IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.335 OF 2022 WITH
CIVIL APPLICATION NO.8534 OF 2022

M/s Shalaka Engineers and JV
A registered Partnership Firm,
having office at 8, Edge Archad,
Sant Eknath Mandir Road,
Osmanpura, Aurangabad ... **APPELLANT**
(Original Plaintiff/ Respondent)

VERSUS

Aurangabad Municipal Corporation,
through its Law Officer -
Mrs. Aparna Thete,
Age 35 years, Occupation : Service,
Aurangabad Municipal Corporation,
Aurangabad ... **RESPONDENT**
(Original Defendant/ Appellant)

....

Shri Mukul S. Kulkarni, Advocate for appellant
Shri Anand P. Bhandari, Advocate for respondent

....

CORAM : R. G. AVACHAT, J.

Date of reserving judgment : 3rd August, 2022

Date of pronouncing judgment : 22nd December, 2022

J U D G M E N T :

This is original plaintiff's appeal from appellate decree (Second Appeal). The plaintiff is a partnership firm. It filed a suit, being Regular Civil Suit No.119/2015 against

Aurangabad Municipal Corporation (AMC) for the following reliefs :-

(a) By Decree of Declaration it be declared that the order dated 24/7/2015 passed by the Defendant terminating the Agreement of Lease dated 16/10/2009 is illegal, null and void and be quashed.

(b) By Decree of Mandatory Injunction the Defendant be directed to remove the seal affixed from the suit property as described in the claim clause and description clause of the plaint on 25/7/2015, vide Panchanama of the even date.

(c) By decree of Perpetual Injunction the Defendant be restrained from creating any sort of third party interest in the suit property of any nature and also from causing obstruction and interference in the peaceful possession of the Plaintiff of the suit property as described in the claim clause and description clause of the plaint.

2. The trial Court decreed the suit vide its judgment dated 9/9/2019. The AMC, therefore, preferred first appeal, being Regular Civil Appeal No.254/2019. The appellate Court, vide its judgment and decree dated 14/1/2022, reversed the decree passed by the trial Court and dismissed the suit.

3. The facts giving rise to this Second Appeal are as follows :-

An open site bearing C.T.S. No.16262, situated at Jyotinagar, Aurangabad belongs to AMC. A swimming pool complex with amenities was proposed to be constructed thereon under Build Operate and Transfer (BOT) Scheme. A concessionaire agreement was, therefore, executed between AMC and Shalaka Engineers & Joint Ventures (JV) on 7/5/2007. Shalaka Engineers and Joint Ventures, under the concessionaire agreement, was authorised to lease out swimming pool complex to anyone on certain terms and conditions. A tri-party agreement was executed between AMC on one hand and Shalaka Engineers and JV and plaintiff firm on the other. Needless to mention, the plaintiff firm is a sister concern or the subsidiary of Shalaka Engineers and JV. The plaintiff firm was given the swimming pool complex on lease.

4. All was well for initial period of six years. The project was run smoothly. As per the case of the AMC, the plaintiff firm committed breach of the terms and conditions of agreement. The plaintiff firm made unauthorised and illegal construction on the open land. A Hukka Parlour was operated from one of the shop blocks in swimming pool complex. A massage parlour was opened in another block. Females were

engaged as masseuse. Under the guise of massage parlour, illegal activities were performed. A restaurant was opened at the swimming pool. One side transparent glass partition was raised between the restaurant and the swimming pool. It was only with a view that the customers at the restaurant could watch swimming activities of women. The AMC received number of complaints from the residents. The AMC authorities, therefore, paid visit to the swimming pool. The police too paid similar visit. Crimes came to be registered. The concerned pleaded guilty for the offence of running Hukka Parlour. They were sentenced to pay a fine. The AMC first issued the plaintiff firm a notice, calling upon it to give explanation. The notice was purportedly issued in terms of clause No.5.6 of the lease agreement. The AMC authorities, after having realised that activities committed by the plaintiff firm were illegal, invoked clause 5.19. Lease agreement came to be cancelled. The swimming pool complex came to be placed under seal.

5. The plaintiff firm initially filed Writ Petition against the AMC. The petition came to be disposed of with a direction to AMC to de-seal the premises and take appropriate action in accordance with law. The plaintiff, meanwhile, preferred Municipal Appeal, under Section 81(F) of the Bombay

Provincial Municipal Corporations Act (for short, the Act). The appeal came to be dismissed with the observations that the plaintiff has not challenged the order of termination of the lease. The plaintiff firm, therefore, filed the suit.

6. The trial Court decreed the suit, observing the plaintiff to have not been given due opportunity of hearing before the action impugned in the suit was taken by the AMC. The first appellate Court upset the decree passed by the trial Court. It observed that, the plaintiff firm indulged in illegal activities and thus committed breach of the terms of the lease agreement. The AMC was, therefore, justified in invoking clause 7.19 of the lease agreement to terminate the same.

7. This Second Appeal is being finally decided at admission stage on the following substantial questions of law, although the learned counsel for the appellant submitted no such questions of law arise herein.

(I) Whether in the facts and circumstances of the case the first appellate Court was justified in reversing the decree passed by the trial Court ?

(II) Whether in view of the subsequent events, particularly settlement between the parties, interference with the impugned decree is warranted ?

8. **Point No.I :-**

Clause (1) of the Concession Agreement dated 7/5/2007 executed between AMC and M/s Shalaka Engineers and JV reads :-

> " **(1) Scope of work :-** The project scheme is to develop the part of open space by constructing swimming pool with Amenities through entrepreneur/ bidder. The project scheme involves construction of swimming pool, children swimming pool with all amenities like- health club and health care facilities shower area, sports shop etc. as per D.C. rules. The successful entrepreneur/ bidder will be responsible for the construction of the swimming pool complex by his own funds. The Aurangabad Municipal Corporation owner of land of project will allow the successful entrepreneur/ bidder to recover his investment by giving the successful entrepreneur/ bidder the right to lease out swimming pool complex having land area 2114.75 sq.mt. with constructed area 422.95 sq.mt. on a long term lease of 30 years further renewal for maximum 99 years to occupants of his choice on payment of non refundable deposit or by making members of his choice by charging membership fees to avail the swimming pool complex facilities to recover his investment on the said project. The occupant of swimming pool complex will have to pay rent Rs.5/- per sq.mt. per month on chargeable area to A.M.C. for first 30 years. A.M.C. will renew this lease for further 30 years on same rent a max. of 99 years."

9. Admittedly, the plaintiff firm, a subsidiary of M/s

Shalaka Engineers and J.V., filed the suit in a capacity as an occupant of the swimming pool complex. A tripartite agreement in the nature of B.O.T. agreement for lease was executed on 16/10/2009 between AMC on one hand and the plaintiff firm with M/s Shalaka Engineers and J.V. on the other. In the definition clause of the said agreement, the term "Concessionaire's Event of Default" has been defined as :-

> "**Concessionaire's Event of Default**" means the concessionaire failure to perform any of its obligations in accordance with the provisions of this agreement and or the concession agreement."

10. Clauses 5.6 and 7.19 of the B.O.T. agreement for lease (Exhibit B) are very much relevant to decide the present Second Appeal. Both the clauses are, therefore, reproduced for ready reference :-

> "5.6: In the occupant event of default after the concession period, AMC shall serve upon the occupant a notice in writing mentioning therein the default and shall time, as may deem fit and proper considering the nature of default, to the occupant for removal/ rectification of the default. In case the occupant does not remove/ rectify the default, AMC is empowered to terminate this lease agreement by giving a one month notice in this regard."
>
> 7.19: That the occupant shall not carry on any illegal activity in the leased premises. In case he/

> she/ it does so, the the lease granted under this agreement shall liable to be terminated forthwith without notice."

11. It is the case of the AMC that, the concessionaire, M/s Shalaka Engineers and J.V. committed illegal activities on the leased premises and, therefore, the agreement of lease came to be terminated invoking clause 7.19. The illegal activities stated to have been committed are :-

Unauthorised construction in the parking space, open space. Hukka parlour was being run. Restaurant, music and dancing class and massage parlour were operated unauthorisedly. A glass partition was raised between the swimming pool and the restaurant. The glass was of such a type (transparent from one side), whereby swimming activities of women could be seen from the pool side restaurant.

12. Learned counsel for the AMC would submit that, the concessionaire or even the plaintiff firm has admitted in no uncertain terms the commission of illegal activities. The AMC was, therefore, justified in invoking clause 7.19 of the lease agreement. According to him, M/s Shalaka Engineers and J.V. had preferred a Municipal Appeal, challenging the

AMC’s action of taking possession of the swimming pool complex. The appeal came to be dismissed. The order passed therein had not been challenged. As such, the said order attained finality. Validity of clause 7.19 has not been challenged. A team of officials of the AMC has paid visit to the swimming pool complex. First Information Reports have been lodged against the representatives of the plaintiff firm. In case of illegal running of Hukka parlour, the concerned pleaded guilty and even paid fine. Section 43 of the Indian Penal Code defines the term ‘illegal’ to mean everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be “legally bound to do” whatever it is illegal in him to omit.

13. Complaints from residents of Jyotinagar locality, whereat the swimming pool complex is situated, were received. Because of a foot-fall at the swimming pool complex on account of illegal activities, life of women in the vicinity became unsafe. Attention of this Court was adverted to the oral evidence in the case.

14. Learned counsel for the plaintiff firm would, on the other hand, submit that, the alleged illegal activities have already been done away with. Running of Hukka parlour is

not such an activity warranting action under clause 7.19. He relies on the judgment of the Apex Court in case of **Narinder S. Chadha Vs. Municipal Corporation of Greater Mumbai [AIR 2015 SC 756].** The relevant provisions of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 were also relied on.

15. A team of officers of AMC paid visit to the swimming pool complex on 3/7/2015. A panchanama of the visit (Exh.52) was drawn. The AMC issued M/s Shalaka Engineers and J.V. a communication dated 17/7/2015 (Exh.57) in relation to illegalities noticed at the swimming pool complex. The last clause of the communication states in so many words that, it was a notice in terms of clause 5.6 of the lease agreement. The plaintiff firm gave its response dated 23/7/2015 to the notice (Exh.57). It half-heartedly denied commission of illegal activities at the swimming pool complex. It was its stand that the restaurant was being run for only refreshment purposes. It was given to an operator- Mr. Amol Pawar. The Hukka parlour was being run without the knowledge of the plaintiff firm. The activities such as parlour, music and dancing class would in no way be termed to be illegal. No complaint was ever received in that regard. The

AMC was ultimately requested to withdraw the notice.

16. It appears that, the AMC had constituted a three member committee of its officials purportedly on the directions of the High Court in a Writ Petition. This Court does not find any such direction asking the AMC to constitute a committee. Be that as it may, a Writ Petition filed by M/s Shalaka Engineers and J.V. (Writ Petition No.6834/2015) was disposed of vide order dated 10/7/2015 with the following observations :-

> "(1) Heard. Learned counsel appearing for Municipal Corporation, Aurangabad, on instructions, makes a statement that the Municipal Corporation shall draw panchanama, tomorrow i.e. on 11th July, 2015 and de-seal the premises, i.e. swimming pool complex with amenities situated at Plot No.CTS No.16261 at Jyotinagar, Aurangabad; and the Corporation may also continue with the action, which is already initiated.
>
> 2) It would be open for the Municipal Corporation to take appropriate steps and action in accordance with the BOT lease agreement for lease and in consonance with the provisions of law."

The aforesaid order, in no way, suggests the AMC to have been given any direction to constitute a three member committee.

17. The Committee gave its report to the

Commissioner, AMC on 23/7/2015. It concluded the plaintiff firm (occupant) to have committed unauthorised activities and, therefore, it would be desirable to cancel the lease agreement, taking recourse to clause 7.19. The Commissioner, AMC, therefore, vide order (Exh.79) dated 24/7/2015, cancelled the lease agreement. The swimming pool complex came to be placed under its seal.

18. The reasoning given by the first appellate Court that recourse to clause 5.6 could have only been taken only during the first year of the lease agreement, was unfounded. It was nobody's case as well. This Court, therefore, do not propose to advert to the said reasonings.

19. A reference to relevant oral evidence would not be out of place at this stage itself.

The plaintiff's witness Sunil Mulchand Raka has admitted in no uncertain terms to have had made unauthorised illegal construction in the open space and parking area. He also admitted that, Hukka parlour was being operated. Undisputedly, a particular type of glass through which activities at the swimming pool could be seen from the pool side restaurant was raised. It is also not in dispute that, a massage parlour was being operated from one of the blocks in swimming pool complex.

As against this, the witness examined on behalf of the AMC admitted that, M/s Shalaka Engineers and J.V. has filed the suit in the capacity of occupant. He also admitted that, M/s Shalaka Engineers and J.V. was appointed as occupant in dual capacity as functional and occupant. In case of any default, objectionable wrong on the swimming pool complex, could be rectified as per clause 5.6. He also admitted that, there was no hearing or decision on the basis of letter dated 17/7/2015. BOT Cell of AMC had not put up a proposal for termination of lease agreement. The Commissioner did not obtain approval of general body prior to taking decision of termination of agreement of lease. The witness went on to admit that, so called illegalities were removed/ done away with before 25/7/2015 itself. He was specific to state that, all illegalities were removed between 3/7/2015 and 24/7/2015.

20. Admittedly, the representatives of the plaintiff firm pleaded guilty in a prosecution instituted under Section 33(w) read with Section 131 of the Mumbai Police Act and under Section 4 read with 21 of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of

Trade and Commerce, Production, Supply and Distribution) Act, 2003 (for short the Act). It was relating to running of a Hukka parlour/ restaurant without obtaining a permit or licence to operate the same. They paid a fine of Rs.1200/- each. It is also true that, an F.I.R. has been lodged for illegalities, namely unauthorised construction etc.

21. Section 4-A of the Act speaks of prohibition of Hukka Bar. The Section reads :-

> **"4-A. Prohibition of hookah bar.**
>
> Notwithstanding anything contained in this Act, no person shall, either on his own or on behalf of any other person, open or run any hookah bar in any place including the eating house.
>
> Explanation:- The term "eating house" shall have the same meaning as assigned to it in clause (5A) of section 2 of the Maharashtra Police Act.

Section 3-ee of the Act defines the term "hookah bar" to mean an establishment where people gather to smoke tobacco from a communal hookah or narghile which is provided individually.

Section 21-A of the said Act came to be introduced by way of amendment in 2018, whereunder, contravention of provision of Section 4-A is made punishable with imprisonment which may extend to three years and with fine which may extend to one lakh rupees but which shall not be less than fifty thousand rupees. This was not the legal position when the offence of running Hukka parlour was committed. At the relevant time, it was an offence under Mumbai Police Act. The contravention was punishable with imposition of fine only.

22. Although motive of the operators of pool side restaurant and massage parlour was oblique, there is nothing to suggest that under the guise of running a massage parlour, illegal activities like prostitution was being run.

23. True, the fact remains that the plaintiff firm committed illegal activities in operating the swimming pool complex. The question is whether the AMC was justified in cancelling the lease agreement, taking recourse to clause 7.19. True, the said clause empowers the AMC to cancel the lease agreement at once, once any illegal activity is noticed. Admittedly, the communication/ notice dated 17/7/2015 was issued to M/s Shalaka Engineers and J.V. taking recourse to clause 5.6 of the lease agreement. The same suggests the AMC authorities had called upon the noticee to rectify the wrong within a notice period of one month. Admittedly, all

the illegal activities were removed before 24/7/2015. When the AMC takes recourse to clause 5.6 of the lease agreement, the same suggests that the illegal activities committed by M/s Shalaka Engineers and J.V. were not of such a nature compelling to have a recourse to clause 7.19. Admittedly, the noticee - M/s Shalaka Engineers and J.V. gave its response to the communication dated 17/7/2015, calling upon the AMC to withdraw the notice since unauthorised construction was removed and other illegal activities were ceased. In this factual backdrop, the AMC ought not to have taken recourse to clause 7.19 to cancel the lease agreement and place the swimming pool complex under seal.

24. Had the AMC really been serious over the illegalities/ lapses committed by the plaintiff firm, it would not have entered into a compromise. Pending the first appeal, tenure of the elected body of people's representatives came to an end. The Municipal Commissioner became the Administrator of the AMC. He is said to have taken a stock of all BOT projects. He decided to enter into a compromise with M/s Shalaka Engineers and J.V. A copy of the minutes of the meeting dated 31/8/2020 indicates that on negotiations with Sunil Raka, developer of the swimming pool complex, a revised agreement of lease was decided to be entered into.

The developer agreed to enhance the lease amount from Rs.5/- to Rs.15/- per sq.mtr. Thereafter on 28/8/2020, the Municipal Commissioner-cum-Administrator approved the proposal regarding entering into a renewed lease. For better appreciation, the order approving the proposal is reproduced below in verbatim.

> "प्रस्तावात दर्शविल्याप्रमाणे औरंगाबाद महानगरपालिकेच्या न.भु.क्र. १६२६१ या रेखांकनातील खुल्या जागेमधील क्षेत्र ८०४ चौ.मी. असून त्यावर रक्कम रुपये ०५ प्रति चौरस प्रतिमाह वार्षिक भाडेपट्टा रु.४८,२४०/- आकारण्यात आलेला आहे. विकासकाने मार्च २०२० पर्यंतचा आगाऊ भाडेपट्ट्यासह आजपावेतो रक्कम रु.५,३०,६४६/- भरणा केले आहे. प्रकल्प पूर्णत्वा नंतर प्रकल्पांतर्गत विना परवानगी अतिरिक्त बांधकाम / वापर केल्यामुळे प्रकल्प २०१५ पासून बंद करण्यात आलेला होता. सद्यस्थितीत प्रकल्पाबाबतचे प्रकरणात महानगरपालिकेने अपिल दाखल केलेले आहे. मा. जिल्हा न्यायालयात आर.सी.ए.क्र.२५४/२०१९ अन्वये समजोता (Compromise Deed) करारनामा दाखल करणे, सुधारित पुर्नकरारनामा करणे, वाढीव एफ.एस.आय. सह नियमानुसार सुधारित बांधकाम परवानगी देणे, त्यानुसार प्रिमियम व भाडेपट्टा वसूल करणे यासाठी मा. प्रशासक यांनी तत्वतः मंजुरी दिली. तदनंतर फेर भाडेपट्टा करारनामा आणि Compromise Deed संदर्भाने उपरोक्त प्रमाणे कार्यवाही करणे बाबत आदेशित केले व त्यास संबंधित विकासक यांनी संमती दर्शविली. रुपये ०५ प्रति चौ.मी. प्रतिमहा ऐवजी रुपये १५/- प्रति चौ.मी.वाढविणेच्या अटीवर तडजोड करण्यात आलेली आहे. त्यानुसार प्रस्ताव मंजूर. वैधानिक कार्यवाही व्हावी."

25. In view of the aforesaid, a compromise pursis at Exh.13 duly signed by the parties to the appeal, was presented before the first appellate Court on 3/9/2020 with the following prayer therein :

> "The appeal be ordered as withdrawn in terms of the Compromise and the Decree of R.C.S. No.119/2015 passed by C.J.S.D. (M.C.A.), Aurangabad on 9.9.2019 be confirmed as per terms and conditions of this Compromise and oblige."

26. Thereafter the Law Officer of the AMC submitted a pursis dated 15/9/2020, whereunder the AMC reneged on the compromise pursis. The first appellate Court, therefore, did not endorse the compromise. The appeal was heard on its merits and came to be dismissed.

27. The learned counsel for the AMC made very many submissions in this regard. He first took this Court through the legal dictionary meaning of the term 'compromise'. He then relied on relevant provisions of Order 23 of the Code of Civil Procedure. He also relied on the judgments of the Apex Court in this regard. According to him, the decree in terms of compromise was not passed. The first appeal was argued on its own merits without taking recourse to the subsequent event of proposed compromise. The terms of compromise

were not in the nature of concluded contract. The plaintiff has filed a Writ Petition before this Court for enforcement of the terms of compromise. No ground in that regard has been made in the memo of this Second Appeal. An affidavit of a Law Officer was placed on record in justification of going back on the terms of compromise. It was further submitted that, the first appellate Court did not verify the compromise memo. The compromise was withdrawn before it received sanctity of the orders of the Court. Till the stage of verification of the compromise, the compromise was not concluded and consent to the same could be withdrawn. It was also submitted that, since there was an interim order against the AMC, preventing it from creating any third party interest in relation to the swimming pool complex, it was thought fit to take appropriate steps in accordance with law for putting the property for beneficial use of citizens. Complaints from the residents were, however, received. A proposal of compromise got wide publicity in the dailies. Ex-Corporators were up in ante. It was, therefore, thought expedient not to go ahead with the compromise. Relevant provisions of Order 23 Rule 3 have also been adverted to. This Court do not propose to reproduce the same.

28. A brief reference to the authorities relied on by the

learned counsel for the AMC is necessary before arriving at a conclusion.

In case of **Shyama Sundar & ors. Vs. Ram Kumar & anr. [AIR 2001 SC 2472]**, the issue involved was, whether amended Section 15 of Punjab Pre-emption Act had retrospective effect. The Hon'ble Supreme Court held that, the Amending Act being prospective in operation, did not affect the rights of the parties to the litigation on the date of adjudication of preemption suit and the appellate Court was not required to take into account or give effect to the substituted Section 15 introduced by the Amending Act.

This Court has carefully perused the entire judgment and specifically paragraphs No.29 and 30 thereof. The said judgment is quite distinguishable and would, therefore, be of no assistance to AMC in the facts and circumstances of the case.

29. The judgment of the Apex Court in case of **Sushil Kukar Agarwal Vs. Meenakshi Sadhu & ors. (Civil Appeal No.1129 of 2012)** speaks of a suit for specific performance of development agreement. Provisions of Section 14 of the Specific Relief Act, 2018 were under consideration in the said appeal.

30. The facts in case of **R. Rathinavel Chettiar Vs. V. Sivaraman [(1999) 4 SCC 89]** suggest that, permission to withdraw a suit after passing decree and matter being at appellate stage, was not granted to the plaintiff since the subject matter of the suit (immovable property) was sold pending the suit. The assignees became parties on the basis thereof. The Court found that, allowing of application for withdrawal of the suit by plaintiff would have been prejudicial to valuable rights that came to be vested in the transferees.

31. The judgment of Apex Court in **Banwari Lal Vs. Smt. Chando Devi (through L.R.) & anr. [AIR 1993 SC 1139]** speaks of, that even after a compromise has been recorded, the Court concerned can entertain an application under Section 151 of the Code of Civil Procedure questioning the legality or validity of the compromise. Rule 3-A of Order 23 bars a remedy of suit to set aside a decree on the ground that the compromise of which the decree was based, was not lawful.

32. This Court has also perused the Apex Court judgment in case of **State of Punjab & ors. Vs. Ganpat Raj [AIR 2006 SC 3089]** and the judgment of Madras High Court

in case of **Athappa Gounder Alias Poosari Gounder Vs. Periasami Gounder [AIR 1956 Madras 344]** to find to have no bearing on the fate of the present Second Appeal.

33. In case of **Nidhi Vs. Ram Kripal Sharma (D) through L.Rs. (Civil Appeal No. 1008 of 2017)**, the Apex Court observed :-

> 15. Ordinarily, rights of the parties stand crystallised on the date of institution of the suit. However, the court has power to take note of the subsequent events and mould the relief accordingly. Power of the court to take note of subsequent events came up for consideration in a number of decisions. In Om Prakash Gupta vs. Ranbir B. Goyal (2002) 2 SCC 256, this Court held as under:-
>
> > "11. The ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. However, the Court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied: (i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted; (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and (iii) that such subsequent event is brought to the notice

> of the court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise. In Pasupuleti Venkateswarlu v. Motor & General Traders (1975) 1 SCC 770 this Court held that a fact arising after the lis, coming to the notice of the court and having a fundamental impact on the right to relief or the manner of moulding it and brought diligently to the notice of the court cannot be blinked at. The court may in such cases bend the rules of procedure if no specific provision of law or rule of fair play is violated for it would promote substantial justice provided that there is absence of other disentitling factors or just circumstances. The Court speaking through Krishna Iyer, J. affirmed the proposition that the court can, so long as the litigation pends, take note of updated facts to promote substantial justice. However, the Court cautioned: (i) the event should be one as would stultify or render inept the decretal remedy, (ii) rules of procedure may be bent if no specific provision or fair play is violated and there is no other special circumstance repelling resort to that course in law or justice, (iii) such cognizance of subsequent events and developments should be cautious, and (iv) the rules of fairness to both sides should be scrupulously obeyed."

> Om Prakash Gupta's case was referred with approval in Ram Kumar Barnwal vs. Ram Lakhan (Dead) (2007) 5 SCC 660.

34. While in case of Bachhaj Nahar Vs. Nilima Mandal & anr. (Civil Appeal Nos.5798-5799 of 2008), the Apex Court

has observed :-

> "8. . . . .
>
> (i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the court.
>
> (ii) A Court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.
>
> (iii) A factual issue cannot be raised or considered for the first time in a second appeal.
>
> Civil Procedure Code is an elaborate codification of the principles of natural justice to be applied to civil litigation. The provisions are so elaborate that many a time, fulfillment of the procedural requirements of the Code may itself contribute to delay. But any anxiety to cut the delay or further litigation, should not be a ground to float the settled fundamental rules of civil procedure. Be that as it may. We will briefly set out the reasons for the aforesaid conclusions."

35. The subsequent event of the compromise between the AMC and the plaintiff firm or concessionaire is a fact not in dispute. Most of the terms of compromise were executed in nature. True, some of them were executory. To be specific,

additional FSI was to be granted permitting further construction. It is also true that, the subject matter of the present appeal is not the enforcement of the terms of the compromise.

This Court, relying on decision of the Apex Court in case of Nidhi (supra), finds that, when the AMC went back on its promise and it has offered every excuse therefor, this Court finds that, those facts need not be brought on record by amending the respective pleadings. This subsequent event is the admitted fact. The defendant AMC is a local authority. It has a battery of lawyers on its panel to advice it. True, it has every authority not to take the compromise terms to logical conclusion. The Court seized of the present Second Appeal, however, could not be oblivious to the factum of settlement. It is not that a litigation could be compromised only by submitting terms thereof to the Court seized of the matter. Parties to the lis are free to settle the matter out of Court. Even after settlement, parties do not appear before the Court and allow the proceedings to be dismissed for want of prosecution. In the present case, a compromise pursis was submitted for withdrawal of the appeal. Be that as it may. This Court is neither endorsing the compromise nor enforcing the same. The factum of compromise, however, is viewed to hold the defendant – AMC to have diluted its stand on the decision of cancelling the lease agreement for illegality committed by the plaintiff firm and/or its sister concern.

In view of the above, the substantial questions of law are answered accordingly.

36. During hearing of this appeal, the learned counsel submitted that, the appellant firm is ready to pay rent/ lease money @ Rs.15/- per sq.mtr. Since for all the aforesaid reasons, this Court is inclined to allow the appeal, it proposes to see that the AMC gets enhancement in the rent since the appellant firm itself offered to pay the same. It shall, however, not be misconstrued that, this Court expects the AMC to perform its further part of the terms of compromise. The appeal, therefore, succeeds.

O R D E R

(i) The Second Appeal is allowed.

(ii) The impugned decree dated 14/1/2022, passed by the District Judge-11, Aurangabad in Regular Civil Appeal

No.254/2019 is hereby set aside.

(iii) The decree dated 9/9/2019, passed by the learned Civil Judge, Senior Division (Corporation Court), Aurangabad in Regular Civil Suit No.119/2015 is restored on condition of the plaintiff/ appellant – firm to pay rent/ lease money @ Rs.15/- per sq.mtr.

(iv) In view of disposal of the Second Appeal, Civil Application No.8534/2022 stands disposed of.

(R. G. AVACHAT, J.)

On request of learned counsel for the Aurangabad Municipal Corporation, operation of this order to stand stayed for the next eight (8) weeks.

(R. G. AVACHAT, J.)

fmp/-