**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**CONTEMPT PETITION NO. 37 OF 2019**
**IN**
**APPEAL (L) NO. 396 OF 2012**
**IN**
**CHAMBER SUMMONS NO. 88 OF 2012**
**IN**
**EXECUTION APPLICATION NO. 1359 OF 2011**
**WITH**
**INTERIM APPLICATION NO.795 OF 2022**

Manojkumar Omprakash Dalmia, ... Applicant/Petitioner

Versus

Omprakash Dalmia and Others ...Respondents

Mr. Akash Pai alongwith Ms. Gauri Patil and Ms. Maansi Gupta for the Applicant/Petitioner.

Mr. Ashok Saraogi with Mr. Anand Mishra for Respondent Nos. 2 and 3.

Mr. Rashmin Khandekar, appointed as Amicus Curiae

Mr. M.S. Hadi alongwith Mr. Deepak Gautam, present.

**CORAM: S.J. KATHAWALLA &**
**MILIND N. JADHAV, JJ.**

**RESERVED ON : 16th MARCH, 2022**
**PRONOUNCED ON : 21st MARCH, 2022**

**P.C.:**

1. The Applicant has filed the present Contempt Petition seeking the following reliefs :

"(a) The rule be issued;

(b) This Hon'ble Court be pleased to call for the record and proceeding pertaining to the Appeal (L) No. 396 of 2012 filed by the Petitioner in this Hon'ble Court after perusing the said proceeding be pleased to take the action against the Respondent Nos. 2 and 3 and punish the said Respondent Nos. 2 and 3 in accordance with law.

(c) That the pending the hearing and final disposal of the petition this Hon'ble Court be pleased to restrain the Respondent Nos. 2 and 3 and their servants, agents, representatives, heirs or any persons claiming through them from selling, transferring, assigning, creating third party or part the possession of the flat bearing Flat No. 51, Rosie Apartment, 9th North Avenue Road, Santacruz (W), Mumbai and also the flat bearing Flat No. B/705 situated in Jay Sheetal CHS Ltd., Bhayander (E), Dist. Thane.

(d) Pending the hearing and final disposal of this Petition, this Hon'ble Court be pleased to direct the Respondent Nos. 2 and 3 to comply the order dated 23.10.2015 and consent terms dated 23.10.2015.

(e) Pending the hearing and final disposal of this Petition, this Hon'ble Court be pleased to direct the Respondent Nos. 2 and 3 to permit the Petitioner and his family members to reside in the flat bearing No. 51, Rosy Apartment, 9th Avenue Road, Santacruz (W), Mumbai along with the Respondent Nos. 2 and 3."

2. The cause title shows Respondent No. 1 as two partnership firms. The Applicant/Petitioner is Respondent No. 2 and 3's son.

**BACKGROUND OF FACTS LEADING TO FILING OF THE PRESENT CONTEMPT PETITION :**

3. This is an extremely unfortunate situation where the parties viz. the son on the one hand, and the parents on the other, have been litigating for over 22 years. Greed, acrimony and deceit are writ large on the conduct of the Applicant. To put

things in context, it will be useful to set out a brief background of the circumstances leading to filing of the present Contempt Petition.

4. In or around the year 1999, disputes arose between the parties *inter alia* relating to family properties and shares of the respective parties in Respondent No. 1. Ever since, the Parties have filed various proceedings against each other including diverse criminal proceedings.

5. In the year 2000, Respondent Nos. 2 and 3 filed S.C. Suit No. 926 of 2000 before the City Civil Court *inter alia* against the Applicant. The City Civil Court referred disputes in respect of the shares of the parties in Respondent No. 1 (partnership firm) and partition of a flat situated at Flat No. 51, Rosie Apartment, 9 North Avenue, Santacruz (West), Mumbai 400 0054 ("**Santacruz Flat**") to arbitration.

6. The Applicant filed a claim before the arbitrator seeking Rs. 2.5 crores.

7. On 22nd October, 2007 an arbitration award ("**Arbitration Award**") came to be passed wherein it was ordered as follows :

> "a) The report dated 18th June 2007 of the Commissioner Shri A. D. Dave is accepted.
>
> b) The summary of certificate of the amount payable to the claimant attached to the Commissioner's Report is approved.

c) **The Respondents shall pay to the Claimant [Applicant] the sum of Rs. 37,93,828** (Rs. Thirty Seven Lakhs Ninety Three Thousand Eight hundred Twenty Eight only) **on the claimant vacating the flat being No.51, Rosey Apartments, Santacruz (West), Mumbai also with his family and handing over peaceful possession to the Respondents.**

d) **The Claimant shall sign and execute all necessary papers and documents or forms as may be required for transfer of the flat at Santacruz in favour of the Respondent Shri O. P. Dalmiya, in the record of the cooperative Society including the Share Certificate.**

e) **The Claimant shall sign all papers, documents or letters etc., which may be required by Banks in which the firms had accounts, so as to enable the Respondents to operate them smoothly**. Similarly, if any paper or document is required to be signed by Income Tax, Sales Tax or any other Govt. Department the claimant shall cooperate with the Respondents in this regard.

f) **All other claims of the Claimant are dismissed.**

g) Each party to bear its own costs."

(Emphasis supplied)

8. The Applicant filed Arbitration Petition No. 95 of 2008 under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the Arbitration Award. By a detailed Order dated 20th April, 2010, the Applicant's objections to the Arbitration Award were held to be misconceived and the aforementioned Arbitration Petition was dismissed by this Court.

9. In 2010, the Applicant filed Appeal No. 887 of 2010 assailing the order

of dismissal. By Order dated 7th March 2011, on the request of the Applicant, the aforementioned Appeal was withdrawn.

10. In 2011, Respondent Nos. 2 and 3 filed Execution Application No. 1359 of 2011 ("**Execution Application**") seeking execution of the Arbitral Award. Respondent Nos. 2 and 3 also moved Chamber Summons No. 88 of 2012 in the Execution Application.

11. By an Order dated 30th April, 2012 in Chamber Summons No. 88 of 2012, certain amounts were directed to be deposited with the Prothonotary and Senior Master of this Court inter alia as under :

> "….The learned Advocate for the Indian Overseas Bank is directed to deposit the entire outstanding amount along with accrued interest thereon with the Prothonotary and Senior Master of this Court on 3rd May 2012."

12. By an Order dated 3rd May, 2012 in Chamber Summons No. 88 of 2012 this Court recorded the amounts deposited and noted as follows :

> "Pursuant to the Orders passed by this Court dated 30th April 2012, **the Indian Overseas Bank has deposited a Demand Draft of Rs.92,64,142.35/- with the Prothonotary and Senior Master of this Court. The bank further undertakes to deposit the fixed deposit of Rs.5,00,000/- along with accrued interest within a period of two weeks from today.** The undertaking is accepted." (Emphasis supplied)

13. Subsequently, by an Order dated 8th May 2012 the Single Judge of this Court (S.J. Kathawalla, J.) allowed the chamber summons and held :

> "(i) The Court Receiver, High Court, Bombay **is appointed as Receiver of Flat No.51, Rosie Apartment**, **9 North Avenue, Santacruz (West)**, Mumbai – 400 054.
>
> (ii) **The Court Receiver shall take physical possession of the suit flat from the Petitioner [Applicant] and his family members if necessary with Police assistance** and hand over the same to the Respondent Nos.1 and 2.
>
> (iii) Until the Court Receiver takes possession of the suit flat the Petitioner [Applicant] and his family members are restrained by an order of injunction from selling, disposing of, alienating, encumbering, parting with possession and/or creating any third party rights in respect of the suit flat.
>
> (iv) **Upon the Petitioner [Applicant] and his family members handing over the vacant and peaceful possession of the suit flat to the Court Receiver, the Petitioner [Applicant] shall be entitled to receive a sum of Rs.37,93,828/- from the Prothonotary and Senior Master of this Court from the funds deposited by the Indian Overseas Bank with the Prothonotary pursuant to the order dated 30th April 2012.**
>
> (v) The Petitioner [Applicant] shall also comply with the Order passed by the learned Arbitrators in terms of prayer clauses (d) and (e) of the operative portion of the Award within two weeks from handing over of possession of the suit flat to the Respondent Nos.1 and 2 and receiving the amount of Rs.37,93,828/- from the Prothonotary and Senior Master of this Court.
>
> (vi) **The Respondent Nos.1 and 2 shall be entitled to receive the balance amount deposited by the Indian Overseas Bank with the**

**Prothonotary and Senior Master of this Court after the amount of Rs.37,93,828/- is paid to the Petitioner No.1 [Applicant].**"

(Emphasis supplied)

14. In 2012, the Petitioner (Applicant) filed Appeal (L) No. 396 of 2012 assailing the aforementioned Order dated 8th May 2012.

15. By an Order dated 2nd August 2012 in Appeal (L) No. 396 of 2012 this Court directed that there should be an ad-interim stay on the Order dated 8th May 2012. However, Respondent Nos. 2 and 3 were given liberty to move this Court for partition of the Santacruz Flat. Further, during pendency of the aforementioned Appeal, Respondent Nos. 2 and 3 were allowed to withdraw 50% of amount deposited with Prothonotary and Senior Master of Court.

16. Respondent Nos. 2 and 3 filed a Special Leave Petition ("**SLP**") challenging the Order dated 2nd August 2012 passed by the division bench of this Court.

17. By orders dated 7th April, 2014 and 21st July, 2014 the Supreme Court directed the Applicant to handover possession of the Santacruz Flat to Respondent Nos. 2 and 3. As there was controversy regarding handing over of possession of the aforementioned flat, by an Order dated 25th August 2014, the Supreme Court directed the Applicant to remove all his possessions from the Santacruz Flat, lock the premises

and bring the key to the Supreme Court on 8th September 2014 on which day the keys could be handed over to the counsel for Respondent Nos. 2 and 3.

18. On 8th September 2014, the Applicant appeared before the Supreme Court and handed over keys of the Santacruz Flat to Respondent No. 2 and 3's counsel. As the Supreme Court believed that possession was handed over, on the same day, the SLP was disposed of leaving it open to both parties to work out other remedies in Appeal (L) No. 396 of 2012 pending before this Court.

19. However, the keys handed over did not work and Respondent Nos 2 and 3 were once again constrained to move this Court vide the Execution Application seeking execution of the Arbitration Award.

20. In the Execution Application the Applicant claimed to have handed over the correct keys. The Applicant also submitted that the Santacruz Flat is not vacant and in fact his wife and son were residing in the Santacruz Flat.

21. By Order dated 18th March 2015 passed in the Execution Application the Court (R.S. Dalvi, J.) *inter alia* noted as follows :

> "The son, who is personally present before the Court states **that the key handed over by him to his parents, is the key of the suit flat. Hence the suit flat must open with that key. The suit flat must be vacant because he made the statement to Supreme Court on 25th August, 2014 that he had vacated the premises.**

8. **The purport of the statement made by the son and handing over keys is not only that the flat can be opened but flat must be vacant when it is opened so that the dispute between the parties comes to an end** and the award is executed.

9. **The son now tells the Court that the flat is not vacant. His wife and son live in the flat. He states that it is HUF property and it is the matrimonial home of his wife. Therefore, his son and his wife are respectively entitled**.

10. **His contention is astounding. His behavior is appalling. The question of vacating the suit flat would always mean and imply that it is vacated not only by the individual who is a party before the Court who is directed to vacate or who offers to vacate, but his servants, agents, heirs and assignees. Upon the aforesaid statements it is seen that a gross contempt of the Supreme Court's order has been committed**. The parents must apply to the Supreme Court to bring this fact of the act of the son to the knowledge of the Supreme Court." (Emphasis supplied)

22. Further, by an Order dated 16th April, 2015 in the Execution Application, the Court (R.S. Dalvi, J.) passed an Order *inter alia* noting as follows :

"10. **Those were the keys that never worked. The act of the son in handing over possession of the above flat was the act that never was. This may be the only matter of the kind where a party appearing before the Supreme Court played a fraud on the Supreme Court**.

.....

20. Son has stated that the execution application is "as good as disposed off with the order of the Honourable Supreme Court dated 7th April, 2014 complied with on 8th September, 2014 with the keys of the suit

flat being handed over to the Counsel Mr. M.C. Dhingra". **The son has contended that the order of the Supreme Court was complied by physically handing over of the keys**. He has contended that the execution application is fully satisfied. Nothing remains to be done and nothing is expected of him.

**This would mean and imply that the keys which were handed over would work. The possession of the flat which was handed over was vacant. The family members of the son, his servants and agents, would follow the son. The parents would obtain peaceful and vacant possession of the flat. They would be entitled to live therein without the son or his family members. It may be remembered that the award specified the vacating of the premises by the son and his family members.**

21. **It would be an insult to the intelligence of even an ignoramus that keys of a flat handed over by a party in deference to an order of the Supreme Court in appeal from an order appointing Court Receiver in an execution against the award directing handing over of vacant possession, would not work and yet the person handing over the keys would claim that the order of the Supreme Court is complied and the execution is fully satisfied.**

……..

**30. It is seen that the act of the son is grossly contemptuous. It is also seen that he has played a fraud upon the Supreme Court**. **It is further seen that the award has remained unexecuted. The above execution application for execution of the award is required to be granted**. The order of Justice Kathawalla dated 5th August, 2012 already passed is required to be acted upon. The order in the above execution application must be in consonance with the order passed by this Court initially which has been completely confirmed by the Supreme Court and got acted upon by the Supreme Court.

31. **Court Receiver has been and is appointed Receiver in respect of flat No. 51, Rosy Apartments, North Avenue, Santacruz (West), Mumbai.**

32. **The Court Receiver shall take physical possession of the suit flat from the son Manoj Kumar Dalmia and his family members including his wife and son, servants and agents or others and hand it over to the parents Om Prakash Dalmia and Kantadevi Dalmia**.

33. The Court Receiver shall be entitled to take police assistance for taking possession.

**34. The Senior Inspector of Santacruz (West) Police Station shall render all assistance to the Court Receiver in obtaining physical possession of the above flat from the above persons or whoever is found in possession thereof.**

35. The son, his servants and agents shall not sell, alienate, encumber, part with possession or create any third party rights in any manner in respect of the above flat until vacant possession is finally handed over to the parents.

36. The son shall be entitled to withdraw Rs.37.93 lakhs with all accrued interest thereon from the Prothonotary and Senior Master of this Court after vacant, physical possession of the above flat is handed over by the son to his parents." (Emphasis supplied)

23. The Applicant filed a Notice of Motion in Appeal No. (L) 396 of 2012 challenging the aforementioned order dated 16th April 2015. By an order dated 28th April 2015 this Court dismissed the Notice of Motion.

24. It is the Applicant's case that on 23rd October, 2015, the Applicant and

Respondent Nos. 2 and 3 entered into consent terms ("**Consent Terms**") wherein it is agreed as follows :

> (a) The Applicant has handed over possession of the Santacruz Flat to Respondent Nos. 2 and 3. Respondent Nos. 2 and 3 are already well settled in the Santacruz Flat. Respondent Nos. 2 and 3 agree to live with the Applicant and his family members in the Santacruz Flat.
>
> (b) Respondent Nos. 2 and 3 are ready to handover and transfer Flat No. B/705 Jay Sheetal Apartment Venkatesh Park Bhayandar ("**Bhayandar Flat**") and Room No. 19 First Floor, Shiv Nivas, Kalbadevi ("**Room**") to the Applicant.
>
> (c) Respondent Nos. 2 and 3 agree to allow the Applicant to withdraw the entire amount alongwith interest lying with the Prothonotary & Senior Master of this Court. (This amount was withdrawn by the Applicant on 16th December 2015)
>
> (d) Both sides agree to withdraw Appeal No. 396 of 2012 and Contempt Petition No. 417/15 pending before the Supreme Court."

25. By an Order dated 23rd October 2015 in Appeal (L) No. 396 of 2012, this Court took the Consent Terms on record and the aforementioned Appeal was disposed of in terms of the same. The Applicant appeared in person and one Mr. Deepak Gautam alongwith Advocate M.S. Hadi appeared on behalf of Respondent Nos. 2 and 3.

26. The Applicant asserts Respondent Nos. 2 and 3 have breached the

Consent Terms and accordingly the present Contempt Petition is filed.

**APPLICANT'S CASE**:

27. The Applicant's case before us is :

27.1 In breach of the Consent Terms: (i) the Applicant and his family were restrained from entering the Santacruz Flat and were physically beaten and abused when they attempted to do so (ii) Respondent Nos. 2 and 3 sold the Room to one Mr. Shivlal Khetaji Choudhary vide Agreement for Sale dated 20th April 2016 and (iii) Respondent Nos. 2 and 3 gave the Bhayandar Flat on lease.

27.2 On 20th November, 2018, the Applicant sent a notice to Respondent Nos. 2 and 3 *inter alia* stating Respondent Nos. 2 and 3 were in breach of the Consent Terms and calling upon Respondent Nos. 2 and 3 to comply with the same.

27.3 Respondent Nos. 2 and 3 failed to take note of the Applicant's requests and in the aforementioned circumstances the Applicant filed the present Contempt Petition seeking compliance with the Consent Terms.

27.4 During the pendency of the present Contempt Petition, in further breach of the Consent Terms, Respondent Nos. 2 and 3 sold the Bhanyandar Flat vide Agreement for Sale and Transfer dated 24th February 2019 and the Santacruz Flat has been transferred in the name of the daughters of Respondent Nos. 2 and 3. The Applicant has filed an Interim Application bringing the aforementioned facts on

record. However, the Applicant has not pressed this Interim Application.

**RESPONDENT NOS.2 AND 3's CASE :**

28. Respondent No. 2 and 3's case before us as pleaded/argued is :

28.1 Respondent Nos. 2 and 3's signatures on the Consent Terms are forged and fabricated and they have not signed the Consent Terms. Respondent Nos. 2 and 3 were not even aware of the Consent Terms.

28.2 Respondent Nos. 2 and 3 have never met Mr. Deepak Gautam whose appearance is recorded in the Order taking on record the Consent Terms and neither have they signed on a vakalatnama authorising Mr. Deepak Gautam to appear and/or plead on their behalf.

28.3 Respondent Nos. 2 and 3 were not personally present in Court when the Consent Terms were filed and taken on record vide Order dated 23rd October, 2015.

28.4 Respondent Nos. 2 and 3 are in the process of initiating necessary action including filing of a complaint with the Bar Council of Maharashtra and Goa against advocate Mr. Deepak Gautam.

28.5 The Consent Terms are false, fabricated and bias. There is gross animosity between the parties to the extent that parties have filed criminal complaints against each other. In these circumstances, there is no basis for Respondent Nos. 2 and

3 to sign Consent Terms permitting the Applicant and his family to reside with Respondent Nos. 2 and 3. Specifically when, the Santacruz Flat was already in possession of Respondent Nos. 2 and 3 pursuant to orders inter alia of the Supreme Court.

28.6 Clause 2(b) of the Consent Terms provide Respondent Nos. 2 and 3 are ready to handover and transfer the Bhayandar Flat and Room to the Applicant. This would practically amount to a decree in the suit pending before the City Civil Court. It would further mean Respondent Nos. 2 and 3 i.e senior citizens giving up rights in two immovable properties which are the source of their livelihood without any consideration whatsoever inspite of the animosity between the parties.

28.7 Clause 2(c) of the Consent Terms record Respondent Nos. 2 and 3's agreement to allow the Applicant to withdraw the entire amount alongwith interest till date lying with the Prothonotary and Senior Master of this Court. This would imply that the Applicant would not only get over and above his alleged monetary share in the Santacruz Flat but at the same time also the right to live in Santacruz Flat and harass Respondent Nos. 2 and 3 and ultimately dispossess them.

28.8 The Consent Terms are entirely detrimental to Respondent Nos. 2 and 3's interest and no prudent man having common sense would enter into such bias terms.

28.9 The Applicant has an alternate remedy in terms of the Consent Terms and as such the present Contempt Petition is not maintainable.

28.10 The present Contempt Petition has been filed after a delay of 3 years, during this period Respondent Nos. 2 and 3 continued to occupy and possess the Santacruz Flat. This emphasises that Respondent Nos. 2 and 3 were not aware regarding the Consent Terms at all having never executed the same. The Contempt Petition is also barred by limitation.

28.11 Pursuant to Orders of this Court a total amount of Rs. 1,03,71,273.35/- was deposited with the Prothonotary and Senior Master of this Court. Out of this, in terms of this Court's Order dated 2nd August, 2012, Respondent Nos. 2 and 3 withdrew 50% i.e Rs. 51,85,636.68/-. The remaining balance i.e Rs. 52,18,506.67 was withdrawn by the Applicant when the Applicant's actual entitlement was only Rs. 37,93,828/-.

28.12 Furthermore, the amount of Rs. 51,85,636.68/- withdrawn by Respondent Nos. 2 and 3 was siphoned off by the Applicant in connivance with one Mr. M.S Hadi, the erstwhile Advocate of Respondent Nos. 2 and 3, by creating false and fabricated documents. The Applicant in connivance with Advocate M.S Hadi prepared the Consent Terms and forged the signature of Respondent Nos. 2 and 3.

28.13 Owing to the aforesaid acts, on 28th December, 2015 Respondent No. 2

filed an F.I.R *inter alia* against the Applicant and Mr. M.S Hadi. In the F.I.R various allegations of cheating, criminal breach of trust, forgery etc. have been made against the Applicant and Mr. M.S Hadi. Respondent No. 2 has alleged that the Mr. M.S Hadi fraudulently obtained signatures of Respondent Nos. 2 and 3 on various blank documents on some pretext or another and in connivance with the Applicant. It is also alleged that the Applicant and Mr. M.S Hadi through forgery withdrew sums from the savings account of Respondent Nos. 2 and 3 and siphoned off the entire sum of monies as withdrawn by Respondent Nos. 2 and 3 pursuant to the order dated 2nd August, 2012 of this Court i.e Rs. 51,85,636.68/-.

**AMICUS CURIAE :**

29. Owing to the serious allegations of forgery and fraud and Respondent No. 2 and 3's claim to have not signed the Consent Terms, by an order dated 3rd March, 2022 we appointed Shri Rashmin Khandekar, Counsel, as Amicus Curiae to assist this Court. At first blush itself we found the Consent Terms to be unconscionable. There was no reason whatsoever for Respondent Nos. 2 and 3 to ordinarily enter into the Consent Terms which basically seek to undo what they had been able to preserve thus far, by securing orders from this Court and the Supreme Court. However, since the said Consent Terms were taken on record by an order of this Court, we requested Mr. Khandekar to assist the Court on this aspect. Since there were various proceedings between the parties, we also requested him to crystallise

facts relating to the Consent Terms.

30. Counsel Shri Rashmin Khandekar has submitted a written note and addressed this Court as under :

30.1 The basic question is whether this Court is of the view that the Consent Terms and the order taking them on record is obtained by fraud, collusion or misrepresentation. It is trite that a judgment, order or decree obtained by playing fraud on the Court is a *nullity* and *non-est* in the eyes of law. Such an order, judgment or decree can be challenged in ***any*** Court, at ***any*** time and even in ***collateral proceedings***. In this regard reliance was placed on the cases of :

(a) **S.P. Chengalvaraya Naidu (Dead) by Lrs. v. Jagannath (Dead) by Lrs. & Ors.**[1] which inter alia holds as follows :

> **"1. "Fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and honest in the eyes of law. Such a judgment/decree – by the first court or by the highest court – has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."**
>
> …
>
> **5.** The High Court, in our view, fell into patent error**. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court**. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High

1 (1994) 1 SCC 1

> Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". **The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean-hands**. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court - process a convenient lever to retain the illegal gains indefinitely. **We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation**."
>
> (Emphasis supplied)

(b) **A.V. Papayya Sastry & Ors. v. Government of A.P. & Ors.**[2]**,** which inter alia holds as follows :

> "**21.** **Now, it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law.** Before three centuries, Chief Justice Edward Coke proclaimed:
>
> "**Fraud avoids all judicial acts, ecclesiastical or temporal."**
>
> **22.** **It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order - by the first Court or by the final Court - has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings.**
>
> …
>
> **24.** In *Duchess of Kingstone, Smith's Leading Cases*, 13th Edn., p.644, explaining the nature of fraud, de Grey, C.J. stated that though a judgment would be res judicata and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was 'mistaken', it might be shown that it was 'misled'. There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the

2 (2007)4 SCC 221

> decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment.
>
> **25.** **It has been said: fraud and justice never dwell together (fraus et jus nunquam cohabitant); or fraud and deceit ought to benefit none (fraus et dolus nemini patrocinari debent).”** (Emphasis supplied)

(c) This principle has also been reiterated by the Supreme Court in the case of **Smriti Madan Kansagra v. Perry Kansagra**[3]**.**

30.2 With regard to the scope of extent of this Court’s jurisdiction in *collateral proceedings* the case of **Kishan Lal Barwa v. Sharda Saharan & Anr.**[4] was relied upon which in turn relies upon several other cases and *inter alia* observes as follows :

> **13.** This Court finds that the basis of petitioner's claim that the decree was obtained by fraud is a report submitted before the Chief Judicial Magistrate by the Directorate of Fingerprint Experts, according to which, the fingerprints of Ashok Kumar, as existing on the lease deed executed by Noida do not match with those upon the power of attorney claimed by Ripudman Kumar Saharan and rather matches with the agreement to sell executed in favour of the defendant-petitioner. This report has been prepared by the experts of Directorate of Fingerprint, who are public servants, and the report is in due discharge of their official duties, and by virtue of section 114 of the Indian Evidence Act, a presumption of correctness of the report would be available in law, subject to further evidence which may be brought on record by the other side. **The question as to whether a plea of fraud could be entertained even in collateral proceedings, at the stage of execution, after passing of the decree, is no longer res integra. It is settled that fraud and justice do not dwell together. It is equally settled that a Court of law would do its utmost to ensure that injustice is not meted out to a party. Such right in a Court of law has been recognized under section 44 of Evidence Act, which**

3 AIR 2021 SC 5423

4 2015 SCC Online All 4980

**reads as under:—**

> **"*44. Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved*.— Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections 40 and 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."**

**14.** **Reliance has been placed upon a decision of the Bombay High Court in *Shewa Lachha Banjar* v. *Bhawarilal Ganeshmal Marwadi*, wherein plea of fraud was setup in execution was rejected by the Courts below.** In such circumstances, the Bombay High Court interfered with the matter and made following observations:

> **"…It must be observed that even in execution if it is shown that the order was made upon mistake or fraud which affects the very validity of the order under execution rendering it ineffective, it can properly be questioned by any one. Section 44 of the Evidence Act in terms applies to such matters and permits a person to lead evidence to show that the order is not binding in any such proceeding."**

**15.** Reliance has also been placed upon following decisions of the High Courts:

(i) **In *Tribeni Mishra* v. *Ram Pujan Mishra*. para 13 has been relied upon, which reads as under:**

> "13. **It may be mentioned here that Shri Kailash Roy, appearing for the defendant-respondents, has contended that the question as to whether there was any fraud in connection with the compromise could not be gone into in the present litigation in view of the fact that the previous suit had been decreed on basis of the compromise and the defendants Had not brought any suit for setting aside the decree within the prescribed time limit under Article 95 of the Limitation Act, 1908. the prescribed period of time limit for institution of a suit for setting aside a decree obtained by fraud or for other relief on the ground of fraud was three years from the date when the fraud became known to the party and the same period of**

**limitation has been prescribed under Article 59 of the new Limitation Act also.** Hence, there cannot be any doubt that a suit by the defendants for setting aside the decree on basis of the compromise on the ground of fraud would have been barred by limitation unless filed within the prescribed time limit of three years from the date of knowledge of the fraud. Section 44 of the Evidence Act, however, provides as follows:

> "Any party to a suit or other proceeding may show that any judgment, order or decree, which is relevant under sections 40 and 41 or 42 and which has been proved by adverse-party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

**The question as to whether in view of these provisions, a decree or order can be challenged on the ground of fraud in a collateral proceeding without any suit for setting aside the decree came up for consideration before a Division Bench of this Court in the case of *Bishnunath Tewari* v. *Mst. Mirchi.*** In this case, there was a divergence of opinion between the two Judges of this Court, namely, Lakshmikanata Jha,. C.J. and Reuben, J. who initially heard the case, on which there was a reference to a third Judge, namely, Ramaswami, J. as he then was) and the latter agreed with the views expressed by Lakshmikanta Jha, C.J. and observed as follows:

> "It is important to remember that fraud does not make a judicial act or transaction void but only voidable at the instance of the party defrauded. The judicial act may be impeached on the ground of fraud or collusion in an active proceeding for rescission by way of suit. **The defrauded party may also apply for review of the judgment to the' Court which pronounced it. But the judgment may also be impeached in a collateral proceeding in which fraud may be set up as a defence to an action on the judgment or as an answer to a plea of estoppel or res judi-cata found upon the judgment.**"

It was further held in this case that the provision

> relating to limitation as provided in Article 95 of the Limitation Act has no bearing in relation to section 44 of the Evidence Act. **As would appear from the terms of section 44 of the Evidence Act, already quoted above, this section lays down that any party to a suit or other proceeding may show that a judgment, order or decree referred to in the section, which has been proved by the adverse party, was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. The right as given by this section has not been fettered by any limitation whatsoever and it is manifest that such a right is quite independent of the right to get a judgment or decree etc. set aside by bringing regular suit for the purpose. I, therefore, fully agree with the views expressed in the earlier decision of this Court referred to above and hold that such a plea can be raised under section 44 of the Evidence Act in a collateral proceeding irrespective of the time when the judgment was delivered or decree or order was passed.** The aforesaid contention of Shri Kailash Roy is accordingly rejected as being quite untenable. This, however, makes no difference so far as the result of this appeal is concerned in view of the findings above that there was no fraud in connection with the compromise in question."

(ii) In *Khirod Chandra Mohanty* v. *Banshidhar Khatua* has been relied upon, which reads as under:

> "8. It was urged by Mr. Mohanty that even though it was held that the ex parte decree in T.S. No. 52/64 was obtained by collusion, that decree would operate as res judicata in this case. In support of his above submission Mr. Mohanty cited the Single Judge decision reported in *Baboo* v. *Mt. Kirpa Dei* The decision in that case was rendered entirely on facts different from those in the present case. In that case the question was whether 'even if one of the defendants to the suit was in collusion with the plaintiff, the decision could be said to be binding on the defendants on the principle of res judicata. That question was decided in the affirmative. In the present case before me it has been found by both the Courts below that the ex parte decree in T.S. No. 52/64 was obtained by the plaintiff in collusion with all the defendants in the said suit. That being so, the above decision is not

applicable to the present case.

> **Under section 44 of the Evidence Act any party to a suit or other proceeding may show that any judgment, order or decree, which it or was obtained by fraud or collusion. The provision of section 44 is not an idle provision. If it is proved that a judgment was obtained by collusion that fact will affect its force, effect, executability and value. So it will be absolutely incorrect to say that even if a judgment is obtained by fraud or collusion that will operate as res judicata in a subsequent suit. That will be giving premium to sham and illegal deals, shutting out persons striving to uphold their rightful cause or claim by exposing illegal or unconscionable bargains.**
>
> In *Manchharam* v. *Kalidas*, it was held that Under section 44, Evidence Act, a party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud.
>
> **In *Nistarini Dassi* v. *Nundo Lall Bose*, it was held that an innocent parly may be allowed to prove in one Court that a decree obtained against him in a different proceeding in another Court of concurrent jurisdiction was obtained by fraud, and if the Court be of opinion that such decree so obtained in the other Court cannot stand it has jurisdiction to treat that decree as a nullity and render its effect nugatory.**

In section 44 of the Evidence Act the word "Collusion" has been placed exactly on the same footing as the word "fraud" in the said section.

In the case in *Bishunath Tewari* v. *Mst. Mirchi*, it has been observed:

> "Thus, a survey of the authorities of the different High Courts, shows that a judgment, decree or order of a Court of competent jurisdiction can be treated as a nullity under section 44, Evidence Act and its effect rendered nugatory if it is shown that it was obtained by fraud or collusion of the antagonist".

On the above discussion I reject the above-mentioned contention

of Mr. Mohanty."

(iii) In *Nechhittar Singh* v. *Smt. Jagir Kaur*, has been relied upon, which reads as under:

> "6. The learned Counsel for the defendant appellant vehemently contended that the decree could only be challenged under section 44 of the Evidence Act and that too by a third party and not by a party to the suit in which that said decree was passed. In support of this contention he referred to *Mt. Parbati* v. *Garaj Singh*, *Shripadgouda Venkangouda Aparanji* v. *Govindgouda Narauangouda Apararij*i, *Parameswearn Naair* v. *Aiuappan Pillai*, and *Laxmi Narain Gododia* v. *Mohd. Shaji Bari* On this question I do not find any merit in the contention raised on behalf of the appellant. Section 44 of the Evidence Act reads as follows:
>
> > **"Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved. Any party to a suit or other or decree which is relevant under sections 40 and 41 or 42, and which has been proved, by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."** Reading section 40 with section 44 it is evident the under section 40 the previous judgments are relevant to bar a second suit or trial. In other words, the earlier judgment operates as *res judicata*. That will only be ordinarily between the same parties, and if that is so then the said judgment being relevant under section 40 could be challenged if it was proved by the adverse party that the same was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. It is only under sections 41 and 42 of the Act when the judgment is relevant that even a third party can show that the same was delivered by a Court not competent to deliver it or that it was obtained by a fraud or collusion. Even the judgments relied on by the learned Counsel for the appellant do not support his contention. In *Laxmi Narian*

*Goddodia's case* (supra) it was held that section 44 is the only provision of law under which a judgment or an order or a decree which is sought to be proved with a view to establish the plea of respondent judicata can be avoided, **similarly, in *Tribeni Mishra* v. *Rampuijan Mishra*. it was held that the right as given by section 44. Evidence Act has not been fettered by any limitation whatsoever and it is manifest that such a right is quite independent of the right to get a judgment or a decree, etc., set aside by bringing a regular suit for the purpose.** A decree or an order can be challenged on ground of fraud in a collateral proceeding without any suit for setting aside the decree irrespective of the time when the judgment was delivered or the order of the decree was passed. Similarly, in *Mt. Parbati's case* (supra) it was held that the meaning of section 44 of the Evidence Act is that if collusion is proved between the parties to previous suit then the judgment in that suit which is relevant under section 40 cannot act as a bar. Thus, the contention that no decree could be challenged by a party to the suit subsequently on the basis of fraud or collusion cannot be accepted as such. The authorities relied on by the learned Counsel for the appellant do not lay down such a law and, in any case the same are distinguishable on facts."

**16. The Apex Court in *Gram Panchayat of Village Naulakha* v. *Ujagar Singh* relying upon various decisions has been pleased to hold as under in paras 4, 5 and 6:**

"4. On this point, we have heard the learned Counsel for the respondents who contended that the principle laid down by the Full Bench in *Jagar Ram's case* is correct and that the earlier judgment in the present case is binding on the basis of the principle of *res judicata*. **The panchayat cannot therefore raise a plea of collusion in the latter proceeding unless it has first filed a suit and obtained a declaration or unless it took steps to have the earlier decree set aside.**

5. We may state that the view taken by the Full Bench of the Punjab and Haryana High Court in *Jagar Ram's case* is not correct and in fact it runs contrary to the provisions of section 44 of the Indian Evidence Act. That section provides that : Any party to a suit or proceeding may show that any judgment, order or decree which is relevant under sections 40, 41, and 42 and which has been delivered by a Court not competent to deliver it or was obtained by fraud or collusion. (section 40 refers to the relevances of previous judgments which are pleaded as a bar to a second suit or trial and obviously concerns section 11. C.P.C.).

6. **It appears from commentary in *Sarkar's Evidence Act* (13th Ed., reprint) (at p. 509) on section 44 that it is the view of the Allahabad, Calcutta, Patna, Bombay High Courts that before such a contention is raised in the latter suit or proceeding, it is not necessary to file an independent suit. The passage from Sarkar's Evidence which refers to various decisions reads as follows:**

> **"Under section 44 a party can, in a collateral proceeding in which fraud may be set up as a defence, show that a decree or order obtained by the opposite party against him was passed by a Court without jurisdiction or was obtained by fraud or collusion** and is not necessary to bring an independent suit for setting it aside, *Bansi* v. *Dhapo*; *Rajib* v. *Lakhan*; *Parbati* v. *Gajraj*; *Prayag* v. *Siva*; *Hare Krishna* v. *Umesh*; *Aswini* v. *Banamali*, *Manchharam* v. *Kalidas*; *Ranganath* v. *Govind*; *Kamiruddin* v. *Jhadejanessa*; *Bhagwandas* v. *Patel and Co.*; *Bishunath* v. *Mirchi*, and *Vijaya* v. *Padmanabham*"

**Thus, in order to contend in a latter suit or proceeding that an earlier judgment was contained by collusion, it is not necessary to file an independent suit as stated in *Jagar Ram's case* for a declaration as to its collusive nature or for setting it aside, as a condition precedent. In our opinion, the above cases cited in Sarkar's Commentary are correctly decided.** We do not

> agree with the decision of the Full Bench of the Punjab and Haryana High Court in *Jagar Ram's case*. The Full Bench has not referred to section 44 of the Evidence Act not to any other precedents of other Courts or to any basic legal principle."
>
> …….

**18.** **It is well settled that once the plea of fraud has been setup by the defendant-petitioner before the Executing Court, and credible evidence in support of such plea was also placed, it was incumbent upon the Executing Court to have examined the issue of fraud, on merits, and such plea ought not to have been rejected merely on the ground that a decree in favour of the plaintiff-respondent had been passed, and the Executing Court, as such, had no occasion to examine the plea of fraud. It is also well settled that fraud vitiates all solemn acts.** Though a plea of fraud was taken up before the Civil Court, but such plea was not adjudicated, which is clarified in the judgment of the Civil Court itself. **However, if a credible material has come into existence, which if is found proved vitiates the decree itself, it is the duty of the Executing Court to consider such plea on merits. It was open for the Executing Court to have examined the report of the Directorate, Fingerprint Experts, in accordance with law, and for such purpose an opportunity was liable to have been allowed to the plaintiff-respondent. The Executing Court could have adjudicated as to whether the plea of fraud was made out on facts or not? but it was not open for the Executing Court to brush aside the objection itself and thereby refused to go into such issue itself.**

**19.** The judgment of the Apex Court relied upon by Sri Pankaj Agrawal, learned Counsel for the respondents, in *Atma Ram Builders Pvt. Ltd.* v. *A.K. Tuli*, and *Smt. Kastoori Devi* v. *Harbansh Singh*, are not relevant for the present purposes, inasmuch as no plea of fraud or interpretation of section 44 of the Evidence Act was involved therein. It was observed, in the facts of the case where no issue of fraud was involved, that once the suit had been decreed, thereafter unnecessary objections should not be entertained and the benefit of decree must be ensued at the earliest. The proposition, aforesaid, is too well settled but has no application in the facts of the present case, where a plea of fraud has been taken and substantiated with *prima facie* evidence. The Apex Court also had an occasion to consider the aspect of playing of fraud upon the Court in *Hamza Haji* v. *State of Kerala*, of the said judgment is reproduced:

"10. It is true, as observed by De Grey, C.J., in *Rex* v. *Duchess of Kingston*, that:

> **"'Fraud' is an intrinsic, collateral act, which vitiates the most solemn proceedings of Courts of justice. Lord Coke says it avoids all judicial acts ecclesiastical and temporal".**

11. In Kerr on Fraud and Mistake, it is stated that:

> "in applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest Court of judicature in the realm, **but in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud.**"

12. It is also clear as indicated in *Kinch* v. *Walcott*, that it would be in the power of a party to a decree vitiated by fraud to apply directly to the Court which pronounced it to vacate it. According to Kerr:

> "In order to sustain an action to impeach a judgment, actual fraud must be shown : mere constructive fraud is not, at all events after long delay, sufficient…. but such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury."
> (See the Seventh Edition, Pages 416-417)

13. In *Corpus Juris Secundum*, Volume 49, paragraph 265, it is acknowledged that:

> "Courts of record or of general jurisdiction have inherent power to vacate or set aside their own judgments".
>
> In paragraph 269, it is further stated,

**"Fraud or collusion in obtaining judgment is a sufficient ground for opening or vacating it, even after the term at which it was rendered, provided the fraud was extrinsic and collateral to the matter tried and not a matter actually**

**or potentially in issue in the action. It is also stated:**

> **"Fraud practiced on the Court is always ground for vacating the judgment, as where the Court is deceived or misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair".**

14. In *American Jurisprudence*, 2nd Edition, Volume 46, paragraph 825, it is stated,

> "Indeed, the connection of fraud with a judgment constitutes one of the chief causes for interference by a Court of equity with the operation of a judgment. The power of Courts of equity in granting such relief is inherent, and frequent applications for equitable relief against judgments on this ground were made in equity before the practice of awarding new trials was introduced into the Courts of common law.
>
> **Where fraud is involved, it has been held, in some cases, that a remedy at law by appeal, error, or certiorari does not preclude relief in equity from the judgment. Nor, it has been said, is there any reason why a judgment obtained by fraud cannot be the subject of a direct attack by an action in equity even though the judgment has been satisfied."**

15. **The law in India is not different. Section 44 of the Evidence Act enables a party otherwise bound by a previous adjudication to show that it was not final or binding because it is vitiated by fraud. The provision therefore gives jurisdiction and authority to a Court to consider and decide the question whether a prior adjudication is vitiated by fraud.** In *Paranjpe* v. *Kanade*, it was held that:

> "It is always competent to any Court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud:"

16. In *Lakshmi Charan Saha* v. *Nur Ali*, it was held that:

> "the jurisdiction of the Court in trying a suit questioning the earlier decision as being vitiated by fraud, was not limited to

> an investigation merely as to whether the plaintiff was prevented from placing his case properly at the prior trial by the fraud of the defendant. The Court could and must rip up the whole matter for determining whether there had been fraud in the procurement of the decree."

17. In *Mahindra Nath Mittra* v. *Hari Mondal*, the Court explained the elements to be proved before a plea of a prior decision being vitiated by fraud could be upheld. The Court said:

> "with respect to the question as to what constitutes fraud for which a decree can be set aside, two propositions appear to be well established. The first is that although it is not permitted to show that the Court (in the former suit) was mistaken, it may be shown that it was misled, in other words where the Court has been intentionally misled by the fraud of a party, and a fraud has been committed upon the Court with the intention to procure its judgment, it will vitiate its judgment. The second is that a decree cannot be set aside merely on the ground that it has been procured by perjured evidence".

18. The position was reiterated by the same High Court in *Esmile-Ud-Din Biswas* v. *Shajoran Nessa Bewa*. It was held that:

> "It must be shown that fraud was practised in relation to the proceedings in the Court and the decree must be shown to have been procured by practising fraud of some sort upon the Court."

19. In *Nemchand Tantia* v. *Kishinchand Chellaram (India) Ltd.*, it was held that:

> **"a decree can be re-opened by a new action when the Court passing it had been misled by fraud,** but it cannot be re-opened when the Court is simply mistaken; when the decree was passed by relying on perjured evidence, it cannot be said that the Court was misled."

20. It is not necessary to multiply authorities on this question since the matter has come up for consideration before this Court on earlier occasions. In *S.P. Chengalvaraya Naidu (Dead) by LRs.* v. *Jagaruiath (Dead) by LRs*, this Court stated that:

> **"it is the settled proposition of law that a judgment or**

> **decree obtained by playing fraud on the Court is a nullity and non est in the eyes of law. Such a judgment/decree — by the first Court or by the highest Court — has to be treated as a nullity by every Court, whether superior or inferior. It can be challenged in any Court even in collateral proceedings."**

The Court went on to observe that the High Court in that case was totally in error when it stated that there was no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence. Their Lordships stated:

> "The Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property-grabbers, tax - evaders, Bank - loan-dodgers, and other unscrupulous persons from all walks of life find the Court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation".

21. In *Ram Preeti Yadau* v. *U.P. Board of High School and Intermediate Education*, this Court after quoting the relevant passage from *Lazarus Estates Ltd.* v. *Beasley*, and after referring to *S.P. Chengalvaraya Naidu (Dead) by LRs.* v. *Jagannath (Dead) by LRs* (supra), reiterated that fraud avoids all judicial acts. In *State of A.P.* v. *T. Suryachandra Rao*, this Court after referring to the earlier decisions held that suppression of a material document could also amount to a fraud on the Court. It also quoted the observations of *Lord Denning in Lazarus Estates Ltd.* v. *Beasley* (supra), that:

> "No judgment of a Court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

22. According to *Story's Equity Jurisprudence*, 14th Edn., Volume 1, paragraph 263:

> "Fraud indeed, in the sense of a Court of Equity, properly

> includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed and are injurious to another, or by which an undue and unconscientious advantage is taken of another."
>
> 23. In *Patch* v. *Ward* Sir John Rolt, L.J. held that:
>
> **"Fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case, and obtaining that decree by that contrivance."**
>
> 24. This Court in *Bhaurao Dagdu Paralkar* v. *State of Maharashtra*, held that:
>
> **"Suppression of a material document would also amount to a fraud on the Court. Although, negligence is not fraud, it can be evidence of fraud."**
>
> (Emphasis supplied)

30.3 Counsel Shri Khandekar submitted that as such this Court has the requisite power to adjudicate on whether there was any fraud and/or collusion and/or foul play with respect to the Consent Terms and the order taking them on record.

30.4 In this case, the following incidents/factors were brought to our attention which could be evaluated to form an opinion, *ex facie* or *prima facie* with respect to the allegation fraud/collusion or otherwise. These are as follows :

"(a) The Consent Terms on the face of it appear to be lopsided and no reasonable person would agree to execute the same specifically when their rights have been commented upon and confirmed through various Orders of this Court and also the Supreme Court.

(b) The Consent Terms also seem untenable owing to the immense animosity and several disputes between the parties including criminal proceedings.

(c) The conduct of the Applicant which is recorded through various Orders passed in previous proceedings appears to be reprehensible. It is difficult to believe that Respondent Nos 2 and 3 would execute the said Consent Terms notwithstanding the background and prior history between the parties.

(d) Respondents Nos. 2 and 3 allege they were not present when the Order dated 23rd October 2015 taking on record the Consent Terms was passed. This is also borne out from the Order which records the appearance of Respondent Nos. 2 and 3 through one Mr. Deepak Gautam and Mr. Hadi.

(e) Respondent Nos. 2 and 3 claim to have never authorised Mr. Deepak Gautam to appear and plead on their behalf. Mr. Gautam was directed to be present at the hearing by this Court. He claimed to have met Respondent Nos. 2 and 3 only at the time when the order taking the Consent Terms on record was passed.

(f) Even after obtaining the Order dated 23rd October 2015, there is nothing on record to show the Applicant took any action to implement the same except for addressing a letter after more than 3 years dated 20th November 2018. This casts further suspicion on the veracity and correctness of the Consent Terms and the conduct of the Applicant.

(g) To the naked eye, signature on the Consent Terms doesn't appear to match the signature of Respondent Nos. 2 and 3 on other documents placed on record. However this cannot be conclusive one way or another.

**FINDINGS AND ANALYSIS :**

31. The matter was heard and stood over on several occasions. During the course of the hearings we were also informed that the Applicant and Mr. M.S. Hadi were behind bars for a substantial period of time owing to the F.I.R filed by Respondent Nos. 2 and 3. We called upon Mr. Deepak Gautam and Mr. M.S. Hadi to remain present before this Court.

32. However, they initially did not appear. By our Order dated 9th March, 2022 we were forced to direct Mr. Deepak Gautam and Mr. M.S. Hadi to remain present before this Court on 10th March 2022, the Order records as follows :

> "**1.** Serious allegations are made against Advocates Shri. M.S. Hadi and Shri. Deepak Gautam by their purported clients Shri. Manoj Kumar Dalmia and his wife aged about 75 years and 74 years respectively. We are also informed that Advocate Shri. M.S. Hadi and the Applicant/Petitioner were behind bars for a substantial period since Shri. Manoj Kumar Dalmia had filed a complaint against them.
>
> **2.** Today the Associate, on instructions from this Court, called up Advocate Shri. M.S. Hadi and asked him to remain present in Court. After informing the Associate that he will soon reach the Court, Advocate M.S. Hadi later called up the Associate and informed him that he is out of town

> and that he will try to send Advocate Shri. Deepak Gautam to Court. Thereafter, there is no response either from Advocate Shri. M.S. Hadi or Advocate Shri. Deepak Gautam.
>
> **3.** In view of the above, we adjourn the matter to 10th March, 2022. To be placed 'High on Board'. Advocates Shri. M.S. Hadi and Shri. Deepak Gautam are directed to remain present before this Court on 10.03.2022 at 10.30 a.m., failing which the Court shall be constrained to pass necessary orders to secure their presence before this Court including issuing a bailable warrant of arrest against them."

33. On 10th March 2022, Mr. Deepak Gautam and Mr. M.S. Hadi were both present before this Court. It appears Mr. M.S. Hadi had appointed Mr. Deepak Gautam to appear in the matter pertaining to taking of the Consent Terms on record. During the course of the proceedings we also learnt Mr. M.S Hadi had obtained certain sums of monies from the Applicant. We called upon Mr. M.S Hadi to explain how he received sums of monies from the Applicant when he was appointed as the advocate on behalf of Respondent Nos. 2 and 3. However, no satisfactory response was provided. These facts are only placed on record for completeness. Adjudication regarding the fraud and forgery by Mr. M.S Hadi is ongoing pursuant to the F.I.R filed by Respondent No. 2 and therefore we are not commenting further upon the issue. Suffice it to state that it is not in ordinary course that the lawyer appointed by one side receives lacs of rupees from the other side. That would certainly need credible explanation. But for a credible explanation, such an act would surely shock the conscience of the Court.

34. After the matter was heard and stood on several occasions the Applicant also attempted to withdraw this Contempt Petition. However, owing to the reprehensible conduct of the Applicant we do not deem it appropriate to permit the Applicant to withdraw the Contempt Petition as this stage and deem it necessary to set out what has transpired. The Applicant cannot be permitted to attempt to enforce the Consent Terms.

35. It is clear that an order obtained by fraud or collusion is a nullity and is *non-est* in law. It is also clear that an enquiry in this regard can also done in a collateral proceeding where "fraud" or "collusion" are set up as a defence. In a given case on the material before it, the Court may declare that a particular order was obtained by fraud or collusion. When such an enquiry is done in the facts of this case, at least *prima facie*, the Consent Terms and the Order appear to be obtained by fraud or collusion. This is on account of the following factors :

**The Consent Terms are entirely lopsided** :

(a) The Consent Terms are entirely lopsided and no reasonable person is likely to enter into the same, particularly in the facts of this case.

(b) Each Clause of the Consent Terms is entirely in favour of the Applicant and detrimental to the rights, interest and mental peace of Respondent Nos. 2 and 3 :

(i) Clause 2(a) of the Consent Terms states the Applicant and his

family members have been granted the right to reside in the Santacruz Flat. Vide several Orders of this Court and the Supreme Court, the Applicant has time and again been directed to handover vacant possession of the Santacruz Flat to Respondent Nos. 2 and 3. Finally after years of litigation, Respondent Nos. 2 and 3 have been handed over vacant possession. It seems unlikely given the animosity and acrimony between the parties and huge monies, effort and time expended to secure vacant possession of the Santacruz Flat, Respondent Nos. 2 and 3 would consent to the Applicant and his family members residing therein.

(ii) Clause 2(b) of the Consent Terms states Respondent Nos. 2 and 3 are ready to transfer and handover the Bhayandar Flat and the Room to the Applicant. No consideration or cause for this transfer is specified. It is Respondent Nos. 2 and 3's case that this clause amounts to a decree in terms of the dispute pending between the parties before the City Civil Court. The aforementioned properties are a source of income for Respondent Nos. 2 and 3. There is no reasonable cause to merely transfer the same without any consideration or benefit whatsoever and also when proceedings pursuant to the same are ongoing and pending adjudication.

(iii) Clause 2(b) of the Consent Terms states that the Applicant was permitted to withdraw the entire amount along with interest deposited with the Prothonotary and Senior Master of this Court. In terms of the Arbitral Award the Applicant was only entitled to withdraw approx. Rs. 37.93 lakhs that too upon handing over vacant possession of the Santacruz Flat. In terms of this Clause the Applicant was getting amounts over and above its entitlement of Rs. 37.93 lakhs as also getting to reside in the Santacruz Flat. It seems entirely absurd that Respondent Nos. 2 and 3 would agree to such a clause.

(c) It seems doubtful that Respondent Nos. 2 and 3 would agree to sign such biased and one-sided terms. The nature of the Consent Terms itself casts a suspicion on the veracity and correctness thereof.

**Orders granted in favour of Respondent Nos. 2 and 3** :

36. Since in or around 1999, various disputes and proceedings have been ongoing and pending between the Applicant and Respondent Nos. 2 and 3, including several criminal proceedings.

37. Time and again, in various proceedings Orders have been passed including by the Supreme Court whereby the Applicant has been directed to handover vacant and peaceful possession of the Santacruz Flat to Respondent Nos. 2 and 3.

38. Owing to these Orders, since in or around April 2015, Respondent Nos. 2 and 3 have been in possession and occupation of the Santacruz Flat. These Orders are more particularly as follows :

(a) Arbitral Award dated 22nd October 2007 *inter alia* granting possession of the Santacruz Flat and enabling Respondent Nos. 2 and 3 to operate bank accounts of Respondent No. 1.

(b) Order dated 20th April 2010 in Arbitration Petition No. 95 of 2008 dismissing the Applicant's Petition under Section 34 of the Arbitration Act.

(c) Order dated 8th May, 2012 in Chamber Summons No. 88 of 2012 in Execution Application No. 1359 of 2011 whereby inter alia a receiver was appointed to handover possession of the Santacruz Flat to Respondent Nos. 2 and 3 and after deduction of approx. Rs. 37.93 lakhs Respondent Nos. 2 and 3 were entitled to receive the balance amount deposited with the Prothonotary and Senior master of this Court.

(d) Order dated 8th September 2014 in Special Leave Petition (C) No. 4281 of 2013 whereby the Supreme Court noted that pursuant to its Order dated 25th August 2014 the Applicant had handed over keys of the Santacruz Flat to Respondent Nos. 2 and 3's Counsel in court premises and as such possession of the Santacruz Flat had been handed over.

(e) Order dated 16th April, 2015 in Execution Application No. 1359 of 2011 whereby again a receiver was appointed in respect of the Santacruz Flat to hand over possession to Respondent Nos. 2 and 3.

39. In light of the aforementioned Orders obtained over the course of several years and after expending substantial amount of money and effort, possession of the Santacruz Flat was already handed over to Respondent Nos. 2 and 3. Further, Respondent Nos. 2 and 3's entitlement over amounts deposited with the Prothonotary and Senior master of this Court was also recorded.

40. Parties have been locked in an extremely contentious litigation since 22

years; there is great animosity between them. Literally every order passed in favour of Respondent Nos. 2 and 3 is assailed by the Applicant. It is unlikely that after receiving favourable Orders from this Court and also the Supreme Court, Respondent Nos. 2 and 3 would enter into the Consent Terms essentially agreeing to each and every demand and claim of the Applicant and also agreeing to live with the Applicant. There is no justifiable cause for Respondent Nos. 2 and 3 agreeing to such a one-sided Consent Terms specifically owing to the fact that Respondent Nos. 2 and 3's rights over the said Flat as also entitlements to part of the amounts deposited with the Prothonotary and Senior master of this Court had been expressly recognised vide Orders of this Court.

**Conduct of the Applicant :**

41. Time and again through various proceedings and Orders the conduct of the Applicant has been reprimanded.

42. The conduct of the Applicant before various forums has not been bonafide *inter alia* including before the Supreme Court. The conduct is actually reprehensible. We specifically place reliance upon the Order dated 18th March, 2015 passed in the Execution Application wherein this Court noted as follows :

> "10. **His contention is astounding. His behavior is appalling. The question of vacating the suit flat would always mean and imply that it is vacated not only by the individual who is a party before the Court who is**

> **directed to vacate or who offers to vacate, but his servants, agents, heirs and assignees. Upon the aforesaid statements it is seen that a gross contempt of the Supreme Court's order has been committed**. The parents must apply to the Supreme Court to bring this fact of the act of the son to the knowledge of the Supreme Court." (Emphasis supplied)

43. We also rely upon the Order dated 16th April, 2015 in the Execution Application which states :

> "**30. It is seen that the act of the son is grossly contemptuous. It is also seen that he has played a fraud upon the Supreme Court**. **It is further seen that the award has remained unexecuted. The above execution application for execution of the award is required to be granted**……"
> (Emphasis supplied)

44. The aforementioned Orders the attempt of the Applicant to circumvent the Supreme Court's directions.

45. There is also nothing on record to show the Applicant made any attempt whatsoever to implement the Consent Terms prior to addressing the letter dated 20th November 2018 i.e after more than 3 years from execution of the Consent Terms. This also definitely casts suspicion on the conduct of the Applicant and the tenability of the Consent Terms. The story is, prima facie, unbelievable.

**Respondent Nos. 2 and 3 appear to not be present during taking on record of Consent Terms** :

(i) The Order dated 23rd October 2015 does not record the presence of Respondent

Nos. 2 and 3.

(ii) The aforementioned Order also does not record anything regarding the facts and/or the merits of the matter and the Consent Terms are simpliciter taken on record. It appears that the Division Bench of this Court was hoodwinked and did not apply its mind to the merits of this dispute.

(iii) Though typically the presence of parties is not warranted in every situation, in the peculiar facts of this case where the Consent Terms appear to be *ex facie* unconscionable, the fact that Respondent Nos. 2 and 3 not being physically present when this Court took the Consent Terms on record casts suspicion on their authenticity. Mr Gautam who appeared for Respondent Nos. 2 and 3 on the instructions of Mr. Hadi for the first time on the day when the Consent Terms were taken on record submitted in court that he was acting on the instructions of Mr. Hadi and had not met Respondent Nos. 2 and 3 prior thereto.

(iv) Mr. Hadi, the erstwhile advocate of behalf of Respondent Nos. 2 and 3 who had instructed Mr. Deepak Gautam to appear when the Consent Terms were filed has admittedly accepted monies from the Applicant. When called to this Court and asked to explain and justify such payments, he claims these payments were made on instructions of Respondent Nos. 2 and 3. To say the least, something is amiss.

(v) Respondent No. 2 has also filed an FIR inter alia against the Applicant and Mr.

Hadi for cheating, breach of trust and forgery. In this respect, Mr. Hadi also admits to have gone to jail for 5 months. Several serious allegations of fraud and forgery are made in this FIR.

46. In these circumstances, Respondent Nos. 2 and 3's absence is a material factor in testing the Consent Terms.

47. We also note that to the naked eye the signature on the Consent Terms (23rd October, 2015) appears to be different from the signature of Respondent Nos. 2 and 3 on the Sale Deed for the Room dated 20th April, 2016. We have referred to these two documents only because they have been executed around the same time. In any event, our view is not influenced by this aspect at all.

48. Prima facie, the Consent Terms do not appear to be genuine for all of the aforesaid reasons. Hence, the question of enforcing the Consent Terms in this Petition does not arise.

49. However, we are cognizant of the fact that Criminal Case No. 72/PW/2006 file pursuant to Respondent No. 2's F.I.R is pending before the 71st Metropolitan Magistrate Court pertaining to forgery, cheating, criminal breach of trust and other like offences by the Applicant and Mr. M.S. Hadi. We therefore do not wish to render any conclusive finding which may have a bearing on any criminal proceeding.

50. Respondent Nos. 2 and 3 are at liberty to file appropriate proceeding challenging the veracity and correctness of the Consent Terms and the Order dated 25th October 2015. This is not to mean that this must be done.

51. Accordingly, the Contempt Petition stands dismissed. The Applicant shall pay costs in the sum of Rs.50,000/- to Respondent Nos. 2 and 3 within a period of 2 weeks from today. In view thereof, Interim Application No.795 of 2022 also stands dismissed.

52. We would like to conclude by expressing our appreciation to Shri Rashmin Khandekar, the Learned Amicus Curiae who assisted us in this matter.

**( MILIND N. JADHAV, J. )** **( S.J.KATHAWALLA, J. )**