Mahulbhai Bipinbhai Tamboli vs Akshaybhai Ramanbhai Thakkar on 26 April, 2019

Equivalent citations: AIRONLINE 2019 GUJ 62

Author: J. B. Pardiwala

Bench: J.B.Pardiwala

C/SA/66/2016 CAV JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SECOND APPEAL NO. 66 of 2016
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2016
In
R/SECOND APPEAL NO. 66 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

Circulate this judgement in the subordinate judiciary.

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MAHULBHAI BIPINBHAI TAMBOLI & 3 other(s)
Versus
AKSHAYBHAI RAMANBHAI THAKKAR & 1 other(s)

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Appearance:
MR DIPEN DESAI(2481) for the Appellant(s) No. 1,2,3,4
MR HS MUNSHAW(495) for the Respondent(s) No. 2
NISARG H VYAS(9431) for the Respondent(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA

Date : 26/04/2019

CAV JUDGMENT

1. This second appeal under section 100 of the Civil Procedure Code, 1908 (for short "the CPC") is at the instance of the original plaintiffs and is directed against the judgment and order passed by the 7th Addl. District Judge, Bhavnagar dated 05.03.2016 in the Regular Civil Appeal No.6 of 2016, by which, the 7th Addl. District Judge, Bhavnagar, dismissed the appeal preferred by the plaintiffs, thereby affirming the judgment and decree passed by the 2nd Addl. Civil Judge, Bhavnagar dated 04.01.2016 below Exh.11 in the Regular Civil Suit No.704 of 2015.

2. For the sake of convenience, the appellants herein shall be referred to as the original plaintiffs and the respondents herein shall be referred to as the original defendants.

3. It appears from the materials on record that the plaintiffs instituted the Regular Civil Suit No.704 of 2015 in the court of the Principal Civil Judge, Bhavnagar for a declaration and injunction. The defendant No.1 is a private party, whereas the defendant No.2 is the Bhavnagar Municipal Corporation through its Commissioner. The suit came to be instituted by the plaintiffs stating that the subject matter touches the public interest and the suit has the ingredients of Order 1 Rule 8 of the CPC. The defendant No.1 preferred an application, Exh.11, under the provisions of Order 7 Rule 11 (d) of the CPC and prayed for rejection of the plaint on the ground that as the suit had been instituted under the provisions of Order 1 Rule 8, the permission of the Court before filing such suit is mandatory, and as no such permission had been obtained, the plaint was liable to be rejected. The 2nd Addl. Civil Judge, Bhavnagar adjudicated the application, Exh.11, and allowed the same. The Civil Judge rejected the plaint on the ground that the suit was barred by law, i.e., the provisions of Order 1 Rule 8 of the CPC.

4. The plaintiffs, being aggrieved and dissatisfied with the order passed by the Civil Judge, rejecting the plaint, preferred the Regular Civil Appeal No.6 of 2016 in the court of the District Judge at Bhavnagar. It appears that in the course of the hearing of the appeal preferred by the plaintiffs, one additional point was raised on behalf of the Bhavnagar Municipal Corporation. Over an above the issue with regard to Order 1 Rule 8 of the CPC, the Bhavnagar Municipal Corporation raised an issue that the suit was otherwise also not maintainable in the absence of any prior notice issued by the plaintiffs under the provision of section 487 of the Bombay Provincial Municipal Corporation Act, 1949 (for short "the Act, 1949). The Lower Appellate Court considered both the issues and on both the counts, took the view that the suit instituted by the plaintiffs is not maintainable and, accordingly, dismissed the appeal preferred by the plaintiffs.

5. In such circumstances, referred to above, the plaintiffs, being dissatisfied with the judgment and order passed by the Lower Appellate Court, has come up with this second appeal under section100 of the CPC.

6. The following substantial questions of law have been framed in the memorandum of the second appeal:

> "(I) Whether the learned lower appellate court as well as the learned Trial Court erred in coming to the conclusion that the civil suit instituted by the appellants is liable to be rejected under the provisions of Order 7 Rule 11 of the Code of Civil Procedure?
>
> (II) Whether the learned lower appellate court as well as the learned Trial Court erred in coming to the conclusion that the civil suit instituted by the appellants is a representative suit and is liable to be rejected for non-compliance of Order 1 Rule 8 of the Code of Civil Procedure?
>
> (III) Whether the learned lower appellate court erred in deciding the issue of cause of action when such issue was not point for determination in Regular Civil Appeal No.6 of 2016?"

7. A Coordinate Bench of this Court, while admitting the second appeal, passed the following order:

> "1. After hearing the learned Senior Advocate Mr. Mihir Thakore for the appellants and the learned Senior Advocate Mr. S.N. Soparkar for the respondent No.1, the appeal is ADMITTED on the following substantial question of law : -
>
> (i) Whether the lower appellate court has committed an error of law in upholding the decree passed by the trial court rejecting the plaint of the appellants plaintiffs under Order VII Rule 11(d) of the Civil Procedure Code on the ground that the suit was barred by Section 487 of the BPMC Act (now GPMC Act), 1959.
>
> 2. Mr. A.S. Vakil, learned advocate waives service of notice of admission on behalf of respondent No.1. Notice of admission be issued to respondent No.2."

8. I take notice of the fact that in the application, Exh.11, preferred by the original defendant No.1 under the provisions of Order 7 Rule 11(d) of the CPC, the only ground urged was with regard to non-compliance of the provisions of Order 1 Rule 8 of the CPC. In the application, Exh.11, the ground with regard to the non-compliance with the provision of Section 487 of the Act, 1949 has not been raised. It is but-obvious that even otherwise the original defendant No.1, being a private party, could not have raised the issue with regard to issue of the prior notice under section 487 of the Act, 1949. The Municipal Corporation could have raised this issue by preferring an appropriate application on their own. The plaint, ultimately, came to be rejected on the ground of non-compliance of the provisions of Order 1 Rule 8 of the CPC . When the plaintiffs went in appeal against the order passed by the Civil Judge, rejecting the plaint, the Corporation, for the first time, raised an issue as regards section 487 of the Act, 1949. In such circumstances, two issues were adjudicated by the lower appellate court. First, with regard to Order 1 Rule 8 of the CPC and secondly with regard to Section 487 of the Act, 1949. I take notice of the fact that only one substantial question of law has been framed by the Coordinate Bench and that is with regard to

Section 487 of the Act, 1949. It appears that inadvertently the substantial question of law as regards the rejection of the plaint on the ground of non-compliance of Order 1 Rule 8 of the CPC could not be framed. If I take the view that the plaint could not have been rejected by the Lower Appellate Court on the ground of Section 487 of the Act, 1949, still the issue with regard to Order 1 Rule 8 of the CPC would remain as it is. This point was elaborately argued by both the sides and discussed in the course of the hearing of this second appeal. In such circumstances, Mr. Desai, the learned counsel appearing for the plaintiffs make a fervent appeal to add one more substantial question of law, keeping in mind Section 100 (5) proviso of the CPC. In addition to the substantial queation of law already framed by the Coordinate Bench, the following substantial question of law has been proposed on behalf of the plaintiffs.

> "(A) Whether the courts below committed an error in rejecting the plaint on the ground that as the suit has been instituted under the provisions of Order 1 Rule 8 of the CPC, the prior permission of the court was necessary and as no permission was obtained, the suit was liable to be dismissed by rejecting the plaint?"

9. Mr. M.C. Bhatt, the learned counsel appearing for the defendant No.1 submitted that it is not permissible for this Court to add any other substantial question of law at this stage, more particularly, when the second appeal is heard finally. Mr. Bhatt submitted that the proviso to sub-section (5) of Section 100 is an exception to the general rule and it is only in rare cases that the Court should exercise its power under the proviso to frame a substantial question of law at a later stage. However, Mr. Bhatt submitted that even if the substantial question of law as regards Order 1 Rule 8 of the CPC is framed at this stage, he would be in a position to convince this Court that the plaint was rightly rejected on such ground.

10. Section 100, C.P.C. was amended by Amending Act No. 104 of 1976. The object and reasons for the introduction of the new section are as under:--

> "Section 100 of the Code provides that a second appeal may lie to the High Court from a decree passed in appeal by any Court subordiante to the High Court on any of the following grounds namely :--
>
> (a) the decision being contrary to law or some usage having the force of the law;
>
> (b) the decision having failed to determine some material issue of law or usage having the force of law; and
>
> (c) a substantial error or defect in procedure provided by the Code or any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

Clauses (a), (b) and (c) of Section 100 are very wide in effect and Cluses (b) and (c) have led to plethora of conflicting judgments. In dealing with second appeals, the Courts have devised and successfully adopted, several concepts such as, a mixed question of fact and law, a legal inference to

be drawn from facts proved, and even the point that the case has not been properly approached by the Courts below. This has created confusion in the minds of the public as to the legitimate scope of second appeal under Section 100 and has burdened the High Courts with an unnecessarily large number of second appeals. Section 100 is, therefore, being amended to provide that the right of second appeal should be confined to cases where a question of law is involved and such question of law is a substantial one."

11. The grounds specified in Section 100 might be changed from time to time by the Legislature, having regard to the legislative policy relating to the second appeals.

12. It will be pertinent to note that the aims and objects make it apparently clear that Section 100 has been made very stringent. By virtue of the amendment introduced in Section 100, the High Court's jurisdiction is restricted only to a consideration of a question of law framed. A further right has been conferred on the respondent to show that no such question has arisen in the case. Sub-section (3) of Section 100, C.P.C. requires that in an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal and under Sub-section (4) the High Court, if it is satisfied, that a substantial question of law is involved in the case, shall formulate that question and thereafter the appeal shall be heard on the question of law so formulated. No doubt, the proviso to Sub-section (5) gives power to the Court to hear an appeal on any other substantial question of law not formulated by it, if the High Court is satisfied that such a substantial question is involved. But before doing so, the High Court is required to record reasons for permitting the appellant to argue on such questions which have not been formulated by the Court at the time of admission of the appeal. Proviso to Sub-section (5) of Section 100 is an exception to the general rule and before the proviso could come into operation, it must be established that the questions of law sought to be raised are capable of being raised as substantial question of law. It is only in rare cases, where substantial question of law is patent on the face of the record and grave injustice is likely to be caused because of the Court's failure to formulate such question at the stage of admission, then only this proviso can be resorted to.

13. I may refer to a very recent pronouncement of the Supreme Court in the case of Mehboob-Ur-Rehman (Dead) Thr. LRS. vs. Ahsanul Ghani, Civil Appeal No.8199 of 2009, decided on 15th February, 2019, wherein the Supreme Court has explained the scope of the proviso to sub-section (5) of Section 100 of the CPC. I may quote the relevant observations:-

> "20. As per Section 100 CPC, the appeal would lie to the High Court from the decree passed in appeal by any Court subordinate only if the High Court is satisfied that the case involves a substantial question of law; such question is required to be stated in the Memorandum of Appeal; the High Court is required to formulate the question on being satisfied that the same is involved in the case; the appeal is to be heard on the question so formulated; and at the time of hearing, the respondent could urge that the case does not involve such a question.
>
> The proviso to sub-section (5) of Section 100 CPC makes it clear that the Court could hear the appeal on any other substantial question of law not formulated by it, but

> only after recording the reasons that the case involves such a question. In the case of Surat Singh (Dead) v. Siri Bhagwan and Ors.: (2018) 4 SCC 562 this Court has pointed out the contours of the powers of High Court under the proviso to sub-section (5) of Section 100 CPC as under:-
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> "21..... The proviso to sub-section (5), however, also recognises the power of the High Court to hear the appeal on any other substantial question of law which was not initially framed by the High Court under sub- section (4). However, this power can be exercised by the High Court only after assigning the reasons for framing such additional question of law at the time of hearing of the appeal".

21. We are clearly of the view that the proviso to sub- section (5) of Section 100 CPC is not intended to annul the other requirements of Section 100 and it cannot be laid down as a matter of rule that irrespective of the question/s formulated, hearing of the second appeal is open for any other substantial question of law, even if not formulated earlier. The said proviso, by its very nature, could come into operation only in exceptional cases and for strong and convincing reasons, to be specifically recorded by the High Court. There being no such strong and convincing reason in the present case to formulate and hear the second appeal on any other question of law, the High Court cannot be faulted in rejecting the contentions urged on behalf of the plaintiff-appellant in this regard."

14. Thus, under the proviso to sub-section (5) of Section 100, additional substantial question of law can well be permitted to be raised with the leave of the Court and along with the initial question framed can partake and formulate the subject matter of the debate in such appeal. This proviso is indicative of the legislative intention in this regard. It confers enabling power upon the Court and consequent entitlement in favour of the party. The restrictive scheme of Section 100 couched in mandatory terms firstly cast a duty on the Court not to admit the appeals which do not invoke substantial questions of law, for, such an appeal is not provided for, and secondly, it requires the admission order to speak about and spell out such substantial question and thirdly on that question the notice has to be issued to the respondents, who are enabled to show that such a question is neither a substantial question of law, nor arises in a given appeal, but further at that stage wish the leave of the Court the appellant is further enabled to rely on any other substantial question of law which can form the part of the debate at the final hearing stage. While working out this compact scheme, however, occasions like the present one may arise, wherein, at times, inadvertently, a particular substantial question of law although formulated in the memorandum of the second appeal, yet, may not be found to be framed by the Court while admitting the second appeal. In the case on hand, if I do not exercise my power under proviso to sub-section (5) of section 100, then the same will lead to gross miscarriage of justice because, as noted above, even if I hold that Section 487 of the Act, 1949 has no application to the case on hand at this stage, the plaintiffs would not succeed because the plaint would still remain rejected on the erroneous ground of non- compliance of the provisions of Order 1 Rule 8 CPC. As I have heard both the sides at length on the issue of Order 1 Rule 8 CPC, no prejudice would be caused if the substantial question of law as regards Order 1 Rule 8 CPC is framed at this stage. The principle that applies to the omissions, errors or mistake on the part of the Court should always be available in such an eventuality provided the course of justice is

not prejudiced or affected to opponent's disadvantage. Once the litigant has diligently followed the procedural law, he cannot be punished for the omission of the Court. To act ex debito justitiae is the basic rule in matters of administration of justice and, particularly, when if arises out of the procedural laws. Failure on the part of the Court, therefore, though serious does not affect the process of appeal, which is set for final hearing, nor can the appeal be dismissed for that reason.

15. It is not in dispute that in the memorandum of the second appeal, the substantial question of law as regards the applicability of the provisions of Order 1 Rule 8 CPC has been formulated. It is also not in dispute that the plaint came to be rejected by the Trial Court only on one ground, i.e, Order 1 Rule 8 CPC. It is also not in dispute that the Lower Appellate Court did consider in details the issue with regard to Order 1 Rule 8 of the CPC.

16. I am of the view that where the substantial question of law is patent on the face of the record and grave injustice is likely to result because of courts failure to formulate the point at the stage of admission, the resort to the proviso to section 100(5) of the CPC should be made. It is true that the proviso to section 100(5) of the CPC is an exception to the main provision of section 100. The Court has a discretion to hear the appeal on any substantial question of law but the legislature has placed an exception to keep the hearing confined to the question formulated by it at the hearing of the appeal. The proviso to section (5) of section 100 could be said to have been kept as the repository of judicial discretion for reasons to be recorded, the power although not unbridled yet enough to impress all such questions which deserves consideration to sub-serve the ends of justice.. I am convinced up to the brim that the plaint could not have been rejected on the ground of prior permission of the court not being obtained under Order 1 Rule 8 of the CPC. I shall assign the reasons in this regard little later. However, if I don't frame this particular question of law in exercise of my powers under the proviso to clause (5) of section 100 of the CPC, then the same will lead to a serious miscarriage of justice. In such circumstances, the objection raised by Mr. Bhatt, the learned counsel appearing for the defendant No.1 in this regard is rejected.

17. The Supreme Court in the case of Kshitish Chandra Pukair vs. Santosh Kumar Pukair & Ors., reported in AIR 1997 SC 2517, has observed as under:-

> "We would only add that (a) it is the duty cast upon the High Court to formulate the substantial question of law involved in the case even at the initial stage; and (b) that in (exceptional) cases, at a later point of time, when the Court exercised its jurisdiction under the proviso to sub- section (5) of Section 100 C.P.C in formulating the substantial question of law, the opposite party should be put on notice thereon and should be given a fair or proper opportunity to meet the point. Proceeding to hear the appeal without formulating the substantial question of law involved in the appeal is illegal and is an abnegation of abdication of the duty cast on Court and even after the formulation of the substantial question of law, if a fair or proper opportunity is not afforded to the opposite side, it will amount to denial of natural justice. The above parameters within which the High Court has exercise its jurisdiction under Section 100 C.P.C should always be borne in mind. We are sorry to state that the above aspect are seldom borne in mind in may case and second appeals are

entertained and/or disposed of without conforming to the above discipline.

The guidelines to determine as to what is a "substantial question of law" within the meaning of Section 100 C.P.C., have been laid down by this Court in a Constitution Bench decision in Sir Chunilal V. Mehta and sons Ltd. Vs. Century Spinning and Manufacturing Co. Ltd., [AIR 1962 SC 1314 = (1962) Supp. (3) SCR 549]. There is also a later decision of this Court in Mahindra and Mahindra Ltd Vs. The Union of India and another. (AIR 1979 SC 798). It is unnecessary to deal at length with that aspect any further.

8. In the light of the legal position stated above we are of the view that the High Court acted illegally and in excess of jurisdiction in entertaining the new plea, as it did, and consequently in allowing the Second Appeal. Even according to the High Court the point urged on behalf of the appellant was only a "legal plea" thought no specific plea was taken or no precise issue were framed in that behalf. The High Court failed to bear in mind that it is not every question of law that could be permitted to be raised in second appeal. The parameters within which a new legal plea could be permitted to be raised are specifically stated in sub-section (5) of Section 100 C.P.C Under the proviso, the Court should be "satisfied" that the case involves a "substantial question of law" and not mere "question of law". The reason for permitted the substantial question of law to be raised, should be "recorded" by the Court. It is implicit therefrom, that on compliance of the above, the opposite party should be afforded a fair or properly opportunity to meet the same. It is not any legal plea that could be raised at the stage of second appeal. It should be a substantial question of law. The reasons for permitting the plea to be raised should also be recorded. Thereafter, the opposite party should be given a fair or proper opportunity to meet the same.

In the present case, as the extracts from the judgment quoted hereinabove would show, the High Court has totally ignored the mandatory provisions of Section 100 C.P.C. The High Court proceeded to entertain the new plea and rendered it decision without following the mandatory provision of Section 100 C.P.C."

18. The Supreme Court in the case of Kondiba Dagadu Kadam vs. Savitriben Sopan Gujar, reported in 1999 (3) SCC 722, has observed as under:

"After the amendment a second appeal can be filed only if a substantial question of law is involved in the case. The memorandum of appeal must precisely state the substantial question of law involved and the High Court is obliged to satisfy itself regarding the existence of such question. If satisfied, the High Court has to formulate the substantial question of law involved in the case. The appeal is required to be heard on the question so formulated. However, the respondent at the time of the hearing of the appeal has a right to argue that the case in the court did not involve any substantial question of law. The proviso to the Section acknowledges the powers of the High Court to hear the appeal on a substantial point of law, though not

formulated by it with the object of ensuring that no injustice is done to the litigant where such question was not formulated at the time of admission either by mistake Or by inadvertence. "

19. A Division Bench of the Patna High Court in the case of Zafar Alam vs. Md. Nizam & Ors., reported in LAWS (PAT) 1986 236, has observed as under:

"7. Under the amended Sec. 100 of the Code of Civil Procedure the appellant is required to state precisely the substantial question of law in the memorandum of appeal and when the High Court is satisfied that a substantial question of law is involved it shall formulate that question. Sec. 100(5) mandates that the appeal shall be heard on the question so formulated and the respondent is called upon to show that the case does not involve such question,. It is, therefore, manifest that at the time of hearing the respondent is noticed only to answer the question formulated. It is in the nature of leave and/or limited rule granted to the appellant only with respect to the point formulated at the time of hearing under Order 41 Rule 11 of the Code of Civil Procedure . It is no doubt true that the Court is left with a discretion to hear the appeal on any other substantial question of law not formulated after recording the reasons therefore and when the Court is so satisfied and not ordinarily. This power, therefore, is required to be exercised cautiously.

8. This provision has come to be enacted by amendment of 1976. There is a salutary purpose for the amendment of Sec. 100 as would be apparent from the 14th Report of the Law Commission (Law Commission's 14th Report; Volume I, page 190). It recommended that the Judge admitting the second appeal should state the points of law which arise for consideration and enabling the High Court to admit second appeal on specified points only. The Shah Committee in 1972 reiterated the 14th Report of the Law Commission and observed that there should be stricter and better scrutiny of second appeal subject to special leave instead of an absolute right of appeal. The Law Commission in its 54th Report (pages 17 and 87) reviewed the position and recommended that the right of second appeal should be confined to cases where a question of law is involved and such a question is a substantial one. It was only the Joint Committee of the Parliament which felt that the discretion of the Court to hear the appeal on any other substantial question of law, not formulated by it, should not be taken away, so that justice may be cone between the parties (See the Gazette of India, Extraordinary, dated 1.4.1976, Part II, Sec. 2, pages 804 -810.

9. Looking to the history and object of the present amendment as well as from 'he words of Sec. 100(5) of the Code of Civil Procedure, we are of the opinion that this Court should be very slow in reopening the whole case at the stage of hearing and not confirming its consideration to the substantial questions of law formulated at the time of admission it is only in rare cases where the substantial question of law is patent on the face of the record and grave injustice is likely to flow in Court's not formulating the said point, which was omitted to be formulated at the stage of

admission, resort to the proviso to Sec. 100(5) could be made. The proviso to Sec. 100(5) carves out an exception to the main provision and in our opinion for exceptional cases indicated above."

20. I may also refer to and rely upon a decision of the Gauhati High Court in the case of Maheshpur Tea & Industries Pvt. Ltd. vs. Mantala Tea Co. Ltd. & Ors., reported in AIR 2001 Gauhati 152. A.K. Patnaik, J. (as his Lordship then was), has observed in para-10 as under:-

"10. After the said orders were passed on 30.8.1999 and 1.9.1999 framing the seven substantial questions of law, opportunity was given to the appellant in the three appeals as well as the respondents in the said appeals to make their submissions on each of the aforesaid substantial question of law framed by the Court by the orders dated 3.8.1999 and 1.9.1999. Opportunity was also given to the respondent No. 1 to argue that no such substantial question of law as formulated by the Court by the orders dated 30.8.1999 arose for decision in the appeals. After about eleven months the substantial questions of law were formulated on 30.8.1999 and 1.9.1999, on 31.7.2000, 1.8.2000, 2.8.2000 and 3.8.2000, the learned counsel for the appellants and the respondents including the learned counsel for the respondent No. 1 in the appeals were heard at length on each of the aforesaid seven substantial questions of law framed by the Court on 30.8.1999 and 1.9.1999 and the hearing was concluded on 3.8.2000. Thus, none of the parties including the respondent No. 1 has suffered any prejudice whatsoever by formulation of the substantial questions of law by the Court by orders dated 30.8.1999 and 1.9.1999. For the aforesaid reasons I am unable to accept the contention of Mr. Chakravorty, learned counsel for the respondent No. 1, that the Second Appeals should be dismissed in limine on the ground that none of the aforesaid seven substantial questions of law were formulated at the time of admission of the appeals."

21. In view of the aforesaid discussion, I frame the following additional substantial question of law:

"(A) Whether the courts below committed an error in rejecting the plaint on the ground that as the suit has been instituted under the provisions of Order 1 Rule 8 of the CPC, the prior permission of the court was necessary and as no permission was obtained, the suit was liable to be dismissed by rejecting the plaint?"

22. I shall now proceed to deal with this appeal on merits.

23. As this litigation has something to do with the rejection of the plaint, I must give a fair idea as regards the suit preferred by the plaintiffs. I deem fit to incorporate the entire plaint along with the prayer clause. The true English translation of the original plaint is as under:

"1) The plaintiffs are the citizens of independent India and are protected by the Constitution Articles Nos.14,16,19, the plaintiffs are awakened citizens of Bhavnagar City. We carry out social and constructive activities in public interests and we are the

tax payers in Bhavnagar Municipal Corporation. The suit dispute is also affecting the plaintiffs and is also touching the public interest and their activities are contrary to the public interest thus the present suit is also having the ingredients of CPC Order (1) Rule (8).

2) The plaintiffs are living in Bhavnagar City at their ownership property shown in the cause title of the plaint, and in the said place constructed building for residential purpose and living in it with family, and certain plots are open.

The plaintiffs have purchased the said property by way of sale deed, details of the same are as here below.

The plaintiff No. 1 has purchased this property plot No.27 by way of registered sale deed No.947 on 17/04/2010 from Mr. Vamanbhai Ratilal Patel, who had purchased this plot from Mrs. Kumudinikumari @ Kumudkumari Jyotindrasingh Jadeja.

The plaintiff No. 2 has purchased the plot No. 32 by way of registered sale deed No.3655 on 16/9/2013 from Mr. Anand Shantilal Khakkhar who had purchased this plot from Mrs. Kumudinikumari @ Kumudkumari Jyotindrasingh Jadeja.

The plaintiff No. 3 had purchased plot No. 33 by way of registered sale deed No. 1667 on 27/4/2007 from Mrs. Kumudinikumari @ Kumudkumari Jyotindrasingh J Jadeja.

The plaintiff No. 4 has purchased the plot Nos. 34-35 on 13/12/2005 from had purchased this plot from Mrs. Kumudmikumari @ Kumudkumari Jyotindrasingh Jadeja.

3) The defendant No. (1) in this matter has purchased Open vacant plot No.36 and he had purchased this plot from Mrs. Kumudinikumari @ Kumudkumari Jyotindrasingh Jadeja. And his said plot is situated besides the plots of the plaintiffs. With this copy of the sale deed of plot No. 36 purchased by the defendant No. 1 is produced below Mark 4/2/6.

4) The plots purchased by the plaintiffs these properties-plots and the plot purchased by the defendant No. 1 original property, was of the original Bhavnagar State of that time, it was the property of the ownership of the Bhavnagar State, and at that time the then ruler of the Bhavnagar State Raol Mr. Krishnakumarsinghji, his younger brother Dhramkumarsinghji Bhavsinghji Gohil had on 25/10/1941 vide document No. 3 S.1998 bequeathed for construction of residential house, and the grantee Dharamkumarsinghji Bhavsinghji Gohil had constructed on his land residential house during the period of 1946 and also put up other constructions and with the passage of time the said land and residential bungalow were acquired by Mrs. Kumudinikumari@ Kumudkumari Jyotindrasingh Jadeja and she had become the absolute and independent owner. She has been making use of the said property land and building for residential purposes. In these facts as per the details stated in the above paragraph No. 3 are clearly stated on the page No. 6 of the sale deed of the defendant No. 1.

5) The properties plots purchased by the defendant No. 1 including the plot property the original land property was used for residential use successively, with such facts and documentary evidences the plaintiffs had made an application on. 5/5/15 before the Collector, Bhavnagar in the form of objections. A copy of the same and the copies of annexures with it are produced in the said matter below Mark 4/ 2-1 to 4/2-8. All the facts stated in the said objection application,details and representation is requested to be considered a part of this suit.

In the matter of the said objection application the Collector has taken into consideration the representation made by the applicant of that application that is the defendant No. (1) in this matter, all the facts stated in the application, details and the representations made by us and the documentary evidences produced and granted stay "in the case of the objection application not to put up any construction on the plot till the next date of hearing' such stay orders were granted, also on the date of hearing thereafter the stay orders were modified that till the time the change of purpose permission is not received till then not to put up any construction, and the stay was ordered to be extended till then.

6) The plaintiffs, are having their residential houses in the neighbourhood of the defendant No. 1 and in the sale deed of the plot holders adjacent the original land owner has stated the following clear facts, in the form of condition, binding to the vendor and vendee, accordingly it is stated. 'the vendee will be entitled to use for residential purpose, or cause to use, and to get the construction plans approved from the Bhavnagar Municipal Corporation and to put up residential construction, or cause to put up, and to live in it, and to sell the same, mortgage, bequeath. the vendee will be entitled.' 'the vendor and the confirming party further gives assurance that, in the ownership , occupation, use by the vendee and their legal heirs, etc. the vendor or the confirming party and others will not cause any obstructions, hindrance and interference or cause to interfere, in spite of this if anyone does then any and every kind of damages or costs caused to the vendee will be paid with consideration and in this regard the vendor and all the confirming parties and our heirs and legal representatives etc. will be bound."

7) Thus, it is the humble belief of the plaintiffs that, this written assurance is given, thus the defendant No. (1) in this matter has taken action for putting up commercial nature of construction, therefore the peace and harmony of the plaintiffs, and there is obstruction in the peaceful occupation of the plaintiffs with their families in this property, and also there is adverse effects to our civil rights. Also, in these facts the plaintiffs would be constrained to enter into litigations with the vendors of our land and assurance givers due to the act of the defendants such circumstances have arisen due to the defendants in this matter, and are continued at present. If such acts of the defendant are not controlled then, the damages caused to the plaintiffs due to the same, and for recovering as per the assurance given also, we will be constrained to take legal action against the original vendors. That is there would be multiplicity of the proceedings.

8) All the above conditions, which are given in the form of assurance, to all the plot holder plaintiffs in the sale deed, the same facts, word to word are clearly stated on the page No. 17 in the sale deed of the defendant No. 1 plot No. 36 holder putting up commercial construction unlawfully. In these facts on the suit premises, the defendant No.(1) has himself on the plot purchased, acquired what nature

of rights, titles, and interests, in this regard he is well conversant, in spite of this when he does not have any rights more than the residential rights, titles and interests then also, he has violated the conditions of the sale deed made, and taken the law in his hands, and grabbed the rights of the neighbours, legally conveyed by the original land owners/ vendors and violated the civil rights and particularly in the residential area where there is a residential society, where against the fundamental rights to live without any kinds of nuisance, annoyances, disturbance and independently and jointly, for causing adverse effects such construction works are being done caused to be done, for preventing such activities with immediate effect the plaintiffs have publicly and jointly, made objection application/representation before the Bhavnagar Municipal Corporation and District Collector. Accordingly, such representation is made before you in the matter of this suit in particular and state that, It is the humble belief of the plaintiffs that, as per the established principles of law, 'A person cannot pass on any right, title or interest better than what he possesses. Similarly, vice versa, a person cannot acquire any right, title or interest better than or more than what is conveyed to him.'

9) Thus as per the above stated details the defendant No. (1) has voluntarily violated the mutual understanding, applicable conditions, by his own will, the same are violated, and on the residential plot he does not have any rights to put up any commercial, industrial or any other purpose construction or cause to construct then also the misdeed of construction of commercial nature of construction on the said plot is continued, therefore the need for filing this suit has arisen.

10) The plaintiffs have stated in particular that, the defendant No.(1) in this matter had produced the lay-out plans for putting up commercial nature of construction before the Bhavnagar Municipal Corporation. The said lay-out plans were approved by the Bhavnagar Municipal Corporation vide the approval No.48 dated 9/3/15, and issued the Development Permission letter Raja Chitthi No. 66, which is produced in this matter below Mark 4/2/7.

11) In the said map or starting the construction conditions are recorded. In which as per the condition No. 1 to 3, are printed by rubber stamp, whereas the condition No. 4 is written with hands, which is as here below.

'Before obtaining the completion of the construction the NOC for change of purpose will have to be obtained from the Collectorate and produced.' Also on the said lay out plans rubber stamp is impressed and below the same it is written in hands that, 'this lay out plan is approved subject to the conditions mentioned in the Town Development Department Raja Chitthi No. 66 dated 9/3/15.' Also on the bottom of the lay out plans rubber stamp is impressed and written in handwriting that, 'Comm. K.M. No. 280 dated 2/3/15' said lay-out plans are produced below Mark 4/2/8 in this matter.

12) With these lay-out plans in the development letter/ Raja Chitthi No. 66 also details as stated in the above paragraph No. (11) are stated. But on the rear of the said document there are printed conditions. Of these conditions on taking into consideration the Condition No. (14) then it reads as here below, 'As per all the other Acts and Rules all the other permissions required to be taken or certificates will have to be obtained from the concerned Competent Officer only thereafter the

construction work will have to be started. On such condition this permission is granted."

13) In the above facts as stated in the paragraph Nos. (11) and (12), the Bhavnagar Municipal Corporation has granted the development permission letter that is the Raja Chitthi No. 66 on 9/3/15. It is clear that there are absolutely contrary conditions in the same.

14) In view of the Act and Rules, the printed condition No.14 on the reverse side page is legal and rational, because, although the development permission is obtained then also, it is not encouraging the illegal construction. Because as per the said condition before commencing the construction all permissions have to be obtained.

15) Whereas contrary to the above condition, on the construction plans in very minute handwritings the condition No. 4 is written. Also, on the Development Permission letter main page, in very small handwritings condition No. 4 is written. Accordingly the person getting the development permissions, has started the construction without obtaining the necessary permissions and certificates from the competent authority illegally starts the construction work, and completes the same, and sells the said constructions, and unauthorizedly earns thick profits, and disappears, does not obtain the change of purpose permission, does not pay the premium to the State Government, and in this manner causes financial losses to the government, does not obtain the completion certificate, that is there is no assessment of the house tax, therefore the Municipal Corporation would suffer house tax loss, it is encouraging such criminal act, thus the defendant No. 1 is given this condition No. 4 facility for committing such chain of criminal acts. The conditions are to restrict applicant, whereas in this case the conditions are bestowed in the form of gift/ prize and for giving advantage.

16) It is also the belief of the plaintiffs that, the above condition No. 4 is made consciously and with mala tide intentions, for putting up criminal illegal construction, for some unknown public purposes, given to certain definite persons. And the honourable court can assume the intentions behind the same.

17) On the above issue we had made an application on 5/5/15 to the Bhavnagar Collector making inquiry that if the owner of the Plot No. 36 had made any representation regarding change of purpose, then in this regard my client had made anticipatory objection application, which is produced in this matter below Mark 4/2. It is requested to take into consideration the representation made and the annexures with the said application.

18) In the matter of the said objection application, the City Mamlatdar has vide his letter dated 12/6/15 on the page No.94 stated in the paragraph No. 6 that, 'the Raja Chitthi No.66 issued by the Bhavnagar Municipal Corporation dated 9/3/15 in which there are two absolutely contrary conditions seen. In fact before the plot holder commences the construction the NOC has to be obtained from the Collectorate and only thereafter the construction permission has to be granted. Thus, due to the contrary conditions in the Raja Chitthi issued by the Bhavnagar Municipal Corporation the legal issues have arisen.'

19) Thus in the above facts the Bhavnagar Municipal Corporation has without obtaining the change of purpose permission from the Collector the lay-out plans are approved. And due to this reason there is no action taken by the concerned persons for obtaining permission for the change in purpose. And the government is also suffering damage of very huge premium. And thereafter also by putting up the illegal construction there is no entry made in the government records therefore also there is huge loss of land revenue caused to the government. Thus, it is requested to direct the Municipal Corporation to approve the lay-out plans only after the change in purpose permission is granted. Also, in this case also it is requested to pass appropriate orders. With this the documents page Nos. 1 to 273 are enclosed and forwarded. This is for your kind information. The said letter is produced in this matter below Mark 4/3.

20) In this matter the owner of the plot No. 36 has made his statement before the Circle Officer on 12/6/15. Wherein he has stated that, 'We will not breach any of the Raja Chitthi conditions by the Bhavnagar Municipal Corporation. This plot No. 36 is residential purpose plot, and therefore for making change of purpose to commercial we have made application as per the Land Revenue Code to the Collector, Bhavnagar Which is pending consideration at present. The Circle Officer has drawn the pancha kyas before the panchas. In which it is noted that, 'and at present for change of purpose of this residential plot to commercial plot for obtaining necessary permission the proceedings are at present pending before the Collector. On inspecting the site at present there is no construction work going on.' On making inquiry Mr. Akshaybhai Thakkar has stated that, after making the said statement there is strike down, and below the same '[after obtaining the necessary permission from the Collector we will start the commercial construction]' whether the said struck out statement is recorded later on or 'at present for the past three days the construction work is stopped.' The said pancha rojkam copy is produced below Mark 4/4.

21) In the said matter City Mamlatdar has addressed a letter to the Bhavnagar Deputy Collector on 30/7/15. In the last paragraph of the said letter he has stated that, 'thus, in the above facts and on the basis of the facts produced on the subject plot No. 36 for putting up commercial construction there is breach of condition. This is for your kind information.' The copy of said letter is produced below Mark 4/5.

22) In the said matter the Collectorate, Bhavnagar Municipal Corporation has written a letter on 13/5/15. A copy of the same is produced below Mark 4/6.

In the said latter the Municipal Commissioner has stated that, 'with regard to the Bhavnagar city Victoria Park Main Road near the water tank proposed Dilharbag Society plot No. 36 having Ward No. 7, City Survey No. 3024 [paiki) representation is made for not granting the commercial construction permission. A copy of the same is enclosed herewith. As per these details you are requested to take appropriate action within your jurisdiction.'

23) From the above letter it is evident that, without obtaining the change of purpose permission from the office of the Collector the development permission that is granted by the Municipal Corporation the said permission, by the development permission letter condition No. 5, 11 and 14 are violated and these facts came to the notice of the Collector, thus, at the relevant time, a letter was

addressed to the Commissioner, Municipal Corporation in spite of this the directions issued in the said letter are overlooked and there is no procedure as per the rules followed by the Commissioner, and has committed contempt of the letter by the Collector.

24) All the above letters were produced by the plaintiffs from time to time before the Municipal Commissioner. The objection application which the plaintiffs have made on 5 5/15 before the Collector, the same objection application copy was given to the Municipal Commissioner, Bhavnagar Municipal Corporation on 8/5/15, the receipt in this regard is produced below Mark 4/7 in this matter.

25) With regard to the said objection application, the Municipal Commissioner, Municipal Corporation was also appraised about the civil rights of the other plot holders in the said society, and the conditions- undertakings on which the other plot holder were allotted the plots in the said Dilharbag Society, that is the civil rights that are acquired by the plot holders through the original vendors.

26) A copy of the letter dated 12/5/15 addressed by the plaintiffs to the Municipal Commissioner is produced herewith below Mark 4/8. With regard to the said letter for halting the construction works on the said plot No. 36 and in its place to maintain status quo qua the suit premises, for granting interim/permanent stay, not to put up construction, for passing such orders, the defendant No. 2 in this matter had made application to the Municipal Commissioner, in spite of this, there is no action taken by him in the interest of justice and the defendant No. 1 is assisted contrary to the interest of Justice.

27) In this mater the letter written by my client on 24/6/15 to the Municipal Commissioner is produced in this matter below Mark 4/9. In this regard we had produced the issue of the said plot No. 36, and representation made on 12/5/15, made particular representation, and the copy of the opinion by the City Mamlatdar was produced, and requested the Commissioner to take due action in the interest of justice, in spite of this he has not taken any action in the interest of justice and allowed the commercial construction to be put up on criminally and illegally on the suit premises, and has remained silent on this issue.

28) Thus, in all these facts, in the facts stated in all the above paragraphs, circumstances and in support of the same evidences produced may be taken into consideration, and the owner of the plot No. 36 that is the defendant No. 1 has acted criminally contrary to the public interest and started unauthorized construction and for such act against the public interest the defendant No. 2 has abetted, and planned complications, and given wide road to the defendant No. 1 for putting up such criminal and unlawful construction, and made it convenient for him and provided him the facilities.

29) In the said matter the Deputy Collector, Bhavnagar has on 24/8/15 addressed a letter to the Collectorate, Non Agriculture unit vide its outward No. Jamin/Vashi/5899/15. 1n the said letter the following facts / opinion is given. 'the details as per which the applicant has got the lay-out plans for the commercial purposes approved and started the construction works. But as per the conditions of the approval and as per the provisions of the Land Revenue Code the applicant has started the

commercial construction at site without obtaining the change or purpose conditions, it appears to be necessary to stop it. Thus, the applicant has started the construction without any change in purpose therefore it is requested to take action for the breach of conditions. With this the original documents in this matter produced by the Mamlatder, Bhavnagar are enclosed.' The said letter is produced below Mark 4/ 10.

30) Taking into consideration the facts stated in the above paragraphs, circumstances and the evidences produced herewith are taken into consideration then the defendant No. (1) has started the criminal unauthorized construction against the public interest, and such contrary to the public interest construction is abetted by the defendant no.2 and has used words in complicated way and given a wide road to the defendant No.1 in commission of this criminal unlawful act, and made it convenient for him and given him facilities. Also, the defendant No.1 is putting up commercial construction on the residential plot No. 36, and in the neighbouring of this plot No. 36 the residential plots of the plaintiff Nos. 1 to 4 plot Nos. 27 to 35 are situated.

In the above facts the defendant No. 1 in this matter has also violated the condition No. 11 printed on the reverse of the said development permission. The said condition No.11 is as here below.

The construction work will have to be done such that there is no damage of any legal rights, interests of anyone.' Also defendant No. 2 is a public institution, and the condition No. 4 that is inscribed clearly appears to be fraudulent, therefore we are required to bring this suit.

31) in view of all the above facts and circumstances, facts of the defendant No. (1) sale deed page No. 17, and etc., all above facts and circumstances taken into consideration, and taking into consideration the evidences produced, it is the respectful request by the plaintiffs that, in this matter the so called development permission letter Raja Chitthi, contrary to the principles of natural justice, and contrary to the rules and regulations by the government, and contrary to the other prevailing laws, contrary to the standing orders, improper, unlawful, and illegal, favouritism, partial and is unfair practice, and unfair equity is followed, and in these facts till the final decision it is requested to cancel the development permission Raja Chitthi, and to pass such declaration in favour of the plaintiff and against the defendants, and for obtaining mandatory stay orders this suit is filed.

32) As per the above details although the proceedings followed in the office of the Collector are appraised to the Municipal Commissioner then also, and although the necessary correspondences are on their records, evidences etc. are produced then also, although it is his pious duty to cancel this scam development permission letter and lay-out plans then also, instead of become active in the interest of justice, take due care, and take trouble instead of this on 13/8/15 by the orders of the Municipal Commissioner the Town Development Officer has informed that all our representations cannot be taken into consideration, this is stated, and observed that no action is required to be taken, and by such act put their stamp on the criminal, unauthorized development permission letter by corrupt ways, and instead of taking action for the corrupt practices by their department, and instead of cancelling the permission letter with immediate effect, informed the applicants to make representation before appropriate authority regarding this corrupt development permission letter, and by such act our valuable time and funds would be wasted and in this manner the person putting

up unauthorized construction would get enough time to complete his construction, such type of action is taken and is continued at present, and therefore our application and representation is ordered to be filed and thus the collusion of the government office with the person making illegal construction is clearly proved, in this manner also the cause for filing this suit has arisen. The said letter is produced below Mark 4/11.

33) The defendant No. 1 has got the illegal, unlawful and unauthorized construction lay-out plans approved through the defendant No. 2, and on basis of such approval the defendant No. 1 is putting up commercial construction in his premises, therefore due to this reason the plaintiffs, who have their residences in this area, there would be adverse effect on their lives, and there is unnecessary nuisance and annoyance created. Also the defendant No. 2 has imposed basic conditions, contrary to the same and in gross violation of the same no conditional construction plans or Raja Chitthi for the same can be granted by the defendant No. (2), in spite of this such action is taken. Albeit, all such proceedings by the defendant No. 2 are unlawful, illegal, contrary to the rules and regulations, and with mala fide, partial and contrary to the Constitution and principles of natural justice, and without any jurisdiction, violative of the rights of the plaintiffs to live peacefully, with political motivation, ex parte, nullity and void. The defendant No.1 who is very rich and having political influences and considered a 'big head', and having acquaintances in the government offices and etc. they have made use of all these influences in their favour, and by such act violated the mandatory provisions of the BPMC Act, Land Revenue Code and other prevailing laws, and in this manner the plans are approved and obtained the Raja Chitthi. Due to all these facts the personal rights, interests and powers of the plaintiffs are damaged, and there is adverse effect on the same.

34) The plaintiffs came to know about the above situation so the plaintiffs have made their representation before the defendant No. 2 and before the authority that has to grant the permission for change in purpose, before all these authorities on basis of the Constitutional rights bestowed upon us and below the Right to information Act at different stages the defendant No. 2 made representations, and whatever conditions that are imposed at the time of giving the Raja Chitthi to the defendant No. 1 with regard to the construction plans, subject to such conditions if the defendant No. 1 has made any demand for obtaining such approval then before granting such permission request was made to afford the plaintiffs opportunity of hearing and if any situation contrary to the provisions of the BPMC Act, Land Revenue Code and General Clauses Act and due to this reason if these persons get encouragement and due to this reason in the surrounding areas citizens suffer nuisance, annoyance and any physical and mental harassment then no such permission can be granted to the defendant No. 2. Therefore in this regard whatever construction plans are approved and Raja Chitthi is given then subject to the condition therein for change of purpose if any such permission is sought by the defendant No. 1 then without hearing the plaintiffs it cannot be granted. Inspite of this in view of the representation made by the plaintiffs separately and to which the reply is also given, in view of the said facts it is a clear fact that, when the defendant No.2 has in violation of the mandatory provisions of law and particularly by giving any wrong conditional approval and on the basis of the same the concerned authority can also not take any decision on such application for change of purpose without hearing the plaintiffs. Therefore whatever permission is granted is unlawful, illegal, contrary to the rules and regulations, and on the basis of the same non agriculture/ULC/ lay out plans orders conditions are violated in such manner

there cannot be any permissions granted. In the said facts the defendant No. 1 has violated the condition No. (5) printed on the reverse of the permission letter. The said condition No. 5 is as here below.

'With regard to the said land the conditions on which non-agriculture use orders and lay-out plans approval is granted of these if there is breach of any condition then the permission will be considered cancelled."

Thus, the approved construction plans by the defendant No. 2 and the Raja Chitthi issued, all these transactions are ab initio nullity, illegal, unlawful, contrary to the rules and regulations, without any jurisdiction, and contrary to the Constitution and principles of natural justice, with malalide intentions, partial and for giving benefits to a deiinite person, nullity and void for obtaining such declaration against the defendant No.(1) and defendant No. (2), and for cancellation of the Raja Chitthi issued by the defendant No. (2) and before obtaining the change or purpose conditions for cancellation of the approved plans and Raja Chitthi and for obtaining mandatory orders and to restrain the defendant No. 1 for putting up any kind of construction on the basis of the Raja Chitthi issued by the defendant No. 2, and on the plot No. 36 of the ownership of the defendant No. 1 no kind of commercial purpose construction be put up on basis of the illegal plans, or take on hand any such proceedings, for obtaining such permanent injunction we are constrained to file the present suit.

35) The cause for filing this suit is that the defendant No. (1) has got the lay-out plans approved conditionally illegally from the defendant No.(2) without making any change in purpose and obtained the Raja Chitthi which is issued without obtaining the approval for the change in purpose by the competent authority. On the basis of the same since a few days on the said place illegal excavations and etc. materials, labour and the materials in this regard are brought on site and we personally met them and tried to stop them but they did not listen, and for preventing the unlawful activities contrary to law and in the meanwhile the defendant No. 1 should not take on hand any further particular activities, in this manner it has arisen and continued at present.

36) Thus, as per all the facts stated in the above paragraphs the plaintiffs have the cause arisen for filing the suit before this honourable court.

37) For hearing and adjudicating this suit and for taking decision this court has the jurisdiction.

38) This suit is filed for declaration, mandatory orders and permanent injunction, therefore the suit is valued at Rs. 600/and four fees fixed stamp of Rs. 400/ is used, and the due process fees is paid.

39) The names and addresses of the parties shown above are true and correct. The memo of address, copies to be supplied to the defendants, and list of documentary evidences etc. are produced separately.

Therefore the plaintiffs have filed this suit and prayed for relief that,

(a) Be pleased to hold that the decision by the defendant No.2 of approving the plans conditionally placed by the defendant No. 1 and in reference to the same the Raja Chitthi issued and the defendant No. 1 has not obtained the permission from the Collector, Bhavnagar for change in purpose, but when the mala fide intentions of the defendants were revealed then, they have made application, and on the basis of the same in a manner that the conditions of the original non agriculture/ULC/ Lay-out plan are breached and the conditions in the sale deed are also breached, in such manner the permission granted and the lay-out plans approved by the defendant No.2 and the Raja Chitthi issued and as per the undertaking given in the sale deed that the suit plot is sold only for residential purposes, such condition is breached and the commercial nature of construction is being put up, and the Raja Chitthi condition Nos. (5), (11), and (14) are violated, and basically all the transactions are nullity, unlawful, illegal, contrary to the rules and regulations, and contrary to the Constitution and principles of natural justice, with mala fide and partial, without any reasons, necessity or jurisdiction or authority, for giving benefit to definite persons and contrary to the conditions and is fraudulent and nullity, as established from the rulings by the honourable Supreme Court and honourable High Court, and any development permission granted encouraging the wrong doers and contrary to the public interest and contrary to the principles of natural justice, such development permission letter/ Raja Chitthi [approval] is void ab initio, be pleased to make such declaration, and grant such permanent injunction in favour of the plaintiffs and against the defendants.

(b) The defendant No. 2 is bound to withdraw the lay out plans approved for commercial purposes of the defendant No. 1 and to withdraw the permission for construction, therefore be pleased to pass mandamus to implement accordingly at the earliest.

(c) Be pleased to restrain the defendant from putting up any commercial purposes construction on the Plot No.36 as per the non agriculture/ULC/ lay out plans orders and as per the sale deed, and therefore on the basis of the approved lay-out plans and the Raja Chitthi issued by the defendant No. 2 or in any other manner there cannot be any commercial purposes construction done, nor caused to be constructed, and also on the basis of the said approved layout plans not sell to anyone else nor obtain any loan from any bank and financial institution nor obtain any financial facilities, be pleased to grant such permanent injunction.

(d) Be pleased to grant any other and further relief in the facts of this case, and be pleased to award the costs of this suit from the defendants."

24. Thus, it appears from the pleadings in the plaint and the materials on record that the plaintiffs are aggrieved by the act of the original defendant No.1 in putting up the construction in the residential area. The construction which has been put up by the defendant No.1 is commercial in nature, whereas it is the case of the plaintiffs that the entire area is residential and the Bhavnagar Municipal Corporation could not have sanctioned the plans and granted the permission to put up such construction. It is the case of the plaintiffs that the action of the Bhavnagar Municipal Corporation is tainted with malafides and all the permissions granted by the Corporation are illegal and void ab-initio. This is the sum and substance of the case put up by the plaintiffs.

25. It appears that even before the written statements came to be filed by the defendants, the defendant No.1 preferred the application,Exh.11, under Order 7 Rule 11(d) of the CPC and prayed for rejection of the plaint. The application, Exh.11, reads thus:

> "(1) The suit by the plaintiffs is for declaration and injunction. The suit is relating to immovable property.

The suit property is of the ownership, occupation and use of the defendant No. 1. This is an undisputed fact. The defendant No.1 has got the lay-out plans for the said property approved and wants to put up residential and commercial construction. Therefore the lay-out plans were presented before the defendant No. 2, and thus the lay-out plans were approved conditionally. From amongst the conditions of approval the condition No. 4 is as here below. 'Before obtaining the completion of the construction the NOC from the office of the Collector regarding the change in purpose will have to be obtained.' The above condition has to be complied with till the construction works are completed. As stated by the plaintiffs in this matter they are the plot holders of the plots in their neighbourhood, and as averred by them by putting up commercial construction on the suit property nuisance would be created. Therefore they had made an application to the Collector, Bhavnagar, and challenged the permission granted by the defendant No.

2. And in the present suit also similar relief is prayed for.

(2) The plaintiffs have made applications against us before the Collector and taken action and the Collector has initiated the proceedings as per the said condition No.4, the said orders are at present pending.

(3) In the above circumstances there is no agreement with the plaintiffs. They have come only with the pleadings of nuisance in the present suit, and the relief of the suit is also sought by them before the Collector also as per the BPMC Act and Land Revenue Code. Thus, when the plaintiffs have alternative remedy available to them then, and also as averred by the plaintiffs themselves the present suit is filed as per the CPC Order 1 Rule 8 provisions, thus, these legal provisions are not fully complied with and the suit is filed contrary to the mandatory provisions. For filing the suit the permission from the honourable court is not obtained, and the true facts are suppressed. In view of all these circumstances this suit is prima facie not tenable and therefore this application is made.

(4) It is humbly prayed that,

1) As per the CPC Order 7 Rule 11 (d) provisions the plaintiffs in the suit have alternative remedy available to them, and the provisions of the CPC are not complied with, therefore, it is requested to dismiss the suit with costs."

26. The application, Exh.11, was adjudicated by the Civil Judge and by an order dated 04.01.2016, the plaint came to be rejected. The impugned order passed by the Civil Judge, rejecting the plaint, reads thus:

"1. This application is filled by the defendant no.1 under order-7, rule-11 of Civil procedure code. In the application it is stated by the defendant no.1 that, he does not have any agreement with the plaintiffs herein regarding the suit property. Plaintiffs have filled suit with the pleadings regarding nuisance only. Plaintiffs have filed application before Collector under BPMC Act and Land Revenue Code regarding the same prayer. Hence they have already opted for the alternate remedy. More over defendant no.1 has stated that, plaintiffs have led this suit under the provisions of Order-l, rule8 of C.P.Code. but they have not taken the permission of the court for filling the suit which is the mandatory provision. Hence defendant no.1 has prayed for rejection of plaint under Order-7, rule-11(d) of C.P.Code.

2. Plaintiff no.1 to 4 have filed reply vide Exh. 22,23,29,30 respectively and have denied the contentions of the Defendant No. 1 in this application. Plaintiffs have stated that, Defendant no.4 has filled this application with. wrong contentions. He has concealed the facts from the court. Plaintiffs have stated that they have not challenged the permission given to the defendant no.1 before collector but they have filled "Vandha Arji" i.e objection application before Collector so that truth can come on record. Further plaintiffs have stated that they have not filed the suit under Order 1. rule 8 of C.P.Code, they have filled this suit in relation to their civil rights. Hence there is no any specific bar to file this suit and has prayed to reject this application with cost. Plaintiff No.1 has filled detailed written arguments in support of his contentions vide Ex-34 other plaintiffs have supported the same vide Ex35 purshish.

3. Now when this application is filed under Order-7, rule- 11 of C.P.Code, it is required to go through the said provision. It is as under.

11. Rejection of plaint.-The plaint shall be rejected in the following cases:

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;]

(f) where the plaintiff fails to comply with the provisions of rule 9:] [Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be

recorded is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.] The Defendant No.1 has prayed for rejection of plain on the ground of point (d) to rule -11 of Order-7 i.e plaint is barred by law. It is the say of the defendant that, plaintiffs have filled this suit under Order 1, rule 8 of C.P.Code. And asI per the said provision, permission of court is mandatory before filling the suit. But plaintiffs herein have not taken any permission before filling the suit hence there is a breach of mandatory provision of law. Now before discussing further on this point, it is necessary to go through Order -1, rule-8 of C.P.Code. it is as under. '

8. One person may sue or defend on behalf of all in same interest.--(1) Where there are numerous persons having the same interest in one suit,

(a) one or more of such persons may, with the permission of the Court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;

(b) the Court may direct that one or more of such persons may sue or be sued. or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

(2) The Court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested, either by personal service, or, where. by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct. (3) Any person on whose behalf, or for whose benefit, a suit is instituted, or defended under sub-rule (1), may apply to the Court to be made a party to such suit. (4) No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub-rule (3), of rule 1 of Order XXlll, and no agreement, compromise or satisfaction shall be recorded in any such suit under rule 3 of that Order, unless the Court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub-rule (2). (5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit. (6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be. Explanation.-For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the persons on whose behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be.] Now looking to Order -1, rule-8 (a), permission of court before filling such suit is mandatory. Plaintiffs in their reply have stated that, they have not filed this suit under Order' 1, rule-8. However in para -1 of the plaint vide Ex- 1, plaintiffs have specifically stated that dispute in this suit is relating to the public interest and as act of defendants is against public interest, this suit also contains ingredients of Order -1, rule-8 of C.P.Code. Now when plaintiffs have specifically stated that their suit contains ingredients of Order

-1, rule-8 of C.P.Code, their contention in reply to this application that they have not filled this suit under Order-1, rule-8 is not tenable at all. Hence it is necessary for the plaintiffs to get permission of the court before filing the suit. In this suit, plaintiffs have not taken permission of the court, which a mandatory provision, before filing this suit.

4. Here lit is also required to understand the term 'barred 'in the legal sense. According to The Concise Oxford Thesaurus (page no. 51) the term 'bar' means debar, prohibit, preclude, forbid, ban, exclude, keep out, block, impede, obstruct, hinder, restrain, check, stop, defer.

5. Now looking to the provision in Order -1, rule-8 of C.P.Code. permission of court is mandatory before filling the suit under said provision. And as discussed earlier, the suit filed by the plaintiff herein is under Order -1, rule-8 of C.P.Code. And in absence of permission of court, the suit of plaintiff is barred i.e prohibited as per Order-1, rule-8(a) of C.P.Code. Herein judgment of Hon'ble Apex court in case of Bhagbat v. Gobardhan reported in AIR 1983 Ori. 50 is relevant which says that The provisions of Rule 8 are mandatory and they have to be complied with. A suit instituted without complying with the rule is bad and is not maintainable. Para 9 of the said judgment says that, "A representative suit cannot be said to have been validly instituted unless and until the mandatory provisions of Order-1,Rule-8 are complied with. It is only when action is taken under Order1,Ru|e-8 of C.P.C that the suit is properly brought against the defendants." .

6. Now when suit of the plaintiffs is barred by law, the provision of Order-7, rule-11(d) of C.P.Code is attracted which says that plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. Hence looking to the above discussion, facts and legal provisions, this court is of the view that plaint of the plaintiffs deserves to be rejected under Order-7, rule-11

(d) of C.P.Code. Hence following order is passed in the interest of justice.

ORDER Plaint of the plaintiffs is hereby ordered to be rejected Order-7, RUle-11 (d) of C.P.Code.

No order as to cost.

Pronounced in open court today on 4'"January, 2016. "

> 27. Being dissatisfied, the plaintiffs went in appeal before the District Judge. The Lower Appellate Court, while dismissing the appeal preferred by the plaintiffs, observed thus:
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> "23. Now, while ascertaining the other aspect that when the plaint is rejected under Order-7, Rule-11(d), Order-7, Rule-11(d) of the CPC provides as under :
>
> Order-7, Rule-11(d) :
>
> (d) Where the suit appears from the statement in the plaint to be barred by any law :

> I have gone through para-5 of order below Ex.11, passed by the Trial Court which reads as under :
>
> 5. Now looking to the provision in Order-1, rule-8 of C.P.Code, permission of court is mandatory before filing the suit under said provision. And as discussed earlier, the suit filed by the plaintiff herein is under Order-1, rule-8 of C.P.Code. And in absence of permission of court, the suit of plaintiff is barred i.e. prohibited as per Order-1, rule-8(a) of C.P.Code. Herein judgment of Hon'ble Apex court in case of Bhagbat v. Gordhan reported in AIR 1983 Ori. 50 is relevant which says that The provisions of Rule 8 are mandatory and they have to be complied with. A suit instituted without complying with the rule is bad and is not maintainable. Para-9 of the said judgment says that, "A representative suit cannot be said to have been validly instituted unless and until the mandatory provisions of Order-1, Rule-8 are complied with. It is only when action is taken under Order-1, Rule-8 of C.P.C. That the suit is properly brought against the defendants."

So, the reason is stated in order below Ex.11 by the learned 2nd Additional Civil Judge, Bhavnagar to the effect that the suit is a representative suit and cannot be said to have been validly instituted and, therefore, the suit is barred by law.

24. The learned advocate for the appellants has argued that the suit is not a representative suit because, the respondent No.1 is making commercial construction instead of residential construction upon plot No.36 in collusion with the respondent No.2 and due to such construction, the present appellants are directly affected and all the present appellants are holding their plots surrounding plot No.36 and, therefore, all the appellants are aggrieved and filed the suit before the Lower Court and as per law, the aggrieved person can also file the suit. He has also relied upon the decision of Hari Ram v. Jyoti Prasad, reported in AIR 2011 Supreme Court 952 wherein, the Hon'ble Apex Court has observed and held as under :

> 20. The next plea which was raised and argued vehemently by the learned senior counsel appearing for the appellant was that the suit was bad for non-compliance of the provisions of Order 1, Rule 8 of the CPC. The said submission is also found to be without any merit as apart from being a representative suit, the suit was filed any an aggrieved person whose right to use public street of 10 feet width was prejudicially affected. Since affected person himself has filed a suit, therefore, the suit cannot be dismissed on the ground of alleged non-
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> compliance of the provisions of Order 1, Rule 8 of the CPC."

(Para-20)

25. He has also relied upon the decision of Kalyan Singh v. Smt.Chhoti, reported in AIR 1990 Supreme Court 396(1) wherein, the Hon'ble Supreme Court has observed and held as under :

"The suit could be instituted by representatives of the particular community, but that by itself was not sufficient to constitute the suit as a representative suit. For a representative suit, the Court's permission under O.1, R.8 is mandatory. In the absence of necessary material the conclusion one way or the other as to the are of the suit will not be justified." (Para-

13) I have gone the abovecited decisions, but the facts of the cited cases are different than the facts on hand and for that, I have also gone through the para-1 of the plaint. The appellants have stated that the act and procedure of the present respondents are against the public interest and, therefore, the suit is also having ingredients of Order-1, Rule-8 of CPC. The Order-1, Rule-8 of CPC reads as under :

> 8. One person may sue or defend on behalf of all in same interest :
>
> (1) Where there are numerous persons having the same interest in one suit, -
>
> (a) one or more of such persons may, with the permission of the Court, sue or be sued, or may defend such sit, on behalf of, or for the benefit of, all persons so interested;
>
> (b) the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.
>
> (2) The Court shall, in every case where a permission or direction is given under sub-

rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested, either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(3) Any person on whose behalf, or for whose benefit, a suit is instituted, or defended, under sub-rule(1), may apply to the Court to to made a party to such suit.

(4) No part of the claim in any such suit shall be abandoned under sub-rule(1), and no such suit shall be withdrawn under sub-

rule(3), of Rule 1 of Order XXIII, and no agreement, compromise or satisfaction shall be recorded in any such suit under Rule 3 of that Order, u8nless the Court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub- rule(2).

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be.

26. So, looking to the above provisions, it appears that the appellants should take permission from the Court before filing the suit. In this case, it appears that they have not taken any permission from he Court before filing the suit. Moreover, the appellants have not given any private or public notice of institution of the suit to all persons, so interested. If the public interest is involved in the disputed matter, then they have to give notice to each persons or they have to give public notice before institution of the suit. But here in this case, the appellants have not given any private or public notice to other affected persons nor they have complied the mandatory provisions of law. Moreover, how many plot- holders are in that society is also not stated in the plaint. Whether the other members of the society agree or disagree for filing the suit is also not mentioned in the plaint.

27. Now, going through another point that whether the appellants have arisen any cause of action to file the suit ? first I have gone through para-35 of the plaint wherein, the appellants have stated that the respondent No.1 has obtained permission for construction without converting the land from its original and main purpose and sanctioned grant permission with condition by the respondent No.2 and as such, the illegal construction is required to be restrained. Hence, a question arises that whatever construction, made by the respondent No.1, either for residential or commercial, is illegal and without obtaining any permission ? My answer to the very question is "no". The respondent No.1 has obtained legal permission from the respondent No.2 after fully compliance of necessary fulfillment and as such, how the appellants can say that the respondent No.1 is making construction illegally and when the respondent No.2 has granted sanction for making construction after following due procedure, how can the appellants can say that the respondent No.2 has granted sanction with condition. If the respondent No.2 has granted sanction to respondent No.1 illegally or without following due procedure of law, then the appellants should go to the higher authority and they can challenge the said sanction. Further, out of corporation limit of Bhavnagar district, the Collector, Bhavnagar is having power to convert agricultural land into non-agricultural land, but in the limit of Municipal Corporation, Bhavnagar, the Municipal Commissioner of Bhavnagar is having power to any land to convert from agricultural purpose to other purpose. The disputed plot No.36 is situated in the limit of Bhavnagar Municipal Corporation.

28. The learned advocate for the appellants has drawn my attention to para-17 of the sale-deed, produced by the appellants vide Mark-14/6 and argued that the said sale-deed is of respondent No.1. He has purchased the plot No.36 from the original owner by virtue of said sale- deed and specific condition mentioned in the sale-deed that the respondent No.1 shall use the said plot only for residential purpose and he shall make construction after passing plan and obtaining necessary permission from Bhavnagar Municipal Corporation, but the respondent No.1 has started commercial construction illegally instead of residential construction.

29. The appellants have produced plan vide Mark-4/8 and sanction vide Mark-4/7. Looking to the sanction, it appears that the Town Development Officer, Bhavnagar Municipal Corporation has issued sanction to the respondent No.1 with 4 conditions. The learned advocate for the appellants has drawn my attention to condition No.4 and argued that before obtaining Completion Certificate, the respondent No.1 obtained No Objection Certificate from the Collector, Bhavnagar and produced before him. Such type of condition is illegal and not as per law. Such type of conditional sanction cannot be issued, but I do not agree with the learned advocate for the appellants because, there is no

any specific provision in Bombay Municipal Corporation Act, 1949 and in any rule that such type of sanction cannot be issued. If the appellants aggrieved regarding issuance of sanction, then they should go before the higher authority and challenge such sanction. They have not stated that the respondent No.2 has no power to grant such sanction or he has utilised his powers beyond limits. He has not stated that the respondent No.2 has not followed due procedure before granting such sanction. Therefore, in my view, the appellants have alternative remedy to challenge the sanction before the appropriate authority. If they shall challenged such sanction before the higher or appropriate authority and higher or appropriate authority had cancelled such sanction, issued by the respondent No.2, then in that circumstances, the respondent would be stopped from making construction. But at this stage, the respondent No.1 is making construction by obtaining legal permission from the respondent No.2 and the respondent No.2 is empowered to issue such sanction.

30. The respondent No.1 has produced No Objection Certificate of the Collector, Bhavnagar vide Mark-32/3. As per condition No.4 of the sanction, issue by the respondent No.2, the respondent No.1 has obtained such No Objection Certificate from the Collector, Bhavnagar. Before issuing No Objection Certificate, the Collector, Bhavnagar has given full opportunity to the present appellants. The present appellants have submitted their written objections on 11-05-2015 and 19-08-2015. Before the Collector, Bhavnagar, the said written objections have been produced by the respondent No.1 vide Mark- 32/1 and Mark-32/2 and thenafter, the Collector, Bhavnagar had rejected the objections, raised by the appellants and issued No Objection Certificate to the respondent No.1. So, in my view, the respondent No.1 is making construction legally after obtaining necessary permission and No Objection Certificate.

31. Further, the learned advocate for the respondent No.2 Mr.UJ Trivedi has argued that the Municipal Commissioner has power to decide zone within the limit of Bhavnagar Municipal Corporation. The disputed plot is situated in the residential zone and as per the Development Control Regulation, the residential zone includes residential dwellings play fields, gardens, gymnasium, swimming-pool, shopping/commercial centre, restaurant, hotel, hostel, indoor hospital, nursing home, surgical hospital, etc. All these are included in the residential zone. So, I have gone through the Development Control Regulations and I agree with the learned advocate Mr.UJ Trivedi. All things are covered in the residential zone. Here in this case, which type of commercial construction is being made by the respondent No.1 on plot No.36 is not mentioned by the appellants. But all type of constructions as mentioned in the Development Control Regulations are included in the residential zone. Looking to the No Objection Certificate vide Mark-32/3, the respondent No.1 is making construction of shops and as per the Development Control Rules, the shops are included in the residential zone.

32. Further, learned advocate Mr.UJ Trivedi has also argued that no cause of action has arisen against the respondent No.2. Looking to para-35 of the plaint, I agree with Mr.UJ Trivedi. There is no any cause of action has arisen against the respondent No.2 because, the respondent No.2 is having full authority to grant such sanction. The respondent No.1 has fulfilled all the requirements for getting such sanction and as such, the respondent No.2 is duty bound to issue such sanction and, therefore, the respondent No.2 has not committed any rule or procedure before granting such

sanction and as such, when the respondent No.2 has performed his duty as per law, the Civil Court has no any cause to take action against the opponent No.2 and the jurisdiction of the Civil Court is barred by section-487 of the Bombay Municipal Corporation Act. In this regard, the section-487 of The Bombay Provincial Municipal Corporations Act, 1949 reads as under :

> 487. Protection of persons acting under this Act against this Act against suits :
>
> (1) No suit shall be instituted against the Corporation or against the Commissioner, or the Transport Manager, or against any municipal officer or servant, in respect of any act done or purported to be done in pursuance or execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act:-
>
> (a) Until he expiration of one month next after notice in writing has been, in the case of the Corporation, left at the chief municipal officer and, in the case of the Commissioner of the Transport Manager or of a municipal officer or servant delivered to him or left at his office or place of abode, stating with reasonable particularity the cause of action and the name and place of abode of the intending plaintiff and of his attorney, advocate, pleader or agent, if any for the purpose of such suit, for
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> (b) unless it is commended within six months next after the accrual of the cause of action.

So, section-487 of the Bombay Provincial Municipal Corporations Act, 1949 itself is very clear that without giving notice to respondent No.2, the suit is not maintainable. Looking to the entire record, the appellants had enough time for giving notice before filing the suit. The respondent No.2 has issued sanction for construction on 09-03-2015 vide Mark-4/7. The appellants have filed their written objections before the Collector, Bhavnagar on 11-05-2015 and 19-08-2015 vide Marks-32/1 and 32/2 respectively. The Collector, Bhavnagar has issued NOC on 03-12-2015 vide Mark-32/3. The appellants filed the suit before the Trial Court on 26-10-2015. So, from 09-03- 2015 to 26-10-2015, the appellants had sufficient time for giving notice and file the suit which is clearly breach of section-487. There is no any specific provision to waive such notice. The learned advocate for the respondent No.2 Mr.UJ Trivedi has relied upon the decision of Arivandanam v. T.V.Satyapal, reported in AIR 1977 Supreme Court 2421 wherein, the Hon'ble Apex Court has observed and held as under :

> If on a meaningful - not formal - reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the trial Court should exercise its power under O.7, R.11, C.P.C. Taking care to see that the ground mentioned therein is fulfilled. The trial Courts should insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Ch.XI) and must be triggered against them. (Para-5)

33. So, in view of aforementioned facts and my discussion as well as provisions of law, the learned Trial Judge has rightly and properly considered all these aspects in his order, passed below Ex.11 dated 04-01- 2016. The reasons, assigned by the learned Trial Judge in his order, are absolutely true and as per law after evaluating all documentary evidences on record in its true letter and spirit, produced by either party. Therefore, in my opinion, the order, delivered by the learned Trial Judge is legal, proper and in accordance with law and as such, it cannot be said illegal, improper, perverse and against the principle of established law. Hence, in view of my aforementioned discussion and observation, I answer issue No.1 in the negative and in reply to issue No.2, pass the following final order in the interest of judgment :

: ORDER :

1. The Appeal stands dismissed.

2. The ad interim relief, granted below Ex.10, stands vacated.

3. No order as to costs.

4. R & P is ordered to be sent back to the Trial Court with a copy of this judgment.

5. Decree to be drawn accordingly.

Pronounced in the open Court today on this 5th day of March, 2016."

28. Submissions on behalf of the plaintiffs:-

> 28.1 Mr. Dipen Desai, the learned counsel appearing for the plaintiffs vehemently submitted that the courts below had committed a serious error in holding that the suit filed by the plaintiffs is not maintainable as the same is barred by the provision of Order 1 Rule 8 of the CPC and Section 487 of the Act, 1949. Mr. Desai would submit that there is an error apparent on the face of the two impugned orders as neither the plaint could have been rejected on the ground that no prior permission was obtained for instituting the suit in a representative capacity under the provisions of Order 1 Rule 8 of the CPC nor on the ground of Section 487 of the Act, 1949.
>
> 28.2 Mr. Desai submitted that the plaint can be rejected, if on plain reading of any statement made in the plaint, the court finds the suit to be barred by any provisions of law. According to Mr. Desai, there is not a single statement in the entire plaint, on the basis of which, it could be said that the suit is barred by the provisions of law. He submitted that the defence of the defendants could not have been made or considered for rejecting the plaint. Mr. Desai submitted that assuming for the moment that the suit could be said to have been preferred in a representative capacity, the plaint could not have been rejected for want of any permission from the Court because the plaintiffs themselves are the affected parties. In such circumstances, they could have

preferred the suit even in their individual capacity.

28.3 Mr. Desai submitted that the Lower Appellate Court committed a serious error in holding that the suit is barred for want of prior notice under Section 487 of the Act, 1949.

According to Mr. Desai, the Lower Appellate Court could be said to have adopted a very unprecedented procedure. He submitted that the issue with regard to Section 487 of the Act, 1949 was not before the Civil Judge. The defendant No.1, being a private party, could not have raised the issue as regards non-compliance of the provisions of Section 487 of the Act, 1949. In such circumstances, the Corporation could have preferred a separate application for rejection of plaint on such ground. Having not preferred any such application before the Trial Court, the Lower Appellate Court ought not to have permitted the Corporation to raise this issue in the course of the hearing of the appeal preferred by the plaintiffs against the order passed by the Civil Judge, rejecting the plaint. Mr. Desai submitted that even, otherwise, Section 487 of the Act, 1949 has no application to the facts of this case. Mr. Desai submitted that the entire cause of action was the gross illegalities committed by the Corporation in sanctioning the plans put up by the defendant No.1 for construction of commercial building in a residential area. He submitted that it is the case of the plaintiffs that all the permissions granted by the Corporation could be termed as a nullity being absolutely illegal. In such circumstances, according to Mr. Desai, it cannot be said to be "an act done or purported to be done in pursuance or execution or intended execution of this Act".

28.4 Mr. Desai submitted that whether there was non- compliance of the provisions of Order 1 Rule 8 of the CPC or Section 487 of the Act, 1949 cannot be said to be the pure questions of law requiring rejection of the plaint without pleadings of the other side. In such circumstances, referred to above, Mr. Desai prays that there being merit in this second appeal, the same may be allowed by quashing and setting aside both the impugned judgments passed by the Lower Courts. He submitted that the plaint may be revived and restored to the original file of the concerned court.

29. Submissions on behalf of the defendant No.1.

29.1 Mr. M.C. Bhatt, the learned counsel appearing with Mr. Nisarg H. Vyas, submitted that no error, not to speak of any error of law, could be said to have been committed by the courts below in rejecting the plaint. Mr. Bhatt submitted that once the suit is filed in a representative capacity, then prior permission of the court under the provisions of Order 1 Rule 8 of the CPC is mandatory. In the absence of such permission being granted by the court, the suit could not be said to be maintainable in law. Mr. Bhatt submitted that once the issue of public nuisance is raised by the plaintiffs in their plaint, the action can be maintained only in accordance with the provisions contained in Section 91 of the CPC. He submitted that the suit can be filed by the Advocate General or by two or more persons with the leave of the Court. In such circumstances, it was incumbent upon the plaintiffs to first seek appropriate permission from the Court to institute the suit. Mr. Bhatt submitted that the words "any act done or purported to be done in pursuance or execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act." in Section 487 of the Act, 1949 would apply to nonfeasance as well as to misfeasance. He would submit that the word

"act" extends to illegal omissions. Mr. Bhatt, by placing strong reliance on a decision of the Supreme Court in the case of State of Maharashtra & Ors. vs. Shri Chanderkant, AIR 1977 SC 148, submitted that no distinction can be made between acts done illegally and in bad faith and acts done bonafide in the official capacity. Mr. Bhatt would submit that in such circumstances, Section 487 of the Act, 1949 is attracted when any suit is filed against the Corporation in respect of any act done in pursuance or execution or intended execution of the Act. Mr. Bhatt submitted that in the absence of any definite statement in this regard in the plaint, the suit could not have been entertained and the plaint has been rightly rejected by the Civil Court. Mr. Bhatt submitted that this second appeal has been admitted only on the limited ground in respect of notice under section 487 of the Act, 1949. In such circumstances, the plaintiffs are not justified in seeking leave of this Court to raise the contentions regarding Order 1 Rule 8 of the CPC. In such circumstances, referred to above, Mr. Bhatt prays that there being no merit in this second appeal, the same may be dismissed.

30. Submissions on behalf of the defendant No.2:

30.1 Mr. Munshaw, the learned counsel appearing for the Corporation vehemently submitted that the courts below rightly rejected the plaint as there is no statement in the plaint with regard to issue of prior notice to the Corporation under section 487 of the Act, 1949. Mr. Munshaw submitted that as the plaintiffs have challenged the grant of permissions and sanctioning of the plans, the same could be said to have been done in execution of the Act and, therefore, a prior notice before the execution of the suit was mandatory. In such circumstances, Mr. Munshaw submitted that no error could be said to have been committed by the Lower Appellate Court in permitting the Corporation to raise this issue for the first time in the appeal preferred by the plaintiffs.

31. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for my consideration is whether the courts below committed an error in rejecting the plaint.

32. Let me first consider the substantial question of law with respect to Order 1 Rule 8 CPC. Order 1 Rule 8 CPC reads thus:

"Order 1 Rule 8:-. One person may sue or defend on behalf of all in same interest (1) Where there are numerous persons having the same interest in one suit,--

(a) one or more of such persons may, with the permission of the Court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;

(b) the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

(2) The Court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested, either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(3) Any person on whose behalf, or for whose benefit, a suit is instituted, or defended, under sub-rule (1), may apply to the Court to be made a party to such suit.

(4) No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub-rule (3), of rule 1 of Order XXIII, and no agreement, compromise or satisfaction shall be recorded in any such suit under rule 3 of that Order, unless the Court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub-rule (2).

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be.

Explanation.--For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the persons on whose behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be."

33. Section 91 of the CPC reads thus:

"91. Public nuisances and other wrongful acts affecting the public.-(1) in the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted,-

(a) by the Advocate General, or

(b) with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provision".

34. The plaintiffs in their pleading in the plaint has made themselves very clear that the dispute is directly affecting them and also the public interest and, in such circumstances, the suit has few ingredients of Order 1 Rule 8 of the CPC too. Thus, this is not a case in which the plaintiffs are absolutely aliens and have nothing to do with the grievance redressed against the defendants. Their case is that the area in which they are residing is declared as a residential zone and the defendant No.1 having purchased a plot in the very same area could not have utilized it for any other purpose other than the residence. The case of the plaintiffs is that the Corporation could not have granted permission to the defendant No.1 to put up a commercial building.

35. I am of the view that as the plaintiffs themselves are affected by the action of the defendants, the plaint could not have been rejected on the ground of alleged non-compliance of the provisions of Order 1 Rule 8 of the CPC. In the aforesaid context, I may refer to and rely upon a decision of the Supreme Court in the case of Hari Ram vs. Jyoti Prasad & Anr., AIR 2011 SC 952. I may quote the relevant observations:

> "20. The next plea which was raised and argued vehemently by the learned senior counsel appearing for the appellant was that the suit was bad for non-
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> compliance of the provisions of Order I Rule 8 of the CPC. The said submission is also found to be without any merit as apart from being a representative suit, the suit was filed by an aggrieved person whose right to use public street of 10 feet width was prejudicially affected. Since affected person himself has filed a suit, therefore, the suit cannot be dismissed on the ground of alleged non- compliance of the provisions of Order I Rule 8 of the CPC.
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> 21. In this connection, we may appropriately refer to a judgment of the Supreme in Kalyan Singh, London Trained Cutter, Johri Bazar, Jaipur Vs. Smt. Chhoti and Ors. reported in AIR 1990 SC 396. In paragraph 13 of the said judgment, this Court has held that suit could be instituted by representative of a particular community but that by itself was not sufficient to constitute the suit as representative suit inasmuch as for a representative suit, the permission of Court under Order I Rule 8 of the CPC is mandatory.
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> 22. In paragraph 14 of the said judgment, it was also held that any member of a community may successfully bring a suit to assert his right in the community property or for protecting such property by seeking removal of encroachment therefrom and that in such a suit he need not comply with the requirements of Order I Rule 8 CPC. It was further held in the said case that the suit against alleged trespass even if it was not a representative suit on behalf of the community could be a suit of this category.
>
> 23. In that view of the matter and in the light of the aforesaid legal position laid down by this Court, we hold that the suit filed by the plaintiff/respondent No. 1 was maintainable. "

36. So far as section 91 of the C.P.C. is concerned, it deals with "public nuisance" which is the combination of a civil and criminal characters and no mention need be necessary that under both the civil and criminal forums, the public nuisance could be dealt with for actions and prosecutions. "Nuisance" is an obstruction, risk or injury caused to any person and if the same is caused in a public place it becomes "public nuisance".

Such a wrongful act affecting the general public, according to Section 91 CPC, could be challenged or testified filing a suit for declaration and injunction and for such other reliefs by the Advocate General or with the leave of the Court by two or more persons though no special damage has been caused to such persons by reason of such public nuisance.

37. However, clause (2) of Section 91 C.P.C. makes it clear that this Section would not limit or otherwise affect any right of suit which may exist independently of its provisions thereby meaning that if any individual gets affected by such public nuisance being caused, he or she, would have the same right to file a suit for declaration and injunction and for mandatory injunction and therefore since the plaintiffs are residing in the same area or rather the society, they are personally affected by the unlawful construction put up by the defendant No.1 of a commercial nature. It cannot be said that no individual will have the right to question the validity of such a wrongful act alleged to have been committed on the part of the defendants in view of the fact that section 91 CPC does not create a bar on any individual from resorting to the Court for the relief in such matters and, therefore, this substantial question of law regarding the capacity of the plaintiffs to maintain a suit of this character has to be decided only against the defendants.

38. In Saina v. Konderi (1984 KLT 428), it was held that a citizen has a right to institute a suit if a person constructs a building in violation of the Municipalities Act and Rules. It was held as follows:-

> "Having regard to the peculiar conditions relating to the enforcement of well conceived municipal measures, it is a liberal view that has to be preferred and the restricted view would be a definitely retrograde step. A citizen has a right to institute a suit with a view to ensure effective implementation of the Municipal Regulations, such as the Buildings Rules in the present case, even in the absence of a specific personal injury to the person suing".

39. I may refer to and rely upon one decision of the Kerala High Court in the case of D.L. Walton vs. Cochin Stock Exchange Ltd. & Ors., AIR 1995 Kerala 106. P.K. Balasubramaniyan, J. (as his Lordship then was) has very succinctly explained the provisions of Order 1 Rule 8 and section 79 of the CPC. I quote the relevant observations:

> " The present suit is filed by the plaintiff claiming to be a recognised Stock Exchange to enforce a right in itself to prevent another organisation from carrying on a similar business within the area of its operation. The suit is filed on the basis that by attempting to carry on similar operation within the area of Ernakulam District the defendants are violating the provisions of the Securities Contracts (Regulation) Act and thereby interfering with the exclusive right of the plaintiff and that therefore the

> defendants are liable to be restrained by a decree of injunction from so doing. It cannot be said that the plaintiff is only one among the numerous persons having an interest in the subject-matter of the suit. I am not therefore in a position to accept the argument based on Order 1, Rule 8 of the Code of Civil Procedure to the effect that the plaintiff ought to have obtained sanction under that provision so as to enable it to maintain the suit. The plaintiff is an incorporated company under the Indian Companies Act and is suing another incorporated company under that Act and its Directors. In my view there is no impediment in the plaintiff maintaining the suit for itself without recourse to Order 1, Rule 8 of the Code of Civil Procedure. It is also not possible to accept the argument that when the plaintiff is seeking to restrain the defendants from running a parallel exchange they are claiming an interest in common with others within the meaning of Order 1, Rule 8 of the Code of Civil Procedure. The argument based on Section 91 of the Code of Civil Procedure is also to some extent sought to be linked with the contention based on Order 1, Rule 8 of the Code of Civil Procedure. According to the learned counsel when the plaintiff seeks to prevent the defendants from carrying on their business they are in fact seeking a relief in respect of an act that is likely to affect the public. In my view there is no question of any public right involved in the nature of the present suit and therefore Section 91(1) of the Code of Civil Procedure will also have no application. On the other hand it appears to me that even assuming that Section 91(1) of the Code Civil Procedure is attracted this would be a case where the plaintiff itself may have a right of suit existing independently of Section 91(1) of the Code of Civil Procedure. I am of the view that in any view this will be a case coming under Section 91(2) of the Code of Civil Procedure and the argument based on Section 91(1) of the Code of Civil Procedure and Order 1, Rule 8 of the Code of Civil Procedure have only to be overruled."

40. Thus, his Lordship took the view that even assuming that section 91(1) of the CPC is attracted, that by itself, would not come in the way for the plaintiff to institute the suit independently of section 91(1) of the CPC.

41. I may also refer to and rely upon a decision of the Madras High Court in the case of S.K. Murugesa Mudaly vs. Baruda Arunagiri Mudaly & Ors., reported in AIR 1951 Madras 498, wherein, in para-6, his Lordship observed as under:-

> "6. It will be seen, however, on a careful scrutiny of that decision that in holding as it does that it is open to an individual member of the public to maintain a suit for removal of obstruction to a public highway which constitutes a nuisance without the sanction of the Advocate-General under Section 91, Civil P. C., and even without proof of special damage, it founds itself upon a prior decision--that of Wadsworth J. to the same effect reported in Munuswami v. Kuppusami, I. L. Rule (1939) Mad. 870 : (A.i.r. (26) 1939 Mad. 691). The case before Wadsworth J. was not itself a case of a suit instituted under Order 1, Rule 8, Civil P. C., but only in the individual capacity of the plaintiff who was entitled to maintain the suit. After all, the provision of Order 1,

> Rule 8, is only an enabling provision, and there is no reason why merely because the plaintiff happens to share the same inconvenience by the obstruction to the highway as other people do he should be debarred of his right to seek relief, when once in view of the Privy Council decision in Manzur Hasan v. Maham-mad Zaman, 47 ALL. 151 : (A. I. R. (12) 1925 P. C. 36) it is realised that the distinction between indictment and action in regard to what is done on a highway which is a distinction peculiar to English law ought not to be applied to India. I am of opinion therefore that even if the damage suffered by the plaintiff in the present case is one which is shared by other residents of the same locality he is still entitled to maintain the present suit. I am also of opinion that the ruling in Subbamma v. Narayanamurthi, 1949-1 M. L. J. 56 : (A. I. R. (86) 1949 Mad. 634) governs the present case in so far aa it lays down that even if proof of special damage is otherwise necessary in a case of this kind, it becomes unnecessary because the wrong complained of in the present case does not constitute a public nuisance. As pointed out in that decision, once it is appreciated that infringement of the rights of the residents of a village in respect of a public street does not constitute a public nuisance in the sense of a nuisance caused to the public in general, such infringement can well be sued upon by any member of the public who suffers from the wrong complained of. The case cannot, in that view, be regarded as one of public nuisance within Section 91, Civil P. C., and the sanction of the Advocate-General accordingly is not required. Nor is it necessary to compel a person that suffers from such wrong to have recourse to the procedure prescribed by Order 1, Rule 8, which, as already stated, is after all only an enabling and not a compulsory provision."

42. Let me proceed on the footing that the provisions of Order 1 Rule 8 of the CPC are applicable to the case on hand and the plaintiffs failed to obtain appropriate permission of the court to institute the suit. Ordinarily, if the provisions of Order 1 Rule 8 CPC are applicable, the plaintiff is obliged to prefer an application seeking appropriate permission from the Court to institute the suit. If any such application is preferred, then it is the duty of the Court to dispose it of. However, the important principle of law which the courts below missed to consider is that the omission to do so can be remedied at any stage during the trial of the suit. Ordinarily, the leave under Order 1. Rule 8 should be sought and its grant considered when the suit is instituted. But the omission to obtain leave at the commencement of the suit cannot serve as a reason for rejecting the plaint. No question of jurisdiction is involved. Leave can be granted at any stage after the suit has been filed. That was the view taken by a Full Bench of the Bombay High Court, in Fernandez v. Rodriques, (1897) JLR 21 Bom 784 (FB), and that view was followed by the Allahabad High Court in Baldec Bhartbi v. Bir Gir, (1900) ILR 22 All 269, and by the Madras High .Court in Chennu Menon v. Krishnan, (1902) ILR 25 Mad 399. It was reaffirmed by the Bombay High Court in Hubli Panjarapole v. Saraswateyya Bayappa Kala Ghatki, AIR 1953 Bom 334. The rule has been extended even to appeals :

> Mookka Pillai v. Valavanda Pillai, AIR 1947 Mad 205.

> 43. I may quote the relevant observations made by Justice P.B. Gajendragadkar (as his Lordship then was) in Hubli Panjarapole (supra) as under:

> "(4) It is true that ordinarily leave has to be and should be obtained under Order 1, Rule 8, at the time of, the institution of the suit. Where there are numerous persons having the same interest in one suit, the Court should be invited at the outset to give leave to bring the suit in a representative capacity. If there are numerous defendants having the same interest, leave has to be obtained to bring the suit against them in a representative capacity, and when leave is granted, notice of the institution has to be issued to all persons as may be directed by the Court. Even so, it cannot be disputed that the suit would not be dismissed only on the ground that the requisite leave has not been obtained under Order 1, Rule 8, at the commencement of the proceedings; it would be opon to a party to apply for such leave and to take such further action as is required by Order 1, Rule 8, even during the pendency of the suit. In
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> -- 'Fernandez v. Rodrigues', 21 Bom 784 (D), a Full Bench of this Court has held that the permission requisite under Section 30 of the Code of 1882, which corresponds to Order 1, Rule 8, can be granted even after the suit was filed. The point which was raised before the Full Bench was whether there was jurisdiction in the Court to entertain a suit where no leave has been obtained previously under Section 30 of the old Code, and the Full Bench held that there was no question of jurisdiction involved and it would be open to the Court to grant leave even after the suit is filed. Incidentally we may refer to the statement made by Mr. Justice Tyabji in his judgment wherein the learned Judge observed (P. 786) :
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> "It is really a question of adding parties (when leave is granted under the said section)."

44. The object of Rule 1 Rule 8 is only to prevent multiplicity of litigations. Because when persons seek to represent a particular community or association, the right and interest of others have to be taken into account and that is why publication is ordered and permission is also sought for to represent others. In such cases, there is a chance for multiplicity of litigation by persons who wants to sue others, instead of the persons who seek to represent others. In a case of this nature where the plaintiffs are themselves interested and are affected parties, there was no necessity to file an appropriate application seeking permission to obtain leave of the Court to file the suit in a representative capacity.

45. Thus, I am convinced that the plaint could not have been rejected on the ground of noncompliance of the provisions of Order 1 Rule 8 of the CPC.

46. I shall now proceed to deal with the second substantial question of law with respect to Section 487 of the Act, 1949. Section 487 reads thus:

> "Section 487:(1) No suit shall be instituted against the Corporation or against the Commissioner, or the Transport Manager, or against any municipal officer or servant, in respect of any act done or purported to be done in pursuance or execution or intended execution of this Act or in respect of any alleged neglect or default in the

execution of this Act :-

(a) Until the expiration of one month next after notice in writing has been, in the case of the Corporation, left at the chief municipal office and, in the case of the Commissioner or of the Transport Manager or of a municipal officer or servant delivered to him or left at his office or place of abode, stating with, reasonable particularity the cause of action and the name and place of abode of the intending plaintiff and of his attorney, advocate, pleader or agent, if any, for the purpose of such suit, nor

(b) unless it is commenced within six mouths next after the accrual of the cause of action.

(2) At the trial of any such suit-(a) the plaintiff shall not be permitted to go into evidence of any cause of action except such as is set forth in the notice delivered or left by him as aforesaid;

(b) the claim, if it be for damages, shall be dismissed if tender of, sufficient amends shall have been made before the suit was instituted or if, after the institution of the suit, a sufficient sum of money is paid into Court with cost.

(3) Where the defendant in any such suit is a municipal officer or servant, payment of the sum or of any part of any sum payable by him in, or in consequence of the suit, whether in respect of costs, charges, expenses, compensation for damages or otherwise, may be made, with the previous sanction of the Standing Committee or the Transport Committee from the Municipal Fund or the Transport Fund, as the case may be."

47. Mr. Bhatt submitted that there is no averment in the plaint with regard to the service of prior notice as contemplated under section 487 of the Act, 1949. He submitted that the plaintiffs were obliged in law to specifically state in the plaint as regards service of notice to the Corporation under Section 487.

48. I fail to understand how Mr. Bhatt appearing for the original defendant No.1 can raise this issue with regard to Section 487 of the Act, 1949. It is for the Corporation to raise such issue. However, considering to be a neat question of law, I permitted Mr. Bhatt to make good his case with regard to Section 487 of the Act, 1949.

49. In order to appreciate the contention raised by Mr. Bhatt it will be appropriate to refer to the provisions of Order 6 Rule 6, Order 7 Rule 1, Order 7 Rule 11 of the Code, which are quoted below:"

"Order 6 Rule 6:

6. Condition precedent:- Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

Order 7 Rule 1:

1. Particulars to be contained in plaint. The plaint shall contain the following particulars:

[a] the name of the Court in which the suit is brought;

[b] the name, description and place of residence of the plaintiff;

[c] the name, description and place of residence of the defendant, so far as they can be ascertained;

[d] where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;

[e] the facts constituting the cause of action and when it arose;

[f] the facts showing that the Court has jurisdiction;

[g] the relief which the plaintiff claims;

[h] where the plaintiff has allowed a set off or relinquished a portion of his claim, the amount so allowed or relinquished; and [i] a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of court fees, so far as the case admits.

xxx xxx xxx Order 7 Rule 11:

11. Rejection of plaint:- The plaint shall be rejected in the following cases:

[a] where it does not disclose a cause of action;

[b] where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

[c] where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so;

> [d] where the suit appears from the statement in the plaint to be barred by any law;
>
> [e] where it is not filed in duplicate;
>
> [f] where the plaintiff fails to comply with the provisions of rule 9:
>
> Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite stamp paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

50. I make it plain and I am quite conscious of the position of law that while considering an application for rejection of plaint in terms of Order VII Rule 11 of the Code, there is no scope of considering any of the defence that the defendant can take in his written statement and the Courts should restrict its scrutiny only to the averments made in the plaint for ascertaining whether on the basis of the averments made in the plaint, the suit is barred by any law for the time being in force. There may be cases where from the mere perusal of the averments made in the plaint, the suit may not appear to be barred by any law, but after the defence of the defendant is taken into consideration which is supported by evidence, the suit may, ultimately, be found to be barred by law. In those cases, although there is no scope of rejection of the plaint, yet the suit may, ultimately, be dismissed.

51. I, therefore, first propose to consider whether the plaint should be rejected being barred by Section 487 of the Act, 1949. To put it in other words, where in the absence of a specific statement in the plaint as regards the issue of notice under section 487 of the Act, 1949, the plaint could have been rejected.

52. In the aforesaid context, I may incidentally refer to the provisions of Section 80 of the Code, which reads thus:

> "80. Notice.[1] Save as otherwise provided in subsection [2], no suit shall be instituted against the Government including the Government of the State of Jammu and Kashmir or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of:-
>
> [a] in the case of a suit against the Central Government, except where it relates to a railway, a Secretary to that Government;
>
> [b] in the case of a suit against the Central Government where it relates to railway, the General Manager of that railway;

[bb] in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government or any other officer authorised by that Government in this behalf;

[c] in the case of suit against any other State Government, a Secretary to that Government or the Collector of the district; and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

[2] A suit to obtain an urgent or immediate relief against the Government (including the Government of the State of Jammu and Kashmir) or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted, with the leave of the Court, without serving any notice as required by subsection [1]; but the Court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit:

Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of subsection [1].

[3] No suit instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity shall be dismissed merely by reason of any error or defect in the notice referred to in subsection [1], if in such notice [a] the name, description and the residence of the plaintiff had been so given as to enable the appropriate authority or the public officer to identify the person serving the notice and such notice has been delivered or left at the office of the appropriate authority specified in subsection[1], and [b] the cause of action and the relief claimed by the plaintiff had been substantially indicated."

53. Thus, Section 80 of the code is a peculiar provision which specifically speaks of a notice mentioned therein as a condition precedent for filing of suit of the nature indicated therein and further requires that compliance of the above condition precedent must be pleaded.

54. In Section 487 of the Act, 1949, the requirement of pleading of such a condition precedent for filing a suit is not a mandate of law and, in such circumstances, Order VI Rule 6 of the Code will not be applicable and in the absence of any pleading as regards the compliance, the plaint cannot be rejected. There is no requirement of a plaintiff to plead the issue of notice under Section 487 of the Act, 1949 and a condition precedent to maintain the suit.

55. The pith and core of the concept of interpretation of pleading in all the precedents have been discharged in the background of the fundamentals in the relevant provisions of the C.P.C. Rules 2, 6,

8, 9 and 10 of Order VI mandatorily imposes on the parties as to what they are bound to state, and all other facts or particulars to be stated are either desirable or useful to settle the issues and to try them to render proper decision. It is Rule 2 of Order VI of the Code of Civil Procedure which mandates that every pleading shall contain and contain only a statement in concise form of material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved. Rule 6 of Order VI contemplates the condition precedent to plead the performance of such a condition precedent etc., etc., to be complied with in the nature of the case. Similarly Rule 8 of Order VI mandates that where there is a plea of contract, it must be specifically denied by the opposite party. According to Rule 10 of Order VI, the plea of malice, fraudulent intention, knowledge or condition of the mind etc., are mandatorily to be stated. Wherever, a notice is mandatory, there must be a specific plea in the plaint according to Rule 11 of Order VI. There is no other mandatory requirement in regard to the pleas or defence in the pleading. They may depend upon the facts and circumstances of each case, wherein the Court may give directions to the parties to supplement the pleadings to render full and effective justice. That is why Order VI, Rule 17 of the Code of Civil Procedure empowers the Court to amend the pleading even without the parties desiring or initiating. A simple and bare reading of the entire Order VI of the Code of Civil Procedure shows that the pleas like adverse possession, easement etc., need not be specifically pleaded. It is also to be made very clear in view of Rule 2 of Order VI and other rules supra of the Code of Civil Procedure that the parties will bring all the necessary facts on record which generates law either in pure and simple manner or mixed questions of law and facts. It is for the Courts to evolve such generated results. Possibly the parties and the learned Advocates representing them will assist the Court in doing that.

56. The above takes me now to consider whether the issue with regard to Section 487 of the Act, 1949 could have been raised for the purpose of getting the plaint rejected. Section 487 provides for filing of a suit in respect of an act or purported act to be done in pursuance of or in execution of the provisions of the Act. Necessarily, all the acts or intended acts of the Corporation must be lawful acts as permitted by the provisions of the Act. Such acts can never cover the ultra vires of illegal acts because no servants or officer has any power to commit or conduct action which is not permissible within the provisions of the Act.

57. Again, at the cost of repetition, I state that the case of the plaintiffs is very specific. The case of the plaintiffs is that the Corporation granted illegal permissions in favour of the defendant No.1 for the purpose of putting up the construction of a commercial nature. The case of the plaintiffs is that the Corporation acted in bad faith and could not have granted such permission and in any circumstances could not have sanctioned the plans. This part of the case of the plaintiffs has been elaborately explained in the plaint itself.

58. I am unable to accede to the suggestion in the present case that the act of the Corporation can be regarded as done or purporting to have been done in pursuance of the Act. At least, at this stage, without evidence being led by both the sides, the courts could not have rejected the plaint on the premise of Section 487 of the Act, 1949. The very wordings of the section does not contemplate giving of a notice to the Corporation if the relief sought against the Corporation is for omission of the Corporation to perform its statutory duties. The issue with regard to application of section 487

of the Act, 1949 requires leading of evidence on both the sides. Only after appropriate evidence is led that the Court may be able to reach to an appropriate conclusion whether the suit is liable to be dismissed for want of any prior notice.

59. In Poona City Municipal Corporation vs. Dattatraya Nagesh Dattatraya Nagesh Deodher, reported in (1964) 8 SCR 178 while interpreting Section 487 of the Act, 1949, observed as under:-

> "The benefit of this section would be available to the Corporation only if it was held that this deduction of ten per cent was "an act done or purported to be done in pursuance or execution or intended execution of this Act."

We have already held that this levy was not in pursuance or execution of the Act. It is equally clear that in view of the provisions of s.l27(4) (to which we have already referred) the levy could not be said to be "purported to be done in pursuance or execution or intended execution of the Act." For, what is plainly prohibited by the Act cannot be claimed to be purported to be done in pursuance or intended execution of the Act".

60. Let me look into few decisions on the subject.

61. In Khetiwadi Utpadhan Bazar Samiti vs. Nitinkumar Maganlal Kalaria, reported in 1995 (1) GLH 1136, a learned Single Judge of this Court had the occasion to consider Section 58 (2) of the Gujarat Agricultural Produce Market Act, 1963. In the said case also, the issue was whether the plaint could have been rejected for the failure to issue notice under section 58 (2) of the Act before the institution of the suit. The learned Single Judge, while negativing such contention, observed as under:-

> "The contention now raised in this petition is that there was non-compliance of provisions of Section 58(2) of the Act. Whether the suit is filed within the period of limitation or whether there was requirement of compliance of provisions of Section 58 of the Act, cannot be said to be pure questions of law requiring rejection of the plaint without pleadings of the other side. On the mere fact that plaint para 15 contains that the cause of action for filing the suit occurred on 20.1.1995 and the suit came to be filed on 30.10.1986, it is contended that the suit was barred by limitation in view of Section 58(L) of the Act. This submission will assume importance in the fact sand circumstances of the case and the nature of the dispute between the parties if the court finds that the statutory provisions required under Section 58(1) of the Act in such suit involving the dispute of refund of earnest money or recovery of installment after cancellation of public auction, whether the cause of action mentioned in the plaint attracted provisions of Section 58(1) will have to be examined by the Court. It cannot be straightway presumed that there was statutory bar of provision of Section 58 even in the nature of claim or cause of action pleaded in the plaint at that stage without filing written statement and raising issues based on pleadings. It is a settled proposition of law that if the impugned action is without any authority of law or illegal or nullity, no notice is required. Whether a statutory notice was required or not is a question depending upon the facts and circumstances of the

case and the nature of the dispute between the parties."

62. In Patel Meghjibhai Vithalbhai & Co. vs. Khetiwadi Utpan Bazar Samiti, reported in 1996 AIHC 370, a learned Single Judge of this Court had the occasion to consider almost a similar issue. I may quote the relevant observations:-

> "The respondent as the defendant without filing its written statement made an application under Order 7 Rule 11(d) of the Code with a prayer that the present petitioner's plaint should be rejected as it was barred by Section 58 of the Gujarat Agricultural Produce Market Act,1963 (the Act for brief) inasmuch as no statutory notice as required to be given thereunder was given by the present petitioner to the respondent herein before institution of the suit in question. That application was taken on record at Exh.15. After hearing the parties by his order passed on 21st April, 1992 below thereto, the learned trial judge accepted the application and rejected the plaint. That aggrieved the present petitioner, and as such the present revisional application has come to be filed questioning the correctness of the impugned order.
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> 3. Order 7, Rule 11(d) of the Code provide for rejection of a plaint on the ground of where the suit appears from the statement in the plaints be barred by any law. It thus becomes clear that the condition precedent for rejection of the plaint under the aforesaid statutory provision is some statement in the plaint showing that the suit is barred by some law. With respect, the learned trial judge has referred to no statement in the plaint showing under what law the suit is barred. The condition precedent for exercise of the power of rejection of the plaint is thus found not satisfied.
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> 4. it is true that the present respondent wide an application inter alia contending that the cognizance of the suit was barred under Section 58 of the Act for want of the required statutory notice. The want of statutory notice can be a ground of defence to the suit. But then, in order to press that ground into service, the respondent as the defendant was required to file its written statement taking such a defence in black and white. It could have thereafter prayed to the Court for framing a preliminary issue in tht regard by making the necessary application under Order 14, Rule 2 of the Code. The respondent could not have and ought not to have made any application under Order 7, Rule 11(d) of the Code for rejection of the plaint for want of the required statutory notice under Section 58 of the Act. Such an application on the part of the respondent herein was misconceived. The learned trial Judge had no jurisdiction to entertain such misconceived application."

63. In Mistri Jayantilal Maganlal Patel vs. Prajapati Kantilal Haribhai & Anr., 2004 AIHC 2268, a learned Single Judge of this Court had the occasion to consider section 320 of the Gujarat Panchyat Act (6) of 1962, which is somewhat para materia to section 487 of the Act, 1949. I may quote the relevant observations:-

"6. Mr. V.C.Desai, learned advocate for the petitioner, submitted that the lower appellate Court should not have reversed the finding of the trial Court, as, according to him, it is an admitted fact that no statutory notice was served upon respondent No.2-Panchayat by the plaintiff before filing of the suit.

7. It is required to be noted that it is an admitted fact that the Panchayat has not raised such objection before the trial Court that the suit is not maintainable against it for want of issuance of the statutory notice. The present petitioner was subsequently joined as defendant No.2 at his own request. At this stage, reference is required to be made to the decision in Begum Noorbanu and others v. Deputy Custodian General of Evacuee Property A.I.R. 1965 SC 1937. The aforesaid case is in connection with the Administration of Evacuee Property Act, 1950. While considering the scheme of the aforesaid Act, the Apex Court has held as under :

"The notice contemplated by S.7 of the Act is in the first place intended to provide an opportunity to the person whose property is in the opinion of the custodian an evacuee property to satisfy the custodian that he is not an evacuee as defined in S. 2 (d) of the Act. If he is not an evacuee his property cannot be declared evacuee property. Moreover, it is to afford an opportunity to persons who have not migrated to Pakistan to satisfy the Custodian that the property which, in the opinion of the Custodian, is evacuee property does not belong to an evacuee or that an evacuee has no interest therein. Once, therefore, a person has been declared an evacuee after due notice, it would not be necessary to give notice to him thereafter under S.7. The earlier notification would be conclusive against the evacuee on the question of his migration to Pakistan and therefore no purpose will be served by issuing such notice. The only person who could claim to be interested in the property would, therefore, be those who have not migrated to Pakistan and who may possibly claim that the property is theirs and did not belong to the evacuee. For the purpose of S.7 it is immaterial whether a particular property had actually devolved on the evacuee before migration to Pakistan or devolved later. Whatever be the point of time at which the property devolved on the evacuee it would become evacuee property in the sense that it is liable to be declared as evacuee property and to vest in the Custodian, provided that the devolution occurred before the power of the custodian to declare any property as evacuee property came to an end under S.7-A of the Act.

An objection as to non-service of notice can properly be taken not by third parties, but only by the person on whom the notice is not served."

64. Mr. Munshaw, the learned counsel appearing for the Corporation submitted that Section 487 of the Act protects even improper acts. He submitted that in truth no distinction can be made between the acts done illegally and in bad faith and acts done bona fide in the performance of a public duty imposed upon a public body as in this case. He submitted that the words "purporting to have been done" will even cover up the acts which are done mala fide. In such circumstances, prior notice was mandatory.

65. Mr. Bhatt and Mr. Munshaw, both, together, invited the attention of this Court to a decision of the Supreme Court in the case of State of Maharashtra & Anr. vs. Shri Chander Kant, reported in AIR 1977 SC 148 to make good their submission that Section 487 of the Act, 1949 would be attracted even if the act, complained, is done illegally or in bad faith. It was a case, in which, the respondent Chander Kant filed a suit against the State of Maharashtra claiming that the order dated 1st March, 1955 in a revenue case declaring one Gajanan Maharaj Sansthan to be a public trust be set aside. The plaint was filed under section 8(1) of the Public Trusts Act (MP Public Trusts Act, 1951) against the State of Madhya Pradesh and the Registrar of the Public Trusts Amraoti. In the said case, no notice under section 80 of the CPC was given. The defendants took the plea that the suit was liable to be dismissed by reason of no notice under section 80 of the CPC. The Addl. District Judge held that a notice under Section 80 of the CPC was necessary and the suit was not maintainable and ordered the dismissal of the suit. The respondent filed an appeal in the High Court. The learned Single Judge of the High Court agreed with the view of the Addl. District Judge. A Letters Patent Appeal was filed. The matter was placed before a Full Bench. The Full Bench held that the provisions of Section 80 of the CPC had no application to a suit filed under Section 8 of the Madhya Pradesh Public Trusts Act, 1951. The State of Maharashtra, being dissatisfied with the decision of the Full Bench, challenged the same before the Supreme Court. The Supreme Court, after looking into the scheme of the Act and other relevant provisions, observed in paras-13 and 14 as under:-

> "13. These provisions indicate that the Registrar is a Public Officer. The word? "act purporting to be done in official capacity" have been construed to apply to non-feasance as well as to misfeasance. The word "act"

extends to illegal omissions. See Prasaddas v. Bennerjee(1). No distinction can be made between acts done illegally and in bad faith and acts done bona fide in official capacity. See Bhagchand Dagadusa's case (supra). Section 80 of the Code of Civil Procedure therefore is attracted when any suit is filed against a Public Officer in respect of any act pur- porting to be done by such Public Officer in his official capacity.

14. The language of section 80 of the Code of Civil Proce- dure is that a notice is to be given against not only the Government but also against the Public Officer in respect of any act purpoting to be done in his official capacity. The Registrar is a Public Officer. The order is an act purport- ing to be done in his official capacity."

66. Thus, it appears that the Supreme Court took the view that as the suit was filed to set aside the order made by a public officer in respect of an act in the discharge of his official duties, notice under section 80 of the CPC was required.

67. In my view, this principle cannot be made applicable to the case on hand. The Corporation will have to lead evidence to establish that the grant of permissions and sanctioning of the plans was in good faith and was an act done or purported to be done in pursuance or execution or intended execution of the Act, 1949. What is plainly prohibited by the Act cannot be claimed to be purported to be done in pursuance or intended execution of the Act. If it is the case of the plaintiffs that the sanctioning of the plans and grant of permission to the defendant No.1 to put up the construction of

a commercial nature in a residential area is illegal and void, then an opportunity to establish the same must be given to the plaintiffs and the plaint could not have been rejected at the threshold. It is altogether a different thing to say that, ultimately, if the Corporation is able to establish that the grant of the permission and the sanctioning of the plans was in accordance with law and the provisions of the Act, 1949, then the Court may dismiss the suit for want of notice under Section 487 of the Act, 1949. However, at the threshold, the plaint could not have been rejected on such a premise.

68. I am afraid, it is not possible to accept such a broad proposition of law and, more particularly, when I am considering the issue with regard to rejection of the plaint at the threshold.

69. The scope of Order VII, Rule 7, C.P.C. has been elaborately considered in Sopan Sukhdeo Sable vs. Asstt. Charity Commissioner, (2004) 3 SCC 137 : (AIR 2004 SC 1801), wherein the Supreme Court held as under:

> "10. In Saleem Bhai v. State of Maharashtra ((2003) 1 SCC 557) : (AIR 2003 SC 759) it was held with reference to Order 7 Rule 11 of the Code that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power at any stage of the suit before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Order 7 Rule 11 of the Code, the averments in the plaint are germane: the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage."

70. The above Sopan Sukhdeo Sable case, (2004) 3 SCC 137 : (AIR 2004 SC 1801) has been referred to in the subsequent judgment Popat and Kotecha Property vs. State Bank of India Staff Assn., (2005) 7 SCC 510. As held by the Supreme Court in Popat and Kotecha Property vs. State Bank of India Staff Assn., (2005) 7 SCC 510), the real object of Order VII, Rule 11 of the Code is to keep out of courts irresponsible suits. Therefore, Order 10 of the Code is a tool in the hands of the courts by resorting to which and by searching examination of the party in case the court is prima facie of the view that the suit is an abuse of the process of the court in the sense that it is a bogus and irresponsible litigation, the jurisdiction under Order 7, Rule 11 of the Code can be exercised.

71. In view of the aforesaid discussion, I am convinced that the courts below committed a serious error in taking the view that the plaint was liable to be rejected on the two grounds discussed above.

71. Before I close this judgment, I would like to say something with regard to the procedure adopted by the Lower Appellate Court while hearing the appeal filed by the plaintiffs against the judgment and decree passed by the Civil Court, rejecting the plaint. I have already observed in the earlier part of my judgment that the issue with regard to Section 487 of the Act, 1949 was raised by the Corporation for the first time in the course of the hearing of the first appeal preferred by the plaintiffs. The Lower Appellate Court thought fit to consider the issue and answer the same in favour of the Corporation. Thus, the Lower Appellate Court not only affirmed the judgment and decree

passed by the Civil Court, rejecting the plaint on the point of Order 1 Rule 8 CPC, but in addition to the same, also took into consideration the point with regard to Section 487 of the Act, 1949 although this point was not before the Civil Court. I assume that the Lower Appellate Court probably had the provision of Order 41 Rule 33 of the CPC in mind while considering the issue with regard to Section 487 of the Act, 1949. However, I would like to remind the Lower Appellate Court that it could not have exercised its power under Order 41 Rule 33 for the purpose of entertaining the contention raised on behalf of the Corporation as regards Section 487 of the Act, 1949 because this issue was not before the Civil Court.

72. This aspect has been taken care of by the Apex Court in AIR 1988 SC 54 (Mahant Dhangir & another vs. Shri Madan Mohan & others) and AIR 2000 SC 43(Delhi Electric Supply Undertaking vs. Basanti Devi & another). In paragraph 15 at page 58 of the judgment of the Apex Court Mahant Dhangir (supra), the provisions of Order XLI Rule 33 C.P.C. was explained. The law laid down in paragraph 15 of the judgment in Mahant Dhangir with respect to Order XLI Rule 33 C.P.C. was followed by the Apex Court in the Judgment of Delhi Electric Supply Undertaking (supra) and it was observed in paragraph 17 and 18 as under:-

> "17. In our approach we can also draw strength from the provisions of rule 33 of Order 41 of the Code of Civil Procedure which is as under :
>
> "33. Power of court of appeal. - The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees :
>
> Provided that the appellate court shall not make any order under section 35A, in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order."

"18.This provision was explained by this court in Mahant Dhangir v. Madan Mohan 1987 Supp(SCC) 528: (AIR 1988 SC 54) in the following words (at page 58 of AIR):

> "The sweep of the power under rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case.
>
> The appellate court could also pass such other decree or order as the case may require. The words 'as the case may require' used in rule 33 of Order 41 have been put

> in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice. What then should be the constraint ? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraint that we could see, may be these: that the parties before the lower court should be there before the appellate court. The question raised must properly arise out of the judgment of the lower court. If these two requirements are there, the appellate court could consider any objection against any part of the judgment or decree of the lower court. It may be urged by any party to the appeal. It is true that the power of the appellate court under rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The court should not refuse to exercise that discretion on mere technicalities."

73. A careful reading of provisions of Order XLI Rule 33 C.P.C. and the judgment of the Apex Court shows that the appellate court could pass any decree or order which ought to have been in the circumstances of the case. Order XLII Rule 1 C.P.C. provides that the rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees. Meaning thereby the provisions would be applicable to Second Appeal also and the power to pass proper decree or order as the case may require also lies with the second appellate court in order to do complete justice between the parties. As observed in Mahant Dhangir (supra), the only constraint is that the parties before the lower court should be there before the appellate court and the question raised must properly arise out of the judgment of the lower court. If these two requirements are there, the appellate court could consider any objections against any part of the judgment and decree of the lower court. It may be urged by any party in the appeal. It is further observed that the power of appellate court under Order XLI Rule 33 C.P.C. is discretionary but it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The Conditions as laid in the provisions of Order XLI Rule 33 C.P.C. are not satisfied in the present case.

74. In the result, this second appeal succeeds and is hereby allowed. The impugned judgment and decree of the Trial Court is quashed and set aside. The judgment and order passed by the Lower Appellate Court is also quashed and set aside. The Regular Civil Suit No.704 of 2015 is revived and placed back before the Trial Court for disposal in accordance with law. I clarify that I have otherwise not expressed any opinion on the merits of the suit. All issues which may arise during the course of the trial shall be decided uninfluenced by any of the observations made by this Court. Any observations touching the merits of the case are relevant only for the purpose of deciding the issue as regards the rejection of the plaint and shall not be construed in any manner as an expression of the final opinion in the main matter. Civil Application, if any, stands disposed of.

(J. B. PARDIWALA, J) Vahid