

Bina Murlidhar Hemdev

Vs

Kanhaiyalal Lokram Hemdev & Cos.

Civil Appeal No. 3141 of 1999

(K. Venkataswami, M. Jagannadha Rao JJ)

14.05.1999

JUDGMENT

M. Jagannadha Rao, J. –

1. Leave granted.

2. This appeal is filed by the four plaintiffs, the widow and children of late Murlidhar Lokram Hemdev who died intestate on or about 8.5.1976. The appeal is directed against the order of the High Court of Bombay in Appeal No. 1019 of 1997 dated 12.9.1997 confirming the order of the learned Single Judge dated 11.7.1997 in an application under Order 39 Rule 1 C.P.C. in Special Suit No. 83 of 1997.

The facts of the case are as follows :-

3. There was an unregistered partnership w.e.f. 27.7.1964 (to which, of course late Murlidhar was not a party) under a deed dated 4.9.1964 between five persons who were in two groups, the Sankhala group having 66% share and the Jains having 34% share. The said firm purchased land admeasuring 31,075 sq. feet in Thane, with the intention of developing and selling the same. This firm is called the 'main firm' in these proceedings before us.

4. The main group entered into a sub-partnership, a registered firm dated 29.7.1964 with Lokram group, consisting of 4 partners : (i) Kanhaiyalal Lokram Hemdev, (ii) Murlidhar Lokram Hemdev (deceased) (father of plaintiffs-appellants), (iii) Kanhaiyalal Sewaram, and (iv) Srichand Dharamdass. In this sub-partnership, the Jain group and the Lokram group share in the ratio of 1:1 (i.e. 17%:17% overall). In the Lokram group Murlidhar (the predecessor-in-interest of plaintiffs) had a 38% share out of 17% (i.e. 6.46%), the 1st defendant (RI) held 44% of 17%, the 2nd defendant held 12% out of 17% and balance by the 3rd defendant. It is stated in the deed of the sub-firm dated 29.7.1964 in clause 10 that Rajendra K. Jain of the Jain group was entitled to deal with the entirety of the 34% share of Jain-Lokram group. This firm is called the 'sub-firm' in these proceedings.

5. The unregistered main firm applied in February 1975 to the Thane Municipal Corporation for sanction of a lay out plan. The Corporation sanctioned the same and divided the land into 12 plots bearing No. 1 to 12 and an internal road subject to certain other conditions namely that open space in plot No. 2 shall be kept permanently open to sky and shall be handed over to Municipal Corporation and shall not admeasure less than 15% of the F.P. No. 325 after demarcation.

6. Initially, the Sankhalas and Jains divided the property of the main firm. There was an MOU dated 4.2.1976 between the partner of the main firm. It refers to the sub-contract dated 29.7.1964 by the Jain Group with their sub-partner (para vi). It refers to a dissolution of the main firm between the Sankhala group and the Jain group w.e.f. 30.1.1976 and states that out of the lay-out, Jain group got plots 8, 9, 10, 11 and 12 comprising 5774.78 sq. met. and the Sankhala got plots 1, 3, 4, 5, 6 and 7 comprising 11,189.37 sq. met., that plot 2 of the final plot 325 (TPSI) admeasuring 329 sq. met. was reserved for garden and for providing access road to the above plots, and that the access road covers 1200 sq. met. The two groups would be entitled to the benefits derived from the concerned authorities either by way of compensation/F.S.I. in the ratio of 34% (Group Jain) and 66% (Group Sankhala) besides common use of access road (Para (i)(viii)). The MOU says in para 3 that the Sankhala Group "is not concerned with sub-partners of Jain group and that they carry out their own obligation with their sub-partners individually." On 26.12.1991, a registered partition deed (called the main partition deed) in implementation of the MOU dated 4.2.1976 between Sankhala group and Jain group was executed and it stated that the plots as stated in the MOU became absolute properties of each group subject to the common right in the road and vacant plot No. 2. The benefits as stated in the MOU dated 4.2.1976 were repeated. It was further clarified that both the groups would be entitled to avail of benefits of the F.S.I. which might be available to the entire plot of land and that the F.S.I. shall only be confined to the reservation and internal road. The Jain group undertook that they shall carry out their pending obligations if any, "with their sub-partners". On 18.6.1992, a registered deed of rectification was executed between the Sankhalas and Jains which made certain amendments to the main partition deed dated 28.12.1991. (Typed copy of this deed was filed by appellant alongwith affidavit of Murlidhar's daughter dated 27.10.1998). In para 12 at the bottom of page 3 of the main partition deed, in line 6, (after the words HUF) the following words were to be added by virtue of the rectification deed :

"and also in the interest of sub-partners/co-members [i.e. Vishram and others who are entitled in plots 1 to 7 as per Indenture 11.12.1974 and 31.12.1978, Similarly Jains executed in the interest of Kanhaya and others who are entitled in plots 8 to 12 as per deed 29.7.1964]".

The words which we have put in brackets are found handwritten in the rectification deed as appears from a registration copy of the rectification deed. According to the respondents-defendants, these words written in hand were not in the original rectification deed dated 18.6.1992. On the other hand according to the plaintiffs-appellants and the Sankhalas, these handwritten words were there in the original before the rectification deed was registered. We may state that the certified copy of the rectification deed was produced as annexure to the affidavit of appellant Mrs. Shivdasani daughter of Murlidhar dated 12.3.1999.

7. According to the appellants, the above words added by hand in para 12 in the bottom of page 3 of the rectification deed show that in the rectification deed between Sankhalas and Jains dated 18.6.1992, the Sankhalas and Jains jointly admitted and recognised the right of Kanhaya and others (i.e. Lokram group) in the corpus of the property allocated to Jain group as distinct from a mere right to profits on dissolution of the sub-firm. If this be so, a question would arise whether the plaintiffs in the Lokram group being heirs of Murlidhar who was one of the partners of the unregistered sub-firm alongwith the Jains were entitled not merely to profits on dissolution of the Jain Lokram sub-firm but to a right in immovable property and whether such a right was accepted both Sankhalas and Jains jointly under the rectification deed.

8. We shall now refer to some developments between the Jain group and its sub-partners, the

Lokram group. Murlidhar died on 8.5.1976 leaving behind the plaintiffs as heirs. On 2.11.1993, on behalf of Lokram group, a letter signed by Kanhaiyalal Hemdev, Kanhaiyalal Sevakram and Shivchand Dharmdas, was sent to the Jain group stating that the Jain group had entered into a sub-partnership with them as well as deceased Murlidhar Lokram Hemdev and that they had come to know that Jain group was thinking of disposing of some plots. The Lokrams said that the Jain group could not do so and that the Lokram group "*were agreeable to the suggestion given by*" the Jain group that the plots 8 to 12 allotted to Jain group in an extent of 5800 sq. met. be subdivided and plots 8 and 9 admeasuring 2447.38 and 835.04 respectively be allotted to the Lokram group. Again on 31.1.1994, Sri Rajendra B. Jain of Jain Group wrote to "Kanhaiyalal Lokram Hemdev and others" that the rights of the Lokram group under the partnership deed dated 29.7.1964 "relating to the property" situated at Thane, being final plot No. 325, IPSI, in equal ratio as mentioned in your (Lokram Group's) letter dated 2.11.1993 addressed to him and his brothers (Jain group). He also stated that he agreed that any transaction/deal pertaining to the "said property" will only be completed "with your consent" (i.e. Lokram group), along with Shri Devshibhai Sankhala, as per the terms specified in the letter dated 2.11.1993. He further declared and confirmed that the documents/written statements referred to in Sri R.B. Jain's letter dated 21.12.1993 which were contrary to the understanding arrived at *in February 1976*, would not be acted upon against the Lokram group till the transaction in the *land* was finalised and he stated that the Jains were withdrawing their letter dated 20.12.1993. A footnote refers to Court litigations as the cause for there being no dealings from 1989 to 1994. These two letters are *prima facie* evidence that the Jain group accepted the right of the Lokram group in the property allocated to the Jain group in the main partition deed dated 26.12.1991 between the Sankhalas and Jains.

9. We now come to the stage where the respondent 8 M/s. Shruti Builders, a partnership of builder comes into the picture. In the subsequent discussion this firm is referred as the 'Builder'.

10. As we shall see presently, the Builder obtained *three separate agreements*, one from Sankhalas on 16.7.1994, one from Jains on 14.8.1994 and one from Kanhaiyalal of Lokram group on 19.9.1994, the last one stating that Murlidhar's heirs had allegedly given up their share on 27.3.1979. *First* the Sankhala group entered into an agreement dated 16.7.1994 with the builder in respect of Plots 1, 3 to 7 and this refers to their title under the partnership deed dated 26.12.1991 between the Jain and Sankhala "*read with Deed of Rectification*". In this agreement with the Builder the reference to the rectification deed is important.

11. The *second* agreement is by the Jain group entered into on 19.8.1994 with the builder. The Jain group entered into the transaction with the building in respect of the entire land i.e. 34% "as owners" which included the 17% share of the Lokrams also (i.e. of Kanhayalal, Murlidhar and others). By this date, the Jains were parties to the rectification deed dated 18.6.1992 wherein *prima facie* the Jain and the Sankhala groups accepted the right of the Lokram to a share in the corpus of plots 8 to 12. But the Jains instead of informing the Builder about the rectification deed, cautioned the builder in para 5(i) and para 6 that there was a *claim* by the Lokram group for 50% share in 34% i.e. 17% which the builder had to take care of. That para 6 reads as follows :

"6. The developers agreed that developers shall deal with and/or settle the *claim* of the said group consisting Kanhaiyalal Lokram and others at their own costs and expenses without making the owner liable and/or responsible in any manner whatsoever nature for the same. The developers further agree that the developers shall make the payment to the owners irrespective of the fact whether the developers succeed to *settle* the matter with the said group of *Kanhayalal Lokram and others* or

not ..... the owners have agreed to assign the development right on "as is where is basis " in relation to the 50% undivided share...."

12. The trouble for late Murlidhar's heirs (plaintiffs) started with the *third agreement* dated 19.9.1994 executed by the 1st respondent (Kanhayalal Lokram Hemdev) ignoring the fractional share of late Murlidhar Lokram Hemdev (i.e. 38% out of 17% of Lokram group) and purporting to enter into an agreement for the entire 17% share of Lokrams, stating that the heirs of Murlidhar (plaintiff's) had released their share on 27.3.1979. The sale consideration was Rs. 40 lakhs. He, Kanhayalal, stated that the fractional share of late Murlidhar's heirs (i.e. 38% out of 17%) was released by late Murlidhar's heirs on 27.3.1979. The plaintiffs, the heirs of Murlidhar denied the so called release deed dated 27.3.1979.

13. It may be here noted that the so called release deed dated 27.3.1979 by the plaintiff was accepted in the trial Court to be a *prima facie* concocted document because it referred to a suit filed by certain third parties i.e. suit No. 1824 of 1979. That was a suit filed in November, 1979. It was obvious that the release deed of March, 1979 could not have referred to a suit of November, 1979. This position became clear in the trial Court and in the High Court. The trial Court accepted this position *prima facie* in para 11 but said in the same para that this aspect could be finally decided only in the suit. The learned senior counsel for the Builders (respondent 3) made it clear before us that the Builder was not relying on the release deed in this Court as he had many other points vis-a-vis the plaintiffs.

14. We shall proceed with the remaining narrative. According to the plaintiffs, the Builder represented to plaintiff in May 1995 that he would not make any construction on plots 8 to 12 which fell to the Jain group and that he would build only in plots 1, 3 to 7 which fell to Sankhala's group.

15. In 1995, the plaintiffs came to know that the Builder 8th defendant was proposing to make construction on the property. This led to correspondence during 1995-96 and ultimately the Special Suit No. 88 of 1997 was filed on 24.1.1997 for various reliefs - declaration of title of Murlidhar's heirs (plaintiffs) in the property as such, for dissolution of the regd. sub-firm and accounts and for partition and damages, permanent injunction and other reliefs. The reliefs are large in number and range from reliefs (a) to (x) in the plaint.

16. The defence of the Builder (respondent 8) and the Jain group in their written statement was that inasmuch as late Murlidhar died in 1976, the sub-firm stood dissolved in 1976 and the suit filed in 1997 for dissolution and accounts was barred by time. Though no reliance was placed on the so-called release deed dated 27.3.1979 allegedly executed by plaintiff, it was contended that, in any event, plaintiffs' right could only be for money that might fall due to the plaintiff's share in the dissolution accounts of the regd. sub-firm and even then the claim would be only against the Jains, the other group in the sub-firm. Plaintiffs could never claim any share in the immovable property as such. The plaintiffs could not rely on the rectification deed dated 18.6.1992 (which modified the main partition deed dated 28.12.1991) executed between the Sankhalas and Jains in the main firm because certain lines were added in the said rectification deed by hand and those lines which purport to give the Lokrams a right in property (plots 8 to 12 etc.) were not there in the original rectification deed. Kanhayalal in the Lokram group supported the builder. The Sankhalas (defendant 7) denied the plaintiff's claim in a general fashion and said the plaintiff's right is only against the Jains.

16. Pending suit, the plaintiffs applied for temporary injunction under Order 39 Rule 1 CPC to restrain the defendants (including the Builder defendant 8) from making any construction in any

manner. The plaintiffs claimed that the Builder had got plans sanctioned showing entire suit land as one plot and the FSI was got worked out on that basis, ignoring the right of the plaintiffs in the immovable property.

17. The builder and the Jain group and Kanhaiyalal in the Lokram group resisted the injunction application on the basis of the pleas raised by them in their written statements. It was also contended that the plaintiffs were guilty of delay, apart from the claim being time barred, because in the meantime the builder had spent several lakhs of rupees on construction. It was, therefore, inequitable to grant stay. The construction programme of the builder defendant 8 was publicised in the press on 6.5.1994 etc. inviting claims. Bhoomi Puja was performed on 26.1.1995. Jain Group was under clause 10 of the sub-firm partition deed dated 29.7.1964 entitled to deal with the entirety of the 34% of Jains and Lokrams. Hence all acts of Jains, including the recital put in by Jains in the agreement dated 19.8.1994 with the Builder that they were absolute owners of the entire plots 8 to 12, was binding on the Lokrams. It was also contended that when prior to November 1995, the 2nd plaintiff and her advocate called on the 8th defendant's Advocate, the said 2nd plaintiff was informed about the above facts and also about the release deed dated 27.3.1979 by plaintiffs in favour of Kanhaiyalal Lokram Hemdev (1st respondent).

18. The Sankhala group filed a counter on the same lines as in their written statement as stated above. But they admitted that the plaintiffs had a share in the *property* allocated to Jain group (plots 8 to 12) and that this was clear from the letter dated 2.11.1993 of Kanhaiyalal addressed to other sharers. (This letter has already been referred to by us earlier).

19. The learned trial Judge dismissed the injunction application of the plaintiffs-appellants holding that the plaintiffs' right is only to a share in profits of the sub-partnership firm and not to the property, that though the release deed dated 27.3.1979 *prima facie* appeared to be forged, this question could not be finally decided at this stage, that the builder, 8th defendant verified all documents and purchased the property and had obtained necessary sanctions and invested crores of rupees and that the Jains under clause 10 of the sub-partnership deed dated 29.7.1964 were entitled to deal with the entire firm property of 34% (i.e. plots 8 to 12) and the actions of Jain group including the act of his purporting to sell the 17% share of Lokram group was binding on the plaintiffs. On these grounds, the application under Order 39 Rule 1 was dismissed.

20. The plaintiffs' appeal to the High Court was dismissed by order dated 12.9.1997 affirming the above reasons.

21. In this appeal we have heard exhaustive arguments of learned senior counsel Sri K.K. Venugopal for the appellants. Learned senior counsel relied upon *Gangubai B. Chaudhary v. Sitaram B. Sukhtankar, 1983(4) SCC 31* strongly in support of plaintiffs' plea for temporary injunction.

22. Learned senior counsel Sri R.F. Nariman appeared for the builder and other counsel appeared for the Jain group. The counsel for the Sankhala group as per the affidavits of the Sankhalas, supported the plaintiffs' case as against the Jain group.

23. The point for consideration is whether the appellants have made out a *prima facie* case and the balance of convenience is in granting temporary injunction and an order in the nature of the one passed in *Gangubai B. Chaudhary v. Sitaram B. Sukhtankar, 1983(4) SCC 31* ?

24. Before we go into the point, we may state that our reasoning and conclusions are intended for

the limited purpose of this interlocutory application under Section 39 Rule 1 C.P.C. and that and when the suit is taken up for trial, the trial Court will decide the suit on the basis of such evidence as may be adduced in the suit unaffected by anything said in this judgment.

25. From the detailed facts set out above, it will be noticed that the suit is not a suit for dissolution and accounts simpliciter but is also one for declaration of title permanent injunction, damages etc. In fact the large number of reliefs in the plaint run from (a) to (x). It is, therefore, *prima facie* not permissible for the 8th defendant and the Jain group or Kanhaiyalal in the Lokram group to contend that if the plaintiffs are not entitled to dissolution or accounts, they are not entitled to any other relief. If there were no documents of a period subsequent to the death of Murlidhar in 1976, evidencing the right of Murlidhar's heirs in the immovable property as such, it might perhaps have been possible for the Builder or the Jains to say that the suit for dissolution or for accounts was barred, consequently the plaintiffs could not get any relief in regard to the property. But, here as we shall presently show there are *prima facie* several registered and other documents subsequent to 1976 which *prima facie* evidence plaintiffs' right to the property itself rather than to money on dissolution of the sub-firm with Jain group. Unfortunately, the trial Court and the High Court have completely ignored these documents.

26. To start with, the Lokrams had only a sub-partnership with the Jains under the sub-partnership deed dated 29.7.1964 while the Jains had the main partnership w.e.f. 27.7.1964 with Sankhala group. But when the Sankhalas and Jains divided the property itself order a registered deed dated 26.12.1991 pursuant to an MOU dated 4.2.1976, the rights of Jain group in 34% share of the main firm became crystallised into rights in immovable property. Murlidhar died on 8.5.1976 subsequent to the MOU dated 4.2.1976 between the Sankhalas and Jains. The rights which accrued to Jain group under the MOU *prima facie* accrue to the partnership of Jains and Lokrams. We have pointed out that para (vi) of the MOU specifically refers to the sub-partnership of Jains and Lokrams dated 29.7.1964. Admittedly, in the sub-partnership deed dated 29.7.1964, Murlidhar had 38% share (i.e. 38% out of the 50% of 34% of Lokrams, the other 50% of 34% belonging to Jain group). Thus the rights under the MOU dated 4.2.1976 were created before Murlidhar's death on 8.5.1976 and they crystallised into the rights in immovable property as per the registered partition deed dated 26.12.1991 between the Sankhalas and the Jains. This deed dated 26.12.1991 also stated that the Jain group had undertaken to carry out their pending obligations with their sub-partners, i.e. Lokram group. This statement will obviously apply to the entire Lokram group i.e. Kanhaiyalal and others including Murlidhar's heirs, the plaintiffs.

27. We next come to the deed of rectification deed 18.6.1992 which amended the partition deed dated 26.12.1991. It is the case of the plaintiffs that in the hand written part of this deed in page 3, the Sankhalas and the Jains accepted the right of the Lokram group in the immovable property in plots 8 to 12.

28. We had earlier briefly referred to the handwritten words at page 3 bottom in the rectification deed dated 18.6.1992 which is otherwise a type-written document. The relevant rectification here referred at page 3 bottom is to an addition of 4 lines in the main partition deed - one line in type and three lines in hand. These disputed handwritten words are at the bottom of page 3 of the rectification deed. The respondents-builders do not deny typewritten addition in one line at bottom of page 3 just above these three handwritten lines but only deny the three lines written in hand below the type-written line. If the words in the 3 lines in the bracketed portion in hand are to be there, it will mean *prima facie* a conjoint admission by Jains and Sankhalas that Kanhaya and others (i.e. the entire Lokram group including Murlidhar's heirs) have a right in immovable property in the plots 8 to 12,

i.e. a right in immovable property, and not merely a right to money on the dissolution of sub-firm of Jains and Lokrams.

29. Now the learned senior counsel for the Builder, Shri R.F. Nariman vehemently contended that the words in brackets were not there or were surreptitiously introduced into the rectification deed. We therefore called for a certified copy of the original rectification deed and we found that the words in brackets in 4 lines were very much there in the certified copy also, one line in type and 3 lines in hand in the 3rd page at the bottom. After all, the registration certified copy shows what is in the original rectification deed. The Sankhalas in their counter affidavit dated 13.3.1999 (attested by notary on 30.3.1999) filed before us (sworn to by Sri Devshi Manju Sankhala who is a signatory to this rectification deed) clearly supported the plaintiffs case in regard to these three handwritten lines and stated that :

"It was found that certain portion was erroneously left out under (c and d) and accordingly the same was written in hand and the said additions under said (c and d) were duly initialled by myself as well as respondent 5 and the same is physically visible to the naked eyes. There is no question of tampering with this confirmation/rectification."

30. Referring to Ex. 1 annexed by respondent 5, Rajendra Kumar Jain to his affidavit dated 13.3.1999 (Vol. 3 of the paper book pages 12 to 15) Mr. Devshi Manju Sankhala said in his affidavit that the said photo copy of the rectification deed produced by Sri Jain was not the one whose original was registered. It is true that copy of the rectification deed produced by Jains as Annexure does not contain the handwritten words but the question is whether after such a draft was prepared, the parties to the deed added 3 more lines in hand at the bottom of page 3.

31. Now we may point out that the photo copy of the original as certified and produced before us contains on first page the word "18th day of JUNE" whereas the photocopy produced by 5th respondent as Annexure shows "18th day of June". There are no capital letters like JUNE. Further the photocopy of the initials put at pages 1, 2 in the certified photocopy produced by the appellants shows that 'initials' are put immediately below the typed words at pages 1 and 2. The initials at the bottom of pages 1 and 2 are not in dispute. Dispute is only raised by respondents to the initials at the bottom of page 3 where these 4 lines occur at the bottom of the page. At page 3, where the handwritten words occur at the bottom, it may be noticed that the initials are clearly found immediately below the handwritten words. If the single typed line of the addition in para (d) alone were there, before any initials were put, the initials would have been close to the single typed line proposed to be added to the main partition deed and it would not have been possible to add three more lines by hand below the typewritten line. The document shows that the initials were not close to the typed line as in pages 1, 2 but below the 3rd handwritten line (i.e. immediately below all the 4 lines). This evidence is clearly against the plea of the respondent builder and the Jains. It is clear *prima facie* that the handwritten words were very much there before the initials were put at the bottom of page 3 and the rectification deed was registered after the said handwritten words became part of page 3. Therefore, the contention of the builder and the Jains that these handwritten words were surreptitiously introduced has to be rejected. The draft produced as Annexure by the Jains is therefore not the last word. As pointed out by the Sankhalas in their affidavit, before registration it was noticed that 3 lines were omitted and they were introduced by hand and thereafter the initials were put below the last of the handwritten lines.

32. In any event, as rightly pointed out by Sri K.K. Venugopal, an argument that certain portion in

the original of a registered document is an interpolation is a contention which cannot be countenanced. One can understand an argument that after a certified copy is obtained, certain lines are added in the certified copy before producing the same in Court but one cannot understand a submission for the builder and Jains, that in the original of a registered document there was an interpolation before it was registered. Such a contention cannot *prima facie* be raised nor be accepted. The circumstantial evidence contained in the manner in which the initials were put below the handwritten words in the three pages does not *prima facie* permit of such a plea.

33. Another argument was advanced by Sri R.F. Nariman that this addition by hand at page 3 bottom of the rectification deed, if true, there should have been other similar additions at other places to bring the other parts of the rectification deed into conformity with this part. This argument could have had some force if the deed was not a registered document and if the various features to which we have already made a reference were not there. This argument loses its force because of the other overriding considerations referred to above.

34. A further contention was raised by the Jains disputing the initials of Jains beneath the handwritten words. We fail to see *prima facie* how a person who admitted execution of a document before the sub-registrar can raise a question that the initials *only* at the bottom of on page 3 of the original (as distinct from the initials at the bottom of page 1, 2 which are accepted) were not his. We are not *prima facie* impressed by the handwriting expert's view of the initials at page 3 bottom in view of the above circumstances.

35. If, therefore, the copy of the rectification deed as produced before us is true to the original - which we think it is - then *prima facie*, it means that there is a clear admission that Lokram group has a right in the property in plots 8 to 12 and that right had been accepted by Sankhala group and Jain group at the time of the rectification deed.

36. In addition, *prima facie* we have two more letters dated 2.11.1993 by Lokram group (including Kanhayalal) and in particular, the letter dated 3.1.1994 by none other than Rajendra B. Jain of Jain group admitting the title of Lokram group in the property and withdrawing all previous denials.

37. We, therefore, hold that there is a *prima facie* case of title to immovable property made out by Lokram group. We also hold that *prima facie* the release deed dated 27.3.1979 is a forged document. As stated earlier, a deed of March 1979 it could not have referred to a suit of November, 1979. That would mean that the heirs of Murlidhar, the plaintiff continue, *prima facie*, to have a share in the plots 8 to 12 and other common property.

38. We now come to the question whether the 8th defendant can be said to be a *bona fide* purchaser for consideration *without notice* of the right of Murlidhar's heirs in Lokram group. Basically, we are of the view that the vendor of the builder could not have conveyed more interest than he had. If the release deed was bad, the vendor could not have conveyed the title of Murlidhar's branch. In that view of the matter, a plea of *bona fide* purchase is, in fact, not available. If a buyer purchased from a vendor property which in part belonged to another and not to the seller, the real owners who were 3rd parties to the deed (Murlidhar's heirs) could not be told by the buyer that he was under the impression that somebody had purportedly sold their right to him. Even so, we shall assume that a plea of *bona fide* purchaser without notice is permissible and examine whether the Builder had no notice of Murlidhar's rights in Lokram group.

39. Now the rectification deed is a registered document. The agreement by Sankhalas with the

builder is dated 16.7.1994 and it specifically refers to the deed of rectification (dated 18.6.1992). The Jains agreement of sale dated 19.8.1994 with the builder no doubt omits to refer to the rectification deed and says that there are only some 'claims' of the Lokrams. But the Sankhalas were obviously more truthful. Now if the agreement of Sankhalas had put the builder on notice of the rectification deed specifically, as stated earlier, it is *prima facie* clear that the builder had actual notice and was obliged to inquire into its details. Thus there is actual notice. There is also constructive notice inasmuch as the rectification deed is a registered deed and section 3 of the Transfer of Property Act comes into play.

40. Under section 3 of the Transfer of Property Act, "a person is deemed to have notice" of a fact when he actually know that fact or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it. The Explanation I thereto say :

"Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of it, or share or interest in such property shall be *deemed to have notice* of such instrument as from the date of registration...."

41. Inasmuch as the rectification deed is a registered deed, it is deemed to be notice to the Builder in view of Section 3 of the Transfer of Property Act.

42. Once notice is there, actual as well as constructive, a plea of *bona fide* purchaser without notice of rights of Lokram group is not permissible. For the present we are not going into the question whether the fiction of a so-called release deed by Murlidhar's heirs is a creation of Kanhayalal Lokram alone or whether the Builder had also a role in the creation of the release deed.

43. But then, it is not as if the Builder merely believed that Lokram group had a claim. He goes to the Lokram group and obtains - not a release of the "claims" of the Lokram group including Kanhayalal - but obtains a clear agreement for transfer of existing rights of the Lokram group in plots 8 to 12 etc. In other words, the Builder accepted that the Lokrams had right in property and not merely claims.

44. In the result, the agreement dated 19.9.1994 by Kanhayalal cannot be treated as an agreement to transfer the title of the heirs of Murlidhar. If the release deed goes, their title remains untransferred.

45. Then there is the argument that as per clause 10 of sub-partnership deed dated 29.7.1964 between the Jains and the Sankhalas, Sri Rajendra Kumar Jain was entitled to deal with the 17% share of Lokrams or their equivalent in terms of right in plots 8 to 12 of the Lokrams. The said clause 10 reads as follows :

"*Clause 10* : The said Rajendra Kumar Jain shall manage the affairs of the partnership and whatever he does shall be binding on the partners."

Under Section 19(1) of the Partnership Act, the acts of a partner which are done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. Under Section 19(2), in the absence of any usage or custom of trade to the contrary, the above implied authority - (here express authority under clause 10 of the same nature) - does not *prima facie* empower the partner to "transfer immovable property belonging to the firm" as stated in clause (g) of Section 19(1) of the Partnership Act. Such a power to transfer property of the firm must be expressly given to the

transferring partner so far as immovable property is concerned there is no such authority shown. Clause 10 does not contain any express power to Sri R.K. Jain to transfer the immovable property of the firm. Hence the said clause is of no use, *prima facie*.

46. In any event, we have the letter of Sri Rajendra B. Jain dated 31.1.1994 which clearly says that the Jain group will not deal with the property right of the Lokram without their consent and without knowledge of the Sankhalas. The said letter dated 31.1.1994 reads as follows :

"From : Rajendra B. Jain

To

Kanhayalal Lokram Hemdev and Others :

I have written a letter dated 20.12.1993 in response to our letter dated 2nd November, 1993, due to misunderstanding I have written above mentioned letter dated 20.12.1993, which I am voluntarily withdrawing the said letter, as your rights under the partnership deed dated 29th July, 1964 relating to the property - situated at Thane, being final plot No. 325, T.P.S.I., Panchpakhadi, Thane, in equal ratio as mentioned in your letter dated 2nd - November, 1993, addressed to me and by brothers (Jain group).

I agree any transaction/Deal pertaining to the said property will only be completed with your consent and knowledge along with Shri Devshibhai Sankhala, as per the terms specified in your letter dated 2nd November, 1993.

I further declare and confirm that the documents/written statements referred in my said letter 20th December, 1993, which is contrary to our understanding arrived at in February, 1976, will never be acted upon against your group till the transaction of mentioned land is finalised.

Thanking you,

Yours sincerely,

Sd/-

(Rajendra B. Jain)

CC : Devshibhai

On account of the *status quo* order dated 6.1.1994 with effect from 1989, no action or any dealings will take place in respect of the said land till the disposal of the pending litigation of which please note."

47. We reiterate, the view that *prima facie* clause 10 of the sub-partnership cannot help the builder.

48. It was argued that the plaintiffs had come to Court after considerable delay in 1997 inspite of notice in the Press dated 6.5.1994 about the proposals to build on the land and in spite of Bhoomi Puja dated 26.1.1995. It is, however, pointed out by the learned senior counsel for the appellants

K.K. Venugopal that the Bhoomi Puja was done in plots 1, 3 to 7 of Sankhalas and not in plots 8 to 12 of Jains and Lokrams. Further as late as 31.1.1994, the Jains had assured by letter to the Lokrams that they would not do anything to affect the interests of the Lokrams in the property i.e. plots 8 to 12 etc. The letter above said itself explains in the footnote that from 1989 to 1994, on account of other litigation, there was no progress. The plaintiffs have, in the plaint, referred to the correspondence during 1995-96 between the parties to explain the delay.

49. It is true that normally a plaintiff who stands - by when another is making construction on his property could not seek injunction to stop construction. But, the manner in which Kanhayalal Lokram set up a release deed which is *prima facie* false the manner in which the Builder and Jains raised contentions regarding alleged interpolation of a registered rectification deed - which plea we have held to be *prima facie* untenable - we are of the view that after Murlidhar's death in 1976, the confidence which his widow and children had in Kanhayalal was *prima facie* abused by setting up a false release deed. Then the Builder and the Jains together started denying the *prima facie* just rights of Murlidhar's widow and children in the property. We are, therefore, not inclined to deny a temporary injunction to the plaintiffs notwithstanding the investments made by the Builder. The Builder had never shown any anxiety before us to come to terms and avoid an injunction by offering certain terms to plaintiffs.

50. Thus it is clear that *prima facie* it was not open to the Builder to have got the benefit of the FSI, treating the entire property as one unit and ignoring the rights of the plaintiffs. We may add here that already there are disputes between the Sankhalas and the Builder which have also gone to Court, the Sankhalas cancelling their agreement and the Builder suing for specific performance.

51. It is in this background that we have to consider the applicability of *Gangubai B. Chaudhary v. Sitaram B. Sukhtankar, 1983(4) SCC 31*. In that case it was noticed that if the respondents were allowed to set up construction by the use of the FSI for the whole land including the land involved in dispute, the situation would become irreversible by the time the dispute is decided and would preclude fair and just decision of the matter. If on the contrary injunction is granted as prayed for the respondents are not likely to be inconvenienced because they were in possession of sufficient land on which they could put up construction.

52. It would have been easy for this Court to avoid granting an injunction if the Builder and the Jains group had come forward with some equitable offer to safeguard the interests of the plaintiffs. The plaintiffs were practically deserted by others in the Lokram group, and were vehemently opposed by their deceased father's erstwhile partners the Jains. The Builder did nothing to bother about their rights. Though the Jains were partners with Lokrams, it is rather curious that it was the Sankhalas who in spite of not having a direct link with plaintiffs that have come to the rescue, of plaintiffs, as is seen from the counter affidavits of Sankhalas filed in this Court. As no effort was made by the Builder and the Jains to come forward with any useful suggestions in regard to safeguarding the rights of the plaintiffs but the plaintiffs were opposed tooth and nail - we have no choice but to grant a temporary injunction against the 8th defendant and anybody who is claiming any rights through the 8th defendant from making any construction or entering into any agreements or sale deeds or other arrangement in relation to plots 8 to 12 and the road and open plot No. 2, by the use of the FSI of the whole land covered by plots 1, 3 to 7 and 8 to 12. An order of temporary injunction will issue accordingly. It will be operative pending the suit. It will however be open to the Builder, 8th defendant or others to come forward for modification of this order subject to offering adequate safeguard in respect of the interests of the plaintiffs in the property. If any such application is filed, it will be entered after the summer vacation.

53. We have to go into various aspects of title to the property in these proceedings arising under Order 39 Rule 1 CPC. We had to do so because the Builder and the Jains insisted upon asserting various contentions in relation to property rights. But we may add again that this order is confined to these proceedings only and will not come in the way of the suit being decided on its own merits unaffected by any observations or *prima facie* findings in this order.

54. The appeal is allowed and the orders of the trial Court and the High Court are set aside. The appeal is disposed of in terms of the directions given above and subject to its being modified (as stated above) if proper safeguards are offered to protect the rights of the plaintiffs. There will be no order as to costs.

Appeal allowed.