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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO. 1642 OF 2012

1. Dr. Dilip B. Raja
2. Smt. Lilavati B. Raja
both adults Indian inhabitants, Residing at
Flat No.701/C, Shree Arihant Apartment,
31, D. B. Marg, Mumbai Central,
Mumbai – 400 008.

... Appellants

Versus

1. Shree Arihant Apartment Co-op. Housing
Society, Duly registered under the
provisions of Maharashtra Co-op.
Society's Act, having registration No.
BOM/WD/HSG/TC/5868/94, having its
office at 'C' Wing, Shree Arihant
Apartment, 31, Dr. Bhadkamkar Marg,
Mumbai Central, Mumbai – 400 008.
2. Narpatraj Besarmal Mehta,
adult, Indian inhabitant, residing at,
Adinath Apartment, B-Wing, 281, Tardeo
Road, Mumbai – 400 007.
3. Hemchand Santokchand Bafna,
adult, Indian inhabitant, residing at,
Sukhsagar Apt, 33, D.B. Marg, Mumbai-8
4. Pukharaj Chunnilal Bafna,
adult, Indian inhabitant carrying on
business as a sole proprietor in the first
name of M/s. Paras Enterprises, having its
office at Veena Chambers, 3rd Floor, 21,
Dalal Street, Fort, Mumbai – 400 023.

... Respondents

**ALONG WITH
FIRST APPEAL NO. 31 OF 2016**

1. Dr. Dilip B. Raja
2. Smt. Lilavati B. Raja
both adults Indian inhabitants, Residing at
Flat No.701/C,,Shree Arihant Apartment,
31, D. B. Marg, Mumbai Central,
Mumbai – 400 008.

... Appellants

Versus

1. Shree Arihant Apartment Co-op. Housing Society, Duly registered under the provisions of Maharashtra Co-op. Society's Act, having registration No. BOM/WD/HSG/TC/5868/94, having its office at 'C' Wing, Shree Arihant Apartment, 31, Dr. Bhadkamkar Marg, Mumbai Central, Mumbai – 400 008.
2. The Municipal Corporation of Greater Mumbai, a Statutory Body having its office at Mahapalika Marg, Fort, Mumbai – 400 001.
3. The Municipal Commissioner, the Municipal Corporation of Greater Mumbai, Mahapalika Marg, Fort, Mumbai – 400 001.
4. The Executive Engineer, (Building Proposal) City-I, The Municipal Corporation of Greater Mumbai, Office - Building, M 3rd Floor, 10, Shaik Hafidudin Mag, Byculla, Mumbai – 400 008.
5. The Assistant Municipal Commissioner, The Municipal Corporation of Greater Mumbai, having its office at D Ward, Municipal Office, Jobanputra Compound, Nana Chowk, Mumbai – 400 007.
6. Narpatraj Besarmal Mehta,
adult, Indian inhabitant, residing at,
Adinath Apartment, B-Wing, 281, Tardeo
Road, Mumbai – 400 007.

7. Hemchand Santokchand Bafna,
adult, Indian inhabitant, residing at,
Sukhsagar Apt, 33, D.B. Marg, Mumbai-8
8. Pukharaj Chunnilal Bafna,
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business as a sole proprietor in the first
name of M/s. Paras Enterprises, having its
office at Veena Chambers, 3rd Floor, 21,
Dalal Street, Fort, Mumbai – 400 023.

... Respondents

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Mr. Venkatesh Dhond, Senior Advocate along with Mr. Rohan Kadam i/by
Mr. Sandeep R. Waghmare, Advocates for the Appellants in both First
Appeals.

Mr. Khan Javed Akhtar, Advocate for the Respondent No.1 in both First
Appeals.

Ms. Sheetal Mane Tadke, Advocate for Respondent Nos. 2 to 4 in
FA/31/2016.

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CORAM : R.D. DHANUKA, J.
RESERVED ON : 6th MARCH, 2020
PRONOUNCED ON : 19th MAY, 2020

JUDGMENT :

. By First Appeal No. 1642 of 2012 filed by the appellants (original
defendant nos. 1 and 2), the appellants have impugned the judgment and
award dated 12th September, 2012 passed by the learned Judge, City Civil
Court, Mumbai in S.C. Suit No.1642 of 2009 thereby decreeing the suit filed
by the respondent no.1 and declaring the agreement dated 28th December,
1993 as bad in law, null and void and stood cancelled to the extent of the
'sale of portion of terrace' and directing the appellants to handover the

possession of the alleged common terrace is concerned.

2. First Appeal No. 31 of 2006 is filed by the appellants (original defendants nos. 5 and 6) *inter-alia* impugning the judgment and order dated 28th October, 2015 passed by the learned Judge City Civil Court, Mumbai in L.C. Suit No. 1543 of 2009 thereby partly decreeing the suit filed by the respondent no.1 (original plaintiff) by cancelling and setting aside the regularization order passed by the respondent nos. 2 to 5 (Municipal Corporation of Greater Mumbai and others) in respect of the suit structure and directing the respondent nos. 2 to 5 to take appropriate action against the appellants by following due process of law in respect of the alleged unauthorized structure raised on terrace of the suit building. The appellants in both these appeal are common. The respondent no.1 (original plaintiff) in both these appeals and some of the other respondents in both these appeals are common. By consent of parties, both these appeal were heard together and are being disposed of by a common order. Some of the relevant facts for the purpose of deciding both these appeals are as under:-

3. Respondent Nos. 3 to 5 in First Appeal No. 1642 of 2012 had carried out construction on a plot of land bearing City Survey No.2/248 of Tardeo Division and admeasuring 1958.20 sq. yards equivalent to 1687.35 sq. mtrs. or thereabouts and situate at 31, Dr. Bhadkamkar Marg. The respondent nos.2 to 5 executed various agreements in support of various flats sold by

them in favour of various flat purchasers. By a letter of allotment dated 30th June, 1992, the respondent nos. 2 to 5 had allotted flat being flat no. 701-A on the 7th floor and part of the terrace above the 7th floor in the building known as Arihant Appartment 'C' Building to Suresh M. Jain and S.P. Choudhary for the total consideration of Rs.8,00,000/-. By an agreement dated 28th December, 1993, between the respondent nos. 2 and 3 and the appellants, the respondent nos. 2 and 3 agreed to sell the said flat no. 701, 701-A on the 7th floor and part of the terrace, above the 7th floor which was allotted to Suresh M. Jain and S.P. Choudhary for total consideration of Rs.9,00,000/-. The said Suresh M. Jain and S.P. Choudhary were confirming parties to the said agreement for sale.

4. In recital VIII, it was provided that the disputes and differences arose between the owner and the promoters with regard to their respective rights which were referred to arbitration. The learned arbitrator made an award on 11th April, 1992. The owner became entitled to flat nos. 101 and 102 on the 1st floor, flat no. 701 on the 7th floor and terrace above the 7th floor. The promoters become entitled to remaining premises of the building under construction. In clause 11 of the said agreement, it was provided that promoters had confirmed and agreed that the purchasers shall be exclusively entitled to a portion on terrace shown in green colour in the plant annexed to the said agreement and shall be exclusively entitled to use, occupy, possess and enjoy the said portion of the said terrace in such manner as the

purchasers may deem fit.

5. It was further provided that the purchasers shall be entitled to put a separate staircase to have direct access to the said terrace through their flat no.701 and the promoters and/or the purchasers of the other premises in the said building shall not be entitled to raise any objection of any nature whatsoever in that respect.

6. In clause 11(d) of the said agreement it was provided that the promoters i.e. respondent nos. 2 and 3 herein represented and confirmed that there was about 145 sq. ft. balance and unutilized FSI out of the permissible FSI as per the rules and regulations in respect of the said property which FSI of 145 sq. ft. could not be consumed and utilized by the promoters as the same was not possible as per the Development Control Rules and Regulations of Bombay Municipal Corporation applicable at that time. It was provided that the purchasers shall be entitled to put temporary or permanent construction or irrigation or shelters or enclosure on the said terrace, if the same was permitted by the Municipal Corporation by utilization and consumption of the balance unutilized FSI of about 145 sq. ft. and/or if permitted free of FSI or even otherwise. It was further provided that the owners, promoters and confirming parties however shall have no responsibility or liability for such works if any that may be carried out by the purchasers. The promoters will not use the said FSI of 145 sq. ft. anywhere.

The owner and the promoters shall not permit any one else to utilize the said balance FSI of 145 sq. ft.

7. In clause 11(f) of the said agreement it was provided that the promoters and/or the purchasers of the other premises shall not interfere with the right, title and interest of the purchasers in respect of the said portion of the said terrace thereby allotted. In clause 12 of the said agreement it was provided that the purchasers shall not have claim save and except in respect of the particular premises inclusive of terrace area, common area, facilities and limited common areas and facilities, thereby agreed to be acquired and all other open space/unallotted parking space/flats/rooms/offices/shops/garages/lobbies/staircases/terraces etc. will remain the property of and/or any part thereof is transferred to the said organization as mentioned in the said agreement but subject to the rights of the promoters under the said agreement.

8. In Seventh Schedule of the said agreement, the list of the portions of the properties not allowed to be utilized were terraces except allotted to particular premises and various other portions of the properties specifically mentioned therein. The said agreement was duly registered with the Registrar of Assurance. The appellants paid the entire consideration to the respondent nos. 2 and 3 under the said agreement for sale.

9. On 21st December, 1992, the respondent nos. 2 and 3 entered into another agreement in favour of Mr. Jitendra Lalchand Shah one of the office bearer of the respondent no.1 society in respect of the flat no. 702 on the same floor adjoining to the suit flat which was sold to the appellants for consideration of Rs.7,00,000/-. Clause 13 of the said agreement provided that the owner and/or his assignee and transferee shall be entitled to allow exclusive use of any areas of the said terrace to any party to their choice. The purchaser and/or the purchasers of the other premises in the said building shall not be entitled to raise any objection of whatsoever kind or nature and shall not be entitled to use of such terrace or open space sold and/or allotted by the owner and/or promoters to the purchaser of such terrace unless the purchaser himself is such purchaser or the purchaser of such terrace shall be exclusively entitled to use the terrace of open space sold and/or allotted to him. It was further provided that the owner/promoter shall be entitled to transfer, assign, dispose off and/or sell in any manner they deem fit or proper the said terrace, open space etc. to anybody on such price, terms and conditions as the promoters deems fit. The purchasers along with other purchasers will not raise any objection of whatsoever nature or kind.

10. In clause 13(c) of the said agreement, it was provided that the owner/promoters shall be entitled to sell or otherwise dispose off the right to the terrace or terraces of the said building for the purpose of construction or advertisement/hoardings or any other use permissible by law, so long as the

means of access is available to the proposed society for approaching the water tanks and the lift room.

11. Clause 24 of the said agreement provided that the purchaser also agreed and undertakes not to use or permit to be used the terrace on the top floor of the said property which shall exclusively belong to the promoters and/or purchasers of the flats on the 7th floor as per writing between the promoters and the concerned parties.

12. Clause 34 of the said agreement provided that the purchasers agrees that the terrace above the 7th floor shall belong exclusively to Pukhraj Chunilal Bafna who shall be entitled to use, occupy, possess and enjoy the said terrace exclusively and the purchasers agreed and undertake not to obstruct or raise any objection in that regard. The said Pukhraj Chunilal Bafna shall be entitled to sell, transfer, assign the said terrace to any person or party. The said Pukhraj Chunilal Bafna shall also be entitled to let, sub-let or in any manner deal with the said terrace and the purchasers thereby irrevocably concerned with to the same.

13. Clause 45 of the said agreement provided that the promoters or the persons nominated by the promoters or the person to whom the rights and benefits conferred under the subsequent clauses were assigned and shall have absolute right to make additions, alterations, raise any storeys or put up

additional structure as may be permitted by the Municipal Corporation and the Competent Authorities. Such additions, alterations, structures and storeys will be the sole property of the promoters and/or its nominees or assignees as the case may be and will be entitled to dispose of the same in any way they choose and the purchasers gave consent to the same. The terrace/s of the building/s till the same is/are allotted to any purchaser and/or agreed to be sold as well as the parapet walls shall be the sole property of the promoters or its nominees or assignees.

14. The said clause further provided that the agreement with the purchaser and all other purchasers of other premises in the said building shall be subject to those rights of the promoters or its nominees or assignees who shall be entitled to use the said terrace/s therein as well as the said property and other purchasers shall not be entitled to any abatement in the price of all the premises therein. The promoters shall be deemed to be the owner of the such premises which have not been allotted and/or acquired and/or agreed to be sold at the time when the said property is transferred as mentioned in the said agreement. Seventh Schedule in the said agreement also provided for various portions of the property which were not allowed to be used by the said flat purchaser i.e. Mr. Jitendra Lalchand Shah who became office bearer of the respondent no.1 subsequently including terraces except 'a terraces allotted to particular premises'.

15. Pursuant to the agreement entered into between the appellants and the respondent nos. 2 and 3, the appellants constructed three side walls below the overhead water tank by utilizing the said FSI of 145 sq. ft. available on the plot. The said construction was carried out by the appellants prior to the formation of the respondent no.1 society. The respondent no.1 society was formed on 26th April, 1994 and was registered. The appellants accordingly started claiming to be owner of the said small room on the terrace of the building since then even prior to the formation of the society. On 6th May, 1994, the Municipal Corporation of Greater Mumbai issued a completion certificate pursuant to the application dated 6th February, 1993 submitted by an Architect appointed by the respondent nos. 2 and 3 in respect of the said building.

16. On 17th February, 1993, the Municipal Corporation issued occupation certificate for occupying the entire building i.e. ground + 7 upper floors, subject to various conditions. After about 12 years, on 30th January, 2005, the respondent no.1 society addressed a letter to the appellants alleging breaches on the part of the appellants for carrying out construction of the room on the 7th floor. The appellants by their advocate's letter dated 10th February, 2005 responded to the said letter and denied the allegations made therein. The appellants informed the respondent no.1 that there was a transaction in respect of flat nos. 701 and 701-A including part of terrace & FSI of 145 sq.ft. between the appellants and the respondent nos.2 and 3. The appellants

have been the owner and were in the enjoyment of the said area since last 11 years to the knowledge of all the concerned members of the society. The society also had collected the maintenance charges from the appellants including the maintenance of that area of the terrace since beginning. The appellants placed various facts on record and called upon the respondent no.1 society to withdraw the said notice.

17. The appellants thereafter filed an application seeking direction under Section 79(2) of the Maharashtra Co-operative Societies Act, 1960 against the respondent no.1 before the learned Deputy Registrar, Co-operative Society, D Ward, Mumbai, on 21st April, 2005. The Deputy Registrar of Co-operative Society passed an order under Section 79(2) of the Maharashtra Co-operative Societies Act, 1960 directing the managing committee of the respondent no.1 to issue the said certificate in the name of the appellants in respect of flat nos. 701 and 701-A. The Deputy Registrar also directed the respondent no.1 not to raise any dispute about terrace premises of the flat nos.701 and 701-A of the appellants, since the builder had granted possession and ownership of terrace as per Sale Deed in their favour. The Deputy Registrar directed that if the appellants wanted to sell their flats in future, the permission was being granted through the Office of the Deputy Registrar and the respondent no.1 should not raise any hurdle and obstruction in that respect. The Deputy Registrar made it clear that if the respondent no.1 would not take any action on or before 15th May, 2004,

further action under Section 79(2) of the Maharashtra Co-operative Societies Act, 1960 would be taken against the society.

18. Being aggrieved by the said order dated 21st April, 2005, the respondent no.1 filed a Writ Petition bearing No. 1718 of 2008 in this Court against the Divisional Joint Registrar and the appellants. By an order dated 20th August, 2008 passed by this Court, this Court noticed that the said certificate was also issued by the society in favour of the appellants. The appellants agreed for deletion of the direction issued by the Deputy Registrar holding that the respondent no.1 society shall not raise any dispute about terrace premises of flat nos. 701 and 701-A sold to the appellants. This Court set aside the directions issued by the Deputy Registrar that if the appellants would sell all their flats in future, permission was granted through the said order and the respondent no.1 should not raise any hurdle and obstruction in that respect. In paragraph 7 of the said order, this Court granted liberty to the parties to raise a dispute as and when occasion arises in accordance with the law before appropriate forum.

19. The respondent no.1 society thereafter filed a suit in the month of July, 2009 against the appellant *inter-alia* praying for declaration that the agreement dated 28th December, 1993 executed between the appellants and the respondent nos. 2 and 3 was illegal, bad in law, null and void and cannot be enforced and stood cancelled to the extent of sale of portion of common

terrace of the building known as Arihant Apartment, 'C' Wing. The respondent no.1 also prayed for an order and direction against the appellants to handover the agreement dated 28th December, 1993 in respect of the sale of portion of common terrace of the building known as Arihant Apartment, 'C' Wing. The respondent no.1 also prayed for a mandatory order and injunction against the appellants to handover the possession of the portion of the common terrace of the society admeasuring 800 sq. ft. approximately to the extent of dividing wall to the respondent no.1. The said suit was resisted by the appellants by filing a written statement on various grounds. The appellants also raised a plea of limitation in the written statement. The respondent nos. 2, 3 and 5 did not file any written statement.

20. Learned Trial Judge framed four issues for determination. The appellant no.1 entered the witness box. The respondent no.1 examined Mr.Jitendra Lalchand Shah, one of the office bearer of the respondent no.1 as a witness. Both these witnesses were cross-examined by the other side. The Trial Court passed a judgment and order dated 12th September, 2012 holding that the said suit filed by the respondent no.1 was not barred by law of limitation. The Trial Court declared the agreement dated 28th December, 1993 between the appellants and the respondent nos. 2 and 3 as illegal, bad in law, null and void and stood cancelled to the extent of sale of portion of common terrace in the suit building and directed the appellants to handover the possession of the common terrace in the suit building to the respondent

no.1 Being aggrieved by the said judgment and award passed by the Trial Court, the appellants filed this First Appeal No. 1642 of 2012 in this Court. The said First Appeal came to be admitted.

Facts in First Appeal No. 31 of 2016 :-

21. It was the case of the respondent no.1 that the appellants had encroached open portion of the terrace of the building by constructing a dividing wall and a room below overhead water tank in the year 2003. The respondent no.1 made a complain to the Municipal Corporation of Greater Mumbai against such alleged encroachment by the appellants. The Municipal Corporation issued a notice under Section 351 of the Mumbai Municipal Corporation Act, 1888 on 10th March, 2003, in respect of such alleged unauthorized construction to the appellants. Sometime in the year 2004, the appellants applied for regularization of the work carried out by the appellant on the 7th floor of the building i.e. regularization of room at terrace of building 'C' on the 7th floor of the building. On 13th September, 2004, the Municipal Corporation of Greater Mumbai allowed the said application for regularization subject to various conditions.

22. The respondent no.1 filed a Writ Petition bearing No. 2588 of 2005 in this Court impugning the order of this Court dated 13th September, 2004. By an order dated 16th October, 2006, this Court disposed off the said writ

petition. This Court held that the issue raised in that petition was before the competent forum. If the respondent no.1 society succeeds before the competent forum, it would be open to them to move the Municipal Corporation based on that judgment and it would be on the Municipal Corporation thereafter to act according to law. In so far as the issue about the dividing wall on the terrace is concerned, this Court granted liberty to the society to file a representation to the Municipal Corporation. This Court directed the Municipal Corporation to pass an appropriate order according to law after hearing the society and the appellants.

23. On 27th January, 2009, the respondent no.1 society issued a notice to the Municipal Corporation and called upon it to initiate appropriate action against the appellants in response to the said statutory notice. The appellants by their letter dated 19th February, 2009 to the Municipal Corporation raised various issues. Sometime in the month of July, 2009, the respondent no.1 filed a suit bearing L.C. Suit No. 1543 of 2009 before the City Civil Court at Bombay against the appellants and the Municipal Corporation *inter-alia* praying for appropriate orders for cancelling the regularization granted by the Municipal Corporation to the appellant in respect of the room constructed below the overhead water tank and for mandatory order directing the Municipal Corporation to demolish the said room below the overhead water tank. The respondent no.1 also applied for an order and direction before the Municipal Corporation to take appropriate action against

the appellants for carrying out alleged illegal construction on the portion of alleged common terrace of the respondent no.1 society. The said suit was resisted by the Municipal Corporation and also by the appellants by filing separate written statements.

24. Learned Trial Judge framed four issues for determination. The appellant no.1 entered the witness box on behalf of the appellants. Mr.Jitendra Lalchand Shah, the Honorary Chairman of the respondent no.1 society entered the witness box on behalf of the respondent no.1. The Municipal Corporation examined Mr. Jeevan D. Rathod, Assistant Engineer (B&F) who filed his affidavit in lieu of examination-in-chief dated 16th December, 2013. All these witnesses were cross-examined. The Trial Court passed a decree and order on 28th October, 2015 thereby decreeing the said suit partly and has set aside the order of regularization passed by the Municipal Corporation. The Trial Court also directed the Municipal Corporation to take appropriate action against the appellant no.1 by filing due process of law in respect of alleged unauthorized structure raised on the terrace of the suit building and rejected the prayers in the plaint made by the respondent no.1. Being aggrieved by the said judgment and order, the appellants (original defendant nos. 5 and 6) filed this First Appeal No. 31 of 2016. The respondent no.1 society did not file any First Appeal or cross-objection.

Submissions on behalf of the appellants in First Appeal No. 1642 of 2012 and First Appeal No. 31 of 2016 :-

25. Mr. Venkatesh Dhond, learned senior counsel appearing for the appellants invited my attention to various averments made in the plaint filed by the respondent no.1 in both the suits filed by the respondent no.1, averments made by the appellants in the written statements filed in both the suits, averments made by the Municipal Corporation in Suit bearing L.C. No. 1543 of 2009, various documents annexed to a compilation of documents including agreement entered into between the appellants and the original owner of the suit property, agreement between the original owner and the Honorary Chairman of the respondent no.1 society, various portions of the oral evidence laid by the witnesses examined by the parties and various findings rendered by the Trial Court in both the suits filed by the respondent no.1.

26. It is submitted by the learned senior counsel that the respondent nos. 2 and 3 in First Appeal No. 1642 of 2012 who were the original owners of the suit property had entered into agreement with the appellants. The respondent nos. 2 and 3 had sold not only the flats but also 145 sq. ft. FSI which could not be utilized by the respondent nos. 2 and 3 by carrying out further construction in the building constructed by them. The appellants were allowed to carry out construction by utilizing the said 145 sq. ft. FSI by carrying out construction of room on the part of terrace sold by the respondent nos.

2 and 3 in favour of the appellants.

27. It is submitted by the learned senior counsel that in the agreement for sell entered into between the respondent nos.2 and 3 with the Chairman of the respondent no.1 society Mr. Jitendra Lalchand Shah and several other flat purchasers, there was a reference to the terrace of the 'C' wing of the building constructed by the respondent nos. 2 and 3. It was specifically mentioned in the said agreement that the respondent nos. 2 and 3 were the owners of the terrace on the 7th floor and were entitled to sell such terrace to the flat purchasers and that no other person except the purchasers of such terrace will have any right, title and interest of any nature whatsoever on the said terrace on the 7th floor. He submits that the said Mr.Jitendra Lalchand Shah was fully aware of the agreement between the appellants and the respondent nos. 2 and 3 in respect of the flats and also the terrace. The said Mr. Jitendra Lalchand Shah was also staying on the same floor and used to visit the flats purchased by the appellants along with terrace. He had also attended the birthday parties of the daughter of the appellants in the said flat along with terrace.

28. It is submitted by the learned senior counsel that the said Mr. Jitendra Lalchand Shah was interested in buying the said flats along with the terrace at a thrown away price. The appellants had categorically refused to sell that flat to the said Mr. Jitendra Lalchand Shah at thrown away price. The said

Mr. Jitendra Lalchand Shah accordingly adopted a vindictive approach against the appellants and filed frivolous complaints to the Municipal Corporation, to the authorities under the provisions of Maharashtra Co-operative Societies Act, 1960 and instigated the society to file frivolous suits against his client.

29. It is submitted by the learned senior counsel that the respondent no.1 society had been collecting separate amount towards maintenance in respect of the said terrace since inception. He submits that the said terrace which was sold to the appellants by the respondent nos. 2 and 3 was not a common terrace on the 'C' Wing of the building constructed by the respondent nos.2 and 3. None of the members of the respondent no.1 society or the respondent no.1 society itself had any right, title or interest of any nature whatsoever on the said portion of the terrace. The appellants had paid consideration in respect of the said terrace portion and also for purchasing 145 sq. ft. FSI from the respondent nos. 2 and 3.

30. It is submitted by the learned senior counsel that though it was to the knowledge of the respondent no.1 society about the agreement entered between the appellants and the respondent nos. 2 and 3 in respect of the said open terrace on the 7th floor which was not a common terrace as far back as on 28th December, 1993, after expiry of the limitation period, the respondent no.1 filed a suit against the appellants for a declaration that the agreement

dated 28th December, 1993 between the appellants and the respondent nos. 2 and 3 cannot be enforced, was illegal, bad in law, null and void and stands cancelled to the extent of sale of portion of common terrace and handing over possession of the alleged common terrace. Learned senior counsel strongly placed reliance on Article 58 of Schedule I to the Limitation Act, 1963 and would submit that each and every prayers of the said suit bearing No. 1642 of 2009 were barred by law of limitation.

31] Learned senior counsel invited my attention to the averments made in paragraph 19 of the plaint filed by the respondent no.1 alleging that the suit was within the period of limitation by relying upon the order dated 20th August, 2008 passed by this Court in Writ Petition No. 1718 of 2008 granting liberty to the respondent no.1 to initiate appropriate proceedings as and when occasion arises. Learned senior counsel invited my attention to the said order dated 20th August, 2008 passed by this Court and would submit that by the said order this Court had set aside the direction issued by the authority which was in the nature of anticipatory relief and granted liberty to the parties to raise a dispute as and when occasion arises in accordance with law before an appropriate forum. Cause of action for filing the said Civil Suit No. L.C. Suit No. 1543 of 2009 had not commenced on the date of the said order dated 20th August, 2008 but had already commenced when the agreement was entered into between the appellants and the respondent nos. 2 and 3 in respect of the said open portion of terrace along with sale of 145 sq.

ft. FSI.

32] It is submitted that the respondent no.1 society through its Honorary Chairman and all other members of the respondent no.1 society were fully aware that the respondent nos. 2 and 3 had reserved their right to sell the open portion on the terrace to any of the flat purchasers and making it clear that the other flat purchasers will not claim any right, title or interest in the said open terrace on the 7th floor. The period of limitation for filing a suit in respect of the prayers sought in the said L.C. Suit had already expired much before the said order dated 20th August, 2008 came to be passed by this Court in Writ Petition No. 1718 of 2008.

33. Learned senior counsel invited my attention to the finding rendered by the Trial Court in paragraph 21 and submits that the trial court has erroneously held that the suit is essentially for enforcement of statutory obligation under the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as 'MOFA Act, 1963' for short) and secondly the agreement to the extent of sale of terrace was not just avoidable but was *void ab initio* being in contravention with law and public policy. The Trial Court also held that the relief of possession, does not prescribe any limitation unless adverse possession is shown by the defendants which was not the case in the present suit.

34. Learned senior counsel invited my attention to the averments made by the respondent no.1 in paragraphs 8, 12 and 13 of the plaint in L.C. Suit No. 1642 of 2009 filed by the respondent no.1. The respondent no.1 society was registered on 26th April, 1994. The respondent no.1 itself had made a reference to agreement dated 28th December, 1993 executed between the appellants and the respondent nos. 2 and 3. In paragraph 6 of the plaint it was averred that the respondent no.1 society came to know about the agreement entered into between the appellants and the respondent nos. 2 and 3 about sale of the open terrace along with FSI admeasuring 145 sq. ft. only on receipt of the copy of the agreement along with letter of the advocate for the appellant dated 10th February, 2005.

35. In paragraph 12, it was alleged by the respondent no.1 that the appellants had illegally constructed a room below the overhead water tank on the common terrace in the year 2003 i.e. after the issuance of the occupation certificate dated 17th February, 1993. The appellant had constructed the dividing wall on the common terrace of the building of the respondent no.1 society on the basis of the agreement dated 28th December, 1993 in the year 2003. It is submitted that even if the date of the advocate's notice dated 10th February, 2005 was considered as a knowledge of the respondent no.1 society, the suit filed in the month of July 2009 is *ex-facie* barred by law of limitation. The suit was affirmed by the said Mr. Jitendra Lalchand Shah who was neighbour of the appellants and was interested in

buying the said flat nos. 701 and 701-A along with terrace.

36. Learned senior counsel for the appellants submits that the said Mr. Jitendra Lalchand Shah who was the Honorary Chairman of the respondent no.1 society or the office bearer at the relevant time was fully aware about the agreement entered into between the appellants and the respondent nos. 2 and 3 and also of the construction carried out by the appellants in the year 2003-2004. The learned senior counsel invited my attention to the averments made by the appellants in this regard in paragraphs 9 and 10 of the written statement filed by the appellants in the said L.C. Suit. At no point of time, the respondent no.1 had raised any objection against the appellant from carrying out construction on the terrace below water tank by constructing three side walls pursuant to the agreement entered into between the appellants and the respondent nos.2 and 3.

37. Learned senior counsel invited my attention to the photograph forming part of the compilation in support of his submission that that the said Mr. Jitendra Lalchand Shah who had attended birthday party of the daughter of the appellant in the year 1996 much prior to the date of three years of the respondent no.1 filing the said suit. The respondent no.1 society had not disputed the agreement entered into between the respondent nos. 2 and 3 that Mr. Jitendra Lalchand Shah in respect of another flat on the same floor and clearly mentioning that the terrace on the 7th floor exclusively

belong to the respondent nos. 2 and 3 and would be sold to one of the flat purchaser and that the other flat purchasers have no right, title and interest in support of such terrace. Flat No.702 was sold to the said Honorary Chariman Mr. Jitendra Lalchand Shah by the respondent nos. 2 and 3 in the year 1992 much prior to the date of sale of the flat nos. 701 and 701-A with open terrace.

38. Learned senior counsel invited my attention to the Sixth and Seventh Schedule of the said agreement for sale entered into between the respondent nos. 2 and 3 with the Chairman of the respondent no.1 society referring to the rights of the respondent nos. 2 and 3 in the open terrace. He invited my attention to the affidavit of evidence filed by Mr. Jitendra Lalchand Shah before the Trial Court and more particularly deposition in paragraphs 7, 13 and 14 and also to his cross-examination. He submits that the said Mr.Jitendra Lalchand Shah admitted in his cross-examination that he had taken possession of flat no.702 in the year 1994. He also admitted that the agreement in respect of the said flat no. 702 was executed between the respondent nos. 2 and 3 and himself in the year 1993. He had gone through the said agreement while purchasing the flat no.702 and did not take any objection while entering into the said agreement in respect of any part of the said agreement.

39. Learned senior counsel submitted that the said Mr. Jitendra Lalchand Shah also admitted that he knew the appellants since the year 1994 and used to visit the house of the appellants and had seen the entire flat in the year 1994. It is submitted that the said witness had admitted that he used to go to terrace about 10 to 12 times in a month. When the construction of the room on the 7th floor on the open terrace was going on, the said Mr. Jitendra Lalchand Shah did not take any objection. Dr. Nikhil Shah had taken objection in the Annual General Meeting of the society. The room in question was constructed prior to the year 2003.

40. Learned senior counsel submits that the said witness also admitted that the terrace was divided in two parts and out of that two parts one part was in possession of the appellants and the other part was in possession of the respondent no.1 society. The said witness also admitted that the appellants were paying maintenance charges of the said terrace room to the respondent no.1 society since 1994. The society was registered in the year 1994. Managing Committee of the respondent no.1 society was looking after the affairs of the society from the year 1994 to 2002. He also admitted that since the year 1994 the members of the society had no objection for accepting the maintenance charges from the appellants in respect of the terrace and room in question. The said witness also admitted that he was aware of the fact that the Municipal Corporation had regularized the construction of room in question. There was a room beneath the staircase on

the ground floor. The approval of plan from Municipal Corporation was taken by the society in the year 2005. The said witness admitted that since 1994, he was member of the Managing Committee of the respondent no.1 society and since then had been attending the meetings of the Managing Committee of the respondent no.1 society.

41. Learned senior counsel invited my attention to the affidavit in lieu of examination-in-chief filed by the appellant no.1 in the said L.C. Suit in 1642 of 2009 and more particularly deposition in paragraphs 2 to 6 and 8 to 10 and his cross-examination. The respondent no.1 was thus estopped by this acquiescence. He submits that the findings rendered by the Trial Court on the issue of limitation is *ex-facie* perverse and contrary to the evidence led by the parties. The Trial Court did not consider the pleadings and evidence filed by the parties. In view of the respondent no.1 society having filed false case and pleadings in spite of knowing the true and correct facts, the Honorary Chairman of the respondent no.1 society shall be punished for perjury.

42. Learned counsel for the respondent no.1 society on the other hand submits that the suit was filed by his client for declaration that the agreement entered into between the appellants and the respondent nos. 2 and 3 was void *ab-initio*. He submits that the respondent no.1 society was formed on 26th April, 1994. Even if the respondent no.1 society had collected any

maintenance charges from the appellants for occupying the terrace, such charges were illegally recovered and will not regularize the unauthorized construction carried by the appellants on the terrace which property belong to the respondent no.1 society.

43. Learned counsel for the respondent no.1 strongly placed reliance on the order dated 20th August, 2008 passed by this Court in the Writ Petition filed by the respondent no.1 and would submit that by the said order, this Court had granted liberty to the parties to raise a dispute as and when occasion arises. The suit was filed by the respondent no.1 within three years from the date of the said order dated 20th August, 2008. He submits that the Trial Court has thus rightly held that the agreement entered into between the appellants and the respondent nos. 2 and 3 in respect of the terrace was void *ab-initio* and accordingly directed the appellants to handover the said terrace portion to the respondent no.1 society.

44. Mr. Dhond, learned senior counsel for the appellants in rejoinder would submit that the said Writ Petition filed by the respondent no.1 was arising out of the order passed by the Deputy Registrar under Section 179(2) of the Maharashtra Co-operative Societies Act, 1960. The liberty granted by this Court in the order passed in the said Writ Petition was to be exercised in accordance with law. The said order passed by this Court would not revive a time barred suit and would not create a fresh cause of action in favour of the

respondent no.1 society. He submits that by the said order passed by this Court the bar of limitation was not waived.

Submission of the parties in First Appeal No. 31 of 2016 :-

45. Mr. Dhond, learned senior counsel for the appellants submits that the appellants had constructed three side walls below the water tank between 28th December, 1993 and 1st January, 1994. The respondent no.1 society was registered only on 26th April, 1994. There was no question of obtaining any prior permission from the society at that stage. No Conveyance Deed has been executed by the developer in favour of the society in respect entire property even till date. The respondent nos. 2 and 3 had already sold 145 sq.ft. FSI to the appellants with permission to carry out construction of a room on the said terrace. The appellants had applied for regularization of the said room by an application dated 4th November, 2004. The Municipal Corporation allowed the said application filed by the appellants for regularization of the said structure on 13th September, 2004.

46. The respondent no.1 society had filed a Writ Petition bearing No. 2588 of 2005 in this Court *inter-alia* challenging the order of regularization passed by the Municipal Corporation. The respondent no.1 also had filed a complaint before the Municipal Corporation. The Writ Petition filed by the respondent no.1 came to be dismissed. The Review Petition bearing No.

1543 of 2009 also came to be dismissed. The respondent no.1 thereafter filed a Civil Suit bearing No. 1543 of 2009 before the City Civil Court *inter-alia* impugning the order of regularization passed by the Municipal Corporation in respect of the said room constructed below overhead water tank.

47. Learned senior counsel invited my attention to the prayers in the said suit. He submits that his client had constructed three walls below the water tank by utilizing balance FSI. He strongly placed reliance on various paragraphs from the written statement filed by the Municipal Corporation clearly stating that the application for regularization made by the appellants was allowed by the Municipal Corporation. There was no violation of the FSI. He also invited my attention to the various paragraphs on the written statement filed by the appellants and the oral evidence led by the parties including evidence led by the Municipal Corporation.

48. It is submitted by the learned senior counsel that the Municipal Corporation is competent authority to regularize any structure and it is exclusively within the powers and domain of the Municipal Corporation to pass an order of regularization in accordance with law. The Municipal Corporation has regularized the said structure. The Trial Court could not have set aside the regularization order of the said structure. The respondent nos.2 and 3 had sold specific portion of terrace to the appellants along with flat Nos.701 and 701A which terrace was not a common terrace. A copy of

the plan was annexed to the agreement entered into between the appellants and the respondent nos. 2 and 3 showing a portion of the terrace sold to the appellants by the respondent nos. 2 and 3. The said structure was put up by the appellants without prior permission of the Municipal Corporation. There was no embargo against the respondent nos. 2 and 3 for carrying out construction by a room by utilizing balance FSI on the 7th floor of the said building or on any other portion of the buildings.

49. Mr. Khan, learned counsel for the respondent no.1 on the other hand invited my attention to the averments made in paragraph 4 of the plaint and would submit that the Municipal Corporation in its letter dated 17th February, 1993 had not mentioned anything in respect of the terrace room on the 7th floor. The completion certificate issued by the Municipal Corporation on 6th May, 1994 was also not in respect of the said terrace room constructed by the appellants. He invited my attention to the notice issued by the Municipal Corporation to the appellants under Section 351 of the Mumbai Municipal Corporation Act, 1888. He submits that in the written statement filed by the Municipal Corporation, there was no specific denial in respect of the building completion plan referred by the respondent no.1 society in the plaint.

50. It is submitted by the learned counsel that it was specifically mentioned in the agreement entered into between the respondent nos.2 and 3

and the appellants that the said agreement was subject to the provisions of MOFA Act, 1963. The learned counsel placed reliance on the Sixth Schedule of the said agreement and would submit that the water tank was common area available to all the members of the society. He also invited my attention to the Seventh Schedule which provides that the terraces except allotment thereof in particular premises. He submits that the respondent nos. 2 and 3 could neither sell the compulsory open space to the appellants nor the appellants could construct any structure in such compulsory open space which was for the benefit of all the members of the respondent no.1 society. The respondent nos. 2 and 3 admittedly had not given any NOC to the appellants to carry out construction of any room in the compulsory open space.

51. Learned counsel for the respondent no.1 placed reliance on the judgment of this Court in case of ***Madhuvihar Co-op. Hsg. Soc. Ltd. and Ors. v/s. Jayantilal Investments and Ors., 2006(3) Bom.C.R. 36*** and in particular paragraphs 26, 29 and 47 on the issue of limitation raised by the appellants in Suit No. 1642 of 2009 and would submit that the claims made by the respondent no.1 in the said suit were not barred by law of limitation.

52. Learned counsel for the respondent no.1 placed reliance on the Section 7 of the MOFA Act, 1963 and would submit that in the occupation certificate granted by the Municipal Corporation in respect of the said

building more particularly 'C' Wing, no room was shown to have been constructed by the appellants on the 7th floor and more particularly in the compulsory open space. No changes thus could be done by the appellants or by the developers without prior specific consent from the other flat purchasers after sale of various flats in the said building in their favour.

53. Learned counsel for the respondent no.1 placed reliance on the following judgments :-

- i. Judgment of this Court in case of ***Abdul Rashid Khan v/s. Brihanmumbai Mahanagar Palika and Ors., 2009(1) ALL MR 38*** and in particular paragraph 11.
- ii. Judgment of this Court in case of ***Ramagauri Keshvlal Virani v/s. Walkeshwar Triveni Co-operative Housing Society Ltd. and Ors., 2000(2) Bom.C.R. 687*** and in particular paragraphs 7, 10, 11 and 14.
- iii. An unreported Judgment of this Court delivered on 8th October, 2018 in case of ***Smt. Neelam Omprakash Singh and Ors. v/s. Awadhnarayan Laxmi Singh and Ors.*** in Writ Petition No. 8805 of 2017 and in particular paragraphs 2, 13 and 14.
- iv. Judgment of this Court in case of ***Esha Ekta Apartments Co-operative Housing Society Ltd. and Ors. v/s. Municipal Corporation of Mumbai and Ors., 2013(5) 30*** and in particular note (a).

- v. Judgment of Supreme Court in case of ***Nahalchand Laloochand Pvt. Ltd. v/s. Panchali Co-operative Housing Society Ltd., 2010(6) ALL MR 430*** and in particular note (c).
- vi. An unreported Judgment of this Court delivered on 17th December, 2011 in case of ***Rachanaa-I Co-op. Hsg. Society Ltd. v/s. Rachnaa – Engineers and Developers and Ors.*** in Appeal From Order No. 357 of 2010 and in particular paragraphs 3, 6 and 12.
- vii. An unreported Judgment of this Court delivered on 7th April, 2016 in case of ***M/s. Dosti Corporation v/s. Sea Flama Co-operative Housing Society and Ors.*** in Appeal From Order No. 117 of 2016 and in particular paragraphs 59 and 74 to 77.

54. Mr. Dhond, learned senior counsel for the appellants in rejoinder submits that in clause 11 of the agreement between the appellants and the respondent nos. 2 and 3, specific portion of the terrace was sold to the appellants which was clearly identified including the use thereof. Respondent Nos. 2 and 3 had also sold FSI admeasuring 145 sq. ft. to the appellants for carrying out construction of a room on the part of the terrace. He relied upon the completion certificate issued by the Municipal Corporation on 6th May, 1994. The appellants had purchased the two flats with terrace on the 7th floor and also 145 sq. ft. FSI after such completion certificate was issued by the Municipal Corporation.

55. It is submitted that it is not the case of the appellants that the said 145 sq. ft. FSI was sold by the respondent nos. 2 and 3 to the appellants or that the said room was constructed by the appellants before the issuance of completion certificate by the Municipal Corporation in favour of the appellants. The appellants had constructed the said three side walls below the water tank by utilizing 145 square feet FSI subsequently and had applied for regularization thereof to the Municipal Corporation. He submits that there is no dispute that the water tank on the 8th floor was the property of the respondent no.1 society.

56. In so far as the judgment of this Court in case of ***Madhuvihar Co-op. Hsg. Soc. Ltd. and Ors.*** (supra) relied upon by the learned counsel for the respondent no.1 is concerned, it is submitted by the learned senior counsel that the said judgment was subsequently set aside by the Division Bench of this Court. In so far as the judgment of this Court in case of ***Abdul Rashid Khan*** (supra) relied upon by the learned counsel for the respondent no.1 is concerned, learned senior counsel distinguished the said judgment on the ground that there was no case of regularization in that matter. Illegal construction was carried out by the member. However, in this case the application for regularization has been rightly sanctioned by the Municipal Corporation.

57. In so far as the judgment of this Court in case of **Ramagauri Keshvlal Virani** (supra) relied upon by the learned counsel for the respondent no.1 is concerned, it is submitted by the learned senior counsel that the said judgment would not apply to the facts of this case. In this case, the respondent no.1 society was not even registered when the said agreement entered into between the appellants and the respondent nos.2 and 3 for sale of the two flats, portion of the open terrace and 145 sq. ft. FSI was entered into. In so far as the judgment of this Court in case of **Smt. Neelam Omprakash Singh and Ors.** (supra) relied upon by the learned counsel for the respondent no.1 is concerned, it is submitted by the learned senior counsel that in the said matter the issue was whether the chamber summons for seeking agreement to the plaint was rightly allowed by the Trial Court or not. The said judgment does not apply to the facts of this case at all.

58. In so far as the judgment of this Court in case of **Esha Ekta Apartments Co-operative Housing Society Ltd. and Ors.** (supra) relied upon by the learned counsel for the respondent no.1 is concerned, learned senior counsel distinguished the said judgment on the ground that in that matter there was no order of regularization of the unauthorized construction, whereas in this case the Municipal Corporation rightly regularized the construction of three sides walls constructed by the appellants below the water tank. In so far as the judgment of Supreme Court in case of **Nahalchand Laloochand Pvt. Ltd.** (supra) relied upon by the learned

counsel for the respondent no.1 is concerned, it is submitted by the learned senior counsel that the facts before the Supreme Court in the said judgment were totally different and are clearly distinguishable in the facts of this case.

59. In so far as the judgment of this Court in case of ***M/s. Dosti Corporation*** (supra) relied upon by the learned counsel for the respondent no.1 is concerned, the said judgment is distinguished by the learned senior counsel on the ground that the developer in the said matter had constructed new buildings after formation of the society without taking specific consent from the flat purchasers in the other buildings. The facts before this Court were totally different in that matter and are clearly distinguishable. In that matter the entire FSI was already consumed by the developer, whereas in this matter 145 sq. ft. FSI was still available with the developer when the said agreement was entered into between the appellants and the respondent nos. 2 and 3.

60. In so far as the judgment of this Court in case of ***Madhuvihar Co-op. Hsg. Soc. Ltd. and Ors.*** (supra) relied upon by the learned counsel for respondent no.1 is concerned, learned senior counsel submits that there is no dispute about the proposition of law laid down by this Court in the said judgment. In this case, the developer had brought to the notice of all the flat purchasers in their respective agreement that there was a separate terrace and no other flat purchasers would be entitled to make any claim

or will have right, title or interest except the purchasers who would be sold the said terrace. The other flat purchasers were also aware of balance FSI available to the developers for carrying out construction. He submit that if the developer could have constructed a room by utilizing the said 145 sq. ft. FSI, no flat purchasers could have raised any objection. The developers have sold the said FSI to the appellants. The appellants rightly constructed three sides walls by utilizing the said FSI on which none of the flat purchasers had any right, title or interest of any nature whatsoever. No such objection thus could be raised by the members of the respondent no.1 society or even by the society itself.

61. Mr. Khan, learned counsel for the respondent no.1 society submits that no construction could be carried out under the water tank by the appellants.

62. Ms. Sheetal Mane Tadke, learned counsel for the respondent nos. 2 to 4 in First Appeal No. 31 of 2016 adopts the stand already taken by her clients i.e. Municipal Corporation in the written statement filed before the Trial Court in the Suit No. 1642 of 2009 and evidence led by her clients before the Trial Court. She submits that the Municipal Corporation had rightly regularized the structure constructed by the appellants on the 7th floor below the water tank and thus no interference with the said judgment and order passed by the Trial Court is warranted.

REASONS AND CONCLUSIONS :-

63. I shall first deal with the First Appeal No.1642 of 2012. It is an admitted position that the respondent nos.2 to 4 in this first appeal had carried out construction on the plot of land at Tardeo Division and executed various agreements for sale of flats in favour of various flat purchasers. It is not in dispute that by a letter of allotment dated 30th June 1992, the respondent nos. 2 to 4 had allotted flat bearing nos.701, 701-A on the 7th floor and also the part of the terrace in the building known as 'Arihant Apartment', 'C' Wing to Suresh M. Jain and S.P. Chaudhari for the total consideration of Rs.8 lakhs. By another agreement dated 28th December 1993, the respondent nos.2 to 4 agreed to sell the said flats and the part of the terrace to the appellants. The said Mr.Suresh M. Jain and Mr.S.P. Chaudhari were the confirming parties to the said agreement. In clause 11 of the said agreement, it was clearly provided that the promoters had confirmed and agreed that the purchasers shall be exclusively entitled to a portion of the terrace shown in the green colour in the plan annexed to the said agreement and shall be exclusively entitled to use, occupy, possess and enjoy the said portion of the terrace in the manner, the purchasers may deem fit in addition to the said flat nos.701 and 701-A.

64. It was further provided in the said clause that the purchasers shall be entitled to put separate stairs to have direct access to the said terrace through their flat no.701 and the promoters and/or the purchasers of the other

premises in the said building shall not be entitled to raise any objections of any nature whatsoever in that respect.

65. In clause 11(d) of the said agreement, it was clearly provided that the promoters had represented and confirmed that there was about 145 sq.ft. balance and unutilized FSI out of the permissible FSI as per the rules and regulations in respect of the said property. It was provided that the purchasers shall be entitled to put temporary or permanent construction or erection or shelter or enclosure on the said terrace, if the same was permitted by the Bombay Municipal Corporation by utilization and consumption of balance unutilized FSI about 145 sq.ft. and/or if permitted free of FSI or even otherwise. It was further agreed that the promoters as well as the confirming parties shall have no responsibility or liability for such work, if any, that may be carried out by the purchasers. The promoters will not use the said FSI of 145 sq.ft. anywhere else. The owners and the promoters shall not permit anyone else to utilize the said balance FSI of 145 sq.ft.

66. It is not in dispute that under clause 11 (f) of the said agreement, it was clearly provided that the said promoters and/or the purchasers of the other premises shall not interfere with the right, title and interest of the purchasers in respect of the portion of the said terrace thereby allotted to the appellants. In clause 12 of the said agreement, it was clearly provided that the purchasers shall have no claim save and except in respect of the

particular premises inclusive of terrace area, common area, facilities and limited common areas and facilities, thereby agreed to be acquired and all other open space/unallotted parking space/flats/rules/offices/shops/ garages/ lobbies/staircases/terraces etc. will remain the property of and/or any part thereof is transferred to the said organization as mentioned in the said agreement but subject to the right of the promoters under the said agreement. In the Seventh Schedule of the said agreement, the list of the portions of the properties not allowed to be utilized were terraces except allotted to the particular premises and various other portions of the properties specifically mentioned therein. Admittedly the said agreement was duly registered with the Registrar of Sub-Assurances.

67. It is also not in dispute that on 21st December 1992, the respondent nos.2 to 4 had entered into another agreement in favour of Mr.Jitendra Lalchand Shah, who was one of the office bearers of the respondent no.1 society in respect of the flat no.702 on the same floor adjoining to suit flat and the said terrace which was sold to the appellants for consideration of Rs.7 lakhs. The respondent no.1 did not dispute that the clause 13 of the said agreement entered into between the promoters and the said Mr.Jitendra Lalchand Shah, it was clearly provided that the owner and/or his assignee and transferee shall be entitled to allow exclusive use of any areas of the said terrace to any party of their choice. The purchasers and/or the purchasers of the other premises in the said building shall not be entitled to raise any

objection of whatsoever kind and nature and shall not be entitled to use such terrace or open space sold and/or allotted by the owner and/or promoters to the purchasers of such terrace unless the purchasers himself is such purchasers or the purchasers of such terrace shall be exclusively entitled to use the terrace of the open space sold and/or allotted to him.

68. It was further provided that the owners/promoters shall be entitled to transfer/assign/dispose of and/or sell in any manner they deem fit or proper the said terrace/open space etc. to anybody or such price, terms and conditions as the promoters deem fit. The purchasers along with other purchasers shall not raise any objection of whatsoever nature or kind. In clause 13(c) of the said agreement, it was clearly provided that the owners/promoters shall be entitled to sell or otherwise dispose of the right to the terrace or the terraces of the said building for the purpose of construction or advertisement/hoardings or any other use permissible by law, so long as the means of access was available to the proposed society for approaching the water tanks and the lift rooms.

69. Clause 24 of the said agreement further provided that the purchasers also agreed to undertake not to use or permit to use the terrace on the top floor of the said property which shall exclusively belong to the promoters and/or the purchasers of the flats on the 7th floor as per writing between the promoters and the concerned parties. Under Clause 34 of the said agreement

entered into between the promoters and the said office bearer of the respondent no.1 society, it was clearly provided that the purchasers agreed that the terrace shall exclusively belong to Pukhraj C. Bafna, respondent no.5 who shall be entitled to use, occupy, possess and enjoy the said terrace exclusively and the purchasers agreed and undertook not to obstruct or raise any objection in that regard. The said Pukhraj C. Bafna shall be entitled to sell, transfer or assign the said terrace any person or party. The said Pukhraj C. Bafna shall also be entitled to let, sublet or any manner to deal with the said terrace and the purchasers thereby irrevocably consented to the same.

70. Clause 45 of the said agreement clearly provided that the promoters or the person nominated by the promoters or the person to whom the rights and benefits conferred under the subsequent clauses were signed and shall have absolute right to make additions, alterations, raise any storeys or put up additional structure as may be permitted by the Municipal Corporation and the competent authorities. Such additions, alterations, structures and storeys will be the sole property of the promoters and/or its nominees or assignees as the case may be. They will be entitled to dispose of the same in any manner they choose and the purchasers gave consent to the same. The terrace/s of the building/s till the same is/are allotted to any purchaser and/or agreed to be sold as well as the parapet walls shall be the sole property of the promoters or its nominees or assignees.

71. It was further provided that the agreement with the purchasers and all other purchasers of other premises in the said building shall be subject to those rights of the promoters or its nominees or assignees who shall be entitled to use the said terrace/s therein as well as the said property and other purchasers shall not be entitled to any abatement in the price of all the premises therein. The promoters shall be deemed to be the owner of such premises which have not been allotted and/or acquired and/or agreed to be sold at the time when the said property is transferred as mentioned in the said agreement. Seventh Schedule in the said agreement also provided for various portions of property which were not allotted to be used by the said flat purchasers including Mr.Jitendra Lalchand Shah who became office bearer of the respondent no.1 society subsequently including the terraces except “a terrace allotted to particular premises.” Similar agreement was entered into by the promoters with several flat buyers in the said building.

72. Pursuant to the agreement entered into between the appellants and the promoters, the appellants constructed three side walls below the overhead water tank on the terrace by utilizing the said FSI 145 sq.ft. available on the plot. The said construction was carried out by the appellants prior to the formation of the respondent no.1 society. Admittedly the respondent no.1 society was formed only on 26th April 1994 and was registered. The appellants were in use of / started claiming

to be owner of the said small room on the terrace of the building since then along with those two flats bearing nos.701 and 701-A. On 6th May 1994, the Municipal Corporation of Greater Mumbai had issued a completion certificate pursuant to the application dated 6th February 1993 submitted by an Architect appointed by the promoters. On 17th February 1993, Municipal Corporation issued an Occupation Certificate for occupying the entire building i.e. ground plus 7th floor subject to various conditions.

73. For the first time, only in the year 2005 i.e. by letter dated 30th January 2005, the respondent no.1 society addressed a letter to the appellants alleging breaches on the part of the appellants by carrying out construction of a room on the 7th floor. The appellants admittedly by their advocate's letter dated 10th February 2005 denied the allegations made therein. The appellants thereafter filed an application under Section 79(2) of the Maharashtra Co-operation Societies Act, 1960 against the respondent no.1 before the learned Deputy Registrar, Co-operative Societies, 'D' Ward inter alia praying for seeking various directions under the said provisions.

74. It is not in dispute that on 21st April 2005, the Deputy Registrar of Co-operative Society passed an order under Section 79(2) of the said Act directing the Managing Committee of the respondent no.1 to issue a share certificate in the names of the appellants in respect of the said flat nos.701 and 701-A. In the said order, the learned Deputy Registrar also directed

the respondent no.1 not to raise any dispute about terrace premises of flat nos.701 and 701-A of the appellants since the builder had granted possession and ownership of the terrace as per sale deed in their favour. The Deputy Registrar also directed that if the appellants wanted to sell their flats in future, permission was being granted through the office of the Deputy Registrar and the respondent no.1. The Deputy Registrar made it clear that if the respondent no.1 would not take any action on or before 15th May 2004, further action under Section 79(2) of the said Act would be taken against the respondent no.1 society.

75. The respondent no.1 thereafter filed a writ petition bearing No.1718 of 2008 impugning the said order dated 21st April 2005 before this Court. By an order dated 20th August 2008 passed by this Court, this Court recorded that the appellants agreed for deletion of the direction issued by the Deputy Registrar holding that the respondent no.1 society shall not raise any dispute about terrace premises of flat nos.701 and 701-A sold to the appellants. This Court accordingly set aside the direction issued by the Deputy Registrar that if the appellants would sell their flats in future, permission was granted through the said order and the respondent no.1 should not raise any hurdle and obstruction in that respect. This Court granted liberty to the parties to raise a dispute as and when cause of action arises in accordance with law before appropriate forum.

76. It is not in dispute that only in the month of July 2009, the

respondent no.1 society filed a suit before Bombay City Civil Court against the appellants and the promoters inter alia praying for declaration that the agreement dated 20th December 1993 executed between the appellants and the promoters was illegal, bad in law, null and void and cannot be enforced and stood cancelled to the extent of sale of portion of common terrace of the building known as 'Arihant Apartment', 'C' Wing. The respondent no.1 also prayed for an order and direction against the appellants to hand over the agreement dated 28th December 1993 in respect of the sale of portion of common terrace of the building known as 'Arihant Apartment', 'C' Wing. The respondent no.1 also prayed for mandatory order and injunction against the appellants to hand over the possession of the portion of common terrace of the society admeasuring 800 sq.ft. approximately to the extension of dividing wall to the respondent no.1. The said suit was resisted by the appellants by filing written statement. The promoters did not appear before the trial Court in the said suit. The trial Court framed four issues for determination. The appellant no.1 entered the witness box. The respondent no.1 examined Mr.Jitendra Lalchand Shah, one of the office bearers of the respondent no.1 as a witness. Both the witnesses were cross-examined by the other side. The trial Court decreed the said suit by judgment and order dated 12th September 2012.

77. A perusal of the plaint in the suit filed by the respondent no.1 before

the City Civil Court indicates that it is an admitted position that the respondent no.1 society was registered on 26th April 1994. In paragraph 3 of the plaint, it is averred by the respondent no.1 that the building of the society consists of ground plus 7th floor and 8th floor is common terrace of the building (which includes the terrace of the appellants) as per sanctioned plan and occupation certification dated 17th February 2003 issued by the Municipal Corporation. It is averred in the said paragraph that there was common terrace on 8th floor of the said building whereupon only the overhead water tanks, lift machine room and stair case room were constructed/existed. The common terrace is being used by the society for mobile antenna for the years together. The suit had been filed for assertion of its alleged rights over part of the terrace.

78. In paragraph 5 of the plaint, it has been alleged that the appellants had illegally encroached upon the portion of common terrace of the building in violation of provisions of MOFA and Development Control Regulations, Greater Mumbai, 1991 and the Model Agreement. In paragraph 7 of the plaint, it is alleged that on perusal of the agreement dated 28th December 1992, it was noticed that builder had in the said agreement clarified that as per DC Regulation, it was not possible to the developer to consume balance FSI and as such permitted the defendant nos.1 and 2 (appellants) to put construction on the common terrace subject to the same being permitted by the Municipal Corporation. It is alleged that

FSI of 145 sq.ft. could not be utilized/consumed by the promoters as the same was not permissible as per DC Regulations.

79. In paragraph 8 of the plaint, it is alleged that bills showing levy of charges in respect of portion of common terrace had been originally issued in respect of flat no.701-A, included by the promoters for terrace prior to the management of building being transferred to the respondent no.1-Society. Upon formation of the society, the respondent no.4 was the Chief Promoter and on the management being taken by the society, the appellant no.1 became the Chairman of the society. In paragraph 9, the respondent no.1 relied upon letter dated 10th February 2005 addressed by the appellants to the Deputy Registrar, 'D' Ward, Malhotra House, Mumbai under Section 79(2) of the Maharashtra Co-operative Societies Act, 1960 seeking certain directions against the respondent no.1 society.

80. The respondent no.1 also placed reliance on the order dated 20th August 2008 passed by this Court in Writ Petition bearing No.1718 of 2008 directing that as and when occasion arises, parties can adopt appropriate proceedings. In paragraph 12, it is alleged that the appellants have illegally constructed a room below overhead water tank on the common terrace of the society building in the year 2003 i.e. after issuance of occupation certificate dated 17th February 1993 by the Municipal Corporation of Greater Mumbai. In paragraph 19 of the plaint, it is

alleged that in the order dated 20th August 2008, this Court in Writ Petition No.1718 of 2008 had granted liberty to initiate appropriate proceedings as and when occasion arises and as such the present suit is within time and the same is not barred by law of limitation.

81. In paragraph 21, it is alleged by the respondent no.1 that the respondent no.1 was filing the said suit through Mr.Jitendra L. Shah the Honorary Chairman of the respondent no.1 society duly authorized by the resolution passed by the managing committee in that behalf and that the said Mr.Jitendra L. Shah is aware of the facts of the present case. The respondent no.1 accordingly prayed for various reliefs in the said suit and more particularly for a declaration that the agreement entered into between the promoters and the appellants was bad-in-law, null and void and cannot be enforced and stood cancelled to the extent of sale of portion of common terrace and also seeking order and direction to hand over the portion of the said plot to the respondent no.1 society. The said suit was resisted by the appellants by filing written statement.

82. In the examination-in-chief of the appellant no.1 who entered the witness box on behalf of the appellants, he deposed as to how the appellants had purchased the Flat Nos.701, 701-A and part of the terrace. He also brought on record that the said room below the water tank was constructed in the year 1993. Members of the society were aware of the

construction and about his agreement with the developer with respect to sale of FSI for consideration. He also produced photographs of birthday celebration of his daughter in the year 1995. The said photographs were taken by him by his camera and developed at his instance in the year 1995. His daughter was seen in the said photographs. At that time, she was about 7 years old. In that event, wife of the Chairman of the respondent no.1 society and his children were seen as they were invited for his daughter's birthday. The said photos showed the terrace room and terrace portion in exclusive use and possession of the appellants at the time of the said birthday celebration in the year 1995 along with wife and children of Chairman Mr.Jitendra L. Shah.

83. It was deposed that the respondent no.1 was fully aware of existence of terrace room and the terrace in the possession of the appellants before formation of the society. In paragraph 6 of the said affidavit of evidence, the appellant no.1 also deposed that he had contemplated to dispose of the said flats along with room on the terrace in the year 2002-03 as his medical practice was more in suburb. Mr.Jitendra L. Shah who is present Chairman approached the appellant no.1 and offered to purchase the said flat premises and the said room from him. He deposed that the said Mr.Jitendra L. Shah demanded that the appellant no.1 should sell the said flat premises to him at thrown away price of about Rs.50 lakhs and if the same was not done as per the demand of the said Mr.Jitendra L. Shah, he

will not be permitted to ever sell the flat premises. He also threatened that he would use the promoter as an instrument and so also the respondent no.1 society to involve the flat premises in litigation and to blackmail the appellant no.1 into selling the flat premises at a price much below the market price as demanded by him.

84. In paragraph 7 of the affidavit in lieu of examination-in-chief, the appellant no.1 pointed out that in the said Writ Petition bearing No.2588 of 2005, the respondent no.1 had alleged that the said room and the dividing wall which were constructed by the appellants was illegal and contrary to the terms of the agreement entered into between the appellants and the developer. In paragraph 8, it was deposed that none of the flat purchasers ever objected to the construction of the said room and the user, occupation, possession and enjoyment of the said room, terrace portion along with wall dividing the terrace portion which was used by the appellants uninterruptedly from 1993.

85. The appellant no.1 also relied upon the maintenance bill issued in favour of the appellants prior to the formation of the society including the maintenance charges for the use of terrace. The appellant no.1 also relied upon the subsequent bills issued by the society after formation of society. He also relied upon the approved plan in respect of terrace room showing that the terrace was in two parts. He produced certified copy of the plan

with letter dated 4th November 2002 issued by the Municipal Corporation. He also relied upon the order passed by the Municipal Corporation regularizing the said construction carried out by the appellants below the water tank which order was passed on 30th April 2005.

86. In paragraph 15 of the affidavit in lieu of examination-in-chief, the appellant no.1 also deposed that the society has been collecting compensation/maintenance charges also in respect of delineated portion of terraces owned by the appellants and enhanced the amount from time to time. The appellant no.1 was cross-examined by the learned advocate for the respondent no.1. The examination-in-chief of the appellant no.1 was not shattered in the cross-examination conducted by the learned advocate for the respondent no.1. In the writ petition filed by the respondent no.1 society in this Court in the year 2005 impugning the order passed by the learned Deputy Registrar under Section 79(2) of the Maharashtra Co-operative Societies Act, in paragraph 4.5, it was alleged by the respondent no.1 that in or about February 2003, the appellants had commenced illegal construction activities upon the portion of terrace on 8th floor of the building admeasuring about 1000 sq.ft. built up area. It was further alleged that the appellants had carried out illegal and unauthorized construction of sub-dividing wall on the said common overhead water tank on the said common terrace on 8th floor of the said building. The office bearer of the respondent no.1 had objected to the same, however, the same

did not deter the appellants.

87. The respondent no.1 examined Mr.Jitendra L.Shah who is the Honorary Chairman of the respondent no.1 society as the only witness before the City Civil Court. In the resolution passed by the society, it was mentioned that the said Mr.Jitendra L. Shah was familiar with the facts of this case. In paragraph 5 of the affidavit in lieu of examination-in-chief, he admitted that the respondent no.1 society was registered on 26th April 1994. The building of the respondent no.1 society consists of ground plus 7th floor and 8th floor of common terrace of the building. He referred to the agreement dated 28th December 1993 executed between the developer and the appellants in paragraph 7 of the said affidavit of evidence. In paragraph 9 of the said affidavit, it is deposed by him that bills which had been originally issued in respect of the Flat No.701-A, the promoters had included the charges for terrace prior to the management of the building being transferred to the respondent no.1 society. He also referred to the Directives issued by the Deputy Registrar by an order dated 21st April 2005 and the order passed by this Court on 20th August 2008 in the writ petition filed by the society.

88. In his cross-examination, the said Mr.Jitendra L. Shah, the Honorary Chairman of the respondent no.1 society, admitted that he had taken possession of the flat no.702 in the year 1994 on the same floor on which

the suit premises were situated. The agreement in respect of the said flat purchased by the said witness was executed between him and the developer in the year 1993. He admitted that while purchasing the flat no.702, he had gone through the agreement and did not take any objection while entering into the agreement between him and the developer. He admitted that he knew the appellants since 1994. He used to visit the house of the appellants. He had seen the entire flat of the appellants in the year 1994. He became the Chairman of the respondent no.1 society after the year 2005. He admitted that he had gone to the flat of the appellants near about one and half years ago for giving wedding card of his daughter to the appellants. There is no internal staircase to go to the suit flat of the appellants. He used to go to the terrace for about 10 to 12 times for a month.

89. The said witness admitted that the appellants had constructed a room on the terrace of the building. When the construction of the said room was going on, at that time, he personally did not take objection. He however, volunteered that Dr.Nikhil Shah and Narayan Bhai had taken objection. The said objection was taken in the Annual General Meeting of the society. The room in question was constructed prior to the year 2003. He denied the suggestion that a room in question was constructed in the year 1994. In his cross-examination, he admitted that the terrace is divided in two parts and out of two parts, one part is in possession of the

appellants and another part is in possession of the society. One service antenna is on the lift room and another service antenna is on the terrace. These antennas are existing since the year 2000.

90. In paragraph 4 of the cross-examination, the said witness of the society admitted that the appellants were paying maintenance charges in respect of the terrace and room in question to the society from the year 1994. The said witness however, volunteered that since the year 2003, society was not accepting maintenance charges from the appellants. The society was registered in the year 1994. He admitted that elections of the managing committee were held during the period 1994 to 2003. The managing committee of the society was looking after the affairs of the society from the year 1994 to 2003. He admitted that since the year 1994, the members of the society did not take objection for accepting the maintenance charges from the appellants in respect of the terrace and the room in question.

91. In paragraph 5 of his cross-examination, he admitted that he was aware of the fact that Municipal Corporation of Greater Mumbai has regularized the construction of the room in question. He also admitted that there was a room beneath the staircase. He however, deposed that he did not know whether the plan in respect of the said room got sanctioned from the Municipal Corporation by the plaintiff-society in the year 2004. He

admitted subsequently that the approval of the plan from the Mumbai Municipal Corporation was taken by the society in the year 2005. He admitted that the suit room belonging to the appellants had been shown in the said plan.

92. The said witness also admitted in his cross-examination that since the year 1994, he was a member of the managing committee of the respondent no.1 society and had been attending the meetings of the managing committee of the society. He also admitted that the society did not raise any objection against the developer from putting an antenna on the terrace of the said building.

93. A perusal of the evidence on record clearly indicates that when the suit agreement was entered into between the developer and the appellants, the respondent no.1 society was not even formed. It is also an admitted position that till date, no conveyance deed has been executed between the developer in favour of the respondent no.1 society in respect of the plot and the building.

94. A perusal of the agreement entered into between the developer and the appellants in respect of Flat Nos.701, 701-A and 145 sq.ft. FSI clearly indicates that the said developer in the said agreement claimed to be the owner of the said flats as well as unutilized 145 sq.ft. FSI by carrying out

construction, if permitted by the Municipal Corporation. It was also made clear that none of the flat purchasers or the developers would have right, title or interest or would claim any interest in the said unutilized 145 sq.ft. FSI. Simultaneously in the agreement entered into between the developer with the said Mr.Jitendra L. Shah and the other members of the society, it was clearly provided that they will not have right, title or interest of any nature whatsoever on the terrace which would be sold by the developer in favour of some other purchasers. It was clearly provided in those agreements that it would be the purchasers of the said portion who would be entitled to claim right, title and interest in the said portion of the terrace and not other flat purchasers in the said building.

95. The said Mr.Jitendra L. Shah in his cross-examination admitted that he had read the agreement entered into between him and the developer. He did not raise any objection about the clauses in the said agreement. He also knew the appellants since 1974 and had visited the house of the appellants on several occasions. His wife and daughter had also attended the birthday celebration of the daughter of the appellants in the year 1995. The respondent no.1 did not dispute the photographs relied upon by the appellants produced in the evidence led by the appellant no.1 showing the terrace on the 7th floor in those photographs in possession of the appellants.

96. There is thus no substance in the submission of the learned counsel for

the respondent no.1 that the said structure was constructed by the appellants in the year 2003. The respondent no.1 in his evidence also admitted that he himself used to visit the terrace of the society several times in a year. He also admitted that the society had been collecting separate amount towards maintenance of the terrace portion and the said room in possession of the appellants for last several years and at least till 2003 even according to the respondent no.1.

97. A perusal of the record further indicates that on the ground floor, one of the occupants of the flat had constructed a structure below the staircase. The developer had applied for regularization of that structure. The society never raised any objection in respect of that structure. The plan issued by the Municipal Corporation in the year 2004 clearly indicated the existence of the construction carried out by the appellants on the terrace by utilizing 145 sq.ft. FSI and also the said structure constructed by the member of the society occupying the flat on the ground floor below the staircase. The respondent no.1 did not dispute this fact in the evidence.

98. The society or its members did not raise any objection in respect of the said agreement from 1993 till 2005. It was a specific case of the appellants in the written statement that when the appellants wanted to sell the said flats to shift to some other premises, the honorary Chairman of the society of the respondent no.1 Mr.Jitendra L. Shah wanted to purchase

the said premises at thrown away price. Since the appellants did not agree to sell the said premises including the terrace to Mr.Jitendra L. Shah, Honorary Chairman of the respondent no.1, appears to have threatened the appellants to drag them in the litigation. During the course of the arguments, learned counsel for the society could not dispute this part of the evidence or the submission advanced by Mr.Dhond, learned senior counsel for the appellants.

99. In the examination-in-chief of the respondent no.1 led through Mr.Jitendra L.Shah, it was deposed that he personally did not raise any objection when the said construction was carried out by the appellants. However, two other members of the society had raised an objection which objection was recorded in the minutes of meeting of the society. Cause of action thus had already commenced when the agreements were entered into between the developer and the appellants as far back as in the year 1993. The respondent no.1 who examined Mr.Jitendra L.Shah himself had purchased the flat on the same floor in the year 1992 and claimed to be fully familiar with the facts of this case as is apparent from the resolution passed by the respondent no.1 society allowing him to file a suit and to verify and affirm the plaint followed by entering into the witness box on behalf of the respondent no.1 society to prove the case of the society before the City Civil Court.

100. A perusal of the impugned judgment and order passed by the trial

Court indicates that the trial Court has recorded a finding that the society had proved that the agreement dated 28th December 1993 between the developer and the appellants is illegal, bad-in-law and null and void to the extent of sale of portion of common terrace of the building 'Arihant Apartment,' 'C' Wing. Trial Court has held that open terrace of the roof of common area is not available for sale or allotment to the individual member. Trial Court also recorded a finding that the common terrace was on the 8th floor of the building. Trial Court did not consider the oral and the documentary evidence led by the appellants about the date of purchase of the said 145 sq.ft. FSI, knowledge of the respondent no.1 society to the said construction carried out by the appellants, use, occupation and possession thereof since 1993-94, the respondent no.1 society collecting separate maintenance charges from the appellants in respect of the said portion of the terrace and the room in possession of the appellants.

101. The trial court did not consider the admitted fact that the respondent no.1 society was not even formed when the said agreement entered into between the appellants and the developers and also an admitted fact that the respondent no.1 who had examined the said Mr.Jitendra L. Shah had clearly admitted that he knew the appellants since 1994 and was visited his house as well as the terrace of the building quite often. Learned Judge also did not consider the fact that the birthday celebration of the daughter of the appellants was held in the said premises including the terrace which

was attended by the family members of the Honorary Chairman of the respondent no.1 society. The photographs produced by the appellants clearly indicated that the said terrace was in possession, use and occupation of the appellants prior to 1997. The impugned judgment and order is passed in total ignorance of the evidence led by the parties and without recording any sufficient reasons.

102. In my view, the trial Court has totally mixed up the fact that there were two portions of terrace. Even according to the respondent no.1 society, in its plaint, it was clearly alleged that there was common terrace on the 8th floor of the building 'C' Wing in 'Arihant Apartment.' Part of the terrace was already in possession of the society admittedly. The society had separately put an antenna on the portion of the terrace in possession of the respondent no.1 society. The trial Court was under an impression that the common terrace of the building of the society was sold to the appellants by an agreement entered into between the developer and the appellants. In my view, the impugned judgment and order is in ignorance of the admitted pleadings and the evidence on record and shows perversity. The findings to that effect and the conclusions drawn by the learned trial Judge thus deserves to be set aside on this ground itself.

103. In so far as the issue of limitation is concerned, though it was an

admitted position that the members of the society were aware of the construction carried out by the appellants and more particularly the Honorary Chairman of the society who entered the witness box being neighbor of the appellants, cause of action had already arisen initially when the agreement was entered into between the developer and the appellants or at least on formation of the respondent no.1 as far back as in the year 1994. The witness examined by the respondent no.1 society clearly admitted about his knowledge and entered the witness box on the premise that he was fully familiar with the facts of the case.

104. In so far as the reliance placed by the respondent no.1 on the order passed by this Court in the writ petition filed by the society is concerned, a perusal of the said order indicates that the said order was passed in writ petition filed by the appellants in the year 2005 impugning the order passed by the learned Deputy Registrar issuing direction under Section 79(2) of the Maharashtra Co-operative Societies Act, 1960. Even in the said writ petition, it was the case of the respondent no.1 that the appellants had carried out unauthorized construction in the year 2003. The respondent no.1 however, admittedly filed a suit for declaration only in the month of July, 2009. In so far as the order passed by this Court on 20th August 2008 is concerned, by the said order, this Court had made it clear that the parties would have liberty to initiate appropriate proceedings as and when

occasion arises.

105. In my view, the suit for declaration that the suit agreement in so far as portion of terrace is concerned, since was executed in the year 1993 was ex facie barred by law of limitation on the date of filing the said suit by the respondent no.1 before the City Civil Court and also on the date when this Court passed the said order on 20th August 2008 in the said Writ Petition No.1718 of 2008. Granting liberty to initiate the appropriate proceedings would not commence fresh cause of limitation since the suit had already become time barred on the date of said order. Reliance placed on the said order by the learned counsel for the respondent no.1 and by the trial court is thus totally misplaced.

106. A perusal of the impugned judgment and order indicates that the learned trial Judge has rendered an erroneous finding that since the suit for enforcement of statutory obligation under MOFA and since the agreement to the extent of sale of terrace is not just voidable but void-ab-initio, such agreement in contravention of law and public policy could not have been entered into between the parties. It was also erroneously held that for the relief of possession, law does not prescribe any limitation unless adverse possession is shown. In my view, even if the declaration is sought that the agreement is null and void, bad-in-law and illegal, a specific period of limitation is prescribed for seeking such relief in Article 58 of the

Limitation Act. The finding of the trial Court that no limitation is prescribed for possession unless adverse possession is shown or that the suit is filed for enforcement of the statutory obligation under MOFA thus limitation is saved is *ex facie* perverse and thus deserves to be set aside. The suit filed by the respondent No.1 was *ex facie* barred by limitation.

107. Insofar as judgment of this court delivered by a learned Single Judge in case of ***Madhuvihar Co-operative Housing Society Limited and Others*** (supra) by the learned counsel for the respondent no.1 is concerned, Mr.Dhond, learned senior counsel for the appellants invited my attention to a judgment delivered by the Division Bench of this court on 7th October,2010 in First Appeal No.786 of 2004 and First Appeal No.989 of 2004 and would submit that the said judgment delivered by a learned Single Judge of this court reported in ***2006 (3) Bom.C.R. 36*** has been set aside by the Division Bench and the matter has been remanded back to the learned Single Judge. A learned Single Judge of this court thereafter has taken a different view in the matter than the view taken by the learned Single Judge in the said judgment reported in ***2006(3) Bom.C.R. page 36***. Reliance placed by the learned counsel for the respondent no.1 on the judgment of learned Single Judge reported in ***(2006) 3 Bom.C.R. page 36*** is misplaced.

108. Insofar as the judgment in case of ***Ramagauri Keshavlal Virani***

(*supra*) relied upon by the learned counsel for the respondent no.1 and referred to and relied upon by the learned trial judge in the impugned judgment and order is clearly distinguishable on the ground that the respondent no.1 society in this case was not even registered when the said agreement was entered into between the appellant and the developer for sale of the flats bearing no.701 and 701A along with open terrace and 145 sq.feet FSI. In that the society was already formed. The flat purchaser who was a party to the said proceedings had purchased the flat much later after formation of the society. An agreement was entered into by the builder after formation of the society for sale of the terrace. In my view, the learned trial judge has erroneously followed the said judgment which is not applicable to the facts of this case at all.

109. Insofar as judgment of this court in case of ***Smt.Neelam Omprakash Singh*** (*supra*) by the learned counsel for the respondent no.1 is concerned, a perusal of the said judgment indicates that the issue before this court in the said judgment was whether an application by way of chamber summons for seeking amendment to the plaint was rightly allowed by the trial court or not. The said judgment is not even remotely applicable to the facts of this case. Reliance thus placed by the learned counsel for the respondent no.1 on the said judgment is totally misplaced.

110. Insofar as the judgment of Supreme Court in case of ***Nahalchand***

Laloochand Private Limited (supra) relied upon by the learned counsel or the respondent no.1 is concerned, the facts before the Hon'ble Supreme Court in the said judgment were totally different. In this case, if the developers themselves would have carried out the further construction by utilizing the said unutilized 145 sq.feet FSI, no objection could have been raised by any of the flat purchasers. The said agreement between the appellants and the developers was executed prior to the formation of the society. The society thus even otherwise could not have raised any objection prior to its formation in respect of the said agreement in respect of the open terrace with 145 sq.feet unutilized FSI.

111. In my view, the impugned judgment and order passed by the learned trial court is contrary to the pleadings, evidence and the principles of law laid down by the Supreme Court and this court referred to in the aforesaid paragraphs of the judgment and thus deserves to be set aside.

Discussion and Conclusion in First Appeal No. 31 of 2016

112. This appeal is arising out of the judgment and order passed by the City Civil Court thereby decreeing the suit filed by the respondent no.1 society partly and setting aside the order of regularization passed by the Municipal Corporation in respect of the suit structure. By the said judgment and order, the Municipal Corporation is directed to take appropriate action against the appellants by following due process of law in respect of the

unauthorized structure allegedly raised on the terrace of the suit. The trial court rejected rest of the prayers made by the respondent no.1 in the suit.

113. A perusal of the plaint filed by the respondent no.1 indicates that it was the case of the respondent no.1 (original plaintiff) that the appellants had illegally encroached upon the portion of the common terrace of the building by constructing a dividing wall and a room below overhead water tank in the year 2003 in violation of the provisions of MOFA and Development Control Regulations for Greater Mumbai, 1991. The respondent no.1 had filed a complaint with the Municipal Corporation alleging the violation of provisions of the MOFA and Development Control Regulations for Greater Mumbai by the appellants. Pursuant to the said complaint made by the respondent no.1, Municipal Corporation issued a notice upon the appellants dated 10th March, 2003. The respondent no.1 also had filed a written complaint with the Municipal Corporation against the appellants on 18th June, 2003. It was the case of the respondent no.1 in the plaint that the appellants had illegally constructed a room below overhead water tank on the common terrace of the society building. It was falsely alleged that the society was duly registered at the relevant time. According to the respondent no.1, even in the building completion plan, the room below the overhead water tank was not shown and the same was shown on open space.

114. It was the case of the respondent no.1 in the plaint that the Municipal

Corporation has regularized the said unauthorized structure without considering the objections raised by the respondent no.1. In paragraph 10 of the plaint, it was averred that the ownership of the building vested in the society since 26th April, 1994 and as such the society is the deemed and beneficial owner of the entire building. It is the case of the respondent no.1 that when no occupation certificate was issued by the Municipal Corporation, the said structure constructed by the appellants on the terrace of the society was not constructed. Learned counsel appearing for the respondent no.1 across the bar urged that the permission of the respondent no.1 society was not obtained nor the permission of the Corporation was obtained before carrying out the said construction by the appellants.

115. In the said suit, the Municipal Corporation was also impleaded as one of the defendant. The suit was resisted not only by the appellants but also by the Municipal Corporation by filing written statement. Insofar as the written statement of the Municipal Corporation is concerned, it was averred by the Municipal Corporation that as per available record with the Municipal Corporation, it was observed that there was already an approved plan for the building consisting of ground plus seven upper floors on the plot bearing City Survey No.2/248 of Tardeo Division at the junction of Dr.D.B.Marg. The plans were approved with two FSI in C Wing of the building. The occupation certificate was issued on 17th February, 1993. Building completion certificate was accepted on 6th May, 1994.

116. In paragraphs (b) of the written statement, it was averred by the Municipal Corporation that the appellants as per the terms and conditions of the sale agreement dated 28th December, 1993 constructed a room by utilizing the FSI as sold to him. At that point of time, no permission for the said construction of the said room was sought from the Municipal Corporation by the appellants though the FSI was available. It is stated in the written statement that the said construction appears to have been carried out by the appellants immediately after the agreement in 1993. The respondent no.1 society however for the first time complained about the said room to the Assistant Commissioner, D Ward who issued a notice under section 351 of the Mumbai Municipal Corporation Act on 10th March, 2003 directing the appellants to show cause for the alleged unauthorized work stated therein i.e. covering of open space below the elevated storage tank situated on terrace of the said building.

117. In the said written statement, it is averred by the Municipal Corporation that the appellants through their architect had submitted a proposal for regularization of the said work along with the copy of the registered agreement with the developers dated 28th December, 1993 allowing and giving rights to the appellants to construct a room on the terrace upto the balance FSI potential of 145 sq.feet. The said architect also submitted a title search report stating that the aforesaid property was not

conveyed in the name of the respondent no.1 society. It was averred by the Municipal Corporation that the said proposal submitted by the architect of the appellant was scrutinized and approved by the competent authority on 10th January, 2004 under the provisions of law and on merits of the case.

118. It was averred that the permissible built up area available was 18.57 sq.meters (199.81 sq.feet) and the plans for the consumption of built area were approved for 13.47 sq.meters (145 sq.feet) for the regularization of the said room on the terrace. There was thus no violation of FSI on account of regularization. The Municipal Corporation annexed a copy of the report and the approval granted by the competent authority on the application submitted by the architect of the appellants. In the said written statement, it was also averred that as regards to the wall, which is sub-dividing the terrace, the said wall was reflected in the agreement between the appellants and the developers and also reflected the said wall in the plan which was approved by the Municipal Corporation.

119. The Corporation admitted that the appellants have carried out the work below the overhead water tank with height of the room as 8 feet (2/44 meters). As per provisions of Development Control Regulation 38(2) (II), Table 19, Serial No.1(c), the height of 2.44 meters (8 sq.feet) is permissible subject to the condition that the said room is provided with A.C. arrangement. The appellants have already installed the air conditioner in the

same room and thus the provision of Development Control Regulation has been adhered to by the appellants. The Municipal Corporation also referred to the search report submitted by the appellants through their architect to show that the said property had not been conveyed in the name of the society till the date of the said application for regularization made by the appellants was considered by the Corporation.

120. In paragraph (4) (i) of the written statement, the Municipal Corporation averred that subsequent to the regularization of the structure of the appellants, another proposal for regularization of inclusion of the passage area in shop no.3 on the ground floor was received by the Municipal Corporation. The said approval report showed that the premises of the appellant viz. terrace along with room and the dividing wall was reflected in the proposal plan as well as the sanction plan of the said premises of the ground floor. The said proposal was submitted by the developer Mr.Pukhraj Bafna who was the owner of the said property. The respondent no.1 society was aware that it was within their knowledge that the said structure and wall was approved and accepted by the Municipal Corporation since 4th November, 2004. The regularization of amalgamation of shops inclusive of the passage area had been done on 30th April, 2005. The Municipal Corporation averred in the said written statement that as there was no violation of FSI available of the said building, construction carried out by the appellant was regularized. The said order of regularization is legal and

proper.

121. In the written statement filed by the appellant, the appellant placed various facts on record about the provisions of the agreement entered into between the developer and the appellants, application for regularization made by the appellants through their architect and the order passed by the Municipal Corporation. The appellants also annexed various receipts issued by the respondent no.1 society showing the payment of maintenance recovered from the appellants for the said terrace for last several years. It is the case of the appellants that since the said construction was carried out by the appellants pursuant to the said agreement entered into between the appellants and the developer, appellants had not obtained any prior permission from the Municipal Corporation. The respondent no.1 society was not even formed when the appellants had carried out the said construction. A question of any prior consent from the respondent no.1 society which did not even exist at that point of time, did not arise.

122. On behalf of the respondent no.1, Mr.Jitendra Shah entered the witness box as the sole witness. In paragraph 12 of his affidavit in lieu of examination in chief he deposed that the ownership of the building is vested in the society since 26th April, 1994 and as such, the society is deemed and beneficial owner of the entire building. The residual FSI in the plot or layout not consumed, will be available to the promoter till the registration of

the society and on registration of the society, the same shall be available to the society and not the builder/promoter. The said witness was cross examined by the Municipal Corporation as well as by the appellants' advocate.

123. In his cross examination, the said witness on behalf of the society deposed that at that point of time, he was not the chairman of the society as the Government had appointed an administrator in the month of October 2011. Though the society was registered, there was no conveyance deed in favour of the society. He deposed that in the year 1993-94 he was not the chairman of the society. He was also not the chairman in the year 2003. He admitted that in the year 2003, the society had filed a complaint with the Municipal Corporation alleging unauthorized construction made by the appellants. He admitted that the Municipal Corporation had regularized the said construction carried out by the appellants. He however pleaded ignorance that he did not know whether any construction was made by the inhabitants of the ground floor was regularized or not.

124. In the cross examination of the said witness examined by the society by the appellants' advocate, the said witness admitted that he was one of the flat purchasers in the building. There were about 32 flats in the said building. He was the office bearer of the society during the period of 1992 to 2005 and was member of the executive body since 1997. When he had

purchased the flat, he had entered into an agreement with the builder.

125. On behalf of the Municipal Corporation, Mr.J.D.Rathod working as Assistant Engineer in Building and Factory Department filed an affidavit in lieu of examination in chief. In his affidavit of evidence, he deposed that the appellants as per the terms and conditions of the sale agreement dated 28th December, 1993 had constructed a room by utilizing the FSI sold to him by the developer. At that point of time, no permission for the said construction was sought from the Municipal Corporation though the FSI was available. The society for the first time made a complaint about the said room to the Assistant Commissioner, D Ward who issued a notice on 10th March, 2003 under section 351 of the Mumbai Municipal Corporation Act. He referred to the application made by the architect of the appellant for regularization of the said work along with the copy of the registered agreement allowing the appellant to utilize 145 sq.feet FSI potential.

126. In paragraph 5 of the affidavit, it is deposed that the proposal was scrutinized and approved by the competent authority on 10th January, 2004 under the provisions of law and/or merits of the case. It was observed that the permissible built up area available was 18.57 sq.meter (199.81 sq.feet) and plans for the consumption of built up area were approved for 13.47 sq.meters (145 sq.feet) for the regularization of the said room. There was no violation of FSI on account of regularization. In the said affidavit, the said

witness also referred to the provisions of DC Regulation providing the permissible height of the structure which can be constructed below the overhead water tank subject to the condition that the said room is provided with AC arrangement.

127. In his affidavit, the said witness also referred to a proposal made by Mr.Chheda occupying the shop no.4 which was approved by the Municipal Corporation for regularization wherein the NOC of the society was not insisted nor the society had objected to the regularization of storage below staircase on 30th April, 2005. The said proposal submitted by Mr.Chheda also reflected the said room below water tank constructed by the appellants. The said proposal was submitted by Mr.Pukhraj Bafna, who was owner of the said building. The respondent no.1 society was thus fully aware and it was within its knowledge that the said structure and the wall was approved and accepted by the Municipal Corporation on 4th November, 2004. The said witness examined by the Municipal Corporation was cross examined by the society's advocate. The said witness had visited the suit flat. There was hardly any cross examination of the said witness by the society's advocate. Various depositions made by the witness examined by the Municipal Corporation thus remained uncontroverted.

128. The appellant no.1 also entered the witness box by filing an affidavit

of evidence. In the said affidavit of evidence, he placed on record the provisions of the agreement entered into between him and the developer. He also pointed out as to when the appellants had carried out the said construction on the terrace below the water tank and about the knowledge of the society about such construction. He also relied upon the recovery of maintenance by the society from the appellant in respect of the said structure on the terrace. There was hardly any cross examination of the appellant no.1 by the society's advocate. Be that as it may, the deposition of the appellant was not shattered in the cross examination by the society's advocate.

129. In so far as submission of the learned counsel for the respondent no.1 that the letter dated 17th February, 1993 issued by the Municipal Corporation or the completion certificate dated 6th May, 1994 was not in respect of the terrace room constructed by the appellants is concerned, it is not the case of the appellants that the said construction was carried out by the appellants prior to 17th February, 1993. Even according to the appellants the said construction was carried by the appellants only after occupation certificate was issued by the Municipal Corporation.

130. In so far as submission of the learned counsel for the respondent no.1 that the appellants had not obtained any prior permission from the respondent no.1 society before carrying out the said construction on the terrace of the said building is concerned, the learned counsel for the respondent no.1 did not dispute that the society itself was formed only on

26th April 1994. The appellants have produced proofs to show that the appellant had already carried out the said construction even before formation of the respondent no.1 society. The Municipal Corporation also has confirmed this fact by filing written statement and by leading evidence on this issue. The question of taking any prior consent of the society at that point of time thus did not arise since the said society itself was not in existence on the date of carrying out such construction.

131. In so far as submission of the learned counsel for the respondent no.1 that the provisions of the agreement entered into between the developers and the appellants that the said agreement was subject to provisions of MOFA Act and that the said unutilized 145 sq. ft. FSI could be used only after obtaining permission from the society is concerned, since the society itself was not in existence, the question of the appellants taking prior consent of the society did not arise. In the pleadings filed before the City Civil Court, it was a specific case of a respondent no.1 society that the society became the owner of the entire building only upon registration of the respondent no.1 society in the year 1994.

132. In so far as submission of the learned counsel for the respondent no.1 that the respondent no.1 did not take any prior consent of the Municipal Corporation before carrying out such construction is concerned, it is not the case of the appellants that the appellants had taken any such prior permission

from the Municipal Corporation before carrying out any such construction. The appellants therefore had applied for regularization of the said structure constructed by the appellants under the provisions of the Development Control Regulations and other related provisions. There is thus no merit in this submission of the learned counsel for the respondent no.1.

133. The Municipal Corporation has not only pleaded in the written statement but has also proved in the oral evidence that the said 145 sq. ft. FSI remained to be utilized by the developers in the said building according to the plan sanctioned by the Municipal Corporation and was available. In fact larger FSI was available then the FSI utilized by the appellants. The Municipal Corporation has also proved by leading evidence that the Corporation had considered the records and has followed the provisions of law and more particularly the Development Control Regulations before regularizing the said construction carried out by the appellants on a portion of the terrace of the building. The Municipal Corporation has also pointed out that below the water tank three sides wall could be put up provided an air Conditioner was installed in the said part of the structure.

134. The Corporation has confirmed in its evidence that the appellants have already installed an Air Conditioner in that part of the structure. After considering this part of the evidence led by the appellants and the Municipal Corporation, I do not find any infirmity in the sanction granted by the

Municipal Corporation regularizing the construction put up by the appellants below the water tank by utilizing the 145 sq. ft. FSI which was lying unutilized as confirmed by the Municipal Corporation. I shall now deal with the findings rendered by the Trial Court in the impugned judgment and order.

135. The entire judgment and the order proceeds on the premise that the appellants had not obtained prior permission of the society before carrying out the construction. The respondent no.1 has not disputed the fact that even according to the respondent no.1 the society was formed only on 26th April, 1994. In paragraph 10 of the plaint it is categorically stated by the respondent no.1 that the ownership of the building vested in the society only 26th April, 1994 and as such, the society is deemed and beneficial owner of the entire building. In my view since the society itself was formed and registered after completion of the construction of three side walls by the appellants below the water tank utilizing 145 sq. ft. balance FSI, the question of taking any prior permission of the society by the appellants did not arise.

136. In so far as the finding of the Trial Court that the developers at the first instance could not have sold the said balance FSI of 145 sq. ft. to the appellants is concerned, in my view the said finding is totally erroneous and contrary to the provisions of Development Control Regulations. It was not the case of the respondent no.1 society that though such FSI was unutilized

and was lying surplus with the developers, the developers could not have sold such FSI to the appellants. There was no such plea raised by the respondent no.1 in the plaint. The developers ofcourse had made it clear in the agreement entered into with the appellants that the appellants would be entitled to utilize the said FSI of 145 sq. ft. if permitted by the Municipal Corporation.

137. Since, the appellants had carried out the said construction without obtaining prior consent of the Municipal Corporation, an application for regularization was made by the appellants through an architect. The finding of the learned Trial Judge that builder had not sold any specific portion of terrace is also totally erroneous and is contrary to the agreement entered into between the developers and the appellants.

138. A plan was annexed to the agreement entered into between the appellants and the developers showing the location at which such construction could be carried out by the appellants by utilizing the said 145 sq. ft. balance FSI. Even after regularization of the said structure the sanction plan was produced on record before the Trial Court showing the exact location of the said structure carried out by the appellants. Be that as it may, the respondent no.1 was fully aware that three sides wall were put up below the water tank to the knowledge of the society since the date of construction of the said structure.

139. In so far as the finding of the learned Trial Judge that the Municipal Corporation has not followed the requisite procedure while regularizing proposal made by the appellants is concerned, in my view this finding of the learned Trial Judge is contrary to the provisions of the Development Control Regulations referred by the Municipal Corporation and more particularly Regulation 38(2)(ii), table 19, serial no.1(c) of the Development Control Regulations. It is also clarified and confirmed by the Municipal Corporation that such construction below the water tank is permissible, if such room is provided with Air Conditioner arrangement. It is not in dispute that the appellants had already provided Air Condition arrangement in the said room.

140. In the agreement entered into between the developers and the other flat purchasers before formation of the society it was made clear that the developers alone were the owners of the said 145 sq. ft. balance unutilized FSI and would sell such FSI to any flat purchaser. It was made clear that only such flat purchaser will be entitled to utilize such FSI for carrying out construction in the said building and no other purchasers will have any right, title or interest of any nature whatsoever in the said portion. It is thus clear that the question of the society claiming any right, title or interest on the said unutilized FSI before formation of the society did not arise. Part of the terrace on the 8th floor in any case is already in possession of the society.

141. In so far as the judgment of this Court in case of ***Esha Ekta Apartments Co-operative Housing Society Ltd.*** (supra) relied upon by the learned counsel for the respondent no.1 is concerned, in my view Mr.Dhond, learned senior counsel for the appellants rightly distinguished the said judgment on the ground that in that matter there was no application for regularization of the unauthorized construction whereas in this case an application for regularization was made by the appellants and after considering the provisions of law and verifying the fact that 145 sq. ft. FSI remained unutilized, the Municipal Corporation rightly regularized the said construction of three sides walls constructed by the appellants below the water tank on part of the terrace. The said judgment thus would not assist the case of the respondent no.1 and is clearly distinguishable in the facts of this case.

142. In so far as the judgment of this Court in case of ***M/s. Dosti Corporation*** (supra) relied upon by the learned counsel for the respondent no.1 is concerned, in that matter the developer had constructed new buildings after formation of the society without taking specific consent from the flat purchasers under Section 7 of MOFA. The facts before this Court in the said matter were totally different and are clearly distinguishable in the facts of this case. In this case, the appellants have proved that the said part of the construction by putting up three side walls below the water tank was constructed prior to the date of formation of the respondent no.1 society. It is an admitted position that even otherwise the deed of conveyance has not

been executed till date in favour of the respondent no.1 society by the developers.

143. Be that as it may, this Court has also set aside the judgment and order passed by the City Civil Court which is subject matter of First Appeal No. 1642 of 2012. This Court having taken such view in the said appeal, this Court is not inclined to accept any submission made on behalf of the respondent no.1 that the developers could not have permitted the appellants to carry out any construction by utilizing the said 145 sq. ft. FSI area. In my view, the impugned judgment and order is totally erroneous and contrary to the provisions of law and ignoring the oral and documentary evidence by the appellants and the Municipal Corporation.

144. The respondent no.1 society did not take any objection when the proposal for regularization was put up by the developers in respect of another premises on the ground floor i.e. construction carried out below the staircase by one of the shop owner. The said proposal for regularization was also made by the developers showing the existing position of the construction carried out on the terrace. The society was thus fully aware of the said construction long back. No objection was raised by the society in respect of the application for regularization made by the developer in respect of the construction carried out by the shop owner on the ground floor below the staircase. Be that as it may, in this case there was already a surplus FSI

of 145 sq. ft. available with the developers which was rightly utilized by the appellants. In my view, both the judgments and orders passed by the City Civil Court allowing the suits filed by the respondent no.1 thus deserve to be set aside.

145. I therefore pass the following order :-

- a. Judgment and order dated 12th September, 2012 passed by the learned Trial Judge in Short Cause Suit No. 1642 of 2009 is set aside. Short Cause Suit No. 1642 of 2009 filed by the respondent no.1 is dismissed.
- b. Judgment and order dated 28th October, 2015 passed by the learned Trial Judge in Short Cause Suit No. 1543 of 2009 is set aside. Short Cause Suit No. 1543 of 2009 filed by the respondent no.1 is dismissed.
- c. First Appeal No.1642 of 2012 and 31 of 2016 filed by the appellants are allowed.
- d. There shall be no order as to costs.
- e. Office is directed to transmit the records and proceedings of the trial Court received by the office, if any, to the concerned trial Court expeditiously.

146. This judgment will be digitally signed by the Private Secretary of this Court. Sheristadar of this Court is permitted to forward the appellants and the respondents copy of this order by e-mail. All concerned to act on digitally signed copy of this order.

(R.D. DHANUKA, J.)

147. Mr.Dhond, learned senior counsel for the appellants, on instructions, seeks liberty to withdraw the amount deposited by his clients in this Court pursuant to the interim order passed by this Court.

148. Mr.Khan, learned counsel for the respondent no.1 seeks time to consider the judgment delivered by this Court today.

149. Office is directed to permit the appellants to withdraw the amount deposited pursuant to the interim order passed by this Court after expiry of six weeks from today.

(R.D. DHANUKA, J.)