



Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.859 OF 2019**

Reshma Estates Private Limited A Company incorporated under The Companies Act, having its Registered Office at Flat No.16, Krishna Mahal, Marine Drive, Mumbai – 400 020.	]]]]]]]]	Appellant (Original Defendant)
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Versus

1) Shivangi Shanker Shri Ashwini Shanker	]]	
2) Awini Ambuj Shanker S/o. Shri Bhawani Shanker Aged – 30 years, Both Indians residing at Flat No.24, 7 th Floor, Krishna Mahal, 63, Marine Drive, Mumbai – 400 020.	]]]]]]]]]	Respondents (Original Plaintiffs)

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Mr. Cherag Balsara a/w Mr. Akshay Doctor, Mr. Aman Arora, Mr. Suyash Bartake i/b Desai and Diwanji, for Appellant.

Mr. Ranjit A. Thorat, Senior Advocate a/w Mr. Dharam Sharma a/w Ms. Uma Sharma a/w Ms. Pratibha Shelake i/b Dharam & Co., for Respondent.

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CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON : 31st AUGUST, 2023.
PRONOUNCED ON : 13th SEPTEMBER, 2023.

JUDGMENT:

1. The appellant – Reshma Estates Private Limited is the original defendant. Feeling aggrieved with the impugned judgment and decree passed by the City Civil Court, Mumbai on 7th December, 2018 in Suit No.7566 of 2003, it has preferred this appeal.
2. The trial Court had directed the appellant to execute a sale deed of Flat No.24, 7th floor, Krishna Mahal, 63, Marine Drive, Mumbai – 400 020 (for short “suit flat”) by making compliance of clause 4 (c) by transferring class-A and Class-B shares of Articles of Agreement dated 25th September, 1986 on or before 31st March, 2019 in favour of the respondents. The Court below, *inter alia*, permanently restrained the appellant from transferring, selling, alienating, parting with possession of the suit flat and/or the land beneath it to any third person.
3. A few facts germane for disposal of the appeal are as follows.
4. A suit for declaration and specific performance of agreement dated 25th September, 1986 executed by the appellant in favour of

the respondents has been filed in respect of the suit flat. Appellant is a company incorporated under the Companies Act. It owns and possesses a property comprising of two plots of land bearing Nos. 63 of Block No.1 of Backbay Reclamation Estate of the then Government of Bombay. Two plots admeasure 5079 and 2065 square yards respectively. A building known as “Krishna Mahal” is standing over a plot of land bearing No.1738. Plots bearing CTS No.1738 and 1729 are two different plots. The building “Krishna Mahal” as well as two plots shall be referred to as “Suit Property”.

5. “Krishna Mahal” originally consisted of ground plus five floors comprising of residential flats which were let out on tenancy basis to various tenants.

6. Somewhere in the year 1980, the appellant with the consent of then tenants of the building undertook extension to the said building by raising two more floors thereon. Since the appellant was in dire need of finance to complete the proposed construction of two additional floors about which the respondents came to know and, therefore, approached the appellant. The respondents expressed their desire to acquire one of the flats of the appellant on

the proposed 7th floor of the said building which is flat No.24 (suit flat). It was agreed between the appellant and the respondents that 7th floor flat would be given on tenancy basis upon respondents advancing construction loan of Rs.7,50,000/- to the appellant. Admittedly, an amount of Rs.7,50,000/- was paid by the respondents to the appellant as a loan amount on the interest @ 4% per annum. In consideration thereof, appellant had granted monthly tenancy of the suit flat to respondent No.1 upon the terms and conditions reduced into writing in an agreement dated 6th February, 1985.

7. Appellant paid interest @ Rs.21,906.85 paise. The respondents have been in exclusive possession of the suit flat. They have been paying agreed rent to the appellant.

8. In the month of September, 1986, appellant approached the respondents and offered them to make and recognize themselves as absolute owners of the suit flat upon payment of Rs.3,00,000/-. The offer was accepted and accordingly an amount of Rs.3,00,000/- was paid to the appellant towards purchase price of the suit flat, *inter alia*, directing the appellant to adjust purchase price in construction

loan amount of Rs.7,50,000/-. An agreement was entered into between the parties on 25th September, 1986, thereby recognizing the respondents as absolute owners of the suit flat. The appellant agreed and assured the respondents to execute a sale deed *qua* the suit flat on completion of the construction work of the additional floors. Since the date of execution of articles of agreement dated 25th September, 1986, the respondents have made inquiries with the appellant on several occasions as regards execution of the sale deed of the suit flat, however, it is contended that the appellant postponed execution of sale deed on various grounds such as non receipt of completion certificate by BMC etc.

9. On 13th February, 1996, appellant approached the respondents with a typed agreement that they received entire consideration of Rs.3,00,000/- from the respondents for their confirmation. The typed agreement was signed by two Directors of the appellant viz: Ajit Zaveri and Ashwin Shah who assured the respondents that by the end of 1996, they would receive the completion certificate and thereafter sale deed would be executed in their favour.

10. Meanwhile, the respondents were served with writ of summons along with a copy of plaint and a copy of draft notice of Motion in S.C Suit No.3155 of 2003 filed by one B.R. Mahadevia, one of the tenants in the said building against the appellant and the respondents along with several other persons for specific performance of agreement. From the copy of the said plaint, the respondents realized that the appellant had entered into similar agreement with the then tenants of the building agreeing to convert the tenancy rights of their flats into ownership. A copy of an affidavit of Mr. Ashwin Shah – Director of the appellant which was sworn on 13th August, 2003 was received by the respondents in the month of September, 2003. It was revealed that the appellant had denied execution of articles of agreement dated 25th September, 1986. The respondents realized the attitude and intention of the appellant of not honouring the terms of articles of agreement. According to the respondents, they have always been and are still ready and willing to perform their part of agreement. The terms and conditions of the agreement are binding upon the appellant.

11. As the respondents had learnt that the appellant is contemplating to transfer, sell or alienate the first and second plot along with the building to a builder, they filed a suit.

12. The appellant in the written statement contended that the suit is hopelessly barred by limitation. It is further contended that the respondents have suppressed material facts. The appellant had already furnished documents being the scheme passed by the appellant on 6th February, 2003 under which it is stipulated that the appellant's Directors would be allotted certain shares *qua* the suit flat and as such, the Directors are the owners of the suit flat and entitled to deal with the same. The respondents are aware of the said scheme.

13. The plaint, according to the appellant, does not disclose any cause of action. It is averred in the written statement that in view of the negotiations in the past several years, the Directors of the appellant viz Ashwin Shah and Ajit Zaveri expressed willingness to implement the agreement dated 25th September, 1986. The appellant had already formulated the scheme for reclassification of the share capital and issue of share dedicated to the designated assets of the appellant to facilitate the transfer of such shares so designated *qua* the respective assets. As per clause 4 (c) of the agreement, appellant was entitled to formulate such a scheme which has been formulated. Under the said scheme, specific shareholding

has been created in favour of only shareholders and directors. Under the said scheme, Ashwin Shah has been allotted shares of Class-B for Flat No.24, Share Certificate No. B 1413 to B 1417. Under the said scheme, *qua* the suit flat, Ajit Zaveri has been allotted Share of Class-B, Share Certificate No.B 161-165.

14. Directors had advised the respondents in the meeting that they were willing to transfer shares of Class-B and that the respondents are not entitled for issuance of Class-A shares. Thus, the respondents have been insisting upon performance of an agreement not covered under the suit agreement or the said scheme. The appellant has, therefore, denied to comply with the demands made by the respondents beyond the terms of the scheme.

15. According to the appellant, the scheme was framed and submitted to the Registrar of Companies vide an application in Form No.23 dated 6th February, 2003 and ultimately it was filed in the Registrar of the Companies on 31st March, 2003. The appellant claimed exclusive rights to the terrace of flats on 6th and 8th floor by contending that none of the tenants Co-operative Society/Apartment Owners Association or Tenants Association shall have or entitled to

claim or rights save as may be permitted by the landlords except for visiting the terraces on 6th and 8th floors for inspecting water tanks, lift room and for installation or removal of T.V Antennas or for repairs thereof.

16. The appellant further contended that the respondents are not entitled to claim benefit of class-A shares. It is contended that all other tenants who had filed the suits have already accepted the said scheme and became members of the appellant by holding class-B shares. Some of the original tenants who became owners of their respective flats have already dealt with their flats in favour of third party. The appellant contended that it is ready and willing to issue class-B shares to the respondents. As such, the appellant prayed for dismissal of the suit.

17. The trial Court framed issues as regards agreement dated 25th September, 1986 in respect of the suit flat as to whether the respondents were ready and willing to perform their part of contract and answered it in the affirmative. The Court below had answered the issue of limitation in the affirmative and decreed the suit as above.

18. I heard Mr. Balsara, learned Counsel for the appellant and Mr. Thorat learned Senior Counsel for the respondents at length. I have also perused the synopsis of written arguments on behalf of the respondents.

19. Mr. Balsara has tendered list of dates and events in the form of a chart along with notes of submissions. According to Mr. Balsara, primarily only 4 important issues are involved in this appeal. They are;

- (a) Whether the trial Court has re-written terms of the contract between the parties?
- (b) Whether directions contained in the impugned decree travel beyond the case in the plaint and the prayers sought?
- (c) Whether the suit was barred by limitation in view of Article-54 of the Limitation Act, 1963?
- (d) The scheme which is already implemented and accepted by all other tenants can be questioned by the respondents?

20. Mr. Balsara would invite my attention to an agreement dated 25th September, 1986, especially clause 4 (c) therein which provides transferring shares of the landlords (Reshma Estate) in favour of the tenants and making such tenants shareholders of the landlords (Reshma Estate) in such of the number of shares as are required per flat so as to divest the existing shareholding in the landlords in favour of the Tenants and/or such other persons who may wish to acquire the shares of the landlords (Reshma Estate).

21. Mr. Balsara would maintain that owners retain dominion over certain parts and the respondents are restricted to their portion/part of ownership. They do not come at par with the owners. Admittedly, there are 24 flats in “Krishna Mahal” building. Out of the 24 flats, 21 flat holders have been allotted class-B shares, whereas, three flat holders have been allotted class-A shares. The Counsel would argue that there is neither pleading nor prayer in the plaint as regards offering class-B shares to the respondents in the year 1986 itself. The respondents have not created any charge over the suit flat in view of clause 16 of the agreement dated 6th February, 1985. Since the document is unregistered, it does not create any right in favour of the respondents.

22. On the other hand, Mr. Thorat, learned Senior Counsel for the respondents took me through the evidence of the respondents as well as cross-examination of the appellant. According to him, the suit is well within limitation as the scheme is dated 31st March, 2003 and the suit came to be filed on 6th December, 2003. Learned Senior Counsel drew my attention to the tenancy agreement dated 6th February, 1985 by contending that the same is different from the agreement of 1986. According to him, loan had been advanced to the appellant by keeping charge over the property. From the recitals of 1986 agreement, intention was to convey flats including land as well as common areas and amenities. He would also argue that the suit was well within limitation since the scheme itself came into force in the year 2003. Cause of action first arose on 13th August, 2003 when one Mr. B.R. Mahadevia filed S.C. Suit No.3155 of 2003 wherein respondents were parties. The learned Senior Counsel, therefore, would argue that the trial Court has correctly appreciated the facts and evidence on record by reaching a correct conclusion in decreeing the suit.

23. The most vital documentary evidence in this case is Articles of Agreement dated 25th September, 1986 (for short “1986

Agreement”) between the parties on the basis of which respondents’ claim a specific performance of agreement.

24. It would be essential to go through the recitals of 1986 agreement in order to ascertain the real intention of the parties and what had been, in fact, agreed between them *qua* the suit flat. Importantly, neither party disputed recitals of the agreement.

25. A bare look at the averments in the plaint would reveal that the respondents understood and accepted the fact that they are, under the agreement, merely entitled to the suit flat alone and not the land underneath “Krishna Mahal” building. Interestingly, the plaint is silent in respect of the scheme or bifurcation of shares as Class A and Class B, although P.W.1 – Bhavani Shanker in his cross-examination candidly admitted discussion with the appellant *qua* the scheme in the year 1996 itself. This material fact appears to have been suppressed by the respondents as regards allotment of class-B shares to them. I will go into the aspect of the scheme in the later part of the judgment.

26. It would be essential to go through the evidence adduced by the respective parties before the trial Court.

27. P.W.1 – Bhavani Shanker is the Power of Attorney Holder of the respondents who had tendered an affidavit in lieu of examination-in-chief. Apart from reiterating what has been stated in the plaint, interestingly, he even deposed that the appellant in it's written statement at point No.10 (V) averred that they are ready and willing to issue Class-B shares to the respondents in respect of the suit flat making them, thereby, owners of the suit flat.

28. There are several vital admissions on material aspects elicited during the cross-examination of P.W.1 – Bhavani Shanker. Before considering the admissions in the cross-examination, it would be apposite to extract relevant clauses of the agreement which would make the factual and legal position clear.

29. Undisputedly, the appellant is the owner and in possession of the property comprising of two adjoining plots as stated hereinabove. "Krishna Mahal" building is standing on Plot No.1738 comprised of ground plus five floors containing residential flats

which were let out on tenancy basis to various tenants. Plot No.1729 (P) was a vacant plot of land reserved for Reshma Estate for its enjoyment. Admittedly, Reshma Estate (Appellant), with the consent of the tenants, decided to undertake an extension of the building by adding two more floors thereon, thereby proposing to construct 6th and 7th floor. Pursuant to an agreement between the appellant and the respondents dated 6th February, 1985, tenancy in respect of Flat No.24, (suit flat) 7th floor of Krishna Mahal was created in favour of the respondents.

30. Now, turning to the agreement dated 25th September, 1986 “1986 Agreement”. Important clauses of the said agreement are extracted below.

“1. The Landlords hereby agree to make the Tenant a full and absolute Owner of his Tenement being Flat No.24 on 7th floor in the said building Krishna Mahal on the Tenant agreeing to pay to the Landlords.

(a) a sum of Rs.3,00,000/- being the purchase price of the said Tenement and

(b) on the tenant agreeing to becoming a member of the Cooperative society/Company/Apartment Owners Association as may be formed at the instance of the Landlords for the purpose of conveying the said land and building and

(c) further agreeing to abide by the Rules and Regulations of such Cooperative society/Company/Apartment Owners Association as may be framed for the maintenance and management of the said building Krishna Mahal;

2. Upon the Tenant becoming the Owner of the said Flat, he shall be entitled to deal with or dispose of the same in such manner as he pleases subject to such Rules of such Cooperative society/Company/Apartment Owners Association as may be framed.

4. The landlords agree that they shall convey the respective flats to the respective Tenants including the Tenant herein by making them full and absolute owners thereof under any of the following scheme as set out hereinbelow:

(a) By forming a Cooperative Society of the Tenants occupiers and conveying the land and building to such Cooperative Society and making the Tenant occupier a member of such Society entitled to shares in respect of such flats as may be issued by such Cooperative Society upon formation.

(b) By submitting the said property under the Apartment Owners' Act, 1970 by executing a Declaration in the prescribed form and thereafter executing Deeds of Apartment in favour of such of the Tenants who wish to join in as a Member of such Association of Apartment Owners or condominium whereafter such member shall enjoy such rights and as owners of their respective Apartment as are provided under the said Maharashtra Apartment of Owners'

Act, 1970 and bound to follow the Rules as may be framed by condominium.

(c) By transferring shares of the Landlords in favour of the Tenants and making such Tenants, shareholders of the Landlords in such of the number of shares as are required per flat so as to divest the existing share-holding in the Landlords in favour of the Tenants and/or such other persons who may wish to acquire the shares of the landlords.

5. It is expressly agreed and recorded that under any of the above schemes for converting the said flats of tenements into ownership, the Landlords reserve to themselves,

(a) exclusive rights to the terrace both on the 6th and 8th floors and in which none of the tenants Cooperative Society/Apartment Owners Association or Association shall have or entitled to claim any rights save as may be permitted by the Landlords except for visting the Terraces on 6th and 8th floors for inspecting the water tanks or the lift room or for installation or removal of T.V Antennas or for repairs thereof.

(b) the exclusive rights of enjoyment of the adjoining plot of the Landlords shown on the plan annexed hereto and shown thereon by green colour wash to be kept open to sky and unbuilt upon and to be maintained as a garden or for such other purposes as the Landlords may deem fit and none of the Tenants including the Tenant herein shall claim any interest therein including a right to park a vehicle or otherwise howsoever and the landlords shall be entitled to fence out the said open and unbuilt open area to prevent access to other Tenants.

6.(a) The Landlords shall in the compound surrounding the said building provide such number of car parking spaces as is feasible for the benefit of the Tenants.

(b) The said car parking space would be numbered and would be allotted by rotation on the terms and conditions imposed by the landlords, and such rotation and allotment shall be carried out on an annual basis.

(c) Any taxes that may become payable on account thereof shall be the exclusive responsibility of the Tenant/allottee of such Car parking space.

7. The other common areas of the building will be Meter room, Pump room, Stair case, landings, chowk and the compound excepting the portion reserved for the Landlords”.

31. It is explicit from the recitals of the agreement that Reshma Estate reserved its rights to select one of the aforesaid three modalities set out in clause (4).

32. Turning back to the cross-examination of P.W.1 – Bhavani Shanker. When his attention was drawn to clause 4(a), 4(b) and 4(c) of the agreement – Exhibit 21, he has unequivocally admitted that as per the said 1986 agreement, he was required to acquire absolute ownership in respect of Flat No.24 as per the scheme set out in the

aforesaid clauses, more particularly, his admission that the appellants/landlords had obtained to implement scheme as set out in clause 4 (c) of the agreement, put his case to rest.

33. P.W.1- Bhavani Shanker, in his cross-examination, further admits that he had seen the scheme. It was drafted pursuant to clause - 4(c) of Exhibit 21. He had duly understood the terms of the said scheme. His cross-examination further reveals that in his evidence in R.A.D Suit No.1022 of 2010 in the Small Causes Court, it has come that he was required to acquire class-B shares under the scheme. He admits that he had given the said admission in the cross-examination before the Court of Small Causes at Mumbai (Exhibit 22). He further admits that the Directors viz; Ashwin Shah and Ajit Zaveri agreed and were willing to implement terms of the agreement dated 25th September, 1986 as per the scheme. He again reiterates in the cross-examination that as per the scheme, only Class-B shares were required to be allotted and transferred in his name. The cross also reveals that he came to know about allotment of class-B shares in the year 1996 itself.

34. The record reveals that the scheme was submitted to the Registrar of Companies on 31st March, 2003 vide an application in Form No.23 dated 6th February, 2003. It is evident from the explanatory statement under section 173 (2) of the Companies Act, 1956 which is annexed to the scheme and was placed before the trial Court, the holders of Class-B equity shares would have ownership rights only on the flat or garage or open to sky parking space. As already stated, structure of the scheme was in accordance with the terms of the agreement. Respondents were only restricted to the absolute ownership *qua* the suit flat. They are not entitled to any share in the land or the building standing thereon. The scheme even contemplates that Class-A equity shares of the appellant include right to vote, dividend and right to distribution of surplus assets on winding up of the appellant. Class-A shares were in respect of the internal functioning of the appellant and had no relevance with the suit flat.

35. There is a clear admission of P.W.1 – Bhavani Shanker in the cross-examination that Class-B shares were offered to him by the appellant in the year 1996 itself and not Class-A shares. Why did he not take steps to challenge the scheme or raised any objection in

that regard in 1996 itself or soon thereafter? The respondents are, therefore, estopped from raising the same *sans* any pleadings. They are trying to seek relief *qua* class – A shares in camouflage. It is essentially a case of estoppel in view of deed of agreement dated 25th September, 1986, especially clause (c) of the said agreement. Rule of estoppel by deed applies only between parties and privies, and only in actions on the deed. No estoppel arises upon recitals or descriptions which are either immaterial or not intended to bind. No estoppel arises where the deed is tainted by fraud or illegality. The respondents herein are trying to seek relief of Class-A shares in camouflage, as already stated hereinabove, which cannot be permitted to be raised in view of the evidence on record, especially, vital admissions elicited in the cross-examination of P.W.1-Shanker Bhavani. In light of the above, it is evident that cause of action for the purpose of seeking an entitlement to Class-A shares arose as far back as in the year 1996 when it was informed to the respondents that they are only entitled to class-B shares and not class-A shares and no class-A shares were offered to them.

36. Relief in respect of class-A shares as sought to be claimed now is, therefore, time barred on the date of filing of the suit. It is

apparent that in order to bring the suit within limitation, the respondents relied on S.C Suit No.3155 of 2003 filed by one Mr. R.B. Mahadevia to contend that cause of action arose pursuant to an affidavit sworn by the Directors of appellant on 13th August, 2003. The respondents cannot be heard to say that cause of action arose for the first time pursuant to a proceeding in S.C. Suit No.3155 of 2003 filed by one Mr. B.R. Mahadevia.

37. The trial Court has committed a grave error in observing that the suit was within limitation by completely ignoring the admission given by P.W.1 – Bhavani Shanker in the cross-examination as stated above as well as the fact that the plaint restricted only to ownership rights to the flat alone *sans* any averment as regards the land and common amenities in the said building. There is absolutely nothing in the plaint indicating claim of the respondents *qua* class-A shares. To claim class-A shares, despite having knowledge in the year 1996 itself exhibits malice in law and fact. The trial Court misread and misinterpreted not only the evidence on record but also recitals of 1986 agreement by observing that there was no evidence of oral negotiations and meetings about class-A and class-B shares. The trial Court had, therefore, committed patent illegality in directing the

appellant to transfer class-A and class-B shares in the impugned decree. In view of Article 54 of the Limitation Act, a suit is to be filed within three years if date is fixed for the performance or when the plaintiff has notice that performance is refused. Relief sought in the plaint is only to the extent of seeking performance of 1986 agreement which was restricted to the flat. The suit is, therefore, barred by limitation. I am afraid, I cannot buy arguments of learned Senior Counsel Mr. Thorat that the cause of action arose for the first time on 13th August, 2003 in view of the aforesaid facts.

38. As already stated hereinabove, in view of clause 4 (c) of 1986 agreement, the appellants-landlords reserved a right of transferring shares in favour of the tenants and making such tenants shareholders of the landlords in such of the number of shares as are required per flat so as to divest the existing shareholding in the landlords in favour of the tenants and/or such other person who may wish to acquire the shares of the landlords.

39. From the recitals of the agreement, it is explicit that right to choose from the aforesaid options was solely with the appellant which appears to have been accepted by 21 out of 24 flats holders in

the said building. The appellant had, therefore, rightly exercised its prerogative to transfer shares in favour of the respondents and other tenants under clause 4(c) of 1986 agreement.

40. The trial Court travelled beyond the scope of the averments and evidence on record by granting relief in view of clauses (2) and (3) of the operative part of the impugned judgment and decree. The respondents even could not have been entitled to seek relief of perpetual injunction in respect of building and land since the rights under 1986 agreement were limited only to the extent of suit flat and not in respect of the land beneath the said building.

41. Learned Counsel for the appellant has, therefore, rightly placed a useful reliance on a judgment of the Supreme Court in case of **Shree Ambica Medical Stores and others Vs. Surat People's Co-operative Bank Limited and others, (2020) 13 Supreme Court Cases 564**. It is held by the Supreme Court:

“The Court while interpreting the contract of insurance must interpret the words of the contract by giving effect to the meaning and intent which emerges from the terms of the agreement. In interpreting documents relating to a contract of insurance, the duty of the court

is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract, however, reasonable, if the parties have not made it themselves. The court through its interpretative process cannot rewrite or create a new contract between the parties. The court has to simply apply the terms and conditions of the agreement as agreed between the parties”

(emphasis supplied)

42. It is apparent that the Court below has re-written the terms of 1986 agreement instead of interpreting the words in which the parties to the contract expressed their intentions. The Court cannot make a new contract, however, reasonable, if the parties have not made it themselves. The trial Court has, therefore, clearly created something new which was never intended by the parties in 1986 agreement.

43. Law as regards scope of pleadings is no more *res integra*. There are several authoritative pronouncements on this aspect. Pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties. If there is no prayer for a particular relief and no pleadings to support such a relief, and when the defendant has no opportunity to resist or oppose such a relief, if

the court considers and grants such a relief, it would lead to miscarriage of justice, which has been, in fact, has occurred in the case at hand.

44. The Hon'ble Supreme Court in case of **Bacchaj Nahar Vs. Nilima Mandal and another, (2008) 17 SCC, 491** has observed thus;

“12. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

13. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on

that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when the defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief”.

45. This is a classic case wherein the trial Court, *sans* pleadings and prayer granted reliefs resulting into miscarriage of justice.

46. Turning to the tenancy agreement dated 6th February, 1985 as emphasized by the Senior Counsel. Clauses 9 and 16 of the said agreement are extracted below;

“9. It has been agreed that the amount of the aforesaid construction loan shall be a charge

on the entire new construction of the said building and the entire interest of the Landlord in the land to which the said building is wedded proportionately/rateably according to the proportion that the amount of such loan advanced by the Tenant bears to the total loan by such other persons and the documents evidencing creating the charge will be prepared when the entire loan is advanced by the Tenant.

16. The necessary document creating charge on the said building and land shall be executed on receiving the full payment of the construction loan by the Landlord in the manner aforesaid”.

47. Though there is an averment in the plaint about the said agreement, it is pertinent to note that a photo copy of the said agreement was filed and not the original. There is no averment in the plaint as regards clauses 9 and 16 as stated hereinabove. There is no pleading in respect of execution of a document/deed creating a charge on the building and land against the construction on loan. No charge has been created over the property. Section 17 (1) (b) of the Registration Act provides the documents which are compulsorily registrable. Clause (1) (b) of Section 17 reads thus;

“17. Documents of which registration is compulsory- (1) The following documents shall be registered, if the property to which they

relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:-

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

48. Admittedly, document dated 6th February, 1985 is an unregistered document. The said document in itself would not create, declare, assign any right, title or interest in respect of the property in question. No charge has been created by any other document over the property and, therefore, there is no question of creating or assigning any right in respect of the property in question *qua* the respondents. Argument of the learned Senior Counsel for the respondents, therefore, cannot be accepted.

49. The impugned judgment and decree, therefore, warrants interference in appeal. The same is modified as under;

- (a) The suit stands decreed with costs.
- (b) The appellant/defendant shall execute sale deed in respect of the suit flat in view of clause 4 (c) of the agreement dated 25th September, 1986 by transferring class-B shares in favour of the respondents within eight weeks.

50. The appeal stands disposed of in the aforesaid terms.

[PRITHVIRAJ K. CHAVAN, J.]