
(1991) 08 BOM CK 0017

In the Bombay High Court

Case No : Notice of Motion No. 1311 of 1988 in Suit No. 1335 of 1988 with
Notice of Motion No. 1470 of 1988 in Suit No. 1104 of 1988

G.I.C. Employer" Sonal Vihar Co-operative Housing Sct. and APPELLANT
Another

Vs

Pandurang H. Vaity and Others RESPONDENT

Date of Decision : 30-08-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 40 Rule 1

Citation : (1992) 2 BomCR 235 : (1992) 94 BOMLR 930

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : H.J. Thakker, instructed by Thakordas Madgavkar, in Notice of Motion No. 1311 of 1988, S.R. Shah and A.R. Shinde in Notice of Motion No. 1470 of 88, for the Appellant; Armin Wandrewala, instructed by Pravia Mehta and Mithal and Co. for defendant Nos. 1 to 6 and 8 to 52 in Notice of Motion No. 1311 of 1988, Armin Wandrewala, Priavia Mehta and Mithal and Co. for defendants 1 to 6 and 8 to 48 in Notice of Motion No. 1470 of 1988, A.Y. Bookwala, instructed by Kishore Dalal and Co., for defendant No. 49 and 53, for the Respondent

Judgement

D.R. Dhanuka, J.—G.I.C. Employees" Sonal Vihar Co-operative Housing Society (hereinafter referred to as the plaintiff No. 1 society) and Mrs. Kusum Bhaskarao Gorule, sole proprietress of M/s. Chitralkha Builders, have filed Suit No. 1335 of 1988 for specific performance of agreement dated 28th April 1986, a copy whereof is annexed as Exhibit "B" to the plaint, in respect of property bearing Survey No. 287 (part) C.T.S. No. 727 situate at Sarojini Naidu Road, Mulund, Bombay, and for various other reliefs. The defendants Nos. 1 to 52 in substance are the vendors of the said property. Defendant No. 53 M/s. Shreenath Builders is impleaded as party defendant at a subsequent stage.

2. In this suit, the plaintiffs have taken out a notice of motion for an interim injunction restraining the defendants from creating any third party rights and/or dispossessing the 1st plaintiff and/or the 2nd plaintiff from the said property. The

notice of motion taken out by the plaintiffs in this suit bears No. 1311 of 1988.

3. Sai Kripa Co-operative Housing Society Ltd. (hereinafter referred to as Sai Kripa Society) has filed Suit No. 1104 of 1988, inter alia, for specific performance of the same Agreement dated 28th April, 1980 and for various other reliefs. The plaintiff in this suit has taken out notice of motion for injunction and receiver, numbered as Notice of Motion No. 1470 of 1988.

4. Both these notices of motion are heard together.

5. Mr. Kamalakar Bhiwa Vaity, who is defendant No. 25 in Suit No. 1335 of 1988 and defendant No. 35 in Suit No. 1104 of 1988, has filed an affidavit dated 15th January, 1990 in reply to Notice of Motion No. 1470 of 1988 on behalf of himself and all the other co-vendors. No affidavit in reply has been filed in Notice of Motion No. 1311 of 1988. It is agreed amongst the learned Counsel that affidavit made in Notice of Motion No. 1470 of 1988 be considered for the purpose of disposal of Notice of Motion No. 1311 of 1988 also and the Court do pass a common order in both the notices of motion after considering the pleading and affidavits in both the suits. The Court accepts the request made.

6. These notices of motion involve prima facie consideration of the following questions :---

(a) Whether the suit Agreement dated 28th April, 1980 was terminated by the vendors at any time by notice or otherwise and whether the suit agreement stood terminated for the alleged breaches or otherwise ?

(b) Whether the defendant No. 53 M/s. Shreenath Builders is subsequent bona fide purchaser of the suit property ?

(c) Whether the defendant No. 53 was or is in possession of the suit property ?

(d) Whether it is just and convenient to appoint receiver of the suit property ?

For the reasons set out in subsequent paragraphs of this judgment, I hold that the contesting defendants have failed to prove that the suit agreement was ever terminated or that it stood terminated for alleged breaches or otherwise. The defendants Nos. 1 to 52 in Suit No. 1335 of 1988 have conceded through their learned Counsel that no written notice of termination was ever issued. The said defendants are unable to state when the suit agreement was orally terminated and from what date or what are the breaches attributed to the plaintiff No. 2. Some of the pleas raised in the affidavit in reply filed on behalf of the vendors are mutually contradictory. Relevant facts are deliberately suppressed from the Court. I hold that the defendant No. 53 is not a subsequent purchaser and the claim made on behalf of defendant No. 53 is totally false and bogus. No affidavit in reply is filed by defendant No. 53 in Suit No. 1104 of 1988 in spite of clear plea in the plaint to the effect that the alleged claim of defendant No. 53 as alleged subsequent purchaser of the suit land was totally false and bogus. No affidavit in reply is filed by defendant No. 53 to the notice of motion in Suit No.

1335 of 1988 also. I hold that the defendant No. 53 was never in possession of the suit land and false statements were made to the Court by defendant No. 53 through their learned Counsel at the earlier hearings when it was asserted that defendant No. 53 was in possession of the suit land. I hold that prima facie no agreement was entered into between the vendors and defendant No. 53 to sell the suit land. The original agreement was never produced before the Court. Even if it were to be assumed that the defendant No. 53 has been able to create some sort of evidence of unlawful intermeddling with the suit land by their alleged forcible entry without authority of law, such wrongful act of defendant No. 53 is of no legal consequence. Such an alleged encroachment on the suit land by defendant No. 53 or anyone else, if any, cannot prevent the Court from rendering justice to the parties who have a valid and lawful claim in respect of the suit land. It shall be obvious from narration of facts hereafter that M/s. Kishore Dalal & Co., Advocates, did not reply to any of the several letter written on behalf of the plaintiffs for copy of the alleged agreement, if any, with defendant No. 53, refused to accept service of chamber summons and did not even file Vakalatnama for a period of two years although appearing in Court. It is therefore, just and convenient to appoint Court Receiver, High Court, Bombay, as Receiver of the suit land. In my opinion, no other remedy would be efficacious in this case.

7. The facts of these two suits reveal shocking state of affairs and would cause anxiety to any right-thinking person of the society and undoubtedly to a Court of law. The material facts are as under :

(a) One Mr. Bama Budhiram Vaity in his capacity as Karta of Hindu Undivided Family was the owner of the above referred suit land. The said Bama Budhiram Vaity died sometime in the year 1954. The defendants Nos. 1 to 52 in Suit No. 1335 of 1988 are the surviving members of six branches of his family. The said family is substantially represented by the said defendants.

(b) By an Agreement dated 28th April, 1980, Mr. Pandurang Harishchandra Vaity and others entered into an agreement to sell the suit land to plaintiff No. 2 and one Tukaram Nalawade, who were then the partners of the firm carrying on business in the name of M/s. Chitrlekha Builders. The plaintiff No. 2 is now the sole proprietress of the said concern. By the said agreement, the vendors agreed to sell the suit land to M/s. Chitrlekha Builders (of which the plaintiff No. 2 is now the sole proprietress) at the rate of Rs. 100/- per square yard. By the said agreement, the vendors acknowledged receipt of a sum of Rs. 50,820/- as earnest money. It was stated in Clause 5 of the said agreement that the suit land had no access from the Municipal road. The suit land was situate in the Industrial Zone at the material time. It was stipulated that the Industrial Zone of the suit land shall have to be got changed. The plaintiff No. 2 took the entire responsibility for procuring the necessary sanctions and permissions needed for development of the said land. Various statutory permissions were required to be obtained under the provisions of the Maharashtra Land (Ceiling and Regulation)

Act, 1976 (hereinafter referred to as the Ceiling Act) and other statutes before the suit land could be developed. Clause 7 of the said agreement provided that in a certain situation the vendors shall be entitled to terminate the agreement by giving 15 day's notice in writing to that effect to the purchaser i.e. plaintiff No. 2. The husband of plaintiff No. 2 appears to be an Architect. It was provided by Clause 8 of the said agreement that the plans for construction of the building shall be got approved by the purchasers. By Clause 13 of the said agreement, the vendors agreed to make out a marketable title to the suit land. Clause 15 of the said agreement provided that the vendors shall hand over vacant possession of the suit land to the purchasers on completion of the sale. The said clause further provided that on passing of the Municipal plans, the purchasers shall be entitled to start construction work on the said land strictly in accordance with the approved plans with the permission of the vendors. The said agreement provided for execution of one or more conveyance by the vendors as may be required by the purchasers.

(c) It was contemplated between the parties concerned at all material times that two building will be constructed on the suit land. The said buildings are referred to in the agreement as Building "A" and Building "B". The plaintiff No. 1 society is concerned with Building "A". Sai Kripa Society is concerned with Building "B". Both the Societies have entered into agreements with plaintiff No. 2 as indicated below.

(d) By an agreement dated 9th May, 1990, a package agreement was arrived at between the 2nd plaintiff and Sarvashri D.L. Satam and S.T. Suvarna in their capacity as Promoters of the proposed Society, which was ultimately registered as plaintiff No. 1 Society. The plaintiff No. 1 Society is a Society consisting of members employees of General Insurance Corporation. A copy of the said package agreement is annexed as Exhibit "E" to the plaint.

(e) On 14th October, 1980, Bhoomi Pooja was performed on the suit land by the plaintiffs. Some of the members of Vaity family (i.e. vendors family) attended the said ceremony. The vendors have never objected to the transaction arrived at between the plaintiff No. 2 and the two Societies in respect of the proposed Buildings "A" and "B" on the suit land.

(f) On 22nd May, 1980, M/s. G.N. Sohani and Associates, Architects employed by the plaintiffs, acting on behalf of and in the name of the vendors with their consent, made an application to the government of Maharashtra for conversion of the suit land from Industrial Zone to residential Zone. It was clearly stated in the said letter that such an application be sympathetically considered as the land was being developed for G.I.C. Employees" Sonal Vihar Co-operative Housing Society for their staff residential quarters. At that stage, the name of plaintiff No. 1 Society as Employees" Society was fully utilised by plaintiff No. 2 and the vendors in order to invoke the sympathetic consideration of various authorities in relation to change of Zone and obtaining of permissions to develop the said land, it being well known that the Government is more responsive to the needs of poor

and middle class employee working in the public sector. A copy of the said application is annexed as Exhibit "J" to the plaint.

(g) At the time when the Bhoomi Pooja was performed, the vendors executed a writing in favour of the 2nd plaintiff, being writing dated 13th October, 1980. The said writing supports the case of the plaintiffs in respect of their averments that the plaintiffs were and are in possession of the suit land. It is not disputed that the plaintiff No. 2 constructed compound wall on the suit land.

(h) On 26th March, 1982, some of the vendors executed a Power of Attorney in favour of two of the vendors in order to speed up the work of obtaining of various approval and sanctions, etc. from the Governmental and other statutory authorities so that houses could be built and the dreams of providing staff quarters could be achieved.

(i) On 24th October, 1983, the promoters of plaintiff No. 1 society acquired the right of way from the adjoining owner of the plot by making payment of a sum of Rs. 40,000/-. A copy of the Deed of Right of Way is annexed as Exhibit "N" to the plaint. Both the plaintiffs spent lot of amounts on development of the suit land for purpose of several sanctions and permissions requisite for development of their land. They spent considerable time and energy for the purpose aforesaid.

(j) On 11th March, 1985, the vendors represented by the above referred Architects made an application for permission to change the user of the land for non-agricultural purpose. The said permission was granted by the concerned authority on 24th October, 1986 as a result of efforts made by the plaintiffs.

(k) Municipal plans were got sanctioned. Commencement Certificate was issued by the Municipal authorities both in respect of Buildings "A" and "B" sometime in the month of March, 1987. No Objection Certificate was issued by the Competent Authority. The said Certificate was issued under the Urban Land Ceiling Act, 1976 in the year 1987-88. As already stated above, a package agreement was arrived at between the plaintiffs No. 2 and plaintiff No. 1 in respect of Building "A" on 9th May, 1980 and the suit land as set out therein.

(l) The plaintiff No. 2 also entered into a package agreement with M/s. Sai Kripa Co-operative Housing Society in respect of Building "B". The said agreement was entered into on 14th May, 1986.

(m) It is common ground that on 22nd April, 1987, the vendors received a further sum of Rs. 10,000/- from Sai Kripa society on account of part-payment under the agreement dated 18th April, 1980. The said amount was paid by the said Society for and on behalf of plaintiff No. 2 in Suit No. 1335 of 1988.

(n) The plaintiff No. 2 constructed compound wall on the suit land. It was necessary that the construction work in respect of the two buildings be started forthwith. The plaintiff No. 2 was keen to start the construction work. The construction work was started. The plaintiff No. 1 in Suit No. 1335 of 1988 and the plaintiff in Suit No. 1104 of 1988 were more keen than even plaintiff No. 2.

The plaintiff No. 2 was in possession of the suit land with the consent of the vendors for benefit of the two Societies. The plaintiff No. 2 had already done various acts on the suit land including construction of compound wall etc. as more particularly set out in the correspondence. Large amounts were spent on development of the suit land and part construction work as aforesaid.

(c) On 6th January, 1988, the plaintiff No. 2 forwarded a cheque for Rs. 1,42,460/- to the vendors on account of further part-payment of amounts payable under the agreement dated 28th April, 1980. The said cheque was forwarded with a covering letter by registered post with acknowledgment due. By this time, the vendors developed dishonesty and decided to create hitches by setting up some other builder. The vendors refused to accept the above amount without disclosing any reason.

(p) On 14th May, 1988, six notices were caused to be published in various newspapers by M/s. Kishore Dalal & Co., Advocates representing defendant No. 53. It was stated in the said notices that the vendors named in the said notices i.e. the members of the Vaity family, had agreed to sell to their clients their 1/6th share in the suit property. By the said notices, claims were invited from members of the public in respect of the suit land. It was stated in the said notices that if the claims were not notified in writing within 14 days from the date of publication of the said notices, their claims will be considered as waived.

(r) By a letter dated 25th March, 1988, M/s. Thakordas & Madgavkar, Advocates, informed M/s. Kishore Dalal & Co., Advocate, that the plaintiff No. 2 had entered into an agreement dated 28th April, 1980 with the vendors in respect of the suit land. It was stated in the said letter that the said agreement was subsisting. It was stated in the said letter that the plaintiff No. 2 was in possession of the suit land. It was stated in the said letter that the plaintiff No. 2 had paid earnest money of Rs. 50,820/- and had made part payment of Rs. 10,000/- on 22nd April, 1987. It was stated in the said letter that a sum of Rs. 1,42,400/- was tendered to the vendors but the same was not accepted and the letter dated 6th January, 1988 along with which the cheque for the said amount was tendered was received back. In paragraph 6 of the said letter, 14 items of development work carried out by plaintiff No. 2 were enumerated. Paragraph 6 of the said letter is accordingly important. The said paragraph reads as under :---

"6. We are instructed to say that along with the said letter dated 6th January, 1988 a list was enclosed setting out the works carried out by our clients, which list, for the sake of ready reference is reproduced herewith.

- 1) The Industrial Zone is converted in Residential Zone by the Government of Maharashtra.
- 2) The 22'-0" wide Right of way is taken from the adjoining Owner Shri T.R. Patil.
- 3) The said Right of way is also constructed.
- 4) The retaining wall along the Nala side is constructed, as per B.M.C." Rule &

Regulations.

- 5) The compound wall is constructed twice.
- 6) The plans of building A & B are approved by the B.M.C.
- 7) The Ceiling Act N.O.C. is obtained from the Government.
- 8) The land is surveyed by the City Survey office and demarcated the boundaries.
- 9) Property Register Cards prepared as per the area available at site.
- 10) The hutments in the extreme corner on north side were removed and some tenants were given the rooms constructing in side land.
- 11) S.W. Drains remarks obtained.
- 12) Special Drains on access road remarks obtained.
- 13) The N.A. Permission of the said land is received.
- 14) The said land is assessed by the Asstt. Assessor and Collector, Mulund."

It was also stated in the said letter that plaintiff No. 2 had commenced construction and had paid taxes and other outgoings in respect of the suit property since the date of the said Agreement.

(s) by a letter dated 2nd April, 1988, M/s. Kishore Dalal & Co. commented on the validity of the said agreement dated 28th April, 1980. It was stated in the said letter that their clients had purchased the property under a valid agreement and that their clients were in actual physical possession of the suit property. The name of their clients was kept secret, the date of their alleged agreement was kept secret, the date on which the alleged possession is supposed to have been taken by their undisclosed clients was also kept secret. Several letters were thereafter written by M/s. Thakordas & Madgavkar to M/s. Kishore Dalal & Co. calling upon the latter to furnish copies of the agreement. These letters are as under :---

- (1) Letter dated 15th April, 1988;
- (2) Letter dated 29th April, 1988;
- (3) Letter dated 3rd May, 1988;
- (4) Letter dated 5th May, 1988; and
- (5) Letter dated 27th May, 1988.

No reply was sent to any of these letters. The requisitions contained in the said letters were not complied with. Copies of these letters are annexed to the affidavit in support of Chamber Summons No. 793 of 1988 referred to in paragraph 11 of this judgment.

8. On 6th April, 1988, Sai Kripa society filed Suit No. 1104 of 1988 and soon

thereafter applied for ad interim injunction. On 11th April, 1999, the said application was considered by Guttal, J. At this stage, Mr. A.Y. Bookwala with Mr. J.B. Chinnai, learned Counsel of this Court, appeared for M/s. Shreenath Builders, defendant No. 53 in suit No. 1335 of 1988, instructed by M/s. Kishore Dalal & Co. to show cause, although the defendant No. 53 was not a party to the suit at that stage. The learned Judge granted ad-interim injunction in terms of prayer (a) of the motion taken out by Sai Kripa Society. The learned Judge recorded the statement of the learned Counsel Mr. Bookwala, obviously made on instructions, that "Shreenath Builders are in possession", meaning thereby that according to Shreenath Builders, Shreenath Builders claimed to be in possession of the said land.

9. M/s. Pravin Mehta & Mithi & Co., Advocates, represented the owners i.e. defendants Nos. 1 to 52, at all times, except defendant No. 7.

10. On 3rd May, 1988, M/s. Thakordas & Madgavkar representing G.I.C. Society requested M/s. Pravin Mehta & Mithi & Co. to furnish a xerox copy of the document under which the said parties (meaning thereby the clients of Mr. Bookwala) claimed to be in possession. By the said letter, copies of the documents relied upon by the vendors and by the third party were sought. By a letter dated 5th May, 1988, M/s. Pravin Mehta & Mithi & Co. informed M/s. Thakordas & Madgavkar that they were seeking instructions in the matter and on receipt of instructions they shall revert to the matter. The vendors or their attorneys never reverted to the matter. This conduct of the vendors and defendant No. 53 reflects on their honesty and bona fides. Copy of the agreement alleged to have been entered into between the vendors and M/s. Shreenath Builders was never furnished. The letters written by the Advocates for the plaintiff No. 1 society were never replied. No reply was given by M/s. Praveen Mehata & Mithi & Co. on merits. No reply was also given by Kishore Dalal & Co. at all. No bona fide third party for value could conduct its affairs in this way. The entire conduct of defendant No. 53 is blameworthy and mala fide. When the parties indulge in scheming to defraud others and fabricate evidence, they are unwilling to disclose facts and produce documents out of fear.

11. In these circumstances, the plaintiffs in Suit No. 1335 of 1988 took out Chamber Summons No. 793 of 1988 for a direction to the defendants to disclose the address of M/s. Shreenath Builders and to disclose the particulars of the alleged agreement which they were setting up. As affidavit of service was filed and the correctness thereof is not disputed. It was stated in the said affidavit of service that M/s. Kishore Dalal & Co. had refused to accept service of the said Chamber summons. This conduct of Advocates is also surprising. No one appeared at the hearing of the said chamber summons on behalf of the vendors or M/s. Shreenath Builders. Nobody wanted to give any information to the Court. The original agreement between the vendors and M/s. Shreenath Builders was never produced before the Court. The Court was being hoodwinked and the plaintiffs were being harassed and victimised. Their prospect of getting

residential quarters suffered unnecessary set back. By an order dated 9th September, 1988, Brother Justice Pendse made the said chamber summons absolute in terms of prayer (a) thereof. The said order remained uncompleted with till today by the defendants. The vendors are thus guilty of wilful disobedience of the order of the Court.

12. It must be observed in the passing, though the possibility of inadvertence cannot be totally ruled out, that no appearance was filed by M/s. Kishore Dalal & Co., Advocates & Solicitors representing Shreenath Builders till June 1990 in one suit and till August 1990 in the second suit. I am, however, disturbed when I find that on one hand M/s. Kishore Dalal & Co. went on appearing in the matter for Shreenath Builders in the year 1988 without filing Vakalatnama and on the other hand they refused to accept service of Chamber Summons No. 793 of 1988. Why ?

13. The matter was carried to appeal court in the appeals arising from interlocutory proceedings in both the suits. In the appeal Court also, statement was made before Bharucha and Suggla, JJ., in Appeal No. 666 of 1988 on 9th May, 1988, which reads as under:---

"Mr. Kishore Dalal for Shrinath Builders states that status quo as of today shall be maintained in respect of the possession of the property and that no further third party rights therein shall be created pending the disposal of the motion in the suit.

Mr. Kapadia for the plaintiff states that Shrinath Builders shall be impleaded as defendants to the suit.

Appeal allowed to be withdrawn."

M/s. Kishore Dalal & Co. did not file appearance for the intervenors in the suit or in the appeal at least for two years. The Court trusted the Advocates when it recorded their statement on the assumption that the appearance must have been filed. The plaintiffs had undoubtedly agreed to implead M/s. Shrinath Builders as party defendant to the suit. A grievance was made to Ashok Agarwal, J., at the hearing of this notice of motion that the plaintiffs had failed to carry out their assurance before the Court by not impleading Shreenath Builders as party defendant. It was forgotten by the Counsel for the defendants that order passed on the chamber summons on 9th September, 1988 was not complied with and the plaintiffs did not have either the address of M/s. Shreenath Builders or the copy of the alleged agreement.

14. Similar statements were made in Appeal No. 593 of 1988 before the Hon'ble the Chief Justice Shri C. Mukharjee and the Hon'ble Mr. Justice S.P. Bharucha regarding M/s. Shreenath Builders being in alleged possession of the suit property. No appearance was filed by M/s. Shreenath Builders in the appeal. The Court permitted the Counsel to make the statement and recorded the same on the assumption that the appearance must have been filed.

15. It is now time to refer to the affidavit of Kamalakar Bhiwa Vaity, defendant No. 25 in Suit No. 1335 of 1988, filed on behalf of the vendors in Notice of Motion No. 1470 of 1988 in Suit No. 1104 of 1988. The said affidavit is being considered for the purpose of disposal of both the motions. From the statements made before the learned Single Judge and before the Hon'ble appeal Court that M/s. Shreenath Builders were in possession of the suit land, one would expect M/s. Shreenath Builders and the vendors to come forward before the Court with the original agreement and other documents and furnish necessary particulars as to when the alleged agreement was entered into and when the alleged possession was handed over. Even in the said affidavit dated 15th January, 1990 filed after about a year and half of taking out of the notice of motion, no date is to be found of the alleged agreement between the vendors and M/s. Shreenath Builders or the date of the alleged delivery of possession by the vendors to M/s. Shreenath Builders. No particulars are disclosed. It is not disclosed in the said affidavit as to whether defendant No. 53 had made any payment to any of the vendors in respect of their alleged transaction. In the affidavit in rejoinder filed in Notice of Motion No. 1470 of 1988, Mr. V.M. Randekar, Honorary Secretary of Sai Kripa Society, had rightly commented that the case set up by the vendors and Shreenath Builders in respect of their alleged agreement was totally bogus. M/s. Shreenath Builders have still not chosen to file any affidavit all those years. Strongest possible adverse inference will have to be drawn both against M/s. Shreenath Builders as well as against the vendors in view of their conduct in refusing to state particulars of the alleged agreement and not complying with the order of Pendse, J., passed on 9th September, 1988 and not filing an affidavit in reply so far. Their conduct of withholding production of original document deserves condemnation.

16. I am considerably disturbed with the false and evasive contents of the affidavit of Kamalakar Bhiwa Vaity. I have heard this matter on more than one occasion and tried to read the said affidavit more than once. It was conceded by the learned Counsel for the vendors that no written notice of termination of the suit agreement was ever issued to plaintiff No. 2 with whom alone the vendors had a direct privity of contract. In paragraph 12 of the said affidavit, it is stated as under :---

"With reference to paragraph 2, these defendants submit that the said agreement dated 28th April, 1980 has been terminated and is null and void."

I repeatedly inquired from the learned Counsel for the vendors as to when the suit agreement was terminated and whether the alleged termination was oral or in writing. I called upon the learned Counsel to produce copy of "termination notice" if any. In reply to the queries of the Court, the learned Counsel stated that no letter of termination was issued by the vendors at any time.

17. In paragraph 26 of the plaint in suit No. 1104 of 1988 filed by Sai Kripa Society, it was in terms averred that no notice of termination of the agreement dated 28th April, 1980 was ever issued to plaintiff No. 2. Admittedly no written

notice was issued. It is not stated in the affidavit in reply that any oral notice was issued. The learned Counsel for the vendors argues ipse dixit when he contends that the agreement might have been terminated orally. A bold and false plea is taken in paragraph 23 of the said affidavit in reply as under :---

"With further reference to the para under reply, these defendants deny that the said agreement dated 28th April, 1980 is in force and/or valid and/or subsisting and/or that no notice of termination or cancellation thereof has been issued."

This statement in plain English means that notice of termination or cancellation of the said agreement was in fact issued. According to plain English it means that written notice of termination was issued by the vendors to plaintiff No. 2 and the plea made in paragraph 26 of the plaint was incorrect. It is now admitted that no written notice of termination was ever issued. In my judgment, the said defendant Kamalakar Bhiwa Vaity has perjured himself by making a statement on oath which was false to his knowledge when made, and it is in the interests of justice and to eradicate evil of perjury that a show cause notice be issued to the said defendant to show cause as to why prosecution should not be sanctioned against him for making the said false statement, which he knew to be false when made. Even in so far as non-compliance with the said order dated 9th September, 1988 passed by Pendse, J., is concerned, the defendants are clearly in contempt. Admittedly no particulars of the agreement were furnished. No copy of the alleged agreement was furnished to the plaintiffs. Still, in exercise of my discretion I do not propose to direct issue of a notice for contempt against the defendants for non-compliance with the said order dated 9th September, 1988 for this reason that it would be difficult to fix the liability on a particular defendant in respect of the wilful non-compliance with the said order. It is possible that some of the defendants may have left the handling of litigation in charge of some of the members of the family and all of them did not even know the contents of order dated 9th September, 1988. Having regard to these practical problems. I do not propose to direct issue of contempt notice against the defendants for non-compliance with the said order at this stage. I express my displeasure at the admitted non-compliance of order dated 9th September, 1988 passed by Pendse, J.

18. During the course of arguments, I requested Mr. Bookwala to produce the original agreement for sale alleged to have been entered into between Pandurang Harishchandra Vaity and others and M/s. Shreenath Builders. A xerox copy of an alleged agreement dated 27th February, 1988 was tendered. The said copy is kept on record and is marked "X" for identification. The said copy cannot be considered as relevant material in absence of an affidavit and in absence of the original. The oral plea of the vendors and defendant No. 53 regarding defendant No. 53 being bona fide purchaser under a subsequent agreement and defendant No. 53 being in possession of the suit land in pursuance thereof is rejected as false and unsubstantiated.

19. The learned Counsel for the vendors has submitted that suit No. 1335 of

1985 is liable to fail at the final hearing of the suit for non-joinder of essential parties. There is no merit in this contention. The learned Counsel contends that all the family members of Vaity family are not impleaded as defendants to the suit. In any event, the defect, if any, is not fatal. Having come to the conclusion that gross injustice has been caused to the plaintiffs by the defendants and the conduct of the defendants is shocking and unjust, I do not propose to refuse grant of appropriate interim reliefs to the plaintiffs on the basis of such technical ground of no substance.

20. The learned Counsel for the vendors submitted that the plaintiff No. 2 had committed breaches of the agreement dated 28th April, 1980 and the said agreement had stood terminated. The learned Counsel was unable to point out from the affidavit in reply any particulars of the alleged breaches said to have been committed by the plaintiffs. The learned Counsel tried to argue an inarguable case in her own way but had no factual answer to any of the material points for lack of instruction for obvious reasons.

21. It was then argued by Mr. Bookwala that the case of defendant No. 53 regarding their alleged possession of the suit land should be accepted by the Court even in absence of any affidavit in view of the statements made by Counsel for Shreenath Builders at the earlier hearings. It is not possible to accept this argument for more than one reason. By various letters addressed by M/s. Thakordas Madgavkar, which are already summarised, particulars were sought of the alleged documents under which M/s. Shreenath Builders claimed to have entered into possession. No reply was sent to any of these letters by M/s. Shreenath Builders or their Advocates. Why? Obviously because the defendants must have still been manipulating documents. I feel that the defendants were scheming all the time to defraud the poor and middle-class members of two societies and the plaintiff No. 2. The above inference is irresistible in view of non-reply to several letters seeking copy of the alleged agreement with defendant No. 53, non-production of the original agreement, if any, and non-filing of affidavit in reply by defendant No. 53. I have no doubt that plaintiff No. 2 was in possession of the suit land at all material times. It cannot be disputed that the plaintiff No. 2 even constructed compound wall on the suit land. The onus of proving the claim made to the effect that M/s. Shreenath Builders were in possession of the suit land was entirely on the defendants. The defendants have failed to discharge the onus. At the bearing of an application for ad-interim relief the courts may be persuaded to record what the Counsel for the party states on behalf of his client. It does not thereby follow that the correctness of that statement shall have to be assumed at the subsequent hearings when matters are being examined on merits. Since M/s. Shreenath Builders have not filed an affidavit and since the affidavit of Mr. Kamalakar Bhiwa Vaity is found to be false, I shall have to hold and I do hold that prima facie the plaintiff No. 2 was in lawful possession of the suit land. Prima facie, no agreement was entered into between the vendors and M/s, Shreenath Builders. The entire claim is prima facie bogus and dishonest. Even if it is found that M/s. Shreenath Builders have encroached on the suit land,

such encroachment, if any, cannot clothe them with any legal right to remain in possession of the suit land. The courts of law are not helpless to prevent injustice to the honest.

22. Mr. Bookwala has relied upon the judgment of the Hon''ble Division Bench of our Court consisting of Mrs. Sujata Manohar and Sugla, JJ., in the case of Purshottam Visindas Raheja Vs. Life Insurance Corporation of India and Others, . In this case, it was held that a party in possession could not be dispossessed in a suit for specific performance. If a third party is in lawful possession of the premises, it cannot be dispossessed in a suit for specific performance by appointment of Court Receiver. The defendant No. 53 is at the most a dishonest intermeddler having no courage to file an affidavit in reply or to reply to any of the several letters or even produce the original agreement. I have no hesitation in holding that the entire claim of defendant No. 53 as a bona fide subsequent purchaser is totally false. If defendant No. 53 is found to have encroached upon the suit property as a rank treapasser, the courts are not helpless to protect the suit property by appointment of Receiver. On either footing, there is no legal impediment in granting of reliefs as sought for. Having regard to the facts of this case, I hold that the judgment in P.V. Raheja's case cited by Mr. Bookwala is clearly distinguishable and, with respect, has no application to these matters.

23. The learned Counsel Mr. Bookwala submitted that the plaintiffs in Suit No. 1104 of 1988 have themselves stated in the plaint and in the correspondence that the package agreement dated 14th May, 1986 was intended to be revised. It is submitted as a matter of inference that the package agreement dated 14th May, 1986 was should, therefore, be treated as having been abandoned and Suit No. 1104 of 1988 for specific performance of the agreement dated 28th April, 1980 be considered as not maintainable. There is no merit in this submission also. Basically, Suit No. 1104 of 1988 is also a suit for specific performance of the agreement dated 28th April, 1980 arrived at between M/s. Chitrlekha Builders and the owners and it is irrelevant that the agreement dated 14th May 1986 was intended to be revised as between the plaintiffs in Suit No. 1104 of 1988 and their vendors. As a matter of fact, no dispute exists at present between the two Co-operative Housing Societies and M/s. Chitrlekha Builders and it is amazing that the contesting defendants should advance arguments on the footing of alleged internal disputes between M/s. Chitrlekha Builders and the two Co-operative Housing Societies instead of proving that the said agreement dated 28th April, 1980 was terminated and M/s. Shreenath Builders were bona fide purchasers of the property. The defendants have miserably failed to substantiate either of their two contentions. The plaintiffs are ready and willing to pay balance of consideration to defendants Nos. 1 to 52 and complete the sale. The said defendants are totally in branch. These are my strong prima facie views after careful evaluation of facts and documents with assistance of learned Counsel.

24. It has then been contended by Mr. Bookwala that the plaintiffs in Suit No. 1335 of 1988 have merely amended cause title of the plaint by impleading

defendant No. 53 as party defendant to the suit and the plaintiff does not disclose any cause of action against the said defendant. The plaintiffs have sought specific performance of the agreement dated 28th April, 1980 against the defendants Nos. 1 to 52. If the defendant No. 53 was trying to intermeddle with the plaintiffs' suit as an alleged intervenor, the plaintiffs have impleaded defendant No. 53 to the suit as a proper party to the suit. The defendant No. 53 has suppressed the facts and withheld evidence. The defendant No. 53 has refused to furnish copy of the alleged agreement, if any to the Advocate for the plaintiffs all these years. I see no merit in this submission. The plaintiffs in Suit No. 1104 of 1988 have made detailed submissions in paragraph 24-A of the plaint. To quote the plaintiffs own words, it is pleaded as under..

"The plaintiff submits that the alleged agreement if any is bogus document fabricated by the defendants in collusion with each other with mala fide intentions of depriving the plaintiff of their rights..."

Own would expect a bona fide estate dealer to file an affidavit in reply controverting these allegations and annex thereto all relevant documents and furnish all particulars. No affidavit is filed. The entire conduct of defendants is totally mala fide.

25. If the defendants would not have obstructed the plaintiffs from continuing with the construction by raising false pleas, the houses to be constructed for the middle class employees of G.I.C. and members of Sai Kripa Society would have been completed by now. It is unfortunate that the plaintiffs in both the suits are victims of mala fide conduct of the defendants and the proverbial law's delays. According to my prima facie findings, the conduct of the defendants is totally dishonest and the defence raised are false and vexatious to their knowledge. It is necessary that the Courts must endeavour to create a just society for our people where truth and justice would prevail. Members of the bar must play their own role in promoting honesty and discouraging dishonesty.

26. In the result, I pass the following order:

(1) Pending the hearing and final disposal of the suit, Court Receiver, High Court, Bombay, is appointed Receiver of the suit land with all powers under Order XL, Rule 1 of the Code of Civil Procedure, 1908. The Court Receiver shall dispossess whosoever is found on the suit land, if necessary with the help of police, and properly safeguard the suit property. The Court Receiver shall not allow the suit property to be developed by anyone without further orders of the Court.

(2) Ad-interim orders in force shall continue to be operative until the Court Receiver takes charge.

(3) Defendants Nos. 1 to 52 in Suit No. 1335 of 1988 shall pay compensatory cost fixed at Rs. 3,000/- to each of the plaintiffs as condition precedent within one week from today.

(4) Defendant No. 53 shall also pay compensatory cost fixed at Rs. 3,000/- to

each of the plaintiffs as condition precedent within one week from today.

(5) Defendants Nos. 3 to 48 in Suit No. 1104 of 1986 shall pay a sum of Rs. 3,000/- as compensatory cost to the plaintiffs as condition precedent within one week from today.

(6) Defendant No. 49 in Suit No. 1104 of 1988 shall pay compensatory cost of Rs. 3000/- to each of the plaintiff within one week from today.

(7) The Prothonotary & Senior Master shall issue a show cause notice to Mr. Kamalakar Bhiwa Vaity, defendant No. 25 in Suit No. 1335 of 1988, calling upon him to show cause as to why this Court should not sanction prosecution for perjury for having made false statement in part of paragraph 23 of his affidavit dated 15th January 1990 duly extracted in paragraph 17 of this judgment which prima facie appears to be false and which was false to the knowledge of the deponent of the said affidavit. The said perjury notice shall be made returnable before this Court on 3rd October 1991.

(8) The appointment of Court Receiver shall be in both the suits. The plaintiffs in Suit No. 1335 of 1988 shall be in carriage of proceedings. The said plaintiffs shall deposit the costs, charges and expenses of the Court Receiver in the first instance. Half of such costs shall be reimbursed to the plaintiffs in Suit No. 1335 of 1988 by the plaintiffs in Suit No. 1104 of 1988 expeditiously. This order shall be subject to further orders of the Court.

(9) The defendant Nos. 1 to 52 in Suit No. 1335 of 1988 have not filed their written statement so far even though they were served with the writ of summons sometime in the year 1988. I have verified facts from the affidavit of service. When I called upon the learned Counsel for the defendants Nos. 1 to 52 to explain as to why the written statement was not filed so far, she replied that in thousands of suits written statements were not filed for years. The Prothonotary and Senior Master is directed to place Suit No. 1335 of 1988 on board for ex parte decree against defendants Nos. 1 to 52 on 6th September, 1991. Since the said defendants have not filed written statement for about 3 years, no further time would be granted.

27. Mr. Bookwala, the learned Counsel appearing on behalf of M/s Shreenath Builders, applies for stay of this order. Miss Wandrawala, the learned Counsel appearing on behalf of the other defendants, also applies for stay of this order. Having regard to the gross facts of this case application for stay is refused.

28. The Court Receiver to act on ordinary copy of the minutes and operative part of this order duly authenticated as true copy by my Associate. Issue of copy of order and the minutes expedited.