

Pallavi

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

WRIT PETITION NO.4509 OF 2019

Shri. Harshwardhan Shrikrishna Dole ... Petitioner
Versus
M/s. Goldminar Developers Pvt. Ltd.
& M/s. Soham Real Estate Development Co. Pvt. Ltd. ... Respondents

Mr. S.S. Butala i/b S.S. Butala & Associates, for the Petitioner.
Mr. Jaydeep S. Deo a/w Mr. Sanjay K. Gunjkar for the Respondent No.1.
Mr. Jayesh Joshi for the Respondent No.2.
Mr. Rohit Joshi for the Respondent No.4.
Mr. Pushkar Nagpurkar i/b. Rohit Sakhadeo for the Respondent No.6 (TMC).

**CORAM: MADHAV J. JAMDAR, J.
DATE : NOVEMBER 25, 2022**

P.C.:

1. The Petitioner who is original plaintiff by way of the present writ petition filed under Article 227 of the Constitution of India has challenged legality and validity of order dated 16th November 2018 passed by learned 3rd Joint Civil Judge, Senior Division, Thane below Exh.23 in R.C.S. No.522 of 2018. The said application bearing Exh.23 was filed by Respondent No.4 i.e. Defendant No.4 seeking prayer that inquiry be conducted under section 8 of the Maharashtra Court Fees Act (Act No. XXXVI of 1959) (hereinafter referred to as “the said Act”) regarding the valuation of the suit as to the reliefs claimed and the Court fees paid and plaintiff be directed to value the suit correctly and properly and also be directed to pay deficit Court fees as may be

ascertained after such inquiry. By the impugned order dated 16th November 2018 the said application of Respondent No.4 at Exh.23 was allowed and the petitioner was directed to pay the requisite Court fee as per the prayer clause of the avoidance of agreement as prayed, within two months from the date of the order.

2. It is the contention of the petitioner that the petitioner is a flat purchaser and he has filed suit for enforcement of statutory obligations as per the various provisions of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management, and Traders) Act, 1963 (for short "MOFA"). It is the contention of the petitioner that defendant no.1 i.e. Respondent No.1 who is developer has constructed the buildings and bungalow on the land bearing Gat No.64, Hissa No.1, village Chitalsar Manpada, Near Tikujini Wadi, Thane. Respondent No.1 – developed the suit property and constructed the buildings and bungalows on the said land. The bungalow owners formed "Raj Vilas Haveli Kothi CHS Ltd." and flat owners formed "Raj Villas Hawa Mahal CHS Ltd.". It is the plaintiff's contention that MOFA is applicable to the said development carried out by the Respondent No.1. According to the Petitioner, Respondent No.1 is the promoter as contemplated under the MOFA.

3. In view of above position, it is the submission of Mr. Butala, learned counsel appearing for the Petitioner that as the suit is filed

for enforcement of statutory obligations as per MOFA, therefore, Court fee, as envisaged under section 6(iv)(j) of the Bombay Court-Fees Act will be required to be paid and accordingly, same is paid. Mr. Butala relied on the decision of this Court in the case of ***Maria Phitomina Pereira Vs. Rodrigues Construction***¹. He also relied on the decision of this Court dated 9th January 2018 passed in Civil Revision Application No.483 of 2017 (***Kiran Suresh Bhagiya Vs. M/s. Kakade Construction Co. Pvt. Ltd. and Anr.***). He also relied on the judgment of this Court in the matter of ***Niraj s/o. Narendra Walle Vs. Smt. Vijaya w/o. Narendra Walle & Ors.***²

4. Mr. Rohit Joshi, learned counsel appearing for Respondent No.4 i.e. purchaser of bungalow under the agreement which is the subject matter of suit submitted that what is sought to be done by prayer clause (d) is seeking declaration that agreement/ registered sale deed executed in favour of Respondent Nos.4 and 5 are sought to be declared as null and void. He submits that therefore, that relief will not come under the purview of the MOFA. He relied on the judgment of this Court in the matter of ***Chandrika Chunilal Shah Vs. Orbit Finances Pvt. Ltd. & Ors.***³ He submitted that the ratio of said judgment is squarely applicable to the present case and therefore, the

1. 1990 Mh.L.J. 445

2. 2017 5 MR 353

3. 2011(4) of ALL MR 275

relief as regards prayer clause (D) is required to be valued as per section 6(iv)(ha) of the said Act. He, therefore, supported the impugned judgment. The submission of Mr. Rohit Joshi is also supported by Mr. Jaydeep Deo, learned counsel appearing for Respondent No.1.

5. Mr. Rohit Joshi, learned counsel appearing for Respondent No.4 fairly pointed out the judgment of this Court delivered on reference in **Writ Petition No.8968 of 2018** in the matter of *Dilip Khushalchand (Srisrimal) Jain and Ors. Vs. Hardik Deepakbhai Ramani and Ors.*

6. As it is the contention of the petitioner that, Section 6(iv)(j) of the said Act applies to prayer clause (D) and as it is the contention of the Respondent No.1 and 4 that Section 6(iv)(ha) of the said Act will attract to prayer clause (D) both these provisions are set out hereinbelow for ready reference:-

“6. Computation of fees payable in certain suits.- The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:-

(iv) -----

[(ha) for avoidance of sale, contract for sale, etc.- In suits for declaration that any sale, or contract for sale or termination of contract for sale, of any movable or immovable property is void [one-half] of *ad valorem*

fee leviable on the value of the property;

(j) **for other declarations.-** In suits where declaration is sought, with or without injunction or other consequential relief and the subject-matter in dispute is not susceptible of monetary evaluation and which are not otherwise provided for by this Act [*ad valorem* fee payable, as if the amount or value of the subject-matter was [one thousand rupees;]]”

7. Before considering whether Section 6(iv)(ha) or Section 6(iv)(j) applies to said prayer clause (D), it is necessary to see the prayers and averments in the plaint to ascertain the nature of the suit filed by the petitioner/ plaintiff.

8. The Petitioner has filed said R.C.S. No.522 of 2018 seeking the following reliefs :

- “A) Hon’ble Court be pleased to direct the defendant No.1 to perform the statutory duty of executing conveyance of entire project in favour of defendant Nos.2 and 3.
- B) Hon’ble Court be pleased to declare that action of defendant No.6 and defendant Nos.1 and 2 in getting plans sanctioned by changing Re-creation Ground is in violation of section 7 of Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 and as such construction made in pursuant to VP 2002/67 is illegal and same be directed to be removed by defendants jointly and severally and directions be issued to restore R.G. location as per first plan bearing V.P. No.95/066 dated 17/4/2006.
- C) Permanent injunction from changing the Re-creation Ground for use of the portion as per original plan No.95/066 be issued.

D) Hon'ble Court be pleased to declare that all such agreements in respect of suit property or construction thereon made by Defendant No.1 in favour of Defendant No.4 and 5 are null and void."

9. The relevant averments showing that the suit as filed is for the purpose of enforcement of statutory obligations of the Respondent No.1 as per MOFA are paragraphs 5, 6 and 7 of the plaint and the same are as follows:-

- "5. Plaintiff states that **at the time of selling of flats and bungalow defendant No.1 specifically mentioned and showed the open land admeasuring 994.50 sq. mtrs as RG (Reserved for Garden/ Recreation Ground) along with special amenities.**
6. It is learnt by plaintiff that **defendant No.1 has signed an Memorandum of Understanding in the month of November 2013 with defendant No.2 for constructing further bungalows on the vacant RG land adjacent to the existing bungalow No.22.** That as per said MOU defendant No.2 gave NOC dated 2/12/2013 to defendant No.4. Plaintiff had issued letters dated 6/12/2013, 13/12/2013 and 29/12/2013 objecting the said illegal construction. That **the said MOU has no sanctity and no sanction of general body and not enforceable.** The map of said newly and illegally carved out bungalow No.27 (as per TMC record) and bungalow No.24 (as per society record) and bungalow no.28 (as per TMC record) and bungalow No.23 (as per society record) on which **construction is going on illegally as marked in Red colour boundary** is hereinafter referred to as "SUIT PROPERTY" and **defendant Nos.4 and 5 and learnt to be purchasers of bungalow Nos.23 and 24** respectively and the said purchasers are aware of the illegality in construction of said bungalows.
7. That defendant No.2 and 3 viz. Raj Villas Hawa Mahal CHS Ltd. and Raj Villas Haveli Kothi CHS Ltd. stands on 1 plot bearing Gat No.64. The plot is not sub-divided and conveyance is not yet done. The plaintiff is having the

right to get the conveyance and enjoy the benefits. **After the formation and registration of both the societies, open space reserved exclusively for garden and re-creation ground cannot be sold or used for construction of bungalow.** After the formation and registration of both the societies, a society can not give NOC for sale of open space reserved exclusively for garden and re-creation ground. **That in view of section 11 of MOFA Act, 1963 builders and developers are under legal duty to execute conveyance of the land and building within 4 months from the date on which co-operative housing society is registered as per the rules framed under rule (9) of Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1964. That as per section 7 of Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 to alter and amend the plan, R.G. ground without the consent of persons who have purchased the flats. Thus plaintiff is entitled to get the statutory duties performed and also to restrain any breach in performance of such statutory duties.”**

(Emphasis added)

10. The averments in the plaint clearly show that the suit has been filed for enforcement of statutory obligations as per section 11 of MOFA and for injunction. The relevant averments in the plaint are already set out hereinabove. It is further mentioned in the plaint that as per the registered agreement dated 29th January 2005 executed by Respondent No.1, specifically recreation ground is mentioned in clause 29. It is submitted that entire project is developed on the land where there are aforesaid two Co-operative Housing Societies registered and there is no valid consent to any change in valid

sanctioned plan without circulating such plan to members and calling General or Special General Body Meeting for the purpose which was never done. It is submitted that the Respondents cannot diminish or alter the amenities and recreation ground shown in the plan. It is contended that Respondent No.4 is illegally constructing the bungalow on the reserved space for garden and recreation ground. Thus, what is sought to be contended in the plaint is that the agreement/sale deeds in respect of the suit property or construction thereon made by Respondent No.1 and transfer in favour of Respondent Nos.4 and 5 are null and void as the said specific portion is designated for recreation ground in the agreement dated 29th January 2005 executed by Respondent No.1 in favour of the petitioners' predecessor in title.

11. The real contentions between the parties is whether the prayer clause (D) of the plaint will also fall under statutory duty of promoter i.e. Respondent No.1 to be performed under section 11 of the MOFA. To ascertain this, it is necessary to see section 7 of the MOFA. The same reads as under :-

“7. After plans and specifications are disclosed no alterations or additions without consent of persons who have agreed to take the flats; and defects noticed within [three years] to be rectified-

(1) **After the plans and specifications of the buildings as**

approved by the local authority as aforesaid, are disclosed or furnished to the person who agrees to take one or more flats, the promoter shall not make-

(i) any alteration in the structures described therein in respect of the flat or flats which are agreed to be taken, without the previous consent of that person; or

[(ii) **any other alterations or additions in the structure of the building without the previous consent of all the persons who have agreed to take the flats in such building.**]

(2) Subject to sub-section (1), the **building shall be constructed and completed in accordance with the plans and specifications aforesaid; and if any defect in the building or material used, or if any unauthorised change in the construction is brought to the notice of the promoter within a period of [three years] from the date of handing over possession, it shall wherever possible be rectified by the promoter without further charge to the persons who have agreed to take the flats, and in other cases such persons shall be entitled to receive reasonable compensation for such defect or change. Where there is a dispute as regards any defect in the building or material used, or any unauthorized change in the construction, [or as to whether it is reasonably possible for the promoter to rectify any such defect or change, or as regards the amount of reasonable compensation payable in respect of any such defect or change which cannot be, or is not rectified by the promoter], the matter shall, on payment of such fee as may be prescribed, [and within a period of three years from the date of handing over possession, be referred for decision,-**

(i) in an urban agglomeration as defined in clause (n) of section 2 of the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976), to such competent authority authorised by the State Government under clause (d) of section 2 of that Act, and

(ii) in any other area, to such Deputy Chief Engineer, or to such other officer of the rank equivalent to that of Superintending Engineer in the Maharashtra

Service of Engineers, of a Board established under section 18 of the Maharashtra Housing and Area Development Act, 1976 (Mah. XXVIII of 1977), as the State Government may, by general or special order, specify in this behalf. Such competent authority, Deputy Chief Engineer or, as the case may be, the other officer of a Board shall, after inquiry, record his decision, which shall be final.”

(Emphasis added)

12. Thus, it is the statutory responsibility of the developer not to alter or add to the sanctioned plans without previous consent of the flat purchaser after the same are disclosed or furnished to the flat purchasers. It is also statutory duty of the Respondent No.1 i.e. the promoter not to carry out any alteration or addition in the structure of the building without the previous consent of all the persons who have agreed to take the flats in such building. Thus, what is sought to be contended in the plaint that by execution of agreement/ sale deed in favour of Respondent Nos.4 and 5 regarding the portion of the suit property and construction made thereon is in violation of section 7 of the MOFA as the same is shown as recreation garden in the plans disclosed to the flat purchasers. It is further the duty of promoter under section 11 to complete his title and convey to the organisation of persons, who take flats, which is registered either as co-operative society or as a Company, promoters right, title and interest in the land and building. Thus, although by prayer clause (D), transaction entered into between defendant no.1 – promoter and defendant

nos.4 and 5 – bungalow purchasers are challenged and declaration is sought to declare the same as null and void, what is in effect sought to be done is to ensure performance of statutory duty by promoter towards flat purchasers under the MOFA and for furtherance of the same the said reliefs are sought. Therefore, it cannot be said that the relief sought in prayer clause (D) of the plaint is outside the purview of MOFA, as it is specific contention in the plaint that agreements and transaction made by Defendant No.1/Respondent No.1 in favour of Defendant Nos.4 and 5/Respondent Nos.4 and 5 and the construction made thereon is on the portion of land which is specified in the sanctioned plan shown to the flat purchasers as reserved for recreation ground for the society. Thus, it cannot be said that the said prayer clause (D) is outside the purview of MOFA and the same is in furtherance of fulfillment of statutory responsibility of the promoter as per the said Act.

13. This Court in *Maria Phitomina Pereira (supra)*, has held that in a suit where the flat purchaser wants the promoter to comply with the requirements of law and suit is filed to enforce obligation arising out of MOFA, such a suit would not fall within the scope of section 6(xi) of the Bombay Court Fees Act. It is further held that it is the statutory obligation which is being enforced and a notional valuation under section 6(iv)(j) of the Bombay Court Fees Act would be proper.

It is specifically held that in all such agreements even if they are enforced in favour of the flat purchasers individually, there can be no conveyance in their favour as ultimately, the conveyance has to be made in favour of the society of all flat purchasers. It has been held as under:-

“6.....

It must necessarily be held that whenever a builder enters into an agreement with any flat purchaser, containing provisions which are to be incorporated as provided under the said Act, all such agreements must necessarily be held to be special agreements which can be enforced by filing suits where the valuation would be a notional valuation under section 6(iv)(j) of the Bombay Court-Fees Act, 1959.”

14. Another judgment on which Mr. Butala has strongly relied is *Kiran Suresh Bhagiya (supra)* wherein above legal position is reiterated. The said judgment refers to another judgment in the matter of *Vrindavan (Borivali) Co-operative Housing Society Ltd. Vs. Karmarkar Brothers and Ors.*⁴. In the said judgment, it has been held that suit to perform specifically agreement executed between the flat purchasers and promoter under MOFA is not a suit simpliciter for specific performance, but it is a suit to enforce the compliance with a statute. Said judgment in *Kiran Suresh Bhagiya (supra)*, makes extensive reference in paragraphs 14 to 16 to the said decision in *Vrindavan (Borivali) Co-operative Housing Society (supra)*. The said

4. 1983(2) Bom. CR 267

paragraphs read thus :-

“14] In paragraph No.20 of the judgment it was further held that, “when the suit is filed seeking to enforce the statutory obligations which are arising under the MOFA Act, such a relief being incapable of monetary valuation, the valuation made by plaintiff in the said case relying on clause No.6(iv)(j) of the Court Fees Act is correct.

15] In paragraph No.21 of the judgment it was further held that "the intention of the Legislature in enacting the Maharashtra Ownership Flats Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 was not to impose any such burden on the respective parties governed by the provisions of said Act, if they are involved in litigation because of non-compliance with the provisions of Act.

16] Paragraph No.22 of the Judgment makes position further clear and it reads as follows:-

“22. The subject-matter of the suit being of right to compel the performance of statutory obligation and the plaintiff who is asking assistance of the Court to compel the promoter to perform his statutory obligation, such a right to compel to perform the obligations provided by the statute being incapable of monetary valuation and there being no provision in the Court Fees Act for such a suit, the provisions of section 6(j) of the Court Fees Act are attracted and they are applicable to this suit. As the Court Fees were paid relying on the provisions, the valuation of this suit is quite proper and the plaint will have to be accepted and the suit will have to be proceeded with as the valuation of the plaint is proper.”

15. If the contentions raised and the reliefs claimed in the plaint are examined on the touchstone of the above legal position then, there is no manner of doubt that all the prayer clauses in the plaint are in effect for enforcement of statutory obligations under the MOFA.

16. Mr. Rohit Joshi, learned counsel appearing for Respondent No.4 has relied on decision in ***Chandrika Chunilal Shah (Supra)***. In that case, apart from the reliefs regarding performance of statutory obligations by the promoter under MOFA which is required to be valued under section 6(iv)(j) of the Bombay Court-Fees Act, additional prayer b(1) was included by way of amendment seeking declaration that the agreement dated 7th August, 2006 executed by Respondent No.1 in favour of Respondent Nos.2 and 3 was invalid and bad in law. In that case, the Court has observed that reliefs which are regarding enforcement of rights under the MOFA and the relief regarding challenge to the said agreement by way of additional prayer clause b(1) are distinct and separate. Therefore, the said judgment in ***Chandrika Shah (supra)*** is not applicable to the present case.

17. Mr. Rohit Joshi, learned counsel for Respondent No.4 fairly pointed out the decision in the matter of ***Dilip Khushalchand (Srisrimal) Jain and Ors.*** In the said judgment, the following issue was referred to the Division Bench by the Hon'ble the Chief Justice:-

“What is the court fee payable in regard to a suit for declaration that the sale deed, to which the Plaintiffs are not privy/party is void and not binding on the Plaintiffs, and for consequential relief of injunction?”

A Division Bench of this Court in the decision on said reference

held as follows :

- “19. Agreement which is not enforceable at law is void. An agreement is void when it is without consideration, it is executed by a person not competent to enter into a contract and by a person who is not of the age of majority, is not of sound mind and is not disqualified by any law to which he is subject. The contract is voidable if it is caused by coercion, fraud or misrepresentation or by undue influence. In case of void agreement, the agreement has no legal existence. Therefore, when a Plaintiff seeks declaration that the agreement, instrument/deed is void, he wants the entire agreement to be cancelled. Void agreement has no sanctity in law. But this is not the case with the Plaintiffs who seek declaration that the instrument/deed is not binding on him. The instrument deed may be otherwise valid, but since the Plaintiff is not a party to the instrument/deed wants the declaration that the said instrument/deed is not binding on him. Therefore, in such cases, the Plaintiff need not seek declaration that the instrument or deed is void. **Therefore, 6(iv)(ha) applies only to the persons who seek declaration that the agreement is void i.e. they challenge the very legality of the agreement and that it is void. But in case of the Plaintiffs who seek declaration that the instrument/deed is not binding on them, they do not question the execution of the agreement. Their only contention is that the instrument/deed is not binding on them. The deed or instrument may be otherwise valid inter parties. In such cases, the Plaintiffs are not required to seek declaration that the instrument/deed is void.**
20. As held in the case of Common Piru Caudhari (supra) **there is a vast difference between a declaration that any sale or contract for sale is null and void and the declaration that sale or contract for sale has no binding effect. In the former case the very existence of the transaction is challenged whereas in the latter case existence of the contract or the instrument is not denied but its effect is sought to be made not applicable to the person who is not a party to the instrument or contract. This would mean that in the latter case, existence of contract is not denied but declaration is sought by the claimant that the instrument or contract is not binding on him but it binds the other executants. In the**

former case the existence of the contract itself is under cloud. In such a case the entire contract is sought to be cancelled whereas in the latter case only the contract to the extent of the claimant is sought to be not binding. Therefore, the Plaintiff in both the categories cannot be placed on the same pedestal. They have to be treated differently. For the reasons given above, it would be apposite to make distinction between the Plaintiff who seeks declaration of cancellation of sale deed and the Plaintiff who seeks avoidance of sale deed on the ground that he is not a party to the sale deed.

21. This distinction, if not made, will lead to anomalous results rather absurd results. A Plaintiff who is a party to the sale deed seeks avoidance of sale deed on the ground of fraud or mistake of fact, coercion, misrepresentation, etc. In such a case it would be prudent to compute the court fee on the consideration mentioned in the sale deed. But a person who is not a party to the sale deed is completely unaware of the sale deed having been executed. These transactions are executed behind his back. He comes to know of such a transaction only after the deed/instrument is executed. Because of subsequent events he gets the knowledge of the sale deed having been executed by a person who is not the owner of the property or by a person selling his own share and share of other co-owners as well. In such cases, the Plaintiff has not received consideration of the sale deed. It would be unreasonable for the plaintiff who has not received a single farthing or even a penny towards the consideration mentioned in the sale deed to pay the court fee on the entire consideration mentioned in the sale deed. In such cases, he would be penalized twice for no fault of his. First he has lost his property and second he has to pay court fee on the entire consideration. Legislature must not be having such an intention in mind. In the case of the Plaintiff who is a party to the sale deed stands on a different pedestal. He has received the entire consideration in the sale deed but for the reasons enumerated above he seeks avoidance of sale deed or cancellation of sale deed and seeking declaration that the instrument/deed is void.
24. From the above discussion in our judgment, Section 6(iv) (ha) would be applicable only to the Plaintiff who is a party to the sale deed seeking declaration of avoidance of sale

deed. It would not be applicable to the Plaintiffs who are not party to the instrument seeking declaration of avoidance of sale deed. Such Plaintiff would be governed by Section 6(iv)(j) as it is not susceptible to monetary evaluation.

26. In view of the above, answer to the reference is that the court fee payable in regard to a suit for declaration of the sale deed to which the Plaintiff is not a party to the sale deed binding on him and for consequential injunction would be governed by Section 6(iv)(j) of Maharashtra Court Fees Act.”

(Emphasis added)

18. It has already been held that the prayers in the plaint are regarding enforcement of statutory obligations by the Respondent No.1-promoter under MOFA. Therefore, the law laid down by the aforesaid *Vrindavan (Borivali) Co-operative Housing Society Ltd. (supra)*, *Maria Phitomina Pereira (supra)* and *Kiran Bhagia (supra)* is squarely applicable to all the prayers in the plaint including prayer clause (D).

19. However, even if, it is assumed that the relief sought by prayer clause (D) is outside the ambit of MOFA, the law declared by this Court in the matter of *Dilip Khushalchand (Srisrimal) Jain (supra)*, is applicable to the present case. It is admitted position that the petitioner is not a party to the sale deed executed by Respondent No.1 in favour of Respondent Nos.4 and 5. Therefore, assuming the said relief to be outside the scope and ambit of MOFA, still as the petitioner is not party to the said agreement and, therefore, suit *inter*

alia seeking declaration that the said transaction be declared as null and void will be governed by section 6(iv)(j) of the Court Fees Act. Therefore, as a result of this discussion, the impugned order needs to be quashed and set aside.

20. Before parting with this case, it is required to be noted that Mr. Rohit Joshi, learned counsel for the Respondent No.4 very fairly pointed out the decision in the matter of ***Dilip Khushalchand (Srisrimal) Jain (supra)***, which is apparently against the contentions raised by Respondent No.4. Therefore, observations of this Court in the matter of ***Chandrakant G. Sutar Vs. M.K. Associates⁵***, are squarely applicable to Mr. Rohit Joshi, learned counsel. The said observations in paragraph 11 reads as under :-

“While parting I would like to make a special mention regarding the fairness of Mr. Oka, Advocate. He conducted the matter with a sense of detachment. In his own inimitable style he did the wonderful act of balancing of his duty to his client and as an officer of the Court concerned in the administration of justice. He has fully discharged his overriding duty to the Court to the standards of his profession, and to the public, by not withholding authorities which go against his client. As *Lord Denning, M. R. in Randel V. W., (1996) 3 All E. R. 657* observed - the Counsel has time and again to choose between his duty to his client and his duty to the Court. This is a conflict often difficult to resolve; and he should not be under pressure to decide it wrongly. Whereas, when the Advocate puts his first duty to the Court, he has nothing to fear. But it is a mistake to suppose that he (Advocate) is the mouth piece of his client to say what he wants. The Code which obligates the Advocate to disregard the instructions of his client, if they conflict with his duty to the Court, is not a code of law - It is a code of honour.

5. 2003(1)Mh.L.J.1011

If he breaks it, he is offending against the rules of the profession and is subject to its discipline. This view is quoted with approval by the Apex Court in Re. T. V. Choudhary.”

21. Hence, the following order is passed :-

ORDER

- (i) The impugned order dated 16th January 2018 passed by the learned 3rd Joint Civil Judge, Senior Division, Thane below Exh.23 in R.C.S. No.522 of 2018 is quashed and set aside and the said Exh.23 application is rejected.
- (ii) In view of this, Writ Petition is allowed and the same is disposed of in above terms with no order as to costs;
- (iii) It is clarified that observations made in this order are restricted to the averments in the plaint and for the purpose of determination of the Court fee;
- (iv) All contentions of the parties with respect to other aspects are specifically kept open;
- (v) The Writ Petition is disposed of in above terms with no order as to costs.

(MADHAV J. JAMDAR, J.)