IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INTERIM APPLICATION NO. 2366 OF 2024
IN
COMMERCIAL SUIT NO. 188 OF 2021

Shameera Vijay Shetty & Ors ...Applicants

In The Matter Between

M/s. Shubh Enterprises & Anr ...Plaintiffs

Versus

M/s. P.D. Associates ...Defendant

Mr. Ashish Kamat, Senior Advocate, *a/w Abhishek Kothari, Saurabh Utangale, i/b Utangale & Co., for the Applicants.*

Mr. Rohan Sawant, *a/w Shubham Mishra, Krishna Shah, Aagam Mehta, i/b Shah & Furia Associates, for Plaintiffs.*

Mr. Shanay Shah, *a/w Duj Jain, Rajan Yadav, Yash Jalandria, i/b Rajan Yadav, for Defendant Nos. 3 & 4.*

CORAM : SOMASEKHAR SUNDARESAN, J.

DATE : December 24, 2025

Judgement:

1. This Interim Application No. 2366 of 2024 ("***Interim Application***") essentially seeks restoration of Commercial Suit No.188 of 2021 ("***Suit***") to the roster of this Court by declaring that the approved Consent Terms dated September 14, 2021 ("***Consent Decree***") are *null, void* and not binding on the Applicants, Mrs. Shameera Vijay Shetty and

Mr. Irshad Vaziralli (for convenience, collectively "***Owners***"). The Consent Decree was between the parties to the Suit i.e. the Original Plaintiffs, M/s. Shubh Enterprises and Mr. Uday Surve (for convenience, collectively "***Developer***") and the Defendant, M/s. P.D. Associates ("***New Developer***").

2. The Suit came to be dismissed by the Consent Decree, which, essentially, dealt with disputes over the redevelopment to be carried out on buildings located on Plot No.88 of TPS IV, Cadastral Survey No.278 of Mahim Division, Mumbai 400 028 admeasuring 428.93 square metres ("***Plot No.88***") situated at the junction of N.C. Kelkar and R.K. Vaidya Marg, Dadar West, Mumbai. A building known as Mohsin Building stands on Plot No. 88. Plot No. 88 was owned by Mr. Mohsin Vaziralli along with his brother Mr. Rajab Vaziralli. The Owners are the offspring of Mr. Mohsin Vaziralli and became owners of Plot No.88.

3. The adjoining plot, namely, Plot No.87 ("***Plot No.87***") was also owned by the same owners. By a registered Sale Deed dated December 2, 2006, Plot No.87 along with the tenanted building standing thereon, was transferred and conveyed to the Developer. As regards Plot No.88, the Owners and the Developer entered into a registered Development Agreement dated February 28, 2009 ("***Development Agreement***"),

conferring development rights on amalgamated land comprising Plot No. 87 and Plot No. 88 ("***Amalgamated Land***"), in favour of the Developer, with the Owners having certain entitlements to the developed premises that would be constructed pursuant to the Development Agreement. The requisite permission for the redevelopment of the Amalgamated Land from Maharashtra Housing and Area Development Authority ("***MHADA***") was obtained on February 8, 2008.

4. Eventually, the Developer engaged with the New Developer to execute a Memorandum of Understanding dated June 8, 2021 ("***2021 MOU***") for redevelopment of the Amalgamated Land. Disputes and differences arose between the Developer and the New Developer under the 2021 MOU, and these form the subject matter of the Suit, which was disposed of in terms of the Consent Decree. The Owners were not a party to the Suit.

5. Under the Development Agreement, various monies were payable by the Developer to the tenants of the buildings standing on the Amalgamated Land. In terms of the 2021 MOU, the New Developer committed to the Developer to make such payment to the tenants. Default in making such payments led to the Developer seeking to

terminate the 2021 MOU. This led to the Suit, which was disposed of by the Consent Decree, under which, the Developer and the New Developer agreed, declared and confirmed that the 2021 MOU was true and correct and that they would not only abide by its terms and conditions but would also ensure that the Development Agreement was always complied with. The Developer confirmed that as required in the 2021 MOU all the responsibilities and liabilities to settle with the investors in the project and one M/s Idol Homes Maker Pvt. Ltd. ("***Idol Homes***") had been taken over by the Developer and there was no other liability including under a Mortgage Deed dated December 13, 2013. The Developer assured that full responsibility for any claims under such Mortgage Deed was his, and also assured that all dues were already discharged. It was agreed between the aforesaid parties that the total liability of the Developer was Rs. 32 crores, including the liability owed to Idol Homes which too had filed Commercial Suit (L) No.38 of 2017, which was represented as having been settled. Any amount paid to them would be deducted from the liability quantum of Rs.32 crores taken on by the Developer.

6. The Consent Decree also recorded that the tenants occupying the buildings standing on both plots had already exchanged draft MOUs with the Developer and the New Developer and this included the

payment of rent arrears; contribution to the corpus fund; and rent payable for the temporary rehabilitation accommodation. The tenants were said to have agreed in principle to receive all arrears in instalments and future compensation from the date of issuance of the Commencement Certificate, in the sum of Rs.18,000/- per month for the first year, with 10% escalation thereafter. The New Developer agreed to abide by such terms and it was also committed that these terms would be incorporated in the MOUs to be executed with each tenant. The parties also agreed, declared and confirmed that the New Developer was in possession of the entire Amalgamated Land i.e. both plots, pursuant to the 2021 MOU and a possession letter of the same date; and also, a Special Power of Attorney and an Irrevocable Power of Attorney, executed on the same date as the date of the Consent Decree.

7. The Developer undertook to get irrevocable consent from the tenants and occupants of the building on both the plots in favour of the New Developer, to enable the New Developer to take complete charge and control over the project and also apply to MHADA for revalidation of the Intimation of Disapproval and to get plans sanctioned for construction on the Amalgamated Land. While the Developer would pursue all permissions and sanctions, all amounts payable, including deposits, penalties and fines, would be paid by the New Developer.

8. In Clause 13 of the Consent Decree, the New Developer recorded that it shall comply with all the terms and conditions of the Conveyance Deed for Plot No.87 and the Development Agreement for Plot No.88. Should any additional documents, signatures or other confirmations in relation to the Amalgamated Land be required "*from the owners*", the Developer was to get the same completed at his own cost and expense. The New Developer undertook to comply with all the terms and conditions contained in the Development Agreement and in the Deed of Conveyance without committing any default.

9. In consideration for the aforesaid arrangement, the Developer was provided with the first floor of the sale component building, to enable them to dispose of the said reserved area on this floor so as to discharge his liability owed to investors, Idol Homes and any other person who would have a legitimate and valid claim against the Developer. It was agreed that if the Developer were to sell any part of such reserved area to a third party, the New Developer would sign the requisite sale agreement without delay, subject to the Developer disclosing his liabilities and fulfilling obligations to clear all liabilities up to Rs.32 crores, for which the New Developer would not be liable. It was agreed that if the first floor reserved for the Developer fetched less than Rs.32 crores, the balance liability would be borne by the Developer, but

if the sales from the first floor were to be in excess of Rs.32 crores, the amount in excess would belong to the New Developer, with the Developer having no additional right over such excess amount.

10. The original title deeds of both the plots were said to be lying in the Developer's office, which had been seized by this Court in Company Petition No.910 of 2015, but true copies were said to have been handed over by the Developer to the New Developer, with an assurance that the originals would be handed over as soon as possible and a further assurance that the original title deeds have not been deposited or mortgaged in favour of any other third party. These terms came to be approved and endorsed, and the undertakings contained therein constitute undertakings given to the Court pursuant to the Consent Decree.

11. On October 19, 2022, the Owners filed Suit (L) No.33662 of 2022 before this Court ("***Owners' Suit***") seeking a declaration that the Consent Decree had been obtained by fraud and misrepresentation, and must be declared *void ab initio* having been obtained by fraud, suppression and concealment, and that it should not be binding on the Owners. Going by the valuation ascribed in the Owners' Suit, the Suit stood transferred to the City Civil Court for want of pecuniary

jurisdiction after the threshold for suits was enhanced to Rs. 10 crores. The Suit also sought declaration that the Owners are the true owners of Plot No.88; that the Development Agreement and connected documentation have been terminated on account of breach of contract by the Developer; and that the development rights under the Development Agreement could not have been assigned to the New Developer under the 2021 MOU. The Owners' Suit also seeks the relief of a permanent injunction from creating any third-party rights in the free sale component of the newly constructed building in order to ensure that 17.5% share on every floor to which the Owners are entitled be preserved.

Contentions of the Parties:

Owners' Contentions:

12. Against this factual backdrop, the contentions of the parties need to be noticed. Mr. Ashish Kamat, Learned Senior Advocate representing the Owners, would explain that the disputes and differences between the Developer and the New Developer were secondary to the entitlement of the Owners under the Development Agreement, insofar as Plot No.88 is concerned. He would submit that the Development Agreement

ensured that the Owners remained the owners of Plot No.88 and the entitlement of the Developer was that of any developer and such entitlements would never give the Developer any title or interest in Plot No.88 in a manner that would entail the Developer to further alienate and create other interests in Plot No.88.

13. Mr. Kamat would point to *Clause 4* of the Development Agreement to indicate that the Owners had merely granted development rights to the Developer in respect of Plot No.88 and the Developer was to construct and allot to the Owners free of cost, on an ownership basis, commercial premises in the new building proposed to be constructed on the Amalgamated Land, which would comprise 17.5% of the total Floor Space Index (FSI) available for free sale premises in the redeveloped property as reduced by the area covered by the tenants' new premises.

14. *Clause 8.2* would also be alluded to, in order to indicate that the Owners' premises were meant to be on the ground floor and on each of the upper floors and would comprise a total of 17.5% of the total carpet area of the free sale premises.

15. Finally, he would point to *Clause 33* which specifically provided that the Developer would not be entitled to assign the development rights granted under the Development Agreement to any third party.

Therefore, Mr. Kamat would contend, the 2021 MoU was *per se* illegal and in conflict with the Development Agreement. The Developer's contention is that the Development Agreement and its prohibition on the assignment of development rights were suppressed from the Court in obtaining endorsement of the Consent Terms, which underlines that the Consent Decree is a product of fraud and misrepresentation to the Court, and therefore, liable to be set aside.

16. Mr. Kamat would point to a termination notice dated August 25, 2021 ("***Termination Notice***"), terminating the Development Agreement, owing to the Developer's delay in implementing the Development Agreement. The Consent Decree was obtained days after the Termination Notice, and therefore, Mr. Kamat would contend that the Consent Decree was obtained on the basis of suppression of the Termination Notice from the Court. If the Court had known that the underlying Development Agreement stood terminated, there would have been no question of the Court approving disposal of the Suit dealing with disputes over dealing with the development founded on the terminated Development Agreement.

17. Mr. Kamat would also point to a reply to the Termination Notice from the Developer to indicate that there was not a whisper about the

Consent Decree in such reply pointing to suppression. On this ground alone, Mr. Kamat would submit that a case has been made out for the Owners, who were third parties to the Suit only because they were not made parties to the Suit, to approach the very Court that had passed the Consent Decree, to call into question the validity of the Consent Terms. Mr. Kamat would rely on the law declared by the Supreme Court in the case of ***Triloki Nath Singh***[1] and ***Mukund Bhavan Trust***[2] to submit that the proviso to Rule 3 of Order XXIII of the Code of Civil Procedure, 1908 ("***CPC***") read with Rule 3A, results in even a third party faced with a compromise decree that affects his interests, having to approach the very Court that passed the consent decree and no other forum.

Developer's Contentions:

18. Mr. Rohan Sawant, Learned Advocate on behalf of the Developer would submit that, at the threshold, the Interim Application is not maintainable and that the only recourse that the Owners may pursue is an Appeal under Section 96 of the CPC. Moreover, having filed the Owners' Suit, Mr. Sawant would submit the Owners have so far tried to pursue the same remedies in two parallel proceedings. Faced with how

1 *Triloki Nath Singh v. Anirudh Singh (Dead) Through Legal Representative And Others* (2020) 6 Supreme Court Cases 629

2 *Shri. Mukund Bhavan Trust and Others v. Shrimant Chhatrapati Udayan Raje Pratapsinh Maharaj Bhonsle and Another* 2024 SCC OnLine SC 3844

this was untenable, the Owners undertook to delete the relief of setting aside the Consent Decree from the Owners' Suit, but have not done so till date.

19. Mr. Sawant would seek to distinguish the Supreme Court's declaration of the law in ***Triloki Nath*** by contending that in that judgement the Court was dealing with the transferee of the suit property *pendente lite*, who was claiming through one of the parties to the proceedings and was thereby bound by the Consent Terms and was sent to the same court that approved the Consent Terms. Mr. Sawant would submit that judgements prior to ***Triloki Nath*** holding that the bar under Order XXIII, Rule 3-A does not apply to complete strangers and third parties is the declared law that continues to hold the field, and that the bar in that provision is to avoid protracted contest by parties to a compromise, in other forums, in newer litigation. The Owners themselves have been of such view, which is why they had filed the Owners' Suit and now they are also pursuing this Interim Application.

20. Mr. Sawant would rely on a judgement by the Supreme Court in ***Sakina***[3] to indicate that the challenge under Section 96 of the CPC is available. Mr. Sawant would submit that even if the Owners' Suit were

3 *Sakina Sultanali Sunesara (Momin) v. Shia Imami Ismaili Momin Jamat Samaj and Others* 2025 SCC OnLine SC 930

misconceived, warranting deletion of a relief sought, it would not mean the proviso to Order XXIII, Rule 3 would become available for this Interim Application to be filed. Mr. Sawant would also rely upon a decision by a Learned Single of this Court in an order dated April 26, 2021 in the case of ***Razia Sultana***[4] to contend that Order XXIII, Rule 3 and Rule 3-A are for parties to the consent decree and not third parties.

21. On merits, Mr. Sawant would submit that the Termination Notice, purportedly dated August 25, 2021, had never been received contemporaneously by the Developer. He would claim that it was received only some time in November/December 2021, for which he would place reliance on the Developer's own written statement in the Owners' Suit. He would submit that despite the Owners being repeatedly called upon to demonstrate service of the Termination Notice prior to the Consent Decree, the Owners have singularly failed to do so. The Owners have not even provided inspection of any record to enable evidencing the foundational claim that prior to the Consent Decree, the Termination Notice had been issued to bring the Development Agreement to an end.

4 *Razia Sultana K. Ahmed v. Adarsh Water Parks & Resorts Pvt. Ltd. Order dated April 26, 2021 in Interim Application (L) No.5113 of 2021 in Suit No.396 of 2006*

22. Mr. Sawant would point to material on record to indicate that the Owners had always been aware about the financial and other difficulties being faced by the Developer, due to which the Developer was scouting for support from third parties, which is a fact discernible from the Owners' own pleadings in the Owners' Suit. He would point to the pleadings contained in sub-paragraphs 'N' to 'S' of paragraph 5 of the plaint in the Owners' Suit to indicate that the Owners admit that they always knew, at least by December 11, 2015, that the Developer was facing financial problems and third party interests were involved, and that the project had considerably slowed down. Such assertion was made in reliance upon the Developer's letter dated December 11, 2015 to MHADA.

23. Likewise, Mr. Sawant would point to letters dated May 31, 2016 and June 16, 2016 addressed by Developer to MHADA and claimed that the Owners always knew that third parties were being approached and monies had been raised from third parties and yet the project was not completed in time. The Owners' own pleadings indicate that the Developer gave assurances that the project would be completed in a speedy manner and that the Owners came to realize later that such promises were hollow.

24. However, Mr. Sawant would submit, the Owners' Suit has a yawning gap between 2016 and 2021 about the state of the relationship between the parties. The Owners claim to have found out in June 2021 that the New Developer had taken over the project and would be paying the tenants directly. And yet, in the purported Termination Notice of August 2021, there is not a whisper about the New Developer's role being prohibited in the Development Agreement, even while the Termination Notice is copied to the New Developer. Now, the very ground on which the Consent Decree is sought to be recalled is giving any role to the New Developer which is in conflict with the Development Agreement, but even after realising the role of the New Developer, this was not asserted in the Termination Notice, which too was in any case not really sent to the Developer and the New Developer until much after the Consent Decree was passed.

25. Therefore, Mr. Sawant would submit, the Owners were always aware of the third party interests having been created and had acquiesced to the role of the New Developer, undermining the claims about suppression and concealment to obtain the Consent Decree. An explicit commitment of the Developer and the New Developer to abide by and comply with the Development Agreement is an integral feature

of the Consent Decree, Mr. Sawant would contend, to submit that there is no adverse impact of the Consent Decree on the Owners.

New Developer's Contentions:

26. Mr. Shanay Shah, Learned Advocate on behalf of the New Developer would submit that, as a matter of law, the law declared in ***Triloki Nath*** and further elaborated and articulated in ***Mukund Bhavan Trust*** makes it quite clear that even a third party needs to approach the same Court that had approved the Consent Terms. However, he would submit that the Owners have already exercised their right to pursue the Owners' Suit and the multiplicity of proceedings seeking the same relief is impermissible. Mr. Shah would also submit that the Interim Application is an afterthought being pursued after the Owners' Suit failed to get traction. Mr. Shah would otherwise endorse and adopt all the submissions made by Mr. Sawant in relation to the merits of the matter, by pointing out that the Owners, by all accounts, had been completely aware of the New Developer's role and is now feigning surprise to seek reversal of the Consent Terms.

27. Mr. Shah would also rely upon ***Oyster Ship Management***[5], a judgement of a Learned Single Judge of this Court, to essentially submit that so long as the Court is satisfied that consent terms executed by parties are lawful, the Suit can be decreed in terms of such agreement and compromise. The consent terms would only record the compromise among the parties and all other questions falling outside of the consent terms, including decisions on whether there is any element to be adjudicated, would not be impacted by accepting the consent terms. No remedy available to such third party would be eroded, and Mr. Shah would contend that this is precisely how the Owners pursued the Owners' Suit. Therefore, he would submit, the afterthought of invoking Order XXIII, Rule 3 of the CPC is not something that merits the attention of this Court.

Analysis and Findings:

Preliminary Objection on Maintainability:

28. At the threshold, the preliminary objection raised on behalf of the Developer may be noticed. The provisions of Order XXIII, Rule 3 and Rule 3-A must be noticed:

5 *Oyster Ship Management Pvt. Ltd. v. Bhavsar Construction Co. Pvt. Ltd. - judgement dated February 22, 2024 in Suit No. 134 of 2009*

*"**3. Compromise of suit**. **Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties**, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, **the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith** so far as it relates to the parties to the suit, **whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit**:*

*Provided that **where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question**; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.*

Explanation. An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this Rule.

***3-A. Bar to suit**. **No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful**.*

[Emphasis Supplied]

29. To begin with, where there is a compromise, the Court shall recognise the settlement, provided it is not unlawful. Where a party denies that a settlement has been arrived at, the Court would determine the question. At first blush, it would appear that the contention that a

compromise has not been arrived at, could only be that of a party to the purported compromise. However, under Rule 3-A, there is a bar on a suit to set aside a decree on the ground that the compromise on which the consent decree was based was not lawful. Therefore, on a conjoint and harmonious reading of the two rules, it would follow that, there being a bar, the term "party" in the proviso to Rule 3 would include a third party. It is not necessary that such party has to be a party to the compromise. If a third party believes that the consent decree was unlawful, the proviso would be available to such third party. Indeed, when it is a third party who alleges that the consent decree is unlawful while the parties to the compromise contend that the compromise was lawfully arrived at, that is the question the Court would decide.

30. Indeed, the law declared in ***Triloki Nath***, as further elaborated in ***Mukund Bhavan Trust,*** would enable the filing of the captioned Interim Application. While in ***Triloki Nath***, the law declared in ***Pushpa Devi***[6] was extracted and such extraction articulated the remedy available to a party to a consent decree, in ***Triloki Nath***, the Supreme Court was in fact dealing with a case where it was a third party to the Consent Terms that had challenged the consent decree. The precise question framed in ***Triloki Nath*** was whether such challenge to a consent decree was

6 *Pushpa Devi Bhagat v. Rajinder Singh – (2006) 5 SCC 566*

maintainable in view of the provisions of Order XXIII. In such context, the Supreme Court articulated that the Court can be instrumental in effecting an agreed compromise and at the same time, the Court should never be a party to the imposition of a compromise upon an unwilling party; and therefore, it would still be open to question the compromise by an application made under Order XXIII, Rule 3 of the CPC. In view of the bar on a suit under Rule 3-A, the Supreme Court declared that the non-party to the compromise could indeed invoke the proviso to Rule 3 and approach the very court that approved the compromise.

31. In the instant case, it is the case of the Owners that the compromise had been obtained by suppression of the Termination Notice, and thereby the endorsement of the contract by the Court was obtained by a fraud on the Court, arising out of suppression of truth. Mr. Kamath submits on instructions that the Owners admit that the Owners' Suit, insofar as it prays for such a declaration is thoroughly misconceived and the pursuit of such relief is untenable. That apart, he submits that his statement may be recorded and the prayer to declare the Consent Decree be treated as having been deleted, owing to being misconceived. This statement is accepted and recorded. On this basis, the prayer in this regard in the Owners' Suit is declared as having been deleted. The ministerial changes shall be effected by the Owners in the

plaint of the Owners' Suit within a period of two weeks from the upload of this judgement on this Court's website.

32. Mr. Kamath also alludes to how the City Civil Court cannot declare the Consent Decree passed by the High Court to be void. This is not really relevant, since the Owners' Suit was originally filed in this Court and was transferred on the basis of the valuation adopted in the Owners' Suit. While it appears illogical that the Owners' Suit seeking a declaration of the Development Agreement as having been terminated is valued at below Rs. 10 crores, that is not a question that needs to detain any attention of this Court. Rule 3-A is a bar on suits to set aside a consent decree, and to this extent, the Owners' Suit is misconceived, whichever be the forum.

33. Mr. Sawant's contention that in ***Triloki Nath***, the person claiming that the consent decree was void was claiming through one of the parties to the compromise, and that such an element is absent in the instant case. However, the situation at hand is not materially different. The Owners claim that the Consent Decree is unlawful in view of the alleged suppression from the Court. The Owners desire to have the Consent Decree set aside, since they perceive it to affect them – in fact, their prayer in this Interim Application is that the Consent Decree be

declared as not binding the Owners. In the perception of the Owners, the impact that the allegedly unlawful Consent Decree would have on them, necessitates this Interim Application. In my opinion, there is nothing to distinguish the facts of this case from the law declared in ***Triloki Nath*** and since the challenge is to the Consent Decree, this Court would have jurisdiction to entertain the Interim Application, taking on record and accepting Mr. Kamath's confirmation to this Court, on instructions, that the prayers in the Owners' Suit to this extent is misconceived.

34. The reliance on ***Sakina*** is also of no use to the Developer, since that decision was about whether the party seeking to challenge a compromise in a consent decree could elect for a first appeal regardless of Section 96(3) which provides that no appeal shall lie from an order passed by consent. That judgement is about a third party to the compromise, such as the Owners having an option to pursue an appeal since evidently, a party to the compromise could only avail of the proviso to Order XXIII Rule 3 and not file a first appeal. A ruling that the Owners would have such an option would not preclude the Owners from exercising the option to pursue this Interim Application.

35. Therefore, I see no merit in the objection to the maintainability of the Interim Application. Even the contention that the Owners could always invoke Section 96 to appeal against the Consent Decree may provide an additional elective option to the Owners but does not oust the availability of the proviso to Order XXIII Rule 3 of the CPC for this Interim Application to be pursued.

Points for Determination on Merits:

36. On merits, in order to deal with the Interim Application, the core ground is that the Development Agreement had already been terminated in August 2021 well before the Consent Decree and this had been suppressed from the Court. Therefore, the following points need to be determined:

> a) Whether the Termination Notice dated August 25, 2021 had indeed been sent by the Owners to the Developer and the New Developer before September 14, 2021 when the Consent Decree was passed; and
>
> b) Whether the Owners were aware of the role of the New Developer and acquiesced to his presence or whether the Owners had always believed that any role for the New

Developer was *per se* violative of Clause 33 of the Development Agreement, which prohibited the assignment of the development rights flowing from that agreement.

37. Having examined the record with the assistance of the parties, in my opinion, the following facets of the matter stand out:

a) The Owners purport to have become aware of the role of the New Developer in June 2021. Accepting this at face value, it would stand to reason that the Owners ought to have believed that such a development constituted a violation of Clause 33 of the Development Agreement. Therefore, at the very least, the Termination Notice would have asserted that the role being played by the New Developer constituted a prohibited assignment of non-assignable development rights under Clause 33 of the Development Agreement;

b) However, inexplicably, in the Termination Notice of August 2021, there is not a whisper about any role for the New Developer (whose taking over of development rights became known to the Owners in June 2021 through their interactions with the tenants) constituting a violation of

Clause 33 of the Development Agreement. By the time the Termination Notice is purported to have been issued, the Owners had notice of at least two months that it was the New Developer who was to pay transit rent to the tenants. If the Owners contemporaneously perceived this to be a breach of Clause 33 of the Development Agreement, at the very least, this would have been asserted in the Termination Notice;

c) Whether the Termination Notice was indeed issued in August 2021 is not demonstrated by the Owners. There is nothing in the Interim Application to indicate that it was indeed served on the Developer. The Owners had notice of the Developer's stance that it was not at all served with the Termination Notice before the Consent Decree, from the Developer's written statement filed in the Owners' Suit. The Owners purport that the filing of the Interim Application is a rectification of their misconceived prayer in the Owners' Suit. The Developer's stance having been known, it was incumbent on the Owners to demonstrate that the Termination Notice had indeed been served. The Interim Application does not contain any proof of service;

d) The Termination Notice is purportedly copied to the New Developer. I have already dealt with how the Termination Notice is silent about the alleged breach of Clause 33 of the Development Agreement. In that context, the Termination Notice being copied to the New Developer, which could have only been to put the New Developer on notice about the Development Agreement having been terminated, would reasonably be expected to have put the New Developer too on notice that the very role he had taken on was violative of the Development Agreement and no consent is being given for the assignment of rights to the New Developer. Since the Owners did not put the New Developer to notice about Clause 33 leading to any assignment of rights to the New Developer being untenable, the preponderance of probability points to the Owners not having perceived a violation of Clause 33 when the Termination Notice was purportedly issued;

e) What appears to have weighed with the Owners is that the Development Agreement was ripe for termination by reason of delay in implementation and other grounds found in the Termination Notice, but not the perceived breach of

Clause 33 of the Development Agreement. The Owners appear to have believed that they had enough grounds to terminate the Development Agreement and that would take care of their interests. One would expect any commercially sound party to invoke every piece of violative conduct when terminating a long-standing contract;

f) Mr. Kamat did not provide any response to Mr. Sawant's assertion that requests for inspection to demonstrate that the Termination Notice had been sent to the Developer and the New Developer before the Consent Decree have met with no response from the Owners;

g) Likewise, Mr. Sawant's efforts to indicate that the Owners were aware from the correspondence by the Developer with MHADA also does not conclusively prove that the Developer kept the Owners informed – particularly since the purported copying of the letters written to MHADA having been copied to the Owners is purported to be backed up with the Owners' name being entered by hand with a tick-mark on it, to suggest that these letters were copied to the Owners; and

h) Just as the Owners are unable to conclusively show that the Termination Letter was indeed served contemporaneously on the Developer and the New Developer, the Developer is unable to conclusively show that the letter to MHADA had indeed kept the Owners in the loop.

Conclusions:

38. Therefore, in my opinion, purely for purposes of this Interim Application, the Owners have not made out a case of having delivered the Termination Notice in August 2021 before the Consent Decree was approved in September 2021. If the Owners cannot demonstrate that they issued the Termination Notice before the Consent Decree was approved, there can be no inexorable conclusion that the Consent Decree was obtained by suppressing the Termination Notice from the Court.

39. Having admittedly become aware of the role of the New Developer in June 2021 (in particular, that the New Developer would be the person paying transit rent to tenants), it is more probable and reasonable to conclude that the Owners had acquiesced to the presence of the New Developer when the Termination Notice was purportedly issued. It is possible that, despite such acquiescence, the Owners have a

right to terminate the Development Agreement for the reasons spelt out in the Termination Notice. That is subject matter of trial in the Owners' Suit.

40. While Clause 33 of the Development Agreement had indeed prohibited assignment of rights, it was well within the powers of the Owners to have acquiesced to or to have permitted an assignment to enable the project to be implemented. Even in the Owners' Suit, the Owners desire protection of their entitlement to the 17.5% share in the developed property, which is an entitlement flowing from the Development Agreement. Whether the Development Agreement was validly terminated or whether the Owners have other rights and entitlements to terminate the Development Agreement, are all matters outside the scope of the Interim Application and indeed even outside the scope of the Consent Decree; and perhaps well within the scope of the Owners' Suit.

41. It cannot be forgotten that the Consent Decree contains nothing that undermines the Owners' rights under the Development Agreement. On the contrary, the Consent Decree can be said to be cognisant of the Owners' rights under the Development Agreement that would be exercisable if the Developer or the New Developer were to act in breach

of the Development Agreement. This would only point to the Developer and the New Developer informing the Court that compliance with the Development Agreement was a necessity for the Consent Decree to have real meaning and such compliance was being assured.

42. Whether these parties have violated the Development Agreement and thereby undermined the Consent Decree is a question of fact that cannot be the subject matter of trial in this Interim Application. The Consent Decree is neutral to the validity of the Development Agreement. If the Development Agreement is declared to have been validly terminated, it would impact the benefits flowing from the compromise recorded in the Consent Decree and would disrupt the contract reached by the Developer and the New Developer. Conversely, the Consent Decree would not adversely impact the Development Agreement or a valid termination of the Development Agreement. If in the Owners' Suit, it is proved that the Development Agreement had been validly terminated, the *inter se* rights of the parties to the Consent Decree would be impacted.

43. Put differently, the Termination Notice, if proved, could adversely impact the fruits of the Consent Decree enjoyed by the Developer and

the New Developer. However, the Consent Decree could never adversely impact the ability to prove the validity of the Termination Notice.

44. Therefore, there is nothing on the face of the Consent Decree to bind the Owners down in erosion of their rights under the Development Agreement, for the Owners to seek a declaration that the Consent Decree is not binding on the Owners. Therefore, there is no reason to disturb the Consent Decree as between the Developer and the New Developer.

45. For purposes of the proviso to Rule 3, whether a compromise has been validly reached is a question that would need to be answered by the Court that passed the consent decree. The issue raised by the Owners when pressing the Interim Application is a different nuance – they raise the question as to whether the Court would have at all blessed the compromise if it was made aware that the very underlying Development Agreement had been terminated.

46. For the reasons set out above, for the limited purpose of adjudicating this Interim Application, the Owners have not been able to show that the Development Agreement had been indisputably terminated before the Consent Decree. The very Termination Notice is copied to the New Developer without a whisper that his very presence is

illegal. The material points to the presence of the New Developer having been acquiesced to, with the grounds for termination regardless of his presence being pressed into service.

47. As regards the grounds for termination set out in the Termination Notice, whether they are borne out and whether the termination was effected earlier or later, are all matters that fall for adjudication in the Owners' Suit and in the domain of the Learned City Civil Court, which would determine the same on merits in accordance with law.

48. Suffice it to say, this judgement only determines that no case has been made out to allow the Interim Application by recalling the Consent Decree. On both the points for determination set out above, I am unable to find in favour of allowing the Interim Application.

49. It is made clear that nothing stated in this judgement is meant to finally adjudicate or influence any facet of the merits of the Owners' Suit. The finding in this judgement is that, based on the material on record in the Interim Application, no case has been made out to recall the Consent Decree on the premise that the Development Agreement had already been terminated before the Consent Decree; and that such termination had been suppressed from this Court.

50. Whether the contents of the Termination Notice, regardless of when it was actually issued, make out a case for a valid termination is already subject matter of the Owners' Suit and that shall be adjudicated on its own merits.

51. The Interim Application is therefore, ***dismissed***, for the reasons set out above, without recalling the Consent Decree.

52. All actions required to be taken pursuant o this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]