IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 5086 OF 1998

Ajay Kumar M. Singh)
Hindu, Indian Inhabitant, aged about)
adult, R/at: Heritage C.H.S. Lajpatrao Road, Vile Parle (W))
Mumbai-400 056)..Plaintiff

vs.

Basant Bhoruka, presently residing at Flat No. 11A & B,Sudhakar)
Building, 11th floor, 16, Narayan Dabholkar Road, Malabar Hill,)
Mumbai-400 006)..Defendant

Mr. Pratap Patil, instructed by Mr. Amol Wagh, for the Plaintiff.
Mr. Rajneesh Agarwal, along with Ms. Pooja Thorat, instructed by Mr. V.M. Thorat, for the Defendant.

CORAM: S.J. KATHAWALLA, J.

Judgment reserved on: 4th March, 2016
Judgment pronounced on: 18th July, 2016

JUDGMENT:

1. The above Suit was originally filed by one Mr. J.P. Karwa against the Defendant -- Basant Bhoruka for the following reliefs:

> *" (a) That the Defendant be ordered and decreed to pay a sum of Rs. 1,41,55,000/- (Rupees One Crore Fortyone Lacs Fifty five Thousand only) as per particulars of claim at Exhibit Y along with further interest at the rate of 24 per cent per annum on the principal amount of Rs. 96,00,000/- from*

the date of filing of the suit till realisation in full.

(a1) that it be declared that, payment of the amounts mentioned in prayer (a) above duly secured by a valid and subsisting charge of the immovable property described in Exhibit W1 hereto and the Plaintiff is entitled to enforce the said security towards the realisation of the said dues."

2. The original Plaintiff -- J.P. Karwa (who later assigned his rights in favour of the present Plaintiff -- Ajay Kumar M. Singh) has in the Plaint stated/submitted as follows:

2.1 That the Plaintiff was a freelance liaison consultant with various Government authorities and body corporates for arranging finance in the form of lease, hire purchases, bill discounting, bank limits, public issue, bridge loan, etc. for body corporates and individuals. The Defendant is the Promoter/Managing Director of M/s. Digital Leasing and Finance Limited ("Digital Leasing"). The residential address of the Defendant is Flat No. 11A & B, Sudhakar Building, 11th Floor, 16 Narayan Dabholkar Road, Malabar Hill, Mumbai-400 006 ("suit property").

2.2 In the year 1992, the Plaintiff came to know from the business circle that M/s. Digital World India Limited ("Digital World"), a Company incorporated under the Companies Act, 1956, intended to go for public issue and was looking for a liaison person like him for getting approvals and sanctions from various Government authorities, banks and body corporates. The Plaintiff wrote a letter dated 8th May,1992 to Digital World , and offered his services which were accepted by Digital World (Exhibit "B" to the Plaint). The Plaintiff sent his quotation for various professional services vide letter dated 25th May, 1992. A Service Agreement dated 2nd June,1992 was entered into by the Plaintiff with Digital World (Exhibit "D" to the Plaint).

2.3 As per the said Agreement, the Plaintiff commenced rendering services to Digital World and accordingly submitted his debit notes dated (i) 26th February, 1993 for Rs. 9,32,000/- (Exhibit "E" to the Plaint), (ii) 12th February, 1994 for Rs. 6,00,000/- (Exhibit "F-1" to the Plaint). The Plaintiff continued to render his services as agreed from time to time to the said Digital World and also forwarded a statement of accounts as on 31st March, 1994 showing that an amount of Rs. 28,16,180/- was due and payable by the said Digital World to the Plaintiff (Exhibits "G" and "G-1" to the Plaint). Since the Plaintiff arranged further finance for Digital World, he also raised his debit note dated 28th May, 1994 for the sum of Rs. 4,40,000/- and by his covering letter forwarded the same to Digital World (Exhibits "H" and "H-1" to the Plaint).

2.4 The Plaintiff sent a letter dated 25th June, 1994 requesting Digital World to clear the debit notes raised till 31st March, 1994 aggregating to Rs. 28,16,180/- + Rs. 4,40,000/- being the amount of the last debit note dated 28th May,1994 (Exhibit "I" to the Plaint). M/s. Digital World sent its reply dated 29th June,1994 and requested further time for payment as the Company then was facing some liquidity crunch which was beyond their control (Exhibit "J" to the Plaint). Since Digital World did not make the payment, the Plaintiff sent a reminder letter dated 18th November, 1994, reminding the Digital World for the over due payment along with interest at the rate of 24 per cent as agreed in the Service Agreement (Exhibit "K" to the Plaint). M/s. Digital World by its letter dated 24th November, 1994 , inter alia, apologized for not making the payment in time and requested for further time (Exhibit "L" to the Plaint).

2.5 Thereafter in the last week of December, 1994, Digital World requested the Plaintiff to arrange for further funds which were arranged for by the Plaintiff, and the Plaintiff under cover of his letter forwarded a debit note dated 28th March,1995 for Rs. 11,20,000/- to Digital World (Exhibits "M" and "M-1" to the Plaint). The Plaintiff under cover of his letter forwarded a statement of account as on 31st March, 1995 to Digital World requesting Digital World to confirm the balance shown in the statement, being total outstanding of Rs. 51,35,663/- and further requested to make the payment due in the statement at the earliest (Exhibits "N" and "N-1" to the Plaint). A reminder letter dated 5th May, 1995 was also sent to Digital World. Digital World by its letter dated 10th May, 1995 again apologized for its inability to make the payment to the Plaintiff and stated that Digital World was in the process of availing further loan facilities from other body corporate which could be utilised to pay off the debts against the Plaintiff (Exhibit "O" to the Plaint).

2.6 According to the Plaintiff, the Defendant personally contacted the

Plaintiff several times and assured the Plaintiff that all the dues would be cleared by the Defendant. The Plaintiff also sent his statement of account dated 5th April, 1996 to Digital World along with a covering letter requesting Digital World to make the payments which were long overdue (Exhibits "P" and "P-1" to the Plaint).

2.7 Thereafter the Defendant approached the Plaintiff for availing his services for one of the Group Companies, M/s. Digital Leasing, and entered into another Agreement dated 4th March,1994 for availing the services similar to that of Digital World (Exhibit "Q" to the Plaint). The Plaintiff rendered his services from time to time and by a letter dated 5th October,1996 forwarded a statement of account as on 30th September,1996 to Digital Leasing and requested for payment aggregating to Rs. 28,12,927/- (Exhibits "R" and "R-1" to the plaint). The Plaintiff sent a reminder letter dated 12th October, 1996 inviting attention of the Defendant and demanded a sum of Rs. 1,00,64,399/- due and payable by Digital World and Digital Leasing cumulatively to the Plaintiff. On 16th October,1996 the Plaintiff again demanded the said amounts and along with the said letter also enclosed the statement of complete accounts of Digital World and Digital Leasing as on 30th September, 1996 (Exhibits "S" and "S-1" to the Plaint), for transactions undertaken on behalf of both Companies. The Defendant on receipt of the letter called upon the Plaintiff and requested for reduction of the total outstanding. The Plaintiff considered the same and agreed for a full and final settlement at Rs. 95,00,000/-. The Defendant agreed to the said settlement and by a letter dated 22nd October, 1996 signed by him as Managing Director of Digital World, and promised to make the payment as agreed upon by the parties and requested for further time of couple of months (Exhibit "T" to the Plaint). Thereafter the Defendant by a letter dated 24th October, 1996 signed by him as Director of Digital World after referring to his earlier letter dated 22nd October, 1996 and subsequent personal discussions forwarded 10 post dated cheques aggregating to Rs. 95,00,000/- , particulars of which are set out in paragraph 14 (a) of the Plaint (Exhibit "T-1 to the Plaint). However, on or about 28th October,1996, the Defendant telephonically instructed the Plaintiff not to present the said cheques till he gave further instructions to do the same. The letter dated 24th October, 1996 and the fact that the cheques were issued to the Plaintiff, and thereafter the Plaintiff was instructed not to present the same, were introduced in the Plaint by an amendment dated 25th April, 2005.

2.8 On 29th October, 1996, the Plaintiff expressed his displeasure to the Defendant with regard to the delay in clearing his dues (Exhibit "U" to the Plaint). Therefore, by a letter dated 5th November, 1996 the Defendant expressed his willingness to execute a personal guarantee and to create a charge over the immovable property, being the suit property, towards security for the payment of dues of Rs. 95,00,000/- including interest till 30th September, 1996, and further interest at the rate of 2 per cent per month on the principal amount of Rs. 95,00,000/- till the payment in full to the Plaintiff (Exhibit "V" to the Plaint). Accordingly, the Defendant executed an Agreement (Exhibit "W" to the Plaint) dated 26th November, 1996 (Exhibit "W-1" to the Plaint) and created a charge over the Flats i.e. A & B Sudhakar Co-operative Housing Society, Narayan Dabholkar Road, Malabar Hills, Mumbai-400 006 ('the suit flats') for which the Defendant is holding shares, towards security for the payment of the long over due service charges to the Plaintiff, with interest at the rate of 24 per cent per annum from 1st October, 1996 on Rs., 95,00,000/- till realisation in full. Vide the Agreement dated 26th November, 1996, the Plaintiff also had the option to stake a claim on the properties (suit flats) in the event the Defendant failed to make the payment within 31st March, 1998. The Defendant also executed a Personal Guarantee dated 26th November, 1996 (Exhibit "X" to the Plaint), which according to the Plaintiff, is independent of the charge created earlier vide Agreement dated 26th November, 1996, and independent of any other right vested with the Plaintiff for claiming the due payment from the Defendant or from the respective Companies.

2.9 Both the Documents i.e. Exhibits "W" and "X" were forwarded by the Defendant to the Plaintiff under cover of his letter dated 4th December, 1996 (Exhibit "X-1" to the Plaint).

2.10 Thereafter the Plaintiff filed the above Suit on 30th October,1998, only for an order and decree against the Defendant to pay a sum of Rs. 1,41,55,000/- as per the particulars of claim Exhibit-Y, along with further interest at the rate of 24 per cent per annum on the principal amount of Rs. 95,00,000/- from the date of filing of the Suit till realisation in full.

2.11 On 27th July, 1999, the Plaint was amended and prayer (a1) was introduced seeking a declaration that the payment of the amounts mentioned in prayer clause (a) were duly secured by a valid and subsisting charge qua the suit flats and the Plaintiff was entitled to enforce the said security towards the realisation of the said dues.

2.12 That vide Deed of Assignment dated 15th September, 2012 executed between the original Plaintiff J.P. Karwa and Assignee Ajay Kumar M. Singh and Supplementary Deed of Assignment dated 15th March, 2014, the original Plaintiff transferred and assigned his entire claim and receivables in Suit No. 5086 of 1998 to the Assignee (present Plaintiff -- Ajay Kumar M. Singh). The Plaint was therefore amended on 25th February, 2015, and the name of the original Plaintiff -- J.P. Karwa was deleted and substituted by Shri Ajay Kumar M. Singh.

3. On 16th March, 2006, the Defendant filed his Written Statement and, inter alia, submitted as under:

3.1 That the entire plaint is patently false, bogus and fabricated, that the events and transactions alleged in the plaint never took place and that the entire plaint is a result of the Plaintiff's forgery, fabrication, manipulation, mala fide intentions and illegality. Never were the alleged services, as stated on record of the case, provided to the two Public Limited Companies, nor were the alleged debit notes raised or sent, nor did any of the alleged correspondence ever take place, nor did the Defendant ever give any alleged personal guarantee for such non-existent services and nor did Defendant create a charge on the said flats.

3.2 That it is well within the Plaintiff's knowledge that in the records of Sudhakar Co-operative Housing Society Ltd., the said flats belonged to M/s. Transport Corporation of India Ltd., as is stated in the said Society's letter to the Plaintiff's Advocates dated 28th April, 1999, and exhibited by the Plaintiff himself as Exhibit-C to his Affidavit in Support of the Notice of Motion No. 180 of 1999. Again, it is apparent that the Plaintiff was fully aware of the transfer of the said flats by registered conveyance by M/s. TCI to Badriprasad Bhoruka Family Trust in December, 1999, since the Plaintiff's prayer to appoint Receiver was made on that very foundation. However, the Plaintiff never thought it necessary to join either the past owner or the present owner of the said flats as necessary parties to the Suit even though the Plaintiff's Suit is based upon an alleged charge over the said flats in favour of the Plaintiff.

3.3 That the alleged charge is an unregistered charge and cannot be looked into by this Court, even if it is presumed, though not admitted, and in fact vehemently denied that such a document was created;

3.4 That the Document dated 29th May, 1992 being the alleged Service Contract between the Plaintiff and the Defendant is a false and fabricated document. In fact, on the date of the alleged personal meeting and execution of the alleged Document, the Defendant was not even in India but was in Singapore from 21st May, 1992 upto 10th June, 1992.

3.5 That the execution of the Deed of Guarantee is denied, and in any event the alleged Personal Guarantee dated 26th November, 1996 is void as the same is without any consideration.

3.6 That even if the case of the Plaintiff is taken at face value, and for the sake of argument it is considered that what the Plaintiff has stated is proved, even then no decree can be passed against the Defendant as prayed for by the Plaintiff since the Plaintiff has lost securities in the form of Negotiable Instruments and the right to recover the monies from the two principal borrower Companies, to which the Defendant certainly would have been entitled.

3.7 It is now apparent that the Defendant will not be in a position to recover monies from the securities of the principal borrower companies, and as such the Plaintiff has no right to recover money from the Defendant because Plaintiff is bound to suffer for its own lapses.

3.8 That the Plaintiff has neither sued those companies nor joined them as necessary parties in the present Suit, and as such has deliberately not availed of any opportunity to establish liability against those two Companies which are in fact principally liable. It is only after the liability of the two companies is established that it can be ascertained as to whether any sum is due to the Plaintiff from those two Companies, for which the Defendant is liable.

3.9 That even otherwise the Deed of Guarantee is inadmissible in evidence as signatures/initials of either party are not affixed on all the pages of the documents, including on the sheets of stamp paper, and as such the entire document is inadmissible in evidence.

3.10 That the present proceeding is liable to be dismissed as the same is barred by limitation.

3.11 That the Plaintiff has not provided any proof of service as alleged to Digital World, and the Defendant has not received any statement of account or debit notes issued by the Plaintiff.

3.12 The Defendant has not received the letter dated 25th June,1994 and has not sent any response dated 29th June, 1994. The Company has also not received any letter dated 18th November, 1994 nor sent its response dated 24th November, 1994 to the Plaintiff.

3.13 That the Defendant was not in India from 20th June,1994 to 13th July, 1994, as is borne out from the Defendant's Passport. The question therefore of him receiving the Plaintiff's alleged letter dated 25th June, 1994 never arose.

3.14 That since the Defendant was often required to visit foreign countries for its business of import, the Defendant used to keep certain signed blank sheets and cheques to enable his senior executives, management and staff to complete documentation and transactions etc. which should not be hampered in his absence. It is apparent that the Plaintiff made friends in the Office of the Defendant and got access to such blank signed papers and cheques and mis-utilised the information and the documents, to fabricate this false Suit.

3.15 That the Defendant never availed of the Plaintiff's services for Digital Leasing nor Digital World and never entered into any alleged Agreement dated

4th March, 1994, the signature on the said document is forged and/or lifted by the Plaintiff.

3.16 That the debit notes and statements referred to by the Plaintiff in respect of both the Companies, Digital World and Digital Leasing are denied. Not a single debit note in respect of Digital Leasing has been exhibited in the plaint.

3.17 That the alleged reminder letter dated 12th October, 1996 and alleged letter dated 16th October,1996 are denied vehemently and the Plaintiff is put to strict proof thereof. The Defendant had never requested the Plaintiff to reduce the total outstanding which is in itself non-existent. The Defendant never sent any letter dated 22nd October, 1996.

3.18 That the Defendant had not sent the letter dated 24th October,1996 and had also not forwarded any post-dated cheques in favour of the Plaintiff amounting to Rs. 95 lakhs.

3.19 That inspection of the said cheques in their covering letter was never provided to the Defendant.

3.20 That the Defendant has not offered to personally guarantee the alleged payment nor to create charge of personal property as alleged.

3.21 That the alleged letter dated 5th November, 1996 is fabricated and the signature is lifted or forged. The letter is one more example of misuse by the Plaintiff of stolen stationery.

3.22 That the alleged Agreement of Guarantee and the Agreement for Creation of Charge were got up and fabricated documents. Stolen sheets with the signatures of the Defendant have been manipulated and used as page 2 of both the Documents, which are not genuine and which were created by the Plaintiff to support his illegal claim.

3.23 That inspection of the original Documents was given to the Defendant and his Advocate on 25th November, 1998, and during the inspection, certain detailed handwritten notes were prepared by the Advocate while comparing the originals given during inspection with the true copies typed and exhibited in the plaint. The said hand written notes were in the nature of description of specific physical characteristics of the original documents given for inspection such as colour of ink used, number of pages, etc. and other such characteristics which could be referred to in future for identification of the said documents. The Advocate for the Plaintiff initialled each page of the said notes and signed upon the last page of the notes thereby verifying the description of the physical documents as noted by the Advocate for the Defendant. Despite specific request made by the Defendant's Advocate on 25th November, 1998 that the Plaintiff should make available photo copies of the original documents, the same were not given to the Defendant or his Advocate on 25th November,1998, but was given 19 days later i.e. on 15th December,1998 at about 4.20 p.m. with no explanation for the delay. There were material variances between the photo copies as furnished by the Plaintiff's Advocate and the original documents produced during the inspection, as set out in clauses (a)to (d) of paragraph 14 of the Written Statement.

3.24 That the Defendant was never at any point of time the owner of the said flats and never created any mortgage, charge or third party interest in the suit flats.

3.25 That the Defendant has placed all the relevant facts of the ownership of the said flats before the Court in the Review Petition filed against the ex-parte order of the Receiver passed by the Learned Single Judge and also in the Appeal against the order appointing Receiver filed before the Hon'ble Division Bench, which are both on the record of the case.

3.26 That in the above circumstances no amount is due and payable by the Defendant to the Plaintiff.

4. On the basis of the Written Statement filed by the Defendant, this Court (Coram: Mrs. Roshan S. Dalvi, J.) by her Order dated 3rd November, 2014, framed the following issues:

> "1. Whether the parties entered into service agreement dated 2nd June, 1992 and 4th March, 1994?
>
> 2. Whether the Plaintiff performed his obligation under the agreement?
>
> 3. Whether the Defendant guaranteed the repayment of the dues of the Plaintiff?
>
> 4. What is the amount that the Plaintiff is entitled to be paid?"

Thereafter on 28th October, 2015, by consent of the parties, the following three additional issues (Nos. 5 to 7) were framed.

> "5. Whether the Plaintiff proves that Defendant created charge on the suit property i.e. flat Nos. 11 A and B, Sudhakar Building, Narayan Dabholkar Road, Malabar Hill, Mumbai-400 006 in its favour?
>
> 6. Whether the Defendant proves that he is not the owner of the suit property?
>
> 7. Whether the suit property is liable for the recovery of dues owed by the Defendant to the Plaintiff? "

5. The Plaintiff examined himself being PW 1 and filed his Affidavit in Lieu of Evidence dated 28th March, 2015. The Plaintiff also filed additional Affidavits f Examination-in-Chief dated 24th April, 2015 and 18th June, 2015. The Plaintiff also led the evidence of Ms. Jyoti Cheulkar (PW 2) who was working with Digital World from April, 1994 till May, 2001 in the Accounts Department. Her Affidavit in Lieu of Evidence is dated 7th July, 2015.

6. The Plaintiff has relied on 23 documents. On 24th April, 2015, the Advocate for the Defendant submitted in writing the admission and denial qua the said 23 documents as under:

"(a) Document at Sr. Nos.1, 14 to 19 and Sr. No. 22 are denied.

(b) Signatures at Document at Sr. Nos. 2 to 10 and Sr. No. 12 are admitted, however the contents of the same are disputed.

(c) Statement of account at Sr. No. 13 is denied except the amount of Rs. 3,66,200/- mentioned in debit note dated 15/07/1995 in clause "B" therein.

(d) Document at Sr. Nos.11, 20 and Sr. No. 21 are admitted.

(e) Document at Sr. No. 23 of Additional Affidavit in lieu of examination in chief is admitted".

7. By an Order dated 24th June, 2015 the documents relied upon by the Plaintiff were marked as under:

Sr.No	Particulars	Exh. No.
1	Agreement of Service dated 02.06.1992 purportedly signed by Defendant and J.P. Karwa	X for identification.
2	Debit note and covering letter dated 26.02.1993 signed by J.P. Karwa for Rs. 9,32,000/-	P-1
3	Debit note dated 12.02.1994 signed by J.P. Karwa for Rs. 6,00,000/-	P-2
4	Covering letter dated 12.02.1994 signed by J.P. Karwa	P-3
5	Statement of account as on 31.03.1994 signed by J.P. Karwa	P-4
6	Debit note dated 28.05.1994 signed by J.P. Karwa for Rs. 4,40,000/-	P-5
7	Debit note dated 28.03.1995 signed by J.P. Karwa for Rs. 11,20,000/-	P-6
8	Statement of account as on 31.03.1995 signed by J.P. Karwa	P-7
9	Statement of account as on 31.03.1996 signed by J.P. Karwa	P-8
10	Agreement dated 04.03.1994 between Second Company Digital Leasing & Finance Ltd. and J.P. Karwa signed by J.P. Karwa and Defendant.	P-9
11	Debit note dated 15.07.1995 signed by J.P. Karwa and Journal vouchers passed by Company M/s. Digital Leasing and Finance Ltd. in original.	P-10

12	Statement of account as on 30.09.1996 signed by J.P. Karwa	P-11.
13	Statement of account of both companies as on 30.09.1996 signed by J.P. Karwa	X-1 for identification.
14	Letter dated 22.10.1996 signed by Defendant agreeing to statement and promising to make payment.	X-2
15	Confirmation letter from Executive of Digital World India Ltd. dated 22.10.1996 in original	P-12
16	Affidavit of Ms. Jyoti Cheulkar, Accounts Executives, Digital World India Ltd.	P-13.
17	Letter dated 05.11.1996 signed by Defendant offering mortgage of flat at 11A and B, Sudhakar , Narayan Dabholkar Road, Bombay-400 006.	X-3 for identification.
18	Registered Deed of Confirmation dated 19.05.1999 enclosing deed of guarantee dated 26.11.1996 signed by Defendant and Agreement to create charge dated 26.11.1996 signed by defendant and J.P. Karwa . Certified copy issued by Sub-Registrar of Assurances, Mumbai.	P-14
19	Letter dated 04.12.1996 signed by Defendant enclosing personal guarantee and agreement to create charge on flats at 11A and B, Sudhakar, Narayan Dabholkar Road, Bombay-400 006	X-3A for identification.
20	Arbitration Award dated 29.04.1994	P-15
21	Calcutta High Court decree dated 05.02.1997	P-16
22	Scheme of Arrangement filed at Hon'ble Andhra Pradesh High Court between TCI Ltd. and TCI Industries Limited and Gati Corporation Ltd. and Transcorp International Ltd. and the respective shareholders	X-4 for identification.
23	Copy of Agreement of sale dated 29.05.1985 signed by Defendant and erstwhile owner M/s.TCI	P-18

8. The Defendant has only examined himself being DW 1. He has filed his Affidavit in Lieu of Evidence dated 17th August, 2015 and the additional Affidavit of Evidence dated 9th September, 2015. The Defendant has relied on the following 10 documents, which were marked by an Order dated 9th

September, 2015:

Sr.No	Particulars	Exh. No.
1	Notarised copy of registered Indenture of Transfer dated 31.12.1999	D-1
2	Original Electricity Bills of BEST Undertaking of period October to December, 1996	D-2
3	Original Resolution of Sudhakar Cooperative Housing Soc. Ltd. dated 27.09.1970	D-3
4	Original order u/s 101 of the M.C.S.Act, 1960 dated 30.12.2002 passed by Learned Deputy Registrar, Cooperative Societies.	D-4
5	Certified copy of order in Revision Application No. 413 of 2005 dated 22.10.2012 passed by Learned District Deputy Registrar along with official translation into English by the Chief Translator's office of High Court dated 07.12.2012	D-5
6	Copy of Suit No. 1554 of 1992 filed at Hon'ble Bombay High Court	D-6
7	Copy of passport of Defendant -- relevant pages from 21st May 1992 to 10th June, 1992	Y-1 for identification.
8	Original and copy of passport of Defendant -- relevant pages from 20th June,1994 to 13th July, 1994	D-7
9	Hand written notes of Adv. Shri Vaibhav Krishna signed by Advocate Shri Vaibhav Krishna and Advocate Shri Premlal.	D-8

9. PW 1 and PW 2 have been extensively cross-examined by the learned Advocate appearing for the Defendant. The Defendant (DW 1) was also cross-examined at length by the learned Advocate appearing for the Plaintiff.

10. **Issue Nos. 1 and 2.**

"1. Whether the parties entered into service agreement dated 2nd June, 1992 and 4th March, 1994?

2. Whether the Plaintiff performed his obligation under the agreement?"

10.1 The parties to the Suit are Ajay Kumar M. Singh (Plaintiff) and Basant Bhoruka (Defendant). It is the Plaintiff's own case that the Defendant -- Shri Basant Bhoruka has signed the Agreements dated 2nd June, 1992 and 4th March, 1994 on behalf of Digital World and Digital Leasing respectively (who are not parties to the Suit), and the same are not signed by the Defendant in his personal capacity. The Defendant has initially i.e. in his Written Statement denied and disputed each and every document relied upon by the Plaintiff in the Plaint by alleging that the same are forged and fabricated. The Defendant also denied that the Defendant had agreed to pay an aggregate amount of Rs. 95 lacs to the Plaintiff. Thereafter the Defendant at the stage of admission and denial of documents admitted the signatures on the debit notes and statement of accounts forwarded by the Plaintiff to Digital World /Digital Leasing (Exhibits P-1 to P-11), but denied its contents. The Plaintiff has, in his Affidavit of Evidence not identified the signature of the Defendant on the Agreement dated 2^{nd} June, 1992 and has also not led the evidence of the original Plaintiff to establish that the Defendant had inter alia signed the said Agreement, or that the denials made by the Defendant qua execution of documents and his signatures being fabricated, are false. However the Plaintiff led the evidence of Ms. Jyoti Cheulkar (PW -2) who was admittedly working in the Accounts Department and was inter alia responsible for accounts data entry and accounts reconciliation for both Digital World and Digital Leasing. Ms. Cheulkar in her Examination-in-Chief deposed that at the instance of the Directors she had written a letter dated 22nd October, 1996 (Exhibit P-12) to the Plaintiff recording the meeting held between the Plaintiff and the Directors of Digital World, wherein the Plaintiff "accepted settlement of outstanding of both companies M/s. Digital World India Ltd. and Digital Leasing Finance Ltd. in the amount of Rs. 95 lacs". In her Cross-Examination on behalf of the Defendant, she further added that she was instructed by Mr. Rathi, the Finance Director of Digital World to address the said letter dated 22nd October,1996 (Exhibit P-12) to the Plaintiff; the entire transaction between the Plaintiff and the two Companies was done under the supervision of Mr. K.B. Rathi, the amount payable to the Plaintiff was above Rs. One crore, but the parties had agreed to pay and accept an amount of Rs. 95 lacs in full and final settlement towards the actual amount payable.

10.2 The Defendant who had initially contended that the Plaintiff had not given any service either to Digital World or Digital Leasing now in his Cross-Examination inter alia admitted having approved a voucher for payment to the Plaintiff, and that the Journal Vouchers at pages 13, 14 and 15 were signed by Mr. K.A. Raveendran and Ms. Kalpana Mayekar who were working for both the Companies i.e. Digital World and Digital Leasing, and were reporting to the Finance Director Mr. Rathi. The Defendant in his Cross-Examination also admitted that though he was one of the Directors of the Company, he was not directly involved in the accounts, finance and administration of the Company, and it was Mr. Rathi who used to directly handle all these aspects and therefore he (the Defendant) would not know the transactions in detail. The Defendant also admitted that it is possible that letters/reminders may have been sent by the original Plaintiff to Digital World/Digital Leasing and he is not aware of the same. He admitted that Ms. Jyoti Cheulkar (PW -2) was working in the Accounts Department and that the communication dated 22nd October, 1996 (Exhibit P- 10) is signed by her. The Defendant also stated that if the contents of the letter dated 22nd October, 1996 are correct, the original Plaintiff ought to have claimed the amount of Rs. 95 lakhs from the Company and should have sued the Company.

10.3 The evidence of Jyoti Cheulkar (PW -2) and the Defendant which is relevant for the purpose of answering Issue Nos. 1 and 2 and which is referred to above, is reproduced hereunder:

10.4 <u>Affidavit in lieu of evidence of Ms. Jyoti Cheulkar (PW 2):</u>

> *3. I say that the Company was mainly looked after by its Directors viz. Shri Basant Bhoruka and Shri K.B. Rathi.*
>
> *4. I say that I was appointed to work in the Accounts Department. I say that amongst others my duties and responsibilities included:*
>
> *(a) Accounts data entry and accounts reconciliation for both Digital World India Ltd. and Digital Leasing & Finance Ltd.;*

(b) Keeping accounts and preparing confirmations of accounts.

I say that I was reporting to Shri K.B. Rathi, the Finance Director of the Company, and after Shri K.B. Rathi resigned in November 1996 I was reporting to other Directors until my resignation.

6. I say that I was instructed by the Directors of the Company to prepare the letter signed by me dated 22.10.1996 calling for revised debit and credit notes from Mr. J.P. Karwa.

7. I confirm that the letter dated 22.10.1996 bears my signature."

10.5 Cross-examination of Ms. Jyoti Cheulkar (PW 2):

"Q.5 *Do you recall which Director instructed you to write letter dated 22nd October 1996?*

A. I was instructed by Mr. K.B. Rathi.

Q.6 Can you say for sure that K.B.Rathi was fully aware of the transaction between J.P. Karwa and the two companies?

A. Yes, the entire transaction between Mr. J.P. Karwa and the two companies was done under the supervision of Mr. K.B. Rathi.

Q.10 I suggest that as on date 22nd October 1996 this amount of Rs. 95,00,000/- was not payable. What do you have to say?

A. It is not correct. The amount was payable and in fact it was more than Rs. 1 crore.

Q.11 If you are saying that the amount payable was more than Rs. 1 crore then why did letter dated 22nd October, 1996 *mentioned the amount payable as Rs. 95,00,000/- (Rupees Ninety Five Lakhs)?*

A. The said figure of Rs. 95 lakhs was arrived at after settlement between J.P. Karwa and the Defendant's companies.

Q.13 I suggest that you know Ajay Kumar Singh since long time and you have only filed this Affidavit to help him?

A. I do not agree. I know him since last 6 months only.

10.6 Cross-examination of D.W.1

"Q. 35 Whether Mr. J.P. Karwa submitted debit notes for the services provided which are mentioned in the suit?

A. Not to my knowledge.

(Witness is shown to Exh. P-10 i.e. Debit Note dated 15.7.1995 at page 16, particularly the initial and the handwritten note written on it, of the Plaintiff's list of documents dated 28.3.2015).

Q.42 Is this your initial on the voucher?

A Yes. (Witness Volunteers): Though it is my initial, the handwritten note is not written by me.

Q.43 What does that initial denote?

A. It denotes that I have seen and approved the voucher for payment.

Q.44 Who has signed these Journal Vouchers at page 13, 14 and 15?

A. These vouchers are signed by Ms. Kalpana Mayekar and Mr. K. Raveendran.

Q.45 Who are Mr. K. Raveendran and Ms. Kalpana Mayekar?

A. Mr. K.Raveendran was employed in the Administration Department of Digital World India Ltd. and Ms. Kalpana Mayekar was in the Accounts Department of Digital World India Ltd.

Q.46 Were these two persons also working for Digital Leasing & Finance Ltd.?

A. Yes.

Q.47 Were these two people reporting to you?

A. No. They were reporting to Mr. K.B. Rathi.

Q.48 Was this payment of Rs. 3,66,200/- referred in Journal Voucher at page 13 of the Plaintiff's compilation of documents, being Exhibit P-10, ever made to Mr. J.P. Karwa?

A. I am not aware of it.

Q.49 In your Written Statement you have denied that any services were rendered by Mr. J.P. Karwa to the two companies i.e. Digital Leasing & Finance Ltd. and Digital World India Ltd., but I just now showed you the original voucher, initialled by yourself and by employees of your company. What do you have to say about that?

A. I am one of the Director of the Company, but not directly involved in the accounts, finance and administration of the Company. Mr. Rathi used to directly handle all these aspects. I would not know the transactions in detail.

Q.51 Is it possible that any communication would come in the office and you would not know about the same?

A. Yes, it is possible.

Q.52 Did the original Plaintiff Mr. J.P. Karwa issued several letters and reminders to your company demanding *payments marked as Exhibits P-1 to P-3 and P-5 to P-11 in Plaintiff's compilation of documents dated 28.03.2015?*

A. I am not aware of any of these letters.

Q.53 Are you aware of the debit note at page 19?

A. Now I am aware of it.

Q.54 Is it true that in your office there was lady named Ms. Jyoti Cheulkar?

A. Yes, she was in Accounts Department.

Q.55 Will you be able to recognise her signature?

A. Yes.

Q.56 Is this signature of Ms. Jyoti Cheulkar?

A. Yes.

Q.57 Is it true that as per this letter, your company owed a sum of Rs. 95 lakhs to Mr. J.P. Karwa?

A. I do not know the correctness of this letter and of the amount mentioned in this letter. And if it is so then Mr. J.P. Karwa should have claimed that amount from the company and he should have sued the company."

10.7 The Defendant in his Written Submissions too, changed his earlier stand taken in his Written Statement and inter alia submitted as under:

"The Plaintiff may be entitled to the amount of Rs. 95 lakhs having entered into the service agreements dated 02.06.1992 and 04.03.1994 with the two companies for which he may have performed his obligations towards the two principal borrower Companies. However, this Defendant is not a party to the service

agreements dated 02.06.1992 and 04.03.1994 and is therefore not liable under the same.

10.8 It is therefore clear that it is the Plaintiff's own case that the said Agreements are between the original Plaintiff and the two Companies i.e. Digital World and Digital Leasing, who are admittedly not joined as party Defendants to the Suit. Further, admittedly the Service Agreements dated 2nd June, 1992 and 4th March, 1994 have not been executed by the Defendant in his personal capacity. Again, despite the original Plaintiff being available he has not come forward to depose that the Agreements were executed by the Defendant on behalf of the two Companies which are not joined as party Defendants to the Suit and its contents are as agreed between the parties thereto. However, from the debit notes and the bank statements it is established that the Plaintiff has given certain services to the two Companies and the Companies have agreed to pay an amount of Rs. 95 lakhs to the Plaintiff in full and final settlement of the Plaintiff's claim as agreed in the letter dated 22nd October, 1996 (Exhibits- P-10) issued by Ms. Jyoti Cheulkar on behalf of the Companies. Issue Nos. 1 and 2 are answered accordingly.

11. Issue No.3

3. Whether the Defendant guaranteed the repayment of the dues of the Plaintiff?

11.1 The Plaintiff has, in the plaint, relied on a Deed of Personal Guarantee dated 26th November, 1996 (Exhibit-X to the Plaint) bearing the signature of the Defendant and witnessed by one S.L. Chandak. Under the purported Deed of Personal Guarantee, the Defendant has promised /guaranteed to pay the entire sum of Rs. 95,00,000/- with interest thereon at the rate of 24 per cent per annum to the Plaintiff on or before 31st March, 1998. Though in Clause 6 of the said Deed of Personal Guarantee it is provided that the Guarantee is an independent guarantee for the due payment of the said amount and can be enforced against the Defendant alone at the option of the Plaintiff for the realisation of the said amount owed by the Companies without exercising his right to enforce his claim against the Companies, it is also mentioned in Clauses, 2 3 and 4 of the said purported Deed of Personal Guarantee as follows.

> "*2. I hereby agree and undertake to create a charge in respect of Flat Nos. 11A & B situated at Sudhakar, Narayan Dabholkar Road, Bombay-400 006, as security for the due payment of the said sum of Rs. 95,00,000/- (Rupees Ninety Five lacs only) together with accrued interest thereon as aforesaid.*
>
> *2. The said flat is hereby charged by me for the payment of the said sum of Rs. 95,00,000/- along with accrued interest thereon and shall not be encumbered by me in any way without the consent of the said Mr. Karwa in writing, so long as the said amount or any part thereof remain unpaid by me.*
>
> *4. I will whenever required by the said Mr. Karwa so to do, execute at my own expense a proper transfer deed and transfer the said property to the said Mr. Karwa in lieu of the said payment above mentioned, on default from my side to comply*

> *with the promise given by these presents. The said securities are capable of being transferred together with power of sale and all other necessary power for sales and all other necessary powers for securing and enforcing the payment of the said amount and interest thereon."*

11.2 The Defendant has in paragraph 11.16 of his Written Statement denied the genuineness of the document, namely, the Deed of Personal Guarantee dated 26th November, 1996 (Exhibit-X to the Plaint). It is submitted that the said Document is got up and fabricated and cannot be relied upon. It is submitted that the stolen sheets with the signature of the Defendant have been manipulated and used as page 2 of the said Document which are not genuine and are created by the Plaintiff to support his illegal claim. It is submitted that the fact that the said Document is fabricated is apparent from the facts that: (i) the stamp paper is not in the name of either of the persons who have stated to have executed the Document, but is in the name of an Advocate Shri R.K. Kulkarni, who is nowhere involved in the alleged transaction; (ii) the typing of the Document at page 2, especially the part of the signatures is contrived, indicating that the alleged Document was created and printed around the pre-existing signature; (iii) no details of the addresses or contact details or designation or description of the witnesses are stated on the Document or elsewhere. The Defendant has no knowledge of the alleged witness and was never introduced to him. The said single witness is common to both the parties to the alleged Document; and (iv) the stamp paper i.e. page 1 of each of the two Documents are neither signed nor initialled at the bottom.

11.3 The Defendant has in his Examination-in-Chief repeated and reiterated all that is stated by him in his Written Statement. He has deposed that the Deed of Guarantee is fabricated, manipulated and a got up Document and he has not signed the same. He has further deposed that the Plaintiff has not produced any witness to prove the said Deed Of Guarantee, nor has the original Plaintiff himself entered the witness box to prove the said Document. He has deposed that the alleged Deed of Guarantee is not registered and also suffers from want of consideration. The same is an unstamped document and therefore is in contravention of the mandatory provisions of the Stamp Act.

11.4 The Plaintiff has in his Affidavit of Documents/Compilation of Documents relied upon the Personal Guarantee only as an enclosure to the registered Deed of Confirmation dated 19th May, 1999, executed only by the Plaintiff (Exhibit P-14). In the recital of the Deed of Confirmation, he has stated that the Defendant has executed in his favour an Agreement dated 26th November, 1996 and a Deed of Guarantee also on 26th November, 1996, and the Deed of Guarantee read along with the said Agreement amounts to an Agreement of Conditional Sale of the property (suit flats). In his evidence the Plaintiff has not mentioned anything about the person who has witnessed the purported Deed of Guarantee. He has not explained as to why the stamp paper was not used in the name of either the original Plaintiff or the Defendant and why the same was purchased in the name of Advocate Kulkarni, and how the said Advocate was concerned with the transaction. He has also not explained as to why the first page of the stamp paper on which the purported Guarantee is typed is not initialled by the parties. In his Cross-Examination, a specific question (Q. No.5) is put to him as to on what basis does he say that the Deed of Personal Guarantee (Exhibit-X to the Plaint) bears the signature of the Defendant to which he first answers that, *" I have seen the signature of the Defendant Mr. Basant Bhoruka appearing on papers of the two Companies i.e. M/s. Digital World India Ltd. and M/s. Digital Leasing & Finance Ltd. and accordingly I have confirmed the signatures of Defendant".* However, when the next question is put to him i.e. Question No. 6, whether he means to say that the signature of the Defendant on the Deed of Guarantee and on the papers of the two Companies are similar, he has not answered the same in the affirmative but has stated that the original Plaintiff has informed him that these documents were signed by the Defendant in his presence and thus the signatures on the Deed of Personal Guarantee is of the Defendant only. The next question therefore which was put to him in his Cross-Examination (Q. No. 7) viz. whether the original Plaintiff Mr. J.P. Karwa can depose to this fact in the present proceedings, the Plaintiff answered that "*I had requested him but till date he has not agreed".* In a specific question (Question No.8) whether the original Plaintiff Mr. J.P. Karwa assigned any reason for such dis-agreement, the Plaintiff answered the same in the negative. Therefore the original Plaintiff, though available has chosen not to enter the witness box to depose that the Defendant had put his signature on the purported Deed of Guarantee in his presence, and the contents of the Deed of Personal Guarantee are true and correct. The present Plaintiff who is only an Assignee of the original Plaintiff is personally unable to identify the signature of the Defendant and has therefore deposed that the document bears the signature of Defendant only on hearsay i.e. on the basis of him being purportedly informed by the original Plaintiff that the Defendant has signed the said Deed of Guarantee in his presence, which the Defendant has denied and has insisted that his signature is fabricated. The present Plaintiff (Assignee) could have very well **summoned** the original Plaintiff to inter alia prove/establish that the Deed of Guarantee was signed by the Defendant in his presence and its contents are true and correct, which the present Plaintiff has not chosen to do. Whilst Cross-Examining the Defendant, the Plaintiff through Q.81 also put his case to the Defendant that since the Defendant was unable to pay the dues to the original Plaintiff, he executed the Deed of Guarantee in favour of the original Plaintiff which the Defendant answered in the negative.

11.5 In support of his case that the Defendant had executed the said Personal Guarantee, the Plaintiff has also relied on a letter dated 5th November, 1996 purportedly addressed by the Defendant to the original Plaintiff (Exhibit-V to the Plaint) whereunder the Defendant expressed his willingness to inter alia execute a Personal Guarantee and to create a charge over the suit flats.

11.6 The Defendant has in paragraph 11.15 of his Written Statement denied the alleged letter dated 5th November, 1996 (Exhibit-V to the Plaint) and has stated that the same is fabricated and the signature is lifted or forged. The Defendant has further stated that the letter is one more example of misuse by the Plaintiff of stolen stationary inasmuch as the said letterhead on which the letter is shown to have been written, is more than 5 years old as is evident from the telephone number shown at the foot of the paper which are old telephone exchange numbers and were not in existence and not used by the Defendant during 1996. The exchange had changed from 811 to 361 before 1993. The Defendant has in his evidence repeated all that is stated by him in his Written Statement.

11.7 The Plaintiff in his Affidavit of Documents/Compilation of Documents relied upon the said letter dated 5th November, 1996 (Exhibit-V to the Plaint) of which the Defendant has denied and disputed the signature as well as its contents. The same was therefore marked as X-3. The burden of proving the said Document was therefore on the Plaintiff. The Plaintiff has in his evidence tendered the said Document viz. the letter dated 5th November,1996 and has stated that he is familiar with the signature of the Defendant and can therefore identify the signature of the Defendant. He has not stated how the said letter was received by the original Plaintiff i.e. through post or by hand delivery. He has also not led the evidence of the original Plaintiff who has allegedly received the Document from the Defendant, though it is not his case that the original Plaintiff is not available for giving evidence. He has not given any explanation to the

Defendant's allegation that he has used a letter-head which was five years old.

11.8 The Plaintiff has in this regard cross-examined the Defendant at length. He was specifically asked whether it is correct that on 5th November, 1996 he sent a letter to Mr. J. P. Karwa expressing his willingness to execute a personal guarantee to which the Defendant has stated that the said letter is a fake letter, and the letter-head is also fake. The address and telephone numbers were not in use at that particular time and the signature is not his.

11.9 The Plaintiff has also relied on a purported letter dated 4th December, 1996 (Exhibit-X1 to the Plaint) under cover of which the Defendant purportedly forwarded the Personal Guarantee and an Agreement creating charge on the said suit flats.

11.10 As regards the said letter dated 4-12-1996 (Exhibit-X1 to the Plaint), the Defendant has in paragraph 11.17 of his Written Statement submitted that the same is a misuse of a stolen letter-head pre-signed by the Defendant. In 1996, the Defendant was not using the said letter-heads and the telephone number shown at the foot of the paper had been changed from 811 to 361 as far back as in 1993. The Defendant has in his evidence repeated all that is stated by him in his Written Statement.

11.11 Since the said letter dated 4th December, 1996, purportedly written by the Defendant to the Plaintiff and under cover of which the purported Deed of Guarantee was forwarded to the Plaintiff by the Defendant, is not admitted by the Defendant at the stage of admission and denials, the same was marked X-3A for identification. The Plaintiff was therefore required to prove the document. However, the Plaintiff has not only not summoned the original Plaintiff to prove the said Document but has not even taken the trouble to put his own case to the Defendant viz. that the Personal Guarantee was purportedly forwarded to the Plaintiff by the Defendant under the cover of the purported letter dated 4th December, 1996.

11.12 In my view, the Plaintiff has therefore failed to prove that the Deed of Guarantee or that the Letters dated 5th November, 1996 and 4th December, 1996 were indeed executed by the Defendant and its contents are true and correct.

11.13 As regards the submission that the Deed of Guarantee is not sufficiently stamped, the said Personal Guarantee dated 26th November, 1996 is stamped on a stamp paper of Rs. 100/-. It was submitted on behalf of the Plaintiff that although the purported Deed of Guarantee dated 26th November, 1996 records, in addition to the guarantee, the creation of a charge in respect of the two flats mentioned therein, since there is a separate document of the same date purportedly creating a charge in respect of the same two flats, and in view of Clause (6) of the document titled "Deed of Guarantee", the contents of which are set out above, the said document (Exhibit- X to the Plaint) if treated only as a Deed of Guarantee, is adequately stamped under Article 5 of the Stamp Act prevailing on 26th November, 1996. Firstly, it is trite law that stamp duty is payable on the instrument and not on the transactions. As such, the contention that there is a separate document of the same date purportedly creating a charge in respect of the same two flats, did not absolve the parties from adequately stamping the document styled as "Deed of Guarantee" as the said Document also purported to create a charge on the said flats. Further, even if it were to be assumed that the instrument styled as Deed of Guarantee was adequately stamped as contended by the Plaintiff, the fact remains that, the stamp paper on which the said Deed of Guarantee has been printed, shows that the same was purchased in the name of Advocate Shri R.K. Kulkarni. Section 34 of the Bombay Stamp Act, as applicable at the time of execution of the purported Deed of Guarantee, mandated that no instrument chargeable with duty, which is written on a sheet of paper with impressed stamp, shall be admitted in evidence for any purpose unless such stamp paper has been purchased in the name of one of the parties to the instrument. As the stamp paper for the said Deed of Guarantee was admittedly purchased in the name of Advocate R.K. Kulkarni, and not in the name of either of the parties thereto, by virtue of the bar contained in Section 34 of the Bombay Stamp Act, the said Deed of Guarantee becomes inadmissible in evidence for any purpose.

It was further submitted that the Deed of Guarantee is also not required to be registered. In *K.B. Saha & Sons Private Limited vs. Development Consultant Limited*[1], the Hon'ble Supreme Court held that although a document which requires to be mandatorily registered under the provisions of the Registration Act, 1908, is not admissible in evidence if the same has not been registered, and

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1 (2008) 8 SCC 564

it can be used in evidence for collateral transactions/purpose as provided in the proviso to Section 49 of the Registration Act. The said decision further states that such collateral transaction must be independent of and divisible from the transaction which requires registration, and the same must not by itself be registerable. Even if one were to assume that in the present case the Personal Guarantee constitutes a collateral transaction which is independent of, or divisible from the creation of the charge under the same instrument, the same would not take the Plaintiff's case any further in view of the mandatory provisions of Section 34 of the Bombay Stamp Act (which provision unlike Section 49 of the Registration Act, does not contain a proviso of the nature contained in Section 49) as the said instrument cannot be admitted in evidence until the document is stamped. In the circumstances, as the said instrument, styled as "Deed of Guarantee" contains a specific provision with regard to the creation of the charge, and the same clearly has not been stamped as required in law, even if a portion of the said instrument were to be de-linked from the rest of the instrument and treated as a separate transaction which does not require registration, and is therefore held to be admissible for a collateral purpose, the same cannot be looked into even in order to establish the purported guarantee as a collateral transaction, in view of the fact that the said instrument has not been stamped as required in law.

11.14 In any event, since it is held that the Plaintiff has failed to prove that the Deed of Guarantee or the letters dated 5th November, 1996 and 4th November, 1996 were indeed executed by the Defendant, the question of going into the other defences raised by the Defendant does not arise.

Issue No. 3 is therefore answered in the negative.

12. **Issue No.4**

"4. *What is the amount that the Plaintiff is entitled to be paid?*"

In view of the reasoning set out in answer to Issue Nos. 1 and 2 and Issue No. 3 above, the Defendant in his personal capacity is not required to pay any amount to the Plaintiff.

13. **Issue Nos. 5 and 7**

"5. Whether the Plaintiff proves that Defendant created charge on the suit property i.e. flat Nos. 11 A and B, Sudhakar Building, Narayan Dabholkar Road, Malabar Hill, Mumbai-400 006 in its favour?

7. Whether the suit property is liable for the recovery of dues owed by the Defendant to the Plaintiff? "

13.1 According to the Plaintiff, along with the Deed of Personal Guarantee, the Defendant also executed an Agreement dated 26th November, 1996, whereunder he created a charge on the suit flats towards the due payment of Rs. 95 lacs together with the agreed interest at the rate of 24 per cent per annum. The said Agreement was witnessed by one Shri S.L. Chandak (Exhibit-W to the Plaint). The Plaintiff has again relied on the letter dated 5th November, 1996 (Exhibit-V to the Plaint and marked X-3 for identification) purportedly written by the Defendant to the Plaintiff offering to mortgage the suit flats as security towards the total outstanding of Rs. 95 lakhs including interest till 30th September, 1996 with further interest at the rate of 2 per cent per month from 1-10-1996 on the outstanding amount of Rs. 95 lakhs till the final amount is paid and also the letter dated 4th December, 1996 (Exhibit X-1 to the Plaint and marked X-3A for identification) under which the Defendant purportedly forwarded the Personal Guarantee as well as the Agreement creating charge on the suit flats. Both the said Documents are denied and disputed by the Defendant. For reasons already set out above in answer to Issue No.3, the Plaintiff has failed to prove execution of both the said Documents by the Defendants. As far as the Agreement creating a charge in respect of the suit flats is concerned, the same was required to be registered under Section 17 of the Indian Registration Act. However, the same is not registered. The Plaintiff has sought to rely on a Deed of Confirmation to which the Deed of Personal Guarantee and the Agreement creating a charge in respect of the suit flats have been annexed, and has tried to contend that the said Deeds have thus been registered. The Plaintiff was questioned in Cross-Examination vide Q/A 40-44 regarding the Agreement to create charge being unregistered. The Plaintiff first stated that the Document for creation of charge was subsequently registered, however he thereafter agreed that it was only the Deed of Confirmation which was registered and not the Document for creation of charge. The said question and answers are reproduced hereunder:

"Q.*40: I suggest to you that the document of creation of Charge dated*

26th November 1996 (Part of Exh.P-14) is an unregistered document.

A. *I think it has been subsequently registered.*

Q.*41 Can you tell on which date the said document Creation of charge dated 26th November 1996 (part of Exh.P-14) was registered?*

A. *I do not remember.*

Q.*42 Can you tell us from the records?*

A. *Witness peruses the compilation of documents dated 28th March 2015 and states that the said document is registered on 11th March, 1999.*

Q.*43 I suggest that on 11th March 1999 the original Plaintiff Mr. J.P. Karwa got a Deed of Confirmation registered an not the Deed of Creation of charge dated 26th November, 1996 (part of Exh. P-14) which is executed by Defendant.*

A. *On going through the documents, it is seen that the documents bear the stamp of Registrar dated 10th June, 2005 and the square stamp of 1999.*

<u>Per Commissioner</u>

Witness after perusing the original compilation of documents dated 28th March 2015, more particularly Exhibit 'P-14' now states that my answer to Q.42 is not correct and I now say that the Deed of Creation of Charge dated 26th November 1996 (part of Exh. P-14) was registered on 10th June, 2005.

Q.44 I repeat my Q.43 and again call upon you to answer the same.

A. Yes."

In any event, it is trite that registration of the Deed of Confirmation would not extend to the enclosures annexed to the said Deed of Confirmation. In other words, by virtue of registration of a Deed of Confirmation, any document annexed thereto does not ipso facto get registered. As also submitted by the Defendant, the said Deed of Confirmation relates to some conditional sale and not to an agreement for creation of charge. Even otherwise the said Document was submitted for registration on 11th March, 1999 i.e. after almost two and half years after its execution. As per Sections 23 and 25 of the Registration Act, a document needs to be tendered within four months of its execution or after explaining sufficient cause within further 4 months thereof and thereafter the Superintendent of Stamps or Sub-Registrar does not have the authority /jurisdiction to even entertain such a request for registration. Both Sections 17 of Registration Act and Section 100 of the Transfer of Property Act make it mandatory for a document creating charge to be compulsorily registered. Section 49 of the Registration Act deals with the effect of non-registration. The same is reproduced hereunder:

> "***49l Effect of non-registration of documents required to be registered.-*** *No document required by Section 17 or by any provision of the transfer of Property Act, 1882, to be registered shall -*
>
> *(a) affect any immovable property comprised therein, or*

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered.

Provided that an unregistered document affecting immovable property and required by this Act, or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 or as evidence of any collateral transaction not required to be effected by registered instrument."

13.2. For the reasons set out above, it cannot be said that the Agreement purportedly creating the charge in respect of the suit flats is a registered document. In my view, the same therefore cannot even be looked at by the Court as a piece of evidence in the present Suit.

13.3. Even otherwise, for the same reasons set out whilst answering Issue No. 3, that the Plaintiff has failed to establish that the Deed of Personal Guarantee has been executed by and between the original Plaintiff and the Defendant and the contents of the same are true and correct, I hold that the Plaintiff has failed to establish that the Defendant has executed the Agreement creating a charge in respect of the suit flats (Exhibit-W to the Plaint). Issue Nos. 5 and 7 are therefore answered in the negative. In any event it is already held whilst answering Issue No.4 that no amount is personally payable by the Defendant to the Plaintiff.

14. **Issue No.6**

"6. Whether the Defendant proves that he is not the owner of the suit property?"

14.1 The Defendant in Paragraphs 7 and 17 of his Written Statement inter alia pointed out that he could not have created any charge in favour of the original Plaintiff since he was not the owner of the suit flats at any time, but was and is only in occupation of the same.

14.2 In support of his case that the Defendant is the owner of the suit flats, the Plaintiff in paragraphs 25, 26 and 27 of his Affidavit in Lieu of Evidence deposed as under:

> *"25. I say that in 1969 or thereabouts TCI offered the said suit property to the father of Defendant herein at book value of the flat in consideration of his service to the Company, and that the father of the Defendant requested TCI to transfer the same to his minor son Shri Basant Bhoruke, and accordingly TCI passed a resolution on 24.01.1973 agreeing to transfer the suit property to Defendant upon attaining majority or getting married and upon payment of book value. I say that subsequently an Agreement for Sale dated 29.05.1985 was executed by TCI in favour of Defendant. I say that Defendant did not pay the book value of the suit property and defaulted in payment of Society's maintenance charges. I say that in addition to this default various disputes cropped up between the family members and finally were referred to sole Arbitrator. I*

say that on the basis of the resolution and Agreement of Sale the Award and Decree were passed by Sole Arbitrator and Hon'ble Calcutta High Court respectively transferring the suit property to Defendant. I say that as per Award passed by Sole Arbitrator dated 29.04.1994 converted into Decree of Hon'ble Calcutta High Court dated 05.02.1997 the suit property is transferred to Defendant unconditionally, therefore Defendant is the owner of the suit property and at the time of execution of the alleged conveyance deed dated 31.12.1999 TCI had no right title or interest over the property such that they could transfer the suit property to the Badriprasad Bhoruka Family Trust as alleged. I say that the Award and Decree clearly show that the Defendant is the absolute owner of the suit property. I further say that when TCI declared the properties in 1998 to the Hon'ble Andhra Pradesh High Court, they have not included the suit property, therefore it is clear that they had transferred said suit property to Defendant vide Arbitration Award and Decree to which both Defendant and his mother were signatories. I hereby produce on record and tender in evidence the copies of the aforesaid Arbitration Award dated 29.04.1994 and Court Decree dated 05.02. 1997 and pray that the same be taken on record, exhibited and admitted into evidence.

26. I say that without setting aside the Award and/or Decree TCI could not have transferred their right and title by Conveyance Deed dated 31.12.1999 to Badriprasad Bhoruka Family Trust, and therefore the said Conveyance Deed is null *and void. I say that the said Conveyance Deed was executed while there was an injunction on the Defendant from dealing with the property by Hon'ble Bombay High Court and for this reason also the said Conveyance Deed is null and void. I further say that the Hon'ble Division Bench of Bombay High Court vide their order dated 27.07.2001 has held that the suit property belongs to Defendant only.*

27. I say that the Badriprasad Bhoruka Family Trust filed a Notice of Motion in the instant suit some time in 2004 claiming ownership of the suit property and praying for discharge of the Court Receiver. The said Trust withdrew the said Notice of Motion unconditionally on 05.05.2005, therefore it is deemed that they have admitted they are not the owners of the said suit property. I say the Trust Deed is not registered with the Charity Commissioner and therefore has no validity whatsoever. I say that a Trust can be formed for immovable assets duly existing at the time of formation of trust, that too in the name of executor only, but Defendant's father was not the owner of the property at the time of formation of the Trust, in fact the suit property did not even exist at that time. It is thus clear that Badriprasad Bhoruka Family Trust is not a legal entity and cannot own the said suit property."

14.3 The Plaintiff in his Cross-Examination (Question/Answer 21 and Question/Answer 22) admitted that he was aware that TCI was the owner of the property and that the Plaintiff never made any enquiries about the title of the suit flats. In Answer to Question 24, the Plaintiff acknowledged that TCI was the owner of the suit flats since 1968-69. In Answer of Questions 25 and 26, the Plaintiff admitted that he has not seen any registered document whereby TCI transferred the suit flats to the Defendant, however he maintains that it is only on the basis of a Resolution passed by the TCI dated 24th January, 1973, the Agreement for Sale dated 29th May, 1985, the Arbitration Award dated 29th April, 1994 and the Decree of the Calcutta High Court dated 5th February, 1997 that he claims the Defendant to be the owner of the suit flats. In Questions/Answers 28 and 29, the Plaintiff has admitted that the Defendant had to pay some amounts to TCI to take ownership of the flats and subject to the said payments, the documents were akin to an agreement of sale. Vide Question/Answer 30, the Plaintiff admits that the Defendant never made payment to the Company TCI. This position is admitted in Paragraph 25 of the Plaintiff's Affidavit also. In Question/Answer 31, the Plaintiff admits that he is not aware about any document whereby TCI transferred the suit flats in favour of the Defendant. Thus it is clear that the Plaintiff has failed to produce any registered conveyance showing that the Defendant was the owner of the suit flats. The said Questions/Answers are reproduced below:

"Q.21 Before accepting the title of the Defendant, did you make any enquiries as to who is the owner of these flats?

A. As informed by Mr. Karwa, he came to know later on that the said flats are in the name of a Company M/s. Transport Corporation of India (TCI).

Q.22 I repeat Q.21 and once again put to you that whether you made any enquiries as to who is the owner of these flats before accepting the title of the Defendant to these flats?

A. As the Defendant was staying in the flat along with his family and claiming to be the owner of the flat, no enquiries were conducted.

Q.24 Do you know that the original builder of the building 'Sudhakar' around 1968-69, by a registered Indenture of Transfer directly sold these flats to the Company Transport Corporation of India?

A. In my affidavit in lieu of Examination in Chief dated 28th March 2015 at para 24 I have acknowledged the above position.

Q.25 Have you seen any registered document whereby Transport Corporation of India transferred these flats to the Defendant?

A. As already stated hereinabove in reply to Q.20 the basis for saying that the Defendant is the owner of these flats are Resolution, Arbitration Award dated 29th April, 1994 and Decree of Calcutta High Court dated 5th February, 1997.

Q.26 I repeat my Q.25 and again ask you have you seen any registered document whereby the Company Transport Corporation of India transferred these flats to the Defendant?

A. No.

Q.28 Which document according to you, amongst these three, transfers the ownership from the Company TCI to the Defendant?

A. Pursuant to these documents the Defendant was required to pay some amount to the Company TCI and take ownership of the flat.

Q.29 Do you mean to say that these documents were akin to agreement to sale?

A. Subject to condition of payment the Defendant was entitled for the ownership of the flats.

Q.30 To your knowledge, whether Defendant ever made these payments to company TCI?

A No, I do not know.

Q.31 Is there any document whereby TCI transferred the property in favour of the Defendant?

A. I am not aware of any document, except for the documents detailed in para 25 of my Affidavit in lieu of Examination in Chief dated 28th March 2015."

14.4 The Plaintiff's own witness Ms. Jyoti Cheulkar (PW -2) who worked as an Accountant in the Office of Digital World and Digital Leasing, has also in her cross-examination admitted that the suit flats were owned by TCI, the Defendant never paid consideration to TCI, and TCI transferred the property to the Trust.

The said Question and Answers are reproduced hereunder:

"Q.14 *You stated that you were also doing the personal accounts of Basant Bhoruka, do you know whether he purchased the property where he resides at 11, Sudhakar, N.D. Road, Mumbai-400 006?*

A: In my knowledge he has not purchased the property where he resides at 11, Sudhakar, N.D. Road, Mumbai-400 006.

Q.15: *Do you know that the property where Basant Bhoruka resides at 11, Sudhakar, N.D.Road, Mumbai-400 006 was transferred to Badriprasad Bhoruka Family Trust on 31.12.1999?*

A: *Yes, I am aware.*

Q.*16: How do you know that the property where Basant Bhoruka resides at 11, Sudhakar, ND.Road, Mumbai-400 006 was transferred to Badriprasad Bhoruka family Trust on 31.12.1000?*

A: *I was present at the Sub-Registrar's office with Mr. Basant Bhoruka on 31.12.1999 when the said property was transferred to Badriprasad Bhoruka Family Trust by Transport Corporation of India.*

Q.*18 : Did Mr. Basant Bhoruka ever pay any money to TCI for buying the above mentioned property.*

A: *No, Mr. Basant Bhoruka did not pay any money to TCI with respect to the purchase of the above mentioned property.*

14.5. In support of his case that he is not the owner of the suit flats the

Defendant relied on a notarized copy of the registered Indenture of Transfer dated 31st December, 1999 executed between TCI and the Trustees of Badriprasad Bhoruka Family Trust transferring the suit flats in favour of the said Trust (Exhibit D-1), original electricity bills of BEST Undertaking for the period October to December, 1996 (Exhibit D-2), Original Resolution of Sudhakar Cooperative Housing Ltd. dated 27th September, 1970 (Exhibit D-3), original Order under Section 101 of the Maharashtra Co-operative Societies Act, 1960, dated 30th December, 2002 passed by the Learned Deputy Registrar, Co-operative Societies (Exhibit D-4) and a Certified Copy of Order in Revision Application No. 413 of 2005 dated 22.10.2012 passed by the Learned District Registrar along with the official translation into English by the Chief Translator's Office of High Court dated 7th December, 2012 (Exhibit D-5).

14.6. The Defendant has, in his Affidavit in Lieu Of Evidence pointed out that the said flats were owned by a Company called Transport Corporation of India (TCI) from 1968 till 1999 and since then the said flats are owned by Badriprasad Bhoruka Family Trust (‘the Trust’). The said flats do not belong to him and never belonged to him. The said flats were owned from their inception by TCI, which was well within the knowledge of the original Plaintiff, as evidenced by the letter of the Society dated 28th April, 1999, addressed to the Advocates for the original Plaintiff and annexed as Exhibit-C to the Plaintiff's own additional Affidavit in Support of the Notice of Motion No. 180 of 1999.

The Plaintiff's original Suit was not containing a prayer for declaration of charge against the property. In spite of the Society informing the Plaintiff that TCI is the owner of the said flats and not the Defendant, the Plaintiff some time in May, 1999 amended the Suit to include such a prayer. TCI further sold the said flats to Badriprasad Bhoruka Family Trust by a registered Indenture of Transfer dated 31st December, 1999. The electricity bills issued by the BEST Undertaking for the period October to December, 1996, i.e. at the time when the Plaintiff alleges that the Defendant signed the purported Guarantee Deed and the Agreement to create charge, shows that the owner of the flats was TCI. TCI purchased the said flats at the inception, in or around the year 1968, and was allotted the said flats and car parking spaces and servants quarters as per the Resolution of the said Society dated 27th September, 1970. In 1968, TCI allowed the father of the Defendant late Shri Badriprasadji Bhoruka who was a Partner in TCI to occupy the same along with the members of his family, including himself. TCI was first a Partnership Firm and was then converted into a Private Limited Company and thereafter to a Public Limited Company, and Shri Badriprasad was the whole-time Director of TCI. Since Shri Badriprasad was instrumental in the growth and success of TCI, during the life time of late Shri Badriprasad, Shri P.D. Agarwal, Chairman of TCI offered to transfer the said flats in favour of Shri Badriprasad at book value in consideration of his valuable life-time services to TCI. The late Badriprasad had settled a Family Trust by the name Badriprasad Bhoruka Family Trust ('the Trust') vide Trust

Deed dated 10th September, 1966. In the said Trust Deed he had expressly stated his wish that all his properties, distributions and entitlements would belong to the Trust for the joint enjoyment of his family members, but since the Defendant was 8 years old at the time of Shri Badriprasad's death and therefore unaware of his affairs, in the year 1973 after the death of late Shri Badriprasad, TCI passed a Resolution dated 24th January,1973 wherein the Defendant was shown as the Nominee of his late father. Upon the Defendant attaining majority, the said Resolution was followed up by an Agreement of Sale dated 29th May, 1985 which required book value of the said flats to be paid by the Defendant as a condition precedent to the execution of the Agreement of Sale and the said flats were not transferred and continued to remain in the name of TCI. Multiple disputes ensued between the family members from 1985 onwards relating to property and shareholding issues leading to protracted litigation before this Court and the Calcutta High Court which are a matter of record. The Defendant has further deposed that all the disputes were finally referred to a Sole Arbitrator who passed his Award on 29th April, 1994 which was converted into Rule of Court on or about 5th February, 1997. The Award and Decree explicitly recorded that TCI remained the owner of the said flats and passed directions for transfer of the said flats in the name of the Defendant upon fulfilment of conditions, including payment of book value. However, even after the Arbitration Award and Decree, disputes continued between the family members as the Trustees of the Trust insisted that TCI should not transfer the said flats in the name of the Defendant on the ground that it was the wish of his late father that the said flats be transferred to the Trust for the joint enjoyment of all family members and that the Defendant should not be made the sole owner thereof. In the year 1999, the mother of the Defendant late Kamladevi Bhoruka filed a Suit and obtained an injunction restraining TCI from transferring the said flats in favour of the Defendant. TCI decided to transfer the said flats to the Trust.

14.7 The Defendant has further deposed that when Notice of Motion No. 180 of 1999 taken out by the Plaintiff in the instant Suit appeared on Board for hearing before this Court from time to time, his Advocates did not appear at the hearing nor did they inform him about the dates of the hearing. No notice was served upon the Defendant directly by this Court and thus he did not come to know about the proceedings and hence by an ex-parte order the Court Receiver came to be appointed in respect of the said flats solely upon the original Plaintiff's misrepresentation that the said flats are owned by the Defendant and on the basis of his conduct and non-appearance.

14.8. The Defendant has in support of his case, that he has never been the owner of the said flats relied on the Recovery Proceedings No. 1960 under Section 101 of the M.C.S. Act,1960 initiated by the said Society against TCI and the Defendant, wherein the said Society had impleaded TCI as Respondent No.1 in the capacity of owner of said flats and the Defendant in his capacity as the occupant of the same. In the course of the proceedings, the said Society dropped the proceedings against the Defendant, and the Dy. Registrar of Co-operative Societies, "D" Ward exercising his powers under Section 101 of the MCS Act, 1960 observed in Paragraph 8 of his Order dated 30th December, 2002 that it is apparent that the Defendant was not and never was a member or owner of the subject premises and if the proceeding against the Defendant would not have been withdrawn by the Society, the same would have been dismissed against the Defendant. The Society filed Revision Application No. 413 of 2005 against the above mentioned Order of the Dy. Registrar dated 30th December, 2002, which appeal was heard and disposed off on 22nd October, 2012, by the District Deputy Registrar confirming the Order of the learned Dy. Registrar.

14.9 The Defendant not being the owner of the property is not only the consistent case of the Defendant in his pleadings and affidavits but even in his Cross Examination the Defendant has maintained the same stand, as is apparent from Q/A 62-76 and 82 reproduced hereunder:

> "*Q. 62 Is it not true that you always claimed in the Society that these flats were owned by you?*
>
> *A. No, it is not true. Neither I was owner nor have I claimed to be the owner and all the documents speak for themselves.*
>
> *Q.63 When the matter came up before Hon'ble Justice Shri D.K. Deshmukh on 17.12.1998 for ad interim reliefs, why did you not state that before Hon'ble Justice Shri D.K.*

Deshmukh that these flats were not owned by you?

A. I had instructed my lawyer to state that I am not the owner.

Q.64 Did you ever inform the Hon'ble High Court that you are not the owner of these flats?

A. I have informed the Hon'ble High Court many times. It is also clearly mentioned in the Written Statement filed on behalf of Defendant in many proceedings from 2001 onwards. The Plaintiff was also aware that the flats belong to TCI (Transport Corporation of India) and then subsequently to the Badriprasad Bhoruka Family Trust and he choose not to make the owners party to the suit.

Q.65 Is it not true that in January 1973 the owner Transport Corporation of India by its Resolution dated 24.1.1973 resolved to transfer these flats to you?

A. In January 1973 I was 12 years old. My father was Promoter Director of TCI. In lieu of his life time service, TCI decided to give him the flats on book value during his life time, but my father passed away suddenly in 1969, so TCI decided to put my name on that Resolution as I was the son.

Q.66 Is it no true that TCI vide agreement dated 29.5.1985 agreed to transfer the said flats in your name on payment of book value?

A. Yes, there was such agreement.

Q.67 Is it not true that on 29.5.1985 you were an adult?

A. Yes, I was.

Q.68 Is it not true that subsequently you had disputes with TCI and you claimed the ownership of these flats?

A. Yes, I claimed the flats to be transferred to me as per the Resolution of January 1973 and the agreement dated 29.5.1985.

|Q.69Is it not true that all these disputes were referred to arbitration before the sole Arbitrator Mr. Nathmal Himatsingka?

A. Yes, it is true.

Q.70 Is it not true that by an Award dated 29.4.1994 the said Arbitrator directed the TCI to transfer these flats in your favour?

A. Yes,TCI was directed to transfer the said flats in my favour in terms of the Resolution dated January 1973 and Agreement dated 29.5.1985 upon payment of book value.

Q.71 Is it not true that the award was filed before the Hon'ble Calcutta High Court and it became decree on 5.2.1997?

A. Yes, it is true.

Q.72 Is it not true that by virtue of Award and Decree, you became owner of these two flats?

A. No, this is not true. Firstly, I never paid consideration that *was required to be paid. Secondly, TCI never made any conveyance deed of the said flats in my favour because my mother and other trustees of Badriprasad Bhoruka Family Trust objected to conveying the said flats in my favour and demanded to TCI that the flats should be transferred to the Trust settled by my father, as per the wishes of my father. Finally on 31.12.1999 TCI conveyed the flats to the Badriprasad Bhoruka Family Trust by a registered Indenture of Transfer dated 31.12.1999.*

Q.73 Whether you consented to such transfer by TCI to the Badriprasad Bhoruka Family Trust?

A. No, the question of consent did not arise. The owner of the property at that time TCI decided to transfer the said flats to Badriprasad Bhoruka Family Trust. They called upon me to sign as a witness to avoid further disputes, which I did.

Q.74 Can you tell us why Sudhakar Co-operative Housing Society Ltd. when it initiated proceedings against you under Section 101 of the Maharashtra State Co-operative Societies Act, 1960, it added TCI and you as a party, however did not add Badriprasad Bhoruka Family Trust as a party to those proceedings?

A. They recognised TCI as the owner and member of the Society and me as an occupant. The society did not transfer the flats to the Badriprasad Bhoruka Family Trust in the books, nor made the Trust a member because of the pending dues.

Q.75 Who is the member now of those flats in the books of the Society?

A. According to my knowledge and information, I believe the trust has approached the Dy. Registrar of Co-op. Society and has got an order to the effect that the Trust is now a deemed member of the Society.

Q.76 How can you say that the suit property belongs to TCI on 31.12.1999 when during the proceedings of their demerger in 1999 they disclosed a list of their properties to the Hon'ble Andhra Pradesh High Court, but the suit properties do not find mentioned in that list?

A. If a Company does not disclose a property, it does not mean that the ownership of the property is taken away and in any event I cannot explain why TCI did, what it did. The question will have to be asked to TCI. I know TCI was the owner as per the Sub-Registrar's record and on 31.12.1999 TCI executed the transfer to the Trust.

Q.82 I put it to you that you are the owner of the suit flats.

A. It is not true. Till 31.12.1999 TCI was the owner of those flats and from 31.12.1999 the Badriprasad Bhoruka Family Trust is the owner of those flats. At no point of time I ever became the owner of the said flats."

14.10 From the aforestated submissions of the Plaintiff and the Defendant as also the Cross-Examination of the Plaintiff and the Defendant, it is clear that the suit flats till date are not transferred in the name of the Defendant. It also appears that the said flats were not transferred in the name of the Defendant because since the year 1985 the Defendant did not comply with the conditions insisted upon by TCI, viz. to pay the book value of the flats to TCI. It appears that TCI has on 31st December, 1999 transferred the flats in the name of the Trust. The Plaintiff has categorically stated in his Answer to Question No. 20 of his Cross-Examination that the basis on which he claims that the Defendant is the owner of the suit flats is the Resolution passed by TCI dated 24th January, 1973, the Agreement for Sale dated 29th May, 1985, Arbitration Award dated 29th April, 1994 and the Decree of Calcutta High Court dated 5th February, 1997. In none of these documents, the flats stood transferred in the name of the Defendant. In fact, in the case of *Amol Bhalchandra Joshi and others vs. Deorao Santoshrao Bhongade*[2] a learned Single Judge of this Court has held that merely because a decree for specific performance is passed, it cannot be presumed that the decree-holder is bound to get a sale deed executed in his favour. The same would be complete only upon execution of a sale deed in favour of the decree-holder either by the vendor/judgment debtor or through the process of Court. Therefore, in my view, it is established that the Defendant is not the owner of the suit flats and Issue No. 6 is therefore answered in the negative.

15. The Suit is accordingly disposed of as dismissed with no order as to costs.

(S.J. KATHAWALLA, J.)

2 2011 (2) Bom. C.R. 537