

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

FIRST APPEAL NO.1128 OF 1995

The Pashmina Co-operative
Housing Society Ltd., a society
registered under the Maharashtra
Co-operative Societies Act having
its registered office at Plot No.3,
Pashmina G.D., Deshmukh Marg,
(Peddar Road), Bombay-400026

...Appellant

Versus

1. Latif Mohamed Hassambhoy of
Bombay Indian Inhabitant residing
at Flat No.53, Maker Tower 'H'
Cuffe Parade, Bombay- 400 005.

2. Fazal Rahim Vali Mahomed Peer
Mohammed a trustee of
Currimbhoy Ebrahim Khoja
Orphanage having office at Baug-
E-Karim Salebhoy Karimji
Barodawalla Marg, Altamount,
Road, Bombay- 400026

3. Gulamali M Hassambhoy of
Bombay Indian Inhabitant residing
at S, Dr. Peter Dias Road, 1st floor,
Bandra, Bombay- 400050

4. Shirin Mohammed Hashambhoy
of Bombay Indian Inhabitant
residing at Flat No.53, H, Tower
Cuffe Parade, G.D. Somani Marg,
Bombay-400 005

5. Arnina Mohamed Hashambhoy
of Bombay Indian Inhabitant
residing at Maker Tower, H, Flat
No.S3, G.D. Somani Marg, Cuffe
Parade, Bombay-400 005.

6. Tabrik A. Currimbhoy; Asian
Flavours and Fragrance Private
Limited, C-21, D'D.A. Sheds,
Okhla Industrial Area, Phase-I,
New Delhi-110 020.

7. Afzal H. Dossani, Nalanda 9,
Flat No.A-1, Oshiwara (Off. Four
Bungalow Andheri (West),
Bombay -400 058

8. Saleem F. Fazalbhoy, Amzel
Automotive Ltd., 225-A-Z,
Industrial Estate, Ganpatrao
Kadam Marg, Lower Parel,
Bombay- 400 013.

9. Tarik A. Currimbhoy, residing
at Bakhtawar Narayan Dabholkar
Road, Bombay- 400 006.

10. Habib H. Datoobhoy, 6
Ramesh Niwas, 51-C, Bhulabai
Desai Road.

11. Subhash Amolakchand Gandhi
of Bombay Indian Inhabitant
residing at-4T, Dr. Gopalrao
Deshmukh Marg, Mumbai-
400026 (Amendment carried out
as per Court's order dated
05/06/2002 passed in CA No.2780

of 2001)

12. M/s. Antilia Commercial Pvt.
Ltd., A Company incorporated
under the Companies Act, 1956
with its Registered Office at 82,
Maker Chamber III, Nariman
point, Mumbai -400 021

13. Naseer Munjee
Residing at -20/21, Spenta
Towers, Forietta Street, Cumballa
Hill, Mumbai- 400 026.

...Respondents

**WITH
INTERIM APPLICATION NO.18684 OF 2022
IN
FIRST APPEAL NO.1128 OF 1995**

Subhash Amolakchand Gandhi

...Applicant

In the matter between
The Pashmina Co-operative Housing
Society Ltd.

...Appellant

Versus

1. Latif Mohamed Hashambhoy and
Ors.

..Respondents.

....

Mr. Rahul Soman with Mr. Amit Mehta, Mr. Vinayak Shukla and Mr. Hitesh Mishra i/b. Mr. Amit Mehta for the Appellant.
Ms Yogita Deshmukh with Ms Jeenal Upadhyay for Respondent No.11.
Mr. Firdosh Pooniwalla with Ms Sangeeta Batheja, Mr. Gaurav Thakur with Mr. Gaurav Gangal i/b. M/s. A.S. Dayal & Associates for Respondent No.12.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED : 09th JANUARY, 2024.

JUDGMENT. :-

1. This is an Appeal under Section 96 of the Civil Procedure Code filed by the Appellant/Defendant challenging the judgment and decree dated 14/09/1995 in S.C. Suit No.3252 of 1981. By the impugned judgment the learned Judge, City Civil Court, Bombay, partly decreed the suit in terms of prayer clauses (b) and (c) and thereby directed the Appellant-Society to demolish RCC columns and structures and construction on plot No.3 bearing Cadastral Survey No.6/669 of Malabar and Kumbala Hill Division, exceeding height of 7 feet from the Altamount road level. The Appellant-Society is also restrained from constructing or attempting to construct any structure exceeding height of 7 feet above the said road level.

2. Habib Mohammad Hoshambhoy was the Plaintiff No.1 and the Appellant was the Defendant No.1 in the suit and shall be hereinafter referred to as the Plaintiff No.1 and the Defendant, respectively. The other Plaintiffs and Defendants were the Trustees of Currimbhoy Ebrahim Khoja Orphanage.

3. The brief facts necessary to decide this appeal are as under:-
By Indenture dated 23/05/1890 Dady Manekji Limji, conveyed a plot of land

admeasuring 38000 sq. yards, known as 'Altamount' to Currimji Alibhai, and retained for himself the remaining plot of land admeasuring 25821 sq. yards known as 'New Bunce' or 'Mount Petit'. The Indenture dated 22/05/1890 contained a covenant, imposing restrictions on construction of walls, fences, structures etc in 'New Bunce' exceeding the height of the compound wall of Altamount, which was 7 feet from the level of existing public road known as Altamount Road, irrespective of any change in the ownership.

4. By successive Indentures dated 21/04/1909, 08/03/1937 and 24/12/1948 the said plot 'New Bunce' was sold to Jehangir Bomanji Petit, Provident Investment Company Ltd. and to Sir Jivajirao Scindia, Maharaja of Gwalior. On or about 02/04/1957 the said land under C.S. No.669 was subdivided into several plots. The Maharaja of Gwalior conveyed Plot No.6 to Currimbhoy Ebrahim Khoja Orphanage Trust and vide Indenture dated 02/04/1957 Plot Nos.1A, 2, 3, 4, 6A and 7 were conveyed in favour of Habib Mohamed Hashambhoy, the deceased Plaintiff No.1. Plot No.6A was reserved for a road and the other plots were conveyed to different persons. The purchasers of various plots entered into a deed of mutual covenant dated 02/04/1957, which also contained a covenant restricting construction

exceeding the height of 7 feet from the road level.

5. The Defendant is the owner of Plot No.3, acquired under Indenture dated 18/02/1968 from M/s. L.K. Marke and Investment Co. Pvt. Ltd. The Plaintiffs claim that Plot No.3 has a structure of basement with three upper floors having height upto 7 feet from the road level. It is the case of the Plaintiffs that the restrictive covenant in Indenture dated 22/05/1890 as well as 02/04/1957 is for the mutual benefit of all the other plots. It is contended that in view of the said restrictive covenant there can be no construction on plot No.3 or any part thereof of a height exceeding 7 feet from the level of Altamount road. The grievance of the Plaintiff was that the Defendant had constructed RCC columns above the existing structure in plot No.3 with an intention of constructing additional floors exceeding height of 7 feet from the road level. It is the case of the Plaintiffs that the said construction, which is in breach of the covenant is likely to cause damage and invade their proprietary rights. The Plaintiffs therefore filed the suit for a declaration that there was restrictive negative covenant on plot No.3. The Plaintiffs also sought demolition of RCC columns and the structure exceeding the height of 7 feet and further to restrain the Defendant

from carrying out any construction exceeding height of 7 feet from the level of Altamount road.

6. The Defendant claimed that the covenant in the original Indenture dated 23/05/1890 was for the benefit of the purchasers of the Altamount property and not for the benefit of the subdivided plots. The Defendant claimed that over the years the property Altamount has been divided in several plots and the identity, ownership and unity of the said property and surrounding setting has totally changed. The Defendant further claimed that the plot No.6A was reserved as a road. The Plaintiff No.1 was required to construct a cement concrete or asphalted road over the said plot and handover the same to the Municipality to be used as a public road. The other plots are parallel to plot No.3 and hence any construction on plot No.3 would not impede use and enjoyment of the said plots in any manner. The Defendant has also averred that high rise construction and multi-storied buildings have been constructed in the adjoining plots. The Defendant claimed that it is entitled to raise additional construction as per the available FSI and as per the sanctioned plan, in accordance with Development Control Rules. The Defendant claimed that restriction is

wholly repugnant to the interest created and absolute transfer of the said plot in its favour. The Defendant also raised a plea of delay and laches.

7. The learned Judge considered the three main issues viz. Issue Nos.3, 4 and 4A, which are as under :-

Issue No.3:- Whether the present Plaintiff No.1 and Defendant Nos.2 to 4 are entitled to the suit plot No.6A as the heirs of the deceased original Plaintiff No.1.

Issue No.4:- Do the Plaintiff prove that the alleged restrictive covenant runs with the land

Issue No.4A:- Do the Plaintiffs prove that the proposed construction on plot No.3 by Defendant would affect the beneficial enjoyment of the Plaintiff in respect of plot No.6 and 6A.

8. As regards issue no.1, the learned Judge upon considering the evidence on record and hearing the respective parties observed that

Habibbhoy, the original purchaser, had retained Plot No.6A as well as Plot Nos.5 and 6 from C.S. No.669, Malabar Kumbala Hill Division. It is held that Habibbhoy died intestate leaving behind Plaintiff No.1a- Latif and Defendant Nos.2 to 4 as his heirs. The learned Judge held that unless the private road under plot No.6A is acquired by BMC, the Plaintiff No.1 and Defendant Nos.2 to 4 are entitled to claim the said road as their private property.

9. As regards issue nos.4 and 4A, the learned Judge observed that the Indenture dated 02/04/1957 stipulates that the earlier covenant in Indenture dated 23/05/1890 imposing restrictions on construction exceeding height of 7 feet in the said plot would continue to remain in force for the benefit of the entire property. The Indenture dated 02/04/1957 also contains a restrictive covenant that no building or structure exceeding height of 7 feet from the road level would be constructed in Plot No.3. The learned Judge therefore held that any owner in respect of the entire property can enforce restrictive covenant against the owner of plot No.3 or any part thereof. Referring to the inspection note, the learned Judge observed that the fact that high rise buildings have come in the surrounding area of Altamount road would not render the covenant inoperative, particularly

considering the fact that the Defendant had not taken steps to get the restrictive covenant modified or discharged. The learned Judge has held that the contract between the parties has its own sanctity and the contract cannot be disturbed unless it is void, invalid or voidable. The learned Judge further observed that construction in breach of the restrictive covenant would affect value of the land or mode of occupation of plot No.6 by or on behalf of the Trust. Based on these findings the learned Judge decreed the suit and ordered demolition of construction exceeding the height of 7 feet and further restrained the Defendant from carrying out any construction in plot No.3, exceeding the height of 7 feet from the road level. Being aggrieved by this judgment, the Defendant has filed this appeal.

10. The Respondent No.11, who has purchased the plot Nos.6A and 7B during the pendency of the appeal has been impleaded as a party pursuant to order dated 05/06/2002 in Civil Application No.2780 of 2001. The Respondent No.11 has also filed an application under Order 41 Rule 27 of the CPC (IA No.18684 of 2022) to produce additional documents viz. (i) Indenture dated 21/10/1959 between Habib Mohamed Hashimbhoy and Tulsidas Gandhi in respect of plot No.3, (ii) Deed of conveyance dated

18/02/1969 between M/s. L.K. Marke and Investment Company and the Defendant -Society, (iii) Deed of conveyance dated 23/10/1997 between the Plaintiff No.1a -Latif and others and the Respondent No.11 in respect of plot No.6A and (iv) Deed of Conveyance dated 18/12/1997 and 19/12/1997 in favour of the Respondent No.11 in respect of plot No.7B, (v) Copy of the plaint in Regular Civil Suit No.234 of 1998, case status of First Appeal (St) No.16210 of 2018, order dated 21/03/2017 in Suit No.3753 of 2012 and status of Writ Petition No.7101 of 2017.

11. Suffice it to say that additional evidence can be adduced in one of the three situations stipulated in Rule 27 (1) of Order 41 of the CPC. In the instant case Respondent No.11 has tried to produce sale deeds in his favour as well as other proceedings initiated by him during the pendency of this appeal. Needless to state that the Respondent No.11, who has purchased the property during the pendency of this appeal cannot set up any independent right or make fresh allegations, which are not based on pleadings or evidence and or fill up the lacunae at the stage of appeal. The proceedings filed by him during the pendency of this appeal, are not relevant to decide the issue involved in the appeal. Furthermore, no explanation has

been offered for not producing the documents at Serial Nos.1 and 2 viz. Sale deeds dated 21/10/1959 and 18/02/1969 before the Trial Court, despite ample opportunity. The said documents are not necessary to pronounce the judgment or any other substantial cause. Under the circumstances, the application for production of additional documents is hereby dismissed.

12. Now coming to the merits of the matter, Mr. Rahul Soman, learned counsel for the Defendant submits that in terms of Section 11 of Transfer of Property Act, there can be no restriction on the enjoyment of property, which has been transferred to the Defendant absolutely, unless for the purpose of securing the beneficial enjoyment of another piece of such property. He submits that Section 40 of the Transfer of Property Act also presupposes existence of a right to restrain the enjoyment in a particular manner for the beneficial enjoyment of his own property. It is submitted that Plot No.6A is a private road and under the deed of mutual covenant dated 02/04/1957 the same was to be constructed and handed over to the Municipal Corporation. He submits that PW1 as well as PW2 were unable to demonstrate that any additional construction on the suit plot would adversely affect the beneficial use of the said plot No. 6A as well as plot No.6.

13. Learned counsel for the Defendant further submits that the restrictive covenant was for the benefit of the purchasers of the Altamount and not for the purchasers of Mount Petit. It is submitted that restricted covenant cannot be enforced as over the years there has been total change in the character of the locality. It is submitted that similar suits to enforce restrictive covenant in respect of plot Nos.4 and 5 have been withdrawn. It is admitted that these plots, which were subjected to similar restrictive covenant are situated towards the southern side of plot No.6 and that the Plaintiffs have not raised objection for construction on plot No.5, which fact amply proves that enforcement of said restrictive covenant is not necessary for beneficial enjoyment of the Plaintiffs land. It is submitted that the learned Judge has not considered the issue of hardship and delay and latches on the part of the Plaintiffs. Learned counsel for the Defendant submits that the suit was barred under Section 164 of the Maharashtra Co-operative Societies Act, for want of notice.

14. Per contra, Ms Yogita Deshmukh, learned counsel for the Plaintiffs submits that the covenant in Indenture dated 23/05/1890 as well

as 02/04/1957, which runs with the land, restricts construction exceeding the height of 7 feet from the level of Altamount road. She submits that the Defendant having purchased Plot No.3 which was subjected to such restriction is bound by such covenants irrespective of change in ownership or change in the locality. Consequently the Defendant is not entitled to construct any structure exceeding the height of 7 feet from the road level and it cannot be heard to say that such breach would not affect value of the land or beneficial use of the land.

15. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

16. It is not in dispute that at the time of sale of the portion of land called Altamount to Currimji Alibhoy vide Indenture dated 23/05/1890, the vendor-Dadi Manekji Limji had retained a portion of land admeasuring 25281 sq. yards known as New Bunce/Petit Mount and interalia agreed not to erect any structure on the said portion called New Bunce exceeding height of western compound wall of Altamount, which was 7 feet high from the level of public road known as Altamount road. The said restriction was for

the benefit of purchaser of the Altamount plot.

17. It is on record that the property New Bunce, which was subjected to the restriction, changed multiple hands. By Indenture dated 24/12/1948, the said property was purchased by Jivajirao Scindia, the Maharaja of Gwalior. The property was subdivided into several plots and was purchased by the original Plaintiff No.1 by sale deed dated 02/04/1957. The Deed dated 02/04/1957 reveals that the plots purchased by the original Plaintiff No.1 were subjected to several restrictive covenants. As regards Plot Nos.1A and 7, strips of land at least 15 feet in width each along the eastern boundary were to be kept open at all times. As regards Plot Nos.3, 4 and 5 the restriction contained in covenant dated 23/05/1890 was continued in as much as restriction was imposed on construction in the said plots exceeding height of 7 feet from the Altamount road running along the eastern boundary. As regards plot No.6A, the same was to be used as a public road. A condition was imposed on the original Plaintiff-Habib Hashambhoy to construct and complete within six months at his own expense a 40 feet wide cement concrete or asphalted road covering the entire area of the said plot, after demolishing portion of the bungalow situated on the said plot and to

take necessary steps to handover the said road to the Corporation to be used as a public road. Till such time that the road was handed over to the Corporation, the original Plaintiff was required to repair and maintain the same and the right was conferred on the owners and occupiers of the entire property or any part thereof to use the said road.

18. The Defendant has purchased the Plot No.3 from M/s. L.K. Marke Investments Co. Ltd. As noted above, the said plot was subjected to restrictive covenant viz. restriction on construction exceeding 7 feet above the level of Altamount road running along the eastern boundary of the said plot. The Plaintiff claims that he is the owner of plot No.6A and the Plaintiff Nos.3 to 5 and Defendant Nos.5 to 7 are the Trustees of Currimbhoy Ebrahim Khoja Orphanage located in plot No.6. The grievance of the plaintiff is that the Defendant has commenced construction in breach of the said covenant and has sought demolition of the said construction by enforcing the said negative covenant in Indentures dated 23/05/1890 and 02/04/1957.

19. In the aforesaid facts and circumstances, the question is whether

the Plaintiff, who claims to be the owner of plot No.6A could enforce the negative covenant and in enforcement of the negative covenant the mandatory injunction could be issued directing the Defendant to demolish the RCC columns and the structure exceeding the height of 7 feet and above the level of the Altamount road.

20. Before considering the evidence on record, it would be advantageous to refer to Sections 11 and 40 of the Transfer of Property Act, 1882, which are relevant to decide the issue, which reads thus:-

Section 11 -Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by her in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Where any such direction is made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of

such property, nothing in this section shall be deemed to affect the right, which the transferror may have to enforce such direction or any remedy which he may have in respect of breach thereof.”

Section 40 -*Where, for the more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property, or*

Or of obligation annexed to ownership, but not amounting to interest or easement.- Where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon,

such right or obligation may be enforced against a

transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, not against such property in his hands.”

21. Section 11 postulates that where property has passed absolutely, any restriction on the enjoyment of property is void and unenforceable. Section 11 rests on a principle that when property is transferred absolutely it must be done with all its legal incidents. The transferee, who has relinquished his entire interest in the property cannot impose any condition upon the transferee restraining his enjoyment or disposition of the property. Such condition, which deprives the property of its legal incidents is repugnant to law and will be disregarded. The second part of Section 11 however provides for an exception to the general rule and permits restriction on the enjoyment of property transferred, if such restriction is for the beneficial enjoyment of the adjoining property of the transferror.

22. The first part of Section 40 of the Transfer of Property Act deals

with enforcement of restrictive and negative covenant by a third party for the more beneficial enjoyment of his own immovable property. The second part of Section 40 deals with obligation annexed to the ownership of immovable property, arising out of contract, which do not amount to interest in the property or easement therein. Nevertheless, the obligation can be enforced against the transferee unless he is a transferee for value without notice.

23. It is thus evident that restriction on the enjoyment of the property transferred absolutely can only be imposed for the beneficial enjoyment of another piece of such property. Similarly, Section 40 presupposes existence of a right to restrain the enjoyment in a particular manner for the beneficial enjoyment of his own property. In such circumstances, the only question for consideration is whether the proposed construction on Plot No.3 would affect the beneficial enjoyment of the Plaintiffs in respect of Plot No.6 and 6A.

24. The plaint and the evidence of the Plaintiff proceeds on the basis that plot No.6A is owned by the Plaintiff. PW1-Latif has admitted in his

cross examination that the case set up by Habibhoy was restricted to plot No.6A. The very Indenture dated 02/04/1957, which contains the restrictive negative covenant sought to be enforced, stipulates that the plot No.6A was to be used as a public road. The said Deed casts obligation on Habib Hashombhoy to construct and complete construction of 40 feet wide concrete or asphalted road covering the entire plot No.6A within a period of six months and handover the same to the Corporation to be used as a public road. The said Deed further stipulates that the owners and occupiers of the entire property, their nominees, servants, agents, visitors and licensees are entitled to use the said road at all time either as a motorable road or otherwise.

25. PW1 has admitted in his cross examination that Plot No.6A serves as a road for all plots in C.S. No.669. He has admitted that from the year 1959 till date plot No.6A is used as a road by the owners /occupiers of all plots including plot No.3. He has admitted that no construction is permissible on Plot No.6A which abuts eastern side of plot No.3. He has stated that he cannot state as to how additional construction of plot No.3 will affect beneficial use and enjoyment of plot No.6A. He has admitted that

plot No.6A being a road, there is no question of any FSI being affected.

26. The terms of the Indenture dated 02/04/1957 as well as the oral evidence of PW1 amply proves that the Plaintiff does not have exclusive right over Plot No.6A. The said plot cannot be used for any purpose other than the road. Hence, any construction in plot No.3 exceeding height of 7 feet from road level would not in any manner affect beneficial use of this plot as a road.

27. It is sought to be contended that construction on Plot No.3 in breach of negative covenant would affect beneficial use of Plot No.6 which is sold to Currimbhoy Orphanage. It is pertinent to note that PW2-Fazal, who is one of the Trustees of Currimbhoy Orphanage has deposed that that plot No.3 is on the south west side of plot No.6 being orphanage property. He claims that air and light will be obstructed by the subject construction in plot No.3. It is to be noted that no such plea was raised in the plaint and such evidence which is beyond pleadings cannot be looked into. Be that as it may, this witness has admitted that orphanage property receives natural light from all sides. He was unable to state whether construction of 10 feet high

building in plot No.3 would obstruct a natural light to orphanage. PW2 has admitted that there is boundary wall between plot No.3 and plot No.6A which is about 8 to 10 feet in height. He has also admitted that there is considerable distance between plot No.6 and plot No.3. The evidence of this witness thus does not sufficiently prove that the construction in plot No.3 is likely to affect beneficial use of plot No.6 or 6A.

28. PW1 and PW2 have admitted that plot Nos.4 and 5 were also subjected to similar restrictions. They have admitted that suit to enforce covenant in respect of plot No.4 was withdrawn. They have admitted that construction exceeding 7 feet from the road level has come up in plot No.4. It is also in evidence that construction above 7 feet high from the road level has come up in Plot No.5 without there being any objection from the Trust.

29. The evidence on record thus amply proves that construction exceeding height of 7 feet has come up in plot Nos.4 and 5, which were also subjected to similar restrictions. It is also on record that plot Nos.3, 4, 5 and 6 are in descending level with the plot No.6 at the highest point and the plot No.3 at the lowest level. The Plaintiff and the Trustees having allowed

construction in plot Nos.4 and 5 in breach of the restrictive covenant cannot now be heard to say that the construction in plot No.3 would affect beneficial use of plot No.6.

30. The evidence of these two witnesses also indicate that Plot No.7, which was retained by Habibbhoy has been acquired by telephone exchange and remaining part of plot No.6 has been acquired by BEST. PW2 has admitted that construction has come up in the portion of land acquired by BEST. He has admitted that number of high rise buildings have come up on the western side of the orphanage building. He has also admitted that several high rise buildings have come up on the southern side of the orphanage, across the Pedder road upto Breach Candy sea face. He has also admitted that number of high rise buildings have also come up towards western side of the orphanage. The evidence of DW 2 -Ram Radhakrishna, an Architect examined by the Defendant also reveals that there are several high rise buildings towards the southern side of plot No.3. The height of Kenilworth building, which is towards the western side of plot No.3 is about 30 to 40 feet from the level of Altamount road. He has stated that there is a multi-storied building on plot No.2, which is also at a higher level.

31. The evidence on record thus reveals that over the years several high rise buildings have come in the vicinity. The inspection note referred to by the learned Judge also confirms that several multi-storied buildings have come up in the surrounding area. It is thus evident that there is total change in the character of the locality. Hence, the restriction is deemed obsolete as a result of changes in the character of the property or the neighbourhood.

32. It need not be emphasized that mandatory injunction, which is a discretionary and equitable relief can be granted under Section 39 of the Specific Relief Act to prevent the breach of an obligation. In the instant case, learned Judge has granted the relief of mandatory and perpetual injunction purportedly on the basis of breach of an obligation in the form of negative restrictive covenant in indentures dated 23.05.1890 and 2.4.1957. It is true that plot no.3 is subjected to negative restrictive covenant. Suffice it to say that such restriction or obligation is not absolute, but has to result in impediment of the beneficial use or enjoyment of the land. In the instant case, the Defendant, who is the absolute owner of the plot No.3 had

undertaken construction in his plot as per the plans sanctioned by the Corporation. The Plaintiffs have failed to prove that the construction infringes their rights or impedes the beneficial use or enjoyment of their land. It is also to be noted that the Plaintiffs had approached the Court after considerable delay. Furthermore, the Plaintiff No.1 having failed to comply with the positive covenant under the Indenture dated 02/04/1957, viz. construction of road in Plot No.6A and handing over the same to the Corporation, cannot claim equity in his favour. In such fact situation the learned Judge has grossly erred in granting mandatory and perpetual injunction in favour of the Plaintiff, thereby depriving the Defendants from enjoying their right to the property with all its legal incidents. Hence, the impugned judgment cannot be sustained.

33. Under the circumstances and in view of discussion supra, the Appeal is allowed. The impugned judgment and decree dated 14/09/1995 in S.C. Suit No.3252 of 1981 is set aside. Consequently, the suit stands dismissed with no order as to costs.

34. Learned counsel for the Respondent states that the Plaintiffs wish

to challenge the judgment before the Hon'ble Supreme Court. In the light of the said statement, the relief of perpetual injunction in terms of prayer clause (c) which was operating in favour of the Plaintiffs is extended for a period of four weeks.

(SMT. ANUJA PRABHUDESSAI, J.)