

IN THE SPECIAL COURT AT BOMBAY

Constituted under the Special Court [Trial of Offences Relating to Transactions in Securities] Act, 1992

MISCELLANEOUS APPLICATION NO.36 OF 2019

IN

MISCELLANEOUS APPLICATION NO.493 OF 2000

IN

MISCELLANEOUS PETITION NO.35 OF 1998

The Custodian Applicant
V/s.	
1. Harisharan Developers Pvt. Ltd.	
2. Santosh Abhay Narottam	
3. The Asst. Commissioner of Income Tax, Mumbai	
4. Kumudben Lal Sodagar (<i>Since Deceased</i>)	
Through Legal Heirs :	
4(a). Priti Parimal Lal Sodagar	
4(b). Parimal Lal Sodagar	
5. Shivaji Tambe	
6. Baban Ramchandra More	
7. Iccha Kutir Co-op. Housing Society Ltd.	
8. The Court Receiver, High Court, Bombay Respondents

Mr. Gandhar Raikar, i/by Shilpa Bhate & Associates, for the Custodian.

Mr. Piyush Raheja, with Mr. Devanshu Desai, for Respondent Nos.1 and 6.

Mr. B.M. Chatterji, Sr. Advocate, with Ms. Kavita Singh, i/by Mr. Ranit Basu, for Respondent No.3–Income Tax Department.

Mr. Tejas Vora, i/by Ms. Nikita Hinger and Ms. Laxmi Vora, for Respondent Nos.4(a) and 4(b).

CORAM : A.K. MENON, J.
JUDGE, SPECIAL COURT

DATE : 18TH FEBRUARY 2022.

P.C. :

1. The Custodian has filed this application in pursuance of a decree passed on 17th March 1999 in Miscellaneous Petition No.35 of 1998 in favour of Abhay D. Narottam (*since deceased*), who was at the material time notified on 8th June 1992 under the provisions of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (*"The TORTS Act"*). The decree was passed against respondent no.1-Developer. By that decree, the respondent no.1-Developer was directed to pay to the Custodian, for and on behalf of late Abhay Narottam, a sum of Rs.13,01,560/-, along with interest thereon @ 19% p.a. from 31st March 1991 till payment or realization and costs of Rs.10,000/-. The decretal amount was directed to be paid in monthly installments within two years from the date of the decree, commencing from 10th May 1999. Each and every subsequent installment was directed to be paid on or before 10th of each succeeding month. In the event of two defaults, the entire balance due was to become due and payable forthwith and the decree become executable. The amount has not been paid.

2. Respondent no.2 in the present application is the legal heir of late Abhay Narottam. Respondent no.3 is the Assistant Commissioner of Income Tax.

Respondent no.4 was an occupant of Flat No.501, Iccha Kutir, Vayu Devta Mandir Complex, Devidas Road, Borivali (West), Mumbai – 400 103, housed in defendant no.7–a co-operative housing society (*“the said flat”*). Defendant nos.5 and 6 are the directors of respondent no.1–Developer and respondent no.8 is the Court Receiver, High Court, Bombay, who was appointed as Receiver of the said flat.

3. The role of respondent no.3–Income Tax Department was extremely limited but crucial inasmuch as it is respondent no.3, which informed the Custodian of the fact of the assets of late Abhay Narottam and the Custodian had sought assistance of respondent no.3 to identify the assets in aid of execution. Original respondent no.4–Kumudben expired on 19th October 2008 and her estate is now represented by legal heirs being respondent nos.4(a)–Priti and 4(b)–Parimal. They are residing in the said flat.

4. The Custodian seeks other reliefs which are summarized as follows :-

- (a) Disclosure of immovable and movable assets of respondent nos.1, 5 and 6.
- (b) An order against respondent no.7 directing disclosure of the details of occupants of the said flat and outstanding maintenance charges.

- (c) A direction to the legal heirs – respondent nos.4(a) and 4(b) to pay license fees as per market value in respect of the said flat.
- (d) Disclosure of Income Tax Returns of respondent nos.5 and 6, who are directors of respondent no.1-Developer.
- (e) A restraint against the legal heirs of respondent no.4 from dealing with or disposing the said flat.
- (f) Appointment of a Valuer to determine the value and annual market rent of the said flat from 13th June 1995 till date.
- (g) An injunction restraining respondent nos.1, 4, 5 and 6 from dealing with, disposing of or encumbering the said flat.
- (h) A direction to respondent no.8-Court Receiver, High Court, Bombay to implement the order dated 13th February 2002, passed in Miscellaneous Application No.493 of 2000 in Miscellaneous Petition No.35 of 1998, in relation to the said flat by taking physical possession of the attached assets.

- (i) Permission to sell Flat No.501, Iccha Kutir, Vayu Devta Mandir Complex, Devidas Road, Borivali (West), Mumbai-400 103.

5. Thus, numerous reliefs are sought. The application is opposed by respondent nos.4(a) and 4(b). The parties have filed following affidavits :-

- (i) Affidavit-in-reply dated 26th August 2019 filed by respondent no.4(b)-Parimal Lal Sodagar.
- (ii) Affidavit-in-reply dated 16th October 2019 filed on behalf of respondent no.1-Developer by respondent no.6-Baban R. More in his capacity as Director of respondent no.1-Developer.
- (iii) Affidavit dated 24th October 2019 filed by Mr. Chirag B. Doshi in his capacity as Secretary of the respondent no.7-society.
- (iv) Affidavit-in-rejoinder dated 6th November 2019 filed by respondent no.4(b)-Parimal Lal Sodagar to the affidavit-in-reply of respondent no.1-Developer.
- (v) Additional affidavit dated 14th January 2020 filed by respondent no.4(b)-Parimal Lal Sodagar.

- (vi) Affidavit-of-disclosure dated 6th January 2022 filed by respondent no.6-Baban More on behalf of respondent no.1-Developer, as directed by the court vide order dated 10th December 2021.
- (vii) Additional affidavit dated 18th January 2022 filed by respondent no.4(b)-Parimal Lal Sodagar to oppose the present MA.

6. It was made clear, at the outset, by Mr. Vora, learned counsel for respondent no.4(a) that the affidavits filed on behalf of respondent no.4(a)-Parimal Lal Saudagar shall be treated as filed on behalf of respondent nos.4(a) and 4(b) as both of them are representing the estate of original respondent no.4-Kumudben.

7. Mr. Raikar appearing in support has submitted that the said flat is the only asset of respondent no.1-Developer, whether it is known or disclosed, that is capable of attachment and sale. He submits that pursuant to the disclosures made and proceeding on the basis that the disclosures are accurate, the affidavit-in-reply of respondent no.1 dated 16th October 2019 and the other affidavits, all revealed that this is the only asset of the 1st respondent which can be proceeded against. It was the case of the Custodian that the decree being outstanding as on 31st January 2019, a sum of Rs.81,86,562=79 was said to be payable under the decree to the "Custodian A/c.- Late Abhay Narottam".

8. Mr. Raikar submitted that respondent no.1 having failed to comply with the decree is liable to be pay the aforesaid sum and that an affidavit dated 13th February 2002 of respondent no.5-Shivaji Tambe, the director of respondent no.1-Developer, filed in Execution Application No.493 of 2000, disclosed the said flat and offered the said flat towards satisfaction of the decreetal sum. The flat was then occupied by original respondent no.4-Kumudben and is presently occupied by the legal heirs - respondent no.4(a)-Priti and respondent no.4(b)-Parimal. It is contended that the said flat was occupied by late Kumudben without any payment or consideration. Mr. Raikar submitted that the Custodian had earlier filed Miscellaneous Petition No.43 of 1995 (*"MP 43"*) against one Neeldeep Investments Co. Pvt. Ltd., in which Garnishee Notice No.6 of 2003 was filed. Respondent no.5-Shivaji Tambe had filed an affidavit dated 25th January 2006 in Miscellaneous Application No.555 of 2005 in MP 43 of 1995 disclosed that Kumudben was residing in the said flat and she had agreed to purchase the flat from the 1st respondent-Developer, but had failed to pay the full amount. In MP 43, the Custodian was seeking to recover monies due to the notified party - Bhupen C. Dalal from the said Neeldeep Investments Co. Pvt. Ltd., one of his debtors. It transpires that Kumudben had filed an application under Section 23 of the Maharashtra Co-operative Societies Act, 1960 seeking registration of the subject flat in her name and directing the respondent no.7-society to make her a member. The Joint Registrar apparently by an order dated 17th January 2002

had directed necessary changes to be made in the records of the society. The 1st respondent-Developer being aggrieved by the said order, filed a Revision before the Divisional Joint Registrar of Co-operative Societies. The revision was allowed and the order dated 17th January 2002 was set aside, against which respondent no.4(a) – Priti filed a writ petition in this court being Writ Petition No.5934 of 2009. The said writ petition was disposed by an order of 26th October, 2010, setting aside the order of the Divisional Joint Registrar and restoring the Revision Application. Later, before the Divisional Joint Registrar, the 1st respondent not having remain present, the Revision came to be dismissed on 6th April 2011. Respondent no.1 thereafter filed an application for restoration of Revision, which again came to be rejected since respondent no.1 had failed to take steps to file application seeking amendment to bring on record legal heirs of late Kumudben.

9. The flat remained in the possession of the occupants by virtue of orders dated 6th April 2011 and 31st May 2012. The said flat therefore could not be sold though attached. Meanwhile, the decretal amount due under the decree dated 8th June 1995 was recovered by the Custodian from Neeldeep Investments Co. Pvt. Ltd. – the judgment debtor and hence there was no occasion to sell the flat. The Custodian thereafter called upon for the 1st respondent-Developer to pay the decretal amount in terms of the order dated 17th March 1999 passed in Miscellaneous Petition No.35 of 1998. There being no response, reminders were

sent and as a result of non-payment, Miscellaneous Application No.84 of 2016 (“MA 84”) was filed. This MA 84 came to be withdrawn since apparently the Custodian found that substantial amendments were required. MA 84 was therefore allowed to be withdrawn with liberty to apply afresh. This application is filed pursuant to such liberty.

10. Mr. Raikar submitted that on 9th July 2018, the Custodian addressed letters to respondent no.1-Developer and its directors being respondent nos.5 and 6 and separately to the respondent no.7-society seeking information about the flat in question. The letters addressed to the directors had been returned undelivered. Appearance has since been entered by respondent no.1. The society also responded to the Custodian’s letter inter alia informing the Custodian that Kumudben had expired. The subject flat was always in the occupation of respondent no.4(b)-Parimal and his family. Parimal had been paying society’s outgoings from 27th February 2007. Receipts were issued in favour of respondent no.1-Developer and the property continued to be in the name of respondent no.1-Developer. A copy of the share certificate has been provided. According to Mr. Raikar, the society was aware of the occupation of the property and its attachment and has therefore not transferred the shares to any other names. Mr. Raikar submitted that respondent nos.4(a) and 4(b) have no right, title or interest in the property in question and therefore, the property continued to be vesting in respondent no.1-Developer. Mr. Raikar therefore

submits that the reliefs sought may be granted since respondent no.1 has submitted to the orders of the court and has not opposed sale of the said flat. He therefore sought appropriate reliefs.

11. Mr. Raheja appearing for respondent no.1 and 6 submitted to the orders of the court as far as the said flat is concerned. He has pressed into service contents of the various affidavits filed by him. Apart from contending that this application is barred by the law of limitation, he contended that the application is frivolous since the Custodian had already filed Miscellaneous Application No.493 of 2000 for the same reliefs and certain reliefs had been granted in 2002. Yet again, the Custodian filed MA 84 for the very same reliefs, which was once again withdrawn on 28th July 2017. Mr. Raheja therefore submits that the present application is barred by application of doctrine of res judicata. However, without prejudice, it is contended that the said flat is the only asset of the respondent no.1-Developer, which was in the business of construction / redevelopment of the properties, and between 1988 and 1992, it had redeveloped buildings in or around Borivali Taluka. In the course of redevelopment, the original respondent no.4-Kumudben was found to be one of the tenants and had entered into an agreement dated 23rd April 1990, whereunder respondent no.1-Developer agreed to give the said flat on ownership basis with an increase of 110 sq.ft. built-up area, for which Kumudben agreed to pay a sum of Rs.1,60,000/-. Mr. Raheja submitted that the

amount was not paid and therefore the flat was not sold to Kumudben. She however continued to occupy the flat as a licensee without any ownership rights. She had failed and neglected to pay the amounts despite several requests and in the meantime, the decree in the above case was passed requiring the respondent no.1-Developer to pay the decretal amount. The said flat being its only asset, the 1st respondent-Developer is offering the same for sale.

12. Without prejudice to this contention, Mr. Raheja submitted that the Developer does not own any other property in Mumbai or at any other place in India. The shares in respect of the said flat, which have been issued by respondent no.7-society, are standing in the name of the Developer. Later, the Developer had also terminated the license in favour of Kumudben vide letter dated 1st October 2019, which was received by the legal heirs of Kumudben on 4th October 2019. Mr. Raheja therefore submitted to orders of the court in respect of sale of the subject flat and proceeded on the basis that respondent no.5-Shivaji Tambe had no other role to play. The flat in question has already been attached and Mr. Raheja submits that the Custodian may proceed to sell the flat since respondent no.1-Developer has no other means of making payments. Reliance is placed on the Articles of Agreement dated 23rd April 1990 between respondent no.1-Developer and original respondent no.4-Kumud V. Lal Sodagar in support of his contentions. Mr. Raheja also submitted that respondent no.6, being director of respondent no.1-Developer, has disclosed all

Income Tax Returns, as directed, for the Assessment Years 2019-20, 2020-21 and 2021-22 and had also furnished bank statements showing that the company had no transactions and no funds from 2017-18.

13. Respondent no.2-Santosh Abhay Narottam has not appeared in these proceedings. Respondent no.3-Income Tax Department was represented by Mr. Chatterji, learned Sr. Advocate, who has submitted to orders of the court. Respondent no.4(a), as we have seen, has filed four affidavits. Mr. Vora, learned counsel appearing on behalf of respondent nos.4(a) and 4(b) submitted that his clients are victims of circumstances. Mr. Vora submitted that Kumudben was a tenant of the premises, which was subject matter of redevelopment by respondent no.1-Developer. The Developer had agreed to provide a permanent alternate accommodation in the new building to be constructed, namely, the said flat, with an enhanced area of 110 sq.ft. Kumudben was entitled to ownership rights in the said flat on payment of Rs.1,60,000/- towards the additional area.

14. The respondent no.4(b)-Parimal had filed an additional affidavit dated 18th January 2022 to demonstrate that the flat in question does not belong to respondent no.1-Developer. In this affidavit, the deponent relied upon the earlier three affidavits dated 26th August 2019, 6th November 2019 and 14th January 2020. While reiterating the contents, the deponent goes on to state that

the flat has been occupied by him for more than 25 years and it has not been shown as an asset of respondent no.1-Developer.

15. My attention has been invited by Mr. Vora to an Independent Auditor's Report issued by one M.D. Pandya & Associates, Chartered Accountants, who had scrutinized Balance Sheets for the period ended 31st March 2015 and 31st March 2017 and the analysis is to the effect that a sum of Rs.1,28,000/- is shown as Trade Receivable from Kumudben Lal Sodagar in respect of the flat and that the respondent no.1-Developer has taken legal steps for repossession of the said flat. However, it is contended by Mr. Vora, as set out in the affidavit by the deponent, that the Developer has not taken any legal steps to claim ownership of the flat; yet, they now seek to contend that the said flat belongs to them. Auditor's Report for the year ended 31st March 2017 also reiterates that a sum of Rs.1,28,000/-, being "Short Term Loan and Advances", is shown under the "Current Assets" column. On page 56 of that report, once again a Trade Receivable of Rs.1,28,000/- has been reflected. Likewise, for the period 1st April 2017 to 31st March, 2018, the amount of Rs.1,28,000/- is shown as a "Short Term Loan and Advances" under "Current Assets".

16. Thus, on analysis of the aforesaid financial statements, inclusive and upto financial statements for 1st April 2019 to 31st March 2020 and 1st April 2020 to 31st March 2021, the amount of Rs.1,28,000/- continues to be shown as "Short Term Loan and Advances" under "Current Assets". Mr. Vora submitted that on

the basis of this deposition, based on documents, revealed by the Director of the 1st respondent-Developer, it is evident that the Developer has never shown the flat in question as a property of the respondent no.1. The respondent no.1-Developer is therefore not the owner and hence the flat cannot be attached and sold by the Custodian. It is also submitted that the Custodian or the applicant cannot have a right higher than that of respondent no.1-Developer and since the Developer is not the owner of the flat, there is no question of now contending that the flat stands attached and that respondents 4(a) and 4(b) are liable to be deprived of the occupation and ownership of the subject flat. Mr. Vora also submitted that so called termination of the purported license in favour of respondents 4(a) and 4(b) and their predecessors-in-title is dated 1st October 2019 and it is in that letter that the 1st respondent-Developer has, for the first time, contended that the license fees are outstanding for 27 years.

17. Mr. Vora further submits that upon receipt of the notice of termination, the deponent had forwarded a cheque of Rs.1,28,000/- to the respondent no.1-Developer, who had returned the said cheque. Mr. Vora has alluded to unfair conduct of the respondent no.1-Developer and its directors. He submits that considering the so called termination only in 2019, after more than 25 years, and the records of the Developer, it is evident that the Developer has not established that it is the owner of the subject flat and the shares. Mr. Vora would submit that the present stand taken up by the 1st respondent-Developer is belied

by the correspondence, replies and the documents that have been disclosed pursuant to the orders passed by this court. Mr. Vora submits that the attachment is bad in law and the same should be vacated because his clients – respondent nos.4(a) and 4(b) are willing to pay the sum of Rs.1,28,000/-, which is said to be due to the Developer.

18. In that respect and the matter of interest and the computation of amounts due said to have been filed by the Custodian, Mr. Vora has submitted that respondents 4(a) and 4(b) have no obligation to pay the so called license fees since it is clear that a sum of Rs.1,28,000/- was to be paid only towards the additional area that was being purchased. There is no doubt that the disclosures made by respondent no.1-Developer, through its director – Baban More (respondent no.6), vide affidavit dated 6th January 2022, do contain the financial statements that Mr. Vora has referred to and those financial statements disclosed the stand taken by respondent no.1-Developer. However, irrespective of what is disclosed in the financial statements, what the court will now need to consider is, on facts, whether the ownership of the subject flat vests in respondent no.1-Developer or did vest in the original respondent no.4-Kumudben and now upon her demise, in respondents 4(a) and 4(b) and it is in this respect that we have to examine the record and the admitted documentation.

19. In the course of submissions, my attention has been invited to the

affidavit of respondent no.4(b)-Parimal Lal Sodagar dated 26th August 2019. Mr. Vora has relied upon this affidavit and the contents thereof have been reiterated by the deponent in his additional affidavit of 18th January 2022. Exhibit-1 to this affidavit dated 26th August 2019 is a copy of an Agreement for Sale dated 1995 and the date of execution is not immediately evident. It is only the year that is seen. The document is stamped on or about 13th June 1995 with a stamp-duty of Rs.1,600/-. It is signed by the 1st respondent-Harisharan Developers Private Ltd. and original respondent no.4-Kumud V. Lal Sodagar. Analysis of this document, in my view, will be critical for understanding the transaction. The opening recitals indicate that Kumud V. Lal Sodagar was residing in Flat 501 in an Ichha Kutir and is described as purchaser. It evidences the fact that late Kumudben was a monthly tenant in respect of a tenement no.I, admeasuring 360 sq.ft., on the ground floor of a building known as "Matru Chhaya" and that vide an agreement dated 23rd April 1990, between respondent no.1-Developer and Kumudben and one DMD Vayu Devta Temple Trusts, the DMD Vayu Devta Temple Trusts described as "owners and confirming party". The respondent no.1-Developer agreed that it would provide late Kumudben permanent alternate accommodation in a new building to be constructed and pursuant thereto, an agreement of 23rd April 1990 had been executed. In addition to the area of 360 sq.ft. occupied, the Developer agreed to provide an additional area of 110 sq.ft., in consideration of which Kumudben had agreed to pay

Rs.1,60,000/- in installments, as set out in clause 8 of the agreement dated 23rd April 1990. Perusal of clause 8 reveals that the agreement contains usual recitals pertaining to redevelopment of properties and the operative portion, in clause 2, of the Agreement for Sale dated 13th June 1995 records the purchaser's agreement to purchase from respondent no.1-Developer Flat No.501 in the building known as "Ichha Kutir" for the price of Rs.1,60,000/-. The flat thus admeasures 426 sq.ft. carpet area and 470 sq.ft. built-up area. It was agreed that this sum of Rs.1,60,000/- shall be paid within seven days of the Developer giving notice of payment, but it is an admitted position that none of these installments have been paid. The "First Schedule" of the Agreement for Sale also describes the land. The "Second Schedule" describes the other amenities. This Agreement for Sale is seen to be signed by the original respondent no.4-Kumudben Sodagar and Priti and not signed by Parimal and Developer. Thus, it is not in dispute that this Agreement for Sale is yet to be executed in its final form. Needless to state, the Agreement for Sale had not been registered.

20. The record indicates that the 1st respondent-Developer, through respondent no.6-Baban More, Director, has filed an affidavit dated 16th October 2019 contending that the present application filed by the Custodian is barred under the principles of res judicata. After giving a brief history of the transactions relating to the redevelopment of three buildings, including the building presently housing the flat in question, the affidavit reiterates the

provisions of clause 21 of an agreement dated 23rd April 1990 signed between the 1st respondent-Developer and original respondent no.4-Kumudben and sets out the fact that construction of the building was completed in 1992 and the Developer called upon Kumudben to pay the amount of Rs.1,60,000/-. However, Kumudben failed to pay the same. The affidavit also admits of the fact that the Developer has since been directed to pay a sum of Rs.13,01,560/-, with interest thereon from 31st March 1991, to the Custodian on account of late Abhay Narottam. The affidavit reiterates the fact that apart from the Flat No.501, the respondent no.1-Developer does not own any other immovable property in Mumbai or at any other place in India. The flat, it is reiterated, stands in the name of the 1st respondent-Developer and that the Developer had issued a letter of termination to respondents 4(a) and 4(b), as aforesaid.

21. The affidavit also deals with the proceedings filed by Kumudben as also the Custodian's earlier application in the matter of Neeldeep Investments Co. Pvt. Ltd. and the fact that the earlier application was withdrawn and the Custodian did not pursue the matter any further. Interestingly, the contents of the Articles of Agreement dated 23rd April 1990, annexed at Exhibit-A to this affidavit, reveals that Kumudben was indeed recognized as a tenant of the building "Matru Chaya". The tenant accepted Developer's right to develop the property and agreed to handover the tenement for reconstruction, agreed to surrender tenancy rights against being offered temporary alternate

accommodation and also agreed to accept on ownership basis an area of 470 sq.ft., as aforesaid, in the new building to be constructed in consideration of payment of Rs.1,60,000/-. This amount was payable in installments. A sum of Rs.16,000/- had already been paid as on date of that agreement and the balance was Rs.1,44,000/-. It is useful to consider the contents of clause 21 of the Articles of Agreement dated 23rd April 1990, which is reproduced below for ease of reference.

“21. It is further expressly agreed between the TENANT and the DEVELOPERS that in the event that the TENANT has not paid all his dues to the DEVELOPERS as per this agreement and the DEVELOPERS allow further time to the TENANT to make the balance payment and if at the request of the TENANT, the DEVELOPERS permit the TENANT to enter into occupation of the said FLAT, then in that event, the TENANT shall continue to occupy the said FLAT as a mere licensee of the DEVELOPER without any possessory or ownership rights in the said FLAT and that the ownership of the FLAT shall be deemed to be transferred to the TENANT only after all the outstanding payments are made to the DEVELOPERS and the Deed of Transfer of the said FLAT is executed by the DEVELOPERS and the TENANT.”

22. A fair reading of clause 21 reveals that upon failure of the tenant to pay all the dues of the respondent no.1-Developer, the tenant would be continuing to occupy the flat as a mere licensee of the Developer without any possessory or

ownership rights in the flat. Ownership rights of the flat would be deemed to have been transferred to the tenant only after payment of all outstanding amounts and after execution of a Deed of Transfer of the flat in favour of the tenant. This Deed of Transfer has not been executed since Kumudben, as a tenant, did not pay the amounts due. This is an agreement which is seen to be executed by the 1st respondent-Developer through one Manoj G. Mehta, authorized signatory, by the tenant Kumudben Lal Sodagar as also by the owners of the property – DMD Shri Vayu Devta Temple Trusts as confirming party through its trustee – M.B. Dalal. This agreement, unfortunately, has not even been registered and hence the property continued to be in the name of respondent no.1-Developer.

23. To top this, I find that, after formation of the society, the share certificate in respect of the flat in question, evidencing ten shares bearing distinctive numbers 191 to 200, has also been issued to the respondent no.1-Harisharan Developers Pvt. Ltd. The share certificate is issued as late as 4th January 2015. No attempt was ever made in the interregnum by Kumudben to pay the consideration under the said agreement or to have the said agreement registered so as to perfect her rights therein. By operation of the aforesaid clause 21 therefore, Kumudben continued to be a licensee and did not acquire ownership rights. Failure of the said tenant therefore to convert her occupation from that of a tenant to an owner had not fructified. Admittedly, Kumudben and thereafter

her legal heirs have been in default since 1990-92 and it is only on 11th October 2019, that the Advocates for the respondents 4(a) and 4(b), while responding to the notice of termination, sought to deny the allegations of the 1st respondent-Developer and contended that out of a sum of Rs.1,60,000/-, Rs.32,000/- was paid by late Kumudben and the balance of Rs.1,28,000/- was tendered by a cheque dated 18th October 2019 in favour of the 1st respondent-Developer. This appears to have been refused by the Developer and in any case could not have been accepted by the Developer since the property in the meantime stood attached. Surprisingly, the language in the Advocate's response to the notice of termination is relevant.

"However, to cut short the matter, as demanded by you in para-15 of your letter/notice under reply, I am forwarding herewith a cheque for Rs.1,28,000/- for the period of 27 years from 01.04.1992 to 30.09.2019 as per the said agreement as demanded by you being the balance amount due as per Clause 21 of the said Agreement. Please note that the said amount is being sent without prejudice to the rights and conditions of my clients and without prejudice to their right to defend legal proceedings, if any, initiated by you, despite receipt of the said amount."

24. The approach of the legal heirs therefore is that the sum of Rs.1,28,000/- was being paid for the period of 27 years from 1st April 1992 to 30th September 2019 being the date of termination. In fact, while Kumudben continuing as a licensee, upon her demise, the license came to an end and did not enure to the

benefit of the legal heirs – respondents 4(a) or 4(b). In my view, therefore, the respondents 4(a) and 4(b) have made out no case at all for rejection of the application. The property is clearly attached. The shares of the property stand in the name of the 1st respondent-Developer and the respondents 4(a) and 4(b) have no semblance of right vesting in them.

25. The Secretary of the respondent no.7-society has filed an affidavit dated 24th October 2019, in which he confirms that as a Secretary of the society and pursuant to the order passed by this court on 13th September 2019, the society has declared that there is no agreement or any document of sale or deed submitted till date by the occupants of Flat No.501, namely, respondents 4(a) and 4(b). Copy of the share certificate is enclosed and it is confirmed that the maintenance arrears from 2007 payable by the occupants of Flat No.501 is an amount of Rs.4,25,000/-. Legal expenses borne by the society recoverable from the occupants are about Rs.50,000/- and that the present occupants have started paying maintenance bills of the flat only from February, 2007 and have been continuing to pay the same. Thus, even the society's record indicates that the flat continues in the name of the Developer. There are arrears of Rs.4,25,000/-. The society claims costs of Rs.50,000/- towards legal expenses and finally the affidavit reveals that the society has not passed any resolution transferring Flat No.501 to respondent no.4-late Kumudben and the flat presently stands in the name of the 1st respondent-Developer.

26. Thus, taking an overall view, I have no manner of doubt that the shares in respect of the flat in question continue to be owned by the Developer. The present occupants-respondents 4(a) and 4(b) therefore continue to occupy the premises as licensees in view of clause 21 of the Articles of Agreement dated 23rd April 1990.

27. In the course of submissions made before me, Mr. Vora was at pains to submit that the present respondents 4(a) and 4(b) are being “harassed” by the Custodian. They are sought to be deprived of their property for no fault of theirs and hence, a lenient view should be taken in the facts of the case. However, the facts as revealed from the documents before me and the affidavits filed, are clear evidence of the fact that the respondents 4(a) and 4(b) did not acquire any right of ownership. They continue to be the legal heirs of a licensee, whose license stood terminated. Their conduct also does not augur well for them to contend that they are owners. There has been abject failure to pay the consideration under the agreement between respondent no.1-Developer and their predecessor-in-title Kumudben Lal Sodagar and in this view of the matter, I am afraid, there is no occasion to show any special consideration for the occupants to have exploited the fact that they were put in possession of the premises and that today they are in arrears of the society dues, apart from being continuing in possession as occupants since 1992.

28. In the course of submissions, Mr. Raikar had, with the leave of the court, obtained a valuation of the premises. That valuation has been placed before the court and the valuation so filed reveals that, even assuming that respondents 4(a) and 4(b) have to continue as occupants, the license fees at market rates that could have been recovered in respect of the flat in occupation of respondents 4(a) and 4(b) is to the tune of Rs.24,83,408/- upto 1st April 2021. Mr. Raikar submitted that as far as the Custodian is concerned, since he is only concerned with recovery of the decretal amount, the decretal amount had today mounted to Rs.89,44,035=05 and that the said amount would have been paid by the respondents 4(a) and 4(b), the flat could have been released from attachment. This however has not been complied with by Mr. Vora's clients and in these circumstances, I am constrained to observe that no case whatsoever has been made out by respondents 4(a) and 4(b) for being shown any special consideration or for granting any further time.

29. In these circumstances, the Custodian's application seeking execution of the decree would necessarily entail the flat being sold under the directions of the court and considering the amendments to the application, I am of the view that the Custodian should be permitted to sell the flat and for that purposes, the Custodian has rightly sought assistance from this court by appointing the Valuer and by seeking appointment of the Court Receiver to take possession of the flat in terms of order dated 13th February 2002 passed in Miscellaneous Application

No.493 of 2000 and the disclosures made by the 1st respondent-Developer. Respondents 4(a) and 4(b) have also been called upon to pay the license fees as per market rate corresponding to the flat in view of the valuation, so as to give an opportunity to them to come clean and pay the amounts due as on date. Computation of the said amounts of license fees has already been shared with the parties by the Custodian during the hearing.

30. On 24th September 2021, this court allowed Miscellaneous Application No.36 of 2019 in terms of prayer clauses E1 and E3, which read as follows :-

“E1. Pending the final hearing and disposal of the present application, an appropriate valuer be appointed to determine as on date value and annual market rent from the period commencing from 13.06.1995 to till date of the said Flat No.501, Icchakutir Co-op. Housing Society, Vayu Devta Mandir Complex, Devidas Road, Borivali (W), Mumbai 400103 and for this purpose, the Respondent No.4(a), (b) and 7 be directed to co-operate with the valuer and give all such information and access to the premises, if necessary.

E3. Pending the hearing and final disposal of the application, the Respondent Nos.4(a) & 4(b) be directed to pay and/or deposit the license fees as per the market value for corresponding each year after conducting the appropriate valuation and assessing the fair market rent for all the years post the late Kumudben Lal Saudagar entering into the said premises.”

31. The Custodian was also allowed to appoint a Valuer from the Panel of Valuers and the respondent no.7-society has been directed to co-operate and provide all records to the Valuer, including Building Plan. Access to the flat in question was ordered to be given if the Valuer sought inspection. Pursuant to that order, valuation has been completed and the Valuer has arrived at a valuation on the basis of fair market value. On 26th November 2021, I directed the registry to provide copies of the Valuation Report to the respondent no.1-Custodian and the applicant-Parimal Lal Sodagar in Miscellaneous Application No.27 of 2021 i.e. respondent nos.4(a) and 4(b) in the present MA. It is thereafter that on 10th December 2021, the court ordered disclosure of all assets by the director of respondent no.1-Developer and the affidavit-of-disclosure has since been filed.

32. I have heard parties on all these aspects thereafter. There has been no opposition to the Valuation Report. I have since perused the Valuation Report in respect of valuation carried out by S.D. Thakare, Architects, Consultants & Valuers, who have completed valuation on 6th October 2021 on the basis of built-up area of 577 sq.ft. The location of the property has been confirmed on the basis of saleable area of 577 sq.ft., built-up area being 494.40 sq.ft. and carpet area being 412 sq.ft., and the fair market value has been disclosed @ Rs.95,21,000/-. The Valuer's Report contains valuation carried out after inspection and relevant photographs have also been taken. The Custodian has,

in the meanwhile, on the basis of valuation, computed the license fees payable. The Custodian has since found the license fees that the premises would command and has computed the same @ Rs.24,83,408/- upto 1st April 2021. The Valuer has also computed, at the request of the Custodian, the annual market value of the premises from 1992 to 2021 based on fair market value and built-up area of 577 sq.ft. As per that, the amount of rent overdue as of April, 2021 would be in excess of Rs.24,83,408/-. Mr. Raikar therefore submitted that even assuming that the respondent no.4(b) was allowed to occupy the flat, he would have been obliged to pay the license fees, which amounts to Rs.24,83,408/- as of 1st April 2021. It is in this background that Mr. Raikar has urged this court to grant the reliefs sought. In view of the fact that Kumudben expired, the license came to an end. Assuming the respondents 4(a) and 4(b) were to be treated as licensees, they would be liable to pay Rs.24,83,408/- at the very least as license fees. The respondents 4(a) and 4(b) have not shown any inclination to pay over the value of the flat or pay any amount higher than Rs.1,28,000/-, which they had offered to pay to the respondent no.1. Thus, it is evident that the Custodian is now entitled to proceed to have the said flat and shares sold and accordingly, I pass the following order :-

Miscellaneous Application is made absolute in terms of prayer clauses (A1) and (A2) with the following modifications :-

- (i) Court Receiver to take symbolic possession of the Flat No.501, Iccha Kutir, Vayu Devta Mandir Complex, Devidas Road, Borivali (West), Mumbai – 400 103 in respondent no.7-Iccha Kutir Co-op. Housing Society Ltd. and shares evidenced by Share Certificate No.018/14-15 issued on 4th January 2015 evidencing 10 shares bearing distinctive numbers 191 to 200 from the Iccha Kutir Co-op. Housing Society Ltd. Court Receiver to affix the board outside the flat and on the name board of the society.
- (ii) Respondent no.7-Iccha Kutir Co-op. Housing Society Ltd.is directed to handover original share certificate to the Court Receiver's representative. The society shall make note of the appointment of the Court Receiver pursuant to this order.
- (iii) Upon the original share certificate being received, the Court Receiver shall handover the same to the Custodian and thereafter make a report to the court.
- (iv) Court Receiver shall not at first instance dispossess the occupants in the flat but shall await further orders of this court. Meanwhile, the occupants in the flat are at liberty

to deposit the entire decretal amount with the Custodian within four weeks of the date of this order.

(v) Miscellaneous Application is disposed in the above terms.

33. At this stage, Mr. Vora on behalf of respondent nos.4(a) and 4(b) applies for stay of operation of this order. The order shall remain stayed for a period of eight weeks from today.

[A.K. MENON, J.]