

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.1342 OF 2003

Smt. Pushpalata Sohanlal Sharma	...	Plaintiff
Vs.		
Smt. Brij Madanlal Sharma & Ors.	...	Defendants

Hiralal Thakkar, Sr. Adv. a/w. Ms. Manju Sharma, Adv. i/b. Mr. A V Doijode, Adv. for plaintiff.

Mr. Prabhanjan Gujar, Adv. a/w. Ms. Priyanka Desai, Adv. i/b. M/s. K Ashar & Co. for defendant Nos.2a & 3.

Mr. Ajay Madanlal Sharma defendant No.2a present in Court.

Ms. Rekha Sharma defendant No.2b present in Court.

Smt. Brij Madanlal Sharma present on 9th July, 2015 upon directions of the Court.

Smt. Pushpalata Sohanlal Sharma, Ajay Madanlal Sharma & Ms. Rekha Sharama also present on 9th July, 2015.

CORAM : MRS. ROSHAN DALVI, J.

Dates of reserving the Judgment : 17th April, 2015
8th July, 2015
9th July, 2015

Date of pronouncing the Judgment : 7th August, 2015

JUDGMENT

1. This is a unique suit filed by the plaintiff who is shown to be Pushpalata Sohanlal Sharma @ Pushpa S. Sharma (Pushpa) against the defendants who were two individuals and a limited company. Defendant No.1 is shown to be Brij Madanlal Sharma but also claims to be Pushpa S Sharma / Pushpa Singh Sharma, (Brij). Her husband Madanlal since expired, was defendant No.2 and a company of which Madanlal is stated to be a director, is defendant No.3. Madanlal has expired and his son and daughter are brought on record as his heirs as defendant No.2a and 2b aside from Brij who has continued to be defendant No.1. The case of all the defendants is

identical as shall be seen presently.

2. The plaintiff has been represented by the same advocate throughout. The defendants have filed a joint written statement. They were represented by the same advocate all through until the last date of the trial including the stage of recording of cross examination. The advocate who earlier represented all the defendants ceased to appear at the time of the hearing of the arguments. A new advocate sought to appear for defendant Nos.2a and 3 only at the time of the hearing of arguments. Defendant No.2a and 2b remained present in Court. Defendant No.1 remained absent and so was purportedly shown not to have been represented. However, the arguments of the advocate for defendant No.2a and 3 have actually been the arguments on behalf of all the defendants since their case is the same. These arguments are evidently in support of the case of defendant No.1 which was the same in the evidence of both defendant Nos.1 and 2. Upon the death of defendant No.2, his children would have the same case. Defendant No.3 is represented, but no separate case of defendant No.3 is shown at any stage. An application for adjournment was made by defendant No.2a on behalf of defendant No.1 on the ground of her illness upon a medical certificate of a doctor unsubstantiated by any medical record of illness and has been rejected. The arguments on behalf of all the parties have been heard. In fact the arguments of the advocate appearing on behalf of defendant No.2a and 3 pertain essentially to the case of defendants No.1 as shall be seen presently. After all the arguments were heard and case of each party was seen, defendant No.1 was specifically directed to remain present in Court as the Court desired to put her certain questions and which she did as shall also be seen presently.

3. Pushpa's case in the plaint is that she is a non resident of India residing in Dubai with her husband Sohanlal Sharma (Sohanlal). She claims to be the owner of the suit premises being Flat Nos.1 and 2 on the ground floor and a garage and servants' quarters (suit flat) in building Indrayani situate at Sophia College Lane, 61-D, Bhulabhai Desai Road, Mumbai 400 026. She claims to be a member of the said society. The plaintiff and defendant No.1 are sisters-in-law, defendant No.1 being the wife of brother of the plaintiff's husband (Sohanlal). The said brother is defendant No.2. (Madanlal)

4. Brij also claims to be the owner of the suit premises and a member of the aforesaid society. She claims membership on the premise that she has purchased the flat in her maiden name of Pushpa S Sharma which is Pushpa Singh Sharma.

5. Hence the purchase of the suit flat has not been denied. The issue of share certificate in the name of Pushpa S Sharma is also not denied. Who is Pushpa S Sharma is to be determined and is in dispute. Both the plaintiff and defendant No.1 claim to be Pushpa S Sharma. Pushpa claims that Pushpa is her maiden name, 'S' stands for Sohanlal, her husband and Sharma is her marital surname. Brij claims that Pushpa is her maiden name. Singh is her other name and Sharma is her marital surname. Pushpa, upon marriage, came to be called Pushpalata. Brij is, before marriage, stated to be Pushpa Singh.

6. The suit flat has been purchased upon payment of consideration in cash. The agreement of purchase with vendors of the flat one Mr. & Mrs. Shashikant Garware (Garware) is not produced by either of the parties. Both the parties claim that the suit flat belonged

to Garwares and was purchased from them.

7. Pushpa claims that her husband Sohanlal was in Dubai and Madanlal, his brother, helped her in acquiring flat. She paid consideration and signed the agreement. She left her documents in trust with Madanlal and went to Dubai. She thereafter continued to live in Dubai. She would come to Mumbai on occasions and reside in the suit flat. She has essentially sued for recovery of possession upon the trespass of Brij and Madanlal. Her suit is for declaration that the defendants have no right, title or interest in the suit premises or the suit shares and are trespassers and that she is entitled to the ownership in the suit flat. She has thus applied for recovery of possession and mesne profits.

8. Brij claims that the flat was purchased by her father in her maiden name upon payment of consideration in cash. She always lived in the suit flat and resisted the suit for recovery of possession as a dishonest and malafide action. She claims that she has executed the agreement for sale with Garware but has not produced the agreement or even its photocopy.

9. The signatures of the parties on the agreement, therefore, cannot be seen by the Court.

10. The society has accepted that Pushpa S Sharma is the owner of the flat. The society has issued a share certificate in that name. The society has entered upon correspondence and sent notices as well as copies of resolutions as required to its member Pushpa S Sharma. Pushpa claims that these are sent to her sometimes in

Mumbai and sometimes in Dubai or Abu Dhabi where she lived at the Post Box Number (P.B.No.) that she had and which is shown in the title of the plaint itself. Brij claims that the correspondence of the society was sent to her at the suit address or to her at the same P B No as that of Pushpa.

11. Upon the aforesaid pleadings, the following issues came to be framed in the suit which are answered as follows :

I S S U E S

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| 1 Whether the Suit is barred by the Law of Limitation? | No |
| 2 Whether Plaintiff proves that she is the owner of flat Nos. 1 and 2 together with Servants' quarter and garage as alleged in para 2 of the plaint? | Yes |
| 3 Whether the Plaintiff's name was changed to Pushpalata as alleged in para 5 of the Plaint? | Yes |
| 4 Whether the consideration of Rs. 99,000/- for purchase of suit premises was paid by Plaintiff to Shashikant Garware through Shri V.A. Phadke as alleged in para 9 of the Plaint? | Yes |
| 5 Whether the society has transferred the shares and suit premises to the name of the Plaintiff as alleged in para 10 of the Plaint? | Yes |
| 6 Whether the defendants are in wrongful occupation of Suit premises as alleged in para 43 of the plaint? | Yes |
| 7 Do defendants prove that prior to 2 nd December, 1960, the 1st defendant's name was Pushpa Singh? | No |
| 8 Do they prove that defendant No. 1 continued to be referred to as Pushpa Singh or Pushpa Singh Sharma after 2nd December, 1960 as alleged in para 9 of the written statement? | No |
| 9 Do they prove that defendant No.1 is the sole and absolute owner of the suit flat and garage in Indrayani as alleged by the Defendants? | No |
| 10 Whether the Plaintiff was not admitted as member of the Indrayani Society as alleged by the Defendants? | No |
| 11 Whether defendant No.1 was admitted as a member of Indrayani Society as alleged by the Defendants in paragraph :No. 10 of the written statement? | No |

- 12 Whether the outgoings in respect of the suit flat was Inconsequ
paid by defendant Nos. 1 and 2 as alleged by the ential
Defendants in paragraph 10 of the written statement? hence not
answered
- 13 Whether the Plaintiff is entitled to any compensation as
alleged in para 48 of the plaint? As per
- 14 Is Plaintiff entitled to the declaration as prayed for? final
- 15 Is Plaintiff entitled to possession of the Suit premises? order
- 16 What Order and relief?

12. Pushpa has led evidence of herself and an officer in the revenue records department of the State of Punjab and Haryana to disprove the birth certificate produced by Brij as a false and fabricated document.

13. Brij initially led the evidence of Madanlal. Madanlal has been extensively cross examined. Thereafter he expired. Brij has also led evidence. She has also been cross examined. The evidence of the husband and wife are materially the same. Pushpa has got produced the file of the society on record to show the correspondence with the society, with a part of which the suit is not concerned. Pushpa has produced a number of documents, several of which are material for determination of the issues in the suit and several which relate to the payment of outgoings and other charges and which do not prove the issue of ownership or the name of the parties are irrelevant and may not be considered. Similarly Brij has produced several documents some of which are marked. The others may also be taken to be so marked as they would be admitted in evidence upon the oral evidence led by the defendants to prove them. Some of them are relevant and some are not. The above issues would require to be decided upon the extensive oral and documentary evidence of the parties and witnesses, a large part of which is irrelevant.

14. It would be appropriate to see who is Pushpa S Sharma first. Once that is clear, the title of Pushpa S Sharma would have to be determined. The consequential membership of the society and lawful occupation of the suit flat would follow. It is upon such adjudication that the issue of Limitation would fall in place and be determined. The reliefs that may be granted or rejected may then be considered.

I S S U E NO.3. – The name of the plaintiff.

15. Pushpa was born Pushpa Kumari. It is her case in paragraph Nos.4 and 5 of the plaint that her maiden name was Pushpa Kumari or Pushpa and after her marriage in 1955 it was changed to Pushpalata. She, therefore, came to be known as Pushpalata Sohanlal Sharma. (Pushpa S Sharma)

16. Pushpa has produced the certificate dated 1st March, 1950 of Modern Indian Language Examinations taken by East Punjab University held in August, 1949. It is in the name of Pushpa Kumari. It is a document executed more than 30 years prior to the filing of the suit. The original document shows the decoloration of the paper. It carries a presumption of correctness of the signature thereon and consequently the contents of the documents under Section 90 of the Indian Evidence Act. It is indeed seen to be a genuine document issued in 1950, half a century prior to the filing of the suit and produced by Pushpa from her own custody showing her name as Pushpa. Similar such document executed one year later of Punjab University being a certificate of Modern Indian Languages Examinations dated 13th August, 1951 is also produced by her. It is a document of similar age and decoloration of paper. Each document

lends support and more credibility to the other.

17. Pushpa is, therefore, seen to be having the name Pushpa Kumari as her maiden name.

18. She has deposed that she uses her name interchangeably as Pushpa or Pushpalata. She calls herself Pushpa.

19. Pushpa's evidence in paragraph 3 of the examination in chief that she was Pushpa or Pushpa Kumari is, therefore, borne out by unimpeachable documentary evidence. Her evidence that after marriage she has been referred to either as Pushpa or Pushpalata and would, therefore, be Pushpa Sohanlal Sharma or Pushpa S Sharma, Pushpalata Sharma is, therefore, acceptable.

20. Pushpa came to be known also as Pushpalata after her marriage in about 1955. That name is reflected in her passport. She has deposed that thereafter she started writing her name as Pushpalata. Such name appears in Court papers also. However, her bank account Exh.V which is also more than 30 years old, shows her name as Pushpa Sharma even in 1964, well after her marriage.

21. The aforesaid oral and documentary evidence shows that plaintiff was born Pushpa. She is also known as Pushpalata after her marriage. She uses both these names interchangeably as contended by her. Hence Issue No.3 is answered in the affirmative.

ISSUE NO.7 & 8 – The name of defendant No.1.

22. Brij claims that she was born Pushpa Singh.

23. Brij has been cross examined about her community and

lineage. She has admitted that her father was a Punjabi Hindu. She has further deposed that she followed both religions – Sikhism and Hinduism. Her brother was a Sikh. She has signed her ration card as Brij M Sharma. The last page of the ration card showed her name as Brij Sharma. That was the ration card of as late as of 1995. It shows an interpolation 'Pushpa'. Brij has deposed that it was added in the ration card as that was her maiden name. She was confronted with the ration card showing different ink in the word 'Pushpa' before the words 'Brij Sharma'. She has feigned ignorance upon the distance of time. She has not deposed that it has no interpolation. She has refuted the case of forgery. She has accepted that she has not produced any passport in her maiden name. In fact, there are no documents produced by Brij showing her maiden name.

24. Brij sought to prove her maiden name by annexing a photocopy of her birth certificate registered under NO3154 showing her birth on 29th August, 1943. Brij has not produced her original birth certificate in evidence. The original birth certificate would carry a presumption of correctness as a public document under Section 79 of the Indian Evidence Act. That is a rebuttable presumption.

25. Such presumption is sought to be rebutted by Pushpa. Pushpa has claimed that it is a forged and fabricated document. Pushpa has challenged the assumption by Brij of the name Pushpa Sharma. Pushpa must and has led evidence to rebut the presumption of the birth certificate.

26. Pushpa has got examined the Inspector – In – charge (Births and Deaths) of the Nagar Nigam / Municipal corporation,

Amritsar where Brij was born, as P.W.2. The officer produced the authority issued by his office to appear and give evidence. The witness has deposed about the Register of Births and Deaths of the year 1943 maintained by the municipality of Amritsar. The witness has deposed that a register of births pertaining to the period 1st June, 1943 to 17th October, 1943 was lying in the Registry of Calcutta High Court for the last more than 30 to 40 years as it was forwarded to the High Court then. He stated that accordingly there was no record available with the municipality for the births registered in the aforesaid period. The record produced is of the period 12th April, 1943 to 18th August, 1943 which is otherwise the relevant period. The said record is marked Exh.JJJ in evidence. This record shows entries from 12th August, 1943 which is under registration No.3081 to 18th April, 1943 which is under registration No.4022. Brij's registration of birth certificate is covered in this period, it being under registration No.3154.

27. He produced a certificate of the Local Registrar, Birth and Death, Municipal Corporation, Amritsar dated 12th January, 2009 in that regard. He identified the signature of the Local Registrar who was the issuing authority under whom he served. He deposed as to the correctness of the certificate from his knowledge of the signature of the certifying authority. The plaintiff accordingly got the certificate proved by direct oral evidence. The certificate accordingly came to marked Exh.JJJ in evidence by the Court along with the English translation thereof attached to which is the extract of the birth register of the above period.

28. The office of the witness had issued the letter dated 23rd May, 2006 relating to the birth certificate No.3154 of Pushpa Singh

which was received by the plaintiff's advocate. The letter came to be marked Exh.GGG in evidence as to the fact of receipt by the plaintiff and subject to the proof of its contents. The contents of the letter were then not proved, though the receipt was proved. The witness has deposed about contents to the letter also. His evidence shows that it was a letter issued from his office. He has identified the signature of the issuing authority. He produced the office copy of the reply dated 23rd May, 2006 which was identical to Exh.GGG being the original reply of his office received by the plaintiff's advocate. He confirmed the statements in the letter. The contents of the letter have accordingly been proved by his direct oral evidence.

29. The letter shows that the certificate No.3154 of Pushpa Singh was not issued by his office. The letter further shows that Sr.No.3154 does not exist in the register of the municipality of Amritsar and that after Sr.No.3099 Sr.No.4000 was shown in the register. There was no entry of Sr.No.3154 existing in the register. No officer from his office had signed on the certificate. The letter, therefore, showed that the birth certificate of Brij was bogus and could not have been issued by his office.

30. The letter in Gurumukhi language is identified by the witness and the attachment in Gurumukhi language is confirmed by the witness showing that after Sr.3099 the next entry is No.4000. The serial numbers of the entries in the register are written in English language and need no translation. The photocopy of the document identified by the witness is the correct document of the birth certificate register maintained by his office.

31. An application was made for translation of births and deaths register by the counsel on behalf of the defendant during the trial.

32. The cross examination of the officer has yielded nothing. The witness reconfirmed that he deposed about the register lying in Calcutta High Court on the basis of endorsement in the register maintained in their office which showed that the relevant extract / entry was not available in his office. The witness has confirmed that Exh.JJJ would show that extracts were lying in Calcutta High Court. The witness has again deposed about the execution of the letter Exh.GGG and stated the name of the officer. It does not matter who the officer was. The witness has identified his signature. The witness has deposed in the cross examination that he would not know why the mistake occurred.

33. Truth has curious ways of coming out. The aforesaid evidence shows that birth certificate relied upon by Brij is forged and fabricated. When Brij obtained such birth certificate to make it the full-proof document showing her maiden name, she would not have realised a mistake committed 70 years prior to her fraud by a clerk in the municipal office in faraway Amritsar. Though Sr.No.3099 is arithmetically followed by Sr.No.3100, a clerk is expected to make the mistake of showing the next number as 4000 since the previous number ends with 99. Such mistake has caused Brij dear. Her dishonestly has been exposed. Brij is seen NOT to be Pushpa S Singh aside from the fact that her act is a criminal offence. The evidence of PW 2 clearly shows the commission of the offence by the person who uses the certificate which could not have been issued by his office,

which was not so issued and which could not have been reflected in the Birth and Deaths Register of 1943 of the municipal office in Amritsar.

34. In fact, Brij has been prosecuted upon such offence.

35. The evidence of PW 2 is sufficient to disprove the birth certificate of Brij showing her maiden name as Pushpa Singh altogether. Upon such evidence Brij has wholly failed to prove that her maiden name was Pushpa Singh or that she was continued to be referred to as Pushpa Singh after her marriage. Consequently Issue Nos.7 & 8 are answered in the negative.

I S S U E Nos.2, 4, 5 & 9 – Ownership of the plaintiff or defendant No.1.

36. Pushpa claims to be the owner of the suit premises. Pushpa claims to have paid consideration of Rs.99,000/- in cash for the purchase of the suit premises in the year 1970. This consideration is shown by Pushpa upon winning a jackpot of Rs.22,950/- from Royal Western Indian Turf Club Ltd. (RWITC) and further sum of Rs.11,475/- towards dividends totaling to Rs.34,425/- which were deposited in her savings bank account with Indian Overseas Bank Ltd. and from her own independent savings. Pushpa has produced the receipts of RWITC Ltd. dated 1st April, 1969 upon the vouchers dated 23rd March, 1969. These are handwritten documents signed by General Manager / Manager of RWITC Ltd. These documents are more than 30 years old and carry a presumption of correctness of the handwriting and signatures thereon. Hence they have been marked Exh.U1, U2 and U3 in evidence. Pushpa has produced the copy of a

bank passbook of Indian Overseas Bank in her name as Pushpa Sharma issued in 1964 as Exh.V which is a document more than 30 years prior to the filing of the suit and the handwritten entries thereunder carry a presumption of correctness. The bank account shows Rs.34,425/- credited to the Pushpa's account in February, 1969 and Rs.25,000/- debited to Pushpa's account withdrawn therefrom on 6th July, 1970 by cheque.

37. Pushpa would contend that this withdrawal forms a part of the consideration paid for the suit flat and given to Madanlal, her brother-in-law towards purchase on her behalf.

38. It is Pushpa's case that she was asked by her husband Sohanlal to entrust her jeweleries and valuables to Madanlal which she did and from which the suit flat was purchased. Pushpa has led no documentary evidence of the sale of jeweleries. She has not specified which were her valuables or what was the value of the valuables. Pushpa has deposed in paragraph 11 of her evidence that Madanlal utilized and sold her jeweleries and valuables which were entrusted to him for the purchase of the suit flat as per her directions. She, therefore, claims the sale price of the jewelery to be a part of the consideration paid by her for the suit flat though the precise amount is not shown. She would claim that aside from the proceeds of the jeweleries, Madanlal was given a part of the amount from her bank account towards the purchase consideration. Interestingly Rs.25,000/- is withdrawn by cheque from the said account out of Rs.34,425/- lying to its credit. The suit flat was purchased in May, 1970 as shall be seen presently. The debit entry, which she has not made any grievance of, but in fact relied upon, is of 6th July, 1970. Hence

Madanlal and Pushpa would have considered Rs.25,000/- out of the balance of Rs.34,425/- to be sufficient withdrawal for the consideration for the purchase of the suit flat by Madanlal on behalf of and on account of Pushpa after sale of the jeweleries entrusted to him.

39. Pushpa has been cross examined upon the amounts of the jackpots. That part of cross examination has revealed what she received. Her evidence has shown that the amount was deposited in her bank account. Her husband collected the cheques. The race was held in 1967. Her husband had signed jackpot slip tickets. Her husband was present in India at that time. She had accompanied her husband. She, of course, was not aware of the rules of horse races. The winning tickets were addressed at Amritsar. The cross examination in this regard is wholly futile. The Court is not called upon to consider the legality of the races or the jackpots. The amount is shown to be independently credited to her account. The explanation of the credit is given by her. It bears no relation with the defendants. These amounts were not credited from the account of defendants or otherwise belonged to them. In fact the cross examination would clarify the receipt of the amount of the jackpots from an independent source. In fact, she has not been cross examined upon the debit entry of Rs.25,000/- showing amount withdrawn from her bank account soon after his purchase of the suit flat.

40 Such is the consideration shown by Pushpa for the purchase of her flat.

41. Pushpa has deposed that the purchase was in 1970 upon

negotiations that took place from 1969 with Garware. Pushpa was residing in Mumbai when the negotiations took place and suit premises was purchased.

42. The averments in paragraph 9 of the plaint show that the Pushpa's husband Sohanlal was away Dubai at the time of the purchase and hence on the request of Sohanlal, Madanlal helped Pushpa in the formalities through Advocate V A Phadke who was the advocate of the society as also of the Garware. The cross examination of Madanlal would show his admissions that Advocate V A Phadke was also the advocate of Madanlal and represented him in his personal and custom matters.

43. There has been some controversy with regard to the act of solicitor in the transaction. Pushpa has averred in the plaint that she had gone to the office of V A Phadke. He was the solicitor of Mr.Garware. He was also the solicitor of Madanlal in his own personal matters as also in his custom matters as admitted by Madanlal in his cross examination. Pushpa had gone to the office of the advocate with Madanlal. She was under the care of Madanlal. She would, therefore, not know the advocate. She would go to the advocate with Madanlal. She has deposed in her cross examination that V A Phadke was not known to her and that he was never her advocate. Much is sought to be made about this statement by the advocate on behalf of the defendants that there is a contradiction in the averments in the plaint and in the cross examination. In fact there is none. She did go to the office of the advocate she had never known and who was never her advocate. She went to the office of the advocate of Madanlal. She went to his office only once when she met

him along with Garware and when she had gone with Madanlal. She also met Garware only once at that time.

44. Her cross examination with regard to the only meeting that she had in the office of V A Phadke with Garware accompanied by Madanlal further shows that she was introduced to Garware then. Garware had once visited the suit flat later. She did not check the documents. Madanlal may have checked documents and applied also for 'no objection' of the society. She signed the papers which were given to her by Madanlal. Madanlal was looking after the transaction, so that she had no knowledge about the transaction except what she deposed. In the usual flush she was asked that she had personal knowledge of the transaction which she genuinely denied as she would not know anything about the transaction other than that she was purchasing the suit flat.

45. Brij and Madanlal seek to rely upon an affidavit prepared by V A Phadke who has since expired. It is rightly not being marked in evidence. V A Phadke cannot be cross examined on his affidavit. Affidavit of evidence is excluded under Section 1 of the Indian Evidence Act.

46. What is material is that the very act of V A Phadke in acting as the solicitor in the transaction being Madanlal's advocate in his custom matters also would show that the entire transaction was under the aegis of Madanlal alone aside from the fact that it would show that Madanlal had custom matters reflecting that he was either settled abroad or dealt in goods from abroad and did come on the wrong side of the custom law at some point of time requiring a solicitor to represent him in his custom matters.

47. In paragraph 12 of her evidence Pushpa has deposed that she executed a written agreement and applied for membership of the society. It was signed by her as purchaser. An application for transfer of the shares pertaining to the suit premises which was owned by Garwares was made by them to the society. She has further deposed that pursuant to these documents the society held a Special general meeting on 16th May, 1970 for transfer of the suit premises to Pushpa which she had attended. Pushpa has produced a copy of the resolution dated 16th May, 1970 of the society marked Exh.W in evidence. The passing of the resolution is not denied. The resolution shows that the flat has been transferred in the name of Pushpa S Sharma. The defendants claim that Pushpa S Sharma is actually Brij in her maiden name. Pushpa claims that it is herself.

48. Pushpa has averred in paragraph 9 of the plaint that the documents with regard to purchase of the suit premises were with Madanlal who kept them in his custody in trust for and on behalf of Pushpa and has not produced them. In paragraph 12 of the evidence Pushpa has stated that the society has not produced the original application made by her as also the copy of the agreement for sale which were filed with the society for the transfer of the suit premises.

49. Pushpa was extensively cross examined about the kind of documents which she signed and which were left with Madanlal by her. She deposed that all the documents of the society were to be completed and she left Bombay after signing her papers which were to be received by Madanlal. This would be the documents of the flat and the documents of “procedure” (there would be certain procedure to be

adhered to in any society for which documents would be required to be signed by the vendors as well as the purchaser. Indeed Garware signed the application for transfer and Pushpa signed the application for membership). Later, thanks to further clarificatory cross examination, she clarified that some documents were to be prepared by society and Madanlal was to collect them from the society.

50. She has been cross examined on she having attended the managing committee meetings of the society. She has replied that she attended the managing committee meetings of the society in which the suit flat was transferred and that was on 16th May, 1970, the proceedings of which are recorded in Exh.W. She deposed that she had signed the register of the society. She had signed an application for transfer as well as the agreement for purchase of the suit flat. Madanlal had got them signed by her. She signed the documents, blindly as suggested to her, putting her full faith in Madanlal, as replied by her.

51. She has been cross examined on the outgoings paid by her. They were paid in cash and cheque but mostly in cash. The payments were made late, sent by post from Dubai and sometimes by hand. She holds no receipts evidencing payments.

52. She has also been cross examined upon her attendance in society managing committee meetings and her knowledge of some members of the society. She knew about the secretary, Ashok Zhaveri and few other members with whom we are not concerned. She attended two managing committee meetings, one was when she was made the member on 16th May, 1970 and other was on 24th April,

1983, after the disputes between the parties. She has deposed that she remembered that she attended those meetings. Indeed those are not the usual meetings. These are the two dates she has remembered edged in her mind in view of her acquisition of title and notice given to the society upon the occupation of Brij and Madanlal in the suit flat from about that time. In fact in April, 1983 she is shown to have come to Mumbai from Dubai, where she lived with her husband, Sohanlal for but one week. Hence this would be mainly for attending to the matter of the suit flat. Her oral evidence that she came on 21st April, and returned on 27th April, 1983 is corroborated by her passport. She indeed must have come to set things right upon the dispute that commenced between the parties. Of course, she was not a member of the managing committee and her attendance would not have been shown as such. She would have attended the meeting only for the aforesaid purpose.

53. In the usual circumstances a person who claims to be owner of a premises must produce his / her documents of title. The documents of title may be in the possession of the owner himself or herself or in the possession of another party. The owner would call upon that party to produce the documents. Pushpa has done so through her attorneys' letters prior to the filing of the suit from Madanlal who is stated to have the documents of title in her favour upon the purchase of the suit premises by her for consideration in the name of herself in the mode and the circumstances stated above.

54. The defendants dispute the ownership of Pushpa upon the premise that the father of Brij purchased the suit premises in her maiden name upon payment of consideration in cash by the father

under an agreement executed by Brij with Garware in Advocate V A Phadke's office.

55. It is the case of the defendants including Brij in paragraph 9 of the written statement of the defendants filed jointly by all of them that due to paucity of place in the premises where their family was residing along with other members of the joint family resulting in quarrels that Brij's father offered to finance a separate accommodation for Brij and Madanlal some time in the year 1970. They came across the suit premises of Garware. Negotiations were held with Garware and the agreement of purchase was arrived at between Brij and Garware. Mr. V A Phadke was the common solicitor who prepared the agreement for sale. Brij was accompanied by her father in the office of Mr. Phadke at the time of the execution of the agreement. Brij's father handed over Rs.99,000/- to Mr. Phadke who had to hand it over to Garware. The instructions were to prepare the agreement in the name of Pushpa S Sharma because that was her maiden name and she was still known by that name. The agreement was prepared in the name of Pushpa S Sharma. 'S' stands for Singh. The written statement does not show when and how the agreement was in fact executed by Brij as Pushpa S Sharma, her maiden name. Defendant No.1 has not relied upon the said agreement in the written statement or produced the same. She has not even relied upon a copy of the agreement for sale executed by her.

56. In the initial evidence of the defendants led by Madanlal he has deposed in paragraph 13 that in view of the quarrels between the family members on account of small and inadequate accommodation, Brij's father Uttamchand Sharma offered to finance separate

accommodation for Brij and himself in the year 1970. They had negotiations with Garware through advocate V. A. Phadke acting as common solicitor for both parties. Garware demanded Rs.99,000/- for the suit premises. Mr. Phadke was to reduce and settle the purchase price. Mr. Phadke prepared an agreement of sale on the instructions of Brij and Madanlal ("our instructions"). He has further deposed in paragraph 17 of the evidence that Uttamchand, himself and his wife went to the office of Mr. Phadke on the day of the execution of the agreement. Brij's father handed over Rs.99,000/- in cash to Mr. Phadke. Rs.89,500/- was settled as consideration. Rs.9,500/- was retained by Mr. Phadke as his professional fee. Mr. Phadke was instructed to put the name of Brij as Pushpa S Sharma as the purchaser of the suit flat since he wanted his property in the maiden name of his daughter for long term security. He has further deposed in paragraph 19 of his evidence that agreement for purchase was prepared by Mr. Phadke describing defendant No.1 as Pushpa S Sharma being the purchaser. The agreement was signed by Garware and Brij in his presence. Upon execution of the agreement keys of the suit premises were handed over to Brij. He has thus deposed about the agreement, but has stopped short of identifying the signature of Brij on the agreement and has not produced the agreement.

57. Evidence of execution of agreement by Brij is identical. She has deposed again as Madanlal who expired pending the suit.

58. There is no case of entrustment of any document by any of the defendants. Hence Brij would have her own document of title. Nevertheless the agreement of sale in favour of Pushpa S Singh (be it Pushpa or Brij) is not produced by the defendants. Similarly, the copy

of the application made by Brij, be it as Pushpa S Sharma, is also not produced by Brij. The application for membership made by Pushpa is not produced by the society. Similarly the application for membership made by Brij, if any, is also not produced by the society from the records of the society in the file which has been produced by the society.

59. The admitted resolution dated 16th May, 1970 of the society, Exh.W in evidence is, therefore, the only document which would confer title upon the sale of the suit premises by Garware to either Pushpa or Brij. Since both of them claim ownership from Garware upon payment of identical consideration in Mumbai – in the year 1970 and claim to have executed the agreement for sale and to have been transferred the shares in respect of the suit premises and to have been made members of the society under the same resolution dated 16th May, 1970, the Court would have to only see who is Pushpa S Sharma, – the plaintiff Pushpa or defendant No.1 Brij having the birth certificate being the documentary evidence of which is specifically disproved. The maiden name of Pushpa Singh. As seen from Issue Nos.3 and 7 above, the plaintiff Pushpa is indeed Pushpa Kumari and later Pushpalata, defendant No.1 Brij is not.

60. Paragraph 5 of the affidavit of examination in chief of Madanlal is intriguing. Sohanlal was the elder brother. Pushpa was the elder sister-in-law. Madanlal married after Sohanlal. Madanlal married Brij on 2nd December, 1960. Paragraph 5 of his evidence shows that her maiden name was Pushpa Singh Sharma. Traditionally the maiden name of the bride is changed. Her maiden name Pushpa Singh Sharma was changed to Brij **to avoid confusion** with the name

of Pushpa who was already the elder sister-in-law in the family. Why was it changed is also mentioned thus :

*“As the plaintiff's name was similar to the first maiden name and **to avoid confusion** to assign one more name and therefore 'Brij' was added to the first defendant's maiden name at the time of the marriage ceremonies”.*

Similar in the evidence of Brij in paragraph 5 of her examination in chief :

*“As the plaintiff's name was similar to my maiden name and **to avoid confusion** it was decided to”*

61. If at the time of the marriage, the name of Brij was changed (from Pushpa to Brij) to avoid confusion, at the time of the execution of the agreement the name which was identical to the plaintiff's name “Pushpa S Sharma”, would not have been used also to avoid confusion. Madanlal as well as Brij would have shown the name in the agreement which was not confusing. They would have at least also shown that Pushpa S Sharma was Brij. Hence the least what Madanlal and Brij could have done was to show her marital name also as alias in the agreement, in the application for membership, share certificate of the society and consequently such name would have appeared in the society's records. And this is not done even though it is the case of Brij and Madanlal that because of frequent quarrels in the joint family house which had inadequate accommodation noticed by Brij's father's eagle eye that he offered to finance the purchase of the flat only for his daughter and her husband in her maiden name. The agreement has created the confusion precisely which was sought to be avoided by the change of name. The explanation and the entire case would insult the intelligence even of an ignoramus.

62. Such is the direct oral evidence of the execution of the agreement that has never seen the light of the day. The agreement is, therefore, in the possession of Brij as the purchaser or her husband Madanlal. However, the agreement is neither relied upon nor produced by either of them in their evidence. Upon the aforesaid evidence it would have been proved as an admissible document but is yet not produced. There is absolutely no reason why upon such evidence, if at all it is honest and truthful, the agreement would not be produced.

63. There is no evidence that the agreement is lost or misplaced or stolen or otherwise not in the possession of Brij or Madanlal. It is just not produced. Even a copy of the agreement is not produced. The agreement would have shown the signatures of Brij as Pushpa S Sharma, her maiden name. That aspect cannot be seen.

64. The lack of evidence, oral as also documentary, about the execution of the agreement and the application for membership stares the Court in the face. It may be stated that upon the Court collating the above evidence, the stark absence of the documents of Brij made the Court call upon her to clarify and explain how the agreement or even any circumstantial evidence was not produced by her before any adverse inference can be drawn against her. Brij, accompanied by her children Ajay & Rekha, defendant Nos.2a & 2b, attended Court when called upon and Brij simply stated to Court that agreement was lost!

65. Upon the execution of the agreement Brij was entitled to membership. Of course, the name of the member is Pushpa S Sharma.

Brij claims to have been made such a member. That only can be upon the application made on behalf of Brij in the name of Pushpa S Sharma. There is no evidence on that score. Nevertheless she claims to have been made a member. That is as per the resolution of the society, Exh.W. Brij's claim is that she became a member as Pushpa S Sharma pursuant to the same resolution dated 16th May, 1970. The resolution shows the agreement of Garware to transfer their flats in favour Pushpa S Sharma. It also show that Pushpa S Sharma has applied for membership of the society and made payment of Re.1 as entry fee.

66. Brij has neither claimed that she made an application nor produced the copy of the application. The reliance upon the resolution Exh.W must require Brij to produce either the application for membership made by her from the records of the society or a copy of the application made by her to society, neither of which is produced.

67. The agreement is for consideration paid entirely in cash. The receipt of payment on the agreement or otherwise is not produced. The cash payment is otherwise not substantiated. There has been some cross examination upon the fact that Brij's father did not have the financial means to make the payment which has been refuted.

68. Though Pushpa has not shown the precise consideration paid for suit premises in the plaint, Brij, has not shown any consideration paid for the suit premises at all. Though Pushpa has shown some financial position to be able to purchase the suit premises, Brij has shown none. Though Pushpa has claimed that the

agreement for sale was executed by her along with the application for membership and left by her in the custody of Madanlal, her brother-in-law, upon her trust in her brother-in-law to retain it as her trustee, Brij has shown no such case. She must, therefore, have the document in her possession. The document not being produced by Brij cannot be accepted, though upon the peculiar case of Pushpa, the document not produced by her may be accepted.

69. Pushpa has sought production of the documents of the society. The secretary of the society was summoned to produce document. A file of the society has been produced but which does not show any application for membership made to the society. Pushpa's case and her grievance that a society has not produced these documents upon the instigation of defendants stands to reason.

70. Upon the resolution, Exh.W being passed, the share certificate of the society would have to be transferred from the name of Garware to the name of Pushpa S Singh. It would have to be delivered to the member who is Pushpa S Singh. If it was to be delivered to Pushpa, it would be delivered to Madanlal to whom Pushpa has entrusted the transaction. If it was to be delivered to Brij, it would have been delivered to Brij or Madanlal directly. Pushpa may not be able to produce the document since it would be in the custody of Madanlal who had breached her trust. Brij would certainly be able to produce that document, as having been delivered to her soon after the resolution was passed by the society accepting her as a member. It is admittedly not shown to be in the custody of Brij within reasonable time after the execution of the agreement and conferment of the membership as it is expected to be.

71. Pushpa had not at that time demanded and obtained the agreement of sale, the share certificate or the copy of the application for membership, which were left with Madanlal. The share certificate appears to have remained with the society until the dispute started between the parties. The evidence of Pushpa has shown that the dispute started between 1982 to 1984. The evidence of Madanlal and Brij has shown that dispute started in 1983. From the file of the society is seen the letter dated 16th July, 1983 of Pushpa addressed to the chairman of the society from P.B.No.3535 Abu Dhabi Exh.GG1 refers to certain payments for repairs demanded by the society (with which we are not concerned) and states about her sister-in-law who complained of harassment from society officials. Some months later on 10th January, 1984 Pushpa has written a letter to the chairman of the society Exh.MM sent from P. B. No.1769 in Dubai (which was her earlier P.B.No. before it was changed to Abu Dhabi P.B.No. in 1983 and re-changed to P B No.1769 to Dubai in 1984) that Madanlal had unauthorisedly entered the suit flat and temporarily occupied it without her authorisation. This letter, appears to have been shown by the society to Madanlal and has put Madanlal and Brij on guard. This is a letter under which Pushpa informed the society of the unauthorised entry of Madanlal in the suit flat and informed the society that it was not authorised by her as the owner. It is soon after the said letter was written by Pushpa to the society that the secretary of the society and Madanlal did the damage to the documents of title of Pushpa – the share certificate -- which appears to have remained with the society from 1970 to 1984 and which came to be sent by the society to Madanlal and received by Madanlal as late as on 20th February, 1984. In the file produced by the society is the copy of the

letter of the then secretary of the society dated 20th February, 1984 receipted by Madanlal. The letter shows that as per 'our discussions and your request' the society has sent share certificate No.7 which was in the society files to Madanlal.

72. The receipt of the society is falsely deposed by Brij to have been signed by the secretary of the society in her presence because they relied upon the receipt to produce the share certificate to purportedly show the evidence of title. The letter is countersigned by Madanlal who failed to prove the letter in the file of the society. It is accordingly not marked an exhibit and has not been admitted in evidence. Much later Brij sought to prove the letter by the aforesaid evidence. Her evidence fell short to prove it to admit it in evidence. Even if the letter dated 20th February, 1984 not admitted in evidence is seen, the receipt of the share certificate 14 years after the transaction, and more than a year after the dispute began and almost immediately after Pushpa informed the society that Madanlal was unauthorisedly occupying the suit flat speaks volumes even without such deposition of Brij.

73. Shorn of unnecessary documents, the file shows essentially the lack of the most expected material documents. The file, of course, as aforesaid, does not contain the initial application for membership made by either Pushpa or Brij or a copy of the agreement of purchase of the suit flat or even the original agreement. The file, as aforesaid, shows that the society had the share certificate until 1984 which was returned by the then secretary of the society to Madanlal after the society was put on guard and caution by Sohanlal and Pushpa. The important documents which could have been obtained from the

possession of the society are, therefore, not in the file except for the importance of they not being in the file.

74. If Brij had purchased the suit premises in 1970 and had continuously resided in suit premises (except when she was out of India) and had paid all the outgoings of the suit premises such as the electricity and other charges as is her case and had occupied the suit premises, she would have taken the share certificate of the society from the society duly transferred to her name soon after she was conferred the membership of the society upon the execution of the agreement of sale and the transfer of premises to her. However, in the circumstances in which Pushpa is stated to have purchased the flat, she having left the documents of the suit flat with Madanlal and left for Dubai to join her husband with her family, as shall be seen from the oral evidence presently, she would not have applied for and obtained the share certificate transferred to her name from the society; she had left it to Madanlal to do so and which was admittedly not done until 1984 after the dispute between the parties had begun.

75. Sohanlal had migrated to Dubai admittedly in 1966. Soon after the purchase of suit premises Pushpa had migrated to Dubai to join her husband, Sohanlal there. Hence the share certificate of Pushpa could have remained with the society though the agreement of sale and the copy of the application for membership of the society would have remained with Madanlal.

76. Upon a reading of the evidence of both the parties together with their respective cases in the pleadings specially the conspicuous absence of the agreement by Brij though she went to her advocates'

office and is stated to have executed the agreement and the peculiar fact that the share certificate remained with the society from 1970 till 1984 and the entire case of ownership made by Brij came to be only after the disputes arose between the parties, the case of ownership made out by Brij has to be rejected. The case of ownership made out by Pushpa would be accepted upon her evidence of payment of consideration by entrustment of her jeweleries to her brother-in-law and a part from her bank account which has been debited for Rs.25,000/- later on 6th July, 1970 upon withdrawal by cheque. Similarly the fact that Madanlal would not produce the original agreement which was never demanded by her initially and until after the disputes can also be accepted. The sending of share certificate by the society as late as on 20th February, 1984 to Madanlal after the letter of the plaintiff putting the society on guard about the disputes speaks volumes.

77. What must be appreciated to see the truth or otherwise of the case of Pushpa and Brij is to weigh the respective evidence of the parties side by side without any cross examination of either of them. The evidence of Pushpa of reposing trust in Madanlal is under the circumstances that her husband was in Dubai. She was to follow him soon. She had some finance. They were to invest such finance before she left India. She sought to invest it in real estate by purchase of a flat. She would be incapable of transacting on her own. She would rely upon her brother-in-law with whom she had lived. Her husband would also entrust such work to his brother. If that case is accepted Madanlal would be in-charge of the documents. Pushpa would let them be whilst the relations remained cordial. Pushpa would not be expected to demand copies either of the agreement from Madanlal or

of application for membership from the society or for that matter get the share certificate from the society. Indeed the share certificate remained with the society until 1984 when it was handed over to Madanlal despite and after receipt of Pushpa's letter of complaint.

78. On the other hand if Brij were to enter into any agreement as per her evidence, she would certainly have the original agreement with her or with Madanlal. Both or either of them would produce it at least in this suit to prove their claim of ownership. Madanlal, who led evidence on her behalf sought to prove the agreement by direct oral evidence. The evidence of proof of the document is bereft of the document itself. Brij's evidence is identical. The identification of the signatures is made by both of them without seeing the document! The agreement is not produced. Even a copy of the agreement is not produced. It is not even stated to be lost. No secondary evidence is also sought to be led. That would be wholly unlikely. It is not the case of Brij that the agreement has been taken by any one else or has remained in the custody of any one else. She has made a vague attempt to state that it remained with the society. There was no reason to give the original agreement to the society at any time. Even if the original agreement was given, a copy could have been retained and produced by her. If the original agreement was given, Madanlal would have asked for the agreement along with the share certificate. The share certificate was given as per "the discussion and request" of Madanlal with the secretary of the society. There was no discussion or request for giving the original agreement. In fact even the copy of the agreement has not been applied for or handed over by the society. It may be mentioned that the case of Brij is not of any fraud or misrepresentation by Madanlal at the time of the transaction. Breach

of such trust is alleged by Pushpa. Hence the total vacuum in the evidence of Madanlal and Brij about the custody or possession of the title document is inexplicable.

79 The Court having found that though Madanlal and Brij both gave direct oral evidence of the execution of the agreement which remained with them, they had not produced the agreement, the Court after going through the record once again put the suit on board for directions to ascertain from the defendants more specially Brij the position of the said document which is imperative to be produced by her. Brij who appeared in person stated to Court upon the Court's query that the agreement was lost. The statement is spacious. There is no such averment in her pleading or in her evidence. There is no such averment in the pleading or evidence of the Madanlal. No copy of the lost document is also sought to be produced as secondary evidence. The onus would only lie upon the Brij to produce it. The burden of proof of proving the agreement by producing it is not discharged. The strongest adverse inference is required to be drawn under Section 114(g) of the Evidence Act that if the agreement was produced, it would show the signature of Pushpa and not of Brij.

80. If Pushpa, though the owner of the suit flat, admittedly lived in Dubai, Brij and Madanlal would occupy the suit flat either continuously or intermittently in view of the cordial relations. In fact, it is Brij's case that Pushpa would occupy the suit flat on the few occasions that she came to Mumbai from Dubai.

81. Upon such respective cases both the parties – the plaintiff on the one hand and the defendants together on the other – have

sought to lead evidence to show their respective ownership by the circumstantial evidence of occupation and possession of the suit flat. Only such of the evidence of occupation and possession as would reflect upon the ownership itself would be material to consider. Later occupation of Brij and Madanlal from and after the disputes started between the parties between 1982 – 1984 is admitted. That is illegal occupation which is precisely why the suit for recovery upon trespass of Brij and Madanlal is filed. Occupation of a trespasser is not proof of ownership and hence wholly irrelevant to prove the case of ownership.

82. What happened immediately after the purchase of the flat in 1970 would, therefore, be material to consider. Pushpa is stated to have left for Dubai 1970. Her husband was admittedly in Dubai since 1966. The averments in paragraph Nos.9 and 12 of the plaint shows that Pushpa “left for Dubai in 1970” and that she “started visiting her husband in Dubai” since 1970. Pushpa claims that she was present in Mumbai on the date the society accepted the resolution to make Pushpa S Sharma, the member of the society on 16th May, 1970. In her evidence she specified that she left for Dubai on 22nd September, 1970. She affirmed that she went with the intention of taking residence in Dubai. She has deposed that she lived in the suit flat for two months after its purchase. The purchase was sometime in about May, 1970. The society passed the resolution to accept Pushpa S Sharma as its member on 16th May, 1970. Having deposed that she lived for two months in the suit flat she deposed that she left for Dubai on 22nd September, 1970. The fact that she left for Dubai in 1970 is not disputed.

83. Brij has of course, deposed that she was in Dubai from 1969 till 1973. That statement is either only vaguely incorrect or completely false. In fact it goes against her own case. She has not produced any passport of that period to substantiate the statement. How she remembers this period from memory is not understood. If the statement is correct she would not be in Mumbai in 1970 to attend the office of Advocate V A Phadke in May, 1970 and to execute any agreement which has not even seen the light of the day. She can, therefore, not be the owner of the flat upon the execution of the agreement in respect of the flat as claimed by her in paragraphs 13 and 17 of her affidavit of evidence.

84 Madanlal has deposed that Sohanlal lived in Dubai and had no ties in Mumbai. To that end his evidence in paragraph 9 of his examination in chief is that Sohanlal was doing reasonably well to support his family in Dubai. He called his family to stay with him in Dubai. He has also acquired a flat for that purpose in Dubai. Pushpa along with her children went to Dubai and permanently settled in Dubai and acquired a status of NRI in 1970 itself (which can be acquired after 180 days of residing abroad). He would, therefore, suggest that Pushpa had no need to purchase the suit flat. However, this entire evidence is relevant only to the extent that it admits that Pushpa went to Dubai in 1970.

85. Paragraph 38 of the examination in chief of Pushpa shows that she went to Dubai in September, 1970 and lived there since then. Whenever she came to Mumbai from Dubai after 1970 she lived in the suit premises.

86 Brij on the other hand is not shown to have left India in 1970. If her father purchased the suit premises in her maiden name in 1970 it was to reside in that suit premises. She would reside with Madanlal in the suit premises from the time of its purchase itself. She must, therefore, show the documents of her possession from 1970. She has not produced the society's bills, electricity bills, ration card, election card or any such document from about 1970 in her name or in Madanlal's name.

87. Pushpa has claimed that her daughter got married in Mumbai in 1976. At that time she had lived in the suit premises. Both Brij and Madanlal claim that was because she was allowed to stay in the suit premises during the time of the marriage which was performed by Madanlal. The marriage was performed in Hotel Horizon, Mumbai. Madanlal would claim that he spent for the marriage of Pushpa's daughter because he was the Managing Director of the hotel. The fact that he was MD is disputed as also the fact that he spent for the marriage of Pushpa's daughter. Madanlal has not produced any evidence to show that he was the MD of the hotel. MD is a full time service. Madanlal has admitted and accepted that his business was watch repairing and trading. He traded in watches. He lived essentially in Hong Kong as shall be seen presently as is reflected from his passport. He had certain custom cases. He has admitted that advocate V A Phadke used to appear for him in his personal cases as also custom matters in answer 281 and 282 of his cross examination. If he was the MD of the hotel he could not have traded in any other commodity. He would not have custom matters to engage a solicitor thereunder. His case of he being the MD is wholly incredible and must be rejected. He would be Jack of two trades!

88. The false statements of expenses for the education and marriage of the children of Pushpa are made to drive the point that Sohanlal was not a man of means but which is irrelevant since Pushpa claims the purchase of a flat from her own funds being partly from the proceeds of the jackpot and partly from the sale of jeweleries. It also runs contrary to the evidence that Sohanlal migrated in 1966 and had acquired a flat in Dubai and that his family had moved to Dubai in 1970.

89. An attempt has been made in the cross examination of Pushpa to berate the financial position of Sohanlal to show that Pushpa could never have purchased the suit flat. It is an admitted fact that Sohanlal, the eldest brother in family migrated to Dubai in 1966. This is well before the purchase of the suit flat and well before Madanlal and Brij migrated anywhere. They were members of a HUF. His business was initially Sharma Watch Company in one shop and Hind Watch Company in another shop. Both shops were adjacent. The brothers looked after the shops. The mother-in-law was running house. Sohanlal had four children. They initially stayed in Amritsar. They moved to Mumbai in 1969. They lived in Mumbai in 1970. 1 child continued his further studies in India, 1 child in Switzerland and 1 in America. This could not have been the position of children of a man without means. Sohanlal was remitting certain monies to Pushpa. Pushpa spent them for the maintenance of herself and the education of her children and saved the remainder. Two remittances were shown in Pushpa's bank account. Some amounts were stated to be given through family members or when Sohanlal came to India. His wife and children remained in India for four years after he migrated. Just before she migrated, Pushpa purchased the suit flat

partly from the proceeds of her bank account (in which two jackpot amounts were credited) and partly by entrusting her jeweleries with Madanlal since parties were on cordial terms. This would be a purchase for investment by a party settled abroad and remitting amounts to India, part of which were saved.

90. An attempt has been made to vaguely contend that Madanlal was in easier circumstances and Sohanlal had no means so that Madanlal educated the children. This is totally without any documentary evidence produced by Madanlal. Of course, Pushpa would not require to produce documentary evidence showing she having educated her own children.

91. Brij has deposed in paragraph 10 of her affidavit of evidence that Sohanlal carried on business in the name of Ebasco Trading Corporation in Dubai. He needed Madanlal to help in expanding his business. Hence Madanlal and his family joined Sohanlal and stayed at his residence in Dubai for about a year. The other part of the evidence has shown that the year in which they lived in Dubai is 1974. As per the entire trend of her evidence, Brij has refuted in the cross examination that Sohanlal started his business in Dubai in the name of Ebasco and claimed it to be a family business. When confronted with her in examination in chief she feigned ignorance of her statement. This innocuous evidence which is not material to determine the title of the parties, which is the main dispute in the suit, assumes importance in view of the fact that Madanlal has later claimed to be one of the directors of Ebasco Finance Company Pvt. Ltd., which is shown as defendant No.3 in the suit. This is a namesake of the company started by Sohanlal which

was sought to be expanded with the help of Madanlal. It claims to be in occupation and possession of the suit premises after the dispute between the parties commenced. The strategy of the defendants would be to claim rights in the name of the company and hence a private limited company containing the name of Ebasco came to be in the disputed premises. The file of the society has shown a number of letters surprisingly written by Madanlal as director of defendant No.3 offering to pay the society dues, inquiring about the dues, claiming to have paid the dues etc., only to create evidence. None of the letters are proved and admitted in evidence. Madanlal has not deposed on behalf of defendant No.3. What is important is that no such letter is written prior to the commencement of the dispute between the parties in 1982-84. The source of the occupation of defendant No.3 has remained unknown. It is, therefore, a rank trespasser. Interestingly the advocate who specially appeared for defendant No.3 (along with defendant No.2a) never argued on behalf of defendant No.3 at all. He has not shown any correspondence of defendant No.3. Defendant No.3 has not led any evidence. Madanlal, its director, has accepted that the firm of Ebasco was initially of Sohanlal. Brij, true to her colour, disputed the very commencement of the firm of Ebasco in her cross examination which she accepted in her affidavit of evidence. Though Madanlal has not shown his directorship in the company, (much as his Managing directorship in hotel Horizon) the company has been jointly represented in the suit by the same advocate along with Brij and Madanlal. The written statement is jointly filed. Cross examination is jointly made. It is only much later that the authority of the advocate of all the defendants is sought to be terminated by only defendant No.2a and the company, defendant No.3 who are separately represented and who through their advocate argued upon

the entire evidence led on behalf of all the defendants to show the case of all the defendants jointly.

92. Pushpa has further deposed that Madanlal and Brij stayed in another premises in 'Sukh Shanti CHS Ltd. (Shanti). Both parties have claimed the ownership of Shanti premises but with which this suit is not concerned. Both parties claim the sale of Shanti premises also. Pushpa has averred in paragraph 38 of her examination in chief that the defendant Nos.1 and 2 lived in Shanti up to 1974 as also other family members. Whenever she came to Mumbai from Amritsar prior 1970, Pushpa also lived in Shanti. Both parties have claimed that the flat in Shanti was sold. Madanlal has claimed that it was sold in 1972-73. Pushpa has claimed that it was sold in 1974. Interestingly, Brij accepted that her children were studying in Dubai after 1974. They would be with Pushpa and Sohanlal who were well settled by that time and Madanlal had moved to Dubai only in 1974. Madanlal was travelling to various places in 1974 until he ultimately went to Hong Kong in 1975.

93. Passports of Madanlal and Brij show that Madanlal went to Hong Kong in about 1975. He was earlier on a visiting visa. The entries in the passports show he having been continuously residing in Hong Kong from March, 1975 except for a brief visit to Mumbai for about 10 days in March, 1976. Madanlal accepts that he was residing and later even domiciled in Hong Kong. The passport of Brij shows that she also lived with her husband in Hong Kong from March, 1975. Her brief visits to Mumbai are for a period of one month, 8 months and two months are in 1976, 1977 and 1979 respectively. Both the husband and wife are shown to have left India for Hong Kong on 21st

March, 1975.

94. As Pushpa purchased the suit flat evidently only as an investment before she moved to Dubai, she has not produced documents of possession which are commonly produced by owners of flats. She has been extensively cross examined on her possession which is to no avail. She has, of course, accepted that she did not have those documents. She has also been cross examined on the furnishing of the suit flat which is wholly immaterial; she has deposed about some spare furniture that she remembered having been in the flat. Aside from the fact that the furnishing of the flat is not evidence of possession or ownership, the lack of furnishing would show that she indeed was not to continuously reside in the suit flat because her husband was away in Dubai and she would leave India for Dubai soon after the purchase of the suit flat. The suit flat was purchased only by way of investment – to put her savings and other investments in real estate before she left India.

95. It is clear that Pushpa was not in India after the purchase of the suit flat but Brij and Madanlal were in India between 1970 and 1974. Pushpa, therefore, would not be able to produce documents of her possession of the suit flat. Brij could have produced such documents if she lived in the suit premises but has not produced any such documents. The electricity bills produced by Brij are from 2004. The ration card produced by Brij is of 1995. The bills of the society for recovery of arrears of outgoings etc. are also not produced though is claimed and indeed made much after the dispute when the defendants were in unlawful possession. The worth of these documents remains nebulous. These documents do not carry the case

of Brij any further. A trespasser is bound to have these documents after he comes into unlawful possession. A got-up document of Brij showing that she got a letter of the society to state that the society knew her to be Pushpa Sharma and that Madanlal was in possession of the flat and they were residing there as of 25th July, 2001. Similar is the one receipt of the society on a notepad with a rubber stamp dated 8th November, 1995, unlike any other. Such document of the society received by Brij in the name of Mrs. Pushpa Sharma mean nothing. A copy of an inland letter addressed to Pushpa Sharma and produced by Brij is equally irrelevant.

96. Though the defendants have produced the electricity bills only from 2004, it is their case that the electricity meter stood in the name of defendants since the beginning. Pushpa has deposed that before 1983 the electricity meter stood in the name of Garware. Pushpa has further deposed that Madanlal occupied the flat in 1983 and since then he got the electricity meter transferred to his name. Madanlal sought to refute that he got the electricity bills transferred to his name. An attempt was made to put a case to Pushpa that Madanlal got the electricity meter replaced by a meter of higher capacity which Pushpa has stated she did not know and which Madanlal, despite such case, has not shown. The most material electricity bills were from 1970 to 1983 which have not been produced by Madanlal though he claims to be occupying the suit flat. He has produced electricity bills only from 2004, after the suit was filed, which mean nothing. He has also produced one letter of BEST for security deposits issued in 1995 in the name of Madanlal which, though not proved, means nothing even if accepted on record as correct. It is produced at about the time the ration card of Brij Sharma

(with the name of Pushpa interpolated therein) was also procured – in 1995 – much after the disputes.

97. Madanlal would also claim that he installed a telephone in the suit flat. When it was installed is not shown. No telephone bills are produced. Indeed even that was not installed soon after the purchase of the suit flat. Brij and Madanlal would have needed the telephone from 1970 onwards. Upon the fact of purchase being put to Pushpa, she has replied that he may have installed the telephone in the suit flat during the period he stayed there.

98. Similarly Pushpa has been cross examined about the outgoings of the society which indeed she had not paid and constraining the society to write to her in Dubai and Abu Dhabi of the society dues. Madanlal would have paid outgoings at some point of time which fact has not been denied by her and which fact goes no further to prove any title of Brij and Madanlal.

99. The court is not required to see the case of unlawfully occupied possession. The Court cannot protect possession unlawfully occupied. Any length of such possession cannot advance its quality. Even to acquire title by prescription, the possession must be shown to be enjoyed for the requisite period hostile to the true owners. That, of course, is not the case of Brij.

100. Possession, or lack of it, as circumstantial evidence of ownership is shown differently in this case and is required to be viewed and appreciated differently.

101. The further evidence of Pushpa in paragraph 38, therefore, becomes material to consider. She has deposed that the suit flat remained closed between 1975-1979. This coincides with the departure of Madanlal and Brij from the suit flat and from India to Hong Kong on 21st March, 1975.

102. Madanlal has deposed that the said flat was locked between 1979 to 1983 “when he along his family had gone to Dubai / Hong Kong”. The statement appears to be eyebrow raising; how could he be in two such distant places? We shall soon find out why he made such an incongruous statement. His passports show that he had left India for Dubai in 1974 and for Hong Kong in 1975 and remained there thereafter. There was nothing new about what transpired in 1979. He has made the statement only to contend that between 1979 to 1983 no other person lived in the suit flat. Pushpa has claimed that her other sister-in-law Nirmala Joshi was allowed to live in the suit flat from 1979. She was sought to be removed by Madanlal in about 1983-1984 when he returned to India. The disputes between the parties admittedly took place between 1982-1984. Madanlal has admitted that the disputes began in 1983.

103. Brij has admitted in answer 70 that from 1979 to April 1984 she was not in India. She indeed was in Hong Kong during that period. Her passport shows short visits to Switzerland and Italy as also Dubai for a fortnight in 1979. Thereafter her passport only shows departure from Calcutta on 28th April, 1984 during the period 1979 to 1984. It is, therefore, seen that she came to India and lived in the suit flat only after April, 1984 and after the dispute between the parties.

104. Seeing the documentary evidence of the passport along with oral evidence of the parties, Pushpa's evidence stands to reason. The initial evidence is in paragraph 38 of her examination in chief without knowing what the defendants would depose. She has deposed that the suit flat remained closed between 1975 to 1979. This coincides with the passports of Brij and Madanlal. Though Madanlal had stated that the flat remained closed between 1979 to 1983 it is of no relevance. It is during the period Madanlal and Brij were admittedly domiciled in Hong Kong and Pushpa was residing in Dubai.

105. Madanlal has admitted that he left India and acquired the domicile of Hong Kong. His wife also stayed with him for most of the period in Hong Kong. He had acquired permanent accommodation in Hong Kong even earlier than 1984. He, therefore, would have no intention to live in India, though he has refuted that fact. Of course, that would not conclusively prove that he had no investment in India or even that Brij could not have purchased the flat in India if she otherwise did. However, that would be material to show how as owners of the flat, Brij or Madanlal, corresponded with the society and how the society corresponded with them.

106. In about 1974-1975 Madanlal and Brij had gone to Dubai. This is reflected in both their passports. The passport of Brij shows that she left for Dubai on 31st October, 1974. She had her passport issued at UAE between 9th November, 1974 and 8th November, 1975. She took a passport from Dubai on 20th March, 1975 and had a passport issued in Hong Kong after 21st March, 1975. Hence she was

in Dubai between October, 1974 to March, 1975.

107. The passport of Madanlal shows that it was issued on 13th November, 1974 at Dubai and an earlier passport of 1974 issued to Madanlal is endorsed thereon but which is not produced. Hence in November, 1974 Madanlal was in Dubai. He is shown to have travelled and departed from UAE, Bahrain and Taipei in December, 1974. Those are, therefore, short visits in 1974.

108. The oral evidence of Pushpa with regard to the stay of Brij and Madanlal in Dubai with Pushpa and Sohanlal is corroborated by the passports of Brij and Madanlal. Madanlal has admitted that he went to Hong Kong in 1975-1976 and that he went to Dubai in 1974. Pushpa has deposed that in 1974 Brij & Madanlal lived with her and Sohanlal in Dubai. In paragraph 23 of the examination in chief of the Brij she has stated that she lived in Dubai for one year. In paragraph 42 of her evidence she has stated she left India for Dubai in 1974. Hence she was in Dubai for one year 1974-1975 which fact is reflected in the her passport.

109. Consequently it is seen that Brij and Madanlal were in Mumbai until about 1974. They lived in Dubai in 1974-1975. Sohanlal and Pushpa were already settled in Dubai by then. Sohanlal and Pushpa would have an address in Dubai. That would be a P.B. No. Pushpa has revealed their P.B. No in the title of the plaint itself. In paragraph 38 of the affidavit of examination in chief of Pushpa, she has deposed about the P.B. No being P.B No.1769, Dubai, UAE where she received certain letters from the society. There has been some interesting correspondence between the society and Pushpa as shown from the file of the society. Some of the correspondence is addressed to Pushpa at Dubai and later Abu Dhabi (when her P B number

changed for some time) and again at Dubai contained in Exh.Nos.EE1, PP1, RR1& SS1. These letters are replied by Pushpa which would make clear that they were not addressed to Brij. One of these letters is addressed to Pushpa C/o. Sohanlal which could never have been addressed to Brij. Incidentally no letter of the society is shown to be addressed to any address in Hong Kong where Brij and Madanlal migrated and lived. Thereafter Madanlal and Brij have claimed that P.B. No to be their address. Madanlal's cross examination shows that he was sponsored by Sohanlal to live in Dubai. Hence it is his address C/o. Sohanlal. Brij has stated for the first time in paragraph 42 of her evidence two P.B. Nos. which were shown as Pushpa's P.B. No. being 1769, Dubai, UAE and P.B. No. 3535, Abu Dhabi, UAE as hers. She claims to have the said address during her stay there for one year. Sohanlal would have had these addresses since 1966 when he migrated to Dubai. She has claimed that to be the P.B. No. of her sponsoring company. She has admitted in her cross examination that the sponsor was Sohanlal. It is the common P.B. No. though she feigns ignorance of Sohanlal's P.B. No. in answer 150 of her cross examination.

110. The importance of the postbox, therefore, has to be noted. The society dues were not paid in respect of the suit flat. The owner of the suit flat would require to pay the dues. There were defaults by the owner. The society addressed letters of demand of dues at the suit address and then at the P.B. Nos. in UAE. The society has recognized one Pushpa S Sharma as the owner. Since both Pushpa and Brij claim to Pushpa S Sharma it would have to be seen to whom these letters of the society were addressed.

111. The file produced by the society shows letters initially addressed to the member at the suit premises itself. Thereafter certain letters are addressed by the society to Pushpa or Sohanlal in Dubai and Abu Dhabi which are replied by Pushpa. Though the contents of the letters are immaterial the source and destination are relevant. Pushpa's letter dated 6th March, 1983 Exh.BB1 is from P.B. No.3535 Abu Dhabi (a short distance away in the UAE) from her initial address at P. B. No.1739, Dubai. A further letter of Pushpa dated 26th March, 1983, Exh.DD1 is also addressed by Pushpa from P.B. 3535 Abu Dhabi. This is in consonance with her case that she lived essentially in Dubai but also in Abu Dhabi. Her passport shows she having travelled between Abu Dhabi and Dubai quite a few times. Upon receipt of her letters of March, 1983 from P.B.No.3535, Abu Dhabi, the society has sent a further letter dated 13th April, 1983 Exh.EE1 to Pushpa at P.B. No.3535 Abu Dhabi. Thereafter her address reverted to P.B.No.1769, Dubai. After the dispute arose between the parties the society's further letter dated 25th March, 1985, Exh.PP1 is addressed to Pushpa S Sharma C/o. S L Sharma (Sohanlal) P.B. No. 1769, Dubai. It may be interesting to ponder why if Brij was known as Pushpa S Sharma by the society, the letter would not be addressed to Pushpa C/o. Madanlal. Such correspondence by the society is a real pointer to the person understood to be Pushpa by the society. No letter was addressed to Brij in the name of Pushpa S Sharma. Though the letters of the society were addressed to Pushpa in the name of Pushpa S Sharma, Brij would claim that they were addressed to her though the letters were not C/o. of Madanlal but C/o. Sohanlal and though she lived in Hong Kong and not Dubai or Abu Dhabi. The evidence of Madanlal that he lived in "Dubai / Hong Kong" between 1979 and 1984 – though incongruous – is shown to be deposed falsely and upon

purpose.

112. What is material to note is the conspicuous absence of any correspondence of the society with Brij and Madanlal in Hong Kong or the letters of Brij and Madanlal from Hong Kong to the society. The society would have corresponded with Brij and Madanlal, had Brij purchased the suit flat. They would have informed the society of their address in Hong Kong. Their absence is also confirmed by their passports. Brij's passports, as aforesaid, have been issued from various places after 1975 showing how she left India then. Only one passport of Madanlal is produced in his evidence. It came to be marked as D7 being a public document. Madanlal was asked in his cross examination about his other passports. He produced copies of passports which have been marked Exh.LLL in the cross examination. These passports show that they have been issued from Hong Kong, UAE and Dubai, but never from India. They would be material only to the extent that they would show that Madanlal never visited India until the aforesaid correspondence of 1983-84 of the society and that the Brij and Madanlal never claimed any rights as owners for the society to deal with them as owners of the suit flat.

113. Such is the story with regard to the stay of Brij and Madanlal for but one year with Pushpa and Sohanlal and its aftermath. It need not detain the Court any longer to see that both Madanlal and Brij never claimed to have to do anything with Dubai in their written statements. They never claimed to have a P.B. No in Dubai or Abu Dhabi. In their written statements just as they claimed the flat which Pushpa claimed, they have claimed the P.B. No which Pushpa had. Their residence in Dubai for about a year is wholly immaterial. Only the abuse of that residence becomes material to see

the falsity of their case.

114. One other aspect though otherwise immaterial might be material in view of the aforesaid evidence relating to the travel and residence and the passports which reflect the travel and residence of Brij. The passport produced by Brij are for the years 1974 to 1980 and then from 1984 to 2002. The vacuum in the period between 1980 to 1984 is material. Pushpa claimed in paragraph 18 of the examination in chief that Brij came to India departing Hong Kong in 1980-1981. She had smuggled in some diamonds. She was caught by the custom authorities and detained. There was a criminal prosecution. Brij absconded from India and arrived in Dubai on a Nepali passport in April, 1981. That passport bearing No.025152 was issued on 26th April, 1981 valid up to 25th April, 1983. Pushpa has produced a photocopy of the passport of Brij showing her name as Brij Maya Sharma marked Exh.HH in evidence. She claims that that was the copy of the passport which Brij had given to Pushpa in Dubai. She has produced that as a secondary evidence of the original passport which would be with Brij. Brij has not refuted the passport altogether. Brij has, however, claimed that the documents produced by Pushpa were stolen by Pushpa whilst she was living in Dubai. This could be during the period 1974-1975 or thereafter. The copy of her Nepali passport shows that it was issued on 26th April, 1981 and was valid till 25th April, 1983. It bears one UAE stamp in Arabic language which cannot show the date on the same as it is not translated. This is during the period that Brij has not produced any passport i.e. period between 1980-1984. Pushpa has made up for a part of that period by production of a copy of passport of Brij. It puts the missing piece of the puzzle in place. Even if Pushpa has stolen the passport of Brij and had photocopied it, it is a photocopy of a document which fits

completely with the other documents produced by Brij and her statement that Pushpa had stolen her documents. Theft of documents cannot disprove a document; in fact it would show the admission of the document by Brij but the production of the document by Pushpa. It would not show that it is procured by unfair means until it is proved that the document was stolen. Mere allegations of theft cannot show that the production is unlawful. Hence the production of the photocopy of the passport produced as secondary evidence must be accepted for that purpose. Though this evidence would not show the ownership of the suit flat in either party, it would show the incredibility of the evidence of Brij. It in fact exposes her as an inveterate liar.

115. The file of the society contains an otherwise innocuous but a very important document of Pushpa being letter dated 4th July, 1978 written and signed by Pushpa to the then secretary of the society, Ashok Zhavari. It has been proved by Pushpa by direct oral evidence in paragraph 13 of her affidavit of examination in chief and marked Exh.X-1 in evidence. It is the original document in the file of the society. It is on an old, yellowed paper as much as the other correspondence of the society. It shows similar punch marks as the other documents in the file. The rust of the file including the rust of the paper clips or pin is on the said letter. The letter shows that Pushpa and her husband desired to sell the suit flat and enquires about arrears payable. The letter does not show ownership or possession of any person but it is an important link as an evidence to prove the ownership. Had Pushpa not been the owner of the flat, she would have never have written this letter. It is only because she was the owner of the flat she could have contemplated its sale. It must be

remembered that Pushpa has deposed that between 1975 and 1979 the flat remained vacant. That was the reason to sell it. This solitary letter, therefore, a surprising circumstantial evidence to speak of the legal position of both the parties, Pushpa's ownership and Brij's lack of ownership.

116. Brij and Madanlal would claim that the suit is false because it has been instituted after the disputes began and that dispute began consequent upon a settlement agreement executed by and between the two brothers on 27th April, 1984. Madanlal has, of course, proved the photocopy of the agreement dated 27th April, 1984 by secondary evidence in paragraph 22 of his examination in chief. Sohanlal is stated to be requiring to pay US\$ 306000 to Madanlal in two installments by the end of December, 1984 which is stated not to have been paid. It cannot be proved that a suit on title is false merely because such agreement is executed. In fact, it would show the dispute between the parties which was sought to be settled and which may not culminate in payment and cordiality. The agreement assumes important to see the position between the parties prior to its execution. It is executed two months after Madanlal surreptitiously took away the share certificate standing in the name of Pushpa S Sharma from the society, then unknown to Sohanlal. Sohanlal is stated not to have repaid the liability to Madanlal and Madanlal is seen to have continued the trespass.

117. Much later Madanlal again sought legal assistance from Advocate Phadke. In the letter dated 18th February, 1997 of Advocate V A Phadke to the society, he has claimed the ownership of the suit flat on behalf of his client Brij! (not Pushpa). This clear give-away is

sought to be explained not by the Advocate but by Brij and Madanlal as an error made by the assistant of Advocate Phadke. The assistant is not examined. The explanation holds no water. The truth has surfaced in a strange way – from the admitted copy letter of the Advocate of Brij and Madanlal themselves.

118. The defendants would contend that it is only for Pushpa to prove her title because she has sued.

119. The defendants have relied upon the judgment of this Court in the case of *Rolex Marbles Vs. Municipal Corporation of Greater Mumbai, 2007(4) Mh.L.J 826*, in which the defendants claimed two tenanted plots of land. He showed the tenancy by producing one receipt for one plot of land. The tenancy of the other plot of land were disputed. He sought to produce rent receipts purportedly of the other plot of land. It was seen on evidence that the first plot of land was smaller and the second plot of land was larger. The rent of the first part of the land admeasuring 1500 Sq.ft. of November, 1984 was Rs.500/- pm. being Rs.2,000/- from August to November, 1984. The other rent receipt purportedly of other plot of land was also of Rs.500/- for November, 1985 but which was for larger plot of 6,925 Sq.ft. That evidence was unbelievable and rejected. It was observed that that party must have two rent receipts for the period immediately after he took the second plot of land on tenancy which was not shown. Hence his documents were not believed. It is under those circumstances that the Court held that just as he had adduced documentary evidence for the first plot of land, he should adduce documentary evidence to prove his title to the suit property which was the second plot of land.

It must be appreciated that this was the case of a party claiming tenancy against a third party. Indeed he must prove his title. Mere oral evidence that he has title is not sufficient. He must prove it by documentary evidence.

In a peculiar case such as this Pushpa has indeed not produced the documentary evidence upon good reasons.

120. In a set-up such as in the present case Pushpa has proved how she came to acquire the suit flat. If the title document is in the possession of the defendant who refuses to produce it, the title would be required to be seen from other circumstantial and corroborative evidence. In this case Pushpa did not have the original document of title or its copy. The defendants not only denied her title but claimed title in themselves under the very same document of the very same date which should have been only with the defendants and none else. Under these circumstances it would not lie upon the defendants to contend that because the plaintiff did not produce the documentary evidence her suit must fail, ignoring all other circumstantial evidence as also the total absence of their own evidence of title by their own title document.

121. It is in this light that the other judgment relied upon by the defendants must be viewed. In the case of *P H Dayanand Vs. S Venugopal Naidu & Ors., 2009(4) Mh.L.J. 334*, the Supreme Court relied upon an earlier Supreme Court judgment in paragraph 11 accepting what is held in that case which runs thus :

“The suit is for recovery of possession on the strength of title. Obviously, the burden is on the plaintiff to establish that title. No doubt in appreciating the case of title set up by the plaintiff, the Court is also entitled to consider the

rival title set up by the defendants. But the weakness of the defence or the failure of the defendants to establish the title set up by them, would not enable the plaintiff to a decree. There cannot be any demur to these propositions”.

Paragraph 12 of the judgment the Supreme Court with reference to the title itself is the authority for the proposition that the Court is entitled to take into consideration the defence of the defendants.

122 Further judgment relied upon by the defendants relate to the burden of proof under Section 101 and 103 of the Indian Evidence Act. Indeed the burden of proof of the facts rest on the party who substantially asserts the facts and not on the party who denies it.

In paragraph 15 of the judgment the Supreme Court has explained that the burden of proof would mean that the party would have to prove the allegations before he is entitled to a judgment in his favour. That would be the party who wishes the Court to believe the existence of the facts which he asserts.

Incidentally in this case both parties similarly assert title. Both must seek to produce documents for their respective assertions. The Court would see which party has proved and which has not.

123. Further in the case of *Parimal Vs. Veena @ Bharti, 2011(3) Mh L J 725* relied upon by the defendants, it is held that burden of proof rests on the party asserts the affirmative of the facts in issue and not the party who denies it.

Indeed the plaintiff must prove her case. Pushpa has asserted that she acquired the suit flat in her name. She is seen to have proved that she acquired the suit flat as shown above.

124. In the case of *Ramchandra Sakharam Mahajan Vs. Damodar Trimbak Tanksale*, AIR 2007 SC 2577, also relied by the defendants, it is held in paragraph 10 that in a suit for recovery of possession on the strength of title the burden is on the plaintiff to establish that title though the Court would be entitled to consider rival title set up by the defendants.

Pushpa has established her title by the aforesaid corroborative and circumstantial evidence. The Court would be entitled to see Brij's title which is not shown.

125 The defendants would contend that the plaintiff must prove her ownership by documentary evidence and that is the only way Pushpa would discharge the burden which rests on her to prove her title. That, however, is not borne out by the authorities acted on behalf of the defendants. True it is that Pushpa must prove her title, but Brij also must prove her title, since she has set up a case of title. What would, therefore, be the position in law when both parties set up rival claims of title to the same property?

126. This is amplified in the case of *Gopal Krishnaji Ketar Vs. Mohamed Haji Latif and Ors.* AIR 1968 Supreme Court 1413. The burden of proof under Section 103 was considered in that case. The Supreme Court considered the principle of best evidence which is the evidence which would throw light on the issue in controversy.

That was the case of a 'Darga' which had been in existence for about 700 years, its origin having been lost in antiquity. The Gazetteer of Bombay Presidency showed the tomb of a Muslim saint who was an Arab missionary along side the tomb of the Hindu princess. The Court saw evidence of the fame of the saint. The fact that the English came

to conquer that of part of India and departed within two years, was an act which was attributed to the holiness of the saint. The Court also further considered certain other miracles as also an area book to see the 'Kabjedar' of the property. The Court further had to consider the income of the 'Darga' and the account which was admittedly kept for the purpose which would show the plot number of the land. The accounts were kept by the defendant though the title was claimed by the plaintiff. The defendant refused to produce the account on the premise that it was no part of his duty to produce it because the onus was upon the plaintiff to prove that the 'Darga' was the owner of the plot. The Supreme Court deprecated the practice and repelled the argument in the following terms relying and extracting the judgment of the Privy Council in the case of *Murugesam Pillai Vs. Gnana Sambandha Pandara Sannadhi*, 44 Ind App 98 at Pg.108 = AIR 1917 PC 6 at P.8 thus :

It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine on onus of proof.

A practice has grown up in Indian Procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough – they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordships opinion, an inversion of sound practice for those desiring to reply upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.

In this case the Supreme Court further held that when a party in possession of the best evidence which would throw light on the issue

in controversy withholds it, the Court ought to draw an adverse inference against him notwithstanding that onus of proof does not lie on him. The Supreme Court observed that a party cannot rely upon the abstract doctrine of onus of proof to withhold from the Court the evidence necessary to determine the truth.

In that case certain evidence in the Gazetteer of Bombay Presidency and the area book was found but not the documents of title. Since the accounts which would have shown the plot number, were not produced, the Supreme Court held that adverse inference may be drawn even though the plaintiff had otherwise proved the title.

Madanlal and Brij have not produced the document which to their knowledge was executed and which remained in their possession, custody and power to produce despite assertion of their title thereunder. They have not only failed to show their title but have rendered themselves liable to be adversely inferred upon the bonafides or truth of their transaction.

127. Pushpa has in the facts of this case not produced document of title which remained with Madanlal. Pushpa could not even produce her own application to the society for membership because it remained with Madanlal. She could not show her title by the share certificate because it was surreptitiously and mischievously taken away by Madanlal from the secretary of the society 14 years after he admitted execution of agreement. However, Pushpa has produced the strikingly the cogent evidence contained in the file of the society showing her initial intention of sale of the suit flat as also the society's documents being addressed to, received by and replied by her or Sohanlal and showing a total vacuum of the existence or claim of ownership or incidents of ownership of Madanlal or Brij during those

years in the suit flat. Pushpa has further produced documents showing the situation of the family, their financial position, their children's education and living and, more important, the residence and the domicile of Brij and Madanlal. These are documents to evidence her title and lawful juridical possession of the suit flat and the lack of title of Brij.

128. The case of *Moran Mar Basselios Catholicos & Anr. Vs. Most Rev. Mar Poulose Athanasius & Ors.*, AIR 1954 S C 526 (Vol.41, CN 125) was another unique case in which ownership rights claimed by two parties was considered differently. It is a case of two groups of trustees claiming the possession of certain Church properties upon their possession as trustees. Hence each group claims in its capacity as owner. The Court held that the suit for possession of Church properties by the trustees must be proved by showing the title of trustees rightly allocated (See paragraph 35).

129. The case of *Fakirbhai Bhagwandas & Ors. Vs. Maganlal Haribhai & Ors.*, ILR Bombay Series 425, is a suit for injunction upon possessory title. The Court referred to the *Privy Council case of Ismail Ariff V. Mohamed Ghous*, 1893 20 Cal 834, PC on page 438 of the judgment holding that lawful possession of land was sufficient evidence of right as owner as against the person who had no title whatever and who was a mere trespasser. It was held in that judgment and was stated with approval that such a plaintiff in possession could obtain a declaratory decree and an injunction against the wrong-doer.

The analogy in the judgment was that the possession of the plaintiff is sufficient evidence of title as the owner against the defendant who

is the wrong-doer (or who has no title). It was observed therein that if the plaintiff was dispossessed otherwise than in due process of law the plaintiff could have recovered possession under Section 9 of the Specific Relief Act, 1877 (later section 6 of the present Specific Relief Act, 1963) within 6 months of dispossession notwithstanding any other title that may be set up in such a suit. Hence by analogy it was observed that if such plaintiff could recover possession from a person who might be able to prove a title, it would be right and just that he should be able to obtain a declaration of title as owner against the person who has no title or he is a wrong-doer and, therefore, an injunction could issue against the wrong-doer from interfering with possession of the plaintiff.

The possession of Pushpa having been seen from the evidence in the file of the society and Brij having been seen not to have been in possession, she and Madanlal having been seen to have been residing in Hong Kong and with whom even the society had not corresponded as owner, the plaintiff would be entitled as in lawful possession of the flat to declaration of ownership and an injunction against Brij as the wrong-doer.

130. In the case of *Kanti Lal Vs. Smt. Shanti Devi & Ors.*, AIR 1997 Rajasthan 230 which was a suit for recovery of possession upon the possessory title which would be good against all the world except the true owner, the aspect of possession has been explained in paragraph 34 of the judgment thus :

34. The expression "possession" is a legal term and its proof varies with the nature of property under the scrutiny of the courts and it can be proved by credible oral evidence as well. The expression "Evidence" has been defined under Section 3 of the Evidence Act which means and includes all statements which Courts permit or

require to be made before it by witnesses in relation to matters of fact under inquiry. Such statements are called oral evidence. The oral evidence to prove possession is also a mode of proof provided under the Evidence Act. The testimony of reliable witnesses about the possession cannot be brushed aside by giving superficial treatment or by ignoring it. The Courts are required to weigh the oral testimony adduced by the parties and its ignorance would be treated to be fatal. In abundant caution, it is held that Courts while analysing oral statements of the witnesses are required to keep in view the statements of those witnesses who had deposed the acts of possession leading to an inference about possession of a party according to the nature of the property under consideration in preference to the statements of the witnesses who had stated only about possession simpliciter without stating any act of possession in favour of one party or other.

It is, therefore, for the parties to prove their lawful possession (of course, the possession must be lawful) by either oral or documentary evidence. As any other fact the testimony of an independent witness such as the Secretary of the society who produced the file of the society as a witness for production of documents could not be brushed aside by giving superficial treatment to it or by ignoring it. The documents in the file must be considered for their true import. They are the relevant independent documentary evidence to substantiate the oral case of Pushpa of purchase of the suit flat, obtaining the membership of the society, being issued the share certificate of the society and also of Sohanlal being contacted by the society for payment of the arrears of the society not only in the suit premises in the society building but also where she resided abroad to show that she was the owner that the society corresponded with. The oral testimony of Pushpa must be accordingly be weighed in accordance with such documentary evidence.

In that case the oral evidence led by the plaintiff was declined to be believed by the trial court. It was held that non acceptance of the oral

statements of the plaintiff which otherwise inspired confidence of the Appeal Court was erroneous. The Court considered the oral as well as documentary evidence to conclude about the plaintiff's possessory title including, in paragraph 61 of the judgment the boundary on the south side of the plot which was taken to be correct and upon which the Court concluded the proof of interrupted continuous possession of title of the plaintiff. The Court hence concluded in paragraph 85 of the judgment that the plaintiff's possession was violently and fraudulently invaded and the suit for recovery of possession filed within 12 years of dispossession was properly filed. In fact the Court held that in such a case the trial Court committed an error in not shifting the onus of proof upon the defendant to establish a better title and the entitlement to retain possession over the suit land. The defendants having not done so, their possession, which was seen to have been obtained by force and fraud, was not allowed to be retained.

In this case Pushpa's flat has been taken over in the aforesaid circumstances by perverse means in about April, 1984 after Madanlal and the society were put to notice of Pushpa's claim. The analogy in that judgment would apply even if Pushpa does not prove her title in the traditional mode of the producing the document of title but has proved it merely by oral evidence of how she obtained title coupled with the evidence that she was in possession and therefore, had possessory title as against Brij, who has not proved the title claimed by her as also consequent lawful possession.

131. In the case of *Chief Conservator of Forests, Govt. of AP Vs. Collector and Ors., (2003) 3 Supreme Court Cases 472*, the Court drew presumption of ownership of the possessor. The case was

of ancestral land. The plaintiffs claimed to be pattedars of the land proving long and peaceful enjoyment of the land. There was, however, no proof of averment of the patta and acquisition of title. The Court held that presumption of ownership arose in favour of the plaintiff who was in settled position and that presumption could not be rebutted by the respondent government until which time the plaintiff's claim could be upheld relying upon the judgment in the case of *Nair Service Society Ltd., V. K C Alexander, AIR 1968 SC 1165* holding that “when the facts disclosed no title in either party, the possession alone decides.” Hence possession alone would be deciding factor in such cases.

If it is to be contended that neither Pushpa nor Brij proved their title by production of their documentary evidence, the proof of possession of either of the parties must be seen. That however, must be lawful possession. Such lawful possession throughout the period between the acquisition of title in 1970 and the disputes between the parties in 1984 is seen to be in Pushpa not Brij. That must then decide the issue. It is ridiculous, but Brij would claim that Brij and Madanlal were in possession of the suit flat upon production of documents – all after 1984 – such as ration card, electricity bills, etc. These are the documents of a trespasser upon trespass and not a party in lawful possession prior to the alleged trespass.

132. Hence we must see the burden of proof as to ownership is set out in Section 110 of the Evidence Act which runs thus :

S. 110 Burden of proof as to ownership. –

When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

133. In the case of *Maria Margarida Sequeria Fernandes & Ors. Vs. Erasmo Jack De Sequeria (Dead) through LRs., 2012(3) Scale 550*, which was a case of possession on the Section 6 of the Specific Relief Act but in which the Supreme Court considered the rights of the owners of the properties seeking recovery of possession on title also, it has been held in paragraph 67 that in an action for protecting possession of an immovable property upon the title being established, the possession or occupation of the property by the person other than the holder of the legal title would be subordinate to the legal title and the person resisting a claim for recovery of possession and claiming to continue in possession would require to establish that he has a right to continue in possession. Such person must, therefore, give sufficient details to support his claim to continue in possession. Hence upon Pushpa's legal title being seen, Brij must surrender possession to her and Pushpa would be entitled to recover possession. If Brij has to resist that possession, she must show how she can claim that right.

134 It may be mentioned that the salutary principle of burden of proof of a given document specially in case of disputed facts resulting in number of issues to be tried is contained in Section 106 of the Indian Evidence Act which runs thus :

Burden of proving fact especially within knowledge.—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

135. Accordingly in two separate cases *Areva T & D India Ltd. Vs. Mr. R Govindrajan & Ors., 2010(3) ALL MR 140* and *H R Irani Vs. Life Insurance Corporation of India & Anr., 2010 (2) ALL M R,*

the onus of a noticee under Sections 4 & 5 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 under Section 106 of the Evidence Act has been considered. When there were facts present to the special knowledge of the noticee, such noticee had the onus to prove them, the contentions of the authority notwithstanding.

Such is the onus that lies on Brij.

136. The ultimate burden is, therefore, on each party to separately and independently prove the title claimed by them. The Court has, as aforesaid, seen such proof of title by Pushpa and lack of proof of title by Brij and accordingly by all the defendants who claim only under her title and not separately or independently. Hence issue Nos.2, 4 & 5 are answered in the affirmative and Issue No.9 is answered in the negative.

ISSUE NO.10 – The plaintiff's admission as member of the society.

137. It is seen that the society has admitted as member one Pushpa S Sharma under the resolution of the society Exh.W in evidence. Pushpa S Sharma is shown to be Pushpa, the plaintiff. The society has accordingly issued a share certificate also in the name of Pushpa S Sharma. That would also be issued in the name of Pushpa, the plaintiff. The circumstantial evidence in that regard is the aforesaid correspondence of the society not only to Pushpa but also to Sohanlal upon P.B.No.1769 in Dubai where they lived and upon the specific instruction of Pushpa also upon P.B.No. 3535 in Abu Dhabi.

138. Since Brij has not shown herself as to Pushpa S Singh and her case of her admission to the society as Pushpa S Sharma is seen to be upon a fraud perpetrated by Brij on Pushpa as also the Court by

production of forged and fabricated birth certificate which has been disproved in evidence upon Pushpa having rebutted the statutory presumption of its correctness, Brij is seen neither to have purchased the flat as Pushpa nor to have applied to the society to be a member and not being conferred the membership of the society. There is no correspondence of the society also with Brij albeit in the name of Pushpa S Sharma where she lived or where she had informed the society to correspond with her. That circumstantial evidence is specifically absent.

139. Consequently the plaintiff is seen to have been admitted as member for Indrayani Society and the defendants' contention that the plaintiff was not admitted as member of Indrayani Society is disproved. Hence issue No.10 is answered in the negative holding that it was the plaintiff who was admitted as member of the Indrayani Society as Pushpa S Sharma.

ISSUE NO.6 – Wrongful occupation of the defendants.

140. The defendants are not seen to have been in occupation of the suit premises soon after the agreement in respect of the suit premises was executed in 1970. The defendants have not produced any documents showing their lawful possession and occupation of the suit premises purchased by Brij soon after the alleged purchase. There is no ration card, voter's cards, electricity bills, society's bills and the like soon after the alleged purchase when the Brij and Madanlal would have lived in the flat specifically purchased for them out of necessity.

141. Such documents are only well after the dispute between

the parties commenced in 1983-1984. These documents are wholly irrelevant to consider lawful occupation or possession. Most of the documents showing the occupation of Brij and Madanlal are the ration card issued in 1995, one letter of the BEST relating to certain deposits of 1995, the electricity bills from 2004 which is even later than the filing of the suit in 2003. The society bills are separately not produced. The correspondence relating to payments of outgoings of the society is essentially after 1984 with Brij.

142. The suit is on trespass. A trespasser is bound to be in occupation of the premises trespassed upon. That is not lawful possession or rightful occupation. Hence the defendants are seen to be in wrongful occupation of the suit premises as alleged by the plaintiff. Consequently issue No.6 is answered in the affirmative.

ISSUE NO.12 – Payment of outgoings of the society by the defendants.

143. Brij and Madanlal have alleged that they paid the outgoings of the society. The outgoings are not determinative of either the ownership or lawful possession. Outgoings of the society would be paid by any occupant. Such outgoings may be paid even by the gratuitous occupant. Brij and Madanlal were the brother-in-law and sister-in-law of Pushpa. Whilst they had cordial relations with Pushpa which was prior to their immigrating to Hong Kong, they may have lived in the suit premises and consequently paid outgoings. They may have been intermittently paying the outgoings upon their own volition. This is seen from some letters of Madanlal as a director of defendant No.3 from the file of the society which demonstrates an oblique motive of creating evidence. Such payments of outgoings do

not matter in a suit on title for eviction of trespassers. Hence the issue is wholly inconsequential and hence not answered.

I S S U E NO.1 – Bar of Limitation.

144. The suit is for recovery of possession from a trespasser. Evidence has shown that Pushpa claims that the trespass was committed by the defendants in about 1983-1984. Brij claims that she continued in lawful possession all through from 1970 when the suit flat was purchased by her until after 1982-1983 when the disputes between the parties arose and she refuted the claim of trespass. Pushpa sued Brij initially in the Co-operative Court in Dispute No.188 of 1995. The inherent jurisdiction of that Court was challenged. The Co-operative Court held that it had jurisdiction in 2002. In an appeal for that order before the Appellate Court it was held that that Court had no inherent jurisdiction under the judgment dated 31st March, 2003. The time from 1995 to 2003 taken in prosecuting the lis by Pushpa in the Co-operative Court is required to be excluded under Section 14 of the Limitation Act, 1963. The suit having been filed in 2003 is within 9 years of the dispossession of the plaintiff. The suit would be required to be filed within 12 years of the dispossession of the plaintiff under Article 65 of Schedule I of the Limitation Act, 1963 (also see the case of *Kantilal Supra*) which deals with the period of limitation in suits for possession on title). Pushpa's claim is, therefore, within time. A solitary statement in the penultimate part of the written statement being paragraph 36 in reply to paragraph Nos.49 and 50 of the plaint with regard to the prosecution of the suit in the Co-operative Court and later in this Court does not bar the suit under the Law of Limitation. Hence Issue No.1 is answered in the negative.

145. The duties of the Court in cases a suit for recovery of possession against wrongful, illegal possession and trespass are set out by the Supreme Court in the case of *Maria Margarida Sequeria Fernandes & Ors. Vs. Erasmo Jack de Sequeria thru L Rs.*, 2012 3 Scale 550 = AIR 2012 SC 1727 which is again followed by the Supreme Court in the case of *A. Shanmugam vs. Ariya Kshatriya Rajakula*, AIR 2012 SC 2010 in eloquent prose thus :

30. The appellant submitted that for more than two decades the appellant is without the possession of her own house despite the fact that she has valid title to the suit property.

Truth as guiding star in judicial process.

31. In this unfortunate litigation, the Court's serious endeavour has to be to find out where in fact the truth lies. The truth should be the guiding star in the entire judicial process.

32. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty.

33. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.

34. In Mohanlal Shamji Soni v. Union of India 1991 Supp (1) SCC 271, this Court observed that in such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions- whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to

do justice but also to ensure that justice is being done.

The Court set out the parameters of the proof by parties in a suit for recovery of possession thus :

63. Possession is important when there are no title documents and other relevant records before the Court, but, once the documents and records of title come before the Court, it is the title which has to be looked at first and due weightage be given to it. Possession cannot be considered in vacuum.

64. There is a presumption that possession of a person, other than the owner, if at all it is to be called possession, is permissive on behalf of the title-holder. Further, possession of the past is one thing, and the right to remain or continue in future is another thing. It is the latter which is usually more in controversy than the former, and it is the latter which has seen much abuse and misuse before the Courts.

65. A suit can be filed by the title holder for recovery of possession or it can be one for ejectment of an ex-lessee or for mandatory injunction requiring a person to remove himself or it can be a suit under Section 6 of the Specific Relief Act to recover possession.

66. A title suit for possession has two parts - first, adjudication of title, and second, adjudication of possession. If the title dispute is removed and the title is established in one or the other, then, in effect, it becomes a suit for ejectment where the defendant must plead and prove why he must not be ejected.

67. In an action for recovery of possession of immovable property, or for protecting possession thereof, upon the legal title to the property being established, the possession or occupation of the property by a person other than the holder of the legal title will be presumed to have been under and in subordination to the legal title, and it will be for the person resisting a claim for recovery of possession or claiming a right to continue in possession, to establish that he has such a right. To put it differently, wherever pleadings and documents establish title to a particular property and possession is in question, it will be for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in

possession.

68. Once the title is prima facie established, it is for the person who is resisting the title holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place before the Court all such documents as in the ordinary course of human affairs are expected to be there.

Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents.

69. The person averring a right to continue in possession shall, as far as possible, give a detailed particularized specific pleading along with documents to support his claim and details of subsequent conduct which establish his possession.

70. It would be imperative that one who claims possession must give all such details as enumerated hereunder. They are only illustrative and not exhaustive.

- (a) who is or are the owner or owners of the property;*
- (b) title of the property;*
- (c) who is in possession of the title documents*
- (d) identity of the claimant or claimants to possession;*
- (e) the date of entry into possession;*
- (f) how he came into possession – whether he purchased the property or inherited or got the same in gift or by any other method;*
- (g) in case he purchased the property, what is the consideration; if he has taken it on rent, how much is the rent, license fee or lease amount;*
- (h) If taken on rent, license fee or lease - then insist on rent deed, license deed or lease deed;*
- (i) who are the persons in possession/occupation or otherwise living with him, in what capacity;*
as family members, friends or servants etc.;
- (j) subsequent conduct, i.e., any event which might have extinguished his entitlement to possession or caused shift therein; and*
- (k) basis of his claim that not to deliver possession but continue in possession.*

71. Apart from these pleadings, the Court must insist on documentary proof in support of the pleadings.

With request to the claim of mesne profits, the aforesaid judgment is the last word :

Mesne Profits

90. Experience has shown that all kinds of pleadings are introduced and even false and fabricated documents are filed in civil cases because there is an inherent profit in continuation of possession. In a large number of cases, honest litigants suffer and dishonest litigants get undue benefit by grant or refusal of an injunction because the Courts do not critically examine pleadings and documents on record. In case while granting or refusing injunction, the Court properly considers pleadings and documents and takes the pragmatic view and grants appropriate mesne profit, then the inherent interest to continue frivolous litigation by unscrupulous litigants would be reduced to a large extent.

ISSUE NOs.13, 14, 15 and 16 – Reliefs

146. The plaintiff is entitled to declaration that the defendants have no right, title or interest in the shares being 31 to 35 (both inclusive) under share certificate No.7 of Indrayani Flat Owners Hsg. Society Ltd., the suit premises and are trespassers thereof. They are bound and liable to handover physical possession and the custody of the share certificate and the suit premises to the plaintiff being Flat Nos.1 and 2 on the ground floor and a garage and servants' quarters in building Indrayani situate at Sophia College Lane, 61-D, Bhulabhai Desai Road, Mumbai 400 026. The plaintiff is further entitled to a declaration that she is entitled to the ownership rights of the aforesaid suit premises. The plaintiff is entitled to recover vacant and peaceful possession of the suit premises. The plaintiff is also entitled to mesne profits on account of the wrongful occupation of the defendants

therein.

147. Hence the following order.

1. The plaintiff is declared to be the owner of the suit premises being Flat Nos.1 and 2 on the ground floor and a garage and servants' quarters in building Indrayani situate at Sophia College Lane, 61-D, Bhulabhai Desai Road, Mumbai 400 026. It is declared that the defendants have no right, title and interest in the above suit premises or in the share certificate bearing No.7 for share Nos.31 to 35 which has been issued in the name of the plaintiff, Pushpa S Sharma.
2. The plaintiff shall be entitled to be handed over and the defendants shall handover the share certificate of the above suit premises taken by Madanlal from the then secretary of the society on 20th February, 1984 to the plaintiff.
3. The defendants shall handover vacant and peaceful possession of the suit premises to the plaintiff within 8 weeks from today.
4. The plaintiff shall be entitled to mesne profits on account of the wrongful occupation of the defendants in the suit premises. The plaintiff shall be entitled to pursue her claim for mesne profits before the Commissioner for taking accounts in accordance with the rules of this Court in that behalf.
5. The defendants shall pay costs of the suit fixed at Rs.2 lacs to the plaintiff.

(ROSHAN DALVI, J.)