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

INTERIM APPLICATION (L) NO. 5342 OF 2025

IN

COMMERCIAL SUIT (L) NO. 5307 OF 2025

Green Garden Apartments Co-operative Housing Society Limited ....*Applicant/Ori. Plaintiff*

In the matter between:

Green Garden Apartments Co-operative Housing Society Limited ....*Plaintiff*

: Versus :

Nitin Chaudhari and others ....*Defendants*

Mr. Prateek Seksaria, Senior Advocate *with Mr. Rohaan Cama, Mr. Ajay Vazirani, Ms. Shreema Doshi, Mr. Rohit Agarwal, Mr. Kyrus Modi, Ms. Sharanya Mahimtura and Mr. Ashwin Sawlani i/b Lexicon Law Partners, for the Plaintiff.*

Mr. Sharan Jagtiani, Senior Advocate *with Mr. Shrinivas Chatti, Ms. Aishwarya Wagle, Mr. Ved Thakur and Mr. Akash Ganapathy i/b M/s. Cyril Amarchand Mangaldas, for Defendant No.2.*

Mr. Pravin Samdani, Senior Advocate *with Mr. Maulik P. Vora and Ms. Akshata Pawar i/b M/s. Pramodkumar & Co., for Defendant No.3.*

Mr. G.S. Godbole, Senior Advocate *with Mr. Atharva Dandekar, Mr. Hitendra Parab, Mr. Tejas Gupta, Mr. Vicky Pohuja and Mr. Aziz Khan, for Defendant No.6.*

Mr. Simil Purohit, Senior Advocate *with Mr. Manish Doshi and Mr. Dhaval Poriya i/b M/s. Vimadalal & Co., for Defendant Nos. 5, 7, 10 and 16.*

Mr. Mayur Khandeparkar *with Srividya Venkat and Mr. Trinity Rebello i/b M/s. J Law Associates, for Defendant No. 14.*

Mr. Karl Tamboly *with Ms. Tanvi Shah and Ms. Shubadha Khandekar i/b M/s. Wadia Ghandy & Co., for Defendant No. 17.*

Mr. S. R. Ganbavale *(Through VC) i/b Mr. Daljeet Singh Bhatia, for Defendant No.1.*

Mr. Rubin Vakil *with Ms. Chitra C. Rao, for Defendant No. 12 & 13.*

Mr. Mehul Shah, *for Defendant No.4.*

Ms. Janhavee Joshi *with Ms. Shweta Nisar i/b Ms. Sonal N. Doshi, for Defendant No. 18.*

Mr. Yogesh C. Naidu *with Ms. Talha Siddiqui, Mr. Eden Ribeiro, Ms. Deepa Bopardikar and Ms. Subiya Kazi, for Defendant Nos. 9 and 11*

Mr. Sahil Gandhi *with Mr. Abhishek Jhaveri i/b M/s. Markand Gandhi & Co., for Defendant No.15.*

Mr. Drupad Patil *with Mr. G.O. Giri i/b Ms. Komal R. Punjabi, for Defendant No. 19-MCGM.*

CORAM : SANDEEP V. MARNE, J.

RESERVED ON : 19 SEPTEMBER 2025.
PRONOUNCED ON : 3 OCTOBER 2025.

JUDGMENT :-

A. THE CHALLENGE

1) This is an application for temporary injunction filed by the Plaintiff-Society seeking to restrain Defendant Nos.5 to 18 to act in furtherance with the Agreements executed in their favour for transfer of Transferable Development Rights **(TDR)** and from selling, transferring, assigning, parting with or alienating the TDR received by them from and out of Plaintiff's Development Rights Certificate (**DRC**) dated 7 August 2023. Plaintiff has also sought injunction against Defendant No.19-Municipal Corporation of Greater Mumbai **(MCGM)** from

recognizing the TDR transfer agreements relied upon by Defendant Nos.5 to 18 and from permitting them to utilize the TDR out of Plaintiff's DRC dated 7 August 2023. Plaintiffs have also sought temporary monetary injunction against Defendant Nos.1 to 4 for deposit of sum of Rs.16.51 crores towards repayment of amounts paid to Defendant Nos.3 to 4 alongwith interest.

B. FACTS

2) Plaintiffs case can be summarized thus :-

2.1) Plaintiff is a co-operative housing society and an owner of piece and parcel of land admeasuring 26,983 sq.mtrs at Village-Borla, Taluka-Kurla, Mumbai Suburban District at Deonar, Mumbai – 400 088. In 1986, portion of Plaintiff-Society's land admeasuring 7,284.10 sq.mtrs. was acquired by Defendant No.19-MCGM for the purpose of construction of road. Physical possession of the acquired land was handed over by the Plaintiff-Society to MCGM on 12 November 1986. The Society apparently did not contemporaneously receive compensation from MCGM in respect of the acquired land. Plaintiff-Society was entitled to apply for compensation in the form of TDR as per applicable Development Control Regulations in lieu of monetary compensation. According to the Plaintiff, Defendant No.2, who is its member, was liasoning with MCGM and had sufficient experience in aiding the Society in the process of securing the TDR and began the process of making applications to MCGM for grant of TDR. A Special General Body Meeting of the Society was held on 8 January 2023 appointing and authorizing Defendant No.1 (Chairman) and Defendant No.20 (Secretary) to submit TDR proposal to MCGM and to obtain DRC for the acquired land. Another Special General Body Meeting was

held on 18 June 2023 in which Resolution was adopted, *inter alia* for appointment of Defendant No.3 (JP Nestor LLP) for providing comprehensive consultation services for acquisition of TDR and sale thereof. Resolution was also adopted for appointment of Defendant No.4 (N.V. Consultants) to provide comprehensive consultancy services for acquiring TDR till sale thereof. Defendant Nos.1 and 2 were entrusted with the task of taking necessary steps for entering into Agreements for appointment of Defendant Nos.3 and 4 as consultants. On 13 July 2023, Society executed Mortgage Deed in favour of Defendant No.3 creating charge/levy on TDR of 6000 sq.mtrs receivable out of DRC. On 7 August 2023, MCGM issued DRC in favour of the Plaintiff-Society under which Society secured FSI credit of built-up area equivalent to 14,568.20 sq.mtrs. Between 14 August 2023 to 26 September 2023, unregistered Agreements for Sale of TDR and Agreements for utilization of FSI were executed between the Plaintiff-Society and Defendant Nos.5 to 18.

2.2) Plaintiff-Society alleges that Defendant No.2, under the guise of raising complaint against Defendant No.1, raised the issue of making payments to Defendant No.4 despite non-performance of any work by Defendant No.4. On account of raising of the said dispute, the members of the Society approached the Secretary (Defendant No.20) and sought clarifications. The Secretary called Special Managing Committee meeting on 16 October 2024 resolving to conduct independent internal audit. Accordingly, N.K. Kalra & Associates was appointed to conduct audit. Defendant No.1 was provided opportunity to clarify the points raised by Defendant No.2. The Managing Committee decided on 10 November 2024 to take legal opinion on Agreements for Sale of TDR. Defendant No.20 realised that her signatures on some of the TDR Agreements were forged.

2.3) Defendant No.2 filed a complaint with the Deputy Registrar alleging misappropriation of Society's funds through unauthorized payments of Rs.15 crores to Defendant No.4 (N.V. Consultants) alleging business relationship with Defendant No.1. Deputy Registrar passed Order dated 16 December 2024 under Section 89(a) of the Maharashtra Co-operative Societies Act, 1960 **(MCS Act)** appointing officers to inspect accounts of the Society. Plaintiff-Society issued notice dated 20 December 2024 to Defendant Nos.5 to 18 alleging large scale fraud in the matter of Sale of TDR and called upon Defendant Nos.5 to 18 not to act in furtherance of TDR Sale Agreements. Society's auditor, N.K. Kalara submitted report on 22 December 2024 highlighting irregularities in sale of TDR. Special General Body Meeting of the Society was held on 22 December 2024 in which the Fact-Finding Committee was appointed. In the meantime, the Divisional Joint Registrar passed order dated 23 December 2024 under Section 83(3)(b) of the MCS Act appointing Flying Squad to conduct audit of Society's Accounts. Parallelly, the Department instituted enquiry under Section 75(5) of the MCS Act on the basis of complaint of Defendant No.2. Society filed Revision Application before the Hon'ble Minister, Co-operation against the orders passed by the Deputy Registrar and Divisional Joint Registrar. In the meantime, Defendant No.4 refunded amount of Rs.6.26 crores to the Society.

2.4) The Fact-Finding Committee appointed by the Society submitted a Report stating that Defendant No.2 is the master mind of the fraud played on the Society. The Society once again issued notice dated 15 January 2025 to the Developers not to act on TDR Sale Agreements. On 19 January 2025, Special General Body of the Society dissolved the Fact-Finding Committee and constituted a Negotiation

Committee for attempting to negotiate and arrive at a settlement. The Negotiations Committee held meeting on 25 January 2025 in which Defendant No.1 accepted the moral responsibility and gave personal cheques of Rs.8.25 crores to the Society. In the meantime, Defendant Nos.5 to 18 replied to Society's notices and took up the defence of *bonafide* purchase of TDR.

3) In the above background, the present suit is filed on 17 February 2025 seeking various declarations relating to MOU executed in favour of Defendant No.3, Agreement for Liasoning and Consultancy for Sale of TDR dated 21 June 2023, Deed of Mortgage dated 13 July 2023. Plaintiff has also challenged the Agreements for Sale of TDR executed in favour of Defendant Nos.5 to 18. Plaintiffs have also sought direction against Defendant Nos.1 to 4 for recovery of sum of Rs.16.51 crores alongwith interest. In this Suit, Plaintiff has filed Interim Application (Lodg.) No.5342/2025 seeking temporary injunction in following terms :-

> a) Pending the hearing and final disposal of the present Suit, that this Hon'ble Court be pleased to pass an order directing Defendant Nos. 1 to 4 to jointly and severally to deposit a sum of Rs. 16,51,00,000/- (Rupees Sixteen Crores Fifty One Lakh only) with this Hon'ble Court towards refund of the amounts paid to Defendant Nos.3 and 4 as per Particulars of Claim (annexed as *Exhibit 'HHHH'* to the Plaint) or such other amount as this Hon'ble Court may deem fit along with interest thereon at 24% p.a. or such other rate as this Hon'ble Court may deem fit from the date of each payment or such other date that this Hon'ble Court may deem fit till the date of actual payment/ realisation;
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> b) Pending the hearing and final disposal of the present Suit, that this Hon'ble Court be pleased to pass an order of temporary injunction restraining the Defendant Nos.5 to 18, their agents, servants, employees or any person claiming through or under them from, in any manner whatsoever, acting upon or pursuant to or in furtherance of the agreements as per the list (annexed at *Exhibit 'IIII'* to the Plaint), including but not limited to registration thereof before the concerned Sub-Registrar of Assurances in the city of Mumbai;

c) Pending the hearing and final disposal of the present Suit, this Hon'ble Court be pleased to pass order of temporary injunction restraining Defendant Nos. 5 to 18, their agents, servants, employees or any person claiming through or under them from selling, transferring, assigning, parting with, or alienating and/or utilizing the TDR and/or claiming any right, title or interest in relation to the said TDR received by the said Defendants from and out of Plaintiff's DRC bearing DRC No. ROAD/0059/2023 dated 7th August, 2023;

d) Pending the hearing and final disposal of the present Suit, that this Hon'ble Court be pleased to pass an order of temporary injunction restraining Defendant No. 19 from, in any manner whatsoever, recognizing the agreements mentioned in the list (annexed at *Exhibit 'IIII'* to the Plaint) and/or in any manner permitting the Defendant Nos.5 to 18 and/or any person(s) claiming through or under them from acting in furtherance of any application and/ or submissions made by Defendant Nos. 1 to 18 for transfer/ utilization of TDR from and out of the Plaintiff's DRC bearing DRC No. ROAD/0059/2023 dated 7th August, 2023 in any manner whatsoever;

e) Pending the hearing and final disposal of the present Suit, this Hon'ble Court be pleased to pass an order of temporary injunction restraining Defendant Nos. 1 and 2 from doing and/or undertaking any further acts on behalf of the Plaintiff Society and/ or representing and/ or holding themselves out as representing the Plaintiff Society with any third parties;

f) For ad-interim reliefs in terms of prayer clause (a) to (e) above.

g) For any other and/or further reliefs as this Hon'ble Court in the nature and circumstances of the Suit may deem fit and proper.

4) Affidavits in-Reply have been filed by Defendant Nos.1, 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, 16, 17 and 18. Interim Application is accordingly taken up for hearing and decision.

C. SUBMISSIONS

C.1 SUBMISSIONS ON BEHALF OF PLAINTIFF

5) Mr. Seksaria, the learned Senior Advocate appearing for the Plaintiff has submitted that the impugned Agreements for Sale of TDR executed in favour of Defendant Nos.5 to 18 are without lawful

authority of the Society and that the same are not binding on Plaintiff-Society. That as per the Resolutions adopted in the Special General Body Meeting held on 8 January 2023 and 18 June 2023, Defendant No.3 was appointed only as a consultant for procurement of TDR from MCGM. That the Society had never authorized Defendant No.3 to sell the TDR. The authority to act as a consultant for sale of the TDR was granted in favour of Defendant No.4-N.V. Consultant who has admittedly not carried out sale of the TDR. That Defendant No.3 did not have any authority to deal with sale transaction of TDR. That therefore the Agreements for Sale of TDR executed in favour of Defendant Nos. 5 to 18 are without lawful authority granted by the Society and therefore the same are void and not binding on the Society. Alternatively, he would submit that the TDR Agreements have not been registered and in absence of mandatory registration required under Section 17 of the Registration Act,1908 **(the Registration Act)** no title in respect of the TDR can vest in favour of Defendant Nos.5 to 18. That the TDR ultimately is a right flowing out of land and therefore an immovable property requiring compulsory registration of document of transfer of TDR. He would rely upon judgment of Division Bench of this Court in ***Chheda Housing Development Corporation Versus. Bibijan Shaikh Farid and Others***[1] in support of his contention that FSI/TDR is a benefit arising from land and hence an immovable property. He would place reliance on Clause-6.4 of Regulation-32 of DCPR, 2034 under which Agreements for transfer of TDR are required to be compulsorily registered. Mr. Seksaria would also rely upon judgment of Division Bench of this Court in ***Shahed Kamal and Others Versus. PagaraniUniversal Infrastructure Private Limited and Others***[2] in support of his contention that FSI and TDR are benefits arising out of the land. He would also rely upon judgment of the Apex Court in ***Ananda Behera***

[1] 2007(3) Mh.L.J. 402

[2] 2022 SCC OnLine Bom 567

and Another Versus. State of Orissa and Another[3] and ***Santosh Jayaswal and Another Versus. State of M.P. and Others***[4] *i*n which it is held that an instrument granting lease for activity of fishing would require registration. He would submit that the judgment of Division Bench of this Court in ***B. Jeejeebhoy Vakharia & Associates Versus. Sahara India Commercial Corporation Limited and Others***[5] is not only distinguishable but cannot be relied upon in the light of order of the Apex Court in ***Sahara India Commercial Corporation Limited Versus. B. Jeejeebhoy Vakharia and Others***[6]. Mr. Seksaria has also relied upon judgment of this Court in ***Sadoday Builders Private Ltd. and Another Versus. Jt. Charity Commissioner, Nagpur and Others***[7], ***M/s. Segment Developers Pvt. Ltd. Versus. The State of Maharashtra and Others***[8], ***Janhit Manch through its President Bhagvani Raiyani and Another Versus. State of Maharashtra and Others***[9]and of Andra Pradesh High Court ***Kalidindi Rukmini Versus. The State of Andhra Pradesh and Others***[10] order of Single Judge of the Andhra Pradesh High Court in support of his contention that TDR is an immovable property. He would further submit that DCPR 6.4 would bind MCGM and once DCPR postulates following of a particular procedure for transfer of TDR, the said procedure must strictly be followed. That all the Agreements executed in favour of Defendant Nos.5 to 18 are for sale of TDR and a hair-splitting exercise of distinguishing concepts of 'utilisation' and 'transfer' of TDR undertaken by the Defendants is meaningless.

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3 1955 SCC OnLine SC 41
4 (1995) 6 SCC 520
5 2008 SCC Online Bom 536
6 (2011) 11 SCC 256
7 (2011) 6 Bom C.R. 42
8 Writ Petition No.2312 of 2016 decided on 20 February 2024. (OS)
9 (2019) 2 SCC 505
10 Writ Petition No.17021 of 2023 decided on 19 March 2024.

6) Mr. Seksaria would further submit that the entire transaction of sale of TDR is an outcome of fraud committed by Defendant Nos.1 to 4. That fraud would vitiate everything and that therefore TDR Sale Agreements executed fraudulently would not be binding on the Society. That therefore Defendant Nos.5 to 18 cannot claim any right, title or interest in TDR allegedly purchased by them through such fraudulent Agreements. He would rely upon the findings recorded in the enquiry conducted under Section 81 (3) (b) of the MCS Act to demonstrate as to how unauthorized transactions from the accounts of the Society had been carried out. That the Audit Report under Section 81(3)(b), as well as Special Report and Specific Report clearly depict embezzlement and misappropriation of huge sums of money by Defendant Nos.1 to 4. He would further submit that the TDR has been sold at a much lower rate compared to market. That the published Annual Statement of Rates (**ASR**) for the TDR was Rs.67,939.08/- per sq.mtrs whereas the TDR is sold at much lower rate, in some cases at Rs.20,851.5/- per sq.mtrs. That the TDR was sold on average of 44.13% lower of the ASR. That the TDR ought to have been sold at Rs.97.88 crores whereas, the Society has received only Rs.46 crores from sale of TDR and has thereby incurred loss of Rs.51.87 crores.

7) Mr. Seksaria would further submit that there is no delay on the part of the Plaintiff-Society in filing the Suit and in moving application for temporary injunction. That most of the Respondent-Developers have merely obtained commencement certificates and some of them are yet to actually utilize the TDR. That no loss or prejudice would be caused to the said Developers if temporary injunction is passed against them from utilization of Society's TDR as it is easily possible for them to procure the requisite TDR from the market. That

the Society instituted Fact Finding Committee and thereafter Negotiation Committee and has thereafter filed the present Suit with the necessary alacrity. That in any case mere delay cannot be a reason for non-grant of temporary injunction. Once it is found that delay is not inordinate it cannot be raised by a party who is guilty of fraud. In support, he would rely upon judgment of the Delhi High Court in ***M/s. Hindustan Pencils Private Limited Versus. M/s. India Stationery Products Co. & Another***[11].

8) Mr. Seksaria would further submit that the Plaintiff-Society need not return the consideration received towards sale of TDR. Once it is proved that the Sale Agreements are outcome of fraud and deceit the Defendants are equally, if not more, responsible for illegality and that there is no cause for restitution. In support, he would rely upon judgment of the Apex Court in ***Loop Telecom and Trading Limited Versus. Union of India and Another***[12], Mr. Seksaria would however clarify that Plaintiff society is not pressing for temporary injunction for deposit of any amount by Defendant Nos.1 to 4 at this stage. He would however seek liberty to press for the said relief at appropriate stage in the Suit. On above broad submissions, Mr. Seksaria would pray for grant of temporary injunction in favour of the Plaintiff.

C.2 SUBMISSIONS ON BEHALF OF DEFENDANTS

9) Mr. Jagtiani, the learned Senior Advocate appearing for Defendant No.2 would submit that the Suit is faulty as the same is not supported by general body resolution. That the Suit is instituted at the instance of managing committee members, who have participated in all

[11] 1989 SCC OnLine Del 34

[12] (2022) 6 SCC 762

decision-making process relating to sale of TDR. That the only relief sought against Defendant No.2 is for deposit of money, which has not been pressed by the Plaintiff at this stage. That the Suit is premised on false pleadings about members of society being kept in dark about sale of TDR and they noticing the transaction in September/October-2024. That further false case pleaded in the Plaint is that there was no resolution for sale of TDR by Defendant No.3. He would submit that decision for sale of TDR as well as of sale transaction by Defendant No.3 was in express knowledge of not only the managing committee members but also of society members. That sale of TDR has taken place with the authority of general body and case does not involve surreptitious sale of TDR. He would take me through minutes of the managing committee meetings held on 10 September 2023 and 1 October 2023 to demonstrate acquisition of knowledge by managing committee members of sale of TDR. That said managing committee were party to all the decisions. He would submit that real intention of filing the Suit is to seek immunity for managing committee members (except Defendants) in respect of transaction of sale of TDR. That Defendant No.2 had raised objection to the manner in which sale proceeds of TDR were utilised and had never questioned the transaction of sale. He would therefore submit that since the transaction of sale of TDR has taken place with full knowledge of all the managing committee members as well as general body, no interference is warranted in the impugned agreements for sale of TDR.

10) Mr. Samdani, the learned Senior Advocate appearing for Defendant No.3 would submit that the Society decided to sell the TDR for the purpose of paying final settlement amount to Mr. N.G. Sawant for purchase of adjoining plots. That the Society was in need of money and therefore decided to sell the TDR. It has sold the TDR and

pocketed the money and now has turned around to question the agreements for sale of TDR. That the Society has taken a false position that special general body resolution dated 8 January 2023 did not authorise Defendant No.3 to sell the TDR. He would submit that the Society secured advance payment of Rs.9 corers from Defendant No.3 and executed Mortgage Deed dated 13 July 2023 mortgaging TDR admeasuring 6,000 sq.meters in favour of Defendant No.3. That Defendant No.3 paid amount of Rs.9 crores to the Society from March 2023 to July 2023, which the Society repaid to Defendant No.3 from 24 August 2023 to 21 September 2023. That if there was no authority for Defendant No.3 to sell the TDR, why Society executed mortgage and accepted Rs.9 crores from Defendant No.3 has not been explained in any manner.

11) So far as the allegation of inadequate consideration is concerned, Mr. Samdani would submit that ASR figures are relevant only for the purpose of computation of stamp duty for sale/utilisation of TDR and there is no material to indicate that ASR rate is the market rate. That in any case mere inadequate consideration cannot be a ground for setting aside a valid sale. That Society has secured Rs.46 crores through sale of TDR and there is nothing to indicate that the TDR has been sold on less than prevailing market rate.

12) So far as the objection of non-registration of TDR Agreements are concerned, Mr. Samdani submits that TDR cannot be considered as immovable property. That TDR is nothing but a compensation in kind in the form of FSI, separated from land. He would explain the concept of TDR generation under the provision of the Maharashtra Regional and Town Planning Act,1966 **(MRTP Act)**. That grant of TDR is one of the recognised methods of compensating

land owner under Section 126 of the MRTP Act. That provisions of the MRTP Act or Development Control and Promotion Regulations-2034 (**DCPR-2034**) do not require registration of documents for utilisation of TDR. That there is fundamental difference between concept of 'utilisation of TDR and 'transfer of DRC'. That no registration is required where TDR is utilised even by another person. That Regulation 6.4 of DCPR-2034 applies only when the whole certificate (DRC) is transferred to another entity. That DRC is a negotiable instrument capable of being transferred multiple times even without utilisation of TDR. That when transfer of DRC takes place, Regulation 6.4 requires registration. However, Section 17 of the Registration Act does not provide for registration of agreement even for transfer of DRC. But the DCPR provide for such registration to shield the Municipal Commissioner from disputes about transfer documents.

13) Mr. Samdani would further submit that the judgment in ***Chheda Housing Development Corporation***(supra) has been explained and distinguished in subsequent Division Bench judgment in ***B. Jeejeebhoy Vakharia & Associates***(supra). That in ***Jabalpur Bus Operators Association and others Versus. State of Madhya Pradesh and others***[13]special Bench of Madhya Pradesh High Court has held that when judgment is explained by later Division Bench, the decision of the later Division Bench becomes binding. Mr. Samdani would submit that various statutory authorities have always treated TDR as movable property in several circulars, communications and explanations. He would rely upon judgment of the Apex Court in ***K.P. Varghese Versus. Income Tax Officer, Ernakulam and another***[14]in support of his contention that the manner in which authorities contemporaneously construe a statute can also provide guidance for its construction. Mr. Samdani would accordingly

[13] 2003(1) M.P.L.J. 513
[14] (1981) 4 SCC 173

submit that an agreement for sale/transfer/utilisation of TDR cannot be treated as an agreement for sale of immovable property within the meaning of Section 17 of the Registration Act.

14) Mr. Ganbavle, the learned counsel appearing for Defendant No.1 would submit that the Suit is bad for non-compliance with provision of Section 12A of the Commercial Courts Act,2015. In support, he would rely upon judgment of the Apex Court in ***Dhanbad Fuels Private Limited Versus Union of India and another***[15]**.** He would submit that Respondent No.1 has accordingly filed Interim Application for rejection of the Plaint under Order VII Rule 11 of the Code of Civil Procedure,1908 **(the Code)**. He would submit that since the Plaintiff is not pressing any interim injunction for deposit of any amount by Defendant No.1, no adverse order be passed against Defendant No.1.

15) Mr. Godbole, the learned Senior Advocate appearing for Defendant No.6 would submit that TDR has consistently been held as movable property by authorities under the Bombay Stamp Act,1958 **(the Stamp Act)**. That the Agreement executed in favour of Defendant No.6 is only for utilisation of the TDR. That Defendant No.6 has not purchased the TDR only for further transfer of DRC. That since TDR is utilised by Defendant No.6 in its own project. That non-registration of Agreement for utilisation of TDR would not render the transaction violative of Section 17 of the Registration Act. That Defendant No.6 is a *bonafide* purchaser of TDR for value which has already been loaded and third-party rights are created in the construction. That Defendant No.6 has dealt with duly authorised Managing Committee members of the Society in the matter of purchase of the TDR, which could have been purchased by it from anyone else in the market. Mr. Godbole

[15] 2025 SCC OnLine SC 1129

would press into service the doctrine of 'Indoor Management' in support of his contention that even if any irregularity is found in the decision making process or procedure to be followed by the Society, the transaction will not be rendered *per-se* illegal. In support, he would rely upon judgment of this Court in ***Shri Kantu Shankar Dessai and Another Versus. Sociedade Agricola Dos Gauncares De Cuncolim E Veroda***[16]**.** He would also rely upon ***Authorised Officer, State Bank of India Versus. C. Natarajan and Another***[17] in support of his contention that the Society must be made to first bring back the entire amount received by it towards TDR before considering its prayer for temporary injunction. That Society cannot retain the money received towards sale of TDR and seek cancellation of TDR Agreements. He would rely upon provisions of Unified Development Control and Promotion Regulations (**UDCPR**) to indicate that both DCPR for Greater Mumbai as well as UDCPR for rest of the planning authorities contemplate registration only when the entire DRC is transferred from one holder to another. That no registration is required for transfer/utilization TDR when the entire DRC is not transferred.

16) Mr. Purohit, the learned Senior Advocate appearing for Defendant Nos.5, 7, 10 and 16 would submit that the Managing Committee members were fully aware of sale transaction of the TDR. He would take me through the relevant SMS correspondence between Defendant Nos. 1 and 21 to demonstrate that Defendant No.21 used to receive SMS of receipt of sale consideration in respect of each TDR transaction. He would also rely upon Audit Report to demonstrate that the managing committee members had reported receipt of consideration towards the TDR. That Audit Report was also made known to all Society members. Mr. Purohit would further submit that the parent Act

[16] First Appeal No.6 of 2010 decided on 20 June 2019
[17] (2024) 2 SCC 637

through which the concepts of TDR and DRC flow is the MRTP Act, which nowhere provides that the TDR is an immovable property or that instrument of its utilisation requires registration. That a delegated legislation cannot go beyond a parent Act. In support, he would rely upon judgment of the Apex Court in ***Indian Young Lawyers Association and others (Sabarimala Temple, in re) Versus. State of Kerala and others***[18]**.** He would submit that inadequacy of consideration cannot be a ground for setting aside sale and in support he would rely on judgment of Calcutta High Court in ***Harendra Nath Ghose &Anr. Versus. Union of India & Ors.***[19]and this Court in ***Dharmil A.Bodani of Mumbai and Another Versus. Manju Meadows Pvt. Ltd. and Others***[20]**.**

17) Mr. Tamboli, the learned counsel appearing for Defendant No.17 would submit that Defendant No.17 has purchased TDR by paying consideration of Rs.8.50 crores to the Plaintiff-Society. That there is a managing committee resolution for execution of TDR Agreement in favour of Defendant No.17. That the entire purchased TDR has been utilized by Defendant No.17 and construction is completed. He would rely upon Section 65 of the Contract Act,1872 in support of his contention that if the Society is questioning correctness of TDR Agreement, it must first return the consideration before seeking any injunctive relief. That the entire Plaint is silent on willingness on the part of the Society to return the consideration received by it. In support, he would rely upon judgment of the Apex Court in ***Kuju Collieries Ltd. Versus. Jharkhand Mines Ltd. and others***[21]and ***Union of India and others Versus. N. Murugesan and others***[22] and ***Dr. Poornima Advani &Anr. Versus.***

[18] (2019) 11 SCC 1
[19] 2006 SCC OnLine Cal 567
[20] 2024 SCC OnLine Bom 1684
[21] (1974) 2 SCC 533
[22] (2022) 2 SCC 25

Government of NCT and anr[23]. He would also press into service doctrine of 'Indoor Management' and would rely upon judgment of this Court in ***Shri Kantu Shankar Desai***(supra).

18) Mr. Khandeparkar, the learned counsel appearing for Defendant No. 14 would submit that entire TDR by Defendant No.14 has already been loaded and it has become part of immovable property of Defendant No.4, inseparable and incapable of being transferred to the Plaintiff-Society. That only possible claim of Plaintiff could now be for compensation that too against Defendant Nos.1 to 4. That the Agreement executed in favour of Defendant No.14 is only for utilisation of the TDR not requiring registration of instrument by which right of TDR utilisation is transferred.

19) Mr. Naidu, the learned counsel appearing for Defendant Nos.9 and 11 would adopt the submissions of other learned counsel appearing for the Defendants. He would additionally submit that there is no cause of action for filing the Suit and that the Suit deserves to be dismissed for non-compliance with provision of Section 12A of the Commercial Courts Act. He would submit that Defendant Nos.9 and 11

have filed application for rejection of the Plaint under Order VII Rule 11 of the Code. That the entire TDR has already been utilised and occupancy certificate has also been issued.

20) Mr. Vakil, the learned counsel appearing for Defendant Nos.12 and 13 would submit that the construction of the building of Defendant Nos.12 and 13 is complete and Occupancy Certificate has been applied for. That even if there is any irregularity on the part of any

[23] Civil Appeal No. 2643 of 2025 decided on 18 February 2025

managing committee members resulting into any loss to the Society, the same can be recovered under Section 88 of the MCS Act. That the possibility of loss caused to the Society cannot be a ground for annulling the validly executed TDR transfer Agreements in favour of third parties for consideration.

21) Mr. Gandhi learned counsel appearing for Defendant No.15 submits that his client is a cooperative Society, which has undertaken self-redevelopment and that construction of the building of Defendant No.15-Society is virtually complete. That Society members would face prejudice if the Agreement for transfer of TDR is interfered with at this stage.

22) Ms. Joshi, the learned counsel appearing for Defendant No.8 would submit that TDR has already been allotted and 10 floors of building of Defendant No.8 have been constructed and that therefore no injunctive relief can be granted in Plaintiff's favour at this belated stage.

D. REASONS AND ANALYSIS

23) Plaintiff-Society, whose land has been acquired by MCGM for construction of road, has secured TDR *in lieu* of monetary compensation. The TDR granted by MCGM has been monetized by it by selling the same to Defendant Nos.5 to 18-Developers. The Society now believes that there are irregularities in sale transactions of TDR and that the TDR has been sold at inadequate consideration resulting in losses to the Society. According to Plaintiff-Society, sale of TDR ought to have fetched consideration of Rs.97.88 crores and since the TDR is sold for Rs.46 crores, it believes that it has incurred loss of Rs.51.87 crores. Plaintiff blames Defendant Nos. 1 and 2 (ex-chairman and

member) who allegedly took decisions for sale of TDR as well as Defendant Nos.3 and 4 who acted as consultants in the matter of sale of TDR. The Suit is accordingly filed essentially for a declaration that the Agreements executed on behalf of the Society for sale of TDR are not binding on the Society. Plaintiff-Society has accordingly prayed for restoration of sold TDR from Defendant Nos.5 to 18. Additionally, it has also sought money decree in the sum of Rs.16.51 crores against Defendant Nos.1 to 4 towards amounts paid to Defendant Nos.3 and 4 as a consequence of declaration that Defendant Nos.3 and 4 had no authority to cause sale of Society's TDR.

24) In its suit, Plaintiff has also impleaded Defendant No.20-Secretary and Defendant No.21-Treasurer of the society. However, no relief is claimed against them. The Plaint is affirmed by the current Chairman of the Society who has apparently taken over the position as Chairman after Defendant No.1 tendered resignation which was accepted on 6 February 2025. It also appears that Defendant No.1 has been disqualified by the Deputy Registrar by order dated 1 April 2024 for a period of one year. The Defendant No.20-Secretary is also disqualified for a period of one year vide order dated 1 April 2024. Mr. Sashidharan Kudwal has apparently taken over as Chairman of the Society in February 2025 who was earlier the Managing Committee member. Thus, out of the erstwhile Managing Committee which had taken decisions relating to sale of TDR, there are five persons who still continue to function on the current Managing Committee. Defendant No.21 continues to be the Treasurer and four other managing committee members still continue to function as such. The suit is thus being prosecuted through current Managing Committee of which five members were also part of Committee, which took the impugned decisions for sale of TDR.

25) Before proceeding to examine Society's challenge to sale of TDR, it would be necessary to consider the background in which TDR is granted to the Society and the reason why the Plaintiff-Society decided to sell the same. As observed above, out of the total land owned by the Plaintiff-Society, land admeasuring 7284.10 sq.mtrs came to be acquired by MCGM in the year 1986 for construction of a road. The Society was apparently not paid compensation for acquisition of land. The Society had some disputes with one Shri. N.G. Sawant relating to adjoining piece of land. The details of the said dispute are not divulged in the Plaint but minutes of Special General Body Meeting held on 8 January 2023 throw some light on the background in which the Society decided to procure the TDR and encash the same. The Society gave offer to Shri. N.G. Sawant to settle the dispute under one time payment of Rs.14 crores to be paid within a period of 12 months. The Society resolved to accept the settlement in Special General Body Meeting held on 8 January 2023.

26) For arranging the funds of Rs.14 crores, the General Body of the Society mulled various options and finally opted for exploring the possibility of securing TDR from MCGM in respect of the acquired land. Accordingly, the Chairman and Secretary were authorized to submit TDR proposal to MCGM for obtaining DRC. The Society contends that the Resolution adopted in Special General Body Meeting dated 8 January 2023 only authorized Chairman and Secretary to submit TDR proposal and to do the consequential acts. It would be apposite to reproduce Resolution-IV adopted in meeting dated 8 January 2023, which reads thus :-

> **Resolution IV :** RESOLVED THAT Mr. Nitin Chaudhari, the chairman and/or Ms Jayshree Visvanathan, the Secretary, of Green Garden Co-

Operative Society Ltd. individually or jointly as required, hereby appointed and authorized, to submit TDR proposal to MCGM and to obtain DRC for 40 mts road bearing CTS no 373, 405, 406 and 408 of village Borla at Vaman Tukaram Patil Marg, Deonar Mumbai 400088 of M/East Ward, and to do all works for obtaining TDR/DRC, including but not limited to the following :-

1) For process of TDR/DRC, to appoint and issued authority letters in favour of Consultants, PMCs, Architects and Legal advisors.

2) To obtain the required Revenue & Legal documents and to Obtain the certified copies from the Sub-Registrar office and Revenue departments etc.

3) To sign all required documents to carry demarcation, joint measurements, to sign letter to obtain NOCs from all Concern authorities, to handover and to execute possession receipt, to sign the Declaration, to make application to concern authorities & to sign all forms and letters for transfer of PRC in favour of MCGM and to receive letters/ notices and obtain the all the copy of process, to the updated Property Card and obtain copies for the Society's record and to submit records, letter to MCGM for further process

4) To sign letters, affidavits, declarations for and on behalf the Society in favour of authorities and to complete the process of obtaining TDR/DRC from MCGM and to accept & receive the original DRC from MCGM.

5) To sign Declarations, Affidavits and to remain present for registration of Declaration at Sub-Registrar office and to obtain certified true copy, index II etc..

6) To deal and/or correspond with the MCGM, Revenue Authority, Collector, CTS office Sub Registrar, SLO including all its departments or officers, architects, PMC, assessors or any other officer or authority in connection with said process of TDR/DRC of society 40mts Road.

7) Generally to do all or any acts in relation to the said Property TDR/DRC and all other matters in relation thereto in which society may be interested and concerned and on society behalf to execute and to make and do all instruments, acts, deeds, things and matters and fully and effectually in all respects pertaining to the said Property as we the society would do if personally present.
Proposed By : Sunil Soi – B no 64
Seconded by :MsParange Shabari – B no 03

> Chairman informed the members that the proposal for TDR/DRC once accepted in principal by the BMC officials our Society will be required to pay online to BMC legal charges for scrutiny.
> Relevant advertisements to be published by the legal department of BMC.
> The related expenditure for consultancy on Legal fees, PMC appointment, FSI and development plan approval will be (Architect Vilas Awachat) approx. 25 lacs. Details of all these will be provided in the next SGM.

27) Based on decision taken in Special General Body Meeting dated 8 January 2023, it appears that the Society went ahead with appointment of Defendant No.3 (J.P. Nestor) as a Consultant for procurement of TDR from MCGM. Since the Society needed funds to settle the disputes with Mr. N.G. Sawant, it appears that the Society opted to secure advance payment of Rs.9 crores from J.P. Nestor and executed a registered Mortgage Deed on 13 July 2023 creating charge/lien in favour of J.P. Nestor in respect of TDR admeasuring 6000 sq.mtrs. There is no dispute to the position that in pursuance of the said Mortgage Deed, the Society received payment of Rs.9 crores from J.P. Nestor. In fact, the payment started much before execution of the Mortgage Deed. The amount of Rs.9 crores was paid by J.P. Nestor to the Society in six tranches of Rs.1.50 crores each during 24 March 2023 to 12 July 2023. Thus, by the time the Mortgage Deed was executed, Society had already received Rs.9 crores from J.P. Nestor. What is pertinent to note here is the fact that Defendant No.21 was acting as a Treasurer of the Society and it is impossible that the Treasurer did not know credit of amounts in the Society's accounts by J.P. Nestor. It is therefore difficult to believe that the involvement of J.P. Nestor in sale of TDR was without the knowledge of the managing committee members.

28) The Plaintiff-Society however relies on Minutes of Special General Body Meeting held on 18 June 2023 which apparently does not contain any reference to the receipt of any consideration from J.P.

Nestor. In fact, in Special General Body Resolution dated 18 June 2023, J.P. Nestor was resolved to be appointed as a Consultant only for procurement of TDR and the Society had resolved to appoint Respondent No.4-N.V. Consultant for carrying out the activity of sale of TDR. Resolution Nos. II and III adopted by the Society held in Special General Body Meeting dated 18 June 2023 read thus :-

RESOLUTION II: APPOINTMENT OF JP NESTOR

Resolved that

1. JP Nestor is to be appointed as consultants for the transferable Development Rights (TDR) matter of the Society.

2. JP Nestor shall be entrusted with the responsibility of providing comprehensive consulting services to the society, encompassing all aspects of the TDR process, from application obtaining the Development Rights Certificate (DRC).

3. The society agrees to receive interest free refundable security deposits from JP Nestor as per the agreed terms.

4. The total fee payable to JP Nestor for their consulting services in relation to the TDR matter shall amount to Rs. 6.5 crores plus applicable Goods and Services Tax (GST).

5. The Managing Committee is directed to ensure that the terms and conditions of the consultancy agreement are mutually agreed upon and duly executed.

6. The payment of the consultancy fee shall be made in accordance with the milestones and conditions specified in the consultancy agreement.

7. The General Body authorises the Managing Committee to issue letters/authorisations in any format as may be required for executing actions from the statutory authorities.

Proposed By: Mr. Gautam Bhattacharya

Seconded by: Mr. Gaurav Chopra

RESOLUTION III: APPOINTMENT OF NV CONSULTANTS

Resolved that:

1. NV Consultants is to be appointed to provide comprehensive consulting services to the society, encompassing all aspects of the TDR process, from award of TDR to the sale of TDR.

2. The payment terms for NV Consultants' services shall be structured as follows:

a. NV Consultants shall be remunerated based on a Success Fee Model. The payment shall be capped at an upper limit of 30% plus applicable Goods and Services Tax (GST) of the TDR sale amount that will be credited to the society's account.

b. Payment to NV Consultants will be executed solely upon the successful credit of the TDR sale amount into the society's bank account.

c. The Managing Committee is directed to ensure that the terms and conditions of the consultancy agreement with NV Consultants are mutually agreed upon and duly executed.

Proposed by: Mr R.C Mehta

Seconded by: Mr Raul Rebello

29) Based on minutes of Special General Body Meeting held on 18 June 2023, it is contended by the Plaintiff-Society that J.P. Nestor was never appointed for sale of the TDR. Since J.P. Nestor had already started paying advance amounts to the Society in anticipation of being appointed as a Consultant for sale of TDR, ordinarily the General Body ought to have been apprised about receipt of advance amounts from J.P. Nestor. Be that as it may. MCGM granted DRC in the name of Plaintiff-Society on 7 August 2023 for total FSI credit of built-up area equivalent to 14,568.20 sq.mtrs. Immediately after procurement of DRC, the TDR has been sold to Defendant Nos. 5 to 18 vide Agreements for Sale of

TDR and utilization of FSI executed between 14 August 2023 to 26 September 2023. The Society received total consideration of Rs. 46,00,92,000/-towards sale of TDR.

30) It is Plaintiff-Society's case that sale of TDR through Defendant Nos.3 and 4 is not only unauthorized but the consideration is grossly inadequate. It is Society's contention that the sale of TDR is fraudulent thereby not vesting any title in favour of Defendant Nos. 5 to 18 in respect of the sold TDR. It is also contended that since the sale of TDR is executed through unregistered instruments, the same cannot confer title on Defendant Nos. 5 to 18 in respect of TDR. I now proceed to examine each of the following grounds set up by the Plaintiff-Society:-

i. absence of authority
ii. transaction vitiated by fraud
iii. non-registration of Agreements
iv. inadequate consideration

ABSENCE OF AUTHORITY FOR SALE OF TDR

31) So far as ground of sale transaction of TDR being without authority is concerned, the said ground is raised essentially on account of minutes of Special General Body meetings of 8 January 2023 and 18 June 2023. It is Society's contention that Defendant Nos. 1 and 2 unauthorisedly caused sale of TDR through Defendant Nos. 3 and 4, without having any authority under the resolutions adopted on 8 January 2023 and 18 June 2023. Before examining this contention, it must be borne in mind that this Court is not considering the correctness of procedure adopted by the Society while taking decisions for sale of TDR. There is adequate mechanism under the provisions of the MCS

Act under the provisions of which necessary remedies can be exercised if the managing committee members or any society member has acted prejudicial to the interest of the Society. It appears that the aggrieved parties have already exercised such remedies under the MCS Act. Apparently, a Flying Squad was appointed for conducting audit and inspection of Society's accounts and after conduct of audit, Specific Report and Special Report has been submitted under the provisions of the MCS Act. Based on the findings recorded in the said reports, the further course of action to be taken by the Co-operative Registrar is through Sections 83 and 88 of the MCS Act. There is adequate mechanism provided under the MCS Act for taking action against erring managing committee members as well as members for recovery of losses, if any, caused to the Society. In view of the separate mechanism provided under the MCS Act, it would not be prudent for this Court to adjudicate each and every action taken by the managing committee or by Defendant No.2. The scope of enquiry in the present Suit is restricted to the validity of transaction of sale of TDR in favour of Defendant Nos. 5 to 18 and entitlement of the Society to make recovery of payments allegedly made to Defendant Nos. 3 and 4. Keeping in mind the broad contours of enquiry involved in the present Suit, the first ground of challenge of lack of authority for cause of sale of TDR needs to be examined.

32) So far as Defendant Nos. 5 to 18 are concerned, they are developers who were desirous of purchasing TDR available in the market. Since they were approached by the Society with the offer of sale of TDR, they purchased the same at mutually agreed price. Defendant Nos.5 to 18 were not expected to conduct an in-depth inquiry into the manner in which various decisions are taken by the Society while effecting sale of TDR. *Prima facie,* it appears that the decisions taken by

the special general body in the meetings held on 8 January 2023 and 18 June 2023 do indicate conscious decision taken on the part of the Society to procure and sell the TDR for settlement of disputes with neighboring land occupier. Perusal of the said two Resolutions would clearly create an impression in favour of purchaser of the TDR that the Society had resolved to sell the same. There is difference between total unauthorised sale of society's property without any authorization by the general body and sale of property without scrupulously following the methodology provided for in the GB resolution. While the former may result in sale being declared void, the latter may not always have refection on validity of the sale, which is otherwise legal. In the present case, it cannot be contended that the society had not resolved to sell the TDR. The objection raised is about the exact consultant who caused sale of TDR. This in my view would not render the sale *ab initio* void. *Prima facie* therefore it cannot be said that there was total lack of authority for cause of sale of TDR by the Society to Defendant Nos. 5 to 18. It is however clarified that this finding is recorded not to absolve any member/managing committee member of the Society but only for the purpose of examining the claim of Plaintiff-Society of faulty title in respect of sold TDR in favour of Defendant Nos. 5 to 18.

33) Defendant Nos. 5 to 18 have relied upon doctrine of 'Indoor Management' in support of the contention that they need not be concerned with nitty-gritties of the internal working of the Society and the sale transaction of the TDR would remain unaffected even if it is observed that proper procedure was not followed by the Society while taking various decisions. Reliance is placed on Division Bench judgment of this Court in ***Shri Kantu Shankar Dessai*** (supra) in which it has held in paras-7 and 8 as under:-

7. At the very root of the controversy in the present case are the matters of execution of the subject Lease Deed and the authority of the person to execute the Deed on behalf of the owner, namely, the society. The charter of the society, which is on record, suggests clearly that the society shall be represented by a Manager acting as the President of the Administrative Committee in all cases, whether in Court or outside and whether actively or passively. The only restriction against such Manager or President is that he shall not take any initiative on important subjects prescribed in the internal statute of the society without the resolution of the Administrative Body. There is indeed nothing in the charter or otherwise to show that the society is forbidden by law or as a matter of contract from creating a lease of its property in favour of any villager. In fact, if anything, the evidence on record suggests that there were a number of other leases created by the society in favour of villagers of properties owned by it. **Once it is held that the act of the society in creating the lease in favour of the defendants is not utra vires, the question of authority of any particular office bearer of the society to act on its behalf in that respect, is really a matter of its internal management.** A person who deals with a society or corporate body must no doubt familiarize himself with the constitution of the society or corporate body(in case of a company, it would be its Memorandum and Articles of Association), **but once it is found that there is no restriction on the authority of the person to execute the act in such constitution, there is no further duty on the person to enquire into the internal management of the society or the corporate body and assess whether or not due procedure has been followed for executing the act in accordance with the rules of management applicable to the society or corporate body, as the case may be.**

8. Our Courts have ruled on the subject, which is broadly described as the doctrine of indoor management, in a number of cases. The case of ***Lakshmi Ratan Cotton Mills Co. Ltd.***(supra), cited by learned Counsel for the appellants, is a case in point. The Allahabad High Court in that case has held that a creditor dealing with a trading company is required by law to be conversant with the terms of its Memorandum and Articles of Association and no more. If it is found that the transaction of loan into which the

creditor is entering is not barred by the charter of the Company or its Articles of Association, and could be entered into on its behalf by the person executing it, he is entitled to presume that whatever formalities are required to be complied in connection therewith, have been duly complied with. **A bona fide creditor, in the absence of any suspicious circumstances, is entitled to presume that such formalities such as passing of a resolution, etc., have been duly complied with.** A transaction entered into by the borrowing company under such circumstances cannot be defeated merely on the ground that no resolution was in fact passed. **The passing of such resolution is a mere matter of indoor or internal management**

> **of the company and its absence, under such circumstances, could not be used to defeat the just claim of a bona fide creditor; such creditor being an outsider or a third party and an innocent stranger is entitled to proceed on the assumption of its existence; he is not expected to know what happens within the doors that are closed to him.** Where the act is not "ultra vires" the statute or the company, such creditor would be entitled to assume the apparent or ostensible authority of the agent to be a real or genuine one. He could assume that such person had the power to represent the company and if he proceeds on that basis, he would be protected by the doctrine of indoor management.
>
> *(emphasis added)*

34) In my view, the doctrine of indoor management would clearly apply to the facts of the present case when it comes to the issue of validity of title acquired by Defendant Nos. 5 to 18 in respect of the purchased TDR. Even if the authorities under the MCS Act come to a conclusion that the members/ managing committee members of the Society have acted against the provisions of the MCS Act or the Rules made thereunder while effecting sale of TDR, the same would not divest Defendant Nos. 5 to 18 of the title acquired by them. In my view therefore the first ground of lack of authority for purchase of TDR sought to be canvassed on behalf of the Plaintiff cannot be *prima facie* accepted for grant of any injunctive relief in its favour.

SALE VITIATED BY FRAUD

35) So far as the ground of fraud in effecting sale transaction of TDR is concerned, the said ground again emanates out of the allegation of misrepresentation by some of the managing committee members to general body while causing sale of TDR. The allegation of fraud is against Defendant Nos. 1 to 4 and the Society believes that those

Defendants have defrauded the Society by selling the TDR without authority and for a lower price compared to market rate. For the reasons indicated above, even the ground of fraud cannot be accepted for the purpose of recording a *prima facie* finding of restoration of the title of the Plaintiff-Society in respect of the sold TDR. If any member/managing committee member has allegedly defrauded the Society, necessary action can be taken against him/her and loss caused to the Society can be recovered by taking recourse to the remedies under the MCS Act.

36) The allegation of fraud is necessarily premised on the allegation of absence of authority and therefore the reasons recorded for rejection of ground of absence of authority would apply for rejecting the ground of fraud as well. The case does not involve sale of the TDR by an entity not having title or sale of TDR by the Society without decision of general body. It is not that the TDR is sold by Defendant Nos. 3 and 4 unilaterally without Society's consent. As observed above, Society had resolved to procure and sell the TDR. It needed funds and took decision to sell the TDR. Thus, the Society's desire and decision to sell TDR is *prima facie* established. The sale documents are not executed by Defendant Nos. 3 and 4 and the same are executed by managing committee members of the Society. Whether they had the authority to execute those documents is a part of internal management of the Society. Therefore, the case does not involve a fraudulent sale transaction where sale is caused by entity not having title in the TDR. In my view, therefore the allegation of fraud again cannot be *prima facie* accepted for invalidating title of Defendant Nos. 5 to 18 in respect of the TDR purchased by them.

NON-REGISTRATION OF AGREEMENTS FOR SALE OF TDR

37) The next and the most vital ground raised by the Society for questioning the title of Defendant Nos. 5 to 18 in respect of the sold TDR is non-registration of the Agreements by which the TDR has been sold. It is Plaintiff's contention that TDR is an immovable property and its sale requires compulsory registration under Section 17 of Registration Act. On the other hand, it is the contention of the contesting Defendants that TDR essentially is a movable property and its purchase merely requires payment of Stamp Duty on the instrument of sale and not registration under Section 17 of the Registration Act. Requirement of registration of instrument of Sale of TDR is the main bone of contention between the parties in the present suit.

38) Section 17 of the Registration Act provides thus :-

> **17. Documents of which registration is compulsory**.—(*1*) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—
>
> (*a*) instruments of gift of immovable property;
> (*b*) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;
> (*c*) …

39) Thus, any instrument which purports or operates to create, declare or assign, limit or extinguish any right, title or interest to or in any immovable property requires compulsory registration under Section 17 of the Registration Act. The expression immovable property has been defined under Section 2(6) of the Registration Act. Thus, it is the nature of the property which would determine as to whether an instrument of

transfer ther eof would require compulsory registration or not. If TDR is held to be an immovable property, an instrument of sale of TDR would require registration under Section 17 of the Registration Act. On the other hand, if TDR is treated as movable property the same would not require its registration under Section 17, but can be registered at the option of parties under Section 18.

40) Rival parties have relied on several decisions in respect of their respective contentions about TDR being a immovable or movable property.

41) The sheet anchor of Mr. Seksaria in support of his contention of TDR being immovable property is the Division Bench judgment of this Court in ***Chheda Housing*** (supra). The Division Bench has dealt with and has decided the issue as to whether specific performance of contract of sale of TDR is permissible or not. While deciding the issue of permissibility to specifically perform Agreement of Sale of TDR, the Division Bench has held in para-15 as under:

> **15.** The question is whether on account of the term in the clause which permits acquisition of slum TDR the appellants insofar as the additional F.S.I. is concerned, are not entitled for an injunction to that extent. An immovable property under the General Clauses Act, 1897 under section 3(26) has been defined as under :–
>
> > (26). "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."
>
> If, therefore, any benefit arises out of the land, then it is immovable property. Considering section 10 of the Specific Relief Act, such a benefit can be specifically enforced unless the respondents establish that compensation in money would be an adequate relief.
>
> Can FSI/TDR be said to be a benefit arising from the land. Before answering that issue we may refer to some judgments for that purpose. In *Sikandar and ors. vs. Bahadur and ors., XXVII Indian Law Reporter, 462*, a Division Bench of the Allahabad High Court

> held that right to collect market dues upon a given piece of land is a benefit arising out of land within the meaning of section 3 of the Indian Registration Act, 1877. A lease, therefore, of such right for a period of more than one year must be made by registered instrument. A Division Bench of the Oudh High Court in *Ram Jiawan and anr. Vs. Hanuman Prasad and ors., AIR 1940 Oudh 409* also held, that bazaar dues is a lease of immovable property. A similar view has been taken by another Division Bench of the Allahabad High Court in *Smt. Dropadi Devi vs. Ram Das and ors., AIR 1974 Allahabad 473* on a consideration of section 3(26) of General Clauses Act. **From these judgments what appears is that a benefit arising from the land is immovable property. FSI/TDR being a benefit arising from the land, consequently must be held to be immovable property and an Agreement for use of TDR consequently can be specifically enforced, unless it is established that compensation in money would be an adequate relief.**
>
> *(emphasis added)*

[

42) By relying on judgment in ***Chheda Housing***, Plaintiff contends that the law is well settled that FSI/TDR being a benefit arising from the land, the same must be held to be an immovable property. However, it must be noted that the observations in ***Chheda Housing*** are made in the context of issue of specific performance of Agreement for use of TDR. It is well settled position of law that judgment is an authority for what it decides and not what can be logically deduced therefrom. In ***Commr. of Customs (Port) v. Toyota Kirloskar Motor (P) Ltd.***[24], it is held as under:

> 37. The observations made by this Court in Essar Gujarat Ltd. [(1997) 9 SCC 738] in para 18 must be understood in the factual matrix involved therein. The ratio of a decision, as is well known, must be culled out from the facts involved in a given case. **A decision, as is well known, is an authority for what it decides and not what can logically be deduced therefrom.** Even in Essar Gujarat Ltd. [(1997) 9 SCC 738] a clear distinction has been made between the charges required to be made for pre-importation and post-importation. All charges levied before the capital goods were imported were held to be considered for the purpose of computation of transaction value and not the post-importation one. The said decision, therefore, in our opinion, is not an authority for the proposition that irrespective of nature of the contract, licence fee and charges paid for technical know-how, although the same would have nothing to do with the charges at the pre-importation stage, would have to be taken into consid-

[24] (2007) 5 SCC 371

> eration towards computation of transaction value in terms of Rule 9(1)(c) of the Rules.
>
> *(emphasis added)*

More recently, in ***Secunderabad Club v. CIT***, the Apex Court had held as under:

> 21. **In the context of understanding a judgment, it is well settled that the words used in a judgment are not to be interpreted as those of a statute.** This is because the words used in a judgment should be rendered and understood contextually and are not intended to be taken literally. **Further, a decision is not an authority for what can be read into it by implication or by assigning an assumed intention of the judges and inferring from it a proposition of law which the judges have not specifically or expressly laid down in the pronouncement. In other words, the decision is an authority for what it specifically decides and not what can logically be deduced therefrom.**
>
> *(emphasis added)*

43) The judgment in ***Chheda Housing*** rendered in the context of specific performance of contract for use of FSI cannot therefore be cited in support of an abstract proposition that the TDR must be held to be immovable property for the purpose of compulsory registration of an agreement for utilization of TDR. More importantly, the judgment in ***Chheda Housing*** has been explained in subsequent Division Bench judgment in ***B. Jeejeebhoy Vakharia*** (supra), in which the Division Bench has held that the judgment in ***Chheda Housing*** does not lay down a general proposition of law that FSI is immovable property. The Division Bench in ***B. Jeejeebhoy Vakharia*** has held in paragraphs 74, 75, 76, 78,79, 80 and 81 as under:-

> **74.** Referring to the decision of a Division Bench in *Chheda's case* and Clauses (2) and (5) of the MoU, it was sought to be contended that F.S.I. is an immovable property and, therefore, any agreement for sharing F.S.I. would create an interest in the property.
>
> **75.** The Division Bench in *Chheda's case*, while dealing with the issue as to in what circumstances the agreement between the parties for development of property with the right to sell the constructed portion to the prospective purchasers, referring to section 3(26) of the General Clauses Act, 1897 and referring to the decisions in the matters of (i) (*Sikandar v. Bahadur*), XXVII Ind. L.R. 462 (*Ram Jiawan v. Hanuman*

Prasad), A.I.R. 1940 Oudh 409 and (*Smt. Dropadi Devi v. Ram Das*), A.I.R. 1974 Allah. 473 held that "*from these judgments what appears is that a benefit arising from the land is immovable property. F.S.I./T.D.R. being a benefit arising from the land, consequently must be held to be immovable property and an Agreement for use of T.D.R. consequently can be specifically enforced, unless it is established that compensation in money would be an adequate relief*". Referring to the above observations in Chheda's case, it is sought to be contended on behalf of the plaintiffs that this Court has already held that F.S.I. is an immovable property. An MoU clearly refers to sharing of F.S.I. in the development to be carried out in the property in question. It is therefore, the contention on behalf of the plaintiffs that it is an agreement in relation to an immovable property and hence it creates interest in the land.

76. It is to be noted that the observation in ***Chheda's case*** about F.S.I. to be an immovable property because it is a benefit arising from the land was on the basis of certain rulings given by the Allahabad High Court and Oudh High Court and in the facts of the case wherein the owner of the land was party to the agreement for development of the property. It was in totally different set of facts. **It cannot be said to lay down a general proposition of law that F.S.I. is an immovable property.**

78. As observed above, the observation about F.S.I. being benefit arising out of the land and consequently to be immovable property in *Chheda's case* is essentially on the basis of the reading of the three judgments, two of the Allahabad High Court and one of the Oudh High Court and in the peculiar facts of the case before the Court. There is no discussion whether in terms of the Regulations governing the F.S.I. the same could fit in the expression "benefit arising out of the land" and whether in the mariner in which F.S.I. is enjoyed can be said to be an immovable property. **In our considered opinion, therefore, the said observation cannot be said to be laying down a binding ratio**.

79. If one peruses the Regulations dealing with the F.S.I. and T.D.R., it undoubtedly disclose that it is a benefit which the owner of the property can enjoy in the course of construction or development in the property. But that itself would not make it a benefit arising out of the land as is understood by the Legislature while defining the term "immovable property" in the General Clauses Act. Section 3(26) of the General Clauses Act, 1897 defines the term "immovable property" as under:

> "(26) "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

80. The expression "benefits to arise out of land" cannot be read ignoring the subsequent expressions as well as the expression preceding the said expression in the definition, and the fact that the immovable property is essentially defined to be a land. It is further clarified that it

> would include benefits arising out of the land and things attached or permanently fastened to the land. **In other words, the benefits arising out of the land to form an immovable property has to be necessarily attached to the land or fastened to the land and until such benefit is either attached or fastened to the land, it would continue to be an immovable property. The moment it is detached from the land to which it pertains to, it will cease to be an immovable property.** Otherwise, as rightly submitted on behalf of the defendants that even the compensation which is payable for acquisition of land could be said to be a benefit arising out of the land. Can it be, therefore, said to be an immovable property?
>
> 81. **Proper reading of decision in *Chheda's case* would reveal that the observation regarding F.S.I. being an immovable property has been made in the peculiar facts of the said case, after taking into consideration the decisions of the Allahabad High Court and Oudh High Court, and it does not lay down a broad proposition of law as such that F.S.I. is invariably an immovable property in each and every case.** Being so, merely on the basis of the said ruling, the contention that the sharing of F.S.I. in terms of Clause (2) of the MoU would imply creation of interest in the immovable property cannot be accepted, apart from the fact that the owner of the land was not a party to the said MoU.
>
> *(emphasis and underlining added)*

44) Thus apart from holding that the observations in ***Chheda Housing*** about TDR/FSI being immovable property not constituting a binding precedent, the Division Bench in ***B. Jeejeebhoy Vakharia*** has made an independent analysis of the concept of TDR in the context of definition of the term 'immovable property' under Section 3(26) of the General Clauses Act, 1897 and has held that to form an immovable property, the benefits arising out of the land has to be necessarily attached to the land or fastened to the land and until such benefit is either attached or fastened to the land, it would continue to be an immovable property. The moment it is detached from the land to which it pertains to, it will cease to be an immovable property. Thus in ***B. Jeejeebhoy Vakharia,*** the Division Bench of this Court has emphatically ruled that since TDR is detachable from land, the same does not constitute immovable property.

45) It is also well settled position of law that when a judgment of coordinate Bench is explained by a subsequent coordinate bench, the explanation in subsequent judgment becomes binding to a bench of lesser strength. Reference in this regard can be made to a Five Judge judgment of Special Bench of the Madhya Pradesh High Court in ***Jabalpur Bus Operators Association*** (supra) in which it is held in paragraph 9 as under :-

> 9. Having considered the matter with broader dimensions, we find that various High Courts have given different opinion on the question involved. Some hold that in case of conflict between two judgments on a point of law, later decision should be followed; while others say that the Court should follow the decision which is correct and accurate whether it is earlier or later. There are High Courts which hold that decision of earlier Bench is binding because of the theory of binding precedent and Article 141 of the Constitution of India. There are also decisions which hold that single Judge differing from another single Judge decision should refer the case to larger Bench, otherwise he is bound by it. Decisions which are rendered without considering the decisions expressing contrary view have no value as a precedent. But in our considered opinion, the position may be stated thus-
>
> With regard to the High Court, a single Bench is bound by the decision of another single Bench. In case, he does not agree with the view of the other single Bench, he should refer the matter to the larger Bench. Similarly, Division Bench is bound by the judgment of earlier Division Bench. In case, it does not agree with the view of the earlier Division Bench, it should refer the matter to larger Bench. **In case of conflict between judgments of two Division Benches of equal strength, the decision of earlier Division Bench shall be followed except when it is explained by the latter Division Bench in which case the decision of latter Division Bench shall be binding. The decision of larger Bench is binding on smaller Benches.**
>
> *(emphasis added)*

Thus, the explanation by Division Bench in ***B. Jeejeebhoy Vakharia*** of judgment in ***Chheda Housing*** would bind me. Consequently, TDR

cannot be held to be immovable property atleast for the purposes of Section 17 of the Registration Act.

46) Plaintiff has also relied on judgment of Division Bench of this Court in ***Shahed Kamal*** (supra) in which the Division Bench has held in para-214 as under :-

> **214.** The width of the exclusion under the aforesaid provisions is also apparent from the use of word "***land***" because land itself has a wide meaning. Section 2(d) of the MMRDA Act defines "*land*" to "*includes benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth*". It is now settled that "*benefits to arise out of land*" also includes FSI. A structure permanently fastened to the earth is also 'land'. Therefore, the word "*land*" in the aforesaid provision will have to be understood as per its wider statutory definition and applicability of MOFA is excluded not only as to land as also the benefits arising out of land, belonging to or vesting in MMRDA namely, in this case, even FSI.

47) The Division Bench in ***Shahed Kamal*** was considering the issue of applicability of provisions of MOFA Act to a land belonging to or vesting in MMRDA. The observations are made in the light of definition of the term 'land' under Section 2(d) of the MMRDA Act. In my view, therefore the judgment in ***Shahed Kamal*** does not provide assistance for deciding the issue of treatment of TDR as immovable property for compulsory registration of instrument evidencing transfer for utilization of TDR.

48) Reliance is placed by Plaintiff on judgments of the Apex Court in ***Ananda Behera*** (supra) and ***Santosh Jayaswal*** (supra) in which the issue was whether right to catch fish in lake would constitute acquisition of right in an immovable property. In ***Ananda Behera***, the Apex Court held in paras-7, 9, 10 and 11 as under:

7. In their petition the petitioners claim that the transactions were sales of future goods, namely, of the fish in these sections of the lake, and that as fish is moveable property Orissa Act 1 of 1952 is not attracted as that Act is confined to immovable property. We agree with the learned Solicitor General that if this is the basis of their right, then their petition under Article 32 is misconceived because until any fish is actually caught the petitioners would not acquire any property in it.

9. **The facts disclosed in Para 3 of the petition make it clear that what was sold was the right to catch and carry away fish in specific sections of the lake over a specified future period. That amounts to a licence to enter on the land coupled with a grant to catch and carry away the fish, that is to say, it is a profit a prendre**: see 11 Halsbury's Laws of England (Hailsham Edn.) pp. 382 and 383. In England this is regarded as an interest in land (11 Halsbury's Laws of England, p. 387) because it is a right to take some profit of the soil for the use of the owner of the right (p. 382). In India it is regarded as benefit that arises out of the land and as such is immovable property..

10. Section 3(26) of the General Clauses Act, 1897 defines "immovable property" as including benefits that arise out of the land. The Transfer of Property Act does not define the term except to say that immovable property does not include standing timber, growing crops or grass. As fish do not come under that category the definition in the General Clauses Act applies and as a profit a prendre is regarded as a benefit arising out of land it follows that it is immovable property within the meaning of the Transfer of Property Act.

11. Now a "sale" is defined as a transfer of ownership in exchange for a price paid or promised. **As a profit a prendre is immovable property and as in this case it was purchased for a price that was paid it requires writing and registration because of Section 54 of the Transfer of Property Act. If a profit a prendre is regarded as tangible immovable property, then the "property" in this case was over Rs 100 in value. If it is intangible, then a registered instrument would be necessary whatever the value.** The "sales" in this case were oral: there was neither writing nor registration. That being the case, the transactions passed no title or interest and accordingly the petitioners have no fundamental right that they can enforce.

(emphasis added)

49) In ***Ananda Behera*** (supra) the dispute before the Constitution Bench was about fishery rights in Chilika lake in the State of Orissa, which was once the estate of the Raja and which later vested in State of Orissa under an enactment. Petitioners therein claimed issuance of license in their favour by Raja before vesting of the lake in Orissa State. The State Government refused to recognise the licensee and proceeded to auction the fishing rights. In the context of this dispute, one of the contentions raised by the Petitioners was that fish being movable property, the Orissa Act 1 of 1952 did not apply which is confined to immovable property. The Apex Court held that right to catch and carry away fish in specific sections of lake amounted to license to entry on the land. Such right was considered as *profit à prendre,* which is recognised in England as interest in land. The Apex Court held that in India it is regarded as benefit arising out of land and therefore is immovable property. The Apex Court thereafter held that since *profit à prendre,* is immovable property, provisions of Section 54 of the Transfer of Property Act got applied and oral sale of rights did not invest any title in favour of the Petitioners therein.

50) In ***Santosh Jayaswal***, the Apex Court held in para-6 as under :-

> **6.** Since the definition of "immovable property" in M.P. General Clauses Act includes benefits to arise out of land and things attached to the earth, the question is whether the right to catch fish is a benefit to arise out of the land. **It cannot be controverted that catching fish from the tank would be a benefit arising out of the land. Therefore, it is an immovable property. Even though it is *profit a prendre*, since it is a benefit to arise from the land, it is an immovable property. If its value is more than Rs 100 or the lease is on year to year basis, it is a compulsorily registrable instrument under Section 17(1)(c) of the Indian Registration Act.** It is an instrument under Article 35(a) of Schedule 1-A clauses (1) to (3) of the Stamp Act. Therefore, it requires to be engrossed with required stamp duty and registered under Section 17(1)(d) of the Indian Registration Act.
>
> *(emphasis added)*

51) In ***Santosh Jayaswal*** (supra) again the case involved right to catch fish, which was again considered as *profit à prendre,* and therefore if the value of right to catch fish which is sold exceeded Rs.100, the instrument is held to be completely registerable under Section 17(1)(c) of the Registration Act.

52) In my view both the judgments in ***Ananda Behera*** and ***Santosh Jayaswal*** involved the issue of *profit à prendre* which essentially involves right to enter upon a land and take profit therefrom. However TDR does not always involve any right in the land from which it is generated. It is like a floating right which is freely transferable. A DRC is like a negotiable instrument which can be traded multiple times. Though the first person selling DRC may be the owner of the land from which TDR is generated, however in respect of subsequent sale transactions of TDR, the same may not always involve connection with any land. It can happen that TDR is purchased by a person not owning any land and can be sold by him to another non-land owner. Therefore, though the TDR may emanate from land, it is not necessary that sale of TDR must always involve any connection to a land. This is dealt with the greater details in latter part of the judgment. In any case TDR cannot be treated as a *profit à prendre.* Therefore, the judgments in ***Ananda Behera*** and ***Santosh Jayaswal*** cannot be relied on in support of a proposition that the instrument of transfer of TDR is compulsorily registrable.

53) Plaintiff has also relied upon judgment of Single Judge of this Court in ***Sadoday Builders Private Ltd.***(supra) in which this Court was concerned with the issue of necessity to secure permission of Joint Charity Commissioner for transaction of sale of TDR. The learned

Single Judge has referred to the decision in ***Chheda Housing*** and held in paragraph 7 as under :-

> **7.** The Division Bench has held that since TDR is a benefit arising from the land, the same would be immoveable property and therefore, an agreement for use of TDR can be specifically enforced. The said dictum of the Division bench is later on followed by a learned single Judge of this court in (2009) 4 Mah LJ 533 in the matter of *Jitendra Bhimshi Shah v. MuljiNarpar Dedhia HUF and Pranay Investment* **The learned judge relying upon the judgment of the Division Bench in *Chheda Housing Development Corporation* (supra) has held that the TDR being an immovable property, all the incidents of immovable property would be attached to such an agreement to use TDR.** In view of the judgments of this court (supra), in my view, the order of the Charity Commissioner that no permission under Section 36 is required as TDR is a movable property cannot be sustained and therefore, the application filed by the respondent No. 2 – Trust under Section 36 of the said Act would have to be considered on the touch stone of the said Section 36 and also on the touch stone of the principles applicable to such a sale by a Trust.
>
> *(emphasis added)*

The judgment of Single Judge in ***Sadoday Builders Private Ltd*** follows the view taken by the Division Bench in ***Chheda Housing***, which is subsequently clarified in ***B. Jeejeebhoy Vakharia & Associates*** *and this clarification was not brought to the notice of the learned Single Judge.*

54) Plaintiff has also relied upon my judgment in ***Segment Developers Pvt. Ltd.***(supra) in which the issue was about payment of stamp duty on agreement executed between Slum Rehabilitation Authority (**SRA**) and the Petitioner therein for sale of the TDR. This Court held in paragraphs 16, 17 and 18 as under:

> 16. The Agreement in the present case was executed and registered on 15 May 2008 and therefore what is relevant in the present case is the Notification dated 4 March 2008. The Explanation to the Notification dated 4 March 2008 clearly provides that the reduction of stamp duty is permissible only in

respect of the instruments relating to the tenements allotted to slum dwellers for residential purposes as per the Slum Rehabilitation Scheme and that the same shall not be permissible in respect of the instruments relating to transfer of tenements to the persons other than slum dwellers or tenements used for commercial purposes or any other instrument of the Developer. Use of the words "or any other instrument of the Developer" in the Notification dated 4 March 2008 would indicate that the provision for reduction of stamp duty as per the Notification dated 4 March 2008 is not applicable in respect of the any instrument executed with the Developer, other than for allotment of rehab tenement to a slum dweller. The reduction of stamp duty is applicable only in respect of the tenements allotted to slum dwellers for residential purposes. Thus, the Explanation to the Notification dated 4 March 2008 makes the objective behind issuing the Notification clear. The objective is only to relieve the slum dwellers of expenditure on stamp duty when he/she receives rehab tenement in lieu of the slum structure. The objective behind the Notification is not to grant any concession to the Developer, in any manner. In the present case, the Agreement does not allot or transfer rehab tenement to a slum dweller. The same merely grants TDR in the form of DRC in favour of the Petitioner. The Petitioner can monetise the same by either selling it in the market or by utilizing the same on another plot. The transaction is thus in the nature of transfer of a right in the land.

17. It is permissible for a land owner to transfer one out of several rights in an immovable property in favour of another person. **The ownership in land consists of bouquet of rights. Development right, which is transferable, is one such facet of right which can be exercised by the owner. Therefore, grant of TDR in favour of the Petitioner by SRA would tantamount to transfer of right in the land.** There is no exemption provided under the Stamp Act or under the Notifications issued under that Act in respect of such instrument on transfer of development rights.

18. The present case can also be viewed from another angle which shows clear inapplicability of the Notification dated 4 March 2008. Petitioner as the owner of the Plot, first gave it to SRA for construction of 732 rehab tenements. By doing so, it denuded itself of the ownership right in the plot without receiving any consideration. The consideration is later given to Petitioner in the form of Agreement dated 8 May 2008, under which the SRA granted him TDR in the form of DRC. Thus, the TDR granted by SRA is actually the consideration received for transfer of plot by Petitioner to SRA. Petitioner can sale such TDR in the market and earn money. The transaction is thus virtually in nature of a conveyance where the land is conveyed to SRA and consideration in the form of TDR, capable of monetisation, is gained.

(emphasis added)

The issue in ***Segment Developers Pvt. Ltd.*** *was* altogether different i.e. levy of stamp duty on agreement for sale of TDR by SRA to landlowner. The Petitioner therein had offered his land for construction of tenements for rehabilitation of slum dwellers and received TDR while denuding himself of title in the land. In these circumstances, this Court held that the TDR received by him was actually the consideration for loss of title in the land. Therefore, levy of stamp duty on agreement for sale of TDR was upheld. The Petitioner therein has claimed benefit of exemption of stamp duty on the basis of a circular which exempted stamp duty for allotment of rehab tenements to slum dwellers. The case did not involve the issue of compulsory registration of agreement for sale of TDR but the issue involved was about requirement of payment of stamp duty. In the present case, requisite stamp duty has been paid by Defendant Nos. 5 to 18. The reliance by Plaintiff on judgment in ***Segment Developers Pvt. Ltd.*** *is* therefore misplaced.

55) Plaintiff has also relied on the judgment in ***Janhit Manch*** (supra) in which the Apex Court has decided challenge to the scheme of award of TDR upon transfer of land to the Government or when the Government requires the private land for building or expanding public utilities. While examining the challenge, the Apex Court held in paragraph 3 as under:

> 3. In order to understand this concept, we would like to further elucidate that the object is to give compensation in different way, to private landowners who have transferred a portion of their land to the Government as and when the Government has required such private land to build or expand public utilities like grounds, gardens, bus stands, roads, etc. **The alternate mode of compensation, instead of payment of money is TDR, which is nothing but a development potential, in terms of increased floor space index (hereinafter referred to as "FSI") awarded in lieu of the area of land given, conferred in the form of a Development Rights Certificate (hereinafter referred to as "DRC"), by the Government. Such TDR**

> **or DRC is negotiable and can be transferred for consideration, leaving it open for the owner of the acquired land to either use the TDR for himself or to sell it in the open market.**
>
> *(emphasis and underlining added)*

The judgment in ***Janhit Manch,*** far from assisting the case of Plaintiff, actually militates against it as the judgment recognizes the concept of DRC being a negotiable instrument freely capable of being transferred for consideration.

56) Lastly, Petitioners have relied on judgment of learned Single Judge of the Andhra Pradesh High Court in ***Kalidindi Rukmini*** (supra) which involved a case where the sanctioned building permission was sought to be revoked on allegation of fraud in purchase of TDR. In that context, the Andhra Pradesh High Court in, after following the judgments in ***Sadoday Builders Private Ltd., Chheda Housing*** and ***Janhit Manch*** has held in paragraph 53 as under:-

> 53. In fact, Transferable Development Right bond is to be treated as immovable property and hence any violation in that regard to be treated as violation of Article 300A of the Constitution of India. In all the batch of writ petitions, all the petitioners are subsequent purchasers. None of their respective vendors are arrayed as party respondents.

In view of discussion above about inapplicability of ratio of judgments in ***Sadoday Builders Private Ltd., Chheda Housing*** and ***Janhit Manch***, the judgment of the learned Single Judge of Andhra Pradesh High Court in ***Kalidindi Rukmini*** would be inapplicable to the present case.

57) There is no dispute to the position that stamp duty of 3% is paid on market value of TDR under Article 25(a) of the Stamp Act by treating TDR as movable property in the agreements executed in favour of Defendant Nos. 5 to 18. No objection is raised by the stamp

authorities in respect of payment of stamp duty on Agreements for Sale of TDR under Article 25(a) of the Stamp Act by treating them as movable property. In fact, the Collector of Stamps has apparently clarified that as per the General Guidelines for the year 2022-23, TDR is to be treated as movable property. The said letter dated 11 October 2023 issued by the Collector of Stamps to MCGM further clarifies that in cases involving sale of TDR between DRC owner and developer, the valuation of TDR needs to be done by taking into consideration 30% of value of the land. Thus, the Stamp Act authorities have accepted the system of payment of 3% stamp duty on market value of TDR calculated by taking into consideration 30% of market value of the concerned land. This is done by treating the TDR as movable property under Article 25(a) of the Stamp Act. If the TDR is considered as immovable property, higher stamp duty would become payable within the limits of Municipal Corporations. Stamp Act authorities are not insisting on payment of higher stamp duty by treating TDR as immovable property. On the contrary, for levy of stamp duty, TDR is being considered as movable property. It also appears that circular dated 5 March 2004 issued by MCGM makes a reference to clarification issued by Inspector General of Registration, Government of Maharashtra, Pune dated 31 January 2004 clarifying that the registration is not mandatory for TDR Agreement so long as the same is adequately stamped. Thus the office of Inspector General of Registration and Controller of Stamps (IGR) has issued instructions from time to time clarifying that registration of instrument involving transfer of TDR is not mandatory.

58) In *K.P. Varghese* (supra) it is held that the rule of construction by reference to contemporaneous exposition is well recognised rule for interpreting the statute by referring to exposition it

has received from contemporary authority. The Apex Court held as under :-

> These two circulars of the Central Board of Direct Taxes are, as we shall presently point out, binding on the Tax Department in administering or executing the provision enacted in sub-section(2), but quite apart from their binding character, they are clearly in the nature of contemporanea expositio furnishing legitimate aid in the construction of sub-section (2). **The rule of construction by reference to contemporanea expositio is a well-established rule for interpreting a statute by reference to the exposition it has received from contemporary authority,** though it must give way where the language of the statute is plain and unambiguous. This rule has been succinctly and felicitously expressed in *Crawford on Statutory Construction*, (1940 Edn.) where it is stated in paragraph 219 that administrative construction (i.e. comtemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned; such a construction, commonly referred to as practical construction, although non-controlling, is nevertheless entitled to considerable weight; it is highly persuasive.
>
> The validity of this rule was also recognised in *Baleshwar Bagarti v. Bhagirathi Dass* where Mookerjee, J. stated the rule in these terms:
>
> It is a well-settled principle of interpretation that courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it.

59) By relying on judgment in ***K.P. Varghese*** (supra) it is contended on behalf of the Defendant No. 3 that the exposition given to the statutory framework of Stamp Act and Registration Act by the office of IGR must be borne in mind while construing requirement for registration of TDR Agreement under Section 17 of the Registration Act. I am in agreement with this contention raised on behalf of Defendant No.3. The office of IGR has contemporaneously construed TDR to mean a movable property requiring only 3% stamp duty under Article 25(a) of the Stamp Act. This would provide a useful tool for deciding the issue of compulsory registration of Agreement for sale of TDR under Section 17 of Registration Act.

60) In support of the contention that the agreement for sale of TDR requires compulsory registration, Plaintiff has placed strong reliance on clause 6.4 of Regulation 32 of DCPR 34, which provides thus :-

> 6.4 Transfer of DRC-
>
> **6.4.1** The Commissioner shall allow transfer of DRC in the following manner-
>
> i) In case of death of holder of DRC, the DRC shall be transferred only on production of the documents as may be prescribed by Commissioner from time to time, after due verification and satisfaction regarding title and legal successor.
>
> ii) If a holder of DRC intends to transfer it to any other person, he shall submit the original DRC to the Commissioner with an application along with relevant documents as may be prescribed by the Commissioner and a **registered agreement** which is duly signed by Transferor and Transferee, for seeking endorsement of the new holders name, i.e., the transferee, on the said certificate. The transfer shall not be valid without endorsement by the Commissioner and in such circumstances the Certificate shall be available for use only to the holder/transferor.
>
> **6.4.2** The utilisation of TDR from certificate under transfer procedure shall not be permissible, during transfer procedure.
>
> *(emphasis added)*

61) It appears that there is a similar provision in UDCPR 2020 as well applicable to Municipal Corporations other than MCGM. In regulation 11.2.10 it is provided thus:-

> 11.2.10 Transfer of DRC
>
> The Authority shall allow transfer of DRC in the following manner:-

i) In case of death of holder of DRC, the DRC shall be transferred only on production of the documents, as may be prescribed by him, from time to time, after due verification and satisfaction regarding title and legal successor.

ii) If a holder of DRC intends to transfer it to any other person, he shall submit the original DRC to the Authority with an application along with relevant documents as may be prescribed by the Authority and a **registered agreement** which is duly signed by Transferor and Transferee, for seeking endorsement of the new holders name, i.e., the transferee, on the said certificate. The transfer shall not be valid without endorsement by the Authority and in such circumstances the Certificate shall be available for use only to the holder /transferor.

The utilisation of TDR from such certificate shall not be permissible during transfer procedure.

(emphasis added)

62) Thus, under the DCPR 2034 applicable to Mumbai and under UDCPR applicable to other planning areas, there is requirement of producing a registered agreement for recording transfer of DRC by the Municipal Commissioner. Relying on clause 6.4 of Regulation 32 of DCPR, it is contended on behalf of the Plaintiff that transfer of TDR /DRC without registered agreement does not invest any title in favour of purchaser and that the Municipal Commissioner cannot allow transfer of TDR in absence of registered Agreement. It is further contended that DCPR applicable to MCGM clearly prescribes a procedure for transfer of DRC /TDR and that unless the prescribed procedure is followed, a valid transfer transaction of TDR cannot occur.

63) To appreciate the requirement of registration of instrument of transfer of DRC in DCPR and UDCPR, it would be necessary to examine the very concept of TDR, how it is generated and in what manner in can be utilized and sold. When the land is reserved in a development plan or a regional plan for public purposes, it becomes mandatory for Planning Authority or the Development Authority to

acquire the same. There are three modes of acquisition under Section 126 of the MRTP Act viz., (i) by agreement of paying the amount agreed to, (ii) grant of FSI or TDR against the area of land surrendered or (iii) by making the application to the State Government for acquisition of the land.

64) There are twin purposes why provision is made under Section 126 of the MRTP Act to enable the Planning Authority to offer FSI or TDR to the landowner. Firstly, it expedites the process of acquisition and secondly it relieves the Planning Authority of financial burden of paying monitory compensation to the land owner. The concept of offering TDR to the land owners in lieu of compensation was introduced by amending Section 126 of the MRTP Act w.e.f. 25 March 1991. Simultaneously, with amendment of Section 126 of the MRTP Act, Development Control Regulations 1991 for Greater Mumbai came to be notified on 20 February 1991 which came into effect from 25 March 1991. Regulations 33 and 34 and Appendix VII of DCR 1991 dealt with procedure for generation of TDR and for grant of DRC. The DCR 1991 also provided for the manner of utilisation of TDR on same or another land. After introduction of DCPR 2034, Regulation 32 therein governs 'Transfer of Development Rights'. Clause 4 of Regulation 32 deals with generation of TDR whereas clause 5 deals with utilisation of TDR. Under Clause 6.2 of DCPR 32 it is provided thus:-

> **6.2** DRC shall be issued by the Municipal Commissioner as a certificate printed on bond paper in an appropriate form prescribed by him. Such a certificate shall be a "**transferable and negotiable instrument**" after the authentication by the Municipal Commissioner. The Municipal Commissioner shall maintain a register in a form considered appropriate by him of all transactions, etc. relating to grant of, or utilisation of, DRC.
>
> *(emphasis added)*

65) Thus, under the DCPR 2034, DRC issued by the Municipal Commissioner is a transferable negotiable instrument. The Municipal Commissioner is required to maintain a register of all transactions relating to grant or utilisation of DRC. Thus, there is a register like a passbook, which must contain entries of utilisation of TDR made from time to time.

66) From the provisions of Regulation 32 of DCPR 2034, it appears that there is a marked difference in the concepts of 'utilisation of TDR' and 'transfer of DRC'. A holder of DRC desiring to use the FSI credit therein can attach valid DRC to the extent required with application for development purpose. Thus, the FSI standing to the credit of DRC holder can be utilised by DRC holder or he may permit such FSI credit to be used by another developer and every time utilisation of portion of FSI credit is made, entry to that effect is made by Municipal Commissioner in the register/passbook. Thus, when TDR in DRC is permitted to be utilised by DRC holder by another developer, the concept is 'utilisation of TDR'. However, the DRC being a negotiable instrument, it can also be traded in the market. To illustrate, a DRC holder may sell the entire DRC to another person in which case there is change in the name of holder of DRC. Against this, in case of utilisation of DRC, the name of holder of DRC never changes but FSI credit in DRC can still be utilised by another developer. This is exactly what has happened in the present case where the name of DRC holder i.e. Plaintiff-Society has remained unaltered despite utilisation of FSI credit therein by as many as 13 developers. Thus, the owner of DRC remained Plaintiff-Society, but FSI credit therein has been permitted to be utilised by the Municipal Commissioner to 13 different developers. Thus, what is done in the present case is 'utilisation of TDR'. However,

Plaintiff-Society could have simply sold the DRC as well to another entity, in which case, the purchaser of DRC would have become holder thereof. This is what is contemplated by clause 6.4 of Regulation 32 of DCPR 32. In a case involving transfer of DRC, the holder changes as the DRC is traded like a negotiable instrument. The purchaser may retain the DRC without utilisation or may utilise the same himself or permit the FSI credit therein to be utilised by third party developers. The purchaser can further trade the DRC by selling the same to another entity. Thus, the DRC in such case is capable of being traded and sold as movable property like a negotiable instrument and it is permissible to earn profits by trading of DRC. However, every time the DRC is traded by way of a transfer, clause 6.4 of Regulation 32 requires a registered agreement for the purpose of changing the name of the holder.

67) Thus, there is a fine but a very important distinction between the concepts of 'utilization of TDR' and 'transfer of DRC'. The DRC contains FSI credit and it is not mandatory that the whole of the FSI must be sold to one entity for being utilized on one land alone. It is permissible to sell the quantum of FSI reflected in the DRC to multiple developers at different points of time. Thus, a DRC holder having FSI credit of 10,000 sq. mtrs can sell only FSI of 1000 in 2025 to one developer and retain the balance 9000 sq mtrs of FSI on his DRC. When he sells that 1000 sq. mtrs FSI for being utilized by a developer, the Municipal Commissioner deducts the sold quantity from the register/passbook maintained in respect of that DRC. Despite sale of 1000 sq. mtrs FSI, the name of DRC holder remains unaltered, and he continues to own the DRC qua balance FSI credit. The DRC holder can then sell the balance 9000 sq. mtrs FSI in the DRC to multiple developers at different times and every time the sold FSI is utilized by a developer, a debit entry is made in the DRC register. This is the concept

of sell of FSI/TDR reflected in the DRC for its utilization by other developers. The other option available to the DRC holder is to 'transfer the DRC', where he needs to sell the whole of DRC to another entity. In this case, the name of the DRC holder changes and the purchaser becomes the DRC holder. The new DRC holder can further sell the DRC to another entity or exercise the right of selling of FSI credit for utilization in phased/staggered manner as demonstrated above.

68) Thus, the concept of sale of TDR for utilization does not permit the purchaser of TDR to further trade the purchased FSI and profiteer therefrom. However, in the concept of transfer of DRC, the purchaser of DRC can trade the DRC and profiteer therefrom. Where the TDR is sold for being utilized, the DCPR 2034 or UDCPR do not require the agreements to be registered, whereas the registration is mandated when the whole of DRC is traded by sale thereof.

69) Thus, the planning authorities have imposed an additional condition of registration of instrument evidencing 'transfer of DRC' for the purpose of changing the name of holder on the DRC. It is not that this requirement flows out of the Registration Act, but the Development Control Regulations have specified an additional requirement of registration of agreement for transfer of whole of DRC. Mr. Samdani attributes this requirement to a possible shield for the Municipal Commissioner in respect of disputes relating to title of DRCs. Be that as it may. I otherwise find it difficult to accept the proposition that the Development Control Regulations can decide the requirement for registration of instrument. Development Control Regulations is a delegated piece of legislation formulated under exercise of delegated powers under the MRTP Act. They govern and regulate construction activities in the jurisdiction of planning authorities. Development

Control Regulations cannot, in ordinary course, decide the requirement of registration of a document. In that sense reliance by contesting Defendants on judgment of the Apex Court in ***Indian Young Indian Lawyers Association*** (supra) is apposite wherein the Constitution Bench has held in paragraph 373 as under :-

> **373.** When the rule-making power is conferred by legislation on a delegate, the latter cannot make a rule contrary to the provisions of the parent legislation. The rule-making authority does not have the power to make a rule beyond the scope of the enabling law or inconsistent with the law. Whether delegated legislation is in excess of the power conferred on the delegate is determined with reference to the specific provisions of the statute conferring the power and the object of the Act as gathered from its provisions.

Thus a delegated legislation in the form of DCPR 2034 or UDCPR 2020 cannot lay down the requirement for registration or otherwise of document by transfer of DRC or sale of TDR when such requirement is not provided for in the parent statute of MRTP Act. However it is not necessary to delve deeper into the aspect of permissibility to prescribe the requirement of registered agreement for taking cognizance of transfer of DRCs, which is not the issue involved in the suit. Suffice it to observe that even the DCPR or UDCPR do not prescribe the requirement of registered agreement for sale of TDR for 'utilisation'.

70) Thus, Plaintiff's reliance on provisions of clause 6.2 of Regulation 32 of DCPR 2034 is misplaced as even the said provision does not prescribe registration of agreement for utilisation of TDR.

71) It is sought to be contended by Plaintiff-Society that the stand of contesting Defendants that each of the Agreements executed in favour of Defendant Nos. 5 to 18 are for 'sale' and not merely for 'utilisation' of TDR. In my view nomenclature of transaction is

irrelevant. Even if TDR is sold, the same is for the purpose of utilisation. It is not that Defendant Nos. 5 to 18, who have purchased the TDR from Plaintiff-Society could further sell it to third parties. Sale for the purpose of utilisation of TDR can only be done by holder of DRC. By reason of sale of TDR, Defendant Nos. 5 to 18 have not become holders of DRC. The Agreements would have required registration only if Plaintiff-Society was to trade and sell the entire DRC in favour of one of the Defendants. In that case, the purchaser of DRC could have not only been entitled to utilise the FSI credit in the DRC but further sell the same to third party.

72) Even otherwise the TDR constitutes nothing but compensation in kind in the form of FSI on account of Planning Authority's financial constraints to pay monetary compensation. It otherwise appears absurd that when land owner accepts compensation in monetary terms, he is entitled to utilise that money without any fetter. Whereas another land owner who accepts compensation in the form of TDR is subjected to the fetter of compulsory registration and payment of stamp duty payable on conveyance of immovable property when he decides to monetise the TDR. To illustrate, land owner 'A' opts for compensation of Rs.1 crore and enjoys the said amount to the fullest whereas land owner 'B' is offered TDR by the Planning Authority worth Rs.1 crore and when he goes in the market to monetise the TDR, the purchaser thereof offers him less than Rs. 1 crore on account of expenditure and labour involved in stamping and registration of instrument for transfer of TDR. The authorities under the Stamp Act have treated TDR as movable property and have accepted levy of 3% stamp duty on ASR calculated on 30% of land cost.In my *prima facie* view therefore the Agreements executed in favour of Defendant Nos.5

to 18 for sale and utilisation of TDR do not require registration under Section 17 of the Registration Act.

INADEQUACY OF CONSIDERATION

73) It is Plaintiff-Society's complaint that the TDR has been sold at a throwaway price. Plaintiff believes that the ready reckoner value of the TDR as per the Annual Statement of Rates (**ASR**) declared by the Stamp Authorities was Rs. 67,938.08/- whereas the TDR has been sold at much lower rate ranging between Rs.20851.50/- per sq. mtrs to Rs. 35260.93/- sq.mtrs. According to the Plaintiff-Society, the TDR has been sold on an average 65% less than the market rate. The following table is presented by the Plaintiff to make out a case of gross undervaluation of the sold TDR :

	Name of TDR Purchaser	Area of TDR Sold in sq. mts. (A)	Total Consideration in Rupees (B)	Rate at which TDR was sold per Sq. Mtr. (D)	ASR (Rupees per sq. mts.) (E)	% of RR value at which the TDR is sold as against the market rate of 65% (F)	Consideration receivable as per ASR (G)=A x E	TOTAL Deficit amount in rupees (G-B)
1.	Rohinton Mehta Builders & Developers	660	1,37,62,000/-	20,851.5/-	67,938.08	30.69%	4,48,39,792.8	3,10,77,791.8
2.	Kanakia Future Realty Pvt. Ltd.	5690	18,50,00,000/	32,513.18	67,938.08	47.85%	38,65,73,365	20,15,73,365
3.	Ajay Agarwal	706	2,40,00,000/-	33,994.33/	67,938.08	50.03%	4,79,64,990.5	2,36,64,990.5
4.	Lakshmi Builders & Developers	378	1,05,00,000/-	27,777.78/	67,938.08	40.89%	2,56,80,972.2	1,51,80,972.2
5.	Shantaprabha CHS Ltd.	178.3	54,00,000/-	30,286.03/	67,938.08	44.58%	1,12,11,538	67,13,537.96
6.	Wheelabrator Alloy Castings Ltd.	2500	8,50,00,000/-	34,000./-	67,938.08	50.04%	16,98,47,700	8,48,47,700
7.	Ranjana Constructions Pvt. Ltd.	460.5	1,40,00,000/-	30,401.73/	67,938.08	44.75%	3,12,85,946.3	63,35,867.54
8.	Kojar Realty	39.4	12,00,000/-	30,456.85/-	67,938.08	44.82%	26,76,799.75	14,76,799.75
9.	Rohinton Mehta Constructions	303	76,30,000/-	25,181.52/-	67,938.08	37.06%	2,08,85,541.2	1,29,55,541,.2
10.	Hill View Developers	304.2	1,00,00,000/-	32,873.1/-	67,938.08	48.39%	2,06,67,068.1	1,06,67068.1
11.	K Raheja Corp Pvt Ltd.	850.8	3,00,00,000/-	35,260.93/-	67,938.08	51.90%	5,78,02,569.3	2,78,02,569.3
12.	Paper Mill Plant & Machinery Manufactures Ltd.	2171.3	6,50,00,000/-	29,935.98/-	67,938.08	44.06%	14,75,16,124	8,25,16,124,.4

	Sabari Urban Develop-ers LLP	327	86,00,000/-	26,299.69/-	67,938.08	38.71%	2,22,16,079.2	1,36,16,079.2
		Total 14568.2	**Total - 46,00,92,000/**			**Avg - 44.13%**		**TOTAL- 51,87,28,407/-**

NOTE: The total consideration receivable should be Rs. 97,88,20,407/- but society has only received Rs. 46,00,92,000/-

74) Plaintiff-Society thus claims that it has incurred loss of Rs.51,87,28,407/- in the matter of sale of TDR on account of actions of Defendant Nos. 1 to 4.

75) In my view, the whole bogey of Plaintiff-Society of loss caused to it in sale of TDR is misplaced. The value of TDR may differ depending on who buys it, the manner in which it is loaded, location at which it is loaded, etc. It is also not that the whole of TDR purchased can be loaded in its entirety by the purchaser. To illustrate, Defendant No.6-Raheja Corporation Ltd. purchased TDR of 850.80 sq.mtrs. from the Plaintiff-Society and has loaded the same on its project named 'Modern Vivaria' located at Mahalaxmi, Mumbai. Thus, the TDR generated through acquisition of land in Deonar is utilised in southern part of the city at Mahalaxmi on account of which, the purchased TDR of 850.50 sq.mtrs. got proportionately reduced for the purpose of utilization at Mahalaxmi and the actual quantity used is in the project by the purchaser is 493.93 sq.mtrs. It is on account of difference in land rate as per ASR in Deonar and Mahalaxmi and therefore as per the formula, as against the purchased TDR of 850.50 sq.mtrs., TDR of only 493.93 sq.mtrs could be utilized by Respondent No. 6. The above table also shows substantial difference in the price paid by the purchasers for the TDR which ranges between Rs. 20851.5 sq.mtrs. to Rs. 35260.93 sq.mtrs. Defendant No.6-Raheja Corporation Private Limited has paid the highest value for the purchased TDR possibly on account of its utilization in more commercially viable project in the southern part of

the city. Thus, the price at which the TDR can be sold depends on who purchases it and where the same is proposed to be loaded. It is not possible that the TDR seller will always attract the purchaser willing to utilse TDR in an affluent part of the city. Thus, the market forces determine the value at which TDR can be sold. Also, it is not possible to infer losses on account of difference in the ASR and the rate at which TDR is sold. TDR in a DRC being a negiotable instrument, it is difficult to ascribe any fixed value to it for inferring losses to Plaintiff-Society

76) Also of relevance is the fact that TDR is freely available in the market and there is no scarcity of TDR. It is not that Defendant Nos. 5 to 18 did not have any other source for purchase of TDR except Plaintiff-Society. If Plaintiff-Society was not to sell TDR to Defendant Nos. 5 to 18, they could have purchased the same through other sources. This is clear from willingness shown by Defendant No. 5 (Hill View Developers) to return the TDR to the Plaintiff-Society subject to refund of purchase price, stamp duty and interest. Thus, it is difficult to infer that there is any wrongful gain by Defendant Nos. 5 to 18 or corresponding loss to Plaintiff-Society in the matter of sale of TDR.

77) It is also settled position of law that mere inadequacy of consideration cannot be a ground for setting aside a sale. Reliance in this regard of contesting Defendants on judgment of Division Bench of Calcutta High Court in ***Harendra Nath Ghose*** is apposite in which it has held in paras-18 and 23 as under:

> **18. In any view of the matter a contract cannot be said to be void on the ground of inadequacy of the consideration as provided in section 25 of the Contract Act**. Similarly a contract cannot be said to be void on the ground of over-consideration. ….

> **23.** The action could have been entertainable had there been a challenge by way of annulment on the ground of fraud either on the factual or legal basis against transaction and return of the entire consideration money paid. The plaintiff cannot be allowed to approbate and reprobate just because it is the Government litigant. **We do not find any legal provision to treat the plaintiff differentially to allow it to keep the property on the one hand treating the sale being lawful and valid and, on the other hand, and ask refund of alleged excess amount.** The plaintiff cannot take the portion of the contract which is advantageous to it and ignore and/or abandon which is disadvantageous to it.
>
> *(emphasis added)*

78) In ***Dharmil A.Bodani*** this Court had an occasion to deal with the argument of inadequacy of consideration and by relying on the judgment of Madras High Court in ***Santappa Rai***, has held that mere inadequacy of consideration can never be a ground for setting aside a valid sale. It is held in para 169 as under :

> 169. After considering the conspectus of provisions of the Indian Contract Act and Specific Relief Act as well as various decisions relied upon by the parties, I am of the view that inadequacy of consideration, by itself, is neither a ground for declaring a contract to be void nor a reason for denying the relief of specific performance of an agreement. …..

79) In my view therefore, the contention raised by Plaintiff-Society of sale of TDR at a rate lesser than ASR is not a ground for grant of temporary injunction in its favour.

NON RETURN OF PURCHASE PRICE

80) One of the striking features of the case is that while the Plaintiff-Society is seeking avoidance of sale of TDR and praying for an injunction against Defendant Nos.5 to 18 from carrying out any construction by utilising purchased TDR, the prayers in the suit and the Interim Application are pressed without showing any willingness to

refund or return the consideration received by the Society. Thus, the Plaintiff Society wants to unjustly enrich itself by retaining the amount received towards sale of TDR and seeking restoration of TDR at the same time. This cannot be countenanced in law. Reliance by Mr. Godbole on judgment of the Apex Court in ***Authorised Officer, State Bank of India Versus. C. Natarajan*** is apposite in which it is held that unjust enrichment occurs when a person retains money or benefits at the instance of another. The Apex Court has held in paras-44 and 46 as under:

> **44.** The circumstances of the case make it imperative to consider the question: When does an enrichment or unjust enrichment occur?
>
> **46.** In *Sahakari Khand Udyog Mandal Ltd. v. CCE & Customs*, this Court had the occasion to reiterate that unjust enrichment means retention of a benefit by a person that is unjust or inequitable. Unjust enrichment occurs when a person retains money or benefit which is in justice, equity and good conscience, belongs to someone else. The doctrine of unjust enrichment, therefore, is that no person can be allowed to enrich inequitably at the expense of another. A right of recovery under the doctrine of unjust enrichment arises where retention of a benefit is considered contrary to justice or against equity.

81) Section 65 of the Contract Act provides that when an agreement is discovered to be void or where a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it. Section 65 of the Contract Act provides thus :-

> **65. Obligation of person who has received advantage under void agreement, or contract that becomes void.—**

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

82) Thus, if Plaintiff-Society is seeking declaration that the Agreements for Sale of TDR are void and not binding coupled with restoration of TDR and re-issuance of DRC, it must offer to return the amount received by it of Rs.46 crores. It cannot seek avoidance of Sale of TDR and at the same time return the money derived out of such sale. In ***Kuju Collieries Ltd.***, the Apex Court has held in para-6 of the judgment as under :-

> 6. We are of the view that Section 65 of the Contract Act cannot help the plaintiff on the facts and circumstances of this case. Section 65 reads as follows :
>
> > When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.
>
> The section makes a distinction between an agreement and a contract. According to Section 2 of the Contract Act and agreement which is enforceable by law is a contract and an agreement which is not enforceable by law is said to be void. Therefore, when the earlier part of the section speaks of an agreement being discovered to be void it means that the agreement is not enforceable and is, therefore, not a contract. It means that it was void. It may be that the parties or one of the parties to the agreement may not have, when they entered into the agreement, known that the agreement was in law not enforceable. They might have come to know later that the agreement was not enforceable. The second part of the section refers to a contract becoming void. That refers to a case where an agreement which was originally enforceable and was, therefore, a contract, becomes void due to subsequent happenings. **In both these cases any person who has received any advantage under such agreement or contract is bound to restore such advantage, or to make compensation for it to the person from whom he received it**. But where even at the time when the agreement is entered into both the parties know that it was not lawful and, therefore, void, there was not contract but only an agreement and it is not a case where it is discovered to be void subsequently. Nor is it a case of the contract becoming void due to subsequent happenings. Therefore, Section 65 of the Contract did not apply.
>
> *(emphasis added)*

83) In *Union of India Versus. N. Murugesan* (supra) the Apex Court has held in para-26 as under :-

> *Approbate and reprobate*
>
> 26. These phrases are borrowed from the Scots Law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. **One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same.** Such a party either has to affirm or disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party. We have already dealt with the provisions of the Contract Act concerning the conduct of a party, and his presumption of knowledge while confirming an offer through his acceptance unconditionally.
>
> *(emphasis added)*

84) In *Dr. Poornima Advani*, supra, the Apex court has held in para-25 as under :-

> 25. If on facts of a case, the doctrine of restitution is attracted, interest should follow. Restitution in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order what has been lost to him in execution of decree or order of the Court or in direct consequence of a decree or order. The term "restitution" is used in three senses, firstly, return or restoration of some specific thing to its rightful owner or status, secondly, the compensation for benefits derived from wrong done to another and, thirdly, compensation or reparation for the loss caused to another.

85) Mr. Seksaria has opposed the argument of restitution by contending that if the sale transaction is *ab-initio-void* and an outcome of stark fraud, it is not necessary for the Plaintiff-Society to return the consideration received towards sale of TDR. Reliance is placed on Apex Court judgment in ***Loop Telecoms and Traders*** (supra) in which it is held in para-62 as under :

> 62. In The Principles of Law of Restitution 37, it has been noted that all claims for restitution are subject to a defence of illegality. The genesis of this defence is in the legal maxim ex turpi causa non oritur actio (no action can arise from a bad cause). A court will not assist those who aim to perpetuate illegality. This rule was initially recognised by the House of Lords in its decision in Holman v. Johnson 38. Lord Mansfield held: (ER p. 1121)
>
> "The objection, that a contract is immoral or illegal as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so. The principle of public policy is this; ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted."

86) In my view, reliance by the Plaintiff on judgment of the Apex Court in ***Loop Telecom*** is inapposite. In that judgment, the Apex Court has discussed the principle that the Court would not assist those who aim to perpetuate irregularity. Thus, the principle discussed in the judgment could be applied if Defendant Nos. 5 to 18 were to secure retention of TDR despite Court coming to the conclusion that sale of TDR is *ab-initio-void*. The principle cannot be made applicable in a reverse situation where the Plaintiffs is seeking to retain monies received by it towards sale of TDR while simultaneously seeking avoidance of sale.

87) Plaintiff's unwillingness to return the sale consideration is for obvious reasons. The very sale of TDR was undertaken by the Plaintiff Society because it needed funds for settling dispute with the adjoining land occupiers. The minutes of Special General Meeting dated 8 January 2023 indicate that the Society decided to settle the disputes with Mr. N.G. Sawant by paying him settlement amount of Rs.14 cores. The Society has possibly paid amount of Rs.14 cores to said Shri. N.G. Sawant and has settled the disputes. This appears to be the reason why after achieving the goal of settling disputes with neighboring land occupier, the Society is taking chances of challenging the sale transaction of TDR.

88) I am therefore of the *prima facie* view that the Plaintiff is not entitled to any temporary injunction on account of non-willingness displayed by it for return of received consideration while seeking avoidance of sale.

UTILISATION OF TDR BY DEFENDANT NOS 5 TO 18

89) A chart has been placed on record depicting the current stage of projects of Defendant Nos. 5 to 18 after the purchase of TDR from the Plaintiff Society:

DRC NO. Road/0059/2023 dated 07th August, 2023					
NAME OF DRC HOLDER: M/S. GREEN GARDEN APARTMENTS CO-OPERATIVE HOUSING SOCIETY LIMITED ASR 2023-24 RATE: RS. 67,939.08/-					
SR. NO.	NAME OF PARTY	QUANTITY	CONSIDERATION	AGREEMENT DATE	CURRENT PROJECT STATUS
1	M/S. KOJAR REALTY	39.4	12,00,000	10.08.2023	Part O.C.
2	ROHINTON MEHTA BUILDERS & DEVELOPERS	660	1,62,39,160	10.08.2023	Obtained C.C.
3	M/S. LAKSHMI BUILDERS AND DEVEL-	378	1,05,00,000	14.08.2023	Obtained C.C.

	OPER				
4	SHRI. LAUKIK DIXIT PARTNER OF ROHINTON MEHTA CONSTRUCTION	303	76,30,000	18.08.2023	Applied for O.C.
5	SABARI URBAN DEVEL-OPERS LLP	327	86,00,000	18.08.2023	Obtained C.C.
6	PAPER MILL PLANT & MACHINERY MANUFAC-TURES LTD.	2171.3	6,50,00,000	21.08.2023	Obtained C.C.
7	SHRI. SUBODH S. RUN-WAL DIRECTOR OF WHEELABRATOR ALL-LOY CASTINGS LIMITED	2500	8,50,00,000	21.08.2023	O.C. obtained
8	M/S. SHANTPRABHA C.H.S.L.	178.3	54,00,000	22.08.2023	Obtained C.C.
9	M/S. RANJANA CON-STRUCTION PVT. LTD.	460.5	1,40,00,000	22.08.2023	Applied for O.C.
10	M/S. KANAKIA FUTURE REALTY PVT. LTD.	5690	18,50,00,000	23.08.2023	O.C. obtained
11	SHRI. AJAY AGAWRAL	706	2,83,20,000	29.08.2023	Obtained C.C.
12	M/S. SUSHIL ENTER-PRISES / HILL VIEW DE-VELOPERS	304.2	1,00,00,000	05.09.2023	Not Utilised
13	K RAHEJA CORP PVT. LTD.	850.5	3,00,00,000	26.09.2023	Obtained C.C.
	TOTAL	14568.2	46,68,89,160		

90) The above chart would indicate that except Defendant No. 5 Hill View Developers, all other Defendants have already utilised the purchased TDR by securing Commencement Certificates. As observed above, Defendant No. 5 has shown willingness to return the TDR subject to refund of purchase price, stamp duty and interest. The other Defendants have already utilised the TDR. Projects of some of the Defendants are already completed as Occupancy Certificates are issued in respect of two projects and Occupancy Certificate is applied in respect of the other two projects. Considering the stage at which the Suit is filed and application for temporary injunction is pressed, in my view, it would otherwise be iniquitous to restrain Defendant Nos. 5 to 18 from carrying out construction on the basis of utlisation of the purchased TDR. The TDR purchase transactions have occurred during August and September 2023, and by now, two years have passed. During this time period, the TDR utilisation in most of the cases is

complete. In respect of those Defendants whose construction is already carried out by utilisation of TDR, grant for any temporary injunction in Plaintiff's favour would render such construction illegal. In respect of those Defendants who have secured Commencement Certificates their building permissions would be rendered illegal if temporary injunction is granted in Plaintiff's favour thereby indefinitely delaying the projects. Third party rights have been created by Defendant Nos. 5 to 18 and the innocent flat purchasers would suffer on account of belated challenge mounted by the Plaintiff-Society in the present Suit. This is yet another reason why I am not inclined to grant any temporary injunctive relief in favour of the Plaintiff-Society.

DELAY

91) As observed above the decision to sell the TDR was taken by the Plaintiff-Society in its Special General Body Meetings held on 8 January 2023 and 18 June 2023. The monies towards sale of TDR started flowing into the bank account of the Plaintiff-Society right since March 2023 as the Society opted for advance payment from Defendant No.3. The first tranche of advance payment of Rs. 1.50 crores was received by the Plaintiff-Society in its bank account on 24 March 2023. As observed above, the Suit is essentially driven by some of the current office-bearers of the Plaintiff-Society, who also happened to be office-bearers when the entire transactions of the sale of TDR took place. Though the Defendant No. 20-Secretary and Defendant No. 21-Treasurer are impleaded as party Defendants, no relief is sought against them. The impleadment appears to be *prima facie* deliberate as they are not sought to be held accountable for their actions impugned in the Suit. Defendant No. 21-Treasurer is bound to know about credits occurring in the bank account of the Plaintiff-Society. Additionally, my attention is

invited to SMS and WhatsApp chats between Defendant No.21 (Mrs. Sudeshna Jana) and Defendant No.1 by which she has forwarded the messages received from Bank about credits of amounts as and when the credits occurred on account of sale of TDR. Additionally, the Audit Report for the financial year ending 31 March 2024 contains specific Audit Remark of procurement and sale of TDR in addition to details of the sale consideration received by the Society. The Audit Report must have been prepared after securing the necessary information from the office bearers of the Society. The Audit Reports must also have been circulated among the members of the Society.

92) The above factors clearly depict knowledge on part of the Plaintiff-Society about the sale transactions of TDR. However, the Suit has been lodged on 17 February 2025. Thus, the suit is lodged almost two years after the Society started receiving monies towards the sale of TDR. If Defendant No.3 did not have the authority to sell TDR or if the management committee members had unauthorisedly sold the TDR, the Plaintiff-Society ought to have taken prompt action by filing the Suit immediately after the sale transactions commenced. The delay of two years in filing the Suit is clearly fatal.

93) Faced with the objection of delay, Mr. Sakseria has submitted that the Plaintiff Society discovered fraud in November 2024. The alleged discovery of fraud is sought to be attributed by the Plaintiff Society to actions of Defendant No. 2, who raised complaints in October 2024 regarding transfer of amounts in the accounts of Defendant No.4 to show that it possibly had links with Defendant No.1. It is contended by Mr. Sakseria that the Society first appointed Fact Finding Committee and thereafter Negotiations Committee and thereafter decided to file the present Suit. He has relied on the judgment

of the Delhi High Court in ***Hindustan Pencils Pvt. Ltd***. in support of his contention that laches or acquiescence cannot be a reason enough for denying the relief for injunction. In my view, the ratio of the judgment in **Hindustan Pencil** is clearly inapplicable to the present case for variety of reasons. The Delhi High Court has dealt with the trademark dispute relating to infringement and passing off. The Court has held that in infringement action, Plaintiff exercises statutory right under Section 28 of the Trademarks Act which gives him exclusive right to use the mark. It has further held that exercise of such exclusive right cannot be hindered by consideration of delay and laches. It has further held that the defence of laches or inordinate delay is a defence in equity and equitable relief can be afforded only to that party who is not guilty of fraud and whose conduct shows that there is honest current user of the mark in question. The Court held that in a case involving apparent dishonest use of the mark, temporary injunction cannot be denied only on the ground of delay and laches. The above principles, in my view, cannot be extended to a case like the present one. The delay on the part of the Plaintiff in the present case has resulted in utilization of TDR by Defendant Nos. 5 to 18 in their respective projects. *Prima-facie* Defendant Nos. 5 to 18 are not guilty of fraud or dishonesty. They are bonafide purchases for value. It is otherwise difficult to believe that the TDR which is freely available for projects in market is purchased by Defendant Nos. 5 to 18 in connivance with Defendant Nos.1 to 4. On the other hand, the Society has sold the TDR with its eyes wide open and is now attempting to take a volte-face and question the agreements after enjoying the sale consideration and without offering to return the same. In my view, therefore delay in filing the suit is yet another reason why this Court would be loathe in granting temporary injunction in Plaintiff's favour.

PROCEEDINGS UNDER THE MCS ACT

94) As observed above, parallel proceedings have been initiated by the parties under the provisions of the MCS Act. It appears that an audit under Section 81(3)(b) of the MCS Act has been conducted in pursuance of order dated 23 December 2024 passed by the Divisional Joint Registrar. Such audit is conducted in pursuance of application of Defendant No.2 and not of Plaintiff-Society or by any of the current managing committee members. Contrary to what is contended in the Suit, the managing committee of the Plaintiff-Society passed a Resolution on 26 December 2024 affirming that there was neither any fraud nor any misappropriation nor any loss caused to the Society. The said meeting was attended by Mr. Shashi Poduwal who has affirmed the Plaint. Based on that Resolution, the Society filed a Revision before the Hon'ble Minister of Co-operation on 2 January 2025 which was again affirmed by the Secretary (Defendant No.20). In that Revision Application, it was asserted by the Society that there was no misappropriation on embezzlement of Society's funds nor is there any corruption in appointment of Defendant Nos.3 and 4. The Society appears to have withdrawn the Revision Application on 12 February 2025 for the purpose of filing of the present suit. It has now turned around and has questioned sale of TDR by raising contentions contrary to the one raised in the Resolution dated 26 December 2024 and Revision Application by filing the present Suit on 17 February 2025. The Society thus does not appear to be consistent in its approach as it had justified the actions relating to sale of TDR, notably through the same person who has affirmed the Plaint. This would be yet another reason for not granting any injunctive relief in society's favour.

NON FULFILLMENT OF TRINITY TEST:

95) Plaintiff has thus failed to make out *prima-facie* case for grant of temporary injunction in its favour. This Court is unable to trace any element of illegality in purchase of TDR by Defendant Nos.5 to 18. The present Suit is an outcome of disputes between the members of the Society. Such disputes cannot be a reason for restraining Defendant Nos.5 to 18 from carrying out construction by utilizing the purchased TDR. The Suit merely seeks to highlight the procedural illegalities in the matter of sale of TDR. Inadequacy of consideration is not a ground for setting aside valid sale of TDR. Even if inadequacy of consideration is ultimately found to be proved, the same would be a ground for recovery of losses from the responsible persons through the machinery provided for under the provisions of the MCS Act. Plaintiff has fulfilled the object behind the sale of TDR. The Society has already pocketed the sale consideration of Rs.46 crores. If it is proved that the TDR ought to have been sold at higher price or that Society has suffered any losses, recovery of such losses can be undertaken in an enquiry under Section 88 of the MCS Act. Therefore, there is no question of Society suffering any irreparable loss by reason of refusal of temporary injunction. The balance of convenience is tilted clearly against the Plaintiffs and in favour of Defendant Nos.5 to 18. Grant of any temporary injunction would affect not just Defendant Nos.5 to 18 who are bonafide purchasers for value, but the innocent flat purchasers. Any delay caused in completion of projects by Defendant Nos.5 to 18 would also affect the third parties

E. ORDER

96) The conspectus of the above discussion is that Plaintiff is not entitled to temporary injunction as sought for in the Interim Application. Consequently, the Interim Application is **rejected**.

[SANDEEP V. MARNE, J.]