

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 140 OF 2022
WITH
INTERIM APPLICATION NO. 850 OF 2022
WITH
INTERIM APPLICATION NO. 3058 OF 2022
IN
APPEAL FROM ORDER NO. 140 OF 2022

- | | | | |
|----|---|--|---|
| 1) | M/s. Skyline Developers
(registered partnership firm)
Having office at Matrukrupa Apartment,
Ground floor, Joshi Baug, Kalyan (W),
District Thane, through its partner
Shri Narendra Janardan Pathak |]
]
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]
]
]
] | <u>...Applicant/
Appellant</u> |
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Versus

- | | | |
|------|---|-----------------------|
| 1) | Suresh Yashwant Phadke
Age: 52 years, Occ.: Doctor
Residing at Phadke Bunglow,
Doodh Naka, Kalyan (W) - 421 301. |]
]
]
] |
| 2) | Dilip Yashwant Phadke
Age: Adult, Occ.: Retired
Residing at Phadke Bunglow,
Doodh Naka, Kalyan (W) - 421 301. |]
]
]
] |
| 3) | Vishwanath Anant Phadke
Since deceased, through heirs and legal
representatives: |]
]
] |
| 3/1) | Smt. Gauri Upendra Gharpure
Age: 63 years, Occ.: Housewife
Residing at Yashodhan Bungalow,
Parnaka, Kalyan (W), Dist. Thane. |]
]
]
] |
| 3/2) | Sau Rajashri Ravindra Godbole
Age: 54 years, Occ.: Housewife
Residing at Nav Ramai Cooperative
Housing Society, Parnaka, Kalyan (W), |]
]
]
]
] |

- Dist. Thane-421 301.]
- 3/3) Jayashri Nitin S.]
Age: 52 years, Occ.: Housewife]
Residing at 1564, Parvani Building,]
Sadashiv Peth, Pune - 411 030.]
- 3/4) Netra Anil Shotri]
Age: 52 years, Occ.: Housewife]
Flat 1564, Sadashiv Peth, Pune - 411 030.]
- 4) Sudha Anant Gavali]
Age: Adult, Occ.: Business]
Residing at Chakki Naka, Tisgaon, Kalyan]
(E).]
- 5) Navin Anant Gavali]
Age: Adult, Occ.: Business]
Residing at Chakki Naka, Tisgaon, Kalyan]
(E).]
- 6) Yogesh Kamal Singh]
(Since deceased, through his legal heirs)]
- 6/1) Dharmavati Yogesh Singh (wife)]
Age: 30 years, Occ.: Housewife]
- 6/2) Aniket Yogesh Singh (son)]
Age: 10 years]
- 6/3) Arpita Yogesh Singh]
Age: 8 years]
- 6/4) Priya Yogesh Singh]
Age: 6 years]
Respondents Nos.6/2 to 6/4]
Since minors, through their natural]
guardian Dharmavati Yogesh Singh]
All residing at Plot No.69A, Chawl near]
mujawar compound, Chakki Naka,]
Tisgaon,]
Taluka Kalyan.]
- 7) Shaligram Baijanath Tiwari]
Since deceased, through heirs and legal]
representatives:]
- 7/1) Kailashnath Sallikram Tiwari]
Since deceased, through heirs and legal]
representatives :]
- 7/1/1) Gnyandevi Kailashnath Tiwari]
Age: Adult, Occ.: Housewife]
Residing at Matru-Chhaya Bungalow,]

- Poona Link Road, Katemanivali,]
Near S.B.Divya High School,]
Kalyan (E)-421 306.]
- 7/1/2) Sarita Rakesh Tiwari]
Age: Adult, Occ.: Housewife]
Residing at Shri Ganesh Housing Society,]
Block No.5, Near Ambemata Hall,]
Brahman Ali, Neral-410 101, District]
Raigad.]
- 7/1/3) Ashish Kailashnath Tiwari]
Age: Adult, Occ.: Business]
Residing at Matru-Chhaya Bungalow,]
Poona Link Road, Katemanivali,]
Near S.B.Divya High School, Kalyan (E)-]
421 306.]
- 7/1/4) Poonam Ashok Shukla]
Age: Adult, Occ.: Housewife]
Residing at Ganesh Baug, R/H B-2,]
Sector-1, Airoli, Navi Mumbai - 400 708.]
- 7/1/5) Neelam Manas Tiwari]
Age: Adult, Occ.: Housewife]
Residing at B-11, 401, Gagangiri Enclave,]
Barve Village Road, Khadakpada, Kalyan]
(W)-421 301.]
- 7/2) Vijaynath Shalikram Tiwari]
Age: 61 years, Occ.: Business]
- 7/3) Amarnath Shalikram Tiwari]
Age: 59 years, Occ.: Business]
- 7/4) Prabhunath Shalikram Tiwari]
Age: 56 years, Occ.: Advocate]
- 7/5) Vimalnath Shalikram Tiwari]
Age: 49 years, Occ.: Advocate]
- 7/6) Dinesh Shalikram Tiwari]
Age: 48 years, Occ.: Business]
- 7/7) Rajesh Shalikram Tiwari]
Age: 47 years, Occ.: Business]
Respondents Nos. 7/1 to 7/7 residing at]
Matru Chhaya Bungalow, Opp. Dr. Kasle]
Hospital, Poona Link Road,]
Katemanivli, Kalyan (E) - 421 306.]
- 7/8) Babulnath Shalikram Tiwari]
Age: 57 years, Occ.: Business]

- Residing at 309, Baghambari Housing Scheme (B.H.S.), Bharatdwaj Puram, Allapur, Allahabad 211 006 Uttar Pradesh State.]
- 8) T.K. Gopal Krishnan]
Age: Adult, Occ.: Business]
Residing at Dinesh Bhavan, Chakki Naka, Tisgaon, Taluka Kalyan.]
- 9) Chinan Potyan Dharman]
Age: Adult, Occ.: Not known]
Residing at Plot No.69/A, Chakki Naka, Tisgaon, Taluka Kalyan.]
- 10) Kacheshwar Baban Choudhary (Since deceased, through his legal heirs)]
- 10/1) Sakhubai Kacheshwar Choudhary]
Age: 78 years, Occ.: Housewife]
- 10/2) Vandana Rajendra Choudhary]
Age: 48 years, Occ.: Housewife]
- 10/3) Avinash Rajendra Choudhary]
Age: 28 years, Occ.: Business]
- 10/4) Anil Rajendra Choudhary]
Age: 24 years, Occ.: Business]
- 10/5) Bhavesh Rajendra Choudhary]
Age: 21 years, Occ.: Student]
Respondents Nos.10/1 to 10/5]
Residing at Plot No.69A, Chakki Naka, Tisgaon, Taluka Kalyan.]
- 11) Krushna Koteswar Choudhary]
Age: Adult, Occ.: Not known]
Residing at Plot No.69A, Chakki Naka, Tisgaon, Taluka Kalyan.]
- 12) Indappa Timmanna China]
Age: Adult, Occ.: Not known]
Residing at Plot No.69A, Chakki Naka, Tisgaon, Taluka Kalyan.]
- 13) Idanmal Bakhmal Lund]
Age: Adult, Occ.: Not known]
Residing at Plot No.69A, Chakki Naka, Tisgaon, Taluka Kalyan.]
- 14) Parbindarsingh Dharamsingh Alang]
Age: Adult, Occ.: Not known]
Residing at Plot No.69A, Chakki Naka,]

- Tisgaon, Taluka Kalyan.]
- 15) The Commissioner]
Kalyan Dombivali Municipal]
Corporation, Shankar Rao Chowk, Kalyan]
(W).]
- 16) The Assistant Commissioner]
The Town Planning Department]
Kalyan Dombivali Municipal Corporation,]
Shankar Rao Chowk, Kalyan (W).]
- 17) M/s. Matrukrupa Enterprises]
(registered partnership firm)]
Having office at Matrukrupa Apartment,]
Ground floor, Joshi Baug, Kalyan (W),]
District Thane.]
Through its partner]
Shri Vijaynarayan Ramcharan Pandit]

...Respondents

Mr. Rajesh Datar a/w Mr. Dushyant Pagare, for the Appellant.

Mr. Vishal Kanade a/w Mr. Digvijay Sarangdhar, Ms. Sunitha Nayak i/b Ms. Asmita Sarngdhar, for the Respondent Nos. 1 & 2.

Mr. D. S. Mhaispurkar, for Respondent No. 3.

Mr. Sandeep Shinde, for the Respondent Nos. 15 & 16.

CORAM : SHARMILA U. DESHMUKH
RESERVED ON : JULY 21, 2026
PRONOUNCED ON : AUGUST 27, 2026

JUDGMENT :

1. Heard. ***Admit.*** With consent, taken up for final disposal.
2. The present Appeal is at the instance of the original Defendant No. 16 being aggrieved by the order dated 12th November, 2021 passed below Exhibit 226 in Special Civil Suit No. 309 of 2011 dismissing the application under Order XXXIX Rule 4 of Code of Civil Procedure, 1908 (for short "**CPC**") seeking modification of the order dated 6th February,

2012 passed below Exhibit 5.

1. Special Civil Suit No 309 of 2011 was filed seeking *inter alia* declaration of 2/3rd share in the suit properties, partition, separate possession and injunction. The plaint assailed the sanctioning of plans dated 4th May, 2011 and 15th January, 2011 by the Defendant Corporation. The Plaintiff's case is of undivided share of the Plaintiffs and the Defendant No 1 in the ancestral suit properties including Survey No 69A/P situated at Tisgaon. It is pleaded that certain properties were alienated with the consent and knowledge of Plaintiffs, which included land admeasuring 14,230.60 square meters out of Survey No 69A/P in favour of various persons including Defendant No 5, through whom, the Defendant No 16 claims development rights.

2. In so far as Survey No 69 A/P is concerned, the plaint describes the area of Survey No 69A/P after deducting the alienated area of 14,230.60 square meters. There was unilateral TILR survey carried out at instance of Defendant No 4 in the year 2007 and by misrepresentation and fraud Survey No 69 A(p) came to be bifurcated into Survey No 69A/1 and 69 A/2. The pleading is that the land admeasuring 6615 square yards was sub-divided in favour of Defendant No 5 and plans were sanctioned by the Corporation illegally.

3. Vide interim order below Exhibit 5 passed on 6th February, 2012, the Trial Court noted that Defendant No 5 had appeared in the suit and

filed his say. The Trial Court considered the Plaintiffs have admitted sale of area admeasuring 6615 square meters in favour of Defendant No 5 but that the dispute is about location. It opined that unless and until there is demarcation of Survey No 69 A(P) it is necessary to restrict activities of Defendant No 5. It held that the Corporation has not considered the objections of the Plaintiffs and have sanctioned development plans in respect of Survey No 69 A(P). The Trial Court restrained the Defendant Nos 1 to 12 from creating any third party rights and restrained Defendant Nos 13 and 14 from sanctioning any development plan in respect of suit properties without giving opportunity of hearing to the Plaintiffs and without written consent/permission of Plaintiffs.

4. Initially Defendant No 16 was not impleaded as Defendants to the suit and filed an application under Order 1 Rule 10 of CPC for impleadment, which came to be rejected on 2nd April, 2013 as against which the Defendant No 16 approached the High Court. Vide order dated 30th January, 2014, the Petition was allowed and Defendant No 16 was joined as party Defendant.

5. The Defendant No 16 challenged the order dated 6th February, 2012 below Exhibit 5 by Appeal from Order No 225 of 2014 before this Court, which came to be disposed of on 30th January, 2017 without interfering with the order but with a direction to decide the suit within

period of two years.

6. On 23rd June, 2016, the Defendant No 16 filed an application for appointment of Court Commissioner under Order 26 Rule 9 of CPC. It was pleaded that the development rights were acquired in respect of 6615 square yards out of Survey No 69A(P) from Defendant No 5, who had purchased the land under conveyance deed of 1973 and possession was handed over to Defendant No 5. It was pleaded that there is allegation of the plot of Defendant No 5 not being identified and of encroachment. It was pleaded that to ascertain the encroachment, the property bearing Survey No 69/A(P) be measured and for that purpose Court Commissioner be appointed. The submission canvassed by the Defendant No 16 was as regards the alleged encroachment and that property in possession of Defendant No 16 not being subject matter of the suit. The Trial Court allowed the application and directed the Court Commissioner to conduct survey, measurement, demarcation of survey of land admeasuring 6615 square yards of Survey No 69/A(P) and submit report.

7. After the survey was carried out and map prepared by the Deputy Superintendent of Land Records, the Defendant No 16 filed an application under Order 39 Rule 4 of CPC seeking modification/variation of the order dated 6th February, 2012 and for permission to carry out construction in respect of area admeasuring 6615 square yards as

shown in Court Commissioner's report within the boundaries shown in blue colour excluding portion of area admeasuring 366 square meters as shown in plan in yellow colour by obtaining requisite/fresh revised building permission. It was pleaded that as per the map, area admeasuring 366 square meters was not part of Survey No 69/A(P). As the Plaintiffs have excluded area of 14,230 square meters from the suit properties, the Defendant No 16 is not concerned with the suit. It was pleaded that in view of the subsequent development of measurement by the Court Commissioner, the earlier injunctive order is required to be modified.

8. The Plaintiffs opposed the application stating that the suit has been filed for partition and other reliefs claiming $2/3^{\text{rd}}$ share in the suit property described in plaint paragraph 3. The order of 6th February, 2012 below Exhibit 5 was passed after hearing all the parties, and though, Appeal was preferred against the order by Defendant Nos. 2 and 3, the High Court has not interfered in the said order. The Defendant No. 5 from whom Defendant No. 16 claims right has not challenged the said order by filing an Appeal, and thus, the said order has attained finality.

9. It was pleaded that the Plaintiffs in paragraph no. 11(A)(viii) of the plaint have made specific allegation against Defendant No. 5 and the alleged second plan, which was got approved by Defendant No. 5

through misrepresentation and fraud. It was pleaded that by way of modification, Defendant No. 16 is seeking a mandatory injunction in its favour in form of permission allowing it to carry out construction upon the alleged area, which cannot be granted in the Plaintiff's suit, and without filing any counter-claim. It was pleaded that the relief of injunction was granted not only against Defendant Nos. 1 to 5, but even against Defendant Nos 13 and 14 i.e. the Corporation.

10. The Trial Court by the impugned order dated 12th November, 2021 noted that the Defendant No. 16 is now in possession of land admeasuring 366 square meters which is not part of Survey No. 69/A(P). It further held that the land admeasuring 5530.94 square meters is not property identified as per conveyance deed and the land needs to be demarcated before it is taken up for development. It further held that by way of the report of Court Commissioner, there is no subsequent development by which temporary injunction needs to be modified and dismissed the application.

SUBMISSIONS

11. Mr. Datar, learned counsel for the Appellant would submit that there is admission in the plaint about the alienation in favour of Defendant No 5 through whom Defendant No 16 claims. He submits that Defendant No. 5 had purchased the land admeasuring 5530.94 square meters on 23rd January, 1973 by registered sale deed executed

by the Plaintiffs, and on 29th June, 2004, granted development rights in favour of Defendant No. 15, who thereafter, applied and secured building permission on 5th February, 2009. The commencement certificate was granted on 11th June, 2010, and the revised building permission came to be issued by Kalyan Dombivli Municipal Corporation on 15th January, 2011. On 18th July, 2011, development rights were assigned to Defendant No 16. He submits that it is only on 21st June, 2011, the Special Civil Suit No. 309 of 2011 came to be filed in respect of 2/3rd share in suit properties, which does not include the alienated properties. He would submit that the subject matter of suit excludes the property already sold by the Plaintiffs, and the partition sought is in respect of the balance property.

12. He would submit that the injunction granted below Exhibit 5 was in respect of area admeasuring 95769.40 square meters of Survey No. 69A/(P). He submits that the Trial Court in the order below Exhibit 5 accepted the sale in favour of the Defendant No. 5, but has held that dispute is regarding its location as Survey No. 69A(P) is not yet demarcated, and therefore, it is necessary to restrict the activities of Defendant No. 5 too.

13. Mr. Datar would further point out the pleading in the plaint that on the basis of Taluka Inspector of Land Records (“**TILR**”) survey carried out in the year 2007, the Defendant No. 4 has got the entire Survey No.

69/A(P) sub-divided. He submits that therefore the finding of the Trial Court that there is no demarcation of Survey No. 69A(P) is erroneous. He would further point out that the order dated 6th February, 2012 passed below Exhibit 5 was challenged by the Defendant No. 16 by filing Appeal from Order which came to be disposed of on 30th January, 2017 on the ground that the impugned order was operating since the last five years, and therefore, there is no need to interfere with a direction to dispose of the suit within a period of two years. He submits that till date, the suit is still at the stage of framing issues.

14. He would submit that on 23rd June, 2016, an application came to be filed by Defendant No. 16 under Order XXVI Rule 9 of CPC for appointment of Court Commissioner, and by order dated 18th February, 2017, the Trial Court appointed Deputy Superintendent of Land Records as Court Commissioner to carry out measurement and demarcation.

15. He would further point out that the conveyance of the year 1973 describes the boundaries in the schedule of the conveyance deed. He would further point out the map prepared by the Court Commissioner wherein, the construction of the Defendant No 16 has been clearly shown. He would also draw attention of the Court to the photographs placed on record in order to demonstrate the hardship caused to the Defendant no 16 by reason of the construction having been halted by the impugned order. He would further submit that the Defendant No 16

would not carry out any construction in the disputed 366 square meters.

16. *Per contra*, Mr. Kanade, learned counsel for the original Plaintiff, would submit that application filed under Order 39 Rule 4 of CPC also sought additional relief of grant of development permissions, which is outside the scope of Order 39 Rule 4. He would further submit that under the statutory provisions, the injunction passed under Order 39 Rule 1 and 2 can be modified upon a change of circumstances, and the report of the Court Commissioner cannot constitute change of circumstances, as its genuineness is to be tested during trial.

17. He would further submit that Survey No 69A/P was not demarcated and there is a specific pleading in the plaint that TILR survey was carried out in the year 2007 and Survey No 69/A(P) was subdivided without knowledge of the Plaintiffs and upon misrepresentation. He would further point out that during the hearing of Exhibit 5 application, the Defendant No. 5 through whom the Defendant No. 16 claims appeared and was heard.

18. He would further point out the specific pleading in the plaint about misrepresentation by Defendant Nos. 4 to 12, that the survey is being carried out with the consent and knowledge of the Plaintiff. He submits that the building plans were sanctioned by misrepresentation, and therefore, the planning authorities are restrained from granting any further planning permissions. He would submit that the Plaintiffs in

reply to the application have denied correctness of the report under Order 26 Rule 9, which cannot be said to be conclusive. He would further submit that if it is found that an area of more than 366 square meters as alleged has been encroached, and the Defendant No 16 is allowed to construct and sell units, it will create an irreversible situation for the Plaintiffs. He would further submit that in 1973, the original Defendant No. 5 purchased 5530.94 square meters of land, and on 29th June, 2004 granted development rights to Defendant No. 15. He would submit that on 21st June, 2011 the Plaintiffs filed suit for declaration and partition, and on 18th July, 2011, Defendant No. 15 assigned the rights to the Defendant No 16. He submits that on 6th February, 2012, the order under Exhibit 5 was passed and original Defendant No. 5 was heard. He submits that the Defendant No 16 challenged the order below Exhibit 5 dated 6th February, 2012 in this Court, which refused to interfere.

19. He submits that under the guise of seeking modification, the Defendant No 16 is seeking interim mandatory relief, which can be granted only upon adjudication of the suit. He would further submit that in the absence of counterclaim and without seeking any affirmative relief, the Defendant No 16 cannot indirectly obtain through an application for modification, a decree for mandatory injunction or any other substantial mandatory relief. He would submit that the Plaintiffs

are ready for an expeditious hearing and final disposal of the suit, and are willing to proceed with the Trial Court. In support, he relies upon the following decisions :-

(i) Madhavlal Narayanlal Pittie And Others vs Madhavlal Narayanlal Pittie And Others¹

(ii) Pidilite Industries Limited vs Jubilant Agri And Consumer Products Limited²

(iii) Sundaram Pillai And Others vs V. R. Pattabiraman And Others³

20. In rejoinder, Mr. Datar would submit that as the pleading in the plaint was about misrepresentation in the survey, a fresh survey was carried out by the Court Commissioner, which was permitted by the Trial Court. He submits that the High Court in the challenge to the first order of injunction did not interfere, as the injunction order was operating for last about five years, which did not preclude the Defendant No 4 from filing an application under Order 39 Rule 4 by reason of changed circumstances. He would submit that if the Court Commissioner's map at page 166 is juxtaposed with the sale deed, the same would tally as per the boundaries mentioned in the sale deed. He submits that the Plaintiffs' case is of encroachment against the present Defendant No 16

1 2017 SCC Online Bom 1796
 2 2016 SCC Online Bom 14093
 3 (1985) 1 SCC 591

and as the Defendant No 16 have title, and there is no challenge to the sale deed of 1973, there can be no grant of injunction. He submits that the order below Exhibit 5 restrains Defendant Nos. 13 and 14 from sanctioning any development plan over the suit properties without giving opportunity of hearing to the Plaintiffs, and without written permission/consent of the Plaintiff, and therefore, the application can also be considered as an application for seeking consent of the Plaintiffs for development.

21. I have considered the submissions and perused the record.

22. During the hearing, as the suit was already expedited by order of the year 2017, this Court made an attempt to verify whether the suit can be disposed of in a time bound manner. This Court noticed that there are various applications pending before the Trial Court, which would consume time and no timelines can be fixed for expeditious disposal of the suit as there is every possibility of every order being challenged in the higher forum. Even after 15 years, the suit is still at the stage of framing issues and deciding interim applications.

23. The impugned order has been passed on an application filed under Order 39 Rule 4 of CPC seeking modification/variation of the Exhibit 5 order dated 6th February, 2012. Order 39 Rule 4 of CPC provides that an order for injunction may be discharged, varied or set aside and the 2nd proviso permits variation of order where the same is

necessitated by a change of circumstances or unless the Court is satisfied that the order has caused undue hardship to that party.

24. The statutory provisions therefore permit the order passed under Order 39 Rule 1 and 2 to be modified even where the order causes undue hardship to that party. In the present case, the application under Order 39 Rule 4 is premised on change of circumstances, which is the Court Commissioner's report, by which the area of 6615 square yards under construction and encroached portion of about 366 square meters is identified.

25. In the order passed below Exhibit 5 on 6th February, 2012, the Trial Court has held that in respect of Survey No 69/ A(P), the dispute is about the location of portion sold to Defendant No 5 and should await demarcation till trial. The Exhibit 5 order reads as under:

ORDER:

" Application is allowed with costs.

1) Defendant No 1 to 12 are hereby temporarily restrained from creating any kind of third party interest, carrying out any kind of construction, development over the suit properties till the final disposal of suit through themselves, their agents, servants etc

2) Defendant No 13 and 14 are hereby temporarily restrained from sanctioning any development plan over the suit

properties without giving opportunity of hearing to plaintiff and without written consent/permission of plaintiff till final disposal of the suit.

3) Both parties to bear their own costs.”

26. In so far as order below Exhibit 5 is concerned, the same has attained finality and the present issue is in respect of modification of Exhibit 5 order.

27. The order of Trial Court dated 6th February, 2012 below Exhibit “5” is premised on the reasoning that Survey No 69 A(P) is not yet demarcated by following due process of law. Subsequently, the Defendant No 16 applied for appointment of Deputy Superintendent of Land Records as Court Commissioner for carrying out survey and measurement of Survey No 69/A(P) and to prepare the map and file report. The said application came to be allowed and measurement of Survey No 69/A(P) was carried out. The order of Trial Court dated 18th February, 2017 allowing the application for appointment of Court Commissioner has held in paragraph 9 as under:

“On perusal of pleadings it reveals that plaintiffs have alleged encroachment on the suit properties and further disputed some boundaries. In view of this position and considering the nature of dispute and reliefs sought, I am of the view that application needs to be allowed. No prejudice will cause to any of the parties if the suit property No 1 is surveyed, measured and demarcated. In order to identify suit property No 1 and so as to resolve the dispute as to the boundaries, location and its identification the matter is required to be elucidate by appointing a Court Commissioner.”

28. Clause 4 of the operative part of order reads thus:

“4. The Court Commissioner is directed to conduct survey, measurement, demarcation of survey of land admeasuring 6615 sq yards of Survey No 69/A(P) and to submit his report on or before 11/04/2017.”

29. Accordingly, the Court Commissioner has surveyed the land admeasuring 6615 square yards of Survey No 69/A(P) and submitted its report. The map prepared by the Court Commissioner reflects the construction on Survey No 69/A(P) and the encroached portion of about 366 square meters on land not falling within Survey No 69/A(P). The direction of Trial Court to the Court Commissioner was to demarcate the land admeasuring 6615 square yards of Survey No 69/A(P), which has been done by the Court Commissioner.

30. The property relevant for our purpose is land admeasuring 5530.94 square meters equivalent to 6615 yards of Survey No 69/A(P). Paragraph 3 of the plaint describes the suit properties and in so far as Survey No 69 /A(P) at Tisgaon is concerned, the area is described as 95769.40 square meters. The pleading in paragraph 11 is that Survey No 69A/P was originally admeasuring approximately 1,10,000 square meters, and out of this total area, an area admeasuring 14,230.60 square meters came to be transferred to various persons with the consent and knowledge of the Plaintiff, which included Defendant No. 5, through whom present Defendant No 16 Appellant claims. It is further pleaded that after the above-referred transfers to various

persons, an area admeasuring 95,769.40 square meters continues to remain in exclusive possession and ownership of HUF comprising of Plaintiff and Defendant No. 1.

31. The injunctive reliefs are granted by the Trial Court in respect of *suit properties*, which excludes the area, which has been alienated with the consent and knowledge of the Plaintiffs. The injunctive reliefs would therefore operate in so far as Survey No 69A/P is concerned on an area admeasuring 95,769.40 square meters and which is in exclusive possession of Plaintiffs HUF. Even the restraint order against the planning authorities is in respect of the same properties. It was not even necessary for Defendant No 16 to challenge the injunction or seek modification as the property alienated in favour of Defendant No 5 was excluded from the suit.

32. The plaint pleads about illegal sub-division of Survey No 69A/P in 2007 and bifurcation of plot and it is claimed that the Defendant No 5 has got plans sanctioned on portion which is not identified and has encroached on another portion of property, without the alienated plots forming subject matter of the suit. The pleading itself describes the area of Survey No 69A/P as the area which continues to remain in possession of Plaintiff's HUF. Admittedly, the Defendant No 16 has commenced construction over the alienated portion and the said area is no longer in possession of Plaintiffs HUF. The Court Commissioner's

report identifies the said area, which is not in possession of the Plaintiffs and would stand outside partition.

33. The Plaintiffs are parties to the deed of conveyance on 23rd January, 1973 in favour of Defendant No 5 in respect of land admeasuring 6615 square yards described in the plan annexed to the conveyance and as described in the schedule. The basis for the injunction *qua* the Defendant No 5 was that Survey No 69/A(P) had not been demarcated by following due process of law. The Court Commissioner has thereafter duly surveyed, measured and demarcated the land admeasuring 6615 square yards of Survey No 69/A(P). As by virtue of the order of Trial Court, the land admeasuring 6615 square yards out of Survey No 69/A(P) has been surveyed, measured and demarcated by the Court Commissioner, the preparation of report and map by the Court Commissioner's report constitutes changed circumstances for exercising powers under Order 39 Rule 4 of CPC.

34. Even if the Court Commissioner's map is disputed by the Plaintiffs, the Plaintiffs have executed the conveyance deed with map annexed in the year 1973 identifying the area sold to Defendant No 5. There is implicit admission by the Plaintiffs that the Defendant No 5 is in possession of the area which has been alienated in his favour. There is an admission in the plaint of sub-division having been carried out and by the Court Commissioner's report, the area of 6615 square yards has now

been identified. The Plaintiffs do not claim any right over the land alienated in favour of Defendant No 5. The partition, if any, would take place in so far as Survey No 69/A(P) is concerned, in respect of area in exclusive possession of the Plaintiffs, which excludes the area in possession of the Defendant No 5 and consequently Defendant No 16.

35. It was pleaded in the application filed for appointment of Court Commissioner that the Defendants have completed construction of three slabs and have taken booking from various customers, and have invested huge amount in project, and third party rights have been created, and therefore, sought appointment of Deputy Superintendent of Land Records to carry out a survey and measurement of Survey No. 69A(P), which hardship has occurred after the order of injunction was passed.

36. The Trial Court dismissed the application, accepting the contention of the Plaintiffs that the allotted portion purchased by Defendant No. 5 is not sub-divided as per the report of Court Commissioner, and the excess land of 366 square meters, which is not part of Survey No. 69/A(P) being in possession of Defendant No. 16.

37. The absence of demarcation by due process of law was the basis for injunction and by appointment of Court Commissioner, the land was surveyed, measured and demarcated, which is due process of law. The Plaintiffs cannot be heard to say that the genuineness of the map is

disputed, when it pleads about suit property being area of Survey No 69A/P, which is in possession of Plaintiffs HUF. The map showing construction indicates the area being in possession of the Defendant No 16.

38. The Trial Court lost sight of its own order specifically directing the Court Commissioner to demarcate land admeasuring 6615 square yards of Survey No 69/A(P). Once the same has been done as per the order of Trial Court, the land stood demarcated and identified and the injunction was then required to be modified to the extent of the identified land. Even if the relief sought by the Defendant No 16 was for permission to carry out construction on the area identified by the Court Commissioner, the relief could have been moulded appropriately.

39. The subsequent development of identification of the land purchased by the Defendant No 5 was a change in circumstances necessitating modification of order dated 6th February, 2012. In so far as the encroached portion of 366 square meters is concerned, the submission of Mr. Datar is that no construction will be carried out in respect of the disputed portion.

40. There is another reason why the order of 6th February, 2012 needs to be modified. The provisions of Order 39 Rule 4 permits modification in the eventuality, the order causes undue hardship to the person. In my view, the present case is a fit case, where the injunction causes undue

hardship to the Defendant No 16. After having sold the property to the Defendant No 5 by registered conveyance deed alongwith map in the year 1973 and despite exclusion of the alienated property from the suit property, the Plaintiff's seeks to put shackles on the Defendant No 16's right to deal with their ownership property, on the specious plea of the same not being identified. If the area alienated in favour of Defendant No 5 was not identified, it is not clear as to how the Plaintiffs are identifying the balance area of Survey No 69A/P. The suit is of the year 2011 and even after 15 years and despite direction of this Court in the year 2017 that the suit be decided within two years, the suit is still at the stage of issues. The land admeasuring 6615 square yards, though not being the subject matter of the suit and having being sub divided in the year 2007 cannot be permitted to remain undeveloped till the final adjudication of the Plaintiffs rights. As the sale in the year 1973 is admitted, the partition would then be effected only in respect of balance portion of land apart from the land on which construction has been commenced by Defendant No 16.

41. Dealing with the citations relied upon by Mr. Kanade, in ***Madhavlal Narayanlal Pittie And Others vs Madhavlal Narayanlal Pittie And Others*** (supra), the Co-ordinate Bench held that the new matter must have such material bearing on the order passed earlier that it was possible that the Court would have decided the matter otherwise

had the material been pointed out to it earlier. This is precisely the case here as the entire basis of injunction was that the Defendant No 5's land was not identified, which now stands identified. If the Court Commissioner's report would have been on record, the report read with pleadings in the plaint, would have led to exclusion of Defendant No 5's plot from injunction.

42. There is no quarrel with the proposition of law enunciated in ***Pidilite Industries Limited vs Jubilant Agri And Consumer Products Limited*** (supra) and ***Sundaram Pillai And Others vs V. R. Pattabiraman And Others*** (supra).

43. In light of the above discussion, as the land alienated in favour of Defendant No 16 stands identified by the map prepared by the Court Commissioner, and the claim of partition by Plaintiffs is in respect of area which is in possession of Plaintiffs HUF, there is identification of Defendant No 5's land. The injunction order dated 6th February, 2012 is therefore required to be modified to exclude the land identified in the map of Court Commissioner. Hence the following order is passed:

ORDER:

(a) The Appeal from Order is allowed.

(b) The order dated 12th November, 2021 passed below Exhibit "226" rejecting the application for modification is hereby quashed and set aside.

(c) The order dated 6th February, 2012 passed below Exhibit "5" in Special Civil Suit No 309 of 2011 restraining the Defendant No. 5 from creating any third party rights or carrying out any development and restraining Defendant Nos. 13 and 14 from sanctioning any development plan without hearing the Plaintiffs and without written consent/permission of Plaintiffs is modified to exclude the land of Defendant No. 5 in respect of which development rights are given to Defendant No. 16, admeasuring 6615 square yards of Survey No 69/A(P) as identified in the Court Commissioner's map.

44. Interim Applications do not survive for consideration and stand disposed of.

[SHARMILA U. DESHMUKH, J.]