause of action. The Court is not expected to go into the merits of the claim and decide the validity of the second claim. The strength of the second case and the conduct of plaintiff are not relevant for deciding whether the second suit is barred by O. 2, R. 2.

2009 (162) DLT 593, Reversed. (Paras 7 , 11 , 12)

(D) Civil P.C. (5 of 1908) , S.11 -Constructive res judicata - Plea must be clearly established - Plaintiff who is sought to be prevented by bar of constructive res judicata should have notice about plea and have an opportunity to put forth his contentions against same - It was not shown as to what was ground of attack that plaintiff ought to have raised in first suit but had failed to raise, which she raised in second suit - Second suit thus would not be barred by constructive res judicata . (Para 15)**(E) Civil P.C. (5 of 1908) , Pre. , O.15 , R.1 -Civil suit - To be decided in accordance with law and provisions of Civil P.C. - Not on whims**



of Court.

(Para 16)

(F) Civil P.C. (5 of 1908) , Pre. , O.14 , R.1 -Civil suit - Cannot be dismissed with out trial - Merely because Court feels dissatisfied by conduct of plaintiff.

2009 (162) DLT 593, Reversed.

Where the summons have been issued for settlement of issues, and a suit is listed for consideration of a preliminary issue, the Court cannot make a roving enquiry into the alleged conduct of the plaintiff, tenability of the claim, the strength and validity and contents of documents, without a trial and on that basis dismiss a suit. A suit cannot be shortcircuited by deciding issues of fact merely on pleading and documents produced without a trial. A suit cannot be dismissed without trial merely because the Court feels dissatisfied with the conduct of the plaintiff.

2009 (162) DLT 593, Reversed. (Para 19)

(G) Civil P.C. (5 of 1908) , O.15 , R.3 -Applicability - Summons issued for settlement of issues - Issues settled - Therefore, unless parties agree, Court cannot deny right of parties to lead evidence - To render final decision by denying such opportunity would be highhanded arbitrary and illegal. (Para 19)

(H) Civil P.C. (5 of 1908) , Pre. , O.15 , R.1 -Natural justice - Branding plaintiff as unscrupulous person who abuses process of Court and manipulates documents - Without there being trial and without giving plaintiff to explain her conduct - Opposed to principles of natural justice embodied in Code of Civil Procedure.

Constitution of India , Art.14 .

Court recorded factual findings on inferences from the plaintiffs (appellant) conduct and branded her as an unscrupulous person who abuses the process of Court and

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as a person who utters falsehoods and manipulates documents without there being a trial and without there being an opportunity to the plaintiff to explain her conduct. Such a procedure is opposed to all principles of natural justice embodied in the

Code of Civil Procedure. At all events, the alleged weakness of the case of the plaintiff or unscrupulousness of plaintiff are not grounds for dismissal without trial. (Para 21)

Cases Referred : **Chronological Paras**

AIR 1990 SC 1607 : 1991 AIR SCW 2226 :1990 Lab IC 1304 (Ref.)	15
AIR 1986 SC 391 (Ref.)	15
AIR 1964 SC 1810 (Ref.)	9
1947 (2) All ER 257	15

Aman Lekhi, Sr. Advocate, Mrs. Meenakshi Lekhi, Sachin Jain, Madhur Jain, Sanjai Kumar Pathak for Appellants; P. C. Agarwal, Sr. Advocate, Aditya K. Dubey, Varun Thakur, Ramesh Babu, M. R. Ambuj Agarwal, for Respondent.

**R.F.A. (OS) 60 of 2009 D/- 7-9-2009 (Reported in 2009 (162) DLT 593)*

Judgement

R. V. RAVEENDRAN, J. :-Leave granted. Heard. For convenience the appellant and respondent will also be referred to by their ranks in the suit, as 'plaintiff and 'defendant' respectively.

2. The appellant and respondent entered into a partnership as per deed dated 5.4.2000 to run an Institute for preparing students for competitive examinations, under the name and style of 'Takshila Institute', at No. F-19, LSC, Bhera Enclave, Paschim Vihar, New Delhi.

3. On 29.6.2004, the appellant entered into an "agreement to sell" (Bayana Agreement) under which she agreed to sell the property described as follows :

"An undivided half share, second floor (without roof rights) of built up property bearing No. 8, Pocket and Block C9, Sector-8, Rohini, Delhi-110 085, built on a plot of land area measuring 158.98 Sq.m. and 50% share of M/s. Takshila Institute established in the above said property which is hereby agreed to be sold includes all rights, titles, interests, goodwill, electricity equipment, furniture, fixtures including passages, easements facilities privileges etc., which attached thereto or connected therewith."



Clause 13 of the said agreement clarified that the property agreed to be sold included the goodwill of the firm M/s. Takshila Institute, having its office at C-9/8, Sector 8, Rohini, Delhi-85 in which the first party is also the partner of 50% and included all rights, interest, claims, title, fittings, furniture, fixtures and all equipment.

4. Under the said agreement, the total consideration agreed was Rs. 21,50,000/- and the appellant received Rs. 750,000/- as advance. The appellant claimed that in pursuance of the said agreement, she executed a sale deed in regard to the immovable property for Rs. 200,000/- and that the respondent promised to pay the balance of Rs. 12 lakhs in regard to the other rights and interest agreed to be sold under agreement of sale dated 29.6.2004. She filed Suit No. 16/2006 in the District Court, Delhi for recovery of Rs.12 lakhs under the said agreement dated 29.6.2004, alleging that respondent had paid in all Rs. 9.5 lakhs towards the agreed price. The said Suit No. 16/2006 was decreed in favour of the appellant on 25.11.2006, directing respondent to pay Rs. 12 lakhs with interest at 7% per annum with effect from 30.8.2004.

5. Thereafter the appellant filed another suit - C.S. (O.S.) No. 302/2007 in the Delhi High Court against the respondent, for rendition of accounts for the period 5.4.2000 to 31.7.2004, in regard to the partnership firm of Takshila Institute constituted under deed of partnership dated 5.4.2000. In that suit, the appellant alleged that the said partnership was at will and it was dissolved by implication on 31.7.2004, when respondent filed Suit No. 438/2004 against the appellant (and others) for an injunction. She also sought a decree against the respondent for her share of profits in the said partnership and for a decree for Rs. 25.28 lakhs or higher amount in regard to the share of plaintiff with interest thereon. The said suit was resisted by the respondent. Three preliminary grounds of objections

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were raised in regard to the maintainability of the suit; (a) that the suit was barred by res judicata; (b) that the suit was barred under Section 69 of the Partnership Act, 1932, as it related to an

unregistered partnership; and (c) that the suit was liable to be dismissed for material suppression of facts and approaching the court with unclean hands. It was alleged that parties were close relatives and appellant being a government servant, was only a sleeping partner. It was contended that by the agreement of sale dated 29.6.2004, the partnership under deed dated 5.4.2000 was dissolved and all claims of appellant were settled.

6. The issues in the said suit were framed on 17.1.2008 with a direction that the first issue, extracted below, be treated as a preliminary issue :

"Whether the suit is barred by the principle of res judicata as issue raised in the suit has been directly and substantially been adjudicated between the plaintiff and the defendant in suit No. 16/2006 titled as Alka Gupta v. Narender Kumar Gupta vide an order dated 25.11.2006 by a competent court?

By order dated 13.3.2009, the trial bench (learned Single Judge of the High Court) held that the suit was liable to be dismissed summarily on the following grounds : (i) The appellant had abused the process of court; (ii) the appellant was an unscrupulous person and the suit was based on falsehoods; (iii) the partnership dated 5.4.2000 was illegal and unenforceable as appellant was a government servant; (iv) the suit was barred by Order 2, Rule 2 of the Code of Civil Procedure ('Code' for short); and (v) the suit was barred by principle of constructive res judicata. The suit was accordingly dismissed with costs of Rupees Fifty Thousand. In the preamble to the said order, the trial court observed that on 12.1.2009, when arguments were on the preliminary issue, it was clarified that arguments were being heard not only on the said preliminary issue, but also the question as to why independent of section 11 and Order 2, Rule 2 of the Code, the suit should not be dismissed summarily on the ground of re-litigation and abuse of process of court. It is further stated that on 16.1.2009, the statement of plaintiff (appellant herein) was recorded and arguments on various aspects were heard on 16.1.2009 and 21.1.2009.

7. Feeling aggrieved, the appellant filed an appeal. An appellate bench of the High Court, by the



impugned judgment dated 7.9.2009, dismissed the appeal. The appellate bench affirmed the decision of the trial bench. It however held that as it was agreeing with the learned Single Judge that the suit was barred by Order 2, Rule 2 of the Code and that the appellant had settled all her claims with the respondent under the Bayana Agreement dated 29.6.2004, it was not necessary to decide upon the question as to whether the partnership deed dated 5.4.2000 could be enforced in a court or not. The said order is challenged in this appeal by special leave. For the reasons following, we are of the view that the orders of the learned Single Judge and the Division Bench which ignore several basic principles of Code of Civil Procedure cannot be sustained.

I. A suit cannot be dismissed as barred by Order 2, Rule 2 of the Code in the absence of a plea by the defendant to that effect and in the absence of an issue thereon.

8. We may extract Order 2, Rules 1 and 2 of the Code for ready reference :

"1. Frame of suit: Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

2. Suit to include the whole claim : (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim : Where a plaintiff omits to sue in respect

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of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs : A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

The object of Order 2; Rule 2 of the Code is

two-fold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. Second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of Order 2, Rule 2 of the Code is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not however bar a second suit based on a different and distinct cause of action.

9. This Court in *Gurbux Singh v. Bhoora Lal* [AIR 1964 SC 1810] held :

"In order that a plea of a bar under O. 2, R. 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the latter suit is based there would be no scope for the application of the bar."

Unless the defendant pleads the bar under Order 2, Rule 2 of the Code and an issue is framed focusing the parties on that bar to the suit, obviously the court cannot examine or reject a suit on that ground. The pleadings in the earlier suit should be exhibited or marked by consent or at least admitted by both parties. The plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action. In this case, the respondent did not contend that the suit was barred by Order 2, Rule 2 of the Code. No issue was framed as to whether the suit was barred by Order 2, Rule 2 of the Code. But the High Court (both the trial bench and appellate bench) have erroneously assumed that a plea of res judicata would include a plea of bar under Order 2, Rule 2 of the Code. Res judicata relates to the



plaintiff's duty to put forth all the grounds of attack in support of his claim, whereas Order 2, Rule 2 of the Code requires the plaintiff to claim all reliefs flowing from the same cause of action in a single suit. The two pleas are different and one will not include the other. The dismissal of the suit by the High Court under Order 2, Rule 2 of the Code, in the absence of any plea by the defendant and in the absence of an issue in that behalf, is unsustainable.

II. The cause of action for the second suit being completely different from the cause of action for the first suit, the bar under Order 2, Rule 2 of the Code was not attracted.

10. The first suit was for recovery of balance price under an agreement of sale. The agreement dated 29.6.2004 was not an agreement relating to dissolution of the firm constituted under deed of partnership dated 5.4.2000, or settlement of the accounts of the said partnership. The agreement of sale made it clear that it related to sale of the undivided half share in the second floor at Rohini, 50% (property bearing No. 8, Pocket and Block C-9, Sector-8, Rohini, Delhi-110085) and 50% share of the business

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that was being run in that premises, that is premises at Rohini. The second suit was for rendition of accounts in pursuance of the dissolution of the firm of Takshila Institute constituted under deed of partnership dated 5.4.2000, carrying on business at Bhera Enclave, Paschim Vihar, Delhi-110087 and for payment of the amounts due on dissolution of the said firm.

11. The pleadings in the two suits make it clear that both parties proceeded on the basis that the partnership between appellant and respondent under deed dated 5.4.2000 was only in regard to the business run under the name and style of 'Takshila Institute' at Bhera Enclave, Paschim Vihar, Delhi-110087. The appellant proceeded on the basis that the property at Rohini and the business carried therein under the name of Takshila Institute, was not a part of the partnership business under deed dated 5.4.2000. Even the respondent in his written statement in the first suit asserted that the partnership dated 5.4.2000 between appellant and respondent did not extend to Takshila Institute at Rohini or other

places. In fact appellant clearly contended that respondent was carrying on business under the same name of Takshila Institute at Janakpuri, Ashok Vihar and Kalu Sarai in Delhi and also at Dehradun and Palampur, but they were not partnership businesses. The respondent in his written statement asserted that he alone was carrying on business at those places under the name of Takshila Institute. Therefore, the court could not, before trial, assume that the sale of appellant's share in the immovable property at Rohini and the goodwill and assets of the business carried on at Rohini under the name of Takshila Institute should be taken as relinquishment or retirement or settlement of share in regard to the partnership business of Paschim Vihar Takshila Institute.

12. The cause of action for the first suit was non-payment of price under the agreement of sale dated 29.6.2004, whereas the cause of action for the second suit was non-settling of accounts of a dissolved partnership constituted under deed dated 5.4.2000. The two causes of action are distinct and different. Order 2, Rule 2 of the Code would come into play only when both suits are based on the same cause of action and the plaintiff had failed to seek all the reliefs based on or arising from the cause of action in the first suit without leave of the court. Merely because the agreement of sale related to an immovable property at Rohini and the business run therein under the name of 'Takshila Institute' and the second suit referred to a partnership in regard to business run at Paschim Vihar, New Delhi, also under the same name of Takshila Institute, it cannot be assumed that the two suits relate to the same cause of action. Further, while considering whether a second suit by a party is barred by Order 2, Rule 2 of the Code, all that is required to be seen is whether the reliefs claimed in both suits arose from the same cause of action. The court is not expected to go into the merits of the claim and decide the validity of the second claim. The strength of the second case and the conduct of plaintiff are not relevant for deciding whether the second suit is barred by Order 2, Rule 2 of the Code.

III. The second suit was not barred by constructive res judicata.

13. The learned trial bench passed the order on



13.3.2009 on the preliminary issue (Issue No. 1) relating to res judicata. But there is absolutely no discussion in the order of the learned Single Judge in regard to the bar of res judicata except the following observation at the end of the order : "Of course it cannot be said that the present suit is barred by res judicata inasmuch as the said claims were not decided in that case. But the principle of constructive res judicata is applicable." This was not interfered by the appellate bench. Both proceeded on the basis that the suit was not barred by res judicata, but barred by principle of constructive res judicata without assigning any reasons. Plea of res judicata is a restraint on the right of a plaintiff to have an adjudication

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of his claim. The plea must be clearly established, more particularly where the bar sought is on the basis of constructive res judicata. The plaintiff who is sought to be prevented by the bar of constructive res judicata should have notice about the plea and have an opportunity to put forth his contentions against the same. In this case, there was no plea of constructive res judicata, nor had the appellant plaintiff an opportunity to meet the case based on such plea.

14. Res judicata means 'a thing adjudicated' that is an issue that is finally settled by judicial decision. The Code deals with res judicata in section 11, relevant portion of which is extracted below (excluding Explanations I to VIII) :

"11. Res judicata . - No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court".

Section 11 of the Code, on an analysis requires the following essential requirements to be fulfilled, to apply the bar of res judicata to any suit or issue :

- (i) The matter must be directly and substantially in issue in the former suit and in the latter suit.
- (ii) The prior suit should be between the same parties or persons claiming under them.

(iii) Parties should have litigated under the same title in the earlier suit.

(iv) The matter in issue in the subsequent suit must have been heard and finally decided in the first suit.

(v) The court trying the former suit must have been competent to try particular issue in question.

To define and clarify the principle contained in Section 11 of the Code, eight Explanations have been provided. Explanation I states that the expression 'former suit' refers to a suit which had been decided prior to the suit in question whether or not it was instituted prior thereto. Explanation II states that the competence of a court shall be determined irrespective of whether any provisions as to a right of appeal from the decision of such court. Explanation III states that the matter directly and substantially in issue in the former suit, must have been alleged by one party or either denied or admitted expressly or impliedly by the other party. Explanation IV provides that any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. The principle of constructive res judicata emerges from Explanation IV when read with Explanation III both of which explain the concept of "matter directly and substantially in issue".

15. Explanation III clarifies that a matter is directly and substantially in issue, when it is alleged by one party and denied or admitted (expressly or impliedly) by the other. Explanation IV provides that where any matter which might and ought to have been made a ground of defence or attack in the former suit, even if it was not actually set up as a ground of attack or defence, shall be deemed and regarded as having been constructively in issue directly and substantially in the earlier suit. Therefore, even though a particular ground of defence or attack was not actually taken in the earlier suit, if it was capable of being taken in the earlier suit, it became a bar in regard to the said issue being taken in the second suit in view of the principle of constructive res judicata. Constructive res judicata deals with grounds of attack and defence which ought to have been raised, but not raised, whereas Order 2, Rule 2 of



the Code relates to reliefs which ought to have been

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claimed on the same cause of action but not claimed. The principle underlying Explanation IV to Section 11 becomes clear from *Greenhalgh v. Mallard* [1947 (2) All ER 257] thus :

"...it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

(Emphasis supplied)

In *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra* [1990 (2) SCC 715] : (AIR 1990 SC 1607 : 1991 AIR SCW 2226), a Constitution Bench of this Court reiterated the principle of constructive *res judicata* after referring to *Forward Construction Co. v. Prabhat Mandal* [1986 (1) SCC 100] : (AIR 1986 SC 391) thus :

"an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence."

In this case the High Court has not stated what was the ground of attack that plaintiff-appellant ought to have raised in the first suit but had failed to raise, which she raised in the second suit, to attract the principle of constructive *res judicata*. The second suit is not barred by constructive *res judicata*.

IV. A suit cannot be dismissed without trial merely because the court feels dissatisfied with the conduct of the plaintiff.

16. Code of Civil Procedure is nothing but an exhaustive compilation-cum-enumeration of the principles of natural justice with reference to a

proceeding in a court of law. The entire object of the Code is to ensure that an adjudication is conducted by a court of law with appropriate opportunities at appropriate stages. A civil proceeding governed by the Code will have to be proceeded with and decided in accordance with law and the provisions of the Code, and not on the whims of the court. There are no short-cuts in the trial of suits, unless they are provided by law. A civil suit has to be decided after framing issues and trial permitting the parties to lead evidence on the issues, except in cases where the Code or any other law makes an exception or provides any exemption.

17. The Code enumerates the circumstances in which a civil suit can be dismissed without trial. We may refer to them (not exhaustive) :

(a) Dismissal as a consequence of rejection of plaint under Order 7, Rule 11 of the Code in the following grounds : (i) where it does not disclose a cause of action; (ii) where the relief in the plaint is undervalued and plaintiff fails to correct the valuation within the time fixed; (iii) where the court fee paid is insufficient and plaintiff fails to make good the deficit within the time fixed by court ; (iv) where the suit appears from the statement in the plaint to be barred by law; (v) where it is not filed in duplicate and where the plaintiff fails to comply with the provisions of Order 7, Rule 9 of the Code.

(b) Dismissal under Order 9, Rule 2 or Rule 3 or Rule 5 or Rule 8 for non-service of summary or non-appearance or failure to apply for fresh summons.

(c) Dismissal under Order 11, Rule 21 for non-compliance with an order to answer interrogatories, or for discovery or inspection of documents.

(d) Dismissal under Order 14, Rule 2(2) where issues both of law and fact arise in the same suit and the court is of opinion that the case or any part thereof may be disposed of on an issue of law only and it

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tries such issue relating to jurisdiction of the court or a bar to a suit created by any law for the time being in force first and dismisses the suit if the



decision on such preliminary issue warrants the same.

(e) Dismissal under Order 15, Rule 1 of the Code when at the first hearing of the suit it appears that the parties are not at issue on any question of law or fact.

(f) Dismissal under Order 15, Rule 4 of the Code for failure to produce evidence.

(g) Dismissal under Order 23, Rules 1 and 3 of the Code when a suit is withdrawn or settled out of court.

18. The following provisions provide for expeditious disposal in a summary manner :

(i) Order V, Rule 5 of the Code requires the court to determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit (and the summons shall have to contain a direction accordingly). In suits to be heard by a court of small causes, the summons shall be for the final disposal of the suit.

(ii) Order 15, Rule 3 of the Code provides where the parties are at issue on some question of law or of fact, and issues have been framed by the court as hereinbefore provided, if the court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit. (But where the summons has been issued for the settlement of issues only, such a summary course could be adopted only where the parties or their pleaders are present and none of them objects to such a course).

(iii) Order 37, Rule 1 read with Rules 2 and 3 of the Code relating to summary suits.

19. But where the summons have been issued for settlement of issues, and a suit is listed for consideration of a preliminary issue, the court cannot make a roving enquiry into the alleged

conduct of the plaintiff, tenability of the claim, the strength and validity and contents of documents, without a trial and on that basis dismiss a suit. A suit cannot be shortcircuited by deciding issues of fact merely on pleadings and documents produced without a trial. In this case; the learned Single Judge has adjudicated and decided questions of fact and rendered a judgment, without evidence tested by cross-examination. We extract below some of the reasonings, findings, assumptions and conclusions of the learned Single Judge leading to the dismissal of the suit when hearing a preliminary issue relating to res judicata, thereby demonstrating assumption of a jurisdiction not vested in it and also acting in the exercise of its jurisdiction illegally and with material irregularity :

"What emerges from the aforesaid is that the plaintiff at the time of inception of the partnership and till date is a government teacher and under the terms of her employment was not entitled to enter into the partnership and was not entitled to earn any profits therefrom. Not only under the terms of her employment, the plaintiff before the Service Tax Authorities also represented that she had only academic interest. It can only mean that she had no profit interest in the partnership. Though the plaintiff has denied that she has filed the clearance certificate aforesaid with the government school in which she is employed but the purpose of plaintiff obtaining the said clearance certificate from the defendant can only be to use the same in the event of any complaint of breach of terms of employment being made against her.

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The question which arises for adjudication

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is whether a litigant can be permitted to take a stand in the court, diametrically opposite to the stand of that litigant elsewhere. Can there be different stands before the government as employer and before the Taxation Authorities and before the court. Should the courts permit such stand to be taken in the course of judicial proceedings and should the courts come to the rescue of such a litigant in recovering dues which that litigant elsewhere has represented are not due to her.



The aforesaid circumstances leave no manner of doubt that the plaintiff in contravention of the terms of her employment was carrying on business as a partner with the defendant. The question is of enforcement of such a partnership and or the terms thereof by the court.

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In the present case the condition in the term of the employment of the plaintiff as a government teacher, admittedly prohibit her from carrying on any business activity or other vocation for profits. Such condition has been imposed to ensure that the teachers of the government school devote their full energy and time to developing the young minds, rather than treating the government service as a mere source of income and utilizing their time and skill in earning/making money elsewhere. The plaintiff by entering into the agreement of partnership with the defendant had clearly violated her terms of employment and this Court cannot come to her assistance to enable her to earn profits which she otherwise is not entitled. The plaintiff has admitted to having not shown any profits whatsoever in her Income Tax return. It is inconceivable that the plaintiff who has claimed to be in partnership since the year 1999 or 2000 would not have earned any profits from the partnership and/or if would not have earned would have sat quietly for four years. The plaintiff cannot be permitted to take different stands before different fora. The condition/term of employment prohibiting the plaintiff from entering into partnership is found to be in public interest and the action of the plaintiff of breaching/violating the same is found to be immoral and opposed to public policy. The breach is not found to be trivial or venial. Further, the conduct of the plaintiff thereafter also, as noted above is found to be of subterfuge and plaintiff has been found to be misstating facts. The plaintiff is found to be an unscrupulous person and her case is found to be based on falsehood. This Court refuses to come to the aid of plaintiff and her case is liable to be dismissed summarily.

That even on the facts of this case, I have no doubt that the plaintiff has abused the process of the court. The plaintiff in the Bayana Agreement aforesaid had clearly agreed to the sum of Rs.

21.50 lacs towards her share in the partnership firm inclusive of the value of the Rohini property where the partnership business was being carried on. As far as the Paschim Vihar property is concerned, the issue with respect whereto was raised, the same also finds mention in the said Bayana Agreement and the receipt. The conduct of the plaintiff also shows that all accounts had been settled and no accounts remained to be taken and for which purpose the suit had been filed. Had the accounts not been settled, the question of the plaintiff instructing the bank to delete her name from the account in the name of the firm and of receiving the original Bayana Agreement and of obtaining the clearance certificate aforesaid would not have arisen. The case set up by, the plaintiff is contrary to all the admitted documents.

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I find the present case to be clear beyond all reasonable doubts. The Bayana Agreement and Receipt admittedly executed by plaintiff and the averments of plaintiff in plaint in earlier suit instituted by plaintiff, permit of no controversy. The consideration mentioned therein was in settlement of all claims of plaintiff with respect to her share in partnership. The

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contemporaneous conduct of plaintiff, of statement on 13th August, 2004 in suit No. 438/2004 instituted by defendant; of taking clearance certificate dated 13th August, 2004 from defendant, of having her name as signatory deleted from the bank account of firm are also in consonance with said documents. The facts of this case do not require any opportunity for leading evidence to be given to the plaintiff. This Court cannot put a case contrary to such documents and conduct to be put to trial. The explanations now given during arguments do not form the basis of suit and pleadings."

(Emphasis supplied)

The observation of the learned Single Judge that "the facts of this case do not require any opportunity for leading evidence to be given to the plaintiff violates Order 15, Rule 3 of the Code. Where summons have been issued for settlement of issues and where issues have been settled, unless



the parties agree, the court cannot deny the rights of parties to lead evidence. To render a final decision by denying such opportunity would be highhanded, arbitrary and illegal.

20. Even the Division Bench committed the same error. We extract below para 14 of the impugned order which shows that the decision was based on assumption without basis and in the absence of evidence freely referring to and relying upon unexhibited documents :

"This is not the case of the plaintiff/appellant that the firm was maintaining separate accounts, one for the business being run by it in Rohini and the other for the business being run in Paschim Vihar. Ordinarily, when there is a Settlement between the partners of the firm whereby they agree to part ways, the Settlement effected between them would cover accounts of the entire business being run by them in partnership and it would not be confined only to one part of the business. This is more so when the document executed between the parties at the time of parting ways and setting the disputes does not reserve any right in favour of the outgoing partner, to receive any further payment from the partner who retains the business of the erstwhile firm. In none of the documents executed between the parties, there is an averment that the accounts of business being run in Paschim Vihar had not been settled or that the plaintiff/appellant would not, in addition to the sum referred in the document, also be entitled to share of the profit earned by the firm from its business in Paschim Vihar. Vide endorsement made on the receipt dated 29.6.2004, the husband of the appellant recorded that Paschim Vihar Institute Deed would be settled in the name of Dr. Rashmi Gupta for the consideration of Rs. 15 lakhs. This is yet another proof of the fact that the matter relating to Paschim Vihar Institute had also been finally settled between the parties. During the course of arguments before us, it was contended by learned counsel for the appellant that the endorsement was made by the husband of the appellant without authority from her. Since we noticed a gentleman giving instructions to the learned counsel for the appellant, during the course of the hearing before us, we asked her as to who the gentleman was and we were told that he was none other than the husband of the appellant. This leaves no doubt in our mind that the

husband of the appellant was acting on authority from her when he made endorsements on the Bayana Agreement and Receipt dated 29.6.2004. The shifting stands taken before him have been noted in detail, by the learned Single Judge.

(Emphasis supplied)

21. The High Court recorded factual findings on inferences from the plaintiff's (appellant) conduct and branded her as an unscrupulous person who abuses the process of court and as a person who utters falsehoods and manipulates documents without there being a trial and without there being an opportunity to the plaintiff to explain her conduct. To say the least, such a procedure is opposed to all principles of natural justice embodied in the Code of

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Civil Procedure. At all events, the alleged weakness of the case of the plaintiff or unscrupulousness of plaintiff are not grounds for dismissal without trial.

22. We also fail to understand how costs of Rs. 50,000/- could be levied. This Court has repeatedly stated that in dealing with civil suits, courts will have to follow the provisions of Code of Civil Procedure in levying costs.

23. This order should not be construed as a finding on the conduct of the appellant one way or the other. We have examined the matter only for the limited purpose of finding out whether the High Court had proceeded in accordance with law and the provisions of Code of Civil Procedure. If on evidence, the conduct of the plaintiff or the defendant is found to be unscrupulous or unbecoming, it is open to the court at that stage to decide upon the consequences that should be visited upon her or him.

24. We therefore allow this appeal, set aside the order of the Division Bench of the High Court dated 7.9.2009 affirming the order dated 13.3.2009 of the learned Single Judge and restore the suit to the file of the High Court with a direction to decide the same in accordance with law, after giving due opportunity to the parties to lead evidence.



Appeal allowed.

TRUE COPY

A handwritten signature in blue ink, appearing to be 'S. K. Singh'.

ANNEXURE A-24



All India Reporter

AIR 2019 SC (Supp) 365
 SUPREME COURT
 : AIROnline 2019 SC 495
 A. K. SIKRI , J. and S. ABDUL
 NAZEER , J. and M. R. SHAH , J.

Civil Appeal No. 5016 of 2016 With C. A. Nos. 8002-8003, 12326, 9227, 10995, 10993, 10994, 10992, 12157, 12152, 12156, 12158, 12160, 12159 of 2016, C. A. Nos. 4923-4924, 1343, 14966 of 2017, C. A. No. 2246 of 2018, D/- 5 - 3 - 2019

Mantri Techzone Pvt. Ltd. v. Forward Foundation and Ors.

(A)National Green Tribunal Act (19 of 2010), S.15 - Compensation and restriction - Allotment of land for Software Technology Park, Commercial and Residential complex, hotel and multilevel car parks - National Green Tribunal's order enlarging buffer zone limits around lakes and water bodies in Bengaluru - Definite possibility of environment, ecology, lakes, and wetland being adversely affected by these projects - Conclusion arrived by Tribunal supported by documents, Committee's report and inspection note of the Expert Members - Imposition of penalty on builder are valid and sustainable and does not suffer from any perversity.

In the present case Tribunal has pointed out on the basis of the Committee report appellant had encroached 3 acres 10 guntas of Bellandur Lake and a boundary wall has been raised around the said land. The Tribunal has also found that the project proponents have violated the Master Plan. They have not obtained the mandatory clearance from the Sensitive Zone Committee constituted by the Government of Karnataka. It is also clear from the materials on record that there are several other violations by the project proponents. There is a definite possibility of

environment, ecology, lakes, and wetland being adversely affected by these projects. Findings arrived at by the Tribunal are not only based on the documents that were available on record but also on the pleadings that were made by the parties buttressed by the Committee's report and the inspection note of the Expert Members. Therefore, the directions passed and the penalty imposed by the Tribunal on both project proponents are valid and sustainable and do not suffer from any perversity.

(Paras52 54)

(B)National Green Tribunal Act (19 of 2010), S.14, S.15 - Limitation - National Green Tribunal's for enlarging buffer zone limits around lakes and water bodies in Bengaluru - Environmental degradation would give rise to independent cause of action and thus petition under S. 15 and not under S. 14 to be filed within 5 years from date on which cause for such compensation or relief first arose.

It was an application where a specific prayer has been made with reference to Lake Development Authority's ('LDA') Report and the Ministry of Environment, Forest and Climate Change ('MoEF') Monitoring Committee Report for restoration of ecologically sensitive land and for maintaining the sensitive in its natural condition so that the ecological balance of the area is not disturbed. It is clear from the documentary evidence supported by data, that the project proponents have committed breaches and the implementation of the project is bound to have serious

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adverse impact on the ecology, hydrology and the environment in the catchment area of Bellandur Lake. The environmental degradation as established from the documents would give rise to an independent cause of action. Therefore, this was a petition under Section 15 of the Act



and thus it could be filed within 5 years from the date on which the cause for such compensation or relief first arose.

(Para49)

(C)Civil P.C. (5 of 1908), S.11 - Res judicata - Writ petition filed by respondent subsequently impleaded - Plea of Res judicata - Neither parties are common nor issues are same in application and in writ petitions - No commonality of cause of action or likelihood of conflict between judgments - Prayers and geneses of respective proceedings are entirely distinct and different in their scope and relief -Issues before Tribunal relate to environment, ecology and its restoration while proceedings before High Court relate acquisition of land, its allotment and transfer to third party - Application not barred by Res judicata.

(Paras57 59)

Cases Referred	Chronological Paras
AIR 2007 SC 1819 : 2007 AIR SCW 3032	44
AIR 1962 SC 1314	37

Udaya Holla, Adv. General, Shashi Kiran Shetty, Maninder Singh, Dharuv Mehta, Mukul Rohatgi, Neeraj Kishan Kaul, R. Venkataramani, Sajan Poovayya, Ms. Kiran Suri, Basavaprabhu S. Patil, Sr. Advs.. Mahesh Thakur, Ms. Anuparna Bordoloi, Savyasachi Sahai, Ms. Vipasha Singh, Gaurav Goel, V.N. Raghupathy, M/s. Devasa and Co., Devashish Bharuka. Justine George, Prabhas Bajaj, Ms. Kanika S., Ravi Bharuka, Ms. Sarushree, Satish Kumar, Gaurav Agrawal, George Thomas, Anurag Gharote, A.S. Bhasme, Abid Ali Beeran P, Nishanth Patil, Rohit Prasad, Ananth Suresh, S.K. Kulkarni, M. Gireesh Kumar, Ankur S. Kulkarni, Shekhar G. Devasa, Bhuvanendra K.V., S. Mahesh, Manish Tiwari, Luv Kumar, Praveen Vignesh, M/s. Devasa and Co., Priyadarshi Banerjee, Pratibhanu Singh Kharola, Saransh

Jain, Meka V. Ramakrishna Madhavam Sharma, Ms. Sriparna Dutta Choudhury, Udayaditya Banerjee, Mahesh Agrwal, Ankur Saigal, Sarans Jain, Ms. Tanvi Manchanda, Nithin P., Ms. Priyanka M.P., E. C. Agrawala, Devashish Bharuka, S.J. Amith, Ms. Rithika Gambir, A. Shwarya Kumar, Dr. (Mrs.) Vipin Gupta, Parikshit P. Angadi, Chinmay Deshpande, Geet Ahuja, Parikshit Angadi, Anup Kumar, O. P. Bhadani, Rajesh Mahale, Anand Sanjay M. Nuli, Dharm Singh, Sandeep Grover, Ms. Pankhuri Bhardwaj, Pai Amit, Advs. with them for Appearing Parties.

Judgement

1. S. ABDUL NAZEER, J. :-These appeals have been preferred under Section 22 of the National Green Tribunal Act, 2010 (for brevity 'NGT Act') challenging the judgment and order dated 07.05.2015 and 04.05.2016 respectively passed by the Principal Bench of the National Green Tribunal, New Delhi (for short 'the Tribunal').

2. The appellants in Civil Appeal Nos. 5016 of 2016 and 8002-8003 of 2016 are respondent Nos. 9 and 10 in the Original Application No. 222 of 2014 (hereinafter referred to as 'the respondent Nos. 9 and 10'). The said Application was filed by respondent Nos.1 to 3 herein (hereinafter referred to as 'the applicants'). Respondent Nos. 4 to 7 in these appeals are the State of Karnataka and other authorities. They were arrayed as respondent Nos. 1 to 4 in the application. Respondent Nos. 12 and 13 herein were subsequently impleaded in the application (for short 'the impleaded respondents').

3. The State of Karnataka has filed Civil Appeal Nos. 4923-4924 of 2017, challenging the general condition and direction No.(1) contained in the order of the Tribunal dated 04.05.2016.

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The other appeals have been filed by different entities, who were not parties before the Tribunal challenging the order of the Tribunal dated 04.05.2016 insofar as it directs a buffer/green zone of 75 metres in respect of lakes, 50 metres in respect of primary Rajakaluves, 35 metres in case of secondary Rajakaluves and 25 metres in case of tertiary Rajakaluves with retrospective effect. According to them, they are adversely affected by the aforesaid condition in the impugned order.

4. The applicants filed O.A. No.222 of 2014 by contending that ecologically sensitive land was allotted by the Karnataka Industrial Area Development Board (for short 'the KIADB') to respondent Nos. 9 and 10 vide Notifications dated 23.04.2004 and 07.05.2004 respectively for setting up of Software Technology Park, Commercial and Residential complex, hotel and Multi Level Car Parks. The Master Plan formulated by the Bangalore Development Authority (for short the 'BDA'), identifies the allotted land as 'Residential Sensitive', though the same land was identified in the Draft Master Plan as 'Protected Zone'. It was further contended that the Revenue Map in respect of properties as referred in the Land Lease Agreements has multiple Rajakaluves (Storm Water Drains). The development projects in question sit right on the catchment and wetland area which feeds the Rajakaluves, which in turn drains rain water into Bellandur Lake. The project will thus encroach two Rajakaluves of 1.38 acres and 1.23 acres each.

5. The Satellite Digital Images of the area from the year 2000 to 2012 show encroachment upon these Rajakaluves, as well as the manner in which they are covered by the construction. The State Level Expert Appraisal Committee (for short 'SEAC'), which was to assist the State Level Environment Impact Assessment Authority (for short 'SEIAA'), held its meetings on various dates to examine the project. It had required the appellant No.9 to submit a revised NOC

from the Bangalore Water Supply and Sewerage Board (for short 'BWSSB') for the project in question. It was also observed that the project lies between the Bellandur Lake and the Agara Lake. Respondent No.9 was also directed to take protective measures to spare the buffer zone around Rajakaluves and also to commit that no construction would be carried out in the buffer zone. In the meeting of 11.11.2011, it was recorded that the project proposes car parking facility for 14,438 cars in that environmentally sensitive area.

6. It was alleged that NOC was issued covering an area of 17,404 sq. mtrs. whereas the built up area, as noted by SEAC, is 13,50,454.98 sq. mtrs. Respondent No.9 obtained NOC from BWSSB by concealing material facts and by misrepresenting that NOC is required only for residential units which form a very minuscule part of the total project. Respondent No.9 had approached the Karnataka State Pollution Control Board (for short 'the KSPCB') for obtaining clearance, which was granted on 04.09.2012 subject to the fulfillment of the conditions stated in the consent order which included leaving the buffer zone all along the valley and towards the lake. It is further contended that the grant of consent by the KSPCB to respondent No.9 also contained a condition with regard to obtaining Environmental Clearance from the Competent Authority and no construction was to commence until such clearance was granted.

7. Applicants further contended that respondent No.9 violated the conditions and commenced construction of the project. There was also violation of the stipulations stated in the approval of SEAC in relation to buffer zone and construction over Rajakaluves. The construction had been commenced over the ecologically sensitive area of the lake

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catchment area and valley, with utter disregard to the statutory compliances. Referring to these blatant irregularities, the applicant submitted that the conversion of land from 'Protected Zone' to 'Residential Sensitive Area' is violative of the law. The project is right in the midst of a fragile wetland area which ought not to have been disturbed by the development activity. The fragile environment of the catchment area has been exposed to grave and irreparable damage. It has severely disturbed and damaged the Rajakaluves. Respondent Nos. 9 and 10 started to level the land by filling it with debris, thus causing damage to the drains. The conditions with regard to no-disturbance to the Storm Water Drains, natural valleys and buffer area in and around the Rajakaluves have been violated. It has in turn, affected the ground water table and bore wells which are the only source of water for thousands of households. Fishing and agriculture which depends on Bellandur Lake are also severely affected. The construction over the wetland between the two lakes is in violation of Wetlands (Conservation of Management) Rules, 2010 (for short 'Rules of 2010').

8. It was submitted that SEIAA in its meeting dated 29.09.2012, decided to close the file pertaining to respondent No. 10 due to non-submission of requisite information and the application thereof was rejected in November, 2012. Despite the rejection, respondent No.10 commenced construction on the project in full swing.

9. The applicants also relied upon the findings of the Joint Legislative Committee, constituted under the Chairmanship of Shri A.T. Ramaswamy in the month of July 2005, which stated that there were 262 water bodies in the Bangalore city in 1961 which drastically came down because of trespass and encroachments. It was also affirmed that about 840 kms. of Rajakaluves have been encroached upon in several places and have

become sewage channels. The applicants also relied on the Report of the Committee under the Chairmanship of Hon'ble Mr. Justice N.K. Patil suggesting immediate remedial action in order to remove encroachments on the lake area and the Rajakaluves and preservation of the lakes in and around Bangalore city. It was further contended that other Expert Committees, including Lakshman Rau Expert Committee had also submitted proposals for preservation, restoration or otherwise of the existing tanks in Bangalore Metropolitan Area which recommended to maintain good water surface in Bellandur tank and to ensure that the water in the tank is not polluted. The Central Government in August 2013 had issued an advisory on conservation and restoration of water bodies in the urban areas. The applicants claim to have obtained monitoring report of the project by respondent No.5, Ministry of Environment and Forests, through RTI on 21.08.2013. The report dated 14.08.2013 revealed that the project proponents are in clear breach of their undertaking to carry out all precautionary measures to ensure that the Bellandur lake is not affected by the construction and operational phase of the project. This approach is particularly with regard to the major alteration in natural sloping pattern of the project site and natural hydrology of the area.

10. The Lake Development Authority (for short 'the LDA'), after inspection in the catchment area of the Bellandur Lake submitted its report dated 12.06.2013 which confirms that the project will have disastrous impact, including deleterious effect on the Bellandur Lake. This report was brought to the notice of KIADB. The LDA has also opined that the land should be classified and maintained as sensitive area. The KIADB called upon respondent No. 9 to comply with the rules of Ecology and Environment Department and to obtain necessary approval from KSPCB and LDA.



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Despite all this, respondent Nos. 9 and 10 have continued with their illegal constructions and have caused damage to the ecology and the environment by irreparably jeopardizing the ecological balance in this sensitive area. The applicants rely upon the Revised Master Plan, 2013 issued by BDA which specifically provides that 30 meters buffer zone is to be created around the lakes and 50 meters buffer zone to be created on either side of the Rajakaluves. It was also pleaded that respondent No. 9 had obtained the NOC from BWSSB only with regard to residential units and not for the entire project and that the Environmental Clearance obtained by respondent No.9 is based upon the partial NOC issued by BWSSB which itself is a misrepresentation. It was contended that the projects are bound to create water scarcity as the requirement of the project of respondent No. 9 alone is approximately 4.5 million liters per day, i.e. 135 million liters per month, which is more than what the BWSSB supplies to the entire Agaram Ward. The construction of respective projects by respondent Nos.9 and 10 respectively, besides having commenced without permission from the authorities and being in violation of the conditions imposed for grant of permission/consent, is bound to damage the environment, resulting in change in the topography of the area, posing potential threat of extinction of the Bellandur lake, causing traffic congestion, shortening and wiping out the wetlands, extinction of Rajakaluves and causing serious and potential threat of flooding and massive scarcity of water in the city of Bangalore, particularly the areas located near the water bodies.

11. Respondent No.9 in its objections contended that it was incorporated with the objective of establishing an Information Technology Park and R and D Centre with facilities such as residential complexes, parks, education centres

and other allied infrastructure within a single compound. It had submitted the proposal to establish such Information Technology Park and other facilities to the State Government and requested for allotment of land for the project. Its proposal was considered in 78th High Level Committee meeting held on 21.06.2000 and after examining the proposal, it was approved by the Government on 06.07.2000. Before the State High Level Committee, it had informed that its requirement was 110 acres of land, 25 MW of power from the Karnataka Power Transmission Corporation Limited (for short the 'KPTCL'), and four lakh litres of water per day from BWSSB. The lands for the project were initially notified vide Notification dated 10.02.2004. Subsequently, the lands were allotted vide letter dated 28.06.2007 for which Lease-cum-Sale Agreement was signed on 30.06.2007. Considering the overall development of the State of Bangalore, this respondent proposed a Mixed Use Development Project consisting of an Information Technology Park, residential apartments, retail, hotel and office buildings with a total built up area of 13,50,454.98 sq mtrs. The Project was conceived as a zero waste discharge project. The project is located one and a half kms. away from the southern-side of the Bellandur Lake. Towards the North, adjacent to the Project, lies vast stretches of lands belonging to the Defence and towards the East, lies the Project of respondent No. 10 and another developer is also developing a project on the western side. It has obtained sanction plan on 04.07.2007 which was renewed from time-to-time.

12. Respondent No. 9 claims that it has obtained NOC from Airport Authority of India on 09.04.2010. Bharat Sanchar Nigam Ltd., vide its communication dated 16.04.2010, granted clearance for the project construction. BWSSB, vide its communication dated 26.04.2011 issued NOC for portion of the proposed construction to be built.



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The Bangalore Electricity Supply Company Ltd. also granted NOC for arranging power supply to the proposed residential and commercial building in its favour. Environmental Clearance was granted by SEIAA vide communication dated 17.04.2012. The Director General of Police has issued NOC and KSPCB vide order dated 04.09.2012 accorded its consent for construction of the said project subject to the conditions stated therein. It was further stated that after grant of the Environmental Clearance on 17.09.2012, the same was published in the leading newspapers "Kannada Prabha" and "The Indian Express" on 12.03.2012 and 14.03.2014 respectively.

13. It submitted a modified the building plan which was approved by KIADB vide its letter dated 30.08.2012, which was valid up to 10.08.2014. It started the construction of the project in November, 2012, taking all precautions as per terms and conditions of the orders issued by the competent authorities. It was also submitted that it has raised the constructions in accordance with the plans and conditions of the Environmental Clearance and consent orders and that it has not violated any of the conditions and has not caused any adverse impact on the ecology and environment of the area. It has denied the contention that its construction activity has blocked the Rajakaluves and has adversely affected the lake. It has already spent a sum of Rs. 306.73 crores on the project towards procurement of men and materials, machinery, infrastructure, medical and sanitary facilities, etc. and that it has availed financial assistance from various banks and financial institutions towards the construction and execution of the project and that various contracts have been signed with the third parties. It is specifically pleaded that the petition is barred by time and suffers from defects and laches.

14. Respondent No.10 pleaded that the applicants raised multifarious proceedings against it which is an abuse of the process of law and mala fide. It had submitted a revised proposal in respect of its project in question and to obtain fresh clearance on 31.08.2007 with an investment of Rs. 179.22 crores. The State High Level Committee had cleared the project which was communicated to it on 25.01.2008. Its properties are located in between Bellandur Lake and Agara Lake but there are no primary storm water drains and secondary storm water drains that exist in its properties. It has clearances from various authorities, including Environmental Clearance and consent for establishment.

15. KIADB stated that after possession of the land was handed over to respondent Nos. 9 and 10, one year time was granted for the implementation of the project which was extended from time-to-time. The building drawings were approved on 04.07.2007, and the modified building drawings were approved on 26.04.2011 and 30.08.2012 with specific conditions. In its meeting held on 16.07.2013, it was resolved to inform respondent No. 9 to fully comply with the Ecology and Environment Rules and to obtain approvals from the LDA and KSPCB. LDA vide its letter dated 24.09.2013, had informed KIADB that the construction activity in the catchment area in the Bellandur Lake could drastically impact the Lake with deleterious effects and asked it to stop construction activity of respondent Nos. 9 and 10. However, the validity of the building drawings was again extended up to 10.08.2014. The Lokayukta on 17.12.2013 had written a letter in respect of complaint filed by the South East Forum for Sustainable Development where it had been averred that the decision had been taken by the Board on 21.12.2013 to keep in abeyance the approval accorded and even the re-validations of plans. This was also informed to respondent No.9. The Board took a decision



which was communicated to respondent No.9 on 02.01.2014,

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wherein it asked the respondent No.9 to stop all construction activities on the allotted lands. The said communication was challenged by respondent No. 9 and on the stop-work notice, stay was granted by the High Court of Karnataka. The stop-work notice dated 23.12.2013 issued by Bruhat Bengaluru Mahanagara Palike (for short 'BBMP') was also stayed vide order dated 21.01.2014. The proposal submitted by respondent Nos. 9 and 10 had been approved by the State Government. The land allotted to respondent Nos. 9 and 10 does not consist of any Rajakaluves.

16. The LDA took a stand that it was not at all aware of the project initiated by KIADB. It came to know about the entire project only when certain newspaper reports surfaced during the month of June, 2013 and till that time it was in the dark. After the complaints, it inspected the Bellandur Lake and the Agara Lake on 12.06.2013 and prepared an inspection report. In the report, it was noticed that large scale construction activities were going on in the catchment area of Bellandur Lake and that there was a change in the land use, which in turn has directly affected the catchment of Bellandur Lake. The wetland area of Agara Lake had also shrunk, which originally formed the irrigation area for the adjoining agricultural lands. Therefore, it had questioned the decision of KIADB vide letter dated 06.07.2013 and even requested it to stop the construction activity and to re-classify the land as non-SEZ area. It was thereafter on 31.08.2013, that respondent No. 9 wrote a letter for according approval for the proposed development projects. However, vide its letter dated 23.09.2013, LDA informed KIADB that it had no authority to grant or deny construction projects, but it

also communicated its objections to KIADB mentioning that construction activity would be in contravention of the directions of the Supreme Court. Despite these warnings, KIADB granted approval to the extension of the building drawings of the project in favour of the project proponents with certain conditions, like ensuring that all natural valleys, valley zone, irrigation tanks and existing roads leading to villages in the said land should not be disturbed. Further, the natural sloping pattern of the project site was not to be altered and the lakes and other water bodies within and/or at the vicinity of the project area should be protected and conserved. Despite the objections, the plans were approved and approvals were extended from time-to-time. It has taken a categorical stand that the projects as approved by the KIADB would have adverse impact on Bellandur and Agara Lakes.

17. On the basis of the pleadings of the parties, the Tribunal framed the following questions for consideration and determination:

1. Whether the application filed by the applicants and supported by respondent Nos. 11 and 12, is barred by time and thus, not maintainable?
2. Whether the petition as framed and reliefs claimed therein, disclose a cause of action over which this Tribunal has jurisdiction to entertain and decide the application under the provisions of the NGT Act, 2010?
3. Whether the present application is barred by the principle of res judicata and/or constructive res judicata?
4. Whether the application filed by the applicants should not be entertained or it is not maintainable before the Tribunal, in view of the pendency of the Writ Petitions 36567-74 of 2013, before the Hon'ble High Court of Karnataka? and
5. What relief, if any, are the applicants entitled to? Should or not the Tribunal, in the interest



of environment and ecology issue any directions and if so, to what effect?

18. The Tribunal by its order dated 07.05.2015 at Annexure A-2, disposed of the applications with the following directions:

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1) We decline to pass any direction or order to stop further progress and/or demolition of the project or any part thereof at this stage. However, we constitute the following Committee to inspect the projects in question and submit a report to the Tribunal inter alia but specifically on the issues stated hereinafter:

a) Advisor in the Ministry of Environment and Forest dealing with the subject of wetlands.

b) CEO of the Lake Development Authority, Karnataka State.

c) Chief Town Planner of BBMP, Bangalore.

d) Chairman of SEAC which recommended the grant of Environmental Clearance to the projects in question.

e) Sr. Scientist (Ecology) from the Indian Institute of Sciences, Bangalore.

f) Dr. Siddharth Kaul, former Advisor to MoEF.

g) A Senior Officer from the National Institute of Hydrology, Roorkee.

2) Member Secretary of the Karnataka State Pollution Control Board shall act as the Convener of the Committee and would submit the final report to the Tribunal.

3) The Committee shall inspect not only the sites where the projects in question are located but even other areas of Bangalore which the Committee in its wisdom may consider appropriate, in order to examine the

interconnectivity of lakes and impact of such activities upon the water bodies with particular reference to lakes. 4) The Committee shall submit whether the projects in question have encroached upon or are constructed on the wetlands and Rajakaluves. If so, are there any adverse environmental and ecological impact of these projects on the lake, particularly Bellandur Lake and Agara Lake, as well the Rajakaluves. The report should specify, if any Rajakaluves have been covered by the construction activities of respondent Nos. 9 and 10 or by any of the projects in the area in question.

5) Committee should submit in its report, if these projects have any adverse impacts upon the surrounding ecology and environment, with particular reference to lakes and wetlands. If yes, then whether any part of the project is required to be demolished. If so, details thereof along with reasons.

6) The Committee shall substantially notice if any of the conditions of the Environmental Clearance order in each case of respondent Nos. 9 and 10 have been violated. If so, to what extent and suggest remedial measures in that behalf to restore the ecology of the area.

7) The Committee would also recommend what should be the buffer zone around the lake(s) and interconnecting passages and wetlands. The Committee shall also report, whether activities of multipurpose projects which have serious repercussions on traffic, air pollution, environment and allied subjects should be permitted any further or not, particularly, in wetlands and catchment areas of water bodies.

8) Recommendations should be made with regard to the steps and measures that should be taken for restoration of lakes, particularly in the city of Bangalore.



9) The Committee shall also find out that whether the construction of the projects is in accordance with the sanctioned drawings and bye-laws in accordance with the letters dated 4th July, 2007 and 22nd April, 2008 respectively. Further, the Committee would also report whether both respondent Nos. 9 and 10 have installed ETP/STP and have taken full measures for recycling of used water for washing and flushing, etc. in terms of letters dated 11th October, 2013 and 3rd January, 2013, issued by the Karnataka Industrial Area Development Board to respondent Nos. 9 and 10 respectively.

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10) In the event, the Committee is of the opinion that the adverse impacts noticed are redeemable, then what directions need to be issued in that behalf and the cost involved for achieving the said conservation and restoration of lakes and water bodies.

11) Till the submission of the report by the Committee and directions passed by the Tribunal in that regard, both respondent Nos. 9 and 10 are hereby restrained from creating any 3rd party interests or part with the possession of the property in question or any part thereof, in favour of any person.

12) The Committee shall submit its report to MoEF and to this Tribunal as expeditiously as possible and in any case not later than three months from today. During that period we restrain MoEF, SEIAA and/or any public authority from sanctioning any construction project on the wetlands and catchment areas of the water bodies in the city of Bangalore.

13) The Committee shall report if the project proponents are proposing to discharge their trade or domestic effluents into the lake or any of the water bodies in and around of the area in question.

14) For the reasons stated in the judgment, respondent No. 9 is liable and shall pay a sum of Rs. 117.35 crores, while respondent No. 10 shall pay a sum of Rs. 22.5 crores respectively being 5 per cent. of the project value, within two weeks from today. The said amount would be paid to the KSPCB, which shall maintain a separate account for the same and would spend this amount for environmental and ecological restoration, restitution and other measures to be taken to rectify the damage resulting from default and non-compliance to law by the Project Proponent in that area, after taking approval of the Tribunal.

15) We make it clear that the said respondents would not be entitled to pass on the amount in terms of direction 14, on to the purchasers because this liability accrues as a result of their own intentional defaults, disobedience of law in force and carrying on project activities and construction illegally and unauthorizedly.

19. Feeling aggrieved by the said order, respondent Nos. 9 and 10 filed Civil Appeal Nos. 4829 and 4823 of 2015 before this Court. This Court by its Order dated 20th May, 2015 passed the following order:

"One of the main contentions raised by the Appellants in these Appeals is that though the Tribunal had heard the matter only on preliminary issues and no arguments on merit were advanced, final judgment decides the merits of the disputes as well and above all a penalty of Rs.117.35 crores against the original Respondent No.9 (the Appellant in C.A. No. 4832 of 2015) and Rs. 22.5 crores against Original Respondent No. 10 (the appellant in C.A. No. 4829/2015) is imposed.

On the aforesaid averment, we feel that it would be more appropriate for the appellant to file an application before the Tribunal with the prayer to recall the order on merits and decide the matter



afresh after hearing the counsel for the parties, as the Tribunal knows better as to what transpired at the time of hearing.

With the aforesaid liberty granted to the petitioners, the appeals are disposed of. Certain preliminary issues are decided against the appellants which are also the subject-matter of challenge. However, it is not necessary to deal with the same this stage. We make it clear that in case the said application is decided against the appellants or if ultimately on merits, it would be open to the appellants to challenge those orders by filing the appeal and in that appeal all the issues which are decided in the impugned judgment can also be raised.

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The counsel for the appellants state that they would file the requisite application within one week. Till the said application is decided by the Tribunal, there shall be stay of the direction pertaining the payment of aforesaid penalty. Mr. Raj Panjwani points out that the Tribunal has allowed the appellants to proceed with the construction only on the payment of the aforesaid fine/penalty. We leave it to the Tribunal to pass whatever orders it deems fit in this behalf, after hearing the parties."

20. In relation to Issue No.5, an opportunity of hearing was granted to the respondents. The Tribunal passed order dated 06.04.2016 on these applications as under:

"M.A. No. 603 of 2015 and M.A. No. 596 of 2015

These Applications have been filed on behalf of the Respondents 9 and 10 respectively. It is not necessary for us to refer to any details in view of the directions that we propose to issue in this case.

Without prejudice to the rights and contentions of the parties and subject to just exception we would hear the parties in terms of the order of the Hon'ble Supreme Court of India primarily on the question of imposition of Environmental Compensation and merits attached in relation thereto. Parties are given liberty to address their submissions on that behalf.

With the above directions the M.A. No. 603 of 2015 and M.A. No. 596 of 2015 stand disposed of without any order as to cost."

21. It is evident from the above orders that the Tribunal had granted opportunity to the parties to address it "limited question", as aforementioned. The Tribunal after hearing the parties passed an order dated 04.05.2016 as under:

"General Conditions or directions:

1. In view of our discussion in the main Judgment, we are of the considered view that the fixation of distance from water bodies (lakes and Rajkalewas) suffers from the inbuilt contradiction, legal infirmity and is without any scientific justification. The RMP - 2015 provides 50m from middle of the Rajkalewas as buffer zone in the case of primary Rajkalewas, 25m in the case of secondary Rajkulewas and 15m in the tertiary Rajkulewas in contradiction to the 30m in the case of lake which is certainly much bigger water body and its utility as a water body/wetland is well known certainly part of wet land. Thus, we direct that the distance in the case of Respondent Nos. 9 and 10 from Rajkulewas, Waterbodies and wetlands shall be maintained as below:-

(i) In the case of Lakes, 75m from the periphery of water body to be maintained as green belt and buffer zone for all the existing water bodies i.e. lakes/wetlands.

(ii) 50m from the edge of the primary Rajkulewas.



(iii) 35m from the edges in the case of secondary Rajkulewas

(iv) 25m from the edges in the case of tertiary Rajkulewas

This buffer/green zone would be treated as no construction zone for all intent and purposes. This is absolutely essential for the purposes of sustainable development particularly keeping in mind the ecology and environment of the areas in question.

All the offending constructions raised by Respondent Nos. 9 and 10 of any kind including boundary wall shall be demolished which falls within such areas. Wherever necessary dredging operations are required, the same should be carried out to restore the original capacity of the water spread area and/or wetlands. Not only the existing construction would be removed but also none of these Respondents - Project Proponent would be permitted to raise any construction in this zone.

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All authorities particularly Lake development Authority shall carry out this operation in respect of all the water bodies/ lakes of Bangalore.

2. The capacity of the existing STPs to treat sewage is 729 MLD, whereas another 500 MLD sewage is proposed to be treated in 10 upcoming STPs. In this context, all the STPs operating in the area whether Government or privately owned, should meet the revised standards notified by CPCB/MoEF.

3. Bangalore city receives treated potable water of 1360 MLD from river Cauvery whereas the requirement is for another 750 MLD and the entire area falls in critical zone in terms of ground water exploitation. Information reveals that only one million litre per month of STP treated water is used by builders for construction purposes.

For this reason, the BWSSB issues partial NOC to various residential and commercial projects in respect of supply of potable water. In this context, following directions need to be issued:

i. At the time of grant of EC, the water requirement for the construction phase and operation phase should be considered separately. Due consideration should also be given for identification of source of supply of water and this should be a pre-requisite for grant of EC.

ii. All the project proponents should necessarily use only treated sewage water for construction purpose and this should be reflected in EC as a condition for construction phase.

iii. Wherever the quality of treated sewage water does not conform to the quality needed for construction, necessary upgradation in STP should be undertaken immediately.

Specific Conditions/ Directions for Respondent 9;

In addition to the above directions which should be equally part of EC condition in respect of respondent Nos. 9 and 10, following specific conditions shall apply to respondent No. 9:

i. Reclaimed area of the lake to the extent of 3 acres 10 guntas in survey No. 43 should be restored to its original condition at the cost of project proponent. The possession of this area should be restored by Respondent No. 9 to the concerned Authorities immediately. In addition, a buffer zone of 75 m should be provided between the lake and the project area and this should be maintained as green area.

ii. In the remaining area, where primary Rajkalewa is abutting the project area, 50 m buffer zone on the side of the project area from the edge of the rajkalewa should be maintained as green belt.



iii. Several irrigation canals or tertiary rajkalewas taking off from the Agara tank were passing through the area of respondent No. 9, and serve the dual purpose of irrigating paddy fields and disposal of surface run off (storm water drains) during rainy season. However on account of the activities of the project, these drains have been totally obliterated. For the purpose of proper disposal of storm run off from the entire area falling between the Agara lake and the Belandur Lake, respondent No. 9 must provide required number of storm water drains based on proper hydrological study. These storm drains should have a buffer zone of 15 m on either bank maintained as green belt.

iv. The cumulative quantity of earth excavated for the construction of project is around 4 lakhs cubic meters in the depth range of 0 to 9 meters. This has created huge hillock like structure obstructing the natural flow pattern of surface runoff from Agara Lake side to Balendur Lake side or primary Rajkalewas. For this purpose, during construction phase garland drain should be constructed around the existing dumping site for safe disposal of run off to the Rajkalewas.

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For the disposal of excavated material, a proper muck disposal plan duly approved by SIEAA shall be prepared. In any case the plan should ensure that no muck/sediment flows into Rajkalewas and/or Belandur lake.

v. The Kharab land identified by Revenue Dept. admeasuring 1 acre 2 guntas should be demarcated and maintained separately as green belt.

vi. The entire green belt created under the directions of this Tribunal should not to be considered as part of green belt of the project as part of EC condition and will be over and above the green belt as indicated in the EC.

vii. In view of the heavy traffic load in the adjoining Sarjapur road, a proper study on the basis of traffic density, foot falls expected, etc., a proper plan needs to be prepared and the concept of service road exclusively for the project needs to be worked out and additional parking space created within the project area and incorporated as a part of the overall project layout, within a period of 3 months.

10. Though, at the time of hearing prior to passing the Judgment, we had heard the parties on all aspects but still we have provided re-hearing to the parties on all issues with emphasis on imposition of environmental compensation including the quantum. Upon hearing, we are of the considered view that environmental compensation imposed upon Respondent No. 9 calls for no variation and the Respondent No. 9 should be called upon to pay the said amount of Rs. 117.35 Crores determined under the Judgment prior to commencement of any project activity at the site. Respondent No. 10 has not commenced any actual construction activity but has carried out various preparatory steps including excavation and deposition of huge earth by creating a hillock at the premises in question and a site office.

Thus, considering cumulative effect on environment and ecology due to various breaches in that behalf by Respondent No. 10 and the fact that the remedial measures can more effectively be taken by the Respondent No.10, we reduce environmental compensation payable by Respondent No. 10 to Rs. 13.5 crores (3% of the stated project cost instead of 5% as imposed in the original judgment). General Directions:

1. We direct SEIAA, Karnataka to issue amended order granting Environmental Clearance within four weeks from today incorporating all the conditions stated in this judgment and such other conditions as it may deem appropriate in light of this judgment and Inspection Note of the



Expert Members. The Project Proponents would be permitted to commence activity only after issuance of amended Environmental Clearance order.

2. SEIAA Karnataka and MoEF shall ensure regular supervision and monitoring of the project and during the construction and even upon completion to ensure that activity is carried out strictly in accordance with the conditions of the order granting Environmental Clearance, this Judgment, Notification of 2006 and other laws in force.

3. The distances in respect of buffer zone specified in this judgment shall be made applicable to all the projects and all the Authorities concerned are directed to incorporate such conditions in the projects to whom Environmental Clearance and other permissions are now granted not only around Belandur Lake, Rajkulewas, Agara Lake, but also all other Lakes/wetlands in the city of Bengaluru.

4. We hereby direct the State of Karnataka to submit a proposal to the MoEF for demarcating wetlands in terms of Wetland Rules 2010 as revised from time-to-time. Such proposal shall be submitted by the State within four weeks from today and the MoEF shall consider the same in accordance with law and grant its approval or otherwise within four weeks thereafter. After such approval is granted by MoEF, the State would issue notification notifying such areas immediately thereafter in accordance with Rules and law.

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5. Both the Respondent Nos. 9 and 10 shall ensure that debris or any construction material that has been dumped into the Rajkulewas, or on their Banks and on the buffer zone of wetlands should be removed within four weeks from today. In the event they fail to

do so, the same shall be removed by the Lake Development Authority along with the State Administration and recover charges thereof from the said Respondents.

6. There is a serious discrepancy even in regard to the measurement of land as far as Respondent No. 9 is concerned. Admittedly the Respondent has been allotted and is in possession of land admeasuring 63.94 acres, though Environmental Clearance has been granted for 2,92,636.03 Sq. Meters which is equivalent to 72.22 acres. For this reason alone, Environmental Clearance cannot be given effect to. While issuing the amended Environmental Clearance, SEIAA Karnataka shall take into consideration all these aspects and, if necessary, would require Respondent No. 9 to submit a fresh layout plan and the entire project may be revised in accordance with law.

7. Both the Respondents (Project Proponents) shall submit an appropriate plan in view of the conditions imposed in this judgment and the amended Environmental Clearance that would be issued.

8. The amount of environmental compensation will be deposited prior to issuance of amended Environmental Clearance.

With the above directions, the Original Application No. 222 of 2014 and Misc. Application Nos. 596/2016 and 603/2016 are finally disposed of while leaving the parties to bear their own costs."

22. Appearing for the appellants in C.A. No.5016 of 2016, Shri Mukul Rohatgi, learned senior counsel, has submitted that the State Government in exercise of the power conferred under the Karnataka Industrial Areas Development Act (for short 'KIAD Act') declared the land in question as an industrial area. Thereafter, the land in question has been acquired by the State



Government in the year 2004. Following the acquisition, on 28.06.2007, the land was allotted to the appellant by the KIADB. The SEIAA granted environmental clearance which was followed by public notice concerning clearance on 14.03.2012. Neither the allotment of land nor the environmental clearance was challenged before the Tribunal. Thus, none of the statutory decisions or processes, are the cause of action for the purpose of the application. The averments made in the original application does not satisfy or meet the requirements of Section 14(1) and (3) of the NGT Act and the original application does not spell out the cause of action relevant for the purpose of said provision. Since the statutory processes and clearances could not have been challenged for being hit by Section 14(3), the construction activities which were the alleged cause of action could not have been challenged. Therefore, the Tribunal ought to have held that the application was not maintainable.

23. Further the application is barred by limitation. Though environmental clearance was granted on 17.02.2012 and it was published in two leading newspapers on 12.03.2012 and 14.03.2012, modified plan was approved by the KIADB on 30.08.2012, the application ought to have been filed within six months from the date on which cause of action for the dispute first arose in terms of Section 14 of the NGT Act. The present application has been filed in March, 2014 which was much beyond the prescribed period of limitation. No application seeking condonation of delay has been filed accompanying the application. Hence, the Tribunal ought to have dismissed the application on the ground that as it is barred by time.

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24. It was also argued that buffer zone laid down by the NGT is substantially higher as compared to buffer zone which is required to be maintained as per the Revised Master Plan, 2015 issued on

22.06.2007. This is contrary to the Karnataka Town and Country Planning Act, 1961 (for short 'the Planning Act').

25. Shri Neeraj Kishan Kaul and Shri R.Venkataramani, learned senior counsel appearing for the appellants, in this case have also made similar submissions. It was argued that the direction imposing penalty/compensation is illegal on the ground that the applicants did not allege that the construction work of the project has caused environmental wrong. No wrong or injury either to Bellandur lake water body or to Bellandur lake area, has been alleged and established. As such, there is no question of any enquiry relating to imposition of penalty or any compensation.

26. Shri Maninder Singh, learned senior counsel appearing for the appellants, in C.A. Nos.5016 and 10995 of 2016, while supporting the submissions made by Shri Rohatgi, has submitted that the appellant has obtained sanction and approvals for the project from the competent authorities. It could not start construction despite grant of all the permissions, including environmental clearance as early as possible i.e. 30.09.2013. Hence, imposing penalty/compensation is entirely unsustainable.

27. Learned Advocate General, Shri Udaya Holla, appearing for the appellant-State of Karnataka in C.A.Nos.4923-4924 of 2017, has submitted that the State of Karnataka is also aggrieved by the order of the NGT to the extent of setting aside the buffer zone in respect of water bodies and drains specified in the Revised Master Plan, 2015, and enlargement of the buffer zone in respect of lakes and Rajakaluves. It is also aggrieved by the order of the NGT directing the authorities to demolish all the offending constructions raised/built in the buffer zone, which will result in demolition of 95% of the buildings in Bengaluru. It is submitted that the Revised Master Plan is statutory in nature and



NGT has no power, competence or jurisdiction to consider the validity or vires of any statutory provision/regulation. Therefore, the order of the NGT to that extent is liable to be set aside.

28. Learned senior counsel appearing for the appellants in other cases, have also supported the arguments of the learned Advocate General. It was contended that the Revised Master Plan provides for a 30 meters buffer zone around the lakes and a buffer zone of 50 meters, 25 meters and 15 meters from the primary, secondary and tertiary drains, respectively to be measured from the centre of the drain. Vide the impugned judgment, the NGT has revised these buffer zones and has directed that the buffer zone be maintained for 75 meters around the lake and 50, 35 and 25 meters respectively from the primary, secondary and tertiary drain, respectively. Variation of buffer zone, as directed by the NGT is without any legal and scientific basis and has the effect of amending the Revised Master Plan, 2015, without there being any challenge to the same or any relief sought with respect to the said Revised Master Plan.

29. On the other hand, Shri Sajan Poovayya, learned senior counsel, appearing for the applicants, has fairly submitted that the applications were filed only against the appellants in C.A Nos. 5016 of 2016 and 8002-8003 of 2016 (respondent Nos. 9 and 10). He has no objection to set aside the order insofar as the appellants in other appeals including the State of Karnataka are concerned. He has also no objection to set aside the general conditions and directions of the NGT in paragraph (1) of the order dated 04.05.2016 except the directions issued against respondent Nos. 9 and 10.

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In view of the above, it is not necessary to examine the contentions of the learned Advocate

General in Civil Appeal Nos. 4923-4924 of 2017. It is also not necessary to consider the contentions urged in the other civil appeals except the appeals filed by respondent Nos. 9 and 10.

30. Shri Poovayya has strongly opposed the submissions made by the learned senior counsel appearing for the appellants in C.A. No. 5016 of 2016 and C.A. Nos. 8002-8003 of 2016. It is submitted that the Tribunal is a specialized body for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment. The jurisdiction of the Tribunal is provided under Sections 14, 15 and 16 of the NGT Act. Section 14 provides for the jurisdiction over all civil cases where a substantial question relating to environment is involved. However, such question should arise out of implementation of the enactments specified in Schedule I. The Tribunal has the jurisdiction under Section 15(1)(a) of the NGT Act to provide relief and compensation to the victims of pollution and other environmental damage arising under the enactments specified in Schedule I. Under Sections 15(1)(b) and 15(1)(c), the Tribunal can provide for restitution of property damaged and for restitution of the environment for such area or areas, as the Tribunal may think fit. Sections 15(1)(b) and 15(1)(c) have not been made relatable to enactment specified in Schedule I of the Act. Section 15(1)(c) is an entire island of power and jurisdiction read with Section 21 of the Act. He submits that whenever ecology is being compromised and jeopardized, the Tribunal can apply Section 20 for taking restorative measures in the interest of environment. The limitation provided in Section 14 is period of six months from the date on which cause of action first arose whereas in Section 15 it is five years. Therefore, the petition is not barred by time.



31. He has further submitted that the provisions of Section 33 shall have the effect notwithstanding anything inconsistent contained in any other law for the time being in force. This gives the Tribunal overriding powers over anything inconsistently contained in KIAD Act, Planning Act, Revised Master Plan of Bangalore, 2015 and Karnataka Municipal Corporation Act, 1976 (for short 'KMC Act'). Therefore, the Tribunal while providing for restoration of environment in an area can specify buffer zone around specific lakes and water bodies in contravention with zoning regulation.

32. Regarding limitation, he has submitted that the application filed by respondents 1 to 3 was not an application simplicitor under Section 14 of the Act. It was an application where a specific prayer has been made with reference to Lake Development Authority's report dated 12.06.2013 and the Ministry of Environment Forest and Climate Change Monitoring Committee report dated 14.08.2013 for restoration of ecologically sensitive land and for maintaining sensitive area in its natural condition so that ecological balance of the area is not disturbed. Therefore, the petition was under Section 15 of the Act and it can be filed within five years from the date on which the cause for such compensation or relief first arose.

33. It was further submitted that right to appeal under Section 22 is not a vested right unless provided by statute. Exercise of Appellate Jurisdiction without the fulfillment of statutory mandate would be without jurisdiction. Section 22 of the Act provides for an appeal on the ground specified in Section 100 of the Code of Civil Procedure, 1908 (for short 'the CPC'). Under Section 100 of the CPC, an appeal can be filed only on the ground that the case involves a substantial question of law as may be framed by the Appellate Court. In the instant case,

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the appeal does not involve any substantial question of law hence it has to be dismissed in limine. He has taken us through various materials placed on record in order to substantiate that the direction passed and penalty imposed by the Tribunal upon to project proponents are sustainable. He prays for dismissal of the appeals.

34. We have carefully considered the submissions of the learned counsel of the parties and perused the materials placed on record.

35. Before considering the other contentions of the learned counsel for the parties, let us first consider the scope of enquiry in appeals filed under Section 22, which is as under:

"22. Appeal to Supreme Court.-Any person aggrieved by any award, decision or order of the tribunal, may, file an appeal to the Supreme Court, within ninety days from the date of communication of the award, decision or order of the Tribunal, to him, on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908 (5 of 1908):

Provided that the Supreme Court may, entertain any appeal after the expiry of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal."

36. It is settled that there is no vested right of appeal unless the statute so provides. Further, if a statute provides for a condition subject to which the appropriate Appellate Court can exercise jurisdiction, the Court is under an obligation to satisfy itself whether the condition prescribed is fulfilled. Exercise of appellate jurisdiction without the fulfillment of statutory mandate would be without jurisdiction. Therefore, the right of appeal provided under Section 22 is to be read subject to the conditions provided therein.

37. Section 22 provides for an appeal to the Supreme Court on the grounds specified in



Section 100 of the CPC. Under Section 100, CPC, an appeal can be filed only on the ground that the case involves a substantial question of law as may be framed by the Appellate Court. The scope of appeal under Section 22, therefore, is restricted to substantial question of law arising from the judgment of the Tribunal. The test to determine whether the question is substantial question of law or not was laid down by a Constitution Bench of this Court in *Sir Chunilal V. Mehta and Sons, Ltd. v. Century Spinning and Manufacturing*, 1962 Supp. (3) SCR 549 : (AIR 1962 SC 1314). This Court has laid down the test as under:

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

38. It is equally settled that merely because the remedy of appeal is provided against the decision of the Tribunal on a substantial question of law alone, that does not ipso facto permit the appellants to agitate their appeal to seek re-appreciation of the factual matrix of the entire matter. The appellants cannot seek to re-argue their entire case to seek wholesale re-appreciation of evidence and the factual matrix that has been considered by the Tribunal is *ex facie* impermissible under Section 22.

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There cannot be fresh appreciation or re-appreciation of facts and evidence in a statutory appeal under this provision.

39. The first question raised by the learned counsel is in relation to the maintainability of the application before the Tribunal.

40. The Tribunal has been established under a constitutional mandate provided in Schedule VII, List I, Entry 13 of the Constitution of India, to implement the decision taken at the United Nations Conference on Environment and Development. The Tribunal is a specialized judicial body for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment. The right to healthy environment has been construed as a part of the right to life under Article 21 by way of judicial pronouncements. Therefore, the Tribunal has special jurisdiction for enforcement of environmental rights.

41. The jurisdiction of the Tribunal is provided under Sections 14, 15 and 16 of the Act. Section 14 provides the jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment) is involved. However, such question should arise out of implementation of the enactments specified in Schedule I.

42. The Tribunal has also jurisdiction under Section 15(1)(a) of the Act to provide relief and compensation to the victims of pollution and other environmental damage arising under the enactments specified in Schedule I. Further, under Section 15(1)(b) and 15(1)(c) the Tribunal can provide for restitution of property damaged and for restitution of the environment for such area or areas as the Tribunal may think fit. It is noteworthy that Section 15(1)(b) and (c) have not



been made relatable to Schedule I enactments of the Act. Rightly so, this grants a glimpse into the wide range of powers that the Tribunal has been cloaked with respect to restoration of the environment.

43. Section 15(1)(c) of the Act is an entire island of power and jurisdiction read with Section 20 of the Act. The principles of sustainable development, precautionary principle and polluter pays, propounded by this Court by way of multiple judicial pronouncements, have now been embedded as a bedrock of environmental jurisprudence under the NGT Act. Therefore, wherever the environment and ecology are being compromised and jeopardized, the Tribunal can apply Section 20 for taking restorative measures in the interest of the environment.

44. The NGT Act being a beneficial legislation, the power bestowed upon the Tribunal would not be read narrowly. An interpretation which furthers the interests of environment must be given a broader reading. (See : *Kishore Lal v. Chairman, Employees' State Insurance Corpn.* (2007) 4 SCC 579, para 17) : (AIR 2007 SC 1819). The existence of the Tribunal without its broad restorative powers under Section 15(1)(c) read with Section 20 of the Act, would render it ineffective and toothless, and shall betray the legislative intent in setting up a specialized Tribunal specifically to address environmental concerns. The Tribunal, specially constituted with Judicial Members as well as with Experts in the field of environment, has a legal obligation to provide for preventive and restorative measures in the interest of the environment.

45. Section 15 of the Act provides power and jurisdiction, independent of Section 14 thereof. Further, Section 14(3) juxtaposed with Section 15(3) of the Act, are separate provisions for filing distinct applications before the Tribunal with distinct periods of limitation, thereby amply demonstrating that jurisdiction of the Tribunal

flows from these Sections (i.e. Sections 14 and 15 of the Act) independently.

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The limitation provided in Section 14 is a period of 6 months from the date on which the cause of action first arose and whereas in Section 15 it is 5 years. Therefore, the legislative intent is clear to keep Sections 14 and 15 as self contained jurisdictions.

46. Further, Section 18 of the Act recognizes the right to file applications each under Sections 14 as well as 15. Therefore, it cannot be argued that Section 14 provides jurisdiction to the Tribunal while Section 15 merely supplements the same with powers. As stated supra. the typical nature of the Tribunal, its breadth of powers as provided under the statutory provisions of the Act as well as the Scheduled enactments, cumulatively, leaves no manner of doubt that the only tenable interpretation to these provisions would be to read the provisions broadly in favour of cloaking the Tribunal with effective authority. An interpretation that is in favour of conferring jurisdiction should be preferred rather than one taking away jurisdiction.

47. Section 33 of the Act provides an overriding effect to the provisions of the Act over anything inconsistent contained in any other law or in any instrument having effect by virtue of law other than this Act. This gives the Tribunal overriding powers over anything inconsistent contained in the KIAD Act, Planning Act, Karnataka Municipal Corporations Act, 1976 ("KMC Act"); and the Revised Master Plan of Bengaluru, 2015 ("RMP"). A Central legislation enacted under Entry 13 of List I, Schedule VII of the Constitution of India will have the overriding effect over State legislations. The corollary is that the Tribunal while providing for restoration of environment in an area, can specify buffer zones around specific lakes and water bodies



in contradiction with zoning regulations under these statutes or the RMP.

48. The second question raised by the appellants is that the petition is barred by time. According to appellants, environmental clearance was granted to the respondent No. 9 on 17.02.2012 for which notice was published in the leading newspaper on 12.03.2012 and 14.03.2012. Modified building plan was approved on 30.08.2012, which was followed up to 10.08.2014. Similar events had taken place in regard to the project of respondent No. 10 who had been granted environmental clearance on 30.09.2013. The application had to be filed within a period of six months from the date on which cause of action for such dispute has first arisen in terms of Section 14 of the NGT Act. Admittedly, the present application has been filed in March, 2014 and according to them, it is much beyond the prescribed period of limitation. Also, there is no application for condonation of delay accompanying the main application. Therefore, the Tribunal will not have jurisdiction to condone the delay.

49. The OA No. 222 of 2014 was not an application simpliciter under Section 14 of the Act. It was an application where a specific prayer has been made with reference to Lake Development Authority's ("LDA") Report dated 12.06.2013 and the Ministry of Environment, Forest and Climate Change ("MoEF") Monitoring Committee Report dated 14.08.2013 for restoration of ecologically sensitive land and for maintaining the sensitive in its natural condition so that the ecological balance of the area is not disturbed. It is clear from the documentary evidence supported by data, that the project proponents have committed breaches and the implementation of the project is bound to have serious adverse impact on the ecology, hydrology and the environment in the catchment area of Bellandur Lake. The environmental degradation as established from the documents would give rise to an independent

cause of action. Therefore, this was a petition under Section 15 of the Act and thus it could be filed within 5 years from the date on which the

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cause for such compensation or relief first arose.

50. In fact, in the original application before the Tribunal there was no mention of the provision under which it was being filed. It is well settled principle of law that non-mention of or erroneous mention of the provision of law would not be of any relevance, if the Court had the requisite jurisdiction to pass an order. It would be a mere irregularity and would not vitiate the application or the judicial order of the Tribunal.

51. Shri R. Venkataramani, learned senior counsel, appearing for the appellant in CA No.5016 of 2016 has submitted that the constructions had not commenced before the grant of environment clearance. The inspection report dated 11.01.2012 of the Chairman of the KSPCB observes that "no construction" had commenced on the date of inspection. This report cannot be overlooked on the basis of some dumping of debris which could not be attributed to the appellant. He has pointed out the report of the Committee appointed by the Tribunal in the month of August 2015, wherein it was stated that "it started construction after obtaining clearance". In this regard he has also taken us through various documents placed on record and submits that there is absolutely no justification in imposing monitoring penalty/compensation without assessment of impact.

52. The Tribunal has pointed out on the basis of the Committee report of August 2015, that the appellant had encroached 3 acres 10 guntas of Bellandur Lake and a boundary wall has been raised around the said land. The Tribunal has also found that the project proponents have violated the Master Plan. They have not obtained the



mandatory clearance from the Sensitive Zone Committee constituted by the Government of Karnataka. It is also clear from the materials on record that there are several other violations by the project proponents. The Tribunal has discussed all these issues from para 52 onwards. It is also clear from the materials on record that there is a definite possibility of environment, ecology, lakes, and wetland being adversely affected by these projects. That is why, the Tribunal has observed as under:

"72. In light of the above scope of the project and records before the Tribunal and the defaults on the part of the Project Proponents, the cumulative adverse effects of the activities undertaken by the respondents before us can be summed up as under:

- 1) The construction of both the projects had started prior to the grant to Environmental Clearance.
- 2) The EIA Notification of 2006 requires that without grant of Environmental Clearance, no project can commence its activity. This restriction applies not only to operationalization of the project but even for the purposes of establishment.
- 3) Revenue Map images shows multiple Rajakaluves flowing through the project(s) in question. The images further show encroachment on Rajakaluves.
- 4) Digital images of the land available on Google satellite images showing encroachment on two major Rajakaluves.
- 5) Google Satellite images retrieved from Google archives clearly reflect two distinct features. Firstly, change in the wetland area between the period of 13th November, 2000 and 23rd November, 2010. Secondly, it reveals the excavation work carried out by Respondent

Nos. 9 and 10 commenced prior to obtaining Environmental Clearance.

6) Restriction in regard to extraction of ground water was not strictly complied with as permission of Central Ground Water Authority was not obtained before construction.

7) The conditions with regard to the natural slopping pattern of the project site to remain unaltered and natural hydrology of the area

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to be maintained as it is, to ensure natural flow of storm water as well as in relation to Lakes and other water bodies within and/or at the vicinity of the project area to be protected and conserved:

The inspection report by the MoEF clearly notes that condition Nos. (xxxix) and (xl) in the Environmental Clearance of respondent No. 9 cannot be complied with as it will necessarily result in some alteration of the natural slopping pattern of the project site and the natural hydrology of the area. It noted that the project area is located in the catchment area of the Bellandur Lake and the project authorities have informed that they will take all precautionary measures to ensure that the lake will not be affected by project activities either during construction or operation phase."

53. In paragraph 81, the Tribunal has observed as under:

"81.Another very important aspect which cannot be overlooked by the Tribunal is with regard to the respondent Nos. 9 and 10 carrying on their project activity fully knowing that they were incapable of or it was not possible for them to comply with condition Nos. xxxix and xl (or alike conditions) in the order granting the Environmental Clearance. This has even been noticed by the MoEF in its monitoring report dated 14th August,



2013. These respondents never applied for variation or amendment of these conditions and continued with their construction activities. This renders these respondents entirely liable for environmental and ecological damage and the restoration and restitution thereof."

54. In our view, the findings arrived at by the Tribunal are not only based on the documents that were available on record but also on the pleadings that were made by the parties buttressed by the Committee's report and the inspection note of the Expert Members. Therefore, the directions passed and the penalty imposed by the Tribunal on both project proponents are valid and sustainable and do not suffer from any perversity.

55. We are also of the view that it is impermissible for the appellants to seek a factual review through the methodology of re-appreciation of factual matrix by this Court under Section 22 of the NGT Act.

56. Shri R.Venkataramani, learned senior counsel has also raised a subsidiary issue relating to res judicata. According to him, respondent Nos. 12 and 13 filed Writ Petition Nos.3656-57/2013 seeking similar reliefs in a representative capacity. The issues raised therein are same as those canvassed in the application before the Tribunal. The reliefs sought for are essentially the same. Hence, the applications are barred by the principle of res judicata.

57. The Tribunal has answered this issue in paragraphs 47 to 51 of the order. There was no dispute insofar as filing of the writ petitions is concerned. However, the parties are not common nor the issues in application and the writ petitions are directly and substantially the same. After examination of the pleadings, the Tribunal has recorded a finding of fact that there is no commonality of a cause of action or likelihood of a conflict between the judgments.

The prayers and the geneses of the respective proceedings are entirely distinct and different in their scope and relief. The issues before the Tribunal would essentially relate to environment ecology and its restoration while the proceedings before the High Court relate to entirely different issues with acquisition of land, its allotment and transfer to the third party. These issues in both the proceedings are neither substantial nor materially identical.

58. After elaborately considering this question, the Tribunal has concluded as under:

"51.For these reasons, we find no merit in this contention of respondent Nos. 9 and 10. The purpose of the doctrine of res judicata

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is to provide finality and conclusiveness to the judicial decisions as well as to avoid multiplicity of litigation. In the present case, the question of re-agitating the issues or agitating similar issues in two different proceedings does not arise. The ambit and scope of jurisdiction is clearly decipherable. The jurisdictions of the Hon'ble High Court of Karnataka and this Tribunal are operating in distinct fields and have no commonality insofar as the issues which are raised directly and substantially in these petitions, as well as the reliefs that have been prayed for before the Hon'ble High Court and the Tribunal are concerned. There is no commonality in parties before the Tribunal and the High Court. The 'cause of action' in both proceedings is different and distinct. The matters substantially and materially in issue in one proceedings are not the same in the other proceeding. There is hardly any likelihood of conflicting judgments being pronounced by the Tribunal on the one hand and the High Court on the other. Therefore, we are of the considered view that the present applications are neither hit by the principles of res judicata nor constructive res judicata. We also



hold that culmination of proceedings before the Tribunal into a final judgment would not offend the principle of 'judicial propriety', because of the Writ Petitions pending before the Hon'ble High Court of Karnataka."

59. We do not find any error in the aforesaid conclusion of the Tribunal. We are of the view that the Tribunal was justified in holding that the objections taken by the respondent Nos. 9 and 10 do not satisfy the basic ingredients to attract the application of res judicata or constructive res judicata.

60. The State of Karnataka is aggrieved by the following offending portion of the order dated 04.05.2016:

"1. In view of our discussion in the main Judgment, we are of the considered view that the fixation of distance from water bodies (lakes and Rajkalewas) suffers from the inbuilt contradiction, legal infirmity and is without any scientific justification. The RMP - 2015 provides 50m from middle of the Rajkalewas as buffer zone in the case of primary Rajkalewas, 25m in the case of secondary Rajkulewas and 15m in the tertiary Rajkulewas in contradiction to the 30m in the case of lake which is certainly much bigger water body and its utility as a water body/wetland is well known certainly part of wet land. Thus, we direct that the distance in the case of Respondent Nos. 9 and 10 from Rajkulewas, Waterbodies and wetlands shall be maintained as below:-

(i) In the case of Lakes, 75m from the periphery of water body to be maintained as green belt and buffer zone for all the existing water bodies i.e. lakes/wet lands.

(ii) 50m from the edge of the primary Rajkulewas.

(iii) 35m from the edges in the case of secondary Rajkulewas

(iv) 25m from the edges in the case of tertiary Rajkulewas

This buffer/green zone would be treated as no construction zone for all intent and purposes. This is absolutely essential for the purposes of sustainable development particularly keeping in mind the ecology and environment of the areas in question.

All the offending constructions raised by Respondent Nos. 9 and 10 of any kind including boundary wall shall be demolished which falls within such areas. Wherever necessary dredging operations are required, the same should be carried out to restore the original capacity of the water spread area and/or wetlands. Not only the existing construction would be removed but also none of these Respondents - Project Proponent would be permitted to raise any construction in this zone.

All authorities particularly Lake development Authority shall carry out

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this operation in respect of all the water bodies/lakes of Bangalore."

61. We have already noticed that Shri. Poovayya has no objection to set aside the aforesaid impugned portion of the order in so far as the appellants in all the appeals except the appeals filed by respondent Nos.9 and 10. The aforesaid portion of the order contains not only general directions but also certain directions against respondent Nos. 9 and 10. Therefore, only that portion of the order which does not pertain to respondent Nos. 9 and 10 needs to be quashed.

62. In the light of the above discussion, we pass the following order:

i) Civil Appeal No. 5016 of 2016 and Civil Appeal Nos. 8002-8003 of 2016 filed by the 56



appellants/respondent Nos. 9 and 10 are hereby dismissed. The impugned judgment and order insofar as appellants/respondent Nos. 9 and 10 are concerned is sustained.

ii) All the other appeals are hereby allowed and the direction/condition No. (1) in the order dated 4.5.2016 is hereby set aside except the direction issued against respondent Nos. 9 and 10.

63. There will be no order as to costs.

Order Accordingly .

TRUE COPY

A handwritten signature in blue ink, appearing to be 'S. M. S.', is written below the 'TRUE COPY' stamp.

ANNEXURE A-25



All India Reporter

AIROnline 2021 Bom 3851
Bombay High Court
DIPANKAR DATTA, C.J.
and M. S. KARNIK, J.

PUBLIC INTEREST LITIGATION - 28 of
2021 D/- 8 - 10 - 2021

Vanashakti and Anr. v. Union of India and Ors.

(A)National Green Tribunal Act (19 of 2010), S.3 - Environment Protection Act (29 of 1986), S.3(1), S.25 - Environment (Protection) Rules (1986), R.3 - Notification - Validity - Notification issued to conserve and protect unique environment of coastal stretches and marine areas and declaring Coastal Regulation Zone (CRZ) - Notification is statutory order of Central Government made in pursuance of Administrative Law as 'administrative delegation' - Notification not having been issued in exercise of rule making power of Central Government, cannot be seen as a product of delegation legislation in sense it is understood in Administrative Law.

(Paras19 20)

(B)National Green Tribunal Act (19 of 2010), S.14, S.22 - National Green Tribunal (Practice and Procedure) Rules (2011), R.24 - Powers of Tribunal - Civil proceedings - Tribunal vested with powers that are normally vested with civil courts - A remedy of appeal to Supreme Court is provided by S.22 on grounds as mentioned in S.100 of Code of Civil Procedure - Case of validity of notification before Tribunal would partake character of dispute Constitution of India, Art.133(1)(c) -

(Paras22 23)

(C)National Green Tribunal Act (19 of 2010), S.14 - Powers of Tribunal - Claim of petitioners that changes brought about in Coastal Regulation Zone by notification

would amount to modification of substantial nature in Development Control Regulations under MRTP Act - Where there is direct violation of a specific statutory environmental obligation by a person affecting community at large or likely to affect such community, Tribunal can step in and pass such order as is warranted for settling dispute.

(Para26)

(D)National Green Tribunal Act (19 of 2010), S.14 - Powers of Tribunal - Environmental issues - Merely because in process of decision making Tribunal may be required to consider provisions of any other enactment would not denude it of its fundamental and predominant task of taking decisions that would advance object of Schedule I enactments as also to secure ends of justice in any particular case - Environmental interest is of paramount consideration and it has to decide accordingly.

(Paras28 30)

(E)Constitution of India, Art.226 - Writ petition - Delay - Notification is dated January 18, 2019 and writ petition presented on March 25, 2021 - No explanation offered for belated approach - Entire nation was in a state of disarray from March 23, 2020 but first wave in Mumbai started receding from November, 2020 - This period could count for exclusion and not rest - Delay thus, unreasonable.

(Para34)

(F)Constitution of India, Art.226 - National Green Tribunal Act (19 of 2010), S.14 - Writ petition - Power of High Courts - Art. 226 in terms does not place any limit on Court's power - However, writ remedy being discretionary, power has to be exercised judiciously bearing in mind certain self-imposed restrictions

(Para10)



Power conferred on the High Courts by Art.226 of the Constitution is very wide. Art.226 in terms does not place any limit on the Court's power. However, writ remedy being discretionary, the power has to be exercised judiciously bearing in mind certain self-imposed restrictions propounded by authoritative decisions of the Supreme Court. A writ court may decline interference if an alternative, efficacious and speedy remedy is available to the petitioner who approaches it with a grievance that his legal right has been infringed. This is not based on any rule of law, rather it is based on a rule of policy, convenience or discretion. There are four exceptions carved out by the Supreme Court and if any one of such exceptions is present in a particular case, the writ court may not hesitate to entertain the plea. On the contrary, a remedy seems to be available to them under the NGT Act; and if petitioners' plea is such that it can be entertained and decided by the forum created by the NGT Act, which also provides an appellate remedy before the Supreme Court on any one of the grounds mentioned in S.100 of the Code of Civil Procedure, it would seem that the NGT Act instead of providing an alternative remedy, provides the first remedy to an aggrieved party who seeks to raise a substantial question relating to environment; and after such remedy is exhausted, he may explore further remedies as law would provide. Apart from this, delay or laches in seeking redress before the writ court is one of the other restrictions based whereon a plea, howsoever meritorious, may not be entertained.

(Para10)

Cases Referred

AIR 2016 SC 261
 PIL No. 49 of 2013, D/
 08.03.2013
 AIR 2017 SC (Supp) 962
 AIR 2019 SC 1074

Chronological Paras

Cases Referred

AIR 1997 SC 1125 : 1997
 Lab IC 1069 : 1997 AIR
 SCW 1345
 AIR 2019 SC (SUPP) 365
 AIR 2012 SC 3081 : 2012
 AIR SCW 4550
 AIR 1965 SC 1818

Chronological Paras

Venkatesh Dhond, Senior Advocate,akash Rebello, Zaman Ali I/by Zaman Ali for Petitioner; Parag A. Vyas I/by A. A. Ansari,milind More, Addl. Govt. Pleader,ms. Sharmila Deshmukh for Respondent.

Judgement

1.DIPANKAR DATTA, C.J. :-The first petitioner is a public trust registered under the Bombay Public Trust Act, 1950. The second petitioner is a Director of the first petitioner.

2. By instituting this writ petition dated March 25, 2021 ~ in the Public Interest Litigation jurisdiction of this Court ~ the petitioners have mounted a challenge to a notification bearing no. G.S.R 37 (E) dated January 18, 2019 (hereafter "the impugned notification") issued by the Ministry of Environment, Forest and Climate Change (hereafter "the Ministry") in exercise of powers conferred by sub-section (1) and clause (v) of sub-section (2) of section 3 of the Environment (Protection) Act, 1986 (hereafter "the Environment Act"). Such notification purports to supersede the Coastal Regulation Zone Notification 2011 (hereafter "the 2011 Notification") bearing no. S.O. 19(E) dated January 6, 2011.

3. Recitals in the impugned notification would reveal that the Ministry had received representations from various coastal States and Union Territories, besides other stakeholders, regarding certain provisions in the 2011



Notification related to management and conservation of marine and coastal ecosystems, development in coastal areas, eco-tourism, livelihood options and sustainable development of coastal communities, etc., together with requests to address the concerns related therewith. Pursuant thereto, the Ministry constituted a Committee under the Chairmanship of Dr. Shailesh Nayak to examine various issues and concerns as indicated hereinabove and to recommend appropriate changes in the 2011 Notification. The report submitted by the Nayak Committee was examined by the Ministry in consultation with various stakeholders. This led to issuance of a draft Coastal Regulation Zone Notification 2018 which was hosted in the website of the Ministry on April 18, 2018 seeking comments and suggestions from all concerned. After considering the objections and suggestions, as received, the impugned notification was issued with a view to conserve and protect the unique environment of coastal stretches and marine areas, besides livelihood security to the fisher communities and other local communities in the coastal areas and to promote sustainable development based on scientific principles taking into account the dangers of natural hazards and sea level rise due to global warming, and the areas specified therein were declared as Coastal Regulation Zone (hereafter "the CRZ").

4. The impugned notification is challenged on the ground that some of its provisions are manifestly arbitrary and violative of Article 14 of the Constitution, as well as violates the right to live in a healthy environment, and consequently violates the right to life of citizens protected by Article 21. It is further claimed that the reasoning for enacting many of the changes leading to the CRZ have no nexus with the object sought to be achieved. Also, the impugned notification contains provisions which are reenactment of provisions earlier struck down as unconstitutional by the Supreme

Court or have been read down by the Supreme Court in earlier judgments. The main prayer in the writ petition is for declaring the impugned notification illegal and ultra vires Articles 14 and 21 of the Constitution, and to declare that the 2011 Notification continues to be valid and binding. It has also been prayed that the respondents may be restrained from acting further on the basis of the impugned notification and for a direction on them to act in accordance with the 2011 Notification. There are alternative prayers. Reading such prayers, one gets the impression of the petitioners feeling aggrieved by bits and pieces of the impugned notification and have prayed that parts of certain provisions may be declared arbitrary, illegal and ultra vires. If the prayers are granted, the effect thereof would result in deletion of such bits and pieces from the impugned notification.

5. At the out-set, Mr. Dhond, learned senior advocate for the petitioners, was called upon to satisfy us that this writ petition touching upon environmental issues is maintainable before this Court having regard to the remedy available to the petitioners before the National Green Tribunal (hereafter "the Tribunal") under the National Green Tribunal Act, 2010 (hereafter "the NGT Act").

6. While attempting to satisfy us that the writ petition is maintainable, Mr. Dhond has advanced the following four contentions: -

(a) Section 15 of the NGT Act, dealing with relief, compensation and restitution and section 16 thereof, providing for appellate jurisdiction, would not stand in the way of entertaining and trying this writ petition. The only provision under the NGT Act which may seem to have some relevance in the present case but not barring a writ petition touching environmental issues is section 14. The jurisdiction of the Tribunal under Section 14 relates to resolution of civil disputes; however, since the prayer of



the petitioners is to strike down a subordinate legislation as unconstitutional, the Tribunal under section 14 would have no such power. This is because this Court has consistently taken a view that the Tribunal cannot hear a challenge to the constitutional vires of legislation or a subordinate legislation.

(b) The Hon'ble Supreme Court has held that a statutory tribunal not constituted under Article 323A or Article 323B of the Constitution cannot consider a challenge to the vires of legislation/subordinate legislation. It therefore matters not whether the challenge is under section 14 or section 16 of the NGT Act. The legislature cannot confer jurisdiction that it is not permitted by the Constitution to confer.

(c) The challenge to a statute/subordinate legislation is not a 'civil dispute' and hence the Tribunal is not clothed with the power or jurisdiction to examine it and strike down the statute.

(d) Without prejudice to the above, in the present matter, certain issues arise under the Maharashtra Regional and Town Planning Act, 1966 (hereafter "the MRTP Act") inasmuch as the impugned notification effectively grants additional FSI (Floor Space Index) which is a matter which falls under the Development Control Regulations framed under the MRTP Act. The writ petition, therefore, includes an issue that is incapable of being decided by the Tribunal.

7. In support of the proposition that the Tribunal has no power to strike down subordinate legislation, reliance has been placed on the Division Bench decision of this Court in *Central India Ayush Drugs Manufacturers Association, Nagpur vs. State of Maharashtra*, reported in (2017) 1 Mh. L.J. 526 : (AIR 2016 SC 261). Reliance has also been placed on an unreported decision dated May 8, 2013 of

another Division Bench of this Court in PIL No.49 of 2013 (*Parshuram Uparkar vs. Union of India*]. In the latter decision, law has been laid down on similar lines that the Tribunal has no power to examine the vires of a provision and strike it down. As to what would constitute a civil dispute, reference has been made to the decision of the Supreme Court in *Techi Tagi Tara vs. Rajendra Singh Bhandari and Ors.*, reported in (2018) 11 SCC 734 : (AIR 2017 SC (Supp) 962). The decision in *Tamil Nadu Pollution Control Board vs. Sterlite Industries*, reported in (2019) 19 SCC 479:(AIR 2019 SC 1074) has also been relied on where, on interpretation of the decision in *L. Chandra Kumar vs. Union of India*, reported in (1997) 3 SCC 261 : (AIR 1997 SC 1125), the Supreme Court has held that only a statutory tribunal constituted under Article 323A or Article 323B would have the power to strike down a legislation/subordinate legislation; and environment not being a subject enumerated under Articles 323A or 323B, an environmental tribunal deriving power from a legislative enactment, as distinguished from the Constitution, cannot strike down legislation on the anvil of it being in violation of Constitutional provisions.

8. It has also been contended, without prejudice to the aforesaid submissions, that the present matter would involve certain issues under the MRTP Act and such issues would be incapable of being decided by the Tribunal. The contention advanced is that the Tribunal not having any specialized expertise to deal with issues pertaining to urban and town planning, this Court ought to exercise its jurisdiction. In this connection, once again the decision in *Parshuram Uparkar* (supra) has been relied on.

9. We have not considered it necessary to call upon the respondents to answer the contentions of Mr. Dhond.



10. Power conferred on the High Courts by Article 226 of the Constitution is very wide. Article 226 in terms does not place any limit on the Court's power. However, writ remedy being discretionary, the power has to be exercised judiciously bearing in mind certain self-imposed restrictions propounded by authoritative decisions of the Supreme Court. A writ court may decline interference if an alternative, efficacious and speedy remedy is available to the petitioner who approaches it with a grievance that his legal right has been infringed. This is not based on any rule of law, rather it is based on a rule of policy, convenience or discretion. There are four exceptions carved out by the Supreme Court and if any one of such exceptions is present in a particular case, the writ court may not to hesitate to entertain the plea. However, here we are not concerned with an alternative remedy available to the petitioners in the sense that they can choose between two remedies made available by law. On the contrary, a remedy seems to be available to them under the NGT Act; and if we hold that the petitioners' plea is such that it can be entertained and decided by the forum created by the NGT Act, which also provides an appellate remedy before the Supreme Court on any one of the grounds mentioned in section 100 of the Code of Civil Procedure, it would seem to us that the NGT Act instead of providing an alternative remedy, provides the first remedy to an aggrieved party who seeks to raise a substantial question relating to environment; and after such remedy is exhausted, he may explore further remedies as law would provide. Apart from this, delay or laches in seeking redress before the writ court is one of the other restrictions based whereon a plea, howsoever meritorious, may not be entertained. We propose to proceed bearing these in mind.

11. The impugned notification has been issued by the Central Government in exercise of power conferred by section 3. Since sub-section (1)

and clause (v) of sub-section (2) of section 3 are the provisions upon invocation of which the impugned notification has been issued in the manner required by sub-section (3), we consider it proper to reproduce the same hereunder for facility of convenience: -

3. Power of Central Government to take measures to protect and improve environment.-

(1) Subject to the provisions of this Act, the Central Government shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution.

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), such measures may include measures with respect to all or any of the following matters, namely:-

(v) restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards;

(3) The Central Government may, if it considers it necessary or expedient so to do for the purposes of this Act, by order, published in the Official Gazette, constitute an authority or authorities by such name or names as may be specified in the order for the purpose of exercising and performing such of the powers and functions (including the power to issue directions under Section 5) of the Central Government under this Act and for taking measures with respect to such of the matters referred to in sub-section (2) as may be mentioned in the order and subject to the supervision and control of the Central Government and the provisions of such order,



such authority or authorities may exercise the powers or perform the functions or take the measures so mentioned in the order as if such authority or authorities had been empowered by this Act to exercise those powers or perform those functions or take such measures.

12. Bare reading of the aforesaid provisions would reveal that section 3 empowers the Central Government to take all such measures, as it deems necessary or expedient for all such purposes as is referred to in sub-section (1) as well as in the various clauses of sub-section (2) including clause (v). It is with a view to implement the mandate of the Environment 1986 Act that the Central Government, upon superseding the 2011 Notification, has proceeded to issue the impugned notification. There can be no dispute that the Central Government has been placed in a position of trust by the people, who have expressed their will through their elected representatives leading to the relevant enactment, to ensure that no activities are allowed which ultimately can lead to unscientific and unsustainable development, and ecological destruction. Indeed, if there be a failure on the part of the Central Government to do so, it would be the duty of the Courts to scrupulously try to protect the ecology and the environment.

13. Till 2010, the Constitutional courts were approached either in its Public Interest Litigation jurisdiction or the "Green Bench" entrusted to hear environmental matters for resolution of disputes touching environmental issues and to address concerns for the benefit of human kind. However, with the introduction of the NGT Act, which received the assent of the President of India on June 2, 2010, a new forum opened up where environmental issues could be tried and decided. The preamble of the NGT Act reads as follows:-

"An Act to provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources, including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto".

14. In terms of section 3 of the NGT Act, the Tribunal has been constituted which has a retired Judge of the Supreme Court of India as its Chairman. The Tribunal also comprises of, inter alia, expert members and the qualifications for appointment as expert members are engrafted in sub-section (2) of section 5 of the NGT Act.

15. Section 14 of the NGT Act, which is the main provision falling for our consideration, reads as follows: -

14. Tribunal to settle disputes. - (1) The Tribunal shall have the jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment), is involved and such question arises out of the implementation of the enactments specified in Schedule I.

(2) The Tribunal shall hear the disputes arising from the questions referred to in sub-section (1) and settle such disputes and pass order thereon.

(3) No application for adjudication of dispute under this section shall be entertained by the Tribunal unless it is made within a period of six months from the date on which the cause of action for such dispute first arose: Provided that the Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from filing the application within the said period, allow it to be filed within a further period not exceeding sixty days."



16. Section 15 of the NGT Act provides for relief, compensation and restitution to the victims of pollution and environmental damage. Section 16 has vested the Tribunal with appellate jurisdiction. These two sections do not create any hurdle for the petitioners.

17. The Environment Act figures in Schedule-I of the NGT Act. Therefore, for the purpose of the present case, the plain meaning of subsection (1) of section 14 is that the Tribunal shall have the jurisdiction to hear a civil case raising a substantial question relating to environment (including enforcement of any legal right relating to environment) subject, of course, to such question arising out of implementation of the Environment Act. The contention advanced before us is that the Tribunal cannot entertain a challenge to the impugned notification because it has no power or jurisdiction to declare a delegated legislation unconstitutional or ultra vires. Let us now consider how far such contention is acceptable.

18. The first question that would necessarily fall for our consideration is, whether the impugned notification is a delegated legislation? The answer, for the following reasons, cannot but be in the negative.

19. We have read the terms of the impugned notification as well as the provisions, which are the source of its origin. Section 3 empowers the Central Government to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of environment and preventing, controlling and abating environmental pollution by restricting areas in which any industries, operations or processes or classes of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards. By the impugned notification, not only has the CRZ been declared but it proceeds to provide for areas requiring special consideration under

the CRZ, prohibited activities and regulation of permissible activities within the CRZ, Coastal Zone Management Plan, CRZ clearance for permissible and regulated activities, etc. It has been notified with other measures for the general information of the public. In effect, these are measures which are geared towards implementation of the Environment Act.

20. We need not burden this order with any discussion on what delegated legislation is. Suffice to say, the petitioners are laboring under a misconception that the impugned notification is a law brought into force by the Central Government in exercise of the power of delegated legislation conferred by the Environment Act. Far from it, we see the impugned notification as one which is a statutory order of the Central Government made in pursuance of what is called in Administrative Law as 'administrative delegation'. A legislature may confer upon an administrative authority not only the power to make rules and regulations to carry out the purposes of a statute but also the power to apply the law to particular cases by making orders in exercise of the statutory power. So far as the validity of such orders themselves are concerned, they are subject to the doctrine of ultra vires and must, therefore, be within the limits set by the statute. Sections 6 and 25 specifically empower the Central Government to make rules in respect of all or any of the matters referred to in section 3 and for carrying out the purposes of the Environment Act, respectively. Pertinently, the Environment (Protection) Rules, 1986 have been framed by the Central Government in exercise of power conferred by sections 6 and 25 of the Environment Act. These rules, being delegated legislation, are distinct and different from the statutory order made under section 3. The impugned notification not having been issued in exercise of the rule making power of the Central Government, cannot be seen as a product of delegation legislation in the sense



it is understood in Administrative Law. This being our conclusion as to the nature of power that was exercised to bring into existence the impugned notification, all the cited decisions have no application.

21. The real concern of the petitioners is that the measures brought about by the impugned notification are insufficient to prevent unscientific and unsustainable development, and ecological destruction, and it is claimed that they are not intended to protect life. The phrase "substantial question relating to environment" appearing in sub-section (1) of section 14 has been defined in clause (m) of sub-section (2) of section 1 of the Environment Act. It reads as follows:

(m) 'substantial question relating to environment' shall include an instance where, -

(i) there is a direct violation of a specific statutory environmental obligation by a person by which, -

(A) the community at large other than an individual or group of individuals is affected or likely to be affected by the environmental consequences; or

(B) the gravity of damage to the environment or property is substantial; or

(C) the damage to public health is broadly measurable;

(ii) the environmental consequences relate to a specific activity or a point source of pollution;"

All the concerns that the petitioners have urged do stand covered by 'substantial question relating to environment', and would also include an attempt to enforce their legal rights in the pursuit of protecting the environment; therefore, their plea is squarely covered by section 14(1) of the NGT Act.

22. Next, we proceed to deal with the contention that challenge to a statute/subordinate legislation is not a 'civil dispute'. We feel, this contention has been urged to be rejected. One has to really torture a case of the present nature so that it does not fit into a 'civil case'. The Tribunal has been vested with powers that are normally vested with civil courts. A remedy of appeal to the Supreme Court is provided by section 22 on grounds as mentioned in section 100 of the Code of Civil Procedure. It would not be inapposite at this stage to remind ourselves of what the Supreme Court observed in *S.A.L. Narayan Row vs. Ishwarlal Bhagwandas*, reported in AIR 1965 SC 1818, on different kinds of proceedings. A passage from such decision, providing useful guidance, is quoted below:

"8. *** The expression 'civil proceeding' is not defined in the Constitution, nor in the General Clauses Act. The expression in our judgment covers all proceedings in which a party asserts the existence of a civil right conferred by the civil law or by statute, and claims relief for breach thereof. A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property. It also includes proceedings in which in the larger interest of the State, orders to prevent apprehended breach of the peace, orders to bind down persons who are a danger to the maintenance of peace and order, or orders aimed at preventing vagrancy are contemplated to be passed. But the whole area of proceedings, which reach the High Courts is not exhausted by classifying the proceedings as civil and criminal. There are certain proceedings which may be regarded as neither civil nor criminal. For instance, proceeding for contempt of court, and for exercise of disciplinary jurisdiction against lawyers or other professionals, such as Chartered Accountants may not fall within the classification of proceedings, civil or criminal.



But there is no warrant for the view that from the category of civil proceedings, it was intended to exclude proceedings relating to or which seek relief against enforcement of taxation laws of the State. The primary object of a taxation statute is to collect revenue for the governance of the State or for providing specific services and such laws directly affect the civil rights of the taxpayer. If a person is called upon to pay tax which the State is not competent to levy, or which is not imposed in accordance with the law which permits imposition of the tax, or in the levy, assessment and collection of which rights of the tax-payer are infringed in a manner not warranted by the statute, a proceeding to obtain relief whether it is from the tribunal set up by the taxing statute, or from the civil court would be regarded as a civil proceeding. The character of the proceeding, in our judgment, depends not upon the nature of the tribunal which is invested with authority to grant relief, but upon the nature of the right violated and the appropriate relief which may be claimed. A civil proceeding is, therefore, one in which a person seeks to enforce by appropriate relief the alleged infringement of his civil rights against another person or the State, and which if the claim is proved would result in the declaration express or implied of the right claimed and relief such as payment of debt, damages, compensation, delivery of specific property, enforcement of personal rights, determination of status etc."

(emphasis supplied)

We say no more.

23. In *Techi Tagi Tara* (supra), the Supreme Court has held, in the context of the NGT Act that a 'dispute' would be the assertion of a right or an interest or a claim met by contrary claims on the other side. Based on the aforesaid guidance provided by the Supreme Court, we hold that the case laid by the petitioner before us, if the same had been laid before the Tribunal, would partake

the character of a 'dispute' if the respondents had chosen to contest the same by countering it. There is absolutely no merit in the contention advanced and, thus, it stands rejected.

24. This takes us to the last contention. It is the petitioners' claim that changes brought about in the CRZ by the impugned notification would amount to a modification of a substantial nature in the Development Control Regulations under the MRTP Act and this is an issue which the Tribunal is incapable to decide in view of the provisions of the NGT Act.

25. We would preface our discussion while dealing with this contention by referring to the decision of the Supreme Court in *Mantri Techzone (P) Ltd. vs. Forward Foundation*, reported in (2019) 18 SCC 494:(AIR 2019 SC (SUPP) 365) This decision is not only relevant for the contention under consideration but also as regards interpretation of the several provisions of the NGT Act resulting in conferment of wide and extensive powers on the Tribunal in relation to environmental issues (paragraphs 40 to 46). The Court, upon recording that the NGT Act is a beneficial legislation held that:

"46. *** An interpretation that is in favour of conferring jurisdiction should be preferred rather than one taking away jurisdiction."

While considering section 33, it was held as follows:

"47. Section 33 of the Act provides an overriding effect to the provisions of the Act over anything inconsistent contained in any other law or in any instrument having effect by virtue of law other than this Act. This gives the Tribunal overriding powers over anything inconsistent contained in the KIAD Act, the Planning Act, the Karnataka Municipal Corporations Act, 1976 (the KMC Act); and the Revised Master Plan of Bengaluru, 2015 (RMP). A Central legislation



enacted under Entry 13 of Schedule VII List I of the Constitution of India will have the overriding effect over State legislations. The corollary is that the Tribunal while providing for restoration of environment in an area, can specify buffer zones around specific lakes and waterbodies in contradiction with zoning regulations under these statutes or RMP."

26. In view of the pronouncement that the NGT Act would override State legislations, any planning law has to yield to the former. Equally, section 24 of the Environment Act provides that the provisions thereof and the rules or orders made therein shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the said Act. The MRTTP Act, if it contains any provision inconsistent with the Environment Act, must yield to the latter. Even otherwise, if there is direct violation of a specific statutory environmental obligation by a person affecting the community at large or likely to affect such community, the Tribunal may step in and pass such order as is warranted for settling the dispute.

27. We now propose to assign our own reasons as to why the contention under consideration does not appeal to us to be acceptable.

28. The Tribunal's jurisdiction to deal with environmental issues is so wide and expansive that literally speaking, 'everything under the sun' raising substantial question relating to environment can be dealt with by it. It would matter little that in its pursuit to further the objects for which the Tribunal has been brought into existence as well as to ensure protection of environment and conservation of forests and other natural resources including enforcement of any legal right relating to environment, any other enactment is required to be considered. So long as the basic question remains the same, i.e., the Tribunal is either approached or is duty bound to secure proper implementation

of the enactments specified in Schedule I of the NGT Act and a substantial question in relation thereto arises, and the decision of the Tribunal on such question would beneficially impact the environment, merely because in the process of decision making the Tribunal may be required to consider provisions of any other enactment would not denude it of its fundamental and predominant task of taking decisions that would advance the object of the Schedule I enactments as also to secure the ends of justice in any particular case. We may refer in this connection to rule 24 of the National Green Tribunal (Practice and Procedure) Rules, 2011 framed by the Central Government.

29. There is one final reason for which we are not persuaded to accept the contention of Mr. Dhond. There could be a situation that the impugned notification is also under challenge before the Tribunal on the first two contentions raised by the petitioners, as noted above, in an application under section 14 of the NGT Act. If this writ petition were entertained, which raises the fourth contention also, as noted above, the Court would be tasked to decide the first two and the fourth contentions on its own merits. The Tribunal also being in seisin of the first two contentions, there would always be a possibility of conflicting opinions being rendered by this Court and the NGT in respect of the same subject matter of challenge which, in our opinion, would be absolutely undesirable.

30. Regard being had to the wide contours of the Tribunal's powers to address all concerns pertaining to environment, it would not be appropriate for us to entertain this writ petition on the specious ground that issues relating to the MRTTP Act may also incidentally arise for consideration of the Tribunal. If such issue arises, the Tribunal has to decide the same bearing in mind that it being a creature of the NGT Act, environmental interest is of paramount consideration and it has to decide accordingly.



31. We are also minded to observe that no Court ought to interfere in respect of matters over which the Tribunal has jurisdiction, or else the very purpose for enactment of the NGT Act would stand defeated. The Tribunal, having regard to its constitution, would be better equipped to deal with all points of law and facts, which could be intricate, with the expert assistance that is available at its level.

32. The discussion must end by quoting paragraph 40 of the decision of the Supreme Court in *Bhopal Gas Peedith Mahila Udyog Sangathan vs. Union of India*, reported in (2012) 8 SCC 326:(AIR 2012 SC 3081) reading as follows:

"40. Keeping in view the provisions and scheme of the National Green Tribunal Act, 2010 (for short "the NGT Act") particularly Sections 14, 29, 30 and 38(5), it can safely be concluded that the environmental issues and matters covered under the NGT Act, Schedule I should be instituted and litigated before the National Green Tribunal (for short "NGT"). Such approach may be necessary to avoid likelihood of conflict of orders between the High Courts and NGT. Thus, in unambiguous terms, we direct that all the matters instituted after coming into force of the NGT Act and which are covered under the provisions of the NGT Act and/or in Schedule I to the NGT Act shall stand transferred and can be instituted only before NGT. This will help in rendering expeditious and specialised justice in the field of environment to all concerned."

(emphasis supplied)

33. We, therefore, reject this contention too.

34. There is one other reason why we feel disinclined to entertain the writ petition. The impugned notification is dated January 18, 2019. The writ petition has been presented on March 25, 2021. There is no explanation offered for

the belated approach. True it is, the entire nation was in a state of disarray from March 23, 2020 but the first wave in Mumbai started receding from November, 2020. This period could count for exclusion and not the rest. The delay is, thus, unreasonable.

35. For the reasons aforesaid, we decline interference. The writ petition is dismissed. No costs.

36. Since we have been informed that the Coastal Zone Management Plan has been finalized during the pendency of the writ petition, we grant liberty to the petitioners to pursue their remedy before the Tribunal in accordance with law.

Petition Dismissed .

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