Waghmare & Sharayu Khot.

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

CHAMBER SUMMONS NO. 471 OF 2018

IN

COMMERCIAL EXECUTION APPLICATION NO. 1022 OF 2018

WITH

COURT RECEIVER'S REPORT NO. 150 OF 2019

IN

COMMERCIAL EXECUTION APPLICATION NO. 1022 OF 2018

Advance Commercial Company Limited **…Applicant (Orig. Petitioner)**

In the matter between

Advance Commercial Company Limited **…Petitioner**

Versus

Pravin Jain **…Respondents**

Ms. Mamta Sadh a/w Ms. Kainaz Irani, Mr. Narendra Devansh i/b Anju Mishra, for the Applicant.

Mr. Anoshak Davar a/w Ms. Swapna Roopavate, Ms. Deepa Bisht i/b Tushar Goradia, for the Respondent.

Mr. D.N. Kher, Court Receiver, present.

CORAM : R.I. CHAGLA J.

DATE : 6 and 9 September 2019

ORDER :

1. This Chamber Summons has been taken out in the above Commercial Application for appointment of Court Receiver as a Receiver in respect of the immovable property being Sarosh Building, 251, D.N. Road, Fort, Mumbai, ("***the said property***") with all powers under Order XL including sale and direct the Court Receiver to auction the said property in accordance with law and the sale proceeds so received to the extent of Rs.5.75 crores with interest @ 24% p.a. from 01.01.2018 till realization be paid over to the Applicant against the Applicant handing over vacant and peaceful possession of the entire first floor of the said property, as per the consent terms dated 28.08.2017.

2. A brief background of facts is necessary :

The Writ Petition No.922 of 2015 was filed by the Applicant against the Mumbai Heritage Conservation Committee as well as other Respondents including the Respondent herein. The Writ Petition was for seeking a deletion of the said property from the heritage list and directing the Respondent No.4 landlord, that is the

Respondent herein, to comply with all requisition in the notice dated 03.11.2014 issued by the Mumbai Municipal Corporation and to take all steps for preservation and conservation of the said property. Further consequential relief was sought in the Writ Petition.

3. An order dated 05.04.2017 came to be passed in the said Writ Petition referring the parties to mediation and the parties agreed to the appointment of Mr. Justice Arvind Sawant (Former Chief Justice) as mediator. It was clarified that the Corporation would not be an active participant in the mediation proceedings.

4. The mediation proved to be successful and a memorandum of understanding-cum-consent terms dated 28.08.2017 (referred to as "***the said MOU***") were filed before the mediator under which the Respondent herein undertook to pay to the Applicant a total consideration of Rs.5.75,00,000/- and upon payment of which the Applicant herein, would surrender all tenancy and possessory rights in favour of the Respondent in respect of the 1st floor of the said property which they were in possession of as tenants. It was further provided in the said MOU that the total consideration of Rs.5,75,00,000/- shall be paid in a one stroke payment by the

Respondent herein who undertook to pay to the Applicant the said consideration on or before 17.10.2017, and in any event, latest by 31.12.2017. It was agreed between the parties that immediately upon handing over of the demand draft of a nationalized bank of the total consideration, the tenant viz. the Applicant herein, will surrender all tenancy and possessory rights in favour of the Respondent herein. The Respondent was to intimate the Applicant in writing one month in advance to vacate and to remove their belongings prior to the date of payment of the entire consideration for the entire area of which the Applicant was occupying in the said property. It was further agreed that the possession of the Applicant would be surrendered on the 1st floor of the said property simultaneously upon accepting the total consideration from the Respondent and the Applicant would give vacant and peaceful possession to the Respondent against receipt of the total consideration, being an amount of Rs. 5,75,00,000/-. There are further clauses in the MOU which include clause 4 which provides for the passing of necessary resolution of one of the present Directors of the Applicant to sign/execute this MOU, surrender deeds. It is provided in Clause 7 of the said MOU that it is agreed between the parties that they shall equally be liable to pay stamp duty, if any, registration charges and miscellaneous expenses, if any, in respect of the said agreement/documents as applicable. It is provided in Clause 12 of the MOU that the various disputes between the parties including in correspondence as well as the Court litigations pending, shall stand withdrawn unconditionally on the signing of the said MOU without any further reference to the respective Courts. In Clause 15 of the said MOU it is agreed between the parties that on payment of total consideration by the Respondent to the Applicant and the Applicant simultaneously vacating their premises in the said property, both parties undertake to exchange letters of withdrawal addressed to the concerned Courts and Authorities of the State Government and/or Municipal Corporation of Gr. Mumbai in respect of all pending matters viz. litigations, complaints, letters etc.

5. This Court by an order dated 28.09.2017 took on record the said MOU which were marked 'X' for the purpose of identification. Under the said MOU, it was recorded that the Applicant has agreed to surrender all the tenancy and possessory rights of the first floor in favour of the Respondent. It is further recorded that as per the terms set out in the said MOU, an amount of Rs.5,75,00,000/- has been agreed to be paid by the owner to the

tenants, in any event, latest by 31.12.2017. As per the said MOU, the Applicant had agreed to vacate the premises on receipt of payment. A one month notice in advance prior to the date of payment of the entire consideration was to be provided by the Respondent to the Applicant intimating them to vacate and remove their belongings. The Writ Petition was accordingly disposed of in terms of the said MOU and Rule was accordingly made absolute.

6. Thereafter by a letter dated 30.11.2017, the Respondent issued the one month notice to the Applicant to make arrangements to vacate the 1st floor of Sarosh Building which was in their possession on or before 31.12.2017 and arrange to surrender the tenancy rights and handover physical possession on receiving the final payment of Rs.5,75,00,000/- on 31.12.2017. Thereafter, communication has been addressed by the Respondent to the Applicant which include letters dated 28.12.2017, 10.02.2018 by which the Respondent expressed his inability to make payment as agreed on the Schedule date under the said MOU due to the financial situation prevailing in the market and it is stated in the letter dated 10.02.2018 that the payment of the consideration could not be made as the financial arrangements from where the Respondent was

expecting were delayed and that the Respondent was expecting the finance only on 16.02.2018 and would pay the total consideration on a later date i.e. 20.02.2018 and thereby clear their obligation under the said MOU.

7. The Advocate for the Applicant addressed two letters dated 13.02.2018 to the Respondent wherein it was made clear that the Applicant had shifted all their belonging pursuant to the notice of the Respondent dated 30.11.2017 and were willing to handover vacant possession as per the said MOU dated 28.08.2017. It is also made clear by the said two letters that the Respondent had been unilaterally extending the time for making payment of the total consideration and that there were no orders passed by this Court for such extension.

8. On 17.02.2018 the above Execution Application was filed in this Court. Further letters were addressed by the Advocates of the Applicant to the Respondent including letter dated 21.02.2018 wherein the said MOU was referred to and it was stated that the Respondent had committed breach of the undertaking and that contempt proceedings would be initiated against the Respondent.

9. Thereafter, the present Chamber Summons was filed in this Court and this Court by an order dated 06.06.2018 directed the Respondent to be present in Court and time was granted till the next morning to produce a Demand Draft or banker's cheque for the full amount of Rs.5,75,00,000/- in favour of the Applicant. It was recorded that if the Respondent continues to be in default, this Court would consider making an order of payment of further interest which will not be not less than @12% p.a. A further order was passed on the same date at 3.00 p.m. as the Respondent was present in the Court. Accordingly, the Court Receiver was appointed in respect of the said premises on the first floor of the said building and unless the sum of Rs.5,75,00,000/- was paid by the Respondent to the Applicant by the stated date, i.e. 01.10.2018, the Court Receiver would proceed to sell the said premises. In that event the amount due from the Respondent i.e. Rs.5,75,00,000/- will carry interest @ 12% w.e.f. the date of the order until payment or realization.

10. By a subsequent order dated 04.10.2018 passed in the Chamber Summons No.471 of 2018 it was recorded that :

"*No executable decree can be indefinitely delayed like*

> *this, most especially not in a matter covered by the Commercial Courts Act, and within the commercial division of this Court. On the one hand, there is a statutory mandate for an early closure of commercial disputes, and on the other we have respondents such as this one who persist in delaying that result. Worse yet, they seem to think nothing of buying time on false assurances and undertakings to the Court. These are predictably breached and not honoured. Instead, even more time is sought. When it becomes a routine pattern, this constant delaying of enforcement of decrees is extremely subversive. It undermines the Rule of Law. When a Respondent is made sanguine that he will obtain endless indulgence from a Court and succeed in delaying the execution of a decree against him, the victim is not just the Decree Holder. It is the entire judicial system that is put under the threat and is weakened*".

11. It was thereafter recorded that the Court Receiver will proceed with the process of sale of these premises, in the possession of the Applicant who are occupying the premises in the said property as agent of the Court Receiver and that this will initially by public auction and thereafter necessary orders may be passed for sale by private treaty. This order was challenged in Appeal by the

Respondent and by order dated 15.04.2019, the Division Bench of this Court dismissed the Appeal on the ground that in view of the consent decree having been passed in the writ proceedings, the Division Bench of this Court found no infirmity in the order dated 04.10.2018 which is in the nature of execution of the consent decree. The Division Bench found that vague and general grounds were made in the Appeal by the Respondent herein and that he cannot now suggest that the Applicant herein as tenant may continue to enjoy the tenanted property as per original agreement and effect such repairs as would be permissible. This overlooked the fact of a consent decree having been passed and it is too late for the Respondent herein to turn the clock back.

12. Thereafter orders have been passed by this Court for sale by private treaty as the public auction had failed and directions were issued in the Court Receiver's Report. It appears that the sale by private treaty also failed and accordingly, the present Chamber Summons has been taken up for consideration.

13. The learned Counsel for the Applicant has submitted that the said MOU was taken on record and a consent decree was passed by this Court in terms thereof by which rule had

been made absolute and the Writ Petition No.922 of 2015 disposed of. Under the consent decree, the Applicant is obligated to pay an amount of Rs.5,75,00,000/- for which the execution have been instituted. She has submitted that the only asset mentioned by the Applicant in the Execution Application attachment is the said property in respect of which sale has been applied for. She has submitted that the parties had acted under the said MOU and pursuant to the notice issued by the Respondent on 30.11.2017 calling upon the Applicant to vacate the 1st floor of the said property in its occupation on or before 31.12.2017, the Applicant had by vacated the first floor of the said property. The Applicant is ready an willing to hand over physical possession i.e. by handing over the keys of the first floor of the said property against final payment of Rs.5,75,00,000/-. In the order dated 28.09.2017 this Court has recorded that as per the terms of the said MOU an amount of Rs.5,75,00,000/- had been agreed to be paid by the Respondent herein to the Applicant, in any event, prior to 31.12.2017 and the Applicant herein had agreed to handover physical possession of the said first floor on receipt of payment.

14. She has submitted that execution of the consent

decree has been sought in respect of the amount of Rs.5,75,00,000/- which is payable by the Respondent to the Applicant. She has submitted that the last date for payment under the said MOU-cum-consent decree was 31.12.2017 and no extension of time had ever been agreed upon by the Applicant. She has submitted that this Court by its various orders passed in the present Chamber Summons had considered the terms of the said MOU and what remained was payment of the said amount by the Respondent. This Court had also appointed a Court Receiver in respect of the premises on the first floor of the said property and for sale of the said premises which was in the possession of the Applicant towards satisfaction of the consent decree i.e. payment of the sum of Rs.5,75,00,000/- to the Applicant out of sale proceeds of the said premises. She has submitted that the Court Receiver has been unable to sell the said premises and hence it is necessary for this Court to appoint the Court Receiver in respect of the said property and for sale of the said property in order that from the sale proceeds so received, the sum of Rs.5,75,00,000/- could be paid over to the Applicant against the Applicant handing over vacant and peaceful possession of the entire first floor of the said property. She has submitted that this Court by order dated 06.06.2018 had recorded that the Respondent was in default in payment of

Rs.5,75,00,000/- to the Applicant and considering that it was a continued default, the amount of Rs.5,75,00,000/- would carry interest @12%. She has submitted that the order of appointment of Court Receiver and sale of the premises in the said property was challenged in Appeal before the Division Bench of this Court, which dismissed the Appeal thereby holding that there was a consent decree passed albeit in a Writ Petition and the contention of the Respondent herein for the Applicant herein to continue to enjoy the tenanted property as per original agreement and effect repairs as would be permissible has been rejected.

15. She has submitted that the said MOU did not require registration and this is clear from the MOU which provided that after execution of the MOU, surrender deeds were to be executed by which the Applicant would surrender their tenancy rights in favour of the Respondent. She has relied upon Rule 647 of the Original Side Rules to contend that a consent order passed in a Writ Petition by which the Petition is disposed of by Rule being made absolute in terms thereof would amount to a decree of this Court. She has submitted that the consent decree is not registerable as it falls under Section 17(2) (vi) of the Indian Registration Act which

provides that any decree or order of a Court not to be registerable. However, there is an exception in that Section viz. where a decree or order is expressed to be made on compromise and comprising immovable property other than that which is the subject matter of the suit or proceeding. She has submitted that this exception does not apply in the present case. She has submitted that the said property is the subject matter of the Writ Petition No.922 of 2015 in which the consent decree was passed. She has placed reliance on the judgment of this Court in ***Rampati G. Pathak vs. Ramdeo Guruprasad Pathak***[1] to contend that the prayers sought for in the proceedings are required to be considered for determining the subject matter thereof as a decree is passed in terms of the prayers. In that case the prayers sought for was only in respect of varanda and tractor and no prayer was sought in respect of the Bombay Shop and/or any other property beyond the vanranda and tractor, which could not be decreed. It was specifically held that prayers made in the suit alone can be considered to indicate the subject matter of the suit. She has further relied upon the decision of the Supreme Court in ***Western Press Pvt. Ltd. Mumbai vs. The Custodian & Ors.***[2] to contend that the subject

1 *2001(1) Bom. C.R. 700*

2 *AIR 2001 SC 450*

matter of the suit would include all that which is made to become part of the proceedings in order to finally and effectively settle all the disputes between the parties. She has submitted that in the present case it is clear from the prayers sought for in the Writ Petition as well as the subject matter thereof viz. preservation and conservation of the said property that the said property did form the subject matter of the Petition in which the said consent decree was passed. She has accordingly submitted that the relief sought for in the Chamber Summons be allowed.

16. The learned Counsel for the Respondent has submitted that the said MOU contain reciprocal promises and relied upon the contract Act, in particular Section 52 thereof, which provides for the order in which the reciprocal promises are to be performed as well as Section 54 of Contract Act where it is provided that where a contract consists of reciprocal promises such that one cannot be performed or that its performance cannot be claimed till the other has been performed and the promisor of the last mentioned fails to perform it, such promisor cannot claim performance of the reciprocal promise. He has also relied upon Section 56 of the Contract Act to contend that as the sum of Rs. 5,75,00,000/- had

become impossible to be arranged by the Respondent it had become an impossible act. Hence, the Applicant cannot now seek to execute the said MOU which had become impossible to perform. The parties to the said MOU should thus be relegated to the position prior to the said MOU having been executed.

17. The learned Counsel for the Respondent in support of his contention that the said MOU contained reciprocal promises has relied upon the judgment of the Supreme Court in case of ***Jai Narain Ram Lundia Vs. Kedar Nath Khetan & Ors***.[3]. It is held therein that when a decree imposes obligations on both sides which are so conditioned that performance by one is conditional upon the performance by the other, execution will not be ordered unless the party seeking execution not only offers to perform his side but when objection is raised, satisfies the executing Court that he is in a position to do so. The Consent Decree in that case contained one set of reciprocal conditions indissolubly linked together so that they cannot exist without each other. He has submitted that in the present case as well the premises which were in the possession of the Applicant was to be vacated only upon the sum of Rs. 5,75,00,000/-

3 ***AIR 1956 SC 359***

being paid. He has submitted that it is thus only upon the Respondent being in position to arrange the consideration of Rs. 5,75,00,000/- that the surrender of the said premises could be effected by the Applicant.

18. He has further relied upon the decision of the Supreme Court in ***Deepa Bhargava & Anr. Vs. Mahesh Bhargava & Ors.***[4], wherein it was held that the executing Court is bound by the terms of the decree and it is not for executing Court to go behind the decree and/or modify the decree. It must execute the decree as it is. In that case even assuming that the term stipulating the entire payment was not paid within a period of six months was penal in nature, it was held that the executing Court was bound by the terms of the decree. He has submitted that the relief sought in the Chamber Summons goes beyond the decree, as the sale of the said property viz. the entire Sarosh Building, is beyond the said MOU which only provided for a surrender of the tenancy rights of the Applicant in the premises of the said building which was in their possession. He has thus,

4 ***2009(2) SCC 294***

submitted that the executing Court is bound by the terms of the decree and cannot grant the prayer sought which goes beyond the decree.

19. He has submitted that under the said MOU the surrender of the tenancy rights and possessory rights contemplated in respect of the premises in the possession of the Applicant cannot be enforced in execution, but a separate Suit for specific performance thereof would have to be filed. The execution of the consent terms and/or the consent decree between the Applicant and the Respondent cannot be in substitution of a Suit being filed. He has relied upon the judgment of the Supreme Court in ***Charu Chandra Poali Vs. Birendra Nath Dutta & Ors.***[5] in support of this contention.

20. He has submitted that the consent decree in the present case would have to be registered as it falls within the exception to Section 17(2)(vi) of the Indian Registration Act, 1908. He has submitted that the subject matter of the consent decree was in

5 ***1969 SCC OnLine Cal 26***

respect of the premises in the possession of the Applicant and handing over of vacant and peaceful possession thereof against payment of money which was not the subject matter of the Writ Petition No. 922 of 2015 in which the consent decree was passed and this is apparent from the prayers in the Writ Petition. The prayer was for the removal of the said building from the heritage list. He has relied upon the judgment of the Supreme Court in ***K. Raghunandan Vs. Ali Hussain Sabir***[6] in support of this contention. This decision which further holds that for a relinquishment of right i.e. surrender of tenancy of the premises by the Applicant in favour of the Respondent registration would be imperative. He has also relied upon the judgment which had been relied upon by the Applicant viz. ***Rampati G. Pathak*** (supra) to contend that the said property not being the subject matter of the Writ Petition, the consent decree was compulsory registerable under the said provisions of the Registration Act, 1908.

21. He has submitted that the prior orders passed by this Court are interim orders and since this is the final hearing of the Chamber Summons, these orders are not to be taken into account for

6 ***(2008)13 SCC 102***

finally deciding the Chamber Summons. He has further submitted that the order which grants interest over and above consideration of Rs. 5,75,00,000/- is not binding on this Court which is finally hearing the Chamber Summons as the grant of interest is not contemplated by the consent decree. He has submitted that any direction to pay consideration of Rs. 5,75,00,000/- which had been directed in the interim order is not of a binding nature and it is for this Court to consider as to whether the Respondent had not been able to arrange the consideration of Rs. 5,75,00,000/- which had become an impossible act and thus, execution of the consent decree cannot be granted. Further, the auction sale by private treaty is also not binding, as these were interim measures taken by this Court which proved unsuccessful and particularly since these were in respect of the subject premises which were in possession of the Applicant and not for the sale of the entire building which is now being contemplated by the Chamber Summons. He has accordingly, submitted that the Chamber Summons be rejected, as it goes far beyond the consent decree.

22. Having considered the submissions, it appears that a consent decree had been passed by this Court vide order dated 20th

September 2017 and by which the Writ Petition had been disposed of by making rule absolute in terms of the said MOU. It is clear from the consent decree that the Applicant had agreed to vacate the first floor premises and grant physical possession to the Respondent upon payment of the consideration of Rs. 5,75,00,000/- which was agreed to be paid by the Respondent being the owner of the said premises to the Applicant, who was the tenant, in any event prior to 31st December 2017. In the said MOU it was provided that the Respondent shall intimate the Applicant one month in advance to vacate and to remove their belongings prior to the date of payment of the entire consideration in respect of the first floor premises which was in occupation of the Applicant. It is an admitted fact that such notice dated 30th November 2017 had been issued by the Respondent to the Applicant intimating to the Applicant to vacate the said first floor premises of the said property, which was in possession of the Applicant on or before 31st December 2017 and to arrange to surrender the tenancy rights of the Applicant and handover physical possession, on receiving of final payment of Rs. 5,75,00,000/- on 31st December 2017. The Respondent had acted upon the said notices by vacating the said first floor premises of the said property on or before 31st December 2017 and the only thing which remained was, the payment of consideration of Rs. 5,75,00,000/- which was to be made latest by 31st December 2017. Thus, the Respondent was obliged to pay the consideration of Rs. 5,75,00,000/- in any event, prior to 31st December 2017. It is upon such payment that the Applicant who had vacated the said premises would handover physical possession of the said premises by handing over the keys thereof to the Respondent. Thus, the consent decree which had been passed in terms of the said MOU was executable to the extent of Rs. 5,75,00,000/- agreed between the parties to be paid by the Respondent to the Applicant.

23. It was the Respondent who unilaterally sought to extend the date of making payment to the Applicant which was under the said MOU to be paid latest by 31st December 2017. It appears that the Applicant did not consent to such unilateral extension of the date for making payment of the consideration of Rs. 5,75,00,000/- by the Respondent to the Applicant. This is apparent from the correspondence exchanged between the parties and/or through their Advocates.

24. The submission of the Respondent that the

arrangement for making payment of the consideration of Rs. 5,75,00,000/- had become an impossible act on the due date i.e. 31st December 2017 and by which the said MOU had become impossible to perform and the parties be relegated to the position prior to the said MOU having being executed cannot be accepted. It is clear from the correspondence on record that the Respondent had agreed to make payment of consideration of Rs. 5,75,00,000/- and had in fact, by their prior notice dated 30th November 2017 represented to the Applicant that they would make payment in any event, latest by 31st December 2017. Accordingly, it was for the Respondent to come up with the consideration of Rs. 5,75,00,000/- by any means on or before the due date. In fact, this Court had observed albeit at the ad-interim stage that it was for the Respondent to make payment of consideration of Rs. 5,75,00,000/- and that if such payment was not made, it would attract interest.

25. The Division Bench of this Court in the said Appeal preferred by the Respondent from the order directing the Court Receiver to sell the said premises had observed that the Respondent had overlooked the fact that a consent decree, albeit in a writ, had been passed and it was too late for the Respondent herein to turn the

clock back by contending that the Applicant as tenant may continue to enjoy the tenanted property as per the original agreement and effect such repairs as would be permissible.

26. The submission of the Respondent that the said MOU contained reciprocal promises and that the promises could not be performed unless the Respondent's promises were performed and that the Respondent's having failed to perform the promise, the Applicant cannot claim performance of the reciprocal promises cannot be accepted. The failure to perform on the part of the Respondent is by no means on account of his promise becoming impossible. It was agreed between the parties that the Applicant had to vacate the said premises in their occupation and remove their belongings and a prior one months notice for which had to be given by the Respondent. It was then for the Applicant to make payment of the entire consideration of Rs. 5,75,00,000/- at the end of the one month and obtain physical possession of the said premises. Thus, what remained was the obligation of the Respondent to make payment of the consideration of Rs. 5,75,00,000/-, and against which physical possession of the said premises i.e. the keys of which would be handed over. The Applicant having already vacated the said

premises. Thus, the Respondent had to pay the said sum by whatever means at their disposal and that too latest by 31st December 2017, as the Applicant now seeking execution of the consent decree had already offered to handover physical possession of the said premises by vacating the said premises. The decision of the Supreme Court in ***Jai Narain Ram Lundia*** (supra) is not applicable in the facts and circumstances of the present case.

27. The decisions of the Supreme Court in ***Deepa Bhargava*** (supra) relied upon by the Respondent in fact supports the Applicant's case that the executing Court cannot go behind the consent decree. In fact in the present case, this Court as the executing Court is in fact, executing the consent decree in terms of the consent decree particularly, as the consideration of Rs. 5,75,00,000/- for which execution is sought is payable by the Respondent to the Applicant against physical possession of the said premises being handed over by the Applicant.

28. The said MOU had become a consent decree upon this Court taking the said MOU on record and making Rule in the Writ Petition absolute and disposing of the Writ Petition in

terms of the said MOU. The submission of the Respondent that the consent decree cannot be executed as it contemplated surrender of tenancy and possession in respect of the first floor premises and that a separate Suit would have to be filed for specific performance cannot be accepted. The consent decree makes it clear that the payment of consideration of Rs. 5,75,00,000/- is payable by the Respondent in any event, prior to 31st December 2017 and that the Applicant as tenant had offered to handover physical possession of the said premises in their occupation on receipt of payment. The Applicant had in fact, vacated the said premises and the only act which remained on the part of the Applicant was to handover the keys upon payment of consideration of Rs. 5,75,00,000/- which they have always been willing to do so. Thus, the decision of the Calcutta High Court in ***Charu Chandra Poali*** (supra) is inapplicable to the facts of the present case.

29. Now what remains to be decided is, as to whether the consent decree had to be registered. It was contended by the learned Counsel for the Respondent that the consent decree falls

within the exception in Section 17(2)(vi) of the Indian Registration Act, 1908, as the subject matter is not the subject matter of the Writ Petition. He has submitted that the prayer in the Writ Petition was for removal of the said property from the heritage list. From perusal of the prayer in the Writ Petition, it is apparent that the prayer in the Writ Petition was much wider that what has been made out by the Respondent, as it was for a direction to the Respondent herein to comply with the requisitions in the notice dated 3rd November 2014 issued by the Mumbai Municipal Corporation and to take all steps for preservation and conservation of the said property. Thus, the subject matter of the Writ Petition was clearly in respect of the said property and the premises therein which was in occupation of the Applicant and it cannot be held that the consent decree is beyond the subject matter of the Writ Petition.

30. In fact, the decision of the Supreme Court in ***K. Raghunandan*** (supra) as well as in the decision relied upon both by the learned Counsel for the Applicant and the learned Counsel for the Respondent viz. ***Rampati G. Pathak*** (supra) make it clear that where the consent decree pertains to

immovable property comprising other than what can be said to be the subject matter of the Suit, the consent decree would require registration. In the present case, the said property as well as the premises therein are clearly within the subject matter of the Writ Petition. Thus, these decisions would in fact support the case of the Applicant that the consent decree being in respect of the said property which is the subject matter of the Writ Petition in which the consent decree was passed, registration of the consent decree would not be required. In the case of ***Rampati G. Pathak*** (supra), this Court has held that the prayers sought for in the proceedings are required to be considered for determining the subject matter thereof, as the decree is granted by this Court in terms of the prayers. In that case, the relief sought for is only in respect of verandah and tractor and any relief granted by way of consent decree in respect of the Bombay Shop and/or other property beyond the verandas and tractor, the decree in respect of such property would be registrable. It is specifically held that the prayers made in the Suit alone can be considered to indicate the subject premises of the Suit. The decision of the Supreme Court in ***Western Press Pvt. Ltd***. (supra) is in support of the Applicant. In that decision, it was held that the subject matter of the Suit would include all which is made to become part of the proceedings in order to finally and effectively settle all the disputes between the parties. In the present case, the subject matter of the Petition was in respect of the said property and its preservation and conservation thereof. The said MOU was a settlement between the parties in respect of the premises in the said property, as it had been contention of the Respondent that the Applicant was interfering with the development of the said property. By the said MOU the Applicant who was the tenant in respect of the first floor premises of the said property had agreed to transfer the tenancy and possessory rights in favour of the Respondent who was the owner for a consideration of an amount of Rs. 5,75,00,000/- which had been agreed to be paid by the Respondent to the Applicant prior to 31st December 2017 in order to resolve the dispute in the Writ Petition. Thus, considering that the said property was the suit matter of the

Petition, the premises therein also formed the subject matter of the Petition in respect of which the consent decree was passed which effectively settled all disputes between the parties in the Writ Petition and hence, the consent decree is not registrable under Section 17(2)(vi) of the Registration Act, 1908.

31. The Chamber Summons which seeks relief for the appointment of the Court Receiver and sale of the said property in accordance with law and the sale proceeds so received to the extent of Rs. 5,75,00,000/- be paid over to the Applicant is required to be granted, as it is in terms of the consent decree under which the Respondent is obliged to make payment of consideration of Rs. 5,75,00,000/- to the Applicant. This Court had permitted the sale the said premises which is in possession of the Applicant both by public auction as well as private treaty which proved unsuccessful. Thus, the only manner in which the consent decree could be executed is for the Respondent to pay the consideration of Rs. 5,75,00,000/- from out of the sale proceeds of the said property, which is the only asset mentioned by the Respondent in the Execution Application. I am not inclined to grant interest on the total consideration of Rs.

5,75,00,000/-, as the payment of interest does not form part of the said MOU which forms a consent decree of this Court. It is well settled that the executing Court cannot go behind the decree in respect of which execution is sought.

32. Accordingly, following order is passed :-

(i) The Court Receiver of this Court is appointed as Receiver in respect of the said property viz. immovable property being Sarosh Building, 251, D.N. Road, Fort, Mumbai with all powers under Order XL of the Code of Civil Procedure, 1908 including for sale thereof.

(ii) The Court Receiver appointed is directed to auction the said property in accordance with law within a period of four weeks from the date of uploading of this order and the sale proceeds so received to the extent of Rs. 5,75,00,000/- be paid over to the Applicant against handing over of the physical possession of the entire first floor of the said property as per the consent terms dated 28th August 2017 which forms the consent decree.

(iii) The Court Receiver is directed to file a Report in this Court as to the steps taken towards auction of the said property which Report shall be filed prior to the public auction of the said property and within three weeks from the uploading of this order.

(iv) The Chamber Summons is partly made absolute in the above terms and disposed of with no order as to costs.

[R.I. CHAGLA J.]