

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.180 OF 2010

Mahendra Valji Rathod ... Applicant
Vs.
National Radio and Electronics Company ... Respondent

Mr. S. M. Vyas for Applicant.
Mr. Surel Shah a/w. Ms K. R. Davierval and Ms Ria Panchal i/b. M/s.
Mulla and Mulla and CBC for Respondent.

CORAM : R. G. KETKAR, J.
DATE : MARCH 29, 2019 &
APRIL 5, 2019

ORAL JUDGMENT :

Heard Mr. Vyas, learned Counsel for the applicant and Mr. Shah, learned Counsel for the respondent at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicant, hereinafter referred to as 'plaintiff', has challenged the judgment and decree dated 07.10.2009 passed by the Appellate Bench of the Small Causes Court at Bandra, Mumbai in Appeal No.129 of 2008. By that order, the Appellate Court allowed the appeal preferred by the respondents, hereinafter referred to as 'defendants', and set aside the judgment and decree dated 30.01.2008 passed by the learned trial Judge in T.E.&R. Suit No.27/30 of 2002. The Appellate Court dismissed the Suit. The relevant and material facts, giving rise to filing of the present Application, briefly stated, are as under:

3. The plaintiff has instituted Suit against the defendants for recovery of possession of flats No.4 and 6 situate on the first and second floor respectively of the building known as 'Girishant', Plot No.351-A,

Linking Road now known as Sardar Vallabhbhai Patel Road, Khar Mumbai - 400 052 (for short 'suit premises') inter alia contending that one Dayabhai Tuljaram Desai (for short 'Dayabhai') was the owner of the immovable property known as 'Girishant'. The said Dayabhai entered into an agreement with defendants on 19.01.1965 for construction loan from the defendants for raising first and second floors of the property known as 'Girishant'. By that agreement, the defendants were granted a lease of 20 years in respect of premises to be constructed on the first and second floors. The monthly rent agreed to be paid was Rs.337.50/- for each of the two flats on the first and the second floor and Rs.675/- for the two flats on or before 10th day of each and every month. The defendants had advanced construction loan of Rs.1,00,000/- for construction of first and second floors. By a confirming agreement dated 15.01.1967, the deceased Dayabhai again raised loan of Rs.20,000/- from the defendants. The said sum was repayable with interest. By the second agreement dated 15.02.1967, defendants were allowed to carry out additions and alterations for better use of the premises. By agreement dated 15.01.1970, the defendants confirmed to have received a loan of Rs.20,000/-.

4. The plaintiff further contended that on 25.03.1973, Dayabhai expired leaving behind two wives by name Janabai Desai (for short 'Janabai') and Nirmalaben Desai (for short 'Nirmalaben'). Janabai had two daughters namely, Pallavi and Ragini. Nirmalaben had two daughters by name Jyotiben M .Purohit (for short 'Jyotiben') and Nutanben J. Thakkar (for short 'Nutanben'). Janabai and Nirmalaben executed a registered partition deed on 21.01.1982. Janabai became owner of flats No.1, 3, 5 and a garage situate on the Southern side of Girishant. Nirmalaben became owner of flats No.2, 4, 6 and a garage situate on the Northern side of Girishant building. Flats No.4 and 6 are

subject matter of the present proceedings.

5. It is the case of the plaintiff that Nirmalaben executed a deed of Conveyance in his favour on 26.09.1998. The said Conveyance was executed by Nirmalaben, Jyotiben and Nutanben as vendors on one hand and the plaintiff as a purchaser on the other. The Deed of Conveyance was executed by Jyoti for herself as also as the Constituted Attorney of Nirmalaben and Nutanben. Deed of Confirmation was executed between Nirmalaben, Jyotiben and Nutanben on one hand and the plaintiff on the other on 03.08.1999. The Confirmation Deed was presented for registration on 03.08.1999 and was duly registered on 03.01.2005 with the Sub-Registrar of Assurances at Mumbai vide Sr. No.4865 of 1999. The plaintiff, therefore, claimed to have become absolute owner and landlord of flat No.2 and the suit premises. The plaintiff contended that with effect from 31.03.2000, Maharashtra Rent Control Act, 1999 (for short 'Act') came into force. The paid up share capital of the defendants is more than Rs.1,00,00,000/-. In view of Section 3(1)(b) of the Act, defendants are not entitled to protection under the Act and are exempt from the provisions of the Act. By letters dated 27.08.2000 and 28.08.2000 through Advocate, plaintiff terminated the tenancy of the defendants in respect of the suit premises and called upon them to handover possession of the suit premises. By letters dated 14.09.2000 and 20.09.2000, the defendants called upon the plaintiff to furnish a copy of Conveyance and about non-signing of the Letter of Attornment by other co-owners. The defendants also pleaded renewal of the Lease Deed dated 19.01.1965 as per the option given to them under the Lease Deed. It is the case of the defendants that by their letter dated 13.02.1985, they had exercised their right to renew the lease for a further period of 20 years to which Nirmalaben, since deceased did not reply.

6. The plaintiff further came with the case that Nirmalaben had already instituted Suit No.621/2148 of 1983 against the defendants. Thus, the defendants sought to exercise their right of renewal pending the Suit for eviction filed by Nirmalaben. Nirmalaben, therefore, did not consent for renewal of the lease. By rejoinder dated 30.10.2001 sent through Advocate, plaintiff called upon the defendants to take inspection of the Conveyance Deed with prior appointment. However, the defendants did not take inspection and also failed to handover possession. The plaintiff, therefore, sought possession of the suit premises among other reliefs.

7. The defendants filed written statement dated 04.09.2002 and amended written statement dated 26.10.2007. The defendants contended that they are entitled to protection granted to them under the Act and the Suit instituted under Section 41 of the Presidency Small Causes Court Act, 1887 (for short 'P.S.C.C. Act') is wholly misconceived and the Small Causes Court has no jurisdiction to entertain and try the Suit. The defendants also put the plaintiff to the strict proof of his derivative title in respect of the suit premises. The defendants further contended that as the plaintiff did not become owner of the suit premises, notice issued under Section 106 of the Transfer of Property Act, 1882 (for short 'T. P. Act') is null and void, illegal, bad in law and non-est. The ownership rights in respect of the suit premises could not be transferred in favour of the plaintiff by virtue of an unregistered Deed of Conveyance. The defendant relied upon the agreement of lease dated 19.01.1965 as also the correspondence.

8. On the basis of pleadings of the parties, the learned trial Judge framed the necessary issues on 07.04.2005. In pursuance thereof, the

parties adduced evidence. By order dated 30.01.2008, the learned trial Judge decreed the Suit. The learned trial Judge held that plaintiff proved that he is the absolute owner and landlord of the suit premises and the defendants are his tenants. The plaintiff also proved that the tenancy of the defendants was legally and validly terminated by issuing legal and valid notice. Consistent with these findings, the learned trial Judge directed the defendants to handover possession of the suit premises. Aggrieved by this decision, defendants preferred appeal before the Appellate Court. By the impugned order, the Appellate Court allowed the appeal and set aside the trial Court's judgment. The Appellate Court also dismissed the Suit.

9. In support of this Application, Mr. Vyas submitted that it is not in dispute that the share capital of the defendants exceeds Rs.1,00,00,000/-. The defendants are, therefore, not entitled to protection of the Act. The defendants are exempt from the provisions of the Act. He submitted that by registered Partition Deed dated 21.01.1982, flat No.2 and the suit premises were allotted to Nirmalaben and her two daughters, Jyotiben and Nutanben. On 26.09.1998, Nirmalaben along with her daughters, Jyotiben and Nutanben executed Deed of Conveyance in favour of the plaintiff. In paragraph 6 of the Deed of Conveyance, reference was made to the Deed of Partition dated 21.01.1982. They sold the suit premises, flat No.2 as also one garage on the Northern side and half of the terrace being the area above flats No.2 and the suit premises for a valuable consideration of Rs.80,000/-. The Deed was executed by Jyotiben as Constituted Attorney of Nirmalaben and Nutaneben and also on behalf of herself. However, due to oversight, the Deed of Conveyance dated 26.09.1998 was not registered. In view thereof, Deed of Confirmation was executed between Nirmalaben, Jyotiben and Nutanben on one hand and plaintiff on the other on 03.08.1999. In the recital, reference was

specifically made to Deed of Conveyance dated 26.09.1998 as also the fact that due to oversight Deed of Conveyance dated 26.09.1998 remained to be lodged for registration. Under the Deed of Confirmation, vendors agreed and confirmed that on 26.09.1998, they had duly executed Deed of Conveyance in favour of the plaintiff. The original Deed of Conveyance was annexed and marked as Exhibit-A. The vendors further agreed and confirmed that for all practical purposes, the land and the premises described in the Second Schedule written thereunder shall be deemed to have been conveyed to the plaintiff as from 26.09.1998 and that, they have not done any act, deed, matter or things whereby they were prevented from executing or granting or conveying the said land and premises. He submitted that on the basis of the market value of Rs.2,10,000/-, plaintiff had paid deficit stamp duty of Rs.13,000/- chargeable under Article 24(b) of Schedule I of the Bombay Stamp Act, 1958 and penalty of Rs.19,760/-, and to that effect, a certificate under Section 41 of the Bombay Stamp Act was issued on 29.11.2004. The Deed of Confirmation was lodged for registration on 03.08.1999. The plaintiff had paid registration fee of Rs.1,300/- on 03.01.2005. The Deed of Confirmation was duly registered on 03.01.2005. He relied upon Section 47 of the Indian Registration Act, 1908 (for short 'Registration Act') to contend that the Deed of Confirmation though registered on 03.01.2005, relates back to the date of execution i.e. 03.08.1999. Even the Appellate Court has held that the Conveyance Deed dated 26.09.1998 can be said to be effective from 03.08.1999. He also relied upon the following decisions:

- a. ***Mitchell Vs. Mathura Dass, (1884-85) 12 Indian Appeals 150;***
- b. ***Official Trustee of W.B. Vs. Stephen Court Ltd., (2006) 13 SCC 401;*** and
- c. ***Hamda Ammal Vs. Avadiappa Pathar, (1991) 1 SCC 715*** to contend that the defect of non-registration of Deed of Conveyance dated 26.09.1998 stands cured upon execution of the registered Deed of

Confirmation on 03.01.2005.

10. Mr. Vyas, therefore, submitted that by the time when the notices under Section 106 of the T.P. Act were issued and Suit was instituted, the plaintiff was the absolute owner of the suit premises. The Appellate Court, however, proceeded to hold that there is inherent defect in the title of the plaintiff and he has not got absolute title in the suit premises.

In paragraph 34, the Appellate Court observed thus,

“34. At the trial of the suit, the plaintiff was called upon to produce power of attorney allegedly executed by Nirmalaben and Nutan in favour of Jyotiben. However, plaintiff has merely produced an ordinary Photostat copy of power of attorney dated 15.11.1983 purportedly executed by Nirmalaben in favour of Jyotiben and Milind (son of Jyotiben). It is marked as Exh.H but its contents are not proved. Thus plaintiff contended with mere production of xerox copy of power of attorney. Admittedly power of attorney allegedly executed by Nutan in favour of Jyotiben is not produced by the plaintiff. It is significant to note that since the date of filing of written statement of defendants, the plaintiff was aware of the fact that defendants have challenged his derivative title. From his own document of Conveyance Deed dated 26.9.1998 it is amply clear to the knowledge of the plaintiff that by Partition Deed dated 25.1.1982 in all 3 flats including suit flats, garage etc. came to the share of Nirmalaben and her two daughters. In the Confirmation Deed dated 3.8.1999 the address of Nutan Thakkar shown to be New Jersey, U.S.A. Considering these facts and circumstances it was incumbent upon the plaintiff to satisfy that Nutan really executed a power of attorney in favour of Jyotiben for transfer of her share in the suit property. Even there is no cogent evidence that Nirmalaben executed a power of attorney in favour of Jyotiben. There is no reference either in the Conveyance Deed or Confirmation Deed about execution of power of attorney, jointly and separately, by Nirmalaben and Nutan in favour of Jyotiben. We are therefore, of the opinion that plaintiff has failed to establish that shares of Nirmalaben and Nutan in the suit flats have been sold to him and consequently failed to prove that he is an absolute owner of entire suit flats. This is not a suit under Rent Act. Defendants never paid rent in respect of suit flats to the plaintiff. Hence there must be cogent evidence proving ownership in the suit flats. The Ld. trial Judge held

that plaintiff has become owner of suit property. This finding based on the reasoning that the transfer of suit premises in favour of the plaintiff is not set aside by any Court of law, that there is a registered instrument in favour of the plaintiff and his name has been mutated in the revenue record. We however, are not convinced with this reasoning as the derivative title of the plaintiff was challenged by the defendants since beginning as well as they have strongly challenged transfer deeds. But plaintiff failed to prove that transfer deeds were executed by all owners. He could not divest Nirmalaben and Nutan from their share in the property. It is well settled that revenue record is not a conclusive proof of title. Hence we have recorded negative finding on point no.1.”

11. Mr. Vyas has invited my attention to the order dated 11.07.2011 passed by this Court (Coram : J. H. Bhatia, J.). After hearing both sides at some length, at the request of the learned Counsel for the plaintiff, this Court adjourned the matter to 22.08.2011 for filing original Power of Attorney executed by Nirmalaben in favour Jyotiben, who had executed the sale deed in favour of the plaintiff for and on behalf of all the three co-owners. In pursuance thereof, plaintiff placed on record-

- (i) General Power of Attorney dated 26.05.1976 given by Nutanben to Nirmalaben, which was marked 'X' before the trial Court;
- (ii) General Power of Attorney dated 15.11.1983 executed by Nirmalaben appointing Jyotiben and grandson Milind Madhusudanbhai Purohit as her Attorneys;
- (iii) Affidavit of Jyotiben dated 28.07.2014; and
- (iv) Affidavit of Nutanben dated 31.07.2014.

12. Mr. Vyas submitted that the Appellate Court committed serious error in holding that there is inherent defect in title of the plaintiff and that plaintiff was not the absolute owner as on issuing notice under Section 106 of the T.P. Act and at the time of instituting the Suit. He,

therefore, submitted that the impugned order deserves to be set aside thereby restoring the trial Court's judgment. The Suit instituted by the plaintiff deserves to be decreed.

13. On the other hand, Mr. Shah supported the impugned order. He submitted that admittedly, Deed of Conveyance dated 26.09.1998 is not registered. At the time of executing the Deed of Conveyance, Power of Attorney given in favour of Jyotiben was not produced. The deficit stamp duty and penalty was paid and to that effect, a Certificate under Section 41 was issued. The Deed of Confirmation was presented on 03.08.1999. However, registration fee of Rs.1,300/- was paid on 03.01.2005 and it was registered on 03.01.2005. The Deed of Confirmation will not relate back to 03.08.1999 being its date of execution. The finding recorded by the Appellate Court in paragraph 28 in that regard is incorrect. He submitted that the defendants can support the decree without filing cross-objections. The defendants are not required to file cross Civil Revision Application / any proceedings challenging the finding recorded by the Appellate Court in paragraph 28 of the impugned order as their appeal was allowed and eviction decree was set aside. He submitted that it is settled principle of law that registration of the Deed of Confirmation would not extend to the enclosures annexed to it. In other words, by virtue of registration of a Deed of Confirmation, a Deed of Conveyance dated 26.09.1998 annexed thereto does not ipso facto get registered. He submitted that Deed of Conveyance was not presented within four months as contemplated by Section 23 of the Registration Act. In support of this proposition, he relied upon the decision of this Court in ***Ajay Kumar M. Singh Vs. Basant Bhoruka***, 2016 SCC OnLine Bom.6960, and in particular paragraph 16. He submitted that on 27.08.2000, tenancy of the defendants was purportedly terminated by the plaintiff. The Suit is

instituted on 21.02.2002. As the Deed of Confirmation was registered on 03.01.2005 at the time of terminating the tenancy and instituting the Suit, plaintiff was not the owner. The Appellate Court, therefore, rightly dismissed the Suit.

14. Mr. Shah also relied upon the decision in ***Uppalapati Veera Venkata Satyanarayanaraju Vs. Josyula Hanumayamma***, AIR 1967 SC 174 which has dealt with the aspect of attornment as also the decision in ***Apollo Zipper India Limited Vs. W. Newman and Company Limited***, (2018) 6 SCC 744 to contend that derivative title of the landlord can be challenged by a tenant in eviction suit. He also contended that in the present case, defendants have not attorned.

15. Mr. Shah submitted that as the plaintiff did not file application under Order XLI, Rule 27 of C.P.C. in the present proceedings, the Power of Attorney produced by the plaintiff deserves to be discarded. For all these reasons, he submitted that Application deserves to be dismissed.

16. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The plaintiffs have instituted Suit against the defendants on the ground that the share capital of the defendants exceeds Rs.1,00,00,000/-. In view of Section 3(1)(b) of the Act, the defendants are not entitled to protection of the Act. The defendants are exempt from the provisions of the Act. It is not in dispute and is a matter of record that by a registered partition deed dated 21.01.1982, the partition was effected between Janabai and Nirmalaben. In pursuance of the partition, Janabai became the owner of flats No.1, 3, 5 and a garage situate on the Southern side of “Girishant”. Nirmalaben became owner of flats No.2, 4, 6 and a garage situate on the Southern side of “Girishant”. The controversy between the

parties is in respect of flats No.4 and 6.

17. The plaintiffs came with the case that Nirmalaben executed a Deed of Conveyance in his favour on 26.09.1998. The Deed of Conveyance was executed by Nirmalaben, Jyotiben and Nutanben as vendors on one hand and the plaintiff being vendee on the other. The Deed of Conveyance was executed by Jyotiben as a Constituted Attorney of Nirmalaben and Nutanben and also for herself. It is the case of the plaintiff that through oversight, the Deed of Conveyance dated 26.09.1998 could not be registered. In view thereof, the Confirmation Deed was executed on 03.08.1999 between the parties to the Deed of Conveyance. The plaintiff contended that on the basis of the market value of Rs.2,10,000/-, he had paid deficit stamp duty of Rs.13,000/- chargeable under Article 24(b) of Schedule I of the Bombay Stamp Act, 1958 and penalty of Rs.19,760/- and to that effect a certificate under Section 41 was issued on 29.11.2004. The plaintiff had paid registration fee of Rs.1,300/- on 03.01.2005. The Deed of Confirmation was registered 03.01.2005.

18. The plaintiff relies upon Section 47 of the Registration Act to contend that the Deed of Confirmation though registered on 03.01.2005 relates back to the deed of execution i.e. 03.08.1999. The Appellate Court has accepted this contention as is evident from paragraph 28 and held that the Deed of Confirmation was executed on 03.08.1999 and registered on 03.01.2005. Therefore, the Conveyance Deed dated 26.09.1998 can be said to be effective from 03.08.1999 provided it is proved that it is executed by all the owners of the suit premises.

19. The plaintiff also relied upon the decision in **Mitchell** (*supra*) and **Official Trustee of W.B.** (*supra*) to contend that defect of non-

registration of Deed of Conveyance dated 26.09.1998 stands cured upon execution of the registered Deed of Confirmation on 03.01.2005.

20. As against this, Mr. Shah submitted that the finding recorded by the Appellate Court in paragraph 28 is legally incorrect. He further submitted that registration of deed of confirmation would not extend to the enclosures annexed to it. In other words, by virtue of registration of a Deed of Confirmation, a Deed of Conveyance dated 26.09.1998 annexed thereto does not ipso facto get registered. He also submitted that Deed of Conveyance was not presented within four months as contemplated by Section 23 of the Registration Act. He relied upon the decision of this Court in **Ajay Kumar M. Singh** (*supra*). Section 47 of the Registration Act reads as under:

“47. Time from which registered document operates.- A registered document shall operate from the time which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.”

21. A perusal of Section 47, extracted hereinabove, shows that a registered document operates from the time from which it would have commenced to operate, if no registration thereof had been required or made, and not from the time of its registration. In the present case, the Deed of Confirmation was executed on 03.08.1999 and it is evident from the record that the same was presented on 03.08.1999 for registration. On 03.01.2005, the plaintiff had paid registration fee of Rs.1300/- and Deed of Confirmation was duly registered on 03.01.2005. Thus, in view of Section 47 of the Registration Act, the Deed of Confirmation is operative from 03.08.1999.

22. The next question is whether the defect in Deed of Conveyance dated 26.09.1998 on account of non-registration is cured by subsequent

Deed of Confirmation dated 03.08.1999 which is duly registered on 03.01.2005. In order to deal with this submission, it is necessary to refer to the decision of **Official Trustee of W.B.** (*supra*). In that case, one Peter Charles Earnest Paul (for short 'Peter Paul') was the owner of the certain piece of land. He executed a registered deed of lease in favour of one Francis Daniel Augustus Larmour (for short, 'Larmour') on 13.09.1919, for a period of 99 years with effect from 01.06.1919 to 31.05.2018. On 16.06.1920, he executed a Will appointing the Official Trustee as its Executor and Trustee in respect of the said property. The beneficiaries of the said Will were his wife and sister. He died on 01.08.1920. A probate was obtained by the Official Trustee on 07.10.1920. Larmour executed a registered deed of assignment in favour of one Arathoon Stephen. On or before 04.12.1923, Stephen Court Limited (for short 'Company') was constituted and incorporated under the provisions of the Companies Act, 1913. Arathoon Stephen was a shareholder and first Managing Director of the Company. He entered into an agreement for acquiring the leasehold rights of Arathoon Stephen. Arathoon Stephen and the Company thereafter agreed to purchase the leasehold rights of the premises for the balance unexpired period under the lease on 10.12.1923. On the same day a registered Debenture Trust Deed was executed by Arathoon Stephen and the Company and the three Trustees referred to in the said Deed, stating that the Company was entitled to the said property for all the residue of the term of 1919 lease. In 1924, the Company had constructed a five-storied building. It continued to pay the rent to the Official Trustee who had issued rent receipts to it.

23. The Company had filed application under Section 302 of the Indian Succession Act, 1925 read with Section 25 of the Companies Act before the Calcutta High Court. The Official Trustee filed affidavit in

opposition. The Company was directed to pay rent @ Rs.8,000/- per month to the Official Trustee for the residuary period of the existing lease by the High Court in terms of an order dated 17.04.1984. A valuer was appointed who submitted its report recommending that fair monthly rent is Rs.19,000/-. No objection was filed thereto. By order dated 30.05.1984, the Court issued certain directions. The directions were accepted and acted upon by the Official Trustee, who executed a lease deed in favour of the company for a period of 60 years on a monthly rent of Rs.19,000/-. An Originating Summons was taken out by the Official Trustee before the Calcutta High Court for determination of certain questions. Question No.(e) was to the following effect:

“e) Whether any leasehold right in respect of the premises No. 18, Park Street, Calcutta has legally vested in Messers Steph Court Limited in the absence of any registered deed conveying, transferring and/or assigning the unexpired period of lease by Mr. Aratoon Stephen in favour of Messers Stephen Court Limited and whether Messers Stephen Court Limited had any legal right to make application before this Hon'ble Court in 1986 praying for extension of the period of Head Lease of 13.9.1919.”

24. By order dated 28.06.1999, the learned Single Judge held that order dated 30.05.1984 was passed without jurisdiction. An appeal was preferred in terms of clause 15 of the Letters Patent, which was allowed. In paragraph 10, the Apex Court referred to the contentions advanced on behalf of the appellant. Contention No.(vii) is to the following effect:

“vii) The deed of assignment executed by Larmour in favour of Arathoon Stephen being not a registered document, the same was wholly inadmissible in evidence.”

25. In paragraph 12, the Apex Court referred to the questions that fell for consideration. Question No.(b) is to the following effect:

“b) Whether the defect of unregistered document assigning lease of immovable property stood cured by registration of subsequent document i.e. Debenture Trust Deed?”

26. In paragraph 18, the Apex Court observed thus,

“18, It may be true that a registered deed of assignment was executed in favour of the said Arathoon Stephen, but the defect in the said agreement of sale between Arathoon Stephen and the respondents stood cured by reason of the Supplementary Agreement, namely, Debenture Trust Deed which was duly registered. In the Debenture Trust Deed Arathoon Stephen was referred to as 'The Transferor', Respondent was referred to as 'The Company' and the three others referred to as 'the Present Trustees'. It was stipulated :

"a) WHEREAS the Company is entitled to the property set forth and described in the first Schedule hereto for all the residue of the term of 99 years from the first day of June 1919 granted by an indenture of lease dated 13rd day of September, 1919 made between Peter Charles Ernest Paul of the one part and Francis Daniel Larmour of the other part and registered at Calcutta in Book I Vol. III being no.; 4493 for 1919 subject to an Indenture dated the 15th day of August 1923 made between the Official Trustee of Bengal of the one part and as such the sole executor and Trustee of the will of the said Peter Chales Ernest Paul of the one part and the Transferor of the other part and registered at Calcutta in Book I Vol. 102 being No. 9712 for 1923 being an Indenture of Rectification of the terms of the said Indenture of lease regarding payment of the owner's share of taxes in respect of the said demised premises AND WHEREAS the said property is at present vested in the Transferor and Trustee for and on behalf of the company and he has agreed at the request of the company to join in these presents in manner hereinafter appearing AND WHEREAS the company being duly empowered in that behalf has determine to raise a sum not exceeding Rs.7,00,000/- (Rupees Seven Lacs) by the issue of Debentures for that amount bearing interest of the rate of 5 = per cent per annum and frame in accordance with the form set forth in the second schedule hereto and has agreed to secure the principal moneys together with interest for the time being payable in respect of such Debentures in manner hereinafter provided AND WHEREAS the present Trustees have consented to act as Trustees of this Indenture upon the terms herein contained.

b) For the purpose of further securing the principal money and interest and all costs and other moneys payable under the Debentures or these presents the Transferor by the direction of the company hereby transfer and assigns and the company hereby transfers assigns and confirms unto the Trustees and singular the hereditaments land and premises

specified and referred to in the first Schedule hereto and all buildings erected on the land or any part thereof and all easements privileges and on the tenancies whatsoever to the same and therewith held used occupied and enjoyed and all the estate right title interest property claim and demand whatsoever of the Transferor and the Company and to the same to have and to hold the same unto the present Trustees as joint tenants with right of survivorship for all the residue now to come and unexpired of the term of ninety nine years granted by the said lease upon and for the trusts intents and purposes hereinafter expressed of land concerning the same."

27. In paragraph 20, the Apex Court referred to the decision of **Mitchell** (*supra*). In paragraph 23, the Apex Court referred to the decision of the Division Bench of this Court in **Jamna Bai Vs. Dharsey Takersey, (1902) 4 BLR 893**. In paragraphs 24 and 25, the Apex Court observed thus,

"24. Even if the assignment was required to be made by reason of a registered document, it is beyond any cavil of doubt that as the Official Trustee had all along been receiving stipulated monthly rent from the Company, it was, thus, admitted and acknowledged to be the lessee in respect of the leasehold. The Official Trustee not only accepted the rent, but also allowed the Company to raise a huge structure. It, therefore, accepted the Company as the lessee in respect of the said property.

25. The Company, therefore, for all intent and purport became a lessee under the Official Trustee. Although in a case of this nature, applicability of Section 53-A of the Transfer of Property Act may not be of much significance, but whether as an assignee of the leasehold or as a monthly tenant, the Company was entitled to protect its possession. Rightly or wrongly, the question of renewal of the said lease for a further period of sixty years came to be mooted. The offer of the Company was that at the end of the period of lease, the property would vest in the Official Trustee. It is again beyond any doubt or dispute that the Official Trustee could have granted a lease. It could have also extended the period of lease. It could have furthermore entered into a new arrangement with the lessee in possession. It was, therefore, within the province of the Official Trustee to deal with the property in any manner, he thought it fit, subject, of course, to any direction which could be issued by the High Court in

exercise of its jurisdiction under Section 302 of the Succession Act and Section 13 of the 1913 Act. The Official Trustee being a statutory authority would be presumed to be aware and understand the provisions of the said Act. It, therefore, instead of dealing with the matter itself asked the Company to file an appropriate application, pursuant where to the application was filed, no jurisdictional question was could be raised.”

28. In the present case, the Deed of Confirmation recorded that through oversight, Deed of Conveyance dated 26.09.1998 remained to be lodged for registration. The purchaser (plaintiff herein) requested the vendors, namely, Nirmalaben, Jyotiben and Nutanben to execute Deed of Confirmation so that it can be duly lodged for registration. The indenture witnessed as under:

“1) The Vendors do hereby agree and confirm that they had on the 26th September, 1998 duly executed the said Deed of Conveyance dated 26th September, 1998 in favour of the purchaser in respect of the land and premises more particularly described in the Second Schedule hereunder written and put the purchaser in possession of the said land and premises. The Original Deed of Conveyance is hereto annexed and marked Exhibit “A”.

2) The Vendors hereby further agree and confirm that for all practical purposes, the said land and premises described in Second Schedule hereunder written, shall be deemed to have been conveyed to the purchaser as from the 26th September, 1998 and that they have done no act, deed, matter or things whereby they are prevented from executing or granting or conveying the said land and premises.”

29. A perusal of the above extracted portion clearly shows that the vendors agreed and confirmed that they had on 26.09.1998 duly executed the Deed of Conveyance in favour of the purchaser. The original Deed of Conveyance was annexed and marked Exhibit-A. The vendors further agreed and confirmed that for all practical purposes, the said land and the premises described in the Second Schedule written thereunder shall be deemed to have been conveyed to the purchaser

(plaintiff) as from 26.09.1998 and that they have done no act, deed, matter or things whereby they prevented from executing or granting or conveying the said land and the premises. Applying the principles laid down by the Apex Court in the case of **Official Trustees of W.B.** (*supra*) to the facts of the present case, it is clear that the vendors admitted and acknowledged the fact of conveying the land and the premises, more particularly described in the Second Schedule, to the plaintiff. It is not in dispute that the suit premises forms part of the Second Schedule. The plaintiff, therefore, for all intent and purport became owner. As mentioned earlier, the Deed of Confirmation was executed and lodged for registration on 03.08.1999 and was duly registered on 03.01.2005. In view of Section 47 of the Registration Act, the Deed of Confirmation is operative from 03.08.1999. As mentioned earlier, plaintiff had issued notice of termination on 27.08.2000 and 28.08.2000. The Suit is instituted in the year 2002. Thus, when the plaintiff had issued termination notice and instituted Suit, he was owner of the suit premises. The defect of non-registration of Deed of Conveyance was cured by execution of Deed of Confirmation. In view thereof, I do not find any merit in the submission of Mr. Shah that the finding recorded by the Appellate Court in paragraph 28 is legally incorrect.

30. Mr. Shah relied upon the decision in **Ajay Kumar M. Singh** (*supra*), and in particular paragraph 18 thereof. In that case, after a full-fledged trial, the learned Single Judge recorded a finding in paragraph 12.15 that plaintiff had failed to prove that the Deed of Guarantee or the letters dated 05.11.1996 and 04.11.1996 were indeed executed by the defendant. In paragraph 15.1, the contention of the plaintiff that along with the Deed of Personal Guarantee, the defendant also executed an agreement dated 26.11.1996 whereunder he created a charge on the suit

flats onwards the due payment of Rs.95 lacs together with the agreed interest at the rate of 24% per annum was recorded. It was observed that as far as the agreement creating a charge in respect of the suit flat is concerned, the same is required to be registered under Section 17 of the Registration Act. However, the same was not registered. The plaintiff sought to rely upon the Deed of Confirmation to which the Deed of Personal Guarantee and the Agreement creating a charge in respect of the suit flats were annexed. The learned Single Judge extracted questions 40 to 44 and answers of the plaintiff. In paragraph 16, the learned Single Judge noted that the Deed of Confirmation related to some conditional sale and not to an agreement for creation of charge. The Deed was submitted for registration on 11.03.1999 i.e. almost 2½ 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.

31. In my opinion, the said decision is not applicable to the facts of the present case for the following reasons:

- i. The learned Single Judge held that defendant was not the owner of the flats in respect of which the agreement dated 26.11.1996 creating charge was executed by the defendant;
- ii. The Deed of Confirmation was submitted for registration after 2½ years after its execution. In the present case, Deed of Confirmation was executed on 03.08.1999 and was presented for registration on the same date;
- iii. The learned Single Judge held that plaintiff had failed to

proved that the Deed of Guarantee or the letters dated 05.11.1996 and 04.11.1996 were indeed executed by the defendant;

32. Apart from Deed of Confirmation, Jyotiben has made an affidavit dated 28.07.2014 in the present C.R.A. affirming the factum of executing two Power of Attorneys in her name, one dated 27.05.1976 issued by Nutanben in her favour and Nirmalaben and another dated 15.11.1983 issued by Nirmalaben in her favour and son Milind. She has affirmed that vide Deed of Conveyance dated 26.09.1998, Nirmalaben, Jyotiben and Nutanben had sold, transferred and conveyed all their rights, title and interest derived under partition deed dated 21.01.1982 to the plaintiff. She had signed the documents for herself as also as Constituted Attorney of Nirmalaben and Nutanben. She confirmed the execution of these documents in favour of the plaintiff. She has enclosed those Power of Attorneys along with the affidavit. In fact, a General Power of Attorney dated 26.05.1976 was shown to the plaintiff during his cross-examination and was marked as Article 'X'. In view of the provisions of Order VII, Rule 14(4) of C.P.C., the learned trial Judge should have admitted this document in evidence and marked exhibit.

32. That apart, Nirmalaben addressed letter dated 07.08.2000 to the defendant informing them that by Deed of Conveyance dated 26.09.1998 executed between Jyotiben, Nutanben and herself as joint vendors and plaintiff as a purchaser, they have sold, transferred and conveyed the immovable property. They had given Power of Attorney to the plaintiff. Tenancy is attorned to the plaintiff and defendants were called upon to pay the rent including the past arrears, if any. Thus, it cannot be said that there was inherent defect in the title of the plaintiff.

33. It is material to note that the plaintiff had called upon the defendants to take inspection of the documents, and till date, no inspection was taken by the defendants. In my opinion, the Appellate Court Committed serious error in holding that plaintiff has not conclusively proved his title. The Appellate Court also committed error in holding that there is no cogent evidence that Nirmalaben executed a Power of Attorney in favour of Jyoti as there is no such reference in the Conveyance Deed or Confirmation Deed. In the light of the discussion, the order passed by the Appellate Court on 07.10.2009 deserves to be set aside thereby restoring the order dated 30.01.2008 passed by the learned trial Judge. Hence, the following order;

- a. The impugned order dated 07.10.2009 passed by the Appellate Court is quashed and set aside. The order dated 30.01.2008 passed by the learned trial Judge is restored;
- b. The Suit filed by the plaintiff stands decreed;
- c. Rule is made absolute accordingly. However, in the circumstances, there shall be no order as to costs.

34. Mr. Vyas submitted that as per the order dated 22.08.2005 in Application No.143 of 2005, the defendants were depositing Rs.786.32/- per month from 01.09.1999 to 28.02.2008. The defendants thereafter deposited Rs.3,000/- per month from 01.02.2008 to 31.12.2009 as per the order dated 23.04.2009 in Interim Notice at Exhibit-6 in Appeal No.129 of 2008. The defendants have not deposited the rent from 01.01.2010 onwards. He submitted that the plaintiffs may be permitted to withdraw the amount as and when deposited by the defendants.

35. In view of these submissions, as C.R.A. is finally disposed of, the plaintiff is permitted to withdraw the amount already deposited by the

defendants and to be deposited by the defendant hereafter unconditionally.

36. At this stage, Ms Davierval orally applies for stay of this order for a period of 10 weeks from today. She assures that within 4 weeks from today, authorized representatives of the defendant will file usual undertaking with advanced copy to the other side incorporating therein that,

- (a) they are in possession and nobody else is in possession of the suit premises;
- (b) they have neither created third party interest nor parted with possession of the suit premises;
- (c) they will hereafter neither create third party interest nor part with possession of the suit premises;
- (d) the defendants will go on depositing Rs.3,000/- per month from 1st January, 2010 till 12th July, 2019 in the Small Causes Court, Mumbai, Bandra Branch under intimation in writing to the learned Advocate for the plaintiff;
- (e) in case they are unable to obtain suitable orders from the higher Court within 10 weeks from today, they will handover vacant and peaceful possession of the suit premises to the plaintiff.

37. In view thereof, on the oral application made by Ms Davierval, eviction decree is stayed for a period of 10 weeks subject to the defendants filing undertaking of their Authorized Representative in the aforesaid terms within four weeks from today. It is made clear that in case the undertaking is not filed in the aforesaid terms within four weeks

from today and/or in case defendants commit breach of any of the clauses of the undertaking, this interim relief shall stand vacated without further reference to the Court.

38. List the Application for 'reporting compliance' on 10.06.2019.

(R. G. KETKAR, J.)

Minal Parab