
(1992) 12 BOM CK 0025
In the Bombay High Court
Case No : Suit No. 891 of 1970

Bomi Munchershaw Mistry

APPELLANT

Vs

Kesharwani Co-operative Housing Society Ltd. and Others

RESPONDENT

Date of Decision : 03-12-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 13, Order 1 Rule 9, Order 31 Rule 1
Contract Act, 1872 — Section 2
Evidence Act, 1872 — Section 115
Limitation Act, 1963 — Article 113, 3(2)
Specific Relief Act, 1963 — Section 20, 20(2), 26, 9
Transfer of Property Act, 1882 — Section 105
Trusts Act, 1882 — Section 3, 63

Citation : (1993) 2 BomCR 329

Hon'ble Judges : S.M. Daud, J

Bench : Single Bench

Advocate : F.S. Nariman, R.A. Dada, B.R. Zaiwala, K.D. Mehta and P.N. Mehta, instructed by Payne and Co, for the Appellant; Aspi Chinoy and N.H. Seervai, instructed by Eastley Lam and Co. for defendant No. 1 and F.E. Devitre and S. Tejpal, instructed by Gagrath and Co. for defendants Nos. 4-A and 5, for the Respondent

Judgement

S.M. Daud, J.—This is a suit for enforcing rights allegedly conferred under conveyance dated 20th March 1951 - hereinafter referred to as "Ex.B".

2. Ratanchand Hirachand Doshi was the owner of a fairly large and valuable property comprising land and structures thereon which property was acquired by him on 15-4-1947 for a consideration of Rs. 6,55,580.80 ps. (see Ex. A-95). Certain parcels of vacant land from out of this property were transferred under three different transactions dated 28-11-1947, 18-5-1949 and 27-4-1950. That left Ratanchand with land measuring 6350.40 sq. yds. with various structures thereon. The structures included Ratan Villa also known as "Ratan Villas" or the "main bungalow", servants' quarters, out-house/guest-house, Secretary's house

and garages. The area on which these structures stood covered 1292 sq. yds. A thousand sq. yds. to the west facing the Arabian Sea was required to be kept vacant as per the Government convenient. The vacant area in bits and pieces totalled 2375 sq. yds. This last figure has been arrived at after excluding from the whole, the area of 565 sq. yds. covered under Ex.B, and that, admittedly required to be kept vacant according to the covenants of Ex.B. The purchasers under Ex.B are the trustees of an Indenture of Settlement dated 17th March 1951. The settlers of that settlement were Munchershaw Mistry, Kekobad Mistry and Dinbai Mistry. Those constituted as trustees by this settlement were Munchershaw Mistry, Kekobad Mistry, Maneck Mistry and Khurshed Mistry. Dinbai was the mother of Munchershaw, Kekobad and Maneck. Khurshed was the wife of the said Maneck. The settlors had placed with the trustees a sum of Rs. 40,000/- and the trustees were authorised to purchase property--movable as also immovable--with the corpus.

3. Ex.B contains various terms, the important ones being thus : Immediately after the preface comes the paragraph specifying that the vendor Ratanchand owns and possesses a piece or parcel of land or ground situated at Nepean Sea Road the full description whereof is given in the First Schedule which schedule forms a part of Ex.B itself. Next, comes the mention of property pointed out by red-coloured boundary line in a plan annexed to the document and marked plan A. This red marked portion, it is made clear, is to be granted or intended to be granted. The price payable by the purchasers viz., the trustees on behalf of the trust, is fixed at Rs. 103/- per sq.yd. On actual measurement the area is found to measure 565 sq. yds., its total value being Rs. 58,195/-. The purchasers are said to have paid to the vendor a sum of Rs. 5,000 as earnest money on 26th October 1950. Ex.B goes on to recite that for the consideration of Rs. 58,195/- the vendor has agreed to convey to the purchasers the piece or parcel of land or ground described in the Second Schedule to the document and delineated on the plan marked "A". The purchasers together with their agents, workmen, servants etc., have been given the right to pass and re-pass from the central passage of the main gate as has been shown in the plan marked "B". This passage is marked in burnt-sienna in plan marked "B". The vendor covenants with the purchasers that he has good right, full power and absolute authority to effect the sale. The covenant as to title is followed by the crucial words in a certain setting, and justice cannot be done thereto without reproducing the same at this very early stage. The recital is :

"THE VENDOR DOTH HEREBY COVENANT WITH THE PURCHASERS THAT the Vendor, his heirs... assigns and all persons... claiming title from him shall, for all times, keep the space on the West of the land agreed to be sold and specified on the plan hereto annexed and marked "B" and thereon surrounded by a red coloured boundary line unbuilt upon and open to sky AND FURTHER THAT THE VENDOR, his heirs... and assigns and all persons claiming title from him shall not build any structure at any time hereafter higher than the present existing garages on the remaining land of the Vendor nor any structure in front towards

the south or on the central passage or in the garden in front of the property now known as RATANA VILLAS BUNGALOW as shown on the plan hereto annexed and marked "B" and thereon marked in burnt-sienna colour..."

Then follow the covenants with the Vendor promising to allow the purchasers passage through the central passage shown in burnt-sienna colour in plan "B", permitting the purchasers to erect a porch without pillars on the strip of land ten feet wide, and proposed to be kept open by the purchasers on the west of the land and also to build weather sheds not exceeding a certain height and width. The First Schedule, to the extent relevant, is in these words :

"ALL THAT piece or parcel of land admeasuring 6,933 square yards or thereabouts together with the messages, tenements and buildings standing thereon... which said land and hereditaments and premises form part of a larger property and which larger portion is registered by the Collector of Land Revenue under... New No. 1989 C.R.R. 7141 and New Survey Nos. 1/7141 and 2/7141 and Cadestral Survey No. 590 of Malabar and Cumballa Hill Division."

The Second Schedule, again to the extent relevant, says :

"ALL THAT piece or parcel of land or ground admeasuring 565 square yards or thereabouts, forming part of the land described in the First Schedule...."

4. Plaintiff comes from the Mistry family, being the son of Munchershaw and defendant No. 6. Dinbai was his paternal grandmother, her sons being Munchershaw, Kekobad and Maneck. She had one daughter named Banoobai. Dinbai expired on 12-9-1961, while her sons and daughter expired as under :

Munchershaw on 23-2-1962 Maneck on 3-9-1972 Kekobad on 1-10-1980
Banoobai on 8-10-1975

Khurshed the wife of Maneck died on 11-11-1978. Ratanchand passed away on 16-11-1981. Defendant No. 6 as said earlier is the widow of Munchershaw. Defendant No. 7 is the daughter of Kekobad and defendant No. 8 is the wife of the plaintiff. Presently, the office of trustees vests in defendants 3-A, 4-A and 5.

5. Munchershaw on 28-6-1951 applied to the Bombay Municipal Corporation (BMC) for permission to put up a structure on the site purchased under Ex.B. The BMC called upon him to supply certain information and in response to the said request, Munchershaw gave a reply on 12-7-1951 which reply is at Ex. W. From the contents of Ex. W it would appear that Munchershaw could have sent along with Ex. W a copy of Ex.B as also the plan B thereto. The property purchased by the trust was built upon in 1954-55 and the structure put up was three-storeyed. This structure, together with the land unbuilt upon, will hereinafter be referred to as "Maneckabad". The remaining portion of the property which was retained with Ratanchand will be referred to as "Ratan Villa".

6. The trustees through Munchershaw or at least Munchershaw so styling himself on 12-9-1959, addressed a letter to the BMC seeking permission to put up

additional floors on the structure in Maneckabad. A ground pleaded in support of the demand was the alleged covenant of Ex.B restraining the owner of Ratan Villa from putting up any structure higher in height than the existing garages which were estimated to be about 9 ft. high. This request was turned down by the BMC by its reply Ex. A-2 dated 6-10-1959, by pointing out that the trust could not be given the advantage of open spaces not belonging to it.

7. The first defendant society was registered to as a co-operative housing society on 19-8-1960. Its membership has undergone drastic changes and the present position may well be that none of the founding fathers is any longer a member of the defendant No. 1 society.

8. Suit No. 304 and 1954 came to be filed by Ratanchand on 12-3-1954. Defendants to that suit were Ratanchand's children Rajesh, Nirmala and Aruna. The suit was a suit for partition and separate possession of the property as between him and Rajesh, with provision being made for the repayment of debts outstanding from the joint family. One of the properties placed in the hotchpotch as being partible was Ratan Villa. Rajesh and Aruna were minors when the suit was filed and therefore a Court Officer was appointed as their guardian ad-item (GAL). Ratanchand had been unlucky in some business ventures undertaken by him and had become indebted. With a view to pay off his debts Ratanchand moved a motion seeking permission to sell Ratan Villa to one Gordhandas Punjabi as per the Articles of Agreement annexed as Ex.B to that notice of motion. The Articles contained certain clauses in relation to the restrictive covenants of Ex.B. Ratanchand in the Articles said that to the best of his knowledge the restrictive covenant in Ex.B extended only "to the area in front of the main bungalow to the east and to the area in front of the three garages to the north and not to any other area". Ratanchand agreed to use his best efforts to procure at his own cost and expense within three months from the date of the Articles a deed by way of clarification and confirmation in conformity with the belief entertained by him from Maneck Mistry and other purchasers so shown in Ex.B or their successors-in-title etc. Punjabi was to be given a copy of the deed of clarification and/or modification within the stipulated period. The notice of motion was moved on 7-9-1962. Even before this, Ratanchand had made approaches to the plaintiff. Letters written by him are at Ex. A-114 and of the dates 23-7-1962, 25-7-1962, 8-4-1964 and 10-4-1964. Letter of 23-7-1962 speaks of Ratanchand learning from a Solicitor that plaintiff would be glad to meet Ratanchand's Architect. He wanted to know the time and place of the meeting so that he could get in touch with the Architect and arrange for the meeting. By letter of 25-7-1962 Ratanchand called upon the plaintiff to give the built-up area of Maneckabad. Letters of 8-4-1964 and 10-4-1964 again requested the plaintiff to furnish particulars regarding the built-up area of Maneckabad. G.G. Zaveri had become interested in property Ratan Villa and this fact had become known to defendant No. 1. On 29-4-1964, Zaveri addressed Ex. A-3 to Ratanchand. This letter contained an offer to take the property on lease for 98 years subject to an option on the part of the person making the offer to

seek a renewal for a further period of 98 years. The rent was to be fixed at the rate of 6% per annum to be calculated on the basis of the entire value of the property placed at Rs. 27,50,000/- A deposit of Rs. 75,000/- was offered. The offerer went on to recite a number of terms one of which was worded thus :

"that there is no restrictive covenant regarding construction on the property except as shown in the plan handed over to him."

Zaveri, on 5-5-1964, entered into an agreement to lease the property to Nainmal P. Shah and Girish Gala who paid a deposit of Rs. 75,000/- to him. On 16-10-1964, the Solicitors on behalf of the intending lessees rescinded the agreement and called upon Zaveri to refund the sum deposited with him along with interest. The request was complied with on 23-12-1964 vide Ex. A-33. Zaveri on 18-12-1964 entered into an agreement to lease the property to R.J. Shah & Co. Pvt. Ltd., from whom he received a deposit of Rs. 1,00,000/-. The intending lessees rescinded the agreement and took back the deposit made by them.

9. Defendant No. 1 on 15-6-1965 addressed Ex. A-41. to Zaveri. The letter spoke of defendant No. 1 learning that Zaveri had finalised the purchase of Ratan Villa and that defendant No. 1 was interested in purchasing the property with complete possession at the rate of Rs. 500 per sq.yd. on certain terms. Ex. A-41. spoke of the understanding of defendant No. 1 about there being a covenant on the main bungalow from Maneck Mistry and others and that the same was to be removed by Zaveri at his cost. One important recital in the letter was, that there was no restrictive covenant regarding construction on the property, except as shown on the plan handed over by Zaveri to defendant No. 1. The BMC on 17-2-1966 received a plan along with an application purporting to be u/s 337 of the BMC Act. Zaveri's Solicitors on 8-7-1965 addressed a letter to the Solicitors of Ratanchand offering to purchase the suit property for Rs. 30,00,000/-. On 12-7-1965, a notice of motion was taken out in the partition suit by Ratanchand seeking the Court's sanction for the transaction in favour of Zaveri. The GAL of the minors filed an affidavit averring that Zaveri had withdrawn his offer to purchase the property on 8-7-1965. The motion was dismissed on 30-7-1965. By an order of the Court made on 28-9-1965, the Court Receiver was appointed the Receiver of the property figuring in the suit. The Court Receiver was not to take charge of properties till 3-11-1965. A consent decree was in the offing and the GAL moved the Court for permission to enter into the settlement on behalf of minor Rajesh. The affidavit given in support of the application by the GAL is at Ex. A-47. and recites that the settlement was for the benefit of the minor. Paragraph 14 of the said affidavit, amongst other things, spoke of Ratan Villa being of the value of Rs. 20,00,000/- with a mortgage encumbrance of Rs. 3,10,000/-. On this aspect the GAL had this to say :

"On making inquiries I am informed by my attorneys that the plaintiff had entered into restrictive covenants, before the filing of the above suit, when he sold a part of the land at Nepean Sea Road adjoining the said Ratna Villas to

Munchershaw Mistry and others. I am therefore advised that the value of the said Ratna Villas at Nepean Sea Road would not be what it would have been if the same had not been subjected to restrictive covenants as aforesaid. The fact of the restrictive covenants had been brought to the notice of the plaintiff's attorneys and Seth Lalchand Hirachand, the brother of the plaintiff and it is admitted that the said property is subject to restrictive covenants."

Ratanchand had made an affidavit and a supplemental affidavit for sanction to the settlement. That affidavit is at Ex.D. In this affidavit in respect of the Ratan Villa property he had this to say :

"The immovable property at Nepean Sea Road is a valuable one but it is mortgaged for over Rs. 3 lacs and it is subject to restrictive covenants so that the development of the property is retarded. At present owing to Municipal restrictions, no good offer is coming for the property. All offers previously made were withdrawn because of the said Municipal restrictions and the said covenants. The said property fetches a monthly rent of Rs. 952/-. It is not sufficient to pay Municipal bill, Income Tax and wealth-tax."

In the supplemental affidavit at Ex. E-1, Ratanchand spoke of Ratan Villa having been valued at Rs. 12,24,000/- by Chartered Architect Mr. M.H. Belaugi, his attempts to sell the property, his receiving big offers in the first instance and which offers had been withdrawn as soon as the intending purchasers learnt that the FSI was 1.33 only and that there were restrictive covenants regarding the area and the height of the structures to be built in future.

10. On the 5th November 1965 under Ex.C a consent decree was passed and it was under that consent decree that Ratanchand's brother Lalchand came to be appointed as the Receiver of the movable and immovable properties coming to the share of Ratanchand. Lalchand was saddled with certain liabilities -- the principal one being, to discharge the debts of the joint family as also Ratanchand. He was given the power to dispose off the joint family properties for the discharge of the aforementioned debts. Zaveri and others (not disclosed) on 1st December 1965 addressed Ex. A-115 to Lalchand offering to purchase Ratan Villa together with structures standing thereon at the cost of Rs. 28,00,000/-. Two terms set out in this letter are to this effect:

"We understand there is a covenant on the main bungalow from Mr. Maneckji Mistry or his nominees (who is one of the lessees). We shall negotiate with Mr. Mistry to get the said covenant removed at your cost, which shall in no case exceed the sum of Rs. 65,000/-... It is agreed and understood... that there is no restrictive covenant regarding construction on the property except as shown in the plan handed over by you to us."

The 1st defendant on 13-12-1965 under Ex. A-50 addressed a letter to the Attorneys of Zaveri offering to purchase from Zaveri Ratan Villa at the rate of Rs. 640/- per sq.yd. on certain terms and conditions. This letter contained various clauses, amongst them being two, which read as follows :

"Our clients understand that there is a covenant on the main bungalow from Mr. Maneckji Mistry and others and that your client shall remove the same at his cost.. It is agreed and understood... that there is no restrictive covenant regarding construction on the property except as shown in the plan handed over by your client to our clients."

Ex. A-51 is a letter dated 6-1-1966 addressed to Zaveri through the Solicitors of the 1st defendant repeating the earlier offer and also the recitals reproduced above.

11. Maneck Mistry on 2-2-1966 addressed Ex. AA-145 to the plaintiff intimating that there was an offer from Ratanchand to give some land in exchange for release of some of the covenants. This would be in addition to some cash consideration. Maneck Mistry, from the letter, appears to have been in favour of the acceptance of the proposal as the transfer of open land to the trustees would mean extra F.S.I. for Maneckabad. He invited plaintiff to attend a meeting at his office on 3-2-1966 at 3.00 p.m. Plaintiff turned down the proposal making it clear that he was against the release of the covenants, that Maneck Mistry was not to go ahead with any talks on the subject and that he would not be attending any meeting. The reply of the plaintiff to this effect is at Ex. A-147 dated 3-2-1966. Enclosed along with Ex. AA-145 i.e. the letter of Maneck Mistry to plaintiff, was a draft of the proposed transaction between the trustees and Ratanchand. The same is at Ex. AA-146 and purports to record a release of the height- restriction covenant appearing in Ex.B in lieu of a lease of 400 sq.ft. of open land by Ratanchand to the trust for a term of 98 years, the monthly rental being the nominal sum of about Rs. 10/-. Phadke & Co., acting as Solicitors on behalf of defendant No. 1 inserted an advertisement in the Free Press Journal intimating defendant No. 1's desire to acquire Ratan Villa and inviting claims and objections from those interested in the property. The BMC received a proposal of defendant No. 1 together with plans to put up a structure on the site of the Ratan Villa main bungalow. Phadke & Co. addressed purchaser's requisitions to the Solicitors for Zaveri vis-a-vis that person's title. This was on 23-2-1966 and 1-3-1966 vide Exs. A-52 and A-54 respectively. One of the queries to be found in Ex. 54 was that calling upon the Vendor to specify whether the property was subject to "any restriction and/or reservation as to the use and enjoyment thereof". The reply given by the Vendor's Attorney was couched thus:

"Subject to the restrictive covenants contained in the Conveyance dated 20-3-1951 in favour of M.P. Mistry and others there is no other restriction as to the user or enjoyment of the property."

Zaveri's Solicitors on 4-3-1966 addressed purchaser's requisitions to the Solicitors for Lalchand. One of the queries put was in relation to the difference in the area of the land purchased on 15-4-1947 and that agreed to be sold. The reply given by the Solicitors for Lalchand was to the effect that Ratanchand had sold a portion of the land by a Conveyance dated 20-3-1951 to M.P. Mistry and others, that the conveyance contained certain restrictive covenants, that the

purchaser had been given a copy of the said covenants, followed by the words "he has moved further now to remove the restrictive covenants".

12. In March 1966 two letters were addressed by Ratanchand to the BMC on 2-3-1966 and 9-3-1966 respectively. In the first letter which is at Ex. Soc 19 Ratanchand spoke of the need to increase the F.S.I. for the area from 1.33 to 2. In support of this claim he mentioned the restriction upon building within 100 yards of the seaside as also on the "garden, round passage and central approach road". The letter of 9th March 1966 was something in the nature of a reminder to that sent on 2-3-1966. Dr. Johari explained these efforts to get the F.S.I. increased in an affidavit filed by him vide Ex. Soc. 20 in Miscellaneous Petition No. 501 of 1968.

13. Lalchand's Solicitors on 28-3-1966 recorded that Zaveri had brought about the agreement to removed the restrictive covenants in Ex.B- Ex. A-131 dated 4-4-1966 is a letter of Lalchand's Solicitors to Zaveri's Solicitors intimating the latter that their client, Zaveri, had taken a copy of Ex.B and also a copy of the restrictive covenants appearing therein. It was further mentioned that Zaveri had arranged for the removal of the covenants. A copy of this communication was sent to defendant No. 1's Solicitors by Zaveri's Solicitors. Defendant No. 1's Solicitors wrote Ex. H on 5-4-1966 to Zaveri's Solicitors to know whether Zaveri had removed the restrictive covenants, and if so, what steps had been taken by him to attain this object. Sometime in May 1966, under Ex. A-150 an agreement for the sale of Majas lands at Andheri was arrived at between Maneck Mistry's daughters and Zaveri. Zaveri's Solicitors on 24-5-1966 informed Lalchand's Solicitors that the agreement between the trustees and Zaveri had not been finalised. The letter to that effect is at Ex. A-151 Lalchand's Solicitors were getting impatient and on 11-6-1966 addressed Ex. A-132 to Zaveri's Solicitors informing them that the issue of removal of restrictive covenants had nothing to do with the execution of an agreement to sell. Zaveri's Solicitors were sent the draft of an agreement to sell as between Zaveri and defendant No. 1 on 23-6-1966 approved by the Solicitors of defendant No. 1--the draft being at Ex. A-170 Clause 9 of Ex.A-170 was added by the Solicitors of defendant No. 1 and it reads thus :

"The Vendor has agreed with Munchershaw Phiroze Mistry and the owners of the adjoining property to give to them lease of 400 sq.ft. of land as shown in the plan annexed hereto by green coloured boundary line for a period of 98 years at the monthly rent of Rs. 10/- on the owners agreeing to keep the said land unbuilt upon and open to the sky in consideration of the said lessees agreeing to waive the covenant against the height restriction on the main bungalow. The purchaser shall abide by the said agreement and shall be entitled to the benefit and bound by the burden thereof."

14. Now come two agreements to sell at Exs. A-111 dated 2-7-1966 and 23-7-1966 at Ex.A-112 between Zaveri and defendant No. 1. The clauses relevant in these two documents read as follows :

"The vendor agrees... to remove the restrictive covenants on the property agreed to be sold (sold?) by Shri Ratanchand Hirachand to M.P. Mistry and others in a Conveyance dated 20th March 1951. The purchaser agrees to bear all costs of such removal provided that the Vendor shall on the execution of this agreement hand over to the purchaser complete possession of the property with vacant possession of the first floor of the main bungalow and the second floor of the guest house.

The Vendor has agreed with Munchershaw Phiroze Mistry and the owner of the adjoining property to give to them lease of 400 sq.ft. of land as shown on the plan hereto annexed and thereon surrounded by green coloured boundary line for a period of 98 years at the monthly rent of Rs. 10/- on the lessees, agreeing to keep the said area unbuilt upon and open to the sky in consideration of the said lessees agreeing to waive the covenant against the height restriction on the main bungalow. The purchaser shall be entitled to the benefit and bound by the burden thereof."

15. In August 1966 a board was put up at the Ratan Villa proclaiming that the same was that of the defendant No. 1 Society Exs. I-1 and I-2 pertain to F.S.I.

16. Ex.K purporting to have been executed on 21-3-1967, records the Articles of Agreement between three parties viz. Lalchand, Zaveri and the defendant No. 1 Society. Briefly stated, under this document Zaveri agreed to transfer his rights in Ratan Villa to the 1st defendant. Ex.A-127 dated 23-3-1967 is a communication addressed by Lalchand to his Solicitors passing on them the copy of a draft conveyance prepared by Phadke Solicitor of defendant No. 1 for scrutiny and approval. The letter mentioned that the conveyance was to be "completed" before 31st March 1967. Under Ex.N dated 29-3-1967 Lalchand's Solicitors communicated their approval to the draft as altered by them. Zaveri, under Ex.A-139 which purports to bear the date 31-3-1967, gave indemnity to the first defendant, and, the following portion therefrom is of some importance :

"AND WHEREAS the Confirming Party had contended that the said covenant does not extend to the remaining land of the Vendor and therefore does not affect the property conveyed under the aforesaid Conveyance of even date in favour of the purchasers;

AND WHEREAS the Purchasers have agreed to complete the sale on the Obligor passing an Indemnity in their favour in the manner hereinafter appearing ;

AND WHEREAS the sale is being completed today.....the Obligor shall and will... keep harmless and indemnified the Purchasers etc. against all rights and claims of any nature whatsoever which may be made by the said Trustees under the aforesaid covenant contained in the said Conveyance dated the 20th Day of March 1951 on the land conveyed ...which may be preferred, claimed or made against the Purchasers."

Ex.J is the conveyance passed in favour of defendant No. 1 with Zaveri being the

confirming party. It makes no mention of the restrictive covenants recited in Ex.B, though taking care to recite the agreements at Exs. A-111 and A-112.

17. Under Ex.J, a substantial amount of the price had been withheld and made payable in instalments. The Solicitors representing the Court appointed GAL in Suit No. 304 of 1954 were to be paid their costs from out of the sale proceeds. They therefore addressed a letter on 11-7-1967 to Phadke & Co., intimating their right to be reimbursed from out of the sale proceeds. Phadke forwarded the letter Ex.A-163 dated 11-7-1967 to the Solicitors of Zaveri and Lalchand. On 19-7-1867, Lalchand's Solicitors addressed the Solicitors of Zaveri and defendant No. 1 about the anxiety of Lalchand to pay off several Solicitors but his being required to defer this because the sale had not been completed. The relevant sentences in this communication read as follows :

"He is only waiting for the completion of the sale... Please let us know when your client wants to complete the sale. The delay in completion of sale has made many Attorneys anxious for their bills."

18. From August 1967 till August 1968 the demolition of the structures on the land including the main bungalow was carried out. Defendant No. 1's Auditors in their report for the financial year ending 30-6-1967 spoke of the Society having agreed to purchase a plot of land etc. and having paid a sum of Rs. 4,03,000/- to Lalchand for the purchase of the land. The Solicitors representing Court appointed GAL on 6-10-1967 addressed Ex.A-122 to defendant No. 1's Solicitors reminding them to ensure that the sale of the suit property was not completed without their getting costs payable unto them. The 1st defendant on 16-10-1967 addressed Ex.L-1 to the BMC seeking higher FSI of 2 on the ground that their plans were submitted in June 1965. The BMC under Ex.L-2 on 14-11-1967 called upon the 1st defendant to produce the original sale agreement. This request was complied with by defendant No. 1 on 22-11-1967 by sending a copy of the agreement dated 23-7-1966 which is at Ex.A-112. Defendant No. 1's Solicitors addressed a letter on 30-11-1967 to the Sub-Registrar of Assurances requesting his attendance at their office because of the indisposition of persons seeking condonation of delay in the production of the conveyance Ex.J for registration. The same day the Sub-Registrar attended and Ex.J was lodged for registration. A sum of Rs. 1,50,000/- was paid by defendant No. 1 to Lalchand on that day.

19. The BMC on 1-12-1967 under Ex.A-176 advised defendant No. 1 to approach the Government in regard to grant of FSI 2. Pursuant to this advice, the 1st defendant on 6-12-1967 addressed a letter to the State Government seeking higher FSI of 2. In this letter, it was stated that defendant No. 1 Society had submitted plans which were lost in a taxi and that covenants quoted in Clause 9 of agreement Ex.A-112 had been cleared. Lalchand on 8-12-1967 addressed Ex.A-134 to defendant No. 1's Solicitors alleging that a receipt for Rs. 1,25,000/- had been taken by defendant No. 1 without paying that amount to Lalchand. This charge was disputed by defendant No. 1's Solicitors on 13-12-1967 vide Ex.A-135, 15-12-1967 and 19-12-1967. On 9-2-1968, the

State Government addressed a letter to the BMC according approval of FSI 2 to defendant No. 1's proposed building subject to the restrictive covenants attached to the site. This was under Ex.U-1. On 13-2-1968, D.W. 3 Johari met the plaintiff and the visiting card which he gave on the occasion is at Ex.A-151. Plaintiff and Johari differ as to the reasons for the visit and what took place then. Defendant No. 1's Architect Godbole addressed a letter to the BMC on 4-3-1968 vide Ex.V-2 forwarding a fresh building proposal on the basis of the FSI being 2. Defendant No. 1 gave a written undertaking not to commence construction of the proposed building unless the existing structure was first demolished. Under Ex.A-75 dated 9-3-1968, the BMC gave an IOD and commencement certificate. The sanction was without prejudice to the covenants which were required to be adhered to as a condition of the approval.

20. Plaintiff filed Misc. Petition No. 501 of 1968 in this Court under Article 226 on 26-8-1968. The petition was to challenge grant of FSI 2 by the Government to the first defendant and the BMC's sanction to the plans. An injunction was sought against the first defendant from carrying out construction work on the basis of the sanction. The petition was admitted on 31-8-1968 and an ad-interim injunction granted. The said injunction was confirmed on 30-9-1968 after hearing defendant No. 1. Defendant No. 1 went in appeal against the order of injunction being Appeal No. 68 of 1968. In appeal, the first defendant was permitted to put up a construction it chose on the land on an undertaking to demolish such construction as would be found necessary to comply with the orders to be finally passed upon the petition. Defendant No. 1 was further precluded from taking up the contention of estoppel or otherwise on the basis of the indulgence shown by the appeal Court. Johari filed an affidavit-in-reply in the writ petition on 13-12-1968. The copy of that affidavit is Ex.Soc-20. Lalchand's Solicitors on 20-12-1968 addressed Ex.A-126 to the Advocates of Dhunmai Cassinath, a tenant of the part of the suit property intimating the sale of Ratan Villa to defendant No. 1 by conveyance dated 30th November 1967. N.R. Kalyaniwala a tenant in a part of Ratan Villa on 20-1-1969 addressed a letter to defendant No. 1's Solicitors wherein it was stated that the conveyance in favour of the defendant No. 1 bore the date 30-11-1967. Dhunmai Cassinath's Advocates on 24-1-1969 addressed Ex.A-125 to defendant No. 1's Solicitors. The letter intimated Dhunmai Cassinath learning from Lalchand's Solicitors of Ratan Villa having been conveyed by conveyance dated 30th November 1967. In April 1969, a new structure on the main bungalow site had come up to just above the ground level. Plaintiff applied for an expeditious hearing of the writ petition. The same was opposed by defendant No. 1 which gave an undertaking that it would not enter into any agreement relating to any portion of the property under construction with persons who were not members of the society pending disposal of the petition. In relation to new members it undertook to intimate these new members in writing of the undertaking given by it to the Appeal Court on 10-10-1968 and also that given on 2-4-1969.

21. Lalchand had acquired new Solicitors and on 8-5-1969 these Solicitors

addressed a letter to defendant No. 1 calling upon it to pay the balance of the price. This notice is at Ex.A-78. In July 1969 the height of the structure on the main bungalow site had crossed 13'-1". Lalchand filed Suit No. 856 of 1969 against the 1st defendant to recover the unpaid purchase price plus interest thereon totalling Rs. 15,00,000/-.

22. In the meantime, defendant No. 1 had raised an objection to the rateable value proposed by the BMC upon the new construction. The objection was heard by a Municipal Assistant Assessor and Collector. Johari, as the Secretary of defendant No. 1, pleaded that the land was struck with sterility in view of the covenant between the original Vendor and the trustees which prevented defendant No. 1 from going ahead with the construction. Defendant No. 1 in fact went in appeal against the rateable value to the Chief Judge of the Small Causes Court. This was on 29-9-1970.

23. Plaintiff had now decided to enforce his rights and therefore gave a notice u/s 164 of the Maharashtra Co-operative Societies Act, 1960. This notice was given on 1-10-1970 and it was sent to the Registrar, Co-operative Societies intimating a desire to file a suit to enforce various rights. The Registrar on 28-10-1970 under Ex.A-88 forwarded plaintiff's notice to the first defendant. The instant suit is filed on 5-12-1970. An ad-interim injunction was granted in terms of prayer (a) in a notice of motion taken out on 28-12-1970. During the pendency of the suit plaintiff's Solicitors addressed a letter on 16-2-1971 to defendant No. 1's Solicitors for production of certain documents. In relation to an agreement dated 26-10-1950, the Solicitors for defendant No. 1 replied that the said agreement was with Ratanchand. Suit No. 942 of 1973 against defendant No. 1, Lalchand, heirs of Ratanchand-the last named having died in the interregnum and Zaveri, was filed on 21-9-1973. This suit shall hereinafter be referred to as the "1973 suit". The relief sought in the 1973 suit was a declaration that Ex.J was void and deserved to be cancelled.

24. In May and June 1978, 20 members of defendant No. 1 resigned and were replaced by 20 others including Kushilal Dak, Advocate P.N. Nanavati and Vinod Jain. This group started disputing the membership of Johari and that led to institution of proceedings by Johari, and possibly, his wife against defendant No. 1 in the Co-operative Court. The annual report of defendant No. 1 for the year ending 30th June 1978 which is at Ex.A-157 made certain observations against Johari holding him responsible for the way in which the litigation had been conducted by that person - in particular, the undertaking given, which according to the newcomers entailed "serious liabilities and implications for the Society".

25. The first defendant in its written statement filed on 15-1-1979 in Suit No. 856 of 1969 brought by Lalchand not only denied the said person's claim, but also claimed a set-off. The plea was that Lalchand was not entitled to claim the full price stipulated in Ex.J. He was entitled to only Rs. 2,15,280/- as that would be the appropriate price where the sale was subject to covenants. Particulars of this were set out in an annexure marked Ex.3. The relevant portion from Ex.3 is

thus :

"On the basis of FSI 1.33, the total FSI for such construction would have been approximately 69,000 square feet. The price of the suit property viz. Rs. 21,50,000/- on the basis of the FSI 69,000 sq.feet would be worked out to Rs. 31.20ps. per square foot. By reason of the restrictive covenants contained in the conveyance dated 20th March 1951 not being removed by the plaintiffs, the defendants can construct approximately 69,000 square feet and the price payable for the property at Rs. 31.20 ps. per square foot would work out to Rs. 2,15,280/-. The plaintiffs are therefore entitled to recover from the defendants only the smaller price of Rs. 2,15,280/- and the defendants are entitled to the reduction in the price or by way of set-off for damages to the extent of Rs. 19,34,720/-."

The suit brought by Lalchand had not been preceded by a notice as required by section 164 of the Maharashtra Co-operative Societies Act. Therefore, he sought for and was permitted to withdraw the Suit No. 23-1-1979 with liberty to file a fresh suit. The fresh suit was filed by Lalchand on 13-6-1979 and was registered as that bearing No. 1098 of 1979. The claim in this suit was the same as that in the withdrawn suit and the first defendant came forth with a written statement and counterclaim on 12-11-1979. Particulars of the counterclaim were virtually the same as that given in the earlier suit. One of the reliefs claimed was - "defendants have suffered a loss or damage which they estimate in the sum of Rs. 19,34,720/- as per particulars marked Ex.G and in respect whereof defendants are entitled to a set-off and Rs. 43,472/- by way of counterclaim against the plaintiffs." Ratanchand was joined as a defendant to the counterclaim, but does not appear to have filed any reply thereto.

26. The first defendant through its Engineer addressed a letter to the BMC on 16-4-1980 pleading for a reduction in the rateable value of the land and one of the recitals was to the following effect :

"Till today the property is neither land under construction nor a constructed building and according to us its rateable value should be zero. Initially this land was purchased from the Vendor Shri Lalchand Hirachand for the price of Rs. 21,50,000/- when the FSI available was 1.33 but however in view of the alleged restrictive covenants we could construct only upto a height of 13 feet. According to the Society, in the light of above facts and circumstances, the price of the entire plot should not exceed 10% of the agreed price i.e. Rs. 2,15,000 in view of the pendency of the suits and injunctions."

The BMC reduced the rateable value from Rs. 48,445/- to Rs. 11,120/-.

27. Lalchand filed a written statement to the counterclaim of defendant No. 1 in the reinstituted suit bearing No. 1098 of 1979. In this written statement, he denied that there was any separate oral agreement for the removal of covenants. In any event, Lalchand expressed readiness to make a refund of the consideration received from the defendant No. 1, if it restored Ratan Villa to him.

This was not agreeable to the 1st defendant. It consented to a decree and agreed to pay Rs. 27,50,000/- to Lalchand with the further liability of interest at rate 18% per annum from the date of decree till realisation.

28. The appeal preferred against the decision in Misc. Petition No. 501 of 1968 was dismissed by the Appeal Court, as having been rendered infructuous in view of the subsequent action taken by the BMC and the State Government. The BMC had rejected defendant No. 1's proposal and the Government had withdrawn the FSI granted by it. Against the dismissal, the first defendant went in appeal by special leave to the Supreme Court of India. The ground taken in the SLP was that the appeal Court should have decided the appeal on merits and not on the preliminary ground of its maintainability, having regard to the retracted action of the BMC and the State Government. Special leave has been granted and the appeal is pending.

29. In November 1988 a Division Bench of this High Court allowed an appeal against the order of the Single Judge in the 1973 suit, which order had the effect of virtually striking off the entire plaint in the said suit under Order VI, Rule 16 of the Code of Civil Procedure. The 1973 suit therefore stands revived.

30. Plaintiff's Solicitors had made certain queries to the Solicitors of Lalchand and defendant No. 1. A reply came from them vide Ex.A-118 dated 22-6-1991.

31. Plaintiff's case for various reliefs specified in the plaint, sets out his locus to sue the defendants. First, he claims to be a tenant in the building known as Maneckabad, a beneficiary and a reversioner in the remainder to the extent of the corpus of the trust created by the Deed of Settlement dated 17-3-1951. At about the time when he and his wife became the tenants of the flat on the ground floor in Maneckabad, the lessors on behalf of the trust gave him an assurance that he would enjoy the benefits of the covenants given by and contained in Ex.B. A part of the first floor of Maneckabad is also used by him along with the other beneficiaries of the deed of settlement aforementioned. Ratanchand under Ex.B had undertaken to observe certain restrictions vis-a-vis Ratan Villa. These restrictions included a total ban on the erection of any structure whatsoever on the portion shown in burnt sienna colour in plan B annexed to conveyance Ex.B. Next, on the remaining property, whether then vacant or becoming vacant in future consequent to demolitions, no structure higher in height than 13'1" could be constructed. The space immediately to the west of Maneckabad and shown in red bounded lines was to be kept open to the sky for all times to come. These were covenants running with the land and Ratanchand's successors-in-title were bound by the same. Defendant No. 1 had notice of all these covenants and had still taken steps to circumvent them. They had attempted to include the land to be kept free for passage and re-passage, for the purposes of carving out a parking lot. Next, the plan annexed to Ex.J constitute a usurpation of Maneckabad as shown in yellow hatched lines in a plan annexed to the plaint. The acts of the first defendant had constrained plaintiff to sue for declarations and injunctions. The first was a declaration that defendant

No. 1 had no right, title or interest in respect of the portion shown in yellow hatched lines and that the said portion belonged to the trustees under the Deed of Settlement dated 17-3-1951. Defendant No. 1 was to be restrained from laying any claim to the said portion. The next declaration and injunction was in respect of the space kept vacant for passage and re-passage and shown in burnt sienna colour in plan B annexed to Ex.B. Defendant No. 1 be injected against providing for recreational space or parking lot in this portion. Thirdly, on no part of Ratan Villa property was defendant No. 1 entitled to construct any structure higher in height than 13'1". The prohibition existed not only in respect of land now vacant, but that which would become so vacant in future. Any structure newly constructed on the Ratan Villa property after Ex.B's execution, violative of the height restriction aforementioned, deserved to be demolished. A mandatory injunction to that effect was solicited.

32. Events pendente-lite have been referred to in the plaint by plaintiff fortifying his locus to sue on the ground that the demise of various members of the Mistry family who were the trustees/beneficiaries had rendered the estate divisible between the heirs of Manchershaw, defendant No. 6 and Kekobad. The plea of non-joinder of parties raised by defendant No. 1 is countered by impleading the heirs of Manchershaw and Kekobad etc. Such persons are defendants 6 to 8. They are neither necessary nor even proper parties to the suit, but had been joined only to obviate all difficulties. No relief, as such, is claimed against defendants 6 to 8. Defendants 3-A, 4-A and 5 are impleaded as trustees being successors of Kekobad, Maneck and Khurshed Mistry, the erstwhile trustees. Again no relief is claimed against them. What has preceded as a statement of plaintiff's case is, that which was set out in the plaint as originally lodged with additions to explain the joinder of defendants 3-A to 8.

33. Kekobad and Khurshed Mistry as defendants 2 and 4 had filed a written statement and the stand taken in this written statement was a masterly evasion of committing themselves to anything definite. As against this evasiveness, their successor trustees support the stand taken by the plaintiff. They want the benefit of covenants conferred by Ex.B and pray that the suit be decreed in terms of the different prayers made in the plaint.

34. Maneck Mistry though joined as defendant No. 3 and alive till 3-9-1972 did not file a written statement. This was despite a direction given by the Court that a written statement had to be filed by him.

35. Defendant No. 1 in its first written statement questioned the locus of plaintiff to file a suit to enforce the covenants allegedly appearing in Ex.B. It denied that the plaintiff was a beneficiary, tenant or reversioner in the remainder. According to it the property vested in the trustees and they alone could maintain the suit. As the trustees had not sued, the suit was not maintainable at all. Next, the suit was in respect of matters touching the business of defendant No. 1 Society which was a Co-operative Housing Society registered under the Maharashtra Co-operative Societies Act. Such a suit was barred u/s 94 of the said enactment. The

claim in suit was barred by limitation as the cause of action had arisen much before the three years preceding the institution of the suit. Defendant No. 1 had by inserting notices in local newspapers in February 1966 invited objections, if any. In August 1966, defendant No. 1 had also put up a board indicating that the plot had been purchased for construction of a multi-storeyed structure. Plaintiff was residing in Maneckabad which was very close to Ratan Villa and therefore had notice of all that was going on. In fact, he was taking a keen interest in the Ratan Villa property and the goings-on there. Even otherwise, the suit had been brought after gross delay and laches. Defendant No. 1 had been granted the IOD by the BMC in March 1968 and the Bhoomi Puja in connection with the structure proposed to be put on the site was performed in the same month. All the neighbours including plaintiff could not be unaware of defendant No. 1's intention to put up a multi-storeyed structure on the site which had been rendered vacant by the demolition of the main bungalow. Considerable expenses and labour had gone into the work done when the suit was instituted. Having been inactive, and deliberately so, plaintiff was not entitled to the equitable reliefs claimed by him. The declaratory reliefs claimed in the suit could not be granted, because the plaintiff though entitled to claim additional reliefs, had omitted to do so. In relation to the height restriction covenant, plaintiff was taking advantage of the words used in Ex.B. This also he was doing by distorting the nature of that document. What plaintiff had omitted to point out was that Ex.B came about in furtherance of an agreement to sell, negotiated between Ratanchand and Maneck Mistry and put into a document dated 26-10-1950. The height restriction covenant in the agreement dated 26-10-1950 clearly showed the same to be limited to the land under the garages and no more. As to the encroachment on the portion shown in the yellow-hatched lines, defendant No. 1 had not encroached upon any portion of Maneckabad. About the space left open for passage, it was defendant No. 1's case that plaintiff could not seek more than a right of convenient passage and re-passage over the said space. He was not permitted to say that the said space should be kept unutilised for any purpose, if it did not obstruct his right of passage.

36. The height restriction covenant could not be enforced as it was ambiguously worded, uncertain and opposed to public policy, in that it came in the way of provision for public housing. Defendant No. 1 as derivative owners could not be bound by the restrictions to which Ratanchand had subjected himself in Ex.B. The original trustees had not taken action to enforce the covenants of Ex. B against defendant No. 1 because of the bona fide belief that the height restriction covenant related only to the land under the then existing garages. Plaintiff's conduct was such as to constitute acquiescence, estoppel and/or waiver disentitling him to any of the reliefs claimed in suit. There was no truth in the allegation of Ex. B having been antedated. In any case, as one not a party to the transaction incorporated in Ex. B, plaintiff could not seek to advance the plea of its being an antedated document for reliefs which were extraneous to the alleged antedating. The plea of antedating of Ex. B could not be entertained in the suit

as Zaveri and Lalchand who were necessary parties to the same had not been impleaded. The physical condition of the area had so changed since the execution of Ex. B that it would be unjust and oppressive to enforce the height restriction covenant. Defendant No. 1 had made it clear to Zaveri and Lalchand that they were interested in Ratan Villa only if they could construct a multi-storeyed building upto the available F.S.I. on the property. They were given an assurance that their object could not be obstructed, and but for this assurance they would not have purchased the Ratan Villa property. The trustees by word and/or conduct had induced in defendant No. 1 a belief that the height restriction covenant was limited to the site on which stood the existing garages. Enforcement of the said covenant would confer an unfair advantage upon the plaintiff and place defendant No. 1 to a serious disadvantage. Similarly, enforcing the covenant would subject defendant No. 1 to unforeseen hardship, there being no corresponding hardship to the plaintiff or the trust. Plaintiff was not entitled to the injunctions claimed as damages would be an adequate relief to compensate him for the infringements complained of. In case defendant No. 1's interpretation of the height restriction covenant was not acceptable, the case of defendant No. 1 was that the language used in Ex. B was the result of a mutual mistake and did not correctly reflect the terms found in agreement dated 26-10-1950. As the language used did not give effect to the real intention of the parties. Ex. B had to be rectified to the requisite effect. The relief of rectification be granted to defendant No. 1.

37. Plaintiff in response to the defence of rectification contended that the agreement dated 26-10-1950 did not exist. It had been fabricated to support a false construction put on the height restriction covenant in Ex. B. In any case, the said agreement dated 26-10-1950 was as between Maneck Mistry and Ratanchand. Therefore, it could not affect the Vendees viz., the trust, of Ex. B. The claim for rectification was untenable as Ratanchand's legal representatives who were necessary parties to the same had not been impleaded. In any case, the said claim was hopelessly barred by limitation.

38. At a very late stage i.e. at the commencement of this year, defendant No. 1 came forth with the plea that a part of Ratan Villa viz. an outhouse, had been materially altered by Ratanchand in about 1952-53. The structure which until then consisted of a ground and one upper storey had been altered to ground and two upper storeys. This was done to the knowledge of the trustees as also the plaintiff. Plaintiff and his father were then residing just opposite the property Ratan Villa, residents of which property could distinctly see the building in which the work aforesaid was in progress. At the time the construction was in progress, none of the trustees had objected to the raising of the outhouse.

39. To the pleadings summarised in the preceding paragraph, plaintiff came out with denials. It was not true to say that any alterations had taken place in 1952-53. If the contrary was established, the alterations were carried out either surreptitiously or in a manner not injurious to the height restriction covenant

relied upon in the plaint. Neither Ratanchand nor defendant No. 1 had ever previously spoken of any such extension in the height of outhouse having been carried out in 1952-53. On the basis of the so-called changes, defendant No. 1 could not plead acquiescence, estoppel or waiver.

40. Pleadings aforestated have given rise to the issues enumerated below:

1. Whether the plaintiff has any locus standi to file and maintain the suit?
2. Whether defendants 2 to 4 did not take action to enforce covenants against the first defendant because of the bona fide belief that the height restriction covenant pleaded by the plaintiff related only to the land under the then existing garages?
3. Does plaintiff establish that the height restriction clause appearing in the conveyance deed dated 20th March 1951 covers the entire remaining property of the Vendor Ratanchand, excluding that portion of the property which is shown in burnt sienna and red colours in that plan accompanying the conveyance deed dated 20th March 1951?
4. Whether defendant No. 1 establishes :
 - (a) that the height restriction covenant restricts construction of a structure on the existing garages and is limited to the land below the existing garages as shown in the plan?
 - (b) that the height restriction covenant is limited to land not built up on at the time of the conveyance?
5. (a) Was there an agreement dated 26-10-1950 between Ratanchand and Maneck Mistry (original defendant No. 3)?
 - (b) Did Maneck Mistry agree to purchase the Maneckabad property from Ratanchand as per the terms contained in the said agreement?
 - (c) Whether the aforesaid agreement of 26-10-1950 was adopted by the trust which trust came into existence by deed of settlement dated 17-3-1951?
 - (d) Was conveyance dated 20th March 1951 executed pursuant to the aforesaid agreement?
 - (e) Was it the real intention of parties to conveyance dated 20th March 1951 to give effect to the aforesaid agreement?
6. Whether the conduct of the plaintiff has been such as to constitute acquiescence, estoppel and/or waiver disentitling him from any of the reliefs claimed in the suit?
7. Has this Court jurisdiction to try the suit notwithstanding section 94 of the Maharashtra Co-operative Societies Act, 1960?
8. (a) Does plaintiff establish the antedating of the conveyance dated 31-3-1967

the conveyance having been really executed in November 1967?

(b) If yes, what is the effect thereof?

9. (a) Are Zaveri and Lalchand necessary parties to the issue of alleged antedating of conveyance dated 31-3-1967?

(b) If so, effect?

10. Are the claims in suit within limitation?

11. (a) Is plaintiff entitled to injunctions mandatory and prohibitory claimed by him?

OR

(b) Is plaintiff not entitled to the aforementioned injunctions being guilty of gross laches, delay, waiver and estoppel?

(c) Whether the physical conditions of the area have so changed as to disentitle plaintiff from enforcing the reliefs claimed in the suit?

12. (a) Is the property conveyed to the first defendant divided from that conveyed to the trustees by a red line on the plan annexed to the conveyance and on the site by a wall built prior to 1967 by the trustees?

(b) If so, whether any property to the east of the boundary line has been conveyed to the first defendant?

13. Whether the declaratory relief claimed by plaintiff is barred by the Proviso to section 34 of the Specific Relief Act, 1963?

14. (a) Whether the passage figuring in the suit has to be kept fully open and with out allocation or reservation of parking space/recreation space by the first defendant? OR

(b) Is the only restriction upon the first defendant that of keeping the same unbuilt upon and provide convenient ingress and egress?

15. (a) Does defendant No.1 establish that it entertained and acted upon a bona fide belief about the height restriction covenant being limited to site under the existing garages?

(b) If so, whether enforcement of the height restriction covenant as suggested by the plaintiff would work great hardship upon the first defendant?

(c) If (b) is answered in the affirmative, is plaintiff not entitled to an injunction?

16. (a) Whether at all material times before the execution of the conveyance, the first defendant made it clear to G.G. Zaveri and Lalchand Hirachand that it was not interested in purchasing the property unless it was entitled to construct on the land a multi-storeyed building upto the available F.S.I. and that G.G. Zaveri and Lalchand Hirachand categorically assured first defendant that the property

was suitable for such construction as alleged in para 21(i) of the written statement of the first defendant?

(b) Whether but for such an alleged assurance the defendant No. 1 would not have entered into an agreement for purchase nor purchased the said property as alleged in para 21(i) of the written statement of the first defendant?

17. (a) Whether the covenants sought to be enforced are covenants running with the land and therefore enforceable against defendant No. 1?

(b) Did defendant 1 have notice of an alleged covenant restricting height restrictions on the entire remaining land of the vendor?

18. Whether the height restriction covenants contained in the conveyance dated 20th March 1951 are unenforceable because of ambiguity and uncertainty?

19. (a) Whether trustees by word or inaction at all times induced defendant No. 1 to believe that the height restriction covenant was limited to the site on which stood the existing garages?

(b) Does this disable plaintiff from seeking to enforce the covenant?

20. Whether enforcing the height restriction covenant in the manner suggested by the plaintiff would confer an unfair advantage to him vis-a-vis the first defendant?

21. Whether enforcing the height restriction covenant in the manner suggested by the plaintiff would lead to working of unforeseen hardship upon first defendant and no correspondent hardship on the plaintiff as also the trust?

22. (a) Does defendant No. 1 establish that damages would be an adequate relief to compensate plaintiff for infringements complained of?

(b) If so, is plaintiff not entitled to the mandatory and prohibitory injunctions claimed in the suit?

23. Whether the height restriction covenant is opposed to public policy as being an unreasonable fetter upon the provision of housing?

24. (a) Is the height restriction covenant not registered as required by law?

(b) If so, is it enforceable as against defendant No. 1?

25. Whether the alleged agreement dated 26-10-1950 stipulated a restriction in regard to height only in relation to the land under the then existing garages?

26 (a) Whether the stipulation in covenant Ex. B viz. "not to build any structure at any time hereafter higher than the present existing garages on the remaining land of the vendor... as shown in the plan hereto annexed and marked B"... was not give effect to agreed condition No. 2 in alleged agreement dated 26-10-1950 i.e. not to "build upper storey on the existing garages" and parties neither intended nor agreed to burden the entire land of the Vendor?

(b) Whether in expressing the portions quoted above defendant 1 establishes that there was a mutual mistake of parties to the conveyance dated 20-3-1951?

(c) Whether as the result of the alleged mutual mistake of the parties the second covenant in the conveyance dated 20th 1951 does not give effect to the real agreement and intention of the parties to the conveyance?

(d) If so, whether the said second covenant contained in conveyance requires to be rectified in the terms suggested by defendant No. 1?

27. Is defendant 1's claim in regard to rectification within limitation?

28. Is defendant No. 1 disabled from getting the relief of rectification for all or any of the reasons advanced by the plaintiff?

29. Is the claim for rectification untenable on account of non-joinder of Ratanchand Hirachand's legal representatives?

30. (a) Whether defendant No. 1 establishes that parties to the conveyance never understood and/or interpreted the height restriction covenant in the manner suggested by the plaintiff in the suit?

(b) Whether enforcing the covenant in the manner desired by the plaintiff would defeat the real intention of the parties and would impose un-contemplated hardship upon defendant No. 1?

(c) If so, effect?

31. Relief and costs?

Additional issues

M-I. Does defendant No. 1 prove that the outhouse/guest house in the Ratna Vilas compound was till late 1952/early 1953 a structure of ground and one upper floor only?

M-II. Does defendant No. 1 prove that in late 1952/early 1953 an additional upper floor was put up by Ratanchand to the outhouse, raising its height to 40" inclusive of the sloping roof and 35" to 36" excluding the said sloping roof?

M-III. (a) Was the trust and its then trustees in the facts mentioned in para 13(b) (2) of defendant's written statement, aware of the addition of a floor and the consequential raising of the height of the outhouse?

(b) If so, effect?

41. For a proper appreciation of the controversy it will be necessary to make some broad groups of the issues framed in the suit. Basically, the dispute between the parties lies within fairly well-defined confines. The broad categories into which the issues fall are as follows : First, there is the issue of the plaintiff's right to sue viz. his locus. Second, comes the contention about the claim in suit or part thereof being untenable because of the non-joinder of necessary parties,

jurisdiction and a defect in the frame of the suit. Third, is the hurdle of limitation which plaintiff has to cross by establishing that all the reliefs claimed by him are within limitation. Fourth, come the issues dealing with the entitlement or disentitlement of plaintiff to the main relief linked with the height restriction covenant. The Fifth set of issues would be those dealing with the construction of the height restriction covenant. Here, a consequential point would be the relief of rectification claimed by defendant No. 1 as an alternative to the no acceptance of its interpretation of the height restriction covenant. The Sixth category of issues would be those dealing with the comparatively minor reliefs. The Last issue would be that in relation to costs. I propose to adhere to these broad headings while discussing the issues. However some of the issues are so inextricably linked up with others, that a certain overlapping will be inevitable.

Locus

42. The locus standi problem is covered by the first issue and the stands taken by the parties are thus: Plaintiff says that he is a beneficiary and has a reversion in the remainder to the extent of the corpus of the trust created vide the Deed of Settlement dated 17-3-1951. He has thus a vested interest in Maneckabad. Next, the plaint speaks of plaintiff and his wife being given an assurance on behalf of the trust that as tenants of a certain flat in Maneckabad they would enjoy the benefit of the covenants given by and contained in Ex. B. Last, comes the contention that with the death of the original beneficiaries, the corpus of the trust property subject to the life interest of defendant No. 6 has become divisible amongst him and defendant Nos. 6 and 7. The first defendant questions the plaintiff's right to sue, contending, that as a beneficiary his rights are only through and/or against the trustees. In so far as third parties like the first defendant are concerned plaintiff has no right to sue them. Title in Maneckabad property vests in the trustees and the plaintiff being a mere beneficiary has no right to sue. They deny that plaintiff has a right to sue as an occupant and/or tenant of any portion of Maneckabad. They further deny that plaintiff is a reversioner in the remainder and has therefore a right to sue.

43. The plaint recital about plaintiff having a right to sue because of his being an occupant/tenant of Maneckabad is without substance. An occupant or tenant has no interest in the property except the right of occupancy consistent with legislation governing the subject-if any-and of course the contract of lease and/or license-if there be any. No attempt has been made by plaintiff to even testify in support of the plaint recital about him and his wife having received assurances from the original trustees that they would get the rights and benefits acquired by the trust under Deed of Settlement dated 17-3-1951.

44. Next, is plaintiff's claim about having a right to sue even as a beneficiary. It is not disputed that the title to the property Maneckabad vests in the trustees consequent to the provisions of the Indian Trusts Act, 1882(I.T.A.). Section 3 of the I.T.A. which is an interpretation clause defines a "beneficiary" as the person for whose benefit the confidence is accepted by the trustee, the person reposing

or declaring the confidence, being the author of the trust. The beneficial interest or interest of the beneficiary is defined as the right of the beneficiary against a trustee as the owner of the trust property. Relying on this definition, the argument on behalf of the first defendant is that the beneficiary's rights having been restricted by the statute, he has no estate or interest in the subject-matter of the trust enabling him to sue. The Indian law does not recognise the existence of separate legal and equitable estates. The trustee is the sole owner of the trust property. Cases relied upon in support of this contention are those reported in AIR 1931 196 (Privy Council) , W.O. Holdsworth and Others Vs. The State of Uttar Pradesh, , Commissioner of Wealth-tax, Bihar and Orissa Vs. Kripashankar Dayashanker Worah, , and Bai Dosabai Vs. Mathurdas Govinddas and Others, .

45. Defendant 1's stand is on a principle best expressed in the words of Sir George Lowndes speaking for the Judicial Committee of the Privy Council in AIR 1931 196 (Privy Council) . Says Sir George---

"The Indian Law does not recognise legal and equitable estates. By that law therefore, there can be but one "owner" and where the property is vested in a trustee, the "owner" must, their Lordship think, be the trustee... The trustee is, in their Lordships' opinion, the "owner", the right of the beneficiary being in a proper case to call upon the trustee to convey to him."

The above excerpts appear in the judgment while discussing the issue of limitation viz. whether Article 120 or 144 of Limitation Act (1908) applied to the suit. While construing section 1(1) of the U.P. Agricultural Income Tax Act, 1948, the Supreme Court in W.O. Holdsworth and Others Vs. The State of Uttar Pradesh, observed---

"The trustee is thus the legal owner of the trust property and the property vests in him as such. He no doubt holds the trust property for the benefit of the beneficiaries, but he does not hold it on their behalf. The expressions "for the benefit of" and "on behalf of" are not synonyms with each other. They convey different meanings."

The exposition aforementioned was sought to be relied upon in Commissioner of Commissioner of Wealth-tax, Bihar and Orissa Vs. Kripashankar Dayashanker Worah, vide section 21(1) of the Wealth Tax Act, 1957. The contention was repelled by the Court holding---

"It is true that it refers to a trustee as holding a trust property on behalf of others. The conception that the trustee is holding the trust property on behalf of others may not be in conformity with the legal position as contemplated by the Trusts Act, but the legislature is competent in the absence of any restrictions placed on it by the Constitution to give its own meaning to the words used by it in a statute."

46. The authorities relied upon by defendant No. 1 are sought to be countered by the plaintiff citing chapter and verse from statute, commentaries and precedents.

Order 31, Rule 1 CPC 1908, permits the beneficiary to initiate and be impleaded to a suit, though ordinarily it shall not be necessary to do so. Rule 1 had a progenitor in 15 and 16 Victoria 1852 which says --

"Rule 9. In all suits concerning Real or Personal Estate which is vested in Trustees under a Will, Settlement, or otherwise, such Trustees shall represent the Persons" beneficially interested under the Trust, in the same manner and to the same extent as the Executors or Administrators in suits concerning Personal Estate represent the Persons beneficially interested in such Personal Estate; and in such cases it shall not be necessary to make the persons beneficially interested under the Trusts Parties to the suit; but the courts may upon consideration of the Matter, on the Hearing, if it shall so think fit, order such persons or any of them, to be made Parties."

In AIR 1940 134 (Privy Council) , it was held that the beneficial interest though not technically an equitable estate in India, could be mortgaged by the beneficiary. That the beneficiary has an interest in trust property as distinct from a right against the trustee was recognised in *M.E. Moolla Sons Ltd v. Official Assignee, Rangoon*, 38 Bom.L.R. 1011 P.C. Sir George Rankin speaking for the Board cited a passage from (*Miller & Collins*), 1896(1) Ch. 573 and then remarked--

"These observations are at least sufficient answer to the view that the beneficiary has no interest in immovable property because his right is only to call upon the trustees to carry out their trusts or because the distinction between legal and equitable estates does not as such exists in the law of India."

A gradual loosening of the old rigidity is visible in later decisions: *L. Janakirama Iyer and Others Vs. P.M. Nilakanta Iyer and Others*, lays it down that section 63 of the I.T.A. is not exhaustive of remedies available to a beneficiary, where the trustee has improperly alienated trust property. Whether this authority compels a certain form to enable a beneficiary to sue as argued for defendant 1 is something I will come to later. What Janakirama (*supra*) specifies is that the beneficiary can sue third parties for more effective reliefs than those contemplated by section 63. Reliance is placed on plaintiff's behalf on *Govordhandhari Devasthan v. Collector of Ahmednagar*, 1982 Mh.L.J 390, to contend that trust property has dual owners viz., trustees as also beneficiaries. This decision however recognises that qua third persons, the law treats the trustees as the owner with a right and entitlement to represent the beneficiary in dealings with the world at large.

47. None of the authorities noticed above deal with the maintainability or otherwise of a suit brought by a beneficiary against a third party. Light on this topic comes from a suit instituted by the Rajah of Ramnad as hereditary trustee representing the orthodox element of a community determined to bar the entry of Shanars into a certain temple. At the stage of appeal, the Rajah entered into a compromise with the Shanars, which compromise was construed as a sellout by

orthodoxy. They entered the fray seeking impleader. Pleading to be beneficiaries they applied to be made parties for opposing the compromise and resisting the appeal. The Shanar appellants resisted the move. Their objection was overruled on the finding that the orthodoxy were proper parties to intervene and that it was not necessary for them to show that the Rajah had acted collusively by entering into the compromise. The High Court's decision is reported in 12 MLJ 355. This decision was affirmed by the Judicial Committee vide 35 I A 176. The decision may be ascribed to the Rajah "betraying his trust by surrendering to a decree" as phrased by Lord Robertson. Be that as it may, it is well settled that a beneficiary is not shackled vis-a-vis a third party, where the trustee is unwilling or refuses to sue or has precluded himself by any act from suing (see *Gopal Jew v. Baldeo Narain Singh*), 51 C.W.N. 383.

48. Plaintiff alleges that the old trustees viz., Kekobad Mistry and Khurshed Mistry were much too much under the domination of Maneck Mistry. For all practical purposes Maneck Mistry was the only one who counted after the passing away of Munchershaw. Kekobad was in the employ of Maneck. Khurshed was Maneck's wife. Maneck's inaction or worse to take up cudgels on behalf of the trust was actuated by a desire to be on the right side of Zaveri with whom an agreement for the sale of Majas lands had been entered into. Defendant 1, as was to be expected, denies this. Yes, the trustees did not file a suit against defendant 1. True, Maneck Mistry did want plaintiff to settle the matter amicably with Ratanchand. This they ascribe to his re mobility of character and refusal to take advantage of involved writing appearing in Ex. B. Even if we assume this to be correct the position is that Maneck Mistry was unwilling to or had refused to sue. However right and righteous that attitude, plaintiff would get the locus to sue precisely because of that attitude. Maneck Mistry went the other extreme by collecting opinions about plaintiff's stand vis-a-vis the height restriction covenant being erroneous. By this act he virtually precluded himself from suing. Kekobad and Khurshed Mistry's attitude is of a piece with that of Maneck. Much has been said of Kekobad being an adult and having an interest in Maneckabad as a beneficiary as also a trustee. But he was in Maneck's employ and did not lift a small finger to sue. Avoiding initiation of dishonest claims may be consistent with standards of rectitude expected from honourable men. They do not cease to be that after becoming trustees. What however is expected from these people is to come out with the plain truth as they see it when forced into a litigation. Maneck Mistry did not file a written statement though asked to do so by the Court. Kekobad's written statement is a work of art in the gallery of evasions. Even if the accusation of collusion and undue influence levelled against the old trustees be negated, inaction when the trust had a possible claim--to put it no higher---would confer on plaintiff the locus to sue.

49. This brings me to the contention of defendant 1 that even if the trustees be guilty of inaction or collusion, the beneficiary's remedy is to sue for their removal and replacement by new trustees to whom the alienated or impaired trust property has to be made over. This argument was repelled in *L. Janakirama*

Iyer and Others Vs. P.M. Nilakanta Iyer and Others, , in the passage appearing at page 640 and reproduced below:

"We are, therefore, satisfied that the observations on which reliance is placed by the learned Attorney-General cannot be said to amount to a decision that in no case can a beneficiary claim that the trustee appointed under the trust should be removed and a new trustee should be appointed and the trust properties improperly alienated by the previous trustee should be ordered to be delivered into the possession of the new trustee. Section 63 no doubt provides for the two remedies which are available to the beneficiary, but, in our opinion, section 63 cannot be treated as exhaustive on the subject and so it cannot be urged that a claim for constructive possession like the one made in the present suit is prohibited by section 63."

50. Under the deed of settlement dated 17-3-1951 plaintiff is a reversioner to the extent of the remainder. This would give him an entitlement to sue to protect a right. Yellarayhala Surayya v. Yellaraghahs Subbamma, ILR (43) Mad 4 is an authority to that effect. This is despite the fact that the plaintiff in that case had possibly a contingent and not vested right at the date of suit. The position of Legal Remainders has been enunciated with great clarity in Chesire's Modern Law of Real Property. Says the Twelfth Edition of the booklet pages 294, 295 and 296 :

"Legal Remainders. Common law permitted future interests, called remainders, to be carved out of a legal estate, though as we shall see presently, there were several restrictive rules which had to be observed. If a stellar decided to create two or more successive estates in his land, and drafted the desired limitations in one instrument, as for instance by a fulfilment to A for life and then to B, for life and then to C, in fee simple, the first estate which preceded the next following remainder was called the "particular estate" and those which followed were denominated "remainders".

Such an estate was called a remainder, not because it was the remnant that was left after the grant of the particular estate, but because the land was not stand over or continue for the remainder man after the particular estate had determined.

A remainder should not be confused with a reversion which is an interest that arises by operation of law, as distinct from act of parties, whenever the owner of an estate grants a particular estate, but does not dispose of the whole of his interest. If, for instance, a tenant in fee simple makes a conveyance of the land in tail, for life or for a term of years, there continues in him an estate which is called a reversion because the land will revert into his possession upon the determination of the particular estate.

"A reversion is where the residue of the estate always doth continue in him that made the particular estate."

Remainders fall into two classes, being either vested or contingent. It follows from what has already been said that a person has a vested remainder if he or his representatives are continually entitled and ready to take actual possession of the land whenever the particular estate ends. This implies that he must be a living ascertained person and that his title as owner does not depend upon the happening of some uncertain event. A simple example is a grant to A, for life, remainder to B in fee simple.

As opposed to this, a remainder is contingent if the grantee is not an ascertained person, or if though ascertained, his title awaits the occurrence of some event, for in neither case is there a person ready to enter the land as soon as it is vacant. Grants to a bachelor for life, remainder to his sons; and to A, for life, remainder in tail to his first son to attain 21 are examples of contingent remainder.

A contingent remainder becomes a vested remainder when the person to whom it is limited is ascertained, or when the event upon which it is dependent, happens. A contingent remainder may be so limited that it can vest only co instanti with the determination of the particular estate, as for instance where the grant is to A, during the life of B, remainder to the heirs of B. In this case the death of B, terminates the particular estate and at the same time enables the person who is heir of B, to be ascertained, for *nemo heres est viventis*.... Moreover, they are present, not future, interests. A future interest properly so called is one which cannot be the subject-matter of ownership until something happens that may never happen. This is not the position with regard to reversions and vested remainders, for although they may be described as future interests inasmuch as they do not at the moment carry immediate possession of the land, they are nevertheless present existing interest in the sense that they confer upon their holders a portion of the actual ownership of the land."

Section 19 of the Transfer of Property Act, 1882 is on the same lines when it reads--

"Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith, or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation---An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person."

51. Plaintiff's right as a reversioner to enforce the height restriction covenant is said to fall under sub-sections (e) and (f) of section 15 of the Specific Relief Act, 1963 (S.R.A.). Being negative in character the relief of injunction claimed by plaintiff is outside the section. This contention has the support of commentaries by Pollock and Mulla, S.C. Banerjee and Anand & Iyer. The answer to this is section 40 of the T.P. Act as explained by the Supreme Court in *Bai Dosabai v. Mathurdas, Chinappa Reddy, J.*, speaking for the Court said--

"The ultimate paragraph of section 54 of the Transfer of Property Act, expressly enunciates that a contract for the sale of immovable property does not, of itself create any interest in or charge on such property. But the ultimate and penultimate paragraphs of section 40 of the Transfer of Property Act make it clear that such a contract creates an obligation annexed to the ownership of immovable property, not amounting to an interest in the property, but which obligation may be enforced against a transferee with notice of the contract or a gratuitous transferee of the property. Thus, the equitable ownership in property recognised by Equity in England is translated into Indian law as an obligation annexed to the ownership of property, not amounting to an interest in the property, but an obligation which may be enforced against a transferee with notice or a gratuitous transferee."

52. The standing of a beneficiary to sue becomes an inconsequential factor for the very good reason that the trustees are before the Court. The new trustees are supporting plaintiff. That they did not institute the suit or that their predecessors had declined to sue is no impediment in the passing of an appropriate decree. In AIR 1939 170 (Privy Council) , relied upon by plaintiff, Lord Porter observed--

"It has long been recognised that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs if they will consent or as co-defendants if they will not. Such cases as 1879 (11) Ch.D. 121, and *Collen v. Knowles & Birlas*, 1898(2) Q.B. 380 are examples of this principles. Nor indeed would it matter that a wrong person had originally sued though he had no cause of action : see 1902 (2) K.B. 485. Once all the parties are before the Court, the Court can make the appropriate order and should give judgment in favour of all the persons interested whether they be joined as plaintiffs or defendants. Prima facie therefore the trial Court in the present case should have given judgment in favour of the eight of the original partners who survived, though some of them had been made defendants : see 1898 (2) Q.B. 380."

A Division Bench of this High Court has gone further in *Cooverje Jethabhai Shah Vs. Amir Abdulali Kachwala and Co.*, to rule :--

"We think that a suit should not be dismissed upon the sole ground that the plaintiff has not averred or proved that some persons who ought to have been made co-plaintiffs and were subsequently made defendants to the suit refused to

be joined as co-plaintiff. In this connection we may refer to the decisions in Pyari Mohun Bose v. Kedarnath, I.L.T. 26 Cal 409 and Biri Singh v. Nawal Singh, ILR 25 All. 226. In both these cases the learned Judges of the two High Courts took the view that it would not be proper in the circumstances like those present before us to dismiss the plaintiff's suit."

The position emerging from the above may be summarised thus :

- (a) A beneficiary can in certain circumstances sue a third party for an injury or threatened injury to trust property.
- (b) In certain suits depending on circumstances the beneficiaries need not establish collusion between trustee and third party.
- (c) The beneficiary definitely has the capacity to sue a third party when the trustee is unwilling, refuses or has precluded himself from suing.
- (d) Where the trustees collude, whether overtly or covertly, with the third party a beneficiary can obviously sue.
- (e) The beneficiary suing need not ask for displacement of the trustee and his replacement by a new trustee in a suit to recover alienated or adversely affected property in the hands of a third party.
- (f) A reversioner or the remainder man can sue even if he be a beneficiary at the date of suing.
- (g) Section 40 of the T.P. Act aids plaintiff as a reversioner to enforce his rights against defendant 1 u/s 40 of the T.P. Act.

The effect of the above conclusions is to sustain plaintiff's right to sue.

NON-JOINDER, JURISDICTION & DEFECT IN THE FRAME OF THE SUIT

53. In response to the plea of Ex. J having been antedated to defraud the Revenue, defendant 1 contends that this plea cannot be appraised in the absence of Lalchand and the heirs of Zaveri. So far as the heirs of Zaveri are concerned, I do not see how the sins of a party to a crime can be examined by the not impleading of his heirs or legal representatives. The civil consequences of a finding that Zaveri was a party to the fraud is a matter between his estate and defendant 1. The suit is by plaintiff who is not concerned with these consequences. That Zaveri's heirs might be interested in defending his reputation or character would give them a right to intervene. It would not be a reason mandating plaintiff to implead them. As to Lalchand's non-joinder, the alleged antedating of Ex. J is in the nature of an additional string to plaintiff's bow. The suit can be decided without going into the allegation. The plea being redundant, no consequences flow from the non-joinder of a party indispensable to its consideration.

54. Defendant 1 pleads that section 94 of the M.C.S. Act debars this Court from trying the present suit as it relates to matters touching the business of a Co-

operative Society. The section relied upon is section 91(3) and the reference to section 94 is an obvious error. Plaintiff does not come within the disputants contemplated by section 91(1) and therefore the bar pleaded by defendant 1 is not attracted.

55. The frame of suit defect is said to lie in plaintiff not claiming reliefs consequential to declaration though entitled to do so. Section 34 of the S.R. Act is relied upon in support of this contention. In addition to declarations, plaintiff has claimed injunctions. There is no other relief that plaintiff could have claimed. So far as the encroachment on Maneckabad is concerned, the same is cartographical and not physical. If defendant 1 is not in physical possession of Maneckabad, plaintiff could not have made a claim to more than a declaration and injunction. The same goes for the reliefs sought in regard to right of way and height restriction covenants. The suit as framed is thus not defective on this count.

LIMITATION

56. To appraise the issue of limitation it is necessary to set out the relevant factual background : The present suit was instituted on 5th December 1970. Inasmuch as defendant 1 was a Co-operative society registered under the Maharashtra Co-operative Societies Act (MCS Act), the suit had to be preceded by the service of a notice prescribed u/s 164 of the said Act. Such a notice bearing the date 1-10-1970 was addressed to the Registrar of Co-operative Societies and that Officer forwarded the communication to defendant 1 on 28th October 1970. This section 164 says :

"Notice necessary in suits -- No suit shall be instituted against a society, or any of its officers, in respect of any act touching the business of the society, until the expiration of two months next after notice in writing has been delivered to the Registrar or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left."

57. The undisputed and indisputable position is that the main bungalow's demolition commenced in August 1967 and was completed about 13 months later i.e. in August 1968. Ex.J was admitted for registration on 30-11-1967. Plaintiff contends that it was also executed on that date though defendant 1 says that its execution had taken place as far back as 31-3-1967. The BMC granted an Intimation of Disapproval (IOD) and Commencement Certificate (CC) vide Ex.A-75 on March 9, 1968 to defendant 1. In August 1968 excavation work on the site rendered vacant by the main bungalow's demolition began. Plaintiff filed Misc. Application No. 501 of 1968 on 26-8-1968. An interim injunction stayed the work from 31-8-1968 to 10-10-1968. On that day, i.e. 10-10-1968, the Court of Appeal vacated the interim injunction on defendant 1's undertaking that it would not make capital of this release by pleading estoppel etc. In July 1969 the structure coming up crossed the height of 31'--1". Ex.J. was registered on

23-2-1970. Pursuant to the decision in Misc. Application No. 501 of 1968, the BMC on 20-5-1970 cancelled the IOD/CC.

58. For plaintiff the submission is that limitation commenced only in July 1969 when the structure crossed the height of 13"--1.". At any rate the cause of action could not be said to arise prior to August 1968. Defendant 1's plea is that even prior to the 31st day of March, 1967 when Ex.J was executed it had left no one in doubt that Ratan Villa was to be purchased, that standing structures thereon were going to be demolished and that a skyscraper much larger than 13"--1." was to come up on the site. A board proclaiming the property's reservation for its building was put up very soon after 31-3-1967. The latest termination point would be August 1967, and thus computed, the suit is beyond three years of the accrual of cause of action even if thereto is added the extension for the section 164 MCS Act notice. An additional reason for the bar of limitation was the joinder of the other beneficiaries to the suit as late as 23-4-1982. Plaintiff's reply to this is twofold : First, the other beneficiaries may be proper but are not necessary parties to the suit. In the case of persons jointly interested in a property, any one of them without impleading the others, could sue. Secondly, the plea of non-joinder was belated having been raised 12 years after the suit's institution. Such a plea was barred under Order I, Rule 13 C.P.C.

59. To take up the additional ground first, it is based on the assumption that the other beneficiaries were necessary parties to the suit. This appears to be misplaced assumption. As co-beneficiaries they are somewhat in the position of tenants-in-common. The interest was undivided when the suit was filed. Each had the right to see that the corpus remained unimpaired. Defendant 1's intent to encroach on the covenants affects all the beneficiaries. This however does not mean that all had to join in filing the suit or that one could initiate the action and join the unwilling ones as proforma defendants. A decision affirming the right of one of the several interested in a property suing and being entitled to the relief claimed is Maqsood Ali Vs. Zahid Ali Sabzposh, . Said the Court in that case :

"The other beneficiaries were proper parties who might well have been impleaded by the plaintiff or added as defendants by the Court, but it cannot be said that no decree can be passed in plaintiff's favour in the absence of the other beneficiaries of "waqf"."

15 ML.J. 396 is the report in Chidambaram v. Siyathasamy, where one of the two vendees right to enforce a covenant without joining the other vendee, was upheld. This was on the finding that the vendees were tenants-in-common. As to the effect of the delay in the raising of the plea of the beneficiaries being necessary parties, their not being impleaded within time and this rendering the suit time-barred, plaintiff is on good ground in raising the bar of Order I, Rule 13 C.P.C. Whatever be the plaintiff's occasioned delay, defendant 1 should have raised the defence at the earliest. By not so doing they are precluded from raising the defence by virtue of Order 1, Rule 13 C.P.C. Defendant 1 relies on para 933 page 519 of Halsbury's Vol. 48. The para is worded thus :

"If no trustee is willing to institute a proper action, the beneficiary may, of course, take proceedings for the administration of the trust by the Court and obtain an order for liberty to use the trustee's name, or for a receiver who will use the trustee's name, in the institution of a proper action. Where the trustees are bare trustees or there is alleged to be fraud or collusion between the trustees and the third person, or where by reason or conflict of interest of duty it is impossible or difficult for the trustee to sue or where it is clear that liberty to use the trustees' names would be granted if sought then a beneficiary may himself bring the action adding as defendants every trustee and every other beneficiary unless the trustees will allow their names to be used as plaintiffs on receiving a proper indemnity."

Here, the beneficiaries have been added though belatedly. It is not every joinder of a necessary party to a suit after the expiry of period of limitation that is fatal. *Shivubai v. Shiddeswar*, AIR 1921 Bom. 152, is an authority affirming this proposition.

60. To turn to the main question viz., when the right to sue accrued, plaintiff cannot be faulted for pointing to August 1968 as the *causa causans*. Putting up a signboard proclaiming the property to be that of a Co-operative housing society would not necessarily be a declaration of war that the structure to come up's height would cross 13--11/2". That Ratanchand, Lalchand, Zaveri and defendant 1 were upto something devious is all that plaintiff could reasonably surmise. But a compulsory cause of action is what is meant by the expression "accrual of a cause of action". Defendant 1 relies on the following passage from *Manick Lal Seal and Another Vs. K.P. Chowdhury*, --

According to Article 113, the limitation for specific performance of contract starts when the plaintiff has notice that performance is refused. The word "Notice" means intimation, information, cognizance, or observance. "Notice" implies knowledge and this knowledge comes from direct perception or from inference reasonably arising out of several facts and circumstances."

Significantly, the word notice has been equated to "knowledge" and not guesswork or hunches. Upto the completion of the demolition of the main building a prudent person could only make guesses in relation to the motives of defendant 1. A special bar is sought to be raised against plaintiff by pleading that he was keeping a third-eye vigil on the goings-on at the site as also the movements of the principal characters like Lalchand, Johari and Zaveri. I cannot agree with this reasoning. If the right to sue accrued at the earliest in August 1968, the suit filed on 5-12-1970, would be well within limitation.

ENTITLEMENT AND DISENTITLEMENT

61. In regard to the issues of plaintiff's entitlement/disentitlement, it must be made clear that these are restricted to the reliefs linked to the height restriction covenant. Next the discussion that follows is predicated upon plaintiff succeeding on the all-important issue of interpretation vis-a-vis the said covenant. Plaintiff

claims a declaration and injunction in regard to Ratan Villa as a whole. To put it in clear terms what he wants is a complete ban on any part of the land-now vacant and that to become vacant in future - having a structure of more than 13'--1" in height. The structure now standing on the site of the main bungalow has crossed this limit. That excess--if the suit succeeds--will have to be brought within the permissible limits by demolitions. Plaintiff contends that a violation of the covenant constitutes an injury in that Maneckabad will be in congested and crowded surroundings. The quantity and quality of light and air receivable will be adversely affected. Water supply to and the drainage facilities of Maneckabad will suffer. The inhabitants of Maneckabad will lose their privacy. Maneckabad's pecuniary value will be greatly reduced. Defendant 1 raises near about ten heads to counter the pleas of the plaintiff summarised above. Now apart from the right of a party to compel performance of an obligation standing in its favour, it is not as if there is no substance in the plaintiff's grievance as to what Maneckabad will lose if the covenant is violated. A multi-rise building will be peopled by many - residents, guests, visitors and servants included. Their numbers will be much more than those who occupied the main bungalow plus the other existing structures in Ratan Villa. The strain on common passages will increase. There will be a diminution however slight in the light and air coming to Maneckabad, notwithstanding defendant 1's present intent to keep the entire site facing Maneckabad unbuilt upon. And the declaration of present intent will not be difficult to wriggle out of for a Society whose membership seems to be perpetually in a state of flux. Crusoe like existence may be a fast vanishing dream for urbanities. That however is no reason to dismiss a claim for the preservation of some vestige of it, provided of course it does not fall foul of the law. And whether or not it does, leads me to the pleas of defendant 1.

62. Defendant 1 contends that the plaintiff is actuated by a desire to persecute and harass it so that defendant 1 succumbs to his exorbitant demand. Particulars of the persecution, harassment and exorbitant demand are not given in the written statements. This is left to be unfolded through the litigation-scarred veteran Johari. According to Johari the BMC authorities informed him of a spate of protests against the grant of building permission to defendant 1. The writers of these protests were differently named. But there was a similarity in the language of all the communications. This indicated the writer to be a single individual. An Engineer, Chhada by name, persuaded Johari to call upon plaintiff. Johari met plaintiff who demanded Rs. 1,00,000 as a price for ceasing his campaign against the grant of building permission to defendant 1. The over-righteous Johari stalked out of plaintiff's office. Chhada then informed Johari that plaintiff was the individual behind the communications received by the BMC. A well-rounded story narrated with the appropriate air of injured innocence. But it is not possible to believe a word of it. That Johari did go to meet plaintiff is admitted and the admission is not because of Johari's love for the truth. Plaintiff had preserved Johari's visiting card and that has compelled the admission. Plaintiff's version that Johari had come to persuade him to give up the claim is easy to believe.

That is what Ratanchand had tried in the past. Defendant 1 had obtained FSI 2 permission by suppression of a vital document. Defendant 1 was quite adept in concocting documents as I will show later. Inventing a story of persecution and blackmail is not beyond its commanders of the past and now. Johari has gone into great details of plaintiff planting defamatory articles and writing offensive letters against him. May be plaintiff did. But the object was not to extort money. The litigation that plaintiff has resorted to must have cost him much more than the sum allegedly demanded from Johari. Johari could have sounded more plausible by inventing a much higher sum. And whatever plaintiff's shortcomings it is not possible to believe that he would let go his advantages, for even in the late 1960s, the trifling sum of Rs. 1,00,000/-. Plaintiff's letters to the Royal College of Surgeons -- assuming that he did so write -- may have been to get even with one who seemed invincible so far as the State Government and the BMC were concerned. Johari admittedly was not so specific in the return to the writ petition filed by the plaintiff. The admissions given by him on this score are sought to be watered down with a reference to the high-toned legalise which are said to imply the same thing. I cannot conceive of a layman resorting to such language when describing an attempt at blackmail. And having seen Johari in the witness box it does not appear that advice to be circumspect would have any effect upon him. Faced with inconvenient questions Johari had to admit that the meeting between him and plaintiff was not of his seeking. As a last ditch attempt to sound respectable, Johari says that Chhada who suggested the meeting with plaintiff may have been acting at the latter's instance. Yet Chhada was a friend of Johari! Attempt to extort money is not established and cannot be a reason for disentitling plaintiff to sue.

63. Now to turn to the defence of gross delay it has to be considered in the factual background. In February 1966 defendant 1 advertised its intention to purchase Ratan Villa and invited claims and objections from the public at large. It is said that plaintiff did not respond to this notice though as a person keenly interested in the matter he could not have been unaware of it. Plaintiff's claim and in its starkness was not unknown to defendant 1. As I shall show later there were warnings and plenty of them of what plaintiff meant and how far he would go to enforce his beliefs. The next stage is the putting up of a signboard proclaiming the ownership of the defendant 1 and the site being meant for putting up a structure for housing members of a Co-operative society. A photograph of the signboard is at Ex. Soc. 7. It proclaims the site to be for the "proposed building" of defendant 1 "Society". The board may have been put up in August 1966. But merely proclaiming the site's being a location for the building of a Co-operative housing society, could not have led plaintiff to infer that the building would violate the limit set up by him. In fact, defendant 1 could not have acquired title to the property until 30-11-1967, though on defendant 1's reckoning the event of that day would make the title relatable to 31-3-1967. Third, comes the beginning of the demolition of the main bungalow. The work began in August 1967 and lasted till August 1968. Defendant 1 would have it

that this was a definite indication of an intent to put up a multi-storeyed structure. Now demolition of an existing building would not indicate the height and breadth of the proposed replacement. That the building was to be that of a Society would only show that the proposed replacement could be a spacious affair. It was suggested to plaintiff in cross-examination that structures for a housing society, by definition, would be multistoreyed. This, it was argued, would be more so in respect of new structures in the Nepean Sea area. Assuming this to be so, can plaintiff's deferring the suit till 5-12-1970 said to be instance of such delay as disentitles a claimant to preventive relief? Plaintiff did not exactly sleep over his rights. Johari accuses plaintiff of flooding the BMC with pseudonymous protests against the grant of building permission to defendant 1. This was an effective step for the BMC was an authority competent to rule upon the sought for permission. Next in 1968 he instituted Misc. Application No. 501 of 1968. In this application he sought for and initially did obtain a blanket stay on the construction initiated by defendant 1. It is said that plaintiff at a later stage gave up reliefs based on private law rights. But this would make no difference for plaintiff had made it clear that the private law rights were not given up for all times. He would be pursuing these separately and that he did by filing this suit. The claim to enforce the covenant could not well be the subject of a writ petition. By giving up that claim in the writ petition, plaintiff was conforming to the procedural law and no more.

64. To turn now to the legal position, a hurried look at the authorities cited by parties is all that is necessary. Delay to be a disqualified disentitling factor must be unreasonable delay in the commencement of proceedings. Defendant 1 would have it that the factor of delay has to be assessed by taking even the evoking of suspicion in plaintiff as the starting point. Reliance is placed upon the following passage at page 415 in Spry's Principles of Equitable Remedies (Third Edition)--

"In order that there may be established laches on the part of the plaintiff it must appear, first, that there has been unreasonable delay in the commencement or prosecution of proceedings, and secondly, that in view of the nature and consequences of that delay it would be unjust in all the circumstances to grant the specific relief that is in question.

In the first place it must hence be shown that the plaintiff has been guilty of unreasonable delay. Prima facie the time from which the length of delay is judged is the time at which the plaintiff became aware of the existence of the facts that gave rise to a right to the equitable relief in question. So on one occasion it was said in the Privy Council, "In order that the remedy should be lost by laches or delay, it is, if not universally at all events ordinarily-and certainly when the delay has been only such as in the present case-necessary that there should be sufficient knowledge of the facts constituting the title to relief." It is generally sufficient that the plaintiff has been put on suspicion, that is, that he is aware of sufficient matters to raise in his mind a doubt whether an infringement of his rights has taken place, but it is not ordinarily sufficient that if he were

reasonably diligent in the examination of his own affairs he would have had sufficient knowledge or doubt. Further, when once it appears that the plaintiff has had sufficient knowledge or suspicion of the facts that give rise to a right to equitable relief, it generally does not matter whether or not it also appears that he has understood as a matter of law that those facts do give rise to that right. So it has been said, "Generally, when the facts are known from which a right arises, the right is presumed to be known."

But the mere existence of delay is not enough. Spry at page 418 to 420 observes :

"It is not sufficient, however, that the defendant should be able to show merely that the plaintiff has been guilty of unreasonable delay. It must be shown further that the delay in question has rendered unjust the grant of the particular relief that is sought. So ordinarily, it must be established that, by reason of the material delay, either the plaintiff has gained an unjust advantage or the position of the defendant has been altered so that an injunction now granted would operate substantially more harshly upon him than an injunction granted without delay or that some other such consideration has arisen so that in all the circumstances it is just that the plaintiff should be confined to such other remedies as he may be entitled to. In such cases it may be said that the defendant has been put "in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted"; and hence it is necessary to look both to "the length of the delay and the nature of the acts done during the interval which might affect either party and causa balance of justice or injustice in taking the one course or the other, so far as relates to the remedy", and, it may be added, the extent to which the position of their persons has been affected by the delay in question must be regarded as relevant also.... Nonetheless special considerations may apply where the defendant is shown to have been guilty of fraudulent or unconscionable behaviour, especially where he has not been misled by the undue delay on the part of the plaintiff; for the ultimate question in all cases of undue delay is whether that delay has rendered the grant of particular specific relief unjust in all the circumstances, and in answering that question unconscionable behaviour of the defendant may be decisive in inducing the Court not to refuse relief on the ground of laches."

Manick Lal Seal and Another Vs. K.P. Chowdhury, , though concerned with limitation contains a useful passage relied on by defendant 1:

"The word "Notice" means intimation, information, cognizance or observance. "Notice" implies knowledge and this knowledge comes from direct perception or from inference reasonably arising out of several facts and circumstances.

Whether a party got notice of refusal or not depends upon the substantive evidence to that effect or inference from the surrounding facts and circumstances."

Woodroffe, J., in Kissen v. Kally, ILR 1905 Cal 633, put the position in its true

perspective by saying:

"There is no question, but that delay may imply and be evidence of release or abandonment of right. Delay of this character, if proved, of course involves the dismissal of the suit, not merely because there has been delay, but because the right sued upon is deemed to have been abandoned upon a proper inference from the facts proved as to delay.

Again, where a right is not in fact actually abandoned, delay to enforce it may induce a reasonable belief that the right is foregone, and the party, who acts upon the belief so induced and whose position is altered by this belief to his prejudice, may plead delay as an answer to a claim made against him. But in my opinion mere delay is not a sufficient reason for debarring the plaintiff from relief by way of specific performance... But on the whole the tendency of the courts is to discourage the plea of laches, unless somebody has been damnified by it; and, as in this country, the period of limitation enacted by the statute is generally very short, that is the less need for the application of the equitable doctrine relating to delay... It must be shown that delay has prejudiced the defendant. To operate as a bar to relief the delay should be such as to amount to a waiver of the plaintiff's right by acquiescence, or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted. When such is not the case, any lapse of time short of the period allowed under the Limitation Act should not disentitle the claimant to relief, to which he is otherwise entitled."

"Now the doctrine of laches in courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument relies, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval which may affect either party to cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy".

See *Lindsay Petroleum Co. v. Hurd*, 1874(5) P.C. 221.

has been distinguished by Das Gupta C.J., in *Gostho Behari Sadhukhan and Another Vs. Omiyo Prosad Mullick and Others*, thus :

"The principle that was being laid down by Sir Barnes Peacock appears to me clearly this that in deciding whether delay bars, the grant of specific

performance, the Court should consider the balance of justice and in considering this should take into account the length of the delay and the nature of the acts done during the interval which may affect such questions. In my opinion even if the circumstances do not show a waiver but it appears that the plaintiff has come to the Court not merely with the motive of obtaining specific performance but with an ulterior motive of taking advantage of money spent by a transferee, it will be proper for the Court to take into consideration such conduct of the plaintiff in deciding whether discretion should be exercised in his favour or not."

The Supreme Court in *Madamsetty Satyanarayana Vs. G. Yelloji Rao and Others*, , affirms emphasis placed on the insufficiency of mere delay as a disqualifier when it says --

"To sum up, while in England mere delay or laches may be a ground for refusing to give a relief of specific performance, in Indian mere delay without such conduct on the part of the plaintiff as would cause prejudice to the defendant does not empower a Court to refuse such a relief ...

It is clear from these decisions that the conduct of a party which puts the other party in a disadvantageous position, though it does not amount to waiver may in certain circumstances preclude him from obtaining a decree for specific performance."

It is unnecessary to further burden this judgment by citations from the other decisions relied upon by defendant 1. The authoritative exposition has been oft-stated and the question is really of its application to the proved facts. Thus viewed, plaintiff had done everything to warn defendant 1 of the peril it was courting by disregarding his interpretation of the covenant. Defendant 1 was not unaware of this. In fact Johari admits that his society was scared of a covenant suit by plaintiff. Plaintiff's writ petition was warning enough. Far from delay disintitling plaintiff, the true position is that defendant 1 with open eyes and by resort to very questionable devices attempted to bypass him though alas! with no chance of success. Plaintiff is therefore right in contending that there was no delay which could be said to cripple him when seeking preventive relief. The contention that plaintiff having forsaken his private law right in the writ petition and delayed filing a suit does not go well with defendant 1's stand there that plaintiff's remedy was to file a suit and not enforce private covenants through the medium of a writ petition. In fact the society has shown no qualms in raising the plea that whatever its knowledge of plaintiff's claim, the delay occasioned by him is fatal. This is an illustration of "heads I win, tails you lose" philosophy that defendant 1 has displayed right since being cornered by plaintiff in obtaining FSI 2 permission by suppressing a vital document. The role of discretion in the law of specific relief is crucial. It is not however so one-sided that defendant 1 can get away with all sorts of raw work and plaintiff penalised at the slightest remissness. Delay and its consequences have to be viewed in a broader canvas which takes in its sweep the acts and omissions of both parties. The other argument is that delay of plaintiff suffices to disqualify him for specific relief and

whatever injury he has suffered can be compensated by an award of damages. The answer is to be found in a passage from Spry's commentary, repeated once again, to wit--

"Nonetheless special consideration may apply where the defendant is shown to have been guilty of fraudulent or unconscionable behaviour, especially where he has not been misled by the undue delay on the part of the plaintiff; for the ultimate question in all cases of undue delay is whether that delay has rendered the grant of particular specific relief unjust in all the circumstances, and in answering that question unconscionable behaviour of the defendant may be decisive in inducing the Court not to refuse relief on the ground of laches."

To recapitulate, plaintiff had made his interpretation of the covenant and a determination to enforce it, to all and sundry. Ratanchand and Johari knew it. Attempts to buy him off had been made by both but with no success. Defendant 1 with open eyes went into the deal. A mixture of defiance and deceit was attempted to bypass plaintiff's opposition. That having failed, it ill becomes defendant 1 to raise inequities defences which fall into the category of "so what?"

65. Defendant 1 takes the plea of the covenant being unenforceable as it is vague and uncertain. Now it may be straightaway conceded that construction of the covenant poses a vexed problem. But difficulty of construction is not to be equated with ambiguity. It would be a different matter where the conflicting recitals of a deed make it incomprehensible or unmeaning. Here the covenant is capable of various constructions and defendant 1 has spelt them all out in a supplemental pleading. A covenant incapable of being unenforceable on account of uncertainty or ambiguity, is one, where the interpreter flounders in the midst of conflicting recitals. The end of the quest should be to compel the interpreter to throw up his hands in dismay and confess an incapacity to know what the scribe or the parties to the deed had in their minds. And defendant 1 cannot pretend ignorance of what plaintiff was contending. They also knew that plaintiff was unrelenting. That is what led defendant 1 to attempt buying off plaintiff. Not succeeding, a "friendly" (collusive) suit, was contemplated with Maneck Mistry being the gentlemanly opponent. Deeds showing a relinquishment in discreetly worded documents were fabricated. The dreaded covenant suit was not long in coming and the carefully laid plans were rendered fruitless. Thus there is no ambiguity in the wording of the covenant to disable plaintiff from relief.

66. This brings me to the factors of estoppel, waiver and acquiescence. Defendant 1 has pleaded all three as debarring plaintiff from seeking to enforce the covenant. These expressions imply different, though somewhat kindred concepts. The factual base for this defence is the inaction of the trustees, to assert and/or enforce the covenant, plaintiff's first resorting to a public law remedy where the covenant was pleaded but abandoned at a later stage and generally giving the impression that while he was willing to strike, wound he would not. The inaction till 1970 led to an alteration of the status quo and it would be unjust to allow plaintiff to get enforcement of a right that he had

waived and also acquiesced in the violation thereof. In support of the alleged inaction of plaintiff and the consequences thereof defendant 1 relies on *Gostho Behari Sadhukhan and Another Vs. Omiyo Prosad Mullick and Others*, . Bose, J., in separate but concurring judgment considered the facts and circumstances and summarised thus at page 377 :

"It appears to me to be not unreasonable to presume that the continued inaction for a period of about ten months on the part of the plaintiffs led the defendants to suppose that the plaintiffs did not wish to proceed further in the matter. The learned trial Judge has found that the plaintiffs have not been able to explain the delay for a few months and the evidence that they gave for explaining the delay is untrustworthy and unacceptable. Although there is no specific pleading of the expression "abandonment" or "waiver", the plea of delay and acquiescence has been taken in the Written Statement of the Base defendants and the facts showing investment of money and alteration of position have been also pleaded in this Written Statement. A definite issue was raised as to this delay and acquiescence but the learned trial Judge does not appear to have laid much stress on this issue, and he has dealt with it summarily. In my view the grant of a decree for specific performance when there has been a change of status qua since the contract, which has been contributed to a large extent by the dilatory conduct of the plaintiffs, will be inequitable, and the delay and laches on the part of the plaintiffs in the facts and circumstances of this case disentitle them to obtain a decree for specific performance."

I fail to see how this passage applies to plaintiff in the instant case. Defendant 1 and Ratanchand before them had done what they could to make him for go his interpretation of the covenant. Maneck Mistry had joined forces with Ratanchand to try bribery as a means of getting over plaintiff's view. In 1967 the demolition of the main bungalow began though an attempt was made to fabricate evidence about permission to build having been sought in 1966. This was to get advantage of a higher FSI. The impermissibility of one not having title to apply for building permission, did not deter defendant 1 in making this claim. In fact they came forth with the story of the building plans having been lost in a taxi, rediscovered by some being person and the same being forwarded to the BMC. All this apart, authorities do not support the extreme position that estoppel, waiver or acquiescence can be inferred from a mere omission to rush to the Court at the first sign of dirty work being contemplated. There is some substance in the plea based on the inaction of the trustees. But here also the inaction verges on collusion--at the least, a refusal to take steps to protect the interests of Maneckabad. Plaintiff is not wrong when he says that Maneck Mistry had reasons to be accommodating vis-a-vis Zaveri and Ratanchand. His daughter's Majas lands were to be sold and Zaveri had agreed to purchase them. That the deal eventually fell through is a different matter. All the same the failure was not on account of nor did it leave behind any ill-will between the contracting parties. Maneck Mistry had desired that plaintiff relinquish the covenant albeit for a consideration. Plaintiff made it clear that he was not to be

swayed. If Maneck Mistry was so sure of his purity and his-mindedness, he should have passed a writing to that effect in favour of Ratanchand. His wife and Kekobad were certainly not opposing him-the question as to whether they had the courage to do so being a different matter altogether. What is clear however is Maneck Mistry's intense desire to favour Ratanchand. He even went with Ratanchand to Sir Jamshedji Kanga to get an opinion on the covenant. The records of Solicitors Ambubhai Diwanji show Maneck Mistry to be the querist and his being expected to pay for the opinion of Sir Jamshedji. Maneck Mistry is said to have assured Johari that "we", meaning the speaker and his co-trustees were honourable people who would not take advantage of typographical errors in the wording of the covenant. Phadke, who Johari claims was then present, says not a word of this visit or conversation. Johari's inventiveness covers other fields to which a reference will be made in due course. And if Maneck Mistry was really what he claimed to be and defendant 1 now says he was, he should have said so in explicit terms. After all he was alive till well past the filing of the present suit. An affidavit by him in the "writ petition or the early stages of the suit would have gone some way to discredit plaintiff. Maneck Mistry in fact evaded filing a written statement though directed to do so. Much is made of Kekobad's not supporting plaintiff. Now Kekobad was both a trustee and beneficiary. Advantage to Maneckabd was an advantage to him. He lived long after the passing away of Maneck Mistry. He was not childless and would not have willingly sided by with Maneck Mistry. But he was an employee of Maneck Mistry and that seems to have instilled in him an awe of that person. It is difficult to see his crossing swords with Maneck Mistry. True, Maneck Mistry's death left him free to assert himself. But could he in the background of a past when he had dutifully toed his master's line? It is said the plaintiff wilfully refrained from questioning Kekobad on the true import of the covenant or any other matter connected therewith. Much before Maneck Mistry's death plaintiff had made his stand clear. Kekobad by his silence had shown on which side his inclinations lay. The written statement filed by him on behalf of himself and trustee is a clear indication of a refusal to take a stand but with a tilt in the direction of defendant 1. Khurshed as the wife of Maneck Mistry was certainly on his side. Inaction on the part of these trustees was thus the result of collusion coupled with a desire to avoid the charge of favouring those who had designs of reneging on a covenant to the immense advantage of those who owned Maneckabad. Motivated inaction on the part of trustees can never be a reason for wiping out the right of beneficiaries. In fact that would be a strong reason for upholding the beneficiary's right to sue. The last proposition is said to be plaintiff's abandoning in the writ petition his private law rights. The abandonment was procedurally correct and could not have been construed as an abandonment for all times come. It has been suggested that whatever reservations plaintiff may have made, his behaviour rightly justified the inference that he would not insist on his legal rights. Acting on this inference defendant 1 acted. That raises an equity in defendant 1's favour. It is impossible to accept this submission. Defendant 1 was hell bent on extracting the maximum that it could vide the building regulations. Plaintiff on his part was clear that

defendant 1 was not to be permitted to go beyond what he understood to be the limitation imposed on the owner of Ratna Villa. Neither gave the other any reason or even the remotest suspicion of not being sincere in the view entertained. Both made it clear that they would fight to the bitter end to attain their objectives. In this background no credence can attach to the pleas of estoppel, waiver or acquiescence.

67. Section 20(2)(b) of the SR Act recites the law governing the factor of hardship vis-a-vis specific performance. Plaintiff is disentitled to relief where defendant would suffer a degree or nature of hardship not foreseen when the contract was entered into, whereas the refusal or relief would involve no such hardship to plaintiff. To put it differently, plaintiff will not be granted a decree for specific relief where the grant would subject defendant to a hardship not foreseen when the contract was made and when the refusal of relief to plaintiff, would not occasion him such hardship as the defendant would be put to. Thus the unpredictable nature of the hardship plus its being qualitatively more deleterious, is what would save defendant from being visited with a decree for specific relief. Now can it be really said that Ratanchand had not foreseen what he had committed himself to in Ex.B? Ratanchand was an astute businessmen who apart from the world of commerce in goods had dabbled in film production or film financing. As has emerged from the law reports, he was also in the business of influence peddling, See Ratanchand Hirachand Vs. Askar Nawaz Jung and Others, and for a sizeable share in the spoils. It is a different matter that the going was not entirely good for him. Debts mounted and influence peddle was held to be disentitled to the promised rewards. The very idea of Ratanchand not having foreseen the consequences of his commitments is laughable. It is argued that for a sum of less than Rs. 60,000/- the purchaser of less than 1/12th of the area of a property acquired the right to insist that the remaining 11/12ths be rendered sterile. But Ratanchand's desperate need for money is evident from the events from 1945 to 1955. The property had been purchased in 1947. In October 1950 Maneck Mistry had got into touch with Ratanchand to purchase the property. In March 1951 came Ex.B. In 1953 or 1954 mounting debts and a desire to see that his children were not left destitute, led him to institute the suit for partition and separate possession. After all such suits are rarely filed by the Karta of a joint Hindu family. The obvious purpose behind the suit was to ensure that something from out of the estate went to his children. There is no evidence of anyone other than Maneck Mistry and the trust showing any interest in the property between October 1950 and March 1951. It is not possible to believe that valuable property was allowed to go for less than its true value by Ratanchand. It was argued that parties had confidence in each other as is clear from their having a common Solicitor M/s. Mazgaonwala & Co. I do not see how this circumstance can lead to the inference that Ratanchand had left everything to the good faith of the trustees. Therefore, the very first reason going against the plea of unforeseen hardship is the character of the Vendor. Forty years after the event, a number of reasons can be cited of the disadvantages in the Ex.B

bargain vis-a-vis Ratanchand. But the time parameter, to assess the hardship criterion is the late nineteen forties and early fifties. Ratanchand's needs, the trustees having the not inconsiderable sum (for 1951) which he wanted, the then expected life span of the standing structures -- these, and other factors, may have induced Ratanchand to accept a sterility for the Ratan Villa property in the then distant future. As to defendant 1, they went into the deal with open eyes--widely open eyes! They knew what plaintiff meant by the covenant. A charade about defendant 1 not being fully informed has been attempted by Johari. He says that Zaveri spoke vaguely of some covenant flaunted by plaintiff. Johari admits that he did not ask Zaveri to remove the ambiguity. The reason for this was Zaveri's giving an indemnity to immunise defendant 1 against any loss arising from plaintiff's enforcing the covenant. Defendant 1 therefore had taken care to protect itself and next did not make honest and reasonable inquiries to ascertain the true nature of plaintiff's claim. This is if we believe Johari's version. As a matter of fact defendant was time and again informed of the trust having a covenant on Ratan Villa. The full horror of the claim was evident to them. They knew that Zaveri had not succeeded in fulfilling the promise to remove the covenant. Johari admits having this knowledge as on 30-11-1987 when Ex.J was admitted for registration. And he was not bothered for (i) he knew that the height restriction did not cover the entire land and (ii) Zaveri had given an indemnity. Refusal to face reality and persistence in self-inculcated beliefs can hardly be the basis for pleading hardship as a defence. The admissions forced out of Johari show a calculated gamble to take on the plaintiff. The single-mindedness with which Johari pursued his ambition shows a ruthlessness, not a helplessness that is a necessary condition for relief on the ground of hardship.

68. The factual position being what it is carrying over the commentaries and precedents is not really necessary. The facts being in plaintiff's favour, I will make only a brief reference to the citations on behalf of defendant 1. Spry in the Principles of Equitable Remedies (Third Edition) repeats the well known dictum--

"Doubtless it has from time to time been said that hardship should be judged as at the time of entry into the material agreement rather than as at the time of enforcement." (Page 191)

But at page 193 appears the other side of the coin--

"Specific performance is not refused merely because inconvenience or even hardship to the defendant would be caused thereby."

Reliance is placed on the proposition that specific performance is not granted, where the grant of relief would give plaintiff an unfair advantage over the defendant Smt. Sandhya Rani Sarkar Vs. Smt. Sudha Rani Debi and Others, . Observation divorced from the context cannot be said to constitute the ratio of a decision. It is alleged that plaintiff is seeking an unfair advantage over defendant and courts have an obligation to see that litigation is not used as an instrument of oppression Parakunnan Veetill Joseph's Vs. Nedumbara Kuruvila's and Ors, . If

Ratanchand had contracted to render sterile Ratan Villa and if defendant 1 has purchased Ratan Villa with knowledge of this covenant, they cannot be heard to plead unforeseen hardship. Assuming plaintiff's interpretation of the covenant to be correct and seeing the overwhelming proof of the awareness of Ratanchand and defendant 1 as to what plaintiff meant by the height restriction covenant, one must negative the defence of hardship.

69. A slightly different defence is that based on the fairness aspect. It is contended that this aspect is of importance whenever a matter outside the contemplation of parties intrudes and which matter renders the contract onerous and unfair vis-a-vis one of the parties thereto. We cannot assume that Ratanchand was unaware of what he was about when affixing his signature to Ex.B. The very possibility of the full implications of the covenant not being apparent to him has to be merely stated to furnish its own refutation. His forays into different fields for making money and the expertise at his disposal, negative the possibility of his missing any likely consequence of the terms set out in Ex.B. Moreover it is not as if the structures on the property were crumbling. True their economic life was less than the physical life. Also true that Architect Belaugi considered the structures an albatross in the way of a more profitable exploitation of the property. But this was a later discovery. And if the Belaugi test is applied, all sales of urban or urbanisable lands in the last 50 years could be dubbed unfair to the Vendors. Unfairness in the equity law has to have a reasonable yardstick. That is how the Judicial Committee negated the plea of unfairness in 38 Indian Appeals 155. There, onerous terms were imposed upon the defendant mortgagor for redeeming the property. Yet neither fraud, nor misrepresentation on the part of the plaintiff was proved. Further the terms were deemed not unconscionable on his part as he was not shown to have taken improper advantage of either his position or of the defendant's difficulties. The Board affirmed the decree of the Court below. Defendant 1 then relies on Sunil Chandra Ghosh Vs. Hemendra Kr. Deb, , to contend that courts will not grant specific performance of agreements which are one-sided and not fair. But the qualification of the time-parameter has been repeated by the Court, affirming that fairness has to be judged as at the time the contract was made. If fair then, specific performance would not be refused because passage of time had rendered the contract too hard vis-a-vis one of the parties. Land hunger is an insatiable trait of the phenomenon of urbanisation-more pronounced in Bombay, than elsewhere. But then in the fifties the craving could not have been as sharp as it is in the recent years. Once we reject the probability of anyone getting the better of Ratanchand, it must be held that the discovery of the one-sided nature of the contract is an after thought. In Sunil Chandra (supra) the factors pointing to unfairness verged on undue influence, if not fraud. The alleged gross inadequacy of the consideration is pressed into service to establish unfairness. This argument overlooks a very significant event. Ratanchand had filed a suit for partition in 1954. His minor children or at least the minor son, was defended by a Court appointed GAL. The said GAL was represented by independent legal practitioners.

Not a word was said about the imprudent nature of the Ex. B transaction. Imprudence leading to alienation of joint family property by the Karta is a well-known ground of impugning alienations -more so, in partition suits. The omission must be given its due importance. The alienation under Ex. B was not challenged for the obvious reason that in the circumstances prevailing the covenant was not unfair at the time the transaction took place. Defendant 1 contends that unfairness per se is all that is necessary to disentitle plaintiff to specific relief, it not being necessary to establish intentional unfairness or dishonesty on the part of plaintiff. If parties agree to certain terms in an arms-length bargaining and if neither party to the contract is a novice, it is not possible to presume that a seeming unfairness of any term was not within the contemplation of parties. Disentitling unfairness, is far removed from onerous ness flowing from a deal fairly negotiated.

70. Defendant No. 1 seeks to avoid enforcement of the covenant on the ground that it is a purchaser for value in good faith and without notice of the covenant as interpreted by the plaintiff. Factually, it is taking liberties with the truth to say that defendant 1 had no notice or that it was acting in good faith. The statutory provision is sub-sections (a) and (b) of section 19 of the SR Act which, excluding the unessentials, reads thus :

"Specific performance of a contract may be enforced against--

(a) either party thereto;

(b) any other person claiming under him by virtue of a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract."

A truly astonishing feature of this suit is the attempt of the Society to pose as innocents and case plaintiff in the role of a scheming blackmailer. The effort carries no conviction. Time and again it was made clear to defendant 1 what plaintiff meant by the covenant. It is said that the vague words "Covenant on the main bungalow" used in the answers to requisitions in regard to title did not indicate the true horror viz. total sterility of Ratan Villa once the existing structures ceased to exist. This also is untrue. Defendant 1 knew of plaintiff being the stumbling block in the way of grant of permission to build sought by them. Yet not one letter was addressed to him asking him as to what was his exact stand. Ratanchand had been rebuffed in his efforts made directly and through Maneck Mistry to make plaintiff change his mind. Defendant 1 cannot in all conscience say that it was unaware of this event. Assuming that it was, the blame lies on it in not going to the source which could clarify the position. Johari speaks of coming to know that plaintiff was the troublemaker. If so, defendant 1 was under an obligation to address a query in writing to the plaintiff. Instead of so doing it tried to outflank plaintiff by devious methods. The first was to get into the agreement to sell dated 23-7-1966 (Ex. A-112) a recital about Munchershaw having agreed to waive the covenant in consideration of a perpetual lease of 400

sq.ft. of land from Ratan Villa. That no such agreement had taken place is an admitted fact. In reality, Munchershaw had expired in 1962. Becoming aware of the feud pas Johari says the name should have been that of Maneckji Mistry. Defendant 1 ever devious in its methods, had Ex. A-112 referred to in Ex. J. But the reference was a discreet mention of its date. No particulars of the covenant having been waived were mentioned in Ex. J. Plaintiff is right in the submission that the idea was not to alarm him and at the same time have an instrument in existence for hocus-pocus in the future. Next, defendant 1 obtained an indemnity from Zaveri. In Johari's words this was the final coat in the armour that defendant 1 had donned to ensure protection of its interests. Third, was the attempt to hoodwink the State Government into relaxing the F.S.I. norm by suppressing vital information. Defendant 1 would have it that it was in error, the error lay in relying upon Zaveri and Lalchand that they could build on any part of Ratan Villa except the existing garages and those areas specifically referred to in Ex. B. This plea also carries no conviction. Had there been any truth therein, defendant 1 would have snapped up Lalchand's offer in the suit for recovery of the balance of the price to get a refund of the sum paid by them. Far from so doing, defendant 1 consented to a full decree inclusive of interest. But whatever be the assurances of Zaveri and Lalchand, defendant 1 cannot be said to have acted in good faith when it omitted to make a formal move to ascertain plaintiff's exact intentions. At one stage a friendly suit seems to have been contemplated with the obliging Maneck Mistry on the other side. The fear of the vigilant and unfriendly plaintiff was too real to allow the charade to be played out. Lalchand's contrition in reimbursing a part of defendant 1's litigation expenses has been referred to by Johari. But that may be an act of charity. Lalchand's keeping out of the witness box is proof enough of his not wanting to be questioned, lest the facade of good faith crumble to dust. Defendant 1 has gone through the motions of applying for a summons to Lalchand. That Lalchand is not examined is explained away as being on account of Lalchand's senility. This is a probability, but should have been substantiated by a medical certificate or the testimony of someone living with the person.

71. Plaintiff seeks an injunction to enforce the covenant and defendant 1's reply is that damages or compensation would be adequate to serve the ends of justice. A quick glance at the provisions of the SR Act will be instructive. Subject to the overriding factor of discretion, sections 10, 11, 14, 16, 21, 23 and 24 of the said Act pertain to this aspect of the case. Section 10 predicates specific performance where (i) there exists no standard for measuring damage caused by non-performance and (ii) where compensation would not afford adequate recompense to the loser. One of the presumptions-rebuttable-annexed to the section by way of an Explanation, is, compensation cannot adequately relieve a non-transfer where the property is held by the defendant as an agent or trustee of the plaintiff. In the matter of preventive injunctions a covenantor and covenantee may occupy the position contemplated by the presumption. Section 11 mandates specific performance subject to the exceptions of the Act where the act agreed to

be done is in the performance, wholly or partly, of a trust. Section 14(1)(a) stipulates a non-performance decree where compensation in money is an adequate relief. The reverse side of this is to be found in section 16(a) where a person not entitled to recover compensation for breach of a contract, is held disentitled to a decree for specific performance. Section 21 does not really concern this case except to note that though plaintiff has not claimed compensation as an alternative to preventive relief, he may be permitted to do so at a later stage. Section 23 again is not attracted for Ex. B does not stipulate a sum as payment for breach of the covenants appearing therein. Section 24 bars a suit for compensation for breach of a contract or part thereof, where a suit for specific performance of the contract or part thereof has been dismissed. A simple and catch-all formula from these provisions may not be easy. Even so, the mandate of law has to be ascertained in a general sense. The rivals, as is to be expected, put it differently.

72. Plaintiff canvasses the following as representing the correct position in law :

The ordinary rule is to grant specific performance unless the grant of such relief could be termed inequitable -- *Madamsetty Satyanarayana Vs. G. Yellogi Rao and Others*, and *Prakash Chandra Vs. Angadlal and Others*, . Next is the almost universal grant of injunctive relief to prevent even a threatened breach of a negative covenant. Reliance in support of this contention is placed on *Parma Singh v. Tulsicharan Goswami*, ILR 1937 Cal. 367, *Tulk v. Moxhay*, 1948 (18) L.J. Ch. 83 and *Lord Stratheona v. Dominion Coal*, 1926 S.C. 108. The principle underlying the rule is best stated in these words of the last decision at pages 119 and 120:

"but the questioned is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. In the opinion of the Board these views, much expressive of the justice and good faith of the situation, are still part of the equity jurisprudence, and an injunction can still be granted thereunder to compel, as in a Court of conscience, one who obtains a conveyance or grant sub conditions from violating the condition of his purchase to the prejudice of the original contractor. Honesty forbids this; and a Court of equity will grant an injunction against it."

Indeed, *Parma Singh* (supra) goes to the extent of saying that the question of comparative convenience or inconvenience on the nature or extent of damage or injury to the plaintiff would not ordinarily arise. The third formulation put forth by plaintiff is that subsequent purchasers with knowledge of a negative covenant cannot plead that plaintiff be relegated to a claim for compensation. This is so even if plaintiff cannot show substantial damage or injury flowing from the breach of covenant- *Chatsworth Estates v. Fewell*, 1931(1) Ch.D. 224 and *Abdul Kayum Ahmad and Others Vs. Damodhar Paikaji Kinhekar and Another*, . The ratio was thus stated by *Farwell, J.*, in the first case :

"As to the form of relief I must grant an injunction. The relief sought is no doubt purely equitable, but I cannot accept the defendant's contention that I ought not to grant an injunction without proof of substantial damage. That is directly contrary to *Elliston v. Reacher* (1). I need not read the familiar passage, but it clearly establishes that a plaintiff is entitled *prima facie* to an injunction, though only equitable rights are being enforced, and though there is not any proof of immediate and substantial damage, unless the plaintiff himself has done something to disentitle him to that form of relief.

This is peculiarly a case for an injunction. Whatever his previous knowledge, the defendant knew before the date of the writ, June 4, 1929, that he was breaking the covenant, and that the plaintiffs objected. In the face of that he elected to go on in assertion of his supposed legal right, to which I have held he is not entitled. In those circumstances I ought to give the plaintiffs the only substantial relief I can namely, an injunction. Damages are no remedy, because the object of the covenant is not to make persons pay for committing breaches but to prevent those breaches."

The fourth proposition canvassed is that in the matter of an obligation annexed to the ownership of Immovable property, the covenantor is in the position of a trustee for the covenantee. Reliance in support of this contention is placed on section 38(3) of the SR Act and *Bai Dosabai Vs. Mathurdas Govinddas and Others*, .

73. Defendant 1 would have it that even in action for enforcement of negative covenants, the Court has in appropriate cases, a discretion, nay, a duty, to decline an injunction and relegate plaintiff to a claim in damages. The reliance placed on *Knight v Simmonds*, 1896(2) Ch. 294, does not seem to support the contention for the context there is more germane to debarment of specific relief on grounds of delay, acquiescence or where the object underlying the covenant has been rendered illustory by changes in the neighbourhood. The last aspect will be considered separately. *Shaw v. Applegate*, 1977(1) W.L.R. 970, is a case where inaction bordering on acquiescence disentitled plaintiff to an injunction, it being held that damages would be the more appropriate remedy. Reliance is placed upon stray sentences to contend that even if there is not sufficient acquiescence to debar plaintiff from all remedy, failure to protest at an early stage leading to an alteration of the status quo, would be enough to disentitle plaintiff to injunctive relief. The factual position leading to the conclusion is stated thus in the leading judgment of Buckley, L.J.:

"Undoubtedly the position is, I think, that the defendant was to some extent lulled into a false sense of security by the fact that the plaintiff's did not protest earlier than they did at the course of action he was pursuing, but, moreover, when the action was launched no application was made for interlocutory relief, and the defendant has continued to conduct his business on this land in the way indicated and has continued to build up the goodwill of that business, and it is clear that he has invested quite considerable sums of money in the installation of

various kinds of amusement and gaming machines. It is now 1977, almost six years since he first began to operate this property as an amusement arcade and I think that it would be extremely hard after that length of time to restrain him by injunction from continuing to carry on this business, and if we were to grant the injunction sought it would involve his ceasing to use the lean-to for the purposes for which he has been using it, it would involve his dismantling large number of fairly valuable machines and it is common ground that there is no other space, upon this property at any rate, where the defendant could make use of them. So it would, to a certain extent, operate in a mandatory fashion and probably subject the defendant to considerable loss.

In these circumstances, I think that the appropriate remedy in this case is not an injunction but damages."

In the instant case plaintiff did everything possible to warn defendant 1 and their predecessor Ratanchand of how he understood the height covenant. In Misc. Application No. 501 of 1968 he had pleaded his interpretation of the covenant and had applied for and secured an interim injunction to restrain the construction. Again, it was defendant 1 who went in appeal and had the injunction vacated with a clear understanding that pleas such as estoppel and the like would not be available in the event of plaintiff succeeding in this suit. The determined opposition put up by plaintiff is a far cry from the belated responses of the plaintiff's in *Shaw v. Applegate* (supra). *Sefton v. Tophams Ltd.*, 1964(1) W.L.R. 1408 does contain an observation about the power and duty of a Court to grant damages instead of injunctive relief in appropriate cases (page 1426). In fact this observation is preceded by Lord Cairns speech in *Doherty v. Allman*, 1878(3) A C 709. which bears reproduction in full to establish the point--

"If parties, "for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury-- it is the specific performance, by the Court, of that negative bargain which the parties have made, with the eyes open, between themselves."

Defendant 1 argues that injunctive relief would be refused if the status quo has been irretrievably altered, even if this is done by defendant pendente lite and with knowledge of plaintiff's claim. The limitation conceded by defendant 1 is that this proposition is good law where the injunction would put the plaintiff in a very strong bargaining position and force defendant 1 to but a release of the injunction. The plea is based on Cross, J.'s judgment in *Baxter v. Four Oaks*, 1965(1) Ch. 816. Again the factual context cannot be overlooked. There, the covenant did not prohibit erection of a block of flats. Plaintiff's could not and did not ask for an order that defendants pull down the building they had constructed.

The relief claimed was an order to prohibit defendants from using the building as flats. Therefore, plaintiffs were really trying to secure an unfair stranglehold over the defendants. Naturally enough, injunctive relief was refused.

74. To summarise, the legal position as also the exposition thereof in precedents inclines in the direction of plaintiff. Defendant 1's predecessor-in-title undertook to observe a certain restraint in the matter of vertical expansion on Ratan Villa. Defendant 1 had notice of this and in any case could have obtained a clear declaration of intent from plaintiff. Sir Jamshedji Kanga had suggested that course by means of an originating summons in his opinion dated 20-10-1966. That this opinion was obtained by Maneck Mistry does not mean that Ratanchand was not aware of it. In fact Ratanchand seems to have given out that he had gone with Maneck Mistry to obtain that opinion from Sir Jamshedji. And there is no evidence that Maneck Mistry conveyed the opinion to plaintiff. Much stress is laid on plaintiff not questioning Maneck or Kekobad as to what they had to say about the covenant. The extent of Maneck Mistry's tilt in favour of Ratanchand has been referred to while dealing with the issue of locus. Kekobad's subservience to Maneck Mistry is clear from his not saying a word during the lifetime of his employer and brother. Even the written statement filed by him and Khurshed is equivocal. Even the once contemplated friendly suit idea was abandoned. In the background of the circumstances, equity and discretion does not lie in favour of defendant 1 whose attitude was and is to brazen it out and when caught try to clutch at any straw available.

75. This takes me to a somewhat more substantial defence viz., the inappropriateness of the grant of injunctive relief having regard to a change in the character of neighbourhood. That congestion, pollution, strain on water supply, drainage etc. etc., and that, in the immediate vicinity of Maneckabad and Ratan Villa, is undeniable. Let it be said to plaintiff's credit that as in other matters, here also, plaintiff has not tried his hand at untruths. More important judicial notice can be taken of the fact that multistoreyed buildings are the order of the day in every urban centre--more-so in Bombay. The fishing village which Charles II got from his Portuguese father-in-law is something that has ceased to exist even in the areas touching the seashore of this metropolis. The Cesser is ancient history. But what exactly is the equity that relieves the covenantor from the burden that he was voluntarily undertaken? The principle is explained by Lindley, L.J., in *Knight v. Simmonds*, 1896(2) Ch. 294 thus :

"But, further, before granting equitable relief, courts of Equity look not only to the words of a covenant, but to the object to attain which it was entered into, and if, owing to circumstances which have occurred since it was entered into, that object cannot be attained, equitable relief will be refused. It is upon this ground that restrictive covenants intended to preserve the character of land to be laid out and used in a particular way will not be enforced if the land has already been so laid out or used that its preservation as intended is no longer possible. Such a state of things can seldom if ever have arisen except from a

departure by the Vendor and the purchasers from him from the scheme, or from the acquiescence or laches of those entitled to enforce the observance of the covenants in question; but, whatever the explanation of the altered state of things may, be if the object to be attained by the covenant cannot be attained, equitable relief to enforce it will be refused."

Plaintiff counters this argument by contending that in an era of ever-burgeoning population with its resultant pressure on space, negative covenants become more precious. The answer is thus put by Harman, J., in *Bell v. Norman C. Ashton. Ltd.*, 1956 P. & C.R. 359---

"He said that town planning approval had been obtained for houses on this scale of density; modern conditions demand that suburban planning should be on that kind of scale; that is the right density at which suburban people ought to live; and if they do not they are obsolete and they ought to be disregarded as being antisocial persons wanting more room than in a crowded country it is right that they should occupy. I must confess that I was much incensed by this evidence. There does remain in a world full of restrictions and of frustration just a little freedom of contract. I do not see why a man should not contract that he shall have half an acre round him and not four neighbours right on him. I do not see why it is antisocial to wish to have a little longer bit of garden or a little wider bit of frontage. To suggest that because these people live on an estate near others where the density is greater their rights ought to be disregarded by the Court and swept away is a proposal which I reject with some indignation."

Next plaintiff is right in contending that discharge or modification of restrictive covenants has been taken out of the realm of equity in England vide section 84(1) (a) of the Law of Property Act, 1925 which has no counterpart in this country. Section 40 of the T.P. Act contains no such limitation. So far as section 20(2) of the SR Act is concerned, Clauses (a) and (b) while not speaking of plaintiff having taken advantage of defendant at the time of the making of the contract, does not stipulate that a contract found to be onerous to one party at a later day, should not be compelled to be performed. In terms, section 20 does not speak of change in character of neighbourhood as a defence to an action for preventive relief. The Law Commission of India's 9th Report has this to say on the subject :

"In India too, it has been held that circumstances which have subsequently arisen such as a rise in prices owing to external circumstances, like war conditions, or the results of litigation, do not constitute hardship which can be relieved against under Clause II."

This sentence is followed by one which shows that a defence of this nature must have a nexus to the act or omission of plaintiff. Thus :

"A subsequent change of conditions causing hardship may, however, be a ground for refusing specific performance where it has been brought about by the acts of the plaintiff."

English decisions so holding are *Chatsworth Estates v. Fewell*, 1931(1) Ch.D. 224 and *Osborne v. Bradley*, 1903(2) Ch. 446. But the former as also *Bell v. Norman C. Ashton. Ltd.*, 1956(7) P.& C.R. 359, articulate doubts as to applicability of this defence vis-a-vis changes outside a particular estate or neighbourhood.

76. It is time now to look at defendant 1's authorities. In *Preston & Newsom's Restrictive Covenants* (7th Edition) at Page 180 the author says that injunction can be refused to a plaintiff on the ground of an alteration in the character of the neighbourhood which cannot be attributed either to his own acts or omissions or those of his predecessors. On page 181 it is observed that equitable relief to enforce will be refused if the object to be attained by the covenant cannot be attained, "whatever the explanation of the altered state of things may be". At page 182 in a footnote *Harman, J.*'s characterisation of the above being a doubtful doctrine in *Bell v. Norman Ashton*, 1956 P.& C.R. 359 is dissented from. *German v. Chapman*, 1877 Ch. 271 is cited for the following passage at page 279 :--

"the property has been.. so substantially changed as that the whole character of the place or neighbourhood has been altered so that the whole object for which the covenant was originally entered into must be considered to be at an end, then the covenantee is not allowed to come into the Court for the purpose merely of harassing and annoying some particular man where the Court could see he was not doing it bona fide for the purpose of effecting the object for which the covenant was originally entered into."

This passage has been read in the background of a waiver by the plaintiff and the degree thereof being fairly substantial. In our case plaintiff did not permit either *Ratanchand* or defendant 1 to harbour any illusions about the seriousness of his desire to enforce the covenant. *Knight v. Simmonds*, 1896(2) Ch. 294, is to the same effect. *Sargant, J.*'s judgment in *Sobey v. Sainsbury*, 1913 (2) Ch. 513 is that rare decision which says that a general change in the character of the neighbourhood irrespective of the acts and omissions of plaintiff, can be taken into account to refuse injunctive relief. With great respect to the Judge it is not possible to take so light a view of covenants solemnly agreed to by parties bargaining with each other at an arms length. To sum up, the defence of a change in the neighbourhood qua such a change, has few votaries in England. In our country its application is not countenanced by statute unlike the English Law of Property Act, 1925. In fact, section 40 of the T.P. Act enjoins the contrary. Moreover the spread of multi-storeyed structures in the locality renders the height covenant more valuable--certainly not obsolete in the sense of an unwanted phenomenon. Change of neighbourhood defence will prevail where it has a connection with plaintiff's inaction amounting to waiver or acquiescence. One more factor of importance is that in England also, the defence has been used in the context of land divided into lots for a building scheme. That situation does not govern *Ratan Villa* and *Maneckabad*. All in all this defence is not attracted to the facts of this case.

77. Public policy is one more ground on which plaintiff's right to preventive relief is questioned. Defendant 1 contends that providing residential accommodation, specially in a place like Bombay is a pressing social need. Where that is the object of defendant 1 vis-a-vis its members and where this does not cause substantial damage to the legitimate interests of plaintiff, public policy necessitates refusal of the injunctive relief claimed by plaintiff. Providing shelter for human beings and the most grandiose of structures for that purpose, do meet a social need. the multistoreyed structure that defendant 1 intends to put up will be occupied by its members and their families. The reliance placed on *Wrotham Park v. Parkside Homes*, 1974(1) W.L.R. 798 is hardly apposite. The covenantee there did not claim an interim injunction while the construction was in progress. This, it was conceded, did not disentitle them to the final relief of mandatory injunction. However a mandatory injunction was not to be granted "as of course". The construction that had gone on led to the erection of a number of houses. Were the mandatory injunction to issue, it would involve a demolition of much needed houses. That, in the opinion of Brightman, J., would be "an unpardonable waste". An award for damages was made, but with a clear warning that not granting a mandatory injunction was not to be looked upon as a charter to breach valid restrictions. "A developer who tries that course may be in for a rude awakening" (Page 811). Therefore it was not public policy that gave the breather to the violator of the restrictive covenant. The Supreme Court in *Gherulal Parakh Vs. Mahadeodas Maiya and Others*, summarised the doctrine of public policy thus :

"Public policy or the policy of the law is an illusive concept; it has been described as "untrustworthy guide", "variable quality", "uncertain one", "unruly horse", etc. The primary duty of a Court of Law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the Court may relieve them of their duty on a rule founded on public policy."

True in *Ratanchand Hirachand v. Askar Nawaz Jung*, (supra) Chinappa Reddy, J., did quote with approval Prof. Winfield's dictum that "public policy is a principle of judicial legislation or interpretation founded on the current needs of the community". The learned Judge further went on to observe--

"in a modern progressive society with fast changing social values and concepts it becomes more and more imperative to evolve new heads of public policy.. law cannot afford to remain static."

But too great a play with this instrument is perilous. In *Fender v. Mildmay*, 1938 A.C. 1 : 1937(3) All.E.R. 402, the tocsin was sounded by saying that the duty of courts was to expound and not expand public policy. The doctrine was to be invoked only in clear cases in which affirming a right to enforce a contract would result in substantially incontestable harm to the public. The acceptability was not to depend upon the idiosyncratic preferences of a few judicial minds. Applying the above to the facts of the present case, what one finds in a deliberate courting

of trouble by Ratanchand and defendant 1. knowing full well what plaintiff meant by the height covenant, they took recourse to devious and dubious measures. Ratanchand tried to bribe plaintiff through Maneck Mistry. Lest this seem too supplicating he addressed haughty notes to plaintiff wanting to create the impression of plaintiff being the suppliant. Maneck Mistry and Ratanchand obtained an opinion from an eminent Counsel to quieten their fears. But the advice to apply for a judicial ruling through a summary proceeding was not followed. A friendly suit contemplated by Lalchand was not instituted. Direct enquiries from plaintiff to ascertain what exactly he meant were not made. A document falsely reciting the agreement of a trustee to relinquish the covenant and that for a quid pro quo tilting in favour of the covenantor, was drawn up. This agreement was not clearly mentioned in Ex. J. Ex. J contained a discreet reference to the indemnity etc. given by Zaveri. F.S.I. 2 was obtained on false pretences from the Government. When that same was exposed, defendant 1 gave assurances of not pleading estoppel and waiver to get vacated the interim injunction against construction obtained by plaintiff. Having tried every trick of the trade and outside it, public policy is hardly the head to which recourse can be taken by defendant 1 to defeat the enforcement of a covenant otherwise binding. Plaintiff's legitimate rights are, it is said, not jeopardised by a skyscraper in the vicinity of Maneckabad. Much is made of the fact that defendant 1 does not want to impede the flow of light and air to Maneckabad. But Maneckabad in solitary splendour with compulsorily retained vacant space in the vicinity will be certainly more valuable than one overshadowed by a cement-concrete Frankenstein with hordes of people living in it. Invocation of public policy in defendant 1's favour would be to aid the slippery to wriggle out of a contract legitimately reached.

78. Defendant 1 is on good ground in asking the Court to ignore the antedating of Ex. J as a feature for appraising the equities of the case. Lalchand and Zaveri, parties to the antedating, are not impleaded as defendant to the suit. An enquiry into the alleged manipulations vis-a-vis Ex. J is also uncalled for as no relief is sought on the basis thereof.

79. Defendant 1 uses the doctrine of "clean hands" in a selective manner. First, it is said to apply only to a plaintiff seeking to derive advantage from his dishonest conduct in so direct a manner that it would be unjust to grant preventive relief to him. Oppression by litigation is not very different from physical torture via racks. But litigation is also the only remedy a law abiding person has against persons bent on violating his rights. Plaintiff's claim cannot be termed dishonest or extortionate because defendant 1 cannot have its way. I cannot conceive of the many individuals who are or have been office-bearers of defendant 1 behaving differently were they in plaintiff's position. Defendant 1 relies on the following passage from Principles of Equitable Remedies by Spry (3rd Edition) page 240--

"In the second category of cases the Court is being asked to assist unconscionable conduct on the part of the plaintiff, either by enforcing a right already improperly obtained or by otherwise furthering unconscionable purposes."

Plaintiff's standing on his rights will result in an infraction of defendant 1's desires. That however, does not make plaintiff's conduct unconscionable. Significantly at page 241 of the work relied upon by defendant 1, appears the observation that courts of equity do not Judge the moral qualities of litigants in the abstract.

80. *Baxter v. Four Oaks*, 1965(1) Ch. 816, is pressed into service by defendant 1 to urge the somewhat unusual plea that a covenant would not be enforced where there was a reasonable doubt as to its effect, and this, despite defendant 1 having the clearest possible notice as to the covenant sought to be enforced. The proposition rests on disparate sentences strung together to carve out a startling principle-- hardly a reasonable way to deduce the ratio of any case. But that apart, Ratanchand, Lalchand and after them Zaveri and defendant 1, had ample opportunity to test their doubts. The opportunities (open and legal) were bypassed to avail of subterfuge. Their doubts were not legitimate and therefore the aversion to open methods to resolve them.

81. To conclude in the entitlement/disentitlement issues, not one factor goes against plaintiff. The normal rule of granting him the declaration and injunction to enforce the covenant will thus prevail.

CONSTRUCTION

82. The crucial issue viz., construction of the height raising covenant is now the issue for resolution. A brief summary of the important phases of the factual perspective requires to be set out. The property then comprising Maneckabad as also Ratan Villa--the latter with all the structures thereon was purchased in 1948 or so far about Rs. 6,00,000/-. The land measured about 6933 sq.yds and it was between the Nepean Sea Road and the sea front. Area not to be built upon vis-a-vis the Government covenant and that admittedly promised under Ex. B, plus Maneckabad plot, left about 2373 sq.yds dispersed all over the property. When Ex. B came to be admitted for registration, the vacant land being transferred thereunder was about 8% of the area together with structures, left with Ratanchand. The rate at which the price was fixed was worked out to Rs. 103/- per sq.yd. Between 1951 and 1959, there was no dispute between the parties to the transaction vis-a-vis the covenant. In 1959, to be precise on 12-9-1959, Manchershaw for self and trustees addressed Ex. A-1 to the B.M.C. The letter emphasised the height covenant as sought to be enforced by plaintiff. This interpretation in all its starkness came to the notice of Ratanchand. He in person and through Maneck Mistry tried his hand at making plaintiff relent-but to no avail. Defendant 1's interest in Ratan Villa started being articulated in 1965. In the two years to follow there was a flurry of activity between Zaveri, Lalchand and defendant culminating in Ex. J. The defendant 1 was informed of owners of Maneckabad having a covenant on Ratan Villa. The pretence that this claim was nebulous, imprecise, vague and uncertain does not hold water. Had defendant 1 laboured under any such illusion they had only to address an open query to plaintiff. They did not so do and the obvious reason was a fear of plaintiff as

much as the scare of a covenant suit. Lalchand's suit for recovery of the balance of the price payable under Ex. J was initially resisted on the ground of the vendor not having got the covenant released. In fact a set-off and counter claim were put forth. Lalchand offered to restore the status quo ante. Defendant 1 surrendered, accepting a full decree with interest.

83. Both the parties have crafted a careful strategy to support their stands. This is apart from claiming that the words used in Ex. B to phrase the covenant, support their differing stands. Broadly speaking, plaintiff would have it that events preceding 20-3-1951 are not relevant to the task of understanding the covenant. The subsequent events are for they are in the nature of admissions. Defendant 1 wants the subsequent events to be ignored as irrelevant. It presses for a place of primacy to be given to the document of 26-10-1950 as a guide to construction. That document was the foundation on which the conveyance Ex. B came into existence. The admissibility and weight to be attached to the 26-10-1950 agreement (hereinafter to be referred to as Ex. Soc.-14 for sake of convenience) requires to be dealt with separately.

84. The original of Ex. Soc-14 is not forthcoming. Until July 1991 neither the plaintiff nor the trustees were called upon to produce the same. Even M/s. Mazgaonwala the common Solicitors were not called upon by defendant 1 to produce the original. The document purports to record an agreement between Ratanchand and Maneck Mistry-the latter acting in his individual capacity. The location of Ex. Soc-14 has an interesting story behind it. Phadke, while investigating the title of the Vendor came across Ex. B. That conveyance made a reference to an agreement of 26-10-1950. Somewhere Ex. B bore an endorsement showing a connection between the transaction and the firm of Mazgaonwala. That led Phadke to the office of the firm. Ex. A-168 which is a communication addressed by Phadke's firm to plaintiff's Solicitors recites that the original Ex. Soc-14 is with Ratanchand and the opinion obtained from Sir J.B. Kanga with the trustees. Phadke had to concede that the above writing on the date it was written i.e. 6-4-1971, was correct. At one stage Phadke was not sure as to when he had been to the office of Mazgaonwala i.e. whether before or after 31-3-1967. Correctly himself, he later said that the visit was made after the filing of the 1968 writ petition by plaintiff. Ex. A-168 is based on instructions given to Phadke by defendant 1-Chiefly Johari. If so, the natural thing for Phadke would have been to inform Johari that he had seen the document's original or copy in office of Mazgaonwala. Forget this incongruity, the affair becomes murkier when we peruse Johari's deposition. According to him he and Phadke went to Ratanchand after the writ petition was filed by plaintiff. He came back with a copy of Ex. A-Soc-1. The two then went to Maneck Mistry for Ratanchand had informed them of the original of Ex-A-Soc-1 being with that gentleman. Maneck Mistry told them of the original being with the firm of Mazgaonwala. Johari and Phadke then went to Mazgaonwala's office where a lady showed them the original. This well-rounded tale -and Johari was the tailender had to plug all the loopholes- does not get corroboration from Phadke. He makes no reference to

Ratanchand showing a copy of Ex. A-Soc-1 and telling them of the original being with Maneck Mistry. He does not speak of Maneck Mistry saying that the original could be found with Mazgaonwala. To cap it all, Phadke does not say that Johari was with him when he went asleuthing on the clue located by him in Ex. B. The contradictions are sought to be papered over by arguing that the event took place long ago and witnesses are bound to differ on details--even, vital details. P.W. 4 Parvez Mazgaonwala is categorical in her refutation of the visit to her office etc. as a pack of lies. And it does appear that she is not forgetful or cowed down by the alleged threats of plaintiff to report her for unprofessional conduct. The possibility of the original of the agreement being with her firm is almost negligible. In the very nature of things the original--if preserved--had to be with Maneck Mistry or better still Manchershaw Mistry. And Maneck Mistry was in league with Ratanchand and defendant 1. If defendant 1 admitted receipt of the original agreement from Maneck Mistry, the charge of collusion stood proved beyond a shadow of doubt. A few heads were put together and a strategy devised to explain defendant 1's custody of the document or variants thereof. And there are variants for some contain Ratanchand's acceptance endorsement while others do not. Phadke cannot say whether the document he was shown was an original or a copy. This was a slip and Johari had to cover it up by being assertive. The document was an original says Johari. Phadke's Clerk who had prepared a copy of the document has gone into the great void that passage of time is. It was not enough to obtain the paper from Maneck Mistry. Some touching up had to be done. Defendant 1 has shown no compunction in, to use an ungrammatical expression, disappearing documents obviously in its possession. And this without putting its Secretaries after Johari into the witness-box to explain what became of the papers. To them, there could be no difficulty in touching-up a document to sound more credible. The importance that the agreement has for Ex. B cannot be doubted. What has been said in the preceding sentence may sound strange seeing that the original of the agreement is unavailable and the accuracy of the copies thereof is doubtful. But the other side cannot be overlooked. Regard being had to the complexity of the terms which form a part of Ex. B, it has to be inferred that a document embodying the agreed terms, preceded the conveyance. Parties being what they were--professionals and businessmen--could not have discarded the important documents which culminated in Ex. B. Maneck Mistry was the moving spirit behind the acquisition as also the body of trustees--the latter more so after the death of Manchershaw in 1962. Defendant 1's turning to Maneck was natural as Johari must have been informed of his amenability as against the hostility of plaintiff. The best proof of the existence of such an agreement is the reference thereto in Ex. B. Ex.B. speaks of an agreement dated 26-10-1950 and the payment of earnest money of Rs. 5001/-. Plaintiff cannot dispute the correctness of these recitals. The document surfaced for the first time in the annexures to a rejoinder filed by Johari in the writ petition. The total absence of a reference to such an agreement in the previous years is a fact of some relevance. But plaintiff's refraining from questioning Maneck or Kekobad on the subject--so he asserts--is also significant.

Plaintiff's explanation takes the usual line about relations between him and Maneck being strained and Kekobad being under the sway of that enemy. That Maneck's signature appears on the document and that this signature is clear even in a photocopy is not disputable. Plaintiff is nothing if not a perfectionist. Meticulousness is natural to him. The emergence of the agreement must have been quite an event in his pursuit of defendant 1. This is not to say that I disbelieve him when he says that he did not question Maneck or Kekobad on the document. The former had committed himself to the enemy camp. Kekobad had no views of his own during Maneck's lifetime. It was too late to show an awareness and assertiveness befitting an independent person after Maneck's passing away. A lifetime's habit of leaving the decision-making to Maneck could not be substituted by anything more effective than the wishy-washy written statement filed by Kekobad on behalf of himself and Khurshed. Plaintiff did not need to question either uncle. The agreement was a natural document and the better alternative was to stay put. Even with the agreement defendant 1 could be outflanked. In its effort to make effective use of the agreement, defendant 1 has tried to touch the same with the result that some 3 to 4 specimens with slight differences have emerged. Great suspicion attaches to the specimen having an endorsement of Ratanchand accepting the term together with his signature. Not that Ratanchand's signature thereon is faked. Ratanchand would have unblinkingly signed a dozen documents to get over the height covenant phrasing in Ex.B. The doubt is whether the original agreement bore such an endorsement or signature. The next doubt is in regard to the use of a stamp paper to embody what was in tone and content an offer. It is true that the stamp paper purports to be in Ratanchand's name. Seeing the case and blandness with which inconvenient documents have been made to disappear at defendant 1's end, it should occasion no surprise that they have also touched-up a few papers to support their stand. Plaintiff has tried to take shelter under the plea that Ex.Soc-1 cannot bind the trust as it relates to an agreement between Ratanchand and Maneck Mistry-the latter in his individual capacity. *Kelner v. Baxter*, 1866 (2) C.P. 174 and in *Re:Empress Engineering Co.*, 1880 (16) Ch. 125, have been cited to show that there can be no ratification of a contract made at a time when the ratifier was not in existence, even though in contemplation. In relation to trustees, the position is more stringent for the very office is such that they have to act together to execute the trust see *L. Janakirama Iyer and Others Vs. P.M. Nilakanta Iyer and Others*, . The contention is irrefutable. Ex.Soc-1's admissibility is what defendant 1 has to establish first. The original not forthcoming from whoever should have been in custody thereof, a case for permitting secondary evidence is established. Subject to the clarification that one has to be wary as to the interpolations, and uncertainty even on that score, I would accept Ex.Soc-1 as reflecting an offer of Maneck Mistry which formed the base for Ex.B. Perhaps the trust was not then even under contemplation. But that the trust later adopted the payment of earnest money under Ex.Soc-1, is clear from the corresponding recital in Exh.B. That apart, the similarity between the documents in relation to price, area agreed to

be sold, right of way and compulsory open space etc. cannot be dismissed as a mere coincidence. Plaintiff concedes that he has no evidence to show how the settlors of the trust or trustees reimbursed Maneck for the payment of earnest money made by him to Ratanchand. Obviously the repayment must have been in cash or it could have been a gift of Maneck to the settlors. Now Maneck may not have disclosed his principals when negotiating the deal. And it is possible that the settlors became interested in the property at a later date. One more possibility is that Maneck for reasons not known, decided to opt out of the purchase in his individual capacity and passed on the benefit thereof to the settlors. Whatever be the reason, it is clear that Ex.Soc-1 had a bearing on Ex.B. Plan B which is an annexure to Ex.B was drawn up on 8-3-1951 by no less a person than plaintiff's father Manchershaw. On 8-3-1951, the trust did not exist. Therefore, except as a technicality, the trust which came into existence on 17-3-1951 had adopted the agreement of 26-10-1950. This last sentence has to be so worded to indicate the caution necessary in accepting Ex.Soc-1 at its face value.

85. Plaintiff contends that Ex.Soc-1 even if genuine and reflective of what was agreed to between Maneck and Ratanchand, cannot be said to have been followed in toto when it came to the execution of Ex.B. Two terms of Ex.Soc-1 bound the Vendee (i) if wanting to dispose of Maneckabad to give the first option of purchase to the Vendor and (ii) sale of Maneckabad or a part thereof to a Muslim purchaser only with the prior assent of the Vendor. These terms do not find a mention in Ex.B. The answer given by defendant 1 is that these were personal covenants not running with the land and therefore were not mentioned in the conveyance. No conclusion is necessary on this point as the omission could have been for either reason and is in any case not of much importance. Plaintiff next points to the variation in regard to water connection and drainage. In Ex.Soc-1, the Vendee was to make his own arrangements whereas Ex.B obliges the Vendor to permit the laying of lines for these and other amenities through the central passage. I would not read this as a variation. It is a mere amplification in Ex.B of something left unclear in Ex.Soc-1. The other variation in relation to passage is a specification of the pathway to be kept free for passage referred to hazily in Ex.Soc-1. The third dissimilarity is in respect of a burden imposed on Maneckabad. Ex. Soc-1 makes no reference to any portion of Maneckabad being left unbuilt. Ex.B recites that the Vendee would keep open a strip of land fronting Ratan Villa of the width of 10". The Vendee was however given the right to put up a porch without pillars and build weather sheds and compound wall on this strip of land. Now this variation cannot be wished away as a minor diversion. It does show that Ex.Soc-1 was not immutable. Parties were in touch with each other after Ex.Soc-1 was sent to Ratanchand. The fourth difference relates to the core issue and is to be relegated to a later stage. The last speaks of Ex.Soc-1's vagueness in regard to space towards side of garage to be kept vacant. In Ex.B the space to be kept vacant is depicted in Plan B. This again is a case of smoothening the creases rather than introducing something new

into the garment.

86. Defendant 1's reading Ex.Soc-1 into Ex.B is the other extreme that has to be scrutinised. This refers to an identity in at least the undisputed covenants in the two documents. Next, is the feature of both reciting the rate of Rs. 103/- per sq.yd. Ex.B specifically refers to the earnest money paid under Ex.Soc-1. The fourth circumstance is the recital in Ex.B that the property was being conveyed "in pursuance of the said agreement and in consideration of the sum of Rs. 5001/- paid on or about 26th October 1950 as earnest money". The only payment made on 6-10-1950 and as earnest is that relatable to Ex.Soc-1. The words said agreement are said to be a clear reference to Ex.Soc-1. Plaintiff would have these words annexed to a recital in Ex.B which alter quoting the rate speaks of the sale being "on the covenants and conditions therefore herein declared and contained". The contention is that the word underlined reflects no more than the terms proclaimed in the conveyance. As said earlier Ex.B is a mix of some terms appearing, not so appearing and amplified in Ex.Soc-1. This being clear it cannot be argued that wherever there be a conflict or ambiguity in the conveyance, the key is the agreement at Ex.Soc-1. Defendant 1 contends that Ex.Soc-1 has been adhered to in relation to almost all the terms-all-the material terms at least and therefore must be treated as reflective of what had been agreed upon. The variation in regard to keeping unbuilt a strip of Maneckabad land fronting Ratan Villa is not a minor deviation. In Ex.Soc-1, Ratanchand had given a carte "blanche" to Maneck Mistry vis-a-vis construction on Maneckabad. Whether or not Ex.Soc-1 can be used to illuminate Ex.B or to rectify the said conveyance is part of a larger question to which I will come later.

87. Ex.Soc-10 is another document on which there has been a great deal of controversy. It purports to be an opinion given by Sir Jamshedji Kanga vis-a-vis the height covenant under consideration. As is usual with defendant 1, the evidence on the subject comes from doubtful, sources with the most material witness being kept out of the witness-box on the specious plea of senility having overtaken him. Phadke and Johari both claim that it was Lalchand who told them of Sir Jamshedji's opinion having been obtained. Phadke was told by Lalchand that the opinion had been obtained through Solicitors Ambubhai & Diwanji. Phadke says nothing about Ratanchand intervening in the conversation. Johari-an expert in interstitial fillings-comes up with the addition that Ratanchand was present and he gave the information of having accompanied Maneck Mistry/trustees on the visit to Sir Jamshedji. As said earlier the timing of Johari's entry into the witness-box was such as to enable him to white wash the lapses of Phadke. Be that as it may, from DW- 2 Nanavati's testimony we get assistance in that his then firm Ambubhai & Diwanji had Ex. 10 in its custody and that its ledger showed a debit of Rs. 225/- to Maneck Mistry's account, being the fee payable for an opinion obtained from Sir Jamshedji. Phadke claims that Ex. 10 was handed over to him while Nanavati says it was made over by him to a Mr. Malvi of the Solicitors presently representing defendant 1. These discrepancies do not discredit Ex.Soc-10. The original of Ex.Soc-10 should have been in the

custody of the trust or trustees. None of them has been able to lay hands on the original - at least, plaintiff and the present trustees claim not to have ever seen such a paper. It is contended that Nanavati should not be relied on as he was a member of the defendant 1 who had come along with a builder Khusilal Dak. But that will not make his testimony as to Ex.Soc-10's custody suspect. Strictly speaking, it cannot be said that Ex.Soc-10 is proved to be Sir Jamshedji's product. Defendant 1's reliance on section 32 of the Evidence Act is not exactly apposite. But it is the intrinsic naturalness of the circumstances leading to Ex.Soc-10 which prove it. Plaintiff himself accuses Maneck Mistry of colluding with Ratanchand. To some extent Maneck's note to plaintiff suggesting a relaxation of the covenant supports the inference of his not being entirely averse to helping Ratanchand. It has been suggested that Maneck was an honourable person and did not want to take advantage of typographical errors. Possible; though the proper course was to seek a Court's opinion through an Originating Summons. Maneck Mistry never disclosed the opinion to plaintiff. This bears out plaintiff's remark that the opinion was obtained to protect Maneck in case plaintiff sued for his removal or worse. Maneckji, going to the most eminent Counsel of his day to arm himself whether for a shield or sword, would not be unusual. The charge of collusion gets support from Ratanchand accompanying Maneck on the errand to Sir Jamshedji. That accompanying was actuated by a sharing of common interests. Therefore, Ex.Soc-10 has to be held as proved. As to its relevance, one has to be very careful of the date supplied to Sir Jamshedji. The words used in the covenant could not be tinkered with. But Maneckji and Ratanchand could supplement the cold record with their interested account as to what was intended. Eminent Counsel are not demigods to remain untouched by their clients' ruminations. The case for opinion's absence only deepens the suspicion on this score. That the event took place just before the onset of the threatened litigation makes it impossible to believe that Maneckji and Ratanchand refrained from supplementing Exs. B and Soc-1 with their versions as to how things had gone. To sum up, Ex.Soc-10 while admissible and also relevant is not to be given disproportionate weight. As to the weight to be attached to the opinion sans the recital in regard to facts, it is common ground that the same is not binding. Incidentally, Ex.Soc-10 is one, more indication of the existence of Ex.Soc-1. The two documents read together with the circumstances probabilise each other.

88. A fresh look at the salient points of Ex.B is necessary. Property owned by Ratanchand particularised in the First Schedule is described as "the piece or parcel of land or ground". The property which was being sold is said to be a "portion" thereof shown by red-coloured boundary line in Plan A. The First Schedule describes the pre-sale property owned by Ratanchand as "piece or parcel of land admeasuring 6933 sq. yds. together with messages, tenements and buildings standing thereon." The Second Schedule and the relevant introductory clause both describe the future Maneckabad as "piece or parcel of land ... 565 square yards". There is a reference to payment of Rs. 5001/- on

26th October 1950 towards earnest money and its appropriation towards the total price of Rs. 58,195/-. The price has been worked out " Rs. 103/- per square yard, and, "on the covenants and conditions herein declared and contained". The purchasers are given "full and free right and liberty - by day and by night and for all purposes to pass and repass from the central passage of the main gate as shown in plan marked B in burnt-sienna colour". Then comes the Vendor's covenant to keep unbuilt upon "space on the west of the land agreed to be sold - pacified on the plan - B - red-coloured boundary". Omitting the controversial covenant for the present, the Vendor promises not to build "any structure in front towards the south or on the central passage or in the garden in front of the property now known as Ratna Villa's Bungalow (main bungalow)". This promise is "shown on plan - B - marked in burnt-sienna colour". An assurance is given by the Vendor that "covenant herein shall run with the land which will be to allow passage over ground or underground of telephone, electric wires...etc.--through central passage shown in plan B in burnt-sienna colour". The purchasers covenant to keep open ten feet wide strip of land on the west from out of land purchased except for the erection of a porch without pillars, weather shed not exceeding four feet in width and a compound wall or open railings-the former not to exceed four feet in width and the latter not seven feet in height. Last comes the assurance about the Vendor's title to the property being sold. Plan A is titled "Plan of the property boundary coloured red containing 565 sq.yds". To the extreme northwest is the legend "existing garage". Below the same but larger in width, comes the open space covenanted to be kept open by the Vendor. In Plan B it is bounded by red lines. To the east of this Vendor-covenanted open space is Maneckabad showing the westward fringe of the land of 10" width to be kept open by the Vendee-except for the porch etc. etc. To the west is shown space of the Vendor to be kept open as a means of access. Plan A's draughtsman is Munchersshaw. It is signed by the Vendor and the trustee-purchasers. Plan B is more detailed as it shows Maneckabad, Ratan Villa and the surrounding properties. The note on top explains the burnt-sienna colouring as depicting "means of access to be kept open under covenant". The access funnel-shaped running east-west is from the main gate right near about half the garden. Next it shows enclosed in red lines the land promised to be kept open to the sky by the Vendor. To the west of this land is legend "garages". This plan also is signed by the Vendor and purchasers. As to the height covenant it says that the Vendor and his assigns etc. SHALL NOT BUILD ANY STRUCTURE AT ANY TIME HEREFTER HIGHER THAN THE PRESENT EXISTING GARAGES ON THE REMAINING LAND OF THE VENDOR.

89. Plaintiff and defendant 1 both claim that the covenant even as phrased supports their differing stands and not that of the other. According to plaintiff the last six words, to wit, "the remaining land of the Vendor" refers to Ratan Villa as a whole, excluding of course the structures existing as on 20-3-1951. Once the structures crumbled or were demolished the ground rendered vacant became subject to the same height limitation as that to which the grounds empty as on

20-3-1951 were subject to. Defendant 1 contends that the last six words cannot be read in isolation from the last antecedent i.e. "present existing garages". Therefore, the covenant's effect is :--Firstly, restricting the height of the existing garages to that which was on 20th March, 1951. This entails two sub-restrictions (i) putting up an additional storey on the existing garages and (ii) raising the height of these garages. Thus, the words "remaining land of the Vendor" are descriptive of the land on which the existing garages are situated, the specification being necessary to differentiate this land from that forming part of the funnel-shaped passage and that to the immediate west of Maneckabad which is red-lined in Plan B. Alternatively and secondly, the restraint operates upon land to the west of Maneckabad over and above the portion shown in red lines. This however would be land running right upto the western limit of Ratan Villa and of the same breadth as the red-lined portion. Thirdly, the covenant would operate only on that land which was unbuilt upon as on 20-3-1951.

90. Defendant 1's preferential alternative is what I shall first take up for consideration and that without recourse to Exs.Soc-1 or Soc-10. Reliance is placed on the rule of 1st antecedent. Justice G.P. Singh in his Principles of Statutory Interpretation (4th Edition) has explained and illustrated this rule at pages 199 to 203. Says the author--

"As a corollary to the rule that phrases and sentences in a statute are interpreted according to grammatical meaning, relative and qualifying words, phrases and clauses are applied to the antecedent immediately preceding."

Cases reported in *The State of Bombay Vs. R.M.D. Chamarbaugwala*, ; *Mahadeolal Kanodia Vs. The Administrator-general of West Bengal*, , and *Leader v. Dupley*, 1888 (13) A.C. 294 are put forth by defendant 1. The only other case cited by plaintiff is that appearing at *The Regional Provident Fund Commissioner, Bombay Vs. Shree Krishna Metal Manufacturing Co., Bhandara*, . And the caveat canvassed by plaintiff are two in number. One, is that the rule is a rule of grammar and not law. Second emphasis is placed on the rule's subordinate being to context and subject matter. Author Singh (supra) puts it as :--

"The rule is, however, subordinate to context and may be better stated by saying that a qualifying phrase ought to be referred to the next antecedent which will make sense with the context and to which the context appears properly to relate it."

Gajendragadkar, J., in *The Regional Provident Fund Commissioner, Bombay Vs. Shree Krishna Metal Manufacturing Co., Bhandara*, negating the reliance placed on the rule said :--

"We are not inclined to accept this construction. The ordinary rule of grammar on which this construction is based cannot be treated as an invariable rule which must always and in every case be accepted without regard to the context. If the context definitely suggests that the relevant rule of grammar is inapplicable then the requirement of the context must prevail over the rule of grammar."

Defendant 1 advances the argument that an adjectival and qualifying clause/phrase qualifies/applies only to the antecedent, immediately preceding words i.e. the proximate substantive in the absence of a disjunctive/comma. And as the excerpted clause does not have a disjunctive or comma, the rule applies thus limiting the height covenant to the present existing garages, or, at the highest, the land whereon these garages stood. Defendant 1 has given different interpretations of the covenant phrasing pursuant to an order dated 26-4-1983. First, it was said that the words, "on the remaining land of the Vendor" described no more than the phrase "the present existing garages" i.e. the former indicated the resting place of the latter. It is impossible to accept this view. "Present existing garages" lay down a benchmark in relation to height and "the remaining land of the vendor" are related to them by the word "on". The three and six words by themselves get meaning only if the words preceding the nine which they total are taken into account. The interpretation pressed by defendant 1 does violence not only to the context and subject matter factors but also to plain common sense. For whatever else may have been in doubt, there was none regarding the existence of garages on Ratan Villa. The word "present" was chosen to denote the height limitation and that limitation could not have any meaning unless one asked the questions, when and where. The question "when" was relatable to "at any time hereafter" and "where" to, "on the remaining land of the Vendor". Next comes the suggestion that the words "remaining land" signify that it is that land on which garages stand and is land other than that belonging to the Vendor which other the Vendor is required to keep unbuilt upon. This would be cutting down the expense of the qualifier remaining and most artificially so. If the intention was that, it could have been better served by showing the existing garages as a northwesterly boundary to the red-lined portion of land, the Vendor had undertaken to keep open to the sky. A more plausible proposition is the contention that the covenant prescribes a vertical limit to the height of the existing garages and any structural replacement in the event of the garages being demolished. In fact defendant 1 points to Munchershaw's implied acceptance of this being the real meaning and his tampering therewith through a letter addressed by the said Munchershaw on 12-9-1959 to BMC. The letter is at Ex.AA-1 and the relevant excerpt is worded as follows:

"Under the deed of conveyance in our favour there is an express covenant that the owner of the adjoining property shall preserve for all times the space on the west of the above plot unbuilt and open to the sky and that further no structure of any kind will be built on the remaining land of the adjoining owner higher in height than the existing garages."

The all-knowing Johari speaks of Maneck Mistry telling him that the typographical error in Ex.B of which he and his co-trustees would not take advantage of lay in the use of the word "on" instead of "than" between the words "shall not build higher" and "the existing garages". Johari's aversion to the truth on matters of importance is very pronounced. Even so, the attempt to retrieve the situation by

him leads to the absurd result of making the covenant read thus :

"shall not build any structure at any time hereafter higher on the present existing garages on the remaining land of the Vendor."

The last six words distort the meaning without the preceding words "which are". More important, by this interpretation the last six words are rendered redundant. Munchershaw's letter Ex.AA-1 despite its apparent juggling of words does less violence to context as also grammar than that attempted by Johari.

91. Defendant 1 submits that Ex.B be read as a whole to get the meaning of the height covenant albeit the said covenant seems an isolated one. In support of this argument reliance is placed on decisions reported at Provash Chandra Dalui and Another Vs. Biswanath Banerjee and Another, , Pearey Lal Vs. Rameshwar Das, and Nichhalbhai Vallabhai and Others Vs. Jaswantlal Zinabhai and Others, . In the first of these decision it is said --

"The best interpretation of a contract is made from the context. Every contract is to be construed with reference to its object and the whole of its terms. The whole context must be considered to ascertain the intention of the parties...every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that is possible."

True, but the passage also goes on to say that in construing a contract, the Court must look at the words used in the contract, unless they are such that one may suspect that they do not convey the intention correctly. It is only when there be reason for suspicion would it be "legitimate to have regard to the circumstances surrounding their creation and the subject matter to which it was designed and intended they should apply" (See Page 1838). The second decision relied on viz. Pearey Lal Vs. Rameshwar Das, relates to a Will. As is well settled in the matter of construing Wills, it says the obvious when saying that the bequest has to be read as a whole and in case of some conflict, so read as would give to every expression some effect rather than that which would render any of the expressions inoperative. Wills have a construction code all their own, though some canons may well be from the rules common to construction of non-bequest instruments, pleadings as also statutes. And one rule common to all interpretations is to give words their natural meaning. There is reason to impute suspicion to the phraseology employed in framing the covenant except in one particular to which I shall come later. Consequently the wandering into the entire conveyance to ascertain the meaning of the covenant, is uncalled for. It is argued that the phrase "present existing garages" are unmeaning for there were garages existing on the northern as well as southern sides of the main bungalow. The three words by themselves may have lent support to the view put forth, but for Plans A and B. Plan A has the legend "existing garage" to the immediate west of portion shown in red-lines in Plan B. No other garage is shown on either plan. Plan B uses the plural "garages" to depict this portion i.e. portion to west of red-lined land. Defendant 1 argues that user of the plans to construe the phrase

"present existing garages" makes the plans available for a wider use. I will deal with that aspect of the case at its appropriate place. What has to be held for the present is that there is no hurdle to use the plans for understanding which are the "present existing garages" referred to in the height covenant.

92. The interpretation placed by defendant 1 is sought to be supported by recourse to verbal pyrotechnics. Their version is said to fit the slot better for plaintiff cannot explain why the clause did not mention the height in figures instead of using the cumbersome expression "present existing garages". The simple answer is that English-the language used for drafting Ex.B-is a treasure house of words. Which words or expression to use depends on the draftsman. Possibly the garage height had never been measured and again it was so apparent a feature that no one could think of a better measure for the height limitation agreed upon. Defendant 1 argues that plaintiff has not explained the incongruity of a 13"-11/2" structure being used as a benchmark for heights when the main bungalow and outhouses were much higher. The answer why this or that term was agreed upon cannot really be used as a key to resolve words, plain and meaningful, appearing in a document. An attempt is made to link the height covenant to the next succeeding covenant vis-a-vis that prohibiting structures on south, the central passage and the garden in front of main bungalow. The purpose is obvious for these are shown in burnt-sienna in Plan B whereas the height covenant is not. The argument is said to be strengthened by the absence of a comma after "Vendor" and the intrusion of "nor" which is said of be, as used, a conjunctive. This submission does violence to the elementary rule by assuming that conjunctives and disjunctives always go strictly according to the rules of grammar. There is no difficulty in reading the height covenant as distinct and different from the bar on structures on the south, central passage and garden - the bar being depicted in burnt-sienna colour upon plan marked B. The word NOR appearing between two or more separate connotations can be also used as a disjunctive in a long sentence. Defendant 1 seeks to bolster its version of the height covenant by reference to a purpose behind the said covenant. Plaintiff who has been questioned on the subject has essayed no explanation on the basis of knowledge garnered from the trustee-purchasers as to why the limitation on height was not expressed in terms of feet and inches. Therefore, the object of making references to the existing garages was to see that there was no upward extension of the existing garages or their replacements in future. And the object behind this reference was to ensure the reception of the existing incoming quantity and quality of light and air to Maneckabad from the western side. But that very object could have been equally if not, better served by a specification of the height covenant in feet and inches. A contradiction is seen in the provision of the height restriction and the bar on garden and common passage. The first if, read as applicable to the entire remaining land of the Vendor is said to conflict with the total ban on garden and common passage. This is imagining a confusion in the face of stark clarity. The height covenant and total ban on common passage/garden are two different things and operate on

different spots. Restriction on height and a total prohibition on construction connote two different concepts in common sense. No theory of interpretation permits a distortion of common sense to the extent suggested in the theory advanced by defendant 1.

93. Relying upon some observations in decisions reported at 1893 A.C. 238 , and Raj Bajrang Bahadur Singh Vs. Thakurain Bakhtraj Kuer, , defendant 1 urges that once words used in a deed are susceptible of two meanings or constructions, it becomes permissible, nay, imperative to look to the context. The first decision contains the somewhat dubious observation that reference to the context is permissible even if there be no perplexity flowing from the words used and even where one of the two meanings is the more obvious one (Page 254). A corresponding observation is not to be found in para 11 of the second authority, to wit, (A.I.R. 1953 S.C. 7). Be that as it may the existence of two meanings/constructions must be due to a real doubt as to the assignment of a single meaning or construction to the words used. The doubt must not originate in idle contention or speculative quibbling, for such contention and quibbling can be occasioned in respect of the clearest of deeds. In respect of the height covenant the difficulty of construction is not such as to make the task irresolvable.

94. Another interpretation put forth by defendant 1 is that the covenant governs the length and breadth of the line facing that on which the northern garages stand and that in direct alignment thereto running west. In other words land to the west of the portion shown by red-lines in Plan B inclusive of the garages. This was the remaining land to be kept unbuilt upon to provide unrestricted flow of light and air to Maneckabad. This is a reversion to construction by the object method - a construction device available but only where the words used are capable of more than one meaning. And the theory militates against the very simple inconsistency of the land suggested as not fully answering the description of being "the remaining land of the Vendor".

95. Turning to the authorities on interpretation I will first state the propositions of each party. Both agree, as they must; that the primary rule of construction is that the words and sentences used in a document must receive their plain and natural meaning. Here the paths diverge. Plaintiff is a strict constructionist. A Court has to discern the meaning of the written word by looking only at the words used. Presumed intent of parties is irrelevant. A deed must be given effect to as it stands even if it embodies a bargain neither intended. In any case intention is to be garnered from words used. Plain language cannot be contradicted by surrounding circumstances. Ambiguity is not to be equated with difficulty of construction. In any case it is wrong to start with an assumed intent behind a deed and then try to bend the words and sentences appearing in an instrument in the direction of the said intent. Defendant 1, as the occasion demands, is more circumspect. Words and sentences get meaning from the subject and context. The context and subject has to be ascertained from what preceded the execution of the deed. The deed as a whole has to be looked into.

The slightest ambiguity, and sometimes not even that, permits the inquirer to go into the surrounding circumstances and in particular writings representing prior communings. Factors like an appended sketch, price, the whys and whereas of a transaction - in fact, every feature can be looked into. There is one forbidden area and that is subsequent conduct or assertions or admissions. Both the sides have referred to innumerable precedents in support of their stands. It is not necessary to go into all of them as that would be uncalled for duplication. I will therefore restrict myself to a scrutiny of the representative ones. *Lampson v. City of Quebec*, AIR 1920 P.C. 103 , relied on by plaintiff lays it down :

"A deed is to be construed according to the intention of the parties to it but the intention by which the deed is to be construed is that of the parties as revealed by the language they have used in the deed itself. The circumstances surrounding the making of a deed may, if it be ambiguous, give to its words a special meaning; but if the meaning of the deed reading its words in their ordinary sense, be plain and unambiguous it is not permissible for the parties to it, while it stands unreformed, to come, into a Court of justice and say : Our intention was wholly different from that which the language of our deed expresses, disregard what we said, and construe it according to what we meant to say, but did not say."

In the same vein is *Sunitabala Debi v. Manindra Chandra*, 32 Bom.L.R. 1553, where it was said that a deed must be construed and given effect to as it stands even if the result be that the document is found to embody a bargain intended by neither of the parties to it. Inspired assumption as to intent not to be determinative of what words mean is the ratio of AIR 1943 115 (Privy Council) . AIR 1949 106 (Federal Court) , warns against disregarding the ordinary meaning of words used on the ground of such meaning leading to hardship or apparent injustice Lord Halsbury L.C. commenting on the dangers of assumption as to intention in *Leader v. Dufley*, (1888)13 A. C 294 says--

"But it appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption to bend the language in favour of the assumption made."

Speculating on the reasons which led to the employment of this or that language in a contract has been disapproved in AIR 1940 151 (Privy Council) . The Judicial Committee in *Bomanji Wadia v. Secretary of State for India*, 31 Bom.L.R. 256(P.C.) expressly disapproved of looking into antecedent communings to ascertain the meaning of a contract when the contract was embodied in a formal document. The construction, it was observed, had to be according to the terms of the formal contract. On the precedence or otherwise of dispositive clauses versus other clauses in an instrument, *Lee v. Alexander*, 1883(8) A.C 853 lays down that though subsidiary clauses of a deed may be legitimately referred to for the purpose of solving any ambiguity which is raised by the terms of dispositive clause, yet the terms of that clause if per se clear, cannot be controlled by a reference to the other clauses of the disposition. A case somewhat close on facts

to the present one is *Millbourn v. Lyons*, 1914(2) Ch. 231. The question arising for decision was stated by Cozen Hard M.R. thus : Whether a restrictive agreement contained in a contract for sale, but not found in the conveyance, will affect the defendant as purchaser under the contract, he having notice both of the agreement and of the conveyance? (Page 236). The learned Master of Rolls said --

"It makes no difference that the prior agreement is itself recited in the conveyance. I think, therefore, that the argument which has been put forward on a general rule, quite apart from the terms of this particular contract, is on that has no foundation in law, and I venture to describe it as dangerous. I see no answer to the point that was made by Mr. Peterson that, if that be the true view, in every case the agreement for sale antecedent to the conveyance will become a document of title and must be put in the abstract, and anything more dangerous or more revolutionary for the purpose of conveyancing than such a view cannot, I think be well imagined."

Defendant 1 perhaps may refer to the citation with approval of James L.J., in *Leggott v. Berrett*, 15 Ch.D. 306 . In the second judgment of Swinfen Eady, L.J. James, L.J. has said that if the contract is recited in the deed it can be looked into for the purpose of construing the deed itself Page 244 in *Millbourn v. Lyons* (supra). Plaintiff's authorities almost done I will not to deal with those cited by defendant 1 -- again, the representative ones only. To provide for the entry of Ex.Soc-1 authorities cited are to show that antecedent agreements can be looked into (i) to determine the true construction of an ambiguous term of the deed, (ii) to show what the parties intended to do and (iii) to understand what was actually agreed upon. The cases cited are those reported at *Jyoti Bhushan Gupta v. The Banaras Bank Ltd.*, 1973 3 SCR 303; *Puran Singh Sahni Vs. Sundari Bhagwandas Kripalani (Smt) and Others*, ; *Tilakdhari Singh v. Kesho Singh*, 27 Bom.L.R. 819 (P.C.); (1880(15) Q.B.D. 306, *Desikha Charyalu v. Narsimha Charyalu*, AIR 1958 A.P. 279; 1883(8) A.C. 853 and *Joseph Dormanin v. Conmel Micallef*, AIR 1946 P.C. 50. The precedents revolve on the existence of an ambiguity-not otherwise. 76 C.W.N. 807 deals with a very different situation where a transaction was contained in more than one document - the second, being in the nature of a supplement to the first. Naturally therefore the 2nd document's words were interpreted in the light of the first document. Defendant 1's attempt to slip out of the covenant by recourse to *Bai Hira Devi and Others Vs. The Official Assignee of Bombay*, , is an obvious failure for that case deals with a stranger to a document wanting to lead evidence to contradict the terms thereof. Defendant 1 cannot get away from the position of its being a successor-in-interest of the covenantor of Ex.B and what is more significant, one with notice of not only the covenant but also plaintiff's interpretation thereof. A somewhat circuitous attempt to link Ex.Soc-1 with Ex.B is made to show the latter as a fruition of the former. *Shri Hanuman Cotton Mills and Others Vs. Tata Air Craft Limited*, , is relied upon for that purpose. Earnest money was paid under Ex.Soc-1 and that payment was recognised under Ex.B. The authority says no more than that

earnest is given to bind the contract. That cannot be read as foisting all the terms of the contract to the sale.

96. Can Ex.Soc-1 be used to understand the height covenant? Defendant 1 says "yes". The reason given is that plaintiff is seeking to depart from the ordinary grammatical construction of the covenant. As I have said earlier there are four versions of the agreement of 26-10-1950 and the matter entails great caution because of defendant 1's marked disinclination against letting the plain unvarnished truth come before the Court. I will however assume the genuineness of the offer, for it was only that - the acceptance endorsement, being clearly a later gloss to suit the purposes of Ratanchand, Lalchand and defendant 1. Ex.Soc-1 was departed from vis-a-vis the 10 ft. wide strip of land in Maneckabad. The argument is that other terms were adhered to and they were material. Next, the covenant on Maneckabad was an addition not a contradiction of terms agreed to. The debate can be endless and to little purpose. Next, of course is the reliance placed on Ex.Soc-10. I have mentioned the susceptibility of the best in the profession to be influenced by their client's instructions. Maneck Mistry and Ratanchand wanted a shield against the plaintiff's single-refrain gong. Neither could have been above the human frailty to justify their stand. A Counsel so positioned, would be influenced whatever his mental training. Therefore with all respect to the late Sir Jamshedji, the opinion given by him has no more value than the many variations pressed by defendant 1 vis-a-vis the plain and grammatical meaning of the height covenant. It is not acceptable for the simple reason that it accepts a laboured interpretation of the height covenant, when the simpler one, stares us in the face. A go-by could have been given to the agreed terms. As to the reasons for so doing, it is better to need the advice against speculating on this point. Neither document can be resorted to for an understanding the height covenant.

97. A more potent argument in support of defendant 1 is that the height covenant as interpreted by plaintiff is the only covenant not shown in Plan B to Ex.B. The other covenants are reflected in the said plan. Therefore, the covenant does not cover the entire land of the Vendor. Now it is necessary to know whether Plans A and B are part of Ex.B and to what extent. As to the first part of the question Plans A and B are referred to in the body of Ex.B as explanatory of certain recitals appearing therein. Plan A has no date on it, but Plan B mentions the date of its completion or preparation on 8-3-1951. On 8-3-1951 Ex.B certainly did not exist. But it does not follow that Plan B was based on the recitals appearing in the body of Ex.B. Exs.Soc-1 and B differ certainly on the length and vocabulary in a number of particulars. Because some papers are not traceable or forthcoming cannot lead to the inference that drafts of Ex.B did not precede its execution. The absence of evidence, is not always evidence of absence. An inference would be that having regard to the plan, trust deed and Ex.B all having been drawn up in the month of March 1951, it is legitimate to hold that draft of each had preceded the final product. That would be consistent with the nature of the task as also the meticulousness of the parties to the

transaction. Thus the argument that Plan B in a manner of speaking mentions the existing garages, but not the spread of the height covenant over the land of Ratanchand does not derive much support from Ex.Soc-1. The plans do not show their purpose to be an enumeration of covenants. Plan A purports to give picture of what the future Maneckabad would look like from the air or an elevation. It gives a rough idea of the common passage and at least three other covenants. Plan B is more detailed in that not only the three covenants but also the surroundings of Maneckabad are given in greater details. More important the words "remaining land of the Vendor" are clear in themselves to obviate the hunt for the a willo-the-wisp. Showing the height covenant on Plan A or B would have required crossing or colouring the entire or almost entire map and this would have created some obscurity to discern the total prohibition on construction over the central passage, garden and the red-lines piece to the west. *Tilakdhari Singh v. Kesho Prasad Singh*, 27 Bom.L.R. 819 was relied upon to show that antecedent documents were admissible under Proviso (6) to section 92 Evidence Act for the purpose of identification and not contradicting terms of a settlement. This would be true of Plan B vide Ex.B, were the latter to correlate to expression "remaining land of the vendor" to that on which the garages stood. In fact it was realisation of this that led Johari to put into the mouth of Maneck Mistry the typographical error that had crept into Ex.B Not that Johari's answers are of any use in the task before us. Therefore, the reliance placed on Plan B is of no avail to defendant 1.

98. Defendant 1 uses the correspondence of price in Exs.Soc-1 and B to negative plaintiff's version of the height covenant. The price in both the offer and deed is placed at Rs. 103/- per sq.yard. In Ex.Soc-1, the height restriction is only on the northern garages and the black soil below. If plaintiff's view of the height covenant in Ex.B is accepted, near about 92% of the property is rendered sterile to benefit a mere 8% transferred to the trustees. It is here that it becomes necessary to bestow more attention to authorities relied upon by plaintiff. On the subject of rate, Ex.Soc-1 may be treated as believable for the rate therein was adopted in working out the price for Maneckabad also. Now none of the authorities say that the rationality of a variation in the deed vis-a-vis what is reflected in an earlier agreement or even an offer cannot be referred to for ascertaining the meaning of the words used in the deed. There exists no dispute that the intention of the parties has to be spelt out from the words used in a deed. True also that one must not start with an assumption -- inspired or otherwise, regarding the intention of parties. But one assumption to be made is that parties acting out of self-interest at the inception, do not become philanthropists at the concluding stages of a deal. The unchanged rate factor with an increase in the benefit to the Vendee remains unexplained by plaintiff and that is a relevant factor in the construction of the height covenant. Plaintiff tries to get over this setback by citing, *Allen v. Cameron*, 149 English Reports 635. *Bayley B* held that price was an ingredient in the construction of an agreement in which equivocal words were used. *Vaughon B* concurred without

the qualifying words of the factor of equivocation in the agreement. Bolland B most emphatically disagreed holding that the price factor could have other dimension and that its intrusion in the construction of a contract was a "dangerous doctrine". Bayley B clarified that he would have excluded the price factor, but for the fact that there was an ambiguity in the agreement. Chitty on Contracts (26th Edition Vol. I Para 821) put the gist of the consensus thus--

"When the meaning of a contract for services is ambiguous, the Court will take into consideration even the price agreed to be paid for those services for the purpose of enabling them to determine the extent of service to be rendered under the contract".

The existence of an ambiguity is the only justification for looking into the price factor. Almost the same words as of Bolland B were used in *Laxman v. Vithu*, (1897) B.H.C. (App.Side) judgments 244. Dangerous may be - but not entirely irrelevant. Here, a qualification needs to be mentioned. It is that the price factor may be susceptible of other explanations as in the illustration given by Bolland B in his opinion in *Allen v. Cameron* (supra). The illustration is that of a young man entering into a contract to build a bridge more with a view to fame than to profit. However no explanation has been essayed by plaintiff and none is discernible otherwise. Defendant No. 1 counters with *Bhaskar Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and Others*, where the factor of consideration paid was given weightage for determining whether a transaction was one of sale with a condition of repurchase or mortgage by conditional sale. Now this controversy is in a class by itself. Plaintiff has tried to get over the price factor by contending that the appreciation in price even with the height restriction pleaded by him will be considerable. There is and has been an all round increase in prices of real estate. But it stands to reason that *Ratan Villa* without the albatross of the plaintiff's version of the height covenant, will, and always has been more valuable, than when so fettered.

99. Defendant 1 pleads the obvious when it says that restrictive covenants have to be construed strictly for they hamper the right of the covenantor to develop his property to the fullest extent probable. But equally important is the need to ensure the rights of the covenantee. This of course depends on the covenant and what that is would be what the words used say it is. Yet the tilt where an ambiguity exists has to be in favour of the covenantor was held in *Dwarkadas Khatau v. Suleman Haji Ahmed Oomar*, Appeal No. 94 of 1954 decided on 11th March 1955. While on this precedent I must deal with defendant 1's use thereof in support of its plea for construction of the covenant from the angle of object. In the case before the Court of appeal the evidence in relation to object was almost undisputed. In the present case the object depends on the insistence of plaintiff on having what the words, according to him, say, while defendant 1's proved incapacity to come out with the truth makes it impossible to accept whatever they alleged to be the object of the covenant. *Keshavraj v. Most Rev. Simon Pimenta*, being Suit No. 467 of 1965 decided on 31st July 1979 is another

decision where Dwarkadas (*supra*) was referred to and followed.

100. It has been suggested that the object of the covenant can be ascertained from the document itself and if that be not so, from the antecedent agreement and communings. *Prenn v. Simmonds*, 1971(3) All.E.R. 237 the leading judgment was delivered by Lord Wilberforce. Lord Wilberforce began with the observation that the time had long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. But he made clear at page 241 the exclusion of evidence as regards intention of the parties. What was admissible was evidence of the factual background known to the parties at or before the date of contract, including evidence of the "genesis" and objectively the "aim" of the transaction (page 241). Yes the background, genesis and aim of the transaction can be looked into, but for the very limited purpose of getting the context of the situation. *Rajagopal Pillai and Another Vs. Pakkiam Ammal and Others*, , emphasises the importance of a time frame and the ground realities than to the construction of a release covenant. That is a feature of importance in this suit and I shall deal with it separately but at a later stage.

101. Defendant 1 says and rightly that the construction canvassed by plaintiff leads to a very unreasonable result. If that be so a very careful inquiry is called for to ascertain why explicit language has not been used. *Schuler v. Wickman Machine Tool*, (1974) A.C. 235 (HL) has been pressed into service. Lord Reid expressed the principle thus--

"The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."

The House of Lords applied the same principle in construing a tax statute in *Luke v. Inland Revenue Commissioners*, 1963 A.C. 557 (HL). The Apex Court of our country followed the ratio in *K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another*, . Plaintiff's insistence on the primacy of the primary rule does not suffer any erosion by the reasonableness test. It is one thing to say that words and phrases used in a deed must be given their natural meaning. Quite another it is, not to wonder how a patently unreasonable result could have been intended and if otherwise why the same was not expressed in clear and unambiguous words. The obvious disadvantage to Ratanchand in accepting plaintiff's construction is that for the price of 565 sq. yds. he had shackled near about 5400 sq. yds. of land without there being any consideration therefor. It is not as if Ratanchand could not sell the remaining land or had no plans for it. In fact the covenant on Maneckabad obtained by him was for the preservation of roominess in Ratan Villa even after the sale to the trustees. It is true that the structure on Ratan Villa had a 20 to 50 years life. But in terms of return the property had become a white elephant. This aspect must have been present to the mind of Ratanchand. Next, it was not as if the trustees were the only people having the

necessary finance and inclination to purchase. Ratanchand had a prejudice against having a Muslim in the neighbourhood. But in the Bombay of 1951, Muslims with the requisite wherewithal to acquire properties like Ratan Villa or parts thereof, were on the wane. Conversely, the profits generated by the Second World War had created millionaires who had the money to pay the required price for good properties. The remaining portion after the sale under Ex.B was not so worthless to be gifted to the Maneckabad Vendees who had paid about 1/12th of what Ratanchand had paid when acquiring the entire property for Rs. 6,00,000/-. Yes, Ratanchand may have been, in fact was, pressed for money. But the situation was not so desperate as to compel him to knowingly make a gift of the bare land of Ratan Villa to a purchaser acquiring less than 10 per cent of that land for a price about commensurate to the appreciated value as reckoned in 1951. The price not being commensurate to the advantage parted with, is the plaintiff's version of the covenant consistent with the language used 7 Lord Reid's dictum - if applicable - would certainly have required more explicit language than that employed by the use of the words "On the remaining land of the vendor". The features of reason and price therefore militate against plaintiff's interpretation.

102. The time-perspective as a constructional device is based on the common-sense principle that clauses in a document have a contemporaneity i.e. deal with a situation within the contemplation of the parties at the date of the execution of the document. *Rajagopal Pillai and Another Vs. Pakkiam Ammal and Others*, , has already been referred to. Though dealing with a release covenant, the principle is of larger application. Plaintiff emphasises the observation in *Keshavraj v. Most. Rev. Simon Piments* (supra) that a Court must read a covenant not in the light of the times in which the Court sits, but in the light of the times when the covenant was imposed. That of course is true. But even in 1951 the purchaser of less than 10 per cent was not getting a stronghold on 90 per cent, even if the latter event was to take place 50 years after the time of the deal being struck. Plaintiff relies on certain passages and footnotes appearing in *Halsbury's Laws of England*, (Forth Edition) Vol. 12 Page 622 has a footnote purporting to be excerpts from decided cases indicating that surrounding circumstances however strong cannot prevail over clear language in an instrument. But the bar is in instruments where the language is clear. As I will show later, the words "remaining land" are in a somewhat blurred area between clarity and ambiguity. And though all that defendant 1 wants to take into the reckoning is not admissible, a few circumstances have to be utilised. There is no evidence extrinsic or otherwise to indicate that the trustees were interested in making Ratan Villa an appendage though not belonging to them for getting a panoramic view to the west of Maneckabad-albeit in the distant or even unforeseeable future. The mystery is not solved by saying that unintended effects do not efface the written word's intendment. The reason of the thing is an ever present concern and it has to be searched for when unusual effects are claimed to be rights flowing from a deed. To sum up, the features of identity in

price between Exs.Soc-1 and B, the reason (or lack thereof) in the covenant and lastly the contemporaneity aspect, all necessitate a caution against the acceptability of plaintiff's interpretation of the covenant.

103. Plaintiff turns to subsequent events and alleged statements of Ratanchand etc. to fortify his stand. Here again parties differ greatly on the legal position. Defendant 1 contends that (i) subsequent conduct even of parties is inadmissible for the purposes of construing a document. Such conduct may have effect but only in the realm of estoppel. (ii) Subsequent interpreting statements made by and between parties to a document if concurred to by both may be admissible as a basis for construction. Thus a statement made by one to third parties or by one not having the concurrence of the other, are not admissible. Plaintiff's riposte to these formulations are as follows: (i) The defence stand is basically propped up by Bhaskar Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and Others, . This is a nature of transaction" case and says no more than that subsequent conduct of parties is not a surrounding circumstances for determining true nature of a deed. Even otherwise, the principles sought to be based thereon has been dissented from in decisions reported at Bhagat Ram Vs. State of Rajasthan, and Puran Singh Sahni Vs. Sundari Bhagwandas Kripalani (Smt) and Others, . (ii) The "concurrence of parties" theory is not applicable where admissions are being utilised. (iii) Exs. AA-1 and A-1, though acts of trustees occurred at a time when no dispute was in existence or in the offing. These also would be admissible.

104. A large number of authorities have been cited on both the sides and a hurried look at these will be necessary before I pass on to the factual appraisal. The bedrock supporting plaintiff's stand in Mahajan J's separate but concurring judgment in Abdulla Ahmed Vs. Animendra Kissen Mitter, . In his judgment the learned Judge quoted with approval the Hailsham Edition of Halsbury's Laws of England thus at page 21:

"The evidence of conduct of the parties in this situation as to how they understood the words to mean can be considered in determining the true effect of the contract made between the parties. Extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning. Evidence of the acts done under it is a guide to the intention of the parties in such a case and particularly when acts are done shortly after the date of the instrument."

The short question which arose for decision in the appeal was whether a letter given to the appellant was an authority to find a purchaser of secure, in the sense of concluding a binding contract with the purchaser to entitle the appellant to a higher commission. Patanjali Sastri, J., speaking for the majority restricted himself to a consideration of the terms of the letter without adverting to the subsequent conduct. Mahajan, J., took into consideration the subsequent conduct also. Defendant 1 in a desperate bid to exclude the very clear words of Mahajan, J., has described it as a "dissenting" judgment and contends that Bhaskar

Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and Others, , binds this Court. The majority view in Abdulla Ahmed's Case (supra) not having adverted to the subsequent conduct aspect and Mahajan, J.'s concurring with the majority's conclusion, would it be proper to describe the passage cited above as a dissent? The status of such a judgment came up for consideration in State of Orissa and Others Vs. Titaghur Paper Mills Company Limited and Another, . Madon, J., at page 1341 observed :--

"It is true as contended by learned Counsel that the majority expressly refrained from deciding the nature of the document because, as it pointed out, in any view of the matter, the petition would fail and it would, therefore, be difficult to say that what Vivian Bose, J., held was the decision of the Court as such."

But the learned Judge further went on to opine--

"However the judgment of Vivian Bose, J., is a closely reasoned one which carries instant conviction and cannot, therefore, be lightly brushed aside as learned Counsel has attempted to do."

Defendant 1 also relies on the following sentence occurring in John Martin Vs. State of West Bengal, --

"But we do not think that these observations made by two out of six learned Judges can be regarded as laying down the law on the point."

H.M. Seervai's constitutional Law of India (3rd Edition) has been relied upon to support the obvious viz., dissenting judgments must be excluded in ascertaining the ratio decidendi of a judgment (Page 2235). Laying down a binding principle and expounding the legal position to support a conclusion, may differ in a given case. But it would be erroneous to dub Mahajan, J.'s view on the admissibility of subsequent conduct as a dissent. Nothing said in Seervai's Commentary can support the extreme stand taken by defendant 1 vis-a-vis Mahajan, J.'s opinion. It is a separate but concurring judgment. On the admissibility of subsequent conduct, Mahajan, J., is categorical in favour of such conduct being admissible. Reliance is placed on the case reported in Belapur Co. Ltd. Vs. Maharashtra State Farming Corporation, . In that case a single Judge of this Court at Page 249 has described Mahajan, J.'s opinion in Abdulla Ahmed (supra) as a dissenting judgment. With respect to the learned Judge, it is difficult to accept the characterisation as correct. He went on to rely upon Bhaskar Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and Others, , to hold that while contemporaneous conduct is always admissible as a surrounding circumstance, subsequent conduct was inadmissible. Dissent, as the very term implies means disagreement. In the context of the decision in Abdulla Ahmed, Mahajan, J.'s opinion is not a dissent. It is a concurring judgment resting on two props : construction of the letter of agency, and also, the interpretation of certain expressions occurring therein with reference to the subsequent conduct of parties. The second point had not even been touched by Patanjali Sastri, J., speaking for the majority. The correct label to describe

Mahajan, J.'s opinion vis-a-vis the admissibility of subsequent conduct, is, that though it is not the decision of the Court, it is a persuasive precedent of high order. An interpretation of a Supreme Court decision by a Single Judge of this Court would not bind me if it were per incuriam. And it is for it overlooks the obvious. But does Bhaskar Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and Others, say the contrary? And will it have precedence over Mahajan, J.'s opinion? This is a unanimous decision of three Judges and it does say that subsequent conduct of parties not being a surrounding circumstance is inadmissible. Plaintiff distinguishes Bhaskar as a "nature of transaction" precedent and therefore inapplicable to other cases where a question of construction arises. Plaintiff seeks support from Puzhakkal Kuttappu Vs. C. Bhargavi and Others, and Timblo Irmaos Ltd., Margo Vs. Jorge Anibal Matos Sequeira and Another, , to press subsequent conduct as a guide to how parties and their representatives-in-interest understood the deed. Both are broadly supportive of the contention advanced and decisions of three-Judge Benches. Defendant 1 tries to lessen the effect of Timbo Irmaos (supra) by pointing to para 10 of the report where a reference is made to "some kind of estoppel" based on prior and contemporaneous course of dealings. That very paragraph and the succeeding one make it clear that the "nature or course of dealings" can be taken into consideration to ascertain the meaning of words used in a document which taken by themselves are not clear. The question for decision in Puzhakkal Kuttappu Vs. C. Bhargavi and Others, was whether a deed was a lease of a mortgage. At page 106 it was observed -

"How the parties or even their representatives in-interest treated the deed in question may also be relevant."

Subsequent conduct was taken into consideration to construe the deed. In The Godhra Electricity Co. Ltd. and Another Vs. The State of Gujarat and Another, , a two-Judges Bench saw no reason to exclude a subsequent interpreting statement to determine the effect of an instrument. Unlike Fuzhakkal & Tiblo (supra), the Court in Godhra Electric Co., specifically chose to notice and approve of Abdulla Ahmed, Abdulla Ahmed Vs. Animendra Kissen Mitter, in paragraph 19 of the report. Again a two Judges Bench in Raj Kumar Rajinder Singh Vs. State of Himachal Pradesh and others, , opined that in cases where the language of the document was not clear, the subsequent conduct of parties furnished evidence to clear the blurred area and to ascertain the true intention of the author of the document (Page 1845). At Page 1846 the passage at Page 21 from Mahajan, J.'s judgment from Abdulla Ahmed was quoted as an authority in support of the proposition- "if any - is needed" (see pages 1845 and 1846 of Rajkumar). The two-Judges Benches decision mentioned above are described as per incuriam, though sub-silento, as their attention had not been drawn to Bhaskar Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and Others, . But there still remain the three Judge Benches decisions in Fuzhakkal & Timblo (supra) which go in a direction other than that taken in Bhaskar Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and

Others, . These two decisions do not refer to either Bhaskar Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and Others, . It is a permissible view that in cases where two authorities of equal jurisdiction conflict, courts subordinate should go by a precedent later in point of time. Defendant 1 trying to limit the damage cites the following from Bank of India v. Rustom Fakirji, 57 Bombay Law Reporter 850, at pages 863 and 864:

"But all this is conduct of one party subsequent to the contract. The construction of a document cannot be controlled by any subsequent declaration or conduct of the parties; a fortiori it cannot be controlled by any such declaration or conduct of one of the parties. It is a firmly established rule that the construction of a contract cannot be affected by the declaration of parties made subsequent to its date though when the words are ambiguous they may be explained by the previous or contemporaneous conduct of the parties."

As is clear from the decisions of the Apex Court many of these sentences do not represent the correct legal position. Next an attempt is made to restrict the admissibility to subsequent interpreting statements (i) made by and between the parties to a document and (ii) statements in which both the parties have concurred. This again is restricting the width of the decisions going against the extreme stand taken by defendant 1. Where defendant 1 is right is in relation to the need for caution in the weight to be attached to such subsequent conduct. The Supreme Court in Sappani Mohamed Mohideen and Another Vs. R.V. Sethusubramania Pillai and Others, , has at page 746 spoken of the possibility of subsequent conduct of parties or their representatives varying for imponderable reasons -- bona fide or otherwise and thus warping the issue. The position of the Apex Court having been clarified, it is not necessary to burden this judgment by many other decisions cited on the subject by parties. The legal position may be summarised thus :

(i) Whether a document or its terms are clear, evidence of surrounding circumstances including subsequent conduct or even subsequent interpreting statements is inadmissible apart from being redundant.

(ii) Where the document or its words are ambiguous, surrounding circumstances will be admissible to ascertain as to how the parties understood the same.

(iii) Surrounding circumstances would certainly include conduct or statements contemporaneous or near proximate to document's execution.

(iv) Subsequent conduct or statements remoter and getting more distant from the date of document is admissible but is an unsafe guide, more-so if it represents a one-sided happening or assertion.

(v) A long course of conduct may be indicative of how parties understood a document suffering from ambiguity in the whole or part thereof and thus illuminate the misty area.

(vi) The above propositions do not govern the operation of an estoppel based

upon a change of position by one of the parties to a document pursuant to a representation as to its effect by the other party thereto.

105. Having cleared the way for reception of evidence in regard to subsequent conduct including subsequent interpreting statements, I will now turn to the material on the subject. Defendant 1's placement of this evidence into four time-frames will help an orderly appraisal and I will accept the same classification. The four time-frames are for the period :

I. April 1951 to April 1953.

II. May 1953 to August 1959.

III. September 1959 to October 1966.

IV. October 1966 to 1980/1981.

Defendant 1 contends that in the first period the trustees neither said nor did anything to show that the height covenant covered Ratan Villa in its entirety. Keeping aside for the present the alleged raising of the height of an outhouse, there was no occasion for the trustees or the beneficiaries to advance the plea of the covenant covering Ratan Villa as a whole. Munchershaw did write to the BMC to record the transfer of ownership vis-a-vis Maneckabad. The BMC wrote back vide Ex.W-1 dated 12-7-1951 calling upon Manchershaw to furnish the conveyance Ex.B. Manchershaw replied on that very day, as per Ex.W enclosing a copy of the conveyance. In both the letters the word used is "covenant"--an obvious mistake which is clear from Ex.W's reference to the non-production of the original as it has not come back from the Registration office. Documents setting out only covenants were admittedly not executed. Sending a copy of Ex.B together with plans A and B cannot be construed as non-assertion of the height covenant. The next stage-a very important one according to defendant 1 -came when one of the outhouses was renovated by increasing its height. The old outhouse was a two-storeyed structure and it was made into a three-storeyed one in 1952-53. The operation was a major one and the tenant on the first floor-witnesses Mr. & Mrs. Kalyaniwala - had to be moved to the Petit Sanatorium to enable the carrying out of the work. As to the period during which this was done, defendant 1 relies upon documents coming from the records of the Petit Sanatorium and the testimony of Mrs. Cassinath. The last-named lady's power of recall is stunning; but explicable, because the renovation coincided with her wedding. The discovery of all this was made by defendant 1 in January 1992. Defendant 1's cross-examination of plaintiff on the subject gives the impression of plaintiff being responsible for the belated awareness on defendant 1's part. Plaintiff has been accused of suppression of evidence and worse. If the same lapse on the part of Ratanchand Maneck Mistry and Lalchand is excusable, I really see no reason why plaintiff should be subjected to vilification. And it is impossible to believe that Ratanchand, Lalchand, Maneck Mistry, Johari and the many lynx-eyed office-bearers of defendant 1 preceding the present Secretary Sanjay Shah underwent so long and all-embracing amnesia. Ratanchand and

Maneck Mistry had to face plaintiff's obduracy as is clear from their efforts to mollify him including measures to buy him off. All sorts of devices including false documents reciting a release of the covenant, were fabricated. And yet not one word of the first decisive blow at the interpretation of plaintiff was mentioned till January 1992. I am asked to believe the incredible when it is said that defendant 1 was misled into believing the plaintiff's recitals on the subject. But plaintiff does not have any credit with defendant 1. Johari gives a long history of the persecution to which plaintiff had subjected him. Ratanchand had no reason to increase the height of the outhouse in 1952. There is no evidence that the increased height would fetch him any extra income or serve some personal need of accommodation. This is not to say that the good folk Kalyaniwala and Mrs. Cassinath are testifying falsely. Ratanchand may have carved out two floors from out of the first floor. A reference is made to the Income Tax Return filed by Ratanchand for the year ending 31-3-1967 and Form E relating to capital gains. The particulars in Form E do not militate against the stands of either party. Whatsoever Ratanchand may have insinuated therein, the significant part of his conduct is the total silence on the subject right till he was alive. Johari who had questioned him and Maneck Mistry was not told a word of the important event of 1952-53. And even now not one old servant of Ratanchand or Lalchand himself are examined to prove the point. The fear of the witness-box shown by this tribe verges on a phobia. The compelling inference is that no such event took place. It is not necessary to go into the question of what inference to be drawn in view of the trustees not shown to have raised any objection. There is however substance in plaintiff's version that he may not have objected to the raising of the outhouse's height seeing that it was on a recessed portion of the property. And it is not every type of condonation of the invasion that gives rise to the discrediting of a suitor's interpretation of the said covenant. Therefore, the happenings in the 1951-1953 period lead to no conclusion either way.

106. This brings us to the May 1953 to August 1959 era. By letter Ex.A-1 dated 12-9-1959 Munchershaw styling himself as a trustee claimed a higher FSI for Maneckabad on the ground that Ratan Villa was subject to a height covenant for the benefit of the first named property. Consequently FSI allocable to Ratan Villa be taken as the entitlement of Maneckabad and building plans submitted by him i.e. Munchershaw, be considered accordingly. Defendant 1 has stigmatised this letter as the first attempt to tamper with the covenant's words. Munchershaw knew that the covenant as worded covered only the existing garages and the land beyond them. Therefore, Munchershaw rephrased the covenant to lend substance to a sinister design. The BMC did not accept Munchershaw's interpretation and fixed Maneckabad's FSI on the basis of its own area. Munchershaw's assertion is in the nature of a self-serving admission. Ratanchand was not made cognisant thereof. Consequently all that can be said of Ex.A-1 is that within 10 years of Ex.Bs execution Munchershaw was laying claim to the covenant being operative over the whole of Ratan Villa.

107. In the early part of the 1959-66 period, we have the four notes from

Ratanchand addressed to plaintiff. Two are of July 1962 and two of April 1964. The first of 23-7-1962 in the series speaks of plaintiff's agreeing to meet Ratanchand's Architect. Craftily worded, the note cannot conceal that the first step in the parleys was taken by Ratanchand. The endorsement of "urgent" on the left side shows the author's urgency. Note of 25-7-1962 reflects Ratanchand's annoyance at plaintiff saying, and that too through Ratanchand's gardener, that he would meet Ratanchand on 1st August. Ratanchand desired particulars about Maneckabad before the scheduled meeting. This was to enable Ratanchand's Architect to have a better perception of the problem before the meeting with plaintiff took place. The second part of the last sentence says "the covenant does not reduce the index No. for building area". It is difficult to know what the words imply. Possibly the writer meant that the covenant would not affect the FST vis-a-vis the buildable area. Nothing further seems to have happened till as late as April 1964. On 8-4-1964, Ratanchand again wanted to know the built up area and dimensions of Maneckabad to discuss the covenant problem with Maneckji. Plaintiff did not respond and Ratanchand sought the said information again on 10-4-1964. These notes show plaintiff standing his ground and Ratanchand failing in his efforts to obtain even a written acknowledgement of letters written to plaintiff. Ratanchand's anxiety to secure a release is understandable for he now wanted to alienate Ratan Villa. Plaintiff relies on the agreement at Ex.Soc. 36 between Ratanchand and Gordhandas Punjabi. This was an agreement to sell Ratan Villa. Clause 4 in this agreement speaks of the Vendor's assurance to get a clarification/waiver vis-a-vis the operation of the covenant. This document was in August 1962. It certainly does not constitute an admission of Ratanchand that plaintiff's interpretation was correct. What it records is Ratanchand's disagreeing with plaintiff's interpretation and his commitment to get a suitable clarification or waiver. A point of some importance is that in 1962 Ratanchand had become aware of plaintiff's interpretation of the covenant. Some assistance is sought to be derived from the trustees not joining plaintiff in the interpretation put by him on the covenant. As said earlier Maneckji held the upper hand vis-a-vis his wife Khurshed and brother Kekobad who was in a servient position to him. Therefore, the trustees silence does not support defendant 1's version of the covenant. It only shows that they had no intention of supporting plaintiff and at the same time did not have the courage to openly proclaim their convictions about Ratanchand being in the right. Ex.A-3 dated 29-4-1964 is an agreement passed by Zaveri to take a plot of Ratan Villa on long lease. It does mention that there was no restrictive covenant on the property except as shown in a plan handed over to Zaveri. That plan is missing and in any case Zaveri's responses are of no consequence for (i) he was a middleman and (ii) interested in statements which extolled the value of Ratan Villa. Zaveri tried his best to attract purchasers like Nainmal Shah and Girish Gala and Raja Shah & Co. Glowing accounts of Zaveri vis-a-vis the prospects of a would-be purchaser carried no conviction and both the offerors backtracked by accepting their advances and cancelling the agreements. The falling through of these agreements is proof of nothing more

than that the above parties were not willing to Court trouble.

108. Defendant 1's then office-bearers headed by Johari came from a different mould. By their letter dated 15-6-1965 at Ex.A-41 they made an offer to Zaveri to buy Ratan Villa " Rs. 500 per Square Yard. The letter went on to recite defendant 1's awareness of a restrictive covenant on the main bungalow. Zaveri was told to remove the same at his cost. There was a further reference to a plan handed over to defendant 1 by Zaveri showing the only extant covenants. As with all such documents defendant 1's answer is that it does not have the plan. Now this answer can lead to the worst possible inference, but for the fact that neither party would be foolish enough to put on paper plaintiff's interpretation of the covenant. Suppression of the plan by defendant 1 is in keeping with its penchant for keeping back all possible material, except that which is demonstrably in its favour. Johari fills up the gap by testifying as to what the plan showed. According to Johari, the vacancy was restricted to only those bits and passage which are acceptable to defendant 1 in this suit. This is evidence of the rightly dreaded "warping of the issue" spoken of in Sappani Mohamed Mohideen and Another Vs. R.V. Sethusubramania Pillai and Others, . No credence can attach to Johari's version as no case for leading secondary evidence has been made out and Johari's veracity is highly suspect. This apart the probabilities militate against the suppressed plan showing the covenant's spread over Ratan Villa as a whole.

109. Now come two documents both of 20-10-1965 bearing Exhibits Nos. D and A-47. Both are affidavits filed in the partition suit brought by Ratanchand against his children in Suit No. 304 of 1954. Ratanchand's affidavit at Ex.D speaks of Ratan Villa being subject to restrictive covenants retarding development of the property. Municipal restrictions combined with the restrictive covenants had led to the restricting of offers made for the purpose of the property and the drying up of good offers. Ex. 47 is the affidavit of the GAL for the minors in the suit lamenting the diminution in the value of Ratan Villa because of its subjection to restrictive covenants. The import of the covenants is not spelt out. Next, the use of the plural would seem to cover all the covenants, i.e. red-lined space, central passage, garden and the height restriction. By October 1965 when these affidavits were filed intending purchasers could not remain uninformed of plaintiff's interpretation of the height covenant. They must have also learnt that plaintiff was dead serious about asserting his rights. Maneckji and his fellow trustees were in no position to influence or restrain plaintiff. In fact a year later Maneckji fled for cover to the doors of Sir Jamshedji. This opinion notwithstanding neither the trustees nor Ratanchand had the courage to take out an originating summons. True as all this is, the two affidavits are not as deadly as plaintiff believes them to be. Any property subject to restrictive covenants (whatever their nature) with a covenantee on the rampage, would not attract good offers. Offers made in ignorance of the latter factor would be withdrawn. Therefore, the two affidavits do not constitute an acceptance of the plaintiff's version of the height covenant.

110. Ex.E-1 dated 5-11-1965 is another affidavit of Ratanchand filed in the partition suit. This affidavit also speaks of difficulties being experienced in the disposal of Ratan Villa because of restrictive covenants. But there is also a mention of the FSI's reduction to 1.33 being a contributory factor. Again, there is no specification of which covenant was impeding the prospects of Ratan Villa. This affidavit merits the same comment as Exs. D and A-47.

111. With the consent decree in the partition suit, Lalchand became the Receiver of Ratanchand's property. Therefore Zaveri addressed Lalchand vide Ex.A-115 offering a price of Rs. 28,00,000/-. The letter makes a reference to a covenant on the main bungalow", Zaveri undertaking to get the covenant released at Lalchand's cost, the said cost not to exceed Rs. 65,000/-. Again the plan said to have been made over by Lalchand to Zaveri is missing, giving rise to the very same argument as before. The answer has to be the same viz., that the plan could not have indicated the height covenant embracing every inch of Ratan Villa.

112. Ex.A-50 is defendant 1's offer to Zaveri offering a dual price on Ratan Villa depending of FSI being 2 or 1.33. The offer recognised defendant 1's awareness of there being "a covenant on the main bungalow" in favour of the trustees and that this covenant would be got removed by Zaveri. Ex.A-51 dated 6-1-1966 is a repetition of defendant 1's offer and Zaveri's acceptance thereof. The words "Covenant on the main bungalow" are not exactly what plaintiff wants them to be understood to mean.

113. Exs.AA-145, AA-146 and AA-147 are of the 2nd and 3rd February 1966. The correspondence begins with Maneckji trying to tempt plaintiff so that he agrees to a release of the covenant. The allurements offered are (i) extra land being given to Maneckabad owners and (ii) cash in addition. It shows the writer making repeated efforts but not succeeding in getting the hostile plaintiff. Reading the tone and contents it is clear that Maneckji had been won over by defendant 1. Ex.AA-146 is the draft of a release of the covenant sent along with Ex.AA-145. Ex.AA-146 is in two parts; the first reciting a release of the height covenant by the trustees and the second giving on lease to the trustees 400 sq.ft. of land from Ratan Villa on a 98 years lease and rental of Rs. 10/- per month. This strip of land was to be kept unbuilt upon - its only use being to add to the FSI accruable to Maneckabad. Plaintiff's answer Ex.AA-147 was stern and cold : there would be no release of any of the covenants. His father had been, as was his mother, opposed to any degree of release. No benefit could accrue from the release of the covenants. In fact the owners would be greatly prejudiced by any form of relinquishment. Such approaches made in the past by Maneckji and Ratanchand had been spurned in the past by him. Plaintiff saw no purpose in attending the proposed meeting. This batch of papers show defendant 1's recognition that they were in for trouble - not because plaintiff was right, but because what he asserted, seemed well-founded.

114. In 1966 there took place a great deal of exchange of letters between defendant 1, Zaveri and Lalchand - all through Solicitors seeking and furnishing

information vis-a-vis Ratan Villa. Exs. F dated 4-3-1966, A-127 dated 12-4-1966 and A-111 dated 2-7-1966 all made a reference to the "covenant on the main bungalow" in favour of the trustees. These do not establish an acceptance of plaintiff's version of the height covenant by the parties to the correspondence. They certainly demolish the myth of defendant 1 being innocent purchasers lured into purchasing Ratan Villa by the plaintiff's acquiescence, waiver and what not. On the contrary defendant 1 went in for the purchase knowingly and wilfully.

115. Ex.A-112 dated 23-7-1966 was a concoction by defendant 1 and Zaveri of agreement by the trustees to waive the height covenant in lieu of 98 years lease of a 400 ft. strip of land. No such agreement had taken place and the object behind this document was to spring it at some future date when the vigilant and obstructive plaintiff, was out of the way. Again this document is evidence of a bad conscience on the part of Zaveri and defendant 1's representatives rather than an admission of the correctness of plaintiff's interpretation of the height restriction. A sure indication of the evil intentions of the participants was the mention of the transaction being between Zaveri and the then not alive Munchershaw. Johari tries to lessen the gravity of the fabrication by pleading that the mention of Munchershaw's name was a mistake and that the name should have been that of Maneckji. But even that obliging trustee had not dared to set pen to paper to sign any such deed. However an admission is something different from crude or crafty preparations to outflank an unrelenting opponent.

116. Exs. A-82 and A-85 dated 15-9-1970 and 29-9-1970 respectively have to be read in the context of the reverses that defendant 1 faced pursuant to the writ petition of 1968 and its aftermath. All the carefully laid plans of Johari and his allies outside had gone haywire because of plaintiff's success in the said proceeding. And worse was yet to come for plaintiff had made it clear that he would be suing to enforce his rights in the realm of private law. Ex.A-82 is a decisions of the Asstt. Assessor and Collector of the BMC after hearing Johari on the rateable value of Ratan Villa. Johari spoke of the reverses suffered by the defendant 1 in the writ petition viz. building plans sanctioned by BMC being quashed, Ratan Villa being struck with sterility because of the height covenant, the matter being subjudice and construction plans and activity being in the doldrums. All this was an effort to get the concerned officer to fix the rateable value as low as possible. This cannot be construed as an admission for the reverses in the writ petition and the treat of a suit to enforce private covenants naturally made the position gloomy. And ratepayers are not averse to portraying a pessimistic picture when appearing before taxing authorities. Ex.A-85 being the appeal memo to the Chief Judge of the Small Causes Court against the Taxing Officer's decision could not be any different from the stand taken before the latter.

117. Defendant 1's written statements in the suits brought by Lalchand for recovery of the unpaid price are at Exs.R-2 and S-2 dated 15-1-1979 and 12-11-1979 respectively. The claim was resisted on various grounds, one being

that because of the "restrictive covenant", defendant 1 could not construct on more than 6900 sq.ft. Defendant 1 wanted the price to be slashed down to a little more than Rs. 2,00,000/-. Lalchand was blamed for not getting the covenant released. In the aftermath of the decision in the writ petition and the covenant suit in the offing, defendant 1 was naturally reluctant to pay up the full balance. Excuses to avoid satisfaction of debts is a common enough phenomenon and these excuses do not always reflect the truth. Reasons given by those sued cannot be really termed admissions. The significant fact is that despite the plea defendant 1 consented to a full decree with interest in favour of Lalchand. Not that this establishes their regard for honesty. What it indicates is defendant 1 giving up the pretence of being an innocent purchaser of whom Lalchand etc. had taken advantage.

118. Ex.A-108 dated 16-4-1980 is a letter addressed to the BMC by defendant 1's Chartered Engineer to get lowered the rateable value because of the "alleged restrictive covenants". The prefix "alleged" seems to be the result of instructions to hedge, and naturally, because of the pending present suit. This cannot be read as an admission of the restrictive covenant operating in the manner suggested by the plaintiff.

119. I am referred to para 13(e) of defendant 1's written statement in the present suit. In this para appears the recital --

"Plan Ex.B to the conveyance only shows a portion of the remaining land of the Vendor."

Plaintiff links the expression "vendor's land" from the above portion of the written statement to some parts of Ex.B where the word "land" has been indicated to mean and include structures. Now there are some other spots in Ex.B where "land" is used as restricted to mean the black soil. Plaintiff then goes on to rely upon an amendment to the written statement moved on 26-4-1983. The amendment was in words suggesting the same meaning to the height covenant as the plaintiff has been contending all along. Defendant 1 withdrew the same at a later stage. That the proposed amendment was the result of a confusion is so obvious that one need not labour over the matter. All that survives now is Ex.Soc-21 dated 25-7-1970. It is a letter addressed on behalf of defendant 1 withholding payment if the covenant was enforced. But that is a matter between defendant 1 and Lalchand and the two made no secret of being in mortal fear of a covenant suit i.e. the present suit. Much emphasis has been placed on the oft-used expression "covenant on the main bungalow" used by Ratanchand, defendant 1 and Lalchand etc. What exactly these words imply will be attended to at a later stage. Presently it is only necessary to say that "main bungalow" is a convenient label for Ratan Villa comprising all the structures and vacant land extent as on 20-3-1951 i.e. the date of Ex.B's execution. The result of the foregoing discussion is that the subsequent conduct of defendant 1 and their predecessors does not corroborate acceptance of plaintiff's interpretation of the height covenant. What it does and very effectively at that, is, to unmask the

pretence of defendant 1 and their predecessors not knowing the exact import of plaintiff's contention. Johari's assertion of Zaveri speaking vaguely of some covenant etc. is a tissue of lies. The discussion on the construction aspect is not yet over for I have still to find what the words used for phrasing the covenant mean. That aspect will have to wait till I am done with the rectification aspect.

RECTIFICATION OF EX.B

120. An important defence counter the main relief claimed in the suit, has now to be considered. This claim has been advanced and incorporated in the written statement shortly before the commencement of the trial. Defendant 1's stand is that the agreement of 26-10-1950 was the basis of the contract of sale culminating in Ex.B. The "garage covenant" (defendant 1's preference for the expression "height covenant") was an essential term of the contract. It was set out with precision in the agreement. Next, it was so set out in Plans A and B appended to Ex.B and this as early as 8-3-1951. Having regard to the basic identity between the main terms of the agreement and Ex. B, it follows that the latter was a transformed formality of the preceding agreement. There was no explicable reasons for a variation in the words used to phrase the garage covenant. The reason of the thing was against plaintiff's interpretation of the covenant. If the words used meant anything other than a restriction on the increase in the height of the existing garages that was due to a mutual mistake. The existence of a mutual mistake was borne out by Munchershaw's acceptance of the garage covenant till 1959; a deliberate attempt by him at plaintiff's instigation to distort the words and failing to have his way with the BMC; Maneckji and the other trustees never agreeing with plaintiff's version; the approach to Sir Jamshedji and his opinion at Ex.Soc-10 and the total lack of evidential support to plaintiff's inequitable construction of the covenant. Section 26 of the SR Act was attracted and the delay in the claiming of the relief was inconsequential. The claim was by way of a defence vide Clause (c) of sub-section (1) of section 26 of the SR Act. To such a claim the bar of limitation provided by the Limitation Act of 1963 did not apply. Alternatively, time began to run for the accrual of this claim only when a compulsory cause of action arose. And such compulsion arose when the present suit was filed. The amendment permitting the taking up of this claim thus related back to the suit's institution for until then there was no effective cause necessitating the preferring of a claim for rectification. Plaintiff's reply to this contention is (i) there being no proof vis-a-vis the document described as an agreement dated 26-10-1950, (ii) the genuineness of the agreement being doubtful as even on defendant 1's own showing there existed many variants, (iii) the agreement being between Maneck Mistry and Ratanchand which could not bind the Vendee trust which was not even in existence on 26-10-1950 and Maneck not having the legal capacity on 26-10-1950 to bind the trust, (iv) the proved variation between the agreement and Ex.B thus showing that the former was pro-tempore, (v) the claim, though put forth by way of a defence being subject to the law of limitation and the arising of a compulsory cause of action way back in 1962 if not earlier - and thus

hopelessly barred by time and (vi) the claim being not maintainable because of the non-joinder of Ratanchand's heirs.

121. Some of the above aspects have been considered by me while appraising the construction of the covenant issues. A duplication of the consideration is necessary in view of the importance attached to the aspect of rectification. As to the factual part of the agreement, plaintiff describes the same as an offer by Maneckji as a person representing himself. That there was a concluded agreement rests on the terms appearing on a stamp paper, which paper had been purchased by Ratanchand. Next it is said that Ratanchand's endorsement of acceptance and his signature thereon is a later interpolation. There is good material in support of these contentions. The discrepancies between Phadke and Johari need not be repeated here except that these emphasise the very origin of the document's being shrouded in suspicion. Next is the proved propensity of defendant 1 and Zaveri etc. to fabrication as also suppression of documents. Having regard to this background, one must not put the doctoring, if not the very creation of the document beyond them. But there is an identity in major terms of the agreement and the conveyance at Ex.B. Defendant 1 relies upon the visit to Sir Jamshedji and the information conveyed to him by Ratanchand and/or Maneckji. As said earlier neither of the two can be, said to be beyond the temptation of "touching up" the agreement dated 26-10-1950 as also giving Sir Jamshedji misleading asides thus vitiating the factual date in his opinion. But an identity in the agreement and conveyance in regard to some important terms remains. That does not however mean that the garage covenant was an inflexible term of the contract. Were it so, it would have been bodily incorporated in Ex.B. The language was easy to graft into the conveyance and Ratanchand with his retinue of advisers in different fields was not the sort of person who could have been lulled into accepting so vital a deviation. There is technical merit and no more in the contention of the document being a matter between Maneckji as an individual and not as a trustee. From what took place later it appears that though the decision to acquire preceded the actual formation of the trust, the two were anticipated simultaneously. A matter of some consequence is that until the filing of a return in the Writ Petition of 1989, Maneckji, Ratanchand and Lalchand etc. made no reference to the agreement and what they had to say on the garage covenant. No attempt was made to venture into the Court with an originating summons as suggested by Sir Jamshedji. Could this be because what was said to be an original was so evidently a concoction, that deception would have been impossible? In this stage of uncertainty it would be unsafe to hold that the true agreement of 26-10-1950 has come before the Court and that the garage covenant was a feature which continued unchanged when the contract was transformed into the conveyance of 20-3-1951 i.e. Ex.B. In this view of the matter the incidental issues do not really survive. However it is necessary to give completeness to the judgment and for that purpose it is necessary to look into some of the many authorities cited on the subject. For that purpose an assumption will be that the agreement is genuine, at least, to the extent of the

garage covenant. The words used to phrase the covenant are :

"You (reference being to Ratanchand) will not build upper storey on the existing garages."

Authorities have been cited to show that Ex.B--minor details apart - was a word-to-word reflection of the terms recited in Ex.Soc-1. This contention stands refuted by the limitation imposed on the purchaser vis-a-vis the use of the strip of land facing the west. Next, there are projections permitted over Ratan Villa by Maneckabad structures. Thirdly there is a reference to the trustees having a right over ground and underground in the matter of water pipes, electricity and telephone wires and sewer drains etc. The basic identity theory is of little assistance for we cannot discern the minds of people in relation to events which took place more than four decades ago. And more importantly, the very simplicity of the term reproduced above negatives the possibility of any mistake occurring in the transcribing thereof into Ex.B. The compelling inference is that in regard to the height covenant parties had a change of intent and that explains the abandonment thereof when it came to the execution of Ex.B.

122. Plaintiff contends that the relief of rectification required the impleading of Ratanchand's estate to the suit. In the absence of the estate the suit suffers from the vice of non-joinder. The record does now show any resistance on the part of Ratanchand or his successors to the construction canvassed by defendant 1. In fact Ratanchand and Lalchand opposed plaintiff's contention as much as defendant 1 has so opposed. Ratanchand's right, title and interest in Ratan Villa has been acquired by defendant 1. The trustees and beneficiaries under the trust deed of 17-3-1951 (Ex.A) are all impleaded to this suit. With all the concerned parties being before me, I fail to see how the non-joinder of Ratanchand's estate can prove fatal to the relief of rectification claimed by defendant 1.

123. Can it be said that phrasing the garage covenant was consequent to a mutual mistake? Plaintiff argues that Ratanchand, Lalchand and even defendant 1 suffered from no misconceptions regarding the exact implications of the said covenant. Once again, plaintiff refers to the conduct and statements subsequent to the execution of Ex. B. This factor has been appraised to decide the construction issues. Going over it once again is necessitated, the emphasis this time being on ascertaining the existence or otherwise of a mutual mistake. Plaintiff points to Ex. E-1 dated 5-11-1965 being an affidavit filed by Ratanchand in Suit No. 304 of 1954. In para 4 of the affidavit Ratanchand speaks of "big offers" for the property being withdrawn as soon as intending purchasers learnt of the F.S.I. being 1.33 and "restrictive covenants regarding the area and height of the structures to be built in future". The recitals extracted above are not an acceptance of the stringent interpretation placed on the covenant by plaintiff. The "area and height of structures" could cover the garages" site as also that claimed by plaintiff. By 5-11-1965 Ratanchand and Zaveri certainly had become aware of plaintiff's interpretation. The former's attempt to buy off plaintiff had been rebuffed and Maneckji had fared no better. The words used in Ex. E-1 even if

applicable to plaintiff's interpretation would not constitute an admission. The other events sought to be used by plaintiff are more or less a repetition of the alleged admissions of Ratanchand and his successors vis-a-vis the height covenant. Far from showing the existence of a mutual mistake in the phrasing of the covenant, they indicate an awareness of what plaintiff meant and a desire to outwit him by means- foul or fair. Defendant 1 goes back to Ex. B and in an exercise in semantics tries to show that the conveyance is a fruition of the agreement. The broad features of this submission are :

(i) Plans A and B being conformity with the agreement of 26-10-1950. Admittedly these plans were drawn up on 8-3-1951 by Manchershaw. Plan B shows all other covenants except the application of the height covenant to Ratan Villa as a whole.

(ii) Ex. B reciting the payment of Rs. 5001/- as earnest money also recorded in the agreement.

(iii) Price reckoned at Rs. 103/- per sq.yd. mentioned in Ex. B also the agreement. Without there being any increase in the price or a decrease in the area being sold, the trust was acquiring all but the title to the Ratan Villa.

(iv) Words used in Ex. B to indicate that it was a formalisation of the agreement.

(v) Subsequent acts of Ratanchand and Maneckji to set right the error that had crept into Ex. B.

There is no substance in this elaborate exercise to link up the garage covenant as being an essential feature of the deal between the Vendor and Vendees, which feature somehow got distorted when it came to Ex. B. For one thing Ratanchand was hardly the sort of person who would place implicit reliance on the other party to the transaction. Both had engaged a common Solicitor to handle the transaction and there is no reason to believe that this agency lacked experience or integrity when drafting deeds for their clients. But to turn to the points summarised above, I will first take up the contention based on Plans A and B. Plan A shows spaces to the south and west and north as those required to be kept open under a covenant. When it comes to garages, the legend is a mere two words viz. "existing garage". And these garages are afflicted by a covenant even on defendant 1's showing. The implications of the covenant are not spelt out either by notations in the key and the indicators whether in words or colours. Plan B has a note at the top reciting that the portion shown in burnt-sienna has to be kept open under covenant as a means of access. The red-lined space to the west is explained as that required to be kept vacant under covenant. But no explanatory words are used to preface the word "garages" given to a rectangle to the west of the red-lined portion. The use of the word or words "existing garages"/garages in the two plans and the body of Ex. B can hardly be a ground for reading the height covenant as restricted to the garages. More difficult to accept is the linkage between the words used in Plans A and B to the agreement of 26-10-1950 and then to conclude that there is identity between the two for

which reason the rendering in the textual part of Ex.B must be ascribed to a mutual mistake. Reliance is placed on plaintiff's admission that except for the height covenant as construed by him, Plan B reflects the other covenants. But plaintiff also maintains that the covenant like right to lay drains, wires and water ways over Ratan Villa for the benefit of Maneckabad, are not reflected in the plans. As said earlier if the height covenant covers the entire Ratan Villa, the depiction thereof in the plans was hardly possible seeing that the entire plans would have been rendered an unmeaning mess. And if the words in the textual part be clear- as they are-no inference could be drawn from an omission in the explanatory plans. The second feature of Ex. B. in acknowledging payment of earnest made on 26-10-1950 does not go beyond establishing payment of earnest money of that date and in pursuance of an agreement. Documents said to reflect this agreement differ and for all we known may have been tampered with. And it is nothing unusual for a bargain to undergo changes from the time of preliminary offers right upto the taking up of pen and paper for writing the final formal document of sale. As to the retention of the rate retained in both the transactions i.e. agreement and conveyance, some features may continue to be constant even while others change. The fourth feature is a strained attempt to establish a linkage when two changes stare us in the face to indicate a departure. Defendant 1 trying to use subsequent event to prove a mutual mistake has not an iota of credibility. Johari's recollection of what Ratanchand and Maneckji had to say on what was meant and how honourable the trustees were, and, how they would not take advantage of typographical errors, are a fib and patently so. Neither spoke of a mutual mistake disfiguring Ex. B in their wary approaches to plaintiff. If anything, their approaches betrayed a fear that plaintiff had the upper hand in the words used to phrase the height covenant. Maneckji despite his obvious partiality towards Ratanchand and being alive till 3-9-1972, did not venture to trot out the mutual mistake theory. He did not file an affidavit in the 1968 writ petition and despite a direction by the Court, did not file a written statement in this suit. The inference of Munchershaw and the trustees realising the existence of mistake rests on passivity when there was no occasion for them to assert their version of the height covenant. And after Munchershaw's death, Maneckji had been won over by Ratanchand and later defendant 1. Maneckji's hold over the remaining two trustees was such as to incapacitate them from every having opinions of their own. After his death, their expressing their minds-if that thought ever occurred to them-would have subjected them to the painful duty of having to explain their earlier silence. Subsequent conduct therefore is of no assistance to establish a base for the plea of mutual mistake. What emerges from the evidence is a clear understanding on the part of Munchershaw and after him, the plaintiff-at least as from the writing of Ex. A-1 dated 2-9-1959- that the height covenant affected Ratan Villa fully. Ratanchand and Maneckji tried their best to buy off plaintiff but to no avail. Their vain attempts will not constitute an admission in the sense plaintiff wants to use that expression. But it certainly negatives the theory of a mutual mistake. And the desperation of Ratanchand and Maneckji is made worse by the crude fabrications

after the advent of defendant 1 on the scene. The keeping back of a number of documents and non-examination of people though alive, eliminates all possibilities of the theory even being considered plausible.

124. An issue of some importance is whether the claim for rectification is within limitation. This appraisal is of course on the assumption that mutual mistake to warrant rectification has been established. Defendant 1 contends that rectification, if sought, by way of a defence is not subject to any bar of limitation. Alternatively, time to seek that relief begins to run only when a compulsory cause of action arises. Plaintiff's reply is that section 26 SR Act though permitting the raising of a claim of rectification by way of a defence, still treats the defence as the making of a claim. If the claim for rectification by a plaintiff is subject to limitation as to the time within which it has to be made there is no reason why a different standard should apply to a defendant when raising that claim albeit as a defence. Section 26 SR Act, excluding the parts not relevant to this discussion says -

"(1) When through.... a mutual mistake of the parties..... instrument in writing..... does not express their real intention, then-

(a)

(b) The plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or

(c) a defendant in any such suit as is referred to in Clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.

(2) ...

(3) ...

(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed;

Provided that where a party has not claimed any such relief in his pleading, the Court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim."

The other statutory provisions of importance are in the Limitation Act of 1963 and comprise section 3(2)(b) and Article 113 thereof. Section 3(2)(b) says--

"For the purposes of this Act -any claim by way of a set-off or a counter claim, shall be treated as a separate suit and shall be deemed to have instituted --

(i) in the case of a set-off, on the same date as the suit in which the set-off is pleaded;

(ii) in the case of a counterclaim, on the date on which the counter claim is made in Court."

Article 113 is thus :

-----	"Description of		
Period of limitation	Time from which suit begins to run	period	
-----	Any suit for		
which no Three Years.	When the right to sue	period of limitation is accrues."	
provided	elsewhere	in this	Schedule."

125. The position prior to the coming into force of the 1963 SR Act (new Act) has some bearing on the words used to draft section 26. Commenting on the changes brought about by section 26 vis-a-vis the old Act of 1877 Sarkar's Specific Relief Act (13th Edition) at pages 256 and 257 says --

"It is provided in sub-section (1) that the relief of rectification may be obtained not only in a suit specifically brought for the purpose as at present, but also in a suit in which any right arising under the contract or other instrument is in issue. It is further provided that the relief will be open to either party, but only if it is specifically asked for in his pleading whether initially or by amendment."

The Law Commission of India in its 9th report while on the subject made suggestions for the amending of the provision (section 31) for rectification contained in the old Act of 1877. Excerpts from pages 38 to 40 of the report read thus :

"It is therefore proposed that it should be provided that the relief of rectification may be obtained not only in a suit specifically brought for the purpose but also in a suit in which any right arising under the instrument is in issue.... It is not quite clear from the statute (old Act of 1877) itself whether a plea by way of rectification can be taken in defence and if so, what are the conditions subject to which it is available.... In India, it has been held by the High Courts of Bombay, Calcutta, Madras and Nagpur, that even where under the law of procedure the defendant is not entitled to make a counterclaim, the defendant should on the principles of justice, equity and good conscience be allowed to raise in defence any plea that would have enabled him to obtain rectification in a suit, instead of being driven to a separate suit. So long as the remedy of counterclaim is not available in all courts, it would be desirable to enact the principle established by the cases just cited..... We are of the view that the conditions in the case of the plaintiff and the defendant should be the same. This result could be secured by providing that either the plaintiff or the defendant may have relief by way of rectification, but only if it is specifically asked for in his pleading, whether initially or by amendment."

A look at some of the four cases referred to by the Commission is necessary. In Sateri Shiddappa Gadkari Vs. Rudrappa Shetteppa Bachenhatti, the plaintiff and defendant had both bought land from a common Vendor-defendant's purchase being earlier in point of time. Plaintiff the subsequent purchaser, sued defendant for possession and the latter's defence was that the suit land was not included in

the sale deed in his favour owing to a mutual mistake of the Vendor and Vendee to that sale deed. At the time the defence was raised, a suit for rectification if brought by defendant would not have been barred by limitation. The plaintiff objected to a consideration of defendant's plea as that would defeat various laws including those relating to stamp and registration etc. The Court overruled these objections relying on *Dagdu v. Bhana*, 6 Bom.L.R. 126, where it was held though rectification was not claimed by way of relief because the rules of procedure in the mofussil precluded a counterclaim, a Court guided by principles of justice, equity and good conscience could give effect to a plea based on facts which in a suit brought for that purpose would entitle a plaintiff to rectification. The decision, it is argued, does not enable a party to plead mutual mistake as a defence, where a right to obtain rectification by the party defending has become time-barred. Reliance is placed upon a passage occurring at Page 465 of the report in *Shiddappa's* case. Is *Shiddappa* an authority for laying down that where the rules of procedure permit the making of a counterclaim as they obviously do on the Original Side of this High Court, the defendant cannot be heard to plead mutual mistake or seek rectification, except by way of a counterclaim or a cross-suit which must be within the period prescribed to Article 113 of the Limitation Act? A somewhat anomalous situation would arise if the query were answered in the affirmative and plaintiff presses for such an answer on the basis of changes introduced in section 3 Limitation Act, 1963 as contrasted with section 3 of Limitation Act, 1908. The Act of 1908, it is said did not refer to rights of defendant whereas the 1963 Act does so provide vide sub-section 2(b) of section 3. Defendant 1 questions the correctness of this proposition. The stand taken by them is that section 26(1)(c) SR Act in fact furthers the rights of a defendant by allowing him to seek rectification in addition to any other defence open to him-the only construction being that the relief rectification should be specifically claimed. There was no question of the bar of limitation to a defendant of mutual mistake even earlier as was held in *Rajaram v. Manik*, AIR 1952 Nag 90 (see page 92). *Sri Kishan Lal v. Kashimro*, AIR 1916 P.C. 172 is relied upon to show that law of limitation does not apply to defences. To the same effect are *Minalal v. Kharsetji*, ILR 1906(30) Bom. 396, *Lakshmi Doss v. Roop Laul*, ILR 1906 Mad. 169 and *Gopal v. Jagannath*, AIR 1935 Bom. 326. As said earlier, plaintiff distinguishes these authorities on the ground of section 3 of the Limitation Act, 1963 being vitally different from its counterpart in the Limitation Act of 1908. Additionally there is the reliance placed on the passage from *Sateri Shiddappa Gadkari Vs. Rudrappa Shetteppa Bachenhatti*, . The matter requires a precedent-free approach in view of the statutory changes brought in by the Limitation Act and SR Act both of 1963. Section 3 of the Limitation Act gives a deemed meaning to the word "suit". A claim by way of a set-off or a counterclaim are to be treated as a separate suit. The deeming in regard to institution has also been specified. Sub-section (1) of section 3 enjoins a Court to dismiss a suit etc. instituted after the period prescribed, although limitation may not have been set up as a defence. Clause (c) of sub-section (1) of section 26 SR Act enables a defendant in a suit in which any right arising

under an instrument is in issue, to ask for rectification of the instrument in addition to any other defence open to him. Does the clause make a distinction between a plea raised in defence and asking for rectification? It does not so appear, because asking for rectification appears to be in addition to any other defence open to him. Thus asking is equated to a defence. Plaintiff points to sub-section (4) which lays it down that the relief of rectification is not to be granted unless specifically claimed. The argument is that claiming by a defendant can only be in the form of a set-off or counterclaim. Therefore, to seek rectification, the only way in which it can be done is by a set-off or counter-claim. Where recourse has not been had to this medium, it cannot be said that defendant has claimed rectification. Plaintiff points out that allowing defendant to seek rectification in any other manner would be to render nugatory the very purpose of the law makers who desired to place plaintiff and defendant at par, apart from introducing some method in the rules of procedure. There is a lot to be said in favour of this argument. We cannot however go by the professed intention of the Law Commission. The touchstone for discerning the legislative intent is the language used to frame the supposed intent. When we turn to that we find the expressions used going counter to the proposition canvassed by plaintiff. SR Act, 1963, though using the words "ask" and "claimed" does not say that this would be by means of a set-off or counterclaim. These forms of redress were known to the legislature. Resort is had to the Proviso to sub-section (4) which enables addition of a claim for rectification at any stage of the proceeding after obtaining leave to amend a pleading which sans this claim. The reply is that the object of the proviso is to get over the hurdles governing the power of courts under Order VI, Rule 17 C.P.C. This seems to be the case and the use of the words "on such terms as may be just" occurring in the proviso do not detract from the correctness of the reply. The words put in quotes only emphasise the need to impose just terms as a condition for allowing an amendment seeking rectification. Moreover sub-section (4) applies to "any party" thus placing plaintiff as also defendant on the same footing. The proviso also applies to both. The result of section 26 is that the claim for rectification whether by plaintiff or defendant is freed from the technical shackles of limitation, non-joinder, mis-joinder and frame of suit etc. with this limitation, that it shall be bound by the rules governing pleadings. Of course, the result may well be that a plaintiff seeking rectification may be subject to the law of limitation, while a defendant so doing is not so disadvantaged. But the explanation is or may be that in seeking rectification, defendant is only putting forth a defence. Evenhandedness is expected from the law, but the remedy lies elsewhere if the expectation is belied in a given case. To sum up, though defendant has to specifically claim rectification, it remains a defence and does not become a counterclaim or set-off by being so claimed. Being a defence, it is not subject to any period of limitation.

126. Defendant 1 contends that even if the relief of rectification be subject to Article 113, the said claim made by them is within limitation. It is contended that plaintiff's threats to enforce the height covenant did not give rise to a

compulsory cause of action. The threat to give rise to a compulsory cause of action had to come from someone in a position to enforce that threat. That position was the preserve of the trustees and these trustees had not joined plaintiff either in the giving of threats or joining him in the institution of the suit. C. Mohammed Yunus Vs. Syed Unissa and Others, , is relied upon to fortify this argument. The property in dispute in that lis was the income in the hands of trustees who were managing a mosque and durgah. Surplus from such income was to be distributed between some branches descended from one Shaikh Mohammad. A claim for such surplus income made by the females of one branch was disputed by a male of the other branch. That led to the Court's observation --

"It is not shown that the trustees have even denied or are interested to deny the right of the plaintiff's and defendant 2; and if the trustees do not deny their rights, in our view, the suit for declaration of the rights of heirs.. will not be barred merely because the contesting defendant did not recognise that right."

Unlike in the present case, there was no proof of inaction or collusion of the trustees vis-a-vis the defendant in that case. The approaches of Ratanchand and Maneckji to plaintiff would also show that they anticipated trouble from plaintiff. Thus the threat was from a person concerned and who was not bluffing. Year after year the threat was more and more potent. Viewed thus the right to sue accrued even before 1970. If the relief of rectification be a set-off or counterclaim, it would obviously be time-barred. But as said earlier the bar of limitation is not applicable to defendant's claim for rectification as it is only a defence.

CONSTRUCTION

127. Reverting now to the subject of construction of the covenant, I have in the earlier discussion negated the interpretations put forth by plaintiff. I have also found it not possible to agree that the height covenant is restricted to the garages. Another interpretation with which I have expressed my disagreement is the attempt to link the covenant to the land running east-west parallel to the garages. In such a situation relief comes from the most obvious source viz. Ex. B. A basic rule in the interpretation of an ambiguous or problematic word or clause is to look for enlightenment at the document in which it occurs. This appraisal is a mix of the thematic, linguistic and reason of the thing principles. The tricky words in the height covenant are the last seven viz. "on the remaining land of the Vendor". Plaintiff wants these words to be read as covering Ratan Villa as a whole-land vacant on 20-3-1951, and, to become vacant in the future. This interpretation is sought to be justified by three arguments (i) that word "land" includes structures in ordinary legal parlance and is also so used in Ex. B, (ii) that if there be an ambiguity in a grant, the same has to be resolved in favour of the grantee and (iii) that a deed must be given effect to as it stands even if the result be hardship or injustice possibly unintended. Much emphasis is placed on the words "covenant on the main bungalow" to contend that

Ratanchand, Lalchand, Zaveri and defendant I admitted a restriction even on the bungalow site. If this is to be construed as an admission would it be right to deduce an inference that they did not accept the height restriction to embrace sites other than that on which the main bungalow stood? That would not be acceptable to plaintiff, and, rightly so, because the expression "remaining land of the vendor" covers the entire Ratan Villa campus and not that on which stood the main bungalow.

128. The word "land" in the legal parlance may be taken to include structures. In the Transfer of Property Act, 1882 the expression "immovable property" has been so amplified as to exclude only "standing timber, growing crops or grass. The necessary inference is that barring fauna meant for short-terms rearing and appropriation by the owner or possessor of the black soil, the rest constitutes immovable property. But is that the sense in which the word "land" occurring in the phrasing of the covenant has been sued? In Ex. B, the word "land" occurs on practically all the pages that constitute the conveyance. In the first recital where Ratanchand speaks of being seized and possessed and entitled to "a piece of land or ground", the word certainly takes in its sweep the entire Ratan Villa then inclusive of Maneckabad. Ratan Villa on 20-3-1951 had a main bungalow, two out-houses and garages etc. apart from vacant land in bits and pieces all over the property. This is made clear by a reference to the First Schedule where the property is detailed as "All that piece or parcel of land admeasuring 6933 square yards or thereabouts, together with messages, tenements and buildings standing thereon." Thus in the first recital the word is used in the broad sense in which plaintiff wants it to be understood. The second recital speaks of Ratanchand having agreed to sell "a piece or parcel of land" described in the Second Schedule. At the date of the conveyance this land i.e. the future Maneckabad site, did not have any structure on it. Yet the same words, as were used in the first recital, occur here. The Second Schedule makes it clear that the land proposed to be sold is bare land. The third recital says that plot of land proposed to be sold has been found to measure 565 sq. yds. A little below come the conveying recitals where the property being conveyed is described as "piece or parcel of land or ground" and more particularly described in the Second Schedule. Then comes a reference to portion red-lined in Plan A. In the bracketed portion following the same are described as "which land, hereditaments and premises". The word "hereditaments" is defined as "any property that may pass to an heir" see Chambers 20th Century Dictionary New Edition 1983. "Premises" in the same dictionary has been given the meaning "a building and its adjuncts". The use of three words as if they were synonyms is therefore not accurate. The deed goes on to specify the purchasers an unrestricted right of way over the portion shown in burnt-sienna in Plan B. Then begin the covenant. First, is the covenant on the vendor's title the vendor assuring that "he hath good right, full power and absolute authority to grant.... the said piece or parcel of land". The second covenant relates to portion red-lines in Plan B which is to be kept unbuilt upon and open to the sky. This portion is

described as "space on the west of the land agreed to be sold". The third covenant is the height covenant and that may be kept aside for the moment. The fourth covenant enjoins the Vendor against any construction upon portion in front towards the south, central passage or garden in front of bungalow (main bungalow) as shows in burnt-sienna colour in Plan B. The fifth covenant is an assurance that covenants set out shall "run with the land". Prohibition vis-a-vis construction is in relation to vacant land while the fifth covenant would be a commitment covering the entire property i.e. land with structures. But the fifth covenant allows the purchasers to use the affected land shown in burnt-sienna colour in Plan B for putting up underground or over ground wires for telephone, electricity, water and sewer lines etc. etc. Then come the purchaser's covenants with the Vendor. Land of the width of 10 ft. to the west but inside Maneckabad, is to be kept open but with permission to erect a porch without pillars thereon. Next on the western side of Maneckabad a restriction is placed on width of weather sheds and height of compound wall and open millings. It will thus be seen that the word "land" has not been used in any one sense of the word. Sometimes it covers structures and sometimes only bare land. Even land open to the sky at the time of Ex. B's execution is taken over in the sweep of expression "premises" which word certainly contemplates structures. And yet the use of the word "premises" was to cover only bare land. The use of a single word in different senses in one document being clear, the task is now to find out in what sense that word was used in the height covenant. Plaintiff seeks assistance from *Russell v. Archdale*, 1962(2) All.E.R. 305 wherein the case depended on the construction of words of a general nature. Even so the words were specific. In any case, words whether singular or where strung together with others, take colour from a context. The context here is a conveyance of about one-eighth of a property measuring 6933 sq. yds. The trustees acquired vacant land measuring 565 sq. yds. This left a balance of about 5785 sq.yds, though according to Ex. J, the balance was 5765 sq. yds. Therefrom the covenanted open land measured about 2100.00 sq. yds. The main bungalow and other structures occupied 1292 sq. yds. The remaining land may be in bits and pieces-measured a formidable 2373.00 sq. yds. The height covenant is applicable to these vacant bits and pieces. These bits and pieces are "remaining land". They belonged to the vendor Ratanchand. The evidence does not show that this entire vacant land was unbuilding according to building regulations. Limiting the height of structures on this vacant buildable land to the height of the then existing garages, sounds quite reasonable. The space though large was already cluttered up with structures of different heights and widths. Construing the height covenant in this fashion does violence neither to language nor to the reason of the thing. What may go against this construction is that neither party has espoused it-at least, seriously. That however is no reason for disregarding it when it fits into the scheme of things so well. Even the retention of the rate factor does not go against it for the Vendor was getting a covenant on 10 ft. wide strip of Maneckabad land facing Ratan Villa. It may be argued that such a construction would enable putting up of a structure over the existing garages. That such a possibility exists is there,

provided of course the building regulations do not go against it. This loss of a direct view of the sea would not be something unthinkable. After all some space to the west of Maneckabad had to be kept open to the sky and that space was considered enough to provide adequate light and air to those in Maneckabad. The interpretation also accords with Ex. B itself quite often equating "land" with vacant land. Thus the reason, context, theme and linguistics all render probable the acceptance of the above interpretation. There is rhetorical merit and no more in plaintiff's contention that words used in a deed must be given full effect to regardless of the hardship and injustice it may lead to. Rules of construction are an aid to justice and justice does not lie in sustaining extreme stands. Plaintiff relies on the Contra Preferentem rule and its acceptance in Delhi Development Authority Vs. Durga Chand Kaushish, . The rule was a reversal of the feudal relic of grants by a Sovereign, hit by ambiguity, being construed in favour of the grantor. The reversal was based on the need to give greater weight to the Sovereign's honour where it appeared to conflict with the Sovereign's profit and this more so in the case of grants for consideration. But even if the principle is held to be applicable to deals between citizen inter-se, there cannot be a strained interpretation where the alternative of a more reasonable one is available. The height covenant is held restricted to that land which was not built upon and which was not part of the central passage, the garden and the red-lined portion to the west as shown in Plan B in Ex. B. Structures on this vacant land if buildable according to building regulations, were not to exceed the height of the then existing garages.... these garages being shown in Plan B. to Ex. B.

MINOR RELIEFS

129. The minor reliefs cover land shown in yellow-hatched lines in Ex.B-this Ex. B being that annexed to the plaint and the land to the south, west and east of Maneckabad. In regard to the portion shown in yellow-hatched lines, this is a pure cartographical encroachment through Ex. J by defendant 1 over site forming part of Maneckabad. Defendant 1 has tried to shrug this off as an unintended error. With defendant 1's propensity for fabricating documents, it is dangerous to accept this sort of explanation. But for plaintiff's vigilance defendant 1 at some future date would have tried its hand at getting the land covered by the yellow-hatched lines. Next is defendant 1's attempt to lessen the rigour of the covenant regarding the central passage and garden and red-lined land to the west covenanted to be kept open in Ex.B. They would have it that plaintiff can insist on no more than enough space to enable passage in these portions. The object behind the covenant was specified as requiring the absence of "any structure in front towards the south, or on the central passage or in the garden in front of Ratan Villa's bungalow". That covenant can be fouled up by allotting parking lots on this or that portion and thus cluttering up the space with immobile automobiles which are as insuperable, as structures. Necessary reliefs will have to be granted in this behalf.

130. The end of the first stage of this suit-hopefully-is in sight. Twenty-two years

ago the suit was instituted, and, that it could be completed even now is attributable to the ungrudging help and assistance rendered by the many Advocates figuring in the case. They have given freely of their time and talents to help me discern the core of the many issues arising in the matter. Unto each one of them I owe a deep sense of gratitude. But for their co-operation I would not have been able to wade through the great mass of material which figures in the case. I take this opportunity to record my appreciation of the help rendered by them.

131. A question arises as to in whose favour the decree should be passed. All the trustees and beneficiaries are parties to the suit. Therefore, it will be appropriate to pass a decree in favour of all of them, except in one particular viz. costs.

COSTS

132. And on costs the result being what it is, the problem is a bit complex. In terms of reliefs, plaintiff will not get an injunction to cover Ratan Villa as a whole with the height covenant. But on the other hand is the responsibility of defendant 1 in giving occasion to this litigation. Defendant 1's conduct before and after the institution of the suit is anything but straightforward. Honesty of word and deed is not to be shrugged off as an irrelevance in the sordid arena of litigation. Three-fourths of plaintiff's costs should therefore come from defendant 1, who, as also the other defendants, should be left to bear their own costs. Plaintiff's remaining costs, shall be borne by him.

133. The issues set out in paragraph 40 are answered as under :

1. Yes.
2. Not so.
3. No.
4. (a) No.
(b) Yes.
5. (a) Yes.
(b) Not wholly.
(c) Partly "yes".
(d) Partly "yes".
(e) No.
6. No.
7. Yes.
8. (a) Does not arise.

- (b) Does not arise.
9. (a) Does not survive.
(b) Does not survive.
10. Yes.
11. (a) Yes as per order
(b) No; he is entitled.
(c) No; not so.
12. (a) Yes.
(b) No.
13. No.
14. (a) Yes.
(b) No.
15. (a) No.
(b) No.
(c) Does not survive.
16. (a) No.
(b) Does not survive.
17. (a) Yes.
(b) Yes, it had notice of plaintiff so contending.
18. No.
19. (a) No.
(b) No.
20. No.
21. No.
22. (a) No.
(b) Does not survive.
23. No.
24. (a) Does not require registration.
(b) Does not survive.
25. No.

26. (a) No.

(b) No.

(c) No.

(d) No.

27. Yes.

28. Defendant No. 1 is disabled because it fails to establish mutual mistake.

29. Joinder of Ratanchand Hirachand's legal representatives not necessary.

30. (a) Defendant No. 1 and Ratanchand knew that plaintiff was so interpreting right from the time of his father's death in 1962.

(b) No.

(c) Does not survive.

31. See Order.

ADDITIONAL ISSUES

M-I. Yes.

M-II No.

M-III.(a).No.

(b).Does not survive.

134. In conformity with the above findings I direct a decree in the following terms :

(i) Declared that defendant 1 is not the owner of the land shown by yellow hatched lines in Ex. B. (being an annexure to the plaint) and that this land belongs to the trustees, the beneficiaries and the reversioners (including plaintiff) of the deed of settlement dated 17-3-1951. Defendant 1 is permanently prohibited from laying any claim to this land or interfering with the possession and enjoyment thereover of the trustees, beneficiaries and reversioners inclusive of plaintiff aforementioned.

(ii) Defendant 1 is prohibited from erecting any structure exceeding in height 13'-1". on the vacant land of the erstwhile Ratan Villa as it was on 20-3-1951. This prohibition, which shall be perpetual, is restricted to the said land whether buildable or otherwise according to building regulations of any authority-then or now in force. Declared that this restraint shall operate perpetually in favour of the trustees, beneficiaries or reversioners including plaintiff and/or their successors as the case may be. Defendant 1 to remove from the land vacant as on 20-3-1951 any structure put up after 20-3-1951 in Ratan Villa campus. This removal be effected in six weeks as from this day. In the event of the above

directive not being complied with, plaintiff will be entitled to get an order for such removal in execution and the expense therefore shall be saddled upon defendant 1.

(iii) Defendant 1 perpetually restrained from putting up any structure or cluttering up with immobile objects the portion in front towards south, the central passage or garden shown in burnt-sienna colour in Plan B to Ex. B dated 20-3-1951. This area shall be kept unbuilt upon, and, in the state it was on 20-3-1951.

(iv) Ex. B to the plaint and Plans A and B to Ex. B dated 20-3-1951 shall form part of the decree. Plaintiff to furnish copies of the said exhibit and plans.

(v) Plaintiff to get 3/4ths of his costs from defendant 1 and bear the remaining 1/4ths himself. Defendant to bear their own costs.