

(2004) 07 GUJ CK 0042
In the Gujarat High Court

Case No : Official Liquidator Report No. 56 of 2003 in Company Petition No. 147 of 2001

O.L. of Piramal Financial Services Ltd.

APPELLANT

Vs

Dena Bank

RESPONDENT

Date of Decision : 02-07-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 6
Companies Act, 1956 — Section 456, 531, 531A
English Sale of Goods Act, 1979 — Section 21(1), 27
Reserve Bank of India Act, 1934 — Section 45A
Specific Relief Act, 1963 — Section 10
Transfer of Property Act, 1882 — Section 5

Citation : (2004) 122 CompCas 967 : (2005) 63 SCL 558

Hon'ble Judges : K.M. Mehta, J

Bench : Single Bench

Advocate : R.M. Desai, for the Appellant; K.J. Brahmbhatt, for Respondent No. 9, Varsha Brahmbhatt and S.I. Nanavati, LD. for Nanavati and Nanavati for Respondent Nos. 10-11, for the Respondent

Judgement

K.M. Mehta, J.—The Official Liquidator has filed this report in petition No. 147 of 2001 with a prayer that this Court may ratify the action taken by the Official Liquidator for taking possession of the assets of the company i.e. M/s.Piramal Financial Services Pvt.Ltd. (in liquidation). He has further prayed that this Court may direct the present occupant i.e. Shri D.P.Shah to submit original sale deed before this Court and M/s.Radhe Associates may be made party to the proceedings.

BRIEF RELEVANT FACTS:

2. Piramal Financial Services Ltd. was a Company incorporated under the Companies Act, 1956. Reserve Bank of India (hereinafter referred to as "RBI") preferred Company Petition No. 147 of 2000 praying that Piramal Financial Services Ltd. be wound up by and under the provisions of Section 45A of the

Reserve Bank of India Act. This Court on 20th October, 2000, admitted the said petition and appointed Official Liquidator as Provisional Liquidator of Piramal Financial Services Ltd. (since reported in case of Reserve Bank of India Vs. Piramal Financial Services Ltd. 41(4) GLR 3426).

2.1 This Court by its order dated 20th March, 2001, directed that Piramal Financial Services Ltd. be wound up and Official Liquidator, who was appointed as Provisional Liquidator by order dated 20th October, 2000, was appointed as Liquidator of the Company with usual powers under the provisions of the Companies Act, 1956. This Court by its order dated 20th July, 2001, passed in Company Application No. 44 of 2000 directed the Official Liquidator to take possession of the properties and assets as mentioned in Schedule A of the report of the Official Liquidator dated 12th July, 2001, in the aforesaid Company Application No. 44 of 2001.

2.2 It has been stated that several creditors had also filed winding up petitions against Piramal Financial Services Ltd. under the provisions of Companies Act, 1956, one of them being Company Petition No. 296 of 1999, which was filed on 18.10.1999. This Court vide its order dated 23rd August, 2002, passed an order of winding up of Piramal Financial Services Ltd. in the said Company Petition No. 296 of 1999 and other several winding up petitions.

Submissions of Mr.R.M.Desai, Learned Counsel for the Official Liquidator:

3. The learned counsel submitted that Radhe Associates and Mr.Ashish Patel, respondents No. 10 and 11 were developers of property owned by Himalayanagar Co-operative Housing Society Ltd. and the construction came to be known as "Ganesh Plaza". Radhe Associates vide letter of allotment dated 10th April, 1997, allotted office/shop No. 103 on first floor in Ganesh Plaza, opp. Navrangpura Bus Stop, Ahmedabad 380 009 ad-measuring approx. 2256 sq.ft. (i.e. suit premises) on full and final payment made by Piramal Financial Services Ltd. It was confirmed by the said letter of allotment that full consideration is paid and also that the society is the owner of the land and superstructure and Piramal Financial Services Ltd, is allotted shop No. 103 and by virtue of the same, Piramal Financial Services Ltd. is de facto owner of the undivided share of the unit, superstructure and other allied services. The said letter of allotment is produced at page 5 of the paper book. Radhe Associates vide certificate dated 10th April, 1997, certified that as per the Himalayanagar Co-operative Society's Rules and Regulations, possession of Shop No. 103 is handed over to Piramal Financial Services Ltd. The said certificate is produced at page 6 of the paper book. It may be noted that both the letter of allotment and the certificate are signed by Mr.Ashish Patel as partner of Radhe Associates.

3.1 The learned counsel further submitted that pursuant to the order dated 20th July, 2001, passed in Company Application No. 44 of 2001, Official Liquidator deputed his representative for taking possession of the premises situated at 103, Ganesh Plaza, Opp.Navrangpura Bus Stop, Ahmedabad. The possession of the

said office/shop could not be taken since it was occupied by Shri Dinesh P.Shah, respondent No. 9 who claimed to be the owner of the premises. Shri D.P.Shah refused to hand over possession of the premises. He handed over to the representative of the Official Liquidator, letter of allotment and certificate in support of his statement that he is the owner of the premises. On perusal of the said letter of allotment and certificate of possession, it was ascertained that letter of allotment was issued on 24th February, 2000, and possession was given on 10th April, 2000. The said letter of allotment dated 24th February, 2000, and the receipts are produced at pages 20 to 28 as Annexure "I" of the paper book. Certificate of possession is produced at Annexure "V" at page 31 of the paper book. It appears that thus Radhe Associates and Mr.Ashish Patel, contrary to the letter of allotment dated 10th April, 1997, and certificate of possession dated 10th April, 1997, allotted shop No. 103 to Shri Manharlal Shivilal Shah, Nikhil Manharlal Shah and Minesh Manharlal Shah.

3.2 The learned counsel submitted that once a letter of allotment is issued in favour of Piramal Financial Services Ltd. on payment of full consideration by Piramal Financial Services Ltd. and Radhe Associates receiving full consideration and in part performance of the contract possession is also handed over to Piramal Financial Services Ltd., it was not open for the Radhe Associates to allot the said Shop No. 103 to Shri Manharlal Shivilal Shah, Nikhil Manharlal Shah and Minesh Manharlal Shah. It is contended that the said transaction is entered into fraudulently with a view to defeat the claim of Piramal Financial Services Ltd. as owner.

3.3 The learned counsel submitted that in part performance of the contract, possession was handed over to Piramal Financial Services Ltd. and thereafter Radhe Associates and/or Ashish Patel had no right, title or interest of any kind whatsoever in respect of said Shop No. 103 and they could not deal with the same. It is submitted that the action of Radhe Associates and Mr.Ashish Patel is a fraud on Piramal Financial Services Ltd. and on Shri Manharlal Shivilal Shah, Nikhil Manharlal Shah and Minesh Manharlal Shah and thereafter on Shri Dinesh P.Shah respondent No. 9.

3.4 Shri Manharlal Shivilal Shah affirmed an affidavit before Notary on 21st March 2000 on a stamp affixed on 21st March, 2000, that he has no interest in the said shop and as such the booking be cancelled and he has also stated that Radhe Associates had refunded the amount by a cheque. Shri Manharlal Shivilal Shah and Shri Nikhil Manharlal Shah affirmed an affidavit before a Notary on 22nd March, 2000. The stamp affixed appears to be on 21.3.2001. This shows a fraud committed by the parties, namely, Shri Manharlal Shivilal Shah, Nikhil Manharlal Shah and Minesh Manharlal Shah and Mr.Ashish Patel in the transaction. It is submitted that before the booking can be cancelled, Radhe Associates contrary to the right of Piramal Financial Services Ltd. issued a letter of allotment in favour of Shri Dinesh P.Shah on 24th February, 2000, one month prior to the booking being cancelled by Shri Manharlal Shah. It is submitted that M/s.Radhe

Associates had no right to deal with the property of Piramal Financial Services Ltd. which was allotted to and was in possession of Piramal Financial Services Ltd.

3.5 It may be stated that from the records it appears that Mr.Ashish Patel had complete influence over the management of Piramal Financial Services Ltd. at relevant time and thereafter on 2nd February, 1999, he became Chairman and Managing Director of Piramal Financial Services Ltd. Everything has been done contrary to the provisions of law by Shri Ashish Patel. It is submitted that this Court may direct investigation to be carried out in the affairs of Mr.Ashish Patel, Radhe Associates and all the companies, who are promoters and/or controlled by Mr.Ashish Patel, his friends, relatives and associates.

3.6 In view of the aforesaid facts, the Liquidator submitted O.L.'s report No. 56 of 2003 praying that Liquidator be authorised to take possession of Shop No. 103 from Shri Dinesh P.Shah. In the said O.L.'s Report, Shri Nikhil M.Shah has been joined as respondent No. 8, Shri D.P.Shah as respondent No. 9 and Radhe Associates as respondent No. 10 and Shri Ashish Patel as respondent No. 11.

3.7 Respondents No. 1 to 8 though served, chose not to appear. Shri Dinesh P.Shah respondent No. 9 entered appearance through Ms.K.J.Brahmbhatt and Shri Y.N.Ravani, learned advocate appeared for respondent No. 10 and 11. Thereafter Nanavati Associates entered appearance for respondents No. 10 and 11. Earlier an affidavit-in-reply was filed on 11th October, 2003, by Shri Ashish Patel respondent No. 11 herein. The said affidavit-in-reply has been produced at page 50 of the paper book. Thereafter additional affidavit dated 1.12.2003 was filed by Mr.Ashish Patel, which is produced at page 91. Respondent No. 9 filed an affidavit dated 13th October, 2003, which is produced at page 77. Respondent No. 9 has produced a letter of allotment dated 20th April, 2000, and certificate of possession dated 20th April, 2000. Letter of Allotment is produced at page 10 as well as at page 20 of the paper book. The said letter of allotment and certificate of possession is issued by Radhe Associates respondent No. 10. Perusal of the said letter of allotment reveals that it is on the similar line as letter of allotment dated 10th April, 1997, issued in favour of Piramal Financial Services Ltd. Except the amount of deposit paid, there is no change in the language in the letter of allotment.

3.8 Shri Dinesh P.Shah - respondent No. 9 contended that the Liquidator has not established his title over the shop in question. The contention is that the letter of allotment did not create any right in favour of Piramal Financial Services Ltd. A further contention is that letter of allotment issued in favour of respondent No. 9 confers title on Shri Dinesh P.Shah since consideration is paid by Shri Dinesh P.Shah. However, respondent No. 9 fails to read that in the letter of allotment dated 10th April, 1997, Radhe Associates admits that it has received full consideration amount. Respondent No. 9 is having a double standard in reading the letter of allotment. According to him, the letter of allotment issued in favour of Piramal Financial Services Ltd. does not confer any right, title and interest in Piramal Financial Services Ltd. However on the other hand his contention is that

the letter of allotment issued in favour of Shri Dinesh P.Shah confers title and as such he is the owner of the property. It is also contended that no other documents are produced by liquidator. In that connection, it may be stated that in para 12 at page 16 of the paper book respondent No. 9 admits that Radhe Associates issued letter of allotment, receipts and possession certificate to respondent No. 9 and no other documents are given to him.

3.9 The learned counsel contended that so far as letter of allotment issued in favour of liquidator is concerned, a contention of respondents No. 9, 10 and 11 is that the said letter of allotment does not create any right in favour of Piramal Financial Services Ltd. and that the liquidator has failed to produce any other document to show the title of Piramal Financial Services Ltd. to the said shop. When it comes to Piramal Financial Services Ltd. their say is that letter of Allotment does not confer any title and liquidator has not produced any other document and when it comes to respondent No. 9 letter of allotment creates title. The said contention reveals the attitude of respondents No. 9, 10 and 11. The respondents No. 9, 10 and 11 have double standards.

3.10 Respondent No. 9 had filed further affidavit which is produced at page 77 of the paper book. In para 2 at page 78 of the paper book it is contended that the said allotment letter and possession certificate do not create any proprietary right, title or interest on the said shop in favour of liquidator. It is also contended that under the so-called possession certificate, Piramal Financial Services Ltd. was never put in actual physical possession of the said shop as mentioned in the affidavit of respondent No. 9. Liquidator contended that respondent No. 9, who is not a party to the transaction, how he can makes such submission and raise such contention. What is the basis of the argument that Piramal Financial Services Ltd. was not in possession when Certificate of Possession dated 10th April, 1997, issued by Radhe Associates clearly shows that the possession is handed over to Piramal Financial Services Ltd. Mr.Ashish Patel himself has signed certificate handing over possession to Piramal Financial Services Ltd. Submission of respondent No. 9 is contrary to the record and the same is not tenable under the law.

3.11 In the affidavit filed by Mr.Ashish Patel produced at page 50 of the paper book, no reference was made to the letter of allotment and certificate of possession issued in favour of Piramal Financial Services Ltd. By the said affidavit two agreements and/or M.O.U. were produced. One agreement dated 7th September, 1999, was entered into between Mr.Ashish Patel and others and Valor Finstock Private Ltd. The said agreement relates to a sale by Shri Ashish Patel and members of his family and friends and relatives and Valor Finstock P.Ltd. The transfer of shares effected was of 84,00,000 equity shares of Rs. 10/- each representing 89.71% of the paid up equity share capital of Piramal Financial Services Ltd. The said fact which is recited (agreement dated 7.9.99) at page 55 of the paper book clearly shows that earlier Mr.Ashish Patel though was not Chairman and Managing Director, he was controlling Piramal Financial Services

Ltd. and he was holding 84,00,000 equity shares of Rs. 10/- each. Conveniently no where it is stated by Mr.Ashish Patel on what day the shares were transferred to him and members of his family and friends and relatives. The said date is material since it may be that on 10.4.97 Mr.Ashish Patel may be holding shares of Piramal Financial Services Ltd. Then there is another M.O.U. (dated 8.9.99) produced at page 66. By the said M.O.U. it is recited that on transfer of shares being effected Piramal Financial Services Ltd. discharged Shri Ashish Patel and Radhe Associates from their liability to make payment to Piramal Financial Services Ltd. which is not a party to the said MOU. Going a further step it is stated that without making payment of the amount to Piramal Financial Services Ltd., the securities are released. It is submitted that such a transaction can never take place. It is submitted that the security can be released only on satisfying the mortgaged debt and not otherwise. By taking over the liability of one person by another person, security created in favour of Piramal Financial Services Ltd. could not be released under any circumstances. No where it is stated and even in the argument either respondent No. 9 or respondent No. 10 or respondent No. 11 has not produced any document to show that the amount has been in fact paid to Piramal Financial Services Ltd.

3.12 It is submitted that by taking over liability of a debtor by another party, it cannot be said that the amount is paid to the creditor and the security stands released. The contention in that behalf is baseless and made with ulterior motive.

3.13 The respondent No. 11 Mr.Ashish Patel has filed additional affidavit dated 11th October, 2003, on page 50 and he has also filed further affidavit dated 1st December, 2003, on page 91 dealing with the Shop No. 103 at Ganesh Plaza. In the said affidavit, respondent No. 11 Shri Ashish Patel has not denied the issuance of allotment letter dated 10th April, 1997, and certificate of possession also dated 10th April, 1997. In the said affidavits, it is contended that Radhe Estate Developers, a partnership firm, took a loan from Piramal Financial Services Ltd. on 14th June, 1996. On 9th July, 1997, an agreement was entered into between Piramal Financial Services Ltd. and Radhe Estate Developers. By the said agreement, two residential flats in Tirthbhoomi Apartment, two offices including office Shop No. 103 in Ganesh Plaza alongwith 13 other flats in Tirthbhoomi Apartment were given as collateral security by Radhe Estate Developers. Agreement dated 9th July, 1997, is produced at page 99 of the paper book. By the said agreement it is recorded that at the request of the borrower Radhe Associates & Others, the company has agreed to release the security of Flat Nos.1/41, B/43 and B/61 in Tirthbhoomi and substitute the said security by allotment of two offices No. 601 and No. 103 ad-measuring in aggregate 4512 sq.ft. in Ganesh Plaza. The borrower has further furnished security by way of allotment of 13 flats in Tirthbhoomi.

3.14 It is submitted that the letter of allotment was issued by Radhe Associates on 10th April, 1997, and certificate of possession was also issued by Radhe Associates. The said allotment letter dated 10th April, 1997, and certificate of

possession are produced at pages 5 and 6 of the paper book. As per the letter of allotment, Piramal Financial Services Ltd. became owner of Shop No. 103 alongwith undivided share of the unit, superstructure and other allied services to it. It is submitted that once Shop No. 103 became of the ownership of Piramal Financial Services Ltd. how Radhe Estate Developers or any third party who has no right, title or interest in respect of the said Shop No. 103, can create a security of the said shop in favour of Piramal Financial Services Ltd. as stated in the agreement.

3.15 It is submitted that it is well settled principle of law that to create a security a deed or document or Memorandum of Entry regarding the creation of equitable mortgage is a must. It is also not stated in the said agreement how alleged securities are created. It is submitted that by an agreement no security can be created and that too by a person, who has no right, title or interest in respect of the property on which security is created.

3.16 It is submitted that Piramal Financial Services Ltd. was the owner of Shop No. 103 and how Radhe Estate Developers who has no right, title or interest in respect of Shop No. 103 can create security in favour of Piramal Financial Services Ltd. So far as Shop No. 103 is concerned, Radhe Estate Developers had no right, title or interest in the said property at any time whatsoever. It is also submitted that once the ownership is created in favour of Piramal Financial Services Ltd. on 10th April, 1997, how any third party, who has no right, title or interest in the said property, can create security and that too in favour of the person, who is the owner of the property. It may be stated here that everything has been done at the behest of Mr.Ashish Patel, who is concerned with all the parties, namely, Piramal Financial Services Ltd., Radhe Associates and Radhe Estate Developers. It is submitted that the agreement is not a valid agreement and does not create any security and is having no effect and it did not create any security, as is alleged by Mr.Ashish Patel.

3.17 It is well settled principle of law that security can be created by way of mortgage. In the present case no document or any other paper is produced to show that the mortgage has been created. It is also not stated what title deeds were deposited with Piramal Financial Services Ltd. when security was created. In view of the same, it is submitted that the agreement dated 9th July, 1997, should not be believed and should be rejected.

3.18 In the additional affidavit it is stated that by an agreement and/or M.O.U. dated 8th September, 1999, entered into between the parties which is produced at page 66 of the paper book liability of discharging debt of Radhe Group of Associates has been taken over by Valor Finstock Pvt.Ltd. The said agreement further recites that on taking over liability securities are released. (In favour of Radhe Estate Developers Ltd. though it is not stated in so many words but since securities were created by Radhe Estate Developers Release of Securities can only be in favour of the person creating it). It is submitted that by taking over the liability it cannot be said that the amount is paid to the creditor. It is

submitted that securities can be released only on payment being made of the debt and not otherwise.

3.19 It is submitted that if the securities are released in favour of Radhe Estate Developers by the agreement dated 8th September, 1999, how Radhe Associates can allot the said shop No. 103 to Shri Dinesh P.Shah. In view of the aforesaid, it is submitted that without prejudice to the contention that no security was created and Piramal Financial Services Ltd. was the owner of Shop No. 103 how Shri Dinesh P.Shah is claiming title from Radhe Associates when securities were released in favour of Radhe Estate Developers and Radhe Associates had no title.

3.20 It is submitted that liquidator has established his right, title & interest in the shop No. 103 at Ganesh Plaza and respondent No. 9 has no right, title or interest in respect of said Shop No. 103 and as such liquidator may be authorised to take possession of Shop No. 103 as prayed for and respondent No. 9 be directed to hand over vacant and peaceful possession and if respondent No. 9 resists in giving possession, liquidator may be authorised to obtain police assistance for taking possession of the shop No. 103 at Ganesh Plaza from respondent No. 9.

3.21 It is also submitted that looking to the record produced, liquidator may be authorised and directed to initiate action against the parties named in the agreement dated 7th September, 1999, and 18th September, 1999, to recover and realise the amount due to Piramal Financial Services Ltd. (in liquidation).

Submissions of Ms.Brahmbhatt on behalf of Shri Dinesh P.Shah - Respondent No. 9

4. Since the year 1999-2000 the respondent No. 9 and his son Saurin D.Shah are the owners of Shop nos. 9 and 10 situated in Ganesh Plaza Building, Opp. Navrangpura Bus Stop, Ahmedabad. They are carrying on cloth business. During the year 1999-2000 their business expanded and they started facing shortage of space and therefore with a view to purchase another shop they first approached Ashish Patel of Radhe Group who has developed the Ganesh Plaza building and inquired for any shop being available on sale or resale basis. They were informed that as such all shops are sold away but the allottee of shop No. A/103 wants to cancel his allotment and if interested he may do the needful. As the said shop was in the same building and situated just above the existing shops, the respondent No. 9 and his son immediately showed their willingness to purchase it.

4.1 It is contended that thereafter somewhere in February 2000 Radhe Associates informed the respondent No. 9 that the erstwhile allottees have agreed for cancelling their allotment and called upon them to make initial payment towards the said shop.

4.2 Thereafter on 24.2.2000 the respondent No. 9 gave a cheque of Rs. 2,50,000/towards the booking charges of shop No. A/103 to Radhe Associates. Radhe Associates issued receipt of Rs. 2,50,000/- and also an allotment letter.

On 26.2.2000 the respondent No. 9 gave another cheque of Rs. 2,50,000/for the said shop No. A/103 to Radhe Associates who issued receipt for the same.

4.3 Thereafter on 7.3.2000 the respondent No. 9 gave another cheque of Rs. 2,50,000/for the said shop No. A/103 Radhe Associates who issued receipt for the same. On 13.3.2000 the respondent No. 9 gave another cheque of Rs. 4,90,800/to said shop to Radhe Associates who issued receipt thereof. On 10.4.2000 the respondent No. 9 gave two cheques; one cheque of Rs. 2,25,600/- towards maintenance charges and a cheque of Rs. 5,000/- towards parking charges for which receipts are given by Radhe Associates.

4.4 The respondent No. 9 on 18.4.2000 gave another cheque of Rs. 2,50,000/ towards maintenance charges for which receipt is given by Radhe Associates. The respondent No. 9 on 19.4.2000 gave another cheque of Rs. 25,000/towards maintenance charges to Radhe Associates who gave the receipt for the same.

4.5 The respondent No. 9 on 20.4.2000 gave another cheque of Rs. 62,800/- for maintenance charges to Radhe Associates who has issued receipt for it. As full payment for the said shop was made by them to the tune of Rs. 15,84,000/-, Radhe Associates issued possession certificate to them and also put them in vacant and actual physical possession of the said shop No. A/103 and since then the respondent No. 9 and his son are occupying the said shop and are doing cloth business in the name and style of "Rohan Enterprise". To show the possession of the respondent No. 9 and his son, electricity bills, telephone bills and receipts, income tax return, bills for monies spent for furniture and fixtures in the said shop are annexed as Annexure VI at pages 32 to 46 and Annexure I at pages 80 to 83.

4.6 All the receipts issued by Radhe Associates for the payments made by respondent No. 9 towards the said shops to the tune of Rs. 15,84,000/- are annexed as Annexure "I", at page 19, Annexure II to III5 at pages 21 to 28.

4.7 Thereafter on 21.3.2000 Radhe Associates cancelled the allotment of shop No. A/103 in the name of erstwhile allottee and also returned his monies back. Radhe Associates supplied to respondent No. 9 the affidavits to that effect by the erstwhile allottees namely Manharlal Shivilal Shah, Mineshbhai Manharlal Shah and Nikhilbhai Manharlal Shah which are annexed as Annexure - IV/1 and IV/2 at pages 29 to 30.

4.8 Thereafter the respondent No. 9 has made full payment of Rs. 15,84,200/ on 20.4.2000 to Radhe Associates which gave vacant and peaceful possession of the said shop to the respondent No. 9 and his son and also issued certificate to that effect. It is annexed as Annexure "V" at page 31.

4.9 Thereafter on 9.8.2001 the representatives of the Liquidator visited the said shop and showed order dated 20.7.2001 passed by this Court and asked the respondent No. 9 and his son to give possession of the same. The respondent No. 9 and his son informed them that the said shop is purchased on making full

payment of Rs. 15,84,200/- from Radhe Associates; that Piramal has nothing to do with the said shop; etc. At that time the respondent No. 9 and his son also called Shri Ashish Patel, the partner of Radhe Associates, the developers of Himalayanagar Co-operative Housing Society Ltd. who informed the representative of Official Liquidator that no loan was taken from Piramal on the said shop. Respondent No. 9 also pointed out certain papers/documents which established that Piramal had no claim over the said shop. Respondent No. 9 has handed over the copy of resolution dated 7.9.1999 and certificate dated 9.9.99 which clearly established that the Piramal had no claim or right or title or interest over the said shop. On being satisfied, the representatives of the Official Liquidator left the said shop without insisting further for taking possession. The copies of the said resolution dated 7.9.99 and certificate dated 9.9.99 are annexed as Annexure II/1 and II/2 at pages 87 to 90. The copy of the minutes supplied by representatives of Official Liquidator to the respondent No. 9 is annexed at Annexure VII at pages 47 to 49.

4.10 It is submitted that the respondent No. 9 had been allotted and put in vacant and peaceful possession of the said shop on full and final payment of Rs. 15,84,200/-. They are in actual physical possession of the said shop and they are occupying and using the said shop since 20.4.2000.

4.11 It is submitted that the Official Liquidator is seeking possession of the said shop only on the basis of the alleged allotment letter and possession certificate dated 10.4.97 (Annexure "A" page 5 and 6). The Official Liquidator has not produced any other document except the said documents at Annexure "A". That the said shop is purchased by them for a valuable consideration and that at the time it was sold to them it was in custody and possession of Radhe Associates. There is no connection between the said shop and Piramal. No receipts about the consideration being paid by the company in lieu of allotment of the said shop is produced by the Official Liquidator to substantiate his stand about the ownership of the said shop and also the so-called allotment letter. Not only that there is nothing on record to show that the alleged possession of the said shop was at any point of time with the Piramal except the said certificate dated 10.4.97 at page 6 of this application. It is submitted that despite the alleged certificate, Piramal was never put in the actual physical possession and Radhe Associates continued in the actual physical possession of the said shop.

4.12 Learned advocate has reiterated that the Radhe Associates had never parted with the actual physical possession of the said shop in favour of any person till they were handed over the actual physical possession on 20.4.2000. It is submitted that the possession of any premises would serve as a notice of title in favour of the person who is in possession. In the present case as Piramal was not in actual physical possession at any point of time there was no question of notice to the world at large about the so-called allotment in favour of Piramal. Moreover, the said documents at page 5 and 6 are not registered one. Moreover, the said allotment letter dated 10.4.97 does not mention any consideration. It

only states that full consideration is received. It is vague. Thus, by merely producing the said allotment letter dated 10.4.97 and certificate dated 10.4.97 the Official Liquidator has failed to establish any linkage between the said shop and the Piramal. On the contrary, the said resolution dated 7.9.99 and the certificate dated 9.9.99 (Annexure II at pages 87 to 90) clearly depicts that the company has no right, title or interest on the said shop.

4.13 It is submitted that the said allotment letter and the certificate dated 10.4.97 do not create any proprietary right, title or interest in the said shop. It is further submitted that even an agreement for sale does not create any proprietary right or title. At the most, the person having agreement for sale in his favour would be entitled to specific performance of the agreement by filing a suit in the court of law against the vendor u/s 10 of Specific Relief Act. It is submitted that respondent No. 9 and his son being the bonafide purchasers of the said shop for value without notice the Piramal cannot get any right over them.

4.14 It is submitted that till the Official Liquidator gets the title over the said shop by legal process he is not entitled to take over the said shop in his custody and such a summons under sec.456 of the Companies Act is not maintainable and hence it requires to be dismissed. It is reiterated that respondent No. 9 and his son are the bonafide purchasers for value without notice. It is submitted that they had no knowledge whatsoever about any transaction or dealing between Piramal and Radhe Associates. They are in legal occupation and use of the said shop and relied upon the judgment of Jagan Nath Vs. Jagdish Rai and Others,

4.15 In the aforesaid premises, it is submitted that the said shop never being the property of the company, the Official Liquidator has no right over the said shop. That the said shop was never purchased by Piramal by paying any consideration and that Piramal was never put in actual physical possession of the said shop. Not only that but the said shop was never given as collateral security to the Piramal and if it was given that in view of Annexure II at page 87 to 90, the same was released. Till date the said documents at Annexure II are legal documents as not being challenged by Official Liquidator. Hence no relief against said shop as asked by the Official Liquidator can be granted and the notice issued in their name and against the Shop No. A/103 requires to be discharged in the larger interest of justice.

Submissions of Mr.S.I.Nanavati, Learned Senior Counsel on behalf of Radhe Associates & Mr.Ashish Patel - Respondents No. 10 and 11.

5. Radhe Estate Developer, a partnership firm, took a loan from Piramal Financial Services Limited on 14th June, 1996. Properties of Radhe Estate Developer were given as collateral security for the said loan. On 9th July, 1997, an agreement was entered into between Piramal Financial Services Limited and Radhe Estate Developers. Under the aforesaid agreement, two residential flats in Tirthbhoomi Apartment, two offices including office Shop No. 103 in Ganesh Plaza along with 13 other flats in Tirthbhoomi Apartment were given as collateral security. A copy

of the agreement dated 9th July, 1997, is at Annexure "I" page 99. The respondent submits that Shop No. 103 was given as collateral security for the loan taken from Piramal Financial Services by virtue of the aforesaid agreement dated 9th July, 1997. The aforesaid shop was never sold to Piramal Financial Services for any consideration. Learned counsel has further submitted that the allotment letter dated 10.4.1997 produced as Annexure "A" to the Official Liquidator's Report and the possession receipt issued to Piramal Financial Services Limited were given by Radhe Estate Developer in terms of the agreement dated 9th July, 1997. It has been further submitted that no consideration was paid by Piramal Financial Services as alleged. The Official Liquidator has not produced any proof of payment or any payment for the aforesaid shop.

5.1 Learned counsel has further submitted that it is pertinent to mention here that when the Official Liquidator is claiming ownership of the aforesaid shop on the basis of the allotment letter dated 10.4.1997, onus is on the Official Liquidator to show the aforesaid shop was sold for consideration. The Official Liquidator has also not produced the accounts of the company in liquidation which show that payment was made for the aforesaid shop. It is, however, reiterated by the respondent that no payment was received by the respondent as consideration for the aforesaid shops. In the absence of consideration, the allegations made by the Official Liquidator that the aforesaid shop belongs to Piramal Financial Services Limited is without any basis and such inference cannot be drawn by this Court.

5.2 It has been further submitted by learned counsel that a Memorandum of Understanding was entered into between Electrical Control Gear (India) Ltd. and Mr.Ashish Patel and family members and associates on 7th February, 1999. In view of the aforesaid MOU, Mr.Ashish Patel was appointed as Chairman and Managing Director with effect from 7.2.99. During his tenure as Chairman and Managing Director of the Company, he infused Rs. 100 lacs into the company through issuance of equity shares and created liquidity of an identical amount. When he took over the management of the company, the company was in a bad shape and he undertook various measures to improve the condition of the company. It was further submitted that, in spite of endeavours to improve the condition of the company, the company was in a bad shape as the company had lost its financial substratum. Mr.Ashish Patel and family members and associates, thereafter, decided to hand over interest of the company to one Valor Finstock Pvt.Ltd. Bombay. M/s.Valor Finstock agreed to purchase shares held by Ashish Patel and associates in Piramal Financial Services for a consideration of Rs. 10 crores.

5.3 A Memorandum of Understanding was entered into on 7th September, 1999, between Ashish Patel and his associates (as party of the first part/seller) and Valor Finstock Pvt.Ltd. (as party of second part/buyer). It was agreed between the parties under clause 2 as under:

"2. Simultaneously, the buyer has stipulated and the seller has consented to discharge the total dues of Radhe group of companies/concerns (borrower) aggregating to Rs. 671.37 lacs, payable to PFSL (Piramal Financial Services Ltd.) on account of loans, hire purchase financing and/or advances for booking of properties treated in the books of PFSL as stock of realty, loans or advances and discharge the borrower of all their obligations on receipt of the said sum in full and final settlement of all the dues payable to PFSL and also the buyer agrees to withdraw for and on behalf of PFSL all the pending suits including the decretal orders instituted/passed against the seller and its group companies/firms at the instance of PFSL. Further, the buyer also agrees to unconditionally return all the documents of title and other documents/papers issued by Radhe group of companies/firms in favour of PFSL for the purpose of creating charge in favour of the latter in consideration of loans, etc. received from PFSL."

5.4 In terms of the aforesaid agreement, the buyer Valor Finstock Pvt.Ltd. undertook to pay the liability of Radhe group of companies of Rs. 671.37 lacs to Piramal Financial Services Limited. It is pertinent to mention here that the Shop No. 103 which was given as collateral security formed a part of the total outstanding loan of Rs. 671.37 lacs payable to Piramal Financial Services Limited by Radhe Group as on 7.9.1999. The aforesaid MOU is produced at Annexure R-1 to affidavit. Mr.Ashish Patel and associates resigned as Managing Director of Piramal Financial Services Limited and Shree Salai K.Mani, Mr.B.C.Shah, Mr.Vijaykumar Upalpatti and Mr.Subramaniam M.V., were appointed as Directors of the company (Piramal Financial Services Limited) on 7th September, 1999. Forms 29 and 32 under the Companies Act, 1956, were filed before the Registrar of Companies, State of Gujarat, in this regard which are at page 64. The company also passed a resolution on 7.9.99 in this regard (which is at page 87) and resolved that PFSL do enter into agreement.

5.5 Thereafter, another Memorandum of Understanding was entered into on 8th September, 1999, between Ashish Patel and associates (as party of first part) and Radhe Developers, Radhe Estate Developers and Radhe Finance (as party of the second part) and Valor Finstock Pvt.Ltd. (as party of third part) and Piramal Financial Services Limited (as party of fourth part). Under the aforesaid agreement which is produced as Annexure R-III to earlier affidavit at page 66, the parties agreed as under:

"1. In consideration of the party of the third part taking up the liability of Rs.671.37 lacs of the party of the second part to the party of the fourth part, the party of the second part is hereby discharged of its liabilities and obligations to the party of the fourth part of Rs. 671.37 lacs and no due of any nature whatsoever is payable by the party of the second part to the party of the fourth part."

"2. The party of the third part expressly confirms without any demur or dispute in future of having taken up the liability of Rs. 671.37 lacs of the party of the second part and owes an identical amount of Rs. 671.37 lacs to the party of the

fourth part and this meets with the concurrence of the party of the fourth part."

"3. xxxx The party of the third part further agrees to offer the properties bearing Survey No. 12/1 situated at Villupatti village, Kodaikenal, Tamilnadu to the extent of 13.5 acres in favour of the party of the fourth part to the latter's satisfaction which will cover the party of the third part's liability of Rs. 671.37 lacs."

"4. It is further agreed that the party of the third part being the holding company and having absolved the liabilities of the party of second part payable to the party of the fourth part on account of loans, hire purchase financing and/or advances for booking of properties which have been treated in the books of the fourth part as stock of reality, the party of the fourth part agrees unconditionally and irrevocably to release the party of the second part from all the liabilities in its books and further agrees to return all the documents of title and other documents/papers issued by party of the second part for the purpose of creating charge in favour of the party of the fourth part as security for the various loans, advances, etc. availed and the party of the fourth part also agrees to withdraw all pending suits including the decretal orders instituted passed against the party of the second part unconditionally and irrevocably".

5.6 In terms of the MOU dated 8th September, 1999, the liability of Rs. 671.37 lacs payable Radhe Group to Piramal Financial Services was taken over by Valor Finstock Pvt.Ltd. The property bearing Survey No. 12/1 situated at Vilupatti village, Kodaikenal, Tamilnadu, ad-measuring 13.5 acres was also given by Valor Finstock Pvt.Ltd. to Piramal Financial Services Limited towards the liability of Radhe Estate DevelepeRs.

5.7 It was further submitted that in terms of the aforesaid MOUs Piramal Financial Services Limited unconditionally and irrevocably released Radhe Estate Developers from all the liabilities and returned all documents of title and other documents/papers issued by Radhe Estate Developers for the purpose of creating charge in favour of Piramal Financial Services Limited. The Shop No. 103 which was given as a collateral security by virtue of the agreement dated 9th July, 1997, was released by PFSL in view of MOU dated 7th September, 1999, and 8th September, 1999. In view of the aforesaid MOUs Shop No. 103 was free from any encumbrances and Radhe Group had the exclusive right of ownership. Pursuant to the release of the aforesaid property, the shop in question was allotted to Mr.N.M.Shah. Mr.Shah later on telephonically informed his unwillingness and requested to cancel the allotment of the said shop in Ganesh Plaza. It is pertinent to mention here that Mr.N.M.Shah was not willing to occupy the said shop, he had also not paid maintenance charges to Radhe Associates. As the full consideration for the said shop was not paid by Mr.N.M.Shah, no possession receipt was given to Mr.N.M.Shah. The money paid by Mr.N.M.Shah for the said shop was refunded. The aforesaid fact is abundantly clear from the affidavit filed by Mr.N.M.Shah which is at page 29 to the present petition.

5.8 In the meantime, Mr.D.P.Shah who was having two shops in Ganesh Plaza on January 2000 approached Ashish Patel and inquired about availability of any shop for sale or resale in the said building. As Mr.N.M.Shah was keen to cancel his allotment, with his consent the shop was allotted to Mr.D.P.Shah on 24th February, 2000, on receipt of Rs. 2,50,000/-. Thereafter, Mr.D.P.Shah paid the full consideration including maintenance and parking charges on 20.4.2000 aggregating to Rs. 15,84,200/-. As full consideration was received from Mr.D.P.Shah, on 20.4.2000, Mr.D.P.Shah was given the possession of the said shop No. 103 in Ganesh Plaza on 20.4.2000. Mr.D.P.Shah is having actual and legal possession of the aforesaid shop for last three years.

5.9 It was further submitted that assuming for the sake of arguments that the shop in question was allotted and sold to Piramal Financial Services Limited as per the allotment letter dated 10.4.1997, the very shop could not have been taken as a collateral security under the agreement dated 9th July, 1997. It is pertinent to mention here that in the year 1997 the respondent No. 10 or his associates were not in charge of the affairs of the company in liquidation. If the version of the Official Liquidator is assumed to be true then the shop in question that was sold on 10.4.1997 to the company in liquidation was taken as a collateral security subsequently on 9th July, 1997. The aforesaid version of the Official Liquidator adduced before this Court is legally not tenable and is without any basis.

5.10 In light of the aforesaid facts and circumstances of the case, it was submitted by the respondent that the contentions, averments made in paragraph 6 of the Official Liquidator's Report are not correct and are denied by respondent No. 10. It has been further submitted that the shop in question has no nexus to the company in liquidation, the shop which was given as collateral security vide agreement dated 9th July, 1997, was released free from any encumbrances in terms of MOU dated 7th September, 1999, and 8th September, 1999, by the company in liquidation. For the aforesaid reason, the shop was never sold to Piramal Financial Services Limited on 10th April, 1997, as alleged by the Official Liquidator.

5.11 In the present proceedings, the Official Liquidator has alleged fraud against Mr.Ashish Patel in para 7 of the O.L.Report. The aforesaid allegation is without any basis and material. It is pertinent to mention here that the allegation of fraud in the O.L. Report is without material and is not in compliance with Order VI, Rule 6 of the CPC which provides as under:

"Rule IV : "particulars to be given where necessary: In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."

5.12 In the present case, the Official Liquidator has alleged fraud without

producing any material evidence or pleadings necessary to allege fraud as contemplated under Order VI, Rule IV of CPC for which the allegations made by the Official Liquidator are not legally tenable. It is pertinent to refer to the decision of the Delhi High Court in the case of Victor Chit Fund Private Limited Vs. Kanhiya Lal and others reported in 1972 (42) Comp Cas 396 wherein the Hon"ble High Court has held as under:

"To set aside a transaction as a fraudulent preference u/s 531 of the Companies Act, 1956, fraud must be clearly alleged, provided and established. A petition containing mere general allegations and lacking in material particulars, is liable to be dismissed."

The Hon"ble High Court has further held at page 401.

"It is the cardinal principle of pleadings that wherever fraud is pleaded full particulars must be set out in the pleadings themselves. This principle has statutory recognition in the provisions of Order VI, Rule IV of the Civil Procedure Code. As the petition is lacking in material particulars about allegations of fraud and mere general allegations cannot suffice, it has to be held that the petition must fail on the ground that it does not set out any particulars of the alleged fraud."

5.13 In light of the aforesaid statutory provisions and looking to the allegations made in the O.L.Report, the Official Liquidator has not placed any material particulars before this Court to substantiate its case either as the owner of Shop No. 103 or to prove fraud against Ashish Patel and his associates.

5.14 It is also pertinent to mention that in a similar case for a flat/shop situated in Ganesh Plaza bearing No. 801 an allotment letter was issued which was verbatim reproduction of the allotment letter dated 10.4.1997 issued for shop No. 103. In the aforesaid allotment letter, it is also mentioned that the shop was allotted on receipt of full and final payment. The Official Liquidator initiated similar proceedings to seal the premises on the strength of the allotment letter. This Court vide its order dated 27.2.2001 directed the Official Liquidator to desal the premises as Piramal Financial Services Limited has no legal right over the said premises. The Official Liquidator thereafter filed a Review Application challenging the aforesaid order passed by this Court. This Court while disposing of the Review Application vide its Order dated 28.6.2002 at para 9 held as under:

"As against that the Official Liquidator has produced only allotment letter dated 21.4.1997 issued in favour of Piramal Finance. Except that no other documents have been produced to show any linkage with the Piramal Finance. In view of this situation, I am of the view that the applicant has proved that he has lawful title and possession of the property in question and there is no connection with the Piramal Finance and, therefore, the order passed by this Court on 19.12.2001 which was subsequently corrected on 22.1.2002 and this Court directed that the order should be treated as 27.12.2001 instead of 19.12.2001 may not be reviewed in this behalf."

5.15 The aforesaid decision of this Court is fully applicable to the facts and circumstances of the present case. The shop in question and shop No. 801 are situated in the same building, similar allotment letters were issued in favour of Piramal Financial Services Limited, the company in liquidation and the Official Liquidator claimed his ownership on the strength of an allotment letter. Therefore, it is submitted that the aforesaid decision would apply to the present proceedings. It is also pertinent to refer to the observations of this Court at para 5.3 and 5.4 in the aforesaid decision.

"5.3 *** At that time the owner or occupier of Office No. 103 contacted Mr.Ashish Patel of M/s.Radhe Associates and he has produced certificate dated 7.9.1999 and copy of the board of resolution dated 7.9.1999 which I have already referred earlier in this behalf."

"5.4 In view of the same the Official Liquidator after showing this documents there is no reason the liquidator should not disbelieve the said documents qua applicant is concerned".

5.16 In the present proceedings also the Resolution dated 7.9.1999 and the no objection certificate issued by PFSL in favour of Ashish Patel and Radhe Estate Developers are at page 87 and 89 to the present proceedings. In the aforesaid facts and circumstances of the case, as held in the aforesaid decision of this Court, the Official Liquidator has no legal right to claim ownership for shop No. 103 situated at Ganesh Plaza.

5.17 In the present O.L.Report the Official Liquidator is claiming ownership of Shop No. 103 and has also alleged fraud against Ashish Patel. Even assuming for the sake of argument that the Official Liquidator is seeking to nullify the transactions entered into by the company liquidator on the basis of Section 531 and 531A of the Companies Act, it is the burden of the Official Liquidator to establish before this Court his legal right and title over shop No. 103 and place material before this Court to substantiate fraud as alleged in the O.L.Report. The Official Liquidator has neither placed any material before this Court to substantiate his ownership over shop No. 103 nor produced material evidencing fraud.

5.18 Learned senior counsel Mr.S.I.Nanavati in this connection relied upon the judgment of the Bombay High Court in the case of Monark Enterprises Vs. Kishan Tulpule and others reported in 74 Comp Cas 89.

5.18(A) Learned counsel has also relied upon Madras High Court judgment in the case of N.Babu Janardhanam and another Vs. Official Liquidator, Golden Cine Studios P.Ltd. reported in 78 Comp Cas 490.

5.19 It was further submitted that the transaction of sale of Shop No. 103 to Mr.D.P.Shah was complete when the full consideration for the same was paid by Mr.D.P.Shah to Radhe Associates and the possession of the said shop was handed over by Radhe Associates to Mr.D.P.Shah. Once the transaction had been

completed and the possession thereof been settled, it cannot be said that the property still stood as collateral security of PFSL. Without prejudice to the foregoing, it is submitted that in any event the property was sold for consideration to a bonafide purchaser and the same being the bonafide purchase by a bonafide purchaser on full payment of consideration, the sale cannot be said to be illegal or otherwise.

5.20 In the aforesaid facts and circumstances of the case, the directions sought by the Official Liquidator has no legal basis and the same deserves to be quashed and set aside.

CONCLUSION:

6. I have considered the facts and circumstances of the case. I have also considered the submissions of Mr.Roshan Desai, learned counsel for the Liquidator, submissions of Ms.Kalpanaben Brahmabhatt as well as submissions of Mr.S.I.Nanavati, learned Senior Counsel in this behalf.

6.1 The Rules and Regulations of the society prescribe the procedure for the admission of a person to the membership of the society and allotment for the shops/offices to such member. According to them, the Committee of the society has to pass a resolution to that effect and issue an allotment letter to such person. The said procedure has been followed with respect to the allotment of the office in question to PFSL and a possession letter has also been issued to it. The genuineness of the said documents has not been challenged by the respondents and as such, they stand admitted by them. The said documents are therefore binding on all concerned parties and have to be given effect to. As such, PFSL has been properly constituted the member of the society and the party entitled to the said office under the said documents. For this purpose, no further documents are necessary since PFSL has been constituted the party entitled to the said office by following the procedure prescribed under the said Rules and Regulations. Once the title to the said office has been passed to PFSL, the transferor of the said office had ceased to have any right over the same and did not have any right to deal with the same any further.

6.2 I have considered sec.27 of the Sale of Goods Act which is under Chapter Transfer of Title. Sec.27 provides sale by person not the owner. Sec.27 expresses the general proposition that no one can give what he has not got, and if one deals with the goods of another without his authority, the transaction is as against that other nugatory in law.

{Re: Pollock & Mulla on Sale of Goods Act, Sixth Edition page 231}.

6.2A This section is based upon the Roman maxim "Nemo Dat Quod Non Habet". The aforesaid maxim has been explained by Benjamin's Sale of Goods, 5th Edition, Chapter 7, para 7-001, page 321 where the learned author has observed as under:

"Nemo dat quod non habet. - The general rule in English law is that no one can

transfer a better title to goods than he himself possesses. This rule is often expressed in terms of the Latin maxim *nemo dat quod non habet*. It is partially set out in section 21(1) of the Sale of Goods Act 1979, which provides "Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had." At one time, the only effective exception to this rule was that of a sale in market overt. But, in response to commercial and social demands, further exceptions to the rule have been progressively introduced both by the common law and by statute. As Denning L.J. has remarked. In the development of our law, two important have striven for mastery. The first is for the protection of property; no one can give a better tile than he himself possesses. The second is for the protection of commercial transactions; the person who takes in good faith and for value without notice should get a good title."

6.2B Broom's Legal Maxims, 10th Edition. The learned author has considered the maxim *assignatus utitur jure auctoris* (Halk. Max., p,14) - An assignee is clothed with the rights of his principal. While discussing the said maxim on page 303 the learned Author has also considered the above maxim and observed as under:

"In order to place in a clear light the general bearing of the maxim *assignatus utitur jure auctoris*, we will briefly notice, first, the quantity, and secondly, the quality or nature, of the interest in property which can be assigned by the owner to another party. And it is a well known general rule, imported into our own from the civil law, that no man can transfer a greater right or interest than he himself possesses; *nemo plus juris ad alium transferee potest quam ipse haberet* (o); The owner, for example, of a base or determinable fee can, as a rule (p), do no more than transfer to another his own estate, or some interest of inferior degree created out of it."

xx xx xx xx "We find it laid down, however, that the maxim above mentioned, which is one of the leading rules as to titles, or the equivalent maxim, *non dat qui non habet*, did not, before the Real Property Act, 1845, apply to wrongful conveyances or tortious acts."

(Re: Broom's Legal Maxim - p.303)

6.2C It may be noted that sec.5 of Transfers of Property Act also provides "transfer of property" whether movable or immovable. The said section provides that transfer of property means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and "to transfer property" is to perform such act. The word "transfer" is defined with reference to the word "convey". The word "conveys" in sec.5 of the Indian Act is used in the wider sense. Transferor must have an interest in the property. He cannot sever himself from it and yet convey it. In view of the same, once the person is owner or has interest in the property, the same can be conveyed or transferred under sec.5

read with principle of Sale of Goods Act. If the person is not owner or if the person has no interest in the property, he cannot transfer or convey the same in this behalf.

6.2D It is a general proposition that man can transfer to another what he has, he cannot transfer anything what he has not. In support of this contention which is a general proposition I have referred to Sec.27 of the Sale of Goods Act, a commentary on Pollock and Mulla, Roman Maxim "Nemo Dat Quod Non Habet" which has been explained by Benjamin's Sale of Goods, which has also been explained in Broom's Legal Maxims. This is a general proposition which I have relied and in support of the same I have referred all these text books in this behalf.

6.2E It may be noted that Mr.Nanavati, learned Counsel for the respondents No. 10 and 11 has relied upon one order of this Court in Misc. Civil Application No. 12 of 2002 in Company Application No. 290 of 2001 in the case of the Provisional Liquidator of the Piramal Financial Services Ltd. Vs. Palash Finvest Pvt. Ltd., Mumbai and another decided by this Court on 28th June, 2002. However, the facts of the case was quite different which I have noted in para 9 of the said order. In that case the Court has observed that liquidator has produced only letter of allotment and no other documents have been produced to show any linkage with the Piramal Finance whereas as against that the applicant had proved that he has lawful title and the possession of the property in question and there is no connection of Piramal Finance and in that peculiar facts and circumstances of the case the Court has directed to deseal the shop in question. The facts of that case and the facts of present case are quite distinguishable in this behalf.

6.3 In this case it is an admitted fact that Radhe Associates issued a letter of allotment on 10th April, 1997, and certificate of possession was also issued by Radhe Associates. The said allotment letter dated 10th April, 1997, and certificate of possession are produced at pages 5 and 6 of the paper book. It has also been stated that full and final payment has been made by Piramal Finance in this behalf. In view of the same as per the letter of allotment, Piramal Financial Services Ltd. became owner of Shop No. 103 alongwith undivided share of the unit, superstructure and other allied services to it. Once Shop No. 103 became of the ownership of Piramal Financial Services Ltd., the Radhe Estate Developers or any third party who has no right, title or interest in respect of the said Shop No. 103, can not create a security of the said shop in favour of Piramal Financial Services Ltd. as stated in the agreement.

6.4 In my view to create a security a deed or document or Memorandum of Entry regarding the creation of equitable mortgage is a must. It is also not stated in the said agreement how alleged securities are created. In this behalf no security can be created by an agreement and that too by a person, who has no right, title or interest in respect of the property on which security is created.

6.5 PFSL was issued a possession certificate by the society which document does not appear to be challenged by the respondents. Shri D.P.Shah has produced certain documents showing that he has been in possession of the office since 2000. It must be borne in mind that the agreement of 1999 has been entered into by the parties thereto which were under the control of the same person namely Shri Ashish Patel. The Company has been issued the possession certificate which, when not shown to be fraudulent, means that PFSL was given possession at the time shown in the said certificate. It may be that thereafter Shri Ashish Patel, which in control of PFSL, may have handed over the said possession to Shri D.P.Shah to suit his evil design. But, all this is irrelevant since possession is not necessary to constitute the ownership of the property. Even if a person is not in possession of a property, he may be the true owner thereof. If he has not given possession thereof to anybody and such person acquires possession otherwise, he is a trespasser and does not acquire any interest in the property. As stated above, PFSL was constituted real owner of the office and it is not shown that it has transferred the ownership thereof to any body. Any person who is in possession thereof cannot claim any right over it unless the owner has given any such right to him which is not the case in the present facts. Thus, the exercise in proving the possession by Shri D.P.Shah of the concerned office is beside the point and irrelevant.

6.6 From the record it appears that Piramal Financial Services Ltd. was the owner of Shop No. 103 and further Radhe Estate Developers has no right, title or interest in respect of Shop No. 103. So far as Shop No. 103 is concerned, Radhe Estate Developers had no right, title or interest in the said property at any time whatsoever. In my view once the ownership is created in favour of Piramal Financial Services Ltd. on 10th April, 1997, no third party can create security and that too in favour of the person, who is the owner of the property. It may be noted that everything has been done at the behest of Mr.Ashish Patel, who is concerned with all the parties, namely, Piramal Financial Services Ltd., Radhe Associates and Radhe Estate Developers. In view of the same, the subsequent agreement is not a valid agreement and does not create any security and is having no effect and it did not create any security, as is alleged by Mr.Ashish Patel.

6.7 In my view it is well settled principle of law that security can be created by way of mortgage. In the present case no document or any other paper are produced to show that the mortgage has been created. In this case it is also not stated what title deeds were deposited with Piramal Financial Services Ltd. when security was created. In view of the same, the agreement dated 9th July, 1997, should not be believed and should be rejected.

6.8 Learned counsel for the respondent has relied upon Memorandum of Understanding dated 8th September, 1999, entered into between the parties which is produced at page 66 of the paper book. From the said Memorandum of Understanding, it is contended that the liability of discharging debt of Radhe

Group of Associates has been taken over by Valor Finstock Pvt.Ltd. The said agreement further recites that on taking over liability securities are released. (In favour of Radhe Estate Developers Ltd. though it is not stated in so many words but since securities were created by Radhe Estate Developers Release of Securities can only be in favour of the person creating it). In my view by taking over the liability it cannot be said that the amount is paid to the creditor. In my view if the securities can be released only on payment being made of the debt and not otherwise.

6.9 In view of this the securities are released in favour of Radhe Estate Developers by the agreement dated 8th September, 1999, how Radhe Associates can allot the said shop No. 103 to Shri Dinesh P.Shah. In this case it is the contention that no security was created and Piramal Financial Services Ltd. was the owner of Shop No. 103 then in that event how Shri Dinesh P.Shah is claiming title from Radhe Associates when securities was released in favour of Radhe Estate Developers and Radhe Associates had no title.

6.10 Agreement of 1999 appears to be collusive since it has been entered into by the parties which were under the control of the same person namely Shri Ashish Patel. As such, it does not inspire any confidence and does not carry any sanctity. It has to be considered with caution taking into account this fact. Moreover, it relates to the release of the charge of PFSL over the property. As stated above, a party which has already transferred the ownership rights over a property does not have any right to create any charge over it. As such, even if it is assumed that PFSL has released the property from the charge, it has no importance since such charge, if at all created, is to be ignored as non est since PFSL had no charge over it since PFSL itself was the owner of the said property. PFSL could not get created a charge in its favour over the said property which belonged to itself. Apart from this, the question here is whether PFSL was the owner of the said property and not whether it had a charge over it and the said charge was lifted. As stated above, PFSL had been constituted the owner of the said property and therefore, the question stands concluded. No further consideration of the release of the same from the alleged charge in favour of PFSL arises.

6.11 As far as the question of consideration paid by PFSL is concerned, the respondents have not alleged that no such consideration has been paid. They have only stated that no evidence has been produced by the official liquidator. When the payment of such consideration is not challenged, the fact of the payment thereof stands admitted and as such it is not necessary to prove the same. Apart from this, this question is irrelevant as far as the question of the title of PFSL to the office is concerned. Assuming that no such consideration is paid, it will not be fatal to the title of PFSL to the said office. The only thing to be verified for this purpose is whether the requirements of the rules and regulations of the society have been followed or not. Once the answer to this question is in the affirmative, even if it is proved that no consideration has been paid by PFSL for the same, PFSL is constituted to be the owner of the said office.

6.12 The Liquidator has established his right, title & interest in the shop No. 103 at Ganesh Plaza and respondent No. 9 has no right, title or interest in respect of said Shop No. 103 and as such liquidator may be authorised to take possession of Shop No. 103 as prayed for and respondent No. 9 be directed to hand over vacant and peaceful possession and if respondent No. 9 resists in giving possession, liquidator may be authorised to obtain police assistance for taking possession of the shop No. 103 at Ganesh Plaza from respondent No. 9.

6.13 So looking to the record produced, liquidator may be authorised and directed to initiate action against the parties named in the agreement dated 7th September, 1999, and 18th September, 1999, to recover and realise the amount due to Piramal Financial Services Ltd. (in liquidation).

7. In this case the case of Liquidator is very simple of prior title and has not prayed for initiation of proceedings under Sec.531 and 531A of the Act and, therefore, there is no question of fraud alleged in this behalf. However, from the record of the case it appears that Ashish Patel has tried to create a fraud between the parties and tried to cheat the parties in this behalf. He has not divulged to the subsequent purchaser Shri Dinesh P.Shah the fact that originally he has handed over the title of the suit property to Piramal Finance. In my view, once he has already transferred the right, title and interest of the suit property to Piramal Finance, he has no right or title of the property in question and therefore subsequent transfer is not legal and valid. The said transaction is bad in law and liable to be set aside. In view of the same, I pass the following order:

(i) I, therefore, ratify the action taken by Official Liquidator for taking possession of assets of company.

(ii) I further direct Shri D.P.Shah to submit original sale deed before this Court. I also direct the Reserve Bank of India to submit the investigation report carried out by Chartered Accountant.

(iii) This Court also pleased to constitute a Sale Committee comprising of Official Liquidator and Secured Creditors, representative of Reserve Bank of India and workers union if any, so that assets of company can be sold by public auction.

8. In view of the aforesaid observations and directions, the official liquidator report is accordingly disposed of with no order as to costs.

After pronouncement of the judgment, the Official Liquidator has requested to constitute a Sale Committee.

The Members of the Sale Committee are as under:

(i) Official Liquidator.

(ii) Representative of the secured creditors suggested by the Official Liquidator.

(iii) Mrs. Jayshreeben Vyas, as suggested by learned advocate Mr.Vasavada, representative of Mahila Seva Sahakari Bank.

(iv) Representative of the Reserve Bank of India (to be suggested by Shri Amar N.Bhatt - Advocate of RBI).

After pronouncement of the judgment, Mr.Roshan Desai, learned Advocate for the Official Liquidator has pointed out that in this case the finding of this Court in para 7(i) is factually not correct. The correct fact is as under and, therefore, in view of the same, para 7(i) to be read as under:

"The possession of the premises in question was already with respondent No. 9. So when the official liquidator went to the suit premises, respondent No. 9 objected to it and therefore the official liquidator could not be able to get physical possession of the property. Therefore I direct respondent No. 9 to hand over peaceful and vacant possession of the property in question to the Official Liquidator within three months from today. As regards compensation/ consideration to be paid by respondent No. 9, it will be considered hereinafter."

In view of the same, office to issue fresh writ of this judgment accordingly.