Ferani Hotels Pvt. Ltd. vs The State Information Commissioner ... on 27 September, 2018

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Bench: Sanjay Kishan Kaul, Kurian Joseph

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL Nos.9064-9065 of 2018
[Arising out of SLP(C) Nos.32073-32074/2015]

FERANI HOTELS PVT. LTD. ….APPELLANT

versus

THE STATE INFORMATION COMMISSIONER
GREATER MUMBAI & ORS. ….RESPONDENTS

JUDGMENT

SANJAY KISHAN KAUL, J.

1. The present appeal raises the issue of disclosure under the Right to Information Act, 2005 (hereinafter referred to as the 'said Act'), seeking information regarding the plans submitted to public authorities by a developer of a project.

2. Late Shri E.F. Dinshaw was the owner of three plots in Malad (West), Mumbai and Mr. Nusli Neville Wadia/respondent No.3 is the sole administrator of the estate and effects of late Shri E.F. Dinshaw. It may be noted that there is litigation pending qua the functioning of respondent No.3 as an administrator, but it is not in doubt that at present, there is no interdict against him in performing his role as the sole administrator. A Development Agreement dated 2.1.1995 was executed inter se respondent No.3 and Ferani Hotels Private Limited /appellant for carrying out the

development on the said three plots. This Agreement was coupled with an irrevocable Power of Attorney executed by respondent No.3 in favour of the appellant. However, disputes are stated to have arisen between the parties some time in the year 2008.

3. As a consequence of the disputes having arisen, respondent No.3 is stated to have terminated the Power of Attorney and the Development Agreement on 12.5.2008 and, on the very next day, Suit No.1628/2008 was filed by respondent No.3 for inter alia declaration that the said Power of Attorney and the Development Agreement had been validly terminated. Interim relief, pending consideration of the suit, qua further construction and demolition was also sought.

4. The question of grant of interim relief has also had a chequered history. The interim relief was originally granted by learned Single Judge of the Bombay High Court vide order dated 19.7.2010, limited to the extent of restraining the appellant from putting any party in possession of any constructed premises, except with the approval of respondent No.3, during the pendency of the suit. This order was assailed before the Division Bench, which initially stayed the interim order on 26.7.2010, and finally vacated it on 19.7.2012, calling upon the learned Single Judge to first consider the issue as to whether the suit was within time. The order of the Division Bench was assailed before this Court, in Nusli Neville Wadia vs. Ferani Hotels (Pvt.) Ltd. & Ors.,1 where the legal issue raised related to the local amendment in Maharashtra, to the Code of Civil Procedure, 1908 (hereinafter referred to as the 'said Code'), whereby Section 9A was inserted. Section 9 of the said Code mandates trial of suits of civil nature excepting suits in which their cognizance is either expressly or impliedly barred. In terms of Section 9A, notwithstanding anything contained in the said Code, or any other law for the time being in force, in case of an objection being raised as to the jurisdiction of the Court to entertain a suit, the Court is mandated to proceed to determine the same as a preliminary 1 Order dated 8.4.2015 in CA No.3396/2015.

issue, before proceeding with the question of granting or setting aside of an interim order. It is the interpretation of this provision, which received the attention of the Supreme Court in the Special Leave Petition filed in this Court, against the order of the Division Bench. In terms of the order dated 8.4.2015, it was held that Section 9A, introduced as the Maharashtra Amendment, was mandatory in nature.

5. The aforesaid proceedings are relevant for the present case only for limited purposes, since we are only concerned, herein, with an application under the provisions of the said Act. In the application for interim relief filed before the learned Single Judge, one of the prayers made was for disclosure of a set of documents, as sought for by the counsel for respondent No.3 vide letter dated 29.3.2012, which the counsel for the appellant had refused to disclose. However, neither in the adjudication before the learned Single Judge, nor before the Division Bench, nor before this Court, was this aspect discussed at all, even though this relief had been claimed throughout. The adjudication, instead, rested on the issue of the provisions of Section 9A, inserted by way of a Maharashtra Amendment in the said Code, coupled with the plea of limitation. We may add here, that as per learned counsel for respondent No.3, these set of documents are not identical to what forms the subject matter of information sought, now, under the said Act.

6. We may now turn to the direct controversy in question, which emanates from an application filed by respondent No.3 under Section 6(1) of the said Act before the Public Information Officer (for short 'PIO'), Municipal Corporation of Greater Mumbai. Vide application dated 10.12.2012, the following information in respect of the plots in question was sought:

> "(a) Certified copies of all PR cards submitted.
>
> (b) Certified copies of all plans and amendments therein from time to time submitted by the Ferani Hotels Ltd. and/or by its any divisions and/or its Architect.
>
> (c) Certified copies of all Layouts, Sub-Division Plans and amendments therein form(sic.)2 time to time submitted by the Ferani Hotels Ltd. and/or by its any divisions and/or its Architect.
>
> (d) Certified copies of all development plans and any amendments therein from time to time submitted by the Ferani Hotels Ltd.

and/or its any divisions and/or its Architect.

(e) Certified copies of all Reports submitted to the Municipal Commissioner and his approvals to the same."

7. The Advocates for the appellant, however, objected to the disclosure of the information on the grounds, as per Section 11(1) of the said Act:

> (a) That it did not serve any social or public interest but was for the 2 To be read as 'from'.

private interest of respondent No.3 in the suit filed before the Bombay High Court.

(b) That the information sought in the suit proceedings had not been granted by the High Court of Bombay, and an appeal against the said findings were pending before this Court, thereby making the information sought, sub-judice.

(c) That respondent No.3 was a competitor in business and, thus, disclosure would cause harm and injury to the appellant's competitive position, as well as to their valuable intellectual property rights. The information sought for was stated to involve commercial and trade secrets, disclosure of which would be detrimental to the interest of the appellant.

(d) That the architect of the appellant informed that all rights in respect of the plans, clarifications, designs, drawings, etc. and the work comprised therein, including intellectual property rights and in particular copyright, were reserved and vested exclusively in the appellant.

The PIO, vide its letter dated 8.1.2013, declined to give information in view of the objections filed by the counsel for the appellant. This communication stated that the information could not be given as per Sections 8(1)(d), 8(1)(g), 8(1)(j) as well as Sections 9 and 11(1) of the said Act, since there was no public interest, as also on account of the claim of copyright.

8. Respondent No.3 filed an appeal under Section 19(1) of the said Act on 12.2.2013, which was disposed of by the First Appellate Authority, vide order dated 1.4.2013, permitting the information sought under the first head to be given, while declining the information under heads 2 to 4 for the same reasons as set out by the PIO. The 5 th information sought was stated to be too detailed and hence was not possible to be given out. This resulted in a second appeal before the State Chief Information Commissioner (for short 'SCIC') under Section 19(3) of the said Act on 28.6.2013. Respondent No.3 succeeded in the second appeal in terms of order dated 31.1.2015, the order being predicated on the reasoning that the development of the property has connection with public interest, as flats erected thereon would be purchased by the citizens at large.

9. It was now the turn of the appellant to assail this order, before the High Court, by filing a writ petition, being Writ Petition (L) No.1806/2015, which was dismissed vide impugned order dated 30.10.2015. The reasoning was based on the very object of the said Act being incorporated, which was to secure access to information, under the control of public authorities, to citizens, in order to promote transparency and accountability. The documents sought, being for the development of land and being copies of plans, layouts, sub-division plans, etc., which had in turn received the attention and approval of the Commissioner of the Corporation (a public authority), and were under his control, the same were to be supplied to anyone seeking the same. The Division Bench then proceeded to refer to the exceptions carved out under Sections 8 & 9 of the said Act to ultimately hold that the information sought for was part of public record and had to be revealed in public interest, and could not be said to be in the nature of trade secrets or of commercial confidence, or of a nature which would harm the competitive position of the appellant. It also dealt with the objection of the appellant qua the endeavour of respondent No.3 to seek the information in the suit proceedings to hold that the said Act was a legislation which confers independent legal right de hors inter se rights between the parties.

10. The aforesaid order has, thus, given rise to the present appeal filed by the appellant. We heard Dr. A.M. Singhvi, learned senior counsel for the appellant and Mr. Gourab Banerji, learned senior counsel for respondent No.3, both seeking to forcefully put forth their stand. We may note that the private disputes inter se the appellant and respondent No.3 have given rise to this contentious proceeding, where the issue in question was, in our opinion, really innocuous. We have considered the submissions advanced by learned counsel.

11. We may note, at the inception itself, that Mr. Gourab Banerji, learned senior counsel for respondent No.3 did not even press the last set of documents sought, which was earlier held to be rather expansive in nature. The first set of information sought is stated to have already been disclosed. The controversy, thus, related to the 2nd to 4th set of information sought, which consists of the plans with amendments, layouts, sub-division plans with amendments and all other development plans with amendments. At the inception of the hearing, we had, in fact, put to learned

senior counsel for the appellant, as to what serious objection could they have to the disclosure of these documents, which were really public documents, having been submitted to the concerned authority and forming part of the sanction process. The persistence over this issue, as noticed above, is clearly the result of the private dispute, rather than any objective consideration qua the issue of disclosure of information.

12. The first objection raised by learned senior counsel for the appellant flowed from the endeavour of respondent No.3 to seek information in the suit proceedings, which endeavour had not been successful. Learned senior counsel contended that no leave had been taken qua that aspect of the matter and, thus, applying any of the principles whether of issue estoppel, constructive res judicata, or election of remedy, respondent No.3 could not be permitted to agitate the issue twice over. Learned counsel sought to refer to the result of the endeavour to obtain interim reliefs in general by respondent No.3, but that, to our mind, would be completely irrelevant. In this behalf, the information sought for, arising from the letter of the counsel for respondent No.3, dated 29.3.2012, has to be examined. We have perused that letter. In substance what has been sought is communications inter se the appellant and public authorities, approvals granted by the Corporation, compliances, occupation certificate, application submitted to authorities, revenue records, documents pertaining to stamp duty, agreement with prospective flat buyers, etc. If we compare this information sought with what has been sought under the said Act, there is little doubt that the information sought under the said Act is different and specific, i.e., dealing with the approved plans and their modifications, which is part of the record of the public authority's sanction. Not only that, even if we look at the aspect of the relief prayed for, arising from the letter; that has not really formed the subject matter of adjudication, before any of the three judicial forums; what received the attention of the Court was quite different, and related to preliminary determination arising from the provision introduced in the Maharashtra Amendment by way of inserting Section 9A in the said Code. This is apart from the aspect, which we will discuss a little later, of the scope and operation of the said Act, in respect of information being sought by any person, even a third party. We have, thus, no hesitation in rejecting this objection that the plea for disclosure of information arose in previous civil proceeding, inter se the parties, and had been denied.

13. The second defence against public disclosure of this information, raised by learned senior counsel for the appellant, is that respondent No.3 has failed to disclose any 'larger public interest', as mandated under the said Act, and that the third respondent has no locus standi to seek such information especially when the information falls under Sections 8(1)(d) & 8(1)(j) of the said Act. To buttress the plea, a reference has been made to the judgment of this Court in Thalappalam Service Cooperative Bank Ltd. & Ors. vs. State of Kerala & Ors.3 opining that if the information falls under 3 (2013) 16 SCC 82.

clause (j) of sub-section (1) of Section 8 of the said Act, in the absence of bona fide public interest, such information is not to be disclosed. It may be noted, at this stage, that even clause (d) of sub-section 1 of Section 8 of the said Act allows for disclosure of exempted information in larger public interest, and hence a similar test would apply.

14. To appreciate this submission, one would have to turn to the very Statement of Objects & Reasons of the said Act, which has also been discussed in the impugned order. The said Act was a milestone in the endeavour to make government authorities more accountable to public at large by facilitating greater and more effective access to information. The Preamble, thus, itself states that "the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority" was being established. Section 2(f) of the said Act defines 'Information' and reads as under:

> "2. Definitions. – In this Act, unless the context otherwise requires, -
>
> xxxx xxxx xxxx xxxx
>
> (f) "information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force;" The 'Right to Information' is defined under Section 2(j) of the said Act, which reads as under:
>
> "2. Definitions. – In this Act, unless the context otherwise requires, -
>
> xxxx xxxx xxxx xxxx
>
> (j) "right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—
>
> (i) inspection of work, documents, records;
>
> (ii) taking notes, extracts, or certified copies of documents or records;
>
> (iii) taking certified samples of material;
>
> (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;" We may note that there is no dispute that the Corporation is a public authority within the definition of Section 2(h) of the said Act.

We may also note the definition of a 'third party' in Section 2(n) of the said Act, which provides as follows:

> "2. Definitions. – In this Act, unless the context otherwise requires, -

xxxx xxxx xxxx xxxx

(n) "third party" means a person other than the citizen making a request for information and includes a public authority."

15. The purport of the said Act is apparent from Section 6 of the said Act, which provides for the manner of making a request for obtaining information. In terms of sub-section (2) of Section 6 of the said Act, there is no mandate on an applicant to give any reason for requesting the information, i.e., anybody should be able to obtain the information as long as it is part of the public record of a public authority. Thus, even private documents submitted to public authorities may, under certain situations, form part of public record. In this behalf, we may usefully refer to Section 74 of the Indian Evidence Act, 1872, defining 'public documents' as under:

"74. Public documents. — The following documents are public documents:— (1) Documents forming the acts, or records of the acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, [of any part of India or of the Commonwealth], or of a foreign country; (2) Public records kept [in any State] of private documents."

16. The only exemption from disclosure of information, of whatever nature, with the public authority is as per Sections 8 & 9 of the said Act.

Thus, unless the information sought for falls under these provisions, it would be mandatory for the public authorities to disclose the information to an applicant.

17. The endeavour of the appellant is to bring the information sought for by respondent No.3, under the exemption of Section 8, more specifically clauses (d) and (j) of sub-section (1), as also Section 9 of the said Act. The provisions read as under:

"8. Exemption from disclosure of information.— (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen, xxxx xxxx xxxx xxxx

(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

xxxx xxxx xxxx xxxx

> (j) information which relates to personal information the disclosure of which has not relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information: Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person." ....

"9. Grounds for rejection to access in certain cases.—Without prejudice to the provisions of section 8, a Central Public Information Officer or State Public Information Officer, as the case may be may reject a request for information where such a request for providing access would involve an infringement of copyright subsisting in a person other than the State."

18. The issue of the test of larger public interest would, thus, arise if it falls within those exceptions.

19. Now turning to the information sought for, as enunciated above, they are really, plans relating to the property in question. These plans are required to be submitted by the person proposing to construct on the property, to the Commissioner of the Corporation. The appellant has submitted these plans to the Corporation, in pursuance of the Development Agreement and the Power of Attorney executed by respondent No.3. As to how these plans are processed, is referred to in the order of the State Information Commissioner dated 31.1.2015, in para 7, which reads as under:

> "(7) On inquiry, the Public Information Officer in the Building Proposal Department of the Municipal Corporation of Greater Mumbai, clarified that there is prevailing procedure under Right to Information Act, for giving copy of map and proposal received from developer. The proposals received from developer, are being sent to the Tax Assessment Department, Water Engineer Department, as well as to the office of concerned Administrative Ward. Besides, also to the Rain Water Drainage Department, Road Department & Fire Brigade etc., of which department no objection or specific approval is required. Besides this, if it is necessary as per local circumstance the reference is also made to Railway Department, Airport Authority and to other Committees. In the Building Proposals received, it includes the particulars of plot, the information related to F.S.I. of open space, sectional plan and drawing." The aforesaid, thus, shows that considerable processing is required before the plans reach the stage of sanction level.

20. The Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as the 'Maharashtra Act') in Section 3 provides for the General Liabilities of Promoters. In terms of sub-section (2) of Section 3, a promoter, who constructs or intends to construct a block or building of flats was required to comply with many disclosure requirements, inter alia clause

(l), which reads as under:

> "(l) display or keep all the documents, plans or specifications (or copies thereof) referred to in clauses (a), (b) and (c), at the site and permit inspection thereof to persons intending to take or taking one or more flats;"

21. The object of the aforesaid was that the purchaser should be able to get full information of the sanction plan. It can hardly be said that while a purchaser can get the information, the person who administers the land as owner and grants the authority through a Power of Attorney to develop the land, would not have such a right.

22. We may note that this Act was, however, repealed specifically by Section 92 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the 'RERA'), which now, under Section 11 of the RERA, provides the functions and duties of promoters. The duties are more elaborate, as under Section 11(1) of the RERA the promoter has to create his web page on the website of the Authority and enter all details of the proposed project as provided under sub-section (2) of section 4, in all the fields as provided, for public viewing. The promoter, in terms of sub-section (3) of Section 11 of the RERA is required to make available to the allottee information about sanctioned plans, layout plans along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the Regulations made by the Authority. The object is clearly to bring greater transparency.

23. The fate of purchase of land development and investments is a matter of public knowledge and debate. Any judicial pronouncement must squarely weigh in favour of the fullest disclosure, in this behalf. In fact, the Division Bench of the Madras High Court in Dr. V.I. Mathan & Ors. vs. Corporation of Chennai & Ors.4 (to which one of us, Sanjay Kishan Kaul, J. was a party) opined that though the Chennai Metropolitan Development Authority mandated plans to be displayed at the site and also be made available on the website, the same principle should apply to the Corporation for all other sanctioned plans and, thus, issued directions for display of the plans on the website of the Corporation, and at the site, with clear visibility. This was just prior to the RERA coming into force.

24. In the aforesaid circumstances, even by a test of public interest, it can hardly be said that the same would not apply in matters of full disclosure of information of development plans to all and everyone. If we turn to the provisions of Section 8 of the said Act and the clauses under which the exception is sought, clause (d) deals with information relating to commercial confidence, trade secrets or intellectual property, which has the potentiality to harm the competitive position of a third party. Firstly, as observed aforesaid, the definition of a third party under Section 2(n) of the said Act means a person other than a citizen requesting for information to a public authority. Under Section 11 of the said Act, the third party has a right to be 4 Order dated 22.3.2016 in WP No.4057/2016.

heard and to object to the disclosure of information. The disclosure of plans, which are required to be in public domain, whether under the repealed Act or RERA, can hardly be said to be matters of commercial confidence or trade secrets. In fact, ex facie, these terms would not apply to the matter at hand. Similarly, insofar as the intellectual property is concerned, the preparation of the plan and its designs may give rise to the copyright in favour of a particular person, but the disclosure of that

work would not amount to an infringement and, in fact, Section 52(1)(f) of the Copyright Act, 1957 specifically provides that there would be no such infringement if there is reproduction of any work in a certified copy made or supplied in accordance with any law for the time being in force. This is what is exactly sought for by respondent No.3 – certified copies of the approved plans and its modifications, from the public authority, being the Corporation. We may also note that Section 22 of the said Act provides for an overriding effect with a notwithstanding clause qua any inconsistency with any other Act, which reads as under:

> "22. Act to have overriding effect.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 (19 of 1923), and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."
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> 25. The aforesaid provision would not imply that a disclosure permissible under the Copyright Act, 1957 is taken away under the provisions of the said Act, but rather, if a disclosure is prescribed under any other Act, the provisions of the said Act would have an overriding effect.
>
> 26. Similarly, clause (j) of sub-section (1) of Section 8 of the said Act ex facie would have no relevance. There is no 'personal information' of which disclosure is sought. Further it cannot be said that it has no relation to public activity or interest, or that it is unwarranted, or there is an invasion of privacy. These are documents filed before public authorities, required to be put in public domain, by the provisions of the Maharashtra Act and the RERA, and involves a public element of making builders accountable to one and all. That respondent No.3, in fact, happens to be the administrator of the property in question, which will certainly not reduce his rights as opposed to anyone else, including a flat buyer.
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> 27. We, thus, reject the submission based on clauses of sub-section (1) of Section 8 read with Section 9 of the said Act.
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> 28. We also fail to appreciate the submissions of the learned senior counsel for the appellant of "vendetta". What is the vendetta involved in seeking disclosure of plans approved by a builder? To say the least, this is really carrying things too far, just for the sake of creating an obstruction in disclosure. Thus, the reference to the judgment in Reliance Industries Ltd.

vs. Gujarat State Information Commission & Ors.,5 would be of no avail.

29. Another limb of the submission of learned senior counsel for the appellant was that the provisions of Sections 10 & 11 of the said Act have been rendered nugatory. The underlying documents of the development plans, drawings, etc. ought not to have been directed to be disclosed and only the grant of permission and approval by the Corporation, i.e., commencement certificate and occupation certificate could have been so directed at best.

30. Section 10 of the said Act refers to severability, i.e., information, which ought to be disclosed and not to be disclosed can be severed. This in turn would require a pre-requisite that the information sought contains some element which has been protected under Section 8 of the said Act. Having held that Section 8 of the said Act has no application, this plea is only stated to be rejected.

31. Insofar as Section 11 of the said Act is concerned, dealing with third party information, and the right to make submissions regarding disclosure of information, that provision has been complied with by permitting the appellant and even the architect to raise objections, and has 5 AIR 2007 Gujarat 203.

been dealt with by the PIO, and even by the State Information Commission, on appeal.

32. Lastly, the irony of the situation. The Development Agreement and the Power of Attorney is sought to be relied upon, by the appellant, to contend that it was the responsibility and authority of the attorney holder to obtain necessary permissions, sanctions and approvals, and that respondent No.3 is not entitled to deal with, nor liable to any authority in respect of the same, but is entitled to only 12 per cent of the monetary shares from sale proceeds of the constructed premises. Thus, no information should be disclosed under the said Act!

33. If we put this in the correct perspective, it means that the owner of the property, who has given authority to a developer under an agreement to develop the property and obtain sanctions, is precluded from obtaining any information about the sanctions, because ultimately he would be entitled to only a percentage of the monetary share of sale proceeds of what is constructed on the premises. Such a proposition is only stated to be rejected, and in a sense seeks to put the developer and holder of the Power of Attorney on a pedestal. This is, of course, de hors any private lis pending between the parties.

34. In the end, we would like to say that keeping in mind the provisions of RERA and their objective, the developer should mandatorily display at the site the sanction plan. The provision of sub-section (3) of Section 11 of the RERA require the sanction plan/layout plans along with specifications, approved by the competent authority, to be displayed at the site or such other places, as may be specified by the Regulations made by the Authority. In our view, keeping in mind the ground reality of rampant violations and the consequences thereof, it is advisable to issue directions for display of such sanction plan/layout plans at the site, apart from any other manner provided by the Regulations made by the Authority. This aspect should be given appropriate publicity as part of enforcement of RERA.

35. The result of the aforesaid is that we find no merit in the appeal and consider it a legal misadventure. The dispute, though in respect of information to be obtained, derives its colour from a private commercial dispute. We note this because, if judicial time is taken, and legal expenses incurred by one side on account of such a misadventure, appropriate costs should be the remedy.

36. We, thus, dismiss the appeals with costs quantified at Rs.2.50 lakhs (Rupees two lakhs & fifty thousand), payable by the appellant to respondent No.3 (though hardly the actual expenses!).

.....J. [Kurian Joseph] .....J. [Sanjay Kishan Kaul] New Delhi.

September 27, 2018.