



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10005 OF 2023

Sita Vihar Co-operative Housing Society Ltd. .. Petitioner

Versus

Surajratan Fatehchand Damani Janhit Nidhi and
Ors.

.. Respondents

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- Mr. Anil V. Anturkar, Senior Advocate a/w. Ms. Karishma Shinde i./by Mr. Sugandh Deshmukh, Advocates for Petitioner.
 - Mr. B. K. Barve a/w. Mr. Sandeep Barve and Ms. Sonali Patil i./by B. K. Barve & Co., Advocates for Respondent No.8.
 - Mr. G. S. Godbole, Senior Advocate a/w. R. S. Datar and Ms. Druti Datar, Advocates for Respondent No.9.
 - Ms. Swati Sawant i./by K. P. Law Associates, Advocates for Respondent No.11.
 - Mr. J. P. Patil, AGP for Respondent No.12 – State of Maharashtra.
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CORAM : MILIND N. JADHAV, J.

DATE : SEPTEMBER 24, 2024

JUDGMENT:

1. Heard Mr. Anturkar, learned Senior Advocate for Petitioner; Mr. Barve, learned Advocate for Respondent No.8; Mr. Godbole, learned Senior Advocate for Respondent No.9, Ms. Sawant, learned Advocate for Respondent No.11 - Corporation and Mr. Patil, learned AGP for Respondent No.12 - State.

2. By consent, taken up for final hearing due to the exigency mentioned by Mr. Anturkar.

3. Petitioner is a Co-operative Housing Society who has filed Regular Civil Suit (“RCS”) No.748 of 2019 on 17.09.2019 for the

following reliefs:-

- a. *It be held, declare and decreed that Plaintiff is entitled to and Defendant Nos.1 to 8 and anybody claiming through and under them including Defendant Nos.9 and 10 are under statutory obligation under MOFA to execute conveyance of suit land admeasuring 9582.650 sq. meters together with the said buildings standing thereon by way of lease for the period of 999 years in favour of Plaintiff as directed by the Charity Commissioner vide order dated 02/11/1987 modified vide order dated 09/02/1988 passed under Section 36 (1) (b) of the Bombay Public Trust Act.*
- b. *It be held, declared and decreed that consent terms executed on 27/04/2011 by and between Defendant Nos.2, 3 and 4 through Defendant No.5 for and on behalf of Defendant No.1 and Defendant No.8 and Defendant No.10 In Regular Civil Suit No.495 of 1998 in the Court of Civil Judge (J.D.) Thane vide Exh.47 and the consent decree dated 18/09/2011 passed thereupon by the Hon'ble Court viz. fraudulent consent decree be declared as null, void-ab-initio and/or not enforceable against the Plaintiff and/or not binding upon the Plaintiff and be quashed and set aside.*
- c. *It be held, declared and decreed that lease deed dated 30/12/2011 registered under serial no.TNN5-00982-2012 on 01/02/2012 with the office of Sub-Registrar, Thane-5 executed by and between the Defendant No.10 and Defendant No.9 viz. fraudulent lease deed be declared as null, void-ab-initio and/or not enforceable against the Plaintiff and/or not binding upon the Plaintiff and be quashed and set aside.*
- d. *It be held, declared and decreed that declaration and undertaking executed by Defendant Nos.2, 3 and 4 through Defendant No.5 for and on behalf of Defendant No.1 and Defendant No.8 executed on ___/02/2011 viz. fraudulent declaration be declared as null, void-ab-initio and/or not enforceable against the Plaintiff and/or not binding upon the Plaintiff and be quashed and set aside.*
- e. *It be held, declared and decreed that resolution passed by the Defendant no.1 in the meeting of Trustees allegedly held on 01/12/2010, inter-alia, resolving to grant lease to the Defendant no.10 herein and further resolving to give credit of lease rent for the residual period to the Defendant no.10 and further resolving to authorize the Defendant no.5 to sign and file the consent terms on behalf of the Trust in RCS no. 495 of 1996 viz. fraudulent resolution be declared as null, void-ab-initio and/or not enforceable against the Plaintiff and/or not binding upon the Plaintiff and be quashed and set aside.*
- f. *It be held, declared and decreed that suit plan no.1, suit plan no.2 and suit commencement certificate be declared as null, void-ab-initio and be revoked, quashed and set aside.*
- g. *The Defendant No.10, and/or Its existing partners, assignees and/or anybody claiming through or under them be decreed and*

directed to handover the vacant and peaceful possession of said portion admeasuring 857 sq. meters viz. Plot F, which is shown in the plan at Annexure A surrounded by letters U, V, W, X, Y, Z.

- h. The Defendant No.9, its agents, servants, assignees, nominees and/or anybody claiming through or under it be restrained as and by way of perpetual injunction of this Hon'ble Court from commencing and/or from carrying out any construction upon said portion of land admeasuring 801 sq. meters out of suit land and/or as per the suit plan no.1 and suit plan no.2 and/or as per any other plans and/or from creating any third party interests upon the premises to be situate in the new building which is sought to be constructed upon said portion of land as per the suit plan no.1 and suit plan no.2 as the case may be.*
- i. The Defendant No.9 & 10, their agents, servants, assignees, nominees and/or anybody claiming through or under them be restrained as and by way of perpetual injunction of this Hon'ble Court from using the portion out of suit land as a right of way to the structures C and D and/or to the said alleged portion E and F as shown in the fraudulent consent decree and/or from having any egress and ingress at and from the suit land to said alleged portion E and F.*
- l. The Defendant No.11, Its officers, agents, servants and/or anybody claiming through or under it be restrained as and by way of perpetual injunction of this Hon'ble Court from entertaining any proposal for development or otherwise from Defendant Nos.1 to 10 and/or from according any further approval, permissions to the Defendant No.9 pursuant to the suit plan no.1 and suit plan no.2.*
- k. The Defendant Nos.1 to 8, their agents, servants, assignees, nominees and/or anybody claiming through or under them be restrained as and by way of perpetual injunction of this Hon'ble Court from creating any further third party rights, titles and interests upon any portion of the suit land and or from using and utilizing any development potentiality in the form of FSI, TDR or DR of and out of suit land viz. suit plot B in construction of any buildings either upon suit plot B or said plot A and or from seeking any further sub division of suit land viz. plot B as sought to be attempted vide the fraudulent consent decree.”*

4. Defendant No.1 is a registered Public Charitable Trust and owner of Suit property. Defendant Nos.2 to 4, 6 and 7 are its present Trustees. Defendant No.5 is the Constituted Attorney of Defendant Nos.2 to 4. Defendant No.8 is a sole proprietary firm known as M/s. Sita Development Corporation which was previously a partnership firm

and developer of Suit property, Defendant No. 10 is a tenant of a portion of the Suit property. Defendant No.9 is attempting to independently develop a portion of the Suit property. Defendant Nos.9 and 10 are Partnership firms deriving their right from Defendant No.1. Defendant No.11 is the Thane Municipal Corporation (Planning Authority).

5. Cause of action resultantly leading to filing of Suit by Plaintiff – Society is stated in paragraph No.5 of the Suit plaint. According to Plaintiff – Society due to failure of Defendant Nos.1 to 8 to comply with the requisitions contained in the legal notice dated 01.04.2019 addressed by Plaintiff- Society's Advocate, cause of action has arisen against the Defendants. Suit land is situated in taluka and district Thane. Plaintiff – Society filed Suit for seeking enforcement of statutory obligations under the Maharashtra Ownership of Flats Act, 1963 (for short “**MOFA**”) principally seeking conveyance under Section 11 of MOFA. Rest of the reliefs are consequential in nature.

6. Learned Trial Court rejected Exhibit “5” Application of Plaintiff – Society on 10.08.2021. This order is appended at page No.315. Being aggrieved, Plaintiff – Society filed Miscellaneous Civil Appeal (“**MCA**”) No.57 of 2021 before District Court. By the impugned order dated 12.05.2023, District Court rejected the MCA. Thus, there are twin concurrent orders below Exhibit “5” which are challenged by

Plaintiff – Society before me in the present Petition. It is opposed by Respondents.

7. Brief facts which give rise to cause of action are briefly stated as under:-

7.1. Reference is made by both sides to a plan at page No.472, appended to the development Agreement for advancing their submissions.

7.2. Defendant No.1 – Trust is owner of several plots of land bearing City Survey Nos.15, 47, 48, 49, 598 and 63 totally admeasuring 25745.78 square meters situated at LBS Marg, Navpada, Thane (West), Thane (for short “**larger property**”). This larger property is broadly divided into two plots viz. Plot ‘A’ admeasuring 9500.83 square meters (excluding set-back area of 1142.70 square meters) and Plot ‘B’ admeasuring 8071 square meters (excluding set-back area of 1511.18 square meters). Originally Respondent No.10 was a tenant in respect of a portion on plot “A”.

7.3. On 29.08.1986, Defendant No.1 entered into an Agreement with Defendant No.10 and shifted the said tenant to plot B and handed over two built-up structures ‘C’ and ‘D’ with their appurtenant open space and since then Defendant No.10 is enjoying possession of the same on Plot ‘B’. There are two structures ‘C’ and ‘D’ on Plot ‘B’, which are in possession and occupation of Defendant No. 10 i.e. M/s. Komet

Trade Link, partnership firm (Respondent No.10 herein) in the capacity of tenant of Respondent No.1. Plot A thus became vacant and available for development. Defendant No.10 was carrying on business of L.P. Gas Cylinder supplier. It required storage of L.P. Gas Cylinders. The business was carried out from the building / structure on plot 'B' – which was designated as 'C'. For carrying out this business, open spaces upto 30 ft. on all sides of the storage place of L.P. Gas Cylinders was a mandatory requirement of the Fire Brigade Department. Defendant No. 1 permitted Defendant No. 10 to use the open space on Plot 'B' for the purpose of carrying on its business which was operated from the structure 'C' on plot 'B'. The structure 'D' was used by Defendant No. 10 for a printing press. Total area of plot 'B' was 8071 sq.mts. Structure 'C' was situated on plot 'B' and had an area of 80 sq.mts. Structure 'D' had an area of 92.52 sq. mts. Rest of the area was vacant and is shown as 'E' and 'F' on plot 'B'. Land portion 'E' admeasured 801 sq.mts. and land portion 'F' admeasured 857 sq.mts. Structures 'C' and 'D' were situated on land portion 'E' and 'F'.

7.4. Defendant No.1 – Trust being desirous of developing Plot 'A' made application before Charity Commissioner seeking permission for development and permission was granted by letter No. J/4/88-87/16577 dated 02.11.1987. In furtherance thereto on 09.05.1988, Defendant No.1 entered into a development Agreement with Defendant No.8 for development on plot 'A' and handed over

possession of Plot 'A' to Defendant No.8. In furtherance of development Agreement Defendant No.8 obtained the necessary construction permissions / approvals from the Corporation and completed construction of 5 (five) buildings thereon.

7.5. On 20.02.1996, Defendant No.8 obtained occupation certificate in respect of the constructed buildings.

7.6. In 1998, Defendant No.1 filed Regular Civil Suit No.495 of 1998 against Defendant No.10 for eviction and removal of encroachment over lands demarcated as 'E' admeasuring 801 sq. mts. and 'F' admeasuring 857 sq. mts. In that Suit, Defendant No.8 sought its impleadment and was impleaded for safeguarding the open parking space of the Plaintiff – Society. This is a crucial aspect because, this Suit was later compromised to the exclusion of the rights of the Society behind its back.

7.7. In 1999, Defendant No.8 entered into a Sale Agreement with various purchasers of flats in the 5 (five) constructed buildings as per the provisions of MOFA and formed the Plaintiff – Society. Conveyance is still not given to the Society and hence the Suit is filed.

7.8. On 27.04.2011, Defendant No.1 and Defendant No.8 executed Consent Terms in favour of Defendant No.10 and filed them in Regular Civil Suit No.495 of 1998. Plaintiff - Society was not aware of filing of the Suit or the Consent Terms.

7.9. It is pertinent to note that in clause 9 of the Consent Terms, it was agreed between parties that Defendant Nos.1 to 8 would grant a perpetual lease to Defendant No.10 for land demarcated as 'E' and 'F' alongwith structures 'C' and 'D' standing thereon as shown in the plan for a period of 999 years. Further, in clause 16 of Consent Terms, Defendant Nos.1 to 8 agreed and confirmed that full development rights in respect of land portion 'E' and 'F' were transferred, conveyed and assigned to Defendant No.10 for its exclusive use and benefit. Furthermore, in clause 23 of Consent Terms, Respondent Nos.1 to 8 admitted and confirmed that Respondent No.10 was their tenant in respect of structures 'C' and 'D' alongwith appurtenant portion of land area 'E' and 'F' and Defendant No.10 was entitled to hold and possess the said portions of land. In effect, by the Consent Terms, the entire area of Plot 'B' was given to Defendant No.10.

7.10. On 30.12.2011, Defendant No.10 executed lease deed in favour of Defendant No.9 in respect of land portion 'E' admeasuring 801 square meters alongwith structure 'C' admeasuring 80 square meters standing thereon and permission to use FSI admeasuring 92.52 square meters of structure 'D' and FSI admeasuring 155.89 square meters. Pursuant to execution of lease deed, property card in respect of the aforementioned land stood transferred and mutated in the name of Defendant No.9.

7.11. On 25.02.2014, Plaintiff – Society issued a legal notice to Respondent Nos.1 to 8 to execute conveyance in favour of Plaintiff – Society under its MOFA obligations.

7.12. On 05.03.2016, Defendant No.11 – Municipal Corporation granted approval to Defendant No.9 to undertake development in respect of land admeasuring 801 square meters being land portion ‘E’ but as there was a common access to the said land from the plot occupied by Plaintiff - Society, Defendant No.11 – Corporation directed Defendant No.9 to obtain No Objection Certificate (“NOC”) from the Plaintiff – Society. On 05.04.2016, Defendant No.9 addressed letter to Plaintiff – Society informing it about approval by Defendant No.11 – Corporation and requested them to grant NOC for construction. In pursuance thereof, on 25.05.2016, Plaintiff – Society addressed letter to Defendant No.9 seeking various documents for verification, which were duly submitted by Defendant No.9 by letter dated 31.05.2016.

7.13. On 15.07.2016, Plaintiff - Society addressed letter to Defendant No.8 seeking clarification about boundaries of Plaintiff – Society’s plot area and about status of conveyance of the land from Defendant Nos.1/8 as per the development Agreement and the individual Agreements to the Society. In response to the said letter, Defendant No.8 replied on 29.08.2016 stating that boundaries were restricted only to the existing plot occupied by Plaintiff – Society.

7.14. On 18.10.2016, Plaintiff – Society addressed letter to Respondent No.9 refusing to grant NOC for construction citing pendency of conveyance and precise demarcation of boundaries of the plot to be conveyed to the Plaintiff - Society.

7.15. By letter dated 08.11.2016, Plaintiff – Society called upon Defendant No.8 to proceed with granting conveyance to Society.

7.16. By letter dated 29.04.2017, Defendant No.9 assured Plaintiff - Society that they would not commence any construction on plots 'E' and 'F' and would endeavour to resolve the issue pertaining to NOC amicably.

7.17. On 20.06.2018, Defendant No.11 – Corporation sanctioned revised plans submitted by Defendant No.9 for development on land portion 'E' of plot 'B' by unilaterally deleting the condition to obtain NOC from Plaintiff Society and granted Commencement Certificate ("CC") to Defendant No.9 to commence construction on plot 'E'.

7.18. Plaintiff – Society filed Writ Petition No.7678 of 2019 before this Court for quashing and setting aside the plans sanctioned and the CC issued by Defendant No.11 – Corporation in favour of Defendant No.9. By order dated 23.08.2019 the said Writ Petition was disposed as withdrawn with liberty to Society to file Suit in the competent Court.

7.19. In the above backdrop Plaintiff – Society filed Regular Civil Suit No.748 of 2019 in Court seeking various reliefs in the nature of declaration and injunction against Defendants. Alongwith Suit, Plaintiff filed Application below Exhibit-5 seeking temporary injunction.

7.20. Application below Exhibit-5 was rejected by order dated 10.08.2021.

7.21. Plaintiff – Society filed Application below Exhibit-108 seeking *status quo* order which was also rejected by Trial Court on 11.08.2021.

7.22. Thereafter, Plaintiff – Society challenged the order dated 10.08.2021 before District Court in Miscellaneous Civil Appeal No.57 of 2021. In that Appeal, Plaintiff – Society filed Application for temporary injunction, which was rejected by District Court on 09.11.2021.

7.23. Subsequently, MCA was heard by District Court and dismissed by the impugned order dated 12.05.2023.

7.24. Hence, the present Writ Petition.

8. Mr. Anturkar, learned Senior Advocate appearing for Plaintiff – Society has taken me through the twin Exhibit “5” orders and would submit that it is an admitted fact that the Suit property comprising of plot ‘A’ and ‘B’ belongs to Defendant No.1 – Trust which

is a private Trust. He would submit that admittedly, Defendant No.1 entered into development Agreement dated 09.05.1988 with Defendant No.8 which is appended at page No.390 of the Writ Petition. Thereafter Defendant No.8 developed the Suit property i.e. plot 'A' fully.

8.1. He would submit that Defendant No.8 Developer entered into various individual agreements with members of Plaintiff - Society since 1996 onwards. Development is with respect to 131 residential and 41 commercial flats / units on plot 'A' in 5 (five) Buildings constructed by Defendant No.8. Purchasers formed and registered Plaintiff Co-operative Housing Society in 1999. He would submit that Plaintiff – Society filed the present Suit seeking enforcement of MOFA obligations, claiming through Defendant No.8 by virtue of the development Agreement dated 09.05.1988 executed with the Defendant No.1 – Trust. He would submit that obligations under Sections 3, 4 and 11 of the MOFA are invoked by Plaintiff – Society against Defendant Nos.1 to 8. He would submit that Defendant No.1 created certain rights in respect of plot 'B' in favour of Defendant No.9 due to which Defendant No.9 commenced construction on the Suit land pursuant to issuance of Commencement Certificate (“CC”) in its favour on 05.03.2016. He would submit that conveyance to the Society has not been executed by Defendant Nos.1 to 8 under its MOFA obligation and to the exclusion of Plaintiffs’ rights Defendant

No.9 is permitted to undertake construction an the area nomenclatured as 'C' and 'D' in its entirety on plot 'B' to the prejudice of Plaintiff. He would submit that until June 2018 Defendant No.11 – Municipal Corporation had consistently insisted on obtaining NOC from Plaintiff – Society for issuance of CC to Defendant No.9 and had specifically laid it down as a condition precedent before grant of construction or development permission. However for the first time on 20.06.2018 the aforesaid condition of NOC was deleted unilaterally by the Corporation. In this regard he has drawn my attention to the development Agreement dated 09.05.1988 and more specifically to clause (d) thereof appearing on running page No.394 of the Petition and would contend that reference to the structures in the said clause is to structures marked as 'C' and 'D' on the plan annexed to the development Agreement on plot 'B' handed over to the existing tenant i.e. Defendant No.10 and there is no reference whatsoever therein to the area marked as 'E' and 'F'.

8.2. According to him dispute relates to whether Survey No.63 pertaining to plot 'B' is included in and is part of development Agreement or otherwise. He would submit that Defendant No.9 is now constructing on a portion of Survey No.63 on plot 'B' and the question that arises is whether Defendant No.9 has received any right from Defendant No.8 / Defendant No.1 in respect of Survey No.63 as appearing on the plan annexed to the development Agreement. In so

far as Plaintiff – Society is concerned, it is its case that CTS No.63 is an integral part and parcel of the entire layout plan referred to and relied upon in the development Agreement. He would submit that even if it may not be mentioned in the legend to the plan which is annexed, but if the sanctioned approved layout sub-division plan dated 30.01.1988 is seen, which is appended at page No.471A to the Petition and if it is juxtaposed with the sanctioned approved layout subdivision plan at page No.472 of the Petition, then it can be ascertained that both plans are absolutely identical. He would submit that CTS No.63 is expressly mentioned in the layout of the sub-division plan dated 30.04.1988 by Respondent No.11 – Corporation, however this plan is suppressed by Defendants to contend that CTS No.63 is not concerned with the development Agreement.

8.3. Next, he would submit that in clause (a) of development Agreement at page No.393 of the Petition, there is an express reference to CTS No.63. He would submit that merely because in the plan enclosed to the development Agreement, CTS No.63 is not mentioned in its legend, it cannot mean that it is not a part of the said plan, since contents of the development Agreement executed between parties will prevail over the plan, which gives express reference to CTS No.63. He would therefore submit that despite Defendant No.9 receiving its CC on 05.03.2016, condition No.11 therein specifically required NOC of the Plaintiff – Society. He would submit that on 21.05.2016, Defendant

No.9 called upon Plaintiff – Society to give its NOC for construction on a portion of CTS No.63 admeasuring 801 square meters i.e. plot ‘E’. He would draw my attention to letter dated 29.08.2016 to contend that it was Defendant No.8’s case that except the two structures i.e. ‘C’ and ‘D’ conveyed to the tenants as per the Consent terms it was agreed by parties that boundaries will remain the same.

8.4. He would vehemently contend that on 29.04.2017, Defendant No.9 issued letter to Plaintiff – Society confirming that it will not commence construction until the issue of NOC is resolved. However expressing surprise, he would inform the Court that on 20.06.2018, Corporation issued CC to Defendant No.9 by unilaterally deleting condition No.11 requiring NOC from Plaintiff – Society to the exclusion of the Society.

8.5. While drawing my attention to the development Agreement and the plan annexed thereto at page No.472 - Exhibit “N” to the Petition, he would contend that Plaintiff – Society otherwise has no dispute or quarrel with development undertaken by Defendant No.9 in respect of the two structures nomenclatured as ‘C’ and ‘D’ and infact he would go to the extent of arguing that land appurtenant to the two structures ‘C’ and ‘D’ as required under the Development Control Regulations can undoubtedly be developed by Defendant No.9. He has however raised a strong objection to permitting Defendant No.9 to

develop the entire area namely area nomenclatured as 'E' and 'F' i.e. plot 'B' which according to him is impermissible in view of the development Agreement and the conveyance not yet been delivered by Defendant Nos.1 to 8 to the Plaintiff – Society.

8.6. He would submit that Defendant No.9 claims through Defendant No.10, the tenant of Defendant No.1 whereas Plaintiff – Society also claims through the Defendant No.1. Defendant No.8 is the Developer appointed by Defendant No.1- Trust. Defendant No.8 executed 171 individual registered agreements with members of Plaintiff – Society and reference in those agreements is to the development Agreement between Defendant No.1 and Defendant No.8.

8.7. He would submit that defence taken by Defendant No.10 and through him by Defendant No.9 that CTS No.63 is not mentioned on the coloured plan enclosed to the development Agreement between Defendant No.1 and Defendant No.8 is taken for the first time in this Court. However there is no response from any of the Defendants with respect to its reflection and specific mention in the body of the development Agreement. He would submit that such a plea is taken by the contesting Defendants for the first time before this Court only in the present Petition and no such plea was ever taken by them either in reply to the injunction application before the Trial Court or in the MCA

before the District Court nor ever argued by them before both the Courts below. He would submit that once the development Agreement categorically refers to and reflects the inclusion of CTS No.63, its omission from the coloured plan cannot be held against Plaintiff – Society and Defendants cannot make any capital out of it. He would stress that the expression ‘said property’ as defined under the development Agreement in clause (a) thereof is clear and unambiguous and refers to the entire portion delineated on the map enclosed to the development Agreement in the red portion which includes plot ‘B’.

8.8. He would submit that Defendant No.9 is claiming through Defendant No.10, but if Defendant No.10 does not have any right in respect of the area beyond the area appurtenant to the structures nomenclatured as ‘C’ and ‘D’ under the development Agreement, then Defendant No.10 cannot claim any such right in the said area and transfer it to Defendant No.9 especially when conveyance to the Plaintiff – Society is still outstanding.

8.9. Finally he would submit that even according to the resolution of Defendant No.1 – Trust appended at Page No.468 of the Petition, the area of the structures nomenclatured as ‘C’ and ‘D’ are 80 square meters and 92.52 square meters and most importantly the areas nomenclatured as ‘C’, ‘D’, ‘E’ and ‘F’ are part of plot B of the larger

property and therefore Defendant No.9 cannot construct on plot 'B' as is sought to be done, save and except to the extent of the area of structures 'C' and 'D' only and the area appurtenant thereto. He would therefore submit that the learned Trial Court ought to have enjoined Defendant No.9 from carrying out construction on the entire area pursuant to CC dated 20.06.2018 since the lease of 999 years alongwith conveyance thereof to the Plaintiff – Society as promised under the development Agreement and the individual Agreements being an enforceable contract and a statutory obligation under Section 11 of MOFA has not been complied with till date and hence the purported construction by Defendant No.9 needs to be restrained in the interest of justice.

8.10. Hence he would submit that both the learned Courts below have not appreciated the aforesaid facts *qua* the development Agreement and have rejected the Exhibit “5” Application by concluding that Plaintiff – Society has no right over the disputed property and that Defendant No.9 has invested money for development in the disputed property and it would cause irreparable loss to Defendant No.9. He would submit that the District Court in MCA has infact overreached the clauses of the development Agreement by holding that the Development Agreement itself states that the structures nomenclatured as 'C' and 'D' are together with the appurtenant land in entirety and therefore the appurtenant area thereto are part and parcel

of the plots of land given for development in plot B.

8.11. He would therefore urge that *prima facie* on the basis of the development Agreement itself, Plaintiff – Society has made out a sufficient case which is incorrectly appreciated by both Courts below and therefore seeks an embargo on carrying out any further construction / development by Defendant No.9.

9. The Petition filed by Plaintiff- Society is vehemently opposed by Defendant Nos.8 and 9 predominantly. Mr. Barve learned Advocate appears for Defendant No.8.

9.1. At the outset, he would submit that Suit filed by Plaintiff - Society without relief of possession at a belated stage is not maintainable in law as well as on facts as it is filed on 17.09.2019 only after construction work by Defendant No.9 has commenced. He would submit that possession of Defendant No.9 is not disputed by Plaintiff – Society, hence it cannot oppose development.

9.2. He would submit that reliefs prayed by Plaintiff - Society are based on distorted and disputed facts which require to be adjudicated only by adducing cogent evidence during trial, that Plaintiff - Society has not made out any *prima facie* case for grant of interim relief since there are concurrent findings of both Courts below and disputed facts raised cannot be considered at interim stage. He would submit that Plaintiff - Society filed amendment Application to amend the Suit

plaint and hence after amendment Suit is required to be proceeded with on merits by giving opportunity to Defendants to adduce evidence and hence at this stage no relief should be granted to Plaintiff - Society. He would contend that interim relief prayed against Defendant No.8 has become infructuous since Defendant No.8 – Developer has already handed over the constructed buildings on plot ‘A’ to the Society.

9.3. Next, he would submit that Plaintiff – Society has not made out any case for grant of interim relief, *inter alia*, and same is hit by the principles of *res judicata* under Section 11 of Code of Civil Procedure, 1908 (for short “**CPC**”) for the reason that the Consent Decree dated 18.09.2011 passed in Regular Civil Suit No.495 of 1998 between the Defendants in respect of the Suit property is legal and enforceable in law as the same is not set aside by any Competent Court of law. Apart from this, he would contend that the said Consent Decree dated 18.09.2011 is not challenged by any party till date and it subsists. He would submit that claim of Plaintiff – Society is devoid of merits and this Court does not have jurisdiction to set aside the Consent Decree dated 18.09.2011, while exercising its limited jurisdiction under Article 227 of the Constitution of India as Consent Decree dated 18.09.2011 cannot be challenged in the Civil Suit No. 748 of 2019 which is not maintainable under Order XXIII Rule 3A of the CPC.

9.4. He would submit that *prima facie* the original Suit and Exhibit “5” Application filed under Order XXXIX Rule 1 of the CPC is not maintainable and the same is rightly rejected by concurrent findings of both Courts.

9.5. He would submit that on the basis of Consent Decree, Defendant No.1 executed lease in favour of Defendant No.9 on 30.12.2011 and name of Defendant No.9 has been mutated in the revenue record which is also not challenged. He would submit that Defendant No.10 is in possession of structures ‘C’ and ‘D’ as well as the disputed property ‘E’ and ‘F’ on the basis of Agreement dated 29.08.1986 and the said property was fenced even before the Plaintiff - Society came into existence.

9.6. He would submit that Defendant No.8 constructed five buildings and ancillary units in accordance with the plans and specifications approved by the Competent Authority on plot ‘A’ and possession of four buildings was handed over to the purchasers of each unit and possession of 5th Building i.e. ‘E’- Wing was handed over to purchasers in the year 1996. He would submit that Suit filed by Plaintiff – Society is bad in law for non-joinder of necessary parties as well as misjoinder of parties and misjoinder of cause of action and hence both Courts have rightly rejected the interim relief prayed for by Plaintiff – Society.

9.7. Next he would submit that Defendant No.8 has categorically confirmed with Plaintiff - Society in the year 2016 that pursuant to Decree dated 18.09.2011, Defendant No.8 does not have any right to execute any conveyance in respect of the Suit property since the said property belongs to the ownership Defendant No.1 – Trust. He would submit that Defendant No.8 had filed a statement that he will not create any third party rights in respect of the disputed property during pendency of the Suit between Defendant No.1 and Defendant No.9, despite the fact that Defendant No.8 did not have any right to create any third party rights in the disputed property without permission of the Charity Commissioner Mumbai as the property belonged to Defendant No.1 which is a Trust registered under the provisions of the Maharashtra Public Trusts Act, 1950.

9.8. He would submit that Plaintiff - Society by letter dated 15.07.2016 addressed to Defendant No.8 raised certain queries which were clarified by Defendant No.8 vide Letter dated 29/08/2016, whereby Defendant No.8 assured the Society that he will take up the matter with the Trustees of Defendant No.1 to resolve the dispute regarding outstanding disputed payment between them and shall further confirm the boundaries of the Society's plot. Plaintiff - Society vide letter dated 08.11.2016 replied to the letter of Defendant No. 8 in the affirmative and contents of said letter were never disputed nor challenged and therefore Plaintiff - Society is legally precluded from

raising erroneous objection and claim against Defendant No.8, which is bad in law and cannot be granted to Plaintiff - Society under any circumstances.

9.9. He would submit that Defendant No.1 - Trust has handed over the balance portion of plot 'B' to Defendant No.8 excluding the portion of the land occupied by Defendant No.10 as the said portion of the property being portion 'E' and 'F' was always in possession of the tenant prior to commencement of development by Defendant No.8. Hence he would state that Defendant No.8 was never in possession of the disputed property. Thus question of executing alleged Conveyance by Defendant No.8 does not arise and reliefs prayed against Defendant No.8 are erroneous and defective for existence of the said property in possession of Defendant No.8. In the Agreement for Sale entered into by Defendant No.8 with the prospective purchasers of various units it is clearly mentioned that in the Plan approved by the Trust in the year 1986, structure 'C' and 'D' on Plot 'E' and 'F' are clearly demarcated and same are delineated in the Plan approved by the Corporation and the said plots are shown surrounded by a blue colored boundary line. Apart from this, Defendant No.8 persuaded Defendant No.1 - Trust to execute the lease deed in favour of Plaintiff - Society for the land occupied by the Society excluding the portion of disputed property occupied by Defendant No.10 - tenant.

9.10. In view of the above submissions, he would submit that Plaintiff - Society has not made out any *prima facie* case for grant of interim or ad-interim relief or admission of Petition or calling for interference with the impugned order dated 12.05.2023 passed in MCA No.57 of 2021 which confirmed the order dated 10.08.2021 passed below Exhibit “5” in RCS Suit No.748 of 2019 by the Trial Court. He would submit that balance of convenience in the present case is in favour of Defendant No.1 – Trust who is the owner of the disputed property and Defendant No.8 who had constructed the buildings of the Plaintiff – Society and handed over its peaceful possession to the Society in the year 1996 alongwith occupancy certificate and thereafter Defendant No.8 does not have any right to execute any lease and/or conveyance of the land belonging to Defendant No.1 and hence the question of creating any third party right in the suit property by Defendant No.8 does not arise and such a relief is not maintainable in law as well as in the facts of the present case.

9.11. He would submit that the allegations of use of FSI are disputed facts and are required to be adjudicated by considering the evidence during trial of the Suit and hence no relief can be granted to the Plaintiff – Society and thus he would urge the Court to dismiss the Petition with costs.

10. Mr. Godbole learned Senior Advocate for Defendant No.9 would submit that the Trial Court and District Court have taken a possible view after considering rival contentions and there is a thorough discussion about all relevant documents, pleadings in Writ Petition No.7678 of 2019, order passed by the Charity Commissioner and no perversity can be found in the reasoning adopted by both Courts. Therefore interference under Article 227 of the Constitution of India may not be justified. He would submit that Defendant No.9 is the most affected party at this stage.

10.1. He would submit that the order of Charity Commissioner dated 09.02.1988 makes it clear that the land area given for development was only 8071 sq. mts. and the FSI of road setback was also given and that is the admitted position. He would submit that perusal of plan annexed to the development Agreement would clearly show that the entire area of land belonging to the Trust was 25748 sq. mts. out of which plot 'A' including setback area admeasured 10643.50 sq. mts. and plot 'B' admeasured 9582.18 sq. mts. (8071 + 1511.18 sq. mts.). He would submit that even if all these figures are added, the total area of land of the Trust is not covered and this completely demolishes the plea of Plaintiff that entire plot 'B' covers the entire the land appurtenant to structures 'C' and 'D'.

10.2. He would submit that Defendant No.8 - Developer has got rights only for developing 8071 sq. mts. and for FSI of 9582.18 square meters and hence he cannot transfer any larger or higher right to Plaintiff - Society. He would submit that merely because the schedule of development Agreement dated 09.05.1988 mentions the entire land admeasuring 25745.28 sq. mts., Plaintiff – Society cannot lay claim to the area. He would submit that Plaintiff – Society addressed letter dated 15.07.2016 to Defendant No.8 for clarity of land area to be conveyed to Society and its boundaries and in reply thereto on 29.08.2016, Defendant No.8 has informed Plaintiff that boundaries of the plot at present shall remain the same, except the two portions agreed to be conveyed to the existing tenant as per the Consent terms between them.

10.3. He would submit that in the earlier Petition, Plaintiff - Society clearly pleaded that it has rights only in respect of land admeasuring 8071 sq. mts. He would submit that the plan at Page No.103 of the Petition has to be read alongwith the order of the Charity Commissioner. He would submit that Defendant No.8 – Developer was first put in possession of a portion surrounded by brown lines and was thereafter allowed to occupy a further portion, the total of which would come to 8071 sq. mts. which would exclude the land leased out to Defendant No.10 i.e. plot 'B' in its entirety.

10.4. He would submit that at the foot of the Application at page No.102, there is no mention of CTS No.63 which clearly indicates that rights therein were not given to the Developer in the development Agreement. He would submit that the development Agreement has to be read conjointly with the Charity Commissioner's order and once this is done, the only possible conclusion is that land given to Defendant No.9 is not and was never part of the property belonging to Plaintiff - Society.

10.5. In view of the above, he would urge the Court that Writ Petition be dismissed with costs.

11. I have heard Mr. Anturkar, learned Senior Advocate for Petitioner; Mr. Barve, learned Advocate for Respondent No.8; Mr. Godbole, learned Senior Advocate for Respondent No.9, Ms. Sawant, learned Advocate for Respondent No.11 - Corporation and Mr. Patil, learned AGP for Respondent No.12 - State and with their able assistance perused the record and pleadings of the case. Submissions made by the learned Advocates have received due consideration of the Court.

12. In the present case, it is seen that the impugned order passed below Exhibit "5" dated 10.08.2021 by the Trial Court proceeds on the premise that the Plaintiff – Society has no right in the disputed property. It is therefore required to ascertain what is the disputed

property on the basis of *prima facie* evidence available before the Court at this stage. Admittedly, Defendant No.1 - Trust is the owner of a large property admeasuring 25745.78 square meters but it was in actual possession of an area admeasuring 20233.70 square meters. Admittedly, Defendant No.10 was tenant of Defendant No.1 – Trust on Plot A in respect of commercial premises used for a gas cylinder agency and a printing press. The larger property is divided into plot 'A' and plot 'B' as per plan at page No.472 which is heavily relied upon by both sides. Admittedly, Defendant No.1 decided to develop the property and convinced Defendant No.10 to shift to plot 'B' so that development could take place on plot 'A' to which Defendant No.10 agreed to shift. Defendant No.1- Trust provided new tenanted premises which are nomenclatured as structures 'C' and 'D' on plot 'B' to Defendant No.10 on plot 'B' on the plan. The area of structure 'C' is admittedly 80 sq. mts. whereas area of structure 'D' is admittedly 92.52 sq. mts. The area of structure 'C' has open appurtenant land and that appurtenant land is shown on plot as 'E' admeasuring 801 sq. mts. whereas the area of structure 'D' is on land nomenclatured as plot 'F' admeasuring 857 sq. mts. Defendant No.1 entered into Agreement dated 10.03.1972 and 29.08.1986 with Defendant No.10 under which the aforesaid structures 'C' and 'D' alongwith appurtenant area was given to Defendant No.10 on plot 'B'.

13. Hence, the question for determination would be whether the entire area of Plot B was given to the tenant (Defendant No.10) alongwith the structures 'C' and 'D' or whether 'C' and 'D' were given alongwith its appurtenant area only.

14. According to Plaintiff - Society, development Agreement refers to occupation of structures 'C' and 'D' by Defendant No.10 only. This stand is however refuted by Defendants. According to Defendants, the entire area of plot 'B' was given to the tenant (Defendant No.10) alongwith structures on 'C' and 'D'. According to Plaintiff - Society, allotment of structures 'C' and 'D' alongwith the appurtenant open thereto under the Agreement of tenancy cannot be in respect of the entire area 'E' and 'F' of plot 'B'. Defendant No. 1 - Trust entered into development Agreement for development of plot 'A' admeasuring 9582.65 sq. mts. with Defendant No.8 who constructed 5 (five) buildings from 1988 to 1996 and handed them over to Plaintiff - Society. Exhibit - '5' order of Trial Court proceeds on the basis that plot 'B' is having a separately demarcated boundary wall around structures 'C' and 'D' encompassing plots 'E' and 'F' and similarly the Society's plot 'A' is also having a demarcated boundary wall. Hence according to Trial Court, Plaintiff – Society cannot claim any entitlement to the area in plot 'B' which is occupied by Defendant No.10 and vice – versa.

15. What is crucial to be ascertained in this dispute is whether the area transferred to Defendant No.10 which is being constructed upon by Defendant No.9 belongs to the Plaintiff – Society by virtue of the development Agreement between the Defendant No.1 – Trust and Defendant No.8 – Developer? It needs to be reiterated that under the development Agreement, Defendant No.1 is required to execute the conveyance in favour of Plaintiff – Society. This conveyance is of how much area is the moot question. Mr. Godbole has vehemently attempted to convince me that the area required to be conveyed to the Society is of a certain denomination and it has no nexus with plot 'B'. If that be so, then Defendant No.8 would not have been impleaded in the 2011 Suit filed by Defendant No.1 against Defendant No.10. Reason for impleadment at that time was to protect the open parking spaces / area which will have to be conveyed to the Society in future. Hence without conveying the area to the Society, Defendant No.1 could not have transferred the entire area of plot 'B' to the Defendant No.10 by virtue of consent terms behind the back of the Society. Hence on reading the development Agreement, I am inclined to accept the submissions of Mr. Anturkar. Both Courts below have completely misdirected themselves and not considered the above with reference to the clauses in development Agreement. Merely because there is a wall around the 5 (five) Society Buildings, does not mean that the area of Society is already demarcated. One of the aspect referred to by the

Trial Court is that the Society has not objected to the occupation and possession of the disputed area by Defendant No.10 since long and therefore it has to be now construed that it has agreed with the case of Defendant No.10 that Society is not concerned with the said entire disputed area i.e. entire plot 'B'. The case of Plaintiff - Society has not found favour with the learned Trial Court. What is surprising on reading the impugned order passed by the Trial Court is that it has not considered and *prima facie* scrutinised the contents of the development Agreement between Defendant No.1 and Defendant No.8 at all. It has infact negated the development Agreement in entirety merely by referring to an averment made in clause 3 of Writ Petition No.7678 of 2019 previously filed by Plaintiff in this Court. The said clause 3 is infact reproduced in paragraph No.32 of the Trial Court's order. The said clause 3 merely reiterates the status of occupation of the various areas, but learned Trial Court has given it the colour of admission by Plaintiff - Society of admitted possession of Defendant No.10 of the disputed area having been admitted by the Plaintiff - Society.

16. The question however is whether occupation of Defendant No.10 of the disputed area i.e. plot 'B' is legal or otherwise? It needs to be ascertained whether Defendant No.10 has a legal right to transfer the entire disputed area of plot 'B' and if not then to whom does the disputed area belong to? Merely because Defendant No.10 is in possession of the disputed area cannot be a ground for concluding that

Plaintiff - Society has admitted the use, occupation and possession of Defendant No.10 as legal. The answer to these questions lie in the development Agreement dated 09.05.1988 executed between Defendant Nos.1 to 7 and Defendant No.8, which is the mother Agreement. The second Agreement is the 1986 Agreement by which Defendant No.10 was relocated from plot 'A' to plot 'B' by Defendant No.1. On the basis of this 1988 Agreement, development of Society's property took place, *inter alia*, representing to the Society and its members about the extent of the area that would be developed and handed over to them. Without looking into this material aspect, learned Trial Court has virtually concluded that since Defendant No.11 - Corporation has issued CC to Defendant No.9 and since Defendant No.9 has invested money for development of the disputed area, grant of injunction will cause irreparable harm to Defendant No.9.

17. The question which begs an answer is whether Defendant No.9 through Defendant No.10 is entitled to develop the disputed area i.e. plot 'B' entirely? Undoubtedly, in view of the rights and obligations between the parties, Defendant No.9 is entitled to develop the area of the structures nomenclatured as 'C' and 'D' to the extent of 80 sq. mts. and 92.52 sq. mts. standing on the land portion nomenclatured as 'E' and 'F' alongwith their appurtenant / set back area as Defendant No.10 is a tenant of those structures only. Though Mr. Godbole would differ but there is material evidence admitted by Defendant No.10 to this

effect which I will refer to and deal with herein. However under what right is Defendant Nos.9 or 10 entitled to develop the entire area of plot 'E' and 'F' namely 801 sq. mts. and 857 sq. mts. is not spelt out nor dealt with by the Trial Court and not even by the learned District Court. In that view of the matter, the impugned order passed by the learned Trial Court deserves interference.

18. However, the impugned order dated 12.05.2013 passed by the learned District Court in MCA when read, proceeds on a completely different footing. The District Court rightly acknowledges the development Agreement being the relevant document between the parties in order to ascertain what area is transferred to Defendant No.10. Infact the learned District Court correctly ascertains that Plaintiff – Society claims through the Defendant No.8 – Developer and Defendant No.8's right is a result of the development Agreement with Defendant No.1 and therefore scrutiny of the development Agreement is required. There are two specific clauses in the development Agreement namely clauses (c) and (d) which are directly relevant and go to the root of the matter. The learned District Court in paragraph Nos.20 to 23 has analysed these clauses as appearing on internal page Nos.4 to 6 of the development Agreement. However, if the said clauses are juxtaposed with the findings given by the District Court in paragraph Nos.20 and 23 and with its conclusion stated in paragraph No.30, then there is a clear dichotomy and contradiction.

19. The learned District Judge's order proceeds on the basis that as per clause 'd', Defendant No.1 constructed two structures i.e. shed 'C' and shed 'D' on the portion of plot 'B' and handed over all premises comprised in the said structures to the existing tenant (Defendant No.10) to provide alternate accommodation and as per the plan of 1986, the said shed 'C' and shed 'D' was handed over along with appurtenant area. This finding in paragraph No. 23 which is a *prima facie* finding is however contrary to clause 'd' as appearing in the development Agreement between Defendant No.1 and Defendant No.8. The relevant portion of Clause 'd' in the development Agreement reads thus:-

"...out of the said five structures, the owners have duly constructed two structures mark no. 'C' and 'D' on the plan thereto annexed on portion of the said larger property and handed over all the premises comprised in the said structures to the existing tenants (Defendant No.10) to provide to them alternate accommodation."

20. Thus, what is held by the District Court in paragraph No.23 of the impugned order is clearly not the content of or is stated in clause 'd' of the development Agreement. The reference in clause 'd' is only to the two structures i.e. 'C' and 'D' marked on the plan. There is absolutely no reference to any appurtenant area along with shed 'C' and shed 'D' stated therein or area as delineated in paragraph Nos.27 and 30 where reference is to sheds / structures 'C' and 'D' together with appurtenant open spaces / premises which is an incorrect reading of clause 'd' by the District Court.

21. Hence, I am inclined to accept the submissions made by Mr. Anturkar, learned Senior Advocate for Plaintiff – Society. Once this is a clear position *prima facie* evident from the development Agreement itself, Defendant Nos.9/10 do not get any right to develop the entire area of plot ‘B’ which includes:- (i) area of shed ‘C’ (80 sq. mts.) alongwith area of land demarcated as land portion ‘E’ admeasuring 801 sq.mts. (which includes shed ‘C’) and (ii) area of shed ‘D’ (92.52 sq.mts.) alongwith area of land demarcated as land portion ‘F’ admeasuring 857 sq. mts. unless and until the Plaintiff - Society’s conveyance is given by Defendant Nos.1/8 as promised and as required under law.

22. In the above facts Plaintiff - Society has therefore correctly invoked its MOFA obligations and it cannot be said that the area presently held by the Society is the only area required to be conveyed to the Society by the Developer / Defendant No.1 as per the development Agreement. Once that is done and unless and until the same is determined, any development by the transferee (Defendant No.9) of Defendant No.10 tenant of Defendant No. 1 - Trust on the entire area of plot ‘B’ clearly jeopardizes the substantive right of the Plaintiff - Society. The findings with respect to area computed by the learned District Court without any evidence being led by the parties to conclude that the entire area of plot ‘B’ is excluded from the development Agreement is not correct on the face of record as these

are triable issues and disputed questions of fact refuted by the Society. Mr. Godbole has attempted to convince me on this aspect by referring to the Charity Commissioner's order of 1987 and the plan annexed to the development Agreement, but unless the Society's area is conveyed, Defendant No.9 cannot argue that entire plot 'B' has been transferred legitimately by Defendant No.1 – Trust to Defendant No.10 – tenant from whom the Defendant No.9 derives its right. Defendant No.9 ought to have done due diligence on this aspect before starting construction or undertaking development. It has chosen to take the risk despite initially waiting for Society's NOC and thereafter proceeding since the NOC condition was dropped. Therefore no equity can be claimed if it has incurred expenditure. Allowing the Defendant No.9 to proceed with construction on the disputed area i.e. any portion or area of plot 'B' will lead to further multifarious litigation between parties. On the basis of the above derivation and what is precisely stated in clause 'd' of the development Agreement, the order dated 12.05.2023 of the learned District Court is clearly unsustainable in law.

23. In fact it is the Plaintiff who has made out a clear *prima facie* case on a plain reading of clause 'd' which is referred to and alluded to hereinabove. In paragraph Nos.23 to 34, the learned District Court has referred to the disputed property i.e sheds 'C' and 'D' alongwith their appurtenant area being equivalent to the entire area of plot 'B'. Such a observation is clearly contrary to the reading of clause 'd' in the

development Agreement which does not say so.

24. In the compilation of documents filed by Respondent No.9 at page No.104 there is an Affidavit which has been filed by Mr. Deviprasad Muljibhai Sompura, Managing Partner of the firm M/s. Komet Trade-Link who is the tenant of Defendant No.1. This Affidavit is dated 16.02.1987. In paragraph Nos. 5 and 6 of the Affidavit, the said tenant after being shifted to sheds 'C' and 'D' has specifically deposed as under:-

- "5) I, on behalf of M/s. Komet Trade-Link and its Partners, hereby state that affirm that the open space of 30 ft. around about provided at L.P. Gas Cylinders Storage godown belongs to the trust, viz. Surajratan Fatehchand Damani Janhit Nidhi and we shall have no claim over that open space.*
- 6) I, on behalf of M/s. Komet Trade-Link and its Partners, hereby undertake that I shall not store nor keep any of my articles or things in the said open space and shall take away or dismantle temporarily fencing constructed by me at any time when demanded by the said Trust. This is quite sufficient to show that the said open space does not belong to us nor it has been rented to us."*

25. From the above, it is clear that it is the tenant's own case that it was using the 30 ft. open space round-about as a condition precedent for storage of L.P. Gas cylinders storage godown which was allowed by Defendant No.1 as it was a mandatory requirement of the Fire Brigade Department to continue to carry on his business of LPG cylinder storage. The Deponent categorically confirms in the very same Affidavit that he shall have no claim over that open space and that the

open space belongs to Defendant No.1 -Trust. It is stated in terms that the said open space does not belong to Defendant No.10 nor it has been rented to Defendant No.10. This Affidavit virtually clears the position and therefore submissions made on behalf of the Defendants have been incorrectly appreciated by the learned District Court. Hence, I am not inclined to admit any of the submissions made by Mr. Godbole. The Society's rights have been clearly and openly trampled upon by the Defendants without executing the conveyance by Defendant Nos.1/8 to the Society, which was obligated to be given within 4 (four) months from the formation of the Society in 1999 itself. We are in 2024 today.

26. From the above observations and findings, it is seen that though Exhibit '5' order of the Trial Court briefly refers to the development Agreement, however it proceeds on a completely incorrect premise that Society has never objected to the occupation and possession of Defendant No.10 of the disputed area and since Defendant No.9 has invested money for development and Defendant No.11 has issued Commencement Certificate in the year 2016, granting of injunction would cause irreparable loss to Defendant No.9. Contrary to this the learned District Court analyses the development Agreement but incorrectly concludes the plain and verbatim language of clause 'd' of the development Agreement and reads something which is not present in the said clause thereby giving undue largesse and

benefit to Defendant Nos.9/10. Both the orders proceed diametrically in different directions.

27. From the above observations and pleadings, it is absolutely an admitted position that Plaintiff – Society’s conveyance / lease of 999 years as promised by Defendant No.8 / Defendant No.1 under MOFA obligations by virtue of the development Agreement dated 09.05.1988, Power of Attorney dated 09.05.1988 and individual registered Agreements has till date not been given which was required to be given within 4 months from the formation of the Society on 08.09.1999 under Section 11 of MOFA. This is a clear breach. That apart, waiving off condition No.11 unilaterally on 20.06.2018 from the CC dated 20.06.2018 despite Society’s objection impinges upon the Society’s right to get conveyance under Section 11 of MOFA. It is seen that Defendant No.5 has acted as Constituted Attorney of the Trustees of the Trust and consent decree dated 27.04.2011 in the Defendant No.1’s Suit against Defendant No.10 has been executed behind the Plaintiff – Society’s back and without its consent. Resultantly leading to execution of lease deed dated 30.12.2011 between Defendant No.9 and Defendant No.10 which once again impinges upon the rights of the Society.

28. It needs to be noted that upto May 2019, right of way to the structures i.e. sheds ‘C’ and ‘D’ was through plot ‘A’ only, but thereafter

Defendant Nos.9 and 10 have claimed right of way through plot 'B'. It is also seen that Defendant No.8 – Developer got himself impleaded in Regular Civil Suit No.495 of 1998 between Defendant No.1 and Defendant No.10 to protect the right of Plaintiff – Society. There is also an affidavit dated 16.02.1987 placed before me by Plaintiff – Society executed by Defendant No.10 confirming that it does not have any right in the land beyond the structures 'C' and 'D' in the further open spaces which are nomenclatured as 'E' and 'F' which is referred and alluded to herein above.

29. The aforesaid issues are *prime facie* evident on the face of record which have been completely disregarded by both the Courts below.

30. That apart, interpretation of clause 'd' made by the learned District Court is clearly erroneous on the face of record. In view of this, the impugned order dated 12.05.2023 calls for immediate interference. Rather it deserves to be quashed and set aside. It cannot be sustained in the facts of the present case which are alluded to hereinabove.

31. Resultantly order passed by Trial Court dated 10.08.2021 and order dated 12.05.2023 passed by learned District Court are quashed and set aside.

32. On the above orders being set aside the, Application below Exhibit '5' filed by Plaintiff - Society stands allowed and it is directed that there shall now be a complete embargo, injunction and restraint on the Defendants and namely Defendant No.9 from carrying out any further construction / development on the Suit property and more specifically plot 'B' until the determination of RCS No.748 of 2019.

33. In the course of submissions, Mr. Godbole indicated that Defendant No. 9 has incurred substantial expenditure till date in development and construction on the said plot 'B' and the Court should consider the same from the point of view of balancing convenience between the parties as Plaintiff has also agreed that Defendant No.9 can be allowed to develop the areas under the two structures i.e. shed 'C' and shed 'D'.

34. After applying my thought to the said submission and looking to the fact that the suit has been filed on 17.09.2019 by the Society, I am inclined to consider the plea of Defendant No.9 and pass direction for expeditious disposal of the Suit proceeding. This is only because the Suit is more than 5 (five) years old and in view of substantial investment made by Defendant No.9, if there is expeditious disposal of the said Suit, it may redress the grievance of Defendant No.9.

35. In that view of the matter, I direct the Trial Court to dispose of RCS No. 748 of 2019 as expeditiously as possible and in any event preferably within a period of six months from today. However, I clarify that during the next six months there shall be complete embargo and restraint on Defendants and more specifically Defendant No.9 from creating any third party rights and carrying out any construction or development on the entirety of plot 'B' which is being carried out by the said Defendant. This is only because of the strong facts pleaded by the Plaintiff *qua* clause 'd' of the development Agreement which have been alluded to herein above.

36. All contentions of the parties to the Suit before the Trial Court are expressly kept open. The Suit shall be determined on the basis of evidence led by the Plaintiff and evidence in rebuttal led by the Defendants without being influenced by any of the observations and findings in both the twin Exhibit '5' orders dated 10.08.2021 and 12.05.2023 as also this order, since all the observations and findings are *sans* evidence and are purely made *prima facie* on the basis of interpretation of the documentary evidence placed before the Courts.

37. The Writ Petition stands allowed in terms of prayer clause 'A'.

38. With the above directions, Writ Petition is disposed.

[MILIND N. JADHAV, J.]

39. After the judgment is pronounced, Mr. Datar, learned Advocate for Defendant No. 9 would request the Court to stay the order of injunction. However, considering the reasons given in the aforementioned judgment, I am not inclined to accede to the request made by Mr. Datar. Hence, the oral request made by Mr. Datar for stay of injunction in the meanwhile, is expressly rejected.

ATU / HHS

[MILIND N. JADHAV, J.]

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