APPEAL FROM ORDER

Before the Hon'ble Mr. Justice C. L. Soni

ANAL APARTMENTS CO-OP. HOUSING SOCIETY LTD. & ANR. v. M/S. KUSHAGRA DEVELOPERS, PARTNERSHIP FIRM & ORS.*

(A) Civil Procedure Code, 1908 (5 of 1908) — Order 39, Rules 1 & 2 — Specific Relief Act, 1963 (47 of 1963) — Gujarat Co-operative Societies Act, 1961 (10 of 1962) — Interim injunction — Housing Society entered into re-development agreement with defendant to construct new flats in place of old flats — Defendant committing breach of contract — Society terminating agreement with defendant and entering into similar agreement with another developer — Defendant filing suit for specific performance — Society filing suit for declaration and injunction to restrain defendant from obstructing re-development by another developer — Considering that defendant has committed breach of contract — Defendant has also prayed for damages in their suit — Plaintiff has got a strong '*prima facie*' case — Balance of convenience is in favour of plaintiff — Held, filing or pending of suit for specific performance by defendant no ground to decline relief of interim injunction to plaintiff — The Court granting interim injunction with conditions to protect interest of defendant — Order by trial Court, reversed.

(એ) દીવાની કાર્યવાહી સંહિતા, ૧૯૦૮ — આદેશ ૩૯, નિયમ ૧ અને ૨ — નિર્દિષ્ટ રાહત અધિનિયમ, ૧૯૬૩ — ગુજરાત સહકારી મંડળી અધિનિયમ, ૧૯૬૧ — વચગાળાનો મનાઈહુકમ — નિવાસી મંડળીએ જૂના ફ્લેટને બદલે નવા ફ્લેટ પુનઃબાંધવા માટે પ્રતિવાદી સાથે પુનઃબાંધકામ માટે કરાર કર્યો — પ્રતિવાદીએ કરારનો ભંગ કર્યો — મંડળીએ પ્રતિવાદી સાથેનો કરાર રદ કરી બીજા બાંધનાર સાથે તે જ પ્રકારનો કરાર કર્યો — પ્રતિવાદીએ નિર્દિષ્ટ વચનપાલન બાબત દાવો દાખલ કર્યો — મંડળીએ પણ બીજા બાંધકામ કરનારને પ્રતિવાદી તરફથી પુનઃબાંધકામમાં રૂકાવટ ન કરવા બાબત મનાઈહુકમ આપવા વળતો દાવો કર્યો — પ્રતિવાદીએ કરારનો ભંગ કર્યો છે એવું પ્રતિપાદિત થયું — પ્રતિવાદીએ પણ તેણે કરેલા દાવાના નુકસાન બદલ અરજી કરી — વાદી (મંડળી)નો દાવો પ્રથમદર્શનીય રીતે 'મજબૂત' છે — સગવડની સમતુલા વાદીની તરફેણ કરે છે — ઠરાવ્યા મુજબ દાવો દાખલ અથવા તો પડતર હોવાથી સગવડની સમતુલા માટેનું પ્રતિવાદીનું કારણ વાદીને વચગાળાનો મનાઈહુકમની રાહત આપવાનું નકારી ન શકે — અદાલતે પણ પ્રતિવાદીનું હિત જળવાઈ રહે તે શરતે વચગાળાનો મનાઈહુકમ મંજૂર કર્યો — નીચલી અદાલતના હુકમને ઉલટાવી નાંખવામાં આવ્યો.

Learned Senior Advocate for the petitioners referred to the letters written by the defendant to the office-bearers of plaintiff-Society, to demonstrate that the defendant had shown clear disinclination and refused to perform its part of

*Decided on 26-9-2018. Appeal From Order No. 34 of 2017 with Civil Appli. No. 1 of 2017 and Civil Appli. No. 1 of 2018, challenging order dated 19-12-2016 passed by Chamber Judge Court No. 21, City Civil Court, Ahmedabad in Civil Suit No. 1644 of 2016.

the contract, it is not in dispute that the defendant has not given bank-guarantee. (Para 13)

Reading the agreement with Clause 21 of the sale-deed, it *prima facie* appears to the Court that the sale-deeds executed for 15 flats in favour of the defendant were primarily for the purpose of and to achieve completion of the re-development scheme of the plaintiff-Society. Thus, conveyance of rights in 15 flats by sale-deeds does not appear to be independent, but *prima facie* appears to be linked with and only for implementing and executing the re-development scheme. When, such appears to be the purpose concerning the agreement, and when the agreement is terminated on the ground that the defendant failed to perform as per the agreement and committed breach of the terms of the agreement, the defendant could not obstruct re-development of the flats for the plaintiff-Society by another developer on the ground that it has proprietary right in 15 flats and without its consent the plaintiff-Society cannot go ahead with its re-development scheme. The Court finds that even if the defendant is taken to have acquired proprietary rights in 15 flats, the defendant shall have no super rights than available to other members of the plaintiff-Society, and therefore, decision of the plaintiff-Society for implementing its re-development scheme should prevail. When purchase of 15 flats by the defendant would not put the defendant on higher pedestrian than the original members as regards their rights against the plaintiff-Society, the contention raised by Senior Advocate for the respondent that the plaintiff-Society cannot go for re-development scheme till final decree for handing over of possession of 15 flats is passed in the present suit is without substance and cannot be accepted. (Para 30)

In the suit for specific performance, the defendant has also asked for awarding damages. Neither pendency nor the maintainability of the suit filed for specific performance of contract would make the plaintiff-Society disentitled to grant of interim injunction if is found that in the facts of the present case, the plaintiff-Society has made out strong *prima facie* case for grant of interim injunction prayed by it. The Court finds that if interim injunction, as prayed for by the plaintiff-Society is granted, it would not result into granting the final relief prayed in the present suit. The Court also finds that on considering the pleading and the prayers of the present suit with the agreement as it is, the question of grant of interim injunction could be considered without taking evidence and by protecting the interest of the defendant. (Para 32)

Considering the time-gap of five years passed after execution of the agreement, the dilapidated condition of old flats, the need for re-development of the flats for the members of the plaintiff-Society, who have been for long time residing elsewhere in rented premises as stated before the Court, the Court finds that plaintiff-Society could be granted interim injunction as prayed for by protecting the right and interest of the defendant in 15 flats and without prejudice to its rights and contentions in both the suits. The plaintiff-Society has seen through the letters written by the defendant that defendant could no longer be relied for re-development work by continuing the agreement with it. The Court finds that in the facts of the case and scenario emerging in connection with

the agreement for re-development scheme of the plaintiff-Society, the plaintiff-Society could be said to have made out strong *prima facie* case for grant of interim injunction as prayed for in the application. Such strong *prima facie* case, as appears to the Court, has woven in it the balance of convenience in favour of the plaintiff-Society and injury to be suffered by the members of the plaintiff-Society on the above facts, if the interim injunction is not granted. (Para 33)

(B) Civil Procedure Code, 1908 (5 of 1908) — Order 39, Rules 1 & 2 — Interim injunction of mandatory nature — Held, where facts are eloquent, no detailed analysis of evidence required — Pleadings and documents on record sufficient for grant of injunction of mandatory nature — When opposite party could be compensated in terms of money, balance of convenience is in favour of party seeking such relief — The Court can grant interim injunction of mandatory nature with conditions to protect interest of opposite party.

(બી) દીવાની કાર્યવાહી સંહિતા, ૧૯૦૮ — આદેશ ૩૯, નિયમ ૧ અને ૨ — આદેશાત્મક સ્વરૂપનો વચગાળાનો મનાઈહુકમ — ઠરાવવામાં આવ્યું કે, હકીકતો જ છટાદાર સ્વરૂપની હોય, ત્યારે પુરાવાની પૃથક્કરણ કરતી વિગતોની જરૂરત રહેતી નથી — નોંધમાં નોંધાયેલા દસ્તાવેજો તથા પક્ષ નિવેદનોની વિગતો, આદેશાત્મક વચગાળાનો મનાઈહુકમ આપવા પૂરતી છે — જ્યારે સામો પક્ષ પૈસાની બાબતમાં વળતર મેળવે ત્યારે સગવડની સમતુલા રાહત માંગતા પક્ષની તરફેણ કરે છે — અદાલત આદેશાત્મક સ્વરૂપનો મનાઈહુકમ મંજૂર કરી શકે એવી શરતે કે સામાપક્ષનું હિત જોખમાય નહીં.

It is not that the Court cannot grant injunction of mandatory nature pending the suit even when the facts of the case call for grant of such relief. When the facts are eloquent and no detailed analysis of the evidence is required and the pleadings and documents on record are sufficient for the purpose of considering the question for grant of injunction of mandatory nature to prevent the sufferance of a party asking for mandatory injunction and when the opposite party could be compensated in terms of money for the loss if found suffered by such party at the end of the trial, the Court may grant injunction of mandatory nature with certain conditions to secure the interest of opposite party on finding that the party asking for such injunction has made out strong *prima facie* case and the aspects of balance of convenience and irreparable loss are also in favour of such party. The present is such case as stated above. (Para 36)

(C) Civil Procedure Code, 1908 (5 of 1908) — Order 39, Rules 1 & 2 — Gujarat Co-operative Societies Act, 1961 (10 of 1962) — Membership of Housing Society — Defendant purchased rights, title and interest of 15 flats from members who wanted to leave Society — Bye-laws of Society providing that person becoming member of Society not entitled to hold more than one unit/flat in Society — Held, defendant could not acquire membership rights in connection with all 15 flats — Defendant had no say in plaintiff-Society taking a decision with its majority members to enter into re-development agreement with another developer.

(સી) દીવાની કાર્યવાહી સંહિતા, ૧૯૦૮ — આદેશ ૩૯, નિયમ ૧ અને ૨ — ગુજરાત સહકારી મંડળી અધિનિયમ, ૧૯૬૧ — નિવાસી મંડળીનું સભ્યપદ — પ્રતિવાદીએ ૧૫ સભ્યોના ફ્લેટ જેઓ મંડળીમાંથી અલગ થવા માંગતા હતા તેમના હક્કો, સ્વત્વાધિકાર તથા હિત ખરીદી લીધાં હતાં — મંડળીના પેટા-કાયદાઓ એવી જોગવાઈ કરતાં હતાં કે, મંડળીના સભ્ય થનાર દરેક મંડળીનો એક થી વધારે ફ્લેટ/એકમ ઉપર સ્વત્વાધિકાર ભોગવશે નહિ — ઠરાવવામાં આવ્યું કે, પ્રતિવાદી ૧૫ ફ્લેટના એકસામટા સભ્યપદ ધરાવી શકે નહીં — પ્રતિવાદી, મંડળીના બહુમતી સભ્યોએ લીધેલા બીજા બાંધકામ કરનાર સાથે કરેલ કરાર બાબતમાં વાદી-મંડળીને કાંઈપણ કહેવાનો અધિકારી નથી.

The Court finds that the plaintiff-Society, which is housing Society, has made provision in its bye-laws that the person becoming member of the Society is not entitled to hold more than one unit/flat in the Society. It is required to note at this stage, that the defendant has remained unsuccessful before the Registrar of Co-operative Societies as also before the State Government in the revision application it *prima facie* appears to the Court that in view of the provision made in the bye-laws for individual membership of the Society against allotment of single unit of residence/flat in the plaintiff-Society and having regard to the purpose for which the agreement was entered into between the parties, the defendant could not be said to have acquired membership rights in connection with all 15 flats purchased by it from 15 members of the society. Therefore, the defendant had no say in plaintiff-Society taking decision with its majority members to enter into new re-development agreement with another developer. (Para 27)

***Cases Relied on* :**

(1) *M/s. Best Sellers Retail (India) Pvt. Ltd. v. M/s. Aditya Birla Nuvo Ltd.,* AIR 2012 SC 2448 : 2012 (6) SCC 792

(2) *Mohd. Mehtab Khan v. Khushnuma Ibrahim Khan,* 2013 (9) SCC 221

(3) *Zoroastrian Co-operative Housing Society Ltd. v. District Registrar, Co-operative Societies (Urban),* 2005 (2) GLR 1530 (SC) : 2005 (5) SCC 632

***Cases Referred to* :**

(1) *Union of India v. Modiluft Ltd.*, 2003 (6) SCC 65

(2) *Orissa Manganese and Minerals Ltd. v. Synergy Ispat Pvt. Ltd.*, 2014 (16) SCC 654

(3) *State of Uttar Pradesh v. Sandeep Kumar Balmiki*, 2009 (17) SCC 555

(4) *Mehul Mahendra Thakkar v. Meena Mehul Thakkar*, 2009 (14) SCC 48

(5) *State of U.P. v. Ram Sukhi Devi*, 2005 (9) SCC 733

(6) *Dorab Cawasji Warden v. Coomi Sorab Warden*, 1990 (2) SCC 117

(7) *Hill Properties Ltd. v. Union Bank of India*, 2014 (1) SCC 635

(8) Civil Appeal No. 17321 of 2017 decided by S.C.

(9) Civil Appeal No. 7079 of 2018 decided by S.C.

(10) *Sahara India Commercial Corporation Ltd. v. B. Jeejeebhoy Vakharia & Associates,* 2007 (4) Bom. CR 65

K. S. Nanavati, Senior Advocate with *Priyal Parekh* for Nanavati Associates, for Petitioner Nos. 1 and 2.

Deven Parikh, Senior Advocate with *S. N. Thakkar*, for Respondent Nos. 1, 2, 3, 4 and 5.

C. L. SONI, J. Arguments were heard for final disposal of the appeal.

2. The appeal is filed under Order 43 of the Civil Procedure Code, 1908 ('the Code') against the order dated 19-12-2016 passed by learned Chamber Judge, Court No. 21, City Civil Court, Ahmedabad below application Exh. 7 with notice of motion Exh. 6 in Civil Suit No. 1644 of 2016, whereby learned Judge has rejected the notice of motion taken out by the appellant. The appellant is the original plaintiff and the respondent is the original defendant in the suit. For the sake of convenience, they shall be referred as per their original status in the suit.

3. The plaintiff-Society has filed the above suit (to be referred as 'the present suit') with following prayers :

(A) be pleased to declare that in the facts and circumstances stated in the plaint and as per the explicit provisions of the Gujarat Co-operative Housing Society Act, since the primary ownership of suit properties mentioned in Para 3 of the plaint is of plaintiff-Society and defendant has purchased possessory rights from the members on the basis of disputed documents only for the purpose of re-development of the plaintiff-Society, the defendant cannot acquire any right or title pertaining to suit properties against the plaintiff-Society based on the disputed documents.

(B) be pleased to declare that in the facts and circumstances stated in the plaint and as per the explicit provisions of the Gujarat Co-operative Housing Society Act, since primary ownership of suit properties mentioned in the Para 3 of the plaint is of plaintiff-Society, and since the defendant made disputed documents for purchase of rights in connection with development agreement dated 21-3-2013 with the plaintiff-Society only for the purpose of redevelopment of the Society, which the plaintiff-Society canceled due to default of defendant, the disputed documents created in connection with agreement are null and void; and after such declaration, be pleaded to pass appropriate decree and order against the defendant to accept Rs. 7,32,60,000/-, paid by it on the basis of disputed documents, from the plaintiff-Society, and execute documents for re-transfer of possessory rights to the plaintiff-Society. :

: *In the alternative* :

(B) If pursuant to the decree and order of the Court, the defendant does not execute the documents for retransfer of possessory rights acquired by it by disputed documents or commits default or delay in

executing such documents, be pleased to appoint Court Commissioner and on plaintiff depositing Rs. 7,32,60,000/- in the Court, the Commissioner be ordered to execute documents for retransfer of possessory rights in favour of plaintiff-Society.

(C) Considering the facts and circumstances stated in the plaint and since the suit land is of the ownership of the plaintiff-Society which the plaintiff-Society is entitled to develop in the interest of the members of the Society and since the main object of the Society is of making construction for residential purpose for the benefit of the members, be pleased to permanently restrain the defendant or its servants, agents, assignees, attorneys *etc.*, from causing any obstruction in carrying out the work of re-development in connection with construction existing on the suit land; from causing any obstruction or interference in removing or demolishing the construction from the suit land for the re-development purpose of the Society; from entering into the suit land; from executing any deed, agreement, contracts or documents with any third party or internally in respect of the suit properties on the basis of the disputed documents; from creating any third party interest in the suit properties and from creating any mortgage, encumbrance, right, claim, *lien* or charge in favour of any person or institution in any manner in the suit properties on the basis of the disputed documents.

(D) - - - - - - - - - - - - - - - - - -

(E) - (Translation supplied)

4. As averred in the plaint of the present suit, the plaintiff is a Registered Co-operative Housing Society and the defendant is a partnership firm. The plaintiff-Society entered into re-development agreement dated 21-3-2013 (to be referred as 'the agreement') with the defendant for re-development of the properties the flats of the plaintiff-Society which were constructed in 1970-1971 and now very old and in dilapidated and dangerous condition. It is alleged that as part of the pre-planned conspiracy, the defendant indulged in acts of cheating and breach of trust with the plaintiff-Society and committed breach of terms and conditions of the agreement, and therefore, the plaintiff-Society terminated the agreement and entered into new re-development agreement with another developer, named Shri Ram Infrastructure, but since the defendant has by all means decided to obstruct and has indulged into unauthorized acts of interfering with the re-development scheme of the society, the suit is filed to prevent it from causing any interference in the re-development scheme of the society. The defendant has filed written statement denying all allegations made against it and stating that the agreement is in force as on to-day. It is denied by the defendant that the 15 flats were sold to it only for the purpose of re-development of the

construction/flats of the plaintiff-Society. It is stated that by purchase of 15 flats, the defendant has become owner of 15 flats as per Transfer of Properties Act. It further stated that since the agreement is not terminated as permissible in law, the defendant is entitled to ask for enforcement of the agreement, for which it has filed suit for specific performance of contract, and that the decision of the plaintiff-Society to enter into new re-development agreement and new re-development entered into with another developer are illegal.

5. Before the plaintiff-Society filed the present suit, the defendant filed Civil Suit No. 1323 of 2014 against the plaintiff-Society, its office-bearers and the members of the Society seeking specific performance of the agreement and for awarding Rs. 2,09,10,200/- as damages with interest at the rate of 18% from the date of filing the suit till it is decided.

6. In its suit for specific performance of the agreement, the defendant filed application Exh. 5 seeking interim injunction restraining the plaintiff-society from handing over possession and selling of its flats, from making any agreement or writing with anybody for the purpose of construction on its property, and from letting out, assigning or in any manner creating any third party interest therein till the suit is decided. However, such application was rejected by learned Chamber Judge, Court No. 10, City Civil Court, Ahmedabad. The Appeal From Order No. 485 of 2014 filed by the defendant against rejection of its application is also dismissed by this Court.

7. After dismissal of above Appeal From Order, the plaintiff-Society entered into new re-development agreement with Shri Ram Infrastructure on 18-8-2015 and then filed the present suit, wherein it filed application Exh. 7 for interim injunction in following words :

> (A) Considering the facts and circumstances stated in the plaint and since the suit land is of the ownership of the plaintiff-Society which the plaintiff-Society is entitled to develop in the interest of the members of the Society and since the main object of the Society is of making construction for residential purpose for the benefit of the members, be pleased to grant interim injunction to restrain the defendant or its servants, agents, assignees, attorneys *etc.*, from causing any obstruction in carrying out the work of re-development in connection with construction existing on the suit land; from causing any obstruction or interference in removing or demolishing the construction from the suit land for the re-development purpose of the society; from entering into the suit land; from executing any deed, agreement, contracts or documents with any third party or internally in respect of the suit properties on the basis of the disputed documents; from creating any third party interest in the suit properties and from creating any mortgage, encumbrance, right, claim, *lien* or

charge in favour of any person or institution in any manner in the suit properties on the basis of the disputed documents till the suit is finally decided.

(B) Taking into consideration the facts and circumstances stated in the application and for the re-development scheme formulated during the year 2011/2012 in connection with the land under the ownership of the plaintiff-Society as mentioned in Para No. 3 of the application with construction made thereon, the present 18 members of the plaintiff-Society have to suffer mental, social, financial and physical loss and are deprived of their basic and constitutional rights due to default of the defendant who is having only symbolic possession of such properties as mentioned in detail in the application; and in the interest of the members of the Society and for overall development and looking to the object of the plaintiff-Society for residential purpose, the Hon'ble Court may be pleased to order to take security/undertaking from the plaintiff-Society to secure and preserve the rights of the defendant as per the disputed documents and appoint the Court commissioner for peaceful handing over of possession of the suit properties by the plaintiff-Society to the new developer for starting the redevelopment activities of the plaintiff-Society and restrain the defendant from causing any obstruction, hindrance or interference in plaintiff-Society handing over peaceful, vacant and actual possession of the suit properties to the new developer for redevelopment work of the plaintiff-Society by issuing mandatory injunction against the defendant.

(C) - - - - - - - - - - - - - - - - -- -- -

(D) - (Translation supplied)

8. Learned Judge rejected the above application with notice of motion by the impugned order mainly on the reasoning that whether the suit filed by the defendant for specific performance of the contract is maintainable or not, cannot be decided at this stage; that the plaintiff society has also moved Chamber Summons with identical relief in the suit of the defendant which is pending before the Commercial Court and that as per the provisions of the Co-operative Societies Act, whether the resolution passed by the Society with only 17 members for cancellation of the M.o.U. the agreement with the defendant could be said to be proper and legal when the defendant has purchased 15 flats of other members with ownership rights by registered sale-deed, is required to be decided after taking evidence in the present suit.

9. Learned Senior Advocate Mr. K. S. Nanavati appearing for Nanavati Associates, Advocates for the plaintiff submitted that as required under the terms and conditions of the agreement, the defendant was to complete

construction of new flats for the members of the Society within prescribed time-limit, was to give bank-guarantee of Rs. 2 crore and to make payment of Rs. 15,000/- per month for each of 17 members of the Society as rent till the construction of new flats was over. Mr. Nanavati submitted that the defendant committed breach of almost all the terms and conditions of the agreement and refused to act as per the agreement, and therefore, the plaintiff-Society terminated the agreement and decided to enter into new re-development agreement with another developer in the interest of the members of the Society. Mr. Nanavati has taken the Court to various communications/ letters written by the defendant to the office-bearers of the plaintiff-Society in connection with the agreement to submit that the defendant never intended to act as per the agreement but in fact tried to impose upon the plaintiff-Society new terms and conditions in connection with the re-development project of the plaintiff-Society which amounted to making new agreement. Mr. Nanavati submitted that since the defendant committed breach of the agreement, it is not entitled to specific performance of the contract and cannot obstruct and interfere with the re-development project of the plaintiff-Society. Mr. Nanavati submitted that under the Gujarat Co-operative Societies Act, the members of the society have no independent rights, as their rights merge in the society and they will be bound by the decision of the Society. He submitted that as per the bye-laws of the plaintiff-Society, the plaintiff-Society is the owner of the land and the flats and the members are only permitted to hold the flats as allottees and share-holders without any proprietary right therein. He submitted that execution of the sale-deeds by 15 members of the society with the defendant was in furtherance of and part of the agreement for re-development scheme of the society, and therefore, purchase of 15 old flats by the defendant has neither conferred any proprietary right nor any membership rights in favour of the defendant in 15 flats. Mr. Nanavati submitted that since the defendant is not eligible to be the member of the Society under the bye-laws of the Society, and therefore, could not claim any membership rights for 15 old flats, it shall have no right to cause obstruction or interference in the re-development scheme of the Society on the ground that since it has purchased 15 flats, the plaintiff-society could not decide and enter into new re-development agreement with another developer without its consent. Mr. Nanavati submitted that since the plaintiff-Society has terminated the agreement with the defendant and when there was no prohibitory order against the plaintiff-Society not enter in to new re-development agreement, it was always open to the plaintiff-Society to enter into new re-development agreement for the benefit of the members of the Society. Mr. Nanavati submitted that learned Judge has refused to grant interim injunction by taking perverse approach to the facts of the case and the principles of law applicable to the facts

of the case, and therefore, the impugned order is required to be interfered with by this Court.

10. Learned Senior Advocate Mr. Deven Parikh appearing with learned Advocate Mr. S. N. Thakkar for the defendant submitted that the agreement called as M.o.U between the parties is binding to the plaintiff-Society and the defendant stands by it and is ready to act and perform as per the agreement as it is, and therefore, there is no question of allowing any other developer to re-develop the old flats of the plaintiff-Society. Mr. Parikh submitted that some exchange of communications/letters between the parties would not take away the very pith and substance of the agreement whereunder the plaintiff-Society agreed to transfer full rights in 15 flats to the defendant, and therefore, there is no justification to deny enforcement of the agreement by referring to some letters alleged to have been written by the defendant. Mr. Parikh submitted that when the plaintiff-Society agreed for purchase of 15 flats by the defendant and when the defendant has purchased all rights in such flats, by paying full consideration under the registered sale-deed, it does not *lie* in the mouth of the plaintiff-Society to say that the defendant has no proprietery right in 15 flats and that it cannot object to re-development of old flats by another developer. Mr. Parikh submitted that the plaintiff-Society, having withdrawn its application filed by it in the suit of the defendant, cannot ask for similar interim relief in the present suit. Mr. Parikh submitted that learned Judge having considered the pendency of the suit filed by the defendant for specific performance of the contract, has rightly refused to grant interim injunction to the plaintiff-Society, as grant of interim relief as prayed for by the plaintiff-Society in the present suit would render the suit of the defendant infructuous and would, at the same time, amount to allowing the present suit of the plaintiff-Society. He submitted that the agreement takes care of all the eventualities and there is no grey area and when the defendant wants to act strictly as per the agreement, the rights of the defendant could not be defeated just because the plaintiff-Society has entered into new re-development agreement with another developer. Mr. Parikh submitted that there was understanding reached between the parties not only for extension of time for completing the construction of the new flats but also for relaxing condition to give bank guarantee, and therefore, on alleged breach of such terms, the plaintiff-Society could not be made entitled to grant of interim injunction of mandatory nature. Mr. Parikh submitted that simply because the plaintiff-Society is getting better deal with another developer is no justification for it to resile from the agreement. Mr. Parikh submitted that the plaintiff-Society not only agreed for purchase of 15 flats by the defendant but also stood in support of the defendant to get exemption from the Registrar of the Co-operative Societies and also to take the defendant as member of the society, and therefore, it is now not

open to the plaintiff-Society to raise any issue as regards non-eligibility of the defendant to be its member. Mr. Parikh submitted that the real issue is, whether the defendant is entitled to enforcement of the agreement and to take further steps for re-development of the flats for the members of the Society and not whether the defendant is eligible to be a member of the plaintiff society, and therefore, irrespective of the eligibility of the defendant to become member of the plaintiff-Society, the right of the defendant for enforcement of the agreement shall be required to be decided. Mr. Parikh submitted that the resolution passed by the plaintiff-Society taking decision to terminate the agreement with the defendant and to enter into new re-development agreement with another developer is illegal as it was passed with only 17 members without consent of the defendant and based on such illegal decision of the plaintiff-Society, the plaintiff-Society could not be permitted to go for re-development scheme by another developer. Mr. Parikh submitted that when the defendant has got proprietary rights in 15 flats after it purchased such flats from the members of the society with consent of the plaintiff-Society, no fresh re-development agreement could have taken place with another developer without consent of the defendant. Mr. Parikh submitted that the interim injunction prayed is in the nature of final relief, which if granted, would amount to granting final relief in the present suit without deciding the important issues in the suit, which could not be decided without evidence. Mr. Parikh submitted that the Court while considering the question as regards grant of interim injunction pending the suit is mainly required to consider three basic elements; *viz. prima facie* case, balance of convenience and irreparable loss, and is not expected to hold mini-trial to decide the serious issues, which are closely connecting to render final decision in the suit, at interim stage without evidence. Mr. Parikh submitted that the impact and effect of granting the interim injunction as prayed for by the plaintiff-Society will be of ousting the defendant from the possession of 15 flats which could only be done by a decree for possession at the end of the suit, and therefore, even if the plaintiff-Society has entered into new re-development agreement, the interim relief prayed may not be granted in exercise of powers under Order 43 of the Code. Mr. Parikh submitted that since the jurisdiction of this Court under Order 43 of the Code is limited, and since learned Judge has on assessment of documents on record found that the plaintiff-Society has not made out any *prima facie* case for grant of interim injunction prayed by it, the Court may not interfere with the impugned order.

11. The Court, having heard learned Advocates, finds that it is the agreement at the fore to decide on the rival claims. The Court therefore finds it appropriate to first glance at the agreement.

12. In the first part of the agreement, it is stated that the plaintiff-Society got 33 flats constructed in six blocks as per the plan sanctioned by the Municipal Corporation and allotted all 33 flats (to be referred as 'old flats') to its 33 members, who hold the old flats with share-holding rights as allottees/transferees of the society; that with consent of all its members, the Society decided for re-development of the flats by constructing new flats, and it unanimously accepted the offer of the defendant for re-development work; that out of 33 members of the Society, some members agreed that they shall accept new flats under the re-development scheme and as per the understanding reached for them, the defendant shall pay Rs. 15,000/- per month as rent for each such member from the date, the Society and its members handover possession of the old flats to the defendant till newly constructed flats are handed over to the Society. There is also understanding reached for payment of advance rent, *etc*. as also payment of maintenance amount in the name of the Society. However, it is provided in such first part of the agreement that on account of any natural calamity, like earthquake, *etc.*, if the work for re-development is required to be stopped or the Society stops construction for re-development of the flats on any issue not connected with the agreement, because of which, if there is delay in completing the construction of new flats, the defendant shall not pay rent amount for the delayed period. The second part of the agreement contains, in detail, the terms and conditions agreed between the parties. As stated in the second part of the agreement, the defendant shall construct 55 flats as per the Rules and Regulation of the Ahmedabad Municipal Corporation, out of which, 33 flats shall be given to old members of the Society and in remaining 22 flats, the defendant shall get selling rights. As further stated in the second part of the agreement, out of 33 members, 17 members of the Society agreed to be part of the re-development scheme and 16 members of the Society did not want to participate in the scheme and wanted to leave the Society by selling their flats to the defendant, to which the plaintiff-Society agreed. The plaintiff-Society agreed to handover possession of 17 flats with the flats of 16 members who were not to participate in the re-development scheme and the defendant agreed to construct and give new flats, each with built up area of 150 sq.yds, to 17 members, who agreed to participate in the scheme, as shareholder and allottee/transferee of the society. Amongst terms and conditions contained in second part of the agreement, Condition No. 24 provides for giving bank-guarantee by the defendant to the plaintiff-Society to secure the rights of 17 members and Condition No. 26 provides for completing construction of new flats within 24 months with extension of time by 6 to 12 months, if contingency arises as stated therein. The Condition No. 24 reads as under :

24. The party of second part has to give Bank-guarantee of Rs. 2,00,00,000/- of Nationalized/Scheduled Bank, to the party of first part only after deciding the names of re-development members (17 members) along with their rights for two years, ten days before taking possession by the Society and demolishing old building, for the construction of this re-development scheme. If the number of members increases, right for the bank-guarantee of Rs. 11,35,000/- per member shall remain for those members who joined the said re-development scheme. Flat purchase shall not be entitled for it. Bank-guarantee shall have to be released after receiving B.U. permission and the party of first part and members of the Society shall not take any objection against the same. They admit that Bank-guarantee shall have to be extended if B.U. permission takes more time due to circumstances. But, the party of second part shall be entitled to the income accrued out of deposit given by him to obtain Bank-guarantee.

13. Though, during his arguments, learned Senior Advocate Mr. Nanavati referred to the letters written by the defendant to the office- bearers of plaintiff-Society, especially letters dated 6-8-2013, 7-10-2013 and 8-8-2013, at page 175, 177 and 179 respectively of the paper-book and also letter dated 24-8-2013 at page 4 of the additional paper-book to demonstrate that the defendant had shown clear disinclination and refused to perform its part of the contract, the Court would, however, restrain itself from expressing any view on the above letters as the suit filed by the defendant for specific performance of the contract with prayer for damages is pending. However, it is not in dispute that the defendant has not given bank-guarantee, though an attempt is made to give out the reason for not giving the bank-guarantee.

14. As stated above, the application Exh. 7 filed by the defendant in its suit for specific performance of the contract was rejected and the order rejecting the application was not interfered with by this Court. In his order dated 18-9-2014 rejecting the above application, learned Chamber Judge has observed, after considering the judgment of Hon'ble Supreme Court in the case of *M/s. Best Sellers Retail (India) Pvt. Ltd. v. M/s. Aditya Birla Nuvo Ltd.*, reported in AIR 2012 SC 2448 : (2012 (6) SCC 792), that the defendant has already sought for damages and if the injunction is not granted in its favour, it will not suffer irreparable injury and as far as the balance of convenience and irreparable injury are concerned, they are in favour of the defendant (the plaintiff-Society).

15. The Court finds that it was after refusal of specific interim injunction prayed for by the defendant against the plaintiff-Society not to enter into any agreement or writing for construction, not to hand over the possession and not to deal with the suit properties, the plaintiff-Society entered into new re-development agreement. The plaintiff-Society has pleaded in the

present suit the justification for entering into new re-development agreement with another developer and has prayed for interim injunction of the nature, as quoted above, in its application Exh. 7. The question is, whether the interim injunction prayed for by the plaintiff-Society deserves to be granted pending the present suit.

16. Learned Senior Advocate Mr. Parikh submitted that grant of interim injunction prayed for by the plaintiff-Society would result into granting final relief prayed in the present suit which is not permissible in law. Mr. Parikh relies on decisions of Hon'ble Supreme Court : (1) in the case of *Union of India v. Modiluft Ltd.*, reported in 2003 (6) SCC 65, (2) in the case of *Orissa Manganese and Minerals Limited v. Synergy Ispat Pvt. Ltd.*, reported in 2014 (16) SCC 654, (3) in the case of *State of Uttar Pradesh v. Sandeep Kumar Balmiki*, reported in 2009 (17) SCC 555, (4) in the case of *Mehul Mahendra Thakkar v. Meena Mehul Thakkar*, reported in 2009 (14) SCC 48, (5) in the case of *State of U.P. v. Ram Sukhi Devi*, reported in 2005 (9) SCC 733 in support of his above submission.

17. The Court has gone through above judgments. In the facts of each case, Hon'ble Supreme Court has held that by interim order, final relief could not have been granted.

(a) In the case of *Modiluft Ltd.*, [2003 (6) SCC 65], it is observed in Paras 11, 16 and 17 as under :

> "11. If either of these grounds is factually correct then we have no difficulty in agreeing with the High Court but in regard to the factum of settlement between the parties, the parties are not at *ad idem*. Learned Attorney General has specifically denied this factual position and has stated that it is not a consent order or an order based on settlement but is an order made by the Court at its discretion after hearing the parties. We also notice from a perusal of the impugned order, it does not indicate that the said order is based on any settlement between the appellant and the respondent herein or on any consent or concession shown by the appellants herein. As a matter of fact, it is the case of the appellants that the respondent having collected the Inland Air Travel Tax (I.A.T.T.) from the passengers as an agent of the Government of India, has not deposited the said amount as required under the statute, hence are not only liable to pay the said collected tax to the Government of India, but also liable to pay interest and penalty on such delayed payment. While the respondent contends that certain sums of money deposited by A.U.L. should be appropriated against the sum due from them and the said amount having been deposited in the year 1997 itself by A.U.L., there is no liability on them to pay any further I.A.T.T. This is an issue which was raised before different forums like the assessing authority, Commissioner of Appeals and the Revisional Authority and all the three authorities have held against the respondent holding that the amount deposited by A.U.L.

cannot be adjusted towards the tax due from the respondent, which still remains to be the bone of contention in the writ petition, it will be difficult to accept that the appellant would have accepted to treat the deposit made by the A.U.L. as available for adjustment towards the tax due from the respondents even for the purpose of an interim order. In the impugned order, it seems the High Court has recognised a settlement between A.U.L. and respondent, but the appellants are not parties to such settlement nor are they willing to associate themselves with such settlement. If that be so, unless and until the High Court decides the issue whether such settlement is binding on the appellant or not to seek adjustment of the said amount deposited by A.U.L., we do not think it was proper for the High Court to have taken note of this deposit by A.U.L. as being in favour of the respondent, while passing the impugned order.

16. Nextly, we notice that the High Court has granted a relief by way of an interim order which we think it could not have done at the interim stage for more than one reason. The writ petition in question was filed challenging an order made by the Government in revision. The subject-matter of the said petition pertains to the liability of the respondent to pay the tax. In the said writ petition, the respondent has sought an additional prayer by way of a direction to the respondent to grant a N.O.C. to relaunch its airline operations. We do not want to say at this stage that such joinder of two separate causes of actions could be maintained in a writ petition like the one that is filed before the High Court by the respondent. It should be noticed that the authorities empowered to permit relaunching of the airline's operations were not before the Court which we are told is the Department of Civil Aviation. Be that as it may, since the relief as termed in the writ petition being a final relief, we think the same could not have been granted by the High Court at an interlocutory stage. But the learned Counsel for the respondent contends that the said prayer is only an incidental prayer because the Civil Aviation authorities have refused to grant necessary permission to relaunch the airline's operations to the respondent only because the customs department which is a respondent before the High Court, has refused to give a N.O.C., therefore in effect what is sought for before the High Court is only a direction to the customs authorities to issue a N.O.C. which in turn may be used by the respondent to obtain the required permission from the competent authorities to relaunch their airline operations. Be that as it may, even accepting the argument of respondent, it is to be noticed that even a N.O.C. from the customs authorities can be directed to be issued by the High Court only after it comes to the conclusion that the amount as determined by it has been paid by the respondent and not by an interim order otherwise it would amount to the granting of a final relief in favour of the respondent who has suffered adverse orders from the authorities below, even before the writ petition is finally decided, and in the event of the ultimate dismissal of the writ petition the respondent would gain

an undue advantage in spite of its default and might even give rise to other questions in equity including rights of the third party.

17. Seen from any angle, we think the High Court has erred in granting the impugned relief to the respondent which in our opinion is in the nature of a final relief which on facts and circumstances of this case, without deciding the issues involved in the writ petition, could not have been granted. Therefore, we allow the appeal and set aside the impugned order. The N.O.C. which is said to have been issued provisionally stands revoked. Payment made, if any, by the respondent would be given credit or adjusted in a manner considered appropriate by the High Court in the pending writ petition."

(b) In the case of *Orissa Manganese & Minerals Ltd.*, 2014 (16) SCC 654, it is observed in Paras 17 and 18 as under :

"17. In view of the categorical assertion made by the appellant and the undertaking that the appellant would consume the entire iron ore excavated captively, we do not see any reason to give any direction to the appellant to sell the iron ore to the respondent during the pendency of the arbitration. Such a direction, in our opinion, would virtually amount to the enforcement of the agreement in issue without adjudication of the right of the respondent to seek specific performance of the agreement. No doubt, if the appellant-Company were to be selling the iron ore excavated by it to any third party, there was some justification by the respondent to seek an interim direction to the appellant to sell the ore to the respondent, subject of course to the determination of the cause finally in the arbitration proceedings. But it is not the case here.

18. The learned Senior Counsel for the respondent further submitted that in case an interim order is not granted, even if the respondent eventually succeeds in the arbitration proceedings and obtains an award for the specific performance of the agreement in question, the success would remain only on paper as huge amount of mineral excavated by the appellant would already have been sold by that time and there is no way of the respondent obtaining the said mineral."

(c) In the case of *Sandeep Kumar Balmiki,* [2009 (17) SCC 555], it is observed in Paras 5 to 7 as under :

"5. In our view, the interim order granted by the High Court staying the order of termination could not be passed at this stage in view of the fact that if such relief is granted at this stage, the writ petition shall stand automatically allowed without permitting the parties to place their respective cases at the time of final hearing of the writ petition. In this case also, the appellants have not yet filed counter-affidavit to the writ petition of the respondents.

6. That being the position and in view of the fact that the final relief could not be granted at the interim stage, we set aside the impugned order and vacate the interim order passed by the High Court.

7. We are informed that now the affidavits have already been exchanged and the matter is ready for hearing. That being the position, we request the learned Single Judge of the High Court to decide the writ petition at an early date, preferably within three months from the date of supply of a copy of this order to it."

(d). In the case of *Mehul Mahendra Thakkar*, [2009 (14) SCC 48], it is observed in Para 2 as under :

"2. In the appeal filed, the appellant has called in question the correctness or otherwise of the findings and the conclusion reached by the Family Court in Petition No. A-1072 of 2000 dated 6-2-2007, wherein the Family Court has reached the conclusion that both the husband and wife are joint owners of flat bearing No. 303, Rajesh Nagar Co-operative Housing Society Ltd., Borivali (West), Mumbai. Even before giving a verdict on the findings and the conclusions reached by the Family Court, by way of interim relief, the Court has granted the main relief itself. This, in our opinion, is unsustainable. It is settled legal position, that by way of interim relief final relief should not be granted till the matter is decided one way or the other."

(e) In the case of *Ram Sukhi Devi*, 2005 (9) SCC 733, it is observed in Para 8 as under :

"8. To say the least, approach of the learned Single Judge and the Division Bench is judicially unsustainable and indefensible. The final relief sought for in the writ petition has been granted as an interim measure. There was no reason indicated by learned Single Judge as to why the Government Order dated 26-10-1998 was to be ignored. Whether the writ petitioner was entitled to any relief in the writ petition has to be adjudicated at the time of final disposal of the writ petition. This Court has on numerous occasions observed that the final relief sought for should not be granted at an interim stage. The position is worsened if the interim direction has been passed with stipulation that the applicable Government Order has to be ignored. Time and again, this Court has deprecated the practice of granting interim orders which practically give the principal relief sought in the petition for no better reason than that of a *prima facie* case has been made out, without being concerned about the balance of convenience, the public interest and a host of other considerations. [See : *Assistant Collector of Central Excise, West Bengal v. Dunlop India Ltd.,* 1985 (1) SCC 260 (at p. 265), *State of Rajasthan v. M/s. Swaika Properties,* 1985 (3) SCC 217 (at p. 224), *State of U.P. v. Visheshwar,* 1995 Supp (3) SCC 590, *Bharatbhushan Sonaji Kshirsagar (Dr.) v. Abdul Khalik Mohd. Musa,* 1995 Supp (2) SCC 593, *Shiv Shankar v. Board of Directors*, *U.P.S.R.T.C.,* 1995 Supp (2) SCC 726 and *Commissioner/Secretary to Government Health and Medical Education Department, Civil Sectt., Jammu v. Dr. Ashok Kumar Kohli,* 1995 Supp (4) SCC 214]. No basis has been indicated as to why learned Single Judge thought the course as directed was necessary to be adopted. Even it was not indicated that a *prima facie* case was made out though as noted above that itself is not sufficient. We, therefore, set aside the order passed by

learned Single Judge as affirmed by the Division Bench without expressing any opinion on the merits of the case we have interfered primarily on the ground that the final relief has been granted at an interim stage without justifiable reasons. Since, the controversy lies within a very narrow compass, we request the High Court to dispose of the matter as early as practicable preferably within six months from the date of receipt of this judgment."

18. The Court finds that none of the above judgments is of any help to the defendant in the facts of the case in hand. The case in hand will call for deciding whether, in the context of the pleadings and the prayers made in the present suit and the agreement entered into between the parties, the plaintiff-Society could have been granted interim injunction prayed by it.

19. In the case of *Best Sellers Ltd.*, (AIR 2012 SC 2448 : 2012 (6) SCC 792), relied on Mr. Nanavati, Hon'ble Supreme Court has held and observed in Paras 26 to 29, 31, 33 to 36 as under :

"26. It has been held by this Court in *Kishorsinh Ratansinh Jadeja v. Maruti Corporation,* 2010 (1) GLR 73 (SC), that it is well established that while passing an interim order of injunction under Order 39, Rules 1 and 2, C.P.C., the Court is required to consider :

(i) whether there is a *prima facie* case in favour of the plaintiff;

(ii) whether the balance of convenience is in favour of passing the order of injunction; and

(iii) whether the plaintiff will suffer irreparable injury if an order of injunction would not be passed as prayed for. Hence, we only have to consider whether these well-settled principles relating to grant of temporary injunction have been kept in mind by the trial Court and the High Court.

27. On a reading of Clause B-2 of the agreement, we find that Liberty Agencies had given a warranty that the suit schedule property was owned by it and that it will retain the possession of the suit schedule property until the expiry of the agreement. Clause D of the agreement clearly stipulated that the duration of the agreement shall be for a period of twelve years from the date of the agreement unless terminated in accordance with the provisions of the agreement. Clause E-2 further provides that respondent No. 1 and not Liberty Agencies could terminate the agreement by giving a notice of not less than three months after the end of six years from the date of the agreement and respondent No. 1 had not terminated the agreement under this Clause.

28. Before the expiry of six years from the date of the agreement, Liberty Agencies sent the letter dated 26-2-2010 to the respondent No. 1 committing a breach of Clause B-2 of the agreement which provided that Liberty Agencies will retain possession of the suit schedule property until the expiry of the agreement. This was the breach of the agreement which was sought to be prevented by the trial Court by an order of temporary injunction. The trial

Court and the High Court were thus right in coming to the conclusion that the respondent No. 1 had a *prima facie* case.

29. Yet, the settled principle of law is that even where *prima facie* case is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered by the plaintiff on account of refusal of temporary injunction was not irreparable.

31. In the present case, the respondent No. 1 itself had claimed in the plaint the alternative relief of damages to the tune of Rs. 20,12,44,398/- if the relief for specific performance was to be refused by the Court and break-up of the damages of Rs. 20,12,44,398/- claimed in the plaint was as follows :

"I. Net Book stock amount on 28-2-2010 is Rs. 1,15,97,638/-.

II. Loan amount due as on 27-1-2010 is Rs. 44,81,584/-.

III. Amount due as per Statement of Accounts as on 28-2-2010 is Rs. 20,65,176/-.

IV. Projected Loss of profit on sales, for the balance 7 years term of the Agency Agreement amounts to a sum of Rs. 10,31,00,000/-.

V. Loss of Goodwill, Reputation including amount spent on advertisement Rs. 2,00,00,000/-.

VI. Loss of amount which Plaintiff would incur for relocating the store to other place on the Brigade Road, Bangalore and to continue its business for rest of the term 7 years would amount to Rs. 6,00,00,000/- along with simple interest at the rate of 24% p.a. from the date of payment till realization as the same being a commercial transaction."

33. 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.

34. 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.

35. 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.

36. To quote the words of Alderson, B. in *The Attorney-General v. Hallett* :

> ".....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"."

20. In the case of *Mohd. Mehtab Khan v. Khushnuma Ibrahim Khan*, reported in 2013 (9) SCC 221, Hon'ble Supreme Court, after considering the guidelines laid down in the case of *Dorab Cawasji Warden v. Coomi Sorab Warden,* reported in 1990 (2) SCC 117 for grant of equitable relief as interlocutory mandatory injunction under Order 39, Rules 1 and 2 of the C.P.C., has held and observed in Paras 17 to 20 of its judgment as under :

> "17. While the bar under Sec. 6(3) of the S.R. Act may not apply to the instant case in view of the initial forum in which the suit was filed and the appeal arising from the interim order being under the Letters Patent issued to the Bombay High Court, as held by a Constitution Bench of this Court *P. S. Sathappan (Dead) by L.Rs. v. Andhra Bank Ltd.*, 2004 (11) SCC 672, what is ironical is that the correctness of the order passed in respect of the interim entitlement of the parties has reached this Court under Art. 136 of the Constitution. Ordinarily, and in the normal course, by this time, the suit itself should have been disposed of. Tragically, the logical conclusion to the suit is no where in sight, and it is on account of the proverbial delays that have plagued the system that interim matters are being contested to the last Court with the greatest of vehemence and fervour. Given the ground realities of the situation it is neither feasible nor practical to take the view that interim matters, even though, they may be inextricably connected with the merits of the main suit, should always be answered by maintaining a strict neutrality, namely, by a refusal to adjudicate. Such a stance by the Courts is neither feasible nor practicable. Courts, therefore, will have to venture to decide interim matters on consideration of issues that are best left for adjudication in the full trial of the suit. In view of the inherent risk in performing such an exercise which is bound to become delicate in most cases the principles that the Courts must follow in this regard are required to be stated in some detail though it must be made clear that such principles cannot be entrapped within any straitjacket formula or any precise laid down norms. Courts must endeavour to find out if interim relief can be granted on consideration of issues other than those involved in the main suit and also whether partial interim relief would satisfy the ends of justice till final disposal of the matter. The consequences of grant of injunction on the defendant if the plaintiff is to lose the suit along with the consequences on the plaintiff where injunction is refused, but eventually, the suit is decreed has to be carefully weighed and balanced by the Court in every given case.

Interim reliefs which amount to pre-trial decrees must be avoided wherever possible. Though, experience has shown that observations and clarifications to the effect that the findings recorded are *prima facie* and tentative, meant or intended only for deciding the interim entitlement of the parties have not worked well and interim findings on issues concerning the main suit has had a telling effect in the process of final adjudication it is here that strict exercise of judicial discipline will be of considerable help and assistance. The power of self-correction and comprehension of the orders of superior forums in the proper perspective will go a long way in resolving the dangers inherent in deciding an interim matter on issues that may have a close connection with those arising in the main suit.

18. There is yet another dimension to the issues arising in the present appeal. The interim relief granted to the plaintiffs by the Appellate Bench of the High Court in the present case is a mandatory direction to handover possession to the plaintiffs. Grant of mandatory interim relief requires the highest degree of satisfaction of the Court; much higher than a case involving grant of prohibitory injunction. It is, indeed, a rare power, the governing principles whereof would hardly require a reiteration inasmuch as the same which had been evolved by this Court in *Dorab Cawasji Warden v. Coomi Sorab Warden,* 1990 (2) SCC 117, has come to be firmly embedded in our jurisprudence.

19. Paras 16 and 17 of the judgment in *Dorab Cawasji Warden*, [1990 (2) SCC 117], extracted below, may be usefully remembered in this regard :

> "16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the *status quo* of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, Courts have evolved certain guidelines. Generally stated, these guidelines are :
>
> (1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a *prima facie* case that is normally required for a prohibitory injunction.
>
> (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
>
> (3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case. Though, the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as pre-requisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

20. In a situation where the learned trial Court on a consideration of the respective cases of the parties and the documents laid before it was of the view that the entitlement of the plaintiffs to an order of interim mandatory injunction was in serious doubt, the appellate Court could not have interfered with the exercise of discretion by the learned trial Judge unless such exercise was found to be palpably incorrect or untenable. The reasons that weighed with the learned trial Judge, as already noticed, according to us, do not indicate that the view taken is not a possible view. The appellate Court, therefore, should not have substituted its views in the matter merely on the ground that in its opinion the facts of the case call for a different conclusion. Such an exercise is not the correct parameter for exercise of jurisdiction while hearing an appeal against a discretionary order. While we must not be understood to have said that the appellate Court was wrong in its conclusions what is sought to be emphasized is that as long as the view of the trial Court was a possible view the appellate Court should not have interfered with the same following the virtually settled principles of law in this regard as laid down by this Court in *Wander Ltd. v. Antox India (P) Ltd.*, 1990 (Supp.) SCC 727."

21. In light of above, the Court is to consider whether refusal of interim injunction to the plaintiff-Society will bear the brunt to it to suffer irreparable loss which with passage of time may not be possible to be compensated and what will be the effect of granting interim injunction against the defendant; whether loss to be suffered by it, if interim relief is granted to the plaintiff-Society would be compensated when the defendant has asked for damages in its suit.

22. Clause 21 of the sale-deed executed by the members, who did not want to participate in the re-development scheme of the plaintiff-Society, reads as under :

"21. Further, the said society has passed resolution for purchase of the said the properties by the party getting the document executed as decided by the society and other share-holders as part of re-development scheme and in that respect, it is clarified that the party has got the sale-deed executed for the said properties."

23. Reading Clause 21 of the sale-deed with the agreement, it *prima facie* appears to the Court that the execution of sale-deeds in favour of the

defendant for purchase of 15 flats of the members, who did not want to participate in the re-development scheme, was as part of, in furtherance of and for the purpose of the agreement entered purely for construction of new flats in place of old flats under the re-development scheme/project of the plaintiff-Society. As provided in the agreement, the defendant is permitted to construct 55 flats. Thus, in addition to 33 old flats, originally constructed and allotted to 33 members of the plaintiff-Society, the defendant is permitted to construct 22 more flats and given selling rights therein to sell such flats only to the persons who are eligible to be taken as members of the Society. The agreement thus appears to be the outcome/creation of commercial wisdom of the defendant to earn profit by offering to construct new flats for the plaintiff-Society which earnestly desired to have newly constructed flats for its members in place of old flats standing in dilapidated condition. Therefore, purchase of 15 flats by the defendant would reflect on the intention of the defendant to complete the re-development scheme without any obstruction and does not appear to be independent of the agreement.

24. Mr. Parikh however relied on the order of Bombay High Court on original side in the case of *Sahara India Commercial Corporation Limited v. B. Jeejeebhoy Vakharia & Associates,* reported in 2007 (4) Bom.CR 65.

25. In the above case, the suit for specific performance was filed and the plaintiff prayed for injunction restraining the defendants from dealing with, disposing of, alienating or encumbering the suit property pending the suit. In the said case, the Court noticed that the M.o.U. was essentially an agreement to transfer immovable property, predominant object of which was to transfer the immovable property and not to give merely development rights. Such judgment has no application considering the nature of the agreement entered between the parties in the present case.

26. Mr. Parikh then submitted that the defendant has acquired full right, title and interest in 15 flats under the registered sale-deed from 15 members of the plaintiff-Society, and therefore, the resolution passed by the plaintiff society with only 17 members deciding to terminate the agreement and to enter into new re-development agreement without consent of the defendant is illegal. He submitted that since the defendant has acquired proprietery rights in 15 flats, the plaintiff-Society cannot be permitted to go for re-development of all the old flats at this stage until it finally succeeds in the present suit and get decree for possession against the defendant.

27. The Court finds that the plaintiff-Society, which is housing society, has made provision in its bye-laws that the person becoming member of the Society is not entitled to hold more than one unit/ flat in the Society. It is required to note at this stage, that the defendant has remained unsuccessful before the Registrar of Co-operative Societies as also before

the State Government in the revision application filed by it wherein its challenge to get the membership rights in connection with 15 flats has come to be rejected mainly on the reasoning that the defendant is concerned with the development activities and that purchase of 15 flats by it was in connection with the agreement. Irrespective of conclusion reached in above proceedings as to the eligibility for membership in the plaintiff-Society, it *prima facie* appears to the Court that in view of the provision made in the bye-laws for individual membership of the Society against allotment of single unit of residence/flat in the plaintiff-Society and having regard to the purpose for which the agreement was entered into between the parties, the defendant could not be said to have acquired membership rights in connection with all 15 flats purchased by it from 15 members of the Society. Therefore, the defendant had no say in plaintiff-Society taking decision with its majority members to enter into new re-development agreement with another developer.

28. In the case of *Zoroastrian Co-operative Housing Society Ltd. v. District Registrar, Co-operative Societies (Urban),* reported in 2005 (5) SCC 632 : [2005 (2) GLR 1530 (SC)], relied on by Mr. Nanavati, Hon'ble Supreme Court has held and observed in Paras 21 and 22 in the context of the provisions made in Gujarat Co-operative Societies Act, 1961 as under :

> "21. Membership in a co-operative society only brings about a contractual relationship among the members forming it subject of course to the Act and the Rules. One becomes a member in a co-operative society either at the time of its formation or acquires membership in it on possessing the requisite qualification under the bye-laws of the society and on being accepted as a member. It is not as if one has a fundamental right to become a member of a co-operative society. But certainly, if the application of one for membership, who is otherwise qualified to be a member under the Act, Rules and the bye-laws of the society, is rejected unreasonably or for frivolous reasons, the person may be entitled to enforce his claim to become a member in an appropriate forum or Court of law. This is the effect of the decision in *Jain Merchants Co-operative Housing Society v. H.U.F. of Manubhai,* 1995 (1) GLR 19, relied on by the High Court. The said decision does not lay down a proposition, nor can it lay down a proposition, that even a person who does not qualify to be a member in terms of the bye-laws of a society can enforce a right to become a member of that society. It is one thing to say that it is not desirable to restrict membership in a society based solely on religion or sex, but it is quite different thing to say that any such voluntary approved bye-law containing such a restriction could be ignored or declared unconstitutional by an authority or a tribunal created under the Act itself. Normally, the bye-laws of a society do not have the status of a statute and as held by this Court in *Co-operative Central Credit Bank Ltd. v. Industrial Tribunal, Hyderabad,* AIR 1970 SC 245 bye-laws

are only the rules which governs the internal management or administration of a Society and they are of the nature of Articles of Association of a Company incorporated under the Companies Act. They may be binding between the persons affected by them but they do not have the force of a statute.

22. The validity of a bye-law, which too an approved bye-law, has to be tested in the light of the provisions of the Act and the Rules governing co-operative societies. In so testing the search should be to see whether a particular bye-law violates the mandate of any of the provisions of the Act or runs counter to any of its provisions or to any of the Rules. Section 24(1) of the Act only provides for open membership subject to a person, aspiring to be a member, possessing the qualification prescribed by the bye-laws. It is not an open membership *de hors* the qualification prescribed by the bye-laws. When in Daman Singh this Court held that when a co-operative society is governed by the appropriate legislation it will be subject to the intervention made by the concerned legislation, it only meant that a legislative provision in the Act can be introduced for the purpose of eliminating a qualification for membership based on sex, religion or a persuasion or mode of life. But so long as there is no legislative intervention of that nature, it is not open to the Court to coin a theory that a particular bye-law is not desirable and would be opposed to public policy as indicated by the Constitution. The Constitution no doubt provides that in any State action there shall be no discrimination based either on religion or on sex. But Part III of the Constitution has not interfered with the right of a citizen to enter into a contract for his own benefit and at the same time incurring a certain liability arising out of the contract. As observed by the High Court of Bombay in *Karvanagar Sahakari Griha Rachana Sanstha Maryadit v. State,* AIR 1989 Bom. 392 the members have joined the Society in accordance with the bye-laws and the members join a housing Society by ascertaining what would be the environment in which they will reside. It is not permissible for the State Government to compel the society to amend its bye-laws as it would defeat the object of formation of the Society. In that case, the society was constituted with the object of providing peaceful accommodation to its members. Though, there may be circumstances justifying the State taking steps to meet shortage of accommodation, it was not open to the State Government to issue a direction to the Registrar of Co-operative Societies to direct a Co-operative Society to make requisite amendments to their bye-laws and grant permission to its members to raise multistoreyed constructions. In appeal from that decision reported as *State of Maharashtra v. Karvanagar Sahakari Griya Rachana Sanstha Maryadit,* 2000 (9) SCC 295, this Court while dismissing the appeal stated that it was clear that though a power was conferred on the Registrar to direct amendment of the bye-laws of a Society, yet the paramount consideration is the interest of the Society. So also, the power of the State Government to issue directions in public interest, could not be exercised so as to be prejudicial to the interest of the Society. In

the view of this Court, what was in the interest of the Society was primarily for the Society alone to decide and it was not for an outside agency to say. Where, however, the Government or the Registrar exercised statutory powers to issue directions to amend the bye-laws, such directions should satisfy the requirement of the interest of the Society. This makes it clear that the interest of the Society is paramount and that interest would prevail so long as there is nothing in the Act or the Rules prohibiting the promotion of such interest. Going by *Chheoki Employees' Co-operative Society Ltd.'s, case*, neither the member, respondent No. 2, nor the aspirant to membership, respondent No. 3 had the competence to challenge the validity of the bye-laws of the Society or to claim a right to membership in the Society."

29. Learned Senior Advocate Mr. Parikh however relied on the decision in the case of *Hill Properties Ltd. v. Union Bank of India,* reported in 2014 (1) SCC 635. In this case, the appellant Company claimed to be the owner of Flat No. 23 (the suit flat). Respondent 5 is a shareholder of the appellant company holding one "A" equity share. Flat No. 23 was allotted to Respondent 5 upon payment of the value of the flat as consideration, *vide* Share Certificate No. 45. Respondent 5 created a mortgage to secure the dues of Respondent 2 to the respondent-Bank by depositing Share Certificate No. 45 with the respondent-Bank. Upon default in repayment of the loan, the respondent-Bank filed an action for recovery of the dues and also for enforcement of the security, and ultimately, the D.R.T. passed an order of attachment in respect of the flat in question. In above context, Hon'ble Supreme Court examined right, title and interest over a flat and held and observed in Paras 12, 13, 15, 16 as under :

"12. We are of the view that the right, title, interest over a flat conveyed is a species of property, whether that right has been accrued under the provisions of the Articles of Association of a Company or through the bye-laws of a Co-operative Society. The people in this country, especially in urban cities and towns are now accustomed to flat culture, especially due to paucity of land. Multi-storeyed flats are being constructed and sold by Companies registered under the Companies Act, as well as the Co-operative Societies, registered under the Registration of Co-operative Societies Act, *etc*. Flats are being purchased by people by either becoming members of the co-operative society or share-holders of the Company and the flat owners have an independent right as well as the collective right over the flat complex. Flat- owners' right to dispose of its flat is also well recognized, and one can sell, donate, leave by Will or let out or hypothecate his right. These rights are even statutorily recognized by many State Legislatures by enacting Apartment Ownership Acts. Such a legislation exists in the State of Maharashtra as well.

13. Most of the flat-owners purchase the flat by availing of loan from various banking institutions by mortgaging their rights over the purchased flat. By purchasing the flat, the purchaser, over and above his species of

right over the flat, will also have undivided interest in the common areas and facilities, in the percentage as prescribed. Flat-owners will also have the right to use the common areas and facilities in accordance with the purpose for which they are intended. It is too late in the day to contend that flat-owners cannot sell, let, hypothecate or mortgage their flat for availing of loan without permission of the builder, Society or the Company. So far as a builder is concerned, the flat owner should pay the price of the flat. So far as the Society or Company in which the flat-owner is a member, he is bound by the laws or Articles of Association of the Company, but the species of his right over the flat is exclusively that of his. That right is always transferable and heritable. Of course, they will have charge over the flat if any amount is due to them upon the flat.

15. Reference may also be made to another judgment of this Court in *D.L.F. Qutub Enclave Complex Educational Charitable Trust v. State of Haryana*, 2003 (5) SCC 622, wherein this Court held that the right of transfer of land indisputably is incidental to the right of ownership and such a right can be curtailed or taken away only by reason of a Statute. In our view, the Articles of Association of a Company have no force of a Statute and that the right of respondent No. 5 to mortgage could not have been restricted by the Articles of Association.

16. We find that neither the Companies Act, nor any other statute make any provision prohibiting the transfer of species of interest to third parties or to avail of loan for the flat-owners' benefit. A legal bar on the saleability or transferability of such a species of interest, in our view, will create chaos and confusion. The right or interest to occupy any such flat is a species of property, and hence, has a stamp of transferability, and consequently, we find no error with the warrant of attachment issued by the D.R.T. on the flat in question."

30. In the above case, the flat-owner's right is considered to be the species of property either accrued under the Articles of Association of a Company or through the bye-laws of a Co-operative Society. But, in the case in hand, as observed above, reading the agreement with Clause 21 of the sale-deed, it *prima facie* appears to the Court that the sale-deed executed for 15 flats in favour of the defendant were primarily for the purpose of and to achieve completion of the re-development scheme of the plaintiff-Society. Thus conveyance of rights in 15 flats by sale-deed does not appear to be independent but *prima facie* appears to be linked with and only for implementing and executing the re-development scheme. When, such appears to be the purpose concerning the agreement, and when the agreement is terminated on the ground that the defendant failed to perform as per the agreement and committed breach of the terms of the agreement, the defendant could not obstruct re-development of the flats for the plaintiff-Society by another developer on the ground that it has proprietery right in 15 flats and without its consent the plaintiff-Society cannot go ahead with

its re-development scheme. The Court finds that even if the defendant is taken to have acquired proprietery rights in 15 flats, the defendant shall have no super rights than available to other members of the plaintiff-Society, and therefore, decision of the plaintiff-Society for implementing its re-development scheme should prevail. When purchase of 15 flats by the defendant would not put the defendant on higher pedestrian than the original members as regards their rights against the plaintiff-Society, the contention raised by Mr. Parikh that the plaintiff-Society cannot go for re-development scheme till final decree for handing over of possession of 15 flats is passed in the present suit is without substance and cannot be accepted. What benefits the defendant will be entitled for its claim to have acquired proprietery rights in 15 flats; whether allotment of 15 flats or selling rights for 15 flats in the re-development scheme or for damages, could be decided on evidence in the context of the purpose and intent of the agreement, but on such claim, the defendant cannot stall implementation of the re-development scheme by the plaintiff-Society through another developer.

31. Learned Judge has observed that the plaintiff-Society has failed to establish strong *prima facie* case and that at this stage, balance of convenience is not in favour of the plaintiff-Society mainly on the reasoning, as stated above, that the suit for specific performance filed by the defendant is maintainable or not could not be decided at this stage; that the plaintiff-Society has moved Chamber Summons in the said suit with identical relief which was pending for decision by the Commercial Court; that whether the resolution passed by the Society with only 17 members to cancel the agreement with the defendant when the defendant has purchased 15 flats under the registered sale-deeds is illegal could be decided on evidence; and that the revision application filed by the defendant before the State Government against the order of the District Registrar was pending. It is stated before the Court that the present suit was filed after Chamber Summons was withdrawn by the plaintiff-Society. The Court finds that learned Judge has taken perverse approach on the pleadings, the prayers in present suit and the agreement by adopting above reasoning to refuse interim injunction. The reasoning of learned Judge would stand depleted against strong *prima facie* case appearing in favour of the plaintiff-Society for grant of the interim injunction prayed by it.

32. For the purpose of considering the question for grant interim injunction, the Court is not to decide on the main issues closely connecting to final decision in the suit. In the case on hand, the Court finds that considering the pleadings and the prayers made in the suit with the nature of the agreement, without touching the issues connecting to final decision in the suit, the interim injunction could be granted. In the suit for specific

performance, the defendant has also asked for awarding damages. Neither pendency nor the maintainability of the suit filed for specific performance of contract would make the plaintiff-Society disentitled to grant of interim injunction if is found that in the facts of the present case, the plaintiff-Society has made out strong *prima facie* case for grant of interim injunction prayed by it. In the present suit, the plaintiff-Society has sought declaration that the sale-deeds in favour of the defendant are null and void and the defendant be ordered to receive back the amount of consideration of Rs. 7,32,60,000/- and retransfer rights in 15 flats to the plaintiff-Society. The Court finds that if interim injunction, as prayed for by the plaintiff-Society is granted, it would not result into granting the final relief prayed in the present suit. The Court also finds that on considering the pleadings and the prayers of the present suit with the agreement as it is, the question of grant of interim injunction could be considered without taking evidence and by protecting the interest of the defendant. In its interim application at Exh. 7, the plaintiff-Society has also stated that it would abide by the conditions as regards giving security or undertaking to preserve the rights of the defendant in 15 flats in re-development scheme till the present suit is finally decided.

33. On consideration of the pleadings as stated above and the purpose of the agreement as *prima facie* found above and on considering the time-gap of five years passed after execution of the agreement, the dilapidated condition of old flats, the need for re-development of the flats for the members of the plaintiff-Society, who have been for long time residing elsewhere in rented premises as stated before the Court, the Court finds that plaintiff-society could be granted interim injunction as prayed for by protecting the right and interest of the defendant in 15 flats and without prejudice to its rights and contentions in both the suits. Mr. Nanavati rightly submitted that work of re-development of a housing society cannot be undertaken without the confidence in the developer and on dispute with the developer, the members will roam in uncertainty and anxiety as regards the completion of the re-development project of the Society and that is what, as submitted by Mr. Nanavati, the plaintiff-Society has seen through the letters written by the defendant that defendant could no longer be relied for re-development work by continuing the agreement with it. The Court finds that in the facts of the case and scenario emerging in connection with the agreement for redevelopment scheme of the plaintiff-Society, the plaintiff-Society could be said to have made out strong *prima facie* case for grant of interim injunction as prayed for in the application. Such strong *prima facie* case, as appears to the Court, has woven in it the balance of convenience in favour of the plaintiff-Society and injury to be suffered by

the members of the plaintiff-Society on the above facts, if the interim injunction is not granted.

34. Learned Senior Advocate Mr. Parikh however relied on the decision of Hon'ble Supreme Court rendered in *Civil Appeal No. 17321 of 2017* and another decision of Hon'ble Supreme Court in C*ivil Appeal No. 7079 of 2018*. In the judgment in *Civil Appeal No. 17321 of 2017*, Hon'ble Supreme Court has examined the question, in the context of Sec. 23 of the Specific Relief Act, whether when the agreement to sell does not specifically provide for specific performance and the seller fails to perform his part of contract of sale according to the terms and conditions agreed upon in the agreement to sell, the holder of the agreement to sell will be entitled to seek specific performance. It is in the above context, Hon'ble Supreme Court has held and observed in Paras 30 and 31 as under :

> "30. In this case, Clauses 11 and 12 of the agreement deal with consequences of breach. They are extracted below :
>
> > "11. That in case the seller fails to perform his part of contract of sale according to the terms and conditions agreed upon in this agreement to sell in matter of execution of the sale-deed and its registration, on the receipt of the balance sale price, he shall be liable to pay double the amount of the earnest money received by her from the purchaser.
> >
> > 12. That in case the purchaser fails to get the transaction of the sale completed by means of execution and registration of sale-deed according to the terms of this agreement for sale, he shall forfeit his earnest money of Rs. 10,000/- advanced by the purchaser to the said seller."
>
> 31. The agreement does not specifically provide for specific performance. Nor does it bar specific performance. It provides for payment of damages in the event of breach of either party. The provision for damages in the agreement is not intended to provide the vendor an option of paying money in lieu of specific performance. Therefore, we are of the view that plaintiff will be entitled to seek specific performance (even in the absence of a specific provision therefor) subject to his proving breach by the defendant and that he was ready and willing to perform his obligation under the contract, in terms of the contract."

Then, in the judgment in *Civil Appeal No. 7079 of 2018*, Hon'ble Supreme Court has examined the challenge made to the judgment and order passed by the Division Bench of Bombay High Court whereby the Bombay High Court upheld the decision of learned Single Judge in notice of motion and passed mandatory interlocutory injunction directing the appellant to hand over 8 flats along with 18 car parking spaces under the settlement agreement of the consent terms between the parties. It was on consideration of the facts of that case in the context of the agreement reached between the parties, Hon'ble Supreme Court has held and observed in Paras 23, 24 and 26 to 30 as under :

"23. What has, however, been glossed over by the High Court is that the Settlement Agreement dated 4th November, 2016 and the Consent Terms dated 29th September, 2017 have been entered into between the respondent No. 1/plaintiff and respondent No. 2/defendant No. 1 *inter partes*. That could not be thrust upon the appellant/defendant No. 2 who had executed a separate agreement with respondent No. 2/defendant No. 1. The appellant could be bound only by the agreement dated 10th March, 2003 in his favour and executed by him. Admittedly, the said agreement is the subject-matter of arbitration proceedings, *inter alia* because respondent No. 2 had failed to discharge its obligation thereunder. The appellant has already parted with the possession of flats to respondent No. 2 in furtherance of agreement dated 10th March, 2003 and respondent No. 1/plaintiff could be accommodated only against those flats. Asking the appellant to hand over additional 8 flats and 16 parking spaces by way of mandatory order, would be to superimpose the liability of respondent No. 2/defendant No. 1 on the appellant for discharging its obligation *qua* respondent No. 1/plaintiff in relation to the agreement entered between them dated 22nd September, 1999 and including Settlement Agreement dated 4th November, 2016 and Consent Terms dated 25th September, 2017, to which the appellant is not a party.

24. That apart, the learned Single Judge as well as the Division Bench have committed fundamental error in applying the principle of moulding of relief which could at best be resorted to at the time of consideration of final relief in the main suit and not at an interlocutory stage. The nature of order passed against the appellant is undeniably a mandatory order at an interlocutory stage. There is marked distinction between moulding of relief and granting mandatory relief at an interlocutory stage. As regards the latter, that can be granted only to restore the *status quo* and not to establish a new set of things differing from the State which existed at the date when the suit was instituted. This Court in *Dorab Cawasji Warden v. Coomi Sorab Warden,* 1990 (2) SCC 117, has had occasion to consider the circumstances warranting grant of interlocutory mandatory injunction. In Paragraphs 16 and 17, after analysing the legal precedents on the point as noticed in Paragraphs 11-15, the Court went on to observe as follows :

"16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the *status quo* of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, Courts have evolved certain guidelines. Generally stated these guidelines are :

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a *prima facie* case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case. Though, the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as pre-requisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion." (Emphasis supplied)

26. The principle expounded in this decision has been consistently followed by this Court. It is well established that an interim mandatory injunction is not a remedy that is easily granted. It is an order that is passed only in circumstances which are clear and the *prima facie* material clearly justify a finding that the *status quo* has been altered by one of the parties to the litigation and the interests of justice demanded that the *status quo ante* be restored by way of an interim mandatory injunction. (See : *Metro Marins v. Bonus Watch Co. (P) Ltd.*, 2004 (7) SCC 478; *Kishore Kumar Khaitan v. Praveen Kumar Singh,* 2006 (3) SCC 312 and *Purshottam Vishandas Raheja v. Shrichand Vishandas Raheja (Dead) through L.Rs.),* 2011 (6) SCC 73.

27. In the factual scenario in which mandatory order has been passed against the appellant, in our opinion, is in excess of jurisdiction. Such a drastic order at an interlocutory stage ought to be eschewed. It cannot be countenanced.

28. Reverting to the decision in *Gaiv Dinshaw Irani,* (supra), relied upon by the High Court, the Court moulded the relief in favour of the party to the proceedings to do substantial justice whilst finally disposing of the proceedings and did not do so at an interlocutory stage. In other words, reliance placed on the principle of moulding of relief is in apposite to the fact situation of the present case.

29. Resultantly, the invocation of principle of moulding of reliefs so also the exercise of power to grant mandatory order at an interlocutory stage, is manifestly wrong. To put it differently, while analysing the merits of the contentions, the High Court was swayed away by the consent agreement between the respondents *inter partes* to which the appellant was not a party. Thus, he could not be bound by the arrangement agreed upon between the respondents *inter se*. The appellant would be bound only by the agreement entered with respondent No. 2 dated 10th March, 2003 and at best the

tripartite agreement dated 11th September, 2009. The respondent No. 2 having failed to discharge its obligation under the stated agreement dated 10th March, 2003, cannot be permitted to take advantage of its own wrong in reference to the arrangement agreed upon by it with respondent No. 1/plaintiff and including to defeat the claim of the appellant in the arbitration proceedings.

30. It would have been a different matter if the High Court were to continue the *ad-interim* arrangement directed in terms of order dated 3rd December, 2012 and as corrected on 17th December, 2012, until the final disposal of the suit. However, by no stretch of imagination, the appellant could be directed to hand over 8 additional flats and 16 parking spaces to respondent No. 1 with whom the appellant has had no independent agreement in that regard. The fact that respondent No. 1 would get a right in the suit property in terms of agreement dated 22nd September, 1999, Settlement Agreement dated 4th November, 2016 and Consent Terms dated 25th September, 2017 with respondent No. 2, cannot be the basis to set up a claim against the appellant and, especially because complying with the directions in the impugned order would result in bestowing advantage on respondent No. 2 who has failed to discharge its obligation under the agreement dated 10th March, 2003 with the appellant."

35. The Court finds that none of the above judgments cited by learned Senior Advocate Mr. Parikh could be applied to the facts of the present case.

36. It is not that the Court cannot grant injunction of mandatory nature pending the suit even when the facts of the case call for grant of such relief. When the facts are eloquent and no detailed analysis of the evidence is required and the pleadings and documents on record are sufficient for the purpose of considering the question for grant of injunction of mandatory nature to prevent the sufferance of a party asking for mandatory injunction and when the opposite party could be compensated in terms of money for the loss if found suffered by such party at the end of the trial, the Court may grant injunction of mandatory nature with certain conditions to secure the interest of opposite party on finding that the party asking for such injunction has made out strong *prima facie* case and the aspects of balance of convenience and irreparable loss are also in favour of such party. The present is such case as stated above.

37. For the reasons stated above, the appeal is allowed. The impugned dated 19-12-2016 is set aside. The application Exh. 7 is partly allowed. The respondent-defendant, its servants and agents are hereby restrained from preventing the plaintiff-Society to undertake re-development activities on the suit properties (the land of society with old flats on the land); from causing any obstruction or interference in removal or demolition of the construction of all 33 old flats from the land for the purpose of re-development project/ scheme of the plaintiff-Society; from entering in the Society or on its land

and from making or executing any agreement or writing with any third party or creating any third party interest or creating any mortgage, *lien* or charge in connection with the suit properties, including 15 flats purchased by it, and the defendant, its servants and agents are further restrained from causing any obstruction or interference to the plaintiff-Society in handing over peaceful, actual and vacant possession of the suit properties (all old 33 flats with land) to the new developer for starting with the work of re-development project/scheme of the plaintiff-Society.

38. The trial Court shall immediately appoint Court Commissioner, in whose presence the plaintiff-Society shall handover the possession of the suit properties to the new developer for re-development of the properties of the plaintiff-Society. The Court Commissioner shall make report to the trial Court as regards handing over of the possession of the suit properties by the plaintiff-Society in his presence to the new developer.

39. The above injunction is issued on condition that the plaintiff- Society shall reserve/keep apart 15 new flats in redevelopment project/scheme till the present suit is finally decided and to that effect, office bearers of the plaintiff-Society shall file undertaking within a period of *TWO WEEKS* from today before the trial Court. However, such reservation of 15 flats in redevelopment project/scheme shall be subject to the final outcome of the present suit.

40. It is clarified that it will be open to the defendant to receive the amount of sale consideration, which is stated to be Rs. 7,32,60,000/-, from the plaintiff-Society for transfer of the rights in 15 flats to the plaintiff-Society, keeping its right open to claim damages in its suit for specific performance of the contract. If the defendant so desires, the defendant shall be required to file *purshis*/application in the proceedings of the present suit clearly stating that it desires to receive the above amount of consideration and shall execute required document to transfer the rights in 15 flats in favour of the plaintiff-Society without prejudice to its rights and contentions to pursue the claim for damages in its suit. If such *purshis*/application is filed in the trial Court, the trial Court shall order the plaintiff-Society to immediately deposit the above amount with the Court and on deposit of the above amount by the plaintiff-Society with the trial Court, the trial Court shall make further order for execution of the requisite document by the defendant for transfer of the rights in favour of the plaintiff-Society in 15 flats and permit the defendant to withdraw the above amount. If defendant files *purshis*/application for above purpose and the trial Court passes the order as stated above, the plaintiff-Society shall not be then required to reserve/keep apart 15 flats in re-development scheme and it shall stands released from its undertaking.

41. At this stage, learned Advocate for the defendant requests to stay/ suspend the present order for a period of eight weeks to enable it to go to higher forum. Such request is opposed by learned Senior Advocate Mr. Nanavati for the plaintiff. However, the Court finds that since the Court has allowed the appeal and granted injunction in favour of the appellant-Society, reasonable time is required to be given to the defendant for approaching the higher forum. Hence, it is ordered that present order shall remain under suspension for a period of six weeks from today.

42. Since the Appeal From Order is disposed of, the Civil Applications shall not survive and stand disposed of accordingly.

(NRP) *Order accordingly.*

* * *

CIVIL APPELLATE

Before the Hon'ble Mr. Justice S. G. Shah

NATIONAL INSURANCE CO. LTD. v.
MAKUBEN RANCHHODBHAI CHAND & ORS.*

(A) Motor Vehicles Act, 1988 (59 of 1988) — Sec. 163A — Accident claim — Deceased travelling in a rickshaw allegedly as passenger when on coming truck dashed with rickshaw — Contention by appellant that since offending vehicle/truck not traced, this is a case of 'hit and run', hence claimants not entitled to compensation from owner and insurer of rickshaw — Contention negatived — Held, right to compensation arises due to accident out of use of motor vehicle — In a claim petition under Sec. 163A only scrutiny is to be made is whether there is involvement of any motor vehicle or not — Award by Tribunal, confirmed.

(એ) મોટર વાહન અધિનિયમ, ૧૯૮૮ — કલમ ૧૬૩એ — અકસ્માતનો દાવો — મરનાર રીક્ષામાં ઉતારુ તરીકે મુસાફરી કરી રહ્યો હતો ત્યારે સામેથી આવતી ટ્રક રીક્ષા સાથે ટકરાઈ — અરજદારની રજૂઆત કે અકસ્માત કરનાર વાહન/ટ્રકને શોધી શકાઈ નથી, તેથી આ દાવો 'હિટ એન્ડ રન'નો છે, તેથી આ દાવેદારો માલિક તરફથી અને વીમો ઉતારનાર કંપની તરફથી વળતર મેળવવાને પાત્ર નથી — રજૂઆત નકારવામાં આવી — ઠરાવવામાં આવ્યું કે, મોટર વાહનના ઉપયોગ દ્વારા તથા તેનાથી થયેલ અકસ્માતથી વળતરનો હક્ક દાવો ઉપસ્થિત થાય છે — કલમ ૧૬૩એ હેઠળની દાવા અરજીમાં માત્ર છાનબીન થવી જોઈએ કે, તેમાં કોઈપણ મોટર વાહનની સંડોવણી થઈ છે કે નહીં — પંચનો એવોર્ડ માન્ય રાખવામાં આવ્યો.

Relying upon the decision judgment dated 13-7-2005 passed by Division Bench in First Appeal No. 3354 of 2000 in the case *of National Insurance Company v. Rasilaben Shantilal Yadav*, it is contended that when claimant has came forward with the case that their vehicle was hit by some unknown vehicle which could not be traced, then this is a case of 'hit and run' and claimants

*Decided on 28-8-2018. First Appeal No. 3288 of 2005, challenging the judgment and award passed by M.A.C. Tribunal at Bhuj in M.A.C.P. No. 212 of 2001.