

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 15436 OF 2023

Salasar Estate Developers LLP

.. Petitioner

Versus

Rufina Walter Gomes & Ors.

.. Respondents

WITH

WRIT PETITION NO. 1124 OF 2024

Martha Joseph Gomes
(since deceased) through Legal Heirs
Frankie Josesph Gomes & Ors.

.. Petitioners

Versus

Walter Francis Gomes
(since deceased) through Legal Heirs
Rufina Walter Gomes & Ors.

.. Respondents

.....

- Mr. Virag Tulzapurkar, Sr. Advocate a/w Mr. Aditya Shiralkar, Ms. Disha Shetty and Mr. Rahul Deshpande i/by Wadia Ghandy & Co for Petitioner in WP/15436/2023
- Mr. Sandesh D. Patil a/w Mr. Chintan Y. Shah & Ms. Divya Pawar for Petitioners in WP/1124/2024
- Mr. Sandesh Deshpande for Respondents in both Writ Petitions

CORAM : MILIND N. JADHAV, J.

DATE : FEBRUARY 20, 2024

ORAL JUDGMENT:

1. Heard Mr. Tulzapurkar, learned Senior Advocate along with Mr. Shiralkar, learned Advocate for Petitioners in WP/15436/2023, Mr. Patil, learned Advocate for Petitioners in WP/1124/2024 & Mr. Deshpande, learned Advocate for Respondents in both Writ Petitions. Both Petitions challenge the same set of

common orders and are heard together and disposed of by this common judgment finally by consent of parties.

2. Writ Petition No. 15436/2023 is filed by Salasar Estate Developers LLP who is Defendant No. 2 in the Suit filed by Plaintiffs which is Regular Civil Suit No. 954/2016. Writ Petition No. 1124/2024 is filed by heirs of one Martha Joseph Gomes who are arrayed against Defendant No. 1 in the Suit proceedings. Reliefs prayed for in the Suit are at page Nos. 217-220 of the Writ Petition wherein Suit plaint has been annexed. Defendant No. 4 is supporting the Plaintiffs in the Trial Court. Suit proceeds on the basis that suit property being New Survey No. 180, Hissa No. 4, area admeasuring 7850 sq. mtrs. Situated at Village Navghar, Bhayandar (E), Taluka & District Thane belong to the Plaintiffs and Defendant No. 4. Suit is filed for declaration, partition, demarcation, possession and permanent injunction by Plaintiffs. Paragraph No. 2 of the Suit plaint proceeds on the basis of a family tree wherein Plaintiffs claim to be successors-in-title of one Shelya Pavlu Gomes who expired intestate according to Plaintiffs. Cause of action stated in Suit plaint is to have occurred in the month of July 2014 when Plaintiff No. 2 claims to have visited the suit property and learnt that construction was started on the suit property. Suit is therefore filed in the year 2016. Just before filing of Suit proceedings, Plaintiffs had approached the SDO for

mutation of their names in the Revenue Record pertaining to the Suit property. They were directed to approach the Competent Authority. According to Plaintiffs Mutation Entry No. 1932 was mutated fraudulently by misrepresentation before the Revenue Officer, since as per Mutation Entry No. 1934, after demise of the late Pavlu Shelya Gomes, Plaintiffs' names were mutated by Mutation Entry No. 1934, but the same course was not followed while mutating their names qua Mutation Entry No. 1932 and therefore a fraud was committed. Plaintiffs would aver that Mutation Entry No. 1932 was therefore challenged by them before the Competent Authority in RTS proceedings unsuccessfully before the Competent Authorities and against that dismissal, statutory appeal is pending. It needs to be stated that this Mutation Entry is of the year 1965 and it was challenged by Plaintiffs in the year 2016. It is claimed by Plaintiffs that suit property is ancestral property belonging to Shelya Pavlu Gomes and Plaintiffs are the only legal heirs entitled to the same. Rather Plaintiffs have virtually disowned the two other legal heirs / branches of Shelya Pavlu Gomes. Such is the sum and substance of the Suit plaint.

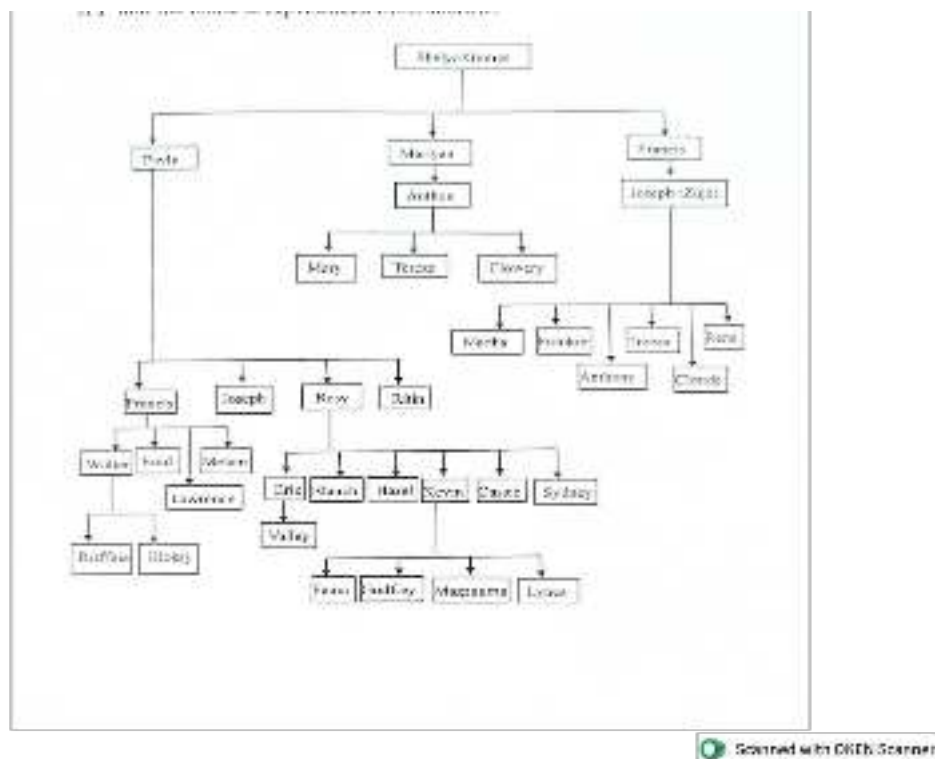
3. Exh. 5 is filed by Plaintiffs which is allowed by order dated 10.06.2019. In Misc. Civil Appeal proceedings, learned Appellate Court by order dated 22.06.2023 dismissed the

Miscellaneous Civil Appeal by concluding that Plaintiffs being legal heirs of Pavlu Shelya Gomes have right, title and interest in the Suit property and have proved *prima facie* case. Both orders below Exh. 5 are challenged before me in two separate Writ Petitions which are referred to herein above since injunction is placed upon Defendant No.2 who is developing the suit property.

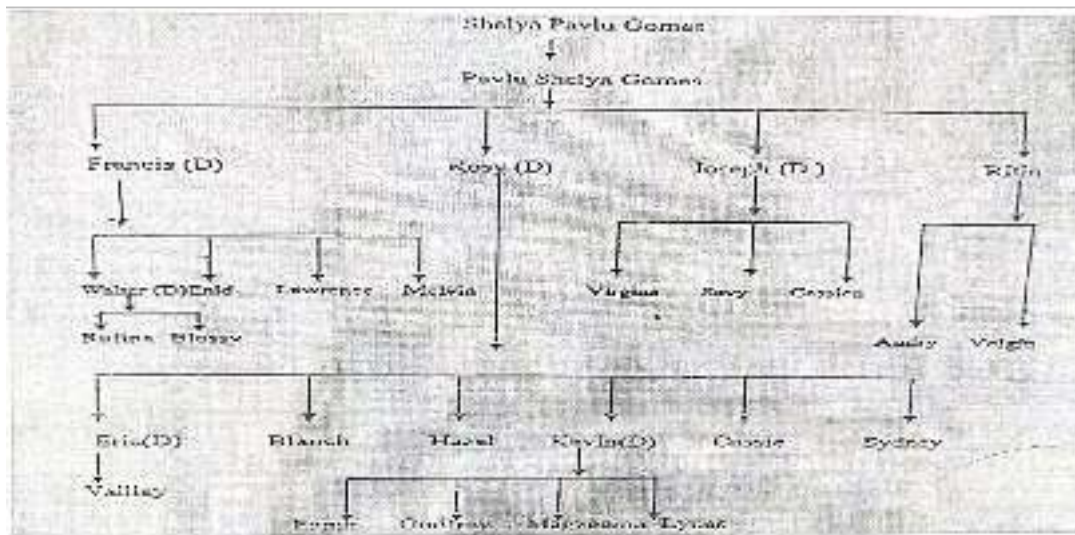
4. While maintaining the challenge, the facts pleaded by Defendant No. 2 – Developer and Defendant No. 1 – heirs of Shelya Pavlu Gomes are extremely shocking. In the first instance, the family tree referred to and relied upon by the Plaintiffs in paragraph No. 2 of the Suit plaint is challenged *prima facie*. According to Petitioners, Shelya Pavlu Gomes was survived by three sons i.e. Pavlu, Mariyan and Francis.

5. Mr. Tulzapurkar, learned Senior Advocate along with Mr. Shiralkar, learned Advocate appearing for Petitioner – Developer (Defendant No. 2) would submit that the reliefs, rather substantive reliefs prayed for in the Suit plaint are to the complete exclusion of two sons i.e. Mariyan and Francis of Shelya Pavlu Gomes. He would submit that Mariyan's branch is completely excluded whereas right, title and entitlement of one of the properties received by Francis' branch is the suit property allegedly claimed by Plaintiffs as their own property. To understand this position, the family tree produced by

Petitioner and which is at page No. 17 of the Writ Petition is delineated below for ease and reference:-



5.1. As compared to above, the Plaintiffs have approached the Court with a restricted family tree alleging that Shelya Pavlu Gomes had only one issue i.e. Pavlu and have excluded the branch of Mariyan completely and have sought entitlement to one of the property i.e. Suit property which went to the share of Francis after almost more than 90 years. The family tree of Plaintiffs is reproduced below:-



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5.2. From the above, it is seen that Plaintiffs' claim is for one specific property received by the branch of Francis Shelya Gomes, and surprisingly none of the other properties received. Plaintiffs do not deny the fact that Francis Shelya Gomes is the legal heir and son of deceased Shelya Pavlu Gomes. This is so because without seeking partition, Plaintiffs are seeking entitlement to one property only. Though while making submissions, Mr. Deshpande has clearly denied that Plaintiffs deny and disown Francis or even for that matter Mariyan as legal heirs and sons of Shelya Pavlu Gomes, that Plaintiffs submission of Mr. Deshpande would not hold any substance because it is ancestral in nature and a title claim made too late in the day and for

obvious reasons which are delineated by me herein under since the suit property is being developed by Defendant No.2 after receiving the same from Francis' branch. As referred to herein above, the contentious Mutation Entry concerning the suit property is of the year 1965 and to be precise, it was effected on 28.05.1965. Admittedly, no steps have been taken thereafter until challenging the Mutation entry in 2016 and filing of the present Suit proceedings in the year 2016 for the very first time. From the above, it is clearly seen and ascertained, at least *prima facie*, that if Plaintiffs claim ownership and title to the Suit property, then there was no reason for them to remain silent for 59 years with respect to the Mutation Entry pertaining to the Suit property as also possession being with Francis's successors in title. No owner can remain silent for such a long period. *Prima facie*, Plaintiffs have deliberately misled the Trial Court by not disclosing the true and correct family tree of the deceased Shelya Pavlu Gomes since partition of his properties was effected to all three branches in 1932.

6. Pleadings are completed in the present Writ Petitions as also pleadings are completed by the parties before the learned Trial Court in so far as Exh. 5 is concerned. In the present Writ Petitions, when I called upon Mr. Deshpande whether he would like to file any affidavit-in-reply to the Writ Petitions, he would submit after taking instructions, answering / contesting Respondents would not like to

file any affidavit-in-reply and would rely upon the pleadings before the Trial Court which are part of the present Writ Petitions.

7. Mr. Tulzapurkar would submit that during the lifetime of Shelya Pavlu Gomes in order to maintain harmony within the family, effective family arrangement and settlement was effected whereby his properties were distributed to the three branches during his lifetime i.e. the branch headed by Pavlu Shelya Gomes (Plaintiff's branch), the branch headed by Mariyan Shelya Gomes and the branch headed by Francis Shelya Gomes. He would submit that this family arrangement was duly reflected in the Revenue Record in respect of having names of the three heads mutated in the Revenue Record to the exclusion of the others and was accepted by all family members of the three branches since then. In order to fortify his aforesaid submission, Mr. Tulzapurkar would submit that Pavlu Shelya Gomes received immovable properties viz., Survey Nos. 31(P), 60/3, 336/3, 336/4, 368/9 (part), 337/2, 337/16, 343/1, 335/11 and 369/27 which correspond to Mutation Entry No. 1934 at Exh. C, page No. 96 of the Writ Petition. Next he would submit that Mariyan's branch received immovable properties viz., Survey Nos. 543/1, 542/1, 550/4, 109 and 110 as reflected in Mutation entries of family members which are at Exh. D to Exh. H, page Nos. 97 to 116 of the Writ Petition. Finally he would submit that Francis's branch duly represented by his son Joseph

(Zuje) (since Francis expired in 1919) received immovable properties, viz., Survey Nos. 299/4, 368/9 (pt) and Survey No. 299/4 which correspond to Mutation Entry No. 1932 of 1965 and Mutation Entry No. 859 which are at Exh. H, page No. 116 of the Writ Petition. I have perused the aforesaid Mutation Entries and *prima facie* ascertained the fact that the three branches were recipient of the properties.

7.1. During the course of his submissions, Mr. Tulzapurkar would submit that in one RCS No. 983 of 1988 was filed by and between heirs of Pavlu Shelya Gomes seeking *inter se* partition of the properties received by them amongst themselves. In those proceedings, the aforementioned lands coming to the share of Pavlu Shelya Gomes are clearly reflected. The Suit property is not reflected. As also in the Will of Rosy Rebello (legal heir) whose name is found in the branch of Pavlu Shelya Gomes. He has drawn my attention to the Will of Rosy Rebello which is at page No. 648 of the Petition as also the decree passed in RCS No. 983 of 1988 which is at page No. 655 of the Petition. This documentary evidence ought to have been considered by any Court for forming a *prima facie* opinion and further he would submit that Mutation Entry of the Suit property has been acted upon by parties for more than 90 years and therefore cause of action as stated in the Suit plaint *qua* the Suit property is untenable, rather it amounts to gross suppression of material facts by Plaintiffs.

7.2. He would submit that the legal heirs of Francis's branch i.e. Martha and Respondent Nos. 12 to 23 on 24.02.2012 issued public notice in respect of alienation of the suit property and called for appropriate objections. By virtue of the family arrangement this suit property came to Francis's branch since 1932. His successors in title decided to develop the suit property alongwith Defendant No. 2 i.e. Petitioner. This public notice is at Exh. K, page No. 135 of the Petition. No objections were received whatsoever. He would submit that on 24.08.2012, legal heirs of Francis's branch executed registered Development Agreement in favour of the Petitioner and handed over vacant and peaceful possession of the suit property to the Petitioner. Thereafter the suit property was converted to non-agricultural use by following the due process of law wherein objections were invited but once again noobjections were received or rather taken by the Plaintiffs. After grant of approvals and statutory permissions by the Competent Authorities concerned, development on the suit property / land was commenced / carried out by Petitioner. At this time Plaintiffs' 4th generation successors in title to Shelya Pavlu Gomes through Pavlu's branch took objection for the first time by challenging the Mutation entry 1932 and then filing the Suit, claiming that they are entitled to the suit property to the exclusion of Francis's branch and disowning their own blood relations through Shelya Pavlu Gomes.

He would submit that substantial progress of development has already been undertaken, namely Phase 1 comprising of a building known as “Salasar Woods” of ground plus 15 upper floors and Phase 2 comprising of a building known as “Salasar Greens” of ground plus 7 upper floors have been almost completed. That apart all units in Phase 1 have been duly sold and allotted to various third party purchasers save and except the premises allotted to the legal heirs of Francis’s branch as per the terms and conditions of the Development Agreement.

7.3. Mr. Tulzapurkar makes one more critical submission i.e. the Plaintiffs and Respondent No. 11 who are the contesting parties / Respondents herein all reside in the vicinity of the suit property and were always fully aware of all development activities on the suit property in view of the widespread advertisement of the project being carried out in Phase 1 and Phase 2 on the suit property and therefore it cannot lie in the mouth of Plaintiffs to contend that only in 2014 for the first time they realized that the suit property was built upon. Next he would submit that under the provisions of Section 157 of the MLRC 1966, there is a presumption of long standing certified revenue record entries / mutation entries evidencing from the family arrangement which has been completely ignored by both learned Courts while passing the twin Exh. 5 orders. That apart he would submit that in the

order of the Appellate Court in MCA proceedings, a fundamental error has been committed in appreciating and treating Defendant No. 1 i.e. Respondent Nos. 1 to 23 who are legal heirs of Francis Shelya Gomes as the heirs of Joseph Pavlu Gomes which is *prima facie* incorrect on the face of the record when one considers the family tree reproduced by Petitioner. He would submit that the branch of Pavlu Shelya Gomes has already exercised their right under the family arrangement and partition, they have received properties from Shelya Pavlu Gomes and have infact sold those properties coming to their share. He would submit that the entire cause of action in claiming that the suit property belongs to Shelya Gomes and through him to Pavlu being his only son cannot be countenanced and rather should not be countenanced in view of clear suppression of facts by the Plaintiffs.

8. Mr. Patil, learned Advocate for Petitioners in Writ Petition No. 1124 of 2024 adopts the submissions advanced by Mr. Tulzapurkar and for the sake of brevity the same are not reproduced. Both Mr. Tulzapurkar and Mr. Patil seek setting aside of the twin Exh. 5 orders passed by the Trial Court and the Appellate Court.

9. *PER CONTRA*, Mr. Deshpande in response to the submissions made by Mr. Tulzapurkar would submit that Plaintiffs vehemently deny the existence of either Francis's branch or Mariyan's branch being legal heirs of Shelya Pavlu Gomes and would contend

that Shelya Pavlu Gomes was survived by his only son named Pavlu. If this is the contention of the answering Respondents that deceased Shelya Pavlu Gomes was survived by his son Pavlu only, then there is no explanation offered by Plaintiffs in the Suit plaint nor in any pleadings to the longstanding Mutation Entry No. 1932 in respect of the suit property in the name of Francis's branch. This itself is *prima facie* material required to be considered by the learned Trial Court which I find has not been considered at all. Next obvious *prima facie* case for consideration would be possession of the suit property. It is ironical and equally shocking that learned Trial Court would accept Plaintiffs' case at face value that they were not aware of the suit property. Addresses of the Plaintiffs which are mentioned in the cause title of RCS No. 954/2016 are all of Bhayander (W) save and except Smt. Audry whose address is of Kalina, Santacruz. The suit plaint is verified by Mrs. Cassie B. Gil who is Plaintiff No. 2. Be that as it may, the principal question which still remained unanswered and that is if the Plaintiffs claim that the suit property is their property, then what steps did they take for claiming the suit property since 1932. There is virtually no answer to this question.

10. Order passed below Exh. 5 concludes that Plaintiffs are entitled to temporary injunction on the basis of Plaintiffs having proved a *prima facie* case. This is an incorrect finding made and given

on the basis of wrongful appreciation of *prima facie* evidence. To say that a trial will determine the question will require strong *prima facie* evidence in favour of Plaintiffs. There is infact none. The fact that Plaintiffs challenged Mutation entry No. 1932 pertaining to suit property and failed in Revenue proceedings and their Appeal is pending is one more incident which *prima facie* goes against the Plaintiffs. The repercussion of passing an order of embargo against Defendant No. 2 in the facts of the present case which are delineated herein above by me are extremely severe and prejudicial. The Trial Court holds is that still construction is not completed and further third party rights are not created and hence it is better at this stage to restrain Defendant No. 2 from carrying out further construction and therefore the restraint order is passed. What I find shocking in the impugned order is that the case of the Plaintiffs has been accepted as gospel truth by the learned Trial Court when there is no *prima facie* evidence in their favour at all. In so far as balance of convenience is concerned, both Courts have not considered the circumstances and case of the Petitioner / Defendant No.2 before the Trial Court at all. The entire order passed below Exh. 5 revolves around the family of Shelya Pavlu Gomes and all that it states that all questions can only be decided after taking evidence to that effect at a later stage and therefore Plaintiffs have succeeded in showing existence of *prima facie*

case. In respect of long standing revenue entries, learned Trial Court holds that such revenue revenue entries are admittedly meant for fiscal purposes only and it would not be appropriate to point out ownership on that basis. But then what is the *prima facie* evidence proved by Plaintiffs to accept them as owners of the suit property. There is none except their pleadings. What is critical is that the learned Trial Court completely disregards the fact that the concerned Mutation Entry is a long standing Mutation Entry having remained undisturbed and possession having been with Francis's branch. The Revenue entries derivating the suit property to Francis's branch comes from Shelya Pavlu Gomes, which is also disregarded and ignored. There is one clear finding which the learned Trial Court has in fact given on a *prima facie* assessment of the case which I find in paragraph No. 10 of the Exh. 5 order and that is after perusing the written statement of Defendant No. 1, suit property *prima facie* seems to be an ancestral property as neither the Plaintiffs have claimed it to be self acquired property nor it is so claimed by Defendant No. 1. The ancestor is none other than Shelya Pavlu Gomes. The order of restraint to Petitioner to temporarily restrain from constructing any further in fact is completely disproportionate to the facts and circumstances in the present case. Not only this the Appellate order passed in MCA proceedings despite considering the aforementioned

twin issues of long standing Mutation Entry as also the Development Agreement with Defendant No. 2, merely on the basis of the pending challenge by Plaintiffs to the Mutation Entry has upheld the order passed below Exh. 5. Once again the Appellate Court without showing any due consideration to the aforementioned facts has held that the revenue record is made for fiscal purpose and does not confer any title. In that case all that the Court has to see is who has the possession. In this case possession of the suit property has been with Francis's branch since long. The very fact that the suit property was not included in proceedings in RCS No. 983 of 1988 is considered by the Appellate Court in paragraph No. 23 of its order and it holds that merely because the suit property was not part of the suit proceedings it cannot be said that Plaintiffs have no right in the suit property. This finding *prima facie* cannot be accepted and countenanced in view of the fact that RCS No. 983 of 1988 was filed for governing *inter se* rights of properties coming to Pavlu's branch and his successors-in-title (including Plaintiffs) and therefore it cannot be construed that the suit property belonged to Pavlu's branch. Had it been so, the suit property should have formed part of the said Suit. It did not. It is clearly and *prima facie* established that the suit property enured to the branch of Francis Shelya Gomes and not that of Pavlu Shelya Gomes. From all the above observations, findings and reasons, I am of the clear

opinion that *prima facie* the Plaintiffs have not approached the trial Court with clean hands. They are guilty of *suppressio veri and suggestio falsi* in disowning their own blood relations and claiming title to their exclusion of one property which does not belong to them at all. Be that as it may, both the orders passed below Exh. 5 are clearly unsustainable in law in the above facts. Both the orders dated 10.06.2019 and 22.06.2023 are therefore quashed and set aside. Balance of convenience is clearly in faovur of the Defendant No. 2 who is the Petitioner before me and Francis's branch. I clarify that these are my *prima facie* observations on the basis of the pleadings before me. Both the Writ Petitions succeed and stand allowed. The embargo on Petitioner in WP No. 15436/2023, if any, placed by virtue of the above two impugned orders stands immediately vacated. Considering that the Suit is filed in the year 2016, I direct the learned Trial Court to determine the same as expeditiously as possible and in any event within a period of 12 months from today. All parties shall appear before the learned Trial Court on Monday, 26.02.2024 at 10:30 a.m. for direction. Parties are directed not to take unnecessary adjournments in the Trial Court and the Trial Court shall not grant adjournments unless they are absolutely necessary. All contentions of the parties are kept open in the Suit proceedings. It is clarified that there is no embargo or restraint on Defendant No. 2 i.e. Petitioner

herein in completing and carrying out the construction on the suit property.

11. Before concluding, I am extremely disappointed with the manner in which the Plaintiffs have approached the learned Trial Court in the present Suit proceedings as also having argued their case on the ground of exclusion of Francis's branch before me. Pleadings of parties cannot be accepted as truth. They need to be supported by cogent evidence which would *prima facie* prove the pleadings. In the Plaintiffs' case, there is none. Longstanding Mutation Entries which have been on revenue record are sought to be challenged after decades and Suit proceedings are filed in the year 2016. Equally possession has always been with Francis's branch. Such pleadings are made so that reliefs prayed for in the Suit proceedings are granted. *Prima facie*, I am of the clear opinion that the Suit proceedings is nothing but an extortionist attempt by the Plaintiffs in the facts and circumstances of the present case and the observations and findings herein above. The Plaintiffs' i.e. successors in title of Pavlu's branch have received their properties, sold them off and now are targeting one particular property only of Francis's branch which is currently being developed. This coupled with the fact that the longstanding Mutation entry is unsuccessfully challenged by them just before filing

the Suit once development has begun, clearly shows the malafide intention and ulterior motive of the Plaintiffs. In view of the fact that the twin orders of injunction have been in operation since 10.06.2019, the Petitioner and Francis's branch have clearly suffered. Hence, Respondents i.e. Plaintiffs represented by Mr. Deshpande before me are directed to pay exemplary costs of Rs. 50,000/- to the Kirtikar Law Library, High Court, Mumbai for their such conduct and approach within a period of two weeks from today. This entire order is dictated in open Court. Copy of receipt of payment of costs shall be placed before this Court for compliance.

12. Both Writ Petition Nos. 15436 of 2023 and 1124 of 2024 are allowed and disposed.

13. Though both the Petitions are disposed, place the same on board on **5th March, 2024** for compliance in respect of payment of costs.

Amberkar

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[MILIND N. JADHAV, J.]