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

**NOTICE OF MOTION NO. 1599 OF 2010
IN
SUIT NO. 1571 OF 2010**

Neil J. Creado & Ors. ...Plaintiffs
Vs.
Shah Abbas Khan alias Sanjay Khan & Anr. ...Defendants

**NOTICE OF MOTION NO. 3614 OF 2011
IN
SUIT NO. 2985 OF 2011**

Shah Abbas Khan alias Sanjay Khan & Anr. ...Plaintiffs
Vs.
Neil J. Creado & Ors. ...Defendants

Ms. Rajani Iyer, Senior Advocate with Mr. R. Shah, Ms. Palak Patel, Ms. Purvi Ashar, Mr. Birrul Mohamedi, i/b Mansukhlal Hiralal and Co. for Plaintiff in S.No.1571 of 2010 and for the Defendant in Suit No.2985 of 2011.

Mr. Darius Khambata, Senior Advocate with Mr. Rohaan Cama, Mr. Narayan Sahu, with M.S.Federal, Mr. Murtuza Federal, Mr. M.K. Sayed, Ms. Aanchal Rohira i/b. Federal & co. for the Defendant in Suit No.1571 of 2010 and for the Plaintiff in Suit No.2985 of 2011.

Mr. Ajay Malvankar, Assistant Court Receiver present.

CORAM: R.I. CHAGLA, J.

ORDER RESERVED ON 31ST JULY, 2019

ORDER PRONOUNCED ON 14TH OCTOBER, 2019.

ORAL ORDER:-

1. These Notices of Motion taken out in the respective Suits were heard together. The Plaintiffs in Suit No.1571 of 2010 (“the

Creados Suit”) are the Defendants in Suit No.2985 of 2011 (“the Khans Suit”). The two Defendants in the Creados Suit are the Plaintiffs in Khans Suit. Thus, the parties in both Suits are the same. The subject matter of the dispute in the Creados Suit and the Khans Suit also appear to be the same and concern a large plot of land bearing survey numbers corresponding to CTS No.505/505/30, 506/2 of village Juhu, referred to in as the ‘Silver Beach Estate’. The Notice of Motion in the Khans Suit would have to be addressed first as it has a material bearing on whether to grant relief in the Notice of Motion taken out in the Creados Suit. Before advertng to the common facts which arise in both the Notices of Motion taken out in the respective Creados Suit and Khans Suit, it would be necessary to refer to the relief sought for in the two Notices of Motion. In the Notice of Motion taken out in the Khans Suit which shall be addressed first, the relief sought is as under:-

(a) that pending the hearing and final disposal of the present Suit this Hon'ble Court be pleased to pass a temporary order and injunction restraining the Defendants, their servants, agents, assigns or any other person claiming by, through or under them from in any manner, altering, affecting, disturbing, obstructing the Plaintiffs' continued rights, use and enjoyment of the internal roads / spaces within the Silver Beach Estate and the said open areas on Plot No. CTS 505 of village Juhu (Plot No.1) for access

to / from their rear gate to /from (i) Juhu Beach through the Khajgi Raasta and (ii) A.B. Nair Road.

(b) that pending the hearing and final disposal of the Suit this Hon'ble Court be pleased to pass a temporary order and injunction restraining the Defendants by themselves, their agents, servants, assigns or any other person claiming by, through and under them to do any act or proceed further with the proposed development or to put up any construction on any part of the plot shaded in Green to Exhibit B-2 to the Plaint, in any manner whatsoever or to alter the layout of Silver Beach Estate, in any manner whatsoever,"

2. The relief sought for in the Notice of Motion taken out in the Creados Suit is as under:-

"(a) Pending the hearing and final disposal of the Suit, the Defendants, their servants and agents or persons claiming under the Defendants be restrained from:

(i) entering the said Plot No.A or any part thereof as shown on the plan being Exhibit "B" to the Plaint.

(ii) parking car or any vehicle on the said Plot No.A or any part thereof as shown on the plan being Exhibit "B" to the Plaint.

(iii) entering upon the Plot No.A by use of the said 3 ft. wide door on dividing wall running between the Plot No.2 and Plot No.A on blue colour line B-J as shown on the plan being Exhibit "B" to the Plaint.

3. The Plot No. A which is referred to in the relief sought for in the Notice of Motion taken out in the Creados Suit is a plot which

is a part of the Plot No.1 on the Silver Beach Estate. Both plots belonged to the Creados. The real dispute is the construction permitted by the Creados on plot No. A through one M/s. Kyrus Industries (Defendant No.6 in the Khans Suit) with whom the Creados had entered into the purchase agreement for purchase of Plot No. A and pursuant to which plot No. A had been handed over to M/s. Kyrus Industries. The construction carried out by the M/s. Kyrus Industries Ltd. is claimed by the Khans to be affecting, disturbing, obstructing the Khans continued rights, use and enjoyment of the internal roads / spaces within the Silver Beach Estate and the open areas on plot No.1 for access to / from the rear gate of plot No.2 on the Silver Beach Estate which vest in the Khans to / from the Juhu beach through the Khajgi Raasta and the A.B. Nair Road. Thus, the short point which arises for determination is as to whether the Khans have been conveyed co-ownership of the said internal roads on plot No.1 of the Silver Beach Estate by conveyance entered with the Creados and / or they have the right to use the said internal roads / spaces by way of easementary right either by way of grant or by prescription. Such right would necessarily have to be determined first prior to considering the relief in the Notice of Motion taken out in the Creados Suit, particularly, since that relief would depend on the

right of the Khans to use the internal roads and spaces which are on plot No. A.

A brief background of facts which arise in common in both Notices of Motion are necessary.

4. The Khans occupied plot No.2 as tenants of the Credos. In that capacity, the Khans have claimed that they were using and enjoying all the interways and passages exiting from Plot No.2 to access the common internal roads on Plot No.1 and through the internal roads on Plot No.1 as well as Khajgi Raasta to access the sea / beach. On 30th June, 1970, a letter has been addressed by Mr. Victor Creado to the Municipal Commissioner for Greater Bombay ("M.C.G.M.") attaching therewith the Terms and Conditions in respect of the development of the Silver Beach Estate as shown in the plan dated 14th May, 1970 and an undertaking to abide by the same. In Clause 1 of the Terms and Conditions, it was undertaken that all the internal and private access roads shall be constructed and lighted to Municipal specification. The layout plan had been approved on 16th February, 1970.

5. A registered Indenture of Conveyance was entered into between the Creados and Khans by which plot No.2 on the Silver Beach Estate admeasuring 1692.90 Sq. mtrs. along with structure standing thereon was sold / conveyed to the Khans. Certain clauses of the Indenture of Conveyance are extracted as under:-

“THEY the Vendors do and each of them doth hereby grant sell convey and assure UNTO the Purchasers for ever all that piece or parcel of land or ground with messuages hereditamens and premises situate at Juhu in registration Sub-District of Bandra, District Bombay Suburban in Greater Bombay being Plot No.2 of the Sub-division of the property known as “SILVER BEACH ESTATE” (bearing Survey No.74A (Part), Survey No.40, Hissa No.3, Survey No.38, Hissa No.1, Survey No.5, Hissa No.4A (Part) and Hissa No.4C (Part) and delineated on the Plan hereto annexed and shown thereon surrounded by a red colour boundary line and marked thereon as “PLOT NO.2” and more particularly described in the Schedule hereunder written (and of which the land hereditaments and premises being the said Plot No.2 are hereinafter referred to for brevity's sake as (“THE SAID PREMISES”) TOGETHER WITH all and singular house, out-house, edifice, building, courtyard, compound, sewers, ditches, fences, trees, drains, ways, passages, waters, water-courses, plants, lights, liberties, privileges, easements, profits, advantages, rights, members and appurtenances whatsoever to the said premises or any part thereof belonging or in any wise appertaining to or with the same or any part thereof now or at any time heretofore usually held, used, occupied or enjoyed therewith or reputed or known as part or member thereof belong or be appurtenant there to.... TO HAVE AND TO HOLD all and singular the said premises hereby granted, conveyed and assured or intended or expressed so to be with their and every of

their rights, members and appurtenances UNTO AND TO THE USE AND BENEFIT of the Purchasers forever as Tenants-in-Common...."

"AND THAT it shall be lawful for the Purchasers from time to time and at all times hereafter peaceably and quietly to hold enter, upon, have, occupy, possess and enjoy the said premises hereby granted and conveyed with their appurtenances and receive the rents, issues and profits thereof and of every part thereof to an for their own use and benefit without any suit, lawful eviction, interruption, claim and / or demand whatsoever from or by the Vendors or their heirs or any of them or from or by any person or persons lawfully or equitably claiming or to claim by, from, under or in trust for them or any of them AND that free and clear and freely clearly and absolutely acquitted, exonerated, released and forever discharged or otherwise by the Vendors well and sufficiently saved, defended, kept harmless and indemnified of from and against all former and other estates, titles, charges, and / or encumbrances whatever had made executed occasioned or suffered by the Vendors or by any other person or persons lawfully or equitably claiming or to claim, by, from, under or in trust for them or any of them..."

"AND THIS INDENTURE FURTHER WITNESSETH that in pursuance of the aforesaid agreement for sale and in consideration of the premises the Purchasers for themselves their heirs, executors, administrators and assigns do hereby covenant with the Vendors and their heirs, executors, administrators and assigns with the intention and object that this covenant shall run with the land hereditaments and premises described in the Schedule hereunder written and shall be binding on the owner or owners for the time being and all persons having any interest in the said land hereditaments and premises described in the Schedule hereunder written, that:-

(a) The Purchasers shall abide by and carry out all the terms and conditions as are prescribed by the Municipal Corporation for Greater Bombay for sanctioning the sub-division in respect of the land hereditaments and premises bearing Survey No.74A(Part), Survey No.40, Hissa No.3, Survey No.38, Hissa No.1, Survey No.5, Hissa No.4A(Part) and 4C(Part) whereof the said land hereditaments and premises described in the Schedule hereunder written forms part, a copy whereof is annexed as Exhibit "A" hereto in so far as the same are applicable to the said land, hereditaments and premises more particularly described in the Schedule hereunder written"

The Schedule to the Indenture is as follows:

"ALL THAT PIECE OR PARCEL of land or ground together with building and structure thereon situate lying and being at Village Juhu in Greater Bombay in the Registration Sub-District Bandra District Bombay Suburban (being Plot No.2 of Sub-Division of Property known as Silver Beach Estate bearing Survey No.74A (Part) Survey No.40, Hissa No.3, Survey No.38, Hissa No.1(Part) Survey No.5, Hissa No.4A(Part) and Hissa No.4C (Part) and which Plot No.2 admeasures 2025 Square yards (equivalent to 1692.90 Square Metres) or thereabouts."

6. In the terms and Conditions prescribed by the MCGM for sanctioning the proposed sub-division of Silver Beach Estate including the said plot no.2 forming a part thereof and which Terms were annexed to the said Indenture at Exhibit 'A', relevant clauses are as under:-

1. That all the internal and private access roads shall be constructed and lighted to Municipal Specifications.

11. That the means of access to the rear plot should be kept free and un-built upon for computation of floor space index of any of the plot.

13. That the land together measuring 15% of the Plot No.2 i.e. 303.70 sq. yds. (243.00 sq.mtrs.) shown in green shall be kept open and unbuilt upon and shall be developed as recreation ground.

14. That adequate number of parking spaces shall be provided within the layout area itself.

16. That no further development of plot of the layout shall be allowed unless the proposed recreation ground is properly leveled, fenced and developed and unless the layout internal roads are duly metalled, drained and lighted.

19. That no building shall be allowed to be commenced unless access road leading to the property from Municipal / private street and the internal road or means of access on which the building abuts is properly constructed to the full width with water bound made of construction and no building will be allowed to be occupied until the said roads are properly asphalted and lighted and satisfactory arrangements made for disposal of storm water and sullage water with Municipal Specifications.

22. That the Municipal Corporation does not bind itself to take over any of the roads, drains, garden etc. for the purpose of maintenance but reserves the right to take over any of these if considered necessary.

25. That these terms and conditions of the sub-division shall be binding not only on the owner for the time being, but also on his heirs, executors, administrators, assignees, and every person deriving title through or under him.

26. That the development of plot no.1 shall be restricted to 0.85 of the net plot area of plot no.1 i.e. area of plot no.1 after deducting areas of 30' and 22' wide internal roads.

7. These terms and conditions were under the said Indenture to be abided by the purchaser viz the Khans and they would carry out all the terms and conditions as prescribed therein for sanctioning the sub-division in respect of plot No.2 on the Silver Beach Estate. The subject of the terms and conditions was the proposed layout of the Silver Beach Estate, Juhu. Thus, it was applicable to the entire layout of the Silver Beach Estate which included internal access roads, ways, passages, easements, appurtenances, etc. The layout plan dated 24th July, 1975 of the Silver Beach Estate was subsequently sanctioned on 28th February, 1978. A registered undertaking was submitted by the Creados to the MCGM for the entire Silver Beach Estate layout including Plot No.2 belonging to the Khans thereby undertaking to abide by the terms and conditions of the MCGM and that the same would be binding also on all persons deriving title through

the Creados. The subject of the covering letter dated 9th September, 1975 enclosing the undertaking reads as under:-

“Proposed sub-division of the land bearing Nos.40, H.No.3, S.No.38A, S.No.38A part S. No.5 H. No.4 / 2C, S. No.76A part and CTS Nos. 505,505/1 to 505/25 of Juhu belonging to Shri N. I. Creado and others at village Juhu in the registration sub-district and district of Bombay City and Bombay Suburban.”

8. The relevant clauses of the Terms and Conditions are as under:-

1. That all the access roads shall be constructed and lighted to Municipal specifications and shall be properly maintained, jointly by all sub-divided plot holders.

10. That the sub-divided plots shall not be amalgamated or sub-divided without the permission of the Municipal Commissioner.

11. That user of all the plots shall be residential purposes and no change of user shall be permitted except with the specific sanction of the Municipal Commissioner in writing.

12. That the land together admeasuring 15% of the area of Plot No.2 i.e. 243 Sq.mtrs. Whichever is greater and shown green in colour on the plan shall be kept open and unbuilt upon and shall be developed as recreation ground / amenity open space by planting trees on the same ground the periphery and shall be properly maintained.

13. That adequate number of parking spaces and unloading spaces shall be provided within the layout area.

15. That no sub-divided plot of the layout shall be sold unless the internal roads are duly installed, drained and lighted.

19. That an association of the plot owners will be formed which will be responsible for maintenance of roads, storm water drains, street lights, sewers and maintenance of the recreation grounds, septic tank soak pits, suction tanks, pump houses and other amenities of the sub-divided property.

27. That the Floor Space Index of all the sub-divided plots except plot No.2 shall be restricted to 0.85% if 15% garden is not provided.

29. That these terms and conditions of the sub-division shall be binding not only on the owners for the time being but also on their heirs, executors, administrators, assignees and every person deriving title through or under them.

30..... As per....b) the layout of the internal water mains in the internal roads shall be submitted, got approved and built at Owner's cost prior to occupation."

9. The schedule II to the Terms and Conditions describes the entire Silver Beach Estate and the owners of the Silver Beach Estate have appended their signature by which they have agreed to above conditions.

10. It is necessary to refer to certain correspondence exchanged between the Creados and Khans and which concerns the temporary obstructions by the Creados to the use of the internal access roads / Khajagi Rasta by the Khans.

- (a) On 27th July, 1988, a letter had been addressed by the Khans to Mrs. V.G. Creado objecting to their servant being obstructed from using access to the beach. It has been stated in the said letter by the Khans that the Creados are aware that the Khans have been enjoying free access to the beach for the last 22 years. Creados were called upon not to create new conditions which interfere and affect adversely the Khans right of free access and easements which have been undisturbed for the last 22 years.
- (b) By a letter dated 23rd November, 1988, addressed by Darry Creado to Sanjay Khan wherein it is stated that as agreed between the Creados and the Khans, the Khans may pass through "Silver Beach Apartments" en route to the beach.

- (c) By a letter dated 28th July, 1990, addressed by Sanjay Khan to Mrs. V.G. Creado calling upon the Creados to forthwith remove the construction which was being done opposite the beach side gate of the Khans.
- (d) A letter dated 28th August, 1991 addressed by Mr. Sanjay Khan to the Creados seeking permission to have the gate opened for transit of men and material to the Khans' Plot No.2 as a swimming pool was being constructed.
- (e) A letter of complaint dated 30th August, 1992, addressed by the Sanjay Khan to the Inspector In Charge of the Juhu Police Station complaining of the "goondas" employed by the Creados for protecting the illegal barricade on the internal road on Plot No.1 which is the common passage for all residents of the Silver Beach Estate.
- (f) A letter dated 2nd September, 1991 addressed by the Creados to the Khans concerning the grant of access from the internal road to the Khans plot No.2 which

the Creados had not allowed. It was stated that the Khans have access to their property from the main A.B. Nair road and they cannot use the Creados private road and property for the purpose of access to their plot.

- (g) A letter dated 1st October, 1992 addressed by the plot holders and occupants of Silver Beach Estate to MCGM, *inter alia* complaining about the non-development of internal roads by the Creados and the right of way to the seashore being encroached upon.
- (h) A letter dated 3rd May, 1993 was addressed by the Advocates for the Khans to the Creado's objecting to the interference with the Khans access to the beach from the internal roads on plot No.1.
- (i) A letter dated 14th May, 1993, addressed by the Advocates for the Creados to the Advocates for the Khans, wherein it was stated that the permission to use the internal access roads was being withdrawn.

- (j) A letter dated 20th July, 1993 addressed by the Advocates for Khans to the Advocates for Creados in response to the letter dated 14th May, 1993 and denying all the contentions in the Creados Advocates letter.
- (k) The letter dated 20th July, 1993 was responded to by a letter dated 11th August, 1993 addressed by the Advocates for the Creados to the Advocates for the Khans dealing with the contentions therein.
- (l) Thereafter correspondence was exchanged between the Khans and Creados on 15th October, 1997 and 26th October, 1997 regarding opening of gate and providing the key as well as a complaint by Creados to the Khans stating that the gate was broken by the truck transporting material to the Khans plot No.2 and that the bill would be sent for the damage.

11. It is the contention of the Khans that after this correspondence was addressed, they continued to use the internal access roads, ways, passages, easements, appurtenances on the layout of the Silver Beach Estate as well as

accessing the beach from their rear gate till 2010. Thus, according to the Khans there was no obstructions from the Creados after 1993 till 2010.

12. A possession letter dated 5th November, 2009 was addressed by the Creados to M/s. Kyrus Industries in which reference was made to the registered Purchase Agreement dated 13th August, 2009 executed between the Creados and M/s. Kyrus Industries and it was recorded that vacant possession of the property described in Annexure I thereto (Plot No. A referred to herein) had been handed over to M/s. Kyrus Industries.

13. It was on 8th February, 2010 that a complaint was made by the Khans Advocate to the MCGM stating that the Creados were attempting to block the right of way and access of all occupants of the Silver Beach Estate to the beach from the Government land bearing CTS Nos. 506 (3). The Khans through their Advoaacte further complained that attempt had been made by the Creados to alter the internal access roads in order to deprive the other occupants of Silver Beach Estate from using the same as internal roads, for parking, loading, unloading, etc. The MCGM was requested to issue a stop work notice to the Creados and not

permit the construction till all the terms and conditions of the undertaking dated 9th September, 1975 were complied with.

14. A further complaint was made by the Khans to the Juhu Police Station that the Creados were committing various illegal activities on the internal roads of the Silver Beach Estate and requested for necessary action and investigation with respect thereto. Thereafter, individual notice dated 26th March, 2010 were issued by the MCGM to the Creados informing them about the complaint made by the Khans and also by Bedis (occupant of CTS No.505/9 and 10 and 505 Part) of Silver Beach Estate and instructing the Creados to remove the barricades and to open the internal access roads as per the sanctioned layout plan. This was responded to by M/s. Kyrus Industries stating to be acting as Constituted Attorney of the Creados and wherein the allegations in the complaint were denied and the plans for construction which had been submitted was requested to be processed without further delay. The processing of the plans submitted were objected to by the Khans in their letter dated 12th April, 2010 addressed to Executive Engineer of the MCGM.

15. In response, the Creados Suit was filed against the Khans for perpetual injunction restraining the Khans from in any manner accessing Plot No. A or any part thereof as well as for damages claimed to be suffered by the Plaintiffs for act of trespass. The present Notice of Motion was taken out by the Creados in their Suit and in which ad interim order dated 7th May, 2010 came to be passed by then (R.Y. Ganoo, J.), the operative part reads as under:-

“b) Statement made by the learned Senior Counsel for the Defendants, that the Defendants or their agents and servants will not enter through points E and F appearing on the plan Exhibit B with cars or vehicles is accepted. It is clarified that the statement is made by the Counsel for the Defendants is without prejudice to the various rights and contentions which Defendants would like to raise by placing them before the Court.”

An ad-interim injunction had also been granted in terms of prayer Clause (a) (iii) of the present Notice of Motion restraining the Khans from entering upon Plot No.A by use of the 3 foot wide door on the dividing wall between Plot No. 2 and Plot No. A on blue colour line B-J shown in the plan being Exhibit B to the Plaint filed in Creados Suit.

16. The Khans thereafter made complaints to various authorities requesting that action be taken against the Creados to stop their illegal activities. As these complaints were not addressed, the Khans thereafter filed their Suit for a declaration

that they are owners of Plot No.2 along with all ways, passages, easements, appurtenances, etc. which includes the internal access roads within the Silver Beach Estate and the part of open areas in Plot No.505 of village Juhu for access to / from their rear gate to / from (i) Juhu Beach through the Khajgi Raasta and (ii) A.B. Nair Road. A plan has been annexed to the Suit to show the internal access roads and which indicates the attempt made by the Creados and Rustom Sethna on behalf of M/s. Kyrus Industries to incorporate some internal access roads belonging to the layout into plot No. A. The present Notice of Motion was taken out by the Khans in their Suit.

17. Notice of Motion No.200 of 2012 was taken out by the Creados and Sethna under Order VII Rule 11 (a) and 11(d) of the Code of Civil Procedure, 1908 in the Khans Suit claiming that the Plaint be rejected in respect of the prayer (b) and the latter portion of prayer (a) thereof. In the reply filed by the Creados in the Khans Notice of Motion, the letter dated 28th August, 1991 addressed by the Khans to the Creados and the letter dated 2nd September, 1991 were relied upon. In the Affidavit in Rejoinder dated 7th February, 2012 filed by the Khans dealing with the said Affidavit in Reply, it was stated that the said letters produced in Reply were

false and fabricated and that the originals in respect thereof had not been provided despite repeated requests.

18. By an order dated 7th February, 2012, the then S.J Vazifdar, J. in the Khans Notice of Motion permitted the Creados and M/s. Kyrus Industries to carry out construction on their plot shown in green colour in Exhibit B2 to the Complaint filed in the Khans Suit and which referred to Plot No. A. However, the Creados were directed to ensure that in the event of the Khans succeeding in the present Notice of Motion or any other proceedings, the Khans shall have access as claimed in respect of the internal roads and the Creados and M/s. Kyrus Industries shall not be entitled to claim any equities in respect of any construction or development in, to, upon or in respect of their property or properties shown in Exhibits B-1 and B-2 to the Complaint. A further order dated 14th February, 2012 was passed by the then S.J. Vazifdar, J. in Notice of Motion No.3614 of 2011, wherein the contention of the learned Senior Counsel for the Creados that, there was no internal road as shown in gray on the plan at Exhibit B to the Complaint in Khans Suit was recorded and it was clarified that whether the road is available today or not is not relevant and that the order would operate if the

Khans establishe that there was such a road at the material time in existence.

19. Mr. Darius J. Khambata, the learned Senior Counsel appearing for the Khans has submitted that the prayers in the Suit filed by the Creados are limited and restricted to Khans right to enter upon Plot No. A and do not concern Khans right to the other areas of internal roads / spaces within the Silver Beach Estate. Whereas the prayers sought for in the Khans suit are in respect of the Khans right of ownership / co-user / easement by grant / layout and in the alternative for an easement by prescription over parts of the entire Silver Beach Estate layout. Thus the subject matter of the Khans Suit is a much wider right claimed over the entire Silver Beach Estate layout. He has submitted that though the Khans plot No.2 was notionally delineated, it was admittedly part of the larger layout of Silver Beach Estate. The layout plans in respect of Silver Beach Estate which had been submitted to the authorities from time to time clearly show the internal layout roads / ways/ passages existing on the layout of the Silver Beach Estate and are incorporated in the Conveyance dated 31st March, 1971 executed between the Khans and the Creados. The layout plan dated 14th May, 1970 submitted by the Creados clearly

reflects the internal access roads. Further, the layout plan annexed to the conveyance clearly shows internal access roads which are referred to as “access roads”. This plan has been signed by the Creados and the Khans. The plan was submitted for registration and is bearing the same serial number as the conveyance itself i.e. Serial No.R-2181 of 1971 and was registered on the same date. The conveyance and the plan both were registered on 4th September, 1974. The layout plan submitted by the Creados to the MCGM was drawn on 24th May, 1974 and revised thereafter on 24th July, 1975 and eventually sanctioned on 28th February, 1978 shows existence of internal roads, referred to therein as “means of access”. The MCGM had pursuant to the order of this Court dated 16th January, 2019 visited the Silver Beach Estate on 6th February, 2019 and prepared the sketch plan which shows the internal access roads virtually going upto the Khans Plot No.505/2. He has submitted that the Creados have relied upon a city survey plan to allege that there were no roads within the layout. This is completely misplaced since the city survey plan is admittedly not upto date and shows only structures on the layout without reference to the ways/passages/roads therein. He has relied upon the photographs which have been submitted by the Court Receiver to this Court

taken during the site visit which evidenced the said internal roads / passages.

20. He has submitted that under the Conveyance Deed dated 31st March, 1971, the Creados conveyed to the Khans Plot No.2 together with various other rights over the entire Silver Beach Estate layout. He has submitted that this is apparent from a plain reading of the Conveyance under which the Khans were conveyed plot No.2 together with rights of co-ownership / co-user *inter alia* in respect of the ways / passages / easements / appurtenances etc on the entire Silver Beach Estate. Further, the wordings in the conveyance read with the MCGM terms and conditions incorporated therein at Exhibit A make it clear that the Khans were the owners of Plot No.2 and co-owners / co-users in respect of the roads / ways / passages in the entire layout which they were to enjoy as tenants in common with the Creados on the terms set out in the conveyance. He has submitted that it is apparent from the words used in the conveyance that the ways, passages, easements, appurtenances etc. are “to” the said premises which cannot in any circumstances mean within or being part of Plot No.2. The ways / passages / easements / appurtenances to plot No.2 leading to and from the Silver Beach Estate layout is from

the rear door / gate on the Khans Plot No.2 and that the wordings of the Conveyance are necessarily referring to the said rear door / gate which the Khans had been using to access parts of the entire Silver Beach Estate layout since 1966.

21. In the alternative, and without prejudice to the Khans case of co-ownership rights under the Conveyance, he has submitted that the Khans have been expressly granted easementary rights under the Conveyance which include the right to use the internal roads in the entire Silver Beach Estate layout, the 'S' shaped path from the rear door / gate over the pathway ('S' shape path) to access the internal access road, and the way / passage / road leading to the beach through the Khajgi Raasta. He has submitted that this easementary right granted under the Conveyance is by way of grant and not an easement by prescription which requires fulfillment of the conditions under Section 15 of the Indian Easements Act, 1882 including enjoyment for a period of 20 years. He has relied upon a recent unreported judgment in the case of *Dr.S. Kumar & Ors. Vs. S. Ramalingam*¹, in which the Supreme Court considered the case wherein the Plaintiff claimed exclusive rights over a path under a sale deed and an injunction against the

1 Civil Appeal Nos. 8628-8629 of 2009 dated 16th July, 2019.

Defendants from using a pathway, being similar reliefs to the claim by Creados against the Khans. In that case, there was a specific mention of easementary rights reserved in a recital of the Sale Deeds in favour of the Defendants. The wordings of that recital are similar to the wording of the recital in the said conveyance in the present case. The Supreme Court held that the Defendants had been expressly granted a right to use the passage in the sale deed. It was not an easement of necessity as claimed but a right granted in the sale deed. This right will not extinguish in terms of Section 41 of the Indian Easements Act, 1882. It was also opined by the Supreme Court that an easement of right of passage granted in a Sale Deed will not be negated only because the recital is generic in nature and usually put by the deed writers, particularly since there is a specific mention of easementary rights reserved. He has further relied upon the judgment of the Calcutta High Court in the case of *Smt. Pravabati Roy and Anr. Vs. Dwijendra Lal Sengupta and Anr.*², wherein the Plaintiffs also claimed that a right of passage was specifically conveyed to them. The Conveyance in favour of the Plaintiffs contained a similar clause to the one in the present Conveyance. The Court further held that the Plaintiffs therein were entitled to a decree since the

2 1986 SCC OnLine Cal140/AIR 1987 Cal 97.

premises together with various rights including an easement that had been conveyed. He has submitted that from a reading of the clause in the Conveyance with the MCGM's terms and conditions annexed thereto which are binding on the Khans and the continuous use of the Khans for several years of the internal roads in Silver Beach Estate layout, it would be clear that the Khans had been specifically granted an easementary right under the Conveyance itself to use the portions of the Silver Beach Estate leading to the beach. The Khans under the Conveyance had agreed to abide by and carry out all the terms and conditions prescribed by the MCGM which have been annexed at Exhibit 'A' to the Conveyance and thus the terms of the Conveyance provided a covenant running with the land. He has referred to the MCGM's terms and conditions and has submitted that these terms make it abundantly clear that all the internal and private access roads form part of the proposed layout. Specific provisions are made for those internal and private roads to be lighted to municipal specifications. He has drawn reference to the clause 26 of the MCGM's terms and conditions which expressly excludes the area of the internal roads from the development potential of the layout as they were to be kept open and available at all times. He has further drawn reference to the condition No.25 of the MCGM's

terms and conditions which make it evident that the owner and every person deriving through or under him would be bound by the MCGM's terms and conditions which were in respect of the entire Silver Beach Estate layout.

22. He has submitted that although in the plans annexed to the Conveyance it can be seen that the access road to the rear of plot No.2 does not touch the rear door / gate of Plot No.2, the Khans have been granted easementary right to use the layout through their rear door / gate under the Conveyance itself since the conveyance clearly provides for easements, appurtenance, ways, passages etc. to, into and out of the said premises of the Khans being conveyed to them. This would include the internal access roads in the layout and the access over the layout to the beach including the 'S' shaped path from the Khans rear door / gate.

23. He has further drawn reference to the undertaking furnished by the Creados dated 9th September, 1975 for the entire layout including plot No.2 on behalf of all the co-owners of the layout including the Khans. He has submitted that it is evident from the subject matter of this letter that it included Khans Plot No.2. He has drawn reference to the terms and conditions which *inter alia*

provided for internal access roads to be maintained jointly by all the sub-divided plot holders and that there would be an association of plot holders who will responsible for the maintenance of the internal access road. He has submitted that the 1975 undertaking makes a reference to a schedule which contemplates available development potential of 13,863.87 square meters for the balance layout aside from plot No.2. This is based on the sanctioned plans submitted by Creados themselves to the Municipal Authorities which plans show that the area of the internal roads referred to therein as “means of access” has been deducted while computing the permissible FSI in accordance with clause 26 of the Terms and Conditions prescribed by MCGM. He has submitted that this would only go to show that the Creados were at all times aware and cognizant of the fact that the internal roads were to be jointly enjoyed by all the plot holders of the entire layout and therefore, could not be developed or constructed upon. He has submitted that despite this the Creados and Defendant No.6 in the Khans Suit viz. M/s. Kyrus Industries claimed exclusive rights over internal roads and are proposing construction which will appropriate the internal road.

24. He has submitted that the internal access roads, within the Silver Beach Estate layout was at all times required to be kept open and the Creados could not have been granted rights in respect of the plot A to develop / construct upon the internal access roads which was meant for the use of co-owners of the plots in the layout. He has relied upon a decision of this Court in *Pashmina Co-Op. Housing Society Ltd. Vs. Subhash A. Gandhi*³ where this Court held that land which is designated as a road in the layout plan cannot be permitted to be sold as this would be against the interest of the residents in the layout. Once the areas are designated as a road, the same has to be retained and used as such. In the present case, Creados had claimed to own the internal roads as per the layout plans. He has submitted that the fact that the internal roads and access from the rear door/ gate was available to the Khans is *inter alia* evident from the various documents addressed by the MCGM to the Creados wherein the MCGM had directed the Creados to remove the barricades placed by them on the internal roads and on the open areas which prevented the access to the beach and keep the access open as per the sanctioned layout plans. The notices from the MCGM to the Creados dated 3rd March, 2010 clearly stated that the

3 Notice of Motion No.224 of 1998 in Suit No.234 of 1998.

Creados were in violation of their undertaking dated 9th September, 1975 given by them to the MCGM and that the proposed construction by the Creados in Silver Beach Estate was also in violation of the said undertaking. He has submitted that the Khans are entitled to the relief prayed for in their Notice of Motion.

25. He has submitted that the Khans learnt about the proposed construction of Defendant No.6 in and around 2010. The layout plan submitted by the Architect of Defendant No.6 to the MCGM on 4th September, 2009 shows that the Defendant No.6 has sought to consume the FSI of the internal roads in the layout for their proposed construction. He has submitted that the proposed construction cannot be permitted as it would completely block the Khans access from the internal roads / ways / passages / open areas on the Silver Beach Estate layout to the rear door / gate of their plot No.2 from / to A. B. Nair road and access from the rear door / gate on Plot No.2 to the ways / passages / internal roads leading to the beach and within the Silver Beach Estate layout.

26. He has submitted in the alternative and without prejudice to the above submission of co-ownership or grant of easementary rights which the Khans were conveyed over the internal roads,

ways and passages ('S' shaped path) of the entire Silver Beach Estate layout, the Khans have acquired by prescription a right of way over portions of the entire layout including to access the internal roads from an 'S' shaped path through their rear door / gate and to access the beach. He has submitted that an easement is an interest in or over lands of another. The "easement" enjoyed by the Khans was not within plot No.2 as contended by the Creados but over the layout of Silver Beach Estate including to access the beach from the Khans rear door / gate. He has submitted that this is apparent from the definition of easement in the commentaries of Gail on Easements 20th Edition. He has relied upon the judgment in the *Eaton Vs. The Swansea Waterworks Company*⁴ to contend that when easement has once been enjoyed as of right, such enjoyment must be taken, to continue though interrupted unless the interruption is acquiesced in for a year. He has submitted that the purported interruptions relied upon by the Creados by placing reliance upon the correspondence exchanged between the Khans and Creados does not constitute an interruption for the purpose of Section 15 of the Indian Easements Act, 1882, and none of them show any acquiescence by the Khans for a period of one year as

4 Q.B.267 – pg.1284 decided on 5th June, 1851.

contemplated by Explanation II to Section 15 of the Indian Easements Act, 1882. He has referred to Section 15 of the Indian Easements Act, 1882 and has submitted that the said provision provides for acquisition of the easementary right by prescription of a party who has enjoyed a right of way over a land of another, peaceably, as an easement and as of right, without interruption and for 20 years. Explanation II to Section 15 provides that nothing will constitute an interruption to that easementary right unless there is an actual cessation of the enjoyment by reason of the obstruction by the act of some person other than the Claimant and unless such obstruction is submitted to or acquiesced in, for one year after the Claimant has noticed thereof. He has submitted that the conditions of actual cessation and acquiescence for one year are cumulative and both must be fulfilled in order to constitute interruptions under Section 15. He has relied upon the judgment of this Court and various other courts in *Subramaniya Ayyar & Ors. Vs. Ramachandra Rau & ors.*⁵, *Kurvarbai & Ors. Vs. Jamsedji Rustamji Daruvala & Ors.*⁶, *Ram Sarup Vs. Abdul Haq*⁷ and *Jogesh Chandra Roy Vs. Smt. Sachchhanda & Ors.*⁸. He has

5 1877 ILR Vol I 335 pg. 339 decided on 28th September, 1877

6 AIR 1919 Bom.94 decided on 15th January, 1919.

7 AIR 1931, Lah.395 pg.398 decided on 28th January, 1931.

8 AIR 1935 Cal 282 decided on 15th August, 1931.

submitted that from these judgments it is clear that to constitute an interruption of a party's enjoyment of easementary rights there must be submission to or acquiescence in the said obstruction for at least one year. Further, it is enough if the party claiming the easementary right has communicated to the party causing obstruction that he does not submit to or acquiescence in it. Further to constitute an interruption there must be actual discontinuance coupled with submission to or acquiescence in that discontinuance. He has submitted that the decision relied upon the Creados viz. *Siti Kanta Pal & Anr. V. Radha Gobinda Sen & Ors.*⁹, *Ravinder Kumar Sejwal & Anr. Vs. D.D.A.*¹⁰ and *Shaikh Khoda Buksh Vs. Shaikh Tajuddin*¹¹ are not applicable in the present case as the Khans never sought permission of the Creados to access the internal roads on the Silver Beach Estate but in fact asserted their rights thereto and hence there was no question of such use being permissive but is as of right. These judgments in the facts of the present case have no application. He has submitted that, the correspondence exchanged between the Khans and the Creados, in particular, the letter dated 23rd November, 1988 and the reply dated 27th July, 1988 shows that at

9 AIR 1929 Cal 542 Calcutta Weekly.

10 (2009) 107 DRJ 84 (DB).

11 (1903-04) 8 CWN 359.

all point of time, the Khans were passing through the Silver Beach Estate layout to access beach. By the letter dated 27th July, 1988, the Khans have sought to exercise two distinct rights viz. 'free access' as assured by the Creados "at the time of our agreement" being the right conveyed to the Khans under the conveyance and easement for 22 years. This has not been denied by the Creados in their letter dated 23rd November, 1988. Further, in the correspondence, the Khans were entitled to such free access to the beach. The letter dated 28th August, 1991 which is not signed by either of the Khan's referred to the 'gate' on the internal access road which is 'Gate A' and not the rear door / gate to the beach. This is clear from the fact that the access through the rear door / gate to the beach is a walking path and not for men and materials, which they wanted access for. The correspondence addressed to the Juhu Police Station and to the MCGM reveal that Khans asserted their 'right of way' to the seashore is as per the agreement. This was also asserted in the Khan's Advocates correspondence to the Creados. The correspondence would reveal that the Khans were claiming two distinct rights; one in the conveyance and a second separate and distinct right of easement. The letters dated 15th October, 1997 and 26th October, 1997 also referred to a motorable road in relation to the gate on the internal

access road being Gate A and not the rear door / gate leading to the internal access roads, which admittedly is not a motorable segment. He has submitted that the first time a complete obstruction of the Khans use / access from the 'S' shaped path to the internal roads took place was in 2010 i.e. within 2 years prior to the filing of Khan's Suit.

27. He has reiterated his main submission and submitted that the Khajgi Rasta and the ways / passages leading to the Khajgi Rasta is nothing but an appurtenance / way / passage to the private or internal road which has squarely been conveyed under the conveyance read with the MCGM's terms and conditions appended to the conveyance and to which all the plot holders have an equal right, title and interest. He has relied upon the definition of appurtenance in the Black's Law Dictionary – Tenth Edition, which defines appurtenance as something that is attached to something else. He has thus submitted that the Khan's are entitled to the relief sought for in their Notice of Motion.

28. Ms. Rajani Iyer, the learned Senior Counsel appearing for the Creados has submitted that the claim of the Khans for declaration of their co-ownership of common areas / ways /

passages on plot No.1 or use of the internal ways in plot No.1 of the Silver Beach Estate and / or their alternate claim of easementary rights by way of grant and / or prescription can only be determined upon this Court getting a proper record of the evidence from both sides in order to adjudicate the claim of the Khans. She has accordingly submitted that that no interim order can be passed without evidence being considered and that the ad-interim order of the then R.Y. Ganoo, J. be continued.

29. She has submitted that the Khans claim of co-ownership is a willful misreading of the said conveyance since it is nowhere stated in the conveyance that the Creados were divesting themselves of any portion of their right, title and interest therein except in the said Plot No.2. She has submitted that the clause relied upon by the Khans, reads as under:-

TOGETHER with all the singular house, out-house, edifice, building, court-yard, compound, sewers, ditches, fences, trees, drains, ways, passages, water, water-courses, plants, lights, liberties, privileges, (easements) profits, advantages, rights, members and appurtenances whatsoever to the said premises or any part thereof belonging or in anywise appertaining to or with the same or any part thereof now or at any time heretobefore usually, held, used, occupied or enjoyed therewith or...."

30. This cannot be read in the manner in which the Khans have interpreted the clause as this clause could never be extended to ways, passages etc. on any portion of the land being plot No.1 belonging to the Creados in the entire Silver Beach Estate. If the interpretation of the Khans to this clause is accepted then such claim of co-ownership would extend to the Silver Beach Estate and that this was never the case. No objection had been taken at the time of sale and development of parcels of lands by the Creados to other third parties and the Creados absolutely and exclusively have entered into these transactions with third parties and received the sale proceeds thereof. She has submitted that this clause is nothing but an “all estate clause” as opined by solicitor Divekar in his commentary, where he has stated that this clause is wholly an unnecessary clause in India. She has submitted that there is no grant of right to use the passages and ways by the conveyance. Further, no such grant is reflected or found in the operative part of the Habendum Clauses / parts / sections of the said conveyance. She has placed reliance upon the correspondence exchanged between the Khans and the Creados and has submitted that the Khans never claimed alleged co-ownership or co-user and this alleged right has been asserted for the first time after nearly 40 years from the date of the

said conveyance. She has submitted that the conveyance clearly states that the Khans shall only abide by the terms and conditions of the Bombay Municipal Corporation "in so far as the same is applicable to the said land, herediataments and premises more particularly described in the schedule hereunder written". The schedule mentions only plot No.2 and nothing more. She has submitted that the terms and conditions imposed by the Corporation could neither purport to make the Khans co-owner of the common areas nor a co-user as the BMC is not privy to any conveyance nor does it hold any title over the Estate. She has submitted that the terms and conditions cannot be a basis of a grant or of any right, title and interest in the property, but they are imposition of liabilities and obligations on the owners of properties. She has submitted that the terms and conditions were annexed to the conveyance so as to bind the purchasers of Plot No.2 (being the Khans) with the terms and conditions but limited to the conditions as are applicable to Plot No.2. She submitted that certain clauses in the terms and conditions are applicable only to plot no.2 and that the Khans are bound by these clauses. She has submitted that the binding nature of these terms and conditions have been demonstrated in the case of the Khans themselves by the BMC allowing the Khans to put up a building known as Sanjay

Plaza although Term No.13 required the Khans to keep open this area by way of recreational ground. These terms vary and the BMC has sanctioned these variations.

31. She has submitted that the conveyance has not granted any right over paths / passages / internal access roads in plot No.1. The layout plan annexed to the conveyance shows no gate on the boundary of Plot No.2 and no 'S' shaped path leading from any point on the boundary outward from plot No.2 is indicated on the said plan. Thus, it is not open for the Khans to claim any grant by conveyance of such easementary rights over such path or passage from plot No.2.

32. She has submitted as that the Khans had no easementary right of any part of the Creados property as tenants and that reading or acceptance of the contentions of implied easementary rights of access to the plot No.2 from a reading of the all estate clause would mean that an easement was created for the first time in 1971 without the 'S' shaped path being specified or identified or recorded. She has submitted that the judgment relied on behalf of the Khans viz. decision of the Supreme Court *Dr.S. Kumar (Supra)* is not applicable to the present case as in that case the

conveyance in question in favour of the successful Defendant No.2 therein specifically referred to a pathway, in respect of which the easementary right which was held to be conveyed. In the present case, there is no description of the easement which was granted by conveyance. She has submitted that there are certain requirements for grant of easementary right of way and most importantly the identification and recording of the easement. She has submitted that both in the commentaries of the Divekar and Tijoriwala which have been relied upon and which are tendered, there is a particular manner and method of drafting a conveyance which consists of several parts that are to be read together. In the present case, there is no easement of way to / into or up to plot not.2 over plot no.1 contemplated or created.

33. She has submitted that the contention on behalf of the Khans that construction on plot No. A is impermissible is erroneous. She has submitted that the Creados are developing portion of their plot and taking care to provide access to the portions of plot No.1 for which the proposed internal access roads were to cater whilst developing that area. Further, she has submitted that Plot No. A is not covering any area designated as RG even in the plan annexed to the conveyance. She has

submitted that the internal access roads shown in the 1970 and 1975 layout plans are not reflected even in the Khans plaint which is adopted by the Court Receiver. She submits that the internal access road is not touching the boundary of plot no.2 belonging to the Khans and this is borne out from the layout plans.

34. She has submitted that the law provides that the internal access roads cannot be sold. It is not open to the Khans to claim ownership of internal access roads on plot No.1 belonging to the Creados. She has submitted that plot No.2 along with plot Nos.3 & 4 have access from A.B. Nair road and hence access is not required to the internal roads as Khans can access the beach via the A.B.Nair road. She has submitted that the development of plot No.1 where the co-operative housing society is situated at the south west corner of the plot no.1 includes the southern arm of the access road within its boundary as there is no other access to the beach or to the land / area to the West of these plots.

35. She has submitted that the reliance placed on the 1975 undertakings for contending that the terms and conditions contained therein are applicable to the Khans is misconceived as the subject therein refers to the Creados as owners of the

Creados estate as the purchasers names had not been reflected in the property register cards. The plan which was submitted along with layout together with the 1975 undertaking clearly excluded the area of plot No.2.

36. She has submitted that the alternative case of easement by right of way of prescription or by way of conveyance is not satisfied. She has submitted that the requisites of right of way by prescription does not exist. The contemporaneous correspondence exchanged between the Khans and the Creados discloses repeated permissions being sought from 1988 and the grant of the same in 1988, 1991 and 1997. She has relied upon decisions of various High Courts including *Siti Kanta Pal & Anr. (Supra)*, *Ravinder Kumar Sejwal & Anr. (Supra)* and *Shaikh Khoda Buksh (Supra)* in support of her contention that the right by prescription is extinguished when a party seeks a permission for access of way. She has submitted that in the correspondence exchanged between Khans and the Creados permissions were repeatedly sought for access of right of way. She has relied upon the correspondence addressed by the Creados to the Khans including letter dated 2nd September, 1991 which had denied access through rear gate for construction of swimming pool. She

has also relied upon the prior letter dated 28th August, 1995 wherein, the Khans have sought the permission of the Creados for access of material for construction of their swimming pool. She has submitted that this correspondence clearly shows that there was no easementary right by way of prescription as an easement is a matter of right and when permission is being sought by a party of a right of way on the land of the other it militates against acquisition of an easementary right by prescription. She has submitted that by the Creados denying permission to access the rear plot of the Khans through the gate would be an actual cessation of the enjoyment of the right of prescription. She submits that this has been acquiesce by the Khans for over a year. She has accordingly submitted that the Khans cannot claim an easement by way of right of prescription. She has accordingly submitted that considering the Khans have not been able to establish their case of co-ownership or grant of easement or easement by way of prescription over the internal roads, ways and passages on the Silver Beach Estate layout, the relief sought for in the Khans Notice of Motion cannot be granted. She has submitted that the ad-interim order of then R.Y. Ganoo,J. is required to be continued as the Khans have no right over the internal roads, ways and passages on the Silver Beach Estate.

37. Having considered the submissions much would depend upon the interpretation of the relevant clauses in the conveyance dated 31st March, 1997 by which the Creados conveyed plot No.2 in the Silver Beach Estate to the Khans. In this context, it would be necessary to refer to Clause No.11 in the conveyance where after mentioning Plot No.2 as "THE SAID PREMISES", the words read as under:-

TOGETHER with all the singular house, out-house, edifice, building, court-yard, compound, sewers, ditches, fences, trees, drains, ways, passages, water, water-courses, plants, lights, liberties, privileges, (easements) profits, advantages, rights, members and appurtenances whatsoever to the said premises or any part thereof belonging or in anywise appertaining to or with the same or any part thereof now or at any time heretofore usually, held, used, occupied or enjoyed therewith or...."

38. From a reading of this clause, it is apparent that together with Plot No.2 conveyed to the Khans there are easements as well as ways, passages, appurtenance etc. which are also conveyed. The submission on behalf of the Creados that the easements, ways and passages mentioned in the said clause should be confined to those on plot No.2 cannot be accepted as they are followed by the words "appurtenaning to or with" the said premises can only refer to an area that is attached to something else as per

the definition in Blacks Law Dictionary. Like wise in the case of easement, Gail on Easements (relied upon by the Khans) has defined an easement as a right over the land of another. Hence, the easements as well as appurtenances are in respect of a right over land belonging to another. It cannot be confined to such right on plot No.2 itself but must be read to the apply to the land belonging to the Creados viz. Plot No.1 which is adjoining plot No.2. The submission on behalf of the Defendants that the above extracted clause is merely an “all Estate Clause” and / or a wholly unnecessary clause likewise cannot be accepted.

39. In the layout plans which have been submitted by the Creados including the layout plan submitted along with the conveyance, the internal access roads / ways / passages are clearly shown to exist on the layout of the Silver Beach Estate. The layout plan which was referred to in the conveyance showed the internal access roads which are referred to “as access road”. This plan has been signed by the Creados and Khans was submitted for registration on the same serial number as the conveyance itself and registered on the same date. Thus, the internal access roads are a part of the conveyance and the easements which have been referred to in the conveyance would

be applicable to these internal access roads. Accordingly, there has been a grant of an easementary right to the internal access roads by the said conveyance. The Supreme Court in the recent decision of *Dr. Kumar (Supra)*, had considered a similar case wherein the Plaintiff claimed exclusive rights over a path under the sale deed and an injunction restraining the Defendants from using the path way, a relief similar to that sought by the Creados against Khans in the Creados Suit. In that case, a specific mention was made of easementary rights reserved in the recitals of the sale deed in favour of the Defendants and the wordings used in that conveyance was more or less similar to the wordings which have been used in the said conveyance which have been extracted above. The Supreme Court held that the Defendants had expressly granted an easementary right to use the passage in the sale deed. In paragraph 13 of that decision, the Supreme Court held this:

13. The relationship of defendant Nos.1 and 2 will not negate the grant of easement right of passage granted to her in the sale deed only because the recital is generic in nature and usually put by the deed writers. Since there is specific mention of easement rights reserved for defendant No.2 which recital is supported by a strip of land 16 feet wide which provides access to the plot of land purchased by defendants and also to the Plaintiff. Once the land has been sold with the right of access through the land adjoining the property sold,

such right could not be exclusively conferred to the plaintiff in the sale deed dated May 31, 1988.

40. It was thus held that even where the recitals are generic in nature it does not negate the grant of an easement right of passage granted to the Defendants. Once a land has been sold with the right of access through the land adjoining the property sold, it was held by the Supreme Court that that such right could not be exclusively conferred to the Plaintiff in the sale deed. The distinction sought to be drawn on behalf of the Creados is that in the facts of that case, the conveyance in favour of the Defendants, specifically referred to the pathway, in respect of which easementary rights were held to be conveyed is not acceptable. In fact, in that case, before the Supreme Court the conveyance of the successful party in whose favour the easement was found to be granted did not specifically mention a rectangular pathway in respect of which it was held that there was easementary right granted. Notwithstanding that, the Supreme Court in interpreting the clause in question which is similar to the clause in the said conveyance concluded that the easementary right was deemed to have been conveyed in respect of the said pathway. In the present case, the internal roads have clearly been set out in the layout plans annexed to the conveyance and hence it is apparent that

the easementary rights in respect of the internal roads have been expressly granted in favour of the Khans.

41. The fact that the internal access roads in the Silver Beach Estate were meant for use of all the occupants of the respective plots in the Silver Beach Estate is borne out by terms and conditions of the MCGM, which make it abundantly clear that 'all internal and private access roads' form part of the proposed layout of the Silver Beach Estate. These Terms and Conditions described by the MCGM are annexed at Exhibit "A" to the conveyance and in the conveyance, it is provided that

AND THIS INDENTURE FURTHER WITNESSETH that in pursuance of the aforesaid agreement for sale and in consideration of the premises the Purchasers for themselves their heirs, executors, administrators and assigns do hereby covenant with the Vendors and their heirs, executors, administrators and assigns with the intention and object that this covenant shall run with the land hereditaments and premises described in the Schedule hereunder written and shall be binding on the owner or owners for the time being and all persons having any interest in the said land hereditaments and premises described in the Schedule hereunder written, that:-

(a) The Purchasers shall abide by and carry out all the terms and conditions as are prescribed by the Municipal Corporation for Greater Bombay for sanctioning the sub-division in respect of the land hereditaments and premises bearing Survey No.74A(Part), Survey No.40, Hissa No.3, Survey No.38, Hissa No.1, Survey No.5,

Hissa No.4A(Part) and 4C(Part) whereof the said land hereditaments and premises described in the Schedule hereunder written forms part, a copy whereof is annexed as Exhibit "A" hereto in so far as the same are applicable to the said land, hereditaments and premises more particularly described in the Schedule hereunder written"

The Schedule to the Indenture is as follows:

"ALL THAT PIECE OR PARCEL of land or ground together with building and structure thereon situate lying and being at Village Juhu in Greater Bombay in the Registration Sub-District Bandra District Bombay Suburban (being Plot No.2 of Sub-Division of Property known as Silver Beach Estate bearing Survey No.74A (Part) Survey No.40, Hissa No.3, Survey No.38, Hissa No.1(Part) Survey No.5, Hissa No.4A(Part) and Hissa No.4C (Part) and which Plot No.2 admeasures 2025 Square yards (equivalent to 1692.90 Square Metres) or thereabouts."

42. It has thus been provided that the Khans are to abide by and carry out all the terms and conditions prescribed by the MCGM and which would include the term that all the internal and private access roads shall be constructed and lighted to the Municipal specification. The contention on behalf of the Creados that the words "insofar as the same are applicable to the said land, hereditaments and premises more particularly described in schedule hereunder written" and in the schedule plot No.2 has been defined, would mean that all the terms and conditions of the MCGM, are not applicable to the Khans and only those terms and

conditions would be applicable to the Khans, wherein plot No.2 has been specifically mentioned, cannot be accepted. In fact, such interpretation of the Creados would mean the initial words in the said clause would not been given effect to i.e. "The purchaser shall abide and carry out all the terms and conditions as are prescribed by the MCGM for sanctioning the sub-division in respect of the land, hereditaments and premises" redundant. Further, such interpretation would run contrary to condition 25 of the Terms and Conditions of the MCGM which provides that these terms and conditions of the sub-division shall be binding not only on the owner for the time being but also on its heirs, executors, administrators, assignees, and every person deriving title through or under him. Thus all the terms and conditions of the sub-division are binding on the Khans.

43. In the undertaking furnished by the Creados on 9th September, 1975, the subject thereof was in respect of the entire Silver Beach Estate and would also be applicable to the Khans Plot No.2. It was provided therein that the owners of the Silver Beach Estate will carry out the terms and conditions of the MCGM. In the schedule which is referred to in the 1975 undertaking it contemplates available development potential of

13,863.87 Sq.mtrs. for the balance layout aside from plot No.2 and the plan shows that the area of the internal roads has been deducted while computing this area of permissible area FSI. This computation and the undertaking given by the Creados on that basis clearly reveals that the Creados were at all times cognizant of the fact that the internal roads were to be jointly used and / or maintained by all the plot holders of the entire Silver Beach Estate layout and could not be developed or constructed upon.

44. Considering that I have found in favour of Khans insofar as the internal access roads viz. that an easementary right of use of the internal access roads on the Silver Beach Estate has been granted to the Khans by way of conveyance dated 31st March, 1997 it would not be necessary to go into the alternative issue as to whether the Khans had acquired an easementary right by way of prescription under Section 15 of the Indian Easements Act, 1882. However, considering that the Khans are also claiming an easementary right in respect of a certain portion of land on Plot No.1 viz. "S" shaped path from the rear gate of plot No.2 to the internal access road, which I do not find had been granted to them by way of conveyance as there is no reference to such 'S' shaped path in either the conveyance or the layout plan attached thereto,

it would be necessary to consider the easementary right by way of prescription in that context. The submissions made on both sides are to the effect that the easementary right by way of prescription has been expressly provided for under Section 15 of the Indian Easements Act, 1882, and the party claiming to have acquired such a right over the land of another peaceably as an easement is a matter of right and this shall be without interruption and for 20 years. Explanation to Section 15 of the Indian Easements Act, 1882 provides that to constitute interruption to that easementary right there must be an actual cessation of the enjoyment by reason of the obstruction by the act of some person other than the claimant and that such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof. The law is well settled that to constitute an interruption of a party's enjoyment of the easementary right there must be submission to or acquiescence in the said obstruction for at least one year and that there would be no submission / acquiescence if the party has communicated to the party causing the obstruction that he does not submit to or acquiesce in it. Further, to constitute an interruption there must be an actual discontinuance coupled with submission to or acquiescence in that discontinuation. These are the fundamental basis for considering whether a party has

acquired an esementary right by prescription. In the present case, it is an established fact that the Khans were enjoying a right of way over a portion of the land in plot No.1 of the Creados i.e. the 'S' shaped path to access the internal access roads and this was clearly from the year 1971 i.e. the date of the conveyance being entered when the Khans became the owners of plot No.2. It is an admitted position that prior to 1971, the Khans were only tenants and as tenants they cannot claim an easementary right by way of prescription and therefore the starting point would be the conveyance by which the Khans became owners of plot No.2. There is sufficient correspondence on record to establish that the Khans were using the 'S' shaped path leading to the internal access roads and from the correspondence it is apparent that they were never prevented from using the 'S' shaped path leading to the internal access road. In fact, from the correspondence, the real dispute was using of the internal access road where a certain gate i.e. 'Gate A' was put up by the Creados on the internal road and for a short period access of trucks on the internal access road to access plot No.2 were prevented. However, there was never any obstruction on the 'S' shaped path leading to the internal access road, till the year 2009 when the said plot No. A was being

developed by M/s. Kyrus Industries Ltd. who had put up structures on the 'S' shaped path.

45. The decisions which have been relied upon on behalf of the Creados viz. *Siti Kanta Pal & Anr. (Supra)*, *Ravinder Kumar Sejwal & Anr. (Supra)* and *Shaikh Khoda Buksh (Supra)* are in the context of the law of limitation in filing a Suit claiming that a party has acquired an easementary right by way of prescription and the extinguishment of that right when a party seeks permission for access of way. Firstly, it is apparent that at no point of time did the Khans seek permission for access from the rear gate of Plot No.2 to the 'S' shaped path for access to the internal access road. Secondly, the Law of Limitation for filing a suit claiming acquisition of an easementary right by prescription is to be computed from 20 years during which the party acquiring the easementary right of prescription has enjoyed the right of way over the land of another and ending within two years from the interpretation of such easementary right. The Khans clearly enjoyed the right of way over the land of Creados from 1971 and such right of way was not in any way interrupted till the year 2010 when the said M/s. Kyrus Industries having been conveyed the right of development of Plot No. A by Creados had set up structures in front of the rear gate of

plot No.2 which blocked the access of the Khans to the 'S' shaped path. The Khans have filed the Suit in the year 2011. Thus clearly within the two years as provided for under Section 15 of the Indian Easements Act, 1882. Hence, the Khans Suit is not in any way barred by the law of limitation.

46. In my view, *prima facie*, the Khans have established that they have been granted an easementary right to the use of the internal access roads by way of conveyance as well as having an easementary right by way of prescription over the 'S' shape path leading up to the internal access road. In view thereof, the Khans are entitled to the relief sought for in their Notice of Motion in terms of prayer clauses (a) and (b).

47. In view of granting relief in the Khans Notice of Motion, the Creados Notice of Motion which seeks to restrain the Khans from entering on the internal access roads and using the 'S' shaped path from the rear gate of plot No.2 cannot be granted. This is in view of my finding that the Khans have established that they have been granted an easementary right by the said conveyance in respect of use of the internal access roads including the internal access road on plot No. A as well as an easementary right by

prescription over the 'S' shaped path from the rear gate of plot No.2 to the internal access road which is also on the plot, No. A. Accordingly, no relief can be granted in the Creados Notice of Motion.

48. Hence, I pass following order:-

- (a) Notice of Motion No.3614 of 2011 in Suit No.2985 of 2011 is made absolute in terms of prayer clauses (a) and (b).
- (b) Notice of Motion No.1599 of 2010 in Suit No.1571 of 2010 is dismissed.
- (c) There shall be no order as to costs.

(R. I. CHAGLA J.)

49. The learned Counsel appearing for the Applicant in Notice of Motion No. 1599 of 2010 in Suit No. 1571 of 2010 applies for a stay of the judgment and order.

50. This application deserves to be rejected, considering that I have found that the Khans have established that they have been granted an easementary right to the use of the internal access roads by way of conveyance as well as having an easementary right by way of prescription over the 'S' shaped path leading upto the internal access road and thereby the Notice of Motion No. 3614 of 2011 in Suit No. 2985 of 2011 have been made absolute in terms of prayer clauses (a) and (b).

51. Insofar as the Court Receiver who was appointed by the order dated 16th January 2019 of this Court in the Notices of Motion which was for the limited purpose of inspecting the said Silver Beach Estate and Plot No. 2 belonging to Khans. In view of the above judgment and order, the Court Receiver stands discharged subject to payment of his costs and charges and without passing of the accounts.

(R. I. CHAGLA J.)