Order passed below exh.5 in Spl. Civil Suit No. 45/2017

CNR-MHPU01-005508-2017

1. This is an application for temporary injunction for restraining defendant Nos. 1, 2, 8 and 9 from parting with possession of suit property described in para 1(b) of the plaint or from inducting any third person in the said suit property or any portion thereof, either personally or through their agents, servants or anyone claims through them.

The plaintiffs have also prayed for temporary injunction against defendant Nos. 1, 2, 10 and 11 for restraining them from parting with possession of suit property described in para 1(c) of the plaint or from inducting any third person in the said suit property or any portion thereof, either personally or through their agents, servants or anyone claims through them.

The plaintiffs have prayed for temporary injunction against defendant Nos. 1, 2, 12 and 13 for restraining them from parting with possession of suit property described in para 1(d) of the plaint or from inducting any third person in the said suit property or any portion thereof, either personally or through their agents, servants or anyone claims through them.

The plaintiffs have prayed for temporary injunction against defendant Nos. 1 and 2 for restraining them from parting with possession of suit property described in para 1(e) of the plaint or from inducting any third person in the said suit property or any portion thereof, either personally or through their agents, servants or anyone claims through them.

The plaintiffs have prayed for temporary injunction for restraining defendant Nos. 1, 2, 8 and 9 from entering into any oral or written agreement or transaction of any nature in respect of the suit property or any portion thereof described in para 1(b) either personally or through their agents, servants or anyone claiming through them.

The plaintiffs have sought temporary injunction against defendant Nos. 1, 2, 10 and 11 for restraining them from entering into any oral or written agreement or transaction of any nature in respect of the suit property or any portion thereof described in para 1(c) of the plaint either personally or through their agents, servants or anyone claiming through them.

The plaintiffs have sought temporary injunction against defendant Nos. 1, 2, 12 and 13 for restraining them from entering into any oral or written agreement or transaction of any nature in respect of the suit property or any portion thereof described in para 1(d) of the plaint either personally or through their agents, servants or anyone claiming through them.

The plaintiffs have sought temporary injunction against defendant Nos. 1 and 2 for restraining them from entering into any oral or written agreement or transaction of any nature in respect of the suit property or any portion thereof described in para 1(e) of the plaint either personally or through their agents, servants or anyone claiming through them.

The plaintiffs have sought temporary injunction against defendant Nos. 1, 2, 8 and 9 for restraining them from causing any construction or development on the suit property described in para 1(b) of the plaint or any portion thereof, either personally or through their agents, servants or anyone claiming through them.

The plaintiffs have sought temporary injunction against defendant Nos. 1, 2, 10 and 11 for restraining them from causing any construction or development on the suit property described in para 1(c) of the plaint or any portion thereof, either personally or through their agents, servants or anyone claiming through them.

The plaintiffs have sought temporary injunction against defendant Nos. 1, 2, 12 and 13 for restraining them from causing any construction or development on the suit property described in para 1(d) of the plaint or any portion thereof, either personally or through their agents, servants or anyone claiming through them.

The plaintiffs have sought temporary injunction against defendant Nos. 1 and 2 for restraining them from causing any construction or development on the suit property described in para 1(e) of the plaint or any portion thereof, either personally or through their agents, servants or anyone claiming through them.

Lastly, the plaintiffs have sought temporary injunction against defendant Nos. 1 and 2 from parting with possession or inducting any third person in the suit property described in para 1(a) of the plaint or any portion thereof from entering into oral or written agreement or transaction of any nature in respect of the suit property or any portion thereof from causing any construction or development thereon or any portion thereof, either personally or through their agents, servants or anyone claiming through them.

The facts which gave rise to the application are as under :

2. The plaintiffs have filed the present suit for declaration, cancellation of document, injunction, compensation and other reliefs pleaded in the plaint. The plaintiffs are the owners of the property described in para 1(a) of the plaint. Defendant No.1 is a partnership firm registered under the provisions of the Indian Partnership Act, 1932, having its registered office at Suite 301/302, Fortune House, Prabhat Road, Pune 411 004. Defendant No. 2 is a partner of defendant No. 1. Defendant No. 1 is in the business of development and construction of properties. Defendant Nos. 4 to 7 were, along with the plaintiffs, co-owners of the property described in para 1(a) of the plaint. Defendant Nos. 8 and 9 are persons in

whose favour Agreement dated 15.03.2013 has purportedly been executed in respect of the property described in para 1(b) of the plaint. Defendant Nos. 10 and 11 are persons in whose favour Agreement dated 30.05.2014 has purportedly been executed in respect of the property described in para 1(c) of the plaint. Defendant Nos. 12 and 13 are persons in whose favour Agreement dated 10.12.2014 has purportedly been executed in respect of the property described in para 1(d) of the plaint. Defendant No. 14 purportedly acted as Power of Attorney Holder of defendant No. 2, admitted execution of purported Agreements dated 15.03.2013, 30.05.2014, and 10.12.2014.

3. It is contended that Deed titled as Development Agreement dated 31.05.2010, duly registered in the office of the Sub-Registrar, Mulshi, Paud, at Serial No. 3295 of 2010 was entered into between the plaintiffs, defendant Nos. 4 to 7 and defendant No. 1 through its partner, defendant No. 2, on the terms and conditions as stated therein, *inter alia* granting to defendant No. 1, the development rights in respect of the property described in para 1(a) of the plaint. The terms and conditions in the said Deed relating to the said development rights and all the aspects related thereto here-in-after are referred to as the ‘said Agreement’. The plaintiffs allowed defendant No. 1 to occupy the property described in para 1(a) of the plaint in terms of Clause Nos. 9 and

18 of the said Agreement.

4. It is contended that Power of Attorney was also executed on 31.05.2010 by the plaintiffs and defendant Nos. 4 to 7 in favour of defendant Nos. 2 and 3, which is registered in the office of the Sub-Registrar, Mulshi, Paud, at Serial No. 3296 of 2010. In such Agreement, the plaintiffs alone were entitled to receive the entire total agreed consideration of Rs. 1,70,00,000/- there under from the defendant Nos. 1 and 2. Defendant Nos. 4 to 7 were not entitled and had no concern with the said consideration. The plaintiffs received only Rs. 90,00,000/- out of the said total consideration.

5. It is contended that the plaintiffs had complied with their part of the said Agreement. Defendant Nos. 1 and 2, however, avoided and failed to comply their part of the said Agreement and to make payment of the said total agreed consideration to the plaintiffs, vide their extensive communication, oral and written, with defendant No. 1 through its partner, defendant No. 2, vide Letter dated 10.10.2011, the plaintiffs had brought to the notice of defendant Nos. 1 and 2, the non-release of the payment of the remaining consideration under the said Agreement and the consequential hardships and losses faced by the plaintiffs. By the said letter, the plaintiffs requested defendant Nos. 1 and 2 to pay

the same and the interest due thereon. Defendant No. 2, as partner of defendant No. 1, sought time for paying the amount demanded, and assured and promised to pay the same soon to the plaintiffs. Believing the assurances and promises of defendant No. 2, the plaintiffs extended the time for the said payment. However defendant Nos. 1 and 2 failed to act upon the said assurances and promises and avoided to pay the plaintiffs, thereby constrained the plaintiffs to persistently pursue the said demand.

6. It is contended that during said period vide one of the responses, letter dated 30.07.2013, defendant Nos. 1 and 2 however, tried to raise blatantly wrong, illegal, and irrelevant contentions and claim and they deferred the payment due to the plaintiffs. Defendant No. 2, as partner of defendant No. 1, tried to create cloud over the clear and marketable title of the plaintiffs, allegedly in view of Regular Civil Suit No. 1478/2010 having been filed. Defendant No. 2 as partner of the defendant No. 1 had, however, vide the very letter, *inter alia* in effect, expressed in clear terms their readiness and willingness to discuss the alleged issue and to make payment due to the plaintiffs. It is stated that the above referred R.C.S. No. 1478/2010 was filed in the Court of Civil Judge Senior Division, Pune, by some of the erstwhile land-owners against the plaintiffs, defendants No. 1 and 4 to 7. The said suit is pending adjudication. Defendant No. 1 who is Defendant No. 1 of

this Suit, is defendant No.1 in R.C.S. No. 1478/2010 has appeared in the said Suit and filed reply to Exh. 5 and written Statement dated 30.04.2012. Without prejudice to contentions and interests of the plaintiffs and without admitting anything contrary thereto, the plaintiffs contended that defendant Nos. 1 and 2 vide said Reply and written Statement admitted that the Plaintiffs in the said Suit do not have any subsisting or valid right in the suit property of the said suit, that the Plaintiffs therein have sold all their rights, title and interest in the suit lands in the year 1995 and the plaintiffs of this Suit alongwith defendant Nos. 4 to 7 were only legitimate owners of the suit land.

7. It is contended that the title of the property described in para 1(a) of the plaint is clear and marketable. Without prejudice, it is stated that property in RCS No. 1478/2010 is different and distinct from the property referred in para 1(a) of the plaint i.e. property which is the subject matter of the said agreement. Further, reliefs sought in R. C. S. No. 1478/2010 are not related to the performance of the said Agreement. Upon above stated differences and distinctions being brought to the notice of defendant Nos. 1 and 2, communications, including messages in the electronic form (SMS sent and received), were exchanged and several meetings were held amongst the plaintiffs and defendant No. 2 as partner of defendant No. 1 and defendant No. 6, in respect

of the plaintiffs' entitlement for receipt of the payment towards the dues of the plaintiffs and the losses, hardship and loss of opportunities been faced by the plaintiffs. During and over the course of the said communications and meetings, defendant No. 2 as partner of defendant No. 1 was convinced and expressed his satisfaction as regards the above stated differences and distinctions and also about clear and marketable title in respect of the property described in para 1(a) of the plaint. Defendant No. 2 acknowledged, assured and promised to release the payment due to the plaintiffs soon. Believing the said assurances and promises of defendant No. 2 as partner of defendant No. 1, the plaintiffs did not take any action against defendants Nos. 1 and 2.

8. It is contended that defendants Nos. 1 and 2, however, deferred and avoided to act upon their assurances and promises, prompting the plaintiffs, vide Letter dated 03.03.2015 and messages to reiterate their demands from defendant Nos. 1 and 2. Letter dated 03.03.2015 was followed yet again by several meetings and communications, whereby defendant No. 2 as partner of the defendant No. 1, acknowledged, assured and promised to release the payment due to the plaintiffs. However, yet again, the same was followed by the neglect and avoidance of defendant Nos. 1 and 2 to fulfill the same. The plaintiffs and defendant No. 2 being acquainted with each other since quite some time, the plaintiffs had

all along believed the assurances and promises of payment given by defendant Nos. 1 and 2 and had been constrained to defendant Nos. 1 and 2 to fulfill their obligations under the said Agreement and to make up the losses suffered by the plaintiffs. Defendant No. 2 as partner of defendant No. 1 had continued to give assurances including the said assurances and promises until as late as few months back.

9. It is contended that it was recently, in or about 2016, revealed to the plaintiffs that Agreements dated 15.03.2013, 30.05.2014, and 10.12.2014 have purportedly been executed between defendant No. 1 through defendant No. 2 as partner of defendant No. 1 and defendant Nos. 8 and 9, 10 and 11 and 12 and 13 respectively, wherein the plaintiffs and the defendant Nos. 4 to 7 had been shown as Confirming parties. It appears that defendant No. 2 has purportedly executed above Agreements, as partner of defendant No. 1 and purportedly as constituted attorney on behalf of the plaintiffs and defendant Nos. 4 to 7 under the power / authority in Power of Attorney at Serial No. 3296 of 2010 registered with the office of Sub-Registrar, Mulshi, Paud. It is contended that the above referred Agreements are registered in the office of the Sub-Registrar, Mulshi, at Serial Nos. 2136/2013, 4283/2014 and 9957/2014 respectively.

10. It is contended that Power of Attorney dated 09.07.2012, registered in the office of Sub-Registrar, Haveli No. 1, Pune, at Serial No. 6362/2012, has purportedly been executed by defendant No. 2 in favour of the defendant No. 14 in respect of construction carried out on S. No. 385, Hissa No. 1, Village Bhugav, Taluka Mulshi, District Pune. It further appears that defendant No. 14 purportedly is Power of Attorney holder of defendant No. 2 acting as Power of Attorney holder of the plaintiffs and defendant Nos. 4 to 7, appeared before Sub-Registrar and admitted execution of said Agreements dated 15.03.2013, 30.05.2014, and 10.12.2014. It is contended that the plaintiffs have never ratified any actions purportedly taken on the basis of or in pursuance of or in furtherance of Power of Attorney executed on 31.05.2010 and/or alleged Power of Attorney dated 09.07.2012. It appears that said Agreements dated 15.03.2013, 30.05.2014, and 10.12.2014, contain clear and unequivocal admissions by defendant Nos. 1 and 2 as partner of No. 1. The said Agreements clearly states entitlement of the plaintiffs to the property described in para 1(a) of the plaint and that the same is free from encumbrances and is perfectly marketable. Defendants Nos. 8 to 12 vide their respective Agreements admitted the title of the plaintiffs. Those Agreements contain certain blatant wrong statements as well. Defendant No. 2 as partner of defendant No. 1 has brazenly falsely and wrongly stated in said Agreements that the plaintiffs have received the price

of the property described in para 1(a) of the plaint and that nothing is due and payable by defendant No. 2 as partner of defendant No. 1 to the plaintiffs.

11. It is contended that simultaneously, during the period of execution of above referred three Agreements, defendant No. 2 as partner of defendant No. 1, vide various communications, letter dated 30.07.2013 and various meetings, had acknowledged, assured and promised to pay the dues to the plaintiffs including the balance consideration under the said Agreement dated 31.05.2010. The plaintiffs have contended that without prejudice, it appears that defendant Nos. 1 and 2 have obtained a Title Report dated 27.02.2013 from their Advocate, a copy of which was recently provided to the plaintiffs, wherein the property described in para 1(a) of the plaint has been, subject to said R. C. S. No. 1478/2010, stated to be free from encumbrances. The said Advocate vide the very Title Report, plainly and clearly opined that the said R.C.S. No. 1478/2010 is likely to fail in view of the documents and the pleadings therein. Defendant Nos. 1 and 2 have relied and acted upon the said Title Report dated 27.02.2013.

12. It is contended that it has been recently revealed to the plaintiffs that it appears that defendant No. 2 as partner of defendant No. 1 has filed Regular Civil Suit No. 382/2014 in the

Court of Civil Judge (Junior Division), Pune, against some of the erstwhile owners of the property bearing S. No. 385, Hissa No. 1, Village Bhugaon, Taluka Mulshi, District Pune, in respect of part of the said property, for declaration and injunction, as stated therein, and the same is pending adjudication. The suit property referred in R. C. S. No. 382/2014 is different and distinct from the property described in para 1(a) of the plaint of this suit and the reliefs sought in R. C. S. No. 382/2014 are also different and distinct from the performance of the said Agreement dated 31.05.2010. Without prejudice to any contentions and interests of the plaintiffs and without admitting anything contrary, the plaintiffs have contended that defendant Nos. 1 and 2 vide the said suit admitted that the erstwhile owners or any of their legal heirs have absolutely no legal right in the entire S. No. 385/1.

13. It is contended that defendant Nos. 1 and 2 being satisfied and convinced about the title of the plaintiffs to the property described in para 1(a) of the plaint being clear, defendant Nos. 1 and 2 have neglected, avoided and failed to pay the dues of the plaintiffs. Recently, in 2016 the plaintiffs realized for the first time the intention of defendant Nos. 1 and 2 not to act upon the terms of the said Agreement and to avoid payment of the total amount of due to the plaintiffs. Recently, in 2016 the plaintiffs realized for the first time that defendant Nos. 1 and 2, since before

inception of the said Agreement dated 31.05.2010, never had the intention to fulfill the terms thereof and to make full payment thereunder to the plaintiffs. Further, recently in 2016 the plaintiffs realized for the first time that defendant Nos. 1 and 2 had since inception of the said Agreement, intention to deceive the plaintiffs and to play fraud upon them and to not act upon the terms of the said Agreement and not to pay the total amount due to the plaintiffs. Further, in the year 2016 the plaintiffs realized for the first time that defendant Nos. 1 and 2 had induced the plaintiffs to enter into the said Agreement dated 31.05.2010 with false promises which defendant No. 1 and 2 never intended to perform. It is contended that Power of Attorney dated 31.05.2010 is executed by the plaintiffs and defendant Nos. 4 to 7 in favour of defendant Nos. 2 and 3, which is registered in the office of the Sub-Registrar, Mulshi, Paud, at Serial No. 3296/2010, as per the contents of the Schedule thereof, is not in respect of the property described in para 1(a) of the plaint or its part. There was no reason whatsoever to execute the said Power of Attorney dated 31.05.2010. It is contended that it appears that the said Power of Attorney is being misused, the plaintiffs did not want to keep the said Power of Attorney dated 31.05.2010 operative and hence they have revoked the same. It is contended that the said Agreement dated 31.05.2010 is vitiated by fraud perpetrated by the defendant Nos. 1 and 2, and the same is avoidable at the instance of the plaintiffs.

Therefore, the plaintiffs are entitled to avoid or cancel or rescind the said Agreement dated 31.05.2010 and they have done so.

14. It is contended that without admitting, but assuming for the sake of argument, that Power of Attorney executed on 31.05.2010 was in respect of the property described in para 1(a) of the plaint, the same having been used as an instrument of and to further the fraud played by defendant Nos.1 and 2 upon the plaintiffs, and as an innate consequence of cancellation or rescission of the said Agreement dated 31.05.2010, the said Power of Attorney dated 31.05.2010 is liable to be revoked and the plaintiffs have done so. Further, it is contended that without prejudice to the voidable nature and treatment given by the plaintiffs to said Agreement dated 31.05.2010 as void as stated above, in case said Agreement dated 31.05.2010 is held to be enforceable, then the plaintiffs state that said Agreement dated 31.05.2010 is avoidable and liable to be cancelled / terminated due to the breaches committed thereof and of the assurances and promises given by the defendant Nos. 1 and 2. The plaintiffs are therefore entitled to terminate the said Agreement dated 31.05.2010. It is contended that defendant Nos. 1 and 2 have avoided and failed to fulfill the terms and conditions of Agreement dated 31.05.2010 and to pay to the plaintiffs total consideration and dues there under and to act upon the assurances and promises given by defendant Nos. 1 and 2

from time to time to the plaintiffs. It is alleged that defendant Nos. 1 and 2 have committed breaches of the Agreement dated 31.05.2010, therefore, the plaintiffs are entitled to terminate said Agreement dated 31.05.2010 and have done so. It is contended that it is needless to state that any acts, transactions or agreements done on the basis of said Power of Attorney dated 31.05.2010, including the Agreements dated 15.03.2013, 30.05.2014 and 10.12.2014 and the Power of Attorney dated 09.07.2012, are of no consequence *ab-initio* and the same are rendered ineffective. According to the plaintiffs Agreements dated 15.03.2013, 30.05.2014 and 10.12.2014 and the Power of Attorney dated 09.07.2012 are not binding on the plaintiffs and the property described in para 1(a) of the plaint or any part thereof. No rights can be claimed on the basis of those Agreements and the Power of Attorney. Hence, according to the plaintiffs, they are entitled to seek and demand from defendant Nos. 1, 2 and 8 to 13 jointly and severally, the vacant, peaceful and actual possession of the respective properties described in para 1 of the plaint, after removing any and all the construction thereon.

15. It is contended that the plaintiffs have suffered tremendous tension and mental agony due to the fraud and illegalities / breaches committed by defendant Nos. 1 and 2, however, the same cannot be compensated in terms of money, can

never be an adequate relief to compensate the same. The plaintiffs have suffered colossal losses, hardship and loss of opportunities due to the fraud and illegalities / breaches committed by defendant Nos. 1 and 2. The plaintiffs lost the opportunity to invest into and acquire various properties and to profit from the humongous increase in the prices thereof due to the non-payment of the balance consideration under the said Agreement. It is contended that apart from the amount of part consideration of Rs. 90,00,000/- received by the plaintiffs from defendant Nos. 1 and 2, the plaintiffs are entitled to get from defendant Nos. 1 and 2 an amount of Rs. 10,00,00,000/- only towards damages/ compensation. Hence, the plaintiffs issued legal notice dated 21.03.2017 to the defendants through their advocate by RPAD, avoiding or cancelling or rescinding or terminating the said Agreement and the Power of Attorney and making legitimate demands from defendants Nos. 1, 2 and 8 to 13 as mentioned in the said notice. However, the defendants failed, avoided and neglected to comply with any of the said demands, hence the plaintiffs are constrained to file this suit.

16. It is alleged that defendant Nos. 1 and 2 have played fraud upon the plaintiffs and have induced the plaintiffs to execute Agreement dated 31.05.2010 and Power of Attorney dated 31.05.2010. The defendants have avoided, neglected and failed to comply with the terms and conditions of the Agreement dated

31.05.2010. It is contended that fraudulent intents of the defendants are further demonstrated by the contradictory stands taken and statements made by the defendant Nos. 1 and 2 at various places as detailed above. It is contended that defendant Nos. 1 and 2 have further entered into various transactions with various persons in respect of portions of the property described in para 1 (a) of the plaint. The plaintiffs have recently before few days, reliably learnt that the defendants plan to and are in process of parting with possession of the respective suit properties or portion thereof or induct third persons therein or in portion thereof or enter into some transactions or agreement in respect thereof or portion thereof or cause development or construction there upon or portion thereof.

17. It is contended that the plaintiffs reasonably apprehend that the defendants will bring into action their said plans, hence if the defendants will not be restrained from parting with possession of the respective suit properties or any portion thereof or from inducting third person therein or any portion thereof or from entering into any agreement or transactions of any nature whatsoever in respect thereof and from causing construction or development there upon, then the plaintiffs will suffer irreparable loss and prejudice, and it may lead to multiplicity of proceedings. Hence, the injunction as prayed is necessary to be granted.

According to the plaintiffs they have made out *prima facie* case and entire balance of convenience is in their favour and they will suffer an irreparable loss, if injunction application will not be granted. with the help of those contentions the plaintiffs have prayed to allow the application.

18. Defendant Nos. 1 to 3 have resisted the application and filed their written statement-cum-reply at exh.48 and it is contended that the plaintiffs claim is false and vexatious as the plaintiffs have suppressed material facts from the Court and, therefore, the Plaintiffs are not entitled to discretionary and ancillary reliefs or compensation as claimed. According to the defendants the claim is barred by law of limitation. No cause of action absolutely arose in favour of the Plaintiffs to file the present Suit. According to defendant Nos. 1 to 3 all the pleadings of the plaintiffs are vague and hence the suit deserves to be dismissed. According to the defendants, the suit is bad for non-joinder and mis-joinder of necessary parties and, therefore, it is liable to be dismissed. It is contended that the description of the property given in para 1(a) of the plaint is totally incorrect. The suit property has been amalgamated and the layout of the larger plot has been sanctioned. Consequently, there does not exist any separate portion of an area admeasuring 34 Ares. Consequently, the Plaintiffs cannot base their Suit on any such property.

19. According to defendant Nos. 1 to 3 the Plaintiffs are not concerned with the property described in para Nos. 1(b), (c), (d) and (e) of the plaint at all. Further, as per the plaintiffs again third party interest has been created. Consequently, the Plaintiffs are not entitled for any reliefs, as are claimed by them. Hence, according to defendant Nos. 1 to 3, the plaintiffs claim has become infructuous. It is contended that as admitted by the plaintiffs, defendant No.14 is purely agent having Power of Attorney of the Defendant No.2 for admission of Agreement. As such, no cause of action can arise against defendant No.14 and no relief can be sought by the Plaintiffs, hence, the suit is bad in law for the mis-joinder of parties. It is contended that the plaintiffs themselves have admitted that the defendants have acquired absolute and irrevocable rights to develop the said are admeasuring 34 R. It is contended that the consideration was agreed at Rs.1,70,00,000/-, out of which defendant Nos. 1 to 3 have bonafidely paid Rs.90 lakhs upon the representation of the Plaintiffs. It is denied that the defendants have avoided and failed to comply and make payment of the remainder amount. It is alleged that the Plaintiffs have suppressed material fact. The Plaintiffs were under obligation to remove all the claims in respect of the property, however, the Plaintiffs have failed to do so and the defendants are required to suffer losses on account of the same, for which, the Plaintiffs themselves are liable. According to defendant Nos. 1 to 3 the

Plaintiffs have come with false and imaginary theory. There is no question of seeking any extension by defendant Nos. 1 to 3.

20. It is denied that defendant Nos,. 1 and 2 have tried to create cloud over clear and marketable title of the plaintiffs, allegedly in view of RCS No. 1478/2010 and defendant No.2 has expressed his readiness and willingness to discuss the issue, etc; the plaintiffs are parties to said Suit. Moreover, title of the plaintiff is udner challenge in said Suit, in fact, the plaintiffs ae not forthcoming in conducting the said Suit, when it is their responsibility that entire onus is to the defendants, who alone are fighting. It is alleged that the plaintiffs have avoided participating in the said suit or to challenge the claim made by the Plaintiffs in the said suit. It is admitted that R.C.S. No.1478/2010 is filed by the erstwhile owners in which the Plaintiffs and defendant Nos. 1 to 3 are parties. However, the Plaintiffs of this Suit are not diligent in contesting the same, when it is the obligation of the Plaintiff to clear all the claims made by the erstwhile owners. There was inordinate delay on the part of the Plaintiffs to file their written statement. It is contended that the Plaintiffs are not participating in conducting cross-examination of the Plaintiffs of RCS No. 1478/2010. As such, there is absolutely no co-operation and in fact, there is total abandonment of duties and the responsibilities of the Plaintiffs of this Suit.

21. It is contended that written statement was filed by defendant nos. 1 to 3 of this Suit in RCS No. 1478/2010 and it was as per representations made by the plaintiffs of this suit. Therefore, the plaintiffs of this suit cannot expect the defendants of this Suit to admit the contentions of the Plaintiffs in the R.C.S. No.1478/2010. It is contended that the defendants have paid Rs.90 lakhs to the Plaintiffs and their valuable money and the project is stuck, because of the said suit bearing RCS No. 1478/2010, the defendants are not able to get good customers and clients and they are constrained to quote lesser prices than the prevailing market rate, as there is pending Civil Suit since 2010. It is contended that the Plaintiffs cannot derive any benefits merely because defendant Nos. 1 to 3 are contesting the said suit, which is absolute responsibility of the Plaintiffs of this Suit and which is totally neglected by them. It is denied that defendant Nos. 1 and 2 deferred and avoided to act upon the promises prompting the Plaintiffs letter dated 03.03.2015. It is denied that in several meetings defendant No.2 has acknowledged, assured and promised to release the payment due to the Plaintiffs and the same was followed by neglect and avoidance of defendant Nos. 1 and 2. It is denied that the plaintiffs have given considerable time to defendant Nos. 1 and 2 to fulfill their obligations under the said Agreement and to make up the losses suffered by the Plaintiffs.

22. Further contentions are also denied by defendant Nos. 1 to 3 alleging that the plaintiffs in order to file present Suit have come with false and afterthought theory. It is contented that preamble of the Agreements dated 15.03.2013, 30.05.2014, and 10.12.2014 was written as per the representations of the plaintiffs. It is contended that defendant Nos. 1 and 2 have obtained Title Report dated 27.02.2013 from their Advocate wherein the property described in para 1(a) of the plaint has been subject to said R.C.S. No. 1478/2010 stated to be free from encumbrances. It is contended that defendant no. 1 and 2 have relied upon the said report and said Title Report is subject to the outcome of above referred Suit. However, the Plaintiffs of this Suit are taking no efforts to dismiss the said suit, which is pending for more than 7 years and, therefore, the defendants were constrained to file RCS No. 382/2014 against the erstwhile owners as the erstwhile owners are disputing the title of the Plaintiffs of this Suit and those erstwhile owners are creating obstructions in the beneficial enjoyment of the suit property, which is part of layout of Survey No.385/1, Bhugaon. It is denied that the said Suit property is different from the property mentioned in the present suit and the reliefs of said Suit are also distinct from the performance of the Agreement dated 31.5.2010.

23. It is contended that the defendants have invested huge amounts on the representation of the Plaintiffs and the defendants are required to fight for the suit property in which they have to necessarily relied upon the representation made by the Plaintiffs that they are the absolute owners. It is denied that the Plaintiffs in 2016 realized for the first time that defendant nos. 1 and 2 since before inception of said agreement dated 31.05.2010 never had intention to fulfill terms of the said Agreement and to make full payment there under to the Plaintiffs. It is denied that defendant Nos. 1 and 2 had induced the plaintiffs to enter into the said Agreement dated 31.05.2010 with false promises which defendant nos. 1 and 2 never intended to perform. It is contended that the Plaintiffs and defendant Nos.4 to 7 have executed registered Power of Attorney on 31.05.2010, which is registered in the office of Sub-Registrar Mulshi. It is denied that said Power of Attorney is not in respect of property described in para 1(a) of the plaint.

24. According to defendant Nos. 1 to 3 said Power of Attorney is executed in pursuance of a Development Agreement dated 31.05.2010 and both are totally irrevocable and there is no question of defendant Nos. 1 to 3 misuses the same. It is contended that the Plaintiffs have no any legal right to revoke the same. It is contended that the plaintiffs have falsely pleaded that said Agreement dated 31.05.2010 is liable to be revoked and the

plaintiffs have done so. According to defendant Nos. 1 to 3 said Power of Attorney and Agreement were executed by the plaintiffs for valuable consideration and they absolutely have no legal right to revoke the same. It is denied that defendant Nos. 1 and 2 avoided and failed to act upon assurances and promises given by them. It is denied that defendant Nos. 1 and 2 have committed breaches of Agreement dated 31.05.2010, including Agreements dated 15.03.2013, 30.05.2014 and 10.12.2014 and Power of Attorney dated 09.07.2012 are of no consequence *ab-initio* and the same are rendered ineffective. It is denied that above Agreements and the Power of Attorney are not binding upon the Plaintiffs and the property described in para 1(a) of the plaint. It is denied that no rights can be claimed on the basis of those agreements Power of Attorney. It is denied that the plaintiffs are entitled to demand vacant possession of the suit property and the plaintiffs are entitled to recover payment of balance consideration. It is contended that it was legal as well as contractual duty of the Plaintiffs themselves to clear all the claims in respect of the suit property.

25. The Plaintiffs themselves are not coming forward to the case filed by the erstwhile owners because of the same the interest of defendant Nos. 1 to 3 are getting adversely affected and the defendants have suffered losses and not the Plaintiffs. It is

contended that defendant Nos. 1 to 3 are always ready and willing to pay remaining consideration. However, prior to that itself, various claims have been made by erstwhile owners and they have also created obstruction in the development of the suit property. Unless and until the same are cleared by the Plaintiffs, they are not entitled for payment of balance consideration.

26. It is contended that the plaintiffs have issued false and illegal notice dated 21.03.2107 because the Plaintiffs cannot cancel or terminate the Power of Attorney and Development Agreement. There is no question of the defendants making any compliance of the said illegal notice. According to defendant Nos. 1 to 3 merely by issuing a notice, no contract or Power of Attorney can be terminated and the Plaintiffs are trying to crate false evidence. It is denied that defendant Nos. 1 to 3 have played fraud upon the Plaintiffs and they have induced the Plaintiffs to execute the Agreement dated 31.05.2010 and the Power of Attorney dated 31.05.2010. It is denied that defendant Nos. 1 to 3 have avoided, neglected and failed to comply with the terms and conditions of the Agreement and the defendants with fraudulent intention made statements. It is denied that defendant Nos. 1 and 2 have further entered into various transaction with various persons in respect of portions of the property described in para 1(a) of the plaint and it is denied that the defendants plan and are in process of parting

with possession of the respective suit properties or portion thereof to third person.

27. It is contended that the plaintiffs themselves had executed Development Agreement in favour of the defendants. The consequent Power of Attorney was also executed by them. The Plaintiffs have received as admitted by them an amount of Rs.90 lakhs and more. Already interest has been created in favour of defendant Nos. 1 to 3 and the defendants are entitled to enjoy the benefits acquired by them under the Agreement and Power of Attorney. It is alleged that the Plaintiffs had made breach of the Agreement and the plaintiffs have failed and avoided to clear the claims of the erstwhile owners, therefore, the plaintiffs are not entitled for any interim reliefs of injunction or otherwise. It is contended that erstwhile owners of suit property had filed RCS No. 1478/2010 and the Plaintiffs are the parties to the said suit, therefore, the plaintiffs cannot say that in the year 2016 for the first time they realized that the defendants had no intention to fulfill the terms of the said Agreement. According to defendant Nos. 1 to 3 entire contention regarding the Plaintiff's realizing anything in the year 2016 is clearly afterthought pleading. No cause of action has arisen as is claimed by the Plaintiffs in the year 2010. According to the defendants merely by issuing any notice, no cause of action can arise. Hence, the plaintiff's claim deserves to be

dismissed as the Suit is filed without cause of action. Further, according to the defendants dispute raised by the plaintiffs is not a commercial dispute and this Court has no jurisdiction to try, entertain and decide the suit. It is contended that the plaintiffs have undervalued their claim and have not paid requisite Court fees, hence, according to the defendants the plaintiffs are not entitled for declaration as sought or any reliefs as claimed in the plaint. Hence, according to defendant nos. 1 to 3 temporary injunction application also is necessary to be dismissed.

28. From the contentions raised by the parties, following points arise for my determination and I am recording my findings against those points for the reasons discussed below :

S.No.	POINTS	FINDINGS
1	Whether the plaintiffs have made out *prima facie* case to grant temporary injunction as prayed for ?	In the negative
2	In whose favour balance of convenience lies ?	Balance of convenience lies in favour of defendants and not in favour of the plaintiffs.
3	Are the plaintiffs entitled to relief of temporary injunction as prayed ?	In the negative
4	what order ?	As per final order.

REASONS

As to Point Nos. 1 to 3 :

29. I have heard plaintiff's advocate Mr. Phatak and advocate Mr. Gadegaonkar, representing defendant Nos. 1 to 3. The plaintiff's advocate Mr. Phatak has argued that the suit is based on the disputed Development Agreement executed by plaintiffs in favour of defendant No.1 Partnership Firm and defendant No.2, its partner. It is pointed out that the said agreement was executed for total consideration of Rs. 1,70,00,000/- and admittedly out of it, amount of Rs. 90,00,000/- is paid by defendant Nos. 1 and 2 to the plaintiffs and amount of Rs. 80,00,000/- has not been paid by defendant Nos. 1 and 2, therefore, the plaintiffs have issued disputed notice of termination of agreement and filed this suit for compensation, declaration and injunction etc. Advocate Mr. Phatak has argued that the plaintiffs have raised two pleas in this suit. One is that since inception defendant Nos. 1 and 2 were having intention to dupe consideration amount and they have got executed disputed agreement fraudulently from the plaintiffs. Hence, according to Advocate Mr. Phatak such agreement is voidable and as defendants have made breach of said agreement, the plaintiffs have treated said agreement as void.

30. It is further argued that the plaintiffs have raised another plea to safeguard their claim and said plea is that if the

Court comes to the conclusion that agreement-in-question is not void agreement or it is valid agreement, then the plaintiffs claim stands on the footing that agreement-in-question is terminated as defendant Nos. 1 and 2 have not paid admitted amount of Rs. 80 lakhs from total agreed consideration. The plaintiff's advocate referred written statement-cum-say of defendant Nos. 1 and 2 which is filed at exh.48. The plaintiff's advocate has argued that defendant Nos. 1 to 3 have raised defence that Suit No. 1478/2010 filed against the plaintiffs was pending and the plaintiffs have not contested the said suit or have not taken care for early disposal of said suit, therefore, the defendants have not paid remaining consideration amount to the plaintiffs. Advocate Mr. Phatak has also pointed out that the said defence raised by the defendants is not maintainable in view of Clause No. 'Q' on page No.20 of the disputed agreement and Clause No.21 of Power of Attorney document. It is argued that from clause “Q' of disputed agreement and Clause No.21 of Power of Attorney document, it becomes clear that defendant Nos. 2 and 3 have undertaken on behalf of defendant No.1 to represent the plaintiffs, to defend plaintiffs in case of filing of any suit against the plaintiffs in respect of suit property. Thus, according to Mr. Phatak defendant Nos. 1 to 3 cannot blame the plaintiffs in respect of pendency of Suit No. 1478/2010.

31. The plaintiff's advocate filed copy of Judgment of Suit No. 1478/2010 and pointed out that the said Suit is dismissed on merits and, therefore, according to advocate Mr. Phatak, it becomes clear that the plaintiffs title over the suit property was and is clear and, therefore, only the said Suit by which the plaintiff's title was challenged is dismissed. It is argued that defendant Nos. 1 to 3 have executed Agreement to Sale of portions of the land from main big plot of the suit property to defendant No.4 onwards and in those agreements, defendants have mentioned that portions of the plots sold to remaining defendants are free from encumbrances. Advocate Mr. Phatak has also referred para No.20 of the plaint and para No.21 of the written statement and argued that in para 20, the plaintiffs have referred title report obtained by the defendants for executing Agreement to Sale in favour of remaining defendants and in said title report, defendant's advocate has mentioned that the plaintiff's title over the suit property is clear one and defendant's advocate has opined in said title certificate that Suit No. 1478/2010 was going to be dismissed. Thus, it is argued that defendant Nos. 1 to 3 knew that plaintiff's title over the suit property was and is clear, in spite of it, defendants have not paid remaining consideration of Rs. 80 lakhs to the plaintiffs. It is argued that defendant Nos. 1 to 3 cannot blow hot and cold together. They cannot say for avoiding remaining consideration that plaintiff's title over suit land is not clear and at the same time, they cannot say for

executing Agreement to Sale in favour of remaining defendants that suit property is free from encumbrances. Advocate Mr. Phatak has referred Clauses 6(a)(b)(f) of the Agreement to Sale executed by defendant Nos. 1 to 3 in favour of defendant No.8 onwards and it is pointed out that in those agreements, defendants have clearly mentioned that suit property is free from encumbrances. Thus, according to advocate Mr. Phatak, defendants have behaved with double standard.

32. One more defence raised by the defendants is also referred by Mr. Phatak advocate and it is argued that the defendants have contended that all the plots in question are amalgamated and, therefore, suit property has lost its identity. Mr. Phatak advocate has referred various case laws and argued that dual character of ownership is recognized by Indian Courts and in the case laws cited by the plaintiffs, it is held that amalgamation will not destroy separate identity of each plot and said amalgamation is only for the purpose of proper development of the property. Thus, according to Mr. Phatak advocate all the defences raised by the defendants are not useful to defendants because defendants have blown hot and cold together and they are avoiding their performance of contract and, therefore, the plaintiffs were required to terminate disputed agreement. It is argued that after termination of disputed agreement, the defendants cannot create

third party rights in the suit property and the defendants cannot part with possession of the suit property to anyone and cannot develop the said property. Therefore, the plaintiffs have claimed temporary injunction as prayed in various prayer clauses of exh.5. Hence, according to Mr. Phatak advocate, temporary injunction application exh.5 is necessary to be allowed and the plaintiffs have made out *prima facie* case to grant injunction.

33. Advocate Mr. Phatak referred clause "D" on page No.14, Agreement to Sale and argued that in said clause defendant Nos. 1 to 3 have mentioned that they have paid total consideration to the plaintiffs, but it is admitted position that yet consideration of Rs. 80 lakhs from total consideration is to be paid by the defendants. Hence, advocate Mr. Phatak argued that defence raised by defendant nos. 1 to 3 is falsified by documents executed by them only. Hence, it is argued that exh.5 is necessary to be allowed.

34. Plaintiff's advocate Mr. Phatak relied on following case laws :

1.*Dinkar S. Vaidya V/s. Ganpat S. Gore and others, reported in AIR 1981 Bombay 190*, wherein the Hon'ble Bombay High Court observed that,

> *"It is a matter of first principles that in India the doctrine of dual ownership is recognized. This doctrine mens that the owner of the land is not necessarily presumed*

to be the owner of the structure standing upon it. In this respect Indian Law is at variance with English Law. In England the doctrine of superficies solo cedit is recognized, meaning thereby that there is a presumption that the owner of the land is the owner of the structure on the land as well. This question becomes relevant in the context of the fact that in India the owner of the structure is frequently is lessee in respect of the land and the owner of the land has no interest whatsoever in the structure at all. The owner of the structure lets out the structure to his own tenants. The question then arises as to what is the right of the tenant of the structure vis-a-vis the land."

2.*Messrs Radheshyam Son Pvt. Ltd. & Ors. V/s. Corporation of Calcutta & Ors, reported in 1978 SCC OnLine Cal 263 : (1979) 2CHN 461*, wherein it is observed that,

"From the scheme of the Calcutta Municipal Ct, 1951 relating to valuation or revised valuation of premises and assessment and recovery consolidated rates and taxes thereon, I am of the opinion that the entire scheme makes the owner of the premises primarily liable for the rates and taxes which includes not only the building but also the land whereon the building is erected and built. There is great force in the contention of Mr. Ghosh that a very anomalous situation would arise if contiguous plots belonging to different persons or sets of persons are amalgamated into one premises had a building is allowed to be constructed thereon, so far as the plots of lands are concerned the same would belong to different persons or sets of persons such having separate right, title and interest in his or their respective plots, while the building would belong to all of them jointly. Again each of the plot may not be of the same size or value and the portions of the building ion each of the plots may not also be of the same size or value. The

expression amalgamation or merger, connotes fusion of two interests into one. There is no dispute that if two or more contiguous plots belong to the same owner there could be an amalgamation of the same. The effect of merger has been explained by Sir Dinshaw Mulla in his book on the Transfer of Property Act and the effect amalgamation has been explained by Buckley in his treaties on the Companies Acts and by Palmer in his book on the Company Law. From the above exposition of the law as to merger and amalgamation the following characteristics of merger or amalgamation may be deduced.

(a)The whole estate must vest in one and the same person or persons jointly in respect of the properties amalgamated ; and

(b)The two estates when amalgamated or merged would lose their separate existence both with regard to their identity and estate and would be fused into one.

If amalgamation is made on 228A and 229 of the above characteristics would not and could not be fulfilled, the two premises cannot vest in one and same person or jointly, 222A would remain vested in the petitioner No.1 as its owner, while 229 would remain vested in the petitioner Nos. 2 to 7 as its joint owners. The two estates in 222A and 229 cannot lose their separate existence and would retain their separate ownership even if they are sought to be amalgamated. There cannot be any fusion of the two plots namely 228A and 229 into one with their respective ownerships.

Therefore, in my opinion, there cannot be any amalgamation of 228A and 229. No act of parties short of transfer either by petitioner No.1 of 228A in favour of *petitioner Nos. 2 to 7 or of transfer by petitioner Nos. 2 to 7 of 229 in favour of petitioner No.1 can lead to amalgamation of the said two premises.*

In my opinion, as there could not be any amalgamation of 228A and 229 therefore no plan for construction of a single building on the said two premises belonging to two separate owners could also be sanctioned. Even if the petitioners had applied jointly for sanction of such a plan no undertaking by the petitioners to share and beat the liability for rates, taxes or other impositions jointly and severally, could cure the initial disability in the matter of amalgamation of the two premises.

In the view, that I have taken the petitioners are not entitled to any relief. The Rule is therefore discharged. Interim Order, if any, is vacated. In the facts and circumstances of the case there will be, however, no order as to costs."

3.*Sitaram Narayan Shinde and others V/s. Ibrahim Ismail Rais and others, reported in 2005(1) Mh.L.J. 35*, wherein it is observed that,

"This was held to be illegal subletting. In India, the concept of dual ownership is well recognized. The land may belong to one person and super-structure standing thereon may belong to another. Where the land belongs to one person and the super-structure belongs to another and the owner of a super-structure lets out the super-structure , in the absence of any other evidence, it cannot be held that the owner of super-structure has sublet the land."

35. Shri Gadegaonkar Advocate representing defendant Nos. 1 to 3 has started with his arguments by referring para Nos. 32 and 33 of the plaint. It is pointed out that in those paras, the plaintiffs have contended that defendant Nos. 1 and 2 have played fraud upon the plaintiffs and induced the plaintiffs to execute disputed agreement dated 31.05.2010 and it is pointed out that in next breathe, the plaintiffs have raised contention that the defendants have avoided, neglected and failed to comply terms and conditions of the said agreement. According to Shri Gadegaonkar Advocate, if really agreement in-question would have been fraudulently executed, no question arises of neglecting or avoiding to comply terms and conditions of the said agreement. It is argued that the plaintiffs have further contended in para Nos. 32 and 33 that recently prior to filing of the Suit, the plaintiffs came to know the fact that since inception the defendants were intending not to pay money to the plaintiffs. It is argued that the plaintiffs have contended that agreement-in-question is voidable. According to Shri Gadegaonkar Advocate, if really according to the plaintiffs, agreement-in-question was got executed by fraud, it must be void only and it cannot be termed as voidable.

36. In further part of arguments, Shri Gadegaonkar Advocate referred various prayer clauses i.e. 'a to z' from the plaint and argued that in prayer clauses 'a to c', the plaintiffs have sought

declaration that agreement-in-question was got executed by fraud and further it is void *ab initio* and it stands cancelled. It is argued that in prayer clause 'd', the plaintiffs have taken 'U' turn and contended that without prejudice to prayer clauses 'a to c', the plaintiffs have prayed for declaration that agreement-in-question is validly terminated and for that purpose according to the plaintiffs first of all Court should come to the conclusion that prayers from prayer clauses 'a to c' cannot be granted. It is argued that prayers from prayer clauses a to c are substantial prayers and hence, once the Court comes to the conclusion that prayers from prayer clauses 'a to c' cannot be granted, no question arises further of granting prayer clause 'd'. It is argued that the plaintiffs have sought perpetual injunction against all the defendants in respect of parting with the possession of the suit property and in prayer clause 'w', the plaintiffs have claimed additional prayer for decree against defendant Nos. 1 and 2 directing them to pay plaintiffs, compensation of Rs. 10 crores, with the interest at the rate of 10% per annum till actual realization of the said compensation amount.

37. Shri Gadegaonkar Advocate has argued that nowhere in the plaint, it is pleaded as to how the plaintiffs are entitled for said additional prayer or as to how the plaintiffs are entitled to the compensation. Therefore, according to Shri Gadegaonkar Advocate prayer clause 'd' is contrary to the agreement-in-question and it is

contrary to the pleadings from the plaint.

38. Further, referring plaint and prayer clauses from the plaint, Shri Gadegaonkar Advocate referred page Nos. 1 to 13 of disputed Development Agreement dated 31.05.2010. It is argued that in disputed agreement reference of the previous agreement of the year 2007 between all the owners of the larger property admeasuring 5 H 7 R is given and it is mentioned in said agreement that by agreement dated 31.05.2010, 3 H 22 R land was agreed to be given to defendant nos. 1 and 2 for the purpose of development for the consideration of Rs. 1,70,00,000/-. It is argued that in the agreement dated 31.05.2010, it is mentioned that Plot No.5 of 40 R, corrected 34 R area was kept with the plaintiffs for their own use, but later on it was noticed that the said Plot was bearing No.7 and not Plot No.5. It is strongly argued by Shri Gadegaonkar Advocate that as mentioned in the agreement dated 31.05.2010, total consideration of the agreement of the year 2007 was already paid by defendant Nos. 1 and 2 to erstwhile owners of 5 H 7 R land and hence, according to Shri Gadegaonkar Advocate, if really defendant Nos. 1 and 2 had an intention since inception to commit fraud with the plaintiffs, defendant Nos. 1 and 2 would not have paid total consideration of the agreement of the year 2007. It is argued that in the plaint, it is mentioned that in the year 2016, the plaintiffs came to know since inception defendant Nos. 1

and 2 had intention to commit fraud and, therefore, they have induced the plaintiffs to execute disputed agreement dated 31.05.2010. It is argued that the year 2016 has immense importance in this case, because disputed Development Agreement was executed in the year 2010 and prior to it in the year 2007, agreement for larger land was executed by defendant Nos.1 and 2 with six owners of larger land and those six owners are paid with consideration of the land. Thus, according to Shri Gadegaonkar Advocate for more than ten years, the plaintiffs could not understand that defendant Nos. 1 and 2 had fraudulent intention and all of sudden in the year 2016, plaintiffs understood about it. Thus, according to Shri Gadegaonkar Advocate when the plaintiffs were silent for more than ten years, question arises about truthfulness of plaintiff's case.

39. Shri Gadegaonkar Advocate has referred para 20 from page No. 22 of the agreement and it is argued that in 2010 itself the plaintiffs have authorized defendant Nos. 1 and 2 to develop and sell the various units from the suit property to prospective purchasers and signed requisite documents for that purpose. Further, the plaintiffs have undertaken that they will execute conveyance of the land from the suit property after development of the property in favour of Co-operative Society or Association of Apartments holders or Company, etc. Thus, according to Shri

Gadegaonkar Advocate in the year 2010 itself, the plaintiffs have empowered defendant Nos. 1 and 2 to sell units from the suit property and for that purpose no separate consent of the plaintiffs was necessary. Hence, according to Shri Gadegaonkar Advocate, the plaintiff's claim is not maintainable in terms of the contents of the disputed agreement.

40. Shri Gadegaonkar Advocate pointed out that the plaintiffs have pleaded case of fraud, but they have not pleaded the particulars of alleged fraud. Shri Gadegaonkar Advocate referred Order VI Rule 4 of CPC and argued that unless the pleadings as provided by Order VI Rule 4 of CPC are given in the plaint, there will be no meaning in pleading, the case of fraud. Shri Gadegaonkar Advocate has also referred Section 14 of the Indian Contract Act and argued that free consent is described in said section. Shri Gadegaonkar Advocate referred Section 17 of the Indian Contract Act, it provides for definition of fraud and it is argued that at the most plaintiff's case can be covered by category given in Section 17(3) of the Indian Contract Act. Shri Gadegaonkar Advocate also referred Section 19 of the Indian Contract Act and referred that the contract which is alleged to be void by the plaintiff is voidable at their option and, therefore, according to Shri Gadegaonkar Advocate as the plaintiffs had option in respect of void or voidable agreement, no reliefs as prayed

in prayer clauses 'a to c' can be granted. Shri Gadegaonkar Advocate has referred para No.20 of the plaint and pointed out that the plaintiffs had knowledge about title report dated 27.02.2013 obtained by the defendants from their advocate in respect of suit property in which it is mentioned that suit property has clear title subject to decision of RCS No. 1478/2010. It is argued that immediately after execution of disputed agreement erstwhile owners of suit property have filed said suit and title of suit property was subject to the decision of the said suit, therefore, it cannot be said that the plaintiffs have given clear marketable title of suit property to defendant Nos. 1 and 2.

41. In further part of arguments, Shri Gadegaonkar Advocate referred various case laws and argued that Development Agreement is enforceable by developers and it is further pointed out that when the plaintiffs themselves have prayed in prayer clause 'w' of the plaint that in addition to prayer clauses 'a to v', defendants should be directed to pay the plaintiffs, compensation of Rs. 10 crores with interest, it becomes clear that plaintiff's claim can be compensated in terms of money and, therefore, according to Shri Gadegaonkar Advocate injunction as prayed cannot be granted. Shri Gadegaonkar Advocate has strongly argued that defendant Nos. 1 and 2 have already paid Rs. 90,00,000/- to the plaintiffs and, therefore, if injunction application will be rejected, the plaintiffs

will not suffer from any loss, which cannot be compensated in terms of money, but if the injunction will be granted, the defendants will suffer from such irreparable loss because already due to filing of Suit No. 1478/2010 project in-question is delayed and further appeal is filed against dismissal of said Suit, therefore, the said appeal is nothing but the continuation of the said Suit and such project is being delayed due to the Suit filed by erstwhile owners of the suit property. Hence, according to Shri Gadegaonkar Advocate when plaintiff's claim can be compensated in terms of prayer clause 'w' injunction as prayed cannot be granted.

42. In support of arguments, learned advocate Mr. Gadegaonkar placed his reliance on the following case laws :

1.*A.C. Thirumalaraj. V/s. M/s. Aditya Birla Nuvo Ltd. And others, reported in AIR 2012 Supreme Court 244B*, wherein the Hon'ble Apex Court observed that,

> *"Despite this claim towards damages made by the respondent No.1 in the plaint, the trial court has held that if the temporary injunction as sought for is not granted, Liberty Agencies may lease or sub-lease the suit schedule property or create third party interest over the same and in such an event, there will be multiplicity of proceedings and thereby the respondent No.1 will be put to hardship and mental agony, which cannot be compensated in terms of money. Respondent No.1 is a limited company carrying on the business of ready-made garments and we fail to appreciate what mental agony and hardship it will suffer*

except financial losses. The High Court has similarly held in the impugned judgment that if the premises is let out, the respondent No.1 will be put to hardship and the relief claimed would be frustrated and, therefore, it is proper to grant injunction and the trial court has rightly granted injunction restraining the partners of Liberty Agencies from alienating, leasing, sub-leasing or encumbering the property till the disposal of the suit. The High Court lost sight of the fact that if the temporary injunction restraining Liberty Agencies and its partners from allowing, leasing, sub-leasing or encumbering the suit schedule property was not granted, and the respondent No.1 ultimately succeeded in the suit, it would be entitled to damages claimed and proved before the court. In other words, the respondent No.1 will not suffer irreparable injury. To quote the words of Alderson, B. in the Attorney General V/s. Hallett[153 ER 1316:(1857) 16 M. and W. 569] :

I take the meaning of irreparable injury to be that which, if not prevented by injunction, cannot be afterwards compensated by any decree which the court can pronounce in the result of the cause."

2.<u>Smt. Ambika Sahu V/s. Smt. Sumitra Sahu, reported in AIR 1990 Orissa 127</u>, wherein the Hon'ble Orissa High Court observed that,

"When an application under S.10 CPC is presented, the court in which the suit is pending is to pass orders and not the court in which the previous suit was pending. An appeal being continuation of the suit, pendency of the second appeals would mean that the previous suits were pending. No order of stay can be passed in the Second Appeals staying further proceedings in the subsequent suit."

3.*Shri Pradeep Shankar Walvekar & Ors. V/s. Shri Anil Narsinha Annachhatre & Anr., reported in 2013(7) All M R 788*, wherein the Hon'ble Bombay High Court observed that,

"In the casse of Gurudev Developers V/s Kurla Konkam Niwas Co-op. Hsg. Society (1999(supp.) Bom.C.R. 257(OOCJ), a learned Single Judge dealt with the same issue. However, it is not necessary to go into the said decision as there is one decision of the Division Bench which directly deals with the issue. The said decision is in the case of Cheeda Housing Development Corporation V/s. Bibijan Shaikh Farid & Ors. (2007(2) Bom.C.R. 587 :[2007(3) All M R 780]). It appears that one of the contentions raised before the Division Bench was that an agreement for development cannot be specifically enforced. This Court made a reference to various decisions of this Court including the first four decisions which we have referred to above. In para 12 of the said decision, the Division Bench has held thus :

> *"12.In our opinion from a conspectus of these judgments, what is relevant would be the facts of each case and the agreement under consideration. Agreements considering what is discussed, amongst others, could be :-*
>
> *(a)An agreement only entrusting construction work to a party for consideration;*
>
> *(b)An agreement for entrusting the work of development to a party with added rights to sell he constructed portion to flat purchasers, who would be forming a Co-operative Housing Society to which society, the owner of the land, is obliged to convey the constructed portion as also the land beneath construction on account of statutory requirements.*

(c)A normal agreement for sale of an immovable property.

Before dealing with the submissions on merits, it will be necessary to have look at the development agreement in the present case and the power of attorney for deciding the question whether the agreement is hit by Section 14 of the said Act of 1963. It must be noted that, out of agreed consideration of Rs. 1,10,00,000/-, a sum of Rs. 90,00,000/- was already received by the appellants on the date of execution of the agreement. In fact, the total amount of Rs. 27,00,000/- was received by the appellants from April, to July 2006. It will be necessary to make a reference to the recitals of the suit agreement and in particular recital (d). It is true that, in the recital (d), initially, there the word "sale' was typed which was struck out. But it will be necessary to refer to second part of recital (d). It notes that an offer was made by the respondents to pay consideration of Rs. 1,10,00,000/- and the appellants found the said offer consistent with the market value and reasonable, and therefore, the appellants agreed to execute the development agreement which cannot be cancelled. Thus, there is a specific recital that what was agreed was to execute a development agreement which cannot be cancelled. We may also note that, a part from the development agreement (the suit agreement at Exh.36), there is a power of attorney at Exh.37 executed by the appellants in favour of the 1st and 2nd respondents conferring all the powers including the power to execute the sale deed. All pervasive powers have been conferred on the respondents. Clause (15) thereof records that the power of attorney was irrevocable. Thus, the aforesaid recital in the development agreement as well as the execution of irrevocable power of attorney shows that what was agreed to confer on the respondents was an irrevocable right to develop the suit property. The other clauses and facts *borne out from the record are consistent with what is set out in clause (d) of the recitals.*

Apart from aforesaid relevant clauses of the suit agreement, clauses (8), (11) and (14) thereof and clause 9 of the Power of Attorney indicate that the respondents were intending to take recourse to the provisions of either MOFA or the said Act of 1970, and therefore, there is a provision for execution of the sale-deed in favour of incorporated body. Moreover, on the basis of the irrevocable power of attorney, the respondents could have obtained sale deed in favour of any person.

Thus, this was a case where the intention on the part of the appellants to confer irrevocable right in respect of the suit property on the respondents is clearly reflected from the recitals in the suit agreement as well the power of attorney admittedly executed by the respondents. Moreover, the development was proposed to be carried out by subjecting to the property either to the provisions of MOFA or the said Act of 1970.

In the circumstances, it is not possible to come to the conclusion that for non-performance of the said contract, compensation in terms of money can be adequate relief as irrevocable rights in respect of the immovable property were created by the agreement. Though the agreement was styled as a "development agreement", there is a provision therein for transfer of the property. Therefore, presumption under clause (I) of Explanation to Section 10 will apply in this case which has not been rebutted. Apart from the said clause (I) of Explanation to Section 10, it cannot be said that, considering grant of irrevocable right in respect of the immovable property, compensation in terms of money can be adequate relief to the respondents. Considering the nature of the agreement and various rights created thereunder, at least one of the two clauses (a) and (b) of Section 10 of the said Act of 1963 and in any event, clause (b) will be squarely apply."

4.*Chheda Housing Development Corporation V/s. Bibijan Shaikh Farid and others, reported in 2007(3) Mh.L.J. 402*, wherein it is observed that,

> *"In our opinion the learned Single Judge has construed the various terms of the agreement and the other material on record and at the prima facie stage has come to the conclusion that the agreement can be specifically performed. An Appellate Court, more so a Court considering an interim order which involves exercise of discretion normally will not interfere with the finding of fact recorded by the trial Court and the exercise of discretion unless the finding is perverse. Nothing has been brought on record to hold that the findings are perverse. The document on the face of it, cannot be an agreement for security. It can only be construed as an agreement to sell or a development agreement. In our opinion in this case, the finding recorded by the learned Single Judge was a finding eminently possible on the material on record. We are, therefore, clearly of the opinion that the agreement prima facie is an agreement which can be specifically enforced and consequently the Appellants have made out a prima facie case. The other predicates for grant of an injunction will be answered in the discussion that follows."*

43. In reply plaintiff's Advocate Mr. Pathak has submitted that plaintiff has a right to claim various reliefs which are necessary to be claimed. It is argued that if such reliefs are not claimed together plaintiffs claim will be hit by Order II Rule 2 of C. P. C. Hence, according to Advocate Mr. Pathak, it cannot be said that plaintiffs are not entitled to the injunction as prayed. It is further

argued that defendants have obtained the title report of suit property and they have admitted plaintiffs title over suit property on that count also injunction is necessary to be granted. Further, it is argued that trial Court has granted decree in favour of plaintiffs, appeal is in continuation of suit, but after appeal before Hon'ble High Court there will be again appeal before Hon'ble Supreme Court and there will be no end to the litigation. Hence, according to Advocate Mr. Pathak as the decree of trial Court is in favour of plaintiffs, injunction as prayed can be granted even though appeal is pending.

44. Lastly, by referring case laws filed by defendants, it is argued that case laws cited by defendants are not applicable to this case.

It is argued that in the case between *Pradeep Shankar Walvekar V/s. Shri. Anil Narshinha Annachhatre, 2013(7) ALL MR 788*. The matter before Hon'ble High Court was in respect of specific relief in respect of the matter under section 16, 20 of Specific Reliefs Act and in said matter the agreement in question was not terminated by other party. Therefore, Hon'ble High Court has observed that decree of specific performance is legally justified. It is argued that in present case the agreement is already terminated by plaintiffs. Hence, the case of *Pradeep Walvekar (Supra)* is not applicable to the facts of present case.

In respect of the case between *Chheda Housing Development Corporation V/s. Bibijan Shaikh Farid and others, reported in 2007(3) Mh.L.J. 402,* it is argued that defendants have not claimed specific relief against plaintiff and already the agreement in question is terminated. Therefore, *Chheda Housing Development Corporation (Supra)* case is not applicable to facts of the present case.

In respect of the case between *A.C. Thirumalaraj V/s. M/s. Aditya Birla Nuvo Ltd, AIR 2012 SC 2448(Supra).* It is argued that plaintiffs have claimed the damages in addition to prayer clause 'A to U' and even if the damage is claimed additionally, the question remains about the fact that whether the termination of agreement made by plaintiff is valid or not.

Hence, according to Advocate Mr. Pathak case laws cited by defendants are not applicable to present case and arguments advanced on behalf of defendants is also not useful in this case.

45. I have given serious consideration to the arguments advanced on behalf of the parties. I have carefully perused documents filed by the plaintiffs below exh.3 and exh.74. At this juncture as defendant's advocate has referred Order VI Rule 4 of CPC, I find it necessary to reproduce it which is as under :

> *"In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."*

46. On perusal of plaint and contentions raised in exh.5 filed by the plaintiffs, it is noticed by me that the plaintiffs have made general statement that since inception the defendants were intending not to make payment to the plaintiffs and they were intending to dupe consideration amount and hence, defendant Nos. 1 to 3 have committed fraud upon the plaintiffs. This is interesting suit in which it is admitted fact that defendant Nos.1 to 3 have paid Rs. 90 lakhs from total agreed consideration of Rs. 1,70,00,000/- to the plaintiffs. Thus, as consideration amount more than 50% is paid by defendant Nos. 1 to 3 to the plaintiffs, it cannot be said that since inception defendant Nos. 1 to 3 had intention to dupe amount of consideration of disputed agreement. If really defendant Nos. 1 to 3 had any such intention since inception, they would not have paid an amount which is more than 50% of agreed consideration. It is admitted fact that development of project-in-question is delayed, but at this stage, this Court cannot blame either plaintiffs or defendants for such delay. The fact that who is responsible for the said delay can be decided only after the parties to the Suit will adduce evidence and will cross examine the witnesses of each

other. Thus, at this stage what is expected for considering *prima facie* case is that whether particulars of alleged fraud are pleaded by the plaintiffs or whether the plaintiffs have made general statement in respect of the said fraud. On careful perusal of plaint, it is noticed that the plaintiffs have made a general statement in respect of such fraud and, therefore, in my opinion mere allegations of fraud, are not sufficient to say that the plaintiffs have made out *prima facie* case to grant temporary injunction on the basis of alleged fraud.

47. Defendant's advocate also referred Section 17 of the Indian Contract Act, which defines word 'fraud'. The said Section is as under :

> *"Fraud" means and includes any of the following acts committed by a party to contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :*
>
> *[1]the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;*
>
> *[2]the active concealment of a fact by one having knowledge or belief of the fact;*
>
> *[3]a promise made without any intention of performing it;*
>
> *[4]any other act fitted to deceive;*

[5]any such act or omission as the law specifically declares to be fraudulent."

48. On perusal of Section 17 of the Indian Contract Act, it becomes clear that the plaintiffs should have *prima facie* established that the defendants had made promise without any intention to perfrom it. I have already observed that if really since inception, the defendants would have intention to dupe consideration amount, defendant Nos. 1 to 3 would not have paid Rs. 90 lakhs to the plaintiffs.

49. Section 19-A of the Indian Contract Act provides that,

"when a consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just."

50. From reference Section 19 provides that,

"when consent to an agreement was caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A Party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if *representations made had been true."*

Thus, from Section 19 of the Indian Contract Act, it becomes clear that it was for the plaintiffs to plead details of alleged fraud or misrepresentation because major part of consideration of disputed agreement is paid by defendant Nos. 1 to 3 to the plaintiffs. Further, as argued by advocate Shri Gadegaonkar, disputed agreement is enforceable by developers i.e. defendant Nos. 1 to 3 and, therefore, only it seems that the plaintiffs have alternatively prayed for damages of Rs. 10 crores from the defendants.

51. This is interesting Suit in which the plaintiffs are not firm whether they have terminated the disputed agreement or not. In prayer clauses 'a to c' of the plaint, they have prayed for declaration that disputed Development Agreement and Power of Attorney dated 31.05.2010 got executed by playing fraud upon the plaintiffs and it is void *ab initio* and, therefore, it may be cancelled. Further they have prayed that subsequent agreements which are executed in pursuance of agreements dated 15.03.2013, 30.05.2014 and 10.12.2014 are void *ab initio* as consequence of the same having been executed in pursuance to agreement dated 31.05.2010 and said agreements may be cancelled. The plaintiffs have also prayed for cancellation of Power of Attorney dated 09.07.2012. In prayer Clause 'a to c', the plaintiffs have claimed for

cancellation of disputed Agreements and Power of Attorney document and in prayer clause 'D', the plaintiffs have contended that if the Court comes to the conclusion that prayer clauses 'a to c' cannot be granted, the Court may declare that those documents are validly terminated and revoked by the plaintiffs. Thus, on careful perusal of prayer clauses 'a to d' of the plaint, it becomes clear that the plaintiffs are not firm about the fact that whether disputed Development Agreement and Power of Attorney document are terminated or not. I have already pointed out that the defendants have paid more than 50% of the total consideration amount to the plaintiffs. Under such circumstances, it was expected that the plaintiffs should have clarified that whether after termination of disputed Development Agreement and Power of Attorney document, they have refunded the consideration amount of Rs. 90 lakhs received by them from defendant Nos. 1 to 3. Under such circumstances, as the plaintiffs are not firm about termination of disputed Development Agreement and Power of Attorney document and further as the plaintiffs have not clarified whether they are ready to refund amount of Rs. 90 lakhs, received by them from defendant Nos. 1 to 3 towards consideration amount to disputed Agreement, I find that the plaintiffs have failed in *prima facie* establishing the case for granting temporary injunction as prayed by them.

52. For considering the fact that balance of convenience lies in favour of which party, it is necessary to refer here Clauses 21, 22 and 23 of the disputed Development Agreement, which is mentioned as under :

> *Clause 21 : The owners shall sell the said property more particularly described in the Schedule hereunder written, in respect of the said property in favour of the DEVELOPER herein or its nominee or nominees including a Co-operative Society as the Association of Apartment Holders or the Company, as the case may be, and as shall be formed by the DEVELOPER at its discretion. It is hereby clarified and understood that the intention of the parties, being that of conveying the right, title and interest of the owners, in respect of the said plot with a right to the Developer to commence the development before the execution of the Conveyance, the DEVELOPER shall have right to seek the specific performance of the contract against the OWNERS, notwithstanding anything contained herein contrary thereto."*

> *Clause 22 : All the expenses required for execution of the Agreements in favour of the prospective purchaser such as a stamp duty and registration charges, shall be borne, and paid by the DEVELOPER, alone. In the event of the OWNERS deciding to convey the plot, more particularly described in the Schedule hereunder written, the expenses required for execution of such Conveyance such as stamp duty, registration charges, etc; shall also be borne and paid by the DEVELOPER alone."*

> *Clause 23 : It is further agreed between the parties hereto that by executing this Agreement, the OWNERS have granted all their rights, in respect of the*

> *aforesaid land in toto to the DEVELOPER has not reserved unto themselves any rights whatsoever nature in the said land and shall not make any claim ever in respect of the same. Except the amounts agreed to be paid as a consideration under this Agreement to the OWNERS*."

53. On reading of clauses 21 to 23 of disputed Agreement, it becomes clear that the plaintiffs have made it clear that they shall not make any claim in respect of suit property except amounts agreed to be paid as consideration, under the Development Agreement. Thus, when the plaintiffs have authorized the defendants to develop suit property and to sell its units, portions etc to the proposed purchasers. As such, if the injunction as prayed will be granted it will be inconvenient for the defendants to develop suit property. Therefore, considering the fact of inconvenience which will be caused to the defendants on allowing this application, I find that balance of convenience lies in favour of the defendants and not in favour of the plaintiffs.

54. Already prayer clause 'w' of the plaint is referred and as per said prayer clause, the plaintiffs have additionally prayed for directions to defendant Nos. 1 and 2 to pay the plaintiffs Rs. 10 crores alongwith interest at the rate of 18% per am thereon till actual realization towards compensation. Therefore, from prayer clause 'w' of the plaint, it becomes clear that the plaintiff's claim can be compensated in terms of money. Therefore, I find that on

rejection of this application, the plaintiffs will not suffer irreparable loss which cannot be compensated in terms of money. As such the plaintiffs have failed in establishing all three essential ingredients for granting temporary injunction as prayed, hence, I find that the plaintiffs cannot have benefit of the case laws cited on behalf of the plaintiffs.

55. For all the above reasons, I find that the plaintiffs are not entitled to relief of temporary injunction as prayed for. Hence, I have recorded my findings against point Nos.1 and 3 in the negative and on point No.2, " balance of convenience lies in favour of the defendants and not in favour of the plaintiffs and I proceed to pass the following order :

ORDER

Temporary injunction application (exh.5) stands rejected.

(K. P. Nandedkar)
Dt. : 28.10.2021 District Judge-2, Pune.

C E R T I F I C A T E

I affirm that the contents of this P.D.F. file judgment are same word for word as per original Judgment.

Name of steno : Smt. M. P. Rahurkar, Stenographer (Grade-I)

Name of the Court : Shri. K.P. Nandedkar, District Judge -2 & Additional Sessions Judge, Pune.

Date of Order : 28.10.2021

Order signed by P.O. on : 08.11.2021

Order PDF & uploaded on : 08.11.2021