



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINATING SUMMONS NO.15 OF 2019**

Vithalnagar Co-operative Housing .. Plaintiff
Society Ltd.

Versus

Municipal Corporation of Greater .. Defendants
Mumbai & Ors.

...

Mr.F.E. Devitre, Senior Advocate with Mr. Kunal Dwarkadas
i/b Dastur Kalambi & Associates for the Plaintiff.

Mr.J.P. Sen, Senior Advocate a/w. Mr. Abhishek Khare a/w. Mr.
Rohan Sathey a/w Ms. Sailee Dixit and Ms. Sheetal Metakari
i/b Mr. Sunil Sonawane for BMC/Defendant No.1 & 2.

Mr. P.G. Lad a/w Ms. Sayali Apte and Ms. Shreya Shah, for
Defendant no.3 (MHADA).

Mr.Nishant Thakkar a/w Mr. Bhavesh Bhatia i/b. Mint &
Confreres for Defendant No.7.

Mr. Aditya A. Joshi i/b Ms. Ketki Gadkari and Purav Damania
for Defendant No.17.

Mr. Surendra Kumar Arvikar, Exe. Eng. (DP) present.

Mr. Mitkari, Asst. Eng. (DP) present.

Mr. Daniel Kamble, officer on Special duty, BMC officer
present.

CORAM : BHARATI DANGRE, J.

**RESERVED ON : 29th FEBRUARY, 2024
PRONOUNCED ON : 18th JUNE, 2024**

JUDGMENT :-

1. The Plaintiff, Vithalnagar Society Ltd, a Co-operative Housing Society registered under the Bombay Co-operative Housing Societies Act, 1925 has filed the Originating Summons, for determination by this Court, of the true and correct interpretation and legal effect of some of the clauses, terms and conditions in the written instrument executed between the Co-owners Societies (being 'Common Plots Conveyance') and the defendant no.3 i.e. the Maharashtra Housing and Area Development Authority (MHADA) a statutory body constituted under the provisions of the Maharashtra Housing and Area Development Authority Act, 1976, (erstwhile '**Bombay Housing Board**', a statutory body constituted under the provisions of the Bombay Housing Act, 1948), for sale and purchase of lands being the common plots namely viz. the Indenture of Conveyance dated 26/04/1960.

14 individual building plot Conveyances were also executed between the Bombay Housing Board and each individual co-owners Society between 14/10/1956 and 22/11/1956.

The Plaintiff seeks determination of the following questions arising from and in respect of the said common plot conveyance to the following effect:

“(a) Whether on a true and correct construction of the registered Common Plot Conveyance (read with the 14 Building Plot Conveyances), the Common Plots are granted, conveyed and transferred absolutely to the fourteen Co-owners Societies, i.e. the Plaintiff and Defendant Nos.4 to 16 herein, as co-owners?

(b) Whether by reason of the use of the expression “tenants in common” in the registered Common Plots Conveyance (read with the 14 Building Plot Conveyances), the said instrument granted only on alleged lease of the Common Plots to the Plaintiff and Defendant Nos.4 to 16 with title allegedly still remaining in Defendant No.3 (i.e. MHADA)?

(c) Whether Defendant No.3 (i.e. MHADA) has any right title or interest in the Common Plots after execution of the registered Common Plots Conveyance (read with the executed 14 Building Plot Conveyances)?”

2. It would be apposite to highlight the background facts in which the determination of the above questions arises, with the introduction of the parties to the proceedings before me.

The plaintiff is the one of the Co-operative Housing Society, whereas the defendant nos. 4 to 16 are distinct Co-operative Housing Societies, who are the owners of distinct residential plots and Co-owners of certain common plots, all forming part of the Juhu Vile Parle Development (‘JVPD’), located on the left bank of Irla Nala, in Juhu.

The Plaintiff and the defendant nos.4 to 16 are collectively referred to as the ‘Co-owners Societies’, who formed an Association, “Juhu Vile Parle Development Co-operative Housing Association Ltd” i.e. defendant no.17 (hereinafter referred to as the ‘**Association**’).

Defendant no.1 is the Municipal Corporation of Greater Mumbai a statutory body constituted under the provisions of the Mumbai Municipal Corporation Act (hereinafter referred to as **MCGM**) whereas the defendant no.2 is its Municipal Commissioner. The defendant No.3 is the Maharashtra Housing and Area Development Authority (**MHADA**) formerly the Bombay Housing Board (‘**BHB**’).

3. In or around 1950, at the request of the Co-owner Societies, the Government of Bombay acquired distinct pockets of land in village Juhu, admeasuring 202 Acres and 35 Gunthas or thereabouts as well as certain pieces and parcels of land in village Vile Parle admeasuring 223 Acres 27 Gunthas for housing schemes, to be conveyed to be Co-owner Societies, which agreed to pay the cost of acquisition and development of the said lands, situated on both the right bank as well as the left bank of Irla Nala in Juhu.

On acquisition, possession of the said land was handed over to the Bombay Housing Board by the Special Land Acquisition Officer and the land thereafter, vested in it.

4. The Government of Bombay vide its order dated 14/05/1951, a written instrument, sanctioned the scheme for laying out and development of the said land for the purpose of allotment, to the Co-owners Societies and entrusted the work of the execution of the scheme to Bombay Housing Board and at its request granted exemption to the scheme, from the provisions of Section 26 to 33 of the Bombay Housing Board Act, 1948. As per the recital in the instrument, the Development Department of the Government of Bombay approved the final layout of the said scheme and the allotment of building plots to individual participating societies by its letter dated 1/06/1955 and approval was granted for the distribution of the areas for roads, canalization, creek and common amenities and public utility plots to the participating societies.

The building plot allotted and conveyed to the each of the Co-owner Societies as well as the Common Plots conveyed and owned in common by the Co-owner Societies are situated on the left bank of Irla Nala and the present proceedings involve the same though, there were other plots on the right bank of Irla Nala, which were conveyed to some other participating Societies.

5. The written instruments recorded the understanding between the Bombay Housing Board and the Co-owner Societies in regard to the building plots, roads etc., by setting out various stipulations and it was understood that a separate Deed of Transfer would be made between Defendant No.3 and the Co-owner Societies the Common Plots and the remaining area falling under the roads, canalization and creek as 'tenants in common.

6. Pursuant thereto, the Bombay Housing Board entered into 10 separate building plot conveyances with the defendant nos. 4, 6, 7, 9, 12, 13, to 16 and with the Plaintiff on 14/10/1956 and 3 more conveyances were executed on 30/10/1956 involving defendant nos.8, 10 and 11, whereas on 22/11/1956 building conveyance was executed with defendant no.5.

Pertinent to note that each of the building plot conveyance is substantially the same, differing essentially only in regards to the amount of compensation and the share of each Society in the common plots, internal roads, canalization and creek.

By and under the distinct conveyances, the building plot describe therein was conveyed separately to each of the Co-owner Society, and their respective shares in the common plots, internal road, canalization, and creek were also specified, as agreed.

7. On execution of the aforesaid conveyances the Bombay Housing Board, conveyed, sold and transferred the plots constituting the JVPD Housing Scheme on the left bank of Irla Nala absolutely to each Co-owner Society, for the consideration set out in each of the building plot conveyances, worked out by it at the rate of Rs. 10/- per square yard of the area of each of the building plot and the consideration included the cost of acquisition and development of the common areas i.e. the common plots as well as the remaining areas of the internal road, canalization and creek.

The total area of the building plots conveyed to the Co-owner Societies under the distinct conveyances was 6,00,103 Sq. yards and as per the plaintiff, the Co-owner societies paid an aggregate sum of Rs.60,01,030 (Rupees Sixty Lakh One Thousand and Thirty only) to the Bombay Housing Board as the agreed consideration for sale, transfer and conveyance of the plots and the conveyance for the common plots along with the remaining areas, falling under the roads, canalization and creek to be owned in common by the Societies.

8. The Bombay Housing Board thereafter executed the Common Plots Conveyances dated 26/04/1960, which acknowledged the aggregate consideration paid by the

Societies for allotment of the building plots as well as the acquisition and development of the common plots i.e. the areas under road, canalization and creek. It is the specific case of the plaintiff that by and under the Common Plots Conveyances, the Bombay Housing Board granted, conveyed and assured unto the Co-owner Societies of all those pieces and parcels of vacant land constituting (i) the common plots [which include 18 amenity plots, and 16 utility plots]; (ii) 40 feet internal roads; and (iii) canalization and creek of Juhu Vile Parle Development Scheme, (JVPD) altogether admeasuring 6,07,036 square yards and thereabouts and particularly set out in Schedule III.

It also conveyed all the estate, right, title, interest, both at law and in equity and as per the plaintiff, the lands stood transferred forever, as tenants in common in proportion particularly set out therein.

9. It would be necessary at this stage to refer to 'Common Plots Conveyance' dated 26/04/1960 and based upon its covenants, the plaintiff stake a claim that the Societies on the left bank of Irla Nala were accepted as tenant in common with its respective shares mentioned of the amenity and public utility plots as also of the areas falling under the roads, canalization and creek by specifically declaring as under:

"that it shall be lawful for the said Societies from time to time and at all times hereinafter peaceably and quietly to enter upon posses and enjoy the said land and to receive the benefits and profits thereof and of every part thereof without any Suit, lawful eviction, interruption, claim or demand whatsoever of from or by the board or any person or persons lawfully or equitably claiming or to claim by from under or in trust for the board or them or any of them and that free from all encumbrances whatsoever made or suffered by

the board or any person or persons lawfully or equitably claiming as aforesaid.”

10. It is the case of the Plaintiff, that on true and correct interpretation of the Common Plots Conveyance, it is evident that the indenture is an instrument by which all right, title and interest of the Bombay Housing Board as the owner of the Immovable property, in respect of the common plots as well as the remaining areas in the road, canalization and creek is conveyed and transferred to the respective Societies absolutely as Co-owners, thereof as tenants in common in the shares and proportion therein set out and on execution and registration of the Common Plot Conveyance and the 14 individual building plot conveyances, neither the defendant no.3 nor its predecessors Bombay Housing Board can claim any right, title or interest and since it enjoyed the common plots and area commonly shared, as “tenants in common”, which is indicative of the nature of the common ownership rights of and between the Co-owners Societies and its nature being, full ownership right.

It is the specific case of the plaintiff that the true legal effect and meaning of the provisions of the Common Plots Conveyance and the meaning of the expression “tenants in common” as used therein, is evident from the reading of the Common Plots Conveyance in conjunction with the Building Plot Conveyance, under which each of the Co-owners Society has paid the entire consideration for allotment, sale, transfer and conveyance of the building plots in its favour individually, for the acquisition and development of the common plots including the remaining areas under internal roads, canalization, and creek. This position, according to the

Plaintiff was enjoyed by each Co-owner Society and the defendants also acted based on this understanding, until recently in 2018, when it sought to raise a plea that the Co-owners Societies are only Lessees of the common plots and this according to the plaintiff is a wholly misconceived notion and a belated and afterthought stand.

11. It is the case of the Plaintiff, that at all material times the Co-owner Societies have acted on the basis of their joint ownership rights with respect to common plots and the period between 2010-2011, 8 separate notices were issued by the defendant no.17 to defendant nos.1 and 2 under Section 127 (1) of the Maharashtra Regional and Town Planning Act, 1966, by relying upon the Common Plots Conveyance, premised on a assertion that the Co-owners Societies are joint owners of the common plots, calling upon the authorities to take necessary action, to complete the acquisition of the common plots, all of which were reserved for various purposes like library, playground, municipal retail market, D.P. Road, Garden, Recreation Ground etc.

Upon purchase notices being issued, acquisition proceedings for the Reserved Common Plots, were commenced by the Additional District Collector by issuing notifications under Section 6 of the Land Acquisition Act, 1894 r/w Section 126 (4) of the MRTP Act, 1966, and presently the acquisition proceedings are pending.

This event is relied upon by the plaintiff to assert that the acquisition proceedings by defendant nos.1 and 2 was premised on the Co-owner Societies having full ownership

rights in respect of the common plots by virtue of the common plots conveyance and it is only in the later part of 2017, it was informed that the acquisition proceedings were suspended.

12. The Co-owner Societies came across the reports in newspapers, where defendant nos.1 and 2 asserted that the common plots belong to MHADA and the Co-owner Societies were tenants and therefore RTI Applications were filed, which resulted in procuring certain internal documents, in form of communications exchanged between the defendants however, there was no intimation received by the Co-owner Societies from MHADA.

According to the Plaintiff, defendant nos.1 to 3, as well as the State of Maharashtra have accepted and proceeded on the basis that the Co-owner Societies are joint-owners of the common plots and admittedly paid entire consideration under the Building Conveyances/Common Plots Conveyance but the denial of these rights at this stage and after lapse of almost 50 years, is the cause for seeking true and correct interpretation of the terms of the Common Plots Conveyance and the Building Plot Conveyance and the true constructions of the words 'tenants in common' in the context, in which the expression is used in the instruments. What is expected by the Plaintiff is an earlier resolution of this question, which according to it will prevent a multitude of disputes involving matters of pure legal interpretation and legal effects of the terms in the written instruments.

13. Learned Senior Counsel Mr.Fredun, by inviting my attention to Chapter XVII of the Bombay High Court (Original

Side) Rules 1980 “Originating Summons” would submit that any person claiming to be interested in the relief sought as beneficiary under the trusts of any deed or instrument, or as claiming by assignment, may apply for issuance of Originating Summons for such relief of the nature or kind, as set out in Rule 238 by issuing summons. He would place reliance upon Rule 245 of Chapter XVII, where any person claiming to be interested under the deed, will or other written instrument, may apply for issuance of an Originating Summons for determination of any question of construction arising under the instrument and for a declaration of the rights of the person interested.

The learned Senior Counsel would place reliance upon the decision of division bench of this Court in case of ***Mazda Theatres Ltd vs. Gordhandas Tribhuwandas Mangaldas***¹, and would submit that only two conditions are required for maintainability of an Originating Summons; that there must be a written instrument and what is required to be done by the Court, is declaration of the rights of the person interested under the written instrument.

By submitting that the plaintiff and the defendant nos.4 to 16 are the absolute owners of various plots of lands situated in Juhu, under 14 separate deeds of conveyance executed in their favour, he would submit that lands were conveyed to the Societies for housing purpose and by a separate, duly registered deed of conveyance dated 24/04/1960, the Bombay Housing Board transferred and conveyed absolutely, the common plots as part of the scheme to the 14 Societies, in their capacity as ‘tenants in common’, i.e. as Co-owners to the extent of their proportionate share in the total area.

1 (1954)LVI BLR 1080

Mr. Devitre would submit that after lapse of about 60 years of the date of registered conveyance, the defendant nos.1 to 3 for the first time are attempting an interpretation of some terms of the Common Plot Conveyance to indicate that the common plots did not vest in the Society's, as owner but they are only the 'tenants', as the Common Plots Conveyance has used the terminology "tenants in common", and therefore, on completion of the JVPD scheme, the common plots vested in the MCGM and in the wake of this situation, it was not open for the Bombay Housing Board to convey or transfer them to the 14 Co-owner Societies. Therefore, according to Mr. Devitre, it has become necessary to ascertain whether, on a true and correct construction of the Common Plots Conveyance read with the Individual Plot Conveyances, whether the common plots are conveyed absolutely to the Co-owner Societies as Co-owners and whether MHADA (erstwhile Bombay Housing Board) has any right, title or interest in the common plots, after execution of the registered Common Plots Conveyance.

In addition another important point, which deserve determination is whether, the conveyances granted the lease of common plots, in the wake of the expression "tenants in common" used in this instrument and whether the ownership of the common plots with the title continue to vest in defendant no.3.

14. According to Mr. Devitre, the questions for determination deserve consideration by this Court, in light of the specific terms of the Common Plots Conveyance under which the Bombay Housing Board transferred the ownership rights of the

common plots to the Housing Societies, by referring to them as “Co-owners” of the Common Plots as “tenants in common” and by focusing upon the recitals in the Common Plots Conveyance. Further he propound, that the question will have to be determined in the backdrop of the factual position, relating to the approvals, sanctions and directions of the State Government and other Authorities for the acquisition by and vesting of the common plots in the Bombay Housing Board for the purposes of the scheme and its transfer to the 14 Co-owner Societies. According to him, the material fact of the Building Plot Conveyances in favour of 14 Co-owner Societies is not in dispute and it is also not disputed that the transfer was with the approval and sanction of the State of Bombay.

He would emphasis on the payment of consideration for acquisition of the plots included in the scheme by the Societies and its exemption from the provisions of Section 26 to 33, as well as an undisputed fact, that there was no declaration under Section 38 (1) of the of the Bombay Housing Board Act, 1948, or any resolution being passed by the Board exercising any option under Section 38(2). According to him, the common plots vested in the Bombay Housing Board, were conveyed and transferred to the 14 Co-owner Societies and therefore, he would request for determination of the aforesaid issue by arguing in favour of maintainability of the Originating Summons.

15. The learned Senior Counsel, Mr. J. P. Sen, who represent the MCGM has raised preliminary objection as regards the scope of the Originating Summons and the objection is raised on two counts; the scope of the Originating Summons and also

on the point that even if it is held to be maintainable, whether the relief prayed can be granted.

Mr. Sen would submit that the High Court exercises a limited jurisdiction while deciding the Originating Summons and its scope is defined under Chapter XVII and in particular in Rule 238 to 261 of Original Side Rules.

Responding to the submission on behalf of the plaintiff, that the Originating Summons is maintainable in light of Rule 245, he would submit that the scope for enquiry under this provision is very limited and the High Court can only determine a question of construction of a particular instrument or declaration of any rights thereunder and hence, the jurisdiction is restricted only to such a construction or declaration and nothing more.

It is submitted that once the validity of an instrument, the construction whereof, or declaration of any rights whereunder, is set up in defence by the defendant, this Court would have no jurisdiction to determine the validity or legality of such an instrument while deciding an originating summons and he would place reliance upon Rule 241.

It is further contended by Mr. Sen, that questions regarding the existence or validity of a contract or instrument cannot be adjudicated upon while deciding the Originating Summons and this Court shall not exercise its jurisdiction to decide upon the existence or validity of a conveyance, which is sought to be interpreted/construed by the Plaintiff by taking recourse to the procedure of Originating Summons. A specific stand is adopted by Mr. Sen, to the effect that the conveyance itself is a void document in view of the statutorily vested right

in defendant no.1, to receive conveyance of the open spaces from the Bombay Board in view of Section 38(2) of the Bombay Housing Board Act, 1948.

According to him, the conveyance which is the focal point of the proceedings itself is a void document which cannot confer any right, title and/or interest in favour of the Plaintiff or the Association of which it is a member i.e. defendant no.17 in respect of the amenity plots, which are areas earmarked for recreation and ventilation, as the Bombay Board could not have conveyed any open spaces, to any entity other than the MCGM and if it was not permissible for it to do so, any conveyance which is alleged to have conveyed the right, title and interest in the plots to the plaintiff or the other Societies is void ab initio and therefore there is no question of seeking a declaration on the basis of the purported conveyance, that the Societies are co-owners of the amenity plots without deciding the issue of legality of the purported conveyance.

In addition, another point of significance according to Mr. Sen is filing of Suit No.89 of 2017, by the Plaintiff along with the other member Societies of defendant no.17, seeking the reliefs in respect of one of the amenity plots namely plot no.A-6 and by inviting my attention to the prayers in the Plaint, he would submit that the prayers necessarily presuppose and are ancillary to the determination of the title of the Societies to the said amenity plot and by extension, the issue of validity for the purported conveyance and the issue raised in the Originating Summons is the one which is covered by the Suit.

In an extremely critical manner, Mr. Sen would urge that, what the Plaintiff is really seeking through the Originating Summons is, determination in a summary manner and

without evidence at trial of the principal issue arising out of the Suit, already instituted and this is nothing but an attempt of forum shopping, which disentitle the plaintiff to any relief in the Originating Summons and he should await the outcome of the Suit, as invocation of the jurisdiction of this Court is nothing but an abuse of process and an exercise in opportunism.

16. On merits Mr. Sen would elaborate on two points, which he has raised by way of preliminary objection and he would submit that the defendant no.1 has a vested right to receive a conveyance of all open spaces for recreation or ventilation, including all amenity plots as also public streets and roads forming part of the Housing Scheme under the Act of 1948 and he has pitched this vested right, as akin to a statutory vesting as provided under Section 38 (2) of the Bombay Housing Board Act, as soon as the Housing scheme is completed. By relying upon the unamended provision, of sub-Section (2) of Section 38, it is the submission of Mr. Sen that when any open space for purposes of ventilation or recreation has been provided by the board in executing any housing scheme, it shall on completion be transferred to the local authority concerned by resolution of the board and it shall thereupon vest in and be maintained at the expense of the local Authority.

Mr. Sen would point his finger to the two failures on part of the Board i.e. the transfer of the spaces contemplated under Sub-section (2) of Section 38 to the Plaintiff and secondly its failure to pass any resolution. According to him, the language

used in sub-section (2) is mandatory and in case of violation of this mandate, a right has accrued in defendant no.1, to receive conveyance of the said plots, akin to statutory vesting and this vested right is a complete vesting in title of such plots and such right comes into existence as soon as the housing scheme is completed under the Bombay Board Act, 1948.

It is further submitted that the present Juhu Vile Parle Development Scheme JVPD has been completed before 1960 when the said conveyance was executed by the Bombay Board in favour of the defendant no.1⁷ and since the JVPD Scheme is a housing scheme under the Bombay Board Act, Sections 23 to 41 would apply to the scheme with equal force though the scheme has received exemption from application of Sections 26 to 33 of the Act of 1948.

Despite such exemption, according to Mr. Sen, the provision contained in subsection (2) of Section 38 would continue to apply to such a housing scheme and exemption from some of the provisions of the statute would have no impact on the statutory creation of vested right in favour of defendant no.1 i.e. MCGM as contemplated under Section 38(2) of the Bombay Board Act.

Mr. Sen would submit that the Bombay Board Act was amended in the year 1964 and the amended Section 38, and in particular Sub-section (2) gave an option to the board, to transfer such open space to the local authority concern on completion of the scheme by passing a resolution and thereupon such open space shall be vested and be maintained at the expense of the local authority. However this amended provision, would not be applicable in the present case is the

specific submission as the amendment was effected in the year 1964 i.e. after the vesting of statutory right in the defendant no.1 under the unamended Section 38(2) of the Bombay Board Act, since by the amended provision the board had an option, to transfer the open space to the local authority which option was not available earlier.

Further upon the Bombay Board Act being repealed by the Maharashtra Housing and Area Development Act, 1976, the option, continue to find place in sub-section (2) of Section 61, which leave it open for the Authority i.e. Maharashtra Housing Development Authority (MHADA) to exercise the option to transfer such open space to the local authority, by passing a resolution and like the amended sub-section (2) of Section 38, such open space shall vest in and be maintained by the local authority.

17. In the wake of the aforesaid statutory scheme, Mr. Sen has submitted that at the relevant time i.e. in the year 1960 and prior thereto when the housing scheme was completed, the Bombay Board was statutorily bound to compulsorily transfer the open spaces in favour of defendant no.1, MCGM, which was entitled to receive conveyance of the open spaces from the Board and now from MHADA.

18. The next point which Mr. Sen has pressed into service, being about the common conveyance/indenture dated 26/04/1960, being void as it defeated the statutory vested right of MCGM.

Mr. Sen has relied upon Section 23 of the Indian Contract Act, 1872, which has declared, as to what consideration and objects are lawful and what are not and by invoking the said provision, he would submit that the consideration/object of the agreement is lawful unless it is forbidden by law or is of such a nature that, if permitted, it would defeat the provisions of any law.

Every agreement of which the object or consideration is void according to Mr. Sen.

By invoking Section 6(h) of the Transfer of Property Act, 1882, which provide that no immovable property can be conveyed to a person for an unlawful object or consideration within the meaning of Section 23 of the Contract Act, to be read with Section 84 of the Indian Trusts Act, which provide that when the owner of the property transfer it to another, for an illegal purpose and such purpose is not carried into execution, the transferee must hold the property for the benefit of the transferrer, he would submit that the plaintiff as well as other members of the Society of defendant no.17, would derive no right, title, and or interest in the amenity plots, conveyed under the conveyance and they would simply hold such plots as trustees for the benefit of the transferee i.e. the erstwhile Bombay Board and now MHADA and which benefit, defendant no.1 would be ultimately entitled to, pursuant to this statutory vested right under Section 38 (2) of the unamended Bombay Board Act.

The quintessence of his argument is, that the Bombay Board could not have conveyed the plots under the conveyance in favour of the Societies and no right, title or interest has been transferred pursuant to the said conveyance to the defendant no.17 Association and/or its members and therefore the

submission that it was conveyed for consideration according to him is irrelevant, as mere payment of consideration cannot make otherwise void conveyance valid, legal or binding and particularly as against the MCGM, which has a statutory vested right to receive conveyance of the property.

19. Dealing with the arguments that the MCGM initiated a process for acquisition of the conveyed plots, Mr. Sen would assertively submit that the acquisition proceedings in respect of the subject plot were incorrectly initiated, as the plaintiff and the other Societies are not the owner of the subject plot which was conveyed through a void document.

His last submission in law is that though MCGM had incorrectly taken steps to begin acquisitions of the subject plot but on realizing the mistake, the acquisition was promptly stopped and there can be no estoppel against law and the right which vested in MCGM as a statutory right to receive the conveyance of the open spaces of the JVPD scheme from the Bombay Board and now from MHADA in no way is effected by the steps taken by it to acquire the subject plot.

Mr. Sen has relied upon various Authorities in law to bolster his submission and as I deal with the counter contentions, I shall also deal with the Authorities cited by Mr. Sen.

20. On hearing learned Senior Counsel Mr.F. E. Devitre for the plaintiff and learned Senior Counsel Mr. J. P. Sen for the defendant No.1 - Municipal Corporation of Greater Mumbai (MCGM), I have perused the entire record placed before me, which include the written submissions placed by the respective Senior Counsel. I have also heard learned Counsel Mr. P. G. Lad

for the MHADA, the erstwhile Bombay Housing Board, who has tendered its response in form of Affidavit and also its brief submissions.

The arguments of Mr.Devitre has to be appreciated in the wake of the two objections raised by Mr. Sen, the first being the maintainability of the originating summons and specifically reliance being placed on Rule 241 of the Bombay High Court (Original Side) Rules and his submission that a question affecting the existence on validity of the contract cannot be determined by this Court while exercising the power conferred under Chapter XVII of the Original Side Rules.

This argument which Mr. Sen has elaborated in the wake of Section 23 of the Contract Act is to be read with Section 6(h) of the Transfer of Property Act, 1882 and it is his submission that when the Conveyance agreement in question itself is void, no immovable property has been conveyed within the meaning of Section 23 of the Contract Act and in view of this, the conveyance is a void document as it defeat the statutorily vested right in the defendant No.1 under Section 38(2) of the Unamended Bombay Housing Board Act, 1948 and according to him, the void document has failed to convey any valid title in favour of the plaintiffs and by stretching his arguments further, Mr. Sen has argued that the documents being void, it need not be challenged by him, contending it to be void ab initio and in fact, in the wake of the legal position, which he has relied upon, no cognizance ought to be taken of such a void document.

21. It has, therefore, become necessary to deal with the necessary documents on the basis of which, the plaintiff has filed this originating summons, calling upon this Court to

answer the three questions, referred to above and seeking a declaration on the same.

The first document, which warrant attention is the Indenture dated 26/04/1960 executed between the Bombay Housing Board constituted under the Bombay Act of 1948 "the Board" of one part and the 14 Co-operative Housing Societies including the plaintiff i.e. Vithalnagar Co-operative Housing Society Ltd, the 14 Societies being located on the left bank Irla Nala being registered under the Bombay Co-operative Societies Act, 1925.

The Indenture record that at the request of the certain Co-operative Housing Societies, the Government of Bombay acquired all that piece and parcel of Khajan Land in the Village called Juhu in the District Bombay Suburban, Tq. South Salsette admeasuring 202 acres, 35 Gunthas as or thereabout also in the village called Vile Parle in the District Bombay Suburban, Tq. South Salsette admeasuring 22 to 23 acres, 27 Gunthas as described in Schedule-I for Housing Schemes to be allotted to Co-operative Housing Societies, which had agreed to pay the cost of acquisition and development of the said land, the indenture clearly recording that on acquisition, possession of all the said land was given to the Board and the land shall vest in the Board.

This arrangement was recorded, in the wake of the Resolution dated 15/03/1949, issued by the Government of Bombay deemed, as it deemed expedient to make provision to provide Housing accommodation and to the Improvement and Development of the said land. With this avowed object, the Government of Bombay, through Labour and Housing

Department sanctioned the scheme of laying out and developing of the land for the purpose of allotment to the Co-operative Housing Societies and entrusted the work of execution of the scheme to the Board vide its order dated 14/05/1951. This scheme received exemption from the provisions of Sections 26 to 33 (Both inclusive) of the Bombay Housing Board Act, 1948.

In pursuance of the said scheme, the Board marked out building plots for allotment of Co-operative Housing Societies demarcated and constructed roads and marked out plots for General Amenity and Public Utility purposes to be owned in common by the present Societies both on the left bank of Irla Nala and the right bank.

22. This Indenture received approval from the Government vide Letter No.JDS 1155/17015-H on 01/06/1955, when approval was granted to the final layout of the scheme and the allotment of building plots to individual Societies and also distribution of the areas occupied by Roads, Canalization, Creek and Common Amenities and Public Utility Plots to the Societies. Even the cost of earth fielding and construction of roads and Canalization was determined in the Indenture and it contemplated as below :-

"Whereas on the basis of the total cost of completing scheme on the left bank of Irla Nala including the cost of earth fielding and construction of roads and Canalization, the cost payable by each society works out about Rs.10.00 per square yard of the building plots to be allotted to each society including the proportionate cost of acquisition and development of common Amenity and Utility Plots, Roads and Canalization and whereas the 14 societies have paid the proportionate cost payable by them amounting in all to Rs.60,01,030.00, which is total estimated cost of acquisition and development of the whole area on the left bank of Irla Nala".

23. The indenture also recorded that the Bombay Housing Board has handed over to each society the building plots as allocated by the respective conveyances and this included the conveyance dated 14/10/1956 in favour of the plaintiff, Vithalnagar Co-operative Housing Society Ltd. In addition, there were other 13 conveyances, which were executed, being the individual conveyance and the Board also acknowledged the receipt of the amount payable by each society aggregating to Rs.61,01,030.00.

The status of these societies was specifically set out, as below :-

"AND WHEREAS it has been agreed that the said Societies on the left bank of the Irla Nala are tenants in common with their respective shares as hereinafter mentioned of the amenity and public utility plots as hereinabove recited as also of the areas falling under the roads, canalisation and creek admeasuring about 8,15,467 square yards as delineated on Plan No.II hereto annexed and more particularly described in Schedule II hereunder written AND WHEREAS it has been agreed that the said 60' and 100' roads should be transferred to the Municipal Corporation of Greater Bombay on terms and conditions agreed to by all Co-operative Housing Societies participating in the Scheme and the Municipal Commissioner of Greater Bombay AND WHEREAS it has been agreed that the remaining areas of amenity and utility plots, internal roads, canalization and creek belong to the Fourteen Societies as tenants in common and each individual society has a share in them as detailed below AND WHEREAS it has been agreed that a separate Deed of Transfer should be made between the Board and the fourteen Co-operative Housing Societies on the left Bank of the Irla Nala participating in the scheme conveying to the said Societies the common area mentioned above as tenants in common as aforesaid AND WHEREAS the Board and the said Societies have now decided to execute the said deed."

24. By the said Indenture, the Plaintiff along with other 13 societies were conveyed all that piece or parcel of vacant land, by specially referring to, as below :-

"All that piece or parcel of vacant land plot Nos. (Amenity Plots) A1, A2, A3, A4, A5, A6, A7, A8, A9, A9A, A10, A10A, A10B, A11, A12, A12/1, A12/2, A12/3, (Utility plots) U1, U2, U3, U4, U5, U6, U7, U8, U9, U10, U11, U12, U13, U14, U15, U16; 40' internal roads, canalisation and creek of Juhu Vile Parle Development scheme situate at Juhu Vile Parle in Greater Bombay in the Registration Sub District of Bandra in the Registration District of Bombay admeasuring in all 6,07,036 square yards or thereabouts more particularly described in the third Schedule hereunder written and delineated on the Plans No.II, III(1), III(2), III(3), III(4), III(5), III(6), III(7), III(8), III(9), III(10), III(11), III(12), III(13), III(14), III(15), III(16), III(17), III(18), III(19), III(20), III(21), III(22) and III(23), hereto annexed together with all and singular the yards wells, ways, roads, compounds, paths, canalisation, creeks, waters, water-courses, sewers, ditches, drains, trees; plants, lights, liberties, easements, profits; privileges, advantages, rights, members and appurtenances whatsoever to the said land belonging or in anywise appeartaining to the same or any part thereof now or at any time heretofore usually held used occupied or enjoyed or reputed to belong or be appurtenant thereto and all the estate right title interest claim and demand whatsoever both at law and in equity of the Board in, to or upon the said land and every part thereof TO HAVE AND TO HOLD the said land hereby granted conveyed and expressed so to be unto and to the use of the said Societies for over as tenants in common in the proportion hereinafter stated."

25. In the wake of the aforesaid Indenture, the Board was granted full right, power and absolute authority to grant convey and assure the land granted, conveyed and assured under the Indenture so to be unto and to the use of the societies in the manner stated therein and it was declared that it shall be lawful to the societies from time to time and all the times, hereafter peacefully and quietly to enter upon, possess and enjoy the said land and to receive the benefits and profits thereof and of every part thereof without any suit, lawful eviction, interruption claim or demand whatsoever from or by the Board or any person or persons lawfully or equitably claiming or to claim by from under or in trust of the Board or any of them and free from all encumbrances whatsoever.

26. Separate and individual Indentures/Deeds were executed with each individual society by the Bombay Housing Board, largely similar in its covenant and the Indenture dated 14/10/1956 with the Plaintiff - Society is annexed at Exh.B and the contents thereof are specifically taken note of, which reproduced hereunder :-

"NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the sum of Rs.6,01,000/- (Six lacs One thousand only) paid as aforesaid before the execution of these presents by the Society to the Board the receipt of which the Board doth hereby admit and acknowledge and of and from the same and every part thereof doth for ever release and discharge the said Society the Board doth hereby grant convey and assure unto the said Society all that piece or parcel of vacant land admeasuring 60,100 square Yards bearing plot Nos.12/1, 12/2 & 12/3 of the Juhu Vile Parle Development Scheme situate at Juhu Vile Parle in Greater Bombay in the Registration Sub District of Bandra in the Registration District of Bombay more particularly described in Schedule III hereunder written and delineated on the Plan No. III thereof hereto annexed and shown thereon by a boundary line coloured red together with all and singular the yards wells, ways, compounds, paths, waters, water courses, sewers, ditches, drains, trees, plants, lights, liberties, easements, profits, privileges, advantages, rights, members and appurtenances whatsoever to the said land belonging or in anywise appertaining to the same or any part thereof now or at any time heretofore usually held used occupied or enjoyed or reputed to belong or be appurtenant thereto AND all the estate right title interest claim and demand whatsoever both at law and in equity of the Board in, to or upon the said land and every part thereof TO HAVE AND TO HOLD the said land hereby granted conveyed and expressed so to be unto and to the use of the said Society for ever for housing scheme SUBJECT NEVERTHELESS to the payment to the said Board of the balance of the cost of the said land and payment of liabilities in execution of the scheme for its development as mentioned above and to the payment of all rents taxes rates assessments dues and duties now or hereafter to become payable to the Municipality or the State of Bombay or any other public or local body in respect of the said land AND the Board doth hereby covenant with the Society that notwithstanding any act deed or thing whatsoever by the Board at any time heretobefore made done or committed or omitted to the contrary the Board now hath good right full power and absolute authority to grant convey and assure the said piece or parcel of vacant land hereby granted conveyed and assured or expressed so to be unto and to the use of the Society in manner aforesaid."

27. The submission of Mr. Sen that this conveyance is void, as it is unlawful or illegal under Section 23 of the Indian Contract Act, as it is canvassed by him that it is the MCGM i.e. Defendant No.1, who has a vested right to receive conveyance of all the open spaces for recreation or ventilation, including all amenity plots, as also public streets and lights forming part of the Housing Scheme and this right is akin to a statutory vesting, as soon as the Housing Scheme is completed. By placing reliance on Unamended Section 38, Mr. Sen has urged that on completion of the scheme, all the open spaces for the purpose of ventilation or recreation, which has been provided by the Board, shall vest in, on passing of the Resolution by the Board and it shall be maintained at the expense of Local Authority.

According to Mr.Sen, the use of the word 'shall' in the said provision, leave no option open for the Bombay Board under the Act to consider transferring the open spaces to any entity other than Defendant No.1 and the effect of the said provision, result in a vested right in MCGM to receive conveyance of the said plots and there is complete vesting in it. According to Mr. Sen, in 1960 and prior thereto, a Housing Scheme was completed and, hence, the Bombay Board was mandatorily required to transfer the open space to Defendant No.1 and a right was created in its favour to receive conveyance of the open spaces from Bombay Board and now, MHADA and if there is no compliance of the stipulation, the conveyance dated 26/04/1960 is rendered void, as it failed to comply the statutory requirement of vesting of these spaces in MCGM under Section 38(2) of the Unamended Bombay Board

Act. He has therefore, sought to convey, that the consideration or object of agreement, which is of such a nature that if permitted, would defeat the provisions of Statutory Law or Rules framed thereunder is unlawful and such an agreement is consequently void under Section 23 of the Indian Contract Act, 1872.

28. In order to test this argument, which is strongly resisted by Mr.Devitre, I must turn my attention to the Statutory Provisions.

The Bombay Housing Board Act enacted in 1948 aimed at making such schemes and carrying out such works, as are necessary for the purpose of satisfying the need of the Housing Accommodation and with that object in view, the Maharashtra Housing Board was incorporated, as Body Corporate, having perpetual succession, competent to acquire and hold property both movable and immovable and to contract and to perform all such things necessary for giving effect to the Enactment.

Chapter-III of the Act contemplated "Housing Schemes", as it provided that the State Government may on such terms and conditions as it deemed fit to impose, entrust to the Board the framing an institution of any Housing Scheme and the Board may then, on such terms and conditions, as may be agreed upon and with the previous approval of the State Government, take over for execution any Housing Scheme on behalf of Local Authority or Co-operative Society or on behalf of employer, when it undertake to cater to the Housing need of its employees.

Section 24 of the Act clearly provided as to what shall be provided in the scheme and the following is provided amongst others :

- f] Construction and re-construction of buildings.
- g] The sale, letting or exchange of any property comprised in the scheme.
- h] The construction and alteration of streets and back lanes.
- j] The provision of Parks, Playing Fields and Open Space for the benefit of any area comprised in the scheme for any adjoining area and enlargement of existing Parks, Playing Fields, Open Spaces, and Approaches.
- p] Any other matter for which, in the opinion of the [State] Government, it is expedient to make provision with a view to provide Housing Accommodation and to the Improvement or Development of any area comprised in scheme or any adjoining area or the general efficiency of the scheme.

29. Section 34 of the Act of 1948 clearly provided for transfer of any street, square or other land or any part thereof situated in any area of a Corporation, Municipality or Zilla Parishad and vested in it, but is required for the purpose of any Housing Scheme and Section 35 is a provision of re-vesting of the said land in the Corporation, Municipality or Zilla Parishad, as a part of street or of an open space under Section 38.

The most relevant provision, is Section 38, which contemplate vesting in Corporation, Municipality or Zilla Parishad of streets laid out or altered and open space provided by the Board under the Housing Scheme and Sub-section (2) of Section 38 and the said provision read thus :-

"38. (1) Whenever the Provincial Government is satisfied -

... ..

(2) When any open space for purposes of ventilation or recreation has been provided by the Board in executing any housing scheme, it shall on completion be transferred to the local authority concerned, by resolution of the Board, and shall thereupon vest in, and be maintained at the expense of, the local authority:

Provided that the local authority may require the Board before any such open space is so transferred to enclose, level, turf, drain and lay-out such space and provide footpaths therein, and if necessary, to provide lamps and other apparatus for lighting it".

30. Sub-section (2), which read as above, however came to be substituted by Maharashtra Act No.III of 1964 and the amended provision read to the following effect :-

"(2) When any open space for purposes of ventilation or recreation has been provided by the Board in executing any housing scheme, [the Board may at its opinion by resolution transfer such open space to the local authority concerned on completion of the scheme and thereupon such open space shall vest in], and be maintained at the expense of, the local authority".

31. The present case is covered by the Unamended provision, which contemplated that on completion of any Housing Scheme by the Board, the open spaces for the purpose of ventilation or recreation shall be transferred to the Local Authority i.e. MCGM and continues to vest in it.

This provision is, however subjected to, to safeguards; the first being it shall be transferred to the Local Authority by passing Resolution by the Board and the second being, thereupon, it shall vest in and be maintained at the expense of the Local Authority.

In the present case, admittedly, there was no Resolution passed by the Board and as a result thereof, the Amenities and Public Utilities were never transferred to the Corporation and in fact, as per the Deed of 26/04/1960, the 14 societies as well as the Respondent No.17 continued to enjoy, hold and possess 18 Amenity Plots and 16 Utility Plots. The individual Deed of Conveyances in favour of the Plaintiff and the Defendant No.4 to 16 - Societies had clearly contemplated that remaining areas of Amenity and Utility Plots, Internal Roads, Canalization and Creek shall be owned in common by the society participating in the scheme, in which the society shall have its share in proportion, as tenants in common and it also clearly

contemplated that the cost of acquisition and development of the common areas is included in the total cost on the basis of which, the society had paid its share of cost of the building plots.

The common plots conveyance, thus included other common areas i.e. 40 feet Internal Roads, Canalization, Streets and Creek Land.

The areas for 100 feet and 60 feet wide road (admeasuring 2,08,431 square yards) was agreed to be transferred to MCGM in terms of the conveyance and it was accordingly transferred. All the 14 societies paid the proportionate cost payable by them amounting to Rs.60,01,030.00, which is total estimated cost of acquisition and development of the whole area on the left bank of Irla Nala and in the common plot conveyance, the Bombay Housing Board, acknowledged the receipt of this amount, which also stipulated that on completion of the scheme, the Board will work out the final cost of the scheme and intimate to the society concerned, the balance, if any of the amount payable by it to the Board by way of its final liability.

Admittedly, no such intimation was ever received by the Plaintiff or any of the co-owner society.

32. The Plaintiff has placed on record a letter dated 22/11/1960 from the Housing Commissioner addressed to the MCGM (the then Municipal Commissioner), through its Additional Affidavit filed on 15/07/1953 being marked as Exh.M, which had recorded as below :-

“The area to the South of Irla Nala in the scheme has been allotted to the 14 Co-operative Housing Societies. The residential plots have been sold to the societies individually, while the Utility and Amenity

Plots, Internal Roads, and Land under Canalization and Creek have been allotted to the 14 societies as "tenants in common" i.e. they are owned "jointly" for the 14 societies having their share in proportion to the residential area purchased by each of them."

The letter further mention that the layout plan of the scheme has been approved by the Government and the 14 societies have to utilize the plots for specific purpose for which they are earmarked in the layout plan.

A copy of the Conveyance Deed executed by the Board with the 14 societies, together with a layout plan of the scheme, clearly mentioning the use and purpose of each of the common plots or area was also forwarded with a request that the Municipality may ensure that the construction work other than the purpose specified in the layout is not undertaken, either by the societies or by other parties to whom the societies may sell these common plots with a further rider being imposed, that any change in the use of the plots can be effected only after obtaining prior approval of the Government through the Maharashtra Housing Board.

33. The aforesaid situation continued till recently, when the Municipal Commissioner on 09/04/2022 addressed a Communication to the Chief Executive Officer / Vice-President, MHADA, purporting to exercise its right over the common spaces by making reference to the Housing Scheme being sanctioned under the Bombay Housing Board Act, 1948 for village Juhu and village Parle in the year 1949 and 1953. The communication also clearly set out that the Amenity and Utility Plots, which were conveyed by the Indenture dated 26/04/1960 for Public Amenities, Public Utilities, Internal

Roads, Canalization and Creek Plots as "Tenants in Common" having subsequently earmarked as Public Reservations and Designations in the Development Plan of K / W Ward sanctioned from time to time. It also make a mention of Purchase Notices being served by the Association of the Co-operative Societies on the Municipal Corporation under Section 127 of the MRTP Act, 1966 claiming ownership, on failure of the Planning Authority to initiate steps for acquisition pursuant to the Purchase Notices resulting in lapsing of the Reservations / Designations.

It is in this letter, the Defendant No.1 - Corporation projected its understanding, to the effect that since the land has been given to the society as "Tenant in Common", which itself proved that the 14 societies cannot claim any legal right as a owner of the land and they are holding as tenants and since the Indenture was executed by erstwhile Bombay Housing Board, which is now substituted by MHADA, by virtue of Repeal of the Act of 1948, the claim of the society as owner is not tenable and MHADA is the owner of the property. Action was initiated for termination of Tenancy in common spaces by issuing separate notice to the society and by placing reliance on Section 38(1) and (2) of the Bombay Housing Board Act, 1948, it was informed that MHADA claimed ownership of all Public Roads, Open Spaces for the purpose of ventilation or recreation in JVPD Housing Scheme. The reference was therefore, made to the State Government under Section 38(3) and the Chief Secretary of Housing had given concurrence to the letter issued by the Vice-President / CEO (MHADA).

In short, MCGM claimed ownership of all these plots by virtue of built in provision in Section 38 of the Act of 1948 and MHADA Act, 1976, by referring to Section 188 by stating that these lands on completion of the scheme, vest in the Corporation.

34. A reading of the Unamended Section 38 of 1948 Act though sought to be projected by Mr. Sen, by contending that it is automatic, when the provision in the Statute is read, it contemplate transfer to the Local Authority concerned by a Resolution of the Board and it is only thereupon, any open space for the purposes of ventilation or recreation shall vest in the Local Authority here MCGM.

35. Mr. Devitre for the Plaintiff, has raised a doubt whether these spaces contemplated in sub-section (2) of Section 38, which has referred to "all open spaces" for the purpose of ventilation or recreation would cover the Amenities and Public Utility, and I am of the view that it would, as a bare look at Section 24, which provide for the matters to be provided in the Housing Scheme by Clause (j) as reference of Parks, Playing Fields and Open Spaces, which are for the benefit of the area comprised in the scheme and the enlargement of existing Parks, Playing Fields, Open Spaces and Approaches and therefore, sub-section (2) would definitely cover Public Utilities and Amenities.

However, the argument of Mr. Sen that it is automatic vesting, which is akin to the statutory vesting of the land on the Local Authority as soon as the scheme is complete, suffers

from incongruity, as Sub-section (2) provide that on completion of the Housing Scheme, the open spaces shall be transferred to the Local Authority, by Resolution of the Board and the words "shall thereupon" will have to be assigned its due meaning, as the vesting of the land in the Local Authority is preceded by a condition of passing of Resolution by the Board, but in the present case, there is no Resolution passed by the Board ever. It is after a lapse of almost 60 years, the Corporation is coming forward claiming its right over the Utility and Amenity Plots, which continued to be owned jointly by the 14 Societies, since the date of the Indenture i.e. Common Plot Conveyance as well as the Individual Plot Conveyance.

In fact, 8 Purchase Notices were issued by the Defendant No.17 in respect of 8 common plots calling upon the MCGM to take necessary action to complete the acquisition of the plots under the MRTP Act. Pursuant to the Purchase Notices, acquisition proceedings were commenced by the Additional Commissioner, who issued Notification under Section 6 of the Land Acquisition Act, 1894 read with Section 126 (4) of the MRTP Act, but all of a sudden, in the year 2016, it was learnt by the societies that the acquisition proceedings were suspended as MCGM is of the opinion that the common plots did not vest in the co-owner societies, as they were only tenants and could not claim ownership thereof.

36. Turning my attention to the objection raised by Mr. Sen that the common plots conveyances is 'void ab initio' as no transfer of property can be legally made under Section 6(h) of

the Transfer of Property Act, for unlawful object or consideration within the meaning of Section 23 of the Contract Act. It is apposite to reproduce the provisions :-

"Section 23. What considerations and objects are lawful, and what not.—

The consideration or object of an agreement is lawful, unless—

it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law;
or is fraudulent ; or

involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void."

37. Section 6(h) of the Transfer of Property Act reads as below :-

"6. What may be transferred.—

Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.

(a) ...

(b) ...

...

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872 (IX of 1872), or (3) to a person legally disqualified to be transferee."

38. A conjoint reading of the above would lead to a legal position, that no immovable property can be conveyed to a person for an unlawful object or consideration within the meaning of Section 23 of the Indian Contract Act.

What considerations and objects are not lawful or they are illegal is set out in Section 23, which stipulate that the consideration or object of an agreement is lawful unless, it is forbidden by law or it is of such a nature that if permitted, it would defeat the provisions of any law.

It is an argument advanced on behalf of MCGM that the conveyance is a void document, as it amount to defeating the statutorily vested right in MCGM under the Unamended Sub-section (2) of Section 38 of the Bombay Board Act. The sequel of which is projected that the Plaintiff and all other members of the societies of Defendant No.17 - Association would derive no right, title and/or interest in the amenity plots sought to be conveyed under the conveyance, as the Bombay Board could not have conveyed the plots, which it sought to be conveyed to the societies under the conveyance and therefore, it is a void document. Mr. Sen has also urged that whether any consideration has been paid or not, is not a relevant test to remove its voidness, as a void conveyance would not be validated on this count.

39. In order to bolster the aforesaid submission, Mr. Sen is relying upon the decision of the Apex Court in the case of ***G. T. Girish Vs. Y. Subba Raju (Dead) by Legal Representatives & Anr.²***

I must, therefore, indulge with this decision, which has held that a contract, which is expressly or impliedly prohibited by a Statute, or is violative of Section 23 of the Contract Act, in any other way, cannot be enforced by a Court.

² (2022) 12 SCC 321

The facts involved indicate that the Bangalore Development Authority (BDA) entered into a Lease Cum Sale Agreement with the Defendant, who was put in possession. This Defendant entered into an agreement with the Plaintiff agreeing to execute the Sale Deed within three months from the date on which the Plaintiff obtained the Sale Deed from BDA.

The Plaintiff issued letters to the First Defendant calling upon her to execute the Sale Deed, but the Defendant responded by intimating the Plaintiff that it was in breach and the Agreement itself had lapsed and the advance amount by the Plaintiff was forfeited. The Plaintiff instituted a Suit seeking specific performance and the Trial Court declined to grant relief of specific performance and instead, directed return of Rs.50,000/- with 9 % interest. The High Court however, recording that entire sale consideration was paid by the Plaintiff to the First Defendant and nothing remained to be done thereafter, found that the Second Defendant was not bonafide purchaser for value without notice, decreed the Suit by directing the First Defendant (her heirs) and the Second Defendant to jointly convey the Plaint Schedule Property to the Plaintiff.

While arguing on behalf of the Appellant before the Hon'ble Apex Court, the prohibition against the alienation of the site or the Plaint Schedule Property for a period of 10 years under the City of Bangalore Improvement (Allotment of Sites) Rules, 1972 and in particular, Rule 18 (2) imposing an embargo against alienation for a period of 10 years was pressed into service. Since this was a condition clearly

stipulated in the Lease Cum Sale Agreement entered into between BDA and the First Defendant, it was urged that the Court could not have granted specific performance unless there was compliance of the conditions contained in the agreement.

40. The Hon'ble Apex Court by referring to the City of Bangalore Improvement Act, 1945 and the Rules framed thereunder, which determined the principles for selection of Applicants for allotment of site and the conditions of allotment and sale of site, by referring to the restrictions, conditions and limitations on sale of site contained in Rule 18, concluded that the agreement executed by BDA related to allotment of public property and the allottee was to be a lessee, who was to pay rent, as per Rule 7. On making reference to the statutory Lease cum Sale Agreement, referred to Rule 18(1), it is held that the allottee begins its innings as a lessee and the terms of the lease are set out in the Rules and he is obliged to observe the conditions of Lease cum Sale Agreement and is forbidden from alienating the site or the building that may be constructed during the period of tenancy, the period of tenancy being fixed as 10 years from the date of giving possession to the allottee. Thus, an allottee, who entered into a Lease cum Sale Agreement is prohibited from alienating the site or the building, which may be put up for a period of 10 years.

It is in this background, Their Lordships were confronted with the issue of conditional decree of specific performance. Reference was made to the decision of the Privy Council in ***Motilal & Ors. Vs. Nanhelal & Anr.***³, where it was categorically

³ A.I.R. 1930 Privy Council 287

ruled that in an agreement, wherein the vendor agrees to convey property, which is permissible only with the permission of some Authorities, the Court can in appropriate cases grant relief.

After referring to several Authoritative Pronouncements, dealing with the suit for specific performance, it was conclusively held that whatever may be the intention of the parties, a contract which is expressly or impliedly prohibited by a Statute, may not be enforced by the Court.

41. While dealing with the question as to whether the agreement in question falls foul of Section 23 of the Contract Act, note was taken of the Three Bench decision in ***Gherulal Parekh Vs. Mahadeodas Maiya & Ors.***⁴, which recorded as under :-

"8. 'act or undertaking is equally forbidden by law whether it violates a prohibitory enactment of the legislature or a principle of unwritten law. But in India, where the criminal law is codified, acts forbidden by law seem practically to consist of acts punishable under the Penal Code and of acts prohibited by special legislation, or by regulations or orders made under authority derived from the legislature."

42. Pertinent observation on which Mr. Sen, would focus is reproduced below :-

"102. A contract may expressly or impliedly, be prohibited by provisions of a law. The intentions of the parties do not salvage such a contract. [See Sobhag Singh V. Jai Singh]. What is involved in this case, may not be a mere case of a conditional decree for specific performance being granted as was the case in the line of decisions commencing with Motilal (supra) and ending with Ferrodous Estates (supra). The Rules contemplate a definite scheme. Land, which is acquired by the Public Authority, is meant to be utilised for the particular purpose. The object of the law is to invite applications from eligible persons, who are to be selected by a Committee and the sites are allotted to those eligible persons, so that the chosen ones are enabled to put up structures, which are meant to be residential houses."

4 AIR 1959 SC 781

By referring to the Rules and the Lease cum Sale Agreement, it was concluded that a sale of a site to any other person clearly, stood prohibited in Rule 18(3), unless the allottee / lessee is compelled to sell. In the circumstances, provided therein and therefore, if the Plaintiff wanted to enforce the agreement for sale of the site on an immediate basis, it would clearly attract the embargo, as it was completely prohibited. A perusal of the aforesaid decision would lead to an obvious conclusion that the dealing by the First Defendant, was in the teeth of the embargo, was a case contemplated under Section 23 of the Indian Contract Act, as there was clear violation of a Statute and if the transfer was made defeating the statutory right, relief of specific performance shall be refused, as such, transfer need not be set aside, as no person can transfer any property pursuant to such void agreement.

43. The above decision is rightly distinguished by Mr. Devitre and this distinction is categorically noted, being that it was a case of where ex-facie the transaction was illegal, as it was expressly forbidden by the Rules, which prescribed that any contravention would render the transaction null and void ab initio. The Apex Court held that the illegality perpetrated by the parties was, that executory agreement for sale was an attempt to transfer the land allotted under the Statute within a period of 10 years and the transaction was without the obligation to construct a residential building on such a land and this was inconsistent with the object of the Statute and it was forbidden by law.

However, in the present case, the ratio in case of *G. T. Girish* (supra) is not attracted, as there is no prohibition for transfer of common plots to the Housing Societies and rather, it was transferred with prior approval and necessary directions being sought from the Government, which continued to remain in force and binding even at the time of the completion of the scheme and thereafter.

The object of Bombay Housing Board Act, 1948 was to take measures to implement schemes necessary for Housing and the object of the satisfying the need of the Housing Accommodation was intended to be served by establishing a Board, which was empowered to take necessary measures for giving effect to the object of the Statute. The State Government itself had entrusted to the Board the task of framing and execution of JVPD Scheme, after the Government had acquired the land for Housing Schemes to be allotted to the Co-operative Housing Societies, who had agreed to pay the cost of acquisition and development of land. The land vested in the Board, with a view to provide Housing Accommodation and the action of the Government / Board in transferring the common plots to the societies was in furtherance of the object of the Statute of providing Housing, with the scope of the scheme clearly highlighted in the Indenture, as well as approved by the Government of Bombay, by specifically approving the final layout of the scheme and the allotment of building plots to the individual society and also for the distribution of the areas occupied by Roads, Canalization, Creek and Common Amenities and Public Utility Plots to the societies located at the left bank or right bank of Irla Nala.

44. Mr. Sen has also placed reliance upon the two other decisions, one from Calcutta High Court in case of *Pranballav Saha & Anr. Vs. Tulsibala Dassi & Anr.*⁵ and a decision of Allahabad High Court in case of *Ghumna & Anr. Vs. Ram Chandra Rao & Anr.*⁶, which have focused on Section 23 of the Indian Contract Act by highlighting the consequences of an act / action entered into for immoral purpose.

In *Pranballav Saha* (supra), the plaintiffs, the executors and Trustees of the Will of one Ranubala Dassi, who died leaving the suit premises at Calcutta, as an asset, obtained the probate of the Will and since the premises were let out by Ranubala Dassi to the Defendant for running a Brothel for carrying out prostitution, sought her eviction, as it was pleaded that they want the premises to administer the Trust imposed by the Will of setting up a Charitable Dispensary.

The Plaintiff raised proverbial defence that a property left for immoral purpose is irrecoverable in the Court of Law though the Defendant denied the charge of running a brothel and staked a claim that she was residing with her family and children.

The Trial Judge found the Plaintiff's case for letting for immoral purpose not proved and even if immoral letting was proved, Plaintiff could not recover possession by relying upon the decision in *Ayerst Vrs. Jenkins (1) Law Report 16 Equity*. The learned Judge extended the doctrine not only to the original parties guilty of immorality, but also to the Trustees and Executors under the Will.

A Division Bench on merits set aside the findings of the Trial Judge and held that the premises were let out to the Defendant for the purpose of running a brothel.

⁵ AIR 1958 Calcutta 713

⁶ 1925 Allahabad 437

Dealing with the question of law as to what are the legal implications in the facts of the case and whether the Court should grant relief, reference was made to Section 6(h) (2) of the Transfer of Property Act and Section 23 of the Indian Contract Act and Shri Justice P. B. Mukharji (As His Lordship Then Was) held in Para Nos.21 and 22 as under :-

"21. The effect, therefore, of Section 6(h)(2) of the Transfer of Property Act is, when applied to the facts of this case relating to immorality, that no transfer of this property has taken place in law because the object or consideration is immoral. Therefore, it follows from the plain construction of the statute that a transfer of property for immoral consideration or purpose is no transfer in law and it does not succeed in transferring the property to such a transferee. No estate passes under such an attempt at transfer. The point then is that if a transferor transfers the property for the immoral object of prostitution the law regards it as no transfer. In other words, if a person lets out a house for the purpose of prostitution, the apparent lessee is not a lessee at all in law and the lessor has not parted with the leasehold interest in the estate. Where then does the property remain? It ought in plain commonsense and on obvious principles of conveyancing, to remain where it was, namely, with the owner. When the law says in Section 6(h)(2) of the Transfer of Property Act that no transfer can be made for an immoral object or immoral consideration, the owner cannot divest himself of ownership by disregarding the law.

22. The reason why ordinarily a person who has himself been a party to the immoral purpose or consideration is not allowed relief in Court is not because the transfer for immoral purpose is good, but because a person participating in immorality is not assisted by the court to take the help of law to enforce his rights. It is a bar on his right of recovery with the aid of court and not a legal sanction to transfer in breach of Statute. It has been put, explained, expounded and formulated in diverse ways. Behind the numerous justifications for this rule the one underlying recurring reason is not that what the law says to be void is not void, but that the court does not allow its own procedure to be used by one who has himself been a party to the immoral purpose of consideration."

45. The doctrine that the Court does not grant relief to a person, who is in pari delicto or particeps criminis was opined to have been extended beyond its rational and legitimate limits and Justice Mukharji concluded that the Plaintiffs, Executors

and Trustees are not in pari delicto or particeps criminis, either literally or metamorphically and they are not so either by any propriety devolution because Section 6(h)(2) of the Transfer of Property Act says no transfer of property at all can take place for immoral purpose. By referring to various Authoritative Pronouncements, where the object was to achieve immoral purpose, distinction was drawn on the Indian Front from the law holding the field in England. However, I need not delve deeper into the said aspect, as in the present case, there is no question of any immorality.

46. Justice Bachawat, another Judge, who wrote a separate concurring opinion, approached the issue with the slightly different angle, when he noticed that the Plaintiffs did not serve upon the Defendants notice to quit, as it was pleaded by them that it is not necessary, as the lease was for the purpose of running a brothel and if it is proved that the lease is in contravention of Section 6(h)(2) of the Transfer of Property Act, then it is void and not voidable and the Plaintiffs may ignore the lease and entitled for possession as a matter of right.

Justice Bachawat then proceeded to discuss the scope of the Rule of Public Policy, which deny the relief particeps criminis and traced the English Law on the point, which was set out in the Classical Judgment in *Holman Vs. Johnson*⁷, where the principle of the Public Policy was stated as; ‘ex dolo malo non oritur actio - No’ i.e. no Court will lend its aid to a man, who found his cause of action upon an immoral or illegal act.

7 (20)(1775) 1 Cowp 341

It is in furtherance of this principle, it was held that the Courts will not allow the particeps criminis to recover money paid on illegal contract, which cannot be enforced, either at law or in equity.

If the transfer itself is prohibited by Statute, the transfer is void and the title to the property does not pass is the ratio flowing from the observation of Shri Justice Bachawat. After discussing the position under English Law, the effect of illegality on contract and rights of property and the claim for relief by particeps criminis was highlighted by referring to three-fold dimension viz; 1] Our Statute Law particularly the Indian Contract Act, the Transfer of Property Act and the Specific Relief Act; 2] Rules of English Law 3]; our Judicial decisions. It is in this background with reference to the Contract Act and the following observation, in particular, is relied upon by Mr. Sen;

"101. Section 6(h) Clause 2 of the Transfer of Property Act has no counterpart in English law. Under that law a transfer pursuant to an illegal agreement or for an illegal purpose is valid at law. *Ayerst v. Jankins* (1) 16 Eq. 275, lays down the principles upon which a Court of Equity may or may not set aside a transfer so valid at law and made by a transferor for an illegal purpose of his own. In our system of law a transfer for an unlawful object or purpose in contravention of Section 6(h) clause 2 of the Transfer of Property Act is a nullity and need not be set aside. The case of *Ayerst v. Jankins* (1) 16 Eq. 275, has no application to a case where the transfer is void and a suit for recovery of possession of the property is brought either by the transferor on the strength of his original title or by the transferee claiming title on the basis of the transfer. The assumptions and rulings to the contrary in *Daivanayaga v. Muthu Reddi* (2) 44 Mad. 329 and *Sabava v. Yamanapva* (41) A.I.R. 1933 Bom. 209 are erroneous and those rulings ought not to be followed on this point.

102. The transferee does not acquire any title under a transfer in contravention of Section 6(h) Clause 2 of the Transfer of Property Act and cannot recover possession of the property on the strength of such transfer."

47. Relying upon the aforesaid observation, that in Indian Law, a transfer for an unlawful object or consideration within the meaning of Section 23 of the Indian Contract Act i.e. prohibited by Section 6(h)(2) of the Transfer of Property Act and such transfer is void, Mr. Sen has suggested, that when an instrument is void on account of illegality not appearing on the face of it and the transaction is such that it cannot stand on the ground of public policy, the Court will decree its cancellation. He would further rely upon the ratio of the decision, that the transferer need not file suit for cancellation of the void instrument or transfer, but if he does so, the Court has discretionary power to grant him relief under Sections 31 to 41 of the Specific Relief Act, and Mr. Sen has argued that no question of limitation arises, since the Defendant No.1 was not to challenge the alleged statutory violation.

48. On somewhat similar lines, Mr. Sen has relied upon the decision of Allahabad High Court where the Plaintiff's claim that the Deed of Gift had been obtained by fraud and it was void, as being for an immoral and an illegal consideration.

The District Judge found that the Donar made a gift of property to husband and wife on the condition that they should have physical enjoyment of the latter and the High Court recording that the consideration of the transfer was the future illicit connection between Donar and Musammat Prabhawati and such an agreement was obviously worked immorally and opposed to the Public Policy within the meaning of Section 23 of the Indian Contract Act and hence, it was altogether unlawful. It was held that the Deed was not only

voidable, but absolutely void from the very beginning and it was even not necessary for Ramakant to have it avoided by the suit and he could have merely ignored it.

49. The aforesaid two decisions relied upon by Mr. Sen, are clearly founded on distinct proposition of law, where the Calcutta High Court noting that the object and consideration of the agreement by which property was let out for running a brothel for an immoral purpose and therefore, void under Section 23 of the Contract Act. Similarly, the Allahabad High Court also recorded a finding on the facts placed before it that a Gift by a third party to a husband and his wife, the consideration for which was maintenance of the immoral relations between the Donar and the wife was held to be immoral and opposed to Public Policy. Hence, void ab initio.

Another decision on which reliance is placed, i.e. in case of *Ishtak Vs. Ranchod Zipru Bhate*⁸, which declared that the agreement in question to be void because the Gift Deeds in question referred to previous agreement to make a Gift in consideration of past illicit cohabitation and such consideration was found to be immoral and unlawful.

50. The principles laid down in the aforesaid Judgments in no case, can be applied to the facts of the present case, as there was no prohibition in transferring the lands to the Housing Societies, particularly, when it was to accomplish the object of Housing and it was only upon obtaining necessary permission and approval of the plans by the Government, when none of the approvals or sanctions have been ever challenged by the

8 ILR 1947 Bom.206

Board or by the Defendant No.1, by no stretch of imagination, the conveyance of the open plots in the form of Amenities or Utilities can be termed to be "forbidden" by any law. The principle of 'particeps criminis' and 'in pari delicto' are also not applicable in the present case, as it necessary to convey 'a partner in crime'; and 'accomplice' or 'accessory'.

It is completely incorrect to say that the Government of Bombay, Bombay Housing Board and the Co-owners Societies colluded or particeps criminis, in order to defeat the provisions of law and hence, forbidden by law.

51. Section 23 of the Contract Act, 1872 clearly convey that the consideration or object of an agreement is lawful unless it is forbidden by law or it is of such nature that would defeat the provisions of any law or is fraudulent or involves or implies injury to the person or property of another or the Court regard it as immoral or opposed to public policy.

There are three well settled principles by the application of which the enforceability or otherwise of a contract should be determined, these are :

- (i) A contract is void if its purpose is the commission of an illegal act;
- (ii) A contract which is expressly or impliedly prohibited by law; and
- (iii) A contract whose performance is not possible without disobedience to law.

52. The principle underlying in Section 23 of the Contract Act would come into force, where the agreement is executed for an illegal purpose or it aims to defeat a Statue, and where the 'object' and 'consideration' must be unlawful. However,

merely because the open spaces have been vested in the societies by executing common conveyance as well as individual conveyance, and the Board completely faltering to hand over the possession to the Corporation, who also remained in slumber for almost 60 years, would not be stamped with an illegal purpose designed to deprive its vesting in the MCGM by the Government or the Bombay Housing Board. Under Section 23 of the Contract Act, 1872, an agreement is void only when its 'object or consideration is unlawful', but this is not the situation here.

The MCGM / Defendant No.1 is raising cloud over the conveyance only on the basis that the open plots statutorily should have vested in it, once the scheme is complete, unmindful of the fact that it is not a deemed vesting, but contemplated an action on the part of Board to have passed a Resolution and if the Board has failed to adhere to this procedure, then definitely, the intention of the Statute was not to have the effect of a deemed vesting. It is trite position in law that Statute prescribed a particular mechanism to be followed, right / liabilities flowing therefrom shall accrue only upon completion of those requirements and if not, then no rights or liabilities shall accrue or fall upon the party.

Worth it to note that this very provision was substituted by effecting an Amendment in the year 1964, when an option was given to the Board to transfer open space to the Local Authority on completion of the scheme by diluting the mandatory requirement contained in the Original Act of 1948. It is thus, evident that after the Amendment, an option is given to the Board to transfer such open space to the Local Authorities concerned on completion of the scheme and thereupon, such

open space shall vest in and be maintained at the expense of the Local Authority.

Above Amendment in the Board Act, 1948 clearly indicate that the Legislation intended to vest the open plots / open space in the Local Authority, provided the Board passed a Resolution to that effect. However, by amending the Statute, it made it optional for the Board to pass a Resolution thereupon, the open spaces would vest in the Local Authority.

53. The shift in the approach adopted by the Legislation, make it obvious that the original sub-section (2) was never intended to have the effect of the transaction itself being rendered void, as it is seen that the conveyance in favour of the 14 societies, was also in respect of those plots where the buildings are constructed for Housing purpose and it was coupled with certain other plots in the form of Amenities and Utilities, Public Streets, which were coupled with the vesting of the former.

The void act / transaction is the one, which is only without jurisdiction, ab initio void i.e. void at the inception and for avoiding the same, no declaration is necessary.

In *Dhurandhar Prasad Singh Vs. Jai Prakash University & Ors.*⁹, the Hon'ble Supreme Court has drawn a distinction in a void act and a voidable act, by declaring as under :-

"Thus the expressions void and voidable have been subject matter of consideration on innumerable occasions by courts. The expression void has several facets. One type of void acts, transactions, decrees are those which are wholly without jurisdiction, ab initio void and for avoiding the same no declaration is necessary, law does not take any notice of the same and it can be disregarded in collateral proceeding or otherwise. The other type of void act, e.g., may be transaction against a minor without being represented by a next friend. Such a transaction is good transaction against the whole

9 2001(6) SCC 534

world. So far the minor is concerned, if he decides to avoid the same and succeeds in avoiding it by taking recourse to appropriate proceeding the transaction becomes void from the very beginning. Another type of void act may be which is not a nullity but for avoiding the same a declaration has to be made. Voidable act is that which is a good act unless avoided, e.g., if a suit is filed for a declaration that a document is fraudulent and/or forged and fabricated, it is voidable as apparent state of affairs is real state of affairs and a party who alleges otherwise is obliged to prove it. If it is proved that the document is forged and fabricated and a declaration to that effect is given a transaction becomes void from the very beginning. There may be a voidable transaction which is required to be set aside and the same is avoided from the day it is so set aside and not any day prior to it. In cases, where legal effect of a document cannot be taken away without setting aside the same, it cannot be treated to be void but would be obviously voidable."

54. The two distinct types of invalidity though belong to the same genus would differ in species, as in the one invalidity is so obvious and grave that it would amount to a nullity and there is no way out, it is automatically null and void. The other kind is when it is not void altogether, but it is voidable and it stands, unless it is set aside.

This principle is equally applicable to 'void' and 'voidable' contract, as a question that would arise is whether in case of concluded transfer of title, where the attempt is to divest a party of its title or its ownership as unless and until, the invalidity goes to the root of the contract, a party may not be divested, as the law provides avenues for rescinding or setting aside such instrument or for declaring it to be validly avoided under the Specific Relief Act in appropriate proceedings. Admittedly, MCGM has not resorted to any such proceedings.

55. In this aforesaid background, when the conveyance of 1960 is carefully read, it is evidently clear that its prime object was effective and expedient completion of the Housing Scheme

on the terms sanctioned by the Government of Bombay, being implemented under the Bombay Housing Board Act, 1948 and the object of this conveyance / contract cannot be said to be illegal or unlawful merely because under sub-section (2) of Section 38 of the Act of 1948, the land in the form of open spaces was not transferred to MCGM. The genesis of the Housing Scheme was the acquisition of different parcels of land in the form of plots at the instance and for the benefit of 14 societies and the societies parted with the consideration in lieu thereof, as the Government of Bombay assured effective and successful implementation of the Housing Scheme by acquisition of the plots for the societies and agreed to transfer the plots to them, as sanctioned and approved by the Government, all acts being discharged pursuant to the authority and powers granted under the Act of 1948.

56. For the above, I have no hesitation in holding that the object and consideration of the conveyance was to provide affordable Housing to the societies, for a consideration that came from these societies and there is no illegality either in object or consideration, as the object of the entire arrangement was to implement the Housing Scheme. Between 1949 to 1956, the Board specifically obtained sanctions, approvals and directions of the Government of Bombay to the Housing Scheme and also obtained approval for transferring and conveying of the common plots to the co-owner societies. Government of Bombay had clearly declared that it was expedient to make provision with a view to provide Housing Accommodation and to the Improvement and Development of

the said lands and it categorically specified the laying out and Development of the said lands including the common plots, when it declared that they should be joint and exclusive property of the 14 co-owner - societies and be transferred to them. Worth it to note that from time to time, this arrangement received approval from the Government of Bombay, as the Resolution dated 15/03/1949 where the Government of Bombay exercised the power conferred by Section 24(p) of the Bombay Housing Board Act made it clear that it had resolved to make provision with a view to provide Housing Accommodation and to improve and develop the lands for the purpose of allotment to Co-operative Housing Societies.

Government of Bombay also sanctioned the scheme by its order dated 14/05/1951 and on 31/07/1952 conveyed the approval to the decision of Advisory Committee of JVPDS that the common plots earmarked for shops, playgrounds, etc. should be the joint and exclusive property of the societies. Apart from this on 01/06/1955, the Government of Bombay approved the demarcation of the final layout of the scheme, which included the common plots.

The above sanctions, approvals and directions were aimed at effective, expeditious successful implementation of the Housing Scheme in favour of the societies for whom, the lands have been acquired and the Government and the Board were authorized under the Act of 1948 to take steps to implement the scheme.

57. Under the Bombay Housing Board Act, there is no prohibition, express or implied on a sale of open plots to the

Housing Societies for whom the lands were acquired and for whose benefit, the Housing Scheme was approved / sanctioned and implemented. The necessary approvals and sanctions were obtained from the Government of Bombay before completion of the scheme and definitely, it shall bind all those concerned including the Board. By no stretch of imagination, it can be said that the conveyance intended to defeat any rights of Defendant No.1, who now claims to be the owner of the open spaces, without exercise being carried out by the Board under sub-section (2) of Section 38 of the Act, 1948. The Board was authorized to sell, transfer or otherwise dispose of any land in Housing Scheme so long as it was for effective implementation of the scheme and development of the lands comprised in the approved scheme as Section 24(g) and (p) clearly permitted that a Housing Scheme shall permit the sale, letting or exchange of any property comprised in the scheme or undertake any other act, which the Government deems it appropriate to complete the Housing Scheme.

In the wake of above, I do not find merit in the submission of Mr. Sen that the object for consideration of 1960 common plots conveyance defeated the provisions of the Unamended Section 38(2) of Bombay Housing Board Act, 1948 and hence, I reject the said contention.

58. Having held that 1960 Conveyance is not unlawful and void as attempted to be canvassed, under Section 23 of the Contract Act and therefore, the transfer being hit by Section 6(h) of the Transfer of Property Act, 1882 being effected for an unlawful object or consideration, I shall now deal with the

scope and ambit of Originating Summons, which seek determination on three points in the factual background, which I have already referred to as above.

The Plaintiff and the Defendant Nos.4 to 16 claiming to be the absolute owners of plots of lands situated in Juhu, Mumbai vide 14 separate Deeds of Conveyances executed in favour of each of it, claimed that the Bombay Housing Board had conveyed the distinct plots of land respectively for Housing to the societies. It is also stated that by a separate duly Registered Deed of Conveyance dated 24/04/1960, the Board had transferred and conveyed absolutely certain common plots i.e. Utility and Amenity Plots as a part of JVPD Scheme to the 14 societies as "Tenants in Common" i.e. as co-owners to the extent of their respective proportionate shares in the total area.

After lapse of about 60 years for the date of registered conveyance since Defendant Nos.1 to 3 for the first time, sought to interpret the terms of common plots conveyance and read it to the effect that the common plots did not vest in the 14 co-owner societies and they are not the owners of the same, but hold it only in the capacity as 'Tenants', since the common plots conveyance, as allegedly used the term 'Tenants in Common' and therefore, on completion of the JVPD Scheme, the common plots vested in Defendant No.1 and the Board has committed an illegality by conveying and transferring the same in favour of the co-owner societies.

59. It is in this background, the Originating Summons are filed by the Plaintiff on 27/06/2019 seeking determination of three

questions and in order to answer these questions, it is necessary to consider the scope of the Originating Summons under the Bombay High Court (Original Side) Rules and since Mr. Devitre has invoked Rule 245, which deserve reproduction :-

"R. 245. Person interested under deed etc. may apply for issue of originating summons.- Any person claiming to be interested under a deed, will or other written instrument, may apply for the issue of an Originating Summons returnable before the Judge in Chambers for the determination of any question of construction arising under the instrument and for a declaration of the rights of the person interested."

60. Chapter-XVII of the Bombay High Court (Original Side) Rules provide for Originating Summons and Rule 238 reads thus :-

"R. 238. Who may apply for the issue of originating summons and in respect of what matters. - The executors or administrators of a deceased person or any of them and the trustees under any deed or instrument or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir or legal representative, or as beneficiary under the trusts of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may apply for the issue of an Originating Summons returnable before the Judge in Chambers for such relief of the nature or kind following as may by summons be specified and circumstances of the case may require (that is to say), the determination, without an administration of the estate or trust, of any of the following questions or matters. :-

(a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or legal representative or beneficiary ;

(b) the ascertainment of any class of creditors, devisees, legatees, heirs, legal representatives, beneficiaries or others;

(c) the furnishing of any particular accounts by the executors, administrators or trustees and the vouching (when necessary) of such accounts;

(d) the payment into Court of any moneys in the hands of the executors, administrators or trustees;

(e) directing the executors, administrators or trustees to do or abstain from doing any particular act in their character as such executors, administrators or trustees;

(f) the approval of any sale, purchase, compromise or other transaction;

(g) the determination of any question arising in the administration of the estate or trust."

61. Rule 241 is another contingency stipulated when the Vendor or Purchaser may apply for the issue of Originating Summons and this is the provision, which Mr. Sen has placed heavy reliance and it reads thus :-

"R. 241. Vendor or purchaser may apply for the issue of originating summons. - A vendor or purchaser of immovable property or their representatives respectively may, at any time or times and from time to time, apply for the issue of an Originating Summons returnable before the Judge in Chambers for the determination of any questions which may arise in respect of any requisitions or objections or any claim for compensation, or any other question arising out of or connected with the contract, not being a question affecting the existence or validity of the contract."

In addition to the aforesaid provisions, Rule 243 is a provision where a Mortgagee or Mortgagor may apply for issue of Originating Summons, whereas under Rule 244, a partner may apply for issue of Originating Summons.

62. An Originating Summons filed in Form No.43 is signed by the Prothonotary and Senior Master before being issued and it need not be accompanied by any documents unless for greater gravity or clearness of some documents are to be annexed along with the Plaint.

Whereas Rule 258 set out the effect of order made on the Originating Summons and it prescribe that if the Judge consider

the matter to be fit, he may pronounce such Judgment, as the nature of case is required and any order made by him shall be drawn up as a Decree of the Court and as per the Rule 259, the Judge may give any directions touching the carriage or execution of such decree or service thereof upon persons not parties as he may think fit.

63. It is in this scheme contained in Chapter XVII of the Original Side Rules, I must consider whether the Plaintiff has made out a case for determination of the questions raised in the Plaint (Originating Summons) and whether it deserve the determination on Point Nos.(a), (b) and (c).

The determination of the questions raised in the Originating Summons placed before me relate to the true and correct interpretation of the common plots conveyance, including the correct construction of, "Tenants in Common" used in the instrument and whether the Board is entitled to the common plots after execution and registration of 1960 Conveyance as regards plots of Utility and Amenity in favour of the societies.

64. The scope of the Originating Summons came up for consideration before the Division Bench of this Court headed by Shri M. C. Chagla, The Chief Justice in case of ***Mazda Theatres Ltd.*** (supra).

Dealing with an Appeal against the Judgment holding that the Originating Summons cannot be maintained in the wake of Rule 241 of the High Court Rules, the Division Bench took note of the essential facts. The Plaintiffs, took out the Originating Summons, where the lessees sought proper

construction of Clause 2(r) of the Indenture of Lease dated 21/11/1997 and summons were taken out against the lessor, the Defendant. The parties agreed on having the clause constructed by means of an Originating Summons and the Plaintiff agreed to pay the cost of summons.

The question that arose for construction was whether the Defendant was entitled to use the complementary pass issued to him by the lessees free from liability to pay Entertainment Duty. Under Clause 2(r), the lessees had undertaken the obligation to give complementary pass to the lessor and reserve one box of six seats to be used by the lessor and his family and friends in every Show on every day. This obligation was abided till the time, when the Government decided to levy Entertainment Duty even on complementary tickets. When the Entertainment Tax was amended and the lessees became liable to pay Entertainment tax, the obligation became a heavy one and therefore, the lessees wanted to be it to be determined by the Court whether the Entertainment Duty had been paid by the lessor to the lessees. This is the question which was sought to be decided by the Court of an Originating Summons.

It is in this background, Shri M.C.Chagla, held as under:-

"The only two conditions which are required are that there must be a written instrument and what should be required to be done by the Court is the declaration of the rights of the person interested under the written instrument. In this case, there is a lease : undoubtedly it is a written instrument, and what the plaintiffs seek is the declaration of their rights or the declaration of the rights of the defendant. The view that the learned Judge seems to have taken is that this rule does not apply when on a broad construction of a contract the question to be decided is whether there is or there is no liability on one party or the other under the contract. Now, with very great respect to the learned Judge, he seems to have overlooked the fact that, if you declare a right under an instrument

in favour of a party, it necessarily follows that there is a corresponding liability upon someone else. If in this case the lessees have the right not to pay the entertainment duty on the complimentary tickets to be given to the defendant, obviously there is a liability upon the defendant to pay the entertainment duty. Conversely, if there is a right in the defendant to have the complimentary tickets without paying the entertainment duty, then there is an obligation or liability upon the plaintiffs to pay the entertainment duty. Therefore, it is not correct to say that what the plaintiffs wanted to determine was a declaration of liability. The learned Judge also seems to have been under the impression that contractual rights cannot be determined under r. 241."

Further, it was thus, concluded that the learned Judge had not exercised the discretion conferred under Rule 242 and if he had exercised the discretion, the matter might have been different and as the view taken by him was that he had no jurisdiction to entertain the Originating Summons, which view was erroneous and thus, set aside.

As a result, the Appeal was allowed and the order of dismissal being set aside, the Originating Summons was sent back to trial on merits.

65. The Bombay High Court in *Homi P. Ranina & Ors. Vs. Eruch B. Desai & Ors.*¹⁰ pronounced upon the scope of the Originating Summons and Justice A. P. Shah, (As His Lordship Then Was) and by referring to Rule 238 decided the objection raised by the Defendant Nos.2 to 5 about the maintainability of the summons, as it was contended that the Originating Summons are decided outside the scope of Chapter-XVII and the Plaintiffs are required to prove alleged custom by adducing evidence and the Court would be required to decide complicated questions beyond the scope and summary nature of the Originating Summons.

¹⁰ 1996(2) Bom.C.R.577

The Pertinent observation in Law Report reads as below :-

"In that context, Judgment delivered by Pratt, J. in (Vithaldas Cursonadas v. Dulsukhbhai Vadilal), 21 Bom. L. R. 972, is extremely relevant. In considering the Rules, it has been observed by Pratt, J.:

"It is contended that these authorities do not apply as the Bombay Rules are wider. There is some force in this contention for our rules go further than the English Rules and allow a partner to take put an originating summons and the procedure approximates more nearly to that of a regular suit for the rules contemplate pleadings. A plaint is required by Rule 218 and a written statement is permitted by Rule 221.

The rules do not forbid questions of fact being determined on an originating summons and I am not prepared to hold that this form of action is always inappropriate whenever there is a question of fact in dispute.

But I think it clear that an originating summons is not the proper procedure where the disputed facts are of such complexity as to involve a considerable amount of oral evidence. There is no machinery for discovery and inspection and Rule 223 indicates that the action should be confined to matters which are capable of decision in a summary way.

10. I am in respectful agreement with the view taken by Pratt, J. The object appears to be to decide the matters mentioned in Rule 238 by providing an effective and inexpensive remedy. Clause (g) of the said Rule clearly empowers the Court to determine any question arising in the administration of the estate or Trust. The only question that is raised by the plaintiffs in this originating summons relates to the mode of appointment of the President. The facts are almost admitted on both sides. In my opinion, unless it is shown that the disputed facts are of such complexity as to involve a considerable amount of oral evidence, the jurisdiction to decide the question of the mode of appointment of the President, application of Rule 238 cannot be excluded on the basis of a bald plea that the facts are disputed."

66. In a subsequent decision of the Bombay High Court in case of ***Charu K. Mehta Vs. Lilavati Kirtilal Mehta Medical Trust & Ors.***¹¹, the purpose of Originating Summons under the Bombay High Court (Original Side) Rules, 1980 came up for consideration once again and in the backdrop of the Bombay Trust Act as well as Rule 238, the scheme of Chapter-XVII along with the procedure contemplated was considered

¹¹ 2013(3)Mh.L.J.269

threadbare and its origin was traced to the Rules of Procedure in England when Lindely, L. J. speaking for the Court of Appeal in *Re W. Holloway 1894 Vol. 2 QB 163* had noted as below:-

"What, then, was an "originating summons" at that time ? It was a method of commencing proceedings in Chancery by a summons in chambers instead of by bill. At the time when the Judicature Act was passed there were two kinds of summonses in use, an ordinary summons and an "originating summons", the latter being used in the Court of Chancery in certain cases instead of a bill. The Rules of the Supreme Court of 1875 did not affect the practice of the Chancery Division as regarded originating summonses. The rules were re-cast in 1883, and then the term "originating summons" was for the first time introduced into the Judicature Rules and defined. The term, however, had not lost its original meaning. It still meant a summons which originated proceedings in Chancery, the summons being substituted for a writ in a suit or an action, which had by the Judicature Act taken the place of a suit"

In other words an Originating Summons meant "only a summons by which proceedings are commenced which must formerly have been commenced by a bill or a writ."

The distinction between the writ of summons and the Originating Summons was succinctly noted and position of law in Halsbury's Laws of England, Fourth Edition, Vol. 37 Para 130 came to be reproduced :-

"1] Proceedings in which the sole or principal question at issue is, or is likely to be, one of construction or some questions of law;

2] Proceedings in which there is unlikely to be any substantial dispute of fact".

The object of Rule was thus discerned to be dealing only with procedure and to facilitate the determination of short questions of construction, which can be examined without Affidavit upon the instrument itself.

67. The position of this scope of an Originating Summons in India was specifically analyzed by recording that this procedure

does not per se forbid a determination of question of fact, but where the dispute on facts involved a degree of complexity, it is held that the Originating Summons would not be appropriate.

Justice B. N. Srikrishna (as the learned Judge then was) in ***Rama Aziz Vs. Balkrishna K. Mehta***¹², held that while exercising jurisdiction in an Originating Summons, the Court is not determining a lis, since it does not adjudicate upon the rights and liabilities of the parties.

The Division Bench of Calcutta High Court in ***Gokul Chand De Vs. Gopi Nath Dey***¹³, held that where the dispute between the parties cannot be disposed of merely by a construction of the Deed of Trust and where before the rights of the parties can be decided, the Court would have to decide the questions, such as plea of estoppel and plea of adverse possession, which were not pure questions of law, the procedure by way of an Originating Summons is not an appropriate remedy.

68. The Division Bench of this Court (Coram : Dr. D. Y. Chandrachud and A. A. Sayed, JJ.) pronounced upon the scope of the Originating Summons and gainfully relied upon the observations of the Division Bench in ***Mazda Theatres Ltd.*** (supra) while it was held that the provisions in Chapter XVII of Rules of the Original Side, which embody the procedure for Originating Summons have to be interpreted broadly and liberally, as the procedure envisages a summary remedy, which is available to determine issues of construction or the interpretation and though determination of factual issue is not

¹² 1993(1) Bom.C.R.267

¹³ AIR 1952 Calcutta 705

barred, conventional learning in this area is that where complexity of evidence and fact arises, the parties should be relegated to the remedy of suit in the ordinary course.

The scope of the Originating Summons was specifically pronounced upon in the following words :

"21. The jurisprudential origin of the procedure envisaged in an Originating Summons has been traced by us in order to shed light on how the procedure has evolved, the rationale for its existence and the limitations subject to which the procedure has to be applied. History and, for judges precedent, are illuminating sources of learning. The institution of proceedings through an Originating Summons was considered as a simple and efficacious procedure that would be applied in the resolution of simple and straightforward issues of construction and interpretation. Though the ambit of the issues that could be decided in an Originating Summons came to be expanded over time, the principle underlying the invocation of the procedure remained relatively constant.

22. The rules in regard to Originating Summons indicate that this was a simple and expeditious procedure of initiating proceedings by applying for the issuance of an Originating Summons before the Judge in Chambers. The persons at whose behest an Originating Summons could be issued and the nature of the relief that could be granted are specified in the rules. A summary procedure is envisaged. But the summons remains a species of the original civil jurisdiction in a suit, commencing with a plaint under Rule 248 and ending with the pronouncement of a judgment and the drawing up of a decree under Rule 259. The judge is empowered to issue directions for the carriage and execution of the decree (Rule 260). Since the procedure envisaged is summary, the Judge retains control over the proceedings and has the discretion as to whether an Originating Summons should be entertained. Once accepted, the plaint is numbered as an ordinary suit with the letters O.S."

69. An insightful reading of the provisions included in Chapter-XVII of the Bombay High Court (Original Side) Rules and the evolution of law on the same would make it evident that the institution of proceedings through an Originating Summons is considered as a simple and efficacious procedure that would be applied in resolution of simple and straightforward issues of construction and interpretation. This is remedy provided in the

form of expeditious procedure before the Judge in Chamber and, which contemplate a summary procedure to be followed.

With the summons remaining the species of the Original Civil Jurisdiction in a suit, commencing with a Plaint under Rule 248 and ultimately resulting in drawing up a decree on pronouncement of Judgment, which is envisaged under Rule 259, the Judge is empowered to issue directions for the execution of the decree and it is a discretionary relief, the Judge being vested with the discretion whether the Originating Summons should be entertained.

In other words, Originating Summons has been regarded as an appropriate remedy where a question of interpretation arise, that does not involve appreciation of evidence or determination of dispute of factual matter of some complexity. The Rules confer a wholesome discretion on the Court whether a question of construction should, or should not be determined on an Originating Summons and Rule 246 has made it apparent that the Court is not bound to determine such a question, if it is of the opinion that it not to be determined.

As has been clearly held in case of **Charu K. Mehta** (supra) that the provisions in Chapter-XVII of the Rules of the Bombay High Court Original Side, provide the procedure for an Originating Summons, which must receive broad and liberal interpretation. What is required to be looked into while entertaining the reliefs prayed in an Originating Summons having clearly set out in **Mazda Theatres Ltd.** (supra), and the only two things are kept in mind, the first being in existence of written instrument and the second being the declaration of the rights of the person interested under the written instrument.

70. Coming to the case in hand, the Defendant No.1 had placed reliance upon Rule 241 of the Bombay High Court (Original Side) Rules to contend that this Court has no jurisdiction to determine the validity or legality of the contract / instrument. However, reliance upon the Rule 241 is in my considered opinion entirely misplaced, as Chapter-XVII has contemplated various situations, when the remedy of Originating Summons can be invoked and Rule 241 is one such contingency.

When a vendor or purchaser may apply for Originating Summons, for determination of any questions, which may arise in respect of any requisitions or objections or any claim for compensation or any question arising out of or connected with the contract, but not being a question affecting the existence and validity of the contract. In the present scenario, the Plaintiff has invoked the jurisdiction of this Court, but it is not in respect of any requisitions or objections or claim for compensation and he is not seeking determination of a question, which would affect the existence and validity of the contract.

Rule 241 operates in a totally different regime being of executory contracts, including claims for specific performance of such contract. It definitely do not cover the contracts, which have travelled 'from the realm of contract' 'to the realm of conveyance' i.e. a situation whether the immovable property is already transferred and the transfer is complete in all aspects.

Reading of Rule 241, which is applicable to 'any requisitions or objections or any claim for compensation', the word "any other question arising out of or connected with the contract", would definitely have to be read ejusdem generis, as

Rule 241 is a provision pertaining to a different arena, as it may be appropriate to determine any question arising in respect of any requisitions or objections or claim for compensation or any other question of the like nature arising out of or connected with the contract. A suit for specific performance relates to executory contracts, which a party claims to be entitled to enforce performance by having immovable property transferred to itself under such contract.

Where the Originating Summons is filed in such cases, the Court cannot determine question under Rule 241, as whether such a contract of which performance is sought exist or valid or not. However, the scope of the distinct Rules in the said Chapter differ in its nature and in Rules 243, 244 and 245, there is no restriction in the Court to determine all questions, including questions relating to existence or validity of the deed or instrument of transfer.

Rule 243 deals with instrument of the Transfer of Property Act namely a mortgage and the relief, which may be sought may include relief regarding "Sale, Foreclosure, by the Mortgagor" and "Redemption, re-conveyance by the Mortgagee". This relief necessary involve questions of title and questions relating to existence and validity of instrument. However, the invocation of Rule 245 by the Plaintiff is by a person claiming to be interested under a Deed (Conveyance of 1960) and it is for determination of the questions of construction arising under the said instrument and for declaration of the rights of the Plaintiff, since what is sought to be determined through the Originating Summons is; whether on a true and correct construction of the registered common

plots conveyance, the common plots are conveyed and transferred absolutely to the co-owner societies; Whether by reason by use of the expression "Tenants in Common", the said instrument granted a lease of common plots to the societies with the title still being retained by the Defendant No.3 and whether it has any right, title or interest in the common plots subsequent to the execution of the registered common plots conveyanced.

The present Originating Summons thus, seek determination in respect of all 34 common plots, 18 Amenity Plots, and 16 Utility Plots.

In the backdrop of the clear understanding recorded by the parties in the common conveyance as well as individual conveyance and the intention of the parties being clearly discerned through this conveyance, what is merely sought through the Originating Summons is the construction / interpretation arising under the instrument for declaration of the rights of the Plaintiff, since there is no complex issue involved, but what is expected from the Court is giving finality to the terminology rules in the deed / instrument, since contrary to the intention of the parties, the MHADA, i.e. (earlier the Bombay Housing Board) is now attempting to interpret the instrument in its favour to indicate that the land was not conveyed to the societies as its owners.

Considering the scope of the Originating Summons and in particular, Rule 245, the determination of the question Nos.A, B and C would avoid multiple proceedings, which would be instituted by the Plaintiff or the Defendants.

71. Mr. Sen has also made a feeble attempt to allege that Suit No.89/2017 is filed, which has raised identical issues. However, on perusal of the reliefs in the suit, it is evident that it revolve around only one of the common plots, which was reserved for market and it revolves around a distinct cause of action, involving the question of trespass by the Corporation upon a permissive gratuitous basis, subject to question by Defendant No.1 in accordance with law. However, as far as the present proceedings are concerned, it is for determination of the questions arising on an interpretation of 1960 Conveyance and is not relating to trespass or acquisition and thus, filing of this suit as well as other suits, if any for trespass is based on distinct cause of action and would not pose any hindrance in entertaining the present proceedings. It is informed that another Suit No.2554/2005 was instituted by the societies for injunction and possession of one of the common plots in the scheme, on which a Hospital - R. C. Kupa Hospital has been set up by the Corporation.

On arrangement being worked out with the societies and the societies had given possession of the said plot to the Corporation at a concessional rate, which was paid by the Corporation. The Corporation however, attempted to dispose of the plot to a third party, claiming to be its owner under an alleged agreement under Sections 90 and 91 of the Municipal Corporate Act. The Corporation claimed that the ownership of the plot was transferred to it by a private contract and it is informed by Mr.Devitre that this plea was negated by an order passed by this Court in an Appeal against order and even the Hon'ble Apex Court had declined to interfere with the said

decision. Eventually, the suit was compromised with Defendant No.1, inter alia agreeing to develop the Hospital on the said common plot by itself.

72. The attempt on the part of Mr. Sen to respond to the submission of the Plaintiff by asserting that the Plaintiff is not only seeking interpretation of 1960 Conveyance, but it is seeking a declaration that the Plaintiff along with other societies are owners of all the common plots, which are subject matter of convenience and MHADA has no right, title and interest in them is not in my opinion on the correct understanding of the argument of Mr.Devitre. Mr. Sen has also attempted to suggest that in answering questions, which are sought to be determined, it would require determination of the issue raised by the Defendant No.1 that 1960 Conveyance is unlawful and therefore, void.

At this stage, I must necessarily take note of the fact that the Defendant No.1 - MCGM never raised any challenge to the 1960 Conveyance as being unlawful and void and rather, it continued to act on it as in the past, when the Purchase Notices were issued by 8 such societies claiming that they are the owners, proceedings were initiated under the MRTP Act, though it is a different matter that thereafter, the Corporation took a U Turn and suspended the proceedings. The MCGM has not taken any independent proceedings for the last 60 years seeking declaration that the conveyance was void and unlawful and it is only in response to the proceedings instituted by the Plaintiff, it is trying to piggyback and want a declaration to the effect that 1960 Conveyance is void.

The arguments that the relief sought in the Originating Summons are beyond the jurisdiction of the Court, in my view, does not hold good as I have exhaustively dealt with the argument of Mr. Sen about the conveyance being invalid / unlawful, since it did not conform to Section 38(2) of the Bombay Housing Board Act and specifically, the Unamended provision.

The premise of Mr. Sen's argument is that the object of the conveyance in favour of the society itself is unlawful and this contention I have disapproved in my earlier discussion, but at this stage, once again, I deem it appropriate to reiterate that the object of 1960 Conveyance is to provide land to the Housing societies for housing purpose and the intention is clearly reflected in the Indenture dated 26/04/1960 executed between the Bombay Housing Board constituted under the Bombay Act LXIX of 1948 and which included its successor and assigns and the 14 Co-operative Housing Societies including the Plaintiff and the object of the arrangement was in conformity with Section 24(p) of the Bombay Housing Board Act, 1948 and the Government of Bombay by keeping in mind this object by its Resolution dated 15/03/1949 deemed it expedient to make provision with a view to provide Housing Accommodation and to the Improvement and Development of the said land and for that purpose, specified the laying out and developing the said land.

By the said Indenture, the land vested in the Board, but it was to be utilized for the purpose of the Housing Scheme and when the object and consideration of the conveyance are present and clearly highlighted in the Indenture, the Corporation, by no stretch of imagination, can take upon itself

and argue that since there was no compliance of sub-section (2) of Section 38 by the Board, the conveyance is void and quoting Mr. Sen, since the object and consideration of the conveyance was unlawful.

This Indenture has also determined the scope of the scheme and also fixed the consideration, when it provided that the total cost of completing the scheme, including the cost of earth fielding and construction of roads and Canalization, cost payable by each society is worked out at Rs.10.00 per square yard of the building plots to be allotted to each society, including the proportionate cost of acquisition and development of common Amenity and Utility Plots, Roads and Canalization and it may make a reference for payment of Rs.60,00,000/-, the total estimated cost being paid by the societies.

73. The Indenture of 1960, therefore, clearly state that the Board has conveyed in favour of the societies all that piece or parcel of vacant plots, including the Amenity Plots, Utility Plots, etc. in all admeasuring 6,07,036 yards described in Third Schedule, in favour of the societies with a right conferred, "To have and to hold", the said land, "unto and to the use" of the said societies, forever as "Tenants in Common" in proportion set out therein and as far as Vithalnagar Housing Co-operative Society Ltd. is concerned, its proportion is reflected as 0.100.

The Conveyance of 1960 being read with Schedule-I and Schedule-II thereof clearly set out the description of the open plots being bifurcated under Public Amenities like recreation

ground, play ground, public hall, 60 feet road, creek, etc. and the public utilities like shops and public buildings, municipal office, police station, shops, fire brigade, post office, bank, shops, schools, shops and markets, etc. The Schedule-II clearly set out that 2,08,431 area in square yard had been transferred to the MCGM for 100 feet and 60 feet road, whereas area of 1,40,203 has been transferred under internal roads to the MCGM.

With this clear stipulation set out in the conveyance, the stand of the MCGM that the conveyance is void and its validity cannot be gone into the wake of Rule 241 of the Originating Summons has failed to persuade me to decline the entertaining of the Originating Summons as well as grant of reliefs therein.

74. The learned counsel Mr.Lad appearing for MHADA-Respondent No.3, by inviting my attention to Exh.B i.e. Indenture dated 14/10/1956 (individual conveyance) feebly submit that consideration was paid towards buildings and not for the amenities and the utilities and, therefore, he would question as to how the societies can become owners? He has invited my attention to the lists of public amenities and utilities, which are appended as Schedule I and Schedule II to the Conveyance and the long and short of his argument is, the societies cannot become owners because they have not paid consideration to acquire ownership right, but as far as common amenities are concerned, they can use it alongwith others, but in contrast, the claim is for ownership and as such, all 14 societies cannot claim ownership of the land.

The aforesaid argument deserve a perforce rejection, as the recitals in the common conveyance as well as the individual

conveyance has clearly recorded that in pursuant of the scheme sanctioned by the Labour and Housing Department for laying out and developing the land for the purpose of allotment to the co-operative housing societies, the land was demarcated for building plots, constructed roads and general amenities and public utilities purposes to be owned in common, by participating societies in proportion with the area of the building plots of each societies bears to the total building area on the two banks of Irla Nala.

Upon the total cost of completing the scheme being worked out and the particular area being allotted to the individual society i.e. 60,100 to Vithalnagar Co-Operative Housing Society i.e. the Plaintiff on plot 12/1, 12/2 and 12/3 and more particularly described in Schedule III. It was recorded that the society had paid to the Board amount of Rs.6,01,000/-, being the proportionate cost pertaining to the land to be allotted to the society and in lieu thereof, what was conveyed to the society was the vacant land admeasuring 60,100 sq. yards, particular described in Schedule III with all its appurtenances whatever belonging to it and this included, the easements, profits, privileges etc. Schedule II appended to Exh.B has referred to the areas on the left bank of Irla Nala and provides the details of amenities and public utilities plots, 60 and 100 ft. road, internal roads, canalization and what was conveyed was what was set out as a part of the said document.

Hence, the argument of Mr.Lad cannot be accepted, as even MHADA, after its incorporation, never asserted its right over the amenity and utility plots.

75. Another point which ought to have focused upon is the holding of the open plots (Amenities and Utilities as "Tenants in Common"), but since Mr. Sen has conceded to the legal position that the use of phraseology "Tenants in Common" in the Conveyance of 1960 confers ownership, Mr. Devitre has not advanced his argument on the said aspect of the matter and therefore, he has restricted his reliefs in Originating Summons to Clauses (a) and (c) only.

Since the Corporation without raising the challenge to the Deed of Conveyance and transfer of the land in favour of the societies by the Board, which act the Board indulged into with prior permissions from the Government of Bombay, after lapse of almost 64 years, it is not open for the Corporation to adopt such a stand premised on its own reading of deeming of vesting of the open lands in its favour once the scheme was completed.

76. For the reasons offered above, the points sought for determination in the Originating Summons are answered in the following manner :

a] On true and correct construction of the registered common plot conveyance (read with 14 individual building plot conveyances), it is declared that the common plots mentioned in the conveyance (Utilities and Amenities) are conveyed and transferred absolutely to the co-owner societies i.e. Plaintiff and Defendant Nos.4 to 16 as co-owners and;

b] By use of the expression “tenants in common” in the registered common plot conveyance (read with 14 building plot conveyances), the instrument granted ownership in favour of the Plaintiff and the 14 societies and the conveyance was not restricted and confined to lease of the common plots in their favour.

c] The Defendant No.3 - MHADA has no right, title or interest in the common plots after execution of the registered common plot conveyance along with individual plot conveyance in favour of the 14 societies.

[SMT. BHARATI DANGRE, J.]