
(2002) 10 CAL CK 0020

Calcutta High Court

Case No: F.M.A.T. No. 3995 of 2001

Bhaskar Aditya

APPELLANT

Vs

Smt. Minati Majumdar
and Others

RESPONDENT

Date of Decision: Oct. 10, 2002

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2, Order 40 Rule 1, 107
- Contract Act, 1872 - Section 202, 204
- Specific Relief Act, 1963 - Section 14(3)
- Transfer of Property Act, 1882 - Section 53A

Citation: AIR 2003 Cal 178 : (2003) 2 CALLT 463 : (2004) 1 CTLJ 76

Hon'ble Judges: Joytosh Banerjee, J; Dilip Kumar Seth, J

Bench: Division Bench

Advocate: S.N. Mukherjee, Harish Tandon and Rajesh Upadhyay, Saktinath Mukherjee and Chameli Majumdar, for Intervenors Group I and Chandranath Mukherjee, for Intervenors Group-II, for the Appellant; Dipak Basu, N.K. Nandy and L.K. Mondal, (for Nos. 1 to 5), S.P. Roychowdhury and S. Nandy, (for Nos. 6 to 8) and Nirmal Mitra, (for No. 13), for the Respondent

Final Decision: Allowed

Judgement

D.K. Seth, J.

This Miscellaneous appeal arises out of an order No. 24 dated 11th October, 2001 passed by the Learned Assistant District Judge, 2nd Court at Barasat, North 24-Parganas in Title Suit No. 66 of 2000, rejecting the application for appointment of receiver under Order 40, Rule 1 of the CPC (CPC) on contest.

The History :

2. This suit has been filed by the plaintiffs (Respondent Nos. 1 to 5) for partition and injunction as against the defendant Nos. 1 to 12 (Respondent Nos. 6 to 17) alleged to be the co-sharers and the defendant No. 13 (Appellant), the developer. The developer had entered into an agreement for development in respect of the property with the defendant Nos. 1, 2 and 3 (Respondent Nos. 6, 7, 8). These defendants are claiming to be the exclusive owners of the suit property. In the suit on the prayer of the plaintiffs, the Learned Trial Court upon an application for injunction passed an order of maintaining status quo in respect of the nature and character and possession of the property. The defendant No. 13, appellant, and the defendant Nos. 1, 2 and 3 had filed application for vacating the interim order under Order 39, Rule 4, CPC. These applications are pending. At this stage, the defendant No. 13 filed an application under Order 40, Rule 1, CPC, for appointment of receiver. By an order No. 19 dated 14th August, 2001, the Learned Trial Court rejected the said application on the ground of subsistence of the interim order of status quo. Against the said order, an appeal being F.M.A.T. No. 2809 of 2001 was preferred. This Court by an order dated 7th September, 2001 disposed of the said appeal and directed re-hearing of the application under Order 40, Rule 1, CPC on merit. Thereafter, the matter was again heard out by the Learned Trial Court. By order No. 24 dated 11th October, 2001, the application for receiver was rejected. It is this order against which the present appeal has been filed. In the meantime, the defendant No. 13 had applied u/s 9 of the Arbitration and Conciliation Act before this Court. In the said proceeding being A.P. No. 207 of 2000 (G.A. No. 2813 of 2000) some clarification was made with regard to the interpretation of the order of status quo permitting the defendant No. 13 to carry on the construction. This, however, was reversed on appeal. Thus, the order of status quo is still continuing.

2.1 The Learned Trial Court had rejected the application for appointment of receiver principally on the ground that the developer is not a co-sharer in the suit property and no relief has been sought for against him. As such stranger, the defendant No. 13 is not entitled to any relief in the suit for partition, His remedy is available in the specific performance of the contract. Appointment of receiver would complicate the issues,

2.2 An application for intervention was filed on behalf of a group of buyers, who had entered into an agreement for purchase with the developer and had already been given possession of the flats constructed on the suit property. However, no conveyance has been executed in their favour. This group of purchasers is represented by Mrs. Chameli Majumdar and Mr. Saktinath Mukherjee. This application for intervention has since been allowed by this Court by an order dated 16th September, 2002. Mr. Chandranath Mukherjee, appears on behalf of another group of buyers, who had also applied for intervention. He was allowed to make his submission at the time of hearing. This application for intervention is decided along with the appeal.

2.3 In connection with the appeal, an application for appointment of receiver has since been made. This application was appearing in the List. In connection with these applications, Mr. Saktinath Mukherjee sought to intervene, which was allowed. There was

already an order by this Court passed on 6th February, 2002 for hearing of the appeal along with this application. By consent of the parties, the application for appointment of receiver and the appeal are taken up for hearing together, treating the same as on day's list for hearing, though, appearing for orders. The learned Counsel representing the respective parties had address the Court on the merit of the appeal. In course of hearing, the application for intervention moved by Mr. Chandranath Mukherjee is allowed.

Facts :

3. Now we may briefly refer to the facts of this case. The defendant Nos. 1, 2 and 3 representing themselves as the owners of the suit property had entered into an agreement for development with the defendant No. 13, on 9th November, 1994 and had executed a Power of Attorney. In the said agreement, the developer was empowered to apply for amalgamation of the two properties and obtain sanction of plan on the amalgamated property. Pursuant to the Power of Attorney granted, the defendant No. 13 (developer) succeeded in obtaining amalgamation of the two plots and had obtained sanction of the plan for construction on the amalgamated plot. Pursuant to such agreement, the developer had floated a scheme for development and invited intending buyers for purchase of flats according to the scheme of the development since specified in the brochure. Some of the blocks have already constructed. The members of the two groups of intervenors had entered into agreements for purchase of the respective developed flats. Some of them had already got possession of such flats. Some are yet to get possession. There are some buyers the construction in respect of whose flats have not yet started, Subsequently, three separate agreements, all dated 15th of April, 1998, were executed by and between the developer and the defendant Nos. 1, 2 and 3 comprising of an area of 29 cottahs of land out of the suit property specified in the respective agreements comprising of Blocks G, C and E as specified in the sanctioned plan. In view of the interim order of status quo, no construction could be undertaken by the developer. The interest of the buyers who had entered into an agreement for purchasing flats are suffering because of this stalemate created on account of the interim order passed in and the suit between the co-sharers.

3.1 The defendant Nos. 1, 2 and 3 had been claiming absolute title to the entire property. They are denying that the plaintiffs had any title or interest or are co-sharers in the suit property. But the fact remains that the defendant Nos. 1 to 8 have filed their joint written objection to the application for receiver.

Submission on behalf of the Appellant:

4. On behalf of the appellant, it is contended that the subsistence of order of status quo does not debar the Court from passing appropriate order for appointment of receiver, if it is found just and convenient. According to him, having regard to the facts and circumstances of the case, a receiver ought to have been appointed by the Learned Trial Court. It is not necessary that in order to obtain an order or appointment of receiver in a

suit for partition, the applicant must satisfy the characteristic of a co-sharer, Even a stranger can seek appointment of receiver, if it is just and convenient. To support his contention, Mr. Tandon referred to the decisions in [S.B. Industries, Freegunj and Another Vs. United Bank of India and Others](#), ; Sree Venkataramana Temple Board v. C. Manjunatha Kamath AIR 1974 Kar 59 (Para 4) and [Industrial Credit and Investment Corporation of India Ltd. and Others Vs. Karnataka Ball Bearings Corpn. Ltd. and Others](#), .

Submission on behalf of the Respondents/Plaintiffs :

5. Mr. Basu appearing on behalf of the plaintiffs supported the application for appointment of receiver filed by the defendant No. 13. Mr. Basu had also expressed his clients' intention, on instruction, that the plaintiffs are not against the construction of the building according to the development agreement and transfer thereof to the intending buyers so far as the developer's shares are concerned. His clients stake their claim only in respect of their share in the owners' share claimed by the defendant Nos. 1, 2 and 3. According to him, defendant Nos. 1, 2 and 3 jointly have 1/5th share and the rest belong to the plaintiffs and the defendant Nos. 4 to 12. The respective shares have been specified in Paragraph 15 of the plaint. He had made it clear that his clients are not against the development. They only insist upon getting their due shares in the owners' portion of the developed property.

Submission on behalf of the Defendant No. 8/Respondent:

6. Mr. Nirmal Mitra appearing on behalf of the defendant No. 8, Sunil Kumar Sarkar, supports the plaintiffs and the developer and also claimed interest in the owners' share of the developed property.

Submission on behalf of the Intervenor-s :

7. Mr. Saktinath Mukherjee appearing on behalf of the intervenors points out that none of the parties to the suit have ever objected to or raised any objection in the matter of construction of the flats or delivery of possession thereof. His clients have parted with their money on the basis of representation made by the respective parties expressly or impliedly. His clients have changed their position and, therefore, the parties to the suit are estopped from denying the rights of the intervenors. He had contended that in such a circumstance, a receiver should be appointed with the power not only to complete the construction but also to convey the title by executing conveyance in their favour. The subsistence of the interim order does not debar the Court from appointing receiver. These questions have since been upheld by this Court in the earlier appeal. This judgment binds the parties. Therefore, this question cannot be raised once again. Next he contends that the order of injunction does not bind the Court. The receiver is an officer of the Court. Therefore, such order does not bind the receiver. The developer can also be appointed as receiver. To support his contention, he relied on the following decisions ; Ishwara

Joisha v. Saraswathi Amma AIR 1959 Mys 35 ; [Ravi Lakshmaiah Vs. Nagamothu Lakshmi and Another,](#) ; [Nirmal Kumar Moulik and Others Vs. Sm. Champabala Roy and Others,](#) ; AIR 1952 253 (Nagpur); [Indrapuri Studio \(p.\) Limited Vs. Sm. Shanti Debi and Others,](#) ; [Brig. Sawai Bhawani Singh Vs. M/s. Indian Hotels Company Ltd. and others,](#) ; [S.J. Chaudhri Vs. Vantage Construction Pvt. Ltd. and Others,](#) ; [Satyanarayan Nathany and Others Vs. Union of India \(UOI\),](#) ; Malay Kumar Bera v. Rabindranath Bera (1977) 1 CLJ 92 and [Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat,](#) .

7.1 Mr. Chandranath Mukherjee, learned Counsel for the other group of intervenors, adopted the argument made by Mr. Saktinath Mukherjee and supported the appointment of the receiver for the purpose of completing the construction and transferring ownership in their favour.

Submission on behalf of the Defendant Nos. 1, 2 and 3/Respondents :

8. Mr. S. P. Roychowdhury appears on behalf of the defendant Nos. 1, 2 and 3. These respondents have no grievances if the order of status quo is vacated and the agreement for development is carried on. But his main objection was with regard to the claim of title or interest in the suit property as raised by the plaintiffs in the plaint. He claimed exclusive title to the property on behalf of the defendant Nos. 1, 2 and 3. According to him, the developer cannot claim any right to convey the title of the property until the suit is decided, i.e. the title is asserted. The developer is only an agent of the defendant Nos. 1, 2 and 3. Therefore, the developer cannot claim any interest adverse to these defendants. He referred to Sections 182, 212, 215 and 230 of the Contract Act.

8.1 The original agreement, entered into on 9th November, 1994, and all other subsequent agreements and Power of Attorney, were respectively cancelled and revoked with the execution of the three agreements dated 15th April, 1998. Therefore, the developer has to confine only to the extent of his right as specified in the said three agreements. By reason of such agreement, the developer is entitled only to construct on the said 29 cottahs of land. He cannot claim interest in the balance area of the land. Therefore, he was required to obtain a modified plan for making such construction on the said 29 cottahs of land. The construction that has been made pursuant to the earlier plan is wholly illegal and invalid and as such if the title is conveyed then the owners would be liable for the defects, but the developer would be exonerated.

8.2 He has also pointed out to various materials to show that the plaintiffs have not been able to make out any prima facie case. The property stands in the name of the predecessor in the interest of his clients. There was a suit for partition being Title Suit No. 272 of 1985 between the parties. The said suit was dismissed for non-prosecution at the instance of the defendant No. 8 pursuant to a settlement endorsed by the defendant No. 1 with no objection. By reason of this dismissal of the suit, the rights of the defendant Nos. 1, 2 and 3 have since been admitted as exclusive owner of the entire property by the other parties.

8.3 Even if the co-sharers have any interest in the property, the same can be satisfied from the remaining part of the property on which no construction is made. In case the remaining part falls short of the share of the plaintiffs and the other co-owners/defendants, then the same can be compensated by owelty money. In any event, there being no agreement for development between the other parties and the developer, they cannot claim any right in the said part of the property comprising of the 29 cottahs of land subject-matter of the three agreements.

8.4 The developer's remedy is through specific performance or by a suit for damages but not by way of appointment of a receiver in a partition suit where he has the status only that of an agent of the defendant Nos. 1, 2 and 3. There cannot be any order for sale by the receiver when there is no dispute with regard to the title. If sale is permitted, it would amount to waste and dissipation of the property. The Court cannot make a separate agreement for the defendant No. 13. He relied on the decision in [Southern Roadways Ltd., Madurai Vs. S.M. Krishnan](#), where it was held that the agent cannot claim any right as agent against the principal.

8.5 There being no default on the part of the defendant Nos, 1, 2 and 3, who are still ready and willing to perform their part of the contract, the developer cannot claim any right against these defendants. He relied on Section 12 of the Specific Relief Act (SR Act) in support of his contention. In view of the hardship, the ad interim order may be varied.

8.6. An order under Order 39. Rule 1, CPC cannot be set aside, when such order is not challenged by way of appeal, in an, appeal arising out of an application under Order 40, Rule 1, CPC even collaterally. He referred to [Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another](#); Bepin Krishna Sur v. Gautam Kumar Sur, 85 Cal WN 393 (Paras 10 and 14) followed in Phani Bhusan Dey v. Sudhamoyee Roy, (1987) 91 Cal WN 1078 (Para 9).

8.7 On these grounds, he opposed the appointment of receiver and prayed for dismissal of the application and the appeal.

Reply on behalf of the Appellant :

9. Mr. S. N. Mukherjee, learned Counsel appearing on behalf of the appellant along with Mr. Tandon in reply contended that when the title is now disputed, the appellant cannot seek specific performance of the agreement as against the defendant Nos. 1, 2 and 3 since defendant Nos. 1, 2 and 3 would not be the exclusive owners of the property until declared by the Court in the partition suit, from the materials whereof it is apparent that the claim of the plaintiffs and the other defendants cannot be thrown out altogether. The remedy by way of arbitration as provided in the agreement also cannot be had by reason of the interest claimed by the other co-owners of the defendant Nos. 1, 2 and 3. At the same time, the developer had acquired interest in the property by virtue of his investment and construction. At the same time, third party interest is also created by reason of the

development agreement with the intending buyers. As such it is a case fit for appointment of receiver so as to honour the development agreement in terms of the scheme as stipulated in the brochure.

9.1 The developer has entered into a contract for construction and had performed major part of the contract to be performed by him, namely, by obtaining amalgamation of the plots and the sanction of the plan on the amalgamated plot and had made construction and floated a scheme and entered into agreements for sale of flats with intending buyers, namely, the intervenors to which none of the parties had objected to. By reason of Sections 202 and 204 of the Contract Act, the developer's right as agent cannot be denied. He has also referred to Section 53-A of the Transfer of Property Act as well as Section 14(3)(c) of the SR Act to support his contention. The order of status quo will not prevent this Court from giving appropriate direction to the receiver for completion of the development in terms of the brochure and the agreements already subsisting.

9.2 He pointed out that Mr. Roychowdhury insisted on clause C(vi) of the agreements dated 15th April, 1998. But this Clause (vi) is not a term of the contract. It is a representation made by the defendant Nos. 1, 2 and 3. On the other hand, even in the representation, Blocks G, C and E have been saved together with the existing agreements entered into by the developer with the in-lending buyers and that the terms do not contain any condition that the earlier agreement or Power of Attorney shall stand revoked.

9.3 A receiver in a partition suit holds the property on behalf of all the parties and for their benefit. In the present case, admittedly, all the contenders claiming interest in the property are before the Court. In case the property is not developed, at this stage it would amount to waste and dissipation of the property. Having regard to the peculiar facts and circumstances of the case, it is just and convenient to appoint a receiver to protect the interest of the parties concerned.

10. We have heard the respective Counsel at length, They have raised interesting questions of law in the process. The question to be determined is as to whether in the given facts, it is just and convenient to appoint a receiver.

Appointment of Receiver at the instance of stranger :

11. Order 40, Rule 1, C. P. C. empowers the Court to appoint a receiver when it is just and convenient. It has not prescribed any criteria for the purpose of appointment, of receiver. The Court can appoint receiver whenever it appears to the Court to be just and convenient. In a suit for partition, it is immaterial whether the application is made by the co-owners or by a stranger. If the question is brought before the Court, it is for the Court to consider whether it is just and convenient to appoint a receiver. The appointment of receiver is conceived for the purpose of management of a property and saving it from being wasted or dissipated, protecting the interest of the respective parties. If it is

necessary for the purpose of protecting the interest of the respective parties, if there are materials before the Court to come to the conclusion that it is just and convenient, the Court has every right to appoint a receiver. In *Sree Venkataramana Temple Board of Education, Karkala v. C. Manjunatha Kamath* AIR 1974 Kar 59(Para 4), it was held that even a stranger can apply for appointment of receiver. After having gone through the reasoning given in the said decision we do not find any reason to differ from the same and we adopt the same reasoning in this case.

11.1 The decisions in *Ishwara Joisha v. Saraswathi Amma* AIR 1959 Mys 35 ; [Ravi Lakshmaiah Vs. Nagamothu Lakshmi and Another](#), and [Nrimal Kumar Moulik and Others Vs. Sm. Champabala Roy and Others](#), cited by Mr. Saktinath Mukherjee, lay down the proposition that upon an application for injunction, it is open to the Court to appoint receiver even suo motu. In AIR 1952 253 (Nagpur) , cited by Mr. Saktinath Mukherjee, it was held that, the Court can appoint receiver at the instance of a non-party provided protection and preservation of the property is necessary.

Status of developer : Interest of developer :

12. That apart, the Court cannot be oblivious the development in the society and the life of the mankind. Law must suit the necessity of the society and follow the development and changes in order to do justice, Sheer technicalities cannot stand in the way. The concept of apartment ownership has now since developed and is an established proposition. It is an advance form of joint ownership or co-ownership of a property. The partition means a partition with metes and bounds having nexus to the land. The partition used to mean division of the land as well. If the land is not divisible by metes and bounds, any division of the structure would used to be regarded as joint ownership or co-ownership. But with the paucity of land in urban areas multi-storeyed buildings have come up, where division of land is not feasible. The concept of apartment ownership has come into being with proportionate share in the land occupying defined portion of a building, comprising of a flat together with right to enjoy the common areas and common facilities, without being joint owners or co-owners/sharer. With the advent of this concept following the necessity of the society and the economic development, development schemes are being undertaken. A group of promoters had come up as developers of such schemes where the owners of the land are unable to venture to undertake the development of their land on account of various reasons, namely, paucity of funds or absence of expertise etc. When such development agreement is entered into between the owners and the developers, the developers by reason of such development agreement are not mere agents, of the owners. Inasmuch as by reason of such development agreement, the developer apart from being an agent of the owners, acquires an interest in the property and does not remain a stranger to the property.

12.1 The development agreement is a kind of assignment of interest in the property somewhat similar to an agreement for sale. The impact of Section 53-A, T. P. Act in a case where possession is delivered, is yet to be examined. Therefore, it cannot be denied

that the developer, though a stranger, has acquired interest in the property after the development scheme is undertaken.

12.2 When the owner enters into an agreement for development with a developer, the development undertaken by the developer is definitely that of the owner through the developer, who is also an agent as well. By reason of such development agreement as agent of the owner, the developer acquires an interest in the property being subject-matter of development and agency, by reason of Section 202 of the Indian Contract Act, 1872 (Contract Act), An agency, in which the agent acquires interest in the property being the subject-matter of the agency, cannot be terminated to the prejudice of such interest of the agent in the absence of an expressed contract.

12.3 In the present case, admittedly, the developer is an agent. By reason of the development agreement, the developer has acquired an interest in the property. u/s 204 of the Contract Act, a principal is precluded from revoking the authority given to the agency, once the agent has partly exercised such authority, in respect of action/ obligation arising from acts already done in the agency. In other words, after the agent exercises the authority conferred upon him by the principal in part and by reason of such acts so done, some obligations do arise, then the principle cannot terminate the agency. In the present case, the developer has succeeded in obtaining amalgamation, of the plots, obtained sanction of the plan, prepared a scheme for development, pursuant to such scheme he had entered into agreements for sale of flats to the intending buyers. He had also constructed some of the buildings and delivered possession to some of such intending buyers. He is obliged to provide for the facilities provided in the scheme. He is obliged to such intending buyers, to perform those parts of the acts, which were conferred upon him. Therefore, in such a situation the principal is precluded from revoking such contract. In *Smart v. Sanders* (1848) 5 CB 895 approved in *Taplin v. Florence* (1851) 10 CB 744 repeated in *Clerk v. Laurie* (1857) 2 H & N 199 adopted in *Carmichael's case* (1896) 2 Ch 643, it was held "that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such authority is irrevocable",

12.4 The developer has acquired a right of specific performance of the contract under the provisions of Section 14(3)(c) of the SR Act. Prima facie it appears that the fact of this case satisfies the requirement of the said Section in favour of the developer.

Third party interest vis-a-vis estoppel :

13. At the same time, the intending buyers have also acquired interest in the property. Original agreement was entered into on 9th November, 1994, The subsequent agreements on which Mr. Roychoudhury had been banking upon were entered into on 15th April, 1998. The parties to the partition all along were aware of the agreement. Even the parties to the partition suit in Title Suit No. 272 of 1985 of the Alipore Court were also aware of the agreement. One of the parties, Sunil Sarkar, had settled his interest with the

developer and got the suit dismissed for non-prosecution sometimes after March 1997. Sri Tarun Sarkar, the defendant No. 1, respondent, had endorsed no objection in the said dismissal of the suit. The existence of the agreement is also pleaded in the plaint of this suit. None of the parties had denied knowledge about the agreement. The development of the property was being carried on quite for sometime. The parties had allowed the developer to develop the property and raise the construction. Three of the blocks are already constructed. The floating of the scheme got due publication. It was not a secret affair. None of the parties plead ignorance of the scheme. Some of the intending buyers have also been given possession. It is also pleaded that some of the parties are residing in the property. Thus, the parties had allowed the developer to make the construction and the intending buyers to enter into agreement for purchase with the developer. Even in course of heaping, none of the parties opposed the development of the property by the developer. None of the parties had objected to the creation of third party-interest viz. that of the developer and the intending buyers. .

13.1 Now the question arises as to whether the defendant Nos. 1, 2 and 3 can oppose the development pursuant to the agreement. The fact remains that the parties had allowed the construction to be carried on for such a long time and were idle onlookers. The defendant Nos. 1, 2 and 3 admitted receipt of payment on account of sale pursuant, to the agreement with the developer (Page 151 of the main Paper Book), The defendant Nos. 1, 2 and 3 and 4 to 12 have applied for vacating the interim order. It is only the plaintiffs who have obtained the order of status quo. Now the plaintiffs are not interested in the order of status quo. By reason of their conduct, they had tempted the developer and the intending buyers to change their position and invest money in the development and acquire interest in it. On behalf of the plaintiffs, Mr. Basu has contended that his clients have no objection with regard to the development of the property. His clients only claim interest in the owners' share in the developed property. Mr. Nirmal Mitra, representing defendant No. 8, Sunil Sarkar, also expressed that his client has no objection to the development of the property. His client claims share in the owners' portion of the developed property. The defendant Nos. 4 to 12 have not contested the case before this Court. The defendant Nos. 1, 2 and 3 also have no objection to the development. But they claim exclusive interest in the owners portion in respect of the 29 cottahs of land, and contends that even if the plaintiffs and the defendant Nos. 4 to 12 have any interest in the property, then the same can be satisfied out of the remaining part of the land and by owelty money, as the case may be. Therefore, the parties are estopped from raising any objection to the development.

Prima facie case :

14. The dispute is with regard to the entitlement to the benefit derived from the development. The defendant Nos. 1, 2 and 3 are claiming exclusive interest in the benefit arising out of the development of the entire property. The other defendants and the plaintiffs are claiming interest in the suit property, as co-sharers confining the interest of the defendant Nos. 1, 2 and 3 to 1/5th share. Then again the defendant Nos. 1, 2 and 3

had filed a joint objection along with the defendant Nos. 4 to 8. Thus, it is apparent that all the parties had allowed the development to continue and permitted the developer to carry on the development including creation of third party interest viz. of intending buyers. At the same time, a joint objection by defendant Nos. 1 to 8 show that the defendant Nos. 1, 2 and 3 had accepted that there is no interest adverse to theirs between themselves and defendant Nos. 4 to 8 and vice versa. In other words, by implication, the defendant Nos. 1, 2 and 3 are admitting the shares of the defendant Nos. 4 to 8.

14.1 The property was originally purchased by two brothers in their own name. But while disposing of a part of the property, these two brothers had admitted that the property was purchased for the benefit of four brothers out of a partnership fund and, therefore, the other two brothers, who were not parties to the original deed of purchase, were required to sign the conveyance disposing of part of the property as attesting witnesses. In a suit for eviction, they had also admitted that the property was a joint property. The documents are all more than 30 years old and are an admission by the predecessor in interest of the defendant Nos. 1, 2 and 3. The defendant Nos. 1, 2 and 3, therefore, are bound by such admission and cannot question it.

14.2 However, Mr. Roychowdhury contends that this admission was negated in the ejectment suit holding that the other two brothers were not owners of the property. But this contention does not help Mr. Roychowdhury in the facts and circumstances of the case. Inasmuch as, the decision that will operate as *res judicata* would be related to the issue decided in the ejectment suit. The issue was between plaintiffs and the tenant who was disputing the ownership of the other two brothers. Such a decision would not bind the plaintiffs *inter se* in a suit for partition. There was no issue, in between the four brothers with regard to the ownership of the property determined as between themselves to operate as *res judicata* against one or the other. In any event, the ownership in a suit for ejectment on the ground of reasonable requirement is distinct and different from ownership relating to the title to the property for the purpose of partition. In an ejectment suit, the owner may not be the real owner having title to the property. The term "owner" therein relates to the ownership in between the landlord and tenant for the purpose of maintaining a suit for ejectment on the ground of reasonable requirement. A finding therein in between the landlord and tenant does not bind the real owner or affect the title of the parties to the property as between plaintiffs themselves claiming to be the landlord. Therefore, the decision in the said ejectment suit does not affect or bind the parties so far as the partition suit is concerned. On the other hand, the ratio in the ejectment suit that would bind the plaintiffs would be the ratio of the admission of the plaintiffs themselves that the property was a joint property. Thus, it appears that there were sufficient materials to show that there is *prima facie* case to substantiate that the property is a joint property of the parties.

14.3 Since Title Suit No. 272 of 1985 was not disposed of on merits deciding any issue, the dismissal thereof for non-prosecution would not bind the parties to sue for partition in this suit. The said dismissal does not purport to extinguish the right of the parties except

that of the said Sunil Kumar Sarkar, who himself had admitted to have satisfied in respect of his share in the property which has not been objected to by the defendant Nos. 1, 2 and 3 represented by Mr. Tarun Sarkar signifying no objection. This no objection puts a seal of recognition of the interest of Sunil Sarkar in the property to obtain a settlement from the developer beyond the Interest of the said defendant Nos. 1, 2 and 3, namely, outside 32% of the developed flats in the said 29 cottahs of land. Thus, also it cannot be claimed that the defendant Nos. 1, 2 and 3 are the exclusive owners of the property at least prima facie since the property prima facie appears to be a joint property,

Status of the interim order of status quo :

15. The defendant Nos. 1 to 8 have also filed an application under Order 39, Rule 4, C. P. C. for vacating the interim order. Therefore, the defendant Nos. 1, 2 and 3 and the defendant Nos. 4 to 8 cannot object to the vacation of the interim order and continuation of the development of the property. Mr. Basu had agreed, on instruction, to submit that his client does not oppose the development of the property. His clients support the appointment of receiver. The interim order was obtained by the plaintiffs. As soon the plaintiffs support the appointment, of receiver and the continuation of the development and claims interest in the developed property, by implication they express that they are no more interested in pressing the interim order. Ultimately Mr. Roychowdhury had confined his claim to the owners" portion in respect of the 29 cottahs of land. Mr. Basu claims equal interest according to the respective share of his clients even on the construction made on these 29 cottahs of land. But this seems to be a contradictory stand taken by the parties, affecting the rights of third parties as well as affecting their own rights. Inasmuch as, when the parties are not interested in the land and are interested in the development of the land and the usufructs of such development, then there is no scope of continuation of the interim order. On the other hand, it is for the benefit of the parties themselves, the development should proceed. The only thing that is to be seen, is as to how the interest of the respective parties can be protected. The plaintiffs or the defendant Nos. 4 to 12 cannot claim any interest in the portion comprising of 29 cottahs covered by the said three agreements between the developer and the defendant Nos. 1, 2 and 3, since they are not parties to it. Prima facie it appears that the plaintiffs and the defendant Nos. 4 to 12 are also co-sharers in the property, Their interest can be protected, fulfilled and satisfied from the remaining portion of the land. If it falls short of their share, then it can be compensated by owelty money. But these are questions to be decided after the ultimate decision is arrived at in the suit.

15.1 Mr. Saktinath Mukherjee, learned Counsel, had argued that this Court can vacate the ad interim order and had relied on various decisions to support his contention. But all these decisions related to the exercise of jurisdiction by the High Court either u/s 115, C. P. C. or under Article 227 of the Constitution of India. While sitting in appeal against a particular order, this Court cannot exercise such jurisdiction, which permits this Court to travel beyond the scope of the appeal itself. This appeal is confined to the order appealed against. This Court cannot stretch the scope of the appeal to anything beyond the order

appealed against taking aid of Section 105 or 107, C. P. C. Inasmuch as, the provisions of Section 105, C. P. C. are available to the Court only in respect of an appeal against a decree, if there is any error, defect or irregularity in any order affecting the decision of the case. Whereas Sub-section (2) of Section 105, C.P.C. makes an exception in respect of an order of remand, if no appeal is preferred against such order of remand. The ad interim order is an interlocutory order and it merges with the decree and subject to vacation under Order 39, Rule 4, C. P. C. Therefore, in an appeal against some other order, such question cannot be attracted u/s 105, C.P.C. That apart, an order under Order 39, Rule 1 and 2, C. P. C. refusing grant of ad interim order is also appealable under Order 43, Rs. 1(r), C. P. C. Since no appeal has been preferred, the ad interim order cannot be dealt with by the Court in a miscellaneous appeal against a different order though arising out of the same proceeding or suit.

15.2 The scope of Section 107, C. P. C. providing the same jurisdiction in the Appellate Court as conferred on Courts of original jurisdiction in respect of suits, yet those are to be exercised in connection with the appeal. The scope of such appeal is confined to the order appealed against within which the Court can apply and exercise its jurisdiction u/s 107, C. P. C. Section 107, C. P. C. does not empower the Court to stretch its jurisdiction beyond the scope of the appeal viz. the order appealed against. This Court cannot suo motu vacate the interim order in this appeal, which is not subject-matter of the appeal, unless consented to by the parties recording their concession that they do not want to press the application for injunction or ask this Court to vacate the interim order even in this appeal. It can be done so by the parties by their consent if all of them are present before the Court. In this case, though the parties are present before this Court and are also agreeable to get the interim order vacated, but they are not expressly conceding to it, enabling the Court to record the concession of the parties. Therefore, this Court cannot vacate the interim order granted by the Learned Trial Court.

15.3 Having regard to the facts and circumstances of the case and for the purpose of facilitating the object and purpose of appointment of receiver, it is desirable that the interim order should be vacated. Even if so desirable by this Court, still then this Court cannot deal with the interim order and vacate the same. The Court can only record an observation that if the parties or any of them are so interested, they may approach the Learned Trial Court with a copy of this order, and if so approached, the learned trial Court shall pass appropriate order to facilitate the functioning of the receiver appointed hereby and for advancement of the purpose and object, the receiver has to undertake. The learned trial Court can vary or modify any interim order in course of disposing of an application under Order 40, Rule 1, C. P. C. Inasmuch as, injunction and receiver are related to and are complementary to each other. The object and purpose of the interim order is to protect the interest of the parties. The object of appointment of receiver is also to protect the interest of the parties. When there is no conflict in between the two, the same are to be reconciled and one may supplement the other. The interim order could be varied or modified to the extent according to the need of the hour. In these

circumstances, if any of the parties including the developer approaches the Trial Court with a xerox copy of this order, the Learned Trial Court shall immediately take up the interim injunction matter and pass appropriate order so as to facilitate the object and purpose of the appointment of receiver to continue with the development work according to the development scheme and the terms provided in the brochure and other relevant documents, particularly, in respect of which third party interest is purported to be created.

15.4 The decision in [Satyadhyay Ghosal and Others Vs. Sm. Deorajin Debi and Another, , Bepin Krishna Sur and Others Vs. Gautam Kumar Sur and Others](#), followed in Phani Bhusan Dey v. Sudhamoyee Roy (1987) 91 CWN 1078 (Para 9) supports the contention that the Appeal Court cannot deal with matters which are outside the scope of the appeal.

The right of the developer to develop :

16. The question that in the absence of any agreement with the co-owners, the developer cannot develop the property except the portion covered under the said three agreements dated 15th April, 1998, does not seem to be of any consequence, when the plaintiffs and the defendant Nos. 4 to 12 has no objection to the development. Particularly, when the defendant Nos. 4 to 8 who had joint defendant Nos. 1 to 8 in the application for vacating the interim order. At the same time, all these parties had allowed the development scheme to be published and undertaken and are also Interested in the development. Thus, by implication, they have adopted the agreement for development and are supporting it claiming interest only in the owners" portion secured by the development agreement. It has been specifically pointed out that the 68% of the developed area is the consideration for the development undertaken by the developer. The remaining 32% of the developed flats are earmarked for the owners. No one has disputed about the apportionment of the developer"s share and the owners" share on the ratio of 68 : 32. Therefore, there is no question of continuance of the development of the entire property by the developer pursuant to the agreement dated 9th November, 1994 according to the scheme floated after such a stand taken before this Court by the parties.

Developer"s remedy? :

17. In course of his submission, Mr. Roychowdhury had pointed out that the developer cannot ask for appointment of receiver. His right is in a suit for specific performance or damages. At the same time, he submitted that the defendant Nos. 1, 2 and 3 have not defaulted in the performance of the part of the contract to be performed by them. His clients are still ready and willing to perform their part of the contract. Therefore, the developer cannot ask for relief as against the defendant Nos. 1, 2 and 3 and, therefore, no receiver can be appointed. His submission appears to be fallacious. Inasmuch as if he is ready and willing to perform his part of the contract, when the developer is always ready and willing to perform his part of the contract, there is no necessity of a suit for specific performance and the contract can be performed mutually between the parties. Therefore, Mr. Roychowdhury cannot oppose the continuance of the development of the

property. At the same time, the plaintiffs and the defendant Nos. 4 to 12 have an interest in the property. Apart from implied consent, concurrence and adoption of the development agreement, there is no direct contract between them and the developer.

17.1 Mr. Roychowdhury had also contended that in case of hardship, the injunction may be varied. He had further referred to Section 12 of the SR Act and contended that the specific performance of a part of contract cannot be directed by the Court except the cases enumerated therein. In order to support this contention, he contended that the developer cannot perform the balance part of the development except 29 cottahs by reason of these subsequent three agreements dated 15th April, 1998 whereby, all earlier agreements were cancelled and Power of Attorneys were revoked. But this contention does not find support from the facts. Inasmuch as clause C(vi) of the agreement dated 15th April, 1998 on which Mr. Roychowdhury had banked upon, is only a recital part of the agreement where the representation made by the defendant Nos. 1, 2 and 3 have been reflected. This part is not included in the part containing the terms and conditions of the contract. In order to be a term and condition of the contract, the terms and conditions must be agreed upon between the parties. There must be an ad idem, From the terms and conditions of the said agreement dated 15th April, 1998, it does not appear that this representation had formed part of the terms and conditions of the contract. On the other hand, Clauses 1.1, 2.1, 2.3, 3.1, Sub-clauses (c), (d) of Clause 4.2, 7.1 and 8 clearly Indicate the development process of the entire property. In Clause 13.2, right to sue of specific performance for damages is provided for only in case of default. There being no default, Clause 13.2 cannot be attracted. At the same time, Clause (C)(vi) saves the existing agreement between the developer and the intending purchasers of flats in respect of Blocks C, E and G respectively. This agreement proceeds on the basis of the development scheme, . which contains the facilities of swimming pool and other developed areas, which are specifically enforceable by the intending buyers in terms of their agreement with the developer. When it is so saved, the right of development of the developer cannot be confined only to these 29 cottaha of land, particularly, when the parties other than defendant Nos. 1, 2 and 3 are interested in it and are eager for the development of the rest of the land.

17.2 As already held, the arbitration clause provided in the agreement will not help the developer and that there is no scope for suit for specific performance and damages in the present case and, therefore, the right of the developer to seek appointment of receiver cannot be disputed or denied, if it seems to be just and convenient to the Court.

17.3 Therefore, the Court feels that it is just and convenient that a receiver should be appointed in order to protect the Interest of the parties to the partition suit, particularly, the interest of the plaintiffs and the defendant Nos. 4 to 12, who prima facie have interest in the property. Mr. Roychowdhury has also contended that if they have any interest in the property, the same can be satisfied from the remaining part of the property. Therefore, the Interest of the parties other than the defendant Nos. 1, 2 and 3 is required to be secured. At the same time, the interest of the defendant Nos. 1, 2 and 3 is also required

to be protected so that the developer may not take advantage of the feud between the parties themselves.

Justification for appointment of and sale by receiver :

18. Prima facie it appears that the agreements dated 15th April, 1998 are additions to the 1994 agreement. The entire development scheme has to be appreciated in the light of the series of actions undertaken by the parties and their conduct. Therefore, how the developer cannot be prevented from continuing with the development scheme in respect of the entire property; Such development will ensure to the benefit of the parties. But in view of the conflicting claims by the respective parties, it is desirable, just and convenient for appointing a receiver in order to secure the respective interest. The subsistence of the interim order does not preclude a party from applying for appointment of a receiver. It was so held in [S.B. Industries, Freegunj and Another Vs. United Bank of India and Others](#), . In Sree Venkataramana Temple Board (AIR 1974 Kar 59) (supra) and AIR 1952 253 (Nagpur) , we have already found that the High Courts at Karnataka and Nagpur; respectively, had held that a stranger can also apply for appointment of receiver,

18.1 In [Industrial Credit and Investment Corporation of India Ltd. and Others Vs. Karnataka Ball Bearings Corpn. Ltd. and Others](#), , it was held that the receiver can also sell the property. In fact, the receiver is an officer of the Court, As soon the receiver is appointed in respect of a property, the Court takes custody of the property. As custodila legis, the property can also be dealt with, in the manner as may deem fit and proper, by the Court for the purpose of protecting or advancing the interest of the parties and furthering the object of appointment of a receiver. According to the scheme, the property is to be transferred to the intending, buyers after its development. Such transfer if does not cause any prejudice to the interest of the parties, then there is nothing to prevent the Court to direct the receiver to transfer or assign the properties in terms of the development scheme.

Waste and dissipation vis-a-vis sale :

19. Mr. Roychowdhury raised an objection based on validity of the sanctioned plan and dissipation and waste of the property in case the receiver is permitted to transfer the property. But this objection cannot be sustained simply on the ground that the defendant Nos. 1, 2 and 3 obtained the plan sanctioned in their names on the basis of the amalgamated plot which they had agreed to in the 1994 agreement and from which there was no deviation even in the agreements dated 15th April, 1998 where the construction is to be carried on according to the plan sanctioned. Nowhere in the four corners of these three agreements dated 15th April, 1998, there is any whisper with regard to the invalidity of the sanctioned plan or restriction of the construction only within these 29 cottahs of land in relation to its amalgamated plot or proposal for obtaining sanction of a new plan, In any event, these 29 cottahs have not been separated from the amalgamated plot and these 29 cottahs have, no separate existence apart from the amalgamated plot. Until and

un less this plot is separated and mutated, there is no scope for obtaining a separate plan other than the plan sanctioned in respect of the amalgamated plot. It is also not claimed by the defendant Nos. 1, 2 and 3 that these 29 cottahs as their share and is exclusively allotted to them and, therefore, they are entitled to mutation of this portion in their name separating it from the amalgamated plot.

19.1 However, the defendant Nos. 1, 2 and 3 are precluded and are estopped by the principle of estoppel from raising any such contention after having agreed, to amalgamate the plot and authorizing the developer to get the plot amalgamated and obtain plan sanctioned in respect of the amalgamated plot. Therefore, if construction is made on the basis of the plan already sanctioned, if it is otherwise valid, then there is no question of waste or dissipation. The development of the land is in effect an improvement of the land. It is not a waste, There is no question of dissipation by sale since the parties are not interested in the property. They are interested in the share in the usufruct of the development. The interest of the parties so far as their respective share is concerned in the usufruct of development of the property having protected, there is no question of dissipation of the property, if 68% of the developer's share is sold out, since owners' interest has been confined to the 32% of the developed flats. So long this 32% is protected and the construction in respect of the 32% is completed, there is no scope of dissipation of the owners' share or portion of the property that might be developed. Therefore, there cannot be any embargo preventing the Court from permitting the receiver from transferring the properties. In [Industrial Credit and Investment Corporation of India Ltd. and Others Vs. Karnataka Ball Bearings Corpn. Ltd. and Others,](#) it was held that the receiver can sale the property as well.

19.2 In any event, the development and the sale would be carried out by the receiver for the purpose of saving the property from being wasted or dissipated for the benefit of the parties to which the parties are eager to be agreeable except in respect of the dispute Inter se the plaintiffs and the other defendants on the one hand and the defendant Nos. 1, 2 and 3 on the other hand. Therefore, the receiver can discharge all authorities including the continuation of the development and complete the development process and transfer of the properties as directed by the Court. A receiver holds the property on behalf of all the parties and for their benefit. When all the contenders are before the Court, there is no difficulty on the part of the Court to confer all the authorities, which the parties could have exercised, upon the receiver.

Agents right :

20. Reliance on Chapter X of the Contract Act by Mr. Roychowdhury does not help him in the facts and circumstances of the case, in view of Sections 202 and 204, respectively of the Contract Act as discussed hereinbefore. Sections 183, 211, 215 and 230 of the Contract Act has no relevance in the facts and circumstances of the case. Admittedly, the developer is not claiming any interest adverse to the defendant Nos. 1, 2 and 3, particularly, in respect of these 29 cottahs of land and as such even as agent, it is not

claiming any right adverse to the interest of principal. Therefore, reliance in the decision in [Southern Roadways Ltd., Madurai Vs. S.M. Krishnan](#), by Mr. Roychowdhury is of no help and use in the present case since the ratio decided therein cannot be attracted in the facts and circumstances of the case which are distinguishable from those involved in the said decision.

Making of new contract by Court :

21. Mr. Roychowdhury contended that if the Court permits development of the balance area of the property other than the 29 cottahs, it would be making a new contract or agreement for the defendant No. 13, developer. This contention is also fallacious. Prima facie it appears that there was an agreement for development of the entire property pursuant to which the plots were amalgamated, sanction was obtained in respect of the amalgamated plot and the development scheme was formulated and published. Neither the defendant Nos. 1, 2 and 3 nor any of the parties, claiming interest in the property as co-sharers, have ever objected to or opposed the development. As observed earlier, it seems that there is an implied contract between the parties and the developer for development of the entire land. As such there is no scope for the Court to make any contract for the developer in the present facts and circumstances of the case, in view of the subsistence of such an agreement as it appears prima facie and to which none of the parties ever objected. The bone of contention between the parties is the claim in respect of the shares in the usufruct of the development process. Therefore, this contention cannot be sustained. That apart, prima facie, it appears that Mr. Roychowdhury's clients have 1/5th share, therefore, his clients cannot object to the development of the rest of the area when he submits that the interest of the other co-sharers can be satisfied from the rest of the area.

Conclusion :

22. In such circumstances having regard to the facts and circumstances of the case, it appears to us that it is just and convenient to appoint a receiver for securing the interest of the contending parties as well as the third party interest created therein with the implied approval of the contending parties. In our opinion, having regard to the facts and circumstances of the case and the responsibility to be undertaken by the receiver, the developer would be the best person to be appointed as receiver in such a case. Similar view was taken by the Delhi High Court in [S.J. Chaudhri Vs. Vantage Construction Pvt. Ltd. and Others](#), where a partner of the builder firm was appointed receiver. We, therefore, propose to appoint the developer as receiver in this case.

Order :

23. In the result, the appeal succeeds. The defendant No. 13, Sri Bhaskar Aditya, is hereby appointed receiver in respect of the suit property. The said receiver as an officer of this Court shall carry on and continue with the development work in respect of the

entire property in terms of the development scheme as enumerated in the brochure and shall complete the development within a period of three years from date. He will be subject to the direction of the learned Trial Court from time to time in respect of the powers conferred upon him by this Court as enumerated hereinafter. For any further direction he shall approach the learned trial Court and obtain necessary directions, which should not deviate from basic terms of this order but should be in furtherance of the terms of this appointment. The receiver shall be liable for development and all sorts of work in connection with the development as is required to be done by the developer including transfer of interest in terms of the directions contained hereinafter.

23.1 The receiver shall complete the construction of Blocks G, C, and E within six months from date in all respect including the owners" portion.

23.1.1 The receiver shall complete the owners" portion and developer"s portion simultaneously. In no event the owners" portion shall remain incomplete for a period more than a fortnight beyond the completion of the developer"s portion.

23.1.2 The receiver shall be entitled to deal with, dispose of or transfer the 68% of the developed area of Blocks G, C and E constructed on these 29 cottahs of land and execute and register deed of conveyance including the proportionate share in the land to the intending buyers, as and when the intending buyers shall comply with all the terms and conditions of their respective agreement for which the developer shall furnish a certificate to the receiver together with the settlement of accounts and the funds (summary), with intimation of transfer in writing given to the Learned Trial Court on notice to the learned lawyers representing the respective parties.

23.1.3 The receiver shall open and maintain an account in the Standard Chartered Grindlays Bank at Church Lane, Calcutta, in respect of his dealing with regard to the 68% of the developed area in these 29 cottahs of land including the amounts already at hand in respect of the said area. After maintaining 20% of the total amount deposited by the intending buyers in the account, the rest may be utilized and adjusted by the receiver for the purpose of carrying out the construction of the structure and the continuation of the development and for meeting other expenses by the developer.

23.1.4 The receiver shall be entitled to transfer, assign or sale or give possession to the intending buyers or encumber the flats to financial organization in connection with its sale to such intending buyers.

23.1.5 In terms of the agreement, the receiver may hand over possession after completion of the respective area of the owners" portion, namely, 32% in these 29 cottahs of land according to the terms of the agreement or intention of the defendant Nos. 1, 2 and 3, who will hold and use the property by themselves subject to the result of the suit without any right to transfer or assign the property to anyone else till the disposal of the suit, except through the receiver and with the leave of the Learned Trial Court.

23.1.6 In case any portion of this 32% of 29 cottahs being the owners" share are sold, the receiver shall keep the sale proceed deposited in a separate account to be opened in respect of these transactions in the Standard Chartered Grindlays Bank, Church Lane, Calcutta, and invest the same in long term deposit according to the term deposit scheme of the said Bank. Such deposit shall be subject to the result of the suit and subject to the direction issued by the Court from time to time.

23.1.7 The receiver may, with leave of the Court, release 60% of such amount from these funds in favour of the defendant Nos. 1, 2 and 3 on their furnishing undertaking to the receiver, the original whereof is to be filed in Court, recording an undertaking that such receipt would be subject to the result of the suit and that in case the Court directs, they would be liable to refund such amount as may be directed by the Court, if necessary for payment of owelty money, if it is found after the decree that the remaining portion of the land is insufficient to meet the shares of the other defendants and the plaintiffs.

23.2 The receiver shall continue and carry out the development work according to the development scheme on the balance property outside 29 cottahs according to the sanctioned plan and according to the terms enumerated in the brochure and deal with the same accordingly.

23.2.1 The receiver shall complete both the 68% of the developer"s share and 32% of the owners" share along with the other facilities to be provided in the project in terms of the scheme simultaneously on the balance other than 29 cottahs and complete the same within three years from this date, In no event the owners" portion shall be left incomplete beyond a fortnight from completion of the developer"s portion if not developed simultaneously. The receiver shall develop the same in all respect and shall be entitled to deal with the intending buyers according to the scheme.

23.2.2 The receiver shall open account in the Standard Chartered Grindlays Bank, Church Lane, Calcutta for the purpose of dealing with the operation or transaction relating to the 68% of the developer"s portion and keep the same in the said account according to the scheme of term deposit of the said Bank. The receiver shall release such amount from this account to the developer as and when necessary keeping accounts therefore retaining 20% of the amount deposited in the said account,

23.2.3 The receiver shall also open a separate account in the said Standard Chartered Grindlays Bank, Church Lane, Calcutta, in respect of the 32% of the owners" portion on the balance land other than 29 cottahs and keep the sale proceeds, if any portion is sold, in fixed or term deposit till the disposal of the suit subject to the result of the suit.

23.2.4 Parties may seek direction from the Learned Trial Court for delivery of possession of this portion to any of the parties and in such event, the Court shall pass appropriate order after giving opportunity to the respective parties, but subject to similar condition as provided in para 23.1.5.

23.2.5 The receiver shall be entitled to transfer, assign and execute and register necessary deed of conveyance in respect of such flats to be constructed on the balance land other than 29 cottahs within the 68% of the developer's portion according to the development scheme transferring interest in the flat and the interest in the proportionate share in the land in favour of such intending buyers, provided that such intending buyers complied with all the necessary terms of the respective agreement, for which the developer shall furnish a certificate in each case to the receiver together with summary accounts, with intimation of transfer in writing given to the Learned Trial Court on notice to the learned lawyers representing the respective parties.

23.2.6 The receiver shall maintain separate account in respect of these four groups of apartments and submit report quarterly to Court in respect of the respective portions.

23.2.7 The 20% of the sale proceeds of the developer's share being the 68% maintained in the respective two accounts shall be retained as and by way of security for appointment of the receiver, in order to ensure discharge of his function as an officer of the Court as receiver. If the receiver discharges his liability in terms of his appointment, in that event, he will be entitled to entire accumulation of these two accounts relating to the 68% of the developer's portion. The Court shall release such amount as soon as a report is submitted to the Court that the developer has completed the project in its entirety together with all facilities as enumerated in the brochure and had handed over and transferred possession to the respective buyers, who have completed and complied with the terms of their respective agreement.

23.2.8 The amount maintained in the respective two accounts relating to 32% shall be dealt with as directed above and according to the direction by the learned Trial Court from time to time or at the time of the passing of decree subject to the result of the suit upon determination of the respective share and entitlement to the respective portion.

23.3 The receiver shall put the entire amount received by him by sale of the 68% of the developer's share or 32% of the owners' share as the case may be, in the separate accounts in the Standard Chartered Grindlays Bank, Church Lane, Calcutta, one for 68% and the other for 32% of the remaining part of the land and the third for 32% of the 29 cottahs of land under the agreement dated 15th April, 1998 and a fourth for 68% of these 29 cottahs of land, subject to the directions contained above.

23.3.1 The receiver shall be entitled to adjust this amount and pay the same to the developer or transfer to the account of the developer as and when necessary with leave of the Court.

23.3.2 However, the Court shall not refuse leave unless it is pointed out that in the process any part of the amount in respect of 32% of the owners' share either in the 29 cottahs of land or in the remaining part of the land are being overlapped or dissipated. The amount should be kept in long term fixed deposits according to the scheme of such

deposit in the Bank which can be encashed in part and such amount shall be kept in part in respect of each transaction, namely, for each flat as separate unit or according to the terms of the scheme of term deposit of the Bank concerned.

23.3.3 In case the owners' portion is not complete, the receiver shall not permit the developer to withdraw any amount from these accounts in respect of the developer's portion of the share, though this will not prevent him from selling or transferring the properties or receiving the consideration.

23.3.4 All amounts now held by the developer shall be transferred to the same account respectively. However, in order to carry out the construction, receiver shall transfer such amounts to the developer for facilitating the development projects, retaining the aggregate of 20% of total deposit made by the intending buyers in the account.

23.4 However, the receiver shall not be entitled to any remuneration or expenses for the purpose of maintaining the office of the receiver and discharge of his function as receiver.

23.5 The receiver shall produce xerox plain copy of this order before Learned Trial Court and apply for vacating the ad interim order of status quo with regard to the nature and character of the property and possession in order to carry out the purpose and object of appointment of receiver according to the authority conferred upon him or according to the directions given herein and as might be given from time to time by the learned Trial Court without deviating from the basic terms or directions given herein.

23.6 The receiver shall be liable to submit the progress report before the learned Court below every quarter together with summary of the respective accounts, which shall be kept in the custody of the Court below at the cost of the developer. The developer shall bear the cost of receiver all through and provide for the office expenses and maintenance of his office and discharge of its function as receiver.

23.7 Any interest or title conveyed by the receiver shall be free from all encumbrances except that might have been encumbered or charged to the respective financial organization, as the case may be, so far as 68%, i.e., the developer's share is concerned and shall have full title and interest to the property except those in respect of 32% of the respective areas, which will, however, be subject to the result of the suit, unless sold to intending buyers with leave of the Court with notice to the learned lawyers representing the respective parties.

23.8 The receiver shall do all things and take all steps for completion of the project in terms of the scheme including renewal of the sanctioned plan, if necessary.

23.9 The receiver shall be entitled to discharge only after successful completion of the project according to the scheme.

Directions on the parties :--

24. The intending buyers shall co-operate and comply with their respective terms.

24.1 The defendant Nos. 1, 2 and 3 shall co-operate and comply with all formalities as may be necessary in terms of their agreement dated 15th April, 1998. In default, the receiver shall be entitled to take all necessary steps, however, with intimation in writing to the learned Trial Court and after issuing a notice in writing to the learned lawyers representing the respective parties.

24.2 The plaintiffs and the defendant Nos. 4 to 12 shall also co-operate and comply with all formalities, as may be necessary for completing the project in terms of the scheme. In default, the receiver shall be entitled to take all necessary steps, however, with intimation in writing to the learned Trial Court after issuing notice in writing to the learned lawyers representing the respective parties.

24.3 The developer shall be responsible for any defect or deviation from the plan or for any lapses or defaults in the process.

Observations :--

25. None of the observations made in this order shall Influence the learned Trial Court in the matter of decision on merit namely with regard to the determination of title and interest in the property and the respective shares, as the case may be. The observations made above are all tentative for the purpose of deciding the question of receiver. The learned Trial Court shall be free to pass appropriate orders or decrees without being influenced of any observation made herein according to its own wisdom and discretion having regard to the merits on the basis of the materials produced before it.

25.1 Let the hearing of the suit be expedited. It is expected that the suit be disposed of declaring the respective title and share or interest in it, as the case may be, within one year from the date of communication of this order.

25.2 The Order No. 24 dated 11th October, 2001 passed by the learned Assistant District Judge, 2nd Court, Barasat, North 24-Parganas in Title Suit No. 66 of 2000 is set aside. The application under Order 40, Rule 1, CPC for appointment of receiver is allowed.

There will be no order as to costs.

Urgent xerox certified copy, if applied for, be supplied within 7 days. Xerox plain copy of the operative part of the order be given to the parties upon usual undertakings.

This appeal is thus allowed.

Joytosh Banerjee, J.

26. I agree.