

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****NOTICE OF MOTION NO. 690 OF 2016****IN****SUIT NO. 188 OF 2016**

Mrs. Meenakshi Vilas Deshpande and others

..Plaintiffs

Vs.

Anantraj Co-op. Hsg.Soc. Ltd. and others

..Defendants

Mr. K.R. Parekh, instructed by M/s. K.R. Parekh & Co., for the Plaintiffs.

Mr. N.Y. Chavan for Defendant Nos. 1 and 2.

Mr. Vishal Kanade, instructed by M/s. Vivek Patil & Associates, for Defendant No.8.

CORAM: S. J. KATHAWALLA, J.

Date: 11th August, 2016

P.C.:

1. The Plaintiffs have filed the above Suit for cancellation of a deemed conveyance dated 30th May, 2012 obtained by Respondent No. 1 Society pertaining to land bearing CTS No. 998, Plot No. 13, Dahanukar Wadi, Gokhale Road, Chandavarkar Cross Lane, Kandivali (West), Mumbai-400 067("the Suit Land") and the building /structure standing thereon ("the Suit Building"). The Suit Land along with the Suit Building shall hereinafter be referred to as "the Suit Property". The Plaintiffs have also prayed for cancellation of the Development Agreement and the Power of Attorney both dated 21st June, 2012 (Exhibits-I and J to the Plaint) executed between the Defendant No. 1 -- Society and the

Defendant No.8 --Developer ("the Second Developer").

2. The Plaintiffs have in the above Suit also taken out the above Notice of Motion for an injunction restraining the Defendants from carrying out any demolition and/or construction activity on the Suit Property.

3. The facts as narrated by the Plaintiffs are briefly set out hereunder:

3.1 One Sitaram Deshpande had two sons named Vasant Deshpande and Yashwant Deshpande. Gulab Vasant Deshpande was the daughter-in-law of Sitaram Deshpande and the wife of his son Vasant. Gulab Deshpande was the owner of the Suit Land. The brother of Vasant -- Yashwant Deshpande was therefore not concerned with the Suit Land and/or any structures standing thereon.

3.2 That upon the demise of the said Gulab Deshpande (mother-in-law of the Plaintiff No.1), her husband Vasant Deshpande (father-in-law of the Plaintiff No.1) applied for and obtained Letters of Administration from this Court by filing Testamentary Petition No. 754 of 1985. The said Vasant Deshpande expired on or about 13th January, 1991. Since the husband of the Plaintiff No.1 -- Vilas Deshpande (son of Vasant and Gulab Deshpande) also expired in the year 1999, the Plaintiffs (i.e. the wife of Vilas Deshpande and their son and daughter) became entitled to the Suit Property and therefore in the year

2012 applied for and obtained Letters of Administration from this Court.

3.3 That the said Vasant Deshpande (father-in-law of the Plaintiff No. 1) during his life time had entered into a Development Agreement dated 23rd January, 1987 with Defendant Nos. 5 to 7 (“the First Developers”). By virtue of the said Development Agreement, the Suit Land was given for development by the said Vasant Deshpande to the First Developers who were permitted to demolish the then old bungalow standing on the Suit Land and put up a multi storied building under the provisions of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale Management and Transfer) Act, 1963 (“MOFA Act”). The said First Developers accordingly carried out the development work and sold various dwelling units to the flat purchasers. Clauses 12, 18 and 22 of the said Development Agreement are relevant and reproduced hereunder:

12. The owner declares that there is a temple within the boundary of the plot on the ground floor which is known as Malai Devi Temple and the said temple is at present maintained by the owner and the owner is performing Puja as well as celebrating all the Utsavas. It is hereby agreed that the owner will retain the ownership of the said temple and continue to perform Puja and celebrating the Utsavas as heretofore.

18. It is hereby agreed by and between the parties that one coconut tree which is in the corner of the temple area will be

retained by the owner and the members of the Society shall not claim any right in the same.

22. The owner declares that he has planted 12 coconut trees in the compound of the plot along its boundaries and these trees have come up over the size of fruit yielding capacity. The owner therefore has sentimental value towards these trees and hence the parties do hereby agree that the coconut trees existing at present will continue to belong solely to the owner and the members of the Society shall not have any right to take fruits of the said coconut trees, provided further it is hereby agreed by and between the parties that the trees that may come in the way of construction of the Garages shall be removed by consent of the owner."

3.4 The First Developers in their agreements executed with the flat purchasers made it clear that the ownership of the temple and coconut trees standing on the suit land continued to vest solely with the Owner i.e. Vasant Deshpande.

3.5 That the flat purchasers after taking possession of their respective flats formed a Co-operative Society in the year 1989-90 and the said Society is duly registered in the name of Defendant No.1 i.e. Anantraj Co-operative Housing Society Ltd. Plaintiff No. 1 being the owner/occupant of Flat No. 3 on the ground floor of the Society building, was also made a Member of the Society.

3.6 That the Members of the Defendant No. 1 Society were trying to damage

the coconut trees of the Plaintiffs and therefore the Plaintiffs filed Suit No. 5050 of 2000 before the City Civil Court, Mumbai, seeking appropriate reliefs against the Members of the Society. By an ad-interim order dated 31st August, 2000 passed in the said Suit, the Members of the Society (Defendant Nos. 1 to 8 thereto) were restrained from cutting the trees standing in the compound of the Society.

3.7 That the Plaintiffs “for their own reasons and convenience” had not been residing in the said Flat No.3 of the Plaintiff since the year 2009 and the said Flat was given on leave and license by the Plaintiff No. 1 to various licensees from time to time.

3.8 That in the year 2013-2014, “the concerned people” (unnamed) destroyed the trees by poisoning them. An FIR was registered, and a report stating that the trees appear to be poisoned, was filed by the Kandivli Municipal Authority.

3.9 That the Suit Property remained to be conveyed to the Society in terms of the Development Agreement due to the strained relationship set out in paragraph 9 of the Complaint i.e. on account of the dispute between the Plaintiffs and the Members of the Society qua the coconut trees in the year 2000. In view of the amendment to the MOFA Act and insertion of the provision pertaining to deemed conveyance, the Second Developer (Defendant No.8) became active

in the matter and instigated Defendant No. 1 to initiate appropriate proceedings for deemed conveyance.

3.10 That due to the strained relationship between the parties, and taking advantage of the fact that the Plaintiffs were not residing in Flat No.3 of the Society, the Defendants committed fraud on the Plaintiffs and obtained an order of deemed conveyance from the District Deputy Registrar (“DDR”) dated 12th April, 2012, and in pursuance thereof registered the deemed conveyance on 30th May, 2015.

3.11 Despite being aware of the residential address of the Plaintiffs, the Application for deemed conveyance was not served upon the Plaintiffs. Instead public notice was got issued from the DDR. Instead of joining the Plaintiffs as party to the said Application, Defendant Nos. 3 and 4 who are related to the branch of Yashwant Deshpande were joined as party Respondents to the said Application.

3.12 That in furtherance of their mala fide conduct, Defendant No. 1 Society and the Second Developer (Defendant No.8) entered into a Development Agreement dated 21st June, 2012, which was duly registered before the Sub-Registrar of Assurances, Borivali-2 under Sr. No. BDR-5/5436/2012. Simultaneously a registered Power of Attorney was also executed by Defendant No. 1 in favour of the Director of the Second Developer. All the said documents

were executed and resolutions pertaining to the redevelopment were passed without the knowledge and consent of the Plaintiffs and behind the back of the Plaintiffs.

3.13 The Plaintiffs were unaware about all the aforestated facts and it was only in November, 2012, when one Mr. Laukik Dixit from the Office of the Second Developer visited the house of the Plaintiffs and informed Plaintiff No.2 about the Order passed by the DDR, that the Plaintiff No.1 through her Advocate's Notice dated 23rd November 2012 addressed to the DDR, placed the true and correct facts on record and called upon the DDR to make an enquiry and revoke the Order passed by him.

3.14 It was only after failure on the part of the DDR to revoke the illegal order, that the Plaintiffs obtained the relevant documents/information by filing applications seeking certified true copies and also filing applications under the Right to Information Act. It was then that the Plaintiffs understood how their rights were jeopardised.

3.15 The copy of the Order of deemed conveyance was not available with the Plaintiffs though their Advocate wrongly stated in his letter dated 23rd November, 2013 as having received the same. A certified copy of the Deed of Conveyance was obtained from the Office of the Sub-Registrar only in October, 2013, i.e. only after the Plaintiff filed an Appeal under Section 19 of the Right to

Information Act on 26th August, 2013.

3.16 That therefore the Plaintiffs had to run from pillar to post as set out in paragraphs 15, 16 and 17 of the Plaint to collect all the documents.

3.17 That the Plaintiffs thereafter filed a Writ Petition being (L) No. 17451 of 2015, which came up before this Court (Coram: M.S. Sonak, J.) on 3rd December, 2015, when the Writ Petition was admitted but the Learned Judge declined to pass any interim orders therein and granted liberty to the Plaintiffs to file a suit on title and move the Court for ad-interim reliefs.

3.18 Since the Plaintiffs filed the Writ Petition, Defendant No. 1 and the Second Developer (Defendant No.8) collusively filed an Arbitration Petition in this Court being Arbitration Petition (L) No. 2006 of 2015. The Second Developer moved an ad-interim application in the said Petition, but no orders in favour of the Second Developer were passed by the Court. The Second Developer has forcibly taken possession of Flat No. 3 on the ground floor of the Suit Building from the Licensee of the Plaintiff No.1.

3.19 Under the Development Agreement dated 23rd January, 1987, the ownership of the land covering the coconut trees as well as the area of land on which the temple was constructed by the Plaintiffs, continues with the Plaintiffs. The Deemed Conveyance and the Development Agreement dated 21st June, 2012, between the Defendant No. 1 Society and the Second Developer

(Defendant No.8) do not take care of the said aspects and thus it is asserted by the Plaintiffs in the plaint that the said Deemed Conveyance is illegal and void.

3.20 The Plaintiffs assert that the decision of the Division Bench of this Court in *Tushar Jivram Chauhan and another vs. The State of Maharashtra and others*¹ is applicable to the facts of this case on all fours.

3.21 In view of the above facts and circumstances, the Plaintiffs filed the above Suit and have sought reliefs as set out hereinabove and have also taken out a Notice of Motion seeking interim reliefs against the Defendants from carrying out any construction in the Suit Property.

3.22 Despite the ad-interim order passed by this Court directing the Defendants to maintain status quo as regards the temple and the coconut trees, the dome on the temple is damaged by the Defendants.

4. The Learned Advocate appearing for the Plaintiffs has taken me through all the above facts and submissions which, according to the Plaintiffs, are true and correct. It is submitted that the Notice of Motion be allowed with costs.

5. The Defendant No. 1 and the Second Developer (Defendant No.8) have filed their Affidavits. They have relied on the Affidavits as well as submissions filed by each other, including the pleadings and affidavits filed in Arbitration

¹ 2015 4) ALL MR 223

Petition (L) No. 2006 of 2015 . They have inter alia submitted as under:

5.1 That pursuant to the Development Agreement dated 23rd January, 1987 between Vasant Deshpande and the First Developer (Defendant Nos.5 to 7) the entire construction on the suit land was completed and a Society was formed in the year 1989. Despite it being mandatory to convey the Suit Property in favour of the Society as per the MOFA provisions, the Plaintiffs failed to do so, and in fact admittedly since the year 2009, discontinued to stay in Flat No.3, which Flat stood in the name of the Plaintiff No.1, on the ground floor of the Suit Building.

5.2 That though the Second Developer (Defendant No.8) in its Affidavit in Rejoinder, filed in Arbitration Petition (L) No. 2006 of 2015 has much before the filing of the Plaint in the above Suit, stated that it was the duty of Plaintiff No. 1 to formally inform in writing to the Defendant No. 1 Society the change in residential address of the Plaintiffs, for the purpose of correspondence etc. and thereby update the records of the Society, Plaintiff No. 1 neither informed nor communicated to the Society their residential address, which they were duty bound to do. However, since the Plaintiffs failed to do so, the Advocate for Defendant No. 1 Society vide Notice dated 21st September, 2011 addressed to the Plaintiff No.1 at her last known address i.e. Flat No. 3, Ground Floor in the

Society Building, called upon the Plaintiffs to execute the conveyance under the provisions of the MOFA Act. The said notice was returned back with the postal remarks “unclaimed”. Therefore, during the proceedings before the Competent Authority/DDR, filed by the Defendant No.1 Society, seeking an order of deemed conveyance in respect of the Suit Property under Section 11 of the MOFA Act, directions were issued for publication of public notices in local newspapers which were duly published on 14th October, 2011. Therefore the Plaintiffs cannot contend that they were not heard before passing the said Order dated 12th April, 2012. Since the Plaintiffs had never intimated the details of their new address, upon publication of the said notice, the Plaintiffs were deemed to have had notice of the said proceedings and cannot contend that the said Order dated 12th April, 2012 was vitiated by fraud. The decision in the case of ***Tushar Jivram Chauhan and another vs. The State of Maharashtra and others (supra)*** relied upon by the Plaintiffs is therefore of no assistance to the Plaintiffs.

5.3 That the Plaintiffs have suppressed the correct and relevant facts from this Court and have wilfully made false and incorrect statements on oath including the statement in the plaint that they came to know about the Order dated 12th April, 2012 passed by the DDR pertaining to the deemed conveyance in November, 2012. This is established from the following:

On the basis of the Order dated 12th April, 2012 passed by the DDR and the registered Conveyance Deed dated 30th May, 2012, the Society had on 16th July, 2012, applied to the City Survey Officer, Borivli for mutating the name of the Defendant No. 1 Society in their revenue records i.e. Property Card of the Suit Land. At that time Plaintiff No. 1 herein through her Advocates, Rane and Company, raised an objection vide their letter dated 30th July, 2012. In view of the said objection, the City Survey Officer, Borivli vide his letters dated 3rd October, 2012 and 26th November, 2012 asked the Constituted Attorney of Plaintiff No. 1, Mr. Parag Deshpande (Plaintiff No.2 herein) and their Advocates Rane and Company to remain present for the hearing on 12th November, 2012 and 1st December, 2012 and submit their claims along with documentary evidence. The said letters are annexed to the Affidavit in Rejoinder filed by the Second Developer (Defendant No. 8) in Arbitration Petition (L) No. 2006 of 2015. Therefore, the Plaintiffs were well aware and conversant with the fact that vide an Order dated 12th April, 2012, the Application for deemed conveyance was allowed in favour of Defendant No. 1 and accordingly the Conveyance Deed dated 30th May, 2012 was duly executed by Defendant No. 1 and registered before the Sub-Registrar of Assurances, Borivli-2.

5.4 That in spite of the letters dated 3rd October, 2012 and 26th November, 2012 issued by the City Survey Officer, Borivli, Plaintiff No. 1 or her

Constituted Attorney i.e. her son, the Plaintiff No. 2 herein, did not appear before the said authority and accordingly the proceedings commenced and concluded before the said authority and the name of the Plaintiff No. 1 Society was duly mutated in the revenue records of the City Survey Officer, Borivli vide Mutation Entry No. 737.

5.5 That the Plaintiff No. 1 through her Advocate's Rane and Company also issued notice dated 23rd November, 2012 to the DDR, Mumbai and its office-bearers, wherein the said Advocate has stated that the Plaintiffs have obtained certified true copies of the registered Deemed Conveyance in favour of the Society, and stating therein that from the documents and records available with them, it is crystal clear that the Chairman of Defendant No. 1 Society and the Secretary Mrs. Swarada Mahesh Sathe have fraudulently obtained the Deemed Conveyance by filing false affidavits, as well as by giving false information to the DDR and to the Office of the Joint Sub-Registrar, Borivli-II. Despite being in possession of all the relevant documents since November, 2012, the Plaintiffs filed the present Suit only on 21st December, 2015 and is therefore guilty of gross delay and laches and not entitled to any reliefs. To cover up this delay, the Plaintiffs have now blamed Advocate Rane by alleging that he has made an incorrect statement in his said Notice dated 23rd November, 2012, that the Plaintiffs have obtained a certified true copy of the registered Deemed

Conveyance.

5.6 That the Second Developer (Defendant No. 8) issued a notice dated 22nd September, 2015 to the Plaintiff No. 1 at her last known address provided by the Society by way of hand delivery as final intimation for handing over the said Flat to Defendant No.8. The said notice was received by the person residing therein as a tenant. The acknowledgement of the said "tenant" is produced before the Court. The said tenant vacated the flat and delivered possession of the same to Defendant No. 1 Society. The Plaintiffs have thereafter wrongly alleged that the signature of the tenant and possession of the Flat was also obtained by force and the tenant was told by Defendant No. 8 that a copy of the letter should not be handed over to the Plaintiffs.

5.7. That a bare perusal of the Development Agreement dated 23rd January, 1987 (the relevant Clauses of which are set out in paragraph 3.3 hereinabove) shows that the Plaintiffs' predecessor had a right only in the temple and the trees (i.e. the fruits borne by the trees) and not the land beneath the same. The said temple is very small. It admeasures only 3'-0(0.914 mtrs. length) x 2'-9.5(0.851 mtrs. width) and height of 2'-3' (0.685 mtrs.) as per the Court Commissioner's Report dated 21st April, 2016. The said temple is not reflected in any sanctioned plans and neither have the Plaintiffs produced any permission of the Municipal

Corporation of Greater Mumbai (MCGM) sanctioning construction of such a temple on the Suit Land. The temple is obstructing the digging work which has commenced on the Suit Property. In any event, the rights of the Plaintiffs, if any, can only be restricted to the temple and trees (i.e. the fruits that grow on the trees) and not the land beneath the same. The Defendants without prejudice to their contentions are willing to relocate the said temple at an appropriate place within the Suit Property. The said temple shall be protected by a compound wall and shall have a separate access for the Plaintiffs to carry out the pooja and other rituals. As far as the trees are concerned, the Defendant No. 1 and/or its Members or Defendant No. 8 have never tried to poison or destroy any of the trees as alleged. Since the Plaintiffs have not bothered to look after the said trees, five trees have become deadwood in or about 2013. Defendant No. 1 therefore made an Application to the MCGM for cutting of the said trees. The Assistant Commissioner, R/South Division of MCGM granted permission for cutting the said trees (Exh U page 226 of the Affidavit in Reply of Defendant No. 8 dated 11th February, 2016). In any event, the Defendants are also willing to plant coconut trees as suggested by the Court appointed Commissioner, if so directed by this Court, and the Plaintiffs may have exclusive rights over the fruits that grow on the said trees.

5.8 That the dome on the temple is not intentionally damaged by the

Defendants. The hectic activities of excavation etc. going on, on the Suit Plot, resulted in the dome of the temple being damaged. The Society/Second Developer (Defendant No.8) shall get the same restored/repared at their costs.

5.9. That the structure on the Suit Plot was in a very dilapidated condition. All the 11 out of the 12 Members therefore agreed to have the suit Property redeveloped through the Second Developer (Defendant No.8). Plaintiff No. 1 did not attend any meetings since she admittedly left her Flat in the year 2009. She had not forwarded to the Society the address where she had shifted. The Plaintiff No. 1 is the only Member who is now opposing the redevelopment. The Building on the Suit Plot is admittedly demolished and 11 Members have shifted to temporary accommodation on leave and license basis. The Plaintiffs too are admittedly residing elsewhere. The Second Developer (Defendant No. 8) has obtained all the necessary permissions, has commenced work and have expended significant amount of money till date, including making payments in lieu of temporary alternate accommodation to the 11 Members. If the Defendants are restrained from carrying out any construction on the Suit Plot, the same will cause grave prejudice not only to Defendant No. 8 but to the other 11 Members of the Society and their families who are residing elsewhere and waiting for the redevelopment work to get completed and the new flats of larger area being allotted to them. The Plaintiffs have failed to make out even a prima

facie case in their favour and the balance of convenience is completely in favour of the Society, its Members and the Second Developer (Defendant No.8).

5.10 The Plaintiffs are therefore not entitled to the reliefs as prayed for or otherwise.

6. I have considered the submissions advanced by the learned Advocate appearing for the Plaintiffs as well as the Advocates appearing for the Defendant No.1 Society, its Office-Bearers and the Second Developer (Defendant No. 8) who is currently developing the Suit Property. I have also perused the pleadings filed by the parties including the pleadings which are filed by them in Arbitration Petition (L) No. 2006 of 2015, and relied upon by the parties in the present proceedings.

7. Admittedly the Suit Plot was originally owned by Smt. Gulab Vasant Deshpande (mother-in-law of the Plaintiffs). After her death her husband Vasant Deshpande (father-in-law of the Plaintiffs) applied for and obtained letters of administration from this Court which included administration of the Suit Land with structures thereon. On 23rd January, 1987, Vasant Deshpande executed a Development Agreement with the First Developers (Defendant Nos. 5 to 7), whereunder the First Developers agreed to demolish the bungalow on the Suit Land and construct a multi storied building under the provisions of the MOFA Act. Apart from some monetary consideration, the First Developers agreed to

hand over three flats on the ground floor to the said Vasant Deshpande. The First Developers, as per the Agreement dated 23rd January, 1987, completed the construction and handed over three flats to Vasant Deshpande and sold the remaining flats to individual flat purchasers. The individual flat purchasers formed a Co-operative Society i.e. Defendant No. 1 which was registered in the year 1989-1990. Since then the Defendant No. 1 Society is in possession of the respective flats as well as the Suit Land. However Vasant Deshpande, and after him his heirs including Plaintiff No. 1, failed to execute the conveyance in favour of the Defendant No. 1 Society. The Plaintiffs have in the plaint, tried to explain that the Suit Property remained to be conveyed to the Society in terms of the said Development Agreement since disputes had arisen between the Plaintiffs and the Members of the Society because the Members of the Society were allegedly attempting to damage the coconut trees in the compound of the Society for which the Plaintiff No.1 had filed a suit against them in the City Civil Court at Mumbai being Suit No. 5050 of 2000, seeking appropriate reliefs (paragraphs 9 and 10 of the Plaint). The excuse given by the Plaintiffs is untenable and cannot be accepted. The dispute qua the coconut trees were the subject matter of a suit filed in the year 2000. The Plaintiffs have failed to explain as to why despite the Society being formed in the year 1989-90 the Suit Property was not conveyed to the Society for 10 long years. Again, even if a suit

was filed by the Plaintiffs against the Members of the Society qua the coconut trees, the Plaintiffs cannot be heard to say that for that reason they refused to execute the conveyance in favour of the Society, despite them being mandatorily required to do so under the provisions of the MOFA Act.

8. The Plaintiffs have themselves stated in the plaint that since the year 2009 they have from time to time given the said Flat on leave and license basis to various licensees and that they started residing elsewhere. Since the said Vasant Deshpande and after his demise his heirs including the Plaintiff No. 1 failed to convey the Suit Property in favour of the Society for 20 long years, even after the formation and registration of the Defendant Society, the Society through its Advocates issued a Notice dated 21st September, 2011, to the Plaintiff No. 1, inter alia, calling upon the Plaintiff No. 1 to execute the conveyance in respect of the Suit Property and also recorded that upon their failure to do so, the Society shall be free to approach the DDR, Co-operative Societies and apply u/s 11 (3) of the MOFA Act for a unilateral deemed conveyance at her risk and costs. The Society posted the said Notice at the address of Plaintiff No. 1 i.e. Flat No. 3 in the said Society which was returned with the remark "unclaimed". The Plaintiff No. 1 has stated that she has not received the notice dated 21st September, 2011 since she was not residing at the said address, but it was her licensee who was residing at the said address. She has stated that though this fact was known to

the Office-Bearers of the Society, they had intentionally sent the said notice at the address where her licensee resided. The Society/the Second Developer submitted that the address where the Plaintiff No. 1 had shifted and was residing at that time was not available in the Society records. How the Plaintiff No. 1 at a much later stage tried to introduce a letter purportedly forwarded by her to the Secretary of the Society, informing the Society about her changed address shall be set out hereinafter.

9. The Society left with no option was thereafter constrained to file an Application under Section 11 (3) of the MOFA Act seeking unilateral deemed conveyance in its favour in respect of the Suit Property. Thereafter the DDR directed the Society to issue public notices in the local newspapers inviting claims from the public at large, if any, in respect of the Suit Property. The same was published on 14th October, 2011 in the Free Press Journal (English) and Navshakti (Marathi). The Plaintiffs did not come forward to object to the said Application even after the said public notices were issued. The DDR vide his Order dated 12th February, 2012 allowed the said Application for unilateral deemed conveyance in favour of the Defendant Society. Pursuant thereto, the Society entered into a unilateral Conveyance Deed on 30th May, 2012 with respect to the Suit Land, and the same was duly registered before the Sub-Registrar of Assurances, Borivli-2 under Sr. No. BDR-5/5435/2012.

10. The Plaintiffs who are aware that they have deprived the Defendant Society of the conveyance in their favour in respect of the Suit Property for 20 years without any justification, now cannot make a grievance that the Society obtained a unilateral deemed conveyance under Section 11 (3) of the MOFA Act. Prior to the making of the Application, the Society did issue a notice to the Plaintiffs at their last known address calling upon them to execute the conveyance in favour of the Society, which Notice was returned unclaimed. The Plaintiffs failed to respond even to the public notice issued by the Society, pursuant to the directions of the DDR, and therefore prima facie no fault can be attributed to the Order passed by the DDR dated 12th February, 201 under Section 11 (4) of the MOFA Act. The decision of this Court in *Tushar Jivram Chauhan and another* (supra) is of no assistance to the Plaintiffs, since in that case, as observed by the Learned Judge, the notice was issued to the owner/promoter at an incorrect address provided by the society, and the deemed conveyance granted was beyond the agreement between the parties and in absence of an occupation certificate issued in respect of the building by the Municipal Corporation.

11. Again on the basis of the aforesaid Order dated 12th February, 2012, passed by the Deputy District Registrar, Mumbai and the registered unilateral Deemed Conveyance deed dated 30th May, 2012, Respondent No. 1 applied on

16th July, 2012 to the City Survey Officer, Borivali for mutating the name of the Society in their revenue records i.e. Property Card of the Suit Land. It appears that the Plaintiff No. 1 through her Advocates, Rane and Company, raised objections vide the said Advocate's letter dated 30th July, 2012. Considering the objections raised by the Advocate for Plaintiff No.1, the City Survey Officer, Borivali vide his letters dated 3rd October, 2012 and 26th November, 2012, called upon the Constituted Attorney of the Plaintiff No. 1 i.e. her son Parag Deshpande (Plaintiff No.2) and their Advocate Rane and Company to attend the hearings fixed on 12th October, 2012 and 1st December, 2012 and submit their claims along with documentary evidence. A perusal of the letter dated 3rd October, 2012, issued by the City Survey Officer shows that in line 2 of the letter, the City Survey Officer has clearly made a mention therein about the deemed conveyance. All these facts along with copies of the letters have been relied upon by the Director of the Second Developer in his Rejoinder of November, 2015 filed in Arbitration Petition (L) No. 2006 of 2015 i.e. even before the filing of the present Suit by the Plaintiffs. Though the Plaintiff has made a general statement in the Plaint that they are relying on the proceedings filed in Arbitration (L) No. 2006 of 2016, they have conveniently chosen not to make any mention about the said facts and have instead stated in paragraph 14 of the plaint that **they were completely unaware of all the facts**

pertaining to the deemed conveyance and came to know about it only in November, 2012. Again, though the Advocates for the Defendant Society as well as the Second Developer (Defendant No.8) have pointed out these facts in the course of their submissions, the Plaintiffs have not advanced any submissions in response thereto.

12. From the aforestated facts it is established that the Plaintiffs being conscious of the fact that they have come to this Court more than three years after being aware of the fact that an order of deemed conveyance has been passed in April, 2012, and the name of the Society has been included in the Property Card as Owners of the Suit Land to which the Plaintiffs had in fact objected to, have suppressed material/relevant facts in their Suit and have moved this Court by making false statements inter alia that they were completely unaware of all the facts until November, 2013, knowing the same to be false. The Plaintiffs have instead in paragraphs 15, 16 and 17 of the Plaint spun an entire story of how they had allegedly run from pillar to post to get the relevant documents to put up their case before the court of law.

13. As if this is not enough, the Plaintiffs have also made false statements in the plaint qua the contents of the legal notice issued by their Advocates dated 23rd November, 2012, addressed on behalf of the Plaintiffs. The said Notice is a very detailed Notice running into 8 pages. In paragraph 5 of the said Notice, the

Advocate for the Plaintiffs has categorically stated that, “***our clients have obtained the certified true copies of registered deemed conveyance in favour of the said Society. Our clients state that from the documents and records available with them it is crystal clear that you Nos. 3 and 4 have fraudulently obtained deemed conveyance by filing false affidavits as well as giving false information to you Nos. 1 and 2....***”. Interestingly though in Clause (o) of paragraph 4 of the Writ Petition filed by the Plaintiffs, the Plaintiffs have stated that their Advocate by his legal notice dated 23rd November, 2012, addressed to the Office of the Learned District Deputy Registrar and others “***have put on record the true facts....***” in the plaint which is filed subsequent to the Writ Petition, have in order to overcome the difficulty in explaining the delay in approaching the Court, for the first time alleged that Advocate Rane has in his notice dated 23rd November, 2012 erroneously made incorrect statements qua the receipt of the certified copies of the documents. The Plaintiffs have therefore not only suppressed facts from this Court as stated hereinabove, but have also made false/incorrect statements knowing the same to be false/incorrect and are therefore disentitled to any reliefs on this ground alone.

14. The falsehood on the part of the Plaintiffs does not end here. Despite the Second Developer having expressly stated in his Affidavit in Rejoinder filed in

November, 2015 in Arbitration Petition (L) No. 2006 of 2015 that, "it was the duty of Respondent No. 2 to inform formally and in writing the change of their residential address for the purpose of correspondence and thereby update the records of Respondent No.1, Respondent No. 2 neither informed nor communicated to Respondent No.1 about the residential address which was the duty of Respondent No.2", the Plaintiffs did not mention anything in the Plaint (which was subsequently filed) about any letter allegedly forwarded to the Society intimating them about their change in address. Even thereafter, the Defendant No. 1 Society as well as the Second Developer (Defendant No.8) through their Advocates repeatedly submitted in the course of their arguments that the Plaintiffs ought to have informed the Society about their change of address, but at no time did the Plaintiffs inform the Court that any written intimation qua their changed address was forwarded by them. Ultimately the matter was closed for arguments and the parties gave their written submissions. Even in the written submissions it was not the Plaintiffs' case that the Society was intimated in writing about their changed address. After the written submissions were filed, since the Court had certain queries, the matter was once again placed on Board. The Learned Advocate appearing for the Plaintiffs once again stated that the Notice dated 21st September, 2011, calling upon the Plaintiffs to execute the conveyance was posted at the address of the Plaintiffs

where the licensees were residing. At that time this Court categorically informed the Advocate for the Plaintiffs that the Court is not willing to take cognizance of the said grievance since despite this point being repeatedly pressed before this Court on behalf of the Plaintiffs, there is nothing to show on record that the Office-Bearers of the Society were aware as to where the Plaintiffs had shifted. The Society was therefore justified in issuing the Notice at the last known address. Even at this stage, the Advocate for the Plaintiffs did not make any submission to the effect that the Plaintiffs have sent a written communication to the Office-Bearers of the Society intimating the change in address. The parties after answering the queries raised by the Court sought time to file their further written submissions which were subsequently filed. Whilst going through the further submissions, this Court was surprised to see that in the additional written submissions the Plaintiffs had for the first time without informing the Court, annexed a letter dated 7th March, 2010 purportedly written by the Plaintiff No. 1 to the Secretary and Chairman of Defendant No. 1 informing them about their changed address. In the said letter there is an endorsement "received M.S. Sathe 07/03/2010". The matter was therefore once again placed on Board and the Advocate for the Plaintiffs was informed that such conduct was not only incorrect and unfair on the part of the Plaintiffs but also on the part of his Advocate. If the Plaintiffs wanted to rely upon a document for the first time at

such a belated stage, the matter ought to have been mentioned before the Court, instead of annexing the document which was never placed before the Court, in such a surreptitious manner to the additional written submissions. The then Secretary Mr. Mahesh Sathe has thereafter filed his Affidavit dated 3rd August, 2016 stating that he had never received the said letter dated 7th March, 2010 and the signature found on the said letter is forged. He has annexed to his Affidavit his admitted signatures. Upon a visual inspection and comparison of the admitted signatures of Mr. Mahesh Sathe with his purported signature on the letter dated 7th March, 2010, I am of the prima facie view that the purported signature of Mr. Mahesh Sathe on the letter dated 7th March, 2010 is completely different. Though the Plaintiffs have filed their response thereto, the same is not at all convincing and I am prima facie satisfied that the Plaintiffs have not only suppressed the correct facts from this Court but have left no stone unturned in repeatedly making false statements before the Court.

15. Being conscious of the several obstacles in their way, the Plaintiffs through their Advocates submitted that the Plaintiffs will have no objection to the Deemed Conveyance already registered on 30th May, 2012 as well as the proposed redevelopment of the Suit Property if the said Deemed Conveyance is modified only to the extent of recording that the land beneath the temple and the trees shall belong to the Plaintiffs i.e. the Plaintiffs shall be Owners of the said

land below the temple and the fruit bearing trees. It is not possible to accede to this request and the same is rejected, since prima facie it is clear from Clauses 12, 18 and 22 of the Agreement dated 23rd January, 1987 (relied upon by the Plaintiffs) that the only Agreement between Vasant Deshpande and the First Developers (Defendant Nos. 5, 6 and 7) was that Vasant Deshpande will continue to be the owner of the temple and the coconut trees i.e. the fruits that will grow on the coconut trees. It is nowhere mentioned that the Society will not be conveyed the land beneath the temple and/or the trees and that Vasant Deshpande shall be the owner of land beneath the temple and the trees. In fact, the dimensions of the temple are not even mentioned in the Agreement dated 23rd January, 1987. Therefore, it is difficult to comprehend on what basis the Plaintiffs are claiming land beneath the temple and/or the trees.

16. The balance of convenience is overwhelmingly in favour of the Society and its 11 Members who have also handed over possession of their respective premises to Defendant No. 8 for redevelopment and the entire building has been demolished. Defendant No.8 has obtained almost all the necessary permissions to carry out the redevelopment and has spent substantial amounts towards the same, including payment of compensation in lieu of temporary alternate accommodation payable to the 11 Members. The Plaintiffs had shifted from their Flat in the Suit Building without any intimation to the Society. The

Plaintiffs cannot now blame the Society for not giving them notices with regard to the meetings where the Members of the Society approved the proposed redevelopment of the Suit Property and passed the necessary resolutions. The licensee of the Plaintiffs has acknowledged the intimation received from the Second Developer and has handed over possession of the Flat owned by the Plaintiff No. 1 to the Society/Second Developer. The allegations of the Plaintiffs that the licensee was forcibly dispossessed is not convincing. The licensee has not filed any such Affidavit in the present proceedings.

17. For all the aforestated reasons the relief sought by the Plaintiffs to restrain the Defendants from carrying out the construction/proposed redevelopment on the Suit Land is rejected.

18. The Plaintiffs have also submitted that the Defendants be restrained from shifting the location of the temple. It is also submitted that the Society as well as Defendant No. 8 have poisoned the trees because of which all the trees on the Suit Land are now dead. Though there is no such specific prayer in the Notice of Motion, since the Society as well as Defendant No. 8 submitted that the temple which is very small in size, is coming in the way of carrying out the digging work, and the temple can be relocated to the main entrance of the plot at the cost of the Society/Defendant No.8 and a separate entrance provided only for the Plaintiffs to have access to the

temple for purposes of worship, and also since the Society and the Second Developer (Defendant No.8) showed their willingness to plant coconut trees in the compound, if directed by the Court, the fruits of which may be enjoyed only by the Plaintiffs, this Court by consent of the parties appointed Mr. G.G. Ketkar from the office of the Court Receiver to visit the Suit Land along with the Architect, Mr. Amol Shetgiri of M/s. Shetgiri and Associates to do the following:

- (a) To measure and specify the height, width and length of the existing structure of the temple and specify the exact location of the said temple with the help of a sketch/map.
- (b) To measure the proposed location for shifting of the said temple as indicated by Defendant No. 8 and accordingly prepare sketch/map to that effect also showing the access to the temple.
- (c) To prepare the report in respect of the location of the coconut trees and other trees existing, if any.
- (d) If further coconut trees are required to be planted, to fix the appropriate location for other remaining trees to be planted."

Accordingly, a Report was submitted along with the photographs of the temple.

One of the photographs is reproduced hereunder:



Admittedly, the temple is not shown on the Suit Plot in any of the sanctioned plans of the Municipal Corporation of Gr. Mumbai. From the aforesaid photograph and the other photographs submitted by the Court Commissioner, it can be seen that the temple is at a location which is inconveniencing the digging/excavation activities. In fact, I am at pains to see the temple (however small it may be) in the midst of dirt/rubble/debris, and in such a pathetic state. The Plaintiffs have taken out a Notice of Motion under Order 39 Rule 2-A of the Code of Civil Procedure, 1908 on the ground that inspite of this Court's order to maintain status quo in respect of the temple and the trees, the Defendants have damaged/demolished the small, top dome of the temple. I am prima facie not

satisfied that the said small dome has been wilfully damaged/broken by the Defendants. The temple is on a portion of the Suit Land where extensive digging/excavation activity is being carried out on a day to day basis. This Court therefore asked the Advocate for the Plaintiffs why the said temple should not be relocated to a clean and clear location, which can be demarcated only for the temple, and as suggested by the Society as well as Defendant No.8, exclusive rights can be given to the Plaintiffs to worship/carry out pooja of the deity Malaidevi. Unfortunately the Plaintiffs have stated that they are not agreeable to the said suggestion. The Commissioner has also in his Report stated that on the suit land he has noticed five trees i.e. one guava tree, one Ashoka Tree, one Mango tree, one coconut tree and one 'Umber' (i.e. Fig) tree. All the trees are planted near the compound wall of the suit land. It is also stated in the Report that further coconut trees if required to be planted, can be so planted at the back side of the suit land near the existing pump room. In my view, the conduct of the Plaintiffs is unreasonable. The said temple is not shown on any of the sanctioned plans of the Corporation. Thus one can conclude that the temple has been constructed without seeking any permission of the Corporation. The submission made on behalf of the Plaintiffs that the Society/Second Developer should not be allowed to relocate the temple (though no such prayer is found in the Notice of Motion) cannot be accepted. The temple needs to be relocated in view of the

redevelopment of the Suit Property to a more clean and appropriate place as suggested by the Commissioner as well as the Architect Mr. Shetgiri, which will also uphold the majesty of the deity who is seated in the said temple.

19. Hence I pass the following Order:

(i) The prayer of the Plaintiffs to restrain the Society/Second Developer (Defendant No.8) from carrying out construction on the Suit Land is rejected.

(ii) The Society/Second Developer (Defendant No.8) shall through M/s. Shetgiri and Associates shift the temple at their costs, as suggested in clause (E) of the report submitted by Shetgiri & Associates, Architects, and indicated as "B-1" or "B-2" on the sketch enclosed with the report. The Plaintiffs shall be provided with an entry gate to access the temple for the exclusive use of the Plaintiffs.

(iii) The Society as well as Defendant No. 8 shall through M/s. Shetgiri & Associates also reconstruct the top small dome of the temple at their cost which has been damaged/broken in view of the activities going on at the suit property.

(iv) Apart from the trees which are already in existence, three more coconut trees will be planted at the back side of the suit land) by the Society/Respondent no. 8, and the Plaintiffs shall be entitled to the fruits therefrom.

(v) The Plaintiffs shall be entitled to receive all the benefits given by the Society/Second Developer (Defendant No.8) to the 11 Members of the Society

under the Development Agreement dated 23rd January, 1987.

(vi) The order granting status quo dated 2nd February, 2016, in respect of the trees and temple on the suit property shall continue for a period of three weeks from the date of uploading of this order i.e. upto 13th December, 2016.

The Notice of Motion is accordingly disposed off.

(S.J. KATHAWALLA, J.)