B. Jeejeebhoy Vakharia & Associates v/s Sahara India Commercial Corporation Limited & Others

APPEAL NO.496 OF 2007 IN NOTICE OF MOTION NO.3950 OF 2005 IN SUIT NO.3376 OF 2005 ALONGWITH APPEAL NOS.501 AND 546 OF 2007

decided on

12-06-2008

at

High Court of Judicature at Bombay

by

THE HONOURABLE MR. JUSTICE R.M.S. KHANDEPARKAR & THE HONOURABLE MR. JUSTICE P.B. MAJMUDAR

advocates

For the Appellant: Milind Sathe, Senior Advocate, with Sarvasri V.R. Dhond and Md. Akram, instructed by M/s. Harilal Thakar & Co., Vijay Thorat, Senior Advocate, with Sri Vivek Kantawala and Ms. Joshi, instructed by M/s. Vivek Kantawala & Company, Advocates. For the Respondent : A.V. Anturkar along with Sri Kishore Jain, instructed by Mr. Tushar Goradia & Bhavin Manek, Debol Banerjee, Senior Advocate, with Sri Nitin Thakkar, Senior Advocate, and Sarvasri Gaurav Joshi, P.S. Sudheer and Khaitan, instructed by M/s. Tanvi Gandhi & Satyen Vora, Ms. Rajeeta Matkar, Joaquim Reis along with Sri Gaurav Joshi, Advocates.

Equivalent Citation(s)

Judgment Oral Judgment: (R.M.S. Khandeparkar, J.)

Admit. By consent heard forthwith. Respective learned Counsel appearing for the respondent Nos.(i) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 in Appeal No.496 of 2007, (ii) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 in Appeal No.501 of 2007 and (iii) 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 in Appeal No.546 of 2007 waive service.

2. All these appeals arise from the order dated 4th June, 2007, passed in Notice of Motion No.3950 of 2005 in Suit No.3376 of 2005. Since common questions of law and facts arise in all these three appeals, they were heard together and are being disposed of by this common judgment.

3. The appellant in Appeal No.496 of 2007 is the defendant No.1, the appellant in Appeal No.501 of 2007 is the defendant No.4 and the appellants in Appeal No.546 of 2007 are the defendant Nos.7 and 11, whereas the respondent Nos.2, 3, 5, 6, 8, 9 and 10 are the defendant Nos.2, 3, 5, 6, 8, 9 and 10 respectively in

the said suit. The appellants and the respondents would be referred to hereinafter as the "plaintiffs" and "the defendants" as they are arrayed in the said suit.

4. We have heard at length the counsel appearing for the parties. We have perused the impugned order as well as the records placed before us.

5. By the impugned order, the learned single Judge has confirmed the ad-interim order dated 2nd February, 2006. By the said ad-interim order dated 2nd February, 2006, passed in the said Notice of Motion, the defendants were restrained from in any manner alienating, encumbering or creating third party rights or parting with possession of the suit property till the disposal of the Motion. In terms of the impugned order, the said restrain stands extended till the disposal of the suit.

6. The facts, which are not in dispute and relevant for the decision in the matter, are that the subject matter of the Suit and the Notice of Motion is an immovable property admeasuring 614 acres bearing CTS No.1/5 (Part) and Survey No.161 (Part) situate in the village of Pahadi Goregaon, Taluka Borivli, Mumbai Suburban District. The entire land is situated in No Development Zone in terms of Development Plan for Greater Mumbai and sanctioned by the State Government. The said land belonged to M/s. B. Jeejeebhoy Private Limited which came to be conveyed in favour of M/s. Pahadi Goregaon Land Development Private Limited on 21st May, 1985. An agreement came to be entered into between the said M/s. Pahadi Goregaon Land Development Private Limited, and Usha Development Co-operative Housing Society Limited, on 19th May, 1988 under which the said M/s. Pahadi Goregaon Land Development Private Limited agreed to sell the said land to Usha Development Co-op. Housing Society Limited. Further agreement was entered into on 12th July, 1988 between Usha Development Co-op. Housing Society Limited on one side and the defendant Nos.5 to 10 on the other by which development rights in respect of the land were agreed to be granted to the said defendant Nos.5 to 10. On 28th July, 1988, conveyance came to be executed by said M/s. Pahadi Goregaon Land Development Private Limited in respect of the land in question in favour of Usha Development Co-op. Housing Society Limited.

7. It is also an undisputed fact that by an order dated 6th November, 1991 passed by the Assistant Registrar of Co-operative Societies, the said Usha Development Co-op. Housing Society Ltd. came to be divided into four different Co-operative Societies. Meanwhile, the defendant Nos.5 to 9 formed a partnership firm being defendant No.1 herein. The said M/s. Pahadi Goregaon Land Development Private Limited went into voluntary winding up and in the process it was decided that the benefits of development agreement entered into between the said M/s. Pahadi Goregaon Land Development Private Limited and the said Usha Cooperative Housing Soc. Ltd. would go to the defendant

Nos.7 and 11.

8. On 27th June, 1995, a proposal was submitted to the Ministry of Environment and Forest, Government of India, for development of the said property for setting up a Golf Club, etc. and a clearance in that behalf was granted by the said Ministry for the said project on 4th July, 1996.

9. A suit came to be filed by the defendant Nos.7 and 11 against the defendant No.4 herein for certain reliefs in the year 2000. The said suit being Suit No.4925 of 2000 came to be disposed of pursuant to the consent terms filed by the parties and a consent decree was passed on 25th July, 2005 whereby the declaration was to the effect that the said land belonged to the defendant Nos.7 and 11 herein who were the plaintiffs in the said suit.

10. In the year 2001, the four Co-operative Societies which were formed pursuant to the order dated 6th November, 1991, by dividing the said Usha Development Co-op. Housing Soc. Ltd. were merged together forming one Co-operative Society viz. the defendant No.4 herein.

11. On 22nd December, 2001, a Memorandum of Understanding (MoU) came to be executed between the defendant No.1 and the plaintiffs herein, which is the subject matter of controversy between the parties and in respect of which the suit for specific performance has been filed by the plaintiffs.

12. At this stage, it is also necessary to refer to some of the other facts which would be relevant for deciding the controversy between the parties.

13. On 29th December, 2001, a letter came to be issued under the signature of the defendant Nos.1 and 4 to the plaintiffs giving license to enter the property in question for certain works to be carried out in the property. On 30th August, 2002, the Municipal Corporation of Greater Mumbai addressed a letter to the Surveyor pointing out certain conditions for setting up of Golf Club in the property. By a letter dated 27th September, 2002, issued by the Ministry of Environment and Forest, Government of India, and addressed to the defendant No.4, the clearance granted under letter dated 4th July, 1996 was suspended and stop work notice was issued in relation to development activities in the land in question.

14. It is also to be noted that from the time of execution of MoU till the date of filing of the suit, there was correspondence between the plaintiffs and the defendant No.1 and reference to the relevant letters would be made in the course of the judgment.

15. The impugned order is sought to be challenged on various grounds. However, before dealing with the challenge to the impugned order, it would be

necessary to consider one of the points which is sought to be raised on behalf of the respondents regarding limited jurisdiction of the Appellate Court while dealing with the appeals against the discretionary orders passed by the Courts of the Original Jurisdiction and the attention sought to be drawn to the decision of the Apex Court in that regard in the matter of Wander and another vs. Antox India P.Ltd. 1990 (Supp.) SCC 727 It is the contention on behalf of the respondents that the impugned order is a discretionary order and, therefore, in the absence of any perversity or arbitrariness on the part of the learned single Judge in grant of the discretionary relief, the Appellate Court has to be slow in its interference therein and considering the contentions sought to be raised on behalf of the appellants, there is absolutely no case for interference and applying the law laid down by the Apex Court in Antox India's case (supra), the appeals should be dismissed.

16. The learned Counsel appearing on behalf of the appellants on the other hand have submitted that the impugned order apparently discloses findings which are contrary to the materials on record as well as the decision having been arrived at ignoring material and relevant documents and, therefore, it discloses the discretion having been exercised arbitrarily and, therefore, warrants interference in the impugned order. 12 th June, 2008

17. In Antox India's case, the Apex Court, while dealing with the point regarding the scope of the Appellate Court to interfere in the order passed by the trial Court in its discretion held that in such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle and, therefore, the Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. In other words, the Appellate Court would not be justified in interfering with the order passed by the trial court in exercise of its discretion, solely on the ground that if the former had construed the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicious manner, the fact that the Appellate Court would have taken a different view would not justify interference with the trial court's exercise of discretion.

18. In fact, the law on this point is well settled and reiterated by this Court as well as by the Apex Court time and again. It cannot be disputed that the discretionary exercise of power by the Court of first instance cannot be interfered with by the Appellate Court unless it is found that such exercise has been done arbitrarily or is based on a finding which is contrary to the materials

on record or on the basis of a finding which has been arrived at ignoring the material piece of evidence which if considered, the decision could be different than the one arrived at by the trial Court. Failure to consider the material piece of evidence would certainly amount to arbitrary exercise of jurisdiction of discretionary power in granting or refusing the interim relief.

19. In the case in hand, it has been the contention on behalf of the appellant that the learned single Judge, while granting the interim relief, has arrived at findings contrary to the materials on record as well as has ignored the material piece of evidence.

20. A perusal of the impugned order discloses that the learned single Judge referring to the decision of the Division Bench in Chheda Housing Development Corporation vs. Bibijan Shaikh Farid and others 2007 (3) Mh.L.J. 402, and in particular paragraph 15 of the said decision has held that the FSI being the benefit arising from the land, it is an immovable property and thus clause 2(a) of the Memorandum of Understanding (MoU) is an agreement for transfer of immovable property. Therefore, considering the clauses 2, 9, 12 and 13 of the MoU, it would reveal that it is not a pure and simple agreement for development of land but the real nature of the agreement is that it is a composite agreement, while it has some features of development agreement. It also implies agreement for transfer of land and thus create a statutory presumption in terms of Section 10 of the Specific Relief Act and, therefore, breach of contract cannot be adequately compensated in terms of money and, therefore, it would entitle respondent No.1 to seek specific performance thereof. It has been further held that letter dated 7th June, 2003 by the defendant No.1 discloses that whatever legal terms which were required to be finalised in terms of clause 26 of the MoU were already finalised and the parties had reached final contract and that, therefore, there was a concluded contract between the parties. It has been further held that in view of the payment of Rs. 25 crores by the plaintiffs to the defendant No.1 and a further expenditure of Rs. 11 crores in carrying out the development work in the land by the plaintiffs, the agreement has been acted upon by the parties.

The impugned order also observes that clause 25 of MoU contains name of the defendant No.2 and declares that it was part of the defendant No.1 and it is nowhere contended by the defendant No.4 that defendant No.3 who had signed the agreement on behalf of defendant No.1 and the defendant No.2 has signed the agreement as a witness had no authority to declare by clause 25 that the defendant No.4 is a party to the agreement. It has also been observed that letter dated 29th December, 2001 signed by the defendant No.4 discloses license to the plaintiffs to enter the property and there is no explanation as to why it had issued the license in case it was not a party to the MoU. The impugned order also draws an adverse inference against the defendant No.4 on account of inability of its counsel to make a statement that the defendant No.3 who had

signed the MoU had no authority to represent the defendant No.4 and that, therefore, concludes that the defendant No.4 was very much party to the MoU. It further draws adverse inference against the defendant No.4 for inability on the part of the defendant No.4 to produce the membership register and therefore holds that 177 Companies had invested in the shares of the defendant No.4. It has also been observed in the impugned order that pursuant to the consent terms filed in a suit between the defendant Nos.4, 7 and 11, the title to the land cannot pass from the defendant No.4 to the defendant Nos.7 and 11 till and until there is registration of the transfer deed or registration of the decree and that it is nobodys case that either conveyance has been executed transferring the title to the land or that the consent decree has been registered.

21. Referring to the above findings, it has been strenuously argued on behalf of the appellant that none of the above findings is borne out from the record and that some of the said findings are totally contrary to the record. As regards the finding relating to the absence of registration of the consent decree, it is the contention on behalf of the appellant that it is an undisputed fact that the consent decree was registered on 24th August, 2005 and this fact was brought on record before the learned single Judge. Apparently, therefore, the finding regarding absence of material pertaining to the registration of the consent decree is undoubtedly contrary to the material on record.

22. As already seen above, the learned Judge has drawn certain inferences based on either the inability on the part of the defendants to make certain categorical statement or to produce certain materials on record in answer to the claim of the plaintiffs as also in relation to the authority to the defendant No.1 to execute the MoU on behalf of the defendant No.4. It is a settled principle of law that when an assertion of a situation by the plaintiffs is denied or disputed by the defendants, burden to establish the existence of such situation primarily rests upon the plaintiffs and the onus to disprove the same would shift upon the defendants only when such burden is discharged by the plaintiffs. Mere claim by the plaintiffs of existence of a thing without any supporting material in that regard cannot lead to a conclusion about existence of such a thing more particularly when the very existence thereof is denied or disputed by the defendants. Undoubtedly, the onus in that regard would shift upon the defendants when the existence of such thing is primarily established by the plaintiffs. But mere statement or claim about existence of a thing by itself cannot be construed to be the proof of existence thereof.

Bearing in mind this elementary rule of law, if one peruses the impugned order, it is at once clear that when the plaintiffs had claimed that the defendants had entered into an agreement with the plaintiffs on behalf of a third party, it was for the plaintiffs to establish that the said defendant had proper authority from the third party to enter into such an agreement on behalf of such third party. An adverse inference cannot be drawn against the defendant merely on the basis of

a claim by the plaintiffs that the defendants had an authority on behalf of the third party to enter into an agreement with the plaintiffs. No amount of weakness on the part of defendant to put forth his defence can enure to the benefit of the plaintiffs to contend that mere failure on the part of the defendants to establish the denial would lead to conclusion that the defendant had authority on behalf of the third party to enter into an agreement with the plaintiffs on behalf of such third party. Unless the initial burden in this regard is discharged by the plaintiffs, it will be too premature for the Court to draw an adverse inference against the defendant in that regard. We find the finding arrived at by the learned single Judge regarding the alleged authority to the defendant No.1 on behalf of the defendant No.4 to execute the agreement is without any material being placed on record in that regard on behalf of the plaintiffs and, therefore, the discretion exercised in that regard to arrive at the said finding cannot be said to have been exercised judiciously.

23. As regards the finding of the learned single Judge that the plaintiffs have produced on record the document which shows that 177 Companies have invested in the shares of the defendant No.4, in spite of lengthy arguments, we have not been pointed out any such document on record which could substantiate the said finding, apart from seeking to draw inference in that regard from the correspondence between the parties. Even the correspondence and balance-sheet nowhere disclose any admission to that effect. It was then strenuously argued by referring to certain averments made in the affidavit filed by the plaintiffs and allegedly not specifically denied by the defendants that it would lead to conclusion that in fact 177 Companies had invested in the shares of the defendant No.4. We are afraid that such a submission cannot be accepted as whether 177 Companies had in fact invested in the shares of the defendant No.4 is not a pure question of law, but is a question of fact to be established by necessary materials in support of such claim. As the matter stands today, we do not find any material which could reveal any such investment by 177 Companies in the shares of the defendant No.4 and, therefore, the finding arrived at in that regard by the learned single Judge, as rightly submitted on behalf of the appellant, does not find support from the materials on record.

24. As regards the finding regarding the transfer of FSI in terms of clause 2 of the MoU, it is pertinent to note that undisputedly at the time of execution of the MoU, the land belonged to the defendant No.4 who was not the signatory to the MoU nor any materials on record disclose any authority to the defendant No.1 to represent the defendant No.4 in the said MoU. In the absence of the owner of the land, by no stretch of imagination, it cannot be said that the MoU between the plaintiffs and the defendant No.1 could create interest in favour of the plaintiffs in the land which belonged to the defendant No.4. The clause 2 relating to FSI is in respect of scheme of the development to be carried out in the property in joint venture.

25. Apparently, the above findings which are very material findings for deciding the matter, disclose to be contrary to the material on record would themselves justify proper appreciation of all the material on record by the Appellate Court to ascertain whether the case of plaintiffs warrants grant of interim relief as has been granted by the learned single Judge.

26. As already observed above, the main contention on behalf of the plaintiffs is that the MoU in question is a concluded contract in relation to the property referred to therein and, therefore, bearing in mind the provisions of Section 10 of the Specific Relief Act, the plaintiffs are entitled for the relief which has been granted by the learned single Judge. It is the further contention that the parties have already acted upon the MoU and the plaintiffs have invested as many as Rs. 36 crores in pursuance of the said MoU which includes the amount paid to the defendant No.1 and further expenditure towards development in the land. There has been also acquisition of shareholding in 177 Companies in terms of the said agreement and thereby investment of an amount of Rs. 1.77 crores for that purpose. It is also contended that Rs. 15 lakhs were paid towards the litigation by the Plaintiffs. Further that there is a clear confirmation of concluded contract in that regard in the letter dated 7th June, 2003 and the defendant No.1 had full authority to enter into the said agreement for sale of the property on behalf of the defendant No.4 as well as the defendant Nos.7 and 11.

As against this, it is the contention on behalf of the defendants that the MoU is not a concluded contract nor the letter dated 7th June, 2003 can be read ignoring the subsequent correspondence between the parties nor any agreement or the materials on record disclose that the defendant No.4 had been a party to the said MoU or had at any time consented to any such agreement. The license dated 29th December, 2001 does not create any interest in the land nor it discloses the defendant No.4's consent to the said agreement and further that there is no material on record to disclose investment by the plaintiffs in 177 Companies as sought to be alleged by the plaintiffs. It is also contended on behalf of the defendants that they are ready and willing to pay to the plaintiffs the amount which the plaintiffs claim to have spent for litigation. It is also the contention on behalf of the defendants that the MoU is an agreement in the nature of joint venture partnership for development of land.

27. The main point for consideration which arises in the matter is whether the MoU dated 22nd December, 2001, is a concluded and enforceable contract between the parties to the suit.

28. The MoU in question has undisputedly been executed by the plaintiffs and the defendant No.1. The defendant No.1 has been defined in the agreement to be a firm registered under the Partnership Act formed by six Companies viz. (i) Beeline Impex Pvt. Ltd., (ii) Beejay Builders Pvt. Ltd., (iii) Vakharia Estates

& Investments Pvt. Ltd., (iv) Usha Holdings Pvt. Ltd., (v) Mehroo Jeejeebhoy Investment Pvt. Ltd., and (vi) Majas Land Development Pvt. Ltd. The opening of the MoU reads that the parties have drawn the said document in relation to the "broad points of agreement between the parties". Clause (1) thereof states that Sahara & Jeejeebhoy would develop the entire land described therein and belonging to M/s. Usha Madhu Development Co-operative Housing Society Limited, Mumbai, in joint venture with the understanding that Sahara would source the money required for the development of the project including cost of construction of all residential units, club house and golf course and infrastructure cost except as expressly provided in the agreement and Jeejeebhoy would provide the entire land with necessary permissions/clearances required for entire development. It also states that Jeejeebhoy had represented that the total FSI would be about 10.15 lacs sq.ft. Residential on the basis of 0.05 FSI (sanctioned area 4,23,051 sq.ft.), 75,000 sq.ft. For club house (sanctioned area 44,868 sq.ft.) and 6.53 lacs sq.ft. in respect of TDZ.

29. Plain reading of para 1 of the MoU would, therefore, disclose that the parties to the agreement i.e. Sahara and Jeejeebhoy, the plaintiffs and the defendant No.1, agreed for development of the land described therein in joint venture with certain understanding as regards the investment to be made and other responsibilities regarding getting the necessary permissions and clearance for such development, etc. It also speaks about the representation made by the defendant No.1 in relation to the available FSI in the land. It further states that the land in question belongs to the defendant No.4 herein. Undoubtedly, it also refers to the fact that the ownership of land has been devolved upon the defendant No.4 in terms of Annexure-A to the MoU.

30. Clause (2) of MoU deals with the subject of "sharing". Clause (a) thereof provides that potential of 10.15 lacs sq.ft. (residential) FSI calculated at the rate of 0.05 FSI in the ratio of 59 per cent to Sahara and 41 per cent to Jeejeebhoy and in the event Jeejeebhoy fails to get .05 FSI and is in position to get only 0.025 FSI in respect of residential premises, the sharing would be 69 per cent to Sahara and 31 per cent to Jeejeebhoy. Clause (b) provides that the potential of TDZ to be shared in the ratio of 59 per cent to Sahara and 41 per cent to Jeejeebhoy. Clause (c) provides for any extra benefit to be split 50:50 including expenses, however, money to be provided by Sahara at mutual agreed rate of interest. The clause obviously deals with the subject of sharing the FSI in the property on its development.

31. Clause (3) enumerates the list of xerox copies of the documents which were handed over by the defendant No.1 to the plaintiffs.

32. Clause (4) of the MoU provides that the plaintiffs should advance a sum of Rs. 25 crores to the defendant No.1 against the cost and expenses incurred by

the latter and payable in three instalments viz. Rs. 10 crores on execution of the MoU, Rs. 5 crores on getting the principal sanction of 0.05 FSI from Municipal Corporation or six months after the first payment of Rs. 10 crores whichever is later and the balance amount of Rs. 10 crores within one year from the date of payment of Rs. 10 crores or getting TDZ sanctioned whichever is earlier. It also provides that amount of Rs. 25 crores would be repaid by the defendant No.1 to the plaintiffs out of the proceeds of TDZ as provided in the said MoU. However, in the event of proceeds of TDZ do not arise or being found insufficient within a period of 30 months from the date of the MoU, then the defendant No.1 would pay the same out of sale of their residential component. The clause obviously relates to the amount to be paid to the defendant No.1 by the plaintiffs in terms of MoU and further repayment thereof by the defendant No.1 to the plaintiffs as the implementation of the MoU would proceed.

33. Clause 5 of MoU speaks about the understanding between the parties in relation to the sharing of cost of principal sanction of TDZ and incidental matters thereto.

34. Clause 6 provides that all decisions in respect of the project development would be taken by the plaintiffs through a Committee jointly appointed but the decision taken by the plaintiffs would be final and binding upon the parties.

35. Clause 7 speaks about the name of the project to be decided by the plaintiffs with the rider that the word "Heritage" should be suitably accommodated.

36. Clause 8 provides that Shri Byram N. Jeejeebhoy & Shri M.B. Vakharia of Jeejeebhoy would continue to be associated with the project as "Senior Guardians of the Project" lending their names to various honorary bodies that would be created from time to time, however, except under clause 2(c) above, they should not be called upon to give their personal or their Company's guarantees for any amount that could be borrowed or raised by Sahara for the project envisaged herein.

37. Clause 9 provides that the sale of bungalows out of Jeejeebhoy's share would be routed through the marketing of Sahara to the intent and purpose that the undercutting in sale price is avoided, the right to sell or not of Jeejeebhoy would be their sole discretion and brokerage to be paid on their share should be borne by them and in case Jeejeebhoy would decide to sell at a price lower than the sale price fixed by Sahara, save and except upto 10 units for family and friends which could be at a lower price, the same to be routed through Sahara, and then Jeejeebhoy would be obliged to give to Sahara first option to purchase at such reduced price.

38. Clause 10 is regarding the agreement pertaining to the sale proceeds to be credited towards the Corpus Fund for maintenance of various infrastructure and

amenities and as regards the interest earned on such fund.

39. Clause 10 provides that subject to what is stated in clause 2(c), proprietary right of club house and golf course would be shared 59% to Sahara and 41% to Jeejeebhoy. However, responsibility of running the same would rest with Sahara.

40. Clause 12 relates to the agreement pertaining to screening of the purchasers by the Screening Committee to be appointed by Sahara and Shri Jeejeebhoy/Shri Vakharia with a rider that the decision of such Committee as to the purchasers acceptance would be final and binding upon the parties.

41. Clause 13 provides that Mr. Madhu Vakharia of Jeejeebhoy would propose the mechanism for transfer of ownership of the residential bungalows to purchasers as well as the Club House and Gold Course and any other transfer. However, it should not adversely affect the interest of Sahara.

42. Clause 14 provides that Madhu Vakharia of Jeejeebhoy had agreed to support the project in all aspects of development and particularly in the areas of legal structuring, getting requisite permissions for development from Government and other bodies that would impact the smooth implementation of the project for all time to come.

43. Clause 15 provides that subject to Sahara carrying out the necessary compliance of I.O.D. conditions, Jeejeebhoy would get the Architect to obtain necessary commencement certificates.

44. Clause 16 provides that Jeejeebhoy would indemnify and would keep indemnified Sahara against any claim on title of land upto the date of MoU.

45. Clause 17 provides that cut off date for day-to-day expenses including filling expenses should be on Sahara account with effect from 15th October, 2001.

46. Clause 18 provides that residential part and golf course and golf club of the project should be completed by Sahara as provided thereunder.

47. Clause 19 provides that both parties would jointly declare the quantum, method and manner of payment of brokerage to M/s. Ashok Thakural.

48. Clause 20 provides that as far as the scheme of development, the role of society, the developer companies, etc. and other items referred to in the MoU of Jeejeebhoy and Sahara would be clear and accordingly the scheme would be carried out.

49. Clause 21 provides that as regards the payment to be made in pending suit or otherwise in respect of the land, the same would be the responsibility of Jeejeebhoy and not of Sahara, it having been represented by Jeejeebhoy that they were in absolute position to clear out the same.

50. Clause 22 provides that Sahara would be entitled to borrow money by raising loan against the project for project development as envisaged under the MoU and would use such monies only for the development of the projects and Sahara alone would be liable and responsible for discharging such borrowings, if any, and Jeejeebhoy's interest would not be jeopardized in any manner.

51. Clause 23 provides that in the event final agreement including Power of Attorney if any is not executed between the parties within six months from the date of the MoU for any reason, Jeejeebhoy would return all the moneys paid to them till date with interest as also expenses incurred by Sahara.

52. Clause 24 provides that for the purpose of commencing the work, Jeejeebhoy will give license and right of entry to the entire land specified in the MoU to Sahara on the date of signing of the said MoU free from all encumbrances on first payment.

53. Clause 25 states that the MoU is on the basis that Jeejeebhoy includes and means the persons, companies, societies, firms, as enumerated in the said clause and they include (i) Usha Development Co-op. Housing Society Ltd. (now wound up), (ii) Usha Madhu Development Co-op. Housing Society Ltd. (owner), (iii) Usha Kiran Development Co-op. Society Limited (now merged with Usha Madhu), (iv) Pahadi Goregaon Land Development Pvt. Ltd. (now wound up), (v) Pearn Cosmetics and Chemicals Pvt. Ltd. (shareholder of Pahadi Goregaon which filed suit), (vi) Beeline Impex Pvt. Ltd. (shareholder of Pahadi Goregaon which filed suit), (vii) Beejay Builders Pvt. Ltd., (viii) Vakharia Estates and Investment Pvt. Ltd., (ix) Usha Holdings Pvt. Ltd., (x) Mehroo Jeejeebhoy Investment Pvt. Ltd., (xi) Majas Land Development Pvt. Ltd., (xii) B. Jeejeebhoy, Vakharia and Associates (partnership firm formed by 6 Companies from serial No.6 to 11, and (xiii) All shareholders and main persons of the above societies, companies including Shri B. Jeejeebhoy, Shri Madhubhai Vakharia, their heirs, legal representatives, successors and assigns, with further rider that all the responsibilities as regards the matters relating to Jeejeebhoy in the MoU would be the responsibility of Jeejeebhoy.

54. Clause 26 reads that "The above terms are strictly commercial terms, the legal terms will be included in the final agreement. It is however, made clear that the title in respect of the said property will be verified and title certificate will be issued by M/s. Kantilal Underkat Advocates and Solicitors for Jeejeebhoy."

55. Plain reading of the MoU would reveal that at the opening of the said agreement, it was specified by the parties that the MoU comprises of broad points of agreement between the parties. The contents of very first paragraph which summarises the nature of the agreement between the parties refers to the understanding arrived at between the parties for joint venture in relation to the development of land admeasuring about 500 acres in a property bearing CTS No.1A (Part) and Survey No.161 (Part) situate in the village of Pahadi, Goregaon, Taluka Borivli in Mumbai Suburban District. It clearly specifies that the parties had arrived at the understanding for forming a joint venture to carry out the said development in the said property on the terms and conditions as specified in the said MoU.

56. Referring to clauses 2, 4, 9, 12, 18 and 24, it was strenuously argued on behalf of the plaintiffs that the agreement apparently discloses the interest having been created in the land in question in favour of the plaintiffs inasmuch as that they have been not only been allowed to develop the land but also to own the structures as also to dispose of the structures to the prospective buyers. On the other hand, it is the contention on behalf of the defendants that the agreement essentially is a joint venture/partnership for development of the land. It nowhere creates any interest in the land. Besides, in the absence of owners of land, question of creation of interest in land under MoU does not arise at all.

57. It is not in dispute that the land in question as on the date of the MoU belonged to the defendant No.4. Indeed there is a clear reference to this fact in the MoU itself. It is also clear that in clause 25 of the MoU it was stated that the MoU was on the basis that Jeejeebhoy includes the defendant No.4, owner of the land. However, it is pertinent to note that neither the MoU on the face of it nor any documentary piece of evidence is placed before us which could reveal that either on the day the MoU was executed or before or subsequent thereto, the defendant No.1 was duly empowered by the defendant No.4 to enter into any such agreement either for development of property or for sale of the structures to be constructed therein. We are aware that there was an earlier agreement for development entered into between Usha Development Co-operative Housing Society Ltd. and the defendant Nos.5 to 10 herein on 12th July, 1988. We are also aware that the said Usha Development Co-op. Housing Society Ltd. was divided into four co-operative societies under the order of Assistant Registrar of Co-operative Societies dated 6th November, 1991 and those four Co-operative Societies thereafter merged to form the defendant No.4 herein in the year 2001. However, we do not find any document having placed on record which confirms or ratifies the agreement dated 12th July, 1988 either by the four Co-operative Societies which were formed after division of Usha development Co-operative Housing Society Limited or by the defendant No.4.

We have not been shown any document which could reveal that the order permitting division of Usha Development Co-operative Housing Society into

four co-operative societies and further merger of the four societies nor it is the case of the plaintiffs that in the said process, there had been any resolution or decision either of these societies or there is any order by any competent authority which would reveal that the agreement entered into between Usha Development Co-operative Housing Society Ltd. with the defendant Nos.5 to 10 would be binding upon the defendant No.4 nor there is any assertion disclosed in that regard on behalf of the defendant No.1 or the defendant Nos.5 to 10 having been made either prior to or at the time of entering into the MoU in question or any time thereafter. Undoubtedly, MoU discloses a responsibility of the defendant No.1 to get the pending suit relating the land in question settled, as also any claim to title to land upto the date of MoU. At the same time, the MoU also claims the first defendant to include the defendant No.4. However, we do not find any material from the defendant No.4 confirming this aspect of the matter. On the contrary, all throughout the proceedings in the Court, the defendant No.4 has denied any such authority to the defendant No.4 except that there was agreement with the defendant No.1 for development of the land.

58. Clauses which relate to sharing of the FSI, entitlement of share in the club house and golf course, screening of the prospective purchasers incorporated in the MoU cannot by themselves be said to create an interest in the land in the absence of the MoU being consented or confirmed by the defendant No.4 to whom admittedly the land belonged to.

59. Besides, it is also to be noted that apart from the fact that the MoU opens with the expression that the same comprised of broad points of agreement between the parties, the Clause 26 thereof specifically provides that the said terms are strictly commercial terms and the legal terms would be included in the final agreement. It is an undisputed fact that after execution of MoU, the correspondence between the parties disclose that the parties were negotiating in relation to the terms of the final agreement between the parties to be arrived at and even the last draft of the agreement which was prepared by the plaintiffs, on the face of it discloses that the same was forwarded by the plaintiffs to the defendant No.1 with a caption "subject to approval by the parties" which would disclose that even after execution of the MoU, the terms of agreement were to be finalised and further that even before those terms ultimately signed by both parties, there was hesitation expressed by the defendant No.1 for execution of any agreement and the MoU was sought to be terminated. The MoU, therefore, on the face of it nowhere discloses a concluded contract between the parties.

60. The above observation regarding absence of a concluded contract is further strengthened from the fact that MoU nowhere discloses about any consideration for the land to the defendant No.4 who was admittedly the owner of the land at the relevant time. The MoU does not speak of any responsibility of the defendant No.1 alone to clear the monetary claim in relation to ownership

rights of the defendant No.4. Undoubtedly, clause 2 of the MoU speaks of sharing of FSI. However, the sharing of FSI refers to the FSI stated to be available in the land as specified in clause (1) of MoU which in turn essentially speaks of an agreement for a joint venture for development of the land between the parties, while specifically acknowledging the ownership of land in favour of a third party who has not been shown to have either consented to or confirmed the MoU. On the contrary, clause 25 merely claims that the defendant No.1 should be deemed to include the defendant No.4. Mere claim in MoU by the parties including the defendant No.1 that it would include the defendant No.4 that by itself would not amount to include the defendant No.4 as the society to MoU unless there is a specific consent either prior to the execution of the MoU or by way of ratification of the MoU by the defendant No.4. There is neither such consent disclosed nor such ratification established. Being so, mere clause regarding sharing of FSI between the parties who have nothing to do with the ownership of the land can by no stretch of imagination would create any interest in the land. It merely refers to sharing of development in the property if at all the parties succeed in carrying out the development by entering into a final agreement in that regard.

61. The clauses relating to sharing of right in the club house or golf course as also Committee for screening the prospective purchasers by themselves would not create any right in the property unless the owner of the property had agreed for such terms between the plaintiffs and the defendant No.1 and as already seen above, the owner-the defendant No.4, nowhere seems to have confirmed any such clause between the plaintiffs and the defendant No.4.

62. In addition to the above clauses, clause 23 of the MoU quoted above clearly speaks of need for final agreement to be drawn between the parties within a specified period and also provides for consequences which shall follow in case of failure to arrive at such final agreement. When the MoU clearly provides need for final agreement to be executed between the parties and further specifies that the same should be within a specific period and also speaks of consequences in case of failure to execute such an agreement within the specified period, by no stretch of imagination it can be held to a concluded contract. It would clearly mean that the parties had drawn broad points of understanding arrived at between the parties based on which detail terms of agreement were yet to be finalised, and were subject to ascertaining the legality as also other related matters in relation to such understanding and need for drawing a final agreement in that regard and, therefore, such a MoU cannot be said to be a concluded contract.

63. It is then sought to be contended on behalf of the plaintiffs that the parties had clearly understood the said MoU was a concluded agreement and even had acted upon the said agreement. It is further submitted that even the plaintiffs had paid Rs. 25 crores to the defendant No.1 and also spent Rs. 11 crores for

development of land, after obtaining necessary licence in that regard from the defendant No.4 and has also invested Rs. 1.77 crores in the Companies who are the members of the defendant No.4.

64. As regards the amount of Rs. 25 crores, clause 4 of the MoU clearly states that the said amount which has been advanced to the defendant No.1 was repayable by the defendant No.1 to the plaintiffs in the course of the development of the land. The amount which is required to be repaid by the defendant No.1 can by no stretch of imagination be said to be a consideration amount towards the price of the land. Besides, neither MoU nor any other document discloses any authority in favour of the defendant No.1 to agree and to accept the consideration amount for the property in question on behalf of the owners thereof.

65. As regards the amounts stated to have been spent for development of land, attention has been drawn to letter dated 29th December, 2001 stated to have been signed by the defendant No.1 and the defendant No.4. Undoubtedly, by the said letter dated 29th December, 2001, it appears that the plaintiffs and the defendant No.1 were permitted to enter the property in question for the purpose of development of the property. The letter also refers to clause 24 of the MoU. Referring to the same, it was sought to be argued that the same discloses consent of the defendant No.4 for the MoU. Otherwise, there would have been no occasion for the defendant No.4 to sign the said letter which specifically refers to clause 24 of the MoU.

66. Clause 24 of the MoU in question, as already stated above, provides that for the purpose of commencing the work, Jeejeebhoy will give licence and right of entry to the entire land specified in the MoU to Sahara on the date of signing of the MoU free from all encumbrances on first payment. As rightly submitted on behalf of the defendants, in view of the acceptance of the agreement between the defendant No.1 and Usha Development Co-op. Housing Society Ltd. dated 12th July, 1988 being enforceable against the defendant No.4, and considering the fact that the said agreement of 12th July, 1988 empowers the defendant No.1 to carry out the development in the property and for that purpose necessity of the owner to allow the developer to enter the property, if the defendant No.4 permitted the plaintiffs to enter into the property in view of such understanding arrived at between the defendant No.1 and plaintiffs, it can by no stretch of imagination be said that permission for such entry would amount to confirmation of the MoU between the plaintiffs and the defendant No.1. A single act of grant of permission for entering into the property to the developer or his agent cannot lead to conclusion that the owner granting such permission would be a party to any understanding between the developer and his agent. When we say agent, it would include any person entering into any understanding in relation to development with the developer who might have entered into an agreement for development of a property with the owner of the

land.

67. The impugned order nowhere discloses any of the above aspects having been taken note of by the learned single Judge. We are aware that we are dealing with the matter at the stage of hearing of the application for the interim relief. However, it is in a suit for specific performance of an agreement. In such a suit, unless the plaintiffs make out a prima facie case about the concluded contract between the parties, question of grant of interim relief does arise. The agreements sought to be specifically enforced should either apparently disclose the same to be a concluded contract or materials placed in support of such agreement should reveal that the parties had intended the understanding to be a concluded contract between the parties and have accordingly acted upon.

68. It is also worthwhile to refer to the correspondence between the parties. Under letter dated 7th June, 2003 by the advocates for the defendant No.1, it was informed to the plaintiffs' advocates that in spite of repeated requests by the defendant No.1, there was failure on the part of the plaintiffs to carry out certain terms of the MoU and in particular in relation to the payment to be made in terms of the said MoU. There was a request from the plaintiffs to the defendant No.1 on 23rd June,2003, to fix a meeting to discuss the issues raised in the said letter dated 7th June, 2003. Further, on 30th June, 2003, the plaintiff's' advocates forwarded to the defendant No.1 a draft agreement with necessary corrections for confirmation by the defendant No.1. The letter dated 11th August, 2003 from the advocates for the defendant No.1 to the plaintiffs' advocates refers to the meeting held on 9th July, 2003 and further records that the defendant No.1 did not desire to continue the arrangement under the MoU and, therefore, MoU was sought to be revoked. The said letter was replied by the plaintiffs under a letter dated 16th August, 2003. In fact, paragraph 3 of the said reply makes an interesting reading. It states that "the understanding between the parties are not only contained in MOU duly executed by the parties but also in the drafts of the agreements and declarations approved by and between the parties and which facts are on record. The fact remains that the draft agreement and declarations were first approved by your clients in December, 2002 and thereafter further amendments were made by your clients which also our clients accepted in the interest of project. In fact, our clients got the agreement adjudicated twice, once in December, 2002 and as thereafter in 2003." This statement on behalf of the plaintiffs in no uncertain terms confirms that the MoU by itself was not a concluded contract between the parties. In fact, the statement discloses that the understanding which was claimed to have been arrived at between the parties remained at the stage of draft agreement even in August, 2003.

69. The letter dated 16th August, 2003 from Advocate for the defendant No.1 to plaintiffs' advocate discloses return of cheque for Rs. 33.96 lakhs. The letter dated 30th September, 2003, from the advocate for the plaintiffs addressed to

the advocates for the defendant No.1 discloses request for handing over cheque for Rs. 33.96 lakhs. As rightly submitted on behalf of the defendant No.1, the letter dated 16th January, 2004 confirms the fact that on 30th December, 2003, draft of the agreement and declarations in relation to MoU were delivered to the advocates for the defendant No.1 by the representative of the plaintiffs for the approval of the defendants' advocate and further that on account of the fact that Shri Vakharia was operated for by-pass surgery, it could not be finalised.

70. The letter dated 6th May, 2005 by the Advocates for the plaintiffs addressed to the advocate for the defendant No.1 states that "Our clients have got final agreement duly stamped and the same is ready for execution. We are enclosing herewith xerox copy of the final engrossed agreement for your record. Kindly fix the time for execution and registration thereof". The said letter was replied to by the advocate for the defendant No.1 on 2nd June, 2005 which was obviously subsequent to the letter dated 6th May, 2005, there was a meeting between the parties on 10th May, 2005 and further that on account of failure on the part of the plaintiffs to carry out certain obligations under the MoU, the defendant No.1 was no more interested in executing the agreement. The letter dated 4th July, 2005, in reply to the said letter on behalf of the defendants undisputedly confirms the meeting held subsequent to the letter dated 6th May, 2005.

71. The above correspondence nowhere discloses that the parties had arrived at any final concluded agreement subsequent to MoU.

72. It is also pertinent to note that draft agreement as well as final agreement which were sent for approval and execution thereof contained the name of the defendant No.4 as the party to the agreement, unlike MoU. In other words, the parties very well knew that for due implementation of whatever broad understanding they had arrived at and whatever agreement was to be finalised between the parties in relation to the development of the property, the consent and participation of the defendant No.4 was absolutely necessary and without the consent and participation of the defendant No.4, no such agreement would be enforceable. In other words, in the absence of the defendant No.4 being party to the agreement in relation to the development of the property, no such agreement could be said to be an enforceable agreement and for the same reason could not be said to be a concluded agreement.

73. It is also pertinent to note that the defendant No.4 ceased to be the owner of the property in question pursuant to the consent decree passed in Suit No.4925 of 2000 on 25th July, 2005. As already seen above, till August, 2005, there was no concluded contract arrived at between the parties, nor there was any consent obtained from the defendant No.4 and in any case, the defendant No.4 had no authority to give any consent for such agreement in relation to the property in August, 2005 or any time thereafter. The fact that the decree has

been duly registered is not in dispute and finding to the contrary by the learned single Judge on this aspect is absolutely contrary to the materials on record and hence cannot be sustained.

74. As already observed above, mere claim by the defendant No.1 that it included the defendant No.4 as stated in clause 25 of the MoU itself would not amount to the defendant No.4 being deemed to be party to the MoU nor the letter dated 29th December, 2001 giving licence to the plaintiffs to enter the property for development would help the plaintiffs to construe that the defendant No.4 had consented to MoU between the plaintiffs and the defendant No.1.

75. Referring to the decision of a Division Bench in Chheda's case and clauses (2) and (5) of the MoU, it was sought to he contended that FSI is an immovable property and, therefore, any agreement for sharing FSI would create an interest in the property.

76. 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 and others vs. Bahadur and others XXVII Indian Law Reporter 462, Ram Jiawan and another vs. Hanuman Prasad and others AIR 1940 Oudh 409, and Smt. Dropadi Devi vs. Ram Das and others AIR 1974 Allahabad 473, held that "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". 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 FSI is an immovable property. An MoU clearly refers to sharing of FSI 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.

77. It is to be noted that the observation in Chheda's case about FSI 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 FSI is an immovable property.

78. The Apex Court time and again in a number of cases has explained how a

binding ratio of a decision is to be understood. In Union of India and others vs. Dhanwanti Devi and others (1996) 6 SCC 44, the Apex Court had ruled thus:

"9. .....It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well settled theory of precedents, every decision contains three basic postulates - (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found."

"It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for what reason, and the precedent by long recognition may mature into rule of stare decisis. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi."

"10. Therefore, in order to understand and appreciate the binding force of a decision it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law..."

79. As observed above, the observation about FSI 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 FSI the same could fit in the expression "benefit arising out of the land" and whether in the manner in which FSI 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.

80. If one peruses the Regulations dealing with the FSI and TDR, 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 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."

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 FSI 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 FSI 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 FSI 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.

82. Referring to the letter dated 7th June, 2003, by the advocates for the

defendant No.1 addressed to the advocate for the plaintiffs, it was sought to be contended that the same discloses concluded contract between the parties and that the same was clearly admitted by the defendant No.1. Indeed, the learned single Judge with reference to the said letter states that the regular agreement and other papers had already been finalized between the parties and the same clearly discloses that legal terms which were referred to in clause 26 of the MoU were finalized between the parties and the parties had reached the final contract. Paragraph of the letter dated 7th June, 2003 reads thus:

"In the above matter in spite of repeated requests of our clients M/s. B. Jeejeebhoy Vakharia and Associates, your clients have not carried out the terms of the above Memorandum of Understanding (MoU). They have even not made full payment though the same was payable by the end of December, 2001. The regular agreement and other papers have been finalized since long. Your clients have informed out clients that the agreement is adjudicated for the purpose of stamp duty. However, it appears that the same is not stamped and therefore not executed"

Paragraph 4 of the said letter further reads as under:-

"We, therefore, request you to call a joint meeting to make all payments required to be made by your clients to our clients and toe execute agreement an other papers or to work out for parting ways."

83. Reading of the said letter would perhaps at the outset may create an impression that everything was finalized between the parties and, therefore, there was a concluded contract. However, the contention in that regard, if accepted, would clearly show that the MoU was by itself not a concluded contract. Secondly, what were the terms of the final regular agreement between the parties is also not clear from the said letter. However, the matter does not end with the said letter. It is pertinent to note that it is nobody's case that subsequent to 7th June, 2003, the parties had executed the so-called regular agreement finalized between the parties. On the contrary, there was further correspondence between the parties and the letter dated 30th June, 2003, by the advocate for the plaintiffs addressed to the advocate for the defendant No.1 discloses that the advocate for the plaintiffs had sent the draft agreements allegedly finalized and corrected by the plaintiffs along with the supplemental agreement and three declarations for necessary correction, if any, therein to be made by the defendant No.1. In other words, even on 30th June, 2003, according to the plaintiffs themselves, there was no finalized agreement between the parties. Even after 30th June, 2003 and further correspondence merely shows that the finalization of the draft agreement was still in process. Ultimately, the defendant No.1 sought to put an end to whatever understanding that was arrived at there between the parties in terms of MoU, in the absence of finalization of agreement between the parties. Being so, the finding arrived

at by the learned single Judge solely on the basis of the letter dated 7th June, 2003, ignoring the subsequent correspondence which is most relevant for the decision on the issue as to whether there was concluded agreement between the parties or not, cannot be sustained.

84. Much grievance is sought to be made on account of failure on the part of the defendant No.4 to produce the register of its members. Indeed, the learned single Judge has sought to draw an adverse inference against the defendants on that count. Whether particular person or a firm is a member of the Co-operative Society is a question of fact to be established by the person asserting or making such claim of membership. The Maharashtra Co-operative Societies Act prescribes the procedure to get necessary documents in relation to the claim of membership of the Co-operative Societies. It is not the case of the plaintiffs that any such attempt was made by the plaintiffs even though there was clear denial on the part of the defendant No.4 about membership of the Companies. In any case, once it was the case of the plaintiffs regarding the membership of the Co-operative Society in favour of the Companies, it was for the plaintiffs to place on record necessary materials in that regard when such a claim is disputed and denied on behalf of the defendants. As the burden in that regard was squarely upon the plaintiffs, the onus would not shift upon the defendants unless such burden is discharged and unless onus is shifted the defendants were not obliged to produce any evidence and, therefore, there cannot be an occasion for the Court to draw any adverse inference against the defendants for alleged failure on the part of the defendants to produce the necessary material in support of denial of the claim of the plaintiffs. The question of drawing adverse inference against a party to the proceedings can arise only when the burden lies on the party to produce necessary material and yet fails to comply with such obligation. At the same time in civil proceedings the Courts are not expected to be witness or the collector of evidence for the benefit of any party to such proceedings. It is the party who has to place the necessary evidence before the Court.

85. Similar is the case in relation to the adverse inference sought to be drawn against the defendant No.4 for not contending that the defendant No.3 who had signed the agreement on behalf of the defendant No.1 defendant No.2 as a witness had no authority to declare clause No.25 of the MoU. No other material was sought to be placed on record by the plaintiffs to show that the defendant No.1 was duly empowered by the defendant No.4 to declare in the MoU that the defendant No.1 includes the defendant No.4. It is to be noted that the defendant No.4 had not signed the MoU at any point of time nor had issued any letter confirming that the MoU between the plaintiffs and the defendant No.1 was acceptable to the defendant No.4. It is also to be noted that the defendant No.4 is a Co-operative Society. It has to speak through the resolutions to be passed by such society. Even the Chairman of society cannot assume powers to deal with immovable property of the society. Such a power has to be

exercised by the society itself who can speak only through the resolutions. Undisputedly, there is no resolution by the defendant No.4 either confirming or agreeing the MoU or any other agreement between plaintiffs and the defendant No.1 in relation to the property in question. In such circumstances, merely because the plaintiffs and the defendant No.1 had agreed to declare that the defendant No.1 includes the defendant No.4 in the MoU, that itself cannot entitle the plaintiffs to get an adverse inference drawn against the defendant No.4 on account of absence on the part of the defendant No.4 to make a statement that the defendant No.4 had not authorized the defendant No.1 to execute the document. Once the document itself nowhere discloses any such authority, it was primarily for the plaintiffs to establish such authority to the defendant No.1 from the defendant No.4 and in the absence thereof, there was no occasion for the learned single Judge to draw adverse inference against the defendant No.4 for not making any statement in the manner it is sought to be observed.

86. There are also contentions sought to be raised on the basis of the provisions of Section 269-UC of the Income tax Act, 1961 as also for non-compliance of the provisions of Indian Registration Act and Bombay Stamp Act. However, in our considered opinion, it is not necessary to consider all those points in the matter in hand at this sage. Once we find that neither the MoU was concluded contract nor there was otherwise contract between the parties, the question of compliance of the provisions of Section 269-UC of the Income tax Act or the Registration Act or the Stamp Act does not arise.

87. Attention was also sought to be drawn to certain bills relating to property taxes sent to the plaintiffs in relation to the property in question claiming reimbursement in that regard by the defendant No.4. Undoubtedly, the letters dated 23rd January, 2003, 30th September, 2003, 13th July, 2004 and 14th December, 2004 disclose such letters having been sent to the plaintiffs. Mere act of sending such letters claiming reimbursement in relation to the amount paid pertaining to the property on behalf of the defendant No.4 by its Secretary in the absence of any agreement being shown in the nature it was contended, would not create a right in the property and would not reveal a contract between the parties in relation to the property. As already seen above, there was some understanding at some point of time between the plaintiff and the defendant No.1. There was also an agreement for development between the defendant No.1 and with the erstwhile owners of the property, Usha Development Co-operative Housing Society Limited as long back as in the year 1988. It is also a matter of record that with the intervention of the defendant No.1, a license was issued in favour of the plaintiff by the Secretary for the defendant No.4 to enter into the property for its development. In this background, the letters asking for reimbursement of the property tax for particular period which apparently relate to the period during which the correspondence was going on between the plaintiffs and defendants itself would not be sufficient to construe

a concluded contract or to construe the same as a material piece of evidence which would reveal concluded contract between the parties nor it would disclose the Defendant No.4 having acted upon the MoU.

88. It is also pertinent to note that it was to the knowledge even at the time of execution of the MoU between the parties that the property in question lies in no development zone. Further efforts to obtain necessary No Objection Certificate from the Ministry of Environment and Forest, though for the time being appeared successful, undisputedly the same was revoked on 27th September, 2002 with specific direction not to carry out any development activity in the land. In other words, any attempt on the part of the parties to develop the land which is undisputedly situated in no development zone would have been an act contrary to the provisions of law and in violation of law. Considering the same, if the defendant No.1 had opted not to proceed with whatever understanding it was arrived at between the parties for the joint venture for the development of the property, no fault can be found with such a decision of the defendant No.1 nor it would entitle the plaintiffs to seek specific performance of an agreement which is contrary to the provisions of law. In fact, the parties were fully aware of the same and that appears to be the reason for incorporating clause 23 in the MoU itself. The clause clearly provided an option for putting an end to the agreement and that appears to have been exercised by the defendant No.1. when the defendant No.1 sought to return the money along with the letter dated 28th September, 2005.

89. Though it was sought to be contended that the conduct on the part of the defendants was not consistent inasmuch as at one place they had admitted about finalization of the agreement between the parties and at another place failure on the part of the plaintiffs to perform their obligations, we find that no such inference can be drawn based on the correspondence between the parties. Once we find that the MoU by itself was not a concluded contract and the parties had to arrive at a concluded contract on finalization of the terms of agreement till and until the terms were finalized, the parties being in negotiation, there cannot be an occasion to infer that the conduct of the parties being not consistent unless specific material disclosing such conduct is placed on record. We find no such material on record and, therefore, the decision in the matter of Jai Narain Parasrampuria (dead) and others vs. Pushpa Devi Saraf and others 2006 (7) SCC 756 and in particular the rulings in paragraphs 37 and 41 to which attention was drawn can be of no help to the plaintiff. Neither the principle of estoppel is attracted nor there is approbation and reprobation on the part of the defendants in the matter in hand.

90. The decision of the Delhi High Court in Rajesh Aggarwal vs. Balbir Singh and another AIR 1994 Delhi 345 is in relation to the necessity of income-tax clearance certificate. As already observed above, we are not dealing with the said issue in the matter as the same does not arise for consideration in the facts

and circumstances of the case.

91. The decision of the Apex Court in Shivji vs. Raghunath (dead) by L.Rs and others AIR 1997 SC 1917 has no application to the matter in hand wherein the Apex Court had held that the agreement being in the nature of pre-emptive right created in favour of the co-owner, therefore, it is enforceable as and when attempt is made by the co-owner to alienate the land to third parties. The law laid down relates to the obligation of the co-owner and pre-emptive rights vis-a-vis the co-owner.

92. The decision of the Apex Court in Kollipara Sriramulu (dead) by his legal representatives vs. T.Aswatha Narayana (dead) by his legal representatives and others AIR 1968 SC 1028 is on the point that mere reference to execute a future formal contract would not by itself mean that there was no concluded contract between the parties. If the parties draw a MoU which includes all the points necessary for a concluded contract between the parties and merely provides that the formal contract in that regard would be executed subsequently, that itself would not amount to saying that there was no concluded contract between the parties. It was clearly held that " There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case." Being so, one has to see in a given case whether the MoU drawn by the parties disclose complete concluded contract in relation to the matter pertaining to which agreement is arrived at between the parties. That would depend upon facts of each case. In the case in hand, as already seen above, we find no such concluded contract having been arrived at between the parties.

93. In The Godhra Electricity Company Limited and another vs. State of Gujarat and another AIR 1975 SC 32 it was held thus:

"In the process of interpretation of terms of a contract, the Court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performance under it. Parties can, by mutual agreement, make their own contracts; they can also by mutual agreement, remake them. The process of practical interpretation and application, however, is not regarded by the parties as a remaking of the contract nor do the courts so regard it. Instead, it is merely a further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reason why the courts should not give great weight to these further expressions by the parties in view of the fact that they still have the same freedom of contract that they had originally. The American Courts receive subsequent actings as admissible guides in interpretation. It is true that one party cannot build up his case by making an

interpretation in his own favour. It is the concurrence therein that such a party can use against the other party. This concurrence may be evidenced by the other party's express assent thereto, by his acting in accordance with it, by his receipt without objection of performance that indicate it, or by saying nothing when he knows that the first party is acting on reliance upon the interpretation."

94. Apart from claiming that the plaintiffs had spent Rs. 11 crores for development of the property, nothing further was placed on record to show that such a development had in any way altered the situation in the property in any manner or that it is entirely to the benefit of any of the defendants or that the same was in terms of any correspondence between the parties subsequent to the MoU executed by the plaintiffs and the defendant No.1 so as to contend that non-reaction on the part of the other defendants would disclose assent either to the MoU between the plaintiffs and the defendant No.1 or to any of the subsequent acts allegedly carried out by the plaintiffs in terms of the said MoU. Being so, the ruling of the Apex Court in paragraph 11 in Godhra's case is of no help to the plaintiffs in the case in hand.

95. In Mrs. Chandnee Widya Vati vs. Dr. C.L. Katial and others AIR 1964 SC 978 that was a case where the enforceability of the contract was sought to be disputed being contract of contingent nature and contingency having not been fulfilled. In our considered opinion, the ruling can be of no help to the plaintiffs in the case in hand. The decision as already held by the Apex Court in Dhanwanti Devi's case is to be applied bearing in mind the facts of the case and the point for consideration which arose therein and the decision thereon. A decision cannot be read independently of the facts of the case and the question which arises for determination in the case.

96. The decision of the learned single Judge in Nircon Development Pvt. Ltd. Vs. Zohrabai Fakhruddin and others 1998 (1) Bom CR 153 was sought to be relied upon in relation to compliance of Section 296-UC. Since the said point is not being dealt with, the decision is of no help in the matter in hand.

97. Similarly, the decisions which are cited in relation to the provisions of the Stamp Act in the matter of Sanjay s/o Shri Kishanji Samani and another vs. Vishnupant s/o Shankarrao Shahane 2007 (6) MLJ 550 and Marine Container Services (India) Pvt. Ltd. Vs. Rajesh Dhirajlal Vora 2001 (4) MLJ 353 are also not relevant to be considered in the matter in hand.

98. The decision of the Apex Court in Mayawanti vs. Kaushalya Devi 1990 (3) SCC 1 (10) rather than assisting the appellants clearly supports the view that we are taking in the matter. It clearly lays down the law that the specific performance of a contract is the actual execution of the contract according to its stipulation and terms. The stipulation and terms of the contract have, therefore, to be certain and the parties must have been consensus ad idem and

the acceptance must be absolute and must correspond with the terms of the offer. The burden of showing stipulations and terms of the contract and the mind were ad idem is of course on the plaintiffs. If the stipulation in terms are uncertain and the parties are not ad idem there can be no specific performance, for there is no contract at all. Where there are negotiations, the Court has to determine at what point if at all the parties have reached the agreement. The material on record nowhere shows that the parties had at any time arrived at final concluded contract.

99. In Hindustan Steel Ltd. Vs. M/s. Dilip Construction Company AIR 1969 SC 1238 the same is in relation to provisions pertaining to Stamp Act and need not be considered in the matter in hand as we are not dealing with the said issue. Attention was also drawn to a decision in the matter of S.P. Chengalvarya Naidu (dead) by L.Rs vs. Jagannath (dead) by L.Rs and others AIR 1994 SC 853, while contending that the learned single Judge was justified in drawing adverse inference against the defendant No.4 for not producing the list of members. The Apex Court in Jagannath's case had held that a litigant who approaches the Court is bound to produce all the documents executed by him which are relevant to the litigation and if he withholds vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party. That was a case where the respondent before the Apex Court viz. Jagannath had obtained a preliminary decree by playing fraud upon the Court. Jagannath was working as a Clerk with one Chunilal Sowcar. He purchased the property in Court auction on behalf of Chunilal. He had on his own volition executed registered deed in favour of Chunilal regarding the party in dispute. He knew that the appellants had paid the total decretal amount to Chunilal. Without disclosing all these facts, he filed a suit for partition of the property on his own behalf and not on behalf of Chunilal. Holding that non-production and non-mentioning of the release deed at the trial, in the facts and circumstances of the case, tantamount to playing fraud on the Court, the Apex Court disagreed with the High Court and held that Jagannath could have easily produced the certified copy of the registered sale deed and could have non-suited the plaintiffs. In paragraph 7 of the decision, the Apex Court held as under:

"7.. The Courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more than not, process of the court is being abused. Property-grabbers, tax evaders, bankloan-dodgers and other unscrupulous from all walks of life find the court process a convenient lever to retain the illegal gains indefinitely. "

100. In the background of the facts of that case, therefore, it was held that the litigant having vital document which is relevant for the decision in the matter should produce the same on record and should not withhold the same. The

question of obligation to produce the documents would arise only in case where the burden lies upon the party to produce such document. In case in hand, there was no burden cast upon the defendant No.4 to produce the list of members. It was the claim of the plaintiffs itself about the membership of the society. There was absolutely no proof produced in that regard and there was no occasion, therefore, of shifting the onus upon the defendant No.4 to produce any documentary proof disputing the plaintiffs unestablished claim.

101. It is however sought to be contended on behalf of the plaintiffs hat there was sufficient proof produced as regards the claim of membership in the form of balance-sheet of the Companies which disclosed payment of membership fees to the society. Production of balance-sheets stated to have been filed by the Companies claiming to have paid membership fees by itself cannot be said to be a proof of their membership from the side of the defendant No.4. They are unilateral documents. As regards the membership of a Co-operative Society, there are sufficient number of provisions of law in the Maharashtra Co-operative Societies Act, 1960 which enables the party to get necessary document in support of his claim of membership which is the primary and best evidence in relation to claim of membership. There is no explanation nor efforts made by the plaintiffs to place on record as to what prevented the plaintiffs from getting any such material in support of his claim. It is undisputed fact that as long back as more than two months prior to the institution of the suit, the defendant No.4 had denied the claim on behalf of the plaintiffs that the said Companies were the members of the society. Thus, there was sufficient time for the plaintiffs to get necessary material in support of its claim and no such material was produced. Merely because the Companies claim to be members of society that itself would not amount to an admission on the part of the defendant No.4. There is no documentary proof about the admission of such claim by the defendant No.4. Being so, it cannot be said by any stretch of imagination that the onus had shifted upon the defendant No.4 so that they were bound to produce the list of membership and failure in that regard would entitle the plaintiffs to draw adverse inference against the defendant No.4.

102. In the course of the argument it was repeatedly argued on behalf of the plaintiffs that though the MoU on the face of it nowhere discloses any authority by the defendant No.4 to the defendant No.1 to execute the MoU, lifting of corporate veil and the probe into the conduct of the parties revealed from the correspondence between the parties as well as the conduct on the part of the defendant No.4 subsequent to the MoU and more particularly in the nature of grant of licence for entering into the property as well as the demand for reimbursement of the property taxes would reveal that there was sufficient understanding between the defendant No.1 and the defendant No.4 to enable the defendant No.1 to agree to enter into an agreement even on behalf of the defendant No.4.

As already observed above, the defendant No.4 is a Co-operative Society. Any decision in relation to the immovable property by the defendant No.4 has necessarily to be through a resolution to be passed by the members of the society. Mere sporadic acts or issuance of letters by a member of the Managing Committee of Co-operative Society itself cannot amount to an authority to act on behalf of the society to a particular person and to deal with the immovable property of such society. Being so, mere issuance of the letter for entering into the property for development in terms of the agreement which is arrived at between the erstwhile owners of the property and the defendant No.1 and referring to the subsequent agreement between the defendant No.1 and the plaintiffs itself would not lead to a conclusion that the defendant No.1 was acing on behalf of the defendant No.4 or that he had been authorized to act on behalf of the defendant No.4. For some reason mere demand for reimbursement of the property tax during the time when negotiations were stated to be going on between the defendant No.1 and the plaintiffs itself would not be also sufficient to accept the contentions sought to be raised on behalf of the plaintiffs. For the reasons stated above, therefore, and more particularly considering clause 23 of the MoU and further action on the part of the defendant No.1 in returning the amount already offered under the MoU, we do not find any case made out for grant of interim relief in the matter. In any case, there is no permission at the moment from the Ministry of Environment and Forests for development of the property and, therefore, we find no justification for grant of any relief in favour of the plaintiffs.

103. As already observed above, considering the facts and circumstances of the case, we do not find the discretion having been exercised judiciously in the matter in hand in granting the relief by the learned single Judge. Hence the impugned order cannot be sustained and is liable to be set aside. There is neither prima facie case made out for grant of any interim relief, nor the balance of convenience lies in favour of the plaintiffs. In the facts and circumstances of the case, there is no question of the plaintiffs suffering irreparable loss in case of refusal of interim relief. Therefore, the application for temporary injunction in the form of Notice of Motion taken out by the plaintiffs deserves to be dismissed, while allowing the appeal.

104. Needless to say that all the observations herein above are for the purpose of disposal of the application for interim relief.

105. In the result, the appeals succeed. The impugned order is hereby set aside. The Notice of Motion taken out by the plaintiffs being Notice of Motion No.3950 of 2005 stands dismissed. Cost to be borne by the plaintiffs.

106. At this stage, the learned counsel for the plaintiffs prays for continuation of ad-interim relief. Considering the findings arrived at in today's judgment, we do not find any justification for continuation of the adinterim relief. Request

for continuation of the ad-interim relief is, therefore, rejected. Learned counsel for defendant Nos.1, 4, 7 and 11, however, states that the defendants would not create any third party rights in the property in question for a period of four weeks from today.

Certified copy expedited.