
(1997) 12 BOM CK 0009

In the Bombay High Court

Case No : Notice of Motion No. 3418 of 1996 in Suit No. 864 of 1982

Abdulla Umar Haji Ismail Merchant

APPELLANT

Vs

Subai Mura Rabari and Others

RESPONDENT

Date of Decision : 22-12-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 32
Constitution of India, 1950 — Article 226

Citation : (1998) 3 CivCC 386

Hon'ble Judges : S.S. Nijjar, J

Bench : Single Bench

Advocate : P.K. Samdani and Mr. Dinesh Shah instructed by Lilani Shah and Co, for the Appellant; J.G. Daniani for Defendant No. 1 and Mrs. Shaila V. Pathak for Defendants Nos. 1 to 4, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Nijjar, J.—Before coining to the merits of this Notice of Motion it would be apt to reproduce certain observations of the Supreme Court and of Punjab and Haryana High Court as they are relevant in the context of the controversy raised in this Notice of motion. In the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, the Supreme Court (Kuldip Singh, J.) observed as follows:-

7. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the Court. The High Court, however, went, haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence." The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The Courts of law are meant for imparting justice between the parties.

One who comes to the Court, must come with clean hands. We are constrained to say that more often than not process of the Court is being abused. Property grabbers, tax-evaders, bank loan dodgers and other unscrupulous persons from all walks of life find the Court process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown put at any stage of the litigation.

(Emphasis supplied)

A Division Bench of the Punjab and Haryana High Court (G.S. Singhvi. J.) in the case of Pawan Kumar v. State of Haryana and another, 1994(5) SLR 73 observed as follows:-

9. There is an additional and a very cogent ground for not giving any relief to the petitioner. We are constrained to observe that the petitioner has made an attempt to mislead the Court by giving an incorrect picture of the remarks made in his annual confidential reports. In para 4 of the writ petition, the petitioner has made a statement regarding the remarks in his annual confidential reports. However, this statement is contrary to the remarks actually made in his annual confidential reports for the years 1983-84,1989-90 and 1990-91.... He has not come out with a case that he presumed entries in his confidential reports for these years to be good because nothing has been communicated to him. It is thus clear that the petitioner has deliberately made an attempt to mislead the Court by painting a rosy picture about the entries in his annual confidential reports. In our opinion, a person who makes an attempt to mislead the Court by misstatement of facts or by deliberate twisting of facts has no right to get any relief from the Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

(emphasis supplied)

Writ jurisdiction of the Court can be exercised only in favour of those who come with clean hands and a person who approaches the Court with tainted hands has no right to be heard on the merits of his case.

10. In Rex v. Kensington, 1917(1) K.B. 486 Cozens Hardy M.R. observed:

On an ex parte application uberrima fides is required, and unless that can be established if there is any thing like deception practiced on the Court, the Court ought not to go into the merits of the case, but simply say we will not listen to your application because of what you have done.

Lord Scrutton L.J. observed:

It has been for many years the rule of the Court and one which it is of the greatest importance to maintain, that when any applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts, facts not law.... The applicant must state fully and fairly

the facts and the penalty by which the Court enforces that obligation is that if it finds out that the facts have been fully and fairly stated to it the Court will set aside any action which.. has taken on the faith of the imperfect statement.

11. In *Reg. v. Garland*, (1870) 39 LJQB 86, it has been held:

Where a process is *ex debito justitiae* the Court would refuse to exercise its discretion in favour of the applicant where the applications found to be wanting in *bona fides*.

12. In *Asiatic Engineering Co. Vs. Achhru Ram and Others*, , a full Bench of Allahabad High Court stated the principles of law in these words:

A person obtaining an *ex parte* order or rule nisi by means of a petition for exercise of the extraordinary powers under Art.226 of the Constitution must come with clean hands, must not suppress any relevant fact from the Court, must refrain from making misleading statements and from giving incorrect information to the Court. Court should insist that persons invoking the extraordinary jurisdiction of the High Court should not attempt in any manner to misuse a valuable right by obtaining *ex parte* order by suppression, misrepresentation or misstatement of facts.

In *Nand Lal v. State of Jammu and Kashmir*, AIR 1960 J&K 19, it has been held:

Where the petitioners under Article 226 have not stated the relevant facts correct and candidly either in their petition or in the affidavit in support of their petition, this is by itself sufficient to entail an outright dismissal of the writ petition without going into its merits. It has further been held in this case that even if the petitioners have good case on merits the Court will be entitled to decline to go into the merits and dismiss their petition because the conduct of the petitioners has been such as to mislead the Court.

Similar proposition of law have been laid down in *M. Haji Mohammed Ismail Sahib and Co., Tanners, Pernambut, North Arcot District Vs. The Deputy Commercial Tax Officer, Gudiyatham, North Arcot District*, , *Abdul Gafoor Vs. State of M.P. and Another*, ; *G. Appukkuttan Pillai Vs. Government of India and Others*, ; *S.H. Motor Transport Co. Vs. Motilal and Others*, and *Om Parkash v. State of Rajasthan*. AIR 1977 Raj 52.

13. The principle which can be deduced from the above referred decisions is that the party who seeks relief from the High Court in exercise of its equitable jurisdiction under Article 226 of the Constitution of India must be true, candid and full disclosure of all the relevant facts. Its conduct must be above board. There should be no attempt by a party to mislead the Court. The petitioner is under an obligation to collect all material facts with due care and attention and he will not be heard to say that facts were not within his knowledge although the same could have come to his knowledge had he taken due care and had made efforts to find them out. The High Court will be fully justified in declining exercise of extraordinary jurisdiction in favour of a party who is guilty of suppressio veri

and suggestio falsi or who makes an attempt to mislead this Court.

Though it may be said that the observations of Singhvi, J. apply only to writ proceedings. But in view of the observations of Kuldip Singh, J. I am of the view that observations of Singhvi, J. will apply to all proceedings where a party is seeking discretionary relief from the Court. So, keeping in view the aforesaid observations of the Supreme Court and the Division Bench the controversy raised in his Justice of Motion has to be examined.

2. Plaintiff Nos. 1 and 2 carry on business as builders. Defendant Nos. 1 to 11 are the only heirs and legal representatives" of one Mura Sura Rabari, hereinafter referred to as ""the deceased". Defendant Nos. 12 to 23 are the original owners of the suit land, hereinafter referred to as "the owners". Mura Sura Rabari was allegedly in possession of a property bearing S.No.31.36.37,48 and 41 (Pt.) of village Poisar, hereinafter referred to as "the Poisar property". This property is not the subject matter of the suit. The deceased was also claiming to be in possession of land bearing Survey No. 148 (Pt.) of village Magathane, Borivli Village, Bombay ("suit land"). It admeasures about 35 acres. The claim of possession of the deceased was by way of adverse possession. The deceased had two wives viz. Subai Mura Rabari (defendant No. 1) and Mukta Mura Rabari (Defendant No.5). Defendant No. 1 is hereinafter referred to as Subai and Defendant No.5 is referred to as Mukta. Deceased and Subai had three children, defendant Nos.2 and 3 daughters and defendant No.4 son. Deceased and Mukta had six children, defendant Nos.6 to 11. Defendant Nos.6,7 and 8 and 11 are daughters and defendant Nos.9 and 10 are sons. Mura Sura Rabari is said to have not been heard of since 1978. According to Subai, the deceased was kidnapped and thereafter killed by persons unknown although she points a finger of suspicion towards various parties at various stages of the pleading. According to the plaintiffs he died intestate on 26.2.1978. Whether Mura Sura Rabari died intestate or has been kidnapped and killed is not relevant for the decision of the Notice of Motion but it is relevant that his whereabouts are not known since the year 1978.

3. The suit property, by a Deed of Conveyance dated 10th December. 1945 signed and executed by Sasoon J. David & Co. Ltd. was sold and conveyed inter alia to and in favour of "the owners". The "Poisar property" belonged to Behramjee Jeejeebhoy and Co. By an agreement dated 31st October, 1979 Subai and Mukta with their respective children agreed to sell the "Poisar property" to the plaintiffs, M/s Gundecha Builders. By an-agreement dated 7th March, 1980 (Exh. D 1) defendant Nos.5 to 11 agreed to sell the "suit land" to one M/s Narendra Builders for Rs. 12 lakhs. Rs.50,000/- is said to have been paid to defendant Nos.5 to 11 by M/s Narendra Builders. Defendant Nos.5 to 11 had agreed to obtain confirmation from Defendant Nos. 1 to 4. Defendant Nos. 1 to 4 also agreed to sell the "suit land" to M/s Narendra Builders for Rs.5 lakhs being their share in the total consideration of Rs. 12 lakhs. They were also paid a sum of Rs.50.000/- by cheque by M/s Narendra Builders. By a tripartite agreement

dated 23rd April, 1981 (Exh.D2) defendant Nos. 1 to 11 agreed to sell the suit lands to plaintiff No. 1 and the original plaintiff No.2 and M/s Narendra Builders were joined as a confirming party. In the meantime the owners were trying to forcibly enter the suit land. Defendant Nos. 1 to 11, therefore, filed a suit being Suit No.2683 of 1980 in the Bombay City Civil Court at Bombay against "the owners" with a prayer for restraining them from entering upon "the suit lands" and from interfering with the possession of Subai, Mukta and their children. Differences having arisen between Subai and Mukta. an application was made by Subai and her children to be transposed as defendants in the suit. In this suit Notice of Motion Nos.2082 of 1980 and 4022 of 1980 were taken out. The Notice of Motion taken out by the plaintiff was dismissed with costs except the bracketed portion wherein the possession of Subai in one hut was protected. It was, however, observed that the deceased was never in possession even of 2 acres of land. Therefore, the question of his being in possession of the entire suit property did not arise. It was also observed that in view of the fact that the plaintiffs have themselves stated that the whereabouts of the deceased were not known since 26.2.1978 they cannot be labeled as legal heirs and the representatives of the said deceased. The presumption of death would only arise after the expiry of a period of 7 years. This order came to be passed on 10.2.1982. Suit No. 1283 of 1980 was filed in the High Court by Subai and defendant Nos.3 and 4 against Gundccha Builders. Defendant No.2 who was impleaded as Defendant No.7 in this suit. Mukta and her children. This suit WM filed with, regard to the "Poisar property". It was prayed that the agreement dated December, 1979 purporting to sell the suit property to Gundccha Builders was null and Void. A declaration was also sought to the effect that defendant Nos.8 to 14 therein, Mukta and her children had no right, title or interest in the "Poisar property". An order in terms of the consent Terms was passed in this suit on 3rd April, 1981 by Lentin, J. In the consent terms it is admitted that the documents executed by the Plaintiffs, defendant No.7 and defendant Nos.8 to 14 viz. the agreement dated 31st October, 1979; the Power of Attorney dated 31st October, 1979 executed by defendant Nos.8 to 14; agreement dated 29th December, 1979; declaration dated 29th December, 1979; Power of Attorney dated 29th December, 1979 executed by the plaintiff; and the endorsement made by the plaintiff in the said agreement dated 31st October. 1979 are valid, subsisting and binding on the plaintiff and defendant Nos.7 and 8 to 14. Pursuant to the consent decree, Defendant Nos. 1 to 5, the plaintiffs herein, were put in possession of the "suit land". A perusal of the order passed by Justice Lentin shows that an affidavit dated 3rd April. 1981 was filed by Subai on behalf of Vikram, the plaintiff No.3 therein together with an advocates certificate of the same date. An affidavit of 8th defendant who was the guardian ad item of minor defendant Nos.9 to 14 along with the advocates certificate dated 1st April, 1981 was also filed. After perusing the affidavits. Justice Lentin has held that the Court is satisfied that the settlement is for the benefit of Vikram. plaintiff No.3 therein and minor defendant Nos.9 to 14 therein respectively. Guardians were permitted to sign the consent terms. Thereafter decree has been passed in terms of the

Consent Terms. An affidavit was filed by Defendant No. 1 on 3rd April, 1981 for leave to compromise on behalf of Vikram. In this affidavit, it is clearly stated that Vikram is mentally infirm and retarded and that she has been appointed next friend in the suit as she is the mother and natural guardian. She also accepted the rights of defendant Nos.8 to 14. After narrating a number of other facts about payment of the amounts due it is stated that the consent terms arrived at between the Plaintiffs and defendants are fair and for the benefit of Plaintiff No.3 who apart from being mentally infirm and retarded was a minor till 1977 and that this Court should certify that the same is for the benefit of plaintiff No.3 under the provisions of Order 32 of the Civil Procedure Code. Out of the amounts received by the parties it was agreed that a sum of Rs.76,700/- will be deposited with the Accounts Officer, Bombay in the name of Plaintiff No.3. Thus it was prayed that leave be granted to her to enter into the compromise on behalf of and for the benefit of Plaintiff No.3. This request was accepted and the order in terms of the consent terms was passed.

4. On the basis of the aforesaid consent terms, an agreement was entered into between the parties on 23.4.1981. In this agreement the facts as narrated above are related in clauses (a) to (h). In clause (I) the Defendants confirm the sale in terms of the Consent terms. In paragraph 3 it was specifically agreed that the vendors shall prosecute Suit No.2683 of 1980 pending in the Bombay City Civil Court or any other suit which may be required to be filed or defended to perfect the title of vendors at the cost of the purchasers. This agreement also mentions about the existence of a temple in the suit property in which one Baba Jairamdas is the officiating Pujari. They were permitted to live in the said premises but the purchasers were permitted to develop the property in accordance with the Rules and Regulations, in clause (8) it was agreed that the vendors will file necessary petition in the Bombay City Civil Court or the High Court for an order sanctioning sale under this Agreement as being for the benefit of minors. The sale was to be completed within a period of one month from the Court's order sanctioning sale. In pursuance of this agreement, Misc. Petition No. 118 of 1981 was filed in the City Civil Court at Bombay by Mukta, Defendant No.5. After examining the agreement and satisfying itself the Deputy Registrar, City Civil Court who was appointed Guardian ad litem on 30.1.1982 reported that the agreed price which Mukta the Petitioner (herein, is getting in respect of the property was fair and reasonable. It was stated that the sale be sanctioned as being for the benefit of minor respondents. This report has never been challenged till date. The City Civil Court accorded the sanction by order dated 9.2.1982. Since the sale was not completed within one month in pursuance of the agreement dated 23rd April, 1981, the plaintiffs filed the present suit on 18th June, 1982. The suit seems to have been filed in panic in view of the order passed on 10.2.1982 in Notice of Motion No.2()82 of 1980 and 4022 of 1980 wherein it is held that the deceased was not in possession of any part of the suit property except for a shed. Thus only the possession of Subai with regard to the shed had been protected. The Notice of Motion taken out by the owners was made absolute and, therefore,

Subai and Mukta were restrained from creating any third party rights. In this suit it is prayed that Subai and Mukta and their children be declared to be owners of the suit land. It is also prayed that defendant Nos. 1 to 11 be directed to specifically perform the agreements dated 7th March, 1980 and 23rd April, 1981. Prayer is also made that "the owners" be restrained from entering on the "suit lands" and/or interfering with the development of the suit land by the plaintiffs. No sooner had the suit been filed within 5 days Suit No.2683 of 1980 pending in the City Civil Court is withdrawn on the ground that the present suit has been filed in the High. Court. A declaration was made by Advocates and Solicitors that the withdrawal of the suit is for the benefit and in the interest of minor plaintiffs. The suit was permitted to be withdrawn subject to the direction that the injunction which had been confirmed on 10.2.1982 shall continue till 14th July, 1982. It was also mentioned that the Contempt Motion taken out by plaintiff Nos. 1,4,9 and 5 on 19th March, 1981 shall remain and shall appear for hearing on 21st July, 1982. Defendant's Motion No. 1343 of 1983 was disposed of. The present suit continued to be pending until 1995. In the meantime S.C. Suit No.31 of 1985 filed in the City Civil Court by Subai and her children against plaintiff and Mukta. In this Suit, Notice of Motion No.39 of 1985 was taken out which was decided on 24th April, 1985. Subai had filed this suit through her Constituted Attorney Baba Jairamdas, the Officiating Pujari in the temple as earlier noticed. In this suit it was prayed that the defendants therein i.e. the Plaintiffs in this suit and Mukta be restrained by an order of mandatory injunction from entering into the "Poisar property". Notice of Motion was taken out for the same relief. Ad-interim injunction was granted and Notice was issued to the Plaintiffs herein and Mukta. In response to the said notice the plaintiffs appeared and brought to the notice of the Court the Consent Decree having been passed on 3rd April, 1981. On 29th March, 1985 the ad-interim injunction was ordered to be vacated. A perusal of the order dated 24th April, 1985 shows that the Constituted Attorney who was present in Court was unable to state anything. His Advocate was not present. Thus the Notice of Motion was dismissed with liberty to the plaintiff to take out fresh Notice of Motion if so advised. It is curious that even though a specific mention is made to the temple of which Baba Jairamdas is the Pujari and he has been given permission to occupy the said temple yet a statement is made before the City Civil Court that he is not aware of anything. There appears to be a hiatus in the proceedings in the present suit for a large number of years. But reality is somewhat different.

5. On the basis of the aforesaid facts, the plaintiffs filed an application on 24.1.1987 before the Tehsildar, Borivli for an enquiry and thereafter to insert their names in the rights column. According to the plaintiffs, the possession of the suit property was delivered to them on 16th June, 1982 excepting the structure in the possession of Subai.

According to the plaintiffs, writ of summons in the present suit were served on defendant No. 1 in July/August, 1982. This fact is vehemently denied by Counsel for Defendant No. 1. It is emphatically stated that the writ of summons was not

served even during the pendency of this Notice of Motion. In the meantime R.B. Enterprises instituted Suit No.2291 of 1983 against the original owners for specific performance of the development agreement. In this suit also a consent decree came to be passed on 13.1.1984. The plaintiffs being in possession of the suit property made an application to the revenue authorities for entry in the record of rights. In the meantime in July, 1986 R.S. Enterprises made an application to be impleaded as a party in the present suit, This, however, was dismissed. An order came to be passed on 19th October, 1988 where the plaintiffs name was recorded in the other rights column, This application of the plaintiff was contested by the defendants through their Constituted Attorney. There were application and cross applications. Against the order dated 19th October, 1988, defendant No. 1 filed an appeal before the Sub Divisional Officer. This was dismissed on 10th September, 1989. Second Appeal was filed which was also dismissed on 30th June, 1990. Revision Application was filed before the Additional Commissioner, Konkan Division which was dismissed on 16th May, 1994. Against this order, the defendants have filed a further revision before the State Government which is pending. Although there was a consent decree between R.B. Enterprises and the owners they were however not able to develop the said property as the possession was with the plaintiffs. R.B. Enterprises therefore, filed Suit No. 1311 of 1989 against the plaintiff. After negotiations. R.B. Enterprises and the plaintiffs came to an amicable settlement. A consent decree came to be passed on 12th March, 1990 the possession of the suit property was with R.B. Enterprises and the plaintiff subject to the possession of Subai with regard to the hut protected by the order of the City Civil Court dated 10.2.1982 and the temple which was in possession of Baba Jairamdas by virtue of the agreement dated 23rd April, 1981. The suit tiled in the City Civil Court was withdrawn as noticed earlier. The injunction granted in the suit filed by Subai through Baba Jairamdas was vacated and the Notice in the suit filed by Subai through Baba Jairamdas was vacated and the Notice of Motion was dismissed as noticed earlier. It thus becomes apparent that by 16th May, 1994 it had been declared by the City Civil Court that the Defendants could not even be held to be in adverse possession of the suit property. It had also been decided in the 2 Notices of Motion mentioned earlier, subject matter of the order dated 10th February, 1982, that the plaintiffs could hardly even claim to be the heirs of the deceased. Whether the deceased had been killed or was kidnapped, the fact of the matter remained that his whereabouts were not known since 26th February, 1978. Thus the learned City Civil Court Judge, has rightly observed that at the time when Suit No.2683 of 1980 was filed, the defendants had no right, title or interest in the suit property. The possession of Subai was, however, protected. It also becomes apparent that by 16th May, 1994 the chances of the defendant succeeding in the establishment of any right, title or interest in the property had become very dim. The conduct of the Defendants in various other litigations speaks volumes which will become apparent from the narration of fact hereinafter.

6. In the present suit decree in terms of the consent terms has been passed on 6.11.1995 and 10.11.1995. The consent terms dated 6.11.1995 deal with the claim of the plaintiffs on one side and defendant Nos.5 to 11 on the other side. The consent terms dated 11.11.1995 deal with the claim of the plaintiff on one side and defendants No. 1 to 4 on the other side. Consent Terms dated 10.11.1995 are sought to be challenged by defendant Nos. 1 to 4 in the present notice of Motion. An affidavit in support of the notice of Motion has been filed. This affidavit is dated 21st December, 1995, A perusal of the first recital of the affidavit shows that the words "for myself and on behalf of defendant No.2 to 4" have been scored out. Thus it would not be possible to accept Mr. Damani's submission that the consent terms are being challenged by defendant Nos. 1 to 4. Therefore, it has to be treated that the Consent Terms are only being challenged by Defendant No. 1. This is No. 1 the only reason why the Court comes to the conclusion that the consent terms are being challenged only by defendant No. 1. Defendant No.2 has filed an affidavit in reply to the Notice of Motion totally supporting the case of the plaintiff. She has succinctly narrated the sequence of event leading to the filing of the consent terms on 10th November, 1995. So far a consent terms dated 6th November, 1995 are concerned, defendant No. 1 right could not say anything about the same. These consent terms are between plaintiff and defendant Nos.5 to 11. Defendant No.5 is supposed to be playing in the hands of the Plaintiff. In the Notice of Motion it is prayed that apart from setting aside the consent terms dated 10th November, 1995 this Court be pleased to impound the consent terms and to direct an enquiry u/s 195 of the Criminal Procedure Code and for a direction to the Petitioner and Sr. Master to lodge a criminal prosecution against the plaintiffs for making false statements, producing false evidence and for obtaining the consent decree by fraud and for the prosecution under Section 120-B, 34 and 420 of the Indian Penal Code.

7. Two very important issues therefore arise, (i) Have the plaintiffs committed a fraud on the Defendants to entice them to enter into the consent terms dated 6.11.1995 and 10.11.1995? (ii) Have the Defendants come to Court with clean hands for their claim of setting aside the consent terms? The Affidavit in support of the Notice of Motion was filed on 21st December, 1995, Affidavit in reply has been filed on 18th November, 1997 i.e. almost 2 years after the affidavit in support. During the intervening period no additional affidavit was filed by defendant No. 1 to supplement any of the averments which have been made in affidavit in support of Notice of Motion. However, on 15th December, 1997 an affidavit in rejoinder has been filed. A perusal of the affidavit in support would show that none of the facts narrated above have been adverted to by the defendant No. 1. When the Court enquired from Mr. Damani, Advocate for the Defendant No. 1 as to the glaring gaps in the information supplied to the Court it was submitted that he had come on the scene only in May, 1995 when he was instructed by defendant Nos. 1 to 4. After taking instructions from defendant Nos. 1 to 4 and after having been apprised of the correction situation he had

addressed a letter dated 19th December, 1995 to the Asstt. Commissioner of Police, Samta Nagar Police Station, Kandivli. In this letter; according to him, it had been pointed out that the plaintiffs have committed fraud and deceived the defendants. It is stated that his clients had recently come from their native place after one month and they were shocked to note that one person by name of Mr. Pandey along with hired Goondas removed their goods and articles from the premises, At this very; stage itself it may be noticed that Mr. Pandey is not impleaded as a party Respondent to, the Notice of Motion. Baba Jairamdas is also not impleaded. None of the Power of Attorneys who are Namdco Kadam, Bha rat Shah and Prasad Tukaram Lad had been impleaded (Though these persons have been perusing various legal proceedings on behalf of defendant No. 1 before various authorities). Throughout the case Mr. Damani has been assisted and instructed by one Mr. Ramesh Dluiri who is alleged to be a social worker. He also claims to be an expert in Tenancy Laws. He is also not impleaded as a party nor is he a Constituted Attorney of defendant No. 1. yet Mr. Damani has received all his instructions in the Court room from the said Mr. Dhuri. In the affidavit in support it is stated that the plaintiffs have filed a false and frivolous suit in collusion with one another. The affidavit goes on to state that the deceased, has not been heard of for the last 17 years and he was having all right, tide and interest in respect of land (suit land). This averment is false to the knowledge/of defendant No. 1 in view of the fact that their" name is not even included in the revenue records. Not only this the City Civil Court has held that they cannot even be held be in adverse possession. They have totally omitted to mention the orders passed on 10.2.1982 by the City Civil Court in Suit No.268.V of 1980 in Notice of Motion Nos.2082 of 1981) and 4022 of 1980. No appeal was filed against this order. Rather the suit was dismissed as withdrawn. The grounds of fraud are alleged in para 4 of the affidavit in support. Ground No.4(i) says that the defendant Nos. 1 to 4 were misrepresented by plaintiff No.2(a) along with one Mr. Pandey. The story with regard to Mr. Pandey changes from time to time according to the circumstances. Mr. Damani has emphatically stated that defendants are illiterate persons and they were not informed about filing of the Consent Terms. Veracity of this averment can be gauged by contrasting it with the averments made in the affidavit in rejoinder and various other places. In ground (iv) it is stated that the defendants were never informed about the filing of the consent terms. They were taken to some place under force and told that they should only nod and say "Yes" otherwise Plaintiff No.2(a) and Mr. Pandey will kill them and cut them into pieces. In ground No.(v) it is stated that Mr. Pandey took them to a place at Borivli (West). There Mr. Pandey is alleged to have taken photographs of defendants Nos. 1 to 4. It is also alleged that they were asked-to thumb mark on various blank papers, against threats allegedly issued by Mr. Pandey. In the very next ground it is . stated that Mr. Pandey in fact took the defendant to some Advocate who appears to have filed the Vakalatnama and later on some papers were filed before the Court. It is reiterated with equal amount of vehemence by Mr. Damani that defendants are poor and illiterate people and have no knowledge about the law. It is even stated that plaintiff No. 1

is believed to be dead. Therefore, he could not have signed the documents. This fact is denied by the plaintiffs and it is stated that plaintiff No. 1 is alive and well and has in fact gone on Haj. These averments can further be compared with the pleading in the plaint of Suit No.3724 of 1996. In this suit the consent terms along with other documents executed on various dates have been challenged. Here it is stated that all sorts of papers were got signed by Mr. Pandey. It is reiterated that Mr. Pandey had directed defendant to only "nod" at the "officers" where they were going to be taken. It is further stated that Mr. Pandey had taken the defendant to some place at Fountain. Then in the second week of November, 1995 Mr. Pandey is supposed to have taken them to some unknown destination and they were told not to come back to Bombay till end of December, 1995. They, however, came back after 10 days only. The complaint is made by Mr. Damani on 19th December, 1995. In the complaint to the police it is stated that the defendants have recently come from their native place. The letter written to the police dated 19th December, 1995 does not tally with the story as given in ground Nos.4(i) to 4(v) in the affidavit in support. Thus it becomes crystal clear that averments in the pleadings have not been made honestly and faithfully but have been deliberately distorted to mislead the Court. This in my considered opinion is sufficient to justify the finding that the Defendants have abused the process of the Court. However, more about that later.

8. It is now 2.10 p.m. The Court is to adjourn for a few minutes and to reassemble at 2.45 p.m. "Mr. Damani has been present throughout the dictation of the order since this morning. He now requests that he may be excused from attending the Court whilst the rest of the order is being dictated which will commence at 2.45 p.m. it is, therefore, recorded in the presence of Mr. Damani that the order will have to be dictated in his absence. This position is accepted by Mr. Damani. He is permitted to remain absent.

9. There is no denial of the fact that the documents which have been executed on the day the consent terms were filed were duly thumb marked or signed by the parties. All the documents have been interpreted by the Official Translator of this Court. The only allegation is that the thumb impressions have been obtained by Mr. Pandey by giving threats or by misrepresentation. I am of the view that all the averments made in the affidavit in support of the Notice of Motion are totally false. They have been made purely for setting up some grounds to challenge the consent terms. The original consent terms dated 3rd April, 1981 were not challenged when the Constituted Attorney of the Defendant No. 1 was confronted with the same in the City Civil Court in Notice of Motion: No.39 of 1985 in Suit No.31 of 1985. These consent terms have been arrived at in the presence of this Court and Justice Lentin had passed an order on the basis of the consent terms. "Affidavit was filed by Defendant No. 1 to say that the consent terms are fair. The only cause offered by the Constituted Attorney of the defendant in the City Civil Court on 24th April, 1985 was that he was not aware of the consent terms. From the above it can be seen that the defendants have been making deliberate efforts to abuse the process of this Court. Initially it was

stated that it was Mr. Pandey who had obtained the thumb impression but in the affidavit in rejoinder of defendant No. 1 it is stated that Mr. Devraj Gundecha since deceased, father of Plaintiff No.2(a) and 2(b) took the signatures on various papers from time to time. Thus Mr. Pandey goes out of the picture altogether. Apart from this, the signatures are no longer stated to be on blank paper any more. It is now stated that signatures were taken on the consent terms by misrepresentation. This Court has examined all the documents and is of the opinion that there are no unnatural groups to indicate that the thumb impressions and signatures had been taken on blank papers. Not being satisfied further allegations are made against Advocate Dinesh Shah and Mrs. Shaila Pathak. It is also stated that Devraj Gundecha was either involved in the kidnapping of the deceased or killing him. None of these allegations are substantiated by any evidence whatsoever. No details have been given about the kidnapping. In spite of the fact that the present notice of Motion was pending, defendant No. 1 filed Suit No.3724 of 1996 claiming the same relief. In paragraph 3 of the plaint in that suit, it is stated that it is the Goondas who contacted and consoled defendant No. 1 and promised to find out the whereabouts of the deceased. It was Devraj Gundecha who carried the plaintiff from time to time to various places under the pretext that the plaintiff has to make the affidavit and to give writings to the concerned authorities who will search out the whereabouts of the deceased. In the said plaint Subai now accused Devraj Gundecha to have killed the deceased in connivance with one Abdulla Omar Haji Ismail Merchant.. They are also alleged to be guilty of destroying evidence but none of these matters are ever reported to the police. In para 12 of the plaint, it is stated that Mr. Pandey forcibly got certain papers signed from defendant No. 1 and her family. Now it is stated that the builders had carried her to some place at Fountain where she and her family members were told to "just nod at the officers". Allegedly Mr. Pandey had Overacted to kidnap and kill Vikram, defendant No.4 in the present suit. These allegations are repeated at various places in the plaint. From a further examination of the pleadings it transpires that the officer mentioned in the pleadings is none other than a Judge of this Court and the Officers of this Court who translated the various documents. Apart from these bald statements there is no evidence at all with regard to any fraud having been committed. Mr. Damani appearing for Defendant No. 1 had time and again reiterated that defendant No. 1 is a poor lady. It was reiterated that she has received no money whatsoever from the plaintiffs. It is, however, a matter of record that defendant No. 1 had deposited a sum of Rs.2,17,200/- with the Agricultural Lands Tribunal. This can be seen from the certificate issued by the A.L.T. u/s 32M of the Bombay Tenancy and Agricultural Lands Act dated 29th June, 1996. A further sum of Rs.6,87,706/- has also been paid on 19th December, 1995 to A.D.C. on account of tax assessment for conversion of the suit land from agriculture to non-agriculture user. It is obvious that this money had come from the payments which were made on 10th November, 1995 when the Consent Terms had been entered into. All the payments were made by cheque. Mr. Samdani, Counsel for the plaintiff,

has produced before this Court the certificate issued by the Bank showing the withdrawal of the money by defendants. All the parties were paid on 15th November and 20th November, 1995. Total amount paid is Rs.20,00,000/-. These "poor illiterate ladies" apparently had some idea about the significance of the change of the user of land from "agriculture" to "non agriculture". In a country seething with poverty, not many will claim to be poor after having been paid a sum of Rs.20,00,000/-. The signing of the consent terms voluntarily and the payments having been received are supported by defendant No.2 in her affidavit filed on 31.1.1996. Mr. Damani had also made a grievance that if the plaintiffs had not been responsible in the kidnapping or disappearance of the deceased then they would not have known the death of the deceased which is said to be 26.2.1978. It is time and again submitted by Mr. Damani that no death certificate has been produced by the plaintiff. But a perusal of the pleadings would show that the date of death had been given by the defendants themselves. In the Agreement Exhibit D-1 the defendants themselves have mentioned that Mura Sura Rabari died at Bombay on 26.2.1978. In Exhibit D-2 also in recital B the same position is reiterated. In the City Civil Court in Misc. Petition No. 118 of 1981 filed by defendant No.5 it is clearly stated that Mura Sura" Rabari died on 26.2.1978. This statement is made on 30. 1.1982. The suit is filed by the plaintiff on 18th June, 1982. Therefore, it can hardly be accepted that the plaintiffs were not aware of the date of the death. The defendants obviously have been taking convenient stands. This date is also mentioned in the report of guardian ad item. The date of death is again mentioned in the consent terms filed in Suit No. 1283 of 1980. Thus I find no substance whatsoever in the submissions made by Mr. Damani on this point. Mr. Damani had also sought to submit that defendant No.4 was not mentally retarded. He had gone so far as to submit that Justice Lentin had perfunctorily accepted the certificate issued by the Advocate at that time. In fact a perusal of the proceedings clearly shows that when the consent terms were drawn up on 3rd April, 1981, it was observed that defendant No,4 is mentally retarded. This order was passed after hearing the counselor the parties and after perusing the affidavit filed by defendant No. I herself. In this affidavit it is stated that consent terms are fair and the son is retarded as well as mentally infirm. Thus I am of the considered view that the defendants have tried their level best to "avoid the adverse orders passed against them, by making false and vexatious averments.

10. The efforts of the defendants do not come to an end merely by taking out this Notice, of Motion for setting aside the consent terms. After having lost in virtually all bouts, of litigation, an attack has been made on the Counsel who appeared for the defendants when the consent terms dated 10th and 16th November, 1995 were entered into. It is significant to note that defendant No.2 who is none other than the daughter of defendant No. I has actually supported the version of the plaintiff. Not only this, defendant Nos.5 to 11 have chosen not to challenge the consent terms dated 6,11.1995. The inference, therefore, is obvious that defendant No. 1 is trying to wriggle out of the original consent

terms dated 3rd April, 1981 followed by the withdrawal of the suit in the City, Civil Court, which in turn is followed by the rejection of all the claims by the Revenue Courts. Only thereafter did the defendants enter into the consent terms on 6.11.1995 and 10th November, 1995. Mr. Damani has made a very serious allegation against the professional conduct of Mrs. Shaila Pathak. Viewed in the circumstances narrated above and what is to be discussed later such an allegation cannot be taken seriously. The allegation has been made out of desperation to get out of the various agreed orders passed between the parties, The case put forward by Mr. Damani is that defendant Nos. 1 to 4 contracted him sometime and narrated the story about the alleged fraud committed by the plaintiffs in connivance with the advocates. Surprisingly no mention of the same is, made the complaint filed with the police on 19th December, 1995. According to Mr. Damani he had been instructed by defendant Nos. 1 to 4 sometime in the month of May be. On the basis of these instructions he had filed applications before various authorities of the Revenue Department from the Tahsildar, Borivli to the Revenue Minister, Maharashtra. A perusal of these applications shows that it is categorically stated that the deceased was in cultivating possession of the suit land on the Tillers day i.e. 1.4.1957. Therefore, a request was made for an enquiry u/s 70-B of the (sic) Tenancy and Agricultural Lands Act, 1948. An enquiry was duly conducted and a report was given by the Tahsildar on 21st September, 1995. A perusal of the said report shows that the name of the deceased is entered in the column of "tenancies and rent" in the year 196(1-61, In spite of this entry it is recommended that the name of Subai be entered against the crop of the current year as against the area mentioned in the column "tenancies and rent" of the Village Form 7/12 extract. This report of the Tahsildar is contrary to the plea of the defendants in the City Civil Court Suit No.2683 of 198() wherein it was claimed that the deceased was in adverse possession of the "suit land". In the meantime this Notice of Motion was taken out and leave was sought for ad-interim relief. This was refused on 22.12.1995. But armed with the order of the Tahsildar dated 21st September, 1995 proceedings u/s 32-G of the Tenancy Act were got initiated. On the basis of these proceedings certificate u/s 32-M was issued in favour of defendant No. 1 on 29th June 1996. In these proceedings the defendants did not disclose the history of litigation, as narrated above. On the basis of this an effort was gain made to dispossess the defendants from the suit land. The defendants, therefore, filed an appeal in the Tenancy Courts. This appeal when all the facts and circumstances were brought to the notice of the Appellate authority was allowed on 14th August, 1997. In order to protect their interest, the plaintiffs also had to file a suit in the City Civil Court being Suit No.4622 of 1996. Ad-interim injunction was granted in favour of the plaintiffs on 20th August, 1996. This Notice of Motion was made absolute on 9th October, 1996 and defendant Nos. 1 to 3 were restrained from dispossessing the plaintiffs. Between 20th August, 1996 and 9th October, 1996 it was not possible to serve defendant Nos. 1 to 3 as the plaintiffs were not aware about the whereabouts of the said parties. Even this is sought to be controverted by Mr. Damani and has invited the Court to read some sort of a conspiracy into the

conduct of the plaintiffs. This Court is unable to agree with Mr. Damani on any of these submissions, lengthy correspondence had been exchanged between the plaintiffs and Mr. Damani.¹ Repeatedly Mr. Damani was requested to accept service on behalf of defendant Nos. 1 to 3. In spite of appearing for defendant Nos. 1 to 3 in the tenancy Court, Mr. Damani refused to accept service on behalf of defendant Nos. 1 to 3. He also failed to supply the address of the defendant to the plaintiffs. Instead of justifying the conduct of the Advocate in not supplying the correct address it is stated by defendant No. 1 in the affidavit in rejoinder that the plaintiffs again played a fraud on the defendants by giving address of the Advocate. It is also stated that this fact was brought to the knowledge of the Judge in the City Civil Court but "for the reasons well known to him in spite of request failed to consider the legal position as a result an application was forwarded to the Hon"ble Chief Justice of this. Court". From the above narration of facts it becomes quite transparent that defendant No. 1 has absolutely no respect for the due process of law. Since the defendants could not be served in the ordinary course they had to be served by substituted service. It was only when the Court was satisfied that the substituted service had been effected that the Notice of Motion was made absolute on 9th October, 1996. This order has not been challenged in any judicial proceedings. All that Mr. Damani has to state is that a complaint has been made against the Judge of the City Civil Court which made the Notice of Motion absolute on 9th October, 1996. Not only the defendants twist and distort the facts in their pleadings but the Advocates appearing for the opposite side are not spared. Even the Presiding Officers of the Court are adversely commented upon. I need not, however, proceed any further against either defendants or the Advocate as the matter is already sub judice before the Division Bench. It has been brought to my notice that defendant No. 1 filed Suit No. 3724 of 1996 against the plaintiff and various other parties including Mukta and her family. In this suit it is prayed that defendants have no right, title or interest in the suit property. It is also prayed that various consent terms referred to in Exhibits D-1 and D-2. An application for ad-interim relief was taken out in this suit. This was rejected on 23rd October, 1996. Thereafter defendant No. 1 took out a Chamber Summons and again made an application for ad-interim relief. This was rejected by Justice Kapadia on 20th December, 1996. Third ad-interim application filed by defendant No. 1 was again rejected on 14.1.1997 by Mrs. Justice K.K. Baam. Not succeeding there now defendant (No. 5) filed Suit No. 144 of 1997 against defendant No. 1. Nobody else is impleaded as a party in the aforesaid suit. This suit is for setting aside an agreement dated 16th November, 1995 wherein plaintiff had agreed to give consideration to defendant No. 1 in list of her surrender of the flat which was supposed to be given to her by Defendant No. 1. An application came to be made in this suit on 16.1.1997 and ad-interim order was obtained from Mrs. Justice K.K. Baam. On 16.1.1997, this Court granted ad-interim relief in terms of prayer clause 9a), (b) and (c) of the Notice of Motion. On 7.2.1997. Senior Inspector, Kandivli Police Station was directed to give assistance and protection to Mukta at the time when

she visits the suit property. It is to be noticed that one Mr. Rao was appearing for the plaintiff and Mr. Damani" was appearing for the defendant. It may be notice on 16.1.1997 itself Mr. Damani appeared for the Defendant (Subai) and waived service of the Notice of Motion. On coming to know of the aforesaid facts an application was filed by the plaintiffs for setting aside the aforesaid orders. After noticing the aforesaid facts and hearing the Counsel for the parties including Mr. Damani for the defendant it is held that the parties were aware of the proceedings taken out by the respective parties. They were also aware of the consent terms which they had filed and that the consideration has been received. It is noticed that the plaintiffs were set up to file the suit with a view to see and ensure that the consent terms- are given a go by. It is categorically observed in paragraph 8 of the order that it is apparent that the parties have played a fraud upon the Court as they have suppressed the aspect of consent terms having been filed and consideration having been received more particularly in the case of defendant who has made several applications to ensure that the consent terms are rendered null and void. The Notice of Motion taken out by the plaintiff was made returnable forthwith and it was heard there and then. The Notice of Motion was made absolute on that very day. Show cause notice for contempt was issued against Mukta and Subai and their respective advocates. This Contempt Notice, 1 am informed, is now pending before the Division Bench. This reference has been made after passing a speaking order on 13th October, 1997. Inspire of all this the Defendant No. 1 marches on regardless. But for the contempt proceedings already pending, this would be a fit case to exercise the summary powers vested in this Court by Article 215 of the Constitution of India.

11. Mr. Damani has laid a considerable amount of stress that Mukta and her family were playing in the hands of the plaintiff. This plea of Mr. Damani cannot be accepted for a number of reasons. A perusal of the order passed by the City Civil Court on 10.2.1982 makes the position amply clear. Although the suit was initially filed by both the families of Subai and Mukta as Plaintiffs but Subai and her family had subsequently transposed themselves as defendants. Having done so, she proceeded to adopt the arguments advanced but the Counsel for Mukta. This statement is to be found in paragraph 17 of the order of the City Civil Court dated Kith Feb. 1982. Having ailed in all the proceedings Mukta ha snow shown her true colors by filing Suit No. 144 of 1997. She has nothing to all to do with the agreement which is executed between the plaintiffs and defendant No. 1. yet she has sought to challenge the said agreement. This is nothing but an effort one way or another to give a go by to the consent terms dated 6/10th November, 1995. The only allegation made against Mrs. Pathak is that she was engaged only for the purpose of filing the consent terms. Thereafter Mr. Damani has submitted that the consent terms were file don 6th November, 1995 with regard to Mukta and her family. But at that time the Vakalatnama in favour of Mrs. Pathak had not been interpreted to defendant Nos.6 to 11. This argument is wholly fallacious as Mrs. Pathak had been retained by defendant Nos.1 to 4. Some other advocates had represented defendant Nos.6 to 11. Mrs. Pathak was concerned only with the

consent terms dated 10th November, 1995 between Plaintiffs and defendant Nos. 1 to 4. In other words Subai and her children, This Vakalatnama in favour of Mrs. Pathak has not been challenged by anybody else except defendant No. 1. From the perusal of the facts narrated above it becomes apparent that defendant No. 1 is merely trying to squeeze as much illegal money from the plaintiff as is possible. Various proceedings have been filed by defendant No. 1 through various Constituted Attorneys as have been narrated above. She has also enlisted Mr. Dhuri who is neither a Constituted Attorney nor is he a relative of defendant No. 1. He merely claims to be a social worker. Allegations have been made against Mr. Pandey and yet he has not been impleaded as a party. In these circumstances it becomes absolutely clear that Subai and Mukta have been acting in collusion with each other. They have described themselves as plaintiffs or defendants according to the convenience in the proceedings to be taken, yet when finally no relief was granted it is Mukta who has filed the suit against Subai in relation to an agreement which has nothing to do with her.

12. I am of the considered opinion that this unsavory situation has been created deliberately by Subai with the active connivance of Mukta. They have also been assisted by the Constituted Attorneys. Those persons have not only represented Mukta and Subai in various proceedings but they are said to have made payments on behalf of them also. The orders have been obtained from the Tenancy Court without disclosing the various proceedings in the Civil Courts. The order dated 10.2.1982 passed by the City Civil Court was never brought to the notice of the revenue authorities or in tenancy proceedings. In the affidavit in support of the present notice of Motion also there is not a whisper of the previous litigation between the parties. As stated above, affidavit in support of this Notice of Motion was filed in December, 1995. Affidavit in reply was filed in November, 1997. No further affidavit was filed by either Suba i.e. or by Mukta to bring on the record the various previous proceedings in various other Civil Courts to apprise this Court of the actual slate of affairs. It was only when the matters were meticulously tabulated in the affidavit in reply that a mention of the previous proceedings were made in the affidavit in rejoinder. Even then there is no explanation as to why the relevant facts were not mentioned in the affidavit in support.

13. Keeping the aforesaid slate of affairs in view, this Court would be justified in taking a very serious view of the matter. However, at this stage it must be stated laudably that Mr. Samdani appearing for the plaintiffs has conducted the proceedings with utmost restraint. He has pointed out to this Court that the Advocates as well as Subai and Mukta are already facing contempt of court proceedings. I, therefore, deem it not proper at this stage to institute any further proceedings against Mr. Damani or Subai and Mukta. It is, however, put on record that the proceedings taken by Subai and Mukta are a very serious abuse of the process of the Court. False and frivolous allegations have been made against the High Court, City Civil Court and the Advocate appearing for Defendant Nos. 1 to 4 before Mr. Damani came on the scene.. In order to satisfy

itself the Court had. however, requested Mrs. Pathak to clarify the whole situation. She has categorically stated that on 10th October. 1995 she was approached by Baba Jairamdas on behalf of Defendant Nos. 1 to 4. They were all accompanied by a person claiming to be Mr. Pandey. This was in the evening between 4 and 5 pm. She was informed that they are being represented by Mr. N.V. Vimadlal in the litigation. A Vakalatnama in favour of Mrs. Pathak was given along with the No Objection Certificate from Mr. Vimadlal on 11th October. 1995. The No Objection was obtained from Mr. Vimadlal on the request of Mrs. Pathak. This Vakalatnama was duly filed in Court on 16th November. 1995. negotiations between the parties for settlement of the various matters were going on as Subai had lost in all revenue and tenancy proceedings. it is stated by Mrs. Pathak that she had a number of meetings with the plaintiffs on behalf of defendant Nos. 1 to 4. After the consent terms were, reduced to writing and before all the other documents had been executed they were duly, interpreted by the Official Interpreters list of these documents which are fifteen in number are exhibited in the affidavit in reply filed by Plaintiff No.2(a) at Exhibit-15. The documents which were executed are as follows.

1. Consent Terms between Plaintiffs and Defendants Nos. 1 to 4.
2. Supplemental agreement between plaintiffs and Defendant Nos. 1 to 4.
3. Irrevocable Power of Attorney by Defendant Nos. 1 to 4 in favour of Plaintiffs No.2(a) and 2(b).
4. Declarations by Defendants Nos. 1 to 4.
5. Deed of Indemnity by Defendants Nos. 1 to 4 in favour of Plaintiffs.
6. Affidavit of Subni Mum Rabari, Defendant No. 1 as guardian of her son Vikram Mura Rabari defendant No.4 for leave to compromise.
7. Consolidated Receipt for Rs.20,50,000/-.
8. Receipt from Defendant No. 1 for Rs.4.80.000/-.
9. Receipt from Defendant No.2 for Rs.4.80.000/-U). Receipt from Defendant No.3 for Rs.4.80.000/-
11. Letter addressed to Sr. Inspector of Police.
12. Letter addressed to Tahsildar. Dorivli
13. Letter addressed to Plaintiffs No.2(a) and 2(b) recording, vacating and handing over of their residential structure.
14. Letter of Attornment
15. Letters to Plaintiffs No. 2(a) and 2(b).

The consent terms and the other documents were filed and executed on 10th November. 1995 as the Court was closed for Diwali vacation, A perusal of the list

of documents reproduced above shows that an affidavit was filed by Subai as guardian of her son Vikram, Defendant No.4 for leave to compromise. This fact is also mentioned in the order passed by Smt. K.K. Baam. J. in the order dated 11th November, 1995. Mrs. Pathak had also filed consent terms on behalf of Baba Jairamdas on 16th October, 1995 in S.C. Suit No.6466 of 1995 filed by the plaintiffs against Baba Jairamdas. In these consent terms it is agreed that the said Jairamdas has been granted only permissive user of the temple. These consent terms have not been challenged till date. Apart from this, there are other circumstances which will show that the complaint against Mrs. Pathak is palpably motivated only to avoid the consequence of the consent terms e.g. affidavit in support does not make any mention of Mrs. Pathak by name. It only says some advocate in ground No.(vi) on page 5. The complaint has been filed with Bar Council on 4th December, 1996. Suit No.3724 of 1996 was filed by Subai against the Plaintiff and Mukta. Therein an interim application was made for some relief. This was refused on 23rd October, 1996 by Justice K.G. Shah, According to Mr. Damani. Mr. Justice has orally observed that if the allegations against Mrs. Pathak are proved then the same are serious. An explanation was sought from Mr. Damani as to why no complaint had been filed with the Bar Council of Maharashtra. It appears that the complaint in Maharashtra Bar Council has been filed only because of the oral observations which are incapable of verification by this Court. A letter is written to Mrs. Pathak by Mr. Damani on 21st December, 1995 asking for her No Objection. This letter was sent to Mrs. Pathak by hand delivery. She, however, refused to give no objection unless defendant Nos. 1 to 4 made the request in person. Thus it appears that Mr. Damani filed the Vakalatnama on 26th December, 1995 on behalf of Defendant Nos. 1 to 4 without seeking discharge of Mrs. Pathak. This Vakalatnama has not been interpreted to Defendant No. 1. Thereafter letter is written on 2nd November, 1996. In paragraph 3 of this letter various allegations of fraud are made. These are, however, contrary to the pleadings as noticed above that the Defendant Nos. 1 to 4 were directed to just nod at the officer. Even the existence of the consent terms is denied. Reference is made to the oral observations of Justice K G. Shah and thereafter Mr. Damani has asked for an explanation. This letter was replied to by Mrs. Pathak on 7th November, 1996. The complaint is filed with the Bar Council on 4th December, 1996 but only by Subai. The aforesaid facts and circumstances clearly show that no fault can be found with the conduct of Mrs. Pathak. It is settled proposition of law that the Counsel has an implied authority to enter into compromise on behalf of the client. This view of mine can be supported by precedents also. Reference can be made to the case of (1935) AWR 980 (Privy Council) . In this case the Privy Council has clearly held that Counsel in India have the same implied authority to compromise an action as Counsel in the English Courts. This law has been approved by the Supreme Court in the case of Jamilabai Abdul Kadar Vs. Shankarlal Gulabchand and Others, . In this case it is held that a pleader has the actual, though implied, authority of a pleader to act by way of compromising a case in which he is engaged even without specific consent from his client, subject undoubtedly to two over-riding

considerations; (i) He must action good faith and for the benefit of his client; otherwise the power fails; (ii) It is prudent and proper to consult his client and take his consent if there is time and opportunity. Having examined the facts and circumstances of the compromise in detail I do not find that the action taken by Mrs. Pathak can be said to be impeachable. In this very case it is further observed by Justice V.R. Krishna Iyer that every legal practitioner, labels apart, is an officer of the Court and aids in the cause of justice. It is the considered view of this Court that Mrs. Pathak has acted with the full consent of her clients. The allegations made against Mrs. Pathak are out of desperation to perhaps extort some more money from the Plaintiffs. It has already been noticed above that the Defendants had executed a consolidated receipt in the sum of Rs.20,50,000/-. There are individual receipts issued by Defendants Nos. 1,2 and 3 in the sum of Rs.4,80,000/- each. It is little difficult to swallow the submission of Mr. Damani that perhaps defendants merely nodded before the Officers at the instance of Mr. Pandey. It must be remembered and reiterated that the consent terms and all the other documents have been challenged only by defendant No. 1. The claim of the plaintiff has been supported by defendant No. 2 who is none other than the daughter of defendant No. 1. Even Plaintiff's advocate has not been spared. I, however, find that there is nothing unprofessional so far as the conduct of Mrs. Sheela Pathak is concerned. I am told the complaint against the Advocate for the plaintiff has already been dismissed. It would be too premature to refer the matter to the Bar Council at this stage with regard to the behavior of Mr. Damani as it is the subject matter of the contempt proceedings.

14. Keeping in view the observations of the Supreme Court as extracted at the beginning of this judgment together with the observations of (he Punjab and Haryana High Court I find that the Notice of Motion deserves to be dismissed on the ground of suppression of material facts alone.

15. I have also, as narrated above, examined the allegations of fraud. It is a settled proposition of law that in order to succeed on the ground of fraud, the party alleging such fraud has to prove the same beyond reasonable doubt, merely stating that a fraud has been committed will not be sufficient to enable a party to succeed. The Court is unable to see any sequence in the events as pointed out by Mr. Damani to lead to the conclusion that there is any fraud. I have also carefully examined the allegations with regard to the disappearance of the deceased. The Court has also disbelieved the sequence of filing the consent terms. The sequence of events, if any, lends credence to the case of the plaintiff that the defendants had no option but to settle the matter. They had lost in virtually all proceedings, civil, revenue as well as under the Tenancy Act. The consent terms dated 3 rd April, 1981 are still intact. The agreement based on the consent terms dated 23rd April, 1981 is also still intact. The suit filed by the defendants being Suit No.2683 of 1980 has been withdrawn. This was withdrawn because an order came to be passed in the Notice of Motion on 10.2.1982. The City Civil Court has in no uncertain terms held that the defendants or the deceased were not in adverse possession of the suit property. It has also been

held that at the time when the said suit was filed the defendants could not be said to be the legal heirs of the deceased as the presumption of death would arise only after a period of 7 years. On the contrary it has been observed by this Court that defendants have played a fraud on this Court in trying to set at naught the consent terms. In this connection the observations of Mrs. Justice K.K. Baam in the order dated 10th March, 1997 are relevant. The law is well settled with regard to the pleadings in cases where fraud is alleged. Mr. Samdani has referred to the case of Bishundeo Narain and Another Vs. Seogeni Rai and Jagernath, wherein it is clearly held as under:

24. We turn next to the questions of undue influence and coercion. Now it is to be observed that these have not been separately pleaded. It is true they may overlap in part in some cases but they are separate and separable categories in law and must be separately pleaded.

25. It is also to be observed that no proper particulars have been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any Court ought to take notice, however strong the language in which they are couched may be and the same applies to undue influence and coercion. See Order 6, Rule 4, Civil Procedure Code.

In that case similar allegation was made to the effect that the compromise had been entered into on the basis of threats of death. The allegations in that case were as follows:-

That the said Firangi Rai being infuriated by the filing of the said suit, put such a pressure upon the father of plaintiffs that the father of the plaintiffs under fear of his threatened death filed a compromise in "the said suit before any written statement was filed by Firangi Rai and other defendants.

In para 15 they say:

That the said compromise was nothing but a dictated mandate of Firangi Rai which the father of plaintiffs out of sheer fear of Firangi Rai submitted against his own free will and signed under compulsion and coercion and undue influence of the said Firangi Rai.

Then in paras 17 and 18 the plaintiff state:

17. That plaintiffs' father being a man of weak intellect And finding no help and succor from the people of residential village or neighborhood and being also aware of the details of the properties of family could not but submit merely and quietly to the dictates of Firangi Rai who taking advantage of his fearful supremacy wanted to have every thing according to his own sweet wish.

18. That even after the compromise plaintiff's father could not get any income of the family properties and Firangi Rai remained the sole master of the family appropriating every piece to himself.

Dealing with the aforesaid allegations it was held by the Supreme Court as follows:

27. We will deal with the case of coercion first. It will be seen that the plaintiff's case regarding that is grounded on the single allegation that their father was threatened with death. When all the verbiage is cleared away, that remains as the only foundation. The rest and in particular the facts set out in paras 8 to 12 about the ferocious appearance of Firangi Rai and his allegedly high handed and criminal activities and his character, are only there to lend colour to the genuineness of the belief said to have been engendered in Ghughuli Rai's mind that the threat of death a (sic) to him was real and imminent. But as regards the threat itself, there is not a single particular, We do not know the nature of the threat. We do not know the date, time and place in which it was administered. We do not know the circumstances. We do not even know who did the threatening. Now when a Court is asked to find that a person was threatened with death, it is necessary to know these particulars, otherwise, it is impossible to reach a proper conclusion.

The aforesaid ratio of law is reiterated by the Supreme Court in the case of Varanasaya Sanskrit Vishwavidyalaya and Another Vs. Dr. Rajkishore Tripathi and Another, . In paragraph 8 of the said judgment it is held as follows:

8. Although we are not satisfied that circumstances existed which justified the use of emergency powers of the Vice-Chancellor u/s 13(7) of the Act, yet, we do not think it possible to enter upon this enquiry as no argument seems to us to have been advanced on this aspect in the high Court or in the District Courts. We, however, think that the first Appellate Court held much too lightly believed that the plaintiff-appellant had been a victim of some kind of fraud, when no such particulars of that fraud or collusion were given as would satisfy "the requirements of Order VI, Rule 4, Civil Procedure Code, which lays down:

In all cases in which the party pleading relies on any misrepresentation, fraud, breach of contract, willful default, or undue influence and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

To be fair to Mr. Samdani he had cited a number of other authorities on the question of pleadings with regard to fraud and on the question of duties of an Advocate as, an officer of the Court. He has also brought to the notice of this Court various provisions of the Advocates Act and the rules made by the Bar Council of India but as stated earlier it would be purely in the discretion of the Bar Council to decide as to whether or not any action is to be taken against Mr. Damani if and when the occasion arises. Apart from the case of Jamilabai

(supra), one can with benefit reproduce certain observations from the famous case of *Rondel v. Worsley*, (1967) 1 QB 443 at p.5()2 wherein Lord Denning while discussing the duty and the authority of the members of the English Bar has observed as follows:

As an advocate he is a minister of justice equally with the Judge. He has a monopoly of audience in the higher Courts. No one save he can address the judge, unless it be a litigant in person. This carries with it a corresponding responsibility. A barrister cannot pick or choose his clients. He is bound to accept a brief for any man who comes before the Courts"...."He must accept the brief and do all he honorably can on behalf of his client. I say "all he honorably can" because his duty is not only to his client. He has a duty to the Court which is paramount. It is a mistake to suppose that he is the mouth piece of his client to say what he wants; or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice"....."He must disregard the most specific instructions of his client, if they conflict with his duty to the Court. The Code which requires barrister to do all this is not a Code of law. It is a Code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline.

When the matter was taken in appeal to the House of Lords it was observed as follows by Lord Reid (*Rondel v. Worsley*, 1969 AC 191):-

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But as an officer of the Court, concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may often lead to conflict with his client's wishes or with what his client thinks are his personal interests.

Thus it would appear to this Court that hardly any fault can be found with the conduct of Mrs. Pathak. Temptation though being great, this Court would refrain from making any adverse comments on the conduct of Mr. Damani as an Advocate. Firstly because substantially the same matter is pending before the Division Bench in the contempt proceedings. Secondly because it would be for the Maharashtra Bar Council to assess the conduct of Mr. Damani if and when any proceedings are initiated or taken suo motu.

16. Before parting with this order it is necessary to note that the matter, has been heard continuously for a period of 6 days, i.e. 15th, 16th, 17th, 18th, 19th and 22nd December 1997. Earlier also the matter was heard on 8th December, 1997. This observation is made only to avoid any further comments to the effect that the defendants or their advocates have not been heard. This comment has become necessary in view of the habit of the defendants to make allegations against the Judges of the Courts as also against the Advocates for the opposite sides. On a number of occasions it was stated by Mr. Damani that Judges of this Court had passed orders in a hasty manner. It has even been stated in the Memo

of Appeal that the Judge has passed the order in prejudicial manner.

17. Keeping the aforesaid facts and circumstances in view, the Notice of Motion is dismissed. The Defendant No. 1 is directed to pay costs to the plaintiffs in the sum of Rs. 10,000/-.

18. A copy of this order be given to Mrs. Sheela Pathak duly authenticated by the Associate of this Court in order to enable her to produce the same in the proceedings before the Maharashtra Bar Council as the same are said to be pending at the stage of evidence.