

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.487 OF 2017

IN

COMMERCIAL SUTT NO.591 OF 2017

1. Akshay Raheja	]	
2. Viren Raheja	]	
Indian Inhabitants, Shareholders and	]	
Directors of Defendant No.12	]	
Both residing at 87, G.B. Marg,	]	
Opp. Bhanu Apartment, Juhu,	]	
Mumbai – 400049.	]	 Applicants

In the matter between

1. Akshay Raheja	]	
2. Viren Raheja	]	
Indian Inhabitants, Shareholders and	]	
Directors of Defendant No.12	]	
Both residing at 87, G.B. Marg,	]	
Opp. Bhanu Apartment, Juhu,	]	
Mumbai – 400049.	]	 Plaintiffs

Versus

1. Gopal Narang,	]	
Director of Defendant Nos.5, 6 and 12 and	]	
Shareholder of Defendant Nos.6 and 12	]	
2. Sangeeta Narang,	]	
Director and Shareholder of Defendant	]	
Nos.6 and 12	]	

3. Soham Narang,]
Director of Defendant Nos.5 and 6 and]
Shareholder of Defendant No.12]
4. Advait Narang,]
Director of Defendant Nos.5, 6 and 12]
and Shareholder of Defendant Nos.6 and 12]
Defendant Nos.1 to 4, Indian Inhabitants,]
residing at 701, "Delphi", 7th Floor, Plot No.73/H,]
Nargis Dutt Road, Pali Hill, Bandra (West),]
Mumbai – 400 050.]
5. Courtyard Real Estate Private Limited,]
[Formerly known as Raghuleela Leasing and]
Construction Private Limited]]
a company incorporated under the Companies]
Act, 1956, having its registered office at]
Windsor, 1st Floor, CST Road, Kalina,]
Santacruz (East), Mumbai – 400 098.]
6. Raghuveer Leasing and Real Estate Pvt. Limited]
a company incorporated under the Companies]
Act, 1956, having its registered office at]
Windsor, 1st Floor, CST Road, Kalina,]
Santacruz (East), Mumbai – 400 098.]
7. Vijay Vasudev Wadhwa,]
Director and Shareholder of Defendant Nos.5 & 11]
8. Vinita Vijay Wadhwa,]
Director of Defendant No.11 and erstwhile]
Shareholder of Defendant No.6.]
9. Ritu Wadhawa Makhija,]
Defendant Nos.7 to 9, Indian Inhabitants,]
residing at 101, Ritu Apartments, 208, B.J. Road,]
Bandra (West), Mumbai – 400 050.]

10. Navin Amarlal Makhija,]
Indian Inhabitant, Director and Shareholder of]
Defendant Nos.5 and 11, residing at 901,]
Golden Peak Co-op. Hsg. Society Ltd.,]
Dr. Ambedkar Road, Khar (West), Mumbai-52]
11. Wadhwa Group Holdings Pvt. Ltd.,]
a company incorporated under the Companies]
Act, 1956, having its registered office at 301,]
3rd Floor, Platina, Plot No.C-59, G Block,]
Bandra-Kurla Complex, Bandra (East),]
Mumbai – 400 051.]
12. Windsor Realty Pvt. Ltd.]
[Previously known as Emgeen Holdings P. Ltd.,]
a company incorporated under the Companies]
Act, 1956, having its registered office at]
“Windsor”, Off C.S.T. Road, Kalina,]
Santacruz (East), Mumbai – 400 098.]
13. Catalyst Trusteeship Limited]
[Formerly known as GDA Trusteeship Ltd.]]
a company incorporated under the Companies]
Act, 1956, having its registered office at]
GDA House, Plot No.85, Bhusari Colony (Right),]
Paud Road, Pune – 411 038.]
14. Piramal Enterprises Limited]
a company incorporated under the Companies]
Act, 1956, having its registered office at]
Piramal Tower, 10th Floor, Ganpatrao Kadam]
Marg, Lower Parel, Mumbai – 400 013.]
15. Piramal Finance Limited]
[Formerly known as Piramal Finance Pvt. Ltd.]
and prior to that as Glass Engineers Pvt. Ltd.]]
a company incorporated under the Companies]
Act, 1956, having its registered office at 1st Floor,]

Piramal Tower Annex, Ganpatrao Kadam Marg,	]	
Lower Parel, Mumbai – 400 013.	]	
16. HDFC Limited	]	
HDFC House, H.T. Parekh Marg, 165-166,	]	
Backbay Reclamation, Churchgate, Mumbai-20.	]	 Defendants

Mr. Darius Khambatta, Senior Advocate, with Mr. Venkatesh Dhond, Senior Advocate, Mr. Zal Andhyarujina, Mr. Siddharth Ranade, Ms. Chitra Rentala and Ms. Sakshi Pawar, i/by Trilegal, for the Applicants-Original Plaintiffs.

Mr. Ravindra Kadam, Senior Advocate, with Dr. Birendra Saraf and Mr. Prashant Beri, i/by Beri & Co., for Defendant Nos. 1 to 4.

Mr. Iqbal Chagla, Senior Advocate, with Mr. Jehan Mehta, Mr. Nishit Dhruva, Mr. Prakash Shinde and Ms. Niyati Merchant, i/by MDP & Partners, for Defendant No. 5.

Mr. Cherag Balsara, with Mr. Parimal K. Shroff, Mr. D.V. Deokar, Mr. Sachin Pandey, Ms. Jasmine Upadhye and Ms. Siddhi Paradkar, i/by Parimal K. Shroff & Co., for Defendant Nos. 7, 8, 9, 10 and 11.

Mr. Sharan Jagtiani, with Mr. Rohaan Cama, Mr. Indranil Deshmukh, Ms. Shreya Jha and Mr. Vinit Bhansali, i/by Cyril Amarchand Mangaldas, for Defendant Nos. 13, 14 and 15.

Mr. Ishwar Nankani, with Mrs. Gauri Menon and Ms. Harshita Garg, i/by Nankani & Associates, for Defendant No. 16.

CORAM : A.K. MENON, J.

RESERVED ON : 22ND OCTOBER 2019.

PRONOUNCED ON : 13TH FEBRUARY 2020.

P.C. :

1. **The Parties:-**

- (i) The plaintiffs are shareholders and directors of defendant no.12-Windsor Realty Private Limited (*Windsor*). They hold 25,000 equity shares each, equivalent to 50% of the issued share capital of Windsor. Plaintiffs are also described as "*Rahejas*".
- (ii) Defendant nos.1 to 4 are Directors of defendant nos.5, 6 and 12 and hold 12,500 equity shares each, representing the remaining 50% shareholding of Windsor. Defendant nos.1 to 4 are referred to as "*Narangs*".
- (iii) Windsor is a Private Limited Company engaged in development of real estate.
- (iv) Defendant nos.5 and 6 are the companies promoted by defendant nos.7 to 10 through defendant no.11. Defendant nos.7 to 11 are referred to as "*Wadhwas*". Defendant nos.5 and 6 are also engaged in the reality business.
- (v) Defendant no.13 is a trustee in relation to Non-Convertible Debentures (*NCDs*) subscribed to by defendant nos.14 and 15.
- (vi) Defendant no.14 is an investor, having advanced Rs.250,00,00,000/- to defendant no.5 by subscribing to NCDs of

Rs.175,00,00,000/- and inter-corporate deposit of Rs.75,00,00,000/-. Defendant no.14 is believed to have assigned these debts to defendant no.15.

(vii) Defendant no.16 is HDFC Limited, which had advanced loan facilities to Windsor.

The Lis :-

2. The suit is a derivative action, filed by the Rahejas for the benefit of Windsor in their capacity as shareholders. They seek re-transfer / re-conveyance of certain property at Thane, damages and/or other appropriate reliefs on account of the loss suffered by Windsor and consequently by the Rahejas, resulting from fraud said to be perpetrated by defendant nos.1 to 11, who have allegedly acted in collusion and caused a distress sale of the Thane property (*suit property*) under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*SARFAESI Act*) and in purchasing the suit property from defendant no.16 (*HDFC*) such that the property came to be beneficially held by the Narangs to the extent of 50%. Defendant nos.1 to 11 are alleged to have defrauded Windsor and the Rahejas by wrongfully depriving them of the suit property, while causing wrongful gain to defendant nos.1 to 11. Windsor is being managed by Rahejas and Narangs, who hold an equal stake and hence Windsor is unable to pass appropriate board resolutions for instituting proceedings in its own

name. The Rahejas have contended that prior to filing of the suit, board resolutions had been circulated seeking initiation of legal proceedings against defendant nos.1 to 11; however, the said resolutions came to be blocked. The reliefs sought in the suit are against defendant nos.1 to 15. No relief is being sought against defendant no.16.

3. In the notice of motion, Rahejas seek;

- (a) an injunction restraining defendant nos.1 to 11 and defendant nos.13 and 14 from constructing, developing, transferring or otherwise creating third party rights in the suit property and any of the under construction units;
- (b) an injunction restraining defendant nos.1 to 11 from using or acting upon or executing construction on the basis of the plans, documents and information described in Exhibit-B to the plaint, which, according to Rahejas, were confidential in nature;
- (c) appointment of Court Receiver, High Court, Bombay as a Receiver of the suit property to take possession from defendant nos.1 to 11 and;
- (d) appointment of Windsor as an agent of the Receiver.

Facts and Submissions :-

4. Windsor being a joint-venture between Rahejas and Narangs, disputes arose between them in or around December, 2011, apparently on account of

the 1st defendant's manner of functioning. On 16th October 2012, a Shareholder's Agreement (**SHA**) came to be executed between Rahejas and Narangs, under which all business decisions were subject to affirmative votes of both the groups. The relevant clauses of the SHA are 3.2, 3.3, 3.5, 3.13 and 4.4. The parties were to independently use commercially reasonable endeavours to promote the business of Windsor. It would market, sell and dispose inventory from various projects. The SHA provides that the obligations of these two groups would be performed in good faith and on the assurance that each party would continue business without adversely affecting the rights of the other party and in mutual co-operation, trust and confidence. The day-to-day business and affairs were to be conducted by an Executive Committee, subject to the control of the Board of Directors. Cash flows and borrowings would be subject to consensual decisions of the Rahejas and Narangs. New equity shares were to be allotted to the parties on a pro rata basis under clause 4.4.

5. The Board of Directors had constituted an Executive Committee and had delegated several of business development activities, which were to be managed by the Executive Committee. Despite execution of the SHA, disputes between the parties continued; as a result, the arbitration agreement under the SHA was invoked. During pendency of the arbitration proceedings, the Narangs approached the Company Law Board (**CLB**) alleging oppression and mismanagement by the Rahejas and sought division of the assets of the

Windsor and dissolution of Windsor. Upon the Rahejas filing an application under Section 8 of the Arbitration and Conciliation Act, 1996, before the CLB, the company petition came to be dismissed. Meanwhile, Windsor defaulted on repayment of amounts due to HDFC. Correspondence followed, which included proposals for sale of certain flats in the project known as Windsor Grande Residences (*WGR*); sale of a school plot; Raheja Group offering to provide interest-free deposits, provided the Narang Group also contribute; creation of escrow account to route all rent receivables for Windsor. These suggestions were apparently rejected.

6. In May, 2013, Windsor announced a residential project at Oshiwara, designed with the help of VDLA, a landscape architecture firm, and showcased the designs prepared by VDLA. Customers reportedly agreed to purchase units, but defendant no.1 is said to have unilaterally discontinued VDLA's work and sought changes. The Rahejas objected to sale of 6 unsold flats in the Oshiwara Project, since apparently the representation made to potential flat purchasers would be improper. But, defendant no.1 insisted on sale of these six flats.

7. In September, 2013, plaintiff no.1 is believed to have agreed to sell 6 unsold flats in the WGR Project. Around the same time, defendant no.1 objected to sale of a school plot on the ground that the suggestion was a piecemeal solution and did not address the then current crisis faced by

Windsor in its entirety and to meet all its liabilities. Defendant no.1 is believed to have objected to all other proposals for drawing funds under the credit facilities offered by HDFC. The rejection of these suggestions continued and in September, 2013, plaintiff no.1 informed defendant no.1 that total cash that would be generated by sale of 20 flats, school plot and receivables from existing commitments would collectively amount to Rs.200 crores, which was enough to wipe out the WGR construction credit facility, which HDFC granted.

8. According to Mr. Khambata, learned senior counsel for the plaintiffs, even though defendant no.1 rejected the suggestion made by the 1st plaintiff, he continued to allege that it was the plaintiffs' (Rahejas) decision to stop sale of flats, which resulted in financial strangulation. Thus, the default on the part of the Windsor continued and HDFC continued to demand repayment. Plaintiff no.1 suggested that he and defendant no.1 should pay about Rs.22.5 lakhs each to ensure that the assurance given to HDFC was fulfilled; especially since HDFC was likely to declare the company rental loan account as a Non Performing Asset (**NPA**). Plaintiff no.1 put defendant no.1 on notice that the rental loan account of Windsor was about to be declared as NPA on account of non-payment of the equated monthly installment of June, while recording that the 1st defendant had engineered a default on this obligation. The fact that the 1st defendant was reluctant and was fully aware of the fact that there was an imminent possibility of the account being declared NPA,

would have been known to him, since on 7th October 2013, HDFC wrote to defendant no.1 recording that while the Rahejas were inclined to contribute, the defendant no.1 had not expressed any willingness to co-operate with the HDFC. In October, 2013, plaintiff no.1 once again wrote to defendant no.1 reiterating earlier proposals, the need for immediate cash for paying off statutory dues and to prevent the accounts from being declaring as NPA. All suggestions to resolve the cash crunch were rejected by the 1st defendant. At the same time, Narangs continued to sell flats owned by them and parties related to them. This continued through October, 2013. Both the parties accused each other of unreasonableness and malafide intentions.

9. Clause 9 of the SHA contemplates an exit and distribution of the assets and in this behalf, the plaintiff no.1 informed defendant no.1 that his conduct was designed to promote Narangs' interest at the cost of Windsor's interest. On 20th November 2019, HDFC issued an ultimatum and called upon Windsor to regularize the loan accounts, failing which HDFC would undertake sale of the assets. Even in the face of such imminent possibility of the company being declared NPA, the defendant no.1 refuted their suggestion. Defendant no.1 then alleged collusion between HDFC and the Raheja Group. According to the plaintiffs, the Narangs caused an artificial cash crunch and that led to defaults in payment of Windsor's statutory dues. The Raheja Group meanwhile continued to pay amounts due in their own accounts to prevent harm to Windsor. Defendant no.1 meanwhile refused to pay his pro rata

share of the guarantee. According to defendant no.1, Windsor had more than sufficient assets to discharge all debts owed to HDFC. The proposals made by plaintiff no.1 were reiterated in further communications in April, 2014, which came to be rejected by defendant no.1. These are all matters of record.

10. As far as division of assets is concerned, the Rahejas proposed a comprehensive plan as against upfront division and further suggestions were made in this behalf, which the Narangs refuted. An amount of Rs.2.50 crores was required to be paid by the joint venture partners to regularize the loan accounts of Windsor; however, it became apparent later that the Narangs admittedly infused loans in defendant no.5–Courtyard to the extent of Rs.40 to 44 crores, after acquiring 50% stake in defendant no.5–Courtyard for a sum of only Rs.1,40,000/-. In June, 2014, the plaintiffs agreed to divide the assets in the shortest possible time-frame, but the Raheja Group was not agreeable with the method of division proposed by the Narang Group, since, according to them, it would be “financially imprudent”. Meanwhile, in June, 2014, the non co-operative attitude on behalf of the Narangs is alleged to have been renewed; as a result of which a petition under Section 9 of the Arbitration and Conciliation Act, 1996 came to be filed by the plaintiffs seeking appointment of an Administrator. This application has since been disposed by an order of this court, granting liberty to approach the arbitral tribunal for interim reliefs. The refusal to agree to the suggestions/proposals made by HDFC was proving detrimental to the interest of the Windsor. In

July, 2014, upon HDFC threatening to declare Windsor's loan accounts as NPAs, the 1st defendant agreed to sell the school plot. Both sides agreed to participate in negotiations for the sale of the school plot. Windsor and Narangs then wrote to HDFC seeking NOC for sale of the school plot. HDFC agreed to issue NOC, subject to purchaser depositing the entire sale proceeds with the HDFC and the loan accounts were to be regularized by 31st August 2014. While the cut-off date was 31st August, 2014, HDFC agreed to modify its NOC for the sale of school plot and insisted on Rs.11 crores, from the sale of the said property, being deposited in HDFC. On 25th August, 2014, the prospective purchaser is said to have requested for an extension to remit the amounts. Narangs were called upon to regularize the loan accounts. The joint-venture partners then addressed letters to HDFC seeking modifications. HDFC declined to modify the NOC and informed the Windsor that it was initiating recovery proceedings.

11. According to Mr. Khambata, the Rahejas warned the Narangs that the request for modification of NOC would not be taken favourably by HDFC while rejecting the offer to infuse funds. The distress sale of the Thane property was thus imminent and on 15th September, 2014, HDFC issued a notice under Section 13(2) of the SARFAESI Act calling upon Windsor to pay the dues in full, totaling to Rs.168,52,77,065/-. On 19th November, 2014, a notice under Section 13(4) of the SARFAESI Act was issued to Windsor. In December 2014, the defendant no.1 attempted to quash the notices dated 15th

September, 2014 and 19th November, 2014 by filing application under Section 17(1) of the SARFAESI Act. In January 2015, defendant no.1 withdrew its challenge to the notices, as aforesaid. Meanwhile, parties attempted to arrive at consent terms in the proceedings under Section 9 of the Arbitration and Conciliation Act.

12. Possession of the Thane property was handed over to HDFC on 2nd February 2015. Pursuant to interim consent terms, the school plot was also sold and sale consideration of Rs.30 crores was paid to HDFC. The SARFAESI proceedings were kept in abeyance and as on that date, a total amount of Rs.168 crores was due to HDFC. HDFC then conducted an auction, to which there was no challenge and the Thane property was sold at a reserve price of Rs.208 crores, which was said to be lower than the market value. According to Mr. Khambata, an adjoining plot, though smaller, was sold for a price of Rs.214 crores. The auction sale notice was issued declaring date of auction sale as 21st July 2015. Through June 2015, the Rahejas attempted to convince the Narangs to infuse funds so as to avoid the auction sale of the Thane property and thereby to pay-off the construction loan facility. However, the Narangs declined, suggesting that the surplus funds from the sale can be used for pre-paying lease rental facility of different properties. A further suggestion was made by Narangs that the pre-payment proposed could be achieved if the joint-venture partners purchase 42 units each in the WGR Project from Windsor, which would result in infusion of Rs.105 crores.

According to Mr. Khambata, this was a clear indication that the funds were available with Narangs. On 21st July 2015, the Thane property was sold for Rs.208 crores to Raghuleela Leasing and Construction Company / defendant no.5 – now known as Courtyard.

13. Mr. Khambata submitted that the sale was fraudulent for the reason that Courtyard had a share capital of Rs.1.40 lakhs and total assets of Rs.4,07,984/-. Courtyard was controlled by the Wadhwa Group. It had two Directors viz. defendant nos.7 and 10. The Rahejas, it was submitted, were unaware of the details of the transactions, but they learnt later that in September 2015, Courtyard executed a Debenture Trust Deed with defendant no.14–Piramal Enterprises limited as a debenture holder and defendant no.13–Catalyst as a trustee, issuing to them 175 secured redeemable non-convertible debentures of the face value of Rs.1 crore each aggregating to Rs.175 crores on a private placement basis. Courtyard created a mortgage in favour of Catalyst, who acted on behalf of Piramal Enterprises/Piramal Finance. Since Piramal Finance had advanced monies, shareholders of Courtyard pledged 100% shares of the Courtyard in favour of Catalyst.

14. Mr. Khambata submitted that the Articles of Association (**AOA**) of Courtyard were amended to insert articles seeking to define “pledged shares” to mean 100% equity share capital of Courtyard held by Wadhwa Group and Vijay Wadhwa pledged in favour of Catalyst for the benefit of Piramal

Enterprises. It was contended by Mr. Khambata that defendant no.6- Raghuvver Leasing and Real Estate Private Limited (*Raghuvver*), which was entirely owned and controlled by Narangs, acquired 50% equity interest in Courtyard and the amendment to the definition was intended to mask this aspect.

15. Meanwhile, in October, 2015, Courtyard launched a project known as “Wadhwa Courtyard”, with plans, lay-out and designs, which were identical to the ones that Windsor had been created for use at the Thane property. According to Mr. Khambata, these were the very designs, plans and lay-outs owned by Windsor. Usually for a project of that size, announcement of construction would take about 9 to 12 months. Courtyard launched the project within two months by using the same plans that were commissioned by Windsor, without any authority from Windsor. In January, 2016, Courtyard is said to have made a private placement offer of additional 14,000 equity shares of the face-value of Rs.10/- each. Soon thereafter, the shareholding of Raghuvver was transferred by Wadhwa Group to Narang Group for Rs.1 lakh. The transfer was apparently in anticipation of issuance of 14,000 shares of Courtyard in favour of Raghuvver, so as to facilitate acquisition of 50% stake in Courtyard by Narangs. When the private placement offer was made by the Courtyard, it declared that the company was wholly owned subsidiary of Wadhwa Group. Raghuvver meanwhile subscribed to all the additional 14,000 equity shares of Courtyard by paying

only Rs.1.40 lakhs; thus becoming a 50% equity shareholder of Courtyard, which was developing the Thane property.

16. In February 2016, Courtyard is believed to have entered into a further term sheet with Piramal Enterprises for additional funding to the tune of Rs.75 crores by way of an inter corporate deposit. Courtyard apparently agreed to create a further mortgage over the Thane property on all current assets of Courtyard and escrow of the receivables and agreed to hold receivables in escrow. Corporate guarantee of Wadhwa Group Holdings and personal guarantees of two of its directors were also obtained and the entire share capital of Courtyard was pledged to Piramal Enterprises. The term sheet on the face of it shows that Wadhwa Group was shown to be promoters of Courtyard. An indenture of mortgage was executed by Courtyard with Catalyst, thereby creating a *pari passu* charge over the Thane property in March 2016. In May, 2016, Advocates of Narang Group issued a notice to Rahejas stating that Wadhwas and Narangs have suffered harm to their reputation at the hands of Rahejas, since Windsor had sold some assets in distress and were liquidating other assets to meet liabilities. In June, 2016, defendant nos.1 and 3 were appointed as Additional Directors of Courtyard, which was then known as Raghuleela Leasing and Construction Private Limited. Meanwhile, the Narang Group members (defendant nos.1 to 4) were appointed as Additional Directors in Raghuveer. Defendant no.4 was appointed as Additional Director in Courtyard in July, 2016 and in August

2016, a resolution was passed by the Directors of Courtyard authorizing transfer of 14,000 equity shares of Courtyard from Raghuveer to the Narangs. At this point of time, Raghuveer was owned and controlled by Narangs and as a result of the resolution, 14,000 equity shares of Courtyard were now held by the Narangs directly, instead of through Raghuveer. Courtyard then applied for re-validation, amendment and extension of the existing environmental clearance of Thane property, relying upon environmental clearance dated 25th November 2010, granted to Windsor in respect of Thane property, and on the basis of sanction of development dated 4th May 2010 and commencement certificates dated 20th November 2010 and 12th July 2011, all of which were obtained by Windsor with a view to develop the Thane property.

17. In December, 2016, public disclosures were made in pursuance of change in management of Courtyard and Raghuveer. The necessary changes were uploaded on the website of Ministry of Corporate Affairs in December, 2016 – January, 2017 and it was only around this time that 1st plaintiff noticed that the name of Wadhwa Group was dropped from the name and style of Courtyard; thus indicating change of ownership. Later, this was confirmed by the plaintiffs from market sources. In May, 2017, the 1st plaintiff sought approval of the Board of Directors of Windsor for initiating legal proceedings against Narangs, Wadhwas, Courtyard and Raghuveer for wrongful sale and re-purchase of Windsor's Thane property. On 4th May,

2017, the suit came to be filed. In July, 2017, Courtyard registered four buildings in different stages of construction with the Maharashtra Real Estate Regulatory Authority (**MAHA-RERA**). The disclosure requirements under the Real Estate (Regulation and Development) Act, 2016 (**RERA**) require a promoter of a project to submit title report, with a title certificate. In the title certificate submitted by Courtyard to the MAHA-RERA, a reference was made to the suit and the allegations of collusion against defendant nos.1 to 10 and that in the suit and the notice of motion, no ad-interim reliefs had been granted.

18. It is submitted by Mr. Khambata that inclusion of a reference to the suit is a material and deliberate misrepresentation and the character of the suit has been misrepresented deliberately in the RERA disclosure. In December, 2017, complaints were filed by the Rahejas against Courtyard with the MAHA-RERA for violation of the disclosure requirements in relation to other projects. This complaint was heard and dismissed by an order dated 15th January 2018, which records that the disclosures made by the Courtyard in the title report were sufficient and that disclosure of all the details of the reliefs sought was not mandatory.

19. This notice of motion having been taken up for final hearing, the Rahejas gave up their contention that Narangs and Wadhwas were guilty of breach of copyright in having obtained and utilized the plans, designs and

lay-outs. Mr.Khambata submitted that the principal complaint was that Wadhwas and Narangs had committed breach of trust and by ensuring that the Thane property was subjected to distress sale. Broadly put is the plaintiffs' case that the Thane property belongs to Windsor. The Narangs have by engineering default in repayment of the credit facilities, manipulated the affairs of Windsor in a manner so as to facilitate distress sale of the Thane property to a secured creditor and thereafter as a part of the larger game plan, acquired the Thane property from HDFC on or about 21st July 2015 at an auction conducted by HDFC pursuant to its rights under the SARFAESI Act. Mr. Khambata submitted that unknown to Rahejas, Narangs had manipulated Windsor's affairs and created an impression that Raghuleela (now known as Courtyard) was a bonafide purchaser of the Thane property, but, in fact, it was only a facade created by Narangs in collusion with Wadhwas and as a result of which, Wadhwas facilitated acquisition of shares of the Raghuveer for a mere consideration of Rs.1.40 lakhs and by virtue of which, Narangs secured 50% controlling rights in the Courtyard and almost immediately announced the project. The fact that this was intentional and premeditated became evident from the fact of the prompt announcement of the project by Courtyard and from the fact that the plans, designs and lay-out of the project were identical to that of Windsor's. He submitted that it is impossible to believe that it is a co-incidence that the very same designs could have been prepared by the Courtyard as well. He submitted that Windsor had

commissioned an architect to prepare the designs and plans and Windsor owned those designs. Although the claim of copyright ownership was not pressed, the plans were confidential and could not have been shared by Windsor with any third party. Windsor alone could have permitted its use and since the Rahejas have not permitted sharing of the plans, nor have they permitted Courtyard to use the plans, it was obvious that the plans were sourced by the Narangs and shared with the Wadhwas and that is how Courtyard has now come to utilize these plans. Mr. Khambata submitted that confidentiality has been breached in this manner.

20. Mr. Khambata also submitted that the Thane property, acquisition costs of which was about Rs.280 crores, was sold for a mere consideration Rs.208 crores by virtue of the subterfuge practiced by the defendants. He submitted that initially the Wadhwas put in Rs.208 crores and then they invited the Narangs to join. He submitted that this is not a coincidence. The 50% shareholding of the Courtyard was divested in favour of Narangs and it is not possible to accept the contention that that Wadhwas were unaware of the transactions and the disputes between the parties. He submitted that the complicity of Wadhwas is obvious. Reliance was placed on the conspiracy alleged to contend that the Narangs engineered distress sale of the Thane property. They were working to a plan to ensure that the Windsor is deprived of the Thane property so that the said property could pass to Courtyard and Courtyard would thereafter induct the Narangs. The intention to deprive

Windsor of its rightful property becomes obvious from the conduct of the parties inasmuch as the shareholding of the Narangs in Raghuveer was 50%, which is not a small amount by any reckoning. Moreover, the 50% shares had been acquired by payment of a mere Rs.1.40 lakhs towards equity. The fact that the loan was also advanced by Wadhwas to the extent of Rs.30 crores is also an unusual method of infusing funds. The submission that the loan is not an equity infusion and, therefore, 50% loan does not amount to any equity infusion and Narangs will now enjoy 50% right in the property just as a gift prior to the distress sale, but with a different partner. However, for the distress sale, the Thane property would continue to vest in Windsor. Narangs had obviously conspired with Wadhwas to achieve this premeditated result, thereby depriving Windsor. According to Mr.Khambata, by February, 2016, Narangs were back in the saddle by owning 50% of Courtyard. According to Mr. Khambata, there was an entrustment of the property; a distress sale having been engineered by Narangs in collusion with Wadhwas and the other defendants to the exclusion of Rahejas, the law requires that the property be brought back into the fold, since under Section 65 of the Indian Trusts Act, 1882, when a trustee wrongfully sells or otherwise transfers trust property and afterwards he himself becomes the owner of the property, the property once again becomes subject to the trust, notwithstanding any want of notice on the part of intervening transferees in good faith and for consideration. In other words, merely because Wadhwas had chosen to participate in the sale

of the Thane property and were third parties to the arrangements inter se the Rahejas and Narangs in the affairs of Windsor, Narangs had wrongfully benefited from this transaction.

21. According to Mr. Khambata, the acquisition of the property by the Courtyard was improper, even assuming that the Courtyard was an intervening transferee. He relied upon Chapter IX of the Indian Trust Act dealing with certain obligations in the nature of trusts and submitted that Narangs were the trustees and in a fiduciary capacity were bound to protect the interest of Windsor. On the other hand, Narangs had made pecuniary gains for themselves and according to him, Narangs, as qualified persons, must hold the pecuniary advantage for the benefit of such other persons. Reliance was also placed on Section 90 of the Trusts Act, which provides that where a tenant for life, co-owner, mortgagee or other qualified owner of property gains an advantage, it must be held for the benefit of all persons interested, including the repayment by such persons in derogation of the rights of the persons interested in the property, their due share of the expenses incurred and to indemnify such persons waiving liabilities. Relying upon this interpretation, Mr. Khambata submits that the reliefs prayed for in this notice of motion may be granted inasmuch as the defendants be restrained from utilizing the property for further development, as now contemplated, and status-quo ante is to be restored by granting the reliefs prayed for in the motion.

22. Mr. Khambata submitted that Narangs (defendant nos.1 to 4) were joint-venture partners and Directors of Windsor. They became 50% owners after the SARFAESI action. They are quasi partners/co-owners in the partnership. Under Section 9 of the Partnership Act, 1932, they are constituted fiduciaries. They are also agents of each other and as Directors, they were fiduciaries. Clearly, a fraud was played upon the Rahejas. Although the SHA did not contain non-compete provisions, the conduct of the defendants was such that it was in breach of trust.

23. Furthermore, it is submitted by Mr. Khambata that the reliefs can be moulded and suggested by way of interim relief. Defendant no.5-the Courtyard may be permitted to continue sale of units on condition to deposit 50% of the net monthly revenues generated from sale in an escrow account, after deduction of monthly project expenses, including statutory dues, contractor's dues, debt servicing costs etc. The statement of number of units sold should be provided on monthly basis and no payment shall be made towards any related party debts, except towards payment of advances by Wadhwa Group to Courtyard. It was further suggested that defendant no.12-Windsor should furnish security for an amount of Rs.44,01,50,000/-, representing the amounts contributed by Rahejas in the form of an undertaking not to alienate flats in the project and in the meanwhile, Narangs should not, directly or indirectly, receive any payments towards debt, interest,

dividend or other amounts from the Courtyard towards their beneficial interest in the Thane property. It was also submitted that the balance 50% of the net revenues would be subject to final orders in the suit.

24. In support of these contentions, Mr. Khambata has relied upon the following judgments :-

- (1) *New Horizons Ltd. and Anr. Vs. Union of India and Ors.*, (1995) 1 SCC 478.
- (2) *Faqir Chand Gulati Vs. Uppal Agencies Pvt. Ltd. and Anr.*, (2008) 10 SCC 345.
- (3) *P.V. Sankara Kurup Vs. Leelavathy Nambiar*, (1994) 6 SCC 68.
- (4) *Vithal Dass Vs. Rup Chand and Ors.*, AIR 1967 SC 188.
- (5) *Deo Nandan Prashad Vs. Janki Singh*, PC 1916 Vol. XLIV Calcutta Series 573.
- (6) *Janki Singh and Ors. Vs. Debinandan Prosad and Ors.*, 1910 SCC OnLine Cal 160.
- (7) *Dattatraya Sitaram Kulkarni and Ors. Vs. Shankar Mahadji Kulkarni*, AIR 1938 Bom 250.
- (8) *Morton H. Meinhard (Respondent) Vs. Walter J. Salmon et al. (Appellants)*, 249 N.Y. 458 (1928).
- (9) *Lalit Mohan Roy and Ors. Vs. Kishori Mohan Roy and Ors.*, AIR 1949 Cal 288.
- (10) *A. Thulasi Bai Ammal Vs. Punapakkam Ramakrishnappa Nattan and Ors.*, AIR 1957 AP 430.
- (11) *Devendra Kumar Vs. State of Uttaranchal and Ors.*, (2013) 9 SCC 363.
- (12) *Kunjulakshmi Amma and Anr. Vs. Padmanabha Pillai*, MANU/KE/0199/1965.

- (13) *Sanagapally Lakshmayya (Minor), by his mother and guardian Venkamma Vs. Intoory Bolla Reddy and Ors., 1902 Vol. XXVI Madras Series 385.*
- (14) *Janardan Dagdu Khomane and Anr. Vs. Eknath Bhiku Yadad and Ors., 2019 SCC OnLine SC 1225.*
- (15) *R.K. Dalmia Vs. Delhi Administration, AIR 1962 SC 1821.*
- (16) *Far Pavilions Tours & Travels Pvt. Ltd. Vs. Manish Pratik, along with connected matter, 2014 SCC OnLine Bom 1843.*
- (17) *Rajeev Saumitra Vs. Neetu Singh and Ors., 2016 SCC OnLine Del 512.*
- (18) *Mohan Singh Bhullar and Ors. Vs. Inderjit Singh Bhullar and Anr., 2003 WL 1202661.*
- (19) *Commissioner of Income Tax, West Bengal Vs. East Coast Commercial Co. Ltd., (1967) 1 SCR 821.*
- (20) *Jiwandas Agarwal Vs. Narayandas Deora, MANU/WB/0291/1972.*
- (21) *Jamila Khatun Choudhury and Ors. Vs. Mahamud Khatun Chowdhury, 1918 SCC OnLine Cal 208.*
- (22) *Zee Telefilms Ltd. Vs. Sundial Communications Pvt. Ltd. and Ors., 2003 (3) Mh.LJ. 695.*
- (23) *Kapil Chopra Vs. Kunal Deshmukh and Ors., 2013 (1) Mh.LJ. 343.*
- (24) *Smt. Basmati Devi (Since Deceased) and after death her Legal Representatives and Anr. Vs. Chamru Sao and Ors., (1964) 7 SCR 633.*

25. On behalf of defendant nos.1 to 4, Mr. Kadam opposed grant of reliefs. He submitted that the plaint proceeded on the basis and as averred in paragraph 9 that defendant no.1 engineered financial distress. He submitted that this contention is without basis. Windsor had defaulted in payment of loan amounts and it is the Narangs who had attempted to resolve the crisis.

Although the Rahejas contended that the Narangs stopped sale of flats resulting in financial strangulation and which led to sale under SARFAESI Act, it is the Rahejas, who had stopped sale of flats. The Narang Group repeatedly requested sale of flats to go on, but this aspect has been suppressed by the Rahejas. Mr. Kadam referred to correspondence and submitted that e-mails dated 18th May 2013 addressed by plaintiff no.1 to defendant no.1 admitted breakdown of the underlying fabric of the joint-venture and that the Rahejas were not in favour of making sales or business commitments on behalf of the Windsor till disputes were resolved. Copy of this e-mail has been filed along with the affidavit-in-reply and this letter had been suppressed by the Rahejas. Similarly, reference was made to the e-mails dated 28th May 2013 from defendant no.1 to plaintiff no.1 calling upon the Rahejas to revoke the decision to stop sale of units in Oshiwara Project. Vide a further e-mail of the same date, the Narangs called upon the Rahejas to inform the agenda to be discussed at the proposed meeting, but to no avail. By subsequent e-mail dated 5th June 2013, the plaintiff no.1 had refused to withdraw his unilateral decision to stop sale contending that the receivables, assets and other reserves of Windsor were sufficient to service debts and operational expenses and that continuing sale during pendency of dispute would affect the reputation of Windsor. This letter is also seen to be suppressed by Rahejas. Likewise, further e-mail correspondence dated 14th June 2013 from plaintiff no.1 to defendant no.1; 20th August 2013 from defendant no.1 to plaintiff no.1 was suppressed.

26. According to Mr. Kadam, on 6th June, 2013, defendant no.1 is said to have called upon the Rahejas to resume sale to prepare a cash flow statement to justify resumption of the sales by pointing out that 55% of the stock in WGR Project was unsold. Plaintiff no.1 had unilaterally stopped sale of flats and Windsor was pushed into availing of further credit, without realizing sale proceeds from sale of flats. This aspect was being canvassed to establish the truth of the allegation that a distress sale was being engineered; however, the contrary was proved. Defendant no.1 had alerted plaintiff no.1 vide e-mail of 12th June 2013 that if the Windsor's financial condition was not rectified, Windsor would default on payments of banks, contractors, employees and statutory authorities, resulting in work coming to a standstill and suggested the Rahejas to infuse Rs.12.7 crores into Windsor to restore parity in contribution, alluding to the fact that the Narangs had already contributed to that extent. A further e-mail dated 14th June 2013 was addressed by the Rahejas to defendant no.1, in which Rahejas refused to commence sale of flats, contending that the correspondence revealed a narrow view of Windsors' interest and were focusing on resumption of sales; whereas, suspension of sale in the WGR Project was in the best interest of the company. Rahejas had admitted that defendant no.1 was concerned with stoppage of sales, but the assertions made in the letter were incorrect. This letter was also suppressed by the Rahejas. In addition, e-mail dated 20th August 2013 from defendant no.1 to plaintiff no.1 contended that there was no commercial justification for

stopping sales, is also suppressed. It is urged by the Narangs that stopping sales would not maximize profitability but would cause irreparable damage.

27. It is this conduct of the Rahejas that led the Narangs to file proceedings in the Company Law Board alleging oppression and mismanagement. At that stage, the 1st plaintiff suggested sale of 6 unsold flats on the lower floors of WGR and parties deliberated upon proposal to sell 20 flats, but this could not fructify and it is alleged that the Rahejas had sought to impose conditions, which were unworkable and there was no real intention to resume sale. Meanwhile, Narangs vide letter of 26th September, 2013 had indicated to the Rahejas that Windsor should conclude as many sales as possible, since retaining the flats, in respect of which occupation certificates had been issued, was certainly not in the interests of Windsor. Based on the above, it was submitted by Mr. Kadam that Rahejas had unilaterally stopped sale of flats. It was the Rahejas, who were adamant in not resuming sales and insisting that Narangs should agree to borrow further funds. The Rahejas sought the consent of the Narangs to borrow further sum of Rs.15 crores from HDFC to ensure that payments due were promptly made.

28. Mr. Kadam submitted that the allegation that the proposals made by the Rahejas were mechanically rejected had no merit. Defendant no.1 had informed the Rahejas that the Narang Group was unable to accept the proposals of the Rahejas for good reasons. Substantial funds of Narang Group

were locked with Windsor and it could not infuse further funds. On the other hand, the Raheja Group had unlimited financial resources. In view of the increasing liability qua HDFC, since the Rahejas and Narang's Directors had given personal guarantees, there was no clarity on how Windsor would pay existing debt and on the fact that personal guarantees given by the Directors on both sides. The company could not undertake sale of flats, because it was unable to give a commitment to its customers as to the date of possession, in view of an order passed by the National Green Tribunal preventing the company from selling its flats. In the meanwhile, the shareholders of the company were unable to work together and being equal partners, it was necessary to divide assets between the two groups of the shareholders. Mr. Kadam then submitted that sale of flats could not be resumed due to the orders passed by the Brihanmumbai Municipal Corporation and the National Green Tribunal and stoppage of sale was not caused by the defendants. The Rahejas had meanwhile resisted attempts to sell despite the impending financial crisis faced by Windsor. Stoppage of sales could not be attributed to the defendants. This is material since on 6th January 2014, the Brihanmumbai Municipal Corporation had issued a stop work notice to Windsor and this order remained in force till July, 2016.

29. On 28th January 2014, Windsor was restrained from creating third party interests in the premises at Oshiwara. Mr. Kadam then submitted that apropos the Rahejas' contention that they specifically wanted to sale the

Thane property, it has also to be considered in the proper perspective since on 7th April 2014, plaintiff no.1 informed defendant no.1 that both groups must inject funds on a matching basis and a third-party agency is to be appointed to take charge of completion of the Oshiwara Project and Kanjurmarg and Thane property should be sold by public auction to meet the outstanding of HDFC. Plaintiff no.1 suggested that the Thane property be sold by public auction to meet the dues of HDFC and, therefore, there is no substance in the contention that defendants engineered any distress sale, as now sought to be contended. Moreover, on 17th May 2014, plaintiff no.1 had informed defendant no.1 that the Raheja Group was willing to divide assets prior to the SHA but only after the occupation certificate for the Oshiwara Project is obtained and after meeting financial obligations of Windsor. It was contended that Raheja Group was not agreeable to the manner of division and at that stage, plaintiff no.1 had considered the value of the Thane property @ Rs.225 crores. The allegation in the plaint that the Thane property sold below the market value was sought to be refuted. Mr. Kadam then submitted that there is no substance in the Rahejas' contention that the sale of the Thane property was engineered by the Narangs. It is submitted that while HDFC issued a notice under Section 13(2) and 13(4) of the SARFAESI Act, it was Narang Group, which filed an application under Section 17 of the SARFAESI Act to oppose the proposed action under SARFAESI Act.

30. Later, in November, 2014, HDFC sought to take possession of the Thane

property. Defendant no.1 had objected on the very same day and sought a personal hearing in the matter. HDFC took up a plea that defendant no.1 had no locus and only Windsor could object. It is in these circumstances that Narangs filed a securitization application under Section 17(1) of the SARFAESI Act. Although Narangs requested Rahejas to join them in the securitization application, they did not and such non co-operation led the HDFC to successfully contend that the Narangs had no locus standi. The Narangs also filed an application to intervene in the proceedings adopted by HDFC before the District Magistrate, Thane and sought a personal hearing. The steps are being projected as evidence of the fact that Narangs had tried to effectively prevent sale of the property, but did not succeed for want of co-operation from the Rahejas. Mr. Kadam further submitted that the Narang Group in its efforts to save Thane Property from being sold, negotiated the sale of a school plot at Oshiwara and certain lands at Kanjur Marg. Since the Rahejas did not oppose the SARFAESI action, the Narangs were attempting to raise monies by sale of these plots, in addition to seeking sale of the flats. In this behalf, correspondence between 20th August 2013 and 21st July 2015 has been referred to by the Narangs, but the proposal made on 20th August 2013 for sale of the plots was rejected on 22nd August 2013. Thereafter, after a gap of several months, the Rahejas and Narangs executed interim consent terms for making part payment of the dues of the HDFC under the construction facilities to enable making payment of statutory liabilities. It was agreed that

the Oshiwara school plot would be sold for Rs.30 crores and the land at Kanjurmarg to be sold at a minimum reserve price of Rs.125 crores, out of which Rs.85 crores were to be paid to HDFC and the balance was to be deposited in a separate account with the Prothonotary and Senior Master in this court. Rs.30 crores were recovered from the sale of Oshiwara school plot and that was paid over to HDFC. Mr. Kadam submitted that the fact of sale under interim consent terms established the bonafides of Narangs and that Narangs were taking the initiative. As far as the Kanjurmarg land was concerned, a proposal was received from Mahindra Homes Pvt. Ltd. on 20th April 2015, under which certain monies were to be paid and deposited with the HDFC to keep the SARFAESI action under abeyance. While this attempt to sell the Kanjurmarg land to Mahindra Homes was underway, on being faced with HDFC's attempts to modify the agreement arrived at by virtue of the consent terms, attempts have been made to convince HDFC to grant extension of time to complete the sale of Kanjurmarg land; however, HDFC did not agree. As a result, auction sale proceeded and the Thane property was sold to defendant no.5-Courtyard.

31. It is contended that the e-mails exchanged between the parties and HDFC would reveal that the Rahejas did not have any objection to the sale of the Thane property. The contention of the Rahejas that Narangs had engineered sale of the Thane property with an intention of once again exploiting through the arrangements arrived at with Windsor, was entirely

baseless. Mr. Kadam further submitted that the Thane property was sold by HDFC through online e-auction. There was no challenge to the auction sale. No allegations were made against HDFC. It is not the contention of the Rahejas that the sale was conducted improperly and even according to the Rahejas, the value was not more than Rs.225 crores. The sale price being Rs.208 crores, the difference is about 7%, which is marginal. Courtyard was a bonafide purchaser and had paid value of Rs.208 crores, pursuant to the e-auction.

32. Mr. Kadam further submitted that Wadhwa Group, comprising defendant nos.7 to 11, had paid an amount of Rs.52 crores from their own sources by availing of Rs.175 crores from defendant no.14-Piramal Enterprises. Windsor lost the opportunity of developing the Thane property upon the sale taking place. Windsor only had a right of redeeming the mortgage by payment, thereby the rights of the Windsor in the property stands extinguished. It is further submitted that the Narang Group had agreed to join the Wadhwa Group about six months after the purchase of the Thane property by Wadhwas. There was nothing illegal about it. The allegation of collusion between Narangs and Wadhwas are result of what the Rahejas see as a complex web and their belief that the acquisition by Narangs of 50% shares in Courtyard was for a sum of Rs.1.4 lakhs. It is contended that the Wadhwas were on the lookout for a partner to develop the Thane property and it is about six months later that they decided to involve the Narangs in

developing Thane property. There is no legal bar in doing so. There is no prohibition on the Narang Group investing in Courtyard and Narangs were entitled to adopt a suitable corporate structure for acquisition of their stake in Courtyard. The acquisition is also at the fair value and the Narangs had contributed in the form of a loan of Rs.44 crores and execution of personal guarantees towards the debt of Courtyard. Explaining the various steps taken, Mr. Kadam submitted that on 27th January 2016, Wadhwas transferred shareholding of defendant no.6–Raghuveer to Narangs. Raghuveer acquired 14,000 shares of Courtyard and became 50% shareholder of Courtyard in February, 2016. The amount of Rs.44 crores shown as loan to Courtyard. Narangs had also given personal guarantees to avail of finance for defendant no.14–Piramal Enterprises. Thus, it was not merely payment of Rs.1.40 lakhs, that should be the focus of attention. Although the Rahejas had contended that Wadhwa Group had availed of Rs.425 crores finance from Piramal Enterprises and did not require finance from Narangs, their contention was refuted by Mr. Kadam by contending that Piramal Enterprises had sanctioned the loan of Rs.175 crores in July, 2015 as a land loan. The balance cost for acquiring Thane property of Rs.52 crores was funded by Wadhwas. The loan provided by Piramal Enterprises was to be disbursed after amended plans were approved and permissions were received, along with the release of FSI, meeting certain sales and construction milestones. Thus, balance funds were not available upfront and the contention that the Wadhwas had a credit

arrangement of Rs.425 crores was not correct. Thus, there was no breach of fiduciary duty by the Narang Group.

33. Mr. Kadam further submitted that the Plaintiffs–Rahejas’ filed the suit as a derivative action and it is Windsor, who is actually to be seen as a plaintiff. It is well settled that shareholder does not owe fiduciary duty to the company and the Director is to be treated as a trustee of the company in a limited sense. There was no entrustment of the Thane property to the Narang Group. Windsor continued to be the beneficial owner. Thus, it was contended that Narangs were not trustees in respect of the Thane property and, therefore, there is no breach of duty even as a trustee, since Windsor had lost the opportunity to develop the Thane property, when it was sold to Courtyard by HDFC. Even otherwise, it was contended that no fiduciary duty had been breached. The Narangs did not misappropriate the assets of Windsor. They had attempted to sell the flats to avoid the coercive action. No attempts were made to challenge the same and the possession of the Thane property was handed over to HDFC, pursuant to consent terms between Rahejas and Narangs. The property having been sold in an e-auction, to which there was no challenge, there was no fiduciary duty or duty of confidence between Narangs and Rahejas, since their relationship had already run into rough weather. Furthermore, it is contended, on a query from the court, that the SHA did not contain any non-compete provision and therefore there was no prohibition against both the parties engaging in construction activities on

their own. It is in these circumstances that the Narangs agreed to collaborate with the Wadhwas. It was a commercial transaction and no fault could be laid at the door of the defendants. Mr. Kadam then contended that Windsor had received the benefit of Rs.208 crores paid by the Wadhwa Group by payment to HDFC. A surplus amount of Rs.40 crores had been utilized to pay off several statutory dues and creditors.

34. The contention that Narangs had not made any disclosure about joining with Wadhwas in developing the Thane property has no merit, since there was no breach of any fiduciary duty. In a derivative action, the duties owed by Narangs to Windsor can be enforced, but once the Thane property was sold, there is no question of any fiduciary duty of disclosure or non-compete that Narangs owe to Windsor or the Rahejas. Since it is a derivative suit on behalf of the Windsor, no such fiduciary duty existed. In any case, the breach of fiduciary duty could not have been invoked as a cause of action, since relationship between the parties had deteriorated and disputes had arisen. A letter dated 18th May 2013 addressed by Rahejas and petition filed before the CLB established that there was no mutual trust remaining between the parties. Moreover, the SHA between Narangs and Rahejas was a joint-venture, which was frustrated due to lack of confidence between the two groups. Windsor was at all times owner of the Thane property and once the said property was sold, there was no question of any entrustment. Thus, Narangs never were the trustees of the Thane property.

35. Mr. Kadam has relied upon the following judgments :-

- (1) *Tan Bug Taim and Others Vs. The Collector of Bombay*, 1946 ILR 517;
- (2) *W.O. Holdsworth and Others Vs. State of Uttar Pradesh*, AIR 1957 SC 887;
- (3) *Narayani Amma Vilasini Amma Vs. Eyo Poulouse of Vattathara*, AIR 1982 Ker 198
- (4) *Bacha F. Guzdar Vs. Commissioner of Income Tax, Bombay*, AIR 1955 SC 74;
- (5) *V. Narasimha Iyengar, Official Liquidator of the City Hygienic Milk Supply Company Limited Vs. The Official Assignee of Madras, representing D. Sadasiva Rao, an insolvent and Others*, 1931) 60 MLJ 280;
- (6) *Vaishnav Shorilal Puri and Anr. Vs. Kishor Kundan Sippy and Ors.*, (2006) 4 Bom CR 358;
- (7) *Chennuru Gavararaju Chetty Vs. Chennuru Sitaramamurthy Chetty and Others*, AIR 1959 SC 190;
- (8) *Deva Sharma Vs. Laxmi Narain Gaddodia*, AIR 1956 Punjab 49;
- (9) *Albert Judah Vs. Rampada Gupta and Another*, AIR 1959 CALCUTTA 715.

36. Mr. I.M.Chagla, appearing on behalf of defendant no.5 Courtyard while opposing this application, submitted that the suit was not a bonafide action in the interest of the company. He submitted that a derivative action could only be for the interest of the company. In the instant case, the plaintiffs

had failed to establish their bonafides. The plaintiffs had merely sought to further their own private agenda against the Narangs. The litigation was initiated for personal interest and not as a bonafide derivative action on behalf of the company.

37. Mr. Chagla has further placed reliance on *Samir Narain Bhojwani Vs. Aurora Properties and Investments and Anr.*¹, wherein the Supreme Court, while examining the power of the court to mould relief at an interlocutory stage, observed that, moulding of relief can only be resorted to at the time of consideration of final relief in the main suit and not at an interlocutory stage. The court held that the Single Judge and the Division Bench had committed a fundamental error in applying the principle of moulding of relief at the interlocutory stage and the order passed was a mandatory order at the interlocutory stage. The court noted the difference between the “moulding of relief” and “granting of mandatory relief at an interlocutory stage”. A mandatory order could be granted only to restore the status-quo and not to establish a new set of circumstances differing from the state, which existed when the suit was instituted; reference being had to the decision of the Supreme Court in *Dorab Cawasji Warden Vs. Coomi Sorab Warden*².

38. Defendant nos.7 to 10 are the directors of defendant no.11, which is the Wadhwa Group Holding Private Limited and which is believed to have

¹ (2018) 17 SCC 203

² (1990) 2 SCC 117

purchased the property at the auction sale. Mr. Balsara submits that the suit is misconceived as against defendant nos.7 to 11 who have unnecessarily being dragged into this litigation. He further submitted that defendant nos.7 to 11 were only involved pursuant to the auction purchase and the plaintiffs' grievance as far as the purchase is concerned could not be adjudicated by this court for want of jurisdiction. It is submitted that the defendants had acquired rights in accordance with the law, paid valuable consideration for the same and the plaintiffs were not entitled to interfere with the rights of defendant nos.7 to 11 who are not concerned with the disputes between plaintiffs and defendant nos.1 to 4 in relation to defendant no.12-Windsor. No factual averments about collusion have been made as to how the plaintiffs were deprived of their rights in the property by collusive methods adopted. He, therefore, submitted that no relief can be granted against the said defendant.

39. Mr. Jagtiani on behalf of defendant nos.13, 14 and 15 submitted that the defendants he represents are merely involved on the financial aspects of the transactions as between them and Wadhwa Group and Courtyard. They were not concerned with the relationship between the plaintiffs and the Narangs and the transactions under the suit agreement. He further submitted that defendant no.13 has been unnecessarily impleaded. There was a security trustee arrangement between defendant nos.5, 13 and 14. This arrangement has nothing to do with the plaintiffs. A Debenture Trust Deed has since been executed. Defendant no.13 is a debenture trustee for issue of debentures of

defendant no.5–Courtyard to defendant no.14, which were later transferred to defendant no.15 under a Debenture Trust Deed. He, therefore, submitted that there is no cause of action against these defendants. The suit itself is liable to be dismissed.

40. On behalf of defendant no.16, Mr. Nankani adopted the submissions that no cause of action occasioned against defendant no.16 and in any event, there are no allegations against defendant no.16–HDFC. HDFC, the secured creditor, has merely exercised its right under the SARFAESI Act and cannot be faulted on any count. Mr. Nankani, therefore, sought dismissal of the motion and the suit as against defendant no.16.

41. Having heard all parties counsel at length I proceed to consider the rival contentions. According to Rahejas, defendant nos.1 to 4 (Narangs) despite being in a joint venture/quasi partnership have breached their fiduciary obligations owed to Windsor and brought about a situation leading Windsor to commit default, which, in turn, led to distress sale of the Thane property and caused by a premeditated scheme under which Narangs acquired 50% beneficial interest in the Thane property in collusion with Wadhwa Group. Being a quasi-partnership and involving obligations of fiduciaries, including directors and participants in quasi-partnership, breach of such obligation will entail consequences. It is the plaintiffs' case that the judgments, upon which they have relied upon, dealt with accepted

propositions of law and hence it cannot be doubted that Windsor is a quasi-partnership firm and the Narang Group were fiduciaries are governed by Sections 65, 88, 90 and 95 of the Indian Trusts Act. Wadhwa Group has provided active assistance to Narang Group. Rahejas have also contended that Narang Group, in breach of their obligations and in breach of confidence, gave away confidential information relating to the Thane property.

42. It is convenient to first consider the case law cited by parties In *New Horizons Limited and Anr. Vs. Union of India and Ors.*³, the Supreme Court, while considering the concept of a 'joint venture corporation', had observed that the court could look through the corporate veil to ascertain the true nature of a company and especially in cases where the corporate personality is found to be opposed to justice, convenience or interest of revenue. At the same time, the fact situation in that case pertained to certain requirements to be fulfilled in relation to the tender documents. The Tender Evaluation Committee informed the petitioners that their offer could not be considered or did not indicate the reason for non-consideration of the offer. The decision in *New Horizons* does not consider the provisions of the Trusts Act and the court was considering a case where the tenders with eligibility criteria were invited by the government and in which the principles of lifting of corporate veil were considered.

3 (1995) 1 SCC 478

43. *New Horizons Ltd. (supra)* quoted from American Jurisprudence (2nd Edition, Volume 46, Pages 19, 22 and 23), alluding to the fact that the Supreme Court observed that joint ventures are, in general, governed by the same rules as partnerships. The relationships of the parties to a joint-venture and the nature of their associations are akin to a partnership that their rights, duties and liabilities are generally tested by rules, which are analogous to and substantially the same, if not exactly, to those which governs partnerships. Further, there is a little law, which applies to one and which does not applies to the other. The liability for torts of parties to a joint venture agreement is said to be governed by the law of partnership.

44. In *Faqir Chand Gulati Vs. Uppal Agencies Private Limited and Anr.*⁴, the Supreme Court, in the course of considering the tests to determine existence of joint-venture, observed that the court had considered the nature of “joint-venture” in *New Horizons Ltd. (supra)*, relying upon American Jurisprudence, to indicate that it refers to a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking a commercial enterprise, wherein all parties contribute assets and share risks. *Faqir Chand* quotes with approval the definition of “joint-venture” in Corpus Juris Secundum (Volume 48-A, pages 314 – 315) and in Black’s Law Dictionary, which defines “joint venture” as a term used interchangeably and

4 (2008) 10 SCC 345

synonymous with joint adventure or co-venture as a combination of two or more persons engaged in a specific venture for profit jointly sought without any actual partnership or corporate designation. The tests to ascertain whether a joint-venture exists are said to be joint ownership and control of property, sharing of expenses, community of control and active participation in management, intention of parties and fixing of salaries by joint agreement.

46. Black's Law Dictionary defines the term 'joint-venture' as a business undertaking by two or more persons engaged in a single defined product. The necessary elements are said to be an express or implied agreement, a common purpose that the group intends to carry out, shared profits and losses and each members have equal voice in controlling the project. In the instant case, I have no doubt that Rahejas and Narangs intended to do business together; however, in contrast with cases where different corporate entities come together to form a joint-venture. In the present case, Rahejas and Narangs were directors personally and their family members were shareholders of Windsor. They had formed a company to carry on business in real estate. Prima facie, I do not find the elements of a joint-venture in the case at hand. The definitions indicate that the joint-venture would be without any actual partnership or corporate designation and yet in another context, a business undertaking by two or more persons engaged in a single defined project. Windsor is nothing but a corporation formed under the Companies Act, wherein members of families engaged in real estate business came together to

carry out real estate business through projects. The requirements of a 'joint-venture', as generally understood, are not evident in the case at hand.

47. In *P.V. Sankara Kurup Vs. Leelavathy Nambiar*⁵, the Supreme Court was considering the challenge to a decree in a suit seeking declaration and title to the property purchased by the petitioner in an auction. The real purchaser was the respondent; whereas, the petitioner was an agent and power of attorney holder, who had purchased the property and ostensibly got his name entered in the sale certificate fraudulently, without the consent of the respondent. Section 88 of the Trusts Act, 1882, therefore, squarely applied and the court negated the contention that Benami Transactions (Prohibition) Act, 1988 would apply. The petitioner was an agent and trustee and in a fiduciary capacity acted as a power of attorney holder and hence, the respondent was held to be the true owner. *Sankara Kurup* offers no assistance to the plaintiffs.

48. In *Vithal Das Vs. Rup Chand and Ors.*⁶, the Supreme Court had occasion to consider application of Section 90 of the Trusts Act, while holding that a co-owner in possession of all the joint properties does not become a trustee by the mere fact of his collection of rent from the tenants. If a co-owner is clothed with the status of a trustee, he should have gained some advantage in derogation of the other co-owners interested in the property

5 (1994) 6 SCC 68

6 AIR 1967 SC 188

and that he gained such an advantage by availing himself of his position as co-owner. This observation was being pressed into service to support the plaintiffs' case.

49. In *Deo Nandan Prashad Vs. Janki Singh*⁷, certain property was sold for recovery of arrears of revenue from the co-owners in which a 3 annas share belonging to the plaintiffs, but subject to a usufructuary mortgage of that share for the benefit of the defendant, who was a minor and as mortgagee in possession had undertaken vide a mortgage deed to pay revenue to the Government in respect of the mortgaged share. The remaining 9 annas belonged to the plaintiffs. The property was sold by the Collector and was purchased by the agents benami on behalf of the mortgagee. The High Court reversed the judgment of the subordinate court, which has dismissed the suit, finding that the sale was fraudulent, but acquitted the minor of personal misconduct. The arrears occasioned was due to insufficient payment made in respect of 3 annas share; however free from personal blame the minor may have been, he could not profit by his agent's deliberate default committed in breach of the terms of his mortgage and the mortgagee could not be allowed to hold any advantage gained by default of his agents.

50. Applying this principle in *Deo Nandan Prashad's case (supra)*, Rahejas sought to contend that Narangs are seeking to derive benefit for themselves in a fraudulent manner and that they must be deprived of that benefit and that

⁷ PC 1916 Calcutta Series Vol.XLIV 573

they cannot be allowed to provide or hold for themselves the advantage of the default. However, the facts of that case revealed that the advantage gained by the scheme must be held for the benefit of co-owners, who were not apparently aware of the default or the sale. The Calcutta High Court considered the effect of Section 90 and the court observed that, even if defendant no.1 in that case is considered as a co-sharer, he must share the acquisition with his other co-sharer. But, since he was a trustee for a co-sharer, he could derive no benefit for himself by committing a breach of trust. Since the property came to him through a polluted channel and a Court of Equity will not allow him to soil his hands by retaining any portion of that ill-gotten profits.

51. In the appeal from the decision in *Deo Nandan Prashad's case (supra)*, the Division Bench of the Calcutta High Court in *Janki Singh and Ors. Vs. Debinandan Prosad and Ors.*⁸, held that the duty to perform through his representative was inconsistent with his becoming purchaser of the property in the way he did and therefore the title acquired by him could not operate in a manner such as to exclude other co-owners.

52. In *Dattatraya Sitaram Kulkarni and Others Vs. Shankar Mahadji Kulkarni*⁹, a learned single Judge of this court had observed that, a person, who was a limited owner by reason of his position, must not utilize that

8 1910 SCC OnLine Cal 160

9 AIR 1938 Bom 250

position to obtain an advantage to the detriment of his co-owners. However, the court also observed, on facts, that, it is necessary for the plaintiffs to establish, before the case is brought within the scope of Section 90, that the property belonging to the family. The underlying factor is, therefore, ownership vesting with the co-owners. *Dattatraya Kulkarni* was concerned with the case of joint family property. Plaintiffs claimed it to be ancestral property and to the benefit of the family. Section 90 was invoked, but this court held that the plaintiffs had failed to prove that the family was the owner of the property. Section 90 was, therefore, inapplicable. In the present case, this would mean that Narangs could not take advantage of their 50% shareholding owner of the Thane property through Courtyard to the exclusion of Raheja, but the fact is that the Thane property did not vest in Narangs personally, but was the property of the company.

53. *Morton H. Meinhard Vs. Walter J. Salmon*¹⁰ puts it succinctly. The Court of Appeals of New York held that joint adventures, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty and that many forms of conduct permissible “in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties”. A trustee is held to something stricter than the morals of the market place and hence an attempt to apply this principle to the facts of the present case. I am unable to agree that the fiduciary duties of the nature the plaintiffs did bind

¹⁰ 249 N.Y. 458 (1928)

the parties once the Thane property was sold especially in the complete breakdown in the business relationship between the two sides.

54. In *Lalit Mohan Roy and Others Vs. Kishori Mohan Roy and Others*¹¹, the Division Bench of Calcutta High Court had occasion to consider the effects of the words “otherwise transfers” in Section 65 of the Trusts Act, which invites application of section to cases of involuntary sales through the default of breach of trust of the trustees. In that case, a Deed of Settlement has been executed and a family trust created. The court held that the trust attached itself to part of the amount accruing from a sale, which was said to be partly falling to the share of a co-sharer, upon re-purchase of the property, the trust attaching to part of the property is said to have divided. The court held, on a proper interpretation of Section 65 of the Trusts Act, that the trust attached itself to the share of the co-sharer, on re-purchase, although the sale was an involuntary sale and purchaser was a bonafide purchaser for value without notice, this is not a case of re-purchase by Narangs and, in my view, cannot apply to the facts of the present case, as the sale of the Thane property was with full knowledge of the plaintiffs and to satisfy the security interest held by HDFC.

55. In *A. Thulasi Bai Ammal Vs. Punapakkam Ramakrishnappa Nattan and Others*¹², the Andhra Pradesh High Court was considering a second appeal.

11 1948 SCC OnLine Cal 125

12 1955 SCC OnLine AP 232

The court disagreed with the opinion of the court of the first instance and observed that it is well settled that a mortgagee in possession, who allows the mortgaged property to be sold in consequence of default in payment of the revenue and who purchases the property at the revenue sale either himself or in the name of a benamidar cannot resist redemption by the mortgagor or his transferee on the ground of statutory extinction of the equity of redemption by the revenue sale. That if there is a breach of an obligation cast upon the mortgagee, either by law or under the terms of the deed, and the breach results in a sale of the mortgaged properties under a paramount claim and the purchase is made by the defaulting mortgagee or on his behalf, the equity under Section 90 of the Trusts Act will fasten the mortgage to the property in his hands. The court also considered a further question whether the principle would apply to a case where the purchase at the revenue sale or court sale is made by a stranger for his own benefit and without any reference to the mortgagor and mortgagee and if the purchaser subsequently conveys the property to the mortgagee for consideration, whether the inter-position of a bonafide purchase of the property by a stranger at a revenue sale or court sale would make a difference? The court observed that there was difference of judicial opinion and once a revenue sale is made, it becomes final, free from fraud and collusion and statutorily extinguishes the rights of the mortgagor and the mortgagee alike and unless the revenue sale is set aside, the mortgagor cannot claim to redeem relying on his antecedent title as owner of

the equity of redemption. If a purchaser at the revenue sale subsequently sells the property to the defaulting mortgagee himself, it does not have the effect of reviving the mortgage or vesting in the mortgagor a right to redeem the property.

56. A different view is taken in *Lakshmayya Vs. Bolla Reddi*¹³. If mortgaged property is sold for arrears of revenue, the purchaser is a stranger but property is subsequently purchased by the mortgagee himself, the mortgage revives and reattaches to the property and could be redeemed by the mortgagor or his heirs or assigns. In *Devendra Kumar Vs. State of Uttaranchal and Others*¹⁴, the Supreme Court had occasion to consider an issue of termination of services upon the employer coming to know of material information about the criminal antecedents of the employee and observed that if a fraud has been perpetrated, the fruits/benefits cannot be retained. Fraud as it is said avoids all judicial acts, ecclesiastical or temporal.

57. In *Kunjulakshmi Amma and Another Vs. Padmanabha Pillai*¹⁵, the Kerala High Court held that the advantage gained of becoming the owner of the property fell within the scope of Section 90 of the Trusts Act and that the principle underlying Section 65 could also be invoked, as observed in *Sanagapally Lakshmayya Vs. Intoory Bolla Reddy*¹⁶, in which the Madras High

13 *ILR 26 Mad 385 (B)*

14 *2013 SCC OnLine SC 675*

15 *MANU/KE/0199/1965*

16 *ILR XXVI Madras 385*

Court held that if the 1st defendant-mortgagee was purchaser at revenue sale, the 2nd defendant-mortgagor could not have extinguished the mortgage and he could enforce his mortgage against the 1st defendant, just as if there had been no revenue sale.

58. In *Janardan Dagdu Khomane and Another Vs. Eknath Bhiku Yadav and Others*¹⁷, the Supreme Court was considering an appeal against a judgment of the Bombay High Court in relation to proceedings under Section 32(G) of the Bombay Tenancy and Agricultural Lands Act, 1948 and observed that although section 94 of the Trusts Act providing for constructive trusts has been repealed, the High Court had restrained itself from exercising its equitable jurisdiction to apply the English doctrine of constructive trust in view of the fact that the legislature had specifically deleted it from the Trusts Act. The Supreme Court proceeded to observe that the repeal of Section 94 does not put any fetter in declaring a trust, even if the situation falls outside the purview of the Act and its jurisdiction can be derived from section 151 of CPC and section 88 of the Trusts Act.

59. In *R.K. Dalmia etc. Vs. Delhi Administration*¹⁸, the Supreme Court had occasion to consider the position of directors and plaintiffs canvassed the aspect of directors' duties to act as trustees. Reliance was placed on the observations in several other judgments such as *People's Bank Vs. Harkishen*

¹⁷ 2019 SCC OnLine SC1225

¹⁸ AIR 1962 SC 1821

*Lal*¹⁹ and *Palmer's Company Law, 20th Edition*, which held that the directors are not only agents, but they are in some sense and to some extent trustees or in the position of trustees. In *Re Forest of Dean etc. Co. LR*²⁰, the court observed that, directors are, no doubt, trustees of assets, which have come into their hands and which are under their control. In the case at hand the Narangs did not personally control any assets. In the present set of facts, the Narangs had no assets in their hands or under their control.

60. In *Mohan Singh Bhullar and Ors. Vs. Inderjit Singh Bhullar and Anr.*²¹, the Chancery Division of the court had occasion to consider the conflict between fiduciary duty and personal interest and held that personal interest presupposes an existing fiduciary duty. In the case of *Commissioner of Income Tax, West Bengal Vs. East Coast Commercial Co. Ltd.*²², the Supreme Court had considered three questions of law arising out of income tax appeal, in which while dealing with the relationship between the members of the family, the Income Tax Tribunal had held that the family did not form a controlling group, because there was no evidence that they had actually controlled the voting, even though they held more than 75% of the stake in the company. The High Court observed that the family was in a position to control the affairs of the company, but there was no evidence to show in fact

19 *AIR 1936 Lah 408*

20 *(1878) 10 Ch D 450, 453*

21 *[2003] EWCA Civ. 424*

22 *(1967) 1 SCR 821*

that they did act in concert and controlled the affairs of the company. The court held that when majority interest is so held, it may be inferred that they were acting together. Considering the present dispute I find these decisions of little assistance in view of the absence of a cestui que trust /existing fiduciary relationship or a majority acting in concert.

61. In *Jiwandas Agarwal Vs. Narayandas Deora*²³, reference was made to a lease and a trust land, construction of which was to be completed within a prescribed period, which provides for vesting of the portion partly completed and has stipulation in lease to deliver land and building on expiry or sooner determination of the lease. The court held that trustees had created falsehoods in the correspondence, repeated in the plaint and in the application for appointing a Receiver. Although the law pertaining to fraud and collusion must be supported by specific particulars, the fraud pleaded must be proved. General principles have no application in the instant case because the collusive arrangement between the two players has not been proved. It was sought to be submitted that in the present case also, the plaintiffs were unaware of the machinations of the defendants.

62. In *Jamila Khatun Choudhury and Ors. Vs. Mahamud Khatun Chowdhury*²⁴, the Calcutta High Court considered a case of defendant no.1 that she was the owner of a moiety share of the taluk, to which the suit

23 MANU/WB/0291/1972

24 1918 SCC OnLine Cal 208

relates. With respect to the other's share, she was a mortgagee in possession under a mortgage of conditional sale and she had undertaken to pay the Government revenue. When taluk was in arrears, it was sold at a revenue sale and purchased by one Abdul Bari, who sold the taluk in May, 1899 to one Basirulla, only to be purchased by defendant no.1 in November, 1900. The court found that the purchase of taluk by Abdul Bari and subsequently by Basirulla were collusive transactions engineered by defendant no.1 for getting the estate into her hands. The court found that the rapidity of transactions was very suggestive and the appellant – Jamila Choudhury, as owner of half of the taluk, was desirous of ensuring that the other half would be acquired by avoiding the mortgage and therefore arranged a collusive set of transactions.

63. Apropos the law cited on the aspect of breach of confidentiality, in *Zee Telefilms Limited Vs. Sundial Communications Pvt. Ltd.*²⁵, reliance was placed on paragraphs 8 to 11, which dealt with inter alia the concept of breach of confidentiality. Since the law of confidence was different from the law of copyright, it may be apposite to mention that in the present case, the claim based on copyright has now been given up by the plaintiffs and they have restricted the claim to that of breach of confidence. The allegation is that the designs of the buildings purported to be put up in Thane property have now been utilized in breach of confidentiality obligation. *Zee Telefilms (supra)* had

25 2003 (3) Mh.L.J. 695

placed reliance on *Saltman Engineering Co. Ltd. Vs. Campbell Engineering Co. Ltd.*²⁶, in which it was observed that if a defendant is proved to have used confidential information, directly or indirectly, obtained from a plaintiff without his/her consent, express or implied, he will be guilty of an infringement of the plaintiff's rights. Needless to mention, in order to be confidential, the information must possess a quality of confidence, something which is not publicly available. This aspect need not detain me further inasmuch as there is no serious dispute between the parties that the designs presently being utilized are sourced from the very architect, who had been engaged by Windsor at the first instance. At best, this would be a breach of copyright or confidentiality vesting in him. The plaintiffs have not canvassed the aspect of any breach by the said architects and in any event, these are the project architects. Nothing has been shown to me to infer that the building designs were the exclusive property of Windsor. These are the aspects which should have been gone into at the stage of trial of the suit. In my view, no prima facie case of breach of confidence has been made out to entitle the plaintiffs to an injunction restraining Courtyard from using the designs and layout plan.

64. *Zee Telefilms (supra)* dealt with various other aspects in *Seager Vs. Copydex Ltd.*²⁷ and *Coco Vs. A.N. Clark (Engineering) Ltd.*²⁸, wherein the

²⁶ (1948) 65 RPC 203

²⁷ (1967) 2 All ER 415

²⁸ (1969) RPC 41

'Springboard doctrine' was considered. Even considering the wider perspective, I find no material on record to indict the defendants on the basis of breach of confidentiality. Reliance was placed by Mr.Khambata on the typical floor plan of various floors, which shall now proposed to be utilized by the Courtyard. Juxtaposed with the typical floor plans proposed earlier, though very similar, prima facie do not appear to be identical, though they may have been inspired by plans initially prepared for Windsor. In the instant case, the focus of the plaintiffs' case has been that the Windsor is a joint-venture; Narang Group is a joint venture partner, trustee and fiduciary of Windsor and; Narang Group also in a fiduciary capacity as directors of Windsor. Therefore, Narang Group was subject to conditions and effects of Sections 65, 88, 90 and 95 of the Indian Trusts Act. Fraud and collusion in the instant case are said to be evident and can be gathered from circumstantial evidence; reference being had to *New Horizons Ltd. (supra)* and *Faqir Chand Gulati (supra)*. The relationship between Rahejas and Narangs was a quasi-partnership. Principles of Partnership Law should therefore be applied. Narangs contention that Windsor was not a joint-venture is incorrect, since the management of Windsor is governed by SHA dated 16th October 2012. Affirmative votes were required from both sides (*Clauses 5.1(f)(i) and (iii) and 5.3(c) of SHA*). The documents and the cheques were to be jointly executed. The SHA contemplated that both the parties would conduct business in the spirit of mutual co-operation, trust and confidence. Thus, applying

principles of Partnership Law, the defendants said to be clearly in breach.

65. Rahejas have contended that the Narangs were in possession as trustees or fiduciaries in their capacities as directors of Windsor. *Far Pavilions (supra)* and *R.K. Dalmia (supra)* held that the directors are trustees, though not in every sense, but restricted to the assets that come into their hands and under their control. Windsor was under the control and management of Rahejas and Narangs, both of whom had directors on board and all decisions would have to be taken jointly. The plaintiffs contend, relying upon *Far Pavilion* and *R.K. Dalmia*, that Narangs are in breach and are clearly accountable. So also, as held in *Rajeev Saumitra (supra)*, the duties of the directors are liken the duties of the trustees. Breach of section 88 of the Indian Trusts Act was observed in that case, as also Section 166 of the Companies Act, 2013. In the case at hand, the scope of fiduciary obligations becomes relevant and in the light of the decision in *Rajeev Saumitra*, it was contended that Narangs, as co-owners of Windsor, were also in a fiduciary capacity. In *Rajeev Saumitra Vs. Neetu Singh and Ors.*²⁹, the Delhi High Court, while considering a pending application under Order XXXIX Rule 1 of CPC, inter alia dealt with duties of a director to a company under section 166 of the Companies Act, 2013, whereby if directors violate the duties, the cause of action accrues in favour of the company. A reference may be made to *Sangramsinh P. Gaekwad Vs.*

29 2016 SCC OnLine Del 512

*Shantadevi P. Gaekwad (Dead), through LRs.*³⁰, which observed that under section 88 of the Trusts Act, a person bound in fiduciary character is required to protect the interests of other persons and one is bound to protect the interests of the other as between two persons, if the former was availing of such a relationship and makes a pecuniary gain for himself, section 88 would be attracted. When a person makes a pecuniary gain by way of a transaction, the cestui qui trust created thereunder must be restored.

66. In *Vitthal Das (supra)*, the court held that a co-owner must, subject to the obligations of a trustee, show that he gains an advantage of his position as trustee and co-owner. Reliance was placed on section 90 of the Trusts Act and the contention that Windsor being a quasi-partnership, Rahejas and Narangs were co-owners. Narangs had gained an unfair advantage in derogation to the interests of Windsor and in breach of their obligations as co-owners to Rahejas and, therefore, all benefits gained by Narangs should be treated as benefits of Windsor. In *Dattatraya Kulkarni (supra)*, the court held that it would not be necessary to make out a case of unfair advantage fraudulently or by misrepresentation and according to the plaintiffs, even if Narangs had declined to accept proposals offered by Rahejas, failure to protect interests of Windsor justifies grant of reliefs against Narangs.

67. The Narang Group was said to be in a position of trustees and fiduciaries, as held in *Meinhard (supra)*, for the reason that the Thane

30 (2005) 11 SCC 314

property was valued @ 1,300 crores and Narangs, by way of their wrongful actions, deprived Windsor of a corporate opportunity to develop the Thane property. Narangs then acquired the said corporate opportunity, which was really Windsors', to exploit. Likewise, for particular reasons, Narangs colluded with Windsor and caused Rahejas, by their wrongful acts, engineered defaults in re-payment obligations resulting in the Thane property being sold. I find no evidence of such default being "engineered".

68. The other proposition canvassed by Rahejas is that sections 65, 88, 90 and 95 of the Trusts Act must be held to be applicable to involuntary sales and involving an innocent third party will not prevent the trust from reviving. Once a fiduciary, such as the Narangs, regain the property by acquisition of an interest in Courtyard. It is in this behalf that reliance was placed in *Janki Singh (supra)* of the Calcutta High Court.

69. In the instant case, it is contended that the property was acquired by Narangs through a polluted channel. Effectively, the acquisition of a large percentage in Courtyard's equity is equivalent to acquiring through a polluted channel. As in the case of *Janki Singh*, where the property was re-purchased by Debinandan Prosad in the name of a servant, the court had held the purchase to be fraudulent and through a polluted channel. In the instant case, considering section 65 of the Trusts Act, in order to hold Narangs' conduct to be accountable, a trustee must be found to have wrongfully sold or

transferred the trust-property and afterwards should become the owner of the property and if he subsequently becomes owner of the property, it would have to be subjected to the trust, even if intervening transfers had occasioned in good faith and for consideration; as in the present case, HDFC sold the property and it was purchased by Courtyard (*earlier known as Raghuleela*).

70. Considerable reliance was placed on the decision of the Privy Council in the case of Deonandan Prashad, wherein the Privy Council observed that Deonandan had a duty to perform, which was inconsistent with his becoming a purchaser of the property in a manner that he had done and accordingly his title could not operate to the exclusion of the co-owners. The facts in hand, however, reveal that Narangs are holding 50% shares of Courtyard; the remaining 50% being held by the Wadhwas. I do not see how the ratio of these judgments would apply to the case at hand. Section 65 of the Trusts Act considers where the trustee wrongfully sells or otherwise transfers trust property. Mr. Khambata has canvassed the point that wrongful sale or otherwise transfers would also include an involuntary sale such as the SARFAESI action and under section 65 of the Trusts Act, even if re-purchase is from an intermediate transferee for value without notice, the trust re-attaches to the property upon the same being re-purchased. Although in the instant case, Narangs have not themselves re-purchased the property, I do not see in this set of facts a sinister design engineered by Narangs. I do not find any sinister design to engineer a default, a SARFAESI driven sale to a specific

identified purchaser and then a repurchase. The cases cited are mainly specific instances, where the properties were repurchased by the defaulters themselves taking advantage of their own wrong.

71. In *Tan Bug Taim and Others Vs. The Collector of Bombay*³¹, this court was considering a proceeding under the Specific Relief Act, 1877 and for requisition of property under the Defence of India Act, 1939. While considering the powers conferred upon the Indian Legislatures, the court had occasion to consider the arguments on behalf of the petitioners in relation to the Indian Trusts Act, 1882, which was intended to apply to private trusts and trustees, and had occasion to observe that the trust, which was subject matter of the enactment, refers to “certain obligations in the nature of trust” and various relationships, which were analogous to that between a trustee and a cestui que trust, were provided for under Chapter IX and in particular Sections 80 to 96, but, by no stretch of imagination, could those relationships be brought in the definition of ‘Trusts’ and the heading of Chapter IX and the terms of Section 80 definitely showed that the reference made in the section were not trusts but were obligations in the nature of trusts. The question is whether those obligations could be included in the definition or concept of “trusts”, which were subject matter of the enactments. The submission is that the obligations in the nature of trusts could not be equated to trusts generally under the Trusts Act.

31 1946 ILR 517

72. In *Tan Bug Taim and Ors. Vs. The Collector of Bombay*³², reliance was placed on the observation of this court that the Indian Trusts Act, 1882 was a law to regulate operation of private trusts and trustees and the fact that all provisions pertaining to trusts and trustees ended with Section 79. That Chapter IX deal with certain obligations in the nature of trusts analogues to that between a trustee and a cestui que trust and that those relationships could not be brought within the definition of ‘trusts’. The contention of the defendants was that Sections 88, 90 and all sections forming part of Sections 90 and 95 would not apply.

73. In *W.O. Holdsworth and Others Vs. State of Uttar Pradesh*³³, the Supreme Court, while considering the interpretation of Section 11(1) of the U.P. Agricultural Income Tax Act, 1948, observed that, whatever be the position in English Law, the Indian Trusts Act, 1882, defines a ‘Trust’ as an obligation annexed to the ownership of property and arising out of confidence reposed in and accepted by the owner for the benefit of another or of another and the owner. A person accepting the confidence is the “trustee” and the person for whom the confidence is accepted is the “beneficiary”. While the subject matter of trust is called as “trust property” or “trust money”, “the beneficial interest” or “interest” of the beneficiary is his right against the trustee as owner of the trust property. The Supreme Court took a view that

32 [1946] Bombay Series 517

33 AIR 1957 SC 887

the trustee is the legal owner of the trust property, which vests in him, and although he holds the same for the benefit of the beneficiaries, he does not hold it on their behalf. It was clarified that the expression “for the benefit of” and “on behalf of” are not synonymous. They convey different meanings.

74. As far as Section 65 of the Trusts Act is concerned, it would apply only to express “trusts” and this principle has been laid down in *W.O. Holdsworth and Ors. Vs. State of Uttar Pradesh*³⁴ and in *Narayani Amma Vilasini Amma Vs. Eyo Poulose of Vattathara*³⁵. In *Holdsworth (supra)*, the “trust” is defined as an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of other or of another and the owner. The concept of “trustee”, “beneficiary”, “the beneficial interest” or “interest” is also clear and the subject matter of trust is called “trust property” or “trust money”. Thus, the trustee must be the owner of the trust property. In the instant case, that is not so. The ownership was always vesting in the company.

75. In *Narayani Amma Vilasini Amma Vs. Eyo Poulose of Vattathara*³⁶, the Kerala High Court, while considering the question whether a person occupying property notwithstanding the extinguishment of the mortgage, under which he was inducted and is held liable for mesne profits, owes his

34 1958 SCR 296

35 1981 SCC OnLine Ker 237

36 AIR 1982 Ker 198

liability as arising out of breach of trust, had occasion to analyze Section 3 of the Trusts Act, 1882, by observing that it arises from the relationship between two persons, by virtue of which one of them holds property for the benefit of the other. It imposes an obligation on the trustee, who has control over the property. Section 3 conceives of a person, in whom the legal ownership vests with an obligation on the part of such owner, annexed to such ownership and arising out of confidence reposed in him and a person other than the owner, for whose benefit the obligation operates. The court observed that the person in whom the confidence is reposed and who is the legal owner of the property is the trustee. The person who reposes such confidence is the creator or settlor of the trust. The existence of legal interest in one person and equitable interest in another is the main feature of a trust. The court also considered Sections 81 to 94 of the Trusts Act, which deals with the obligations in the nature of trusts, holding that they are strictly not trusts, but are instances of fiduciary obligations founded on implied intention; the principle being that no person, who is in a fiduciary position, can make a profit out of that position to the detriment of persons, who were actually interested in the property along with him.

76. *Narayani Amma* also analyzes the definition of “trust” in Section 3 of the Trusts Act as (i) a person in whom legal ownership of property vests; (ii) an obligation on the part of such owner, annexed to such ownership and arising out of confidence reposed in him and; (iii) a person, who is not the

owner, for whose benefit the obligation here-in-before mentioned operates. That the person in whom the confidence is reposed and who is the legal owner of the property is the trustee. The person reposing such confidence is the settlor of the trust and the beneficiary is the person for whose benefit the trust is settled.

77. In *Bacha F. Guzdar Vs. Commissioner of Income Tax, Bombay*³⁷, reference was made to the Supreme Court's consideration of interest of a shareholder vis-a-vis the company was explained in the *Sholapur Mills case*³⁸, which negated the position taken up on behalf of the appellant that the shareholder has a right in the property of the company. That although shareholders of the company have a sole determining voice in administering the affairs of the company and that they are entitled to declare dividends to be distributed, the interest of the shareholders individually or collectively does not extend to more than a right to participate in the profits of the company and there is nothing to justify and that no assumptions could be made that the shareholders, who buys shares buys any interest in the property of the company. The Supreme Court held that shareholders of the company may have the sole determining voice in administering the affairs of the company, but the shareholders, who buy shares, do not buy any interest in the property of the company, which is a juristic person distinct from the shareholders. The

³⁷ AIR 1955 SC 74

³⁸ (1950) SCR 869, 904

law on this aspect is fairly well settled. That buying interest by the shareholder does not amount to more than a right to participate in the profits of the company. This aspect need not detain us since there is virtually no contest on this well established principle. The question that arises is whether in the case at hand, by virtue of Narangs holding shares in Courtyard, it would amount to Narangs owing the property vesting in Courtyard. The answer to this must be in the negative, considering the legal provision that Narangs as shareholders have no ownership right in the property of Courtyard.

78. In *V. Narasimha Iyengar, Official Liquidator of the City Hygienic Milk Supply Company Limited Vs. The Official Assignee of Madras, representing D. Sadasiva Rao, an insolvent and Others*³⁹, the court considered the question whether Directors of companies are trustees for the purpose of Section 10 of the Limitation Act and held that the directors are not trustees. Directors, in the facts of that case, could not be regarded as ‘express trustees’ and if they were not express trustees, Section 10 of the Limitation Act would not deprive them of their rights to rely on any provision of the Act. The Division Bench of the Madras High Court held that the director not being the owner of the property of the company, Section 65 of the Trusts Act would not be applicable. That a director may be acting as a trustee in a limited sense, as contemplated under Section 88 of the Trusts Act, and a director may gain a pecuniary advantage

39 (1931) 60 MLJ 280

in his capacity as a fiduciary. In the present case, there is nothing to indicate that Narangs filled in this capacity.

79. In *Far Pavilions Tours & Travels Private Limited Vs. Manish Pratik*⁴⁰, the Division Bench of this court then considered the decision in the case of *V. Narsimha Aiyangar Vs. Official Assignee of Madras*⁴¹, which dealt with the issue whether the directors of companies are trustees for the purpose of Section 10 of the Limitation Act and hold that they are trustees of assets, which have come into their hands and under their control, but not trustees of a debt due to the company.

80. In *Chennuru Gavararaju Chetty Vs. Chennuru Sitaramamurthy Chetty and Others*⁴², the Supreme Court, while considering the question whether renewal of a lease for running a salt factory, granted by the Government in favour of the appellants, could be treated as an asset of the dissolved partnership between the contesting parties. The court had occasion to consider whether in the impugned judgment, the High Court was right in holding that under Sections 88 of the Indian Trusts Act or under General Law, the contesting defendants had placed themselves in such a position as to render themselves accountable as constructive trustees. The Supreme Court analyzed Section 88 of the Trusts Act by observing that, firstly, it has to be shown that the contesting defendants had a fiduciary character and were

40 2014 SCC OnLine Bom 1843

41 (1931) 60 M.L.J. 280

42 AIR 1959 SC 190

duty bound to protect the interests of the other partners in the matter of obtaining the lease. In the facts of that case, they obtained the lease for themselves instead of availing the character. Upon a fair reading, the section is in two parts. It must be shown that, in the second part, while obtaining the benefit, they had placed themselves in such a position as to render their interests adverse to the interests of the other partners and that they had thereby obtained a pecuniary advantage, which they must hold for the benefit of the other partners. This, in my view, has not been established in the facts of the present case. Nothing has been shown to establish that the defendants have utilized funds of the company or gained any benefit to the detriment of the company. On the other hand, Windsor has benefited from repayment of the loan, which resulted from the SARFAESI sale. If the SARFAESI sale had not taken place, liability to the extent of Rs.208 crores would have been continued to subsist and burdened Windsor with further interest liability. This aspect cannot be lost sight of. *Chennuru Chetty (supra)* observed, after examination of the English precedents, that the Indian legislature has substantially adopted the English law while enacting rules in the Indian Trusts Act, particularly, Sections 88 and 90, and in the facts of that case, the parties chose to fix the term of the partnership and there was no provision for extension. The Supreme Court, therefore, upheld the trial court's verdict in favour of the plaintiffs while holding that the lease in respect of the salt factory could not be treated as an asset of the dissolved partnership firm.

81. The court, while considering the facts, observed that Section 88 is in two parts. In the first part, the contesting defendants must fulfill a fiduciary character and, that in the second part, it had to be shown that the contesting parties have placed themselves in a position so as to render their interests adverse to those of the other partners and thereby obtained a pecuniary advantage, which they must hold for the benefit of the other partners as well. The illustrations (d) and (e) to the section were then considered. For ease of reference, Section 88 and relevant illustrations are reproduced below :-

“88. Advantage gained by fiduciary –

Where a trustee, executor, partner, agent, director of a company, legal advisor, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person, so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.

Illustrations

- (a)
- (b)
- (c)
- (d) *A, a partner, buys land in his own name with funds belonging to the partnership. A holds such land for the benefit of the partnership.*
- (e) *A, a partner, employed on behalf of himself and his co-partners is negotiating the terms of a lease, clandestinely stipulates with the lessor for payment to*

himself of a lakh of rupees. A holds the lakh for the benefit of the partnership.

(f)

(g)

(h)

82. While Mr. Kadam had canvassed the view that, in the present case, the test of fiduciary character was not satisfied, since Narangs did not gain any pecuniary advantage, there was no question of holding any such advantage for the benefit of the Rahejas. Mr. Khambata had submitted that apropos this very decision, considering the fact that the section was in two parts and the Narangs hold a fiduciary character which resulted in their gaining a pecuniary advantage, which they must hold for the benefit of the plaintiffs and for that reason, they were entitled to reliefs.

83. The Law in England pertaining to renewal of a lease of the partnership property by one or more of the partners, without privity of the others, was held to enure for the benefit of all. It was also contended that the Legislature had adopted the English Law concept and has incorporated it in Sections 88 and 90 of the Trusts Act. The court further observed that, on a close examination of the English precedents, it was found that there is no absolute rule of law or equity that a renewal of a lease by one partner must necessarily enure for the benefit of all. If there is a presumption of fact, as distinguished from a presumption of law, that there is an equity in favour of renewal of

lease enuring for the benefit of all, but such a presumption is rebuttable, being a presumption of fact, and must therefore depend on the facts and circumstances of each case. In the present case, I have no manner of doubt that the chain of events, which led to Narangs requiring 50% controlling interest in Courtyard cannot be said to be one which would fall within the scope of Section 88 of the Trusts Act, so as to require me to hold that they had gained a pecuniary advantage and they hold such benefit for the advantage of Rahejas.

84. The effect of Section 88 was also considered by the Division Bench of this court in *Vaishnav Shorilal Puri and Anr. Vs. Kishor Kundan Sippy and Ors.*⁴³, wherein the court had occasion to consider the decisions in *Chennuru Gavararaju Chetty Vs. Chennuru Sitaramamurthy Chetty and Others*⁴⁴ and *Deva Sharma Vs. Laxmi Narain Gaddodia*⁴⁵, (which considers whether Section 88 applies to the facts of that case). In paragraph 32 of that judgment, the question that fell for consideration was whether the plaintiff was entitled to accounts. Referring to Section 88 of the Trusts Act, Falshaw, J. observed that Deva Sharma did not obtain the selling agency in his character as a partner of plaintiff. That Deva Sharma and the British India Corporation, with whom he was persona grata, had both regarded the agency agreements and partnership as having come to an end. Falshaw, J. also held that a particular benefit can no

43 (2006) 4 Bom CR 358

44 AIR 1959 SC 190

45 AIR 1956 Punjab 49

longer be secured on behalf of an estate or a partnership, the fiduciary relationship ends and an individual partner or beneficiary of the estate is free to look after his own interests and secure the benefit for himself.

85. The Division Bench also analyzed *Chennuru Gavararaju Chetty (supra)* and *Deva Sharma (supra)* and summarized the points extracted *inter alia* as follows :-

- (i) For Section 88 to apply, parties must have a genuine fiduciary relationship.
- (ii) When it is clear that a benefit can no longer be secured for the partnership, the fiduciary relationship ends and the individual partner is free to look after his own interest and to secure benefit for himself.
- (iii) To attract the first part of Section 88, a pecuniary advantage must be gained while in a fiduciary capacity and while dealing with the third party.
- (iv) For the second part of Section 88 to apply, the collusion with the third party would have to be established (in the instant case, collusion between Narangs and Wadhwas).

86. The basic factual aspects that would have to be established in the present case; mainly, (i) whether Rahejas and Narangs were in a genuine

fiduciary relationship ? If so, the joint-venture business would break in the fiduciary relationship and, therefore, Narangs were entitled to look after their own interests ?; (ii) whether the Narangs gained any pecuniary advantage while dealing with the Wadhwas ?; (iii) whether there was any collusion between the Narangs and the Wadhwas, all of which will be required to hold that the rigours of Section 88 would apply ?

87. The grievance of the plaintiffs is that the entire set of transactions was designed to achieve a predetermined result, namely, that Narangs regained the benefit of the Thane property. In this behalf, it was contended that on 21st July 2015, HDFC sold the Thane property under SARFAESI proceedings to Courtyard (*the then Wadhwa Group entity*) for Rs.208 crores. On 14th September, 2015, Courtyard executed a Debenture Trust Deed with Piramal Enterprises as debenture-holder and Catalyst as trustee, by which Courtyard issued 175 Secured Redeemable Non-convertible Debentures for the face-value of Rs.100 lakhs each, aggregating to Rs.175 crores, against security for mortgage of the Thane property in favour of Catalyst. On 27th January 2016, Wadhwas transferred shareholding in Raghuveer to Narangs for Rs.1 lakh. On 3rd February 2016, Raghuveer subscribed to additional 14,000 equity shares of Courtyard under a private placement for Rs.1.40 lakhs and accordingly acquired 50% shareholding in Courtyard. Narangs, through Raghuveer, owned 50% shareholding in Courtyard, in which the Thane

property was vested. On 5th August 2016, 14,000 equity shares of Courtyard were transferred by Raghuveer to Narangs and in that manner, Narang Group holds 50% of the equity share capital of Courtyard, with Wadhwas holding the balance.

88. The Division Bench, as laid down in *Chennuru Gavararaju Chetty (supra)*, has observed that there is no absolute rule of law in equity governing the conduct of partners that an action by one must necessarily enure for the benefit of all parties. The Division Bench of this court observed, in paragraph 65, in the facts of the *Vaishnav Shorilal Puri (supra)* that the business opportunity was no longer available to the company in question and, therefore, no breach of fiduciary obligation had occasioned. In the present case as well, the relationship between the parties was irretrievably disturbed, which is evident from the conduct of the parties viz the fractious relationship between Narangs and Rahejas. The Calcutta High Court in the case of *Albert Judah Vs. Rampada Gupta and Another*⁴⁶, while dealing with the position of directors, observed that the directors are the trustees in a very limited sense and they are liable as trustees for breach of trust, if funds were misapplied, and it is futile to apply the entire law of trust while determining the rights and liabilities of a director.

89. To recapitulate, in the present case, the contention of the Rahejas is that

46 AIR 1959 CALCUTTA 715

the auction sale was engineered by the Narangs. It alludes to a premeditated motive to ensure that the auctioned property would ultimately form an asset of Courtyard. To hold so, would require me to arrive at a finding that the Narangs had planned various events, that have unfolded upon the auction sale being concluded in a manner such that the vesting of the property in Courtyard took place according to a predetermined scheme of events engineered by the Narangs, in collusion with Wadhwas. I am unable to find any such contrived plan as the plaintiffs would have me believe.

90. In *Darius Rutton Kavasmaneck Vs. Gharda Chemicals Limited*⁴⁷, this court observed that in *Anil Madhavdas Ahuja Vs. Marvel Fragrances Private Limited*⁴⁸, by an order of 11th August 2011, the court had observed that a derivative action by a party contrary to the interest of the company and in furtherance of his personal interest should not be encouraged. In *Kavasmaneck (supra)*, there were other aspects, which the court observed, namely, that a derivative action is not maintainable, if the plaintiff has an ulterior motive in bringing the action, which is not bonafide in the interest of the company. Reference was made to a decision of the court of appeal in *Barrett Vs. Duckett*⁴⁹, wherein the court observed that a shareholder would be allowed to sue on behalf of the company, if the action was bonafide for the benefit of the company for wrongs to the company and for which no other

47 (2015) 2 Bom.C.R. 100

48 Notice of Motion No.767/2011 in Suit No.566/2011, dt. 11.08.2011

49 (1995) 1 BCLC 243

remedy is available. But, if an action was brought for an ulterior purpose or if an adequate remedy is available, the court will not allow the derivative action to proceed. In that case, the derivative action was prompted by family hostilities and being brought with ulterior motive, was not a bonafide action in the best interest of the company.

91. The facts of the cases cited are those in which undisputed facts established at the trial reveal that a fiduciary and/or persons in position of fiduciaries and trustees had purchased or had re-purchased properties, in some cases through intervening transactions, and by innocent purchasers, who had acquired the property for value without notice and from whom the Narangs re-purchased properties. In the instant case, there is nothing to indicate existence of such premeditated scheme to acquire a stake in Courtyard, which would be the beneficiary of development rights pursuant to the SARFAESI sale in favour of Wadhwas. I find myself in agreement with the defendants' contention that relationship between the parties had turned acrimonious. Business was not being conducted in the initial spirit with which the parties set about their venture. Even assuming that they were of Rahejas that the Windsor was a joint-venture, a quasi-partnership of thoughts in a sense of a joint-undertaking to develop real estate for mutual profit and undoubtedly a commercial enterprise, I am of the view that the elements of trust that the Rahejas sought to invoke to prevent development of the Thane property had not been made out at this interim stage.

92. Reliance placed on *Kunjulakshmi Amma (supra)* is misplaced inasmuch as it postulated a premeditated object while purchasing property in the revenue sale. The Rahejas have stressed upon the fact that Narangs acted in breach of their fiduciary obligation and accelerated sale by HDFC by refusing the proposals made by Rahejas for curing defaults. The allegation that the Narangs consistently rejected the proposals to resolve the impasse between Rahejas and Narangs, including the option of division of assets, has not been made out. The allegation that refusing proposals to sell flats, while continuing to sell their own flats at Oshiwara Project to their parties as a means to engineer defaults, has also not been made out. Acts of alleged misdemeanor in routing rent through escrow accounts have not been established. Even assuming them to be correct, the same cannot be attributed to a deliberate design to engineer defaults. Nothing in the set of facts shown to me convince me to hold that Windsor's ability to clear its outstanding and cure defaults have been deliberately frustrated by the Narang Group. One must not lose sight of the fact that the sale was one driven by compulsion and efforts were made by Narangs as well to ensure sale of properties to avoid the defaults. The allegation that defaults were caused by Narangs alone has prima facie not been established. Even assuming that to be so, it would have to await trial of the suit and evidence. Acquisition of beneficial interest to the extent of 50% in Thane property cannot prima facie said to be in breach of fiduciary obligations, if any.

93. I do not find that Narangs have taken advantage of their own wrong, so as to invite application of section 65 of the Trusts Act. So also, even assuming that Narangs were in a position of a trustee, partner, director or otherwise bound in fiduciary character to protect the interest of Rahejas or had entered into any dealings to gain pecuniary advantage, then they must hold such benefits for Rahejas. It may not be a matter of co-incidence that Narangs joined hands with Wadhwas to set up and hold stake in Courtyard. One upmanship is common place in business and such incidents are not uncommon in the commercial world, that it should happen between the two groups, who hold stakes in Windsor, no doubt, may be unanticipated, but the course of events have demonstrated that Narangs do not appear to have deliberately stalled operations of Windsor in order to gain control of 50% stake in Courtyard. If that was to be established, Rahejas' case would have been firmly in the saddle, but I am unable to find such motives. On the part of Narangs, upon commencement of SARFAESI proceedings or immediately upon its completion, acquisition of interests / stake in Raghuleela took place after the SARFAESI sale in favour of Wadhwas. In that view of the matter, it is not possible to accept Rahejas' contention. In my view, sections 65, 88, 90, read with section 95, of the Trusts Act could not enure to the benefit of Rahejas in the present set of facts. I am unable to hold that the Narangs as fiduciaries engineered and have taken advantage of collusive transactions to gain a stake in Courtyard.

94. Apropos the contention that the constructive trusts are not confined to cases under the Indian Trusts Act and can be construed by application of section 151 of the CPC and as contemplated in *Janardan Khomane (supra)*, I am unable to form such a view in the facts of the present case. Here is a case where commercial compulsions of the parties led to SARFAESI action being initiated. The initiator of the SARFAESI action is HDFC, a company unconnected with Rahejas or Wadhwas. I have not heard Rahejas to contend that HDFC was colluding or otherwise “co-operating” with Narangs, although there may be business relationship with various customers including Rahejas and Narangs. The submission of plaintiff that Narangs cannot plead that Rahejas failed to perform their obligations, is unacceptable. There is no denial by Rahejas that they may have also acted in an indifferent manner, that the need of the hour was curing of defaults. The Rahejas cannot take advantage of their own wrong, if indeed their decision to not to consent to the sale of flats at the material time appeared to be obstructive. In that view of the matter, the contention that the Narangs cannot fault Rahejas for non-performance, cannot be accepted as a ground for granting interim relief. Furthermore, Rahejas’ contention that the Wadhwas acted in collusion with Narangs and assisted Narangs in perpetrating a fraud upon Windsor and that such collusion and fraud can be inferred, is not made out. No doubt, direct evidence may not be available at this stage, but if the Rahejas are correct in their contentions, they would be required to establish the said fact by leading

evidence such that would lead the court to an inescapable conclusion that Wadhwas had prior knowledge of Narangs' intention to deprive Rahejas and/or Windsor of the right of exploitation of the Thane property.

95. One must not lose sight of the fact that the property belonged to the company to start with and was offered as security to HDFC exposing security interest therein to a SARFAESI action. The contention that the Wadhwas colluded and helped in perpetrating a fraud has not been established at this stage. Although Rahejas have relied upon the fact that Narangs declined to pay a sum of Rs.2.50 crores to HDFC and triggered the sale process, nothing prevented Rahejas from doing the needful to prevent the SARFAESI action. It is true that when Thane property was acquired by Courtyard, it was wholly owned by Wadhwas. It was later that Narangs were granted co-ownership in Courtyard. Although much has been said about the acquisition of shares for Rs.1.40 lakhs, this submission overlooks the fact that Narangs have advanced loan of Rs.44 crores to Courtyard and despite the fact that Wadhwa Group had availed of institutional loans of Rs.375 crores for Courtyard. The detailed business relationship between Narangs and Wadhwas is not up for examination before the court at this stage. The allegation that corporate structure was created to ensure ownership and control of Courtyard by Narang Group with the help of Raghuleela, even if proved, does not prima facie fall foul of provisions of the Trusts Act. Absent a case on the basis of entrustment or partnership, I find no reason to hold in favour of the plaintiff

on that count. The other contention of Rahejas that Narangs cannot be allowed to benefit from Courtyard is premised on the contention that Courtyard reaps fruits of fraud. These allegations are bald and bereft of any prima facie evidence of collusion, suppression of truth or suggestion of falsehood. For the same reasons, it is not possible to hold that Narangs are liable for breach of confidence in respect of breach of confidential information. No doubt, these are the aspects to be proved at the final hearing, but, prima facie, it is evident that the drawings and designs were prepared by the Architect. Nothing on record indicates that this was confidential information proprietary to Windsor and which could not have been utilized. The property was sold on “*as is where is & as is what is*” basis. This expression probably includes plan as well because these were part of the project which was envisaged. It will have to be examined whether HDFC had the right to develop the property. It is possible that HDFC may have had right to utilize the Thane property in such manner they chose to do. However, these are the aspects to be established at the trial. At this interim stage, I am not convinced that confidential information has been parted with. There is no evidence that Windsor was the owner of the confidential information.

96. *New Horizons (supra)* holds that a joint venture contemplates a legal entity in the nature of a partnership, with attendant obligations of the partners. *Faqir Chand Gulati (supra)* imports principles of Partnership Law and applies the same to the management of quasi-partnership. The question

is whether defendants have incorrectly contended that Windsor was not a joint-venture, the fact that the management of Windsor was to be managed in accordance with the Shareholders Agreement dated 16th October 2012 and was necessarily involved the affirmative vote of Raheja Group and Narang Group. The SHA contemplates mutual co-operation and requires the parties to act in trust and confidence. If Windsor was a joint-venture, then principles laid down in *New Horizons* and *Faqir Chand* would require Rahejas and Narangs to ensure that principles of Partnership Law are followed. In my view, no case for invoking principles of partnership are made out in this case.

97. In relation to the position of trustees and fiduciaries, *Far Pavilions* contemplates that the directors, though not trustees, are liable to act as trustees in respect of assets that have come into their hands. *R.K. Dalmia* also takes a similar view. Rahejas have contended that assets of Windsor were under the control and management of both Narangs and Rahejas and hence the directors of the companies would be bound as if they were trustees. *Rajeev Saumitra* also takes a view that directors' duties are in the nature of trusteeship. Narang Group, it is contended, were bound by this principle and, in particular, Section 166 of the Companies Act, 2013 enjoins upon the directors of Narang Group to comply with the said provision. The Narang Group's directors were required to act in good-faith in order to promote the objects of the company for the benefit of its members and such exercise shall be carried out with due care and diligence to ensure that company's interest

is not conflicted, while ensuring that no undue gain is made by the directors or the relatives or the partners or the associates.

98. *Vitthal Das* held that a co-owner will be bound by obligations of a trustee, if he gains an advantage by availing of his position as a trustee. It was sought to be contended by Rahejas, when considered the applicability of Section 90 of the Indian Trusts Act, in the instant case, that Windsor, being a quasi-partnership, Narangs are akin to co-owners, who had gained an advantage contrary to the interests of Windsor and that of the other co-owner the Rahejas. Likewise, *Dattatraya Kulkarni* also asserts that a person in a fiduciary position cannot make profit to the detriment of other persons interested in the property and it was not necessary that other persons should establish that Narangs obtained an advantage by fraud or misrepresentation. It was sought to be contended that failure to protect the interests of Windsor by declining to accept proposals of Rahejas would amount to breach of duty of a fiduciary. *Meinhard* clearly accentuates the aspect that in a joint-enterprise, both sides have a duty of utmost good-faith to the other and one should not obtain or appropriate an advantage over the other. Since development of the Thane property was one of the objects of Windsor, it was not proper for the defendants to deprive Windsor of its corporate opportunity to develop the Thane property. Reference was also made to *Mohan Singh Bhullar* to assert the view taken therein that where joint-venture partners or shareholders in a quasi-partnership acquired corporate opportunities, which

were to be available to the joint-venture company, the partners must hold the opportunity for the benefit of the joint-venture company. In the instant case, it is sought to be made applicable on the basis that the Narangs, by the acts and omissions, caused Windsor to default on repayment obligations and thereafter acquired 50% interests in the Thane property. In *P.V. Sankara Karup*, the Supreme Court invoked Section 88 of the Trusts Act and observed that, property in the hands of the agent is impressed with a trust in favour of the principal and in the facts of the present case, Narangs were in a fiduciary character. One of the propositions advanced is that principles of Section 65 of the Trusts Act are applicable to involuntary sales as well. It was then submitted that a person, who takes on a fiduciary capacity or that of a trustee, must adhere to Sections 65, 88, 90 and 95 of the Trusts Act.

99. *Janki Singh* held that a mortgagee, who was a trustee for the co-sharer, cannot derive a benefit for himself by committing breach of trust and a court of equity will not allow him to retain any portion of the ill-gotten profits. In that case, the defendant was a mortgagee for the revenue paying estate of the mortgagors, who were the plaintiffs. The defendant failed to pay his share of the revenue on the mortgaged property, resulting in an involuntary sale. The property was later repurchased by the defendant in the name of his servant. The Calcutta High Court held that a mortgagee, who is a trustee for the co-sharer, cannot derive such benefit. This is said to be relevant in the present case, since the defendants are alleged to have acted in breach of what is

contemplated under Section 65 of the Indian Trusts Act. Section 65 is reproduced below for ease of reference.

“65. Where a trustee wrongfully sells or otherwise transfers trust-property and afterwards himself becomes the owner of the property, the property again becomes subject to the trust, notwithstanding any want of notice on the part of intervening transferees in good-faith for consideration.”

100. In an appeal in *Deonandan Prashad*, the Privy Council held that, as against a mortgagor, the mortgagee cannot be allowed to hold for himself the advantage gained by the default, for which his agents were responsible. He cannot hold the advantage for himself to the prejudice of his co-sharers. In *Lalit Mohan Roy*, the contention is that the expression *“where the trustee wrongfully sells or otherwise transfers”* would include an involuntary sale as well and even if it is repurchase of an asset from an innocent third-party transferee for consideration and without notice, upon repurchase the property becomes fiduciary trust. In the present case, it is contended that the involuntary sale was analogous to the provisions of Section 65 of the Trusts Act. The involvement of a third-party has also been considered in *Kunjulakshmi Amma*, in which the Kerala High Court held that, the default need not be with a preconceived intention of buying the property in the revenue of sale. Thus, even if there was no premeditated intention viz. even if Rahejas are unable to prove a premeditated approach by the defendants at a

prima facie stage, Rahejas may still be entitled to relief, since the Narangs were in breach of their fiduciary obligations as directors and joint-venture partners for accelerating recall of HDFC facilities and consequent sale under the SARFAESI Act. To recapitulate, it was contended that, (i) the defendants persistently refused all proposals made by Rahejas for curing default in repayment; (ii) the defendants refused proposals for repayment on the basis that curing the defaults was not a holistic solution and; (iii) that the only holistic solution was an immediate and upfront division of the assets of Windsor on the terms suggested by Narangs. Narangs refused proposals to sell flats in the joint-venture project, while at the same time continued to sell their own flats in the Oshiwara Project to third-parties. Narangs also refused to contribute a trust payment of a sum of Rs.5.50 crores, which was required for curing default in repayment of HDFC credit facilities. Narangs allegedly withheld a cheque for EMI of June, 2014 for more than three months and also declined to route the rent received from Windsor through an escrow account, which had been specifically created for funding repayment of credit facilities. Rahejas have squarely blamed Narangs in this behalf, since according to Rahejas, had the Narangs been more cooperative and pragmatic, Windsor could have cured all defaults and avoided the consequences of default and the resultant sale of the project assets.

101. *A. Thulasi Bai Ammal* also supports the view that a mortgagee cannot

be allowed to gain out of breach committed by him. In the present case, Narangs have allegedly benefited from their conduct in obstructing repayment and later acquiring beneficial interest to the extent of 50% in the very same property. *Sangapally Lakshmayya* also reiterates the provisions of Section 65 of the Trusts Act, in effect, holding that when a mortgagor has a right to redeem the mortgage, when the mortgagee fails to pay the arrears of payment and becomes a purchaser at a revenue sale, it was effectively a result of his own default. Similar view has been taken in *Jamila Khatun Chowdhury*. A party who had engineered collusive transactions could not get benefit of the same. Thus, reiterating the provision of Section 65 of the Trusts Act and alluding to the fact that Narangs had, in collusion with Wadhwas, engineered defaults on repayment.

102. The Rahejas have then submitted that the principles of constructive trust are not confined to cases under the Indian Trusts Act and Section 151 of the Code of Civil Procedure, 1908 empowers the court to declare a constructive trust, as has been held in *Janardan Dagdu Khomane*. Even assuming that the suit transactions do not attract provisions of the Trusts Act, it is the contention of Rahejas that the facts at hand clearly satisfy the requirements of Sections 65, 88, 90 and 95. One other proposition canvassed on behalf of Rahejas is that the defendants cannot be permitted to plead that Rahejas also failed to perform their obligations. If defendants failed to

perform their obligations and that resulted in a distress sale, the defendants have also acquired interests in the very same property forming subject matter of the sale. Thus, where both the parties were in default in discharging their obligations leading to an involuntary sale, the Supreme Court found in the case of *Basmati Devi* that, if property had been sold as a result of defaults by both mortgagor and mortgagee, if the mortgagee had gained a benefit by virtue of this default, the fact that the mortgagor had also defaulted is of no consequence and as held in *Lalit Mohan Roy*, the extent of breach by a trustee is not relevant. Even assuming that all trustees were responsible for the loss and only the one had acquired an interest in the property, then such trustee would be governed by Section 65 of the Trusts Act. But then the property must be trust property, which is not the position in these facts.

103. The next proposition pertains to Wadhwa Group having acted in collusion with Narangs and in that behalf, in *Commissioner of Income Tax, West Bengal*, the Supreme Court observed that in cases of fraud and collusion, circumstantial evidence is sufficient. In the present case, it is suggested that circumstantial evidence can be gathered from the fact that the Narang Group refused to provide Rs.2.50 crores to regularize the HDFC loan account and from September, 2013 till the date of sale in 2015 under the SARFAESI Act, Rahejas had offered numerous options such as (i) sale of the required number of flats in WGR Project; (ii) sale of the school plot at Oshiwara; (iii) draw-down of funds from the available undrawn credit facilities; (iv) creation of an

escrow account to route all rent receivables for Windsor and Windsor House, Kalina, so that monthly installments of HDFC could be paid on time. Raheja Group was providing interest-free deposits to Windsor and a request to Narangs to contribute equally for interest-free deposits, being made by Raheja Group, to help resolve the cash crunch in Windsor. These were all options deliberately rejected by Narangs, as a result of which the Thane property was sold at a reserve price of Rs.2.08 crores, although the valuation set out was between Rs.2.70 crores to Rs.2.95 crores. Although Narangs claim to have advanced a loan of Rs.44 crores to Courtyard, it would not justify acquisition of 50% equity interest in Courtyard. Reference was specifically made to the fact that the loan of Rs.44 crores would not justify huge equity gained, based on the sale of the very property of the joint-venture, especially since Wadhwa Group had availed of Rs.3.75 crores and would hardly require the loan of Rs.44 crores in Wadhwa Group. It was further contended that a corporate structure was created, whereby control of Courtyard by Narang Group was initiated through Raghuveer Leasing, which was a company under the control of Wadhwa Group. Strangely, despite having acquired a share in the property, the defendant no.1 claimed to have suffered a major loss on account of distress sale of the Thane property. Moreover, Courtyard commenced construction of building within two months of acquiring the Thane property. The reason is that layout, designs and approvals all belonging to Windsor were utilized.

104. Rahejas have repeatedly stressed upon the fact that the Narang Group cannot be allowed to benefit from re-acquisition of the Thane property and in *Devendra Kumar*, the Supreme Court has recognized the proposition that a party who has indulged in fraudulent activity, cannot enjoy the fruit of his fraud. In the present case, defendant nos.1 to 11 had allegedly acted fraudulently and collusively, which is evident from the surrounding circumstances, which would justify such an inference being drawn.

105. The only other proposition canvassed by Rahejas is that Narangs were liable for breach of confidence in respect of confidential information available with them in relation to the Thane property. I may observe here that, although the cause of action based on copyright in designs has been given up, Rahejas persisted in their claim that confidential information was held by Windsor, which was clearly identified and was in the possession of both the parties on conditions of confidentiality. In *Zee Telefilms*, the court has laid down certain principles, including that use of confidential information need not be proved at the interlocutory stage, but may be proved in evidence. Rahejas' case that Narangs had committed breach of confidence by sharing the suit drawings and designs of the project, more particularly referred to in Exhibit-AAAAA to the plaint, to defendant nos.5 to 11, who had used such information to launch their project within a couple of months, which would normally require about 8 to 10 months. *Kapil Chopra* also recognizes a case where an injunction can be issued for breach of confidence,

as distinguished from copyright.

106. *Tan Bug Taim* does not deal with the Indian Trusts Act. Although a reference has been made to various illustrations, which were said to be *pari materia* to the relevant provisions of the Specific Relief Act, 1953, there is no consideration as to whether Chapter IX of the Indian Trusts Act is a self-contained code such that other provisions of the Trusts Act need not be applied. In the present case, non-applicability of section 65 has not been considered and in any event, Section 95 incorporates the obligations of trusteeship by reference in respect of persons mentioned in Chapter IX. The decision in *Narayani Amma*, relied upon by the defendants, deals with the meaning of the expression “trust” in the Kerala Relief Debt Relief Act, 1977, which excluded liability in the cases of breach of trust under that Act. The expression “trust”, it was held, did not include a mortgage. The decision in the *Chennuru Chetty* is of no assistance to the defendants, in which it was held that a former partner could not have acquired the benefit of a lease.

107. One of the contentions raised is that Sections 1 to 79 of the Trusts Act would be applicable to express trust and Sections 80 to 94 would be applicable to the obligations in the nature of the trust and that those relationships in the nature of trust cannot be brought within the definition of ‘trust’. The provisions of Section 65 also must apply to an express trust and in order to apply the requirements and for the provisions of Section 65 to be

applicable, the trustee will have to be the legal owner of the property, as recognized in *W.O. Holdsworth*.

108. In the Indian context, a ‘trust’ is defined as an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner or declared and accepted by an owner for the benefit of another or of another and the owner. The person accepting the confidence is the trustee and the person for whose benefit the confidence is accepted is the beneficiary. The interest of the beneficiary is his right against the trustee as owner of the trust property, which is a subject matter of the trust. Thus, ownership and beneficial interest go hand in hand. While a trustee holds a trust property for the benefit of the beneficiaries, he does not hold it on their behalf. *Narayani Amma*, in paragraph 6 of the judgment, reiterates this aspect. A parallel can be drawn from *V. Narsimha*, which held that a director not being owner of the property, Section 65 would not apply to such a director. In the instant case, therefore, Narangs would not be said to be the trustees in relation to the Thane property and Thane property, therefore, could not be treated as the trust property.

109. The limited sense in which a director may assume the role of a trustee can be culled out from Section 88 of the Trusts Act and if such a director uses his position and character as such to take advantage as against his general obligation to hold such advantage for other persons, he may be said to be

falling foul of his obligations under section 88. The fact that the directors are held position akin to trustees in a very restricted sense, has also been considered by the Calcutta High Court in *Albert Judah*. Section 88 appears to be the only relevant section, which could relate to suit obligations. The analysis of Section 88 in *C.G. Chetty* reveals that the partners concerned, who were not on cordial terms and there were already disputes between them and as such loss of confidence was evident. The question is whether, once the directors had differences of opinion and serious differences as in the present case, whether the Narangs could be considered as fiduciaries at all ? In *Vaishnav Puri*, the Division Bench of this court considered whether the issue fell within the first part of Section 88 or in the second part. To the extent it concerns the first part, there does not appear that any element of confidence that survived as between the Raheja and Narang directors and when I consider the second part of Section 88, the fact that HDFC had adopted SARFAESI proceedings and the property thus was taken out of the scope of ongoing business, the lender having exercised its security interest, it is difficult to accept the contention that Narangs continued to be acting under a fiduciary duty. In the present case, Section 90 is also not attracted since it applies to co-owners, mortgagees, tenants for life or other form of ownership of property. Directors of a company cannot fall within any of these categories of contemplation and therefore, I am of the view that Rahejas cannot claim benefit of Section 90 of the Act.

110. Section 95 requires the person, upon whom the obligations of the trust were being imposed, to necessarily hold certain property in accordance with the preceding sections and mandates that such a person must perform duties and is subject to disabilities and liabilities as if he were a trustee of the property. The facts at hand do not fit into any of the provisos to Section 95 either. The requirement of “holding property” is essential, since Sections 83, 84, 86, 87, 91 and 92 specifically require a person concerned to “hold” property. Section 88 does not incorporate the requirement of person holding property in the first part, the obligation to “hold further benefit” of other persons comes alive only upon a fiduciary gaining a pecuniary advantage. That does not arise in the case at hand. The Narang directors do not by themselves gain a pecuniary advantage that they are bound to “hold” for the benefit of the Rahejas and it would be improper to import into Section 88 the requirements of Section 95.

111. There is also no occasion to consider lifting of the corporate veil. The dispute in hand has nothing to do with the conduct of Raheja directors or Narang directors in their respective capacities as directors in Windsor, except to the extent of Rahejas’ contention that they are constituted trustees or in the nature of trustees and that the Narangs were bound to comply with their obligations in the nature of trustees. I am in agreement with the submissions made on behalf of the defendants that rather than a case of lifting of the corporate veil, the Rahejas are pursuing a derivative action. The present suit

is admittedly a derivative action, not in the personal capacities of Rahejas' shareholders. The other question is whether principles of partnership law would apply and in the context of Sections 88 and 90 of the Trusts Act. The principles of partnership law cited cannot be imported entirely and applied to a company, which is governed by the Companies Act. Sections 90 and 95 of the Trusts Act were pressed into service in the case of *Vithal Dass*; however, in that case also, the contesting parties were partners. The partnership had been dissolved and in the fact situation, it was revealed that the parties continued to be the co-owners of the property. Co-owners in that case, it was observed, would have gained undue advantage by availing the position of trustees. *Meinhard* once again deals with the partnership and not a company. In my view, there is no occasion in the present case to apply the doctrine and in view of the facts that have been transpired, I am unable to accept the principal contention of the plaintiffs that there was an entrustment or that the entrustment could be revived in the circumstances set out in Section 88 of Trusts Act, 1882. I am in agreement with the contention that in order for Section 88 of the Trusts Act to apply, the plaintiffs must demonstrate that the Narangs held and continue to hold a fiduciary character and were duty bound to protect the interests of the plaintiffs and that Narangs secured benefits for themselves as opposed to their obligations to perform their duties as fiduciaries. That while securing such benefit by way of pecuniary advantage, they deprived the other persons entirely. In the facts at hand, the

Thane property came to be sold by virtue of default by user, but prior to the sale, the secured creditor acted pursuant to consent terms, which facilitated sale. There is no challenge to the sale itself. Property was sold in a public auction. The contention that Narangs had taken advantage of the business opportunity of developing Thane property by securing 50% stake in the very business, which was to be conducted by Windsor, prima facie cannot be sustained. Narangs' directors were not acting in their capacity as directors of Windsor when they pursued the opportunity to work with Wadhwa Group and exploit the Thane property. In the case at hand, the property in question had been sold by consent of the parties. Rahejas probably did not anticipate that Narangs would join hands with Wadhwa Group to exploit the Thane property through Courtyard. Having done so, the conduct of Narangs' directors cannot be questioned on the basis of the allegations that they had gained an undue advantage or a pecuniary benefit, contrary to the rights of Rahejas or Windsor.

112. Although initially attractive, the argument that the Narang Group had breached the confidence reposed in them by Windsor cannot be of any assistance to Rahejas. There is no support that can be drawn from the decisions on Intellectual Property Rights. On facts in this case, the layout plan and drawing was prepared by a professional Architect and nothing has been brought on record to show that the design was proprietary to Windsor. The project architect is said to be the same even today. The design would be

proprietary to the project architect. Nothing on record indicates and indeed none of the submissions made indicates that the designs and plan were proprietary to Windsor. These are the aspects which cannot assist the plaintiffs in securing any interim relief. Finally since the sale was conducted by e-auction, the chances of manipulation, in my view, are bleak and in any event, I have not heard the Rahejas to complain that the e-auction was improperly conducted or was otherwise suspect or subjected to any interference by the defendants or any of them. The property was sold on “as is where is” and “as is what is” basis. The bidders in the disclosure in the encumbrances and claims forming part of Exhibit-“XXXX”, interested bidders were put to notice that they would have to specify themselves regarding all relevant details and material information pertaining to the property. Any purchaser of land considers the prospects of exploiting the development potential, if any, and steps taken towards development of the property and probably include the plan as well. Even otherwise, the plans do not appear to be proprietary to the plaintiff. It was apparently proprietary to the project architect, who was the author of these plans. Hence, no case for injunction on that count would arise.

113. The plaintiffs have contended that principles of joint venture, partnership and entrustment have to be read into the relationship between the two factions viz the plaintiffs and defendant nos.1 to 4 in connection with management of their affairs and business of defendant no.12-Windsor. At the

outset, I may observe that no case whatsoever is made out against defendant nos.13, 14, 15 or 16. Considering the abundance of cases cited, the various aspects which have been considered therein, In some cases, parties have taken advantage of defaults in payment of revenue, triggering a revenue sale and purchased property at such sale. In other; parties gained advantages in derogation of rights of other persons for whose benefit property was held. Holding of property forms a very critical pre-requisite in matters of entrustment and in that respect, the concept of “holding” we must take into consideration what is meant by “holding a benefit or property for the benefit of a trust”. Prior to considering whether there could have been entrustment of the Thane property qua the directors, it would be appropriate to consider the meaning of the expression “hold”. Black’s Law Dictionary, VIIIth Edition, defines “hold” in the context of ownership or right to property as;

- (i) “To take or have an estate from another”;
- (ii) “To possess or occupy”;
- (iii) “To be in possession and administration of”
- (iv) “To possess by lawful title”.

114. The concept of “*holding a benefit or property for the benefit of a trust*” contemplated under the Trust Act includes any asset, tangible or intangible, including intellectual property which must be capable of being possessed or controlled or administered. The admitted position is that the Thane property was that of the Windsor—the company and not the individual directors. As I

have already observed, there is no occasion to lift the corporate veil and this is made clear with the help of *Bacha F. Guzdar (supra)*. In *Deo Nandan Prashad (supra)*, there is a finding that he was a trustee for a co-sharer and the property had come to him through a polluted channel, excluding co-owners. In the present case, upon the sale at the instance of HDFC, the company-Windsor was deprived of its property in accordance with law viz. by disposal of the security interest. Since the sale itself has not been questioned, there would be, in my view, no occasion to assail the Narangs acquiring a stake in Courtyard because the upon the auction resulting in the sale, the property was acquired independent of any connection with or help from the Narangs. This is not a case where any such acquisition was premeditated.

115. The sale resulted from an e-auction and the Narangs could not obviously have chartered the course of that auction sale. Situations resulting from sale of mortgaged property for recovery of arrears of revenue and purchase by a stranger to the loan transactions and the said stranger selling the property to the mortgagee, as in the case of *Lakshmayya Vs. Bolla Reddi* or for that matter *Thulasi Bai Ammal (supra)* do not arise in the present case. The plaintiffs have not challenged the acquisition by Wadhwa. It is the subsequent conduct in having inducted the Narang Group that has sparked controversy. In my view, the facts do not justify drawing of an inference that obligations in the nature of trust had been created, as contemplated by Chapter IX of the Trusts Act and in particular Section 88 where the director

of a company was bound in a fiduciary character to protect the interest of some other person. In the instant case, the “*other person*” would only mean the Rahejas’ directors or, at best, Windsor. If the Narang directors has not acquired that fiduciary character, there is no question of any obligation to protect any interest of another person, the Rahejas’ included. Moreover, a director must “*gain for himself*” a pecuniary advantage, adverse to Rahejas or Windsor. It is only in such circumstances, that he is bound to “*hold for the benefit of such other person the advantage so gained*”.

116. Unlike in the cases where parties have manipulated their way to acquiring properties at revenue sales, as in the case of *Jamila Khatun Choudhury (supra)*, *A. Thulasi Bai Ammal (supra)* and other similar cases, I am unable to find in the facts of the present case a duty owed by Narangs or the Wadhwas to act in a manner as if they were bound by fiduciary ties. The enterprise of Windsor continues; but unlike *Meinhard (supra)*, where joint adventures like co-partners owed a duty of loyalty to one and another, given the break down in operational/decision making matters, fiduciary ties cannot be imposed upon parties such as in the present case.

117. The Narangs are not the persons who 'held' the property in the sense required for the purposes of the Trusts Act. It is obvious that Chapter IX concerns obligations in the nature of but not strictly trusts. Analysis of the aforesaid precedents would thus reveal that in order to control exploitation of

any asset or property, it must either be the subject matter of express trust which is conspicuous by its absence in the present case. Absent an express trust, the obligations under Chapter VI available to beneficiaries of a trust are not attracted. This is not a case where a trustee has wrongfully purchased property under Section 62 or a case where property has been wrongly converted as a result of which the Narangs are sought to be made liable for breach of trust in seeking to gain an advantage without consent of other beneficiaries like Rahejas. No such case can be read into the present set of facts. There is no express or implied entrustment, nor any obligation in the nature of trust created. No advantage is seen to be gained by exercising any undue influence in derogation of rights of Rahejas, if any. The concept of holding the trust property or holding the property for the benefit of a beneficiary or persons interested in the property or persons deprived of advantages gained by a fiduciary including a director of the company must be made out before seeking to impose the obligations under the Trusts Act. In the present case, there is no property or trust property being held for the benefit of Windsor or the plaintiffs or any property or other advantage gained or debt, as contemplated in Chapter IX of the Trusts Act. Moreover, Section 96 saves the rights of the bonafide purchaser and in that sense the rights of Wadhwas on acquisition appear to be saved.

118. The suit seeks a declaration that all the defendants, other than defendant no.12-Windsor, are trustees and fiduciaries for the benefit of

Windsor and are jointly liable to convey the Thane property to Windsor along with usufructs and benefits and for a decree directing all the defendants, to the exclusion of Windsor, to jointly and severally assign and convey to Windsor all rights, title and interests in the Thane property. These prayers would include the rights vesting in Wadhwas as well. One wonders how this can be justified, considering the fact that Wadhwas had paid for the plot by making remittances to HDFC at the time of the sale and they are now expected to convey the property to Windsor. Thus, as a consequence of Windsor's inability to repay their debts in time, a third-party is sought to be deprived at partially by disrupting a business set up by Wadhwas with Narangs. Clearly, in my view, this is far-fetched, even assuming that the entrustment argument is accepted and as canvassed by Mr. Khambata.

119. The alternate prayer in the suit is to transfer entire equity share capital of Courtyard to Windsor, which would once again effectively transfer of all control over the Thane property. In further alternative, a money decree in the sum of Rs.500 crores has been sought and in the alternative, to jointly and severally convey and assign the constructed area in the project titled as "Courtyard", which would constitute the value of Rs.500 crores. Interim reliefs sought are in furtherance of and in anticipation of these final reliefs. If the injunctions, as sought, were granted, it would entail all construction being stalled, including the very area, which the Rahejas seek a conveyance of in prayer clause (d)-(ii). In my view, the injunction sought would run contrary

to the reliefs sought and certainly cannot aid in the final relief, which seeks conveyance of the constructed area and the development of the Thane property.

120. All of the aforesaid prayers in the suit are being pressed albeit in the alternative. According to Narangs, the Thane property had to be sold on the insistence of the Rahejas. They urged that the defendants were not trustees and no fraud can be attributed to Narangs. HDFC's attempts to acquire the property were resisted by Narangs and in any event, even assuming that there was an entrustment, once the property was sold, no element of trust would survive. It was contended that there is no fraud or dishonesty and that the Narangs had to be legal owners, in order to enable the Rahejas to seek reliefs pursuant to Sections 62 and 65 of the Trusts Act. Since Narangs were not legal owners, there was no question of invoking those sections. Besides, the Narangs hold no duty to disclose for the trust to come into effect. For the entrustment to come into effect, there has to be property and obligations attaching to ownership. In the present case, Windsor was the owner. Chapter 6 of the Trusts Act thus cannot be attracted to the facts of the present case, because it applies to express trusts. In the present case, there is no express trust that appears to have been set up. Even considering Section 65 of the Trusts Act, there is no transfer by a trustee and no wrongful sale and to that extent the prima facie requirement; does not appear to be satisfied.

121. The Rahejas' contention that they are now entitled to a share of the Thane property and that Windsor is entitled to return of the property, without payment of any amount to Courtyard, is prima facie not acceptable. Courtyard has put in substantial funds and monies for completion of construction of four buildings. Courtyard has completed construction of four buildings, of which two buildings have been granted occupation certificate; 240 flats have been sold and 58 families have been put in possession. The contention that Rahejas are entitled to benefits in Courtyard's business cannot be accepted. The project has proceeded to a great extent, the balance of convenience does not favour the plaintiffs. This motion cannot succeed and therefore the following order;

- (i) Notice of Motion is dismissed.
- (ii) No order as to costs.

(A.K. MENON, J.)