

Ajay

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION NO. 731 OF 2025
IN
SUIT NO. 21 OF 2025

New Deluxe Co-operative Housing Society Ltd. Applicant
.. (Orig. Plaintiff)

IN THE MATTER BETWEEN

New Deluxe Co-operative Housing Society Ltd. .. Plaintiff

Versus

Pemino Co-operative Housing Society Ltd. .. Defendant

WITH
INTERIM APPLICATION NO. 4573 OF 2025
IN
SUIT NO. 21 OF 2025

New Deluxe Co-operative Housing Society Ltd. Applicant
.. (Orig. Plaintiff)

IN THE MATTER BETWEEN

New Deluxe Co-operative Housing Society Ltd. .. Plaintiff

Versus

Pemino Co-operative Housing Society Ltd. .. Defendant

WITH
INTERIM APPLICATION NO. 6242 OF 2025
IN
SUIT NO. 21 OF 2025

Pemino Co-operative Housing Society Ltd. Applicant
.. (Orig. Defendant)

IN THE MATTER BETWEEN

New Deluxe Co-operative Housing Society Ltd. .. Plaintiff

Versus

Pemino Co-operative Housing Society Ltd. .. Defendant

.....

- Mr. Virag Tulzapurkar, Senior Advocate a/w. Mr. Amit Mehta and Mr. Vedant Rane, Advocates i/by Mr. Amit Mehta for Applicant / Plaintiff.
- Mr. Navroz Seervai a/w. Mr. Naushad Engineer, Senior Advocates a/w. Mr. Pranav Narsaria, Mr. Abha Gokhale, Advocates i/by Desai & Diwanji for Defendant.

.....

CORAM : MILIND N. JADHAV, J.

DATE : FEBRUARY 11, 2026.

JUDGMENT:

1. Heard Mr. Tulzapurkar, learned Senior Advocate for Applicant / Plaintiff and Mr. Seervai, learned Senior Advocate for Defendant.

2. Plaintiff – Society filed the present Suit seeking permanent injunction against Defendant – Society and declaration of the restrictive covenant in Indentures dated 15.10.1943 and 25.07.1944 as void, invalid and unenforceable.

3. Interim Application No.731 of 2025 is filed for interim reliefs whereas Interim Application No.4573 of 2025 is filed for grant of leave under Order II, Rule 2 of the Civil Procedure Code, 1908 and to amend the Suit Plaint by Plaintiff – Society.

4. Interim Application No.6242 of 2025 is filed by Defendant – Society for condonation of delay in filing Written Statement under Order VIII Rule 1 of the Civil Procedure Code, 1908.

5. By consent of the parties, all three (3) Interim Applications are taken up for hearing. Parties are referred to as ‘Plaintiff’ and ‘Defendant’ for convenience.

6. For the reasons stated, Interim Application No.4573 of 2025 is allowed in terms of prayer clause “a”. Amendment is permitted to be

carved out within one week from today. Reverification stands dispensed with. Additional Written Statement only to the extent of the amendment as permitted is allowed to be filed on service of the amended Plaintiff in accordance with law.

7. For the reasons stated, Interim Application No.6242 of 2025 is allowed. Delay of 125 days stands condoned. Written Statement is directed to be taken on record by the Department.

8. Interim Application No.731 of 2025 for interim reliefs is taken up for hearing.

9. The relevant facts necessary for adjudication for grant of interim reliefs in the present case are as follows:-

9.1. Plaintiff – Society is a Co-operative Housing Society duly registered under Registration No. BOM/HSG/-220 of 1962 under the Maharashtra Co-operative Societies Act, 1960. It is Plaintiff's case that prior to 1950, Govindram Brothers Private Limited was the owner of land admeasuring 3,016 square yards situated at Altamount Road, Mumbai and out of the 3,016 square yards of land, Govindram Brothers Private Limited sold and conveyed a portion thereof admeasuring 1,900 square yards to Seksaria Industries Private Limited.

9.2. That by registered Agreement / Indenture dated 05.04.1963, Seksaria Industries Private Limited sold, conveyed and transferred land admeasuring 1,588.642 square meters i.e. equivalent to 1,900 square yards bearing Cadastral Survey No.5/664 of Malabar and Cumballa Hill Division to Plaintiff – Society (for short “**the suit property**”) upon which a building comprising ground plus three (3) storey was constructed by Plaintiff – Society and since then it is in lawful possession and occupation thereof.

9.3. It is Plaintiff’s case that its building constructed on the suit property is more than 60 years old and has deteriorated over a period of time. In view thereof, Plaintiff – Society resolved to undertake redevelopment of the suit property. As part of redevelopment process, Plaintiff – Society conducted a title search by its Advocate to ascertain and confirm its title to the suit property, pursuant to which it issued Public Notices dated 01.03.2024 in three newspapers viz; The Times of India, The Indian Express and The Economic Times inviting claims, demands and objections with respect to redevelopment of the suit property by Plaintiff - Society.

9.4. On 20.03.2024, Plaintiff – Society addressed letter to Defendant – Society inviting constructive suggestions and inputs in relation to its proposed redevelopment, however no response to the same was received. On 12.04.2024, Plaintiff – Society addressed a

follow up letter to Defendant – Society intimating that since no objections or suggestions were received from the Defendant – Society, it would proceed further with its redevelopment plan, to which once again there was no response.

9.5. On 16.04.2024, Defendant – Society in response to the Public Notices issued by Plaintiff – Society, addressed a legal notice to Plaintiff – Society opposing and objecting to its proposed redevelopment of suit property on the ground that Defendant – Society claimed to be a beneficiary of certain stipulations, agreements and restrictive covenants qua the suit property. Defendant - Society contended that Plaintiff – Society was prohibited from constructing any building / structure exceeding a height of 30 feet asserting existence of a restrictive covenant which was legally binding on the Plaintiff – Society. Defendant – Society stated that Plaintiff – Society was required to adhere to the said restriction without any exception and any construction exceeding height of 30 feet on the suit property would amount to breach of the restrictive covenant and Defendant – Society was entitled to enforce it.

9.6. Upon receipt of legal notice dated 16.04.2024, Plaintiff – Society by reply dated 22.04.2024 called upon Defendant – Society to furnish and provide details and particulars of the alleged stipulations, agreements, covenants and restrictions on the basis of which it

claimed existence of the restrictive covenant.

9.7. In the interregnum, Plaintiff – Society appointed Architect and Consulting Engineer to inspect the suit property for examination of the structure and condition of its building. On receipt of Structural Inspection Report dated 13.05.2024, Plaintiff – Society issued advertisement dated 12.06.2024 in The Times of India newspaper inviting tenders for redevelopment of the suit property. Plaintiff – Society received inquiries / offers from reputed Developers, however all such proposals were based on utilization of the maximum permissible development potential of the suit property which involved construction exceeding height of 30 feet. As no further response was received from the Defendant – Society to the reply Plaintiff – Society by letter dated 16.07.2024, proposed a meeting with Defendant - Society to amicably resolve the issue raised by Defendant - Society. However, Defendant – Society instead issued a Public Notice dated 22.08.2024 in The Times of India newspaper wherein in addition to objections raised by them in the legal notice dated 16.04.2024, reliance was placed on the Indenture dated 15.10.1943 as the source of their purported right and entitlement to restrict the Plaintiff – Society from constructing any structure exceeding 30 feet in height.

9.8. In response to the said Public Notice, Plaintiff – Society addressed letter dated 28.08.2024 objecting to the said Public Notice.

Plaintiff asserted that there was no such Indenture dated 15.10.1943 or it found mention or reference in any subsequent Agreement relating to the suit property.

9.9. According to Plaintiff, Defendant – Society by issuing the Public Notice created a roadblock in its redevelopment plan and Developers who had expressed interest in redevelopment refrained from proceeding unless a No-Objection Certificate was obtained from Defendant – Society permitting redevelopment of the suit property exceeding height of 30 feet.

9.10. Being aggrieved by the action of Defendant – Society and apprehending hindrance / obstruction from Defendant – Society in its proposed redevelopment of the suit property, Plaintiff – Society filed present Suit and Interim Application No.731 of 2025 seeking interim reliefs.

10. Interim Application No.731 of 2025 seeks the following reliefs:-

- “(a) That pending the hearing and final disposal of the present Suit, this Hon’ble Court be pleased to pass an order of temporary injunction thereby restraining the Defendant and/or its agents, servants and/or any persons claiming through or under them from in any manner interfering with or meddling with the rights of the Plaintiff Society in appointing a Developer / Builder and entering into a Development / Redevelopment Agreement and also in approaching the Municipal Corporation of Greater Mumbai for having the plans sanctioned /approved in accordance with law in respect of redevelopment of the said Property being carried out even beyond the height 30 feet.*
- (b) for costs of this Interim Application.*
- (c) for such other and further reliefs as this Hon’ble Court may deem fit and proper in the facts and circumstances of the matter.”*

11. Mr. Tulzapurkar, learned Senior Advocate for Plaintiff – Society would submit that its building standing on the suit property is more than 60 years old and redevelopment has become imperative. He would submit that Plaintiff – Society consists of 23 members, most of whom are senior citizens. He would submit that Defendant – Society sought to obstruct its redevelopment by raising objection through its Advocates letter dated 16.04.2024 and by issuing Public Notice dated 22.08.2024 thereby impeding Plaintiff – Society from utilising the full development potential of the suit property.

11.1. He would submit that conduct of Defendant – Society clearly demonstrated malafide intention. He would submit that Plaintiff – Society issued 3 Public Notices in three different newspapers, however no objections were raised by Defendant – Society. He would submit that thereafter two specific letters were addressed to Defendant - Society inviting suggestions and objections, however once again no reply was received to the same. He would submit that only after a delay of almost 78 days Defendant – Society issued a legal notice for the first time alleging existence of an Indenture restricting Plaintiff – Society from constructing any structure beyond the height of 30 feet on the suit property. He would submit that despite seeking details of the Indenture, no details were furnished due to which Plaintiff - Society proceeded with its redevelopment plan by appointing

Architect and Consultant Engineer for Structural Inspection / Report.

11.2. He would submit that pursuant thereto Plaintiff – Society issued another Public Notice inviting claims / objections and called upon Defendant – Society to hold meeting for amicable settlement. He would submit that, instead Defendant – Society issued Public Notice asserting for the first time existence of a restrictive covenant in the Indenture dated 15.10.1943 without giving copy of the same. He would submit that if Defendant – Society were beneficiary of the restrictive covenant then such objection ought to have been raised in the first instance, however it failed to do so. He would submit that conduct of Defendant – Society is nothing but an afterthought intended solely to stall redevelopment of the suit property.

11.3. He would submit that despite diligent efforts by Plaintiff – Society the alleged restrictive covenant in the Indenture dated 15.10.1943 could not be traced. He would submit that no reference to any such restrictive covenant was found in any subsequent title document available with Plaintiff - Society. He would submit that if at all any such restrictive covenant existed affecting the suit property, then the same ought to have been registered. He would submit that however on search conducted by Plaintiff - Society at the Office of the Sub-Registrar of Assurances, no such registered document was either found. Hence, he would submit that the restrictive covenant if

assumed to subsist, then the same ought to have been expressly transferred to the Defendant – Society in its title document which is not the case. He would submit that the restrictive covenant if at all it subsists cannot be absolute and override development of the suit property with passage of time. He would submit that the restriction is wholly repugnant to the interest created and absolute transfer of the suit property in Plaintiff – Society's favour.

11.4. He would submit that the Public Notice created a serious impediment to Plaintiff - Society's redevelopment as all interested Developers withdrew and refrained from proceeding further and insisted upon a No Objection Certificate from the Defendant – Society.

11.5. He would submit that Defendant – Society itself prior in point of time comprised of ground plus three storeys, however four additional floors were constructed by Defendant – Society in or about the year 1966 on its own building exceeding height of 30 feet and yet it sought to prevent Plaintiff – Society from redeveloping its property in accordance with law by relying upon an unsubstantiated restrictive covenant. He would submit that Plaintiff – Society is in lawful possession of the suit property for more than six decades and grave loss and irreparable harm would ensue if interim reliefs are not granted. He would submit that Interim Application No.731 of 2025 be therefore allowed in the interest of justice.

12. Mr. Seervai, learned Senior Advocate for Defendant – Society would draw my attention to the Affidavit-in-Reply dated 30.11.2024 filed on behalf of Defendant – Society by Mrs. Meher Dave, Treasurer and Authorised Signatory of the Defendant – Society appended at page No.27 and would submit that there exist an express restrictive covenant that restricts Plaintiff – Society from constructing any structure exceeding the height of 30 feet. He would submit that the restrictive covenant is clearly reflected in the title documents under which Plaintiff – Society has derived its title to the suit property.

12.1. He would submit that in the present case it is utmost necessary to therefore advert to the background relating to derivation of title by both Societies. He would submit that such examination would *prima facie* clearly disclose the origin, scope and continued subsistence of the aforesaid restrictive covenant against the Plaintiff – Society.

12.1.1. He would submit that Phirozeshaw Darashaw Dubash (“PD Dubash”) and Bachubhai Phirozeshaw Dubash (“BP Dubash”) were owners of a large parcel of land admeasuring 11,983 square yards on Altamount Road. He would submit that by registered Indenture dated 15.10.1943, PD Dubash and BP Dubash as “Vendors” sold and conveyed land admeasuring 2,873.6 square yards out of the larger portion in favour of Kaikushru Gazdar and Piroja Gazdar wherein

under Clause 6, Vendors also being predecessors-in-title of Plaintiff – Society agreed to a restrictive covenant that the plot marked as “Plot of Cottages” shall not construct any structure exceeding 30 feet in height. He would submit that the maps appended at Exhibits “A” and “B” thereto clearly identify the Plaintiff - Society’s land as the “Plot of Cottages” where the Plaintiff - Society’s building stands. He would submit that the said covenant runs with the suit property i.e. land and operates for the benefit of the Gazdars’ land and for the remaining part retained by PD Dubash and BP Dubash which was subsequently conveyed to the Defendant – Society. Hence, he would submit that the restrictive covenant has been in operation since 1943 and binds the successors, heirs and assigns of the covenantor in this case.

12.1.2. With regard to sale of land / portion to Plaintiff – Society, he would submit that by a registered Indenture (Conveyance) dated 25.07.1944, PD Dubash and BP Dubash “Vendors” sold and conveyed land admeasuring 3,016 square yards out of the larger portion of land to Govindram Brothers Limited. He would submit that in the said Indenture at internal page No.10, it is expressly stated that Govindram Brothers Limited – “Purchaser” shall not put up any structure exceeding height of more than 30 feet. He would submit that in and around 1950, Govindram Brothers Limited sold and conveyed the said land admeasuring 3,016 square yards to Seksaria Industries Private

Limited which was further sub-divided into sub-plots.

12.1.3. He would submit that by registered Indenture dated 05.04.1963, out of the 3,016 square yards, 1,900 square yards was conveyed by Seksaria Industries Private Limited as “Vendors” and Govindram Brothers Limited as confirming parties thereto in favour of Plaintiff – Society wherein it is expressly set out that the sale was subject to all stipulations, agreements, covenants and restrictions contained in the original Indenture (Conveyance) dated 25.07.1944. He would submit that the restrictive covenant therefore continues to bind the suit property and restricts construction on Plaintiff - Society’s suit land beyond the height of 30 feet which was deliberately concealed by Plaintiff – Society and thus Interim Application No.731 of 2025 being based on a false premise and suppression deserves to be dismissed in the interest of justice with costs.

12.1.4. With regard to sale of land / portion to Defendant – Society, he would submit that on 26.04.1945 PD Dubash and BP Dubash “Vendors” sold and conveyed land admeasuring 3,762 square yards in favour of Dinshaw Daruwalla, Frenny Daruwalla, Noshir Daruwalla, Nadirshaw Sidhwa, Minocher Sidhwa and Pesi Daruwalla. He would submit that the said sale was expressly made together with the benefit of the stipulations, agreements, covenants and restrictions contained in the Deed of Conveyance dated 15.10.1943 i.e. Gazdar’s Indenture

through which the restrictive covenant originated.

12.1.5. He would submit that on 09.01.1950 Dinshaw Daruwalla and Frenny Daruwalla released their rights in the land in favour of Noshir Daruwalla. He would submit that on 26.03.1962, Noshir Daruwalla sold half of his share to Aloo Sidhwa. He would submit that the remaining owners constructed a ground plus three (3) storey building known as “Pemino” on the said land. He would submit that on 28.04.1966 the owners entered into a Development Agreement with Wadhmal Dalamal for further development of Pemino pursuant to which the Defendant – Society came to be constituted. He would submit that on 28.06.1972 the said land was partly conveyed to the Defendant – Society.

12.2. He would submit that the benefit of the restrictive covenant was expressly passed on to Defendant – Society’s predecessor-in-title under the sale deed dated 26.04.1945. He would submit that the covenant contained in the Deeds of 1943 and 1944 is a covenant running with the land and it was intended to enure to the benefit of Defendant – Society’s land. He would submit that the Deed of 1944 expressly stated that the covenant shall run with the premises and be binding on the owners thereof. He would submit that covenants running with the land are enforceable by any person in whom the interest of the covenantee is vested irrespective of notice. He would

therefore submit that the benefit of the said restrictive covenant was expressly retained by the original Vendors while selling the land to Plaintiff – Society’s predecessor’s under the Deed dated 25.07.1944.

12.3. In support of his submissions, he has referred to and relied upon the decision of this Court in the case of *Bomi Munchershaw Mistry Vs. Kesharwani Co-operative Housing Society Limited*¹ wherein this Court has held that the restrictive covenant which runs with the land since inception for the benefit of the covenantee and a specific assignment of the covenant in favour of the covenantee is not required and further held that multi-storeyed structures in the vicinity / neighbourhood render the restrictive height covenant more valuable and not obsolete. He has also referred to and relied upon the decisions in support of the above proposition arrived at in the Judgments passed by the English Courts in the case of *In Re Union of London and Smith’s Bank Limited’s Conveyance*,² *Dyson v. Foster*³, *Rogers Vs. Hosegood* ⁴, *Miles Vs. Easter*⁵, *Mathewson Vs. Ram Kanai Singh Deb* ⁶ and *Princy & Another Vs. Jose* ⁷ wherein Courts have held that such covenants are enforceable by any person in whom the property of the covenantee is vested for their benefit, irrespective of notice.

1 1992 SCC OnLine Bom 483
 2 (1933) Ch.611
 3 1909 AC 98
 4 (1900) 2 Ch. D.388
 5 (1931. U. 546)
 6 1898 R. 2163
 7 2009 SCC OnLine Ker 1262

12.4. He would submit that Plaintiff's contention that Defendant – Society has no locus to enforce the covenant on the ground that it was not specifically assigned under the Deed of 1972 is wholly misconceived. He would submit that the said contention proceeds on the erroneous assumption that the restrictive covenant is personal in nature. He would submit that the Deed of 1972 conveyed undivided shares together with all rights, lights, liberties, privileges, easements, advantages and appurtenances which necessarily includes the benefit of the restrictive covenant. He would submit that Plaintiff – Society has failed to establish any *prima facie* case and in that view of the matter, Interim Application No.731 of 2025 deserves to be dismissed on the face of record.

13. Considering the submissions emanating from various documents presented and argued before me, I have permitted the learned Senior Advocates to address the questions raised by the Court in Rejoinder and Sur-Rejoinder submissions.

14. Mr. Tulzapurkar, learned Senior Advocate for Plaintiff – Society would draw my attention to the Affidavit-in-Rejoinder dated 31.12.2024 filed on behalf of Plaintiff – Society by Mr. Sunil Mehta, Treasurer and Authorised Signatory of the Plaintiff – Society appended at page No.142 onwards to contend that the restrictive covenant relied upon by Defendant – Society specifically of the present nature

necessarily operates between a covenantor whose land bears the burden and a covenantee whose land enjoys the benefit i.e. corresponding respectively to the servient and dominant. He would submit that the question that arises before the Court is who has the benefit of the said restrictive covenant and whether can the Defendant – Society have benefit of the same against Plaintiff – Society's land? He would submit that such covenants do not operate in vacuum or generally at large but bind only identifiable parties in respect of clearly identifiable properties. He would submit that unless both the burden and benefit of the covenant are shown to specifically subsist and have been validly passed to the party asserting such rights thereunder, until then no enforceable claim can arise in that regard.

14.1. He would submit that under the Indenture dated 15.10.1943, PD Dubash and BP Dubash as owners of larger parcel of land conveyed 2,873.6 square yards to Gazdars. He would submit that it is necessary to consider that Clause 6 of the said Indenture imposed a height restriction of 30 feet upon PD Dubash and BP Dubash in respect of a plot described as "Plot for Cottages" to be measured from a specified point marked on a plan annexed to the Indenture. He would submit that PD Dubash and BP Dubash were the covenantor bearing the burden and Gazdars were the sole covenantee enjoying the benefit of the said covenant.

14.2. He would submit that the plan annexed to the 1943 Indenture, which could only identify the “Plot for Cottages” and the point from which the restriction of the height is to be calculated is admittedly not produced or is placed on record. He would submit that in the absence of the said plan, the covenant lacks certainty as neither the area, nor the boundaries or C.S. number of the “Plot for Cottages” can be ascertained. He would therefore submit that the covenant is vague and incapable of enforcement and the burden of establishing its enforceability lies entirely upon the Defendant – Society. He would submit that the 20 meter wide road was not in existence before the said restrictive covenant was introduced in the Indenture dated 15.10.1943. He would submit that the structure of Clause 6 in the 1943 Indenture is clear that the restrictive covenant was personal to PD Dubash and BP Dubash. He would submit that insofar enforceability of the covenant is concerned, the 1943 Indenture does not expressly state that it will bind the heirs, executors, administrators and assigns, in respect of the height restriction. He would submit that this distinction clearly evidences the intention that the height restriction was not to bind assigns and therefore it did not run with the suit property.

14.3. In support of his submissions, he has referred to and relied upon the decision of the Supreme Court in the case of *Administrator of*

*the Specified Undertaking of the Unit Trust of India and Another Vs. Garware Polyester Ltd.*⁸ and specifically on paragraph No.29 of the said decision wherein Court held that a negative covenant requires strict construction and cannot be given a passing by interpretation.

14.4. He would submit that by the Indenture dated 26.04.1945, PD Dubash and BP Dubash conveyed 3,762 square yards to Daruwalla and Sidhwa i.e. Defendant - Society's predecessors-in-title. He would submit that the 1945 Indenture transfers only such benefits as were held by PD Dubash and BP Dubash under the 1943 Indenture. He would submit that the height restriction was not a benefit held by PD Dubash and BP Dubash but a burden upon him and therefore it could not have been transferred. He would submit that the 1945 Indenture contains no reference to the Indenture dated 25.07.1944 or to the "Plot for Cottages".

14.5. He would submit that Defendant – Society's title deed dated 28.06.1972 by which the Pemino land (Defendant – Society's Plot) was conveyed does not refer to either the 1943 or the 1944 Indenture. He would submit that absence of any express reference of transfer of the restrictive covenant in the Defendant – Society's own title document conclusively establishes that no benefit of any restrictive covenant ever vested in the Defendant - Society. He would submit that Defendant – Society therefore lacks *locus* to enforce any such covenant

8 (2005) 10 SCC 682

against the Plaintiff – Society though in his usual fairness he has accepted that the restrictive covenant would apply to Plaintiff – Society’s plot of land but disagree as to whether Defendant – Society can or has the right to enforce it. In support of this submission, he has referred to and relied upon the decision of the Karnataka High Court in the case of *Motilal J. Boal Vs. The Corporation of City of Bangalore and Another*⁹ wherein Court held that mere intention to transfer cannot confer any right. He would submit that Court further held that unless the expression and language employed in the deed of sale clearly indicate not mere intention but the actual effectuation of such intention and in absence of such transfer, the purchasers cannot be vested with the benefit of such covenant.

14.6. He would submit that under the Indenture dated 25.07.1944, PD Dubash and BP Dubash conveyed land to Govindram Brothers Private Limited subject to a height restriction in favour of PD Dubash and BP Dubash. He would submit that under the Deed dated 05.04.1963, Plaintiff – Society acquired title subject to the said covenant. He would submit that if at all the covenant subsisted the benefit thereof remained solely with PD Dubash and BP Dubash and could never have passed on to the Defendant – Society. He would submit that there is no privity of contract between the Plaintiff – Society and the Defendant - Society in respect of the 1943 Indenture.

9 1961 Mysore Series 675

14.7. He would submit that Defendant – Society’s case that Plaintiff – Society’s land must necessarily be the “Plot for Cottages” is wholly unsustainable as total / combined area of the Gazdar plot, the Govindram plot and the Daruwalla and Sidwa plot aggregates only to 9,651 square yards, leaving a balance of 2,332 square yards from the original 11,983 square yards which is unaccounted. He would submit that neither the area nor the C.S. number of the “Plot for Cottages” is identified in any document and there is a possibility that the unaccounted land constitutes the said plot. He would therefore submit that the Defendant – Society has failed to discharge its burden of proof on this issue.

14.8. He would submit that the plea of limitation raised by Defendant – Society is wholly untenable in law. He would submit that the cause of action arose only in the year 2024 when for the first time Defendant – Society asserted the alleged restrictive covenant and obstructed the redevelopment of the suit property by issuing a Public Notice dated 22.08.2024. He would submit that mere existence of a covenant in an old title document does not by itself set limitation in motion unless and until the same is sought to be enforced which was done for the first time in the year 2024 by the Defendant – Society. In support of this submission he has referred to and relied upon the decision of the Supreme Court and this Court in the case of *Daya*

*Singh and Another Vs. Gurudev Singh (Dead) by LRS and Others*¹⁰ and *Geeta Patkar Vs. Chandrakant Kantilal Shah and Others*¹¹ wherein Court has held that cause of action for the purpose of Article 58 of the Limitation Act, accrues only when the right asserted in the suit is infringed or there is a clear and unequivocal threat to infringe that right asserted by the Plaintiff, in the suit. Hence, he would submit that the cause of action to file the suit accrued to the Plaintiff – Society for the first time after the receipt of legal Notice dated 16.04.2024 and issuance of Public Notice dated 22.08.2024 by Defendant – Society and hence it cannot be said that it was barred by the law of limitation.

14.9. He would submit that the character of the entire locality on Altamount Road has undergone a complete and irreversible transformation with high-rise development on all surrounding plots, including the Defendant - Society's own property which has been extended from three (3) to seven (7) storeys. He would submit that the restrictive covenant therefore cannot be enforced against the Plaintiff – Society in view of the "Doctrine of Obsolescence" as the said doctrine postulates that if there is a total change in the character of the locality, property or neighbourhood, the negative restriction ought to be deemed as obsolete and therefore cannot be enforced. He would submit that Plaintiff - Society's building is more than 60 years old, dilapidated and occupied by senior citizens and therefore requires

¹⁰ (2010) 2 SCC 194

¹¹ 2015 (6) Mh.L.J. 692

immediate redevelopment. He would submit that Plaintiff - Society's land is separated from the Defendant - Society's land by a 20 meter wide road and the Defendant – Society therefore has no easementary rights with regard to the suit property.

14.10. Mr. Tulzapurkar in support of his submissions in Rejoinder has referred to and relied upon the following citations and decisions of the Courts:-

- (i) *Bhagwat Prasad Vs. Damodar Das and Others*¹²;
- (ii) *Roshan Lal Jeevraj Sethia Vs. Manoj Kumar Sohan Lal Pugalia and Others*¹³;
- (iii) *B.D. Ramble Vs. Micheal K. Lal*¹⁴;
- (iv) *Sayers Vs. Collyer*¹⁵;
- (v) *Pashmina Co-operative Housing Society Ltd. Vs. Latif Mohamed Hassambhoy of Bombay Indian Inhabitant and Others*¹⁶;
- (vi) *Krushna Kishore Bal Vs. Sankarsan Samal and Others*¹⁷;

14.11. He would submit that the Defendant – Society has failed to establish any subsisting or enforceable right under the alleged restrictive covenant and no *prima facie* case or *locus* is made out to restrain the Plaintiff – Society from redevelopment of the suit property. He would therefore submit that the interim relief as prayed be granted in the interest of justice.

¹² 1976 SCC OnLine All 411

¹³ 2015 (4) RLW 2781

¹⁴ 1948 SCC OnLine Ajm 28

¹⁵ 1882 S, 1004.

¹⁶ 2024 SCC OnLine Bom 76

¹⁷ 1973 SCC OnLine Ori 197

15. Mr. Seervai, learned Senior Advocate for Defendant – Society would draw my attention to the Affidavit in Sur-Rejoinder filed on behalf of Defendant – Society by Mrs. Meher Dave, Treasure and Authorised Signatory of the Defendant – Society dated 22.01.2025 from page No.172 onwards and would submit that the Plaintiff – Society has suppressed true and correct facts and documents including its own title deeds dated 25.07.1944 and 05.04.1963 which expressly contain the restrictive covenant. He would submit that despite being fully aware of the said covenant, Plaintiff – Society created an impression in the Suit Plaint that there was no restriction prohibiting construction on its land beyond 30 feet height. He would submit that suppression of these documents was conscious and deliberate to mislead the Court. He would submit that it was only after the Defendant – Society pointed out the said documents in the Affidavit-in-Reply the Plaintiff sought amendment of the Suit Plaint. In support of his submission he has referred to and relied upon the decisions of the Supreme Court in the case of *Bhaskar Laxman Jadhav and Others Vs. Karamveer Kakasaheb Wagh Education Society and Others*¹⁸, *Kishore Samrite Vs. State of Uttar Pradesh and Others*¹⁹ and *Oswal Fats and Oils Limited Vs. Additional Commissioner (Administration), Bareilly Division, Bareilly and Others*²⁰ wherein it is held that a litigant

18 (2013) 11 SCC 531

19 (2013) 2 SCC 398

20 (2010) 4 SCC 728

cannot choose which facts are material for adjudication and is therefore under a duty to make full disclosure of all relevant facts. He would submit that a party who does not approach the Court with clean hands and suppresses material facts is not entitled to be heard or to claim any interim or equitable relief.

15.1. He would submit that it is settled law that a party cannot be permitted to “blow hot and cold” or “approve and reprobate” as the “doctrine of approve and reprobate” being a facet of the equitable “doctrine of election”, bars a party from accepting and rejecting the same instrument or transaction. He would submit that once a party with full knowledge has accepted and acted upon the benefits thereof, it stands estopped from denying its validity or binding effect. He would therefore submit that the Plaintiff-Society having enjoyed the fruits of the arrangement cannot now assail the same and is therefore disentitled to any interim reliefs. In support of his above submissions he has referred to and relied upon the following decisions of the Supreme Court in the case of *Union of India and Others Vs. N. Murugesan and Others*²¹, *Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond and Gem Development Corporation Limited and Another*²² and *Karam Kapahi and Others Vs. Lal Chand Public Charitable Trust and Another*²³.

21 (2022) 2 SCC 25

22 (2013) 5 SCC 470

23 (2010) 4 SCC 753

15.2. He would submit that even though this Court by order dated 27.01.2025 allowed the Plaintiff - Society's Interim Application for amendment, Court has expressly kept open the Defendant - Society's contention that the suit was filed by suppressing material facts and documents. He would submit that the Court expressly kept open the contention that the amended reliefs were barred by limitation. He would submit that the restrictive covenant is admittedly reflected in the Plaintiff - Society's own title document and Plaintiff – Society was fully aware of the same since inception. He would submit that on this ground alone the Interim Application deserves to be dismissed.

15.3. He would submit that Plaintiff – Society sought to challenge the restrictive covenant contained in the Indenture dated 25.07.1944 while completely avoiding any challenge to the covenant contained in its own Indenture dated 05.04.1963. He would submit that the restrictive covenant was expressly passed onto Plaintiff - Society under its Indenture dated 05.04.1963 and therefore it continues to bind the Plaintiff - Society. He would submit that it is impermissible for Plaintiff – Society to accept title under the said Indenture and challenge a binding condition contained therein which is to its disadvantage which existed since the year 1963. He would submit that due to the restrictive covenant that runs with the land, Plaintiff - Society's

predecessor-in-title had purchased the land at a lower price, whereas Defendant - Society's predecessor-in-title purchased the adjoining land from the same owners at a much higher price within a period of nine (9) months which is clearly reflected in both the documents which are now placed on record and perused by the Court.

15.4. He would submit that, Plaintiff – Society's case is clearly barred by limitation under Article 58 of the Limitation Act, 1963 which clearly prescribes a period of three (3) years from the date when the right to sue accrues. He would submit that Plaintiff – Society was aware of the restrictive covenant since 1963 and approached the Court only in 2024 i.e. after a lapse of almost 61 years. He would submit that the amended suit is therefore clearly barred by limitation and even the maximum permissible period of limitation stands expired. He would submit that mere change in neighbourhood does not render the restrictive covenant infructuous or unenforceable. He would therefore submit that Plaintiff - Society failed to establish any *prima facie* case and permitting construction on its plot beyond the height of 30 feet at the interim stage would cause irreparable prejudice to Defendant – Society and would amount to grant of final reliefs at the interim stage and therefore in that view of the matter, the Interim Application deserves to be rejected.

15.5. He would submit that it is pertinent to note that the interim

reliefs prayed for by the Plaintiff – Society are in the nature of final reliefs prayed for in the Suit Plaint and are therefore impermissible in law.

15.6. In these circumstances, he would submit that the restrictive covenant is binding and enforceable. He would submit that the Plaintiff – Society is guilty of suppression and gross delay and has failed to make out any *prima facie* case. He would therefore submit that the Interim Application deserves to be dismissed.

16. I have heard Mr. Tulzapurkar, learned Senior Advocate for Applicant / Plaintiff and Mr. Seervai, learned Senior Advocate for Defendant and with their able assistance perused the record of the case. Submissions made by both the learned Senior Advocates at the bar have received due consideration of the Court.

17. At the outset, it is seen that Interim Application No.731 of 2025 is filed by the Plaintiff – Society seeking interim reliefs. With regard to validity and subsistence of the restrictive covenant it is seen that the Plaintiff – Society derived title to the suit property under a registered Indenture dated 05.04.1963 which expressly records that the conveyance is subject to all stipulations, agreements, covenants and restrictions contained in the earlier Indenture dated 25.07.1944. The Indenture dated 25.07.1944, in turn, expressly incorporates a height restriction of 30 feet. *Prima facie*, the restrictive covenant has

travelled through successive conveyances and stands reflected in Plaintiff – Society’s own chain of title. I have perused these documents with the able assistance of Mr. Seervai and Mr. Tulzapurkar has also accepted this position.

18. The submission of Plaintiff – Society that the restrictive covenant cannot be enforced in the absence of a specific assignment of the covenant in favour of the Defendant – Society cannot be accepted at the interim stage. Where the conveyances in favour of both the Plaintiff – Society and the Defendant – Society expressly refer to the earlier Indentures and convey the property together with all rights, liberties, easements, advantages and appurtenances, a *prima facie* inference arises that the stipulations and restrictions contained in the earlier Indentures were intended to bind and benefit all successors-in-title. An express reiteration of the covenant in every subsequent deed is not a *sine qua non* for its *prima facie* continuance, particularly when the deeds incorporate earlier documents by specific reference to them.

19. The Plaintiff – Society has specifically argued that the Indenture dated 1972 under which the Defendant – Society derived its title does not expressly state that the restrictive covenant stood assigned or passed in favour of the Defendant – Society. This submission, *prima facie*, cannot be accepted. The said argument is refuted by the very contents of the Indenture dated 1972 itself, which

expressly records that the conveyance is subject to and together with the binding nature and benefits of the stipulations, covenants and restrictions contained in the earlier Indenture executed by its predecessor-in-title dated 26.04.1945.

20. On perusal of the Indenture dated 26.04.1945 at internal page No.5, it is seen that it expressly incorporates all the rights, liberties, privileges, advantages and appurtenances which in turn includes the restrictive covenant in question. Once the Indenture of 1972 expressly acknowledges and adopts the binding effect and benefits of the earlier Indenture, it is not open to the Plaintiff – Society to contend that the restrictive covenant did not enure for the benefit of the Defendant – Society merely because the covenant is not in verbatim reproduced in the 1972 Indenture. *Prima facie*, the covenant stands preserved and transmitted through the chain of title and continues to bind and benefit the successors-in-title, including the Defendant – Society.

21. In support of the above, attention is drawn to the decision of the Kerala High Court in the case of *Princy & Another (supra)*. Relevant paragraph Nos.9 and 10 are reproduced herein below for immediate reference:-

“9. Then the question is whether the deceased first appellant being an assignee from the covenantee, the additional appellants could enforce the negative covenant in Ext. A2 without a specific assignment of the benefit of the covenant in favour of the deceased

first appellant? Exhibits A1, A3 and A4 as per which she acquired title do not specifically assign the benefit of the covenant provided under Ext. A2. Collins L.J. stated in *Rogers v. Hosegood*, (1900) 2 Ch. D. 388 thus:

“.....these authorities establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or representation on the assignment. In such cases it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in, or was annexed to the land bought”. (Emphasis supplied)

Following these observations the Calcutta High Court in *Mathewson v. Ram Kanai Singh Deb*, (1909) XXXVI ILR Calcutta 675 held thus:

“.....one very important test whether the benefit of burden of a covenant or contract in any particular case runs with the land or not is whether such covenant or contract in its inception binds the land. If it does, it is then capable of passing with the land to subsequent assignees, if it does not, it is incapable of passing any mere assignment of the land.....” (Emphasis supplied)

Therefore, if the covenant bound the land at the inception it goes with the land for the benefit of the assignee of the covenantee and a specific assignment of the covenant in favour of the assignee (of the covenantee) is not required.

10. Halsbury's Laws of England, Vol. 14, 3rd Edn. Page 564 states as regards covenants running with the land in equity that the equitable doctrine relating to restrictive covenants is confined to covenants of a negative nature. It states that:

“Where a vendor retains land which is sufficiently defined and which is capable of being benefited by the covenant at the time when it is imposed, and the covenant is expressed to be for the benefit of that land and every part thereof, then the benefit of the covenant is annexed to the land and passes on a subsequent conveyance of the land or any part thereof without express mention, even though the purchaser is not aware of the existence of the covenant. It constitutes an equitable interest in the land and passes, not on the ground that a subsequent purchaser has expressly bought it, but because it inheres in or is annexed to the land which he has bought. Moreover, although the covenant is not taken for the benefit of the defined land “or any part thereof”, yet the benefit will pass on an assignment of part, if the conveyance shows an intention that the” covenant should be annexed to each part of the land”.

In this case it is seen from Ext. A1 and A2 that the covenant not to construct any portion of the building within a space of 12 feet from the common wall on either side was stipulated for the protection of the common wall (as it then stood) which was necessary for enjoyment of the respective portions of the building.

That covenant being negative in character bound the land at the very inception and hence in my view runs with the land for the beneficial enjoyment of which it was imposed. Hence, a specific assignment of the benefit of the covenant in favour of the assignees of the covenantee is not required. That apart, Exts. A1, A3 and A4 show that while assigning the southern portion of the building and the land to Enasu, John and appellant No. 1, respectively all rights of the vendor (which should include the benefit of the covenant imposed on the respondent under Ext. A2) in the property was conveyed to the purchasers. Hence the assignee of the covenantee was entitled to enforce the covenant against the respondent.”

22. The submission of the Plaintiff – Society that the restrictive covenant cannot be enforced in the absence of privity of contract between the Plaintiff and Defendant also cannot be accepted at this stage. The doctrine relating to covenants running with the land does not rest solely on privity of contract between the present parties. The enforceability of such covenant is examined on the basis of the intention of the original parties, the nature of the covenant, and the manner in which the covenant has been preserved and transmitted through the chain of title. *Prima facie*, the documents relied upon by the Defendant – Society indicate that the restrictive covenant was intended to bind its successors and assigns and to run with the land. It constitutes an equitable interest in the land and passes, not on the ground that a subsequent purchaser has expressly bought it, but because it inheres in or is annexed to the land which he has bought.

23. Plaintiff – Society has further contended that even if the restrictive covenant is assumed to subsist, the Defendant – Society is not the beneficiary thereof. However, the Plaintiff – Society has not

been able to state / identify as to who, according to it, is entitled to enforce the covenant if Defendant – Society is to be excluded. This uncertainty itself demonstrates that the issue of enforceability and identification of the beneficiary is a matter requiring trial. Once the Plaintiff – Society admits that the restrictive covenant runs with its own land, the question as to who is entitled to enforce it cannot be conclusively determined at the interlocutory stage in the Interim Application.

24. It is also significant that while the Plaintiff – Society has sought to challenge the restrictive covenant contained in the Indentures of 1943 and 1944, it has not challenged the covenant as expressly incorporated in its own title deed document dated 05.04.1963. A party cannot be permitted, at least at the interim stage, to approbate and reprobate by accepting title under a document while simultaneously disputing a binding condition contained therein. *Prima facie* the Plaintiff – Society is bound by the terms under which it has derived its title.

25. Plaintiff – Society's argument that the absence of the map annexed to the Indenture dated 15.10.1943 and subsequent changes in the physical features of the locality, including the existence of a 20-meter wide road which was not in existence at the time of the original covenant, render the covenant vague and unenforceable. These

submissions undoubtedly raise triable issues as these are disputed or disputable questions of facts. However, at the interim stage, the Court cannot ignore the fact that the restrictive covenant has consistently found place in the chain of title documents culminating in the Plaintiff – Society’s own conveyance of 1963. *Prima facie*, this indicates that the predecessors-in-title were *ad idem* that the restriction would continue to bind the land notwithstanding subsequent changes in the surroundings.

26. On perusal of the pleadings, affidavits and documents on record, it is further necessary to examine the foundational basis on which the Plaintiff – Society has approached this Court.

27. It is seen that the Plaintiff – Society initially approached this Court on the categorical footing that no restrictive covenant existed in respect of the suit property. This assertion formed the very foundation of the Interim Application as filed alongwith the Suit Plaint on 26.09.2024. However, only after the Defendant – Society pointed out the existence of a restrictive covenant in the Plaintiff – Society’s own title documents, Plaintiff – Society accepted the existence of such restrictive covenant and shifted its stand to contend that even if the said restrictive covenant did exist qua the Plaintiff – Society’s land, the Defendant – Society has no *locus* to enforce the same. This change of stand on the fundamental issue cannot be ignored at the interim

stage. As in view of the doctrine of election a party who accepts a benefit under a deed must adopt the whole contents of that instrument. It is settled principle of law that a person cannot say at one time that the transaction is valid and then turn around and say it is void for the purpose of securing some other advantage.

28. Attention in this regard is drawn to the decision of the Supreme Court in the case of *Rajasthan State Industrial Development and Investment Corporation and Another (supra)*. Relevant paragraph Nos.15 and 16 of the said decision are reproduced hereinbelow for immediate reference:-

“15. A party cannot be permitted to “blow hot-blow cold”, “fast and loose” or “approve and reprobate”. Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner so as to violate the principles of what is right and of good conscience.

16. Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approve and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppels in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had.”

29. It is pertinent to note that such conduct of Plaintiff cannot be treated as a mere oversight. The initial denial and subsequent acceptance of the restrictive covenant goes to the root of the matter. A party which approaches the Court on an incorrect factual basis and corrects its stand only after being confronted with its own documentary material cannot seek interim relief in equity.

30. At the outset, it is apparent that the Plaintiff – Society suppressed material facts with regard to the restrictive covenant. It is settled principle of law that a party approaching a Court must state correct facts and come with clean hands. Where pleadings are founded upon information, the source of such information must be disclosed. A suit filed on misconceived and misleading facts to achieve an ulterior purpose amounts to an abuse of the due process of Court. A party seeking equity must do equity and no litigant can play “hide and seek” with the Courts and adopt “pick and choose” by concealing material facts from the Court.

31. Plaintiff – Society has relied upon correspondence addressed to the Defendant – Society seeking suggestions in relation to redevelopment. *Prima facie*, there was no legal requirement for the Plaintiff – Society to do so or seek suggestions from the Defendant – Society in respect of redevelopment of its own property. Such action is completely unusual and unheard of. The said correspondence appears to be nothing more than an attempt to ascertain whether objections against the Plaintiff – Society *qua* the very restrictive covenant would be raised by the Defendant. Such conduct does not assist the Plaintiff – Society in establishing any right to interim relief atleast in my opinion. In today’s times Developers appointed for redevelopment conduct a thorough due diligence. Plaintiff’s own case is that all Developers who had shown interest in Plaintiff’s redevelopment had

withdrawn and called upon Plaintiff to obtain NOC from the Defendant which itself signifies that Plaintiff was fully aware about the restrictive covenant hurdle.

32. The mere fact that other buildings in the vicinity have increased their height or have undergone redevelopment cannot, by itself, be a determinative factor for granting interim relief to Plaintiff – Society. Change in neighbourhood or surrounding development does not automatically render a restrictive covenant obsolete or unenforceable. Whether the doctrine of obsolescence applies and whether the covenant has lost its purpose or materially affects the rights and enjoyment of the Defendant – Society’s land, are issues requiring evidence and detailed examination and can only be adjudicated at trial on issues.

33. With regard to the issue of limitation, attention is drawn to the decision of the Supreme Court and this Court in the case of ***Daya Singh and Another (supra)*** and ***Geeta Patkar (supra)***. In this case, I am of the opinion that Plaintiff - Society’s right to sue under Article 58 of the Limitation Act, 1963 accrued when a clear and unequivocal threat to infringe that right by Defendant – Society arose i.e. when they objected to redevelopment of the suit property vide letter dated 16.04.2024 addressed by Defendant – Society. Therefore, in so far as the issue of limitation is concerned, *prima facie*, at this stage, this

Court is inclined to accept Plaintiff – Society’s submission that the cause of action arose in the year 2024 when the Defendant – Society first asserted the restrictive covenant in the context of Plaintiff’s redevelopment. Mere existence of a covenant in an old documents does not, by itself, give rise to a cause of action. To that limited extent, the Suit cannot be rejected at the threshold on the ground of law of limitation, keeping all contentions of the Defendant – Society open to be agitated since limitation would be a mixed question of law and facts.

34. However, the above *prima facie* view on limitation does not justify grant of interim relief to Plaintiff – Society either. The reliefs sought by Plaintiff – Society at the interim stage are however in the nature of final reliefs. Grant of such reliefs would amount to permitting redevelopment beyond the application of the restrictive covenant and height restriction which would result in irreversibly altering the status of the suit property even before rights of the parties are finally adjudicated on trial.

35. It is also relevant to note that Plaintiff – Society derived title under documents which expressly refer to stipulations, agreements and restrictions as alluded to hereinabove. Hence at this stage, the Plaintiff – Society cannot be permitted to accept the benefit of title while seeking to avoid the conditions attached thereto. The balance of

convenience does not lie in permitting construction or redevelopment beyond the height restriction at this stage, as the same would cause irreversible consequences. Needless to state that Plaintiff – Society is entitled to redevelopment otherwise upto height restriction of 30 feet.

36. In the aforesaid circumstances, this Court is of the *prima facie* view that the Plaintiff – Society has clearly failed to establish a strong *prima facie* case for grant of interim relief. The balance of convenience does not lie in its favour and irreparable prejudice would be caused to the Defendant – Society if such reliefs are granted. Conduct of the Plaintiff – Society is also not completely honest in approaching this litigation.

37. In view of the above *prima facie* findings, Interim Application No.731 of 2025 is liable to be rejected. It is clarified that all observations made herein are *prima facie* in nature and confined only to the adjudication of the Interim Application. All rights and contentions of the parties are otherwise expressly kept open to be decided on evidence at the trial of the Suit.

38. Interim Application No.731 of 2025 is dismissed.

39. Interim Application No.4573 of 2025 is allowed.

40. Interim Application No.6242 of 2025 is allowed.

[MILIND N. JADHAV, J.]