

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 1152 OF 2022

WITH

INTERIM APPLICATION NO. 30423 OF 2022

Saraswatibai Bishwambarlal Charity
Trust, thr. Sudarshan Malpani and Ors.

...Appellants

V/s.

Gopal Traders Pvt. Ltd.

...Respondent

Mr. G.S. Godbole, Senior Advocate a/w. Mr. Roshan Sawant i/by. Mr. Kaustubh Patil, for the Appellant.

Mr. Sanjay Jain a/w. Mr. Nakul Jain, Mr. Viraj Bansod i/by. Mr. Tushar Goradia, for the Respondent.

CORAM : SANDEEP V. MARNE, J.

RESD. FOR JUDGMENT ON : 20 OCTOBER 2023.

PRON. JUDGMENT ON : 9 November 2023.

JUDGMENT :

THE CHALLENGE

1. This Appeal is filed challenging the order dated 12 October 2022 passed by the learned Judge, City Civil and Sessions Court, Greater Mumbai allowing Notice of Motion No. 1797/2021 filed by the Defendant under Order 7 Rule 10 of the Code of Civil

Procedure, 1908 (**the Code**) returning the Plaint to be presented before this Court. The Plaint is returned essentially on the ground that the same does not fall within the pecuniary jurisdiction of the City Civil Court.

FACTS :

2. The Appellant-Plaintiff is a Trust and Plaintiff Nos.1 to 6 are its Trustees. The Trust apparently owns land bearing C.T.S. No. 2/583, Jagmohandas Marg, Nepean Sea Road, Mumbai-400026 (**suit land**). Defendant owns a Plot adjoining the suit land and the Defendant has been granted easementary right to approach his land from the suit land owned by Plaintiffs. Plaintiff got aggrieved by the act of the Defendant in commencing construction on the Trust property and accordingly instituted S. C. Suit No. 112 of 2021 before the City Civil Court seeking *inter alia* prohibitory injunction against the Defendant to restrain it from raising any construction over the suit property. In its Written Statement, Defendant relied upon the Deed of Additional Right of Way dated 4 November 2020 executed by Mr. Sunil Damani in his capacity as the Trustee of the Trust, under which the Defendant claims that the Trust granted additional right of way of 3.74 mtrs width on the western portion passing through the Trust property and leading to the Defendant's property on consideration of Rs. 7,50,000/- annually to the Trust. Plaintiffs therefore amended the Plaint, *inter-alia* to include challenge to the Deed of Additional Right of Way dated 4 November 2020.

3. After amendment of the Plaint, Defendant filed Notice of Motion No. 1797/2021 under the provisions of Order 7 Rule 10 of the Code for return of the Plaint on the ground that the Deed of Additional Right of Way dated 4 November 2020 is valued at Rs.1,95,00,000/-, on which stamp duty of Rs.5,85,000/- is paid. Defendant therefore contended that the suit ought to have been valued at Rs. 1,95,00,000/- and therefore would fall beyond the pecuniary jurisdiction of the City Civil Court, which is restricted at Rs.1 crore. Plaintiffs resisted the Motion by filing Affidavit in Reply *inter-alia* contending that the document is not executed by the Trust and therefore not binding on it. That the suit has rightly been valued under Clause 6(iv)(j) of the Maharashtra Court Fees Act, 1959 (**Court Fees Act**). After hearing both sides, the City Civil Court proceeded to pass order dated 12 October 2022 and allowed Notice of Motion No. 1797/2021 directing return of the Plaint filed in S. C. Suit No. 112/2021 to the Plaintiffs to be presented before this Court. Plaintiffs are aggrieved by the order dated 12 October 2022 and have filed the present Appeal.

4. Mr. Godbole, the learned senior advocate would appear on behalf of the Appellants/Plaintiffs and submit that the Suit is only for a declaration and is therefore correctly valued under Section 6(iv)(j) of the Court Fees Act. He would submit that the valuation done for the purpose of payment of stamp duty under the provisions of Maharashtra Stamp Act, 1958 is totally irrelevant for the purpose of valuation of the suit under the provisions of the Suits Valuation Act, 1887 or under the

Court Fees Act. That the case of the Plaintiffs is that the Deed of Additional Right of Way has been unauthorisedly executed by Shri. Sunil Damani who does not have any authority to execute any document on behalf of the Trust and the Trust is merely seeking a declaration that the said document is not binding on it. That under such circumstances, the suit has correctly been valued under Section 6(iv)(j) of the Court Fees Act.

5. Mr. Godbole would further contend that an easement does not create any right in the property, which is capable of being sold or transferred. That therefore a suit seeking declaration that the Deed of Additional Right of Way is not binding on the Trust cannot be valued under the provisions of Section 6(iv)(ha) of the Court Fees Act. He would also invite my attention to the provisions of Section 6(v) of the Court Fees Act under which suits for recovery of possession of lands, houses and gardens can be valued. That even if the suit is treated as the one for recovery of possession of land, the same would be valued under Section 6(v) of the Court Fees Act. That the Plaintiff-Trust is not seeking avoidance of sale or contract of sale of any immovable property and therefore there is no question of valuation of the suit under Section 6(iv)(ha) of the Court Fees Act. Mr. Godbole would then refer to the provisions of Suit Valuations Act, 1887 and the Maharashtra Suit Valuation Rules, 1983 where, if the subject matter of the suit is a land, the suit is required to be valued at a sum equal 200 times of the assessment payable in respect of the land.

6. Mr. Godbole would then refer to the provisions of Transfer of Property Act, 1882 and the Indian Easements Act, 1882. He would contend that a right of easement cannot be transferred under the provisions of Transfer of Property Act. Easement is just an encumbrance of sort imposed by the owner of dominant heritage on the land of servient heritage. That Section 54 of the Transfer of Property Act does not recognize the concept of transfer or sale of an easementary right. He would submit that since the Trust is not a party to the Deed of Additional Right of Way, it need not seek declaration for avoidance of sale by valuing the suit under Section 6(iv)(ha) of the Court Fees Act and that the suit has correctly been valued under Section 6(iv)(j) of the Court Fees Act. That every suit which relates to possession of land, which is assessed to the payment of land revenue, the value of the suit must be made under the provisions of Section 6(v) of the Court Fees Act. That grant of easement does not involve transfer of ownership in an immovable property as contemplated under Section 54 of the Transfer of Property Act. That even if Defendant was to seek a declaration of right of easement, the suit will have to be valued for the purpose of payment of court fees under the provisions of Section 6(e) of the Court Fees Act. That therefore merely because a challenge is raised to a document granting easement, it cannot be construed that the Suit is for avoidance of sale under Section 6(iv)(ha) of the Court Fees Act. Mr. Godbole would therefore pray for setting aside the impugned order passed by the City Civil Court with restoration of the interim order granted in Plaintiffs' favour during pendency of the suit. In

support of his contentions, Mr. Godbole would rely upon the following judgments:

- (i) ***Surabhi Gehlot & Ors. V/s. Swarn Kanta Punj***, 2015 SCC Online Del 12047.1
- (ii) ***Maruti Gabaji Thopate Vs. Kailash Gabaji Thopate & Ors.*** Appeal from Order No. 459 of 2021 dated 25 April 2022.
- (iii) ***K. Krishnamoorthy vs. Nagammal & Ors.*** 2015-1-L.W.570.
- (iv) ***Bachhaj Nair Vs. Nilima Mandal and Anr.*** (2008)17 SCC 491.
- (v) ***Suhrid Singh alias Sardool Singh Versus. Randhir Singh and Ors.*** (2010) 12 SCC 112.
- (vi) ***Smt. Tarabai Bhausahab Deokar V/s. Jaywant Mahepati Balwadkar 1 & Ors.*** Writ Petition No.1659 of 2005 dated 15 December 2009.
- (vii) ***Dilip Khushalchand (Srisrimal) Jain & Ors. V/s. Hardik Deepakbhai Ramani & Ors.*** Writ Petition No. 8968 of 20 18 dated 5 May 2022.
- (ix) ***Musunoori Satyanarayana Murti V/s. Chekka Lakshmayya and Ors.*** 284 The Law Weekly, 1929 Vol.XXX.
- (x) ***Madhaorao and Ors. V/s. The State of Maharashtra***, 1971 (1) SCC 542.

7. Mr. Jain the learned counsel appearing for the Respondent/Defendant would oppose the appeal and support the order passed by the City Civil Court. He would submit that since the Deed of Additional Right of Way dated 4 November 2020 is challenged by the Plaintiffs, provisions of Section 6(iv)(ha) of the Court Fees Act would be attracted for valuation of the suit. That Section 6(iv)(ha) of the Court Fees Act employs the words “any sale” and “of any....immovable property”. That ownership in an immovable property consists of multiple rights or bundle of rights and therefore for transfer/grant/sale of any one of those multiple rights would attract the provisions of

Section 6(iv)(ha) of the Court Fees Act. He would submit that even a Development Agreement, which does not *per-se* involve sale of land as such, would still amount to sale of interest in the land and therefore the suit challenging the Development Agreement is also required to be valued under the provisions of Section 6(iv)(ha) of the Court Fees Act. In support of his contention, he would rely on the judgment of this Court in the case of ***Prism Reality V. Govind Yashwant Khalade*** 2015 (4) Bom.C.R 370.

8. Mr. Jain would then submit that the Trust is a party to the Deed of Additional Right of Way. Therefore, the Trust is bound to value the suit under Section 6(iv)(ha) of the Court Fees Act. He would rely upon the judgment of this Court in ***Sanjay Ramchandra Shendkar and Ors. V. Narayan Antu Zendge***, 2022 (4) Mh.L.J. 130 which has followed the judgment in ***Prism Realty*** (supra).

9. Mr. Jain would further submit that the Plaintiffs have not presented any other documents indicating different valuation of the right created under the Deed of Additional Right of Way and in absence of any such documents being produced by the Plaintiffs, the valuation done by the Competent Authority at Rs.1,95,00,000/- is required to be accepted. In support of his contention, he would rely upon judgment of this Court in ***Prasadnagar Co-operative Housing Society Vs. The State of Maharashtra***, 2005 (2) Mh.L.J. 310. Mr. Jain

would further submit that reliance of Plaintiffs on the provisions of Section 54 of the Transfer of Property Act is misplaced as easement is also one of the rights created in a land under the provisions of the Indian Easements Act. That since an immovable property consists of bundle of rights such as lease, mortgage, remand etc. every time a singular right in an immovable property is transferred, the ownership in the land gets diluted to that extent. Such bundle of right may include a right to possess, use and enjoy the thing owned and a right to consume, destroy or alienate it. That the right of way and/or easement creates an interest in the immovable property under which the servient owner parts with/alienates some of the rights in respect of the immovable property in favour of the dominant owner. He would rely on the judgment of the Apex Court in ***NOIDA Vs. Anand Sonbhadra*** (2023) 1 SCC 724 in which the Apex Court has quoted *Salmond* on jurisprudence in 'idea of ownership' and has held that ownership consists of complex of rights and it is permissible for an owner to give one right to one person and another right in favour of another person. He would pray for dismissal of the Appeal.

10. Rival contentions of the parties, now fall for my consideration.

11. The entire controversy in the present Appeal revolves around the nature of relief sought by the Plaintiffs in their suit. It

would therefore be necessary to reproduce the prayers in the suit as under:

a. This Hon'ble Court shall be pleased to pass decree for Permanent Prohibitory Injunction and Mandatory Injunction restraining the Defendant from raising any construction over the suit premises being all that piece and parcel of land bearing C.T.S. No. 2/583 situated at Jagmohandas Marg, Nepean Sea Road, Mumbai - 400 026;

(a-1). This Hon'ble Court be pleased to declare that the purported Deed of Additional Right of Way dt. 04.11.2020 being Ex. H, executed in respect of Additional Right of Way having width of 3.74 meters lying, being and situated on the western side of the property and which is passing along with all that piece and parcel of land bearing C.T.S. No. 2/583 situated at Jagmohandas Marg, Nepean Sea Road, Mumbai- 400 026 standing thereon and assessed by the Assessor and Collector, Municipal Corporation of Greater Mumbai under "D" Ward is Illegal, not est, bad in law and not binding upon the Plaintiffs;

(a-2) That this Hon'ble Court be pleased to pass a permanent order and injunction restraining the Defendant, their servants, agents, employees, workmen, and every other person claiming through or under them from acting and relying upon the purport Deed of Additional Right of Way dt. 04.11.2020 being Ex. H having width of 3:74 meters lying, being and situated on the western side of the property and which is passing along with all that piece and parcel of land bearing CTS. No. 2/583 situated at Jagmohandas Marg, Nepean Sea Road, Mumbai - 400 625 using the same for any purpose including but not limited to applying for any permissions, sanctions or approvals with Municipal Corporation of Greater Mumbai or any other authority.

b. This Hon'ble Court shall be pleased to pass necessary orders directing the Defendant to reconstruct the Dividing Wall in the exact same location as the earlier wall demolished by the Defendant,

c. This Hon'ble Court shall be pleased to pass necessary orders directing the Defendant to remove the illegal construction work over the suit premises owned by the Plaintiff,

d. In case, the Defendant fails to remove the structures erected on the suit premises, the Plaintiff may be permitted to remove the structures at the Defendant's cost,

e. This Hon'ble Court shall be pleased to pass necessary orders directing the Defendant to handover the peaceful possession of the encroached portion of the suit premises upon by the Defendant;

(ea) That this Hon'ble Court be pleased to pass a permanent order and injunction restraining the Defendant and/or their servants, employees, agents and/or any person acting on behalf of the Defendant from obstructing the Saraswatibai Bishwambharlal Charitable Trust, its trustees and/or its tenants/residents, employees, agents and/or any person acting on behalf of the Saraswatibai Bishwambharlal Charitable Trust from accessing the right of way currently used by the Defendant;

(eb) That this Hon'ble Court be pleased to pass a permanent order and injunction restraining the Defendant and/or their servants, employees, agents and/or any person acting on behalf of the Defendant from obstructing the Saraswatibai Bishwambharlal Charitable Trust, its trustees and/or its tenants, employees, agents and/or any person acting on behalf of the Saraswatibai Bishwambharlal Charitable Trust from accessing water well, water pump installed on the said water well, currently partially encroached by the Defendant;

(ec) That this Hon'ble Court be pleased to pass a permanent order and injunction directed the Defendant to forthwith remove all barricades and gates erected on the suit premises;

f. Pending hearing and final disposal of the present suit the Defendant, their servants, agents and any person claiming by through under by them be directed to maintain status- quo with respect to the construction work carried out by the Defendant into the suit premises;

g. Pending hearing and final disposal of the present suit the Defendant, their servants, agents and any person claiming by through under by them be restrained by order and injunction of this Hon'ble Court from any manner construction on the suit premises;

h. Pending hearing and final disposal of the present suit the Defendant, their servants, agents and any person claiming by through under by them may be directed to stop the illegal construction work on the suit premises;

(ha) That this Hon'ble Court be pleased to pass a temporary order and injunction restraining the Defendant and/or their servants, employees, agents and/or any person acting on behalf of the Defendant from

obstructing the Saraswatibai Bishwambharlal Charitable Trust, its trustees and/or its tenants, employees, agents and/or any person acting on behalf of the Saraswatibai Bishwambharlal Charitable Trust from accessing the right of way currently used by the Defendant, pending the hearing and final disposal of the suit;

(hb) That this Hon'ble Court be pleased to pass a temporary order and injunction restraining the Defendant /or their servants from obstructing the Saraswatibai Bishwambharlal Charitable Trust, its trustees and/or its tenants, employees, agents and/or any person acting on behalf of the Saraswatibai Bishwambharlal Charitable Trust from accessing water well, water pump installed on the said water well, plants and trees currently partially encroached by the Defendant, pending the hearing and final disposal of the suit,

(hc) That this Hon'ble Court be pleased to pass a temporary order and injunction directing the Defendant to forthwith remove all barricades and gates erected on the suit1 premises;

(hd) That this Hon'ble Court be pleased to pass a temporary order and injunction restraining the Defendant, their servants, agents, employees, workmen, and every ofzer person claiming through or under them from acting and relying upon the purported Deed of Additional Right of Way dt. 04.11.2020 being Ex. H and also using the same for any purpose including but not limited to applying for any permissions, sanctions or approvals with any authority, executed in respect of Additional Right of Way having width of 3.74 meters lying, being and situated on the western side of the property and which is passing alone with all piece and parcel of land bearing C.T.S. No. 2/583 situated at Jagmohandas Marg, Nepean sea Road, Mumbai-400 026 pending the hearing and final disposal of the present suit.

(i) for ad interim and interim relief in terms prayer clause (e), (f), (g), (ha) and (hb) above.

12. Thus in prayer in prayer clause (a-1), Plaintiffs have sought the relief of declaration of the Deed of Additional Right of Way dated 4 November 2020 to be illegal, *non est*, bad in law and not binding on them. The valuation clause in the plaint is as under:

8. That the value of the suit for the purposes of jurisdiction has been fixed for Rs.1,000/- and for the purposes of declaration and correct and authorized court fee stamp of Rs.1,000/- has been affixed on the plaint u/s.6(iv)(j).

13. The Suit, where Plaintiff seeks avoidance of sale or contract for sale, are required to be valued under clause (ha) of Section 6(iv) of the Court Fees Act. Section 6(iv)(ha) of the Court Fees Act reads thus:

S.6(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 moveable or immovable property is void – one half of ad valorem fee leviable on the value of the property.

14. The Scheme of the Court Fees Act is such that only those suits can be valued under Section 6(iv)(j) for which valuation is not provided for in any other provisions of the Court Fees Act. Therefore, once it is found that a particular suit is capable of being valued in any other provisions of the Act, other than Section 6(iv)(j), the valuation of the suit for the purpose of payment of court fees would not be under the provisions of Section 6(iv)(j). Therefore, it was for the Defendants to prove before the City Civil Court that the suit is capable of being valued under some other provisions of the Court Fees Act. In Notice of Motion No. 1797/2021, the Defendant sought return of the Plaint under the provisions of Order 7 Rule 10 of the Code by asserting that the Deed of Additional Right of Way is valued at Rs. 1,95,00,000/- and since the Suit was amended by raising challenge to the Deed dated 4 November 2020, it was also required to be valued at Rs.1,95,00,000/-. It must also be observed here that the Defendant did not quote any

specific provision of the Court Fees Act under which the suit ought to have been valued. The relevant pleadings in paras-4, 5 and 6 of the Notice of Motion reads as under :

4. By an Order dated 18th June 2021 passed in the Chamber Summons No.761 of 2021, this Hon'ble Court permitted the Plaintiff to amend the Plaint lodged in the Suit. By this amendment, the Plaintiff now seeks to challenge the Deed of Right of way dated 4th November 2020 ("the Deed") executed between the Applicant and the Trust, through Mr. Sunil Damani thereby granted an additional Right of way to the Applicant having a width of 3.74 Meters.

5. The consideration under and the value of the Deed is reserved / quantified at Rs.1,95,00,000/-. Thus, the Deed is valued is Rs.1,95,00,000/-. Accordingly, the Applicant has paid a sum of Rs.5,85,000/- as stamp duty levied on the Deed. On account of the Deed being in question, the Suit. inter alia, is to be valued as per the value reserved under the Deed. The value of the Deed is to be treated as the value of the Suit. In the premise, the Suit is valued at Rs.1,95,00,000/-.

6. The land in question in the Suit admeasures about 3.74 Square Meters. The Plaintiffs seek possession thereof. Even if valued notionally, the same would quantify above a sum of Rs.1 Crore. Therefore, relief seeking possession of the land in question is also valued beyond Rs.1 Crore.

15. Thus, in addition to seeking valuation of the suit at Rs.1,95,00,000/-, the Defendant also pleaded that since the suit is for recovery of land admeasuring 3.74 sq.mtrs, the valuation of the suit would exceed Rs.1 crore. As pointed out by Mr. Godbole, Suit for recovery of possession of land is required to be valued under Section 6(v) of the Court Fees Act which provides as under:

6(v) for possession of lands, houses and gardens

In suits for the possession of land, houses and gardens according to the value of the subject-matter; and such value shall be deemed to be, where the subject-matter is a house or garden according to the market value of the house or garden and where the subject-matter is land, and-

(a) where the land is held on settlement for a period not exceeding thirty years and pays the full assessment to Government a sum equal to [forty times] the survey assessment;

(b) where the land is held on a permanent settlement, or on a settlement for any period exceeding thirty years, and pays the full assessment to Government a sum equal to [eighty times] the survey assessment; and

(c) where the whole or any part of the annual survey assessment is remitted a sum computed under sub-paragraph (a) or sub-paragraph (b) as the case may be, in addition to eighty times the assessment or, the portion of assessment, so remitted;

16. Section 8 of the Suit Valuations Act, 1887 (in its application to State of Maharashtra) provides that for the suit other than those referred to in paras/clauses-(v), (vi) and (ix) and Clause(d) of Para-(xi) of Section 6 of the Court Fees Act, the court-fees are payable *ad-valorem* the value determinable for computation of court-fees and the value for the purpose of jurisdiction shall be the same. Under Section 3 of the Suits Valuation Act, the State Government is empowered to make Rules for determining value of land for the purpose of jurisdiction in the suits mentioned in the Court Fees Act. Section 4 of the Suits Valuation Act further provides that valuation of relief in certain suits relating to land shall not exceed the value of the land. Under the provisions of Section 3 of the Suits Valuation Act, the State of Maharashtra has notified The Maharashtra Suits Valuation (Determination of Value of Land for Jurisdictional Purposes) Rules, 1983 (**Suit Valuation Rules**), Rule 2 thereof provides thus:

1. In suits for the possession of land, houses and gardens mentioned in paragraph (v) in section 6 of the Bombay Court Fees Act, 1959 (Bom.XXXVI of 1959), (hereinafter referred to as “the Court Fees Act”), for the purposes of jurisdiction, the value of the property shall be determined as follows, namely :-

where the subject-matter is a house or garden – according to the market value of the house or garden, as the case may be;

where the subject-matter is a land – a sum equal to two hundred times of the assessment payable in respect of the land.

Explanation- Where any land is partially or wholly exempt from the payment of land revenue, the full assessment leviable in respect of such land shall be deemed to be the assessment payable in respect of such land for the purposes of this rule, as if the land was not exempt from the payment of land revenue either partially or wholly.

17. Thus, a combined reading of provisions of Section 6(v) of the Court Fees Act and Rule 2 of Suit Valuation Rules, would indicate that a Suit seeking possession of land is required to be valued at sum equal to 200 times of the assessment payable in respect of that land. Therefore, the prayer for recovery of land admeasuring 3.74 sq.mtrs is required to be valued at 200 times the assessment payable in respect of that land. Defendant did not demonstrate as to what is the assessment payable in respect of land admeasuring 3.74 sq. mtrts. Therefore the Defendant’s contention that the suit for recovery of possession of land admeasuring 3.74 sq.mtrs would be outside the jurisdiction of the City Civil Court is unacceptable and is liable to be rejected.

18. That leaves the moot point of valuation in respect of prayer clause (a-i) in the suit in which the Plaintiffs have sought a declaration

about the Deed of Additional Right of Way dated 4 November 2020 being illegal and void. The prayer would leave no matter of doubt that the same is for avoidance of that Deed of Additional Right of Way. Therefore, ordinarily such a prayer will have to be valued under Clause 6(iv)(ha) of the Court Fees Act. Further, Mr. Godbole has contended that the prayer does not seek avoidance of any contract for sale of any movable or immovable property and that therefore Clause 6(iv)(ha) of the Court Fees Act is not attracted even in respect of prayer clause (a-i). According to Mr. Godbole, it is only when the Contract involves 'sale of immovable property' that provisions of Section 6(iv)(ha) of the Court Fees Act would come into play. On the other hand, it is Mr. Jain's contention that grant of easement creates a right in immovable property and therefore the Deed of Additional Right of Way would be a contract for sale of a right in immovable property and therefore prayer clause (a-i) will have to be valued under Clause 6(iv)(ha) of the Court Fees Act.

19. To decide the controversy about valuation of prayer clause (a-i) in the plaint, it is necessary to decide whether the Deed of Additional Right of Way, involves sale of immovable property or not. It is nobody's case that by that deed, land admeasuring 3.74 sq.mtrs is sold or transferred. The Deed merely granta additional right of way of 3.74 mtrs width on the western portion of plaintiff's land to the Defendant. Clauses-(2), (4) and (5) of the Deed are relevant, which read thus :

(2) The Grantor hereby grants onto the Grantee the Additional right of Way of 3.74 Meters width (Additional Right of Way) on the western portion and which is passing along with the Trust's Property (which is more particularly described in the First Schedule hereto), leading to the Grantee's Property (which is more particularly described in the Second Schedule hereto).

4. In consideration for the grant of the Additional Right of Way, the Grantee hereby agrees to pay lump sum amount of Rs.7,50,000/- annually to the Grantor. The Grantor agrees and covenants that the consideration in respect of the present year shall be paid on or before execution of these presents. The successive payments of consideration for the following years shall be paid by the Grantee to the Grantor in the first month of the successive following years.

5. The period for which the Additional Right of Way is granted hereof onto the Grantee shall commence from the date of execution hereof till and upto 2046."

20. Thus, by accepting valuable consideration of Rs.7,50,000/- payable each year, the Deed grants additional right of way in favour of the Defendant to use land admeasuring 3.74 mtrs width on the western portion of Plaintiff's land for ingress and egress of the Defendant upto the year 2046. According to Mr. Jain, the Deed assigns a right in the property in favour of the Defendant. There can be no dispute to the proposition that owner of immovable property has bundle of rights in that property. Such rights can be independently exercised or assigned to different persons. To illustrate, an owner of immovable property can create a mortgage in favour of person 'A', while simultaneously granting license in respect of the same property to 'B' but continue to retain ownership to himself. He may grant development rights in the land, while continuing to be the owner thereof. In similar manner, while

retaining ownership and possession of the land, the owner can grant easement in favour of another person for valuable consideration. This concept of owner exercising bundle of rights in immovable property is explained by the Apex Court in its judgment in **NOIDA** (supra) wherein *Salmond on Jurisprudence* is quoted with approval and the Apex Court has held as under-

137. We may notice the following discussion regarding the "*idea of ownership*" in *Salmond on Jurisprudence*, 12th Edn.:

"Ownership denotes the relation between a person and an object forming the subject-matter of his ownership. It consists in a complex of rights, all of which are rights in rem, being good against all the world and not merely against specific person(a). Though in certain situations some of these rights may be absent, the normal case of ownership can be expected to exhibit the following incidents (b)."

138. Thereafter, the following are treated as the rights associated with ownership. An owner of a property will have the right to possess the thing which he owns, it is stated. Secondly, the second principle is described as follows:

"Secondly, the owner normally has the right to use and enjoy the thing owned: the right to manage it ie. the right to decide how it shall be used: and the right to the income from it. Whereas the right to possess is a right in the strict sense, these rights are in fact liberties: the owner has a liberty to use the thing ie, he is under no duty not to use it, in contrast with others who are under a duty not to use or interfere with it."

139. The third right is described as follows:

"Thirdly, the owner has the right to consume, destroy or alienate the thing. The rights to consume and destroy are straight-forward liberties. The right to alienate i.e. the right to transfer his rights over the object to another, involves the existence of a power. A non-owner even though he has possession, cannot normally transfer the rights of ownership over a thing to another; for the law acts on the principle *nemo dat quod non habet*. To this principle there are certain exceptions: for example, the Factors enable non-owners in possession to transfer ownership in certain circumstances."

140. Fourthly, the right is one associated with the indeterminate duration of the right. It is here that we find the following discussion in this regard:

"Fourthly, ownership has the characteristic of being indeterminate in duration. The position of an owner differs from that of a non-owner in possession in that the latter's interest is subject to be determined at some future set point, whereas the interest of the owner can endure theoretically for ever. The interest of a bailee or lessee comes to an end when the period of hire or of the lease determines; the owner's interest is perpetual, being determined neither by any set point nor by the owner's death, because the property owned can descend to the owner's heir or next-of-kin, and if he had sold the property prior to his death, then the new owner's interest would continue unaffected by the previous owner's death."

141. Fifthly, there is a residual nature, in regard to the concept of ownership and it is described as follows:

"If, for example, a landowner gives a lease of his property to A an easement to B and some other right such as a profit to C. his ownership now consists of the residual rights i.e. the rights remaining when all these lesser rights have been given away. Moreover, in English law the general rule is that the extinction of such lesser rights will revive in the owner all his original rights."

(emphasis supplied)

21. Grant of development right is also one of the bundles of rights which the owner can assign while retaining ownership to himself. The issue about valuation of suit challenging Development Agreement is dealt with by Single Judge of this Court in *Prism Realty*. This Court held in paras-9 and 10 as under:

9. Insofar as section 6(iv)(j) is concerned, the same applies to suits which have been filed for declaration other than those sought in the earlier sections with or without injunctions 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. Insofar as section 6(iv) (ha) is concerned, the same applies to suits for declaration that any sale, contract for sale or termination of contract for sale, of any moveable or immoveable property is void. The said provision therefore, encompasses within itself suits that have been filed for avoidance of sale, contract for sale, etc. In the light of the reliefs which have been sought in the instant suit vide prayer clauses (a) and (b), the suit as filed is undoubtedly for declaration in respect of the Development Agreement and the Sale Deed

and by seeking the reliefs sought, what the plaintiffs in fact are seeking to do is the avoidance of the said sale or contract. Hence, insofar as the said reliefs are sought, the provisions of section 6(iv)(ha) can be said to be applicable. The fact that according to the plaintiffs the said documents are sham and bogus cannot be considered for computing or determining the valuation of the suit and the payment of the Court Fees in respect thereof. The Sale Deed which has been executed by the defendants No. 2 and 3 in favour of the defendants No. 4 and 5 is undisputedly a registered document and clause (4) thereof the consideration has been mentioned and also the fact that the vendors have accepted that payment of the said consideration has been made to them so also is the Development Agreement. Hence, merely because the plaintiffs questioned the Sale Deed as being sham and bogus, the plaintiffs cannot be exempted from the rigours of section 6(iv)(ha) of the Court Fees Act in the matter of valuation of the suit and payment of the Court Fees.

10. Insofar as the judgment of the Apex Court in *Surhid Singh @ Sardool Singh* (supra) is concerned, the Apex Court was concerned with a case under the Punjab Court Fees Act and especially section 7(iv)(c) thereof which was in respect of suits seeking various declarations. Since the plaintiff in the said suit was not the executant of the document and was seeking a declaration that the Apex Court observed that Court Fees would have to be paid in terms of Clause (c) of the said section 7 and not in terms of the consideration mentioned in the document. It would have to be borne in mind that the Apex Court was not concerned with a provision akin to section 6(iv)(ha) of the Bombay Court Fees Act, as probably such a provision does not find a place in the Punjab Court Fees Act. However, as indicated above, insofar as the Bombay Court Fees Act is concerned, there is a specific provision governing the suits, where a declaration is sought in respect of a sale or contract for sale or termination of contract is void. Hence, the statutory regime prevailing in the Punjab Court Fees Act being different than the statutory regime prevailing in the Bombay Court Fees Act, the judgment of the Apex Court in *Suhrad Singh @ Sardool Singh*'s case (supra) would have no application and would not aid the plaintiffs in the instant case to contend that they are liable to pay Court Fees as per section 6(iv)(j). The learned counsel appearing for the respondents also sought to place reliance on the judgment of the learned Single Judge of the Madras High Court reported in 2006 DGLS (AHS) 16555 in the matter of *Siddha Construction (P) Ltd. vs. M. Shanmugan and ors.* The said judgment was rendered in the context of the Madras Court Fees and Suits Valuation Act, 1965, wherein also it appears that there is no provision akin to section 6(iv)(ha). Insofar as the present case is concerned, it is squarely covered by the judgment of this Court in *Abdulsattar Gulabbhai Bagwan*'s case (supra), where the Sale Deed allegedly executed by committing a fraud was sought to be challenged and a declaration sought. This Court in the

facts of the said case observed that it would be section 6(iv)(ha) that would be applicable and that the plaintiffs though not the executants or parties to the said documents would have to pay Court Fees accordingly as they in fact are seeking the avoidance of the sale or contract.

22. Thus, in case of a Development Agreement, though the transaction does not involve contract for sale of land as such, it does create an interest in the land. This Court therefore held that the suit challenging the Development Agreement will have to be valued under Section 6(iv)(ha) of the Court Fees Act.

23. Coming back to the concept of easement, the Indian Easements Act, 1882 defines 'Easement' under Section 4 as under:

4. "Easement" defined.-An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

Dominant and servient heritages and owners.-The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

Explanation. - In the first and second clauses of this section, the expression "land" includes also things permanently attached to the earth; the expression "beneficial enjoyment" includes also possible convenience, remote advantage, and even a mere amenity; and the expression "to do something" includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage, or anything growing or subsisting thereon.

24. Thus, an easement is a right created in owner or occupier of the land to do certain acts on the land of another which such owner does not own. The concept of an easement is explained by the Apex Court in *Surbhi Gehlot* (supra) in which the Apex Court has held in paras-17 and 18 as under:

17. A right of easement is essentially a right which a person has over land that is not his own, for the enjoyment of land that does belong to him. In *Re Ellenborough Park* [1956] Ch. 131 it was held that the four characteristics of an easement are that (1) There must be a dominant and servient tenement, (ii) an easement must accommodate the dominant tenement, (iii) dominant and servient tenement owners must be different persons and lastly (iv) a right over the land cannot amount to an easement unless it is capable of forming the subject matter of a grant.

18. Crucially, therefore, there must be a dominant and servient heritage; two separate and distinct areas of land owned by two distinct and separate owners. **The essence of an easement is that an encumbrance of sorts is imposed by the owner of the dominant heritage on the land of another, for the enjoyment of his own land.** In other words, an easement requires some form of diminution of the natural rights incident to the ownership of an estate of the servient heritage, and that diminution of right must be reflected as a corresponding positive right of the owner of the dominant heritage to effect enjoyment of his land. Logically, therefore, an easement can never be exerted over one's own land. The basic nature of an easement presupposes a derivation of an enjoyment from land that is not the prior entitlement of the person deriving such benefit. Ownership or entitlement, can never co-exist with a claim of easement. There must be an element of acquisition or specifically, an animus of acquisition, for one cannot seek to acquire what is already his. In the present case, the respondent plaintiff has asserted a right of easement over the open space adjacent to the apartment, both being a part of one piece of land owned by the appellant. What the plaintiff asserts as her right was a permissive user, which never entailed questioning the right of the lessor over the entire property. The essential ingredient of hostility (of title to use) and exclusivity was, therefore, absent.

25. Thus in the words of the Apex Court, the essence of easement is that an encumbrance of sorts is imposed by the owner of dominant heritage on the land of another for enjoyment of his own land. Thus, the Apex Court in *Surbhi Gehlot* has recognized the concept that grant of easement is sort of an encumbrance on the land.

26. The question is whether such right is assignable? Mr. Godbole has strenuously contended that a right of easement is incapable of being assigned. Reliance is placed on order of Single Judge of this Court in *Maruti Gabaji Thopate* (supra), in which this Court referred to the judgment of the Madras High Court and held that right of easement by grant is not transfer of ownership as contemplated under Section 54 of the Transfer of Property Act, 1882. In paras-5 and 6 of *Maruti Gabaji Thopate*, this Court held as under :

5. Question that falls for consideration is, whether creation of right of easement by grant vide deed of easement dated 18th July, 2018, causes creation of interest in the Suit Property.

6. Section 6 of the Transfer of Property Act reads as under :

“6, What may be transferred.- Property of any kind may be transferred, except as provided by this Act or by any other law for the time-being in force;

a...

b...

c. An easement cannot be transferred apart from the dominant heritage.

In the case of *Musunoori Satyanarayana Murti v. Chekka Lakshmayya and Ors.* AIR 1929 Madras 79, it was held that ‘the creation of a right of easement by grant is not such a transfer of ownership as is contemplated by Section 54 of the Transfer of

Property Act, 1882, and therefore, provisions of the Transfer of Property Act has no application to the creation of easement. Section 6(c) of the Transfer of Property Act contemplates that existing easement cannot transferred apart from dominant heritage. Therefore, prima-facie, the deed of easement is a creation of easement and not a transfer of existing easement.

27. There can be no dispute to the proposition that a right of easement cannot be independently assigned to a third person. Therefore, such transfer of an easement is not recognized under the provisions of Section 54 or Section 6(c) of the Transfer of Property Act.

28. Though, there may be prohibition on assignment of right of easement under Section 54 and Section 6(c) of the Transfer of Property Act to a third person but the question is whether the owner of servient heritage can accept valuable consideration for grant of right of easement to the owner of dominant heritage? The answer to the question, to my mind, appears to be affirmative. There is no prohibition on the owner of servient heritage to demand and accept valuable consideration for grant of right of way to his own land. This is exactly what has happened in the present case as the Deed of Additional Right of Way is executed for valuable consideration of Rs.7,50,000/- per annum. In that sense, right of way or easementary right, which is one of the bundles of rights, which an owner of land possesses, is capable of being monetized atleast *qua* owner of dominant heritage. In that sense, the right of way or easementary rights can be put on the same pedestal (atleast to some extent, if not completely) as that of other bundle of rights like mortgage, license, lease, development rights etc. since the same is capable of being monetized. Therefore, it is

difficult to accept the proposition of Mr. Godbole that easementary right is not a right which can be sold by way of a contract.

29. Mr. Godbole has relied on the provisions of Section 6(iv)(e) of the Court Fees Act in support of contention that suits seeking declaration of easement are to be valued in the manner provided under Section 6(iv)(e) which read thus :

(e) declaration of easements etc.

	Area 1	Fee 2
(a)	The area within the limits of the Municipal Corporations of Brihan Mumbai or the Corporation of the City of Nagpur or any Municipal Corporation constituted under the Bombay Provisional Municipal Corporations Act, 1949	One-fourth of the ad valorem fee leviable for a suit for possession of the servient tenement or the dominant tenement, whichever is less, subject to a minimum fee of one hundred rupees.
(b)	Areas within the limits of Municipal Councils constituted under the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965	One-sixth of the ad valorem of fee leviable or a suit for possession of the servient tenement or the dominant tenement, which ever is less, subject to a minimum fee of one hundred rupees.];
(c)	Any other area in the State of Maharashtra	One hundred rupees.];

30. Mr. Godbole is however candid in admitting that Section 6(iv)(e) of the Court Fees Act would apply only where a suit seeks a declaration for existence of easementary right. Thus, if Defendant was to file a suit for declaration of easementary right against the Plaintiffs, that suit ought to have been valued under Section 6(iv)(e) of the Court

Fees Act. In the present case, however the situation is different. Plaintiffs are seeking avoidance of Deed of Additional Right of Way which granted easementary right in favour of the Defendant. Therefore, the provisions of Section 6(iv)(e) would be wholly inapplicable for valuation of suit of Plaintiffs.

31. Thus the broad scheme of the Court Fees Act is such that if a declaration of right is sought, valuation of which is not provided for in any other sections of the Court Fees Act, the Suit will have to be valued under Section 6(iv)(j) to the extent the valuation is not provided for in some other sections of the Court Fees Act. Thus the suit for declaration of existing right in immovable property, the valuation would be under that provision. However, if a right in immovable property is created and assigned and the suit is filed for avoidance of the Deed of assigning that right, the valuation of the suit will have to be under Section 6(iv)(ha) of the Court Fees Act. This is the broad distinction between the nature of relief sought for valuation of the suit. To put it in other words, if a Plaintiff seeks a declaration that he is owner of immovable property, the suit would be valued under the provisions of Section 6(iv)(j) of the Court Fees Act. However, the moment, he seeks cancellation/avoidance of a deed which has already assigned the immovable property, the valuation will have to be under Section 6(iv)(ha) of the Court Fees Act. Applying the above broad principles to the facts of the present case, there can be no matter of doubt that the suit is for avoidance of Deed of Additional Right of Way, which is executed for valuable consideration. Therefore, the suit

will have to be valued under Section 6(iv)(ha) of the Court Fees Act and cannot be valued in respect of that prayer under Section 6(iv)(j).

32. Having held that the Plaintiffs' suit, especially with regard to prayer clause (a-i), is required to be valued under the provisions of Section 6(iv)(ha) of the Court Fees Act, the next issue is about the quantum of valuation. Section 6(iv)(ha) of the Court Fees Act uses the word "on the value of the property". The City Civil Court has proceeded to accept the valuation done by the Stamp Office of Rs.1,95,00,000/- for levy of stamp duty on the Deed of grant of right of way. There is no other material placed on record which suggests a different valuation. Therefore, Mr. Jain has contended that in absence of any other document suggesting a different valuation, the valuation done by the Competent Authority is required to be accepted. Reliance is placed on judgment of this Court in *Prasadnagar Co-op. Hsg. Soc. Ltd.* (supra) in which this Court held in paras-10, 11 and 14 as under :

10. The fact remains that the directions were issued to the Registering Authority to strictly follow the Ready Reckoner and it is, therefore, in the light of law as settled by the Apex Court, it has become necessary to render a Judgment and issue directions in present case.

11. The petitioner therefore, succeeds and by issue of writ of mandamus, the respondents are directed to treat the Ready Rckoner sheerly as guidelines and as a declaration of "prima facie" market value and further clarify by necessary amendments in the rules that those rules are subject to the powers of the Collector under sections 31 and 32 of the Bombay Stamp Act, 1958. Since direction is issued as above in clear terms it shall not be necessary to quash the guidelines/ready reckoner, which shall now have the value of prima facie declaration of market value and nothing more.

33. Therefore the view taken by the City Civil Court in accepting the valuation done by the Stamp Authorities for the purpose of determining the valuation of Suit appears to be plausible.

34. What remains now is to deal with various judgments cited by Mr. Godbole

(i) ***Surabhi Gehlot*** (supra) essentially explains the concept of easement and has already been dealt with hereinabove.

(ii) ***Maruti Gabaji Thopate*** (supra) is cited in support of the proposition that a right of easement cannot be transferred under Section 54 read with Section 6(c) of the Transfer of Property Act. The judgment has already been dealt with above. In the present case, there is no issue of transfer of right of easement to a third person. In the present case, the right of way is granted for valuable consideration and the deed granting such right of way is under challenge. Therefore, the judgment would not assist the case of the Appellant.

(iii) The judgment of Madras High Court in ***K. Krishnamurthy*** (supra) is with regard to the inconsistent pleas raised by the Plaintiff therein of ownership and easementary right and the Madras High Court has held that such inconsistent pleas cannot be raised. The judgment therefore has no application to the present case.

(iv) ***Bachhaj Nair*** (supra) deals with conditions required for establishment of easement by prescription. The judgment therefore does not throw any light on the issue of easement being one of the facets of rights attached to the immovable property.

(v) ***Suhrid Singh*** (supra) deals with the issue of difference between seeking a relief of annulment of deed by executant and declaration of that deed as not binding by a non-executant. The judgment therefore has no application to the facts of the present case. Supreme Court has also held that in addition to seeking relief of declaration of deed not being binding on a non-executant, if relief of possession is also sought, the suit needs to be valued under Section 6(v)(c) of the Court Fees Act. However, this observation of the Apex Court cannot be cited in support of an absolute proposition that in every case where one of the reliefs is for possession of land, the valuation can be done only under the provisions of the Section 6(iv)(c).

(vi) ***Tarabai Bhausaheb Deokar*** (supra) is cited in support of the proposition that every suit dealing in land must be valued under

the provisions of Section 6(v) of the Court Fees Act. However, this proposition may be relevant only where the suit is for possession simplicitor. In the present case, the Plaintiffs have sought prayer for avoidance of Deed of Additional Right of Way and therefore the judgment would not assist Plaintiffs' case.

(vii) ***Dilip Khushalchand (Srisrimal) Jain*** (supra) reiterates the difference between valuation of suit filed for avoidance of sale by an executant or non-executant and the judgment therefore will have no application to the present case.

(viii) ***Musunoori Satyanarayana Murti*** (supra) in judgment of Madras High Court which is relied upon by the Single Judge of this Court in *Maruti Gabaji Thopate* and therefore the judgment would not assist the case of Plaintiffs.

(ix) ***Madhaorao*** (supra) dealt with the issue of valuation of suit filed for seeking possession of the land, which is not the only relief sought in the suit. The judgment therefore will have no application to the facts of the present case.

34. After considering the entire conspectus of the matter, I do not see any patent error in the order passed by the City Civil Court accepting the contention of the Defendant that the suit ought to be valued at Rs.1,95,00,000/- . Since such valuation of suit would put the suit beyond the pecuniary jurisdiction of the City Civil Court, the

plaint in the suit has rightly been returned to the Plaintiffs for being presented before this Court.

35. I therefore find the order passed by the City Civil Court to be unexceptionable. Appeal, being devoid of merits, is dismissed without any orders as to costs.

SANDEEP V. MARNE, J.