
(2014) 10 BOM CK 0091

In the Bombay High Court

Case No : Notice of Motion No. 1352 of 2013 in Suit No. 730 of 2013

Ashok Dattatraya Kulkarni

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 07-10-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3)
Maharashtra Co-operative Societies Act, 1960 — Section 163, 163(3), 164, 2(16), 21A
Transfer of Property Act, 1882 — Section 5

Citation : (2015) 4 ABR 329 : (2014) 7 BomCR 781

Hon'ble Judges : G.S. Patel, J

Bench : Single Bench

Advocate : S. Ganesh, Senior Counsel, Pravin Samdani, Senior Counsel, Pradeep Sancheti, Senior Counsel, Chetan Kapadia, Ankit Lohia, Rahul Totla and Sorshit Jain i/b Tushar Goradia, Advocate for the Appellant; D.D. Madon, Senior Counsel, M.S. Doctor, Senior Adv., Z.T. Andhyarujina, S.U. Kamdar, Senior Counsel, Madhavi Divan, Vineet Naik, Senior Counsel i/b Kunal Bhanage, F.E. Devitre, Senior Counsel i/b Tushar Goradia, U.S. Upadhyay, AGP and S.P. Thorat, Advocate for the Respondent

Judgement

G.S. Patel, J.

STRUCTURE/OUTLINE

A. INTRODUCTORY.....	12
B. THE FACTUAL BACKGROUND.....	15
C. RIVAL SUBMISSIONS & FINDINGS.....	22
I. The 2004 Development Agreements.....	24
II. Membership of the 5th Defendant Society.....	31
III. Kulkarni's Role in Allotment and Transfer of the Land.....	43

IV. The Frame of the Suit and the Reliefs Sought.....	50
V. The Failure to Give Notice to Kulkarni.....	57
VI. Delay and laches.....	60
VII. Bona fides.....	61
D. CONCLUSION, ORDER & COSTS.....	65

A. INTRODUCTORY

1. This dispute pertains to a substantial tract of land admeasuring 94,861.30 sq. mts., roughly 23 acres, at Village Versova, Taluka Andheri in the Mumbai Suburban District. Situated as it is in a prime area in Mumbai's suburbs, the property is undoubtedly of considerable value.

2. The Plaintiffs claim to be exclusively entitled to an allotment of this land along with Defendants Nos. 61 and 62.1 This claim is made on the basis that the ten Plaintiffs and Defendants Nos. 61 and 62 are all members of the Apna Ghar Cooperative Housing Society Limited, the 5th Defendant ("the Society"), of which the 1st Plaintiff, Ashok Dattatraya Kulkarni ("Kulkarni"), is said to be the Chief Promoter, a position he says he has held since the very beginning. The allotment is claimed on the basis of an agreement for sale of 1981 followed by an order of the Supreme Court in 2008. I will return to these facts in some detail presently.

3. The motion seeks injunctive reliefs restraining the Defendant No. 4, a partnership firm of builders and developers, one Samartha Development Corporation ("SDC") and Defendant No. 5, the Society, from creating any third party rights in respect of this land. A stay is sought of a resolution dated 24th December 2011 passed by the General Body of the Society at a Special General Body Meeting. Much turns on the precise cast of the prayers both final and interim, but in essence all of them, without exception, are founded on the Plaintiffs' claim to exclusive allotment of the land in question.

4. The defence is mounted vigorously on distinct counts. The membership of Plaintiffs Nos. 2 to 10 and Defendants Nos. 61 and 62 is disputed: none of them are, the Defendants say, the original members of the Society. Kulkarni himself has been removed as the Chief Promoter of the Society. Defendant No. 6, Sudhakar Sitaram Jadhav ("Jadhav") has been appointed in his place. This was done at the Special General Body Meeting of the Society, one that was attended by 10 of the 14 original members of the Society. These 14 members are Defendants Nos. 7, 8, 10, 11, 13, 14, 16, 27, 28, 34, 46, 47, 48 and 55. Kulkarni's denial of the membership of these Defendants is unconvincing, say the Defendants. The allotment of land is not to Kulkarni personally but only to the Society, which, at the time, was yet to be formed; Kulkarni acted in a representative and fiduciary capacity and served only at the pleasure of the General Body. In any case, the reliefs sought are such that they cannot be granted: there is, firstly, a statutory bar under the Maharashtra Cooperative Societies Act, 1960 ("MCS Act"); secondly, the Plaintiffs have exhausted their

remedies in proceedings before the authorities under the MCS Act, as also in subsequent writ proceedings, and cannot indirectly or circuitously re-open these again.

5. Having heard learned Counsel for the appearing parties, and having carefully considered their respective submissions and the large volume of material before me, I am not persuaded that the Plaintiffs have made out any sort of prima facie case for the grant of the injunctions sought. The allotment of land under an order of the Supreme Court in 2008 on certain Consent Terms to which I will turn presently was not to Kulkarni personally, but always only to the society of which he was then a Chief Promoter. The society having since been registered in accordance with law, he cannot continue in that post. His submission that he and he alone is entitled to allotment and title, albeit in trust, and the society can neither get an allotment nor acquire title until he decides, is unsustainable. Kulkarni's case that all 55 members of the 5th Defendant Society are recently enrolled by the developer, and that his fellow Plaintiffs are the only "true" members of the society, being persons of his choosing is equally untenable. I have found, on facts, that Kulkarni has not been able to establish the membership credentials of those he claims are members of the society. There is also the matter of delay and laches; the delay is considerable, and it is entirely unexplained. In the following judgment, I have considered the submissions under seven separate heads, including an analysis of the Development Agreement(s) assailed in the suit. On each count, I have found against the Plaintiffs.

6. In addition, I find there are very curious attendant circumstances, never satisfactorily explained by the Plaintiffs (indeed, some are not explained at all) that militate against the acceptance of their claim even on a prima facie assessment. I have dismissed the Notice of Motion. In the facts of the case before me, and in view that I have taken, I have also held that this is a fit case for the award of costs. I must straightaway state that although this is not expressly stated everything points to this being a sponsored and put up litigation and not a bona fide espousal of a cause.

B. THE FACTUAL BACKGROUND

7. What follows is a bare-bones narrative of the facts that led to the present Notice of Motion. I have not, in this outline, dealt with the arguments on each of the documents in question. I will turn to those as necessary when I consider the rival submissions.

8. Under a kaul or grant of 12th October 1820, one Byramjee Jeejeebhoy Private Limited ("BJPL") or its predecessors claimed to have acquired ownership of an enormous acreage of land, some 1,270 acres and 20 gunthas in all, at Village Oshiwara. This was Survey No. 41 in the land records. In 1964, BJPL entered into an agreement for the sale of all this land with one Swastik Land Development Corporation, later the renamed Oshiwara Land Development Corporation Limited ("OLDC"). The agreement for sale (of 25th January 1964) was modified by

several subsequent writings. These are not immediately germane for our purposes.

9. On 18th February 1981, OLDC entered into an agreement for sale with one Vasant Mahadeo Tikekar ("Tikekar") and Kulkarni, the 1st Plaintiff. This agreement for sale was in respect of a larger piece of land of about 86 acres. Although the plaint proceeds on the basis that this was the first dealing Kulkarni and Tikekar had in respect of lands in that area, this was not so; both had a history going back to at least 1975 of transactions in respect of other lands in that area, in which OLDC and SDC were both involved. The 1981 Agreement was also with one Mahajan, the Chief Promoter of the Shree Swami Samartha Prasanna Co-operative Housing Society (Proposed), but with which we are not at present concerned. The consideration for this agreement is set out in clause 2 and required the purchasers to make payment in stages at the rate of Rs. 10 per square yard. The initial payment was Rs. 1.5 lakhs. A further Rs. 11.5 lakhs was payable on or before 30th June 1983.

10. The Government of Maharashtra and the Maharashtra Housing & Area Development Authority ("MHADA") disputed BJPL's and OLDC's title inter alia to this larger piece of land. In 1991, OLDC, Tikekar and Kulkarni filed Suit No. 3429 of 1991 ("the OLDC Suit") in this Court against the Government of Maharashtra and MHADA in respect of these 86 acres of land.

11. On 11th November 2004, Kulkarni and Tikekar entered into a Development Agreement with the 4th Defendant, Samartha. Much turns on this Agreement, and the plaint proceeds on the footing that there are two versions of this Development Agreement: the first as originally signed by Tikekar and Kulkarni, and another one that Kulkarni alleges is a fabrication with interpolated pages. The first of these is at Exhibit "D" to the plaint, and the second is at Exhibit "E". Final reliefs are sought in respect of both. For convenience, I will refer to these as "DA-1" and "DA-2" respectively.

12. On 19th December 2006, Consent Terms were drawn up and tendered in the OLDC Suit. A learned single Judge of this Court declined to pass an order in accordance with those Consent Terms. In appeal, the Trial Court's order was set aside by an order dated 17th January 2008 and the matter was remanded. A Special Leave Petition was filed to the Supreme Court. Leave was granted, and the Special Leave Petition was renumbered Civil Appeal No. 6245 of 2008. On 23rd November 2008, the Supreme Court passed an order in terms of the Consent Terms. The OLDC Suit was decreed, and the trial court was directed to have the decree drawn up accordingly. These Consent Terms provided for the allotment of the suit land (about 23 acres of the 86 acres to which the suit related) to Kulkarni in his capacity as a Chief Promoter of the proposed Society.

13. There follows a four-year hiatus during which time Kulkarni and his fellow Plaintiffs did nothing in furtherance of the Consent Terms and order of 2008. It seems that on 24th December 2011, pursuant to a notice dated 15th December

2011, a Special General Body Meeting was held of the 5th Defendant society. Kulkarni says he was wholly unaware of this, and was given no notice of it; and neither were his fellow members, Plaintiffs Nos. 2 to 10 or Defendants Nos. 61 and 62. At this meeting, Kulkarni was removed as the Chief Promoter and Jadhav (Defendant No. 6) appointed in his stead. Further resolutions were also passed on this date. Kulkarni's case is that this meeting is wholly invalid, and that none of those who attended were the original promoter-members of the 5th Defendant society.

14. On 3rd February 2012, the 5th Defendant Society applied to the Deputy Registrar for a reservation of its name. This application was granted on 15th February 2012. On 18th February 2012, the 5th Defendant applied for registration, and a certificate of registration was issued on 28th February 2012.

15. In April 2012, one of Kulkarni's associates, one Tendulkar, filed an application under the Right to Information Act. Kulkarni claims that it was from the documents received on 9th April 2012 in response to this RTI query that he learned (i) that the 5th Defendant Society had already been formed and registered; and (ii) of the Special Body Meeting of 24th December 2011 and the preceding notice of 15th December 2011.

16. On 12th April 2012, the Plaintiffs (to reiterate: this includes Defendants Nos. 61 and 62) held a meeting and inter alia elected (or re-elected) Kulkarni as Chief Promoter of the Society and authorized him to register the Society in the same name, i.e., Apna Ghar. It does not seem that Kulkarni told his fellow members about the information he had by then received under the RTI Act.

17. A few days later on 17th April 2012, the Plaintiffs applied for a reservation of the name "Apna Ghar Cooperative Housing Society". This application was rejected on 15th May 2012 on the ground that a society with that name and in respect of the very same land had already been registered. The 1st Plaintiff filed an appeal against this order on 29th June 2012 but applied for an unconditional withdrawal on 8th August 2012, an application that was granted on 22nd August 2012. In the meantime, on 1st June 2012, Kulkarni filed an application under Section 21A of the Maharashtra Cooperative Societies Act, 1960 ("MCS Act") before the Joint Divisional Registrar, Cooperative Societies, seeking to de-register the 5th Defendant Society on the ground of misrepresentation. This application was opposed before the Joint Divisional Registrar. A reply was filed. Several months later, the 1st Plaintiff filed a rejoinder. On 22nd February 2013, the Joint Divisional Registrar rejected the Plaintiffs' application for de-registration. The Plaintiffs appeal was dismissed on 8th May 2013.

18. The Plaintiffs also filed an FIR alleging that the development agreement (DA-2) had been manipulated and certain pages were fabricated. On 20th March 2013, an order was passed directing an investigation and a report under Section 156(3) of the Criminal Procedure Code, 1973.

19. On 4th June 2013, the Plaintiffs terminated the development agreement

Kulkarni and Tikekar had signed (DA-1). On 5th June 2013, the Kulkarni filed Writ Petition No. 4882 of 2013 in this Court challenging the orders of the Appellate Authority and the Joint Divisional Registrar dismissing his application under Section 21A of the MCS Act. The present suit was filed on 18th June 2013. On 24th July 2013, the Plaintiffs' Writ Petition No. 4882 of 2013 was dismissed.

20. On 26th November 2013, the Supreme Court passed an order in a Special Leave Petition No. 33361 of 2013 (filed to challenge the dismissal of the Writ Petition) inter alia directing Kulkarni to furnish a list of original promoter members of the proposed society. Kulkarni filed such an affidavit on 29th November 2013.

21. Meanwhile, on 23rd September 2013, Kathawala, J. framed two preliminary issues in this suit under Section 9A of the Code of Civil Procedure, 1908: first, whether the suit as filed is barred by the Law of Limitation; and second, whether it was not maintainable for want of notice under Section 164 of the Maharashtra Cooperative Societies Act, 1960.

22. In the present suit, an application for grant of ad-interim reliefs in the present notice of motion was rejected on 21st January 2014. The Plaintiffs' filed an appeal. In the meantime, while that appeal was pending, the Supreme Court passed an order on 10th February 2014 in the Plaintiffs' Special Leave Petition No. 33361 of 2013 against the order of dismissal of his Writ Petition, and inter alia ordered a status quo. As a result, the appeal from the order refusing ad-interim reliefs was adjourned.

23. On 2nd February 2014, the 5th Defendant-Society received a Letter of Allotment in respect of the suit property.

24. On 25th April 2014, parties were heard on the preliminary issues framed. A learned Single Judge of this Court held that the second issue did not survive and that the burden lay on the Plaintiffs to establish that the suit was within time. An appeal from order was disposed of on 11th June 2014. A Special Leave Petition No. 18924 of 2014 was filed against that order. On 4th August 2014, the Supreme Court granted leave,² and passed an order in this second Special Leave Petition inter alia: directing disposal of this notice of motion within eight weeks from 4th August 2014; continuing the status quo ordered in the previous Special Leave Petition No. 33361 of 2013 for a period of ten weeks after the decision on the notice of motion; and deferring to the final hearing of the suit the determination of the surviving preliminary issue. 25. The matter was then mentioned before me on 20th August 2014, when I was first informed of the Supreme Court order of 4th August 2014. On that day, I was told that the Plaintiffs had in the meantime, on 19th August 2014, filed Chamber Summons 795 of 2014 for amendment to the plaint and that this Chamber Summons was being opposed. I was asked to take up the Chamber Summons first before disposing of the Notice of Motion. I heard parties at length on the Chamber Summons, and disposed it of by allowing the amendment with some

modifications by an order dated 5th September 2014. I then listed this Notice of Motion for hearing and final disposal. I heard learned counsel for the appearing parties on 25th September 2014, 29th September 2014 and 30th September 2014. The Supreme Court's order of 4th August 2014 allowed eight weeks' time, i.e., till end-September 2014 to dispose of the Notice of Motion. Since this time-frame was curtailed on account of the Chamber Summons, it seems that a joint request was made for an extension of time for disposal of this Notice of Motion. However, none before me seems to be clear about the result of that application. Given that hearings concluded only on 30th September 2014, and since the volume of material is considerable, parties consented to the matter being reserved for judgment till the next but one working day, 7th October 2013, the intervening days between 2nd October and 6th October 2014 being public holidays when the Court was closed.

26. This is, as I have noted, the most skeletal outline of the facts. Many of these documents and events have been subjected to intense analysis and scrutiny during oral arguments, and I will now proceed to consider them with the rival submissions.

C. RIVAL SUBMISSIONS & FINDINGS

27. In assessing the Plaintiffs' case at this interlocutory stage, I must address myself to well-settled principles: have the Plaintiffs made out a sufficient prima facie case? Is the balance of convenience in their favour? Would irretrievable or irredeemable harm or prejudice be caused to the Plaintiffs if reliefs as sought are denied? These are, of course, stated at the broadest level. Each of these must turn on the facts. In addition, there are also questions of delay, laches and bona fides that fall for consideration.

28. The entirety of the Plaintiffs' case, as presented by Mr. S. Ganesh and Mr. Pravin Samdani, 3 learned Senior Counsel for the Plaintiffs, rests on these three postulates: (a) first, that the first Development Agreement, DA-1, was a contingent contract, incapable of enforcement since the contingency contemplated had not arisen and, in any case, was bad for want of consideration; it is also vitiated by misrepresentation and has been terminated; and the second Development Agreement, DA-2, since it contains interpolations is void ab-initio ;

(b) second, that all 55 members to whom notice was sent of the 24th December 2011 were recently inducted by the 4th Defendant, SDC, the developer and builder, with the sole intention of ousting Kulkarni, and this renders the decision at the 24th December 2011 illegal;

(c) third, that the rights under the Agreement for Sale read with the Consent Terms of 2008 flow to, and only to, Kulkarni and without his presence there can neither be a valid allotment of land to the society, nor can any title pass to it.

29. On this basis, the following reliefs are sought in the Notice of Motion:

(a) That pending the hearing and final disposal of the above suit, Defendant Nos.

4 and 5 their servants, agents or nominee and/or persons or entities claiming through or under them and/or their nominees and/or any persons or entities claiming through or under them be restrained from creating third party right, title and/or interest of whatsoever nature in connection with the said property.

(b) That pending the hearing and final disposal of the above suit, the effect, implementation of the resolution dated 24th December 2011 purported passed by Defendant Nos. 4 to 60 be stayed and/or suspended.

(c) That pending hearing and final disposal of the above suit all further proceedings, acts, deeds, and/or things done or to be done by Defendant Nos. 4 to 60 or their servant, agents representatives with a view to take over possession of the said property from Defendant Nos. 1 to 3 be stayed, suspended and/or kept in abeyance.

(d) That pending the hearing and final disposal of the above suit, Defendant Nos. 4 to 60 or their servants, agents, representatives or persons claiming through or under them be directed to maintain status quo in respect of the said property.

I. The 2004 Development Agreements

30. The first Development Agreement (DA-1), Exhibit "D" to the plaint, is the one that Kulkarni admits executing along with Tikekar, his co-Chief Promoter. According to Mr. Ganesh, this was a contingent contract by which certain development rights were given by the then-proposed society, acting through Kulkarni and Tikekar qua Chief Promoters of the Society, to SDC, the 4th Defendant. Tikekar and Kulkarni are described in this document as the "Parties of the First Part". DA-1 is clear and unambiguous in its terms, Mr. Ganesh submits. The grant of development rights is in Clause 1, and these development rights are delineated in Clause 2. Clauses 2(h) to 2(j) include the right to lease or transfer flats or premises in the buildings to be constructed on the property; to enrol members of the society for and on behalf of Tikekar and Kulkarni (as Chief Promoters of the Society) and allot occupancy rights in respect of these flats and premises; and to assign the benefit of the agreement in whole or in part. Clause 3 of DA-1 refers to the consent terms proposed in the OLDC suit, and records that those Consent Terms require Kulkarni and Tikekar to make various payments including the cost of land, reimbursement to MHADA, payments to OLDC and so forth. The clause then expressly states that these costs are to be paid by SDC. Although this is the consideration for the grant of development rights and the right to enrol members, expressly so stated in Clause 5, Mr. Ganesh says that the entire Agreement is without consideration. SDC's right to enrol members and to enter into flat purchase agreements with them is again reiterated in Clause 6. Clause 10 then provides that on allotment of the land being made to the Society, Tikekar and Kulkarni are to put SDC in possession of the property; SDC is also given the power to prevent encroachments, set up a site office and construct a boundary wall. Clause 11 allows SDC to consume the entire FSI (Floor Space Index) and TDR (Transferable Development Rights) in

respect of this property. The submission is that in and of itself, DA-1 created no enforceable right.

31. Mr. Ganesh's submission is that everything depended on the allotment, and SDC's rights accrued only on the happening of a contingency, i.e., the allotment of the land. Without that allotment, SDC acquired no rights. Specifically, its right to enrol members and to develop the property were dependent on the occurrence of this contingency. DA-1 necessarily contemplated that Kulkarni would be the Chief Promoter along with Tikekar; since Tikekar has since resigned from membership of the Society, the agreement must be construed as a reference to Kulkarni, who continued as the Chief Promoter. SDC could not possibly oust Kulkarni as the Chief Promoter, for its rights accrued only after an allotment to a society of which Kulkarni was the Chief Promoter. The entirety of DA-1 was vitiated on the ground of misrepresentation and fraud, both of which came to light only in 2012. Mr. Ganesh says that SDC has entered into not a single flat purchase agreement with any member, not even the 55 persons it says are now members. All have been recently inducted. Their induction has one purpose, and one purpose only: to oust Kulkarni and to hijack the allotment of the property. The contingency as contemplated--the allotment of the property to a society of which Kulkarni is the Chief Promoter--not having arisen, DA-1 has not begun to operate and is of no effect. In any event, Kulkarni has terminated it, and SDC and the other Defendants claiming to be members can get no rights under it. It was therefore an agreement without consideration, a nudum pactum incapable of enforcement.

32. Realizing this, Mr. Ganesh says, SDC substituted DA-1 with a wholly fraudulent agreement, one in which pages were substituted. This is DA-2, purportedly of the same date, but an entirely different agreement. A copy is at Exhibit "E" to the plaint. In this, there are pages where the initials of both Tikekar and Kulkarni do not appear; these are the only pages with two sets of initials and not three: Tikekar's initials are missing. Mr. Ganesh says that this is a fraudulent document, with pages interpolated by SDC, and since SDC's entire case rests on this document, this should weigh in favour of the Plaintiffs.

33. On 4th June 2013 the Plaintiffs terminated DA-1, the Development Agreement Kulkarni and Tikekar signed. There is no reply to the termination letter, nor any proceedings to challenge that termination. Therefore, Mr. Ganesh submits, the Defendants can claim no rights flowing from DA-1; nor from DA-2, since that is fraudulent. SDC's actions are based on, and only on, the interpolated document, DA-2.

34. Mr. Madon, learned Senior Counsel for the 4th Defendant, SDC, strenuously disputes this formulation regarding the two Development Agreements. There is, he points out, no interpolation at all. The second Development Agreement, DA-2, was one in which certain pages were changed at Kulkarni's instance. It is wholly wrong to say, he submits, and in my view with considerable justification, that the original Development Agreement was a nudum pactum for want of consideration.

The consideration is expressly stated in Clause 5: rights accrue to SDC because it has agreed to discharge all the financial and other obligations of the promoter-members and, specifically, Tikekar and Kulkarni as the Chief Promoters, in getting the land allotted and transferred to the society. Indeed, both agreements specifically say as much. In its Affidavit in Reply, SDC has set out the reasons why DA-2 was necessary. According to it, members of the society began demanding flats of 7700 sq. ft. (built up area) free cost. SDC agreed to this demand, and the members insisted this be recorded in the Development Agreement. It was in these circumstances that the DA-2 came into existence. Kulkarni himself initialled the substituted pages, though Tikekar did not.

35. Kulkarni's allegation that DA-2 is fraudulent and interpolated is a submission without foundation, Mr. Madon submits. He points out that Kulkarni filed an FIR about this so-called interpolation. The matter was ordered to be investigated. A detailed investigation was carried out. The report is on file, annexed to SDC's Affidavit in Reply of 16th December 2013. This shows that the investigating agency obtained the opinion of a handwriting expert. That report shows that there is no discrepancy in the signatures on the two documents: Kulkarni in fact signed both. The investigation also revealed that it was Kulkarni who visited the office of SDC and demanded the change to incorporate the provision that flats of 7700 sq ft. would be given to members free of cost. Tikekar was not present when this change was made, and hence his signature does not appear on the new pages in DA-2. The investigation concluded that the entire complaint was false and, consequently, a "B" Summary Report was filed. All this is compelling material, and Mr. Samdani's answer that this matter is still at large, a re-investigation having been subsequently ordered, is not one that I can accept. There is on record overwhelming evidence to falsify Kulkarni's case of falsification, and nothing from Kulkarni to the contrary. This is, after all, a prima facie assessment, and at that level of scrutiny, I do not believe any other conclusion is possible.

36. As I have noted, the consideration is clearly stated even in DA-1. In DA-2 it is specifically tied to the provision of flats free of cost, but the original obligation to make all payments on behalf of the promoters remains unchanged. There is a distinction between a complete want of consideration in an agreement and a contractual provision for time in future for performance of obligations. The procuring of the allotment itself involved monetary obligations, ones that SDC fulfilled, making all payments required. Kulkarni, on the other hand, has paid nothing at all. It is impossible to hold that DA-1 is a nudum pactum.

37. The only conclusion to be drawn is that the Plaintiffs are unable to make out a prima facie case on the DA-2 being interpolated or DA-1 being void for want of consideration.

38. The subsidiary argument that DA-1 is vitiated for misrepresentation is an argument more of desperation than substance. It does not seem to me to stand to reason that eight years after it was executed Kulkarni could avoid this

agreement on the ground that he now finds that SDC had no intention of honouring it. There is a wholly insufficient pleading on this in the plaint, which merely states this and leaves it at that. What precisely is the nature of the misrepresentation is unclear. All that Mr. Ganesh and Mr. Samdani say is that SDC had "no intention of honouring its obligations" under the Development Agreement. But this surely is some sort of forensic self-goal: if DA-1 was a nudum pactum, void for want of consideration, then there would be no question of SDC "failing" to honour its contractual obligations, for it would have had none. These are not submissions taken in the alternative; they are taken together and they seem to me to be not just contradictory but mutually annihilating.

39. I am also unable to accept the submissions that the contingency contemplated in the Development Agreement, even assuming this to be a contingent contract, has not yet arisen. Indeed, that is demonstrably incorrect, for the so-called contingency occurred immediately on the Supreme Court's order in 2008 on the Consent Terms or perhaps even earlier in 2006 when the Government of Maharashtra and MHADA consented to the allotment by signing the Consent Terms, it only remaining to take an order on those Consent Terms. These Consent Terms directed the allotment of the land, and even on the Plaintiffs' construction of the development agreement, the contingency must be held to have then arisen either in 2006 when the Consent Terms were signed or at any rate on 23rd November 2008 when the Supreme Court passed an order on the Consent Terms.

40. Mr. Madon is also correct in pointing out the inherent fallacy in the Plaintiffs' argument: DA-2 is bad because it interpolates material for want of which the DA-1 is void, and therefore both Development Agreements fail. This is a submission that can withstand no sort of scrutiny.

41. Ms. Divan, learned Counsel for some of the members of the 5th Defendant Society, points out that the Development Agreement has been substantially implemented. A preliminary agreement has been signed on 9th April 2013. Moneys have been paid. The argument that the Development Agreement begins to operate only when the allotment is made is, she submits, and I believe with quite considerable justification, wholly misconceived. The allotment itself depends on payment being made to MHADA. That obligation to make payment is under the Development Agreement itself. Kulkarni and his cohorts did not have the wherewithal to make this payment, and this is where SDC stepped in with the funds.

42. The first limb of the Plaintiffs' case is, thus, entirely without merit and incapable of assistance.

II. Membership of the 5th Defendant Society

43. The second pivot of the Plaintiffs' case is that the induction of other members by SDC was entirely illegal, and, therefore, the so-called Special General Body Meeting resolution of 24th December 2011 was also illegal.

Therefore, according to the Plaintiffs, they are entitled to the reliefs sought; specifically, prayers (a) and (b) of the Notice of Motion.

44. On 15th December 2011, Defendant No. 14, Mahesh Natekar, convened a special general meeting of the society. He gave notice of a special general body meeting to be held on 24th December 2011. This notice is Exhibit "D" to the Plaintiffs' Affidavit in Rejoinder dated 22nd September 2014 in the Notice of Motion. That notice, Mr. Ganesh says, makes for curious reading. First of all, what authority Natekar had to call this meeting is unclear; Kulkarni does not accept him as one of the original promoter-members of the society. More telling, according to Mr. Ganesh, is the fact that Kulkarni was not given any notice of this meeting, and this fact is admitted. The Defendants have taken conflicting stands on this. At one point, they contended that Kulkarni was no longer a promoter-member and hence was not required to be given notice; later, they finally conceded that he continued to be a member. Yet no notice was given to him. The notice had only two agenda items: (1) to inform members of the steps taken by SDC for getting the lands in question; and (2) to inform members of the steps that now required to be taken for registration of the Society and for obtaining allotment of the land. To this notice was appended an Explanatory Statement. This, Mr. Ganesh submits, put beyond all doubt the fact that all 55 members to whom notice was sent were freshly enrolled by SDC. Not one of them was an original promoter-member. He emphasizes paragraph (ix) of the Explanatory Statement:

"(ix) In any event, in view of Development Agreement dated 11 November 2004 entered with SDC, the various matters concerning the land have been taken over by SDC and they having been authorised to enrol members, now there are 55 persons enrolled as members of Apna Ghar Co-operative Housing Society (Proposed)."

45. According to Mr. Ganesh, this is an admission that all 55 members to whom notice was given were freshly enrolled and that not one was an original promoter-member. This explanatory statement is repeated almost verbatim in the minutes of the Special General Body Meeting that followed on 24th December 2011. 4 This meeting was attended by 44 "members", 10 of whom claimed to be original member-promoters of the Society. A partner of SDC was a "special invitee" to this meeting. Mr. Ganesh says that paragraph (ii) of the minutes falsely records a so-called "consideration" for the Development Agreement, one that never existed; and paragraph (iii) then records, according to Mr. Ganesh, that all the members present were newly enrolled for it says that in furtherance of the right conferred on SDC, it has enrolled members of the 5th Defendant Society "who now constitute its General Body". Paragraphs (iv) and (v) of these minutes expose SDC's dastardly designs, says Mr. Ganesh: the former purports to record that Tikekar and Kulkarni have left the matters of land allotment and society registration to the other promoter-members; and the latter records that while Tikekar has resigned, Kulkarni has "recently indicated" that he is no longer

interested in functioning as a promoter of the society. To whom, how and when Kulkarni supposedly so indicated is left conveniently unstated. At this meeting, Kulkarni was substituted by Jadhav as the Chief Promoter. Mr. Ganesh emphasizes that the members' contribution is nominal, a few hundred rupees, and the rest remains to be collected in future. There is even now not a single flat purchase agreement.

46. In paragraph 9 of its Affidavit in Reply, SDC has claimed that the Society was formed in 1980, and its original promoter-members included, apart from Tikekar and Kulkarni, 14 others, viz., Defendants Nos. 7, 8, 10, 11, 13, 14, 16, 27, 28, 34, 46, 47, 48 and 55. This, Mr. Ganesh says, is entirely untrue. All these 14 members are newly inducted. The original members are those that are set out in Kulkarni's affidavit dated 29th November 2013 in compliance with the Supreme Court's directions for disclosure, 5 and these are Plaintiffs Nos. 2 to 10 and Defendants Nos. 61 and 62. Even the application for registration of the society does not show Tikekar and Kulkarni, although a total of 55 members are shown. On the other hand, the Plaintiffs' registration application of 17th April 2012 refers to the correct list of members, viz., the Plaintiffs and the Defendants Nos. 61 and 62. Now given that neither side has any material to corroborate their respective member lists, that produced by the Plaintiffs must be accepted, according to Mr. Ganesh. This is so, he and Mr. Samdani say, because Kulkarni is admittedly the original Chief Promoter and his version must, only for that reason, be preferred.

47. Mr. Samdani refers to the Affidavit in Reply filed on behalf of the 5th Defendant Society by Jadhav. In this, Jadhav says the 5th Defendant Society was formed in the 1980's and included, apart from Kulkarni and Tikekar, the 14 others I have referred to above. 6 He also says that the Society was formed "at the behest of and under the guidance of the late Mr. Kamlakar Walawalkar", a partner of SDC. He then says that since, in the 1980's, there was a shortage of affordable housing for middle class professionals, the members of the 5th Defendant Society were mostly professional persons--doctors, lawyers, engineers and so on. This cannot, Mr. Samdani says, possibly be true: Defendant No. 27, for instance, is supposed to have been 51 years old at the time of the application for registration of the Society. That would mean that in the 1980s when, according to Jadhav's affidavit, the Society was formed, Defendant No. 27 was only 19; hardly one who could be said to have either need for affordable housing in his own name, let alone of being a "professional". Indeed, an analysis of the entire list of the so-called "original" members shows them to be decidedly unprofessional: there were among them only two doctors and two lawyers, and all the rest were in their early 20's. Besides, how would Jadhav be privy to any of this information? asks Mr. Samdani. Clearly, he has been put up by the builder and developer, SDC. If there was the slightest doubt that this entire list of "original" members has been fabricated by SDC, Mr. Samdani says, it is put to rest by the affidavit filed by Defendant No. 16 (Vishwanath Dinanath Banawali) in opposition to the Plaintiffs' application for deregistration of the 5th Defendant

Society. Here, the 16th Defendant claims that Tikekar and Kulkarni were the "nominees" of SDC and that Kulkarni and Tikekar had since both ceased to be promoter members. This is untrue, and is stated only to justify the omission of notice to Kulkarni for the wholly illegal 24th December 2011 meeting.

48. On a plain reading, I am unable to accept Mr. Ganesh's submission on the notice and the minutes of the 24th December 2011. The portions he emphasizes do not show that all 55 members were recently inducted, but only that with the induction of new members, the General Body strength now stood at 55. The paragraphs that Mr. Ganesh and Mr. Samdani emphasize refer to SDC's right to enrol new members and then say that there are now 55 members. This does not and cannot mean, and mean only, that all 55 members have been recently inducted. It means exactly what it says: some new members have been enrolled and the general body strength now stands at 55 persons.

49. Mr. M.S. Doctor, learned Senior Counsel for the 5th Defendant, submits that there is an inconsistency between the plaint as laid and the oral arguments advanced on behalf of the Plaintiffs. It is nobody's case in the plaint that Plaintiffs Nos. 2 to 10 and Defendants Nos. 61 and 62 are the original members of the Society. The case pleaded was always that of a right personal to Kulkarni, with the other Plaintiffs and Defendants Nos. 61 and 62 being entitled to allotment. But it is now argued that the society is the one entitled to the final allotment. Mr. Doctor's submission is that if Plaintiffs Nos. 2 to 10 and Defendants Nos. 61 and 62 are not the promoter-members of the Society, they can get no relief.

50. Fundamental to the Plaintiffs' case as argued, Mr. Doctor says, is the submission that all 55 members of the Society (those to whom notice of the 24th December 2011 meeting was sent) are freshly inducted by SDC. Mr. Doctor is at pains to point out that this was not the Plaintiffs' case till very late in the day. In earlier proceedings, the Society did not have to establish that 14 of its members were the original promoters, as this was earlier admitted. It is only now sought to be recanted. To his application of 17th April 2012 for a name reservation, Kulkarni attached the minutes of the 12th April 2012 meeting of the Plaintiffs and Defendants Nos. 61 and 62. This shows only their names, and the assertion made was that Kulkarni had enrolled these members pursuant to the right conferred on him by the Consent Terms in the OLDC Suit. On 1st June 2012, Kulkarni filed his application for de-registration of the Society under Section 21A of the MCS Act. No reference was made to the original 16 members of the Society. The application only said that Jadhav had masqueraded as the Chief Promoter of the Society and had illegally inducted Defendants Nos. 7 to 60 at the meeting on 24th December 2011. On 23rd June 2012, Defendant No. 16 filed a reply to Kulkarni's Section 21A application, listing the original 14 members of the Society. Each of these had signed the application for registration of the 5th Defendant Society. Five months later, on 6th October 2012, Kulkarni filed a rejoinder. He did not dispute these 14 names. Indeed, he said that at the

highest, only these had the authority to remove Kulkarni as the Chief Promoter. A few months later, on 15th January 2013, Kulkarni filed written submissions before the Joint Divisional Registrar in these proceedings, saying in paragraph 6 that;

"Admittedly 41 out of the Opponents Nos. 1 to 55 were neither original Promoters nor were they appointed as new Promoters by the Applicant. Consequently, the group consists of such 41 Opponents cannot now put the same name to their Proposed Housing Society."

This, Mr. Doctor submits, is the clearest possible admission that the 14 members named by the Defendants were indeed the original member-promoters of the Society.

51. It does not end there. On 22nd February 2013, the Joint Divisional Registrar disposed of Kulkarni's application under Section 21A of the MCS Act. The order records that Kulkarni had proceeded on the basis that only 14 of the 55 rival promoter members were the original promoter members, and Kulkarni had not disclosed the names and addresses of those who elected him as a Chief Promoter. On 15th March 2013, Kulkarni filed an appeal. During the hearing of this appeal, the 5th Defendant Society's advocates called on Kulkarni's advocates to furnish a list of the 12 persons who Kulkarni said in his appeal memo were the original promoter members. Kulkarni's advocates replied on 2nd April 2013. They refused to furnish this list or to give inspection. The Society filed an application for disclosure. On 8th May 2013, Kulkarni's appeal was dismissed and one of the findings was that Kulkarni had not denied that the 14 persons named by the present 5th Defendant were indeed among the original promoter members of the society. The Appellate Authority also noted Kulkarni's failure or refusal to produce his list of original members, and that none of these 14 were present at the meeting called by Kulkarni on 12th April 2012. Kulkarni then filed Writ Petition No. 4882 of 2013 in this Court challenging the orders of the Appellate Authority and the Joint Divisional Registrar. In this petition, too, Kulkarni did not disclose the names of the original members of the Society. All 14 persons named by the 5th Defendant as the original members filed affidavits in this Court affirming that they were the original promoter members of the Society. In a rejoinder, for the first time, Kulkarni set forth a list of 12 entirely different names, but again with no particulars. That Writ Petition being dismissed, Kulkarni filed Special Leave Petition No. 33361 of 2013, and it was in that SLP that the Supreme Court on 26th November 2013 directed Kulkarni to furnish a list of members who were existing when the Co-operative Society was formed and the members present in the General Body Meeting who had participated in the voting. On 29th November 2013, Kulkarni filed an affidavit in ostensible compliance with these directions. For the first time he now sought to draw a nexus between the present Plaintiffs and Defendants Nos. 61 and 62 with the "original" 12 members. Now, for the first time, Kulkarni said that but for himself, each of the other "original" members had "nominated" others in their place and

stead. Various dates of nominations were given but with no supporting particulars.

52. The entire trajectory of the case, Mr. Doctor submits, is inconsistent with the submission now made, that all 55 members of the Society were freshly inducted. It is for the Plaintiffs to establish their credentials, for it is they who seek interim relief. It is they who must make out a prima facie case, and the burden lies squarely on them. The 5th Defendant in its very first Affidavit in Reply in paragraphs 3(E) and 9 had categorically asserted that Plaintiffs Nos. 2 to 10 and Defendants Nos. 61 and 62 had no locus and were never promoter members of the Society. In his first rejoinder, there was nothing but a bare denial from Kulkarni: he did not then say that these persons were nominees or heirs of the original promoter-members. Kulkarni's case on membership, Mr. Doctor submits, and I think rightly, has been one of constantly shifting stands and incessant prevarication.

53. Kulkarni called a meeting of "his" society on 12th April 2012. The list of those who attended was attached to his name reservation application. Absent from this list is Tikekar. In his affidavit of 29th November 2013 in ostensible compliance with the Supreme Court's order of 26th November 2013 says in paragraph 13 that Tikekar:

"did not wish to and expressed desire to not to continue [sic] as the Co-Chief Promoter and is not the Co-Promoter Member of the proposed society. Shri Jagannath H. Pandit was appointed as a promoter member in and around 17th June 2010 by the members of the proposed society."

54. In and of itself, there are so many difficulties with this assertion that it is hard to know where to begin. When did Tikekar express this desire not to continue? To whom? In what manner? How is that someone else, entirely unrelated to Tikekar, is brought into the picture? If Pandit's induction was at the behest of other members of the society, there would surely be a record of it; this could only have been done at a meeting and on a consideration of (a) a document of relinquishment or resignation by Tikekar and (b) an application by Pandit. No such material is produced; indeed, no material at all is produced.

55. The date provided of Pandit's induction, 17th June 2010, is very specific. Kulkarni does not give an approximate date; he is very precise. That would necessarily mean that this assertion is made on the basis of some record, for it would be wholly unreasonable and even unrealistic to assume that he was able to dredge from the depths of memory (especially given that he has similarly precise dates for all the other Plaintiffs) so exact a date. Yet, there is no record produced or even referenced.

56. Even odder is the choice of this date. The Development Agreement was of 2004. At the time of its alleged interpolation, Tikekar absented himself. He had signed the Consent Terms in 2006; yet these terms do not mention him at all (he was Plaintiff No. 3(a) in the OLDC Suit). Clearly, these were prepared earlier, at a

time when Tikekar had already withdrawn from the proceedings. How he did so is nowhere stated on record; I should have expected that Kulkarni at least would know of this, given that he and Tikekar shared something of a history in the matter. There is nothing at all to indicate that Tikekar continued to be active after the Supreme Court order on the Consent Terms in 2008. Why then Tikekar's name should be substituted in June 2010 remains a mystery that Kulkarni never cares to unravel.

57. Ms. Divan is also correct in her submission that Kulkarni's right to enrol new members is not traceable to any provision of the Development Agreement. That right is given to SDC, not retained by Kulkarni. It is curious indeed, as Ms. Divan points out, that Kulkarni's members are all new entrants, supposedly nominees, all brought in well after the Consent Terms. Indeed, not all of them are nominees at all (as in the case of Tikekar). Even more peculiar is Kulkarni's conduct. On 9th April 2012, he claims to have information of the registration of the 5th Defendant Society. Yet this is not information he discloses to his so-called "members" at the meeting he calls on 12th April 2012. He merely proceeds on the footing that the society is yet to be registered. If there ever was a case to be made of misrepresentation and misdirection, she says, it is on Kulkarni's part.

58. Ms. Divan's arguments on this point are supplemented by Mr. Kamdar, learned Senior Counsel for some of the other Defendants (including some members of the Society), and Mr. Andhyarujina, learned Counsel for the 6th Defendant, Jadhav. It is inconceivable, Mr. Kamdar submits, that Kulkarni, who claims to be so diligent in safeguarding his rights, should have no record at all of who became a member and when and who resigned and when. The suit is plainly an attempt to hijack the 5th Defendant society and to grab for himself the allotment that has now been made. It is, Mr. Andhyarujina says, for the Plaintiffs to show how they became members and when, and to establish this on cogent evidence to make out a prima facie case. All that we have here instead is Kulkarni's ipse dixit. There is a finding by the Joint Divisional Registrar that Kulkarni's "enrolments" were all after the Consent Decree of 2008. This is a matter that stands finally concluded, and there is no possibility of re-opening this question now. The new members (the Plaintiffs and Defendants Nos. 61 and 62) could not have been enrolled by Kulkarni after the filing of the Consent Terms before the Supreme Court.

59. There is, I believe, considerable force in all these submissions. It is, as Ms. Divan says, unclear who it is that Kulkarni claims to represent. It matters little that the Defendants too have no documentation; this was surely for the Plaintiffs to prove and establish, since it is they who have come to court and doubly so since Kulkarni claims to be in the know of all matters since the beginning. This brings into focus Kulkarni's authority to terminate the Development Agreement, too, for he could not possibly have done this on his own account and for himself; yet this is precisely what he claims to have done.

60. On these facts, it is not possible to arrive at the prima facie assessment

commended by Mr. Ganesh and Mr. Samdani that all 55 members of the 5th Defendant Society are newly inducted. To the contrary, it does appear that Plaintiffs Nos. 2 to 10 and Defendants Nos. 61 and 62 have all been put up by Kulkarni and that none of them had any connection at all with the 5th Defendant Society. Kulkarni's tergiversation in setting out his list of members and then only providing unauthenticated information, nothing more than his mere say-so, does not and cannot establish the credentials of these claimants.

III. Kulkarni's Role in Allotment and Transfer of the Land

61. Turning to the Consent Terms, Mr. Ganesh points out that these identified separate pockets out of the total property that was the subject matter of the OLDC suit, admeasuring some 86 acres and 32 gunthas. Three pockets identified as A, E and F on the plan annexed to the Consent Terms were to be:

"given to the Plaintiff No. 3(b) in his capacity as a the Chief Promoter of the Apna Ghar Co-operative Housing Society (Proposed)"

Kulkarni was Plaintiff No. 3(b) in the OLDC Suit. Clause 3 of the Consent Terms further said that these lands:

"be allotted to the Plaintiff No. 3(b), the Apna Ghar Co-operative Housing Society (Proposed)."

Clause 9 further required that the actual cost of development of land to be borne by the 5th defendant to that suit, MHADA, and:

"which is allotted to Plaintiff No. 3(b) will be paid by Plaintiff No. 3(b) to the Defendant No. 5."

According to Mr. Ganesh, this leaves no manner of doubt that the allotment could only be made to Kulkarni as the Chief Promoter of the Society; it could not be made to any other individual at all, and since the Society itself did not exist at the time and was not a body corporate, that allotment had to be made in Kulkarni's name, for and on behalf of the Society, as its Chief Promoter (Tikekar by that time having exited the picture, though he had also signed the Consent Terms).

62. The Consent Terms also specifically said that the allotment to Kulkarni on behalf of the Society was subject to the terms and conditions set out in Exhibit "B" to those Terms. This annexure clearly sets out, at its very head, that the land in question is sanctioned for allotment to the Society (not to Kulkarni), but this, Mr. Ganesh and Mr. Samdani say, is correct, for Kulkarni had no personal interest in this land. Mr. Samdani also points out that this annexure requires a list of members to be submitted within one year, something that was never done; that the maximum area of flats was fixed at 700 sq. ft.; and that 20% of the members of the society were compulsorily required to be of the backward class, a criterion not met by the members put up by the Defendants. It is, however, unclear whether this is also met by any of the Plaintiffs.

63. Mr. Samdani builds on this construct, and says that there is a question of privity of contract vis-à-vis the question of entitlement, as also the matter of the mode and manner in which the Society could ever acquire title to the lands in question. Under the Consent Decree, only Kulkarni had the entitlement; that position remains unchanged today. Therefore, unless and until Kulkarni joined in the allotment to the Society, or the transfer of the allotment to another Chief Promoter, the land itself could never be claimed by either the Society or any other Chief Promoter. If Kulkarni failed to transfer the land, the Society could sue him to compel the transfer, but it could not bypass or leapfrog him and directly take the allotment in its own name or through any other Chief Promoter. In this context, Mr. Samdani refers to the decision of the Gujarat High Court in *Ramji Mandir Narsinhji and Others Vs. Narsinh Nagar Co-operative Housing Society Ltd. and Others*, to submit that since the Society was till then not a body corporate it could obtain neither an allotment nor title in its favour. This decision, he submits, was upheld by the Supreme Court in *Maneklal Mansukhbhai Co. Op. Housing Society Ltd. Vs. Rajendrakumar Maneklal Shah and Another*. Moreover, there can be no transfer of land to a non-juristic entity. *Hindustan Lever and Another Vs. State of Maharashtra and Another*. Therefore, there must be an assignment or a transfer by the Chief Promoter, i.e., Kulkarni, and till he joins in such an assignment or transfer there can be no allotment to the Society. Yet, Mr. Samdani hastens to add, this does not mean that Kulkarni has any personal right or interest in the property, but only that, on allotment, he would hold it in trust. To a question for whom would he so hold it, Mr. Samdani's response is that Kulkarni would do so only for those persons of his choosing; for only those, the ones Kulkarni chooses, Mr. Samdani says, are the "true" members of the Society.

64. It is not possible to accept these arguments, and for more than one reason. As Ms. Divan points out, the Consent Terms before the Supreme Court created obligations and Kulkarni's role, one that Mr. Samdani now accepts, though in a highly qualified form, required him to act in a fiduciary capacity on behalf of and in trust for a society yet to be formed. The MCS Act recognizes the concept of a proposed housing society; such a body may not be able to sue, but it is not altogether without statutory standing. Section 2(16) of the MCS Act defines a housing society:

Section 2(16): "housing society" means a society, the object of which is to provide its members with open plots for housing, dwelling houses or flats; or if open plots, the dwelling houses or flats are already acquired, to provide its members common amenities and services;

Section 9 of the MCS Act specifically recognizes the concept of a "proposed society":

Section 9 -Registration

(1) If the Registrar is satisfied that a proposed society has complied with the provisions of this Act and the rules, or any other law for the time being in force,

or policy directives issued by the State Government under Section 4 and that its proposed by-laws are not contrary to this Act or to the rules, he shall, within two months, from the date of receipt of the application register the society and its by-laws.

(2) Where there is a failure on the part of the Registrar to dispose of such application within the period aforesaid, the Registrar shall, within a period of fifteen days from the date of expiration of that period refer the application to the next higher officer and where the Registrar himself is the registering officer, to the State Government, who or which, as the case may be, shall dispose of the application within two months from the date of its receipt and on the failure of such higher officer or the State Government, as the case may be, to dispose of the application within that period, the society and its by-laws shall be deemed to have been registered and thereafter the Registrar shall issue a certificate of registration under his seal and signature within a period of fifteen days.

(3) Where the Registrar refuses to register a proposed society, he shall forth-with communicate his decision, with the reasons therefore, to the person making the application and if there be more than one to the person who has signed first thereon.

(4) The Registrar shall maintain a register of all societies registered, or deemed to be registered, under this Act.

65. Under Section 36 of the MCS Act, a society becomes a body corporate on registration. Till such time as it is registered, and is a proposed society, a housing society can get an entitlement to property in its proposed name. One of the conditions required for registration of a proposed society is the description of the property on which the housing society has or proposes to have a building. Ms. Divan submits that Section 5 of the Transfer of Property Act 1882 contemplates a transfer of immovable property to body of individuals, whether incorporated or not. She relies on the decision of the Supreme Court in *Jai Narain Parasrampuriah (Dead) and Others Vs. Pushpa Devi Saraf and Others*, in which title to an immovable property acquired on behalf of an unincorporated company passed to it on its incorporation. The mere fact that it was not incorporated when the property was acquired on its behalf would not mean that no title passed to it. The allotment of the land flowed under the Agreement of Sale of 1981 read with the fortuitous Consent Terms of 2008. To say, therefore, that only Kulkarni acquired rights and that the proposed society had none is patently incorrect.

66. I believe Ms. Divan is generally correct in her submissions. Indeed, Exhibit "B" to the Consent Terms and various clauses of the Consent Terms themselves make it clear that Kulkarni was at best a conduit or a facilitator. No title was ever intended to vest in him for any purpose. Evidently, all the members of the society could not be expected to collectively take the allotment or the title; that would be merely impractical, and Kulkarni was therefore appointed by the society. He acted in a representative capacity, and only in that capacity and in no other. Mr.

Samdani's submission seems to me to take it to an unacceptable extreme, one that is not cohesive with the frame of the MCS Act. In essence, his submission is that Kulkarni would get the allotment and the title. He was then duty-bound to make these over to the society. But he retained some sort of Olympian control: he could choose the society, and he could choose its members, and he could, if he so wished, not make that transfer at all. In short, Kulkarni had the full panoply of dispositive powers over the property once it was allotted to him, albeit in his capacity as the Chief Promoter. The hapless society would then be driven to filing suit against him to compel that transfer.

67. On Mr. Samdani's own reference to the Ramji Mandir cases, what he suggests could never happen. What Mr. Samdani's argument overlooks is that the Ramji Mandir case was about a suit for specific performance, which is not the case here. There, the original lease agreement was with an individual, one who was later a promoter of the cooperative housing society in question. It does not appear from the Supreme Court decision that the individual's agreement was on behalf of the proposed society. The draft lease in favour of the society was never executed. It was on these facts that Ramji Mandir was decided, and it is, I think, of vital importance that in that case there was no allotment in favour of the society at all. There is also material distinction between obtaining an allotment and obtaining a conveyance: on the strength of the allotment, the 5th Defendant society could be properly registered; a conveyance of title to it would then follow. This is unexceptionable, and not contrary to the Ramji Mandir decision in any way. But to read this decision to say that there can be no allotment to a proposed society seems to me incorrect. There is, indeed, no inconsistency between the Ramji Mandir case and the Jai Narain case on which Ms. Divan relies.

68. Mr. Kamdar carries the argument further. He is absolutely correct in his submission that the entire suit is based on the "Chief Promoter" concept. This arises under Section 8 of the MCS Act: any ten persons form the initial body. These are the promoters, those who set up the society. They elect one or more among them to be the "Chief Promoter". Under Rule 4 of the Maharashtra Cooperative Societies Rules, the Chief Promoter must apply in Form A, signing as the Chief Promoter. His role as a Chief Promoter ends once the society is constituted and the first meeting is called. There is no concept, as Kulkarni seems to suggest, of a Chief Promoter for life. For, under Section 73(1A) of the MCS Act, once registered, a committee must be appointed within three months to conduct the affairs of the society. Seen thus, there is no question of Kulkarni continuing as the Chief Promoter. The 5th Defendant Society was registered on 28th February 2012; he obtained this information on 9th April 2012. There is no question of Kulkarni being a Chief Promoter any longer unless the society is de-registered, an application for which Kulkarni made and in which attempt he has failed. There is no question of Kulkarni continuing as a Chief Promoter post-registration. 11 Shankar Y. Gavli Vs. Vishakha Sadan Co-operative Housing Society and Another, .

69. Then there is the question of Kulkarni's capability. From the very start, he seems to have been considerably less than able, hardly the macher he now portrays himself to be. He could make no payment. It was not he who contested the litigation. For four years after the Supreme Court order of 2008 he did absolutely nothing, a matter to which I will return presently. The Plaintiffs' submissions on the Consent Terms, the Development Agreement and Kulkarni's role could not be further from the facts.

IV. The Frame of the Suit and the Reliefs Sought

70. Mr. Kamdar, Mr. Doctor, Mr. Vineet Naik, learned Senior Counsel for some of the contesting Defendants, and Ms. Divan are also justified in their submission that the Society having been registered, and Kulkarni having failed in his attempt to have it de-registered by his application under Section 21A of the MCS Act, the reliefs sought are such as are incapable of being granted. Ms. Divan and Mr. Kamdar point out that the prayers in the suit concern the allotment of land and have a direct, fundamental and immediate impact on the registration of the Society. This is a matter now closed to the Plaintiffs in view of Section 163(3) of the MCS Act:

Section 163: Bar of jurisdiction of Courts

(1) Save as expressly provided in this Act, no Civil or Revenue Court shall have any jurisdiction in respect of--

(a) the registration of a society or its bye-laws, or the amendments of its bye-laws, or the dissolution of the committee of a society, or the management of the society on dissolution thereof; or

(b) any dispute required to be referred to the Co-operative Court, for decision;

(c) any matter concerned with the winding up and dissolution of a society.

(2) While a society is being wound up, no suit or other legal proceeding relating to the business of such society shall be proceeded with or instituted against the society or any member thereof, or any matter touching the affairs of the society, except by leave of the Registrar, and subject to such terms as he may impose.

(3) All orders, decisions or awards passed in accordance with this Act or the rules shall, subject to the provisions for appeal or revision in this Act be final; and no such order, decision or award shall be liable to be challenged, set aside modified, revised or declared void in any Court upon the merits or upon any other ground whatsoever.

(Emphasis supplied)

71. Specifically, prayers (a), (b), (f) and (g) of the suit cannot be granted.

a. That this Hon'ble Court be pleased to declare that the Plaintiffs and Defendant Nos. 61 and 62 are entitled to allotment and possession of all those pieces or parcels of land or ground bearing (i) Survey No. 120 (part) bearing C.T.S. No.

1374/A/8/1 to 5 admeasuring 39,790.80 sq. mtrs; (ii) Survey No. 120 (part) bearing C.T.S. No. 1374/A/4 admeasuring 41,570.10 sq. meters (iii) Survey No. 120 (part) bearing C.T.S. No. 1374/A3 admeasuring 13,500.40 sq. mtrs; in all aggregating to 94,861.30 square meters all of village Versova, Taluka Andheri, District Mumbai Suburban (the said property).

b. That this Hon"ble Court be pleased to declare that Defendant No. 5 i.e. Apna Ghar Co-operative Housing Society Limited or Defendant No. 6 to 60 are not entitled to be allotted or handed over possession of the said property.

f. That this Hon"ble Court be pleased to direct that possession of the said property should be handed over to the Plaintiffs and Defendant Nos. 61 and 62 by Defendant No. 1 to 3 to the exclusion of all others.

g. That this Hon"ble Court be pleased to pass a permanent and mandatory order of injunction against Defendant Nos. 4 and 5 to 60 their servants, agents or nominee and/or persons or entities claiming through or under them and/or their nominees and/or any persons or entities claiming through or under them and Defendant Nos. 4 and 5 to 60 from creating third party right, title and/or interest of whatsoever nature in connection with the said property.

72. All these prayers relate to the property and to its allotment to the 5th Defendant Society. The interim prayers are all in furtherance of these prayers. If the final reliefs cannot, prima facie, be granted, there arises no question of grant of interim reliefs in furtherance of those prayers.

73. I believe there is ample justification for this submission. As Ms. Divan says, the Plaintiffs cannot get circuitously what they cannot get, or have failed to get, directly. This is now well-settled, even in the context of cooperative society law. 12 Sant Lal Gupta and Others Vs. Modern Co-operative Group Housing Society Ltd. and Others, The Joint Divisional Registrar, an authority within the meaning of Section 163(3), had before him all the material. He applied his mind to it and granted the 5th Defendant Society registration. That registration is inextricably linked to the property and its allotment. It is not possible to abstract the plot from the society without rendering its registration otiose. Similarly, Kulkarni's application for registration was rejected. His application for de-registration of the 5th Defendant Society also failed. That application was brought under Section 21A of the MCS Act:

Section 21A. De-registration of societies

(1) If the Registrar is satisfied that any society is registered on misrepresentation made by applicants, or where the work of the society is completed or exhausted or the purposes for which the society has been registered are not served, or any primary agricultural co-operative credit society using the word "Bank", "Banking", "Banker" or any other derivative of the word "Bank" in its name, he may, after giving an opportunity of being heard to the Chief Promoter, the committee and the members of the society, de-register the society:

Provided that, where the number of members of the society is so large and it is not possible to ascertain the correct addresses of all such members from the records in the office of the Registrar and, in the opinion of the Registrar it is not practicable to serve a notice of hearing on each such individual member, a public notice of the proceedings of the de-registration shall be given in the prescribed manner and such notice shall be deemed to be notice to all the members of the Society, and no proceeding in respect of the de-registration of the society shall be called in question in any Court merely on the ground that individual notice is not served on any such member.

(2) When a society is de-registered under the provisions of sub-section (1), the Registrar may, notwithstanding anything contained in this act or any other law for the time being in force, make such incidental and consequential orders including appointment of Official Assignee as the circumstances may require.

(3) Subject to the rules made under this act, the Official Assignee shall realise the assets and liquidate the liabilities within a period of one year from the date he takes over the charge of property, assets, books, records, and other documents, which period may, at the discretion of the Registrar, be extended from time to time, so however, that the total period does not exceed three years in the aggregate.

(4) The Official Assignee shall be paid such remuneration and allowances as may be prescribed; and he shall not be entitled to any remuneration whatsoever beyond the prescribed remuneration or allowances.

(5) The powers of the Registrar under sub-sections (1) and (2) shall not be exercised by any officer below the rank of a Joint Registrar of Co-operative Societies.

(Emphasis supplied)

74. Section 21A(1) makes it clear that if the land is taken away from the 5th Defendant Society, as sought in this suit, the "purpose for which the society has been registered will not be served". This has only one inevitable result, viz., the de-registration of the 5th Defendant Society. This is the same result that Kulkarni sought, and failed, to achieve by seeking de-registration on the ground of misrepresentation. The entire suit is, therefore, as Mr. Kamdar and Ms. Divan submit, entirely misconceived and an abuse of the process of the court. For his part, Mr. Kamdar submits that no prayer to set aside the resolution of 24th December 2011 can ever be granted. The allotment was ever only to the society and never to Kulkarni personally. If, therefore, he cannot be a Chief Promoter today, he has no nexus at all with the property in question. The Joint Divisional Registrar not only found there to be no misrepresentation as alleged by Kulkarni in his Section 21A application, but also specifically found that Jadhav had been validly appointed as the Chief Promoter in Kulkarni's place. That very finding and, consequently, even if sub-silentio, that order is now sought to be challenged in this suit, an attempt that, if allowed to succeed, would render entirely

meaningless Section 163(3) of the MCS Act.¹³ Mr. Naik makes a pointed reference to the scope and nature of the enquiry preceding registration: proof of allotment was sought and provided, and an undertaking was given. A site inspection, too, was carried out. All of this indicates a detailed investigation under Section 9 of the MCS Act, one that should not be lightly dislodged. 75. These submissions are, I find, ones to which there is no ready or tenable answer. Indeed, it seems to be no answer at all to say, as Mr. Samdani does, that proceedings under Section 21A of the MCS Act are summary in nature, and that since matters antecedent to incorporation can never be a part of such proceedings because the nature of the proceeding posits registration, therefore, his only remedy is by way of a civil suit. I think that is entirely incorrect; it would render Section 163(3) meaningless. The reliefs sought would have the effect of wholly defenestrating a registration properly granted after a complete and independent enquiry. The fact that a previous attempt at de-registration failed only makes matters worse; as Ms. Divan says, that issue cannot now be agitated afresh by opening up another front of attack. If, therefore, it is not possible to come to a *prima facie* conclusion that the final reliefs are tenable, no interim relief in aid of those final reliefs should be granted.

76. In this assessment, I am mindful of the Supreme Court's directions in its order of 4th August 2014 not to frame any issue for the final determination of the suit. Indeed, that has not been either my attempt or that of counsel for the Defendants. They have only made their submissions, as I believe they are entitled to do, that one of the factors to be borne in mind while assessing an interlocutory application is whether in a given case it is at all possible, albeit on a *prima facie* appraisal, to grant the final reliefs. If the Plaintiffs cannot satisfy that *prima facie* test, then interim reliefs should not be granted.

V. The Failure to Give Notice to Kulkarni

77. Both Mr. Ganesh and Mr. Samdani have made much of the fact that no notice of the 24th December 2011 meeting was ever given to Kulkarni though it is now accepted that he continues to be a member of the 5th Defendant Society. Ms. Divan submits that a mere omission in such a case does not invalidate the notice or the meeting that followed. She relies on the decision of the Supreme Court in *The Vice-chancellor, Utkal University and Others Vs. S.K. Ghosh and Others*, where Bose, J. speaking for a five-Judge Bench said:

"15. Several English authorities were cited about the effect of an omission to give notice to even one member of a body entitled to receive it, in particular a decision of the Privy Council in AIR 1934 62 (Privy Council). We do not think it necessary to examine the general principle at any length because, in our opinion, this case is governed by its own facts. It may well be that when there is a statutory requirement about notice the provisions of the statute cannot be evaded or ignored. It may also be, though we do not stop to enquire whether it is, that when the constitution of a non-statutory body required notice to be given, then also there cannot be any relaxation of the rule.

16. The reason for the stricter rule laid down in the cases cited before us is that though an incorporated body like an University is a legal entity it has neither a living mind nor voice. It can only express its will in a formal way by a formal resolution and so can only act in its corporate capacity by resolutions properly considered, carried and duly recorded in the manner laid down by its constitution. If its rules require such resolutions to be moved and passed in a meeting called for the purpose, then every member of the body entitled to take part in the meeting must be given notice so that he can attend and express his views. Individual assents given separately cannot be regarded as equivalent to the assent of a meeting because the incorporated body is different from the persons of which it is composed. Hence, an omission to give proper notice even to a single member in these circumstances would invalidate the meeting and that in turn would invalidate resolutions which purport to have been passed at it. But this is only when such inflexible rigidity is imposed by the incorporating constitution.

The position is different when, either by custom or by the nature of the body or by its constitution and rules, greater latitude and flexibility are permissible. Each case must be governed by its own facts and no universal rule can be laid down; also it may well be that in the same body certain things, such as routine matters, can be disposed of more easily and with less formality than others. It all depends on the nature of the body and its rules."

78. The submissions of Ms. Divan and Mr. Madon are that there is, in the context of a society before its registration, no absolute rule about notice. It must be borne in mind, Ms. Divan and Mr. Madon say, and I think correctly, that Kulkarni served at the pleasure of the General Body. He had no superior or absolute right to be a Chief Promoter. That was something the General Body could always confer or take away, and he himself would have no say in the matter. His entire role was that of a facilitator, a catalyst, a mere enabler. If someone else could serve the function as well, or perhaps better, he certainly could not insist on continuing in that post. There is, therefore, no consequence in law to this omission, even assuming it was deliberate and not an accidental oversight. Now where there is no prejudice, there is no inevitable validation Ms. Divan submits, relying on the decision of the Supreme Court in *Aligarh Muslim University and Others Vs. Mansoor Ali Khan*, The Court must, as Mr. Madon says, distinguish between the desirable and the legally necessary. If there be no such requirement in law, this being a loose association of persons prior to registration, all coming together with a common aim, then there is no legal consequence. This submission is well founded. Certainly, the want of notice is not a ground for invalidating the 24th December 2011 meeting and its resolution. To achieve that, the Plaintiffs have many hurdles to cross; they have stumbled at the first stile, being unable to establish the correctness of their member list and the incorrectness of the list propounded by the Defendants. Indeed, I would venture to suggest that of the many obstacles in their way, the Plaintiffs have not surmounted a single one.

VI. Delay and laches

79. There can be no dispute that the plaintiffs' delay and laches will weigh against them in considering an application for interim reliefs. Has there been such a delay, one long unexplained, as might defeat the Plaintiffs' claim to interim relief in this case? Indeed there is, says Mr. Madon. Kulkarni's right, as claimed, and that of those he says he represents arose at the very latest in 2008 when an order was made on the Consent Terms by the Supreme Court. This suit is, however, filed only in 2013, and it seeks nothing more than rights allegedly flowing from those Consent Terms. The only answer Kulkarni gives is in paragraph 3(k) of the plaint, where he says that he had to face "conflicting claims" by others, including SDC. There was, however, no litigation till 2012.

80. Mr. Madon is supported by Ms. Divan and Mr. Andhyarujina, and I believe they are all correct in this submission as well. Between 2008 and 2012, Kulkarni seems to have done absolutely nothing. It is not until April 2012 that there is any activity from him. There is nothing remotely resembling an explanation for this delay.

81. Even more telling is the prolonged silence on the Development Agreement, DA-1. I will assume that Kulkarni learned of what he calls SDC's nefarious intentions only in 2012; yet under the Development Agreement read with the Consent Terms, SDC had certain undeniable obligations, ones that it fulfilled. Kulkarni seems not once to have even sought an explanation from SDC or made any attempt toward getting the land allotted. Indeed, this delay is, in such a case, unconscionable; being unexplained, it is inexcusable; and it is therefore sufficient reason in and of itself to deny the Plaintiffs interim relief.

VII. Bona fides

82. That is not all. There is something very seriously amiss with the way this entire case has been brought. Throughout, Kulkarni has been at some pains to distance himself from SDC and its partners, members of the Walawalkar family. The distinct impression sought to be conveyed in the plaint is that Kulkarni and Tikekar bona fide entered into the Agreement for Sale of 1981 with OLDC on their own, and that SDC entered the picture only much later in 2004 at the time of the Development Agreement.

83. In fact, there is material to indicate that this is far from true. One of SDC's addresses is at 11A, Suyash, Gokhale Road (North), Dadar (West), Mumbai-400028. In the 18th February 1981 OLDC Agreement, Tikekar's and Kulkarni's address, for the Apna Ghar Co-operative Housing Society (Proposed), is at this very place. Mr. Naik points out that this is not, in fact, the first agreement between Tikekar, Kulkarni and OLDC. This is in fact a supplemental agreement. The first agreement was of several years earlier, 2nd December 1975, in which Tikekar's address was also shown at Suyash, Gokhale Road, Dadar, i.e., SDC's address.

84. SDC has made an Affidavit in Reply dated 15th September 2014. In paragraph 15 of this Affidavit, the history of the matter is traced. One K.L. Walawalkar ("Walawalkar") established SDC in the early 1970's. Its registered office since then has been at 11-A, Suyash, Gokhale Road, Dadar. In 1975, Walawalkar negotiated with OLDC to acquire two large tracts of land from Survey No. 41, the larger property that OLDC had earlier contracted to purchase by BJPL. It seems that two layouts were in fact fully developed: the Swami Samarthra Prasanna Layout and the Apna Ghar Layout. SDC claims that the practice at the time was that the developer would identify the land and then invite potential purchasers to invest in the proposed development. The developer would then also organize cooperative societies. Tikekar and Kulkarni were both involved in the setting up of the Apna Ghar Layout which, curiously, was also dubbed the Apna Ghar Co-operative Housing Society (Proposed). The area of this layout was about 200,000 square yards. Both the Swami Samarthra Prasanna Layout and the Apna Ghar Layout were completed. Walawalkar then identified the additional land of about 86 acres and 32 gunthas. This was later the subject matter of the OLDC Suit and, consequently, the 2008 Consent Terms. It was in this context that Kulkarni, Tikekar and 14 others, viz., Defendants Nos. 7, 8, 10, 11, 13, 14, 16, 27, 28, 34, 46, 47, 48 and 55 were brought together to form the suit society. None of this is mentioned even in passing in the plaint, presumably on the ground that this is all immaterial to the cause of action pleaded. I do not think that is correct, especially given the allegations made in the plaint against SDC. The traverse in paragraph 17 of Kulkarni's rejoinder is evasive at best. He does not deny, as indeed he cannot, his involvement in the Apna Ghar Layout; he only says it is irrelevant. Indeed it is not, for it shows that Kulkarni, Tikekar and SDC had dealings even prior to the one in the present suit and that SDC was not, as Kulkarni suggests, an outsider to his (i.e., Kulkarni's) proposed society.

85. Even this must be viewed in context. The Development Agreement itself clearly records that Kulkarni and his fellow promoters at the time were without funds, and that the consideration for that Agreement was SDC discharging their financial obligations. They could make no payment for acquisition of the lands. They have, in fact, made no payment. SDC has borne all costs, including paying MHADA and all stamp duties etc. A total of over Rs. 61 crores has been paid out by SDC in this manner to the State Government, over Rs. 89 lakhs to MHADA, more than Rs. 4 crores to OLDC and so on. Including legal fees, the total outlay by SDC exceeds Rs. 72 crores. Kulkarni's contribution, and that of his fellow Plaintiffs and Defendants Nos. 61 and 62, is precisely nil.

86. Yet another contextual fact: as I have noted, between the time of the Consent Terms and the order of the Supreme Court in 2008 and till 2012, Kulkarni did absolutely nothing. There is every reason to suspect that he would probably have done nothing even thereafter. But what follows from 2012 is a truly astonishing tsunami of legal activity: repeated appeals at every level, including to the Supreme Court, and representation by a staggering phalanx of the most formidable lawyers at each stage. I cannot help but notice with some

incredulity that Kulkarni engaged several senior counsel in the Supreme Court and a very large team of lawyers, including three senior counsel, before me. What is telling is not so much choice or even range of counsel but that all this frenetic litigation is apparently paid for by someone who claims to be "retired" and whose own documentation indicates that he could not even pay an amount of under Rs. 1.5 lakhs in 2004. Nothing explains this incongruity; nothing, that is, except perhaps this: the land in question is about 23 acres. It is in one of Mumbai's north-western suburbs, an area substantially developed, where land values are astronomical. It is an area of enormous development potential. In short, everything points to this being nothing but a sponsored litigation at the behest of a rival developer, possibly one who saw in the occurrence of Kulkarni's name in the Consent Terms an opportunity impossible to resist, a chance well worth taking when weighed against the potential development profits. This, and this alone, explains the sudden emergence of Kulkarni's member list, one with absolutely no documented history or background, and one for which the scantiest information is provided only very late in the day. Only this explains Kulkarni's volte face on the two Development Agreements: his allegation that the second one (DA-2) was interpolated and fraudulent, an allegation investigated and found to be false, and the first one (DA-1) "vitiating" by misrepresentation; both allegations made a good eight years after date of the Development Agreement. Kulkarni's much-vaunted altruism is smoke and mirrors; nothing is as it is made to seem. He espouses no cause but his own. There is simply no other explanation for his failure to share with his supposed fellow members the details of the information he received on 9th April 2012 under the RTI Act. There is no explanation for his sudden source of funding for sustaining these litigations at these levels; this is, after no Public Interest Litigation, nor has anyone claimed it to be so. This is also the only reason that Kulkarni attempts to distance himself from SDC, a firm with which he has had extensive dealings in the past, a fact that he is careful to elide from the plaint. Hence, too, his inconstancy in recognizing the 14 original promoter members of the 5th Defendant society, and his refusal to provide any meaningful data about his fellow Plaintiffs. Most of all, this is the only reason for Kulkarni's peculiar construction of the Consent Terms, one by which he now claims plenipotentiary rights in and over the property. I found particularly startling the submission that without Kulkarni personally being allotted the land and taking title, albeit in trust, the society acquired no rights. This is incorrect: it is contrary to the plain wording of the Consent Terms and, in particular, to the very first lines of Exhibit "B" to those Consent Terms. Equally extraordinary is the submission that since he was the original Chief Promoter, everything Kulkarni says in regard to membership must be accepted as gospel without need for further corroboration. I have already noted that his explanation for the induction of the remaining Plaintiffs and Defendants Nos. 61 and 62 is not in the least credible. This concatenation of factors points to only one thing: the Plaintiffs are fatally wanting in bona fides.

87. On this view of the matter, Mr. Ganesh's submission that the Court should

take a "broad brush" approach, one that I understand to be an invitation to overlook all the very many things that must weigh against the Plaintiffs, does not commend itself in the slightest. This is an argument of convenience, meant only to put a gloss on what is, to my mind, and prima facie, a case that is not merely frivolous, but worse: speculative, false and driven by an outsider.

D. CONCLUSION, ORDER & COSTS

88. There is no manner of doubt in my mind that the Plaintiffs cannot possibly be said to have made out any sort of prima facie case. In this assessment, I have not had any regard at all to the previous ad-interim order, or the order of another learned single Judge of this Court dismissing Kulkarni's Writ Petition. The facts and submissions as I have set them out alone lead ineluctably to this conclusion. Given the expenditure made by SDC and the formation of the 5th Defendant Society, and, too, the fact that among the Defendants are those who appear, prima facie, to be the original promoter members of the Society, the balance of convenience cannot possibly be said to be with the Plaintiffs. Indeed, it is against them. As to irretrievable prejudice or injury being caused to the Plaintiffs, there is none. Not one of Kulkarni's fellow claimants is shown even prima facie to be promoter members of the Society. They have, between them, paid not a farthing toward the allotment of the land or its attendant costs. For four years, between 2008 and 2012, they sat indolent and idle. None of the tests for the grant of interlocutory orders can be said to be satisfied. This is on the assumption that the Plaintiffs are entitled to final reliefs, and that the interim reliefs they seek are a step in aid of those. As I have noted, there is prima facie material to indicate that the Plaintiffs' attempt is to bypass a statutory prohibition and to achieve in a circuitous manner that which they failed to do directly. Reliefs must be denied to the Plaintiffs.

89. There remains the issue of costs. As I have noted, everything points to this being a sponsored litigation, with Kulkarni having lent his name to some other entity. On his account alone, huge amounts have had to be spent in defending this and associated litigations. The present litigation is one I have found to be without the faintest glimmer of merit. It is precisely the kind of litigation--speculative, lacking in bona fides, sponsored, an abuse of the process of law and of the Court, and perhaps even a fraud on the Court--that our Supreme Court has repeatedly decried and deprecated, even said should be visited with exemplary and penal costs. These should, in my view, be paid to SDC, the 4th Defendant, and the Apna Ghar Co-operative Housing Society Ltd., the 5th Defendant, the two parties most affected. I quantify these costs at Rs. 20 lakhs payable to each of these Defendants. Though it may seem high, it is undoubtedly an infinitesimal fraction of the costs actually incurred in opposing this Notice of Motion: SDC's statement of costs and expenses includes an amount of about Rs. 3 crores on litigation alone. It is true that SDC, too, is a developer, but it is one with a history of contractual rights that prima facie it appears to have discharged. The costs that I have ordered are little more than a drop in the

ocean of the litigation costs that Kulkarni and his fellow claimants have foisted on the contesting Defendants.

90. The Notice of Motion is dismissed with costs as indicated.

91. The Supreme Court by its order dated 4th August 2014 directed the status quo to continue for a period of 10 weeks from that date. That period expires next week, by which time this Court will be in its Diwali Vacation. In view thereof, MHADA is directed not to hand over possession of the suit property till 14th November 2014. The order of payment of costs shall also remain stayed till then.

1 Throughout, a reference to the Plaintiffs includes these two Defendants. 2 Consequently, SLP (C) No. 18924 of 2014 was renumbered as Civil Appeal No. 7205 of 2014. 3 Mr. Samdani addressed in rejoinder, Mr. Ganesh being unavailable on that day. I have noted their respective submissions in opening and in rejoinder together for convenience and clarity. 4 Part of Exhibit "L" to the plaint, the Plaintiffs' application for de-registration of the 5th Defendant Society; page 232 of the Plaint. 5 Exhibit "A" to the Plaintiffs' Affidavit in Rejoinder dated 6th January 2014. 6 Defendants Nos. 7, 8, 10, 11, 13, 14, 16, 27, 28, 34, 46, 47, 48 and 55 13 Cooverjee H. Plumber Vs. Vasant Theosophical Co-Operative Housing Society, Ltd., ; decided under the Bombay Cooperative Societies Act, 1925 that had provisions in pari materia.