

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

NOTICE OF MOTION NO. 3831 OF 1999
IN
SHORT CAUSE SUIT NO.469 OF 1978

Time Field Corporation,
a partnership firm, carrying on
business as builders and contractors,
and registered under the Indian
Partnership Act, 1932, and having
their office at above Kurla Restaurant,
Opp. Kurla Railway Station,
Kurla (West), Bombay-70

....Plaintiff

V/S.

1. Shri Sankalp Co-operative Housing
Society Limited, a Co-operative
Society registered under the
Maharashtra Co-operative Societies
Act, 1960 under No. BOM/HSG/1727 of
Act, 1960 under its office at
4, Arun Kamal Society, Mahatma
Gandhi Road, Vile Parle (E),
Bombay-400 057.

... Defendant

And

1. Mrs Rekha D. Mehta
2. Mr.K.C. Mehta
3. Mr.Joginder Pal
4. Mr.Gurudayal Singh
5. Mrs. Nirmalaben D. Dagli
6. Mrs. M.F. Kothari
7. Mr.Sampat F. Kothari
8. Mr. Kishore C. Makwana
9. Mrs. Jayshree Mohanlal Dhanak
10. Mrs. B.M. Mehta

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11. Mr. R. Shandilya
12. Mrs. R. Dudeja
13. Mr.Dinesh Dudeja
14. Mr. B. Meena

All residing at
Sankalp Co-operative Housing
Society Limited,
23/B/2, Subhash Road,
Vile Parle (E),
Bombay – 400 057.

...Respondents

Mr.J.S. Kini, a/w. Ms. Sapna Krishnappa, for original plaintiff in suit.

Mr. J.P. Cama, Senior Advocate, a/w Mr. Amit Saple, Ms. Priyanka Kumar, Ms.Roshni Vipani, and Mr. Anilkumar K.P., for defendant and applicants.

CORAM	: N.J. JAMADAR, J
RESERVED FOR ORDERS ON	: 2 nd December 2019.
PRONOUNCED ON	: 2 nd June 2020

JUDGMENT :

1. This notice of 1motion is taken out by Shri Sankalp Co-operative Housing Society Limited, the defendant and the respondents who claimed to be the members of the defendant society (collectively referred to as ‘the applicants’), to set aside the

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consent decree passed by this Court on 19th April 1993 and the amendments thereto made by orders dated 28th September 1993, 20th February 1996, 19th December 1996 and 17th February 1999 and the Conveyance of the property of the society executed in favour of the plaintiff in pursuance of the aforesaid consent decree.

2. The genesis of the dispute between the parties is in the works contract, which was entrusted to the plaintiff Time Field Corporation, a partnership firm by the defendant-society, and which resulted in the institution of Suit No.469 of 1978. Thus, to begin with, it would be apposite to note the circumstances in which Suit No. 469 of 1978 came to be instituted and the relief sought therein.

Suit No. 469 of 1978

3. The defendant society came to be registered in the year 1968, under the provisions of the Maharashtra Co-operative Societies Act, 1960 ('The Act, 1960') vide registration No.Bombay/Housing/1727 of 1968. The defendant society professed to carry out certain repairs and develop the property, situated at Plot No.23/B/2, Subhash Road,

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Vile Parle (East), Mumbai ('subject property'). Thus, an agreement came to be executed between the defendant society and the plaintiff firm, which was carrying on the business of builder and developer. Under the terms of the said agreement dated 20th April 1975, the plaintiff was to carry out the works contract for a lump sum consideration of Rs.2,68,000/-. On the very day, a supplementary agreement came to be executed between the parties, whereunder the plaintiff was allowed to erect construction on the fourth floor, at the cost of Rs.60/- per sq.ft. with right to sell the units constructed on the fourth floor, with the consent of the society. Though, under the Principal Agreement dated 20th April 1975, the work was to be completed within three months, the work remained incomplete. As certain disputes arose, a further agreement came to be executed on 30th April 1976. It was agreed by and between the plaintiff and defendant that the remaining work would be entrusted to the plaintiff on the terms that the defendant society did owe a sum of Rs.40,000/- to the plaintiff, and the plaintiff had the right to sell the flats on the fourth floor of the premises. In the event of default on

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the part of the defendant society to pay the said sum of Rs.40,000/- to the plaintiff, there would be a charge on the property of the society.

4. It was the claim of the plaintiff that despite execution of the work in pursuance of the aforesaid agreements and certification thereof by Shri V.G. Chemburkar, the then Architect of the defendant, and raising of the bills for the agreed and additional works executed at the instance of the defendant, the defendant failed and neglected to pay a sum of Rs.1,73,350/-. Thus, the plaintiff instituted Suit No.469 of 1978 seeking, *inter-alia*, a declaration of charge on the society premises, i.e., the land bearing Plot No.23/B/2 and the structure standing thereon for the sum of Rs.1,87,998.50; that the plaintiff was entitled to sell the flats on the fourth floor and the defendant society was bound to admit and accept the persons to whom the plaintiff would sale the flats as the members of the said society and to transfer flats and shares in the society to those transferees, and a money decree for the sum of Rs.1,87,998.50, with

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further interest @12% per annum. It would be contextually relevant to note that the plaint was signed and verified by Mrs. Padma Yashwant Jawale, in the capacity of the partner of the plaintiff.

5. The society contested the claim by filing written statement on 10th January 1979. The claim of the plaintiff for the balance amount of Rs.1,73,350/- was stated to be false and exaggerated. The society, on the contrary, claimed recovery of a sum of Rs.40,206/- which was paid in excess of the work, certified by the Architect.

Power of Attorney

6. During the pendency of the said suit, certain events transpired including initiation of the proceedings against the office bearers of the society at the instance of the Planning and Regulatory Authorities. It is the claim of the plaintiff that the members of the society executed an irrevocable general power of attorney in favour of Mr.Yashwant Y. Jawale and Mr.D.W. Ayre, on 8th October 1984, and authorised them to do all the necessary acts including sale and transfer the flats allotted to those members. Mr. Yashwant Jawale is

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the husband of Mrs. Padma Jawale, who instituted the suit in the capacity of the partner, and also claimed to be a partner of the plaintiff firm. The said power of attorney also empowered the attorneys to represent the society and settle the disputes.

Order dated 19th April 1993

7. In this backdrop, on 19th April 1993, Suit No.469 of 1978 was moved for orders before this Court. It was submitted before the Court that the dispute between the parties has been settled and the consent terms have been arrived at. Mr.Yashwant Y. Jawale, the contractor and partner of the plaintiff, then represented as the member and constituted attorney of the defendant. Mrs.Padma Y. Jawale, his wife, represented the plaintiff firm. The consent terms were thus taken on record and marked 'X' for identification and it was ordered that there shall be a decree in terms of the consent. The suit, thus, came to be decreed in accordance with the consent terms.

Consent Terms

8. A brief resume of the consent terms would be in order, at this

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stage. As indicated above, the consent terms were executed on behalf of the plaintiff by Mrs. Padma Jawale and on behalf of the defendant by Mr.Yashwant Jawale, the husband-wife duo. Under the said consent terms, the defendant agreed that a sum of Rs.15,27,336/- was due and payable by the defendant to the plaintiff. The defendant agreed to pay the said amount of Rs.15,27,336/- with further interest @ 18% per annum from 1st April 1993, till realization. The said amount was agreed to be paid in four six monthly equal installments of Rs.3,81,634/-, and the first instalment was to be due and payable on or before 1st May 1993, and the subsequent installments were be paid on or before 10th day of succeeding six months. The defendant further agreed that in the event of single default, the plaintiff shall be entitled to absolute possession of all the structures standing on the society premises including new incomplete structure and the entire land bearing Plot No.23/B/2 with further right to sell, transfer, assign or dispose of the said property. In short, in the event of default in payment of one instalment, all right, title and interest in the society premises

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would vest in, and stand transferred to, the plaintiff. It was further agreed that the plaintiff would be entitled to the benefit of further increase in FSI, and construct the garages and sale the same etc.

Subsequent amendments to Consent Decree

9. Evidently, there was default in payment of the amount which was agreed to be paid under the consent terms. On 28th September 1993, the consent decree dated 19th April 1993 came to be further amended to the effect that 'decree to act as conveyance'. This was with the consent of the parties. By a subsequent order dated 20th February 1996 in chamber summons taken out on behalf of the plaintiff, the plaintiff was allowed to amend the decree further by incorporating the city survey number of the subject property. A further amendment in the decree was permitted by an order dated 19th December 1996. By an order dated 17th February 1999, in Chamber Summons No. 213 of 1999, the decree was further amended by addition of the words, "that the defendant society has ceased to exist". The consent terms executed on 19th April 1993

were thus amended by subsequent orders, *albeit* with consent of the counsel for the defendant, to further provide that the consent decree itself would operate as a conveyance and the defendant society ceased to exist.

Proceedings before the Registrar , Co-operative Societies

10. In the meanwhile, it is the claim of the respondents that Mr.Yashwant Jawale had executed various agreements and sold the flats in the defendant society to either the respondents or their predecessor-in-title. The affairs of the society were being managed by Mr.Yashwant Jawale in the capacity of its Chairman. Mrs. Padma Jawale represented herself to be the Secretary of the society. However, the affairs of the society were being managed in total disregard to the provision of the Act, 1960. Neither the meetings of the society were held in conformity of the provisions of the Act, 1960 and the rules thereunder nor the record was maintained.

11. The respondents addressed a letter to the Divisional Registrar, Mumbai on 9th March 1998 to intervene in the matter. In the

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meanwhile, Mrs.Padma Jawale sought the cancellation of the registration of the society as the society ceased to exist. The Deputy Registrar, by his order dated 7th September, 1998, was persuaded to appoint a Committee of Administrators under section 77A of the Act, 1960. An appeal, being Appeal No.208 of 1998, preferred by Mrs.Padma Jawale against the aforesaid order of appointing a Committee of Administrators came to be dismissed by the Joint Registrar on 14th December 1998. As Mrs. Padma Jawale did not entrust the record of the society to the Committee of Administrators, action under section 80 of the Act, 1960 was also initiated.

Notice of Motion

12. In these proceedings, the respondents claimed, Mrs.Padma Jawale sought to rely upon the consent decree passed by this Court on 19th April 1993 and the amendments thereto in support of the claim that the plaintiff has become the absolute owner of the society premises. Thereupon, the respondents took inspection of the record of Suit No.469 of 1978 and realised that a fraud was played on the

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defendant as well as the Court in obtaining the said consent decree.

13. The applicants have thus preferred this notice of motion to set aside the consent decree as a clear and egregious fraud was practiced by the husband-wife duo. The respondents have, *inter-alia*, alleged that Yashwant Jawale, who claimed to represent the defendant society was not at all authorised to represent the society. He was admittedly not a member of the defendant society. He could not have represented the defendant society having already represented the plaintiff in the capacity of its partner in the very same suit by filing vakalatnamas and affidavits. This fact was suppressed from the Court and a false representation was made that he was a member and constituted attorney of the society. There was no resolution passed by the society to execute the consent terms. Even otherwise, in the context of the nature of the suit, which was essentially a money claim for the sum of Rs.1,87,998/-, the consent terms are wholly unconscionable and were executed with an oblique motive of usurping the entire property of the society. In no

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circumstances the society would have agreed to the liability to pay a huge sum of Rs.15,27,336/- in the context of the claim of the plaintiff.

Plaintiff's resistance

14. The plaintiff resisted the notice of motion by filing an affidavit in reply. Interestingly, the affidavit in reply came to be sworn by Mr.Yashwant Y. Jawale, in the capacity of the partner of the plaintiff. The tenability of the notice of motion was assailed on the counts of laches and delay, locus of the respondents-applicants and for irregularity of the procedure. The plaintiff asserts that the respondents were not at all the members of the defendant society when the consent decree was passed. Thus, the respondents have no *locus standi* to assail the said decree. It was contended that a decree lawfully passed by a Court cannot be set aside by taking out a notice of motion. The proper remedy was to file an appeal or seek review.

15. The plaintiff claims that Mr.Yashwant Jawale and

Mr.D.W.Ayre, the then Chairman of the defendant, society were entrusted by executing an irrevocable general power of attorney by as many as 16 members of the defendant society to not only alienate their rights and interests in the flats in the society but also to settle, compromise, adjust or compound the dispute, which had arisen or may arise. It is claimed that the general power of attorney which was executed on 8th October 1984 was preceded by a resolution by the Managing Committee, which, in turn, was duly approved by the General Body of the defendant society.

16. Mr.Yaswant Jawale affirmed that the consent terms were executed by him in pursuance of the authority to compromise the matter conferred upon him under the said irrevocable general power of attorney. It was denied that the consent terms were unconscionable. Lastly, it was contended that the defendant society, its members as well as the respondents-applicants were all along aware that the consent decree was passed and on account of the default on the part of the society to discharge its liability under the

consent decree, a conveyance came to be registered on 3rd April 1995, with the Sub-Registrar of Assurances. And yet the notice of motion is taken out after about six years of the passing of the said consent decree. Hence, the notice of motion deserves to be dismissed on the count of delay and latches as well.

Initial Order and Appeal No. 542 of 2000

17. Initially, by an order dated 9th March 2000, the notice of motion came to be dismissed by a learned Single Judge of this Court on the ground that the respondents had no locus and were not legally entitled to maintain such a notice of motion. It was further opined that the notice of motion could not be considered to be a motion filed on behalf of the defendant society. The applicants carried the matter in appeal. In Appeal No.542 of 2000, by an order dated 1st November 2004, the execution of the consent decree passed in Short Cause No. 469 of 1978 dated 19th April 1993 and the amendment thereto were stayed, subject to deposit of a sum of Rs.10 lakhs by the original defendant No.1-society and upon furnishing of an undertaking that it will not transfer, alienate,

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dispose of or create any third party rights or interest in the subject property. Subsequently, by judgment and order, dated 25th February 2010, the Appeal Court allowed the appeal with the following directions :

“Notice of Motion No. 3831 of 1999 is restored to file for de-novo decision after allowing the parties to lead evidence about membership of any of the appellants of the Shri Sankalp Co-operative Housing Society.

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Undoubtedly, all contentions on merits are left open. Interim order passed in this appeal shall continue to operate till the notice of motion is decided.”

18. In the light of the aforesaid pleadings and developments, especially the direction of the Appeal Court to allow the parties to lead evidence, issues were framed by this Court on 6th March 2017. The issues are reproduced below with my findings against each of them for the reasons to follow :

ISSUES

1) Whether the Respondents prove that on the date of the Consent Decree, i.e., 19th April 1993 each of them was a member of the 1st Defendant Society?

FINDINGS

Affirmative to the effect that the respondent No.10-applicant has the legal standing to seek setting aside of the consent decree.

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| 2) Whether the Applicants prove that they are entitled to an order setting aside the Consent Decree and its subsequent amendments? | In the affirmative |
| 3) What relief and what order? | Notice of Motion stands allowed. |

Reasons

19. In support of the notice of motion, Mr.Mahendra K. Mehta (D.W.No.1), who is stated to be an associate member of the defendant society, was examined. The applicants have tendered a number of documents in support of their claim. It is pertinent to note that after the issues were settled, the applicants had filed affidavits of evidence of 18 witnesses, who claimed to be the members of the defendant society. However, the applicants chose not to examine those witnesses. Thus, this Court, by an order dated 22nd March 2018, recorded that the evidence on behalf of the defendant/respondents-applicants was closed, with the consequences (which would follow) to be considered at the time of final hearing.

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20. In the rebuttal, Mr. Pawan Yashwant Jawale, (P.W.No.1), who claimed to be a partner of the plaintiff and son of Mr.Yashwant and Padma Jawale, who have died during the pendency of this notice of motion, came to be examined on behalf of the plaintiff. A number of documents were tendered on behalf of the plaintiff to substantiate its defence that the consent decree was lawfully passed.

21. I have heard Mr.J.P. Cama, the learned Senior Counsel for the applicants-defendants and Mr. J.S. Kini, the learned counsel for the plaintiff, at some length. Perused the material on record including the proceedings of original suit No.469 of 1978.

Issue Nos.1 to 3 :

22. Though issue No. 1 is in a sense objective as the legal standing of the respondents as the members of the defendant society as on the date of the consent decree, i.e., 19th April 1993 is put in contest. Yet, in the backdrop of the nature of the dispute and the evidence and the material which bears upon the controversy, a

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legitimate answer to issue No.1 cannot be recorded without delving into the attendant facts and circumstances. It is more so for the reason that the thrust of the allegation is of fraud. It is trite, fraud unravels everything. Hence, I propose to determine all the issues by a common reasoning, while broadly maintaining the sequence of consideration.

23. The learned Senior Counsel for the applicants would urge that the facts brought out on record, which are rather indisputable, lead to no other inference than that of a fraud having been practiced not only on the defendant society but on the Court as well. Taking the Court through the sequence of the events commencing from the execution of the works contract to institution of Suit No.469 of 1978, to the execution of the irrevocable power of attorney, culminating in the passing of the consent decree and subsequent amendments thereto, Mr. Cama urged with a degree of vehemence that the manner in which the existence of the defendant society, which is a juristic entity, was sought to be wiped out speaks in

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volumes. On the one hand, there was no resolution of the society to settle the dispute with the plaintiff. On the other hand, there was no representation of the society. In contrast, the partner of the plaintiff Mr.Yashwant Jawale fraudulently represented the society and a farce of amicable resolution of the dispute was made and, eventually, the consent terms were executed between the husband and wife, who also donned the roles of the partners of the plaintiff firm. The situation is further exacerbated by the fact that under the consent terms, the society was shown to have acknowledged the liability to pay a sum of Rs.15,27,336/- as against the money claim of Rs. 1,87,998/-, which was contested by the society not only by disputing the claim but also raising a claim for refund of the sum of Rs.40,206/-. To add to this, an endeavour was made to divest the defendant society of its property by incorporating the term that in the event of default, entire property including the land and structures standing thereon would vest in the plaintiff.

24. As against this, the learned counsel for the plaintiff would

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urge that the respondents-applicants have failed to disclose their interest in the society as members thereof. The evidence of Mr.Mahendra Mehta (D.W.No.1) is of no assistance to establish either his claim of being an associate member or that of his wife being a member of the defendant society. In fact, Mr.Mahendra Mehta (D.W.No.1) conceded in no uncertain terms that the respondents-applicants have not placed on record any document to show that his wife was a member of the society on the day the consent decree came to be passed. Thus, at the instance of the respondents-applicants, who are no more than strangers to the *lis* between the plaintiff and the defendant, the legality and validity of the consent decree cannot be called in question.

25. Mr. Kini, the learned counsel for the plaintiff urged with a degree of vehemence, that the refusal of the rest of the members, who had filed affidavits of evidence, to enter the witness box in support of their claim dents the application irretrievably. It was submitted that it is well recognized principle that adverse inference

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becomes justifiable in the event a party refuses to enter into the witness box in support of his case and offers himself for cross-examination. According to Mr.Kini, the notice of motion deserves to be dismissed on this singular count of lack of locus to challenge the consent decree. Even otherwise, according to Mr.Kini, the applicants have failed to establish any circumstances, which would justify the setting aside of the consent decree, which is lawfully passed.

26. To start with, it may be appropriate to have recourse to the evidence of Mr.Mahendra Mehta (D.W.No.1). It is the claim of Mahendra Mehtra (D.W.No.1) that his wife Mrs. Bharati M. Mehta is the member of defendant society. He claims to be an associate member. Mahendra (D.W.No.1) wants the Court to believe that the original allottee of flat No.301 was one Mr. S.W.Mayadeo. In pursuance of the power of attorney executed by the members of the society in favour of Mr.Yashwant Jawale, the later sold the said flat No.301 to Mrs.Sushma Rathi by executing an instrument on 26th November 1981. The said Mrs.Sushma Rathi, in turn, conveyed the

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flat No.301 to his wife Mrs. Bharati M. Mehta by executing an agreement on 2nd May 1995, which was duly registered along with a deed of declaration filed by Mrs. Bharati Mehta on 28th October 2004. On the strength of the said conveyance, Mrs. Bharati Mehta became the member of the defendant society.

27. It was brought out in the cross examination of Mahendra Mehta (D.W.No.1) that on 19th April 1993, he was not a member of the society and that Mrs.Sushma Rathi, the alleged predecessor-in-title of Mrs. Bharati Mehta, is not one of the applicants to this notice of motion. Mahendra Mehta (D.W.No.1) went on to concede that there is no document to show as to which of the persons became members of the defendant society at what point of time. He conceded that the share certificate which came to be issued pursuant to the orders of the Deputy Registrar, Co-operative Society on 12th June 1999 was issued as a duplicate certificate. He went on to further admit that there is no document to show that the original share certificates existed at any point of time and the share

certificate issued on 12th June 1999 is a duplicate share certificate.

28. On the strength of the aforesaid admissions in the cross-examination, Mr. Kini would urge that the evidence of Mahendra Mehta (D.W.No.1) demonstrates beyond any pale of controversy that Mrs. Bharati Mehta, his wife, who claims interest in flat No. 301 was not a member of the defendant society on 19th April 1993, the day the consent decree was passed. From the own showing of the applicants, Mrs.Bharati Mehta allegedly acquired interest in the said flat in the year 1995. If the case of the applicants is taken at par, then the membership of Mrs. Bharati Mehta, to establish which Mr.Mahendra Mehta (D.W.No.1) was examined, cannot be said to have been proved. Conversely, the rest of the applicants chose not to enter the witness box. Thus, there is no evidence to establish that any of the applicants were the members of the defendant society on 19th April 1993. Resultantly, the challenge miserably fails, urged Mr.Kini.

29. The aforesaid submission appears attractive at the first blush. However, the nature and context of the proceedings cannot be lost sight of. During the course of the cross-examination of Mahendra Mehta (D.W.No.1) a concerted effort was made to demonstrate that Mr.Mayadeo (who was stated to be the original allottee of flat No.301 by the deponent) was not the allottee of Flat No.301. The agreement executed by Mr.Yashwant Jawale in favour of Mrs.Sushma Rathi, the predecessor-in-title of Mrs. Bharati Mehta, was stated to be forged. However, the fact remains that there was an instrument under which Mr.Yashwant Jawale professed to allot flat No. 301 to Mrs. Sushma Rathi. In its endeavour to demonstrate that a part of the claim of Mahendra Mehta (D.W.No.1), as regards the original allottee of flat No.301, is unworthy of credence, the plaintiff placed on record the original instrument (Exh.P1-28) executed by Mr.Yashwant Jawale in favour of Mrs. Sushma Rathi. The said instrument seems to have been executed on 5th September 1981 whereunder the flat No.301 situated on the third floor of the said society was allotted to the said Mrs.Sushma Rathi on certain terms

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and conditions. The said instrument, *inter-alia*, provides that upon allotment, Mrs. Sushma Rathi would become the member of the defendant society and her rights and obligations would be governed by the rules regulations and bye-laws of the said society.

30. Since this instrument is relied upon by the plaintiff, *albeit* to show that a part of the assertion of Mr.Mahendra Mehta (D.W.No.1) is not correct, the plaintiff cannot be permitted to resile from the consequences which emanate therefrom. The entitlement of Mrs.Sushma Rathi, predecessor-in-title of Mrs. Bharati Mehta to flat No.301 cannot be disputed. There is no challenge to the claim of Mahendra Mehta (D.W.No.1) that Mrs.Sushma Rathi subsequently conveyed the said flat No.301 in favour of Mrs.Bharati Mehta.

31. The situation which thus obtains is that in the year 1981 itself, Mr.Yashwant Jawale had professed to allot flat No.301 to Mrs.Sushma Rathi and the later conveyed the said flat to Mrs.Bharati Mehta, in the year 1995. Thus, when the consent decree was passed,

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Mrs. Sushma Rathi, the predecessor-in-title of Mrs. Bharati Mehta, had a subsisting and transferable interest in the said flat. It is not the case that Mrs. Sushma Rathi had executed any instrument in favour of the plaintiff at any point of time. The said title, which was valid and subsisting, passed on to Mrs. Bharati Mehta.

32. It is true that this Court has framed issue No.1 to cast liability on each of the respondents-applicants to establish that he/she was a member of the society on the date of passing of the consent decree. However, the order of the Appellate Court makes the position abundantly clear. The Appellate Court had remanded the matter for de-novo decision after allowing the parties to lead evidence about the membership of any of the appellants of the said society. These directions are required to be considered in the backdrop of the context of the proceedings.

33. It is well nigh settled that fraud vitiates everything. A decree or order obtained by fraud is non-est in the eye of law. The nullity

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of such decree or order obtained by fraud can be agitated in any proceeding and at any stage, despite finality having been attached to the proceedings. From this standpoint, in my considered view, the aforesaid proof of interest of Mrs.Sushma Rathi, the predecessor-in-title of Mrs.Bharati Mehta, is adequate to cloth Mrs. Bharati Mehta, with the legal standing to assail the consent decree as null and void on account of alleged fraud.

34. The matter can be looked at from another perspective. The fundamental question which wrenches to the fore is can the existence of a Co-operative Society, which has the trappings of a Corporation, be wiped out by resorting to the means which are alleged to be fraudulent? Can the members of such a society, which is neither deregistered nor wound up in the manner known to law, and continues to be in existence by the orders passed by the authorities under the Act, 1960, be precluded from agitating that the consent decree, whereby the Co-operative Society is deprived of its corporate existence and divested of its property, was obtained by

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practicing fraud? In my view, in these circumstances, the issues of locus and procedural challenges stand relegated to a subsidiary stage, provided a clear case of fraud is made out.

35. Was there a fraud? For an answer, the circumstances, which transpired on the date of passing of the said decree, as are evident from the order passed by the Court on 19th April 1993, assume critical salience. From the perusal of the order, it becomes evident that the plaintiff firm was represented by Mrs. Padma Jawale, in the capacity of the partner of the plaintiff. Mr. Yashwant Jawale, her husband, was also present. It was represented to the Court that he was a member and constituted attorney of the defendant society. The Court was further informed that the dispute has been settled and the consent terms have been arrived at and recorded. Mrs. Padma Jawale and Mr. Yashwant Jawale vouched for the correctness of the consent terms and execution thereof by them. The consent terms (Exh. 'X') were taken on record. The Court thus directed that the decree be drawn in terms of the said consent.

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36. It would be contextually relevant to note that Mr.G.R. Hegde, Advocate represented the plaintiff. Mr. C.M. Mankad represented the defendant society. At the request of Mr.C.M. Mankad, Advocate for defendant society, as noted by the Court, issuance of the certified copy of the consent decree was expedited. The Court further recorded that Mr.Mankad undertook to furnish xerox copy of the power of attorney of the defendant in favour of above-named representative of the defendant by the next date.

37. The later two observations cannot be said to be inconsequential. They indicate that, firstly, the defendant was more desirous of obtaining the certified copy of the consent decree, which betrayed an element earnestness to facilitate its execution. Secondly, a genuine doubt arises as to whether the copy of the power of attorney was then tendered for the perusal of the Court. Evidently, the Court has not recorded that the Court did peruse the copy of the power of attorney, on the strength of which Mr.Yashwant Jawale

claimed to represent the defendant society. Had the Court perused the copy of the power of attorney, the Court would not have probably recorded an undertaking on the part of Mr.Mankad, the Advocate for the defendant, that a xerox copy of the power of attorney executed by the defendant in favour of Mr.Yashwant Jawale would be furnished by the next date. It would be legitimate to infer that had the original power of attorney been tendered for the perusal of the Court and the Court desired its copy to be placed on the record, the same would have been directed to be done on the same day.

38. A brief reference to the principal terms of consent, in accordance with which the consent decree came to be passed, would be apposite, at this juncture. The defendant society acknowledged the liability and agreed to pay a sum of Rs.15,27,336/- to the plaintiff. The said sum was to carry interest @ 18% per annum from 1st April 1993, till realization. The said sum was to be repaid in four equal instalments of Rs.3,81,634/-. The first instalment was to be

paid on or before 1st May 1993. The rest of the instalments were to be paid at an interval of six months on or before 10th day of the given month. In the event of a single default, in repayment, the plaintiff firm was entitled to absolute possession of the property of the defendant society including the land and structures standing thereon and all the right, title and interest in the property of the society would vest in, and stand transferred to, the plaintiff. The plaintiff was entitled to utilize whole of the FSI which was then admissible. In addition, in the event, there was any increase in the FSI in future, the defendant society agreed to forego all right, interest and claim over the said increase and the plaintiff alone would be entitled to the said benefit. The defendant society further agreed that the plaintiff shall be entitled to construct the garages on the premises of the society, and sale, transfer, assign and dispose of those garages and the defendant would be enjoined to admit those transferees as members of the defendant society.

39. These terms, in accordance with which, the dispute between

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the plaintiff and the defendant society was professed to put an end to, are required to be appreciated in the backdrop of the jural relationship between the plaintiff and defendant. The plaintiff's claim in Suit No.469 of 1978 was principally for the unpaid amount of the works contract, which the plaintiff claimed to have executed at the instance of the defendant. The plaintiff further claimed right to dispose of the flats on the fourth floor in accordance with the supplementary agreement executed between the parties on 20th April 1975. The value of the suit claim, i.e., Rs.1,87,998/- also cannot be lost sight of.

40. In the light of the aforesaid facts, the submission on behalf of the applicants that the consent terms were ex-facie unconscionable cannot be said to be unfounded. The acknowledgment of the liability to the tune of Rs.15,27,336/-, especially when the defendant society had contested the claim of the plaintiff by filing the written statement, in the backdrop of the suit claim of Rs.1,87,998/-, does not appeal to human credulity. Could the society have agreed to

such terms which would eventually divest the society of its property and render the interest of the members in the individual units in the said society also completely divested, is the pivotal question. The consent terms, *prima-facie*, appear to be unilateral, unconscionable, onerous and arrived at with a design to cause an unjust enrichment to the plaintiff, much beyond its stated claim.

41. The plaintiff endeavoured to draw support and sustenance to the authority of Mr. Yashwant Jawale to execute the consent terms from the irrevocable power of attorney executed on 8th October 1984. In the evidence of Mr.Pawan Yashwant Jawale, (P.W. No.1) and during the cross-examination of Mr.Mahendra Mehta (D.W.No.1) an effort was made to bank upon the power of attorney to draw home the point that the persons who had executed the power of attorney in favour of Mr.Yashwant Jawale had done so for valuable consideration and, thus, the power of attorney was not a mere instrument of agency but it conferred proprietary right on Mr.Yashwant Jawale. To this end, it was put to Mr.Mahendra Mehta

(D.W.No.1) (Que. No.91) that initially those 16 members and thereafter 4 members sold their flats in the society to Mr.Yashwant Jawale and then gave the power by way of irrevocable power of attorney. Mr. Mahendra Mehta (D.W.No.1) did not accede to the said suggestion. Thereupon, it was suggested to Mr.Mahendra Mehta (D.W.No.1) that since there is no record to indicate that those 20 persons had sold the flats to Mr.Yashwant Jawale, he claims that there was no such transaction.

42. The aforesaid endeavour on the part of the plaintiff to bank upon the power of attorney as an instrument which constitutes conveyance and vests title in Mr. Yashwant Jawale, cannot be countenanced. The facts that some of the members, who had executed the said power of attorney, had tendered resignations and accepted some consideration, which was sought to be established by placing on record the letters of resignation and receipts (Exh.‘P-16’ to ‘P-19’), are of no assistance to the plaintiff in its endeavour to establish the conveyance of title. The legal position, in this context,

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is fairly well recognised. The interest in an immovable property of the value of more than rupees one hundred cannot be conveyed otherwise than by a registered instrument. Moreover, Rule 154B-12 of the Maharashtra Co-operative Societies Rules provides that a member may transfer its share, right, title and interest of his property in the society by way of registered document by following the due process as provided in the Rules or Bye-laws.

43. A profitable reference in this context can be made to the judgment of the Supreme Court in the case of *Suraj Lamps and Industries Pvt. Ltd. Vs. State of Haryana & Anr.*¹, wherein the Supreme Court, after noting the pernicious effects of the transfer of property on the strength of the power of attorney had enunciated the scope of the power of attorney. Para Nos. 20 and 21 are instructive. They are extracted below :

“Scope of Power of Attorney

20. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency

¹ (2012) 1 SCC 656

whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see [section 1A](#) and [section 2](#) of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee.

21 [In State of Rajasthan vs. Basant Nehata](#) - 2005 (12) SCC 77, this Court held (SCC pp.90 & 101, paras 13 & 52) :

"13 A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience.
.....

52 Execution of a power of attorney in terms of the provisions of the [Contract Act](#) as also the [Powers-of-Attorney Act](#) is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such

power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee."

An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor."

44. The Supreme Court went on to exposit the conclusions in the following words :

"Conclusion :

23 Therefore, a SA/GPA/WILL transaction does not convey any title nor create any interest in an immovable property. The observations by the Delhi High Court, in [Asha M. Jain v. Canara Bank](#) - 94 (2001) DLT 841, that the "concept of power of attorney sales have been recognized as a mode of transaction" when dealing with transactions by way of SA/GPA/WILL are unwarranted and not justified, unintendedly misleading the general public into thinking that SA/GPA/WILL transactions are some kind of a recognized or accepted mode of transfer and that it can be a valid substitute for a sale deed. Such decisions to the extent they recognize or accept SA/GPA/WILL transactions as concluded transfers, as contrasted from an agreement to transfer, are not good law.

24 We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a

registered deed of conveyance. Transactions of the nature of 'GPA sales' or 'SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of [section 53A](#) of the TP Act. Such transactions cannot be relied upon or made the basis for mutations in Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales.”

45. Undoubtedly, the Supreme Court made it clear that the said pronouncement would not impair genuine transactions. The observations in Para No. 27 clarify the said position :

“27 We make it clear that our observations are not intended to in any way affect the validity of sale agreements and powers of attorney executed in genuine transactions. For example, a person may give a power of attorney to his spouse, son, daughter, brother, sister or a relative to manage his affairs or to execute a deed of conveyance. A person may enter into a development agreement with a land developer or builder for developing the land either by forming plots or by constructing apartment buildings and in that behalf execute an agreement of sale and grant a Power of Attorney empowering the developer to execute agreements of sale or conveyances in regard to

individual plots of land or undivided shares in the land relating to apartments in favour of prospective purchasers. In several States, the execution of such development agreements and powers of attorney are already regulated by law and subjected to specific stamp duty. Our observations regarding 'SA/GPA/WILL transactions' are not intended to apply to such bonafide/ genuine transactions.”

46. In view of the aforesaid exposition of the legal position, the half-hearted endeavour on the part of the plaintiff to bank upon the power of attorney as an instrument which conveys title in favour Mr.Yashwant Jawale is unworthy of acceptance, no matter certain documents were executed by the erstwhile members of the defendant society acknowledging receipt of some consideration from Mr.Yashwant Jawale or for that matter Mrs.Padma Jawale, and they also happened to be the persons who executed the said power of attorney. At the cost of repetition, it has to be noted that apart from the power of attorney, the plaintiff has not relied upon any registered instrument executed by any of the signatories to the said power of attorney.

47. This takes me to the question of value of the power of attorney as an instrument of agency empowering Mr.Yashwant Jawale to execute the consent terms. Indisputably, the said power of attorney was executed by the then individual members of the defendant society. Though 20 persons were named as the executors of the said power of attorney, it was, in fact, executed by 16 persons. The power of attorney does not seem to have been executed by and on behalf of the society by the office bearers who were empowered by the resolution to execute the said power of attorney. In this backdrop, the crucial question which comes to the fore is whether the defendant society had appointed Mr.Yashwant Jawale as its constituted attorney?

48. The juridical status of defendant society is required to be kept in view. Section 36 of the Act, 1960 declares societies to be body corporate. It reads as under :

“Section 36 Societies to be bodies corporate : The registration of a society shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal, and

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with power to acquire, hold and dispose of property, to enter into contracts, to institute and defend suits and other legal proceedings and to do all such things as are necessary for the purpose for which it is constituted.”

49. Section 36 thus makes every society registered under the Act, 1960 a corporation with perpetual succession and common seal. The society, in its corporate character, acts through the committee for management. Section 72 of the Act, 1960 provides that subject to the provisions in the said Act and the rules, the final authority of every society shall vest in the general body of members in general meeting, summoned in such a manner as may be specified in the bye-laws. Section 73, on the other hand, provides that the management of every society shall vest in a committee, constituted in accordance with the said Act, the rules and bye-laws, which shall exercise such powers and perform such duties as may be conferred or imposed respectively by the said Act, the rules and the bye-laws.

50. In the light of the aforesaid corporate character of the society, a profitable reference can be made to the judgment of the Supreme

Court in the case of *Daman Singh Vs. State of Punjab*², wherein the juristic character of the society was illuminatingly postulated. It was, *inter-alia*, observed that once a person becomes a member of a co-operative society, he loses his individuality qua the society and he has no independent rights except those given to him by the statute and the bye-laws. He must act and speak through the society or rather, the society alone can act and speak for him qua rights or duties of the society as a body. Therefore, co-operative society is a corporation as commonly understood :

“5 What is a corporation ? In Halsbury's Laws of England, 4th Edition , Volume 9 , Paragraph 1201, it is said :

"A corporation may be defined as a body of persons (in the case of a corporation aggregate) or in office (in the case of a corporation sole) which is recognised by the law as having a personality which is distinct from the separate personalities of the members of the body or the personality of the individual holder for the time being of the office in question."

A corporation aggregate has been defined in paragraph 1204 as,

"A corporation of individuals united into one body under a special domination having perpetual succession under an artificial form ,

²(1985) S.C. 973

and vested by the policy of law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations and of suing and being sued, of enjoying privileges and immunities in common and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence."

This court in the Board of Trustees , Ayurvedic and Unani Tibbia College , Delhi v. the State of Delhi(1) was required to answer the question whether the Board of trustees which was originally registered under the Societies Registration Act, 1860 and a new Board of trustees which was incorporated by an Act of the legislature called the Tibbia College Act, 1952 by which the old Board was dissolved and a new Board constituted were corporations. The court held that the old Board was not but the new Board was. Posing the question what is a corporation, the court answered it with the statements contained in Halsbury's Laws of England already extracted by us and added,

"A corporation aggregate has therefore only one capacity , namely, its corporate capacity. A corporation aggregate may be a trading corporation or a non-trading corporation. The usual examples of a trading corporation are (1) character companies, (2) companies incorporated by special acts of Parliament, (3) companies registered under the Companies Act, etc. Non-trading corporations are

illustrated by (1) municipal corporations, (2) district boards, (3) benevolent institutions, (4) universities etc. An essential element in the legal conception of a corporation is that its identity is continuous, that is, that the original member or members and his or their successors are one. In law the individual corporators, or members, of which it is composed are something wholly different from the corporation itself; for a corporation is a legal person just as much as an individual. Thus, it has been held that a name is essential to a corporation, that a corporation aggregate can, as a general rule, only act or express its will by deed under its common seal; that at the present day in England a corporation is created by one or other of two methods, (1) [1962] SUPPL. 1. SCR 156 namely, by Royal Charter of incorporation from the Crown or by the authority of Parliament that is to say, by or by virtue of statute. There is authority of long standing for saying that the essence of a corporation consists in (1) lawful authority of incorporation, (2) the persons to be incorporated, (3) a name by which the persons are incorporated, (4) a place and (5) words sufficient in law to show incorporation. No particular words are necessary for the creation of a corporation : any expression showing an intention to incorporate will be sufficient."

The court then noticed the various provisions of the [Societies Registration Act](#) , 1860 which according to them contained no sufficient words to indicate an intention to incorporate but on the contrary contained provisions showing that there was an absence of such intention. Therefore , they observed , "We have , therefore , come to the conclusion that the provisions aforesaid do not

establish the main essential characteristic of a corporation aggregate , namely , that of an intention to incorporate the society." Considering next the question whether the new Board was a corporation , the court had no difficulty in answering the question with reference to sub-section 2 of section 3 which stated that the Board shall be a body corporate having perpetual succession and common seal and shall by the said name sue and be sued. The court observed , "Subsection 2 of sec. 3 says in express terms that the new Board constituted under the impugned Act is given a corporate status; in other words , the new Board is a corporation in the full sense of the term."

6. We have already extracted sec. 30 of the Punjab Act which confers on every registered co-operative society the status of a body corporate having perpetual succession and a common seal , with power to hold property , enter into contracts , institute and defend suits and other legal proceedings and to do all things necessary for the purpose for which it is constituted. There cannot , therefore , be the slightest doubt that a co-operative society is a corporation as commonly understood. Does the scheme of the Constitution make any difference ? We apprehend not."

51. The aforesaid pronouncement of the Supreme Court was further explained by the Supreme Court in the case of ***State of U.P. & Anr. Vs. C.O.D. Chheoki Employees' Co-op. Society Ltd. & Ors.***³.

The observations in para No. 18 are of material significance and thus extracted below:

³ JT 1997 (2) S.C. 265

“18 Thus, it is settled law that no citizen has an fundamental right under Article 19(1)(c) to become a member of a Co-operative Society. His right is governed by the provisions of the statute. So, the right to become or to continue being a member of the society is a statutory right. On fulfilment of the qualifications prescribed to become a member and for being a member of the society and on admission, he becomes a member. His being a member of the society is subject to the operation of the Act, rules and bye-laws applicable from time to time. A member of the Society has no independent right qua the Society and it is the society that is entitled to represent as the corporate aggregate. No individual member is entitled to assail the constitutionality of the provisions of the Act, rules and the bye-laws as he has his right under the Act, rules and bye-laws and is subject to its operation. The stream cannot rise higher than the source.”

(emphasis supplied)

52. The decision to compromise the suit by executing the consent terms is required to be appreciated through the aforesaid prism of the corporate character of the defendant society. It is not the case of the plaintiff that the decision to amicably resolve the dispute with the plaintiff was taken either by the management committee or the general body of the defendant society. Nor it is the case that there was any resolution authorising Mr.Yashwant Jawale to execute the consent terms on behalf of the defendant society, immediately

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preceding the date of the execution of the consent terms.

53. The contents of the irrevocable general power of attorney are, thus, required to be resorted to, to ascertain exact power conferred on Mr.Yashwant Jawale. The trigger for execution of the said power of attorney was that the government editors had filed a criminal complaint in Andheri Court against the Chairman, Secretary, Treasurer of the society, the Architect and Mr.Yashwant Jawale, the contractor. It was thus decided that the irrevocable power of attorney be executed in favour of the contractor. (The status of Mr.Yashwant Jawale as the contractor is indubitably re-emphasised). The members thereafter proceeded to nominate and constitute Mr.Yashwant Jawale and Shri D.W. Ayre, as their attorneys to transfer the flats/share certificates and execute conveyances on their behalf. Two of the clauses which empowered the attorneys to settle the dispute read as under :

“Clause 4 : To settle, adjust, compound, submit to arbitration and compromise all actions, accounts, claims and demands whatsoever, which now or

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hereinafter shall be pending between ours and any other person whomsoever in such manner as our attorneys shall think fit.

Clause 18 : To settle and compromise any suit, proceedings, both civil and criminal disputes under the Maharashtra Co-operative Societies, Act, 1960.”

54. Emphasis was laid on behalf of the plaintiff on the aforesaid clauses to bolster up its case that Mr.Yashwant Jawale had the necessary authorisation to settle the dispute, and execute the consent terms. As indicate above, the power of attorney, on the own showing of the plaintiff, was not executed by the office bearers of the defendant co-operative housing society in that capacity and under the seal of the co-operative society. Secondly, the tenor of the power of attorney is that the individual members who executed the said power of attorney intended to transfer their interest in the units allotted to them and those two persons were constituted as attorneys for the said purpose.

55. There are subsequent developments which erode the authority

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of Mr.Yashwant Jawale to settle the dispute with the plaintiff, of which he was indisputably a partner, on the strength of the said power of attorney. Seven of those members, who had executed the said power of attorney, instituted a suit against the plaintiff firm and its partners; Mr.Yashwant Jawale and Padma Jawale, bearing Suit No.2253 of 1986 seeking, *inter-alia*, declaration that the Principal Agreement dated 20th April 1975, Supplementary Agreement dated 20th April 1975 and the further agreement dated 30th April 1976, entrusting the works contract to the plaintiff firm were validly terminated by the defendant society and those seven members. A decree for vacant and peaceful possession of the properties of the defendant society was also sought.

56. The plaintiff asserts that the said suit also came to be compromised as the plaintiffs therein also received valuable consideration from Mr.Yashwant Jawale, the defendant No.2 in the said suit. The consent terms executed in the said suit record that those seven members resigned from the membership of Shri Sankalp

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Co-operative Housing Society Limited-the defendant society on and from 8th October 1984, and acknowledged and confirmed that they have no right, title and interest of whatsoever nature as the members of the said society and/or in the respective flats agreed to be purchased by them. The consent terms record that the defendant No.2-Mr.Yashwant Jawale had paid certain amounts to those persons as recorded in Schedule I and Schedule II appended thereto. This composition, according to the plaintiff, confers further rights on Mr.Yashwant Jawale to deal with the units, the rights over which those seven members relinquished.

57. In contrast, the respondents-applicants claimed that in pursuance of the said power of attorney executed on 8th October 1984, Mr.Yashwant Jawale executed further instruments and allotted flats to the respondents-applicants after acceptance of valuable consideration.

58. The relinquishment of the rights by the erstwhile members

does not ipso-facto vest the title in the respective flats, in Mr.Yashwant Jawale. It is pertinent to note that the plaintiff does not claim that these relinquishments automatically led to vesting of those flats in Mr.Yashwant Jawale. In this view of the matter, the question of authority of Mr.Yashwant Jawale to compromise the suit on the strength of the power of attorney executed by the persons, who, on the own showing of the plaintiff, relinquished their rights and interest in the society in the year 1988 with effect from 8th October 1984, wrenches to the fore. So far as those seven persons, who relinquished their rights under the consent terms recorded on 1st February 1988 in Suit No. 2253 of 1986, the authority of the agent came to an end instantaneously. Thus, the claim of Mr.Yashwant Jawale that the said power of attorney gave him the authority to represent the defendant society in the year 1993 cannot be legally countenanced.

59. On the aspect of the capacity to compromise the suit, a profitable reference can be made to the judgment of the Supreme

Court in the case of *Ahmedabad Municipal Corporation & and Anr. Vs. Rajubhai Somabhai Bharwad and Anr.*⁴, wherein the Supreme Court considered the question whether the Sarpanch while representing the concerned Gram Panchayat could have entered into a compromise on behalf of the Gram Panchayat without a proper resolution of the Gram Panchayat ?, and answered the same in the negative, with the following observations :

“21 The purpose of referring to the same is that the village panchayat by a specific provision of the Act is regarded as a body corporate. A body corporate as has been held can sue or be sued in its name. [Section 101](#), which we have already reproduced, confers power on the village panchayat to enter into a compromise. As the factual matrix has been uncurtained, the village panchayat represented itself through the Sarpanch. Nothing has been brought on record that the Panchayat had conferred any authority on the Sarpanch to enter into any kind of settlement with the workman, the first respondent herein. In the absence of any authority and in the absence of any statutory permissibility it is absolutely inconceivable in law that a Sarpanch can enter into settlement with a workman.

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24 In this context, we cannot be oblivious of a very significant facet. The Labour Court as we find in a single line order has accepted the settlement and has not made any endeavour to even find out whether the Sarpanch was authorised with any kind of resolution to enter into compromise/settlement by the village panchayat. He

⁴ (2015) 7 SCC 663

should have borne in mind that it is not the Sarpanch who was the employer; that much of scrutiny was required on the part of the Labour Court. It will not be a hyperbole if it is said that it is the bounden duty on the part of the presiding officer of the Labour Court to do so and we say so without any hesitation, for court has a sacred duty to scrutinize whether a valid compromise has been entered into or not. He has to be satisfied that the compromise is lawful.”

60. This propels me to the crucial aspect of the representation, rather misrepresentation, before the Court, at the time, the consent decree was obtained. To begin with, it has not been categorically denied that there was no resolution of the society preceding the execution of the consent terms. The manner in which Mr.Yashwant Jawale changed his capacity seamlessly is of critical significance. It needs no emphasis that for Mr.Yashwant Jawale, being a partner of the plaintiff firm (the contractor), which had instituted the suit primarily for the purpose of recovery of the cost of the work executed), the representation on the part of the defendant society was a clear case of conflict of interest.

61. It is pertinent to note that though the plaint was signed and verified by Mrs.Padma Jawale, in the capacity of the partner of the

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plaintiff, yet, Mr.Yashwant Jawale, had also represented the plaintiff in the said suit. On 31st March 1980, Vakalatnama of M/s. D.J. Kamdin and Co. came to be filed on behalf of the plaintiff. The said Vakalatnama was signed by Mr.Yashwant Jawale in the capacity of its partner. In Notice of Motion No.539 of 1980 in the said suit, Mr.Yashwant Jawale had sworn an affidavit in support of the plaintiff's claim, again in the capacity of its partner. An inference thus becomes inescapable that Mr.Yashwant Jawale actively prosecuted the suit.

62. Though, during the course of cross-examination, Mr. Pawan Yashwant Jawale (P.W.No.1) feigned ignorance as to whether Mr.Yashwant Jawale signed vakalatnama on behalf of the defendant society as well. Yet, the circumstances in which Mr.C.M. Mankad, Advocate came to represent the defendant society render the said charge far from disproved. Initially, Y.S. Abhyanakar and Co. filed vakalatnama on behalf of the defendant society on 18th April 1978. The vakalatnama was duly signed by the office bearer of the

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defendant society. Later on, M/s.Chitnis Vaity and Co. filed vakalatnama on behalf of the defendant society. The vakalatnama of Mr.C.M. Mankad came to be filed on behalf of the defendant on 25th November 1992. The vakalatnama seems to have been signed by the Chairman of Shri Sankalp Co-operative Housing Society Ltd. Though it would be hazardous to draw an inference on the basis of the comparison of signatures that Mr.Yashwant Jawale signed Vakalatnama on behalf of the defendant as well, (having already signed the vakalatnama in the capacity of the partner of the plaintiff), yet, there are concomitant circumstances which justify such an inference.

63. Mr.Yashwant Jawale was arraigned as the defendant in Suit No.2253 of 1986. Mr. C.M. Mankad, Advocate represented Mr.Yashwant Jawale in the said suit and signed the consent terms in that capacity, as is evident from the consent terms recorded in the said suit. It is interesting to note that the defendant society filed a Writ Petition bearing No.1764 of 1993 along with Mr.Yashwant

Jawale in the capacity of Chairman and constituted attorney assailing the notice dated 11th June 1993 issued by the Municipal Corporation for the alleged regulatory breaches. The said writ petition was instituted after a couple of months of the passing of the consent decree. The endeavour on the part of the plaintiff to deny that Mr.Yashwant Jawale also professed to discharge the functions of the Chairman of the defendant society thus does not merit acceptance.

64. From the perusal of the aforesaid material, it becomes evident that Mr.Yashwant Jawale professed to represent the plaintiff and the defendant in the same suit at different points of time. The inevitable conclusion is that there was no proper representation of the defendant society when the consent terms were executed and the consent decree followed. The Court was made to believe that there was a proper representation of the defendant society and the consent terms were arrived at between the parties freely. This factor coupled with the expropriatory nature of the consent terms whereby the co-

operative society was sought to be deprived of its existence and divested of its property, for all intent and purpose, would lead to no other inference than that of the consent decree having been obtained *suggestio falsi* and *suppressio veri*.

65. The Courts frown on such sharp practices. Any conduct which is actuated by the design to obtain an unfair advantage over the other side and based on falsehood is firmly deprecated by the Courts. A profitable reference in this context can be made to the judgment of the Supreme Court in the case of ***S.P Chengalvaraya Naidu vs Jagannath***⁵, wherein the vitiating effect of fraud was tersely put in the opening paragraph of the judgment :

“1. "Fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decreed by the first court or by the highest court has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.”

⁵(1994) 1 SCC 1

66. The pronouncement of the Supreme Court in the case of **A.V. Papayya Sastry & Ors. Vs. Government of A.P. & Ors.** ⁶ also enunciates what constitutes the fraud in judicial proceedings and the consequences it entails. The relevant paragraphs reads as under :

"21 Now, it is well settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed:

"Fraud avoids all judicial acts, ecclesiastical or temporal".

22 It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order by the first Court or by the final Court has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings.

23 In the leading case of Lazarus Estates Ltd. v. Beasley, (1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502, Lord Denning observed:

"No judgment of a court, no order of a Minister, can be allowed to stand, if it has been obtained by fraud."

24 In Duchess of Kingstone, Smith's Leading Cases, 13th Edn., p.644, explaining the nature of fraud, de Grey,

⁶(2007) 4 SCC 221

C.J. stated that though a judgment would be res judicata and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was 'mistaken', it might be shown that it was 'misled'. There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment.

25 *It has been said; Fraud and justice never dwell together (fraus et jus nunquam cohabitant); or fraud and deceit ought to benefit none (fraus et dolus nemini patrocinari debent).*

26 *Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants."*

67. On the aforesaid touchstone, reverting to the facts of the case, in the totality of the circumstances, the conduct of the plaintiff in clandestinely obtaining a consent decree on the strength of a power of attorney executed by the members of the society, who

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subsequently relinquished their membership and interest in the society, to compromise the suit in such a fashion that the entire property of the society vests in the plaintiff is nothing but fraudulent. This inference is further reinforced by the circumstances in which the subsequent orders of amendments to the decree were obtained. The order dated 28th September 1993, whereby the decree was amended to the effect that “decree to act as conveyance” was, again with the consent of the Mr.C.M. Mankad, the learned counsel for the defendant. Even the order dated 17th February 1999, whereby the decree was further amended to provide that the defendant society ceased to exist was with the consent of Mr.C.M. Mankad, Advocate for the defendant.

68. The element of suppression of facts was present even when the last amendment by the aforesaid order dated 17th February 1999 was obtained. There is material on record to indicate that the applicants had already moved the Deputy Registrar, Co-operative Society, alleging mismanagement of the affairs at the hands of Mrs.Padma

Jawale and Mr.Yashwant Jawale. By order dated 7th September 1998, the Deputy Registrar had appointed a committee of Administrators under Section 77A of the Act, 1960 to administer the affairs of the defendant society. Mrs. Padma Jawale had made an effort to get the society deregistered by filing an application on 5th February 1998. The said application was not countenanced. Mrs.Padma Jawale preferred an appeal against the order passed by the Deputy Registrar of appointing a Committee of Administrators and the said appeal was also dismissed by the Joint Registrar on 14th December 1998. Yet, when the chamber summons for amendment in the decree, bearing Chamber Summons No. 213 of 1999, was moved on 16th February 1999, all these facts were conveniently suppressed from the Court. Had these facts been apprised to the Court, the Court would have issued notices to the person who were prosecuting the interest of the society and would not have allowed the decree to be amended to the effect that “that the defendant society has ceased to exist”.

69. It would be contextually relevant to note that there are provisions in the Act, 1960 to address the contingency of deregistration of a society. Section 21 provides for cancellation of registration and section 21A provides for deregistration of societies on certain grounds. Mrs. Padma Jawale, the partner of the plaintiff, having made an effort to get the society deregistered and failed, thus, could not have sought the amendment of the consent decree to provide that the defendant society ceased to exist, without disclosing the aforesaid facts. The suppression of these facts also constitutes fraud.

70. In the case of *S.P Chengalvaraya Naidu* (Supra), the Supreme Court inter-alia observed that, a litigant, who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party. The aforesaid observations govern the facts of the case with regard to

multiple suppression of facts on behalf of the plaintiff and its partners Mrs.Padma Jawale and Mr.Yashwant Jawale.

71. For the foregoing reasons and findings, I am persuaded to answer issue No.1 in the affirmative to the effect that the respondent No.10-applicant has the legal standing to seek setting aside of the consent decree. Issue No.2 is answered in the affirmative.

72. Resultantly, the notice of motion deserves to be allowed and the consent decree passed by this Court in Short Cause Suit No.469 of 1978, dated 19th April 1993 and the subsequent amendments thereto are required to be set aside. Hence, the following order :

O R D E R

- (i) The notice of motion stands allowed.
- (ii) The consent decree passed by this Court in Short cause Suit No. 469 of 1978 by order dated 19th April 1993 and the amendments made thereto by orders dated 28th September 1993, 20th February, 1996, 19th December 1996

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and 17th February 1999 are set aside.

(iii) The actions taken pursuant to the said consent decree, including the conveyance registered with the Sub-Registrar of Assurances on 3rd April 1995 and the mutation of the name of the plaintiff to the record of rights of the subject property, are also declared void and the said instrument and mutation stand cancelled.

(iv) Suit No.469 of 1978 stands restored to file, and be listed for directions after eight weeks.

The notice of motion stands accordingly disposed of.

(N. J. JAMADAR, J.)

At this stage, the learned counsel for the plaintiff seeks stay to the order passed by this Court. The prayer is opposed by the learned counsel for the respondents. By an interim order passed by Appeal Bench in Appeal No. 542 of 2000, on 1st November 2004, the execution and operation of the consent decree was stayed subject to certain conditions, and the said order was continued by the

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judgment and order dated 25th February 2010.

In this view of the matter, the order passed by this Court today is stayed for a period of eight weeks. The interim order passed by the Appeal Bench in Appeal No. 542 of 2000 on 1st November 2004, and continued by the judgment and order dated 25th February 2010 shall continue to operate for the said period of eight weeks.

The plaintiff shall not create any third party rights in the subject property during the said period of eight weeks, for which the execution and operation of this order is stayed.

(N. J. JAMADAR, J.)