

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
IN ITS COMMERCIAL DIVISION  
NOTICE OF MOTION (L) NO. 706 OF 2017  
IN  
COMMERCIAL SUIT NO. 614 OF 2017**

Vilas Chandrakant Gaokar )  
6 Sence, Gokhale Road, Prabhadevi, Mumbai - 25. )... Applicant

**IN THE MATTER BETWEEN :**

1. Mr. Anand Agarwal )  
2. Mrs. Pramila Anand Agarwal )  
Both adults of Mumbai, Indian inhabitants, )  
residing at 17/A, Dr. Bhagwanlal Inderjit Road, )  
6th Floor, Sea Crest Building, )  
Mumbai - 400 006 )... Plaintiffs

**Versus**

1. Vilas Chandrakant Gaokar, )  
Adult of Mumbai, )  
Sole Proprietor of M/s. Shree Swami जयते )  
Samarth Construction, having address )  
at Sixth Sence, Gokhale Road, Prabhadevi, )  
Mumbai - 400 025 )  
2. Sagar Shah, )  
An adult of Mumbai, residing at Flat No. 1201, )  
Tytan, Napean Sea Road, Mumbai - 400 026 )  
3. Nikunj Mittal, )  
The Managing Director of NNM Securities Pvt. Ltd. )

having office at 1111, Stock Exchange Tower, Dalal )  
Street, Mumbai - 400 023 )  
4. Vivek Gangwal, )  
An adult of Mumbai, residing at 302, Marathon )  
Heights, P.B. Marg, Worli, Mumbai )  
5. Mrs. Natasha Sagar Shah, )  
An adult of Mumbai, residing at Flat No. 1201, Tytan )  
Napean Sea Road, Mumbai - 400 026 )...Defendants

*Mr. Mathew Nedumpara, instructed by Mrs. Rohini M/ Amin, for the Applicant.  
Mr. S. Jagtiani, instructed by M/s. J.Law Associates, for the Plaintiffs.*

**CORAM: S. J. KATHAWALLA, J.**  
**JUDGMENT RESERVED ON : 4<sup>th</sup> January, 2018**  
**JUDGMENT PRONOUNCED ON : 5<sup>th</sup> March, 2018**

#### JUDGMENT :

1. At this point of time, the Judiciary is mired in challenges of a very grave nature, perhaps like never before. It is being observed that there is, amongst some litigants and their Advocates, virtually no fear or hesitation in making false statements and misrepresentations before the Court, which should under any and all circumstances be dealt with the iron hand of the judiciary with zero tolerance for such blatantly unethical and mala-fide behaviour.

2. The dignity and respect of the Court along with its prescribed procedures is being unabashedly violated by certain litigants who are using foul and unfair means to demean and denounce the august Judiciary by making frivolous and

baseless allegations against the Judges, and/or their opponents and their Advocates, with a view to rescind and back-track on solemn undertakings and statements earlier made in Court. This malicious *modus operandi* of certain dishonest litigants is absolutely unacceptable, as it seeks to subvert the very foundations of justice that the Judiciary is committed to uphold. With no merit in their case, and in a bid to avert an unfavourable order being passed against them, such dishonest litigants collude with their Advocates to use underhanded means to ensure favourable orders and their consequent success in litigation instituted or defended by them.

3. Certain Advocates sadly seem to have forgotten the code of ethics that enjoins upon all Advocates, that they are Officers of the Court first and Advocates of their clients only thereafter. It is anguishing to note that such Advocates facilitate the unethical misadventures of their clients, often encouraging their clients' dishonest practices, causing grave stress to the Judiciary, and unfortunately bringing the entire judicial system to disrepute. It has become a vicious and despicable cycle wherein dishonest litigants with mala-fide intentions seek out unethical Advocates, who for hefty fee and the lure of attracting similar new and unscrupulous clients, conveniently choose to disregard and/or forget all ethics and the code of conduct enjoined upon this

august profession. It is with a heavy heart, that Courts at times note that clients have no hesitation in replacing good and honest Advocates, with unscrupulous ones, who go to any dishonest lengths, merely to secure favourable orders for their clients.

4. The present case and the conduct of the Defendant No. 1 / Applicant strongly affirms the aforesaid observations. The Defendant No.1 Shri Vilas Chandrakant Gaokar had through out the hearing of his case, remained present and appeared before the Court with his Counsel as well as the Advocate on record. He took the assistance of this Court in resolving his issues pertaining to the Suit, gave undertakings in pursuance of it, obtained consent orders and also acted in consonance with the same. However, Defendant No.1 breached one of the undertaking given by him and being fully aware of the consequences thereof, he craftily and quickly changed his Advocates ( who had already been previously changed) and briefed Counsel Mr. Mathew Nedumparra, who in turn advised him to file this Notice of Motion. In this Notice of Motion, he has stated that all the previous orders passed by this Court are null and void for reasons which are utterly false and dishonest to the knowledge of his client Shri Vilas Chandrakant Gaokar.

5. This malicious and mala-fide Notice of Motion sets out/alleges totally

baseless and contemptible allegations against this Court, which are completely unacceptable and are a mere shenanigan to circumvent the action of contempt of Court. This reprehensible attempt at intimidating and manipulating this Court into not taking any action under the Law of Contempt calls for censure in the strongest terms. In an attempt to cover up the mala-fide intent, which is crystal clear and amply evident, the litigant Shri Vilas Chandrakant Gaokar dishonestly/falsely reiterates in the Application that he holds the Court in the highest esteem and respects its integrity. It will not be out of place to mention here that in an earlier matter before me, in which Mr. Mathew Nedumpurra appeared for one of the parties, he, after repeatedly reiterating that he holds the Court in the highest esteem and respects its integrity, had proceeded to pray that I recuse myself from all the matters in which he appears. That Application was, however, rejected by a detailed Judgment dated 23<sup>rd</sup> December, 2014, reported in 2015(2) Bom.C.R.247.

6. Therefore, such unethical and unacceptable behaviour needs to be met with the iron hand of the Court. The Courts must tackle all such unethical conduct fearlessly by taking stern action against litigants, and if need be their unethical Advocates as well. A failure to do so, will result in seriously jeopardising the Judiciary and will erode the Rule of Law, which is absolutely

integral to the justice system in the country. The Courts must act swiftly and firmly, without getting intimidated by false and frivolous charges, and utterly baseless, malicious and dishonest allegations that are levelled against the Judges.

7. I shall now proceed to deal with the above Notice of Motion taken out by Shri Vilas Chandrakant Gaokar (Applicant/Original Defendant No.1).

8. The above Notice of Motion is taken out by Defendant No. 1 Vilas Chandrakant Gaokar, for a declaration that the Orders dated 26<sup>th</sup> April, 2017, 29<sup>th</sup> April, 2017, 12<sup>th</sup> May, 2017, 19<sup>th</sup> June, 2017, 26<sup>th</sup> June, 2017, 10<sup>th</sup> July, 2017, 18<sup>th</sup> July, 2017, 20<sup>th</sup> July, 2017, 25<sup>th</sup> July, 2017, 10<sup>th</sup> August, 2017, 24<sup>th</sup> August, 2017, 11<sup>th</sup> September, 2017, 18<sup>th</sup> September, 2017, 25<sup>th</sup> September, 2017 and 10<sup>th</sup> October, 2017, passed by me are all rendered void ab initio, vitiated by errors apparent on the face of the record and that the same should be recalled. Defendant No. 1 has also sought a declaration that this Court is not invested with the jurisdiction to embark upon the controversies which it has been called upon to decide, since it is not a Commercial Court within the meaning of Section 2 (1) (b) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (Commercial Courts Act, 2015) and further for a declaration that the Suit is barred by limitation and that the issue of maintainability is liable to be decided as a preliminary issue.

9. Relying on the Affidavit-in-Support of the Notice of Motion, Mr. Mathew Nedumpara, the Advocate for Applicant/Original Defendant No. 1 has **submitted as under:**

9.1 That the above Suit is a commercial suit within the meaning of Section 7 of the Commercial Courts Act, 2015. The case was for the first time placed on Board on 26<sup>th</sup> April, 2017. A notice of the said hearing was served on Defendant No. 1 on 22<sup>nd</sup> April, 2017. The Defendant No.1, as a layman, felt it only appropriate to consult a lawyer and felt that the case being of a civil nature, his presence was not required. The Court apparently relying on the submission of the Plaintiff passed an order directing that Defendant Nos. 1 to 5 be present in the Court on 28<sup>th</sup> April, 2017 at 11.00 a.m., and recorded that if they fail to remain present the Court shall pass necessary orders to ensure their presence before this Court including issuing a warrant of arrest. The Senior Inspector of the local Police Station was asked to assist the representative of the Plaintiffs and/or their Advocates to serve a copy of the order on the Defendants and obtain their acknowledgments. The Court, in the meantime, also restrained Defendant No. 1 from creating any third party rights in respect of any of the flats in his project, more particularly described in prayer clause (1) of the Plaint.

9.2 That on 28<sup>th</sup> April, 2017, when the Defendant No.1 appeared before

the Court for the first time, he was threatened that he will be sent to jail. Therefore, he was terribly frightened. That is the reason he readily agreed to whatever came from the “mouth” of the Court. Even today, he is terribly frightened but he is reassured that he is before a Court of law and he commits no wrong in asserting his rights, and his fear is misplaced. His Counsel has infused in him some confidence and trust in the procedural protection which he is entitled in law.

9.3 That on 29<sup>th</sup> April, 2017, this Court was pleased to direct the Branch Manager of C.K.P. Co-operative Bank, Dadar Branch, Mumbai, to be present with the records on 3<sup>rd</sup> May, 2017, at 10.30 a.m., in Chambers along with the records of the account of Swami Samarth Medical Stores. The Court further directed that no third party interest shall be created in respect of Veg Always Hotel and/or any properties in which Defendant No. 1 has any interest.

9.4 That on 3<sup>rd</sup> May, 2017, the Bank Manager of C.K.P. Co-operative Bank, Dadar Branch and one Shri Mohan Chavan were present.

9.5 That Defendant No. 1 was relaxed that since the High Court had been closed for summer vacation, he could brief his lawyer leisurely. However, he was served with a notice by the Plaintiffs lawyer that he should be present in my Chambers on 12<sup>th</sup> May, 2017. Defendant No. 1, therefore, had to engage a



Counsel post haste. However, this Court, for reasons difficult to fathom, was pleased to record the undertakings on his behalf, as set out therein, and also recorded in the order that, “by consent the matter is treated as part-heard”.

9.6 That the Court was pleased to do so, on the request of the Counsel for the Plaintiffs. Any right thinking person would have entertained disturbing thoughts as to the integrity and honesty of this Court in passing orders/recording the proceedings of the Court as above. However, Defendant No.1 did not even in his wildest of dreams allow such thoughts to ever enter his mind. He has the greatest of faith in the integrity of this Court so also the highest of regard, in spite of the fact that he has been put to grave injustice by the aforesaid orders of the Court which has recorded as consent, things which were forced to be consented to out of sheer fear of the Court. Therefore, whatever is recorded and attributed to be the consent of the Defendant No.1 and undertaking given by him is what the Court made him agree upon.

9.7 That the recording that, “by consent, the matter is treated as part-heard”, and further hearing of the suit by me, amounts to an investiture of a jurisdiction on me by consent, which the law has not invested in me. The above Suit is a commercial suit instituted before the Commercial Bench of this Court by virtue of Section 4 of the Commercial Courts Act, 2015. When the above

Suit was listed before me on 26<sup>th</sup> April, 2017, 29<sup>th</sup> April, 2017 and 3<sup>rd</sup> May, 2017, my Court was the Commercial Court Bench in terms of Section 4 of the Commercial Courts Act, 2017. However, on 12<sup>th</sup> May, 2017, I was not invested with any jurisdiction to hear any case much less the instant Suit, the Court being closed for mid-summer vacation on 6<sup>th</sup> May, 2017. As per the Letters Patent Act/Bombay High Court Rules/Notifications only the Vacation Bench constituted by the Hon'ble the Chief Justice alone was invested of the jurisdiction to hear any matter whatsoever. As far as the information and knowledge of Defendant No.1 goes, the Hon'ble Chief Justice had not authorised me to hear any Commercial Suit within the meaning of Section 2 (1) (b) of the Commercial Courts Act, 2015, or the instant case in particular.

9.8 The Defendant No. 1 was made to agree to the Order dated 12<sup>th</sup> May, 2017, which has recorded many undertakings and the consent of Defendant No.1. Therefore, the same is rendered void ab initio, being one at the hands of a Court which is invested with no jurisdiction whatsoever to hear the case. Therefore, my Court was a *coram non judice* in so far as the above case is concerned on 12<sup>th</sup> May, 2017, so too the various dates on which the above case was posted. The orders/proceedings of this Court dated 12<sup>th</sup> May, 2017, 19<sup>th</sup> June, 2017, 26<sup>th</sup> June, 2017, 10<sup>th</sup> July, 2017, 18<sup>th</sup> July, 2017, 20<sup>th</sup> July, 2017, 25<sup>th</sup>

July, 2017, 10<sup>th</sup> August, 2017, 24<sup>th</sup> August, 2017, 11<sup>th</sup> September, 2017, 18<sup>th</sup> September, 2017, 25<sup>th</sup> September, 2017 and 10<sup>th</sup> October, 2017, and the undertaking and consent recorded therein are all rendered void ab initio.

9.9 That no Court or Tribunal could confer jurisdiction upon itself by consent of parties, however voluntary, bona fide and well meaning it could be, if the law has not conferred such jurisdiction upon it. The question of jurisdiction involved, in so far as the present Suit is concerned is substantive in nature. It is about the very competence and authority of this Court to hear the above case even after my Court ceased to be a Commercial Bench within the meaning of Section 2 (1) (b) of the Commercial Courts Act of 2015.

9.10 That the foundation, based on which this Court proceeded to hear the above case is the Order dated 12<sup>th</sup> May, 2017, which recorded that the case be treated as part-heard. To give full meaning to the word “consent” would mean consent given by Defendant No. 1 and/or his lawyer. Defendant No. 1 has not given any consent. He is not capable of giving any consent. He never understood the implication of the words, “by consent the matter is treated as part heard”. Even assuming that he understood the meaning of the said words, which certainly is not true, even then it is of no consequence since he is incapable of empowering this Court with jurisdiction which the law has not invested upon it.

10. In support of the above submissions/contentions, Mr. Nedumpara has relied on the following decisions of the Hon'ble Supreme Court of India :

(i) *Kiran Singh and others vs. Chaman Paswan and others*<sup>1</sup> wherein it is held that a decree passed by a Court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction whether it is pecuniary or territorial or whether it is in respect of the subject matter of the action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties.

(ii) *State of Rajasthan vs. Prakash Chand and others*<sup>2</sup> wherein it is held that a Judge shall exercise his powers within the bounds of law and should not use intemperate language or pass derogatory remarks against other judicial functionaries unless it is absolutely essential for the decision of the case and is backed by factual accuracy and legal provisions and that Judges must be circumspect and self-disciplined, in the discharge of their judicial functions. The virtue of humility in the Judges and the constant awareness that investment of power in them is meant for use in public interest and to uphold the majesty of the rule of law, would to a large extent ensure self-restraint in discharge of all judicial

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<sup>1</sup> AIR 1954 SC 349

<sup>2</sup> (1998) 1 SCC 1

functions and preserve the independence of the judiciary.

(iii) *Campaign for Judicial Accountability and Reforms vs. Union of India*<sup>3</sup>

wherein the Hon'ble Supreme Court has held that once the Chief Justice is stated to be the master of the roster, he alone has the prerogative to constitute Benches. Needless to say, neither a two Judge Bench, nor a three-Judge Bench can allocate the matter to themselves or direct the composition for constitution of a Bench.

(iv) *Naresh Shridhar Mirajkar and others vs. State of Maharashtra and another*<sup>4</sup>

wherein it is held that the High Court has inherent jurisdiction to hold a trial in camera if the ends of justice clearly and necessarily require the adoption of such a course. However, such inherent power must be exercised with great caution and it is only if the Court is satisfied beyond any doubt that the ends of justice themselves would be defeated if a case is tried in open Court that it can pass an order to hold the trial in camera.

11. The Plaintiffs have filed a detailed Affidavit setting out how the entire matter progressed before this Court, how Defendant No. 1 has suppressed the true and correct facts in his Application and how he has made statements in his Application which are false and incorrect to his knowledge. Mr. Sharan Jagtiani, the learned Advocate appearing for the Plaintiffs has pointed out that the

<sup>3</sup> Unreported order of the Hon'ble Supreme Court of India in Writ Petition (Crl.) No. 169 of 2017

<sup>4</sup> AIR 1967 SC 1

Defendant No. 1, except for on day one i.e. 26<sup>th</sup> April, 2017, has throughout remained present in Court and was duly represented by a Counsel as well as his Advocates/Attorney on record.

12. Mr. Jagtiani has submitted that not only are the submissions made by the Defendant No. 1 in his Affidavit in support of the Notice of Motion false and dishonest to his knowledge but the same are scandalous. He has submitted that Defendant No. 1 has made statements in his Affidavit suppressing the fact that after the hearing held before this Court on 3<sup>rd</sup> May, 2017, there was a hearing before this Court on 9<sup>th</sup> May, 2017, which was amongst others, attended by Defendant No.1 as well as his Advocate. In fact, thereafter the parties including Defendant No. 1 and their Advocates have met the Plaintiffs and their Advocate and drafted Minutes of Order, which were forwarded by the Advocate for the Plaintiffs to the Advocate for the Defendant No. 1 on 11<sup>th</sup> May, 2017 and thereafter all the parties and their Advocates, as decided on 11<sup>th</sup> May, 2017 appeared before this Court on 12<sup>th</sup> May, 2017 and obtained an Order by Consent and also agreed that the matter be treated as part-heard before this Court. Mr. Jagtiani has submitted that despite there being documentary evidence in support of the above facts, Defendant No.1 has suppressed the correct facts and has instead alleged as follows :

(i) That on 3<sup>rd</sup> May, 2017 after the Bank Manager of C.K.P.Co-op. Bank, Dadar Branch and one Shri Mohan Chavan, were present before this Court, the Defendant No.1 was relaxed that since the High Court is closed for summer vacation, he could brief his lawyer leisurely. However, he was served with a notice by the Plaintiffs lawyer that he should be present in my Chambers on 12<sup>th</sup> May, 2017. Defendant No. 1, therefore had to engage a Counsel post-haste. However, this Court, for reasons difficult to be fathomed, was pleased to record the undertakings on his behalf, as set out therein, and also recorded in the Order that, “*by consent the matter is treated as part-heard*”.

(ii) That the Court was pleased to record in the Order dated 12<sup>th</sup> May, 2017 “by consent the matter is treated as Part-heard” on the request of the Counsel for the Plaintiffs. Any right thinking person would have entertained disturbing thoughts as to the integrity and honesty of this Court in passing orders/recording the proceedings of the Court as above.

(iii) Defendant No.1 is put to grave injustice by the orders of the Court which are recorded as consent, for things which were forced to be consented to out of sheer fear of the Court. Therefore, whatever is recorded and attributed to be the consent of the Defendant No.1 and undertaking given by him is what the Court made him agree upon.

(iv) That the recording that, “by consent, the matter is treated as part-heard”, and further hearing of the Suit by this Court amounts to investiture of a jurisdiction on the Court by consent, which the law has not invested in the Court.

13. Mr. Jagtiani has submitted that even after 12th May, 2017, the matter appeared on my board on 12 occasions and was shown as “Part Heard” and several orders were passed by this Court, when Defendant No. 1 as well as his Advocates were present. Mr. Jagtiani has submitted that apart from the fact that the Advocate has implied authority of his client to enter into a compromise and an order passed by consent cannot be appealed and no review can be sought in respect thereof, the parties are estopped from withdrawing their consent. Mr. Jagtiani has submitted that stern action be taken against Defendant No. 1 for making incorrect statements, suppressing facts and making scandalous allegations against this Court. Mr. Jagtiani has submitted that the above Notice of Motion therefore, deserves to be dismissed with exemplary costs and this Court be pleased to initiate action against Defendant No. 1 for making false and incorrect statements on oath and for casting aspersions and scandalous allegations against this Court.

14. In support of the above submissions / contentions, Mr. Jagtiani has relied



on the following decisions :

(i) *Kiran Narottamdas Merchant Vs. Ravindra Narottamdas Merchant*<sup>5</sup>

wherein the Division Bench of this Court comprising of Dr. D.Y. Chandrachud (as he then was) and S.C. Gupte, JJ, held that a judgment by consent binds the parties as effectively as a judgment delivered upon adjudication and hence constitutes an estoppel between the parties. Paragraphs 14 and 15 of the said Judgment are relevant and reproduced hereunder :

*"14. The concept and consequence of a compromise decree was considered in a judgment of the Madras High Court in Raja Kumara Venkata Perumal Raja Bahadur vs. Thatha Ramasamy Chetty, 1911 21 MLJ 709. A judgment by consent of the parties constitutes more than a mere contract and is said to have sanction of the Court. Consequently, a judgment by consent has all the force and effect of any other judgment being conclusive as an estoppel upon the parties. The jurisdiction and powers of the Court to pass a decree by consent is, however, limited in the sense that the Court does not decide the disputes between the parties, but only embodies the decision of the parties and makes their decision as its own, giving it the force and solemnity of a decision of the Court. This principle has subsequently been adopted by the Supreme Court in Raja Sri Sailendra Narayanbhanja Deo vs. State of Orissa, AIR 1956 SC 346 at para 14. The same principle was enunciated*

<sup>5</sup> 2014 (2) Mh.L.J. 395

*subsequently in Byram Pestonji Gariwala vs. Union Bank of India (1992) 1 SCC 31 where the Supreme Court held that a consent decree binds the parties and is as effective an estoppel between them. The same principle was followed by the Supreme Court in P.T. Thomas vs. Thomas Job., (2005) 6 SCC 478.*

*15. The principle of law is, hence, well settled. Where the Court delivers or pronounces a judgment by consent, what the Court does in effect is to place its imprimatur on a contractual arrangement between the parties. The agreement between the parties which forms the foundation of the judgment is contract nonetheless like any other contract. A judgment by consent, therefore, binds the parties as effectively as a judgment delivered upon adjudication and hence, it has been held to constitute an estoppel as between the parties."*

(ii) *Lalit Kumar s/o. Purushottamdas Mohta vs. Official Liquidator, High Court of Judicature at Bombay, Nagpur Bench, Nagpur and Others*<sup>6</sup> wherein the Division Bench of this Court comprising of D.D. Sinha and K.J. Rohee, JJ., (as they then were) held that the impugned order is a consent order and therefore the Appellant and Respondent No. 3 are estopped from making grievance thereof since both of them by necessary implication waived their right to question the propriety and legality of such order.

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<sup>6</sup> (2004) 2 Mh.L.J. 457

(iii) *Govindarajan and Others vs. K.A. N. Srinivasa Chetty and others*<sup>7</sup>, wherein the Madras High Court held that an Advocate appearing for a party always has an implied authority to enter into a compromise on behalf of his party. The relevant portion of paragraph 7 of the said Order is reproduced hereunder :

"7. .... It was not the case of the defendants in this case that the compromise itself was opposed to public policy or contrary to law. It was only stated that the same is voidable at their instance because of fraud and coercion. The Court below could not have, therefore, refused to record the compromise on that ground. The learned Counsel is also not well-founded in this contention that because the Advocate had executed the compromise on behalf of his client, it is not valid in law. In another decision reported in *Madras Co-operative Printing and Publishing Society Limited, Madras represented by its Secretary v. O. Ramalingam and others*, have held following the decision of the Supreme Court in C.A. No. 43 of 1968, that an advocate appearing for a party always has an implied authority to enter into a compromise on behalf of his party. The only limitation is if there was any written prohibition or limitation, he will have to act within that prohibition or limitation. The learned counsel for the appellants in this case is not able to point out any such limitation on the authority of the Advocate to enter into the compromise in this case. We have, therefore, to proceed on the basis that there was a legal and valid compromise between the parties."

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<sup>7</sup> AIR 1977 Mad 402

15. Before I proceed to set out how the matter proceeded before me, I would at the outset like to make it clear why the Order dated 26<sup>th</sup> April, 2017 was passed, why the matter was kept on some occasions in Chambers and why it cannot be alleged that I was not invested with jurisdiction to hear any case, much less the instant Suit, since the Court was closed for mid-summer vacation on 6<sup>th</sup> May, 2017 upto 5<sup>th</sup> June, 2017, and thereafter.

16. As set out in the orders passed by me in several matters, a majority of the fresh suits filed before me and the ad-interim applications made before me for urgent ad-interim reliefs, pertain to matters in which the builders/developers promise to sell/allot ownership flats and after collecting crores of rupees cheat such flat purchasers, by not only not carrying out/completing the construction as promised, but by creating third party rights in respect of the same flats promised to be sold, in favour of other purchasers. I have also observed in such matters that some of the developers/builders despite being given notice of an application before the Court seeking urgent reliefs, they neither appear before the Court by themselves nor through their Advocates in order to avoid making any statements before the Court with regard to the suit premises and/or the suit project. The motive behind not appearing before the Court is to buy time to create a defence which includes creating documents in the form of allotment letters, etc., as

would suit them. Such builders/developers also do not care if any ex-parte orders of injunction are passed against them in their absence because they are aware that they will defeat any orders passed by the Court by appearing on the adjourned date, give some excuse for their non- appearance, produce documents that they have subsequently created and on the strength thereof, contend that third party rights are already created in respect of the subject premises/project. Keeping this modus operandi in mind, and in order not to give any opportunity to such litigants to play such games with the Court and defeat the ends of justice, I ensure their presence by passing an order requiring them to remain present immediately within a day or two, with a warning that if they breach the order, the Court shall be constrained to pass necessary orders to ensure their presence before the Court, including issuing a warrant of arrest. To further ensure that the order reaches the concerned Defendant by hand-delivery and is accepted by such Defendant, because many a times they brazenly refuse to accept service, I also direct the local police station to assist the Plaintiff in serving a copy of the order and obtain an acknowledgment of the erring party. Therefore, as set out hereinabove, such orders are passed to prevent a dishonest party from playing such games with the Court to defeat the ends of justice.

17. In the instant case, on 26<sup>th</sup> April, 2017, an application was made before

me by the Plaintiffs and it was pointed out to me that the Plaintiffs have been cheated by Defendant Nos. 1 to 5 by collecting an amount of Rs. 9.5 crores and allotting flats in a building known as Samarth Heights in Dadar (which were really intended as security for an admitted debt) without disclosing that the flats were already sold to third parties. In order to point out that the Plaintiffs are not the only individuals who are cheated by the Defendant No.1 and in support of the submission that he is a habitual fraudster, I was informed that Defendant No.1, Shri Vilas Chandrakant Gaokar, has cheated and duped various other gullible persons by selling flats in the same building by collecting substantial funds from them and after carrying out some initial construction, the construction work is brought to a halt. It was also pointed out that Defendant No.1 has also cheated the tenants who vacated their old tenements and have handed over possession of the same to Defendant No.1 for redevelopment work. He has not only not provided them with the new flats as promised, but has also not paid to them the rent promised in lieu of temporary alternate accommodation, thereby virtually bringing them on the streets. I was informed that some of the tenants have approached the Court and the proceedings are pending. In view of the said submissions and being conscious of the fact that though the intimation of the Application seeking urgent ad-interim orders to be made on 26<sup>th</sup> April, 2017 was

received by Defendant Nos.1 to 5 on 22<sup>nd</sup> April, 2017, none of the Defendants have bothered to remain present in Court on 26<sup>th</sup> April, 2017 by themselves and/or through their Advocates despite the matter being shown on board on that day for urgent ad-interim reliefs, this Court therefore proceeded to pass the Order dated 26<sup>th</sup> April, 2017, the contents of which are set out hereinabove. The Order dated 26<sup>th</sup> April, 2017 has not caused any prejudice to any of the Defendants. The Defendants and/or their Advocates including Defendant No.1 Shri Vilas Chandrakant Gaokar and his earlier Advocates, who have been regularly appearing before this Court since 28<sup>th</sup> April, 2017, have not made/raised any grievance/objection with regard to the said Order dated 26<sup>th</sup> April, 2017 and a grievance/objection is now made/raised for the first time on 28<sup>th</sup> October, 2017 by Defendant No.1 only to wriggle out of an undertaking given by him much after 26<sup>th</sup> April, 2017, which I will hereinafter explain in detail. The Defendant No.1 has, even at this stage, not raised the objection/grievance through his earlier Advocates, knowing fully well that they will not agree to be a party to his dishonest design of filing an Affidavit based on falsehood with the dishonest intention to wriggle out of an undertaking recorded by consent in the Order dated 12<sup>th</sup> May, 2017. Defendant No.1 Vilas Chandrakant Gaokar, therefore, discharged his earlier Advocates and has thereafter, brought Ms.

Rohini Amin, Junior/colleague of Mr. Mathew Nedumpara on record and through her has briefed Mr. Mathew Nedumpara as a Counsel, to interalia raise the grievance/objection with regard to the Order dated 26<sup>th</sup> April, 2017 by filing the present Notice of Motion only on 28<sup>th</sup> October, 2017. The Order dated 26<sup>th</sup> April, 2017 is, therefore, passed in the interest of justice and the question of taking cognizance of the grievance/objection of Defendant No.1 with regard to the same, or to recall the said Order as prayed for by Defendant No.1, does not arise and is rejected.

18. Defendant No. 1 and his Counsel Mr. Nedumpara have admitted that when the Orders dated 26<sup>th</sup> April, 2017, 28<sup>th</sup> April, 2017 and 3<sup>rd</sup> May, 2017 were passed by this Court in the above matter, the Hon'ble the Chief Justice had assigned commercial matters to me and that my Bench was a Commercial Court Bench in terms of Section 4 of the Commercial Courts Act, 2015. However, Mr. Nedumpara submitted that on 12<sup>th</sup> May, 2017, I was not invested with any jurisdiction to hear any case much less the instant Suit, since the High Court was closed for summer vacation on 6<sup>th</sup> May, 2017 and so far as their information and knowledge goes, I was not authorised to hear any commercial suit within the meaning of Section 2 (1) (c) of the Commercial Courts Act, 2015 or the instant case in particular. Though I am not in favour of setting out the extent of judicial



work done by me in the past about 10 years, only for the sake of placing on record the correct facts, I am constrained to mention, much against my wish that during all these years, I do not remember having taken a single day off during any of the vacations, be it Diwali, Christmas or Summer. I have either worked as a Vacation Judge or have worked on matters which were before me prior to the vacation. I have during vacations also placed matters which were heard by me prior to the commencement of vacations. All this is done only after seeking permission of the Hon'ble the Chief Justice. Infact, in April-May, 2017, the Hon'ble the Chief Justice had, pursuant to the request of the Hon'ble Chief Justice of India, requested the Judges of this Court to come forward and voluntarily hear pending matters at least for one week during the ensuing summer vacation of four weeks. I had informed the Hon'ble Chief Justice that, as in the past, I will be working and taking up matters during all the four weeks and that I should be allowed to take up matters during the period from Sunday, 7<sup>th</sup> May, 2017 to Sunday, 4<sup>th</sup> June, 2017 as per the extant assignment of my judicial work with effect from 27<sup>th</sup> March, 2017 including matters for pronouncement of judgments and orders. I had also issued oral directions to the Registry to obtain orders from the Hon'ble the Chief Justice in this regard. In view thereof, on 4<sup>th</sup> May, 2017, the Master and Assistant Prothonotary (Judicial) placed a written

submission before the Hon'ble Chief Justice seeking permission to list matters before me during the summer vacation from Sunday 7<sup>th</sup> May to Sunday 4<sup>th</sup> June, 2017 as per the extant assignment of judicial work w.e.f. 27<sup>th</sup> March, 2017, including matters for pronouncement of judgments/orders. The Learned Chief Justice had, on 4<sup>th</sup> May, 2017, itself, granted written permission in this regard. It is on the strength of this permission received from the learned Chief Justice that several matters were heard by me including commercial matters (since my assignment of judicial work w.e.f. 27<sup>th</sup> March, 2017 included matters under the Commercial Courts Act) and the above matters were also entertained by me on 9<sup>th</sup> and 12<sup>th</sup> May, 2017. In fact, on 12<sup>th</sup> May, 2017, the matter was not on my Board, but since the Advocates for the Plaintiffs as well as the Defendants including the Counsel and Advocates representing the Defendant No.1 were aware that I was continuing with my earlier assignment during the entire vacation, they mentioned the matter before me in Chambers and sought orders by consent, when Defendant No. 1 was also present. During the summer vacation, 30 matters were finally disposed off by me which included final disposal of 11 regular suits as well as commercial suits, final disposal of 15 Notices of Motion in Commercial Suits, final disposal of one Arbitration Application and final disposal of three Misc. Applications. Apart from the said

30 matters disposed of by me, 40 matters had remained part-heard and if the same would not be treated as part-heard upon reopening of the Court on 5<sup>th</sup> June, 2017, the entire exercise of proceeding with the matters during court vacations would be futile. Therefore, the parties through their Counsel/Advocates on their own requested the Court that their matters be treated as part-heard. On 12<sup>th</sup> May, 2017, the Advocates for the parties in the above matter including the Advocates for Defendant No. 1 also requested the Court to treat their matters as part heard. Again, the Defendant No.1 being aware that he has made false and incorrect statements in the Affidavit in support of his above Notice of Motion and his earlier Advocates will not support his dishonest stand, has changed his Advocates and dishonestly contended, through Mr. Mathew Nedumpara, that it was at the instance of the Plaintiffs that this Court recorded that by consent the matter be treated as part-heard, and that he had not given his consent. Though it is true that my regular assignment from June, 2017 did not pertain to commercial matters, a statement showing the disposal of the 30 matters finally disposed of and the balance matters which were heard and treated as part-heard by me, by consent of the parties was prepared by the Section Officer, Statistics Department which was subsequently handed over to the Registrar, Judicial-I, who forwarded the same to the Learned Chief Justice. In the said statement forwarded to the

Learned Chief Justice, even the dates fixed by me for hearing of the matters treated as part-heard, including the dates fixed in the above matter after re-opening of the Court on 5<sup>th</sup> June, 2017, are also mentioned. After the Court re-opened, Defendant Nos. 1 to 5, along with their Advocates, appeared before me on 12 different dates of hearing and several orders were passed by me in the matters without any party or the Advocates representing them making any grievance. As stated earlier, it is only when the Defendant No. 1 wanted to wriggle out of his undertakings that he discharged his earlier Advocates who were aware of the true and correct facts in the matter and instead briefed Mrs. Rohini Amin and Mr. Mathew Nedumpara to make the above Application, by suppressing facts, and on grounds which are false and dishonest to his knowledge.

19. After the Order dated 26<sup>th</sup> April, 2017, was served on Defendant Nos. 1 to 5, the manner in which the matter has progressed is set out in detail by the Plaintiffs in their Affidavit-in-Reply and in their submissions at the hearing of this Notice of Motion. The same is referred to hereinafter. It is pertinent to note that Defendant No. 1 has in his Rejoinder reiterated his allegations and made a general denial, but has not specifically dealt with the facts set out in the Affidavit in Reply. Even during his arguments Mr. Nedumpara has not

submitted that what is stated by the Plaintiffs in the Affidavit in Reply is incorrect.

20. On 28<sup>th</sup> April, 2017, Defendant No. 1 was personally present in Court along with the Counsel as well as his Advocate on record. This Court made it clear to the Advocates appearing for the Defendants that it will be in the interest of the Defendants to briefly disclose all the facts before the Court pertaining to the construction of the building and the third party rights already created by the Defendants in respect of the Suit Flats much before accepting the sum of Rs.9.5 Crores from the Plaintiffs. This Court also made it clear to the Advocates for the Defendants that the Defendants be informed as to what the consequences would be if the disclosure made by them turns out to be untrue. If this is perceived as a threat by any party, so be it. Defendant No. 1, through his Advocate, admitted having received a sum of Rs. 9,50,00,000/- from the Plaintiffs in lieu of allotting 7 flats in Samarth Heights. He also admitted that he had already sold the Suit Flats to other parties/purchasers prior to their allotment in favour of the Plaintiffs. In view of the above admission, Defendant No.1 agreed to return the amount of Rs.9,50,00,000/- with interest to the Plaintiffs within 12 months. A request was made to this Court on behalf of Defendant No.1 to urge the Plaintiffs not to insist on the agreed interest @ 36% p.a. but to reduce the same. Since

Defendant No.1 volunteered to settle the matter and agreed to pay the amounts due to the Plaintiffs, this Court requested the Advocate for the Plaintiffs to reduce/accept interest @ 15 percent per annum instead of the agreed rate of 36% p.a., which they agreed and the Defendant No.1 also accepted the same. After this agreement/settlement, it was suggested that, the Defendant No.1 to show his bonafides should arrange for at least Rs. One Crore and also provide some security to ensure the balance payment. At this stage, despite Defendant No.1 being represented by a Counsel as well as the Advocates on record, Defendant No.1 himself came forward and addressed the Court. He voluntarily informed the Court that since he was facing financial problems, he will need some time to arrange for Rupees One Crore. He submitted that he can forthwith pay Rs.25 lakhs to the Plaintiffs towards part payment. Defendant No. 1 requested that the matter be kept on 29<sup>th</sup> April, 2017 to enable him to give his proposal qua the return of the amounts received from the Plaintiffs with interest @ 15% p.a. and to also offer security for repayment of the entire amount. This Court acceded to the request of the Defendant No.1 and adjourned the matter to 29<sup>th</sup> April, 2017, despite it being a Saturday. Defendant No.1 has in his above Notice of Motion, in a clear attempt to suppress relevant facts, not made a whisper about what transpired in Court on 28<sup>th</sup> April, 2017.

21. On 29<sup>th</sup> April, 2017, Defendant No. 1 was present in my Chambers along with the Counsel who was instructed by his Advocates on record. Defendant Nos. 2 and 4 were also present with their Advocates. The Counsel for Defendant No.1, on instructions, informed the Court that Defendant No. 1 intends to repay some portion of the amount due to the Plaintiffs by sale of his medical shop at Parel, and shall pay the balance amount within 12 months, and in the interim offered his restaurant premises at Parel named 'Veg Always' as security for repayment of the balance amount. Defendant No. 1 despite being represented by his Counsel once again came forward and informed the Court that his medical shop is attached by CKP Bank for non-payment of its dues and there is a buyer named Wellness Group who is negotiating with him to buy his medical shop. He urged the Court to help him in his hour of need by requesting the Bank to accept its dues by way of One Time Settlement ('OTS') and raise the attachment on his shop so that he could sell the shop and from the consideration received therefrom, he could resolve his monetary problems. This Court was of the view that though Defendant No. 1 has taken a huge amount from the Plaintiffs and has offered them flats towards security which were already sold by him to third parties, since he is now expressing remorse and is making a genuine attempt to settle the matter, and further keeping in mind that if the financial

problems of Defendant No.1 are solved, he will be able to complete his project, which in turn will help all flat purchasers who must be waiting to get possession of their ownership flats. Therefore, keeping this in mind, this Court, strictly on sympathetic grounds and only with the intention of helping out the Defendant No.1, acceded to his request and by its Order dated 29<sup>th</sup> April, 2017 adjourned the matter to 3<sup>rd</sup> May 2017 and directed the Bank's representative to remain present. This Court also directed Defendant No.1 not to create third party rights in respect of the Restaurant and/or his other properties, and to produce his income tax returns. The Advocate for Defendant No.1, on instructions from Defendant No. 1 requested the Court to keep the matter in Chamber on the adjourned date since they did not want to negotiate with the Bank in open Court and also did not want to openly discuss the figure at which they would agree to sell their medical shop which was attached by the bank and thereafter kept closed.

22. It appears that after the hearing before this Court on 29<sup>th</sup> April, 2017 and before the next adjourned date i.e. 3<sup>rd</sup> May, 2017, certain discussions had taken place between the Advocates for the Defendant No.1 and the Advocates for the Plaintiffs, when the Advocates for the Plaintiffs were informed by the Defendant No.1/his Advocates that the medical shop is not an ownership



premise of Defendant No.1, but was given by the landlord on tenancy basis to Swami Samarth Medical and General Store, which is a partnership firm of Defendant No.1. However, Defendant No.1 had an understanding with the landlord under which he had orally consented for sale of the said shop.

23. In view thereof, on 2<sup>nd</sup> May, 2017, the Advocate for Defendant No. 1 sent an email to the Plaintiffs' Advocate from the email ID of Rahul Gaokar (son of Defendant No.1) recording as follows :

*“Pursuant to our hearing in the Chambers of Justice S.J.Kathawalla on 29<sup>th</sup> April, 2017, we discussed as follows :*

*(i) The medical shop situated at Supariwala building, Opp. KEM Hospital, Parel, is given on Tenancy basis (?agadi to Shree Swami Samarth Medical and General Store, a partnership firm of Defendant No.1;*

*(ii) The aforementioned shop is not on ownership basis. However, my clients i.e. Defendant No.1 has an understanding with the landlord Mr. Supariwala under which he has orally consented for selling of the said shop. My clients' will try and keep him present in Court on Wednesday at 10.30 a.m.*

*The aforementioned details are by and for the purposes of clarification and record what was discussed with you and other Defendants. The aforementioned facts were immediately conveyed to you by our counsel and we undertake to inform this fact to the Hon'ble Bombay High Court on Wednesday i.e. 3<sup>rd</sup> May, 2017 when the*

*matter is listed.*

*This is for your information and record.”*

24. The email therefore shows that the parties and their Advocates were also having discussions on days when the matters were not before me, to work out the modalities of settlement i.e. to sell the shop secured in favour of CKP Bank and solve the financial problems of the Defendant No.1. However, not a whisper is made about these facts in the Affidavit in support of the above Notice of Motion.

25. On 3<sup>rd</sup> May, 2017, Defendant No. 1 along with his Counsel and Advocates on record were present before me. The Advocate for the Plaintiffs and the respective Advocates for the Defendant Nos. 2 and 4 were also present. The Advocate for CKP Bank informed the Court that the Defendant No. 1 has defaulted in making payments as agreed qua his several facilities / accounts with the CKP Bank and the Defendant No.1 has also defaulted in making payments under the OTS Scheme of the Bank with regard to Account No.227 in respect whereof the medical shop / premises is held as security by the Bank. This Court requested the Bank to suggest a reasonable figure to settle Account No.227, to enable the Defendant No.1 to pay the agreed amount and get his security (medical shop) released, which will be of help not only to the Defendant No.1,

but also the Plaintiffs and the other flat purchasers. The Counsel for CKP Bank requested for some time to take instructions and agreed to revert on the adjourned date. The matter was therefore posted to 9<sup>th</sup> May, 2017, when the Officers of CKP Bank were directed to remain present after taking instructions from their Board.

26. Between 3<sup>rd</sup> May, 2017 and 8<sup>th</sup> May, 2017, Defendant No. 1 handed over documents pertaining to Veg Always Property to the Plaintiffs for due diligence.

27. On 9<sup>th</sup> May, 2017, the Authorised Officers of CKP Bank, Dadar Branch i.e. Vice-Chairman Mr. Anand Bhosale, Director Mr. Prakash Shinde and General Manager Mr. M. Dhaimodkar were present. Defendant No. 1 was also present along with his Counsel. Defendant Nos. 2 to 4 were also present along with their respective Advocates. The Officers of the Bank informed the Court as well as those present that the total dues of the Bank from Defendant No. 1 in respect of the said Account No. 227 was Rs. 7 crores and that they had offered OTS of Rs. 4.34 crores, but Defendant No. 1 defaulted and the OTS lapsed. They further informed the Court that they had earlier valued the medical shop at Rs. 3.25 crores. Though they had recently not obtained a valuation report, according to them, considering the current market scenario, the said shop

would at least fetch an amount of Rs.5.25 Crores and thus if Defendant No.1 deposited Rs. 5.25 crores in Court, the Bank can consider settling Account No.227 and release the medical shop for sale. On that day, Defendant No. 1 also handed over a demand draft of Rs. 25 lacs to the Plaintiff's lawyers. He further assured that he would pay the remaining Rs. 75 lacs within a month. Defendant No. 1 has not disclosed in his Affidavit in support of the above Notice of Motion that the matter was adjourned to 9<sup>th</sup> May, 2017, or what transpired on 9<sup>th</sup> May, 2017.

28. It is pointed out by the Advocate for the Plaintiffs that after 9<sup>th</sup> May, 2017, meetings were held with the Plaintiffs, their Advocate, Defendant No.1 and his Counsel to draft settlement terms. This fact is suppressed from the Court. Thereafter Defendant No.1 changed his Advocate and engaged M/s. Kochar and Company which firm continued instructing the same Counsel.

29. It is further pointed out by the Plaintiffs that on 11<sup>th</sup> May, 2017, a meeting was held in the office of the Advocate for Defendant No. 1 - Kochar & Co., to finalise the draft minutes of order, pursuant to the settlement proposed by Defendant No.1. Plaintiff No. 1 and Defendant No. 1 were also present in that meeting. The minutes of the proposed consent order were prepared and agreed upon and since the Bank had agreed to release the medical shop before this

Court, it was mutually decided to mention the matter before this Court on 12<sup>th</sup> May, 2017 and file the same. In view thereof, the Plaintiffs' lawyers vide their email dated 11<sup>th</sup> May, 2017, addressed to the Advocate for the Defendant No. 1 specifically recorded that the matter shall be mentioned as agreed in the joint meeting. The letter dated 11<sup>th</sup> May, 2017 forwarded by the Advocates for the Plaintiffs to the Advocate for Defendant No. 1 reads thus:

*“We are concerned for the Plaintiffs abovenamed.*

*As agreed today in your office, the captioned matter will be jointly mentioned tomorrow at 11.00 am before the Hon?le Mr. Justice S.J. Kathawalla presiding in Chamber No. 11, Ground floor, High Court, main building.*

*You are therefore requested to ensure presence of your client Mr. Vilas Chandrakant Gaonkar (Defendant No.1) along with Mr.Vipul Shah.”*

In fact, Mr. Jagtiani, the learned Advocate for the Plaintiffs has pointed out that in the late evening on the same day i.e. 11<sup>th</sup> May, 2017, the Advocate for the Plaintiffs interalia forwarded to the Advocate for the Defendant No.1 by email, the modified draft order to be presented before me on 12<sup>th</sup> May, 2017 in Chambers.

30. All these facts, including the fact that the Defendant No.1 and his

Advocates had a meeting with the Plaintiff No.1 and his Advocates and prepared a draft order on 11<sup>th</sup> May, 2017 and also decided to appear before me in my Chambers on 12<sup>th</sup> May 2017 and the fact that a letter dated 11<sup>th</sup> May, 2017, was received by the Advocate for the Defendant No. 1 from the Advocates for the Plaintiffs and that by an email dated 11<sup>th</sup> May, 2017, the Advocates for the Plaintiffs had forwarded to the Advocates for Defendant No. 1, a modified draft order to be presented before me on 12<sup>th</sup> May, 2017 in Chamber, are suppressed in the above Application.

31. Instead a dishonest attempt is made by Defendant No.1 to blame this Court by stating in the Affidavit that, *“on 3<sup>rd</sup> May, 2017, myself, the Bank Manager of the Branch Manager of C.K.P. Co-operative Bank, Dadar Branch so too one Shri Mohan Chavan were present. .... while I was rather relaxed that I need to brief my lawyer leisurely since the High Court had been closed for the summer vacation I was served with a notice by the Plaintiffs lawyer that I need to be present in Chambers on 12.05.2017 of Hon'ble Justice S.J. Kathawalla. I therefore had to engage a counsel post haste.”*

32. In order to make out a false case and hurl false accusations against the Plaintiffs and this Court, Defendant No. 1 also forgot that admittedly on 3<sup>rd</sup> May, 2017, the matter was adjourned to 9<sup>th</sup> May, 2017 i.e. during the summer vacation,

on which day he was present in Court along with his Advocates.

33. On 12<sup>th</sup> May, 2017, the matter was mentioned before me in my Chambers by the Advocates for the parties including the Advocates for the Defendant No.1. Amongst others, Defendant No.1 had also accompanied his Advocates in my Chambers. Upon mentioning of the matter, the same was taken on Board. The Advocates for the parties produced draft minutes of the consent order and requested me to pass an order by consent as agreed by the parties in the said minutes. The parties including Defendant No.1 were asked by me to go through the minutes in my presence and confirm whether they were agreeable to the same and whether an order be passed in terms thereof. Defendant No. 1 along with Defendant No. 2 (Sagar Shah) and Defendant No. 4 (Vivek Gangwal), who stood as Guarantors for Defendant No. 1, went through the minutes in my presence, confirmed its contents and submitted that an order be passed in terms thereof. Thus, in the presence of the parties and their respective Advocates, the Consent Order dated 12<sup>th</sup> May, 2017 came to be passed. As the Consent Order required various steps to be taken for its compliance, including steps to be taken by third parties such as CKP Bank, the landlords of the medical shop, the proposed buyers/purchasers of the medical shop, the parties before the Court mutually agreed and through their Advocates, made a request that the matter be

treated as part-heard before me. It was therefore recorded in the Order that, “*by consent the matter is treated as part-heard*”.

34. The Defendant No. 1 has once again suppressed all these facts in his Affidavit-in-Support of the Notice of Motion and after reproducing certain portions of the Consent Order dated 12<sup>th</sup> May, 2017, dishonestly contended that the same have been recorded by the Court for reasons which are difficult to fathom. Defendant No.1 has further dishonestly alleged that he had not given any undertakings, nor had he given any consent and that the said undertakings/consent were given because I (the Court) made him agree to or undertake the same. Defendant No.1 has also stooped to the extent of alleging that any right thinking person would have entertained disturbing thoughts as to the integrity and honesty of this Court in passing orders/recording the proceedings. At the cost of repetition, it is pertinent to note that the above allegations are made against me by the Defendant No.1 despite there being documentary evidence available by way of emails that the draft consent order was ready with the Advocates for the Plaintiffs and the Defendants on 11<sup>th</sup> May, 2017, and they had by written communication agreed to mention the matter before me on 12<sup>th</sup> May, 2017 (despite the matter not being on my Board/Cause List), and present the same before me, which as stated hereinabove, they infact



did and obtained the Consent Order dated 12<sup>th</sup> May, 2017.

35. Matters did not rest with the Consent Order of 12<sup>th</sup> May, 2017. All parties and in particular Defendant No. 1 acted upon and in furtherance of the Consent Order. The steps taken by Defendant No.1 and the other parties pursuant to the Order dated 12<sup>th</sup> May, 2017, are set out hereunder:

- (i) Duplicate share certificates of landlord and tenant companies were issued and share transfer documents were executed in compliance with the Consent Order dated 12<sup>th</sup> May, 2017, by Defendant No.1;
- (ii) The transfer of shares in both companies was done (stamp duty paid by the Plaintiffs as per the Order) and ROC records were updated to reflect the share transfer in favour of the Plaintiffs.
- (iii) Mr. Vipul Shah, balance 50% shareholder of the landlord company also signed an NOC Affidavit consenting for the arrangement under the Consent Order dated 12<sup>th</sup> May, 2017.
- (iv) Defendant No. 1 executed an Affidavit and an Indemnity, indemnifying the Plaintiffs against the liabilities of the landlord and tenant companies;
- (v) Letters written by lawyers of Defendant No. 1- Kochar & Co. to Plaintiffs' lawyers, recording various compliances.

(vi) Kochar & Co. by letter dated 8<sup>th</sup> June, 2017, forwarded the draft of the Leave and License Agreement signed by Defendant No. 1 and other parties in respect of the restaurant Veg Always as directed in the said Order dated 12<sup>th</sup> May, 2017.

(vii) Since the relevant details in the Leave and License Agreement were not filled in and the same was inadequately stamped, the said Agreement was returned to Kochar & Co. for taking necessary steps to complete the same as per law. The execution and registration of the said Agreement is pending till date.

36. On 13<sup>th</sup> June, 2017, the matter was shown on my Board at item No. 904 under the caption "Part Heard". On that day, Defendant No. 1 who was present in Court informed the Court through his Advocate that Wellness Group was no more interested in buying the medical shop and that he is looking for another buyer. The matter was therefore adjourned to 19<sup>th</sup> June, 2017.

37. On 19<sup>th</sup> June, 2017, Defendant No. 1 introduced another buyer, one Mr. Abrol who made an offer of Rs. 12 crores. He was present in Court and requested for the original title papers in order to carry out his due diligence and he also expressed a desire to give public notice inviting objections against the proposed sale. Pursuant thereto, this Court directed CKP Bank to bring all the

original papers of the medical shop to the Court so that the proposed buyer can take inspection and copies. The matter was therefore adjourned to 22<sup>nd</sup> June, 2017.

38. On 22<sup>nd</sup> June, 2017, the matter was again listed on my Board at Sr. No. 902 under the caption Part Heard. On that day, the lawyer for CKP Bank informed the Court that as per procedure, before releasing the security i.e. the medical shop, the Bank has to notify the Guarantors whether they wish to buy the security or have any objections if the security is sold for Rs. 5.25 crores and thus the matter came to be adjourned till expiry of the notice period for calling offers from the Guarantors. The matter was therefore adjourned to 26<sup>th</sup> June, 2017.

39. On 26<sup>th</sup> June, 2017, the Advocate for CKP Bank informed the Court that since no offers/objections were received from the Guarantors, the medical shop can now be released from the Bank's attachment upon payment of its dues of Rs. 5.25 crores, from the consideration to be received from the buyer. All three Partners of Defendant No. 1 in Shree Swami Samarth Medical Stores (in whose name the tenancy of the medical shop stood) were present in Court and gave NOC for release of the medical shop from the Bank attachment and for its sale in favour of the proposed buyer. The matter was therefore adjourned to 10<sup>th</sup> July,

2017.

40. On 10<sup>th</sup> July, 2017, Defendant No. 1 informed the Court that the second buyer Mr. Abrol had backed out and produced another buyer i.e. one D-force Electro Werke Pvt. Ltd. who was represented by an Advocate and Counsel. The new buyer through his lawyer made an offer of Rs. 7 crores for buying the medical shop. Since the said buyer was also introduced by Defendant No. 1 and quoted half the price quoted by the Wellness Group, it was apparent that the buyers were not acting or purchasing the property on an arm's length basis. The Court thus directed Defendant No. 1 not to deal with the said shop. The matter was therefore adjourned to 18<sup>th</sup> July, 2017.

41. On 18<sup>th</sup> July, 2017, pursuant to the Order dated 10<sup>th</sup> July, 2017, the offer by the new buyer D-force Electro Werke Pvt. Ltd. was revised to Rs.8 crores. The price was sought to be justified by the new buyer on the grounds that since the property was tenanted and disputed, the price fetched was low. A notice was also issued to the representatives of the Wellness Group to appear before the Court.

42. On 20<sup>th</sup> July, 2017, a notice was issued by this Court to the representative Mr. Vinay Sharma of the new buyer D-force Electro Werke Pvt. Ltd., to remain present in Court.

43. On 24<sup>th</sup> July, 2017, the new buyer of D-force Electro Werke Pvt. Ltd. through its authorised representative and the authorised person from the Wellness Group appeared before this Court. At that hearing they placed their respective offers and since the new buyer then revised its quote to Rs. 8.5 crores, which was more than the offer of the Wellness Group which stood at Rs.8 crores, the offer of the new buyer was confirmed and expressly consented to by Defendant No.1. Mr. Sopariwala, Landlord of Sopariwala Building gave his consent to convert the tenancy rights into ownership rights of the medical shop in the name of the new buyer upon payment of Rs.70 Lakhs.

44. By Orders dated 25<sup>th</sup> July, 2017, 10<sup>th</sup> August, 2017 and 24<sup>th</sup> August, 2017, by consent of the parties, the distribution of consideration of Rs. 8.5 crores by the new buyer to the Bank, landlords and plaintiffs came to be recorded. All 3 Partners of Shree Swami Samarth Medical Stores gave their no objection for the directions recorded in the Order. The Partners of M/s. Sopariwala Enterprises also gave their NOC to transfer ownership rights of the medical shop in favour of the new buyer. By consent the Court inter alia recorded how the balance consideration was to be paid by the new buyer to the Plaintiffs and how the transaction qua the finalization of the sale of the medical shop was to be completed, by executing the necessary transfer documents in favour of the new

buyer.

45. As the payment of the balance sum, out of the consideration received on sale of the medical shop to the Plaintiffs was done by the new buyer as per the directions in the Order dated 24<sup>th</sup> August, 2017, this Court by its Order dated 11<sup>th</sup> September, 2017 recorded these facts.

46. On 12<sup>th</sup> May, 2017, this Court had by consent inter alia passed the following Order :

*“xi. Defendant No.1 further states that Company No. 2 had given the said Units on leave and license to his own partnership firm in the name and style of Shree Swami Samarth Hotel (said Firm who has been and is presently carrying on business of restaurant named ?eg Always therefrom. The said firm has Defendant No. 1 (holding 75% share) and one Mr. Sanjay Chandrakant Gaonkar (the brother of Defendant No. 1, who is holding 25% shares) as partners. However, the said license has not been extended after the year 2013. Defendant No. 1 agrees that the Plaintiffs (through the said Company No. 2 and as shareholders thereof) shall enter into leave and license agreement with the said firm for a period of 12 months and collect the license fee and adjust the same against the Plaintiffs claim (in respect of the interest on the balance principal) against him. The statements are accepted and recorded as undertaking given to this Court.”*

Defendant No.1 who had by now achieved what he wanted i.e. to get his medical

shop released by making payment of Rs.5.25 Crores, instead of Rs.7 Crores due and payable by him to the Bank, and had also sold the said shop for a consideration of Rs.8.5 Crores, now embarked upon a dishonest design of not complying with the above undertaking, but to breach the same. This was brought to the attention of this Court on 11<sup>th</sup> September, 2017. This Court therefore, directed the Partners of the restaurant named 'Veg Always' including Defendant No.1 to remain present before this Court on 18<sup>th</sup> September, 2017 at 03.00 p.m. Defendant No.1 who was aware that his then Advocates Kochar and Company and the Counsel previously engaged by them will not agree to be a party to his dishonest design, decided to discharge them. Therefore, Kochar and Company appeared before the Court on 18<sup>th</sup> September, 2017 and sought discharge from representing Defendant No. 1 in the above Suit, which was allowed and the matter was adjourned to 25<sup>th</sup> September, 2017 at 03.00 p.m. (incorrectly typed in the Order as 25<sup>th</sup> October, 2017 at 03.00 p.m.) Mr. Mathew Nedumpara, Advocate, thereafter appeared for Defendant No.1 and moved the above Notice of Motion seeking reliefs set out hereinabove.

47. As stated hereinabove, Defendant No.1 in the above Notice of Motion has suppressed facts, has made allegations against the Plaintiffs and this Court, which are scandalous, false and incorrect to the knowledge of the

Defendant No.1 and has prayed that all the orders passed by this Court from 26<sup>th</sup> April, 2017 are void ab-initio and ought to be set aside. When this Court pointed out the facts narrated hereinabove to Advocate Mathew Nedumpara and enquired why the same are suppressed in the Affidavit in Reply to the above Notice of Motion, Advocate Nedumpara stated that, "I have accepted the brief only after perusing the order dated 26<sup>th</sup> April, 2017 and I have not considered what happened thereafter and have also not gone through the subsequent orders." A reading of the Affidavit in support of the Notice of Motion along with the Reply filed thereto by the Plaintiffs, establishes beyond any doubt that since Advocate Mathew Nedumpara is unable to explain the contemptuous conduct of his client and justify the scandalous allegations made by Defendant No.1 against this Court, he has given an answer which is not only incorrect, but is highly irresponsible and not befitting any Advocate appearing before the highest Court of the State, and hence is strongly deprecated.

48. To sum up :

(i) The reasons for the Orders passed by me dated 26<sup>th</sup> April, 2017 are mentioned in Paragraphs 16 and 17 hereinabove. No objection was ever raised by Defendant No.1 and/or his Advocates qua the said Order and, infact, after the Order dated 26<sup>th</sup> April, 2017 was passed, the Defendant No.1 throughout appeared before this Court along with his Advocate and as stated hereinabove



himself came forward, admitted his mistake and sought assistance of the Court in resolving his financial problems. This Court acceded to his request and passed several orders, which led to his medical shop being released by the Bank upon payment of Rs.5.25 Crores only , instead of Rs.7 Crores due and payable by him to the Bank and sale of his medical shop for an amount of Rs.8.25 Crores.

(ii) That as explained in Paragraph 18 hereinabove, the question of hearing the matters and orders being passed without jurisdiction, does not arise. Infact, since the earlier Advocate of the Defendant No.1 was well aware that I am authorized by the Learned Chief Justice to hear matters throughout the vacations as per my Assignment with effect from 27<sup>th</sup> March, 2017, they along with the others, including Defendant No.1, moved this Court on 12<sup>th</sup> May 2017 (during vacations and despite the matter not appearing on my board) and obtained consent orders. Again, since all the parties and their respective Advocates including Defendant No.1 were aware that several steps were required to be taken in the matter, as agreed and undertaken in the Consent Order dated 12<sup>th</sup> May, 2017, they requested me to treat the matter as Part-Heard and accordingly, their consent was recorded in the Order dated 12<sup>th</sup> May, 2017. A report was also submitted to the Hon'ble the Chief Justice setting out the number of disposals during the court vacations, the matters which were treated

as part-heard and the dates on which the same were placed before me including the matters between the Plaintiffs and the Defendants herein. The Advocates for the parties including the Advocate for Defendant No.1 appeared before me on 12 occasions after the Court reopened and obtained several orders including acceptance of the offer of Rs.8.50 Crores towards sale of the medical shops of Defendant No.1 and its partnership. At no point of time any of them have raised any objection as is now sought to be done.

(iii) On 3<sup>rd</sup> May, 2017 amongst others, Defendant No.1 and his Advocate were present before me. The matter was adjourned to 9<sup>th</sup> May, 2017, when amongst others, Defendant No.1 along with his Advocate, were present before me. However, Defendant No.1 has in his Affidavit in support of the Notice of Motion, dishonestly alleged that on 3<sup>rd</sup> May, 2017 he felt relaxed that since the High Court is closed for summer vacation, he could therefore brief his lawyer leisurely. However, he was served with a notice by the Plaintiffs lawyer stating he should be present in my Chambers on 12<sup>th</sup> May, 2017. Defendant No. 1, therefore, had to engage a Counsel post haste and this Court, for reasons difficult to be fathomed, was pleased to record the undertakings on his behalf, as set out therein (in the Order dated 12<sup>th</sup> May, 2017), and also recorded in the Order that, *“by consent the matter is treated as part-heard”* and that any right

thinking person would have entertained disturbing thoughts as to the integrity and honesty of this Court in passing orders/recording the proceedings of the Court. That Defendant No.1 has been put to grave injustice by the aforesaid orders of the Court which has recorded as consent, things which were forced to be consented out of sheer fear of the Court. The extent to which these dishonest and scandalous allegations are made against the Court, is clearly established from the fact that after the matter on 9<sup>th</sup> May, 2017, there was a meeting held between the Advocate for the Plaintiffs and Advocate for Defendant No.1 in the presence of Defendant No.1 and Consent Minutes were prepared. The Advocates for the parties had agreed to move my Court on 12<sup>th</sup> May, 2017 (when the matter was not shown on Board) and obtain an order in terms of the Consent Minutes prepared by them. Infact as pointed out by the Advocate for the Plaintiffs, a copy of the Consent Minutes was emailed to the Advocate for Defendant No.1 on 11<sup>th</sup> May, 2017. Thereafter, as agreed between the parties and their Advocates, on 12<sup>th</sup> May, 2017, an Application was moved before me and an order was obtained in terms of the Consent Minutes when Defendant No.1 was present. Since various steps were required to be taken by the parties, as per Order dated 12<sup>th</sup> May, 2017, at the request of the parties, it was recorded in the Order that, “*by consent the matter is to be treated as part-heard.*”

49. As set out hereinabove, Defendant No. 1 was conscious of the fact that all the allegations made by him are false and incorrect. He was well aware that his earlier Advocate will not be a party to his dishonest design of making allegations against the Court only because he was wanting to wriggle out of his undertakings recorded in the Order dated 12th May, 2017. He therefore, changed his Advocate and briefed Mr. Mathew Nedumpara to appear on his behalf in the above Notice of Motion, making false and scandalous allegations against this Court.

50. In view of the facts and circumstances narrated hereinabove, the case laws relied upon by Mr. Nedumpara does not assist him in any way. As held in the decisions of the Hon'ble Supreme Court and this Court, set out hereinabove, the undertakings given by Defendant No. 1 are binding on him and he is estopped from going back on the same.

51. In view thereof, the following Order is passed :

- (i) The above Notice of Motion is dismissed.
- (ii) The Defendant No. 1 is directed to pay exemplary costs of Rs.10

Lacs to the Plaintiffs within a period of two weeks from today.

**(S.J. KATHAWALLA, J.)**