

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****CIVIL WRIT PETITION NO. 4797 OF 2013**

Shri Horace Kevin Gonsalves)
 Age : 42 years, Occ : Business, Adult,)
 a British citizen residing at G1 & G2,)
 Flushel Premises CHSL, 7th Floor,)
 21st Road, Khar (West), Mumbai – 400 052)
 and c/o. Mrs. Sheila T. Coutinho,)
 Sheltery, 30, St. Paul's Road, Bandra)
 (West), Mumbai – 400 050)

..... Petitioner
 (Orig. Applicant)

Versus

1. Miss Prabha Ganpat Borkar)
 Miss Prabha Dinesh Kannan)
 Age – 56 years, Occupation : Housewife,)
 presently residing at entire 7th Floor,)
 with terrace & closed garage/parking)
 space Flushel Apartments,)
 Plot no. 519/A-1/A-2, C.S.T. No. F/4-F/5,)
 21st Road, Bandra, Mumbai – 400050)
 also residing at 22, Shantivan, Andheri)
 (West), Mumbai – 400 058)

..... Respondent
 (Ori. Plaintiff)

2. M/s. Drego Enterprises)
 A Registered partnership firm,)
 Having its office at Hari Niwas, 30th Cross)
 Road, S.V. Road, T.P.S. III, Bandra,)
 Mumbai 400050)

..... Respondent
 (Ori. Defendants)

WITH
CIVIL APPLICATION NO. 2116 OF 2014
IN
CIVIL WRIT PETITION NO. 4797 OF 2013

Shri Horace Kevin Gonsalves)
Age : 42 years, Occ : Business, Adult,)
a Overseas Citizen of India and British)
citizen residing at G1 & G2,)
Flushel Premises CHSL, 7th Floor,)
21st Road, Khar (West), Mumbai – 400 052))
and c/o. Mrs.Sheila T.Coutinho,)
Sheltery, 30, St.Paul's Road, Bandra)
(West), Mumbai – 400 050) **..... Applicant**

IN THE MATTER OF :

Shri Horace Kevin Gonsalves)
Age : 42 years, Occ : Business, Adult,)
a Overseas Citizen of India and British)
citizen residing at G1 & G2,)
Flushel Premises CHSL, 7th Floor,)
21st Road, Khar (West), Mumbai – 400 052))
and c/o. Mrs.Sheila T.Coutinho,)
Sheltery, 30, St.Paul's Road, Bandra)
(West), Mumbai – 400 050) **..... Petitioner**
(Orig.Applicant)

Versus

1. Miss Prabha Ganpat Borkar)
nee Miss Prabha Dinesh Kannan)
Age – 58 years, Occupation : Housewife,)
presently residing at entire 7th Floor,)
with terrace & closed garage/parking)
space Flushel Apartments,)
Plot no.519/A-1/A-2, C.S.T. No.F/4-F/5,)
21st Road, Bandra, Mumbai – 400050)
also residing at 22, Shantivan, Andheri)
(West), Mumbai – 400 058) **..... Respondent**
(Ori.Plaintiff)

2. M/s.Drego Enterprises)
A Registered partnership firm,)
Having its office at Hari Niwas, 30th Cross))
Road, S.V.Road, T.P.S. III, Bandra,)

Mumbai 400050) **..... Respondent**
(Ori.Defendants)

AND
CIVIL WRIT PETITION NO. 11790 OF 2013

M/s.Drego Enterprises)
A Registered partnership firm,)
Having its office at Hari Niwas, 30th Cross)
Road, S.V.Road, T.P.S. III, Bandra,)
Mumbai 400050)
Current address c/o. Suzanne Drego,)
Age 44 years, Occupation : service,)
The authorized representative and the)
Constituted Attorney to the partners of)
the Petitioner firm above named, residing)
at Tonian, Plot No.358, First Floor,)
21st Road, TPS – III, Bandra (West),)
Mumbai – 400 050) **..... Petitioner**
(Ori. Petitioner)

V/s.

Miss Prabha Ganpat Borkar)
Miss Prabha Dinesh Kannan)
Age – 56 years, Occupation : Housewife,)
presently residing at entire 7th Floor,)
with terrace & closed garage/parking)
space Flushel Apartments,)
Plot no.519/A-1/A-2, C.S.T. No.F/4-F/5,)
21st Road, Bandra (West),)
Mumbai – 400050 also residing at 22,)
Shantivan, Andheri (West),)
Mumbai – 400 058) **..... Respondent**
(Ori.Plaintiff)

Ms.Archana Khan for the Petitioner in Writ Petition No. 4797 of 2013.

Mr.B.M.Chatterjee, Senior Advocate, i/b. Mr.Rahul Motkari for the Petitioner in Writ Petition No. 11790 of 2013 and for the Respondent no.2 in Writ Petition No.4797 of 2013.

Mr.S.K.Shinde, i/b. Mr.Omkar Nagvekar for the Respondent in Writ Petition No.11790 of 2013 and for Respondent no.1 in Writ Petition No.4797 of 2013.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 17th DECEMBER, 2014

PRONOUNCED ON : 28th JANUARY, 2015

JUDGMENT :

By Writ Petition No.4797 of 2013 filed by the petitioner, the petitioner has impugned the order dated 9th May, 2013 passed in Miscellaneous Application No. 20 of 2012 dismissing the application of the petitioner for staying the consent decree dated 14th September, 2012 and for other reliefs. The petitioner in Writ Petition No. 4797 of 2013 has filed civil application inter alia praying for appointment of the court receiver and for other reliefs in respect of the suit flats. The petitioner in Writ Petition No. 11790 of 2013 has impugned the order dated 17th June, 2013 passed by the trial court in Miscellaneous Application No. 4 of 2013 thereby rejecting the application filed by the petitioner for setting aside the consent terms and decree of consent terms both dated 16th September, 2012 obtained by the respondent Ms.Prabha Ganpat Borkar alias Ms.Prabha Dinesh Kannan. By consent of parties, both the petitions were heard together and are being disposed of by a common order. Some of the relevant facts pertaining to the subject matter of both these writ petitions and civil application are as under :-

2. I shall first summarise the relevant facts in the **Writ Petition No.4797 of 2013**. M/s.Drego Enterprises which was a registered partnership firm and which is the petitioner in Writ Petition No.11790 of 2013 constructed a building Flushel Apartment in the year 1973 consisting of ground plus 7 floors with total 14 flats, two flats on each floor. In the year 1975, Flushel Premises Co-op. Society Ltd.

was formed. Out of the 14 floors, the said M/s.Drego Enterprises had sold 12 flats save and except two flats on 7th floor which were retained to distribute and appropriate to its family members/property owners. It is the case of the petitioner that 1974 onwards all outgoings, electric bills, society bills, taxes were paid by the Drego family till the sale of the two flats and thereafter by the petitioner. By registered agreement for sale, the partners of Drego Enterprises conveyed the said two flats (hereinafter referred to as the suit premises) in favour of the petitioner and his sister on 16th November, 2006. It is the case of the petitioner that since November 2002 one of the partner of the said M/s.Drego Enterprises viz. Mr.Peter Drego went missing on his way to court at Goa. During the period between 2003 and 2006 various FIR's were registered against the ex-peon of the said firm Mr.Shamsuddin Kasamali Qureshi for forging documents, fabricating a forged power of attorney of Mr.Peter Drego and making forcible entry through front persons, to misappropriate valuable properties of the Drego family.

3. On 16th November, 2006 wife of the said Mr.Peter Drego who was one of the partner of the said M/s.Drego Enterprises entered into agreement for sale with the petitioner in respect of the said suit premises on the terms and conditions recorded in the said agreement. The said agreement for sale was registered. It is the case of the petitioner that the suit premises were transferred in favour of the petitioner by the said M/s.Flushel Co-op. Society Ltd. on 10th August, 2011. In the month of January 2012 share certificate in respect of the suit premises came to be transferred in favour of the petitioner by the said society.

4. It is the case of the petitioner that since January 2012 till the end of July 2012, the petitioner was occupying the suit premises with his parents and carried out repairs to the monsoon leakages at the behest of the society and joint inspection

of the repairs was conducted by the society, contractor and the petitioner.

5. On or about 14th August, 2012, respondent no.1 filed a Short Cause Suit No.1835 of 2012 in Bombay City Civil Court at Dindoshi against M/s.Drego Enterprises alleging that the said M/s.Drego Enterprises was threatening her of dispossession and her family members from the suit premises where she was alleged to have been residing since August 2002, i.e. since few months prior to the said Mr.Peter Drego went missing.

6. It is the case of the petitioner that on 16th August 2012, respondent no.1 moved for urgent ad-interim reliefs before Bombay City Civil Court in the notice of motion filed by her. The alleged constituted attorney of the said M/s.Drego Enterprises Mr.Shamsuddin Kasamali Qureshi appeared before the City Civil Court and consented for grant of ad-interim injunction against the said M/s.Drego Enterprises and in favour of the respondent no.1.

7. On 16th September, 2012, the respondent no.1 and the said Mr.Shamsuddin Kasamali Qureshi filed consent terms in the said suit thereby said M/s.Drego Enterprises allegedly agreed to grant various rights in favour of the respondent no.1 herein. It is the case of the petitioner that the said Mr.Shamsuddin Kasamali Qureshi who fraudulently claimed himself to be an alleged constituted attorney of the said M/s.Drego Enterprises did not file any power of attorney alleged to have been issued in his favour by Mr.Peter Drego. It is the case of the petitioner that no such power of attorney was even referred in the consent decree or the consent terms. There was no alleged power of attorney on the record of the City Civil Court.

8. It is the case of the petitioner that on 1st October, 2012 the respondent no.1

tried to break into the suit premises but was prevented by the society members. Some of the members and also the aunt who was the member of the society called the petitioner. The petitioner immediately rushed to India and lodged a complaint with Khar police station. The Honorary Secretary of the society and aunt of the petitioner also filed a complaint.

9. On 5th October, 2012, the petitioner filed Miscellaneous Application No.20 of 2012 in S.C.Suit No.1835 of 2012 and obtained permission to register the said miscellaneous application. On 6th October, 2012 the City Civil Court granted ad-interim reliefs in favour of the petitioner thereby staying the fraudulent consent decree, sealing the papers and issued directions to the police to investigate.

10. On 8th October, 2012 the concerned police station registered FIR No.329/2012 against respondent no.1, her husband Mr.Dinesh Kannan and Mr.Shamsuddin Kasamali Qureshi for offences of criminal trespass, forgery, theft, fabrication of documents and using the same for wrongful benefits. On 31st October, 2012 and 8th November, 2012, the learned Principal Sessions Court and Additional Chief Metropolitan Magistrate 9th Court at Bandra respectively rejected the anticipatory bail of respondent no.1 and her husband respectively.

11. On 3rd November, 2012 panchnama of the suit flat was carried out by the police. It is the case of the petitioner that all the articles of the petitioner and their family members including imported goods, christian faith religious literature and photos and photographs of Mr.Peter Drego and entire Drego family, old cupboard of Khira make full of several photo negatives of Drego family and gowns of Sharon, miscellaneous articles, wall attached furnitures were found inside the suit flat. On 22nd November, 2012, the respondent no.1 and her husband were released

on bail by Sessions Court. On 23rd November, 2012, learned Single Judge passed an injunction order restraining the respondent no.1 from entering into the suit flat and tempering with the evidence.

12. On 6th February, 2013, Mr.Shamsuddin Kasamali Qureshi filed an application for anticipatory bail before Sessions Court. The said application came to be rejected on 6th February, 2013. On 6th February, 2013, the trial court refused to adjourn the Miscellaneous Application No. 20 of 2012 which was filed by the petitioner and rejected the said application. By an order dated 1st March, 2013 passed in Writ Petition No.1624 of 2013 filed by the petitioner, the said order dated 6th February, 2013 passed by the trial court came to be set aside and the said writ petition was allowed and the matter was remanded back for re-hearing of the said Miscellaneous Application No. 20 of 2012.

13. Before the trial court in the said suit, M/s.Drego Enterprises through one of his partner Mr.Kenneth Drego also filed a separate Miscellaneous Application (4 of 2013) inter alia praying for setting aside the consent decree and for other reliefs. The said Miscellaneous Application No. 4 of 2013 filed by M/s.Drego Enterprises was heard alongwith Miscellaneous Application No.20 of 2012 which was filed by the petitioner. By an order dated 9th May, 2013 the learned trial judge dismissed the Miscellaneous Application No. 20 of 2012 which was filed by the petitioner and adjourned the Miscellaneous Application No.4 of 2013 to 12th June, 2013. On 9th May, 2013, the stay application made by the petitioner for continuation of the order dated 6th October, 2012 and 23rd November, 2012 was rejected by the learned trial judge.

14. On 10th May, 2013 the petitioner made further application for continuation of

the ad-interim order. The said application was partly considered by recording the undertaking of the respondent no.1 that she would not interfere with, remove, damage or touch the articles of the petitioner inside the suit flats.

15. Being aggrieved by the said order dated 9th May, 2013, the petitioner in Writ Petition No.4797 of 2013 filed the said writ petition for various reliefs. In the said writ petition, the petitioner has also applied for appointment of the court receiver and for other reliefs by filing a separate civil application (2116 of 2014) which civil application is also heard alongwith this writ petition.

RELEVANT FACTS OF CIVIL WRIT PETITION NO.11790 OF 2013

16. M/s.Drego Enterprises was constituted in the year 1973 and was a registered partnership firm constituted of three partners in 1973 with Mr.Peter Drego, Mr.Kenneth Drego and Ms.Mary D'souza. Mary D'souza expired in 1997 and the firm was reconstituted with four partners being Peter Drego, his wife Mrs.Jessica Peter Drego, Mr.Kenneth M.Drego and Ms.Kareena Drego. The suit premises continued to be retained by Drego family and all the outgoing of society was continued to be paid by Drego family till 2006.

17. It is the case of the petitioner that the partner Mr.Peter Drego got married to Jessica on 14th November, 1982 and after marriage the said Ms.Jessica Peter Drego was staying with her husband Mr.Peter Drego at the suit premises for more than 20 years. Since 16th November, 2002, Mr.Peter Drego a partner of Drego Enterprises went missing and could not be found. Senior Police Inspector issued a certificate declaring name of the said Mr.Peter Drego permanently missing on 28th January, 2011. Copy of the said certificate issued by the Senior Police Inspector has been annexed to the petition.

18. It is the case of the petitioner that at the end of 2005 and early 2006 distribution of the property took place and it was agreed by the family that suit premises be given to Fluda Theresa Gonsalves and as per the wish of Fluda Theresa Gonsalves, both the flats were conveyed to her children i.e. Horace Kevin Gonsalves and Sharon Lilian Gonsalves. However for the purpose of payment of stamp duty and registration, only one document by way of agreement for sale was executed.

19. On 16th November, 2006, the agreement for sale came to be executed in favour of the petitioner in Writ Petition No. 4797 of 2013 and Sharon Lilian Gonsalves under the said agreement, the suit premises were transferred and assigned to Sharon Lilian Gonsalves (flat G-1) and Horace Kevin Gonsalves (flat G-2). The said agreement was signed by Ms.Jessica Peter Drego on behalf of M/s.Drego Enterprises.

20. It is the case of the petitioner that since 2006 Sharon and Horace were in exclusive use, occupation and possession of the suit flat and had been paying society maintenance charges for the same. Flushel Society has already transferred shares and two flats Sharon Lilian Gonsalves (flat G-1) and Horace Kevin Gonsalves (flat G-2) in the AGM of the society held on 10th August, 2011. The society transferred shares in respect of the said two flats on 12th January, 2012.

21. It is the case of the petitioner that in the year 2012 when Horace and Sharon were not in India, the respondent no.1 trespassed into the suit premises forcibly and created havoc in the society. When the members of the society obstructed the entry of respondent no.1, the respondent no.1 produced a copy of the consent terms of the City Civil Court signed by the alleged constituted attorney of Mr.Peter Drego

and stating that the respondent no.1 was the true owner of the suit flat. The members of the society thereafter informed the said Horace and Sharon about this illegal act of the trespass of the said flat by the respondent no.1. The petitioner filed Miscellaneous Application No.4 of 2013 before the trial court in the said Short Cause Suit No.1835 of 2012 inter alia praying for setting aside decree on various grounds. The said application filed by the petitioner was heard by the trial court in Miscellaneous Application No.4 of 2013 before the trial court alongwith Miscellaneous Application No. 20 of 2012 filed by the petitioner in Writ Petition No.4797 of 2013. By a separate order passed by a trial court on 17th June, 2013, the trial court rejected the Miscellaneous Application filed by the petitioner. Being aggrieved by the said order, the petitioner filed a separate Writ Petition No.11790 of 2013 inter alia praying for setting aside the said order rejecting the miscellaneous application filed by the petitioner. Both the petitions were heard together by this court.

22. Ms.Khan, the learned counsel for the petitioner in Writ Petition No.4797 of 2013 submits that the then owner of the suit flats had transferred the suit flats in favour of the petitioner much prior to respondent No.1 filing a suit before the Bombay City Civil Court. The agreement executed between the petitioner and M/s.Drego Enterprise was duly registered. The society had already transferred the suit premises as well as the shares in favour of the petitioner. The respondent No.1 suppressed all these facts and without impleading the petitioner as a party defendant to the suit obtained a consent decree from the Bombay City Civil Court fraudulently. The petitioner thus had locus to apply for setting aside such consent decree fraudulently obtained by the respondent no.1 by committing a fraud upon the court. It is submitted that even when the panchanama was made pursuant to an

order passed by the learned trial court judge, it is not in dispute that the articles of the petitioner were found lying in the suit premises. The respondent no.1 and her husband were released by the Sessions Court. Anticipatory bail was rejected. Even the earlier order passed by the trial court rejecting the miscellaneous application filed by the petitioner has been set-aside by this court and the matter was remanded back for fresh consideration.

23. It is submitted by the learned counsel that the agreement on which the respondent no.1 placed reliance on allegedly executed the agreement in the year 1974 with respondent no.2 was itself fraudulent document. The said alleged agreement was not even registered. The respondent no.1 could not show any consideration alleged to have been paid in respect of the suit premises to the respondent no.2. The promoters had filed an application for registration of the society after the alleged execution of the agreement in favour of the respondent no.1. It is not in dispute that the suit premises were always shown in the name of the respondent no.2 from the year 1974 till 2002. The respondent no.1 could not show any proof of any payment alleged to have been made by the respondent no.1 to the society or showing any proof of making any application to the society for the membership. The respondent no.1 also could not produce any proof of showing her possession in respect of the suit flats from 1974 to 2002.

24. The learned counsel submits that since the date of the petitioner becoming member of the society in respect of the suit flats, admittedly the petitioner started paying all out-goings and other charges in respect of the suit flats to the society. The learned counsel submits that even the respondent no.2 in their separate application have disputed the receipt of any amount of Rs.1.00 lakhs as and by way

of consideration under the alleged agreement of 1974 or otherwise from the respondent no.1 in respect of the suit flats. The respondent no.1 did not produce any such document in the plaint.

25. It is submitted by the learned counsel that the respondent no.2 which is a registered partnership firm did not execute any power of attorney in favour of Mr.Samsuddin Quereshi. There was a fraud committed upon the court by the respondent no.1 and the said Mr.Samsuddin. The said Mr.Samsuddin fraudulently relied upon the said fabricated document. The said alleged power of attorney was not even filed along with the consent terms before the trial court. No copy of the said power of attorney was on record of the trial court. Even in the order passed by the trial court, there was no reference to the copy and/or the original of any such alleged power of attorney. The petitioner however, procured a copy of such alleged power of attorney which was relied upon by Mr.Samsuddin in some other proceedings. It is submitted that a perusal of the copy of the said power of attorney would indicate that the stamp paper was in the name of Jal Office. The signature of Peter Drego on the said alleged power of attorney does not tally with his other admitted signatures.

26. It is submitted by the learned counsel that since the petitioner had right, title and interest in the suit flats, the petitioner was entitled to protect his interest by making an application to the trial court and to bring to the notice of the court the fraud committed by the respondent no.1 upon the court by obtaining consent decree. It is submitted that if there is abuse of process of court, the court has implied power to prevent such abuse of process of law, as may be necessary for the ends of justice. It is submitted that such powers are not limited. Once it is brought to the notice of the court by even a third party that fraud is committed upon the

court, it is the duty of the court to interfere and to prevent the abuse of process of court for doing complete justice in the matter.

27. It is submitted by the learned counsel that under Order XXIII Rule 3, explanation, any agreement or compromise which is void or voidable under the Indian Contract Act, 1872 would not be deemed to be lawful within the meaning of the said rule. Under Order XXIII Rule 3-A, no suit is maintainable to set-aside a decree on the ground that compromise on which the decree is passed, was not lawful. It is submitted that the petitioner having interest in the subject matter of this suit and though was a necessary party to the suit was not impleaded as a party defendant and the respondent no.1 having committed fraud upon the court in respect of the subject matter of the suit in which the petitioner had interest, the petitioner had locus to challenge such decree obtained fraudulently and to bring to the notice of the court fraud committed by a party to the suit upon the court.

28. The learned counsel submits that since M/s.Drego Enterprises who was admittedly a party defendant in the suit before the trial court, had informed the court that the petitioner had right, title and interest in the suit properties, the trial court ought to have impleaded the petitioner as a party to the suit. The learned counsel placed reliance on section 44 of the Indian Evidence Act, 1872 and would submit that any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections 40, 41 or 42 is obtained by fraud or collusion. It is submitted that thus the petitioner though being not a party impleaded to the suit by the respondent no.1 before the trial court, was entitled to show by filing an application in the same proceedings that such decree was obtained by fraud or collusion by the parties to the suit.

29. The learned counsel also placed reliance on section 30 of the Bombay Stamp Act and would submit that admittedly no appropriate payment of stamp duty was made on the alleged power of attorney by the person making such instrument or even by respondent no.2. Such document was even otherwise inadmissible in evidence.

30. The learned counsel placed reliance on sections 18, 19(2)(c), 19(2)(g), 20, 21 and 22 of the Partnership Act, 1932 and would submit that even if Peter Drego had executed any such power of attorney in favour of Mr.Samsuddin, he being one of the partner could not have implied authority to transfer any immovable property belonging to the firm or could not have compromised or relinquished any claim or portion of a claim on behalf of the firm. He submitted that each and every partner of the firm is an agent of the firm and has to act in accordance with the powers and authorities under the partnership deed as well as under the provisions of the Partnership Act, 1932.

31. It is submitted that even under the said alleged power of attorney, there was no reference to the suit property which could have been dealt with by the alleged constituted attorney on behalf of the firm. The other partners of the said M/s.Drego Enterprise who are alive and were continued to be the partners no such alleged power of attorney could be executed without their consent. The learned counsel placed reliance on the provisions of the Power of Attorney Act and in particular section 2 thereof and would submit that there was no seal of M/s.Drego Enterprise on such alleged power of attorney and/or on that ground itself the said power of attorney could not have been enforced. The learned counsel placed reliance on the copy of the extract of the registration of firm of M/s.Drego Enterprise and would submit that admittedly the said firm had not been dissolved when the alleged

power of attorney was executed or even till date.

32. The learned counsel submits that Mrs. Jessica Drego, who was the wife of the said Peter Drego and who had executed an agreement in favour of the petitioner on behalf of M/s. Drego Enterprise had filed a complaint with the concerned police station of the said Peter Drego missing from Goa. The concerned police station had also certified that the said Peter Drego was missing and was not traceable. It is submitted that even if any such power of attorney was executed by Peter Drego, the same was not executed on behalf of M/s. Drego Enterprise and atmost it could have considered as if executed by the said Peter Drego in his personal capacity. It is submitted that even the alleged power of attorney was executed contrary to the provisions of the Partnership Act, 1932 and could not be acted upon.

33. The learned counsel invited my attention to the alleged power of attorney alleged to have been executed in the year 1996 and would submit that though the name of the Bombay was already changed to Mumbai one year prior to the date of execution of the alleged power of attorney, in the power of attorney the address mentioned of Peter Drego was of Bombay. It is submitted by the learned counsel that neither the said power of attorney was registered nor the consent terms which conferred the alleged rights in favour of the respondent no.1 was registered.

34. The learned counsel invited my attention to the various averments made in the plaint filed by the respondent no.1 before the trial court. It is submitted that the signature of Peter Drego was different on each page of the alleged agreement of 1974. The area of the flat mentioned was 1980 sq. ft. It is submitted that actually there were two flats and not one flat, as described in the agreement. The learned counsel submits that under the said consent terms, the respondent no.1 has alleged

to have paid further sum of Rs.2,60,000/- to M/s.Drego Enterprise. However, no such proof of any such alleged payment has been shown to the court. The concerned police station has already lodged FIR against the respondent no.1, her husband and Samsuddin.

35. The learned counsel for the petitioner submits that the respondent no.1 has alleged to have created further third party rights in respect of the suit flats in favour of her two cousin. Even those agreements sought to be relied upon by the respondent no.1 would clearly indicate that even those two agreements are fraudulent documents. The respondent no.1 has not produced any proof of any consideration received from those parties. One agreement relied upon by the respondent no.1 is an agreement of leave and licence in favour of one cousin and within a short span, another agreement is entered into i.e. agreement for sale in favour of another cousin. The learned counsel also invited my attention to the correspondence entered into between one of such cousin for seeking permission of the society for carrying out repairs. It is submitted that respondent no.1 having committed fraud upon the court, even those third parties who are claiming to be in possession of the suit flats are liable to be evicted by this court. No third parties who are beneficiaries of such fraud can be allowed to occupy the suit premises. The learned counsel submits that this is a fit case for appointment of a court receiver with a direction to take forcible possession from those third parties and to seal the premises till disposal of the suit.

36. Ms.Khan also placed reliance on some of the judgments delivered by the Supreme Court and this court that if any fraud is committed upon the court, the court has implied power to take appropriate steps and to pass appropriate orders under section 151 of the Code of Civil Procedure, 1908.

SUBMISSIONS OF THE PETITIONER IN W.P. NO.11790 OF 2013.

37. Mr.Chatterjee, the learned senior counsel for the petitioner submits that there was no agreement entered into between the petitioner and the respondent. Even the copy of the said alleged agreement of 1974 would indicate that the respondent was minor. The petitioner did not receive any consideration of Rs.1.00 lakh, as alleged in the said agreement. The learned senior counsel invited my attention to the consent terms filed by the respondent allegedly with the petitioner before the trial court and would submit that no alleged consideration of Rs.2,60,000/- alleged to have been paid by cheque or otherwise to the petitioner or has been received by the petitioner.

38. The learned senior counsel placed reliance on the reports submitted by the police pursuant to the police investigation carried out and would submit that even according to the said report, no cheque of Rs.2,60,000/- cleared in the account of the petitioner or was debited to the account of the respondent. The trial court did not consider the police report though such report was called for by the trial court. It is submitted that the alleged power of attorney, which was never executed by the suit firm in favour of Samsuddin and in any case was not on record of the trial court. The suit properties were not even mentioned in the alleged power of attorney. The alleged power of attorney was neither notarized, nor registered. The alleged signature on that alleged power of attorney was not even identified by any advocate.

39. It is submitted by the learned senior counsel that though the miscellaneous application was filed by one of the existing partner of the respondent and it was clearly so stated in the application itself, the trial court erroneously proceeded on

the premise that the application was filed by a retired partner of M/s.Drego Enterprise. The entire order is vitiated on that ground alone.

40. It is submitted that though the petitioner was a party to the suit admittedly, the trial court has erroneously proceeded on the premise that the petitioner was not a party to the suit and was a third party. The impugned order shows total non-application of mind on the part of the learned trial judge and shows patent illegality. It is submitted that there was no prohibition under Order XXIII Rule 3-A of the Code of Civil Procedure from making an application in the said suit for setting aside a decree obtained by fraud. On the contrary, filing of a suit for a declaration that such decree is unlawful is prohibited under the said provisions.

41. The learned senior counsel placed reliance on the judgment of the Supreme Court in ***S.P. Chengalvaraya Naidu vs. Jagannath, (1994) 1 SCC 1***, in support of his submission that any order obtained by fraud on court by any party is nullity. It is held that the person who comes to the court must come with clean hands and whose case is based on fraud, has no right to approach the court. He can summarily be thrown out at any stage of litigation.

Paragraphs 5 and 6 of the said judgment read thus :-

“5. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that “there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence”. The principle of “finality of litigation” cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to

the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

6. The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Ex. B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Ex. B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."

42. The learned senior counsel also placed reliance on the judgment of this Court in the case of ***Peter John D'Souza and others vs. Armstrong Joseph D'Souza, delivered on 28th March, 2014 in Miscellaneous Application No.69 of 2012 in Testamentary Petition No.722 of 2010*** and in particular paragraphs 8, 14,

15, 17, 19 and 20 and would submit that once fraud is brought to the notice of the court, even by a third party, it becomes the duty of the court to look into such allegations and to set-aside such order obtained by fraud by the parties to the proceedings.

Paragraphs 8, 14, 15, 17, 19 and 20 of the said judgment read as under :-

“8. Mr. Kumbhakoni, the learned senior counsel appearing on behalf of the respondent, on the other hand, raises issue of maintainability of these petitions on the ground that the petitioners in both the matters were admittedly not the legal heirs of the said deceased and did not have any caveatable interest, the question of effecting any service of citation or citing the petitioners in the petition for letters of administration did not arise. It is submitted that in any event both the petitioners are claiming title adverse to the alleged title of the deceased testator and thus could not have maintained any caveat and thus have no locus to file these petitions for revocation of the grant of succession certificate under Section 263 of the Act.

14. Insofar as the issue of locus standi raised by Mr. Kumbhakoni, learned senior counsel is concerned, Mr. Korde, learned senior counsel does not dispute that the petitioners are not the legal heirs of the said deceased. It is also not disputed that in the petitions filed by the petitioners, the petitioners have disputed the alleged title in respect of the deceased testator. The learned senior counsel, however, submits that even if this Court comes to the conclusion that the petitioners have no caveatable interest in the estate of the deceased, the petitioners are entitled to urge and bring to the notice of the Court that the letters of administration have been fraudulently obtained by the respondent by concealment of material facts.

15. In my view, Mr. Kumbhakoni, learned senior counsel is right in his submission that a party who has no caveatable interest and claims interest adverse to the alleged interest of the deceased testator could not have maintained a caveat. The question, however, that arises for consideration of this Court is that in case of a fraud, fabrication or concealment of facts, if brought to the notice of the

Court, whether the Court can suo moto revoke the grant, if satisfied that such concealment, fraud or fabrication is made by the party obtaining such grant ?

17. Be that as it may, in view of the fact that it is not in dispute that the deceased had left a Will in the year 1966, such fact is not having been disputed at least today by the respondent, whether such grant issued by this Court on the premise that the said deceased died intestate can be revoked suo moto or not ?

19. Even if the argument of Mr. Kumbhakoni, learned senior counsel is considered that on the date of filing of the petition for letters of administration, the respondent was not aware of any such Will left by the deceased testator and thus such statement came to be made in the petition for letters of administration is accepted, in view of the fact that there is no dispute that the said deceased left a Will and/or the same is discovered subsequently, such grant is liable to be revoked under Section 263(b) and (c) of the Act. A conjoint reading of illustrations (v) and (vi) to Section 263 of the Act makes it clear that even after the administration of the estate, if the Will is discovered subsequently, such grant is liable to be revoked.

20. I am not inclined to accept the submission of Mr. Kumbhakoni, learned senior counsel that merely because there was no specific bequest in the Will of the deceased in respect of the plots in which the petitioners claim interest, the petitioners cannot be even allowed to urge and bring to the notice of this Court the fact of fraud, fabrication or concealment. In my view, Court can take cognizance of the allegation of fraud, fabrication or concealment even at the instance of a party who claims even a slightest interest in the property of the deceased. Once the allegation of fraud, fabrication or concealment is brought to the notice of the Court, which is alleged to have been committed by the opposite party for obtaining letters of administration from a Court, it becomes the duty of the Court to look into such allegation whether any grant of letters of administration is obtained by a party from the Court by practicing fraud, fabrication or concealment. The Court can take cognizance of such allegation suo moto and if it comes to the conclusion that the grant is obtained fraudulently or by making false suggestion or by concealment of such fact, it is duty

of Court to set aside such grant.”

43. The learned senior counsel also placed reliance on the judgment of this Court delivered on 6th May, 2014 in Notice of Motion No.765 of 2009 Suit No.4816 of 2000, in the case of ***Chandrabhan Chunilal Agarwal vs. Sharad by son of Ramgopal Radhavallabh Agarwal & Ors.*** and in particular paragraphs 71, 72 and 73, which read as under :-

“71. In so far as submissions of the learned counsel for the intervener that the defendants and the plaintiff are trying to convert the notice of motion as suit for possession against the intervener and the same are thus not maintainable is concerned, in my view since the fraud is committed by the plaintiffs and the intervener on this court, this court has power to recall any such orders passed by this court which are obtained by any party fraudulently and by committing fraud upon this court by exercising inherent powers. Separate suit for setting aside such orders obtained by committing fraud is not required. In my view, such orders can be set aside and/or recall in the notice of motion in the same suit.

72. From the judgments referred to and relied upon by Mr.Kanuga, learned counsel appearing for the legal heirs of the original defendant referred to aforesaid following statements of law can be culled out :-

(a) Any judgment or order obtained by fraud cannot be said to be a judgment or order in law and such judgment decree or order is nullity and non est in the eye of the law and can be challenged even in collateral proceedings.

(b) Fraud is an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. Fraud is an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. A person whose case is based on falsehood has no right to approach the court and can be summarily thrown out at any stage of the litigation.

(c) Court or tribunal is not powerless to recall its own order if convinced that such order was obtained by committing fraud or

misrepresentation of such a dimension as would affect the very basis of the claim.

(d) An order obtained by practicing or praying fraud is non-existent and cannot be allowed to stand by the court at first instance or by the final court.

(e) If it is held that an order, judgment or decree are obtained by reason of commission of a fraud, all subsequent proceedings taken pursuant thereto also are void and nullity and it would not be equitable to confer a benefit on a party who is a beneficiary thereunder.

73. In my view the record clearly indicates that the plaintiff as well as the intervener are the beneficiaries of this fraud committed upon the court and are liable to be thrown out from the premises in their respective possession obtained by committing a fraud on this court in this notice of motions itself. The intervener admittedly claims to be in possession of the entire property though part of it was not even subject matter of the suit. The intervener was fully involved in the entire fraud jointly with the plaintiff. I am thus not inclined to accept the submissions of Mr. Deshmukh, learned counsel appearing for the intervener that no order can be passed by this court against the intervener, he being neither party to the suit prior to such orders having been passed by this court nor after such orders are passed.”

44. Per contra, Mr. Shinde, learned counsel for the respondent, in so far as the Writ Petition No.4797 of 2013 is concerned, would submit that the petitioner had no locus to file any application before the trial Court under Section 151 of the Code of Civil Procedure, 1908 and under any other provisions. It is submitted that the Court has no power to take recourse to section 151 to set aside the consent decree. My attention is invited to the provisions of Order XXIII Rule 3 and Order XXIII Rule 3A and it is submitted that when the proviso to Order XXIII Rule 3 was inserted w.e.f. 1st February 1997 and the Order XXIII Rule 3A was also inserted by the Legislature, Order XLIII Rule 1 Clause (m) came

to be deleted. It is submitted by the learned counsel that proviso to Order XXIII Rule 3 applies only to a party to the suit and not to a third party. In view of prohibition under Order XXIII Rule 3A, the parties are prohibited from filing a suit even if the decree is unlawful. The said provision is thus available only to a party to the suit and not to an outsider.

45. It is submitted that the petitioner admittedly not being a party to the suit and/or the consent decree was not prohibited from filing a separate suit for alleging fraud, if any, committed by the party to the suit in obtaining the consent decree. It is submitted by the learned counsel that even the party to a decree cannot invoke the provisions under Section 151 of the Code of Civil Procedure, 1908. No appeal shall lie against a consent decree under Section 96(3) of the said Code. Order and decree are separately defined under Section 2(14) and 2(2) respectively. Section 151 of the said Code cannot be invoked to set aside a decree even if obtained by fraud.

46. It is submitted that Section 151 of the said Code does not confer any substantive right on parties, but is meant to get over the difficulties arising from rules of procedure. Section 151 does not give any right to any party to make an application but it gives power to the Court to pass such orders as it thinks fit. Section 151 is really intended to prevent Courts from being rendered impotent by any omission in the Code; but it is not intended to override the main enactment of the law. It is submitted that the Code of Civil Procedure does not affect the power and duty of a Court where no specific rule exists to act according to justice, equity and good conscience, though in exercise of such power, it must be careful to see that its decision is based on the sound general principles of law and is not in conflict with them or the intention of the Legislature. It is submitted

that inherent powers of the Court cannot override the expressed provision of law. Section 151 of the said Code does not invest the Court with jurisdiction over matters which are excluded from its cognizance. This Court cannot exercise inherent power if the applicant has another remedy provided elsewhere in the Code of Civil Procedure but has neglected to avail himself such remedy. This Court cannot exercise inherent power so as to come in conflict with the general principles of law.

47. It is submitted that the inherent power of the Court is in addition to and complementary to the powers expressly conferred under the Code of Civil Procedure but such powers cannot be exercised if its existence is inconsistent with or comes into conflict with any of the powers expressly or by necessary implication conferred by the other provisions of the Code. Section 151 of the said CPC is an enabling section.

In support of the aforesaid submissions, learned counsel placed reliance on the following judgments:-

- 1) ***Pushpa Devi Bhagat (dead) through L.R. Vs. Rajinder Singh and Ors.***, reported in (2006) 5 Supreme Court Cases 566;
- 2) ***Daljit Kaur and Anr. Vs. Muktar Steels Pvt. Ltd. & Ors.***, reported in 2014 (2) SCJ 128;
- 3) ***Arjun Singh Vs. Mohindra Kumar & Ors.***, reported in (1964) 5 SCR 946; and
- 4) ***Padam Sen & Anr. Vs. State of Uttar Pradesh***, reported in (1961) 1 SCR 884.

48. Reliance is placed on paragraphs 16 and 17 of the judgment in the case of

Pushpa Devi Bhagat (dead) through L.R. Vs. Rajinder Singh and Ors.

(supra) which read thus :-

“16. Section 96 provides for appeals from original decrees. Sub-section (3) of Section 96, however, provided that no appeal shall lie from a decree passed by the court with the consent of the parties. We may notice here that Order 43 Rule 1 (m) of CPC had earlier provided for an appeal against the order under Rule 3 Order 23 recording or refusing to record an agreement, compromise or satisfaction. But Clause (m) of Rule 1 Order 43 was omitted by Act 104 of 1976 with effect from 1.2.1977. Simultaneously, a proviso was added to Rule 3 Order 23 with effect from 1.2.1977. We extract below the relevant portion of the said proviso:

“Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the court shall decide the question;”

Rule 3A was also added in Order 23 with effect from 1.2.1977 barring any suit to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

17. The position that emerges from the amended provisions of Order 23, can be summed up thus:

(i) No appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) CPC.

(ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of Clause (m) Rule 1 Order 43.

(iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3A.

(iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 of Order 23.

Therefore, the only remedy available to a party to a consent decree to

avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree, is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21.8.2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27.8.2001), filed an appeal and chose not to pursue the application filed before the court, which passed the consent decree. Such an appeal by second defendant was not maintainable, having regard to the express bar contained in Section 96(3) of the Code.”

49. Reliance is placed on paragraph 14 of the judgment in the case of **Daljit Kaur and Anr. Vs. Muktar Steels Pvt. Ltd. & Ors. (supra)** which reads thus :-

*“14. The pivotal issue that arises for consideration is whether in the present case the appeal could have been preferred against the judgment and decree passed by the learned trial Judge. As is evincible, the lower appellate court as well as the High Court has placed reliance on **Pushpa Devi Bhagat** (supra) to come to hold that the appeal was not maintainable. In **Pushpa Devi Bhagat** (supra) a two-Judge Bench, dealing with a contention canvassed for the first time before this Court that the appeal before the first appellate court or before the High Court was not maintainable as there was a consent decree, permitted the contention to be raised and heard both parties on that score. In the context, it referred to Rules and of Order XXIII and analyzing the said provisions summed up the statement of law emerging from Order that (i) no appeal is maintainable against a consent decree having regard to the specific bar contained in Section Code of Civil Procedure; (ii) no appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of Clause (m) of Rule Order XLIII; (iii) no independent suit can be filed for setting*

aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3-A; and (iv) a consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule Order XXIII. Thereafter the learned Judges proceeded to state thus:

“...the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second Defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21.8.2001 by alleging that there was no valid compromise in accordance with law. For reasons best known to herself, the second Defendant within a few days thereafter (that is on 27.8.2001) filed an appeal and chose not to pursue the application filed before the court which passed the consent decree. Such an appeal by the second Defendant was not maintainable, having regard to the express bar contained in Section of the Code.”

50. Reliance is placed on paragraph 20 of the judgment in the case of **Arjun Singh Vs. Mohindra Kumar & Ors. (supra)** which reads thus :-

“20. On this submission, which we might mention has been urged for the first time in this court, the first question that arises is whether the Court has the inherent jurisdiction which learned counsel contends that it has. For the purpose of the discussion of the question in the context of the relevant provisions of the Code, it is unnecessary to embark on any detailed or exhaustive examination of the circumstances and situations in which it could be predicated that a Court has the inherent jurisdiction which is saved by Section 151 of the Civil Procedure Code. It is sufficient if we proceed on the accepted and admitted limitations to the existence of such a jurisdiction. It is common ground that the inherent power of the Court cannot override the express provisions of the law. In

other words, if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates. We shall confine our attention to the topic on hand, namely applications by defendants to set aside *ex parte* orders passed against them and reopen the proceedings which had been conducted in their absence. Order IX, Rule 1 requires the parties to attend on the day fixed for their appearance to answer the claim of the defendant. Rule 2 deals with a case where the defendant is absent but the Court from its own record is apprised of the fact that the summons has not been duly served on the defendant in order to acquaint him with the proceedings before the Court. Rule 2 contains a proviso applicable to cases where notwithstanding the absence of service of summons, the defendant appears. Rule 3 deals with a case where the plaintiff alongwith the defendant is absent when the suit is called on and empowers the Court to dismiss the suit. Rule 5 deals with a case where the defendant is not served properly and there is default on the part of the plaintiff in having this done. Having thus exhausted the cases where the defendant is not properly served, Rule 6(1)(a) enables the Court to proceed *ex parte* where the defendant is absent even after due service. Rule 6 contemplates two cases : (1) The day on which the defendant fails to appear is one of which the defendant has no intimation that the suit will be taken up for final hearing for example, where the hearing is only the first hearing of the suit, and (2) where the stage of the first hearing is passed and the hearing which is fixed is for the disposal of the suit and the defendant is not present on such a day. The effect of proceeding *ex parte* in the two sets of cases would obviously mean a great difference in the result. So far as the first type of cases is concerned it has to be adjourned for final disposal and, as already seen, it would be open to the defendant to appear on that date and defend the suit. In the second type of cases, however, one of two things might happen. The evidence of the plaintiff might be taken then and there and judgment might be pronounced. In that case Order IX, Rule 13 would come in. The defendant can, besides filing an appeal or an application for review, have recourse to an application under Order IX, Rule 13 to set aside the *ex parte* decree. The entirety of the evidence of the plaintiff might not be

concluded on the hearing day on which the defendant is absent and something might remain so far as the trial of the suit is concerned for which purpose there might be a hearing on an adjourned date. On the terms of Order IX, Rule 7 if the defendant appears on such adjourned date and satisfies the Court by showing good cause for his non-appearance on the previous day or days he might have the earlier proceedings recalled - "set the clock back" and have the suit heard in his presence. On the other hand, he might fail in showing good cause. Even in such a case he is not penalised in the sense of being forbidden to take part in the further proceedings of the suit or whatever might still remain of the trial, only he cannot claim to be relegated to the position that he occupied at the commencement of the trial. Thus every contingency which is likely to happen in the trial vis-a-vis the non-appearance of the defendant at the hearing of a suit has been provided for and Order IX, Rule 7 and Order IX, Rule 13 between them exhaust the whole gamut of situations that might arise during the course of the trial. If, thus, provision has been made for every contingency, it stands to reason that there is no scope for the invocation of the inherent powers of the Court to make an order necessary for the ends of justice. Mr.Pathak however, strenuously contended that a case of the sort now on hand where a defendant appeared after the conclusion of the hearing but before the pronouncing of the judgment had not been provided for. We consider that the suggestion that there is such a stage is, on the scheme of the Code, wholly unrealistic. In the present context when once the hearing starts, the Code contemplates only two stages in the trial of the suit : (1) Where the hearing is adjourned or (2) where the hearing is completed. Where the hearing is completed the parties have no further rights or privileges in the matter and it is only for the convenience of the Court that Order XX, Rule 1 permits judgment to be delivered after an interval after the hearing is completed. It would, therefore, follow that after the stage contemplated by Order IX, Rule 7 is passed the next stage is only the passing of a decree which on the terms of Order IX, Rule 6 the Court is competent to pass. And then follows the remedy of the party to have that decree set aside by application under Order IX, Rule 13. There is thus no hiatus between the two stages of reservation of judgment and pronouncing the judgment so as to make it necessary for the Court to afford to the party the remedy of getting orders passed on the lines of Order IX, Rule 7. We are, therefore, of the opinion that the Civil Judge was not competent to entertain the application dated May 31, 1958 purporting to be under Order IX, Rule 7 and that consequently the

reasons given in the order passed would not be res judicata to bar the hearing of the petition under Order IX, Rule 13 filed by the appellant.”

51. Reliance is placed on paragraph 8 of the judgment in the case of **Padam Sen & Anr. Vs. State of Uttar Pradesh (supra)** which reads thus :-

“8. Section 151 of the Code reads :

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court".

The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in Section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. It is also well recognized that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code.”

52. Learned counsel submits that Mr. Peter Drego, who was an acting partner of M/s.Drego Enterprises, had implied authority to represent the firm and to execute power of attorney in favour of a third party to represent them and take an action on behalf of the firm under Sections 18 and 19 of the Indian Partnership Act, 1932. In support of this submission, learned counsel placed reliance on the following judgments:-

- 1) J.J.L.B. Engineers and Contractors through its partner Balabeersingh Vs. Manmohan Harijinder & Associates & Anr.,** reported in **2001 (3) Bom.C.R. 577;** and
- 2) Sanganer Dal and Flour Mill Vs. F.C.I. and Ors.,**

reported in **(1992) 1 Supreme Court Cases 145.**

53. Reliance is placed on paragraph 8 of the judgment in the case of **J.J.L.B. Engineers and Contractors through its partner Balabeersingh (supra)** which reads thus :-

“8. Section 19(2)(a) of the Partnership Act clearly provides that in the absence of any usage or custom of trade to the contrary the implied authority of the partner does not empower him to submit a dispute relating to the business of the firm to arbitration. There is no dispute that the matter which was referred to the arbitration was relating to the business of the appellant's firm. Clause 14 of the Partnership Deed of the appellant empowers four partners of the firm including Bhupindersing to sign tender documents, receive cheques and payments etc. from the department and also to enter into correspondence with others for and on behalf of the firm. There cannot be and there is also no dispute that Bhupindersing was entitled to enter into correspondence with others on behalf of the appellant firm. The point is whether Clause 14 of the Partnership Deed empowers partners and more particularly Bhupindersing to refer a dispute in relation to the business of the firm to Arbitration on behalf of the firm. Plain reading of Clause 14 of the Deed discloses that Bhupindersing was certainly entitled to execute tender documents and have dealings with the department. The department is none other than the Government department as the firm had dealings with the Government department in relation to the canal work. Clause 14 further empowers Bhupinder Singh to enter into correspondence with others for and on behalf of the firm.”

54. Reliance is placed on paragraph 3 of the judgment in the case of **Sanganer Dal and Flour Mill Vs. F.C.I. and Ors. (supra)** which reads thus :-

“3. The High Court found that Satya Narain has implied power to conduct business on behalf of the partnership firm and the implied authority binds all the partners. Section 18 of the Partnership Act postulates that "subject to the provisions of the Act a partner is the agent of the firm for the purposes of the business of the firm". Section 19(1) adumbrates that "subject to the provisions of Section 22 the act of the partners which is done to carry on in the usual way the business of the

kind carried on by the firm, binds the firm". Thus, Satya Narain has implied authority to enter into the contract with the corporation to supply the Dal of 1000 quintals at the contracted rate which is the usual course of the business of the appellant. But it is settled law that the operation of Sections 18 & 19(1) is subject to the exceptions engrafted in Sub-section (2) of Section 19. Section 19(2)(a) provides that in the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to submit a dispute relating to the business of the firm to arbitration. Satya Narain has power to do business on behalf of the firm and in exercise thereof he entered into the contract with the corporation during the usual control of business to supply the Dal. Then crucial question is whether a valid contract which was not repudiated as per law, binds the other partners? Our answer is yes. It is not in dispute that the contract engrafts an arbitration clause and in terms thereof the dispute is to be referred to the arbitration. Therefore, the reference made by the Addl. District Judge under Section 20 of the Arbitration Act is perfectly within the jurisdiction and in terms of the contract. It is not the case of the partners that the firm is not carrying on the business of the supply of Dal and that Satya Narain, as found by the Trial Court, was authorised to do business on behalf of the firm."

55. It is submitted that the learned trial Judge has rightly rendered a finding that M/s. Drego Enterprises was not in existence. Learned counsel submits that though the firm technically continued to be in existence and the petitioner in Writ Petition No.11790 of 2013 continued to be a partner of the said firm, the fact remains that the said firm was defunct. Other partners had already left India for decades. Mr. Peter Drego was thus authorised to execute power of attorney. Various correspondence were placed on record which were alleged to have been exchanged between the said Mr. Peter Drego and respondent no.1 regarding the suit flats. It is submitted by the learned counsel that the ad-interim order passed by this Court against the respondent no.1 was vacated on 29th October 2013. The respondent no.1 has already created third party rights in respect of the suit flat and has also entered into a Leave and License Agreement and Agreement for

Sale thereof. My attention is invited to copies of such two alleged agreements forming part of the record. Learned counsel submits that both the parties who are parties to the agreements are cousin of respondent no.1. The person who has purchased the suit premises from respondent no.1 is in possession of the suit flat. Learned counsel after few minutes, when the learned counsel for the petitioner started her rejoinder arguments, made a statement that both the parties to the said two agreements were in joint possession. When the Court inquired whether the respondent no.1 possesses any copy of the power of attorney which was used by Mr. Shamsuddin for the purpose of filing consent terms and vakalatnama in the City Civil Court, the learned counsel stated that his client did not have any such power of attorney.

56. In so far as the submission made by the learned senior counsel for the petitioner in Writ Petition No.11790 of 2013 is concerned, learned counsel for respondent no.1 would submit that the petitioner had not laid any foundation for filing proper proceedings. The impugned order passed on such application thus cannot be impugned by invoking Article 227 of the Constitution of India. It is submitted that even the petitioner in Writ Petition No.11790 of 2013 had invoked Section 151 of the Code of Civil Procedure and had mentioned the said provision in the application made before the trial Court. The petitioner did not mention even in the writ petition that the said miscellaneous application filed before the trial Court by the petitioner was under Order XXIII Rule 3A of the CPC.

57. Learned counsel submits that in so far as the submission made before the police officer in support of the submission that a cheque of Rs.2,60,000/- was not cleared is concerned, the said submission made before the police officer under

Section 161 of the Code of Criminal Procedure, 1973 is not admissible except to the extent of pointing out contradictions. No such reliance thus can be placed by the petitioner on such statement made before police officer. It is submitted that the learned trial Judge, therefore, rightly did not consider any such statement made before the police officer.

58. In so far as the judgment relied upon by Mr.Chatterjee, learned senior counsel for the petitioner in Writ Petition No.11790 of 2013 is concerned, learned counsel made an attempt to distinguish the said judgment. In so far as the judgment of this Court in the case of ***Peter John D'Souza (supra)*** is concerned, it is submitted that in that judgment, this Court considered the powers of testamentary Court under Section 263 (b) and (c) of the Indian Succession Act, 1925 which are the enabling provisions. It is submitted that in view of the admitted position that the Will was suppressed though the same was within the knowledge of the respondents, this Court exercised powers and set aside the grant. The facts of this case, however, are different. In so far as the judgments of this Court in the cases of ***Chandrabhan Chunilal Agarwal (supra)*** is concerned, learned counsel submits that the facts before this Court in the said judgment is totally different and not applicable to the facts of this case.

59. In rejoinder, Mr. Chatterjee, learned senior counsel appearing for the petitioner in Writ Petition No.11790 of 2013 submits that none of the judgments relied upon by the learned counsel for respondent no.1 deals with the allegations of fraud. Learned counsel distinguished the judgment of the Supreme Court in the case of ***Pushpa Devi Bhagat (dead) through L.R. Vs. Rajinder Singh and Ors. (supra)*** relied upon by Mr.Shinde, learned counsel for respondent no.1 on the ground that the respondents in that case were holding possession of that

property.

60. Learned senior counsel invited my attention to the observations made by the learned trial Judge and in particular paragraph 28 thereof and submits that the entire premise of the order that intervener was not a party to the suit and therefore, it could not make any grievance for fraud at this stage after disposal of the suit, is ex facie perverse. The miscellaneous application for intervention and for setting aside the decree obtained by fraud by respondent no.1 upon the Court was filed not by an individual but was filed by the firm which was admittedly defendant to the said suit filed by respondent no.1. It is submitted that the learned trial Judge erroneously carried an impression that the petitioner was a third party and was not a party to the suit. The learned senior counsel submits that it was not an admitted position that all the partners of the petitioner firm retired from the firm or that only Mr. Peter Drego was actively involved in the affairs of the firm. The firm was not admittedly dissolved.

61. It is submitted that no sooner the petitioner came to know about the fabricated power of attorney acted upon by Mr. Shamsuddin in collusion with respondent no.1 and based on such power of attorney, a consent decree has been obtained fraudulently by respondent no.1 by committing a fraud upon the Court, the petitioner has taken an action against Mr. Shamsuddin as well as the respondent no.1. Learned senior counsel invited my attention to the observations made by the learned trial Judge in paragraph 33 of the impugned order and submits that on one hand, the learned trial Judge had held that the petitioner had no locus to file any application for intervention or for setting aside the consent decree on the ground of fraud and on the other hand, the learned trial Judge has erroneously held that in absence of particulars of fraud or deception, merely by submitting

that the power of attorney is forged, it could not be held that the fraud is played upon the Court and on the said fraud, order of decree shall be set aside. It is submitted that the application for intervention has been dismissed by the learned trial Judge on the ground that a stranger cannot interfere or intervene in the application for setting aside the decree under Order XXIII Rule 3 of the CPC. Though the petitioner was a party-defendant to the suit, the learned trial Judge rejected the said application on the ground that the petitioner was a stranger to the suit and could not apply for setting aside the consent decree.

62. Ms. Khan, learned counsel for the petitioner in Writ Petition No.4797 of 2013 in rejoinder submits that the petitioner had not applied for intervention and for appropriate reliefs on the ground that the respondent no.1 had committed a fraud upon the petitioner but applied on the ground that the respondent no.1 had obtained such consent decree fraudulently by practicing a fraud upon the court and abused the process of Court. It is submitted that Section 151 of the CPC is thus clearly attracted to the facts of this case. It is submitted that any person can bring to the notice of the Court about the fraud committed upon the Court by a party to the suit. In this case, the petitioner had right, title and interest in the suit property and was seriously prejudiced by fraud committed upon the Court by respondent no.1. It is submitted that all the benefits of such fraud have gone to the respondent no.1 who was a party to the fraud committed upon the Court. Under Section 151 of the CPC, the Court can stop any mischief on the Court. The powers of the Court are not curtailed but expanded to prevent mischief with a view to do a complete justice in the matter.

63. Learned counsel submits that if the consent decree is obtained by committing fraud upon the Court, Order XXIII Rule 3 does not come in picture.

On the allegations of the respondent no.1 that whether Mr. Sikandar Suleman Loladia, cousin of respondent no.1, the alleged purchaser of the suit property under Agreement for Sale dated 27th December 2013 was in possession of the suit flat or not, learned counsel invited my attention to a letter dated 19th August 2014 addressed by the alleged licensee of the suit property to the Society which letter was addressed much after execution of the alleged agreement dated 27th December 2013 claiming possession of the suit property. When this letter was pointed out by the learned counsel for the petitioner, learned counsel for the respondent no.1, on instructions from his client who was present in Court, made a statement that though the statement was made earlier during the course of his arguments that the alleged purchaser under Agreement for Sale dated 27th December 2013 was in possession of the suit property, the suit property was in joint possession of the alleged purchaser and the alleged licensee.

64. Learned counsel submits that under both these alleged agreements relied upon by respondent no.1 in support of her allegations that she has already created third party in respect of the suit property are ex facie fabricated and executed fraudulently to cause serious prejudice to the petitioner. It is submitted that the value of the suit property as on today is more than Rs.10 crores whereas, the payment alleged to have been received by respondent no.1 in respect of the suit property is about Rs.15 lacs. It is not the case of respondent no.1 that the earlier agreement of leave and license which was to be valid till 2016 was terminated before execution of Agreement for Sale dated 27th December 2013. The respondent no.1 has violated the status-quo order passed by this Court. In these circumstances, the learned counsel submits that to preserve the valuable property which is subject matter of these proceedings, it would be appropriate, if the Court Receiver of this Court is appointed with all powers to take forcible possession of the suit property from the alleged licensee, the alleged purchaser,

from respondent no.1 or anybody else found in possession of the suit property and the suit premises be directed to be sealed.

REASONS AND CONCLUSIONS

65. With the assistance of the learned counsel appearing for the parties, I have gone through the records and proceedings of this matter. The annexures to the proceedings filed and compilation filed in this proceedings were forming part of the record before the learned trial judge. The question that arises for consideration of this court is whether there was any prima facie substance in the allegations of fraud made by the petitioners in both the writ petitions before the learned trial judge played upon the court by respondent no.1 in collusion with the alleged constituted attorney of Mr.Peter Drego or not. The question that also arises for consideration is whether the learned trial court could have taken cognizance of such allegations of fraud committed upon the court and could have set aside the consent decree obtained by respondent no.1 from the trial court based on such fabricated and fraudulent documents in the applications filed by the petitioners.

66. I will now deal with some of the pleadings and documents referred to by both the parties in the proceedings to find out whether there was any substance in the allegations of fraud made by the petitioners in both the writ petitions played upon the court by the respondent no.1 in obtaining the consent decree from the trial court.

67. A perusal of the plaint filed by the respondent no.1 before the trial court indicates that the respondent no.1 had filed a suit inter alia praying for the order and injunction against M/s.Drego Enterprises from in any manner entering into and remaining upon the suit premises and/or from in any other manner interfering with

or disturbing alleged physical possession of the respondent no.1 in respect of the suit premises and/or from dispossessing the respondent no.1 and/or her family members from the suit premises otherwise then by due process of law. A perusal of the plaint indicates that it was the case of the respondent no.1 that she had been in use occupation and possession of the suit premises.

68. According to the respondent no.1, on 20th August, 1974 M/s.Drego Enterprises had sold to the respondent no.1 the suit premises for the consideration of Rs.1,10,000/-. The respondent no.1 had alleged to have paid a sum of Rs.1 lakh to the said M/s.Drego Enterprises leaving balance of Rs.10,000/- to be paid by respondent no.1 to the said M/s.Drego Enterprises. It was the case of the respondent no.1 that she called upon the said M/s.Drego Enterprises for possession from time to time but the possession was not handed over in respect of the suit premises to her. The respondent no.1 placed reliance on the letter dated 5th August, 2002 alleged to have addressed by the said M/s.Drego Enterprises stating that a sum of Rs.2,60,000/- was due and payable by the respondent no.1 to the said firm and that the possession of the premises would be handed over to her shortly.

69. It was the case of the respondent no.1 that on 15th August, 2002, the respondent no.1 made payment in the sum of Rs.2,60,000/- as alleged to have been demanded by the said M/s.Drego Enterprises. The respondent no.1 also placed reliance upon the receipt dated 1st September, 2002 alleged to have been issued by the said M/s.Drego Enterprises through Mr.Peter Drego. It is alleged by the respondent no.1 that she thereafter collected from the said M/s.Drego Enterprises the keys of the suit premises and took possession of the suit premises and since then she had been in use, occupation and possession of the suit premises. In the

said plaint, the respondent no.1 has alleged that two ladies started coming to the suit premises and demanded that they would be forcibly entering into the suit premises. Respondent no.1 lodged a complaint with the Khar Police Station on 9th August, 2012. In the said complaint addressed to the Khar Police Station, the respondent no.1 did not disclose the name of the persons who were allegedly threatening the respondent no.1 to vacate the suit premises.

70. A perusal of the plaint further indicates that the respondent no.1 has placed reliance upon the alleged letter dated 5th August, 2002 alleged to have been signed by Mr.Peter Drego on the letterhead of M/s.Drego Enterprises stating that the respondent no.1 was a bonafide buyer of the flat on the 7th floor of Flushel Apartments which had been allotted to her in the year 1974. The original agreement was still with Mr.Peter Drego and also the possession of the suit flat. In the said letter, it is alleged to have been stated that very soon Mr.Peter Drego would hand over the flat to the respondent no.1. Respondent no.1 was called upon to make payment of remaining amount of Rs.2,60,000/- as early as possible. On 1st September, 2002, the said Mr.Peter Drego has alleged to have handed over possession of the suit premises to the respondent no.1 and alleged to have acknowledged the receipt of Rs.2,60,000/-. In the said letter, it was alleged to have stated that Mr.Peter Drego would be removing his furnitures as and when he would come back from his tour. The respondent no.1 was called upon to collect the original agreement from his office.

71. A perusal of the record indicates that in the said suit, the respondent no.1 had also filed a Notice of Motion bearing no.1948 of 2012 inter alia praying for an order and injunction against the said M/s.Drego Enterprises from in any manner interfering with or disturbing with the alleged physical possession of the

respondent no.1 in respect of the suit premises and/or dispossessing the respondent no.1 and/or his family members otherwise than by due process of law. Roznama dated 16th August, 2012 indicates that the trial court granted ad-interim injunction as prayed in terms of prayer (a) of the draft notice of motion. The alleged constituted attorney of the defendants agreed that the defendant would not dispossess the plaintiff. Appearance of Mr.Shamsuddin Qureshi, the alleged constituted attorney of defendants is shown in the said Roznama dated 16th August, 2012. Though the said matter was pertaining to Court Room No.8, by a praecipe, the matter was mentioned before Court Room No.7.

72. A perusal of the Roznama dated 14th September, 2012 indicates that respondent no.1 was present through her advocate. One Mr.A.D.Thakur advocate appears to have been tendered his vakalatnama on behalf of the defendant and the same was taken on record. The learned advocate appearing for the parties informed the court that they had arrived at an amicable settlement and were intending to file consent terms. The trial court took the said consent terms signed by the plaintiff and the alleged constituted attorney of the defendant alongwith their respective advocates on record. The trial court disposed of the said suit in terms of the consent terms and ordered that the decree be drawn accordingly. A perusal of the record indicates that no power of attorney was even relied upon by the said Mr.Shamsuddin Qureshi, the alleged constituted attorney of Mr.Peter Drego who was then partner of M/s.Drego Enterprises. There was no reference to the alleged power of attorney at all in any of the Roznama on record of this proceedings. Even when the consent terms are taken on record by the trial court, there was no endorsement made whether the trial court had seen the original power of attorney of the said Mr.Peter Drego in favour of Mr.Shamsuddin Qureshi who was working as a peon once upon a time in the office of M/s.Drego Enterprises. A

perusal of the record also does not indicate that any writ of summons or any other notice was served upon M/s.Drego Enterprises at any point of time.

73. In the said suit before the trial court, after passing of the consent decree, the petitioner in Writ Petition No.4797 of 2013 filed an application for intervention and for other reliefs on the ground that he was party interested in the suit property and was owner of the suit property under a registered agreement for sale executed by and between him alongwith his sister Ms.Sharon with M/s.Drego Enterprises through its partner. Name of the petitioner and his sister was also recorded in the record of the society and share certificate in respect of the suit property also came to be transferred in their name by the society.

74. In the said miscellaneous application, the petitioner placed on record the documents in support of his title in respect of the suit properties. The petitioners also placed reliance on the record that Mr.Shamsuddin Qureshi was working as a peon with M/s.Drego Enterprises. Mr.Peter Drego was one of the partner of the said firm M/s.Drego Enterprises. It was also brought on record that on or about 15th November, 2002 whilst on way of Goa to attend court proceedings, Mr.Peter Drego went missing. His wife had lodged a complaint with the police. After seven years of persistent efforts to trace him out, Police Bureau of Missing Person finally declared him missing on 28th January, 2011. Mr.Shamsuddin Qureshi who was employed as a peon had access to the office keys and cupboard of the office situated at Bandra.

75. In the said application, the petitioner also highlighted and furnished the details of several FIR filed and pending against Mr.Shamsuddin Qureshi of charges of housebreaking, criminal trespass, forgery, fraud, cheating, fabrication of

documents etc. In the said application, the petitioner also relied upon an order dated 31st March, 2005 in Industrial Complaint No.332/2003. The said Mr.Shamsuddin Qureshi has used the alleged power of attorney showing the employment of cohorts who had then applied for workers compensation to the tune of Rs.5 lacs which was contested by Kenneth Drego and the same was dismissed and the alleged power of attorney held to be invalid. The petitioner in Writ Petition No. 11790 of 2013 also placed on record that the rubber stamp of the petitioner company M/s.Drego Enterprises had been fabricated and forged and Mr.Shamsuddin Qureshi had represented himself as constituted attorney and had signed the consent terms without any authority at all. The said power of attorney had been established as fraudulent in charge-sheet in MECR 1/2006 by DCB/CID showing that the respondent no.1 and the said Mr.Shamsuddin Qureshi had cheated the court, played fraud, practised deceit with help of forged documents and attempted to misappropriate valuable properties.

76. In the said miscellaneous application, the petitioner also referred to another important fact which is not in dispute that the said Mr.Shamsuddin Qureshi had filed a complaint at Churchgate Police Station on 27th January, 2007 to the effect that he had alleged to have lost the alleged power of attorney. Though admittedly Mr.Shamsuddin Qureshi did not have any original of the alleged power of attorney with him, admittedly on the date of filing vakalatnama or on the date of filing consent terms, how could he represent M/s.Drego Enterprises or file any consent terms on its behalf.

77. The petitioners also placed on record that the respondent no.1 and her husband were apprehended for serious FEMA crime in July 2002 before the trial court. The petitioners also brought on record the applications made by respondent

no.1 and Mr.Shamsuddin Qureshi for anticipatory bail/regular bail and various orders passed by the criminal court from time to time rejecting such bail applications filed by them making various adverse observations against them.

78. The petitioners also placed reliance on record the report submitted by the Inspector of Police (Crime) Khar Police Station filed before the learned Session Judge, Dindoshi court showing that a cheque of Rs.2,60,000/- issued by respondent no.1 in favour of M/s.Drego Enterprises drawn on Axis Bank did not come for clearance as confirmed by Axis Bank and therefore the information of the respondent no.1 that she had issued a cheque was false. In response to the said application filed by the petitioners, the respondent no.1 filed a detailed reply before the trial court. Even the reply filed by the respondent no.1 would indicate that it was admitted position that she was arrested number of times and was refused bail for quiet sometime and various FIRs' lodged against her and her husband are pending.

79. A perusal of the order dated 31st October, 2012 passed by the learned Session Judge in Anticipatory Bail Application No.1299 of 2012 filed by the respondent no.1 and her husband indicates that even the said Sessions Judge while rejecting the anticipatory bail filed by the respondent no.1 and her husband took cognizance of the fact that Mr.Peter Drego was already missing since 2002. Respondent no.1 did not produce any document except showing the photocopy of the agreement of 1974 in respect of the disputed flat before the investigating agency. It is observed that the case papers revealed that respondent no.1 had trespassed into the said flats and had forged the signatures of Mr.Peter Drego who was declared to be missing on the documents.

80. A perusal of the order dated 6th February, 2013 passed by the Additional Sessions Judge in anticipatory bail application filed by Mr.Shamsuddin Kasamali Qureshi indicates that the learned Judge has noticed that Mr.Peter Drego was missing since the year 2002. The missing report was given to Nirmal Nagar Police Station. The learned Judge also noticed the certificate issued by the Bureau of Missing Persons on 28th January, 2011. The said Mr.Shamsuddin Kasamali Qureshi in the anticipatory bail application argued that the original power of attorney given to him by Mr.Peter Drego was lost in the year 2007 and he had made a complaint to the Churchgate Police Station on 27th January, 2007 which was registered as Crime NO.5/2007 under section 379 of Indian Penal Code. He also urged that since 2002 Mr.Peter Drego was missing. He also admitted that on complaint filed by the aunt of the complainant, he was arrested and was later released on bail. The charge-sheet filed against him is pending. The State Government also opposed the said anticipatory bail application filed by the said Mr.Shamsuddin Kasamali Qureshi. It was also urged by the State Government that though the said applicant had produced copy of the power of attorney, the original was to be recovered. The disputed power of attorney was held to be invalid by the Industrial Court, yet the same was used by the said Mr.Shamsuddin Kasamali Qureshi in the proceedings filed before the City Civil Court at Dindoshi. Several other criminal cases were registered against the said Mr.Shamsuddin Kasamali Qureshi for various offences committed by him.

81. In the said order, the learned Sessions Judge took cognizance of the fact that the said Mr.Peter Drego was admittedly missing since 2002. The disputed power of attorney was dated 21st December, 1996. Even according to the said Mr.Shamsuddin Kasamali Qureshi, the original power of attorney was lost/stolen in the month of January 2007 and a complaint in that regard was already registered.

The learned judge also considered the statement of the Secretary of the society stating that the complainant used to stay in the flat during his visits to Mumbai. On 1st October, 2012, the respondent no.1 herein had asserted that the decree was passed by the Court authorising her to take possession of the suit premises and she had accordingly informed the complainant. The learned Sessions Judge by the said order dated 6th February, 2013 rejected the said anticipatory bail application filed by the said Mr.Shamsuddin Kasamali Qureshi.

82. A perusal of the record clearly indicates that various criminal proceedings are pending against respondent no.1 and the said Mr.Shamsuddin Kasamali Qureshi for various crimes alleged to have been committed by them. The records produced by both the parties before the trial court clearly indicated the pendency of such criminal cases against respondent no.1 and the said Mr.Shamsuddin Kasamali Qureshi. The statement made by the Honorary Secretary of the society and also the report submitted by the concerned police station, pursuant to the order passed by the trial court was on record of the proceedings before the trial court.

83. According to the age of the respondent no.1 disclosed on the record of the proceedings before the trial court, in the year 1974 when the alleged agreement for sale was entered into between M/s.Drego Enterprises and the respondent no.1 in respect of the suit premises, she was 17 years old. The respondent no.1 did not produce any record before the trial court showing the payment of the alleged consideration of Rs. 1 lac. It is not possible to accept the case of the respondent no.1 that out of the alleged consideration of Rs.1,10,000/-, the respondent no.1 had already paid Rs. 1 lac as far back as in the year 1974, the respondent no.1 would not ask for possession of the suit premises or for specific performance of the said

alleged agreement till 2012.

84. If according to the respondent no.1, she was already in possession since 2002, she could have produced documents before the trial court or in this proceedings to indicate her possession since 2002 or that in furtherance of agreement of 1974, she had applied for becoming member of the society in respect of the suit premises. A perusal of the plaint filed by her in the Bombay City Civil Court indicates that she had applied for simplicitor injunction in respect of the suit premises by fraudulently impleading only M/s.Drego Enterprises. The respondent no.1 could not show any record for satisfaction of this court that the said M/s.Drego Enterprises, the only defendant in the said suit was served with any notices and/or writ of summons in the said suit. The alleged constituted attorney Mr.Shamsuddin Kasamali Qureshi appeared on the first day before the trial court and agreed for ad-interim injunction against M/s.Drego Enterprises. Within one month from the date of such ad-interim order, the respondent no.1 and the said Mr.Shamsuddin Kasamali Qureshi entered into consent terms purportedly representing the defendants i.e. M/s.Drego Enterprises and conferred various alleged rights in favour of respondent no.1 in respect of the suit premises thereby conferring her alleged ownership based on the 1974 documents though the suit was simplicitor was for grant of injunction against M/s.Drego Enterprises in respect of the suit premises.

85. Neither any such power of attorney is referred in the consent terms nor in the consent decree passed by the trial court. It is common ground that such alleged power of attorney was not on record before the trial court. In any case, the original of such alleged power of attorney was admittedly lost even according to Mr.Shamsuddin Kasamali Qureshi to the knowledge of the respondent no.1 in the

year 1997 itself, the said Mr.Shamsuddin Kasamali Qureshi could not have filed any vakalatnama on behalf of M/s.Drego Enterprises and could not have entered into any consent terms fraudulently with respondent no.1. It is very curious to note that the learned trial court did not bother to examine before passing of the consent decree whether any alleged constituted attorney had any authority on behalf of the registered partnership firm to file vakalatnama and the consent terms within the short span of filing such suit.

86. Learned trial court totally ignored the factum of the registered agreement referred to and relied upon by the petitioner in Writ Petition No.4797 of 2013 in his favour by the then owners of the suit premises and put the seal of the court on such fabricated documents of the 1974 which was neither registered nor any proof of payment of consideration was shown to the satisfaction of the court. The trial court also ignored the fact that much before filing of the suit by the respondent no.1 in respect of the suit premises, the society had already transferred the suit premises and the shares in favour of the petitioner. Though all these facts were brought to the notice of the learned trial court in support of the plea raised by both the petitioners in their respective applications that the fraud was committed upon the court by the respondent no.1 in collusion with Mr.Shamsuddin Kasamali Qureshi, the trial court totally ignored such crucial documents and refused to look into it.

87. Even in the present proceedings, this court called upon the respondent no.1 to produce any proof of consideration amount of Rs. 1 lakh alleged to have been paid to M/s.Drego Enterprises in the year 1974 or further sum of Rs.2,60,000/- in favour of the said sale in the year 2012 as alleged or the alleged consideration

received from alleged licensee or purchaser of the suit premises. The learned counsel appearing for the respondent no.1 could not produce any such document for satisfaction of this court though an opportunity was repeatedly rendered to the respondent no.1. In my view, the alleged agreement of 1974 and other two agreements which are relied upon by the respondent no.1 are ex-facie fabricated and fraudulent.

88. In my view, the respondent no.1 who has prima facie criminal antecedent and Mr.Shamsuddin Kasamali Qureshi also having criminal antecedent, once these material facts alongwith documents were brought on record before the trial court by both the petitioners in support of their plea that the fraud has been committed upon the court by the respondent no.1 and Mr.Shamsuddin Kasamali Qureshi, the trial court in my view could not have ignored all these crucial facts and the documents while considering the miscellaneous application filed by the petitioners in setting aside the decree obtained by fraud committed upon the court by the respondent no.1 and Mr.Shamsuddin Kasamali Qureshi.

89. A perusal of the impugned order passed by the learned trial court in Miscellaneous Application No.20 of 2012 clearly indicates that in support of the plea of fraud made by both the petitioners, large number of documents and orders passed by various criminal courts against respondent no.1 and Mr.Shamsuddin Kasamali Qureshi were produced and relied upon by the petitioners were not disputed by the respondent no.1. A perusal of the said order however indicates that the learned trial judge rejected the application of the petitioner on the ground that he had no locus to intervene in the suit for the simple reason that the respondent no.1 was already in possession and a decree was passed in her favour. In the impugned order, the learned trial judge has also referred to an order passed by this

court in Civil Application No.3951 of 2008 in First Appeal No.1271 of 2008 observing that the power of attorney was not that of the firm but that of Mr.Peter Drego. In my view, even if the said order is considered as relevant, it is clear that no power of attorney was ever executed by M/s.Drego Enterprises in favour of Mr.Shamsuddin Kasamali Qureshi.

90. A copy of the alleged power of attorney also clearly indicates that there was no reference to the suit premises at all in the said power of attorney which could be dealt with by the alleged constituted attorney and in respect of which he could have filed vakalatnama and consent terms as done fraudulently in collusion with the respondent no.1. In my view under the provisions of Partnership Act, even a partner could not have executed such power of attorney in favour of the third party when other partners had not retired and were available and without their consent.

91. The learned trial court clearly ignored crucial fact that it was established on record that Mr.Peter Drego was missing since 2002. A certificate in that regard issued by Bureau of Missing Persons of the year 2011 was already on record before the trial court. Though such certificate of missing certifying the fact that the said Mr.Peter Drego was missing since 2002 was on record before the trial court, the trial court in my view could not have ignored this fact while dismissing the application filed by the petitioner. If the said Mr.Peter Drego was missing since last several years and such fact was confirmed by his family members who were partners of M/s.Drego Enterprises, Mr.Shamsuddin Kasamali Qureshi could not have represented the said M/s.Drego Enterprises or Mr.Peter Drego in the year 2012 and filed such consent terms in favour of respondent no.1. Mr.Shamsuddin Kasamali Qureshi was already involved in several criminal cases while dealing with various properties of Drego family and various criminal proceedings were

pending against him. In paragraph 55 of the impugned order, the trial court has though observed that in various suits, the constituted attorney of Mr. Peter Drego had appeared and criminal proceedings were also initiated by the petitioner against him, the learned trial court did not consider the seriousness of the allegations made by the petitioner which were supported by various orders passed by the court.

92. In paragraph 57 of the impugned order, the trial court has held that in absence of particulars of fraud or deception, merely by submitting that power of attorney was forged, it could not be held that fraud was played upon court and on the said fraud, order of decree could be set aside by filing an application at the instance of the petitioner who was not even a party to the suit or who was stranger to the suit.

93. A perusal of the record clearly indicates that the material produced before the trial court was more than sufficient to establish the fraud committed by respondent no.1 and the said Mr. Shamsuddin Kasamali Qureshi upon the court in obtaining consent decree. There was a gross abuse of process of law and of court by the respondent and the said Mr. Shamsuddin Kasamali Qureshi. A perusal of the entire order makes it abundantly clear that the trial judge has taken a very casual approach in the matter while considering serious allegations of fraud committed upon the court though more than sufficient material has been produced by the petitioners to indicate the systematic fraud played upon the court by the respondent no.1 and the said Mr. Shamsuddin Kasamali Qureshi. Even at this stage when the application was made by the petitioners for setting aside the consent terms on the ground that there was no power of attorney on the record or proceedings, the trial court did not bother to look into the seriousness of such allegations and to look into

as to how the vakalatnama of Mr.Shamsuddin Kasamali Qureshi came to be taken on record without original power of attorney and how could such consent terms on behalf of the registered partnership firm be taken on record of the court and the seal of the court was affixed on such fraudulently obtained consent decree.

94. The question now arises for consideration of this court is whether any of the petitioners filing miscellaneous application for setting aside and/or stay of consent decree had locus to file such application for the reliefs as claimed under section 151 of the Code of Civil Procedure or under any other provisions of law.

95. In so far as Writ Petition No.4797 of 2013 is concerned, admittedly the petitioner was not made a party to the suit though in the facts of this case was atleast a proper party in view of the petitioner having vested interest and right in the suit premises under a registered agreement for sale, name of the petitioner having been already recorded in the record of the society in respect of the suit premises and in the shares allotted.

96. On the issue of locus in so far as Writ Petition No.11790 of 2013 is concerned, it is not in dispute that M/s.Drego Enterprises was the only defendant in the said suit filed by the respondent no.1. A perusal of the miscellaneous application filed by the petitioner in Writ Petition No.11790 of 2013 clearly indicates that the said application was filed by M/s.Drego Enterprises, the original defendant to the suit and not by any individual person. The said application also indicates that a partner of the said firm Mr.Kennith Drego who had filed the said application on behalf of the said firm had described himself as a partner of the said firm. It was categorically stated in paragraph (1) that Mr. Kennith Drego was a

partner of M/s.Drego Enterprises. The said firm was being represented by the said partner Mr.Kennith Drego who was fully aware of and conversant with the facts and circumstances of the case. The said M/s.Drego Enterprises had also given names of all the existing partners of the suit firm and brought on record that the said firm had not dissolved.

97. Though all these facts were placed on record including the certificate issued by the Registrar of Firms showing the existence of the said M/s.Drego Enterprises, a perusal of the order dated 17th June, 2013 passed by the learned trial court which has rejected the Miscellaneous Application No. 20 of 2012 filed by the petitioner in Writ Petition No.4797 of 2013 shows that the said application filed by the firm M/s.Drego Enterprises is rejected on the ground that the petitioner was not a party to the suit and had thus no locus standi to intervene in the suit. In paragraph (30) of the impugned order, the trial court held that if the partners admittedly had retired from the firm, only Mr.Peter Drego was actively involved in the affairs of the firm. The trial court totally overlooked the undisputed averments made in the application filed by the petitioner firm and took a perverse view in the matter that the petitioner was not a party to the suit firm and had no locus to file such application. The trial court also overlooked the averments that the said application was filed through one of the existing partner Mr.Kennith Drego and not by the retired partner as erroneously observed by the trial court in paragraph (30) of the impugned order. In my view the rejection of the application filed by the petitioner firm which was admittedly the defendant to the suit filed by the respondent no.1 on the ground that the petitioner was a third party is ex-facie perverse and patently illegal on the face of the order passed by the trial court. In my view, the impugned order passed by the learned judge shows total non application of mind on the part of the trial judge rejecting the application filed by the partnership firm which was a party defendant

to the suit.

98. Be that as it may, in my view even if such application would have been filed by a person having interest though not party to the suit, once such person having brought to the notice of the court that the fraud is committed upon the court by a party to the proceedings and had abused process of law and of the court, in my view it would be duty of the court to look into such serious allegations of fraud committed upon the court and ought to have conducted proper enquiry into such allegations of fraud before rejecting the same on merits. In my view the trial court has not taken a view seriously but has taken a very casual approach as is apparent from the two orders passed by the learned trial court in the facts of this case.

99. Be that as it may, the miscellaneous application filed by the partnership firm who was a party defendant to the suit could not have been rejected on the ground that such firm had no locus to file such application for setting aside the consent decree obtained by a party to the suit by committing a fraud upon the court.

100. This court in judgment dated 6th May 2014 in case of **Chandrabhan Chunilal Agarwal vs. Sharad Ramgopal Agarwal & Ors.** in Notice of Motion No.765 of 2009 in Suit No.4816 of 2000 after considering almost similar facts and after adverting to the judgment of the Supreme Court in case of **A.V.Papayya Sastry and others vs. Govt. of Andhra Pradesh and others**, judgment of Supreme Court in case of **S.P.Chengalvaraya Naidu vs. Jagannath**, judgment of Supreme Court in case of **T.Vijendradas vs. M.Subramanian and others** has culled out the principles laid down by the Supreme Court in those judgments and held that any judgment obtained by fraud cannot be said to be a judgment and order in law and such decree or order is nullify and nonest in the eye of the law and can be

challenged even in the collateral proceedings. The court or tribunal is not powerless to recall its own order if convinced that such order was obtained by committing fraud or misrepresentation of such a dimension as would affect the very basis of the claim.

101. It is held that it would not be equitable to confer a benefit on a party who is a beneficiary of such order and decree obtained by fraud. A person whose case is based on falsehood has no right to approach to the court and can be summarily throughout at any stage of litigation. Even in the said judgment of this court, the petitioner who had applied for setting aside the order passed by this court was not a party to the said proceedings in which the order granting letters of administration was passed by this court and had brought to the notice of the court that the fraud was committed upon the court. In the judgment of this court delivered on 28th March, 2014 in case of ***Peter John D'Souza & Ors. vs. Armstrong Joseph D'Souza (supra)*** this court has allowed the application of the third party for setting aside order passed by this court in favour of a party obtaining letters of administration by committing fraud upon a court. This court took a view that the court can take cognizance of the allegations of fraud, fabrication or concealment even at the instance of a party who claims even a slightest interest in the property of the deceased. Once the allegation of fraud, fabrication or concealment is brought to the notice of the court, which is alleged to have been committed by the opposite party to the proceedings on court, it becomes the duty of the court to look into such allegation whether any such order has been obtained by the party from the court by practicing a fraud, fabrication or concealment. The court can take action even suo moto if comes to the conclusion that an order is obtained fraudulently or by making false suggestion or by concealment of such fact by a party and can set aside such order. In my view this judgment also squarely applies

to the fact of this case.

102. In my view application made by the petitioner in Writ Petition No.4797 of 2013 was also maintainable under section 151 of the Code of Civil Procedure though the petitioner was not a party to the suit. In my view, the court has inherent power to recall and set aside the order obtained by fraud practiced upon the court or when the court is misled by the party. The court can also recall its order when a judgment is rendered in ignorance of the fact that a necessary party had not been served at all.

103. In so far as judgment relied upon by Mr.Shinde, learned counsel appearing for the respondent no.1 in support of the submission that the petitioner in Writ Petition No.4797 of 2013 being not a party to the suit had no locus to file any application for setting aside the consent decree and the only remedy for setting aside such consent terms was only by filing a suit is concerned, in my view in none of the judgment relied upon by the learned counsel, court was dealing with any allegation of fraud committed upon the court by a party to the suit. In my view, the petitioner in the Writ Petition No.4797 of 2013 was not a stranger in respect of the subject matter of the suit. The petitioner was claiming rights in the suit premises by virtue of a registered agreement for sale and was already made member of the society and was issued share certificate by the society in respect of the suit premises. Once even if such third party having slightest interest in the suit property files an application for setting aside a decree obtained by a party by practicing fraud upon the court, in my view section 151 of the Code of Civil Procedure stands attracted to such application and cannot be dismissed on the ground of locus. It is duty of the court to look into such allegation of fraud

practiced upon the court on merits and may take a different view altogether if so warranted in facts of that case. In my view, none of the judgment relied upon by Mr.Shinde, learned counsel appearing for the respondent no.1 would assist respondent no.1. There is no dispute about the proposition of the law laid down by the Supreme Court in various judgments relied upon by the learned counsel. Said judgments are however clearly distinguishable with the facts of this case.

104. Supreme Court in case of ***Indian Bank vs. M/s.Satyam Fibres (India) Pvt. Ltd. AIR 1996 SC 2592*** has held that judiciary in India possesses inherent power, specially under section 151 of Code of Civil Procedure to recall its judgment or order if it is obtained by practicing fraud upon court. These powers spring not from legislation but from the nature and the Constitution of the tribunal or courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behavior. This power is necessary for the orderly administration of the Court's business. Paragraphs 22 and 23 of the said judgment read thus :-

22. The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on court. In the case of fraud on a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or courts themselves so as to enable them to maintain their dignity, secure obedience .to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the court's business.

23. Since fraud affects the solemnity, regularity and orderliness of the proceedings of the court and also amounts to an abuse of the process of court, the courts have been held to have inherent

power to set aside an order obtained by fraud practised upon that court. Similarly, where the court is misled by a party or the court itself commits a mistake which prejudices a party, the court has the inherent power to recall its order. (See: *Benoy Krishna Mukerjee v. Mohanlal Goenka*³; *Gajanand Sha v. Dayanand Thakur*⁴; *Krishnakumar v. Jawand Singh*⁵; *Devendra Nath Sarkar v. Ram Rachpal Singh*⁶; *Saiyed Mohd. Raza v. Ram Saroop*⁷; *Bankey Behari Lal v. Abdul Rahman*⁸; *Lekshmi Amma Chacki Amma v. Mammen Mammen*⁹.) The court has also the inherent power to set aside a sale brought about by fraud practised upon the court (*Ishwar Mahton v. Sitaram Kumar*¹⁰) or to set aside the order recording compromise obtained by fraud. (*Bindeshwari Pd. Chaudhary v. Debendra Pd. Singh*¹¹; *Tara Bai v. V.S. Krishnaswamy Rao*¹².)

105. In my view the court has thus ample power under section 151 of the Code of Civil Procedure to set aside an order obtained by a party to the proceedings by practicing fraud upon the court or where the court is misled by a party or the court itself commits a mistake which prejudices a party. I am respectfully bound by the judgment of the Supreme Court in case of ***Indian Bank (supra)*** which squarely applies to the facts of this case. In my view the submission of the learned counsel for the respondents that section 151 of the Code of Civil Procedure, 1908 could not have been attracted even if there were allegations of fraud is contrary to the principles laid down by the Supreme Court in case of ***Indian Bank (supra)***.

106. In so far as submission of the learned counsel for the respondent that even in the miscellaneous application filed by the petitioner in Writ Petition No.11790 of 2013 petitioner had referred to under section 151 of the Code of Civil Procedure, 1908 and not Order 23 Rule 3A is concerned, in my view there is no merit in this submission of the learned counsel firstly on the ground that the

petitioner in that writ petition was a party defendant to the suit and was entitled to invoke the provisions of Order 23 Rule 3A of the Code of Civil Procedure. Be that as it may, even if the said party has referred to only section 151 of the Code of Civil Procedure in the miscellaneous application, the same would be still maintainable on the ground that any person can bring to the notice of court the fraud practiced upon the court by a party to the proceeding and secondly on the ground that even if wrong provision is mentioned in the application for setting aside the decree obtained by fraud, that would not be fatal to the maintainability of such application considering the reliefs claimed in such application which was even otherwise falling under Order 23 Rule 3A of Code of Civil Procedure, 1908.

107. In so far as submission of the learned counsel for the respondent that Mr. Peter Drego was an acting partner of M/s. Drego Enterprises and had implied authority to represent the firm and to execute the power of attorney in favour of the third party is concerned, in my view there is no substance in this submission of the learned counsel. In my view, since there were other partners of the said firm M/s. Drego Enterprises, one partner could not have given any authority to third party on behalf of the firm without consent of the other partners to represent the firm and to settle the dispute if any by filing consent terms. Be that as it may, a perusal of the alleged power of attorney itself indicates that there was no power given in respect of the suit premises by the said Mr. Peter Drego.

108. In so far as submission of the learned counsel that the said M/s. Drego Enterprises had become defunct as other partner has already left India for decade and thus Mr. Peter Drego was authorised to execute power of attorney is concerned, learned counsel could not dispute that the said firm M/s. Drego Enterprises was not dissolved and was in existence. The petitioners had produced copy of the

certificate issued by the Registrar of Firm showing existence of the said firm M/s.Drego Enterprises. In any event there was nothing on record to place by respondent no.1 to controvert the submission of the learned counsel for the petitioners that the firm was in existence and that Mr.Kennith Drego, one of the partner who represented the firm in the miscellaneous application was an existing partner. The respondent no.1 also failed to prove on record to show that the said Mr.Peter Drego was authorised to execute such power of attorney on behalf of the firm in favour of Mr.Shamsuddin Kasamali Qureshi under an express authority of other partners or otherwise.

109. In so far as submission of the learned counsel that the petitioner in Writ Petition No. 11790 of 2013 did not lay any foundation for filing miscellaneous application is concerned, in my view there is no merit in this submission of the learned counsel for the reason that the petitioner in the said Writ Petition No.11790 of 2013 was a defendant to the said suit and had not been served with any notice and/or witness summons. The alleged constituted attorney who represented the firm was not authorised by the firm and who in collusion with the respondent no.1 has obtained the consent decree by practicing fraud upon the court. The petitioner was entitled to apply for setting aside the consent terms obtained by respondent no.1 by practicing a fraud upon the court.

110. In so far as submission of the learned counsel that the submission/statement made before the police officer under section 161 of the Code of Criminal Procedure, 1973 is inadmissible and thus no cognizance of such statement/submission that cheque of Rs.2,60,000/- was not cleared is concerned, in my view there is no merit in this submission of the learned counsel for the reason

that the respondent no.1 even otherwise could not produce any proof of such payment of Rs.2,60,000/- to M/s.Drego Enterprises or Mr.Peter Drego. Though this court rendered an opportunity to respondent no.1 to produce such proof atleast before this court, the learned counsel could not produce any such payment of proof of payment of Rs.2,60,000/-. Even otherwise there was enough evidence on record to indicate that the respondent no.1 in collusion with Mr.Shamsuddin Kasamali Qureshi had practiced a fraud upon the court by obtaining a consent decree in respect of the suit premises in which the petitioner had claimed interest.

111. In so far as the agreements alleged to have been entered into between the respondent no.1 and her two cousin referred to and relied upon by the respondent no.1 is concerned, in my view since the respondent no.1 had obtained the consent decree by practicing fraud upon the court, no rights can be conferred upon such third party also. The copies of the documents produced on record also clearly indicates that the same are fraudulent. Learned counsel appearing for the respondent no.1 could not produce any proof of payment reflected therein for scrutiny of this court though an opportunity was rendered repeatedly by this court. The alleged agreements were entered into obviously with a view to cause prejudice to the case of the petitioners in both the writ petitions. The learned counsel has made inconsistent statement about the alleged possession in respect of the suit premises that alleged licensee or alleged purchaser during the hearing of these writ petitions.

112. In my view, the petitioners have made out a case for appointment of the court receiver in respect of the suit premises in view of the clear case of fraud practiced upon the court by the respondent no.1 in obtaining the consent decree and in committing gross abuse of process of law and of court.

113. I, therefore, pass the following order :-

(a) Civil Writ Petition No.4797 of 2013 is made absolute in terms of prayer (a). Miscellaneous Application No.20 of 2012 is allowed.

(b) Consent decree dated 16th September, 2012 passed in Short Cause Suit No.1835 of 2012 is set aside. S.C.Suit No. 1835 of 2012 is restored to file.

(c) Court Receiver, High Court, Bombay is appointed as receiver of the suit premises i.e. flat nos. G-1 and G-2, Flushel Premises CHSL, 7th Floor, 21st Road, Khar (West), Mumbai – 400 052 and is directed to take forcible possession of the suit premises from the respondent no.1 or any person found in possession of the said premises with assistance of the police and if required by breaking open the lock and to seal the said premises till disposal of the Short Cause Suit No.1835 of 2012 and for a period of four weeks thereafter.

(d) Civil Writ Petition No.11790 of 2013 is allowed in terms of prayers (b), (c) and (f). Miscellaneous Application No. 4 of 2013 is allowed. Rule is made absolute in aforesaid terms. Writ Petitions as well as Civil Application No. 2116 of 2014 are disposed of in the aforesaid terms. Other Civil applications pending if any in the aforesaid two writ petitions are also disposed of in view of the disposal of the writ petitions.

(e) Parties as well as the court receiver to act on the authenticated copy of this order.

(f) The trial court is directed to keep the original record and proceedings in Suit No. 1835 of 2012 in safe custody till the trial is proceeded with and even thereafter.

(g) Hearing of the suit is expedited. Learned trial judge shall make an endeavour to dispose of the suit within one year from the date of the petitioner furnishing an authenticated copy of the order.

(h) Respondent no.1 Ms.Prabha Ganpat Borkar alias Prabha Dinesh Kannan is directed to pay cost of Rs.50,000/- to each of the petitioner in both of the writ petitions within two weeks from the date of this order.

(R.D. DHANUKA,J.)

At this stage Mr.Shinde, the learned counsel for respondent no.1 seeks stay of the operation of appointment of the Court Receiver. In view of the facts and circumstances of this case, I do not propose to accept this request of the learned counsel. The application for stay is accordingly rejected.

(R.D. DHANUKA,J.)