



Atul

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
NOTICE OF MOTION (L) NO. 152 OF 2019**

**IN**

**SUIT (L) NO. 70 OF 2019**

Lodha Developers Limited ...Plaintiff  
*Versus*  
Krishnaraj Rao & Ors ...Defendants

**NOTICE OF MOTION (L) NO. 760 OF 2019**

**IN**

**NOTICE OF MOTION (L) NO. 152 OF 2019**

**IN**

**SUIT (L) NO. 70 OF 2019**

Lodha Developers Limited ...Plaintiff  
*Versus*  
Krishnaraj Rao & Ors ...Defendants

**NOTICE OF MOTION NO. 1056 OF 2019**

**IN**

**SUIT (L) NO. 70 OF 2019**

Lodha Developers Limited ...Plaintiff  
*Versus*  
Krishnaraj Rao & Ors ...Defendants



**NOTICE OF MOTION NO. 1064 OF 2019**

**IN**

**SUIT (L) NO. 70 OF 2019**

Lodha Developers Limited ...Plaintiff

*Versus*

Krishnaraj Rao & Ors ...Defendants

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**Mr Sharan Jagtiani**, *with Anirudh Hariyani, Nooruddin Dilla & Zaid Wahidi, i/b Hariyani & Co., for the Plaintiff & Applicants in NMSL/152/2019.*

**Mr Krishnaraj Rao**, *Defendant No. 1, in person.*

**Mr Zal Andhyarujina**, *with Onkar Gupte, Jarin M Doshi & Ishani Khanwilkar, i/b Malvi Ranchoddas & Co., for Defendants Nos. 2 & 3.*

**Mr Naushad Engineer**, *with Dinesh Pednekar & Chanakya Keswani, i/b Economic Laws Practice, for the Respondent- You Tube LLC in NMSL/243/2019 & NMSL/548/2019.*

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**CORAM: G.S. PATEL, J**

**DATED: 26th April 2019**

**PC:-**

1. The Plaintiff has an edifice complex. It calls this complex 'New Cuffe Parade'. It is nowhere near the old — and real — one. It is at Wadala, near the truck terminal. The appellation that Lodha has adopted is a triumph of imagination over geography. Lodha uses this moniker for its Wadala development for one reason only: it adds a cachet of desirability and is supposed to portray excellence, wealth and style. The edifice in question is named 'Dioro' in the usual



fashion of this builder, using vaguely Italian names for all its buildings. This choice of names is neither irrelevant nor accidental. With other glossy material of a promised lifestyle, it lies at the core of the dispute: this is a case about a promise the Plaintiff is said to have made, one the Defendants say it has not kept, and now cannot keep.

2. Lodha Developers Limited is one of several real estate developers in this city. It claims to offer residential housing and commercial spaces of exceptional quality. The 1st Defendant, Mr Krishnaraj Rao, says he is a journalist; specifically, an investigative journalist. For some time now, Lodha has been the object of his investigative affections. He has for more than a year questioned — and I am putting this only as broadly and neutrally as possible in view of what follows — the very many claims that Lodha makes about its construction quality. He has previously written critically about Lodha 2017. That is not the immediate cause for this suit, an action in damages for defamation, and this Motion originally seeking very broad injunctive relief against the three Defendants. There is little purpose in reproducing the prayers in the Motion. They amount to only this: a plea to the Court to totally prohibit the Defendants from saying anything at all about Lodha's constructions anywhere and, specifically, about the construction quality of Dioro (at the Wadala site near the truck terminal). The Defendants have defamed it, Lodha says, and therefore the Defendants must be gagged.

3. The nature and trajectory of this litigation, at least at the interim stage, has dramatically altered from the time of the suit's



institution. It now has a far narrower focus, limited to five specific allegations. I am not, therefore, required to look at the full spectrum of Lodha's plaint and Notice of Motion. Consequently, only a very brief summary is necessary.

4. Between 2011 and 2012, Defendants Nos. 2 and 3, Shilpi Thard and Amit Jaisingh, husband and wife, purchased two flats 3013 and 3014 on the 31st floor in "B" wing of Tower 5 in this Dioro building at the Wadala site. The flats are not cheap: the sale price for one flat is about Rs.2.37 crores, and about Rs.3.5 crores for the other. This does not include a raft of other costs (Rs.7.2 lakhs for a club membership, etc). Thard and Jaisingh say they have paid Lodha nearly Rs.6 crores.

5. Lodha claims Thard and Jaisingh took possession in February 2018 'without protest or demur'. The month is about the only thing on which there is some sort of agreement. Thard and Jaisingh say possession was several years late — they had been promised possession in 2015, and the delay itself caused them loss. They also say the possession was more or less thrust on them without giving them a chance to inspect their flats until they had signed some documents. They then claim that there were several deficiencies in the construction. They noticed leakage and seepage in the monsoon of June 2018. Other flat purchasers too were affected. Attempts to resolve these issues with Lodha were stonewalled. There were even public protests in which Thard participated. In September 2018, Thard approached the Rao, whom she knew of from his previous writings on Lodha projects. Rao himself was not unfamiliar with the site. He had inspected it earlier. At her behest, Rao and she visited



the site in September and October 2018, took photographs and made videos. Rao wrote up an article in a blog (embedding the audio visual material). Thard says Lodha was emailed an advance copy of this material but did not respond; more on this shortly. The first lot of blog posts, videos and photographs went online on the Rao's blog, *The Brave Pedestrian*, on 12th November 2018. More followed on this blog on 7th December 2018, 2nd–3rd January 2019 and 7th–11th January 2019. Between 7th and 14th January 2019, Rao uploaded several videos on his YouTube channel.

6. Lodha filed suit on 17th January 2019. It said that Rao, Thard and Jaisingh had defamed it. Lodha described the online posts, videos and photos as 'the Offending Material'. From paragraph 13.20 of the plaint onwards there is a description of this material. The plaint notes at least as many 20 videos and several distinct blog posts. Lodha attempts to describe Thard as a blackmailer and an extortionist. There is some vague mention of 'goodwill compensation'. Lodha says it was 'not a pittance'. It was apparently 'without prejudice'. Lodha says it was for something it calls '*inconvenience caused due to the work of removal of upper floors due to reduction in height of the building approved by Airports Authority of India and other such factors*'. This deliberate woolliness is less than helpful. It may contain some form of admission, but that is left to a later date. Several hundred flat purchasers, Lodha says, accepted this 'goodwill gesture'. But not Thard. She went about 'bad-mouthing' Lodha. She 'created a ruckus'. She sent threatening emails. She said she would take steps that would potentially harm the Lodha sales and brand.



7. Between paragraphs 13.11 and 13.19 there is a fairly detailed time-line and chronological delineation of events according to Lodha. There is a mention of Thard's emails. There is a mention of discussion. We are told that some purchasers filed a writ petition and another filed a complaint before the regulatory body. Thard continued to 'threaten' Lodha, paragraph 13.18 says, and continued her 'harassment' and demands for 'exorbitant compensation' for the 'purported' delay in possession (though I do not see how a delay is purported; there is a delay or there is not; the fact that the delay might be explained does not make it *purported*).

8. At least at this prima facie stage, this narrative is important, but not for the reasons Lodha imagines. Lodha's narrative is important not for what it says, but for what it does not. It completely suppresses all mention of the fact that Lodha had the entire content of the first 12th November 2018 blog post and audio visual material in an email from Rao on 8th November 2018. Lodha's plaint makes no mention of this email. We do not know why. If the other emails could be referenced, why not this one? It was the one email that spoke directly to the cause of action pleaded. In fact, Rao sent a reminder on 12th November 2018. Other than some auto-response, Lodha said nothing.

9. Lodha then complains that the material that offends it was widely circulated on WhatsApp and available on YouTube. In other words, and to use popular phrasing, 'it went viral on social media'. There is something that needs to be said about this, and I will return to it a little later towards the end of this order. There then follows in paragraph 15 a dissection of bits and pieces of the published



material. In paragraph 16, Lodha says the videos were shot in August 2018 but published later. There is an allegation of malice. Lodha says 'rectification work' was still ongoing in August 2018. In paragraph 17, Lodha says Rao is a busybody who habitually publishes negative articles and videos against select developers and then hints at blackmail. Against Thard, in paragraph 18, Lodha clearly accuses her of being an extortionist. It says the contents of the published material are defamatory, false and untrue. This is repeated in paragraphs 20 and 21. Lodha maintains there is nothing very wrong with 'Dioro'. The attempt is to portray full compliance, and to say that rectification works are minor, not unusual, being done in any case, and therefore the published material is the handiwork of extortionists whose demands have not been met. Lodha maintains it is the aggrieved innocent victim of a smear campaign.

10. The reply affidavits from Thard and Rao say differently. In paragraph 20 of her reply, Thard lists the very many individual defects she found on actual inspection. There was shortfall in the carpet area. The construction was substandard. The internal walls were flimsy. There was wet sand under floor tiles. There were mineral blooms in tiling joints. Interior walls were damaged by moisture. The basements are unsafe and not properly ventilated. There was a significant fire risk. In his affidavit, Rao expands on these defects in greater detail. He also confirms that he visited the site at Thard's instance in September and October 2018. He also confirms what Thard said, viz., that he sent an advance copy to Lodha on 8th November 2018 and a reminder on 12th November 2018, but got nothing but an auto-responder reply.



11. Clearly, the Defendants plead justification.

12. There are rejoinders. A detailed scrutiny of the allegations and counter-allegations is now not necessary in view of the reduced ambit of these proceedings. Mr Jagtiani has limited himself to relief only in regard to five specific identified statements attributed only to Rao. This is of some consequence because, by an early order of 21st January 2019, KR Shriram J appointed Kishore Karamsey & Co, architects, to inspect the flats and make a report. They did. I have been through portions of that report. It broadly establishes many of the accusations the Defendants make.

13. In Notice of Motion No. 760 of 2019, Rao's seeks an order rejecting that Architect's report. I have understood Rao to say that while the report is not in itself false, it is not sufficiently comprehensive: it does not go far enough. He says it has missed or overlooked other significant deficiencies in the flats, and in the project as a whole. He also says that some of the deficiencies that have been noted have been played down or understated.

14. Rao's application is not maintainable in law. The order appointed a commissioner for local investigation to assist the Court. These reports called for by a court cannot be 'rejected'. They will remain and form part of the record. It is always open to Rao to make his submissions in regard to the report, and to bring on record at the trial or at any other stage as the law allows such supplemental material that he is able to marshal in support of his claims. He is also at liberty to make an application in an appropriate proceeding to





have a more detailed report prepared, to engage his own experts and to lead those reports in evidence. But all this must necessarily await the further progress in the suit. Rao's Notice of Motion No. 760 of 2019 will thus stand dismissed, but with this express liberty reserved to him to adduce further material in support of his contentions or to seek in this suit or other proceedings a fresh or more detailed enquiry. What I am rejecting is his prayer that the report by M/s Kishore Karamsey and Co be rejected.

15. What remains of Lodha's Motion for interim relief is a set of five statements that Mr Jagtiani has culled out and given to me in a statement that I have taken on record and will now mark "X1" for identification with today's date. I am reproducing each of these statements below as being the ones, and the only ones, in respect of which Lodha now seeks an injunction against Rao (and only against Rao). As to Thard and Jaisingh, I will consider Mr Andhyarujina's submissions on their behalf later in this order.

16. I will set out each of these five statements, note what Rao has to say on each where necessary, and then return my finding. Given this narrowing, I have not found it necessary to view the videos included in the blog posts that Rao made available online including those related to Thard's and Jaisingh's flats.

**17. RE : STATEMENT 1 OF 5:**

*"The suited-booted residents of Lodha NCP have been conned into living on a construction site, and MMRDA officials who issued the certificate, are in connivance. It's an*



*open secret hiding in plaintiff sight. it's the proverbial elephant in the room.*

**Contained in:**

Blog Post 6 titled "*Lodha NCP residents, where are your recreational open spaces?*" [Exhibit 'O' @ 201 to the **Plaint**]

17.1 This is part of Rao's blog post of 9th January 2019. The statement that Mr Jagtiani says is offending is in the last paragraph. Rao is emphatic that he stands by this statement. This means that in law it is incumbent on Lodha to demonstrate that this statement is per se defamatory. I will turn to a discussion of a law presently, but it seems to me clear that this statement does not fall within that definition. It is undoubtedly comment. Some may say it is aggressively worded, but that is possibly the worst that can be said about it. It is not without factual context. To claim that it should be read in isolation without its preceding paragraphs is as unfair as it is untenable. The preceding four paragraphs make it clear that according to Rao, and he claims he is in the position to justify and demonstrate this, a local or special planning authority has granted permission for occupation of a structure that is nowhere near ready or fit for occupation. It is, he says, risky. The allegation of connivance in the last paragraph is a conclusion that he believes that he can legitimately draw for he questions how any authority could lawfully have granted any such occupancy certificate, complete or partial, for a project so far from readiness.

18. I will not therefore grant the injunction that Mr Jagtiani seeks in respect of statement no.1.

**19. RE: STATEMENT 2 OF 5:**

*"It is a large plot of land which has been leased from MMRDA which has been originally intended for infrastructure, very honestly there has been a lot of 'golmaal' in the way they have acquired the plot, in the way MMRDA has leased them the plot..."*

**Contained in:**

Video 18 titled *"Lodha Defamation Case Against Us for Criticizing Lodha New Cuffe Parade Wadala"* [**Transcript - Exhibit AA @ 230 to the Plaintiff**]

**19.1** Rao states he has sources to establish the correctness of what he has said here. In fairness, he agrees that factual material is not disclosed or stated in this passage. He agrees that he will not repeat the statement without the necessary factual basis. I accept that statement, but clarify that this is not to be construed as a requirement that he must reveal his sources nor an assessment of the sufficiency of that factual material. His statement is only to this limited purpose: *that without supporting factual material this statement at page 30 and culled out in this form will not be repeated hereafter.* Rao's statement is noted and accepted.

**20. RE: STATEMENT 3 OF 5:**

*"That said it does not mean that they can ... make a product ... without following rules and norms, National Building Code and DC Regulations" ... "Various norms for designing a building ... have been thrown to the winds."*

**Contained in:**



Video 18 titled “Lodha Defamation Case Against Us for Criticizing Lodha New Cuffe Parade Wadala” [Transcript - Exhibit AA @ 230 to the Plaint - @ 231]

**20.1** This is part of the same written transcript as Statement No. 2. The extract is only partial. I reproduce the whole of it.

*“That said it does not mean that they can play with the lives of people and does not mean that they can made a product which is shoddy or ill-conceived without due process and without following rules and norms, national building code and DC regulations that we have to keep quiet just so that their brand identity does not suffer. I do not believe this and I am not going to stand for it, how any court is going to see things, quite honestly that is the state of affairs that I would oppose even at the cost of committing ‘Contempt of Court’.*

*I say this with full consciousness of the seriousness of what I am saying, I like to believe that the judiciary of our country is not going to throw the common man to the dogs. I would like to believe that the judiciary is there to uphold the quality of life, the rules, the laws, the norms, the standard practices that have been established and is not going to stand by as builders violate these norms and rules and standard practices and throw them to the winds...”*

**20.2** I will leave aside the second portion, which is an expression of Rao’s expectation of the judiciary. The first portion is what affects Lodha. The allegation here is that there is been a violation of rules, norms, the National Building Code and DC Regulations. It is true that this is been stated in generalised terms without particulars. Rao says, as he did for the previous comment, that he reserves to himself the right to show particulars of these violations and that if he agrees



not make a generalised statement hereafter it is with that express reservation and qualification. Indeed, Rao states that as regards the Thard's and Jaisingh's flats there is a previous architect's report which points out specific violations. That report has been included in his Affidavit in Reply from page 363. This is a report of Nadkarni & Co, a firm on this Court's panel. The report is of 7th January 2019. It was commissioned by Jaisingh. The report does say there are violations of the NBC and the DCRs, but does not say which. It does point to a very specific carpet area deficit. The accuracy and correctness of this earlier report are disputed. Mr Hariani for Lodha also submits that it is not sufficiently specific to substantiate what the Defendants have said. That submission is noted.

**20.3** It is difficult to accept Mr Jagtiani's statement that the statement is per se defamatory. It will have to await trial. There is some material supporting justification. There is no law that demands that an interim stage a defendant in such an action must prove all his justifying evidence.

**20.4** Consequently there can be no injunction of the nature that is sought in regard to this third extract.

**21. RE: STATEMENT 4 OF 5:**

*"Banks are part of the Lodha scam" ... "Banks are also involved with Lodha in passing of loan" "This is because Lodha is such a big customer of the banks that Lodha dictates terms to the banks ..." ... "Banks have an approved project finance form and mostly normal builders who are there have to fill up that bank form. But over here it is*

*completely opposite. Over here the APF form is made by Lodha. And banks fill it up.” ... “Banks take this kind of risk because Lodha is giving them bulk business. They also tend to dominate them.” ... “If any bank says that we will not fill up your AFP form, you fill up our APF form, then Lodha will tell them that we will not recommend your bank. We will tell our clients to go to your bank. So this way there are a couple of banks which are blacklisted by Lodha” ... “HDFC Bank have got the bulk of the home loans of Lodha. They are hand in glove with them and are protecting them....”*

**Contained in:**

Video titled *“How banks are part of the Lodha scam”*  
**[Transcript ‘L’ @ 433 to Plaintiff’s Rejoinder to Defendant No. 1’s Reply dated 21.01.2019]**

**21.1** This is not part of the Plaint. It is part of the Rejoinder to Rao’s Affidavit in Reply.

**21.2** This extract is from a video that was at least partly in Hindi. The offending portion is scattered over this transcript. Rao is accused of having said without justification that banks are also involved with Lodha regarding the manner in which loans are passed. Lodha dictates terms to the banks. It is a large customer that banks cannot refuse. Banks have an approved project finance form. Most have to fill up the bank-mandated form, but in this case it is Lodha that does so because Lodha sends bulk business to the bank. If there is any protest, then Lodha does not recommend the home purchase financing from that bank. One particular bank is mentioned, and it is alleged that it is in cahoots with Lodha.



**21.3** The context has nothing at all to do with mere financing or even the level of influence or money muscle, but is traceable to an allegation Mr Rao makes that the entire financing structure is based on an incorrect statement of the actual carpet area of the flats being sold. This overlaps what is being said in the previous extract. In addition, there are incorrect representations as to the phases or stages of constructions and their date of completion. He illustrates this by saying that the area mentioned supposedly includes balconies. Mr Jagtiani's response, that this is something to which the purchasers have agreed in their purchase documents, is underwhelming, and that is putting it mildly. What Rao says is that financing is obtained on the basis of a carpet area representation Lodha knows to be inflated and incorrect. This home-grown definition of carpet area as including balconies (and perhaps flower beds) is a statement of fact. That is indeed how the carpet area has been computed. Whether this is lawful or not, and if not, why this has been done, is an opinion, and falls squarely in the realm of fair comment. When therefore Mr Jagtiani says that this is 'per se defamatory', he throws down the gauntlet: he challenges Rao to show that any part of it is true. Once Rao does this, and there is now supporting material from Nadkarni's report, it is for Mr Jagtiani to show that the allegation is without a vestige of truth, *and that it was always so, i.e. that Rao never had any basis for his statement.* He cannot. And so, I have not even turned to Rao for his view.

**21.4** On an objective assessment, I find that what Rao has said here is in an opinion, fair comment or argument with some basis in fact. There is no question of an injunction or even of asking if he will volunteer a statement.



21.5 Lodha may or may not like the use of the word ‘scam’. Courts are not here to pander to Lodha’s notions of exquisite linguistic delicacy. If indeed there is this carpet area misstatement in the agreement itself, and obviously that statement was presented by Lodha with purchasers having no say in the matter, then there may be a storm coming with other, far harsher, words looming on the horizon. The statement is not, prima facie, per se defamatory.

## 22. RE: STATEMENT 5 OF 5:

*“...[The basement of Lodha New Cuffe Parade does not have Occupation Certificate. The fire brigade has not inspected it, MMRDA has not inspected it, MMRDA will not certify it, it cannot be certified as it stands. I suspect that in the space where they had permissions for 3 basements, they have gone and built 4 basements on the top of it, to cut corners and maximize their basement space and now they do not have enough head space left for proper air circulation and that is a chronic problem that is not a problem that Lodha can fix. I am sorry to give you the bad news guys many parts of Lodha New Cuffe Parade is an unfixable problem. It is a ticking time bomb and the authorities need take note of it.”*

*“The hazard is that [in the basements] the fire systems are not in place, that the ventilation is not in place and there is no scope for ventilation. ...”*

### **Contained in:**

Video titled “Lodha NCP Basements are ticking time-bomb. Mumbai Fire Brigade, you have been warned.” [Transcript - Exhibit J @ 426 to Plaintiff’s Rejoinder to Defendant No. 1’s Reply dated 21.01.2019]





**22.1** This allegation is in relation to an occupation certificate. The relevant portion must be approached with some caution. Rao is accused of saying that the basement of this entire complex does not have an occupation certificate. The fire brigade and MMRDA have not inspected it and it cannot be certified as it stands. He alleges that with permissions for three basements, four were constructed. He also alleges, importantly, that the clearance or head space is inadequate for proper air circulation and ventilation. He says this is a problem that cannot now be fixed since the construction is done. He says that this is a fire hazard with inadequate provision for ventilation.

**22.2** Rao maintains the underlying factual basis. He says it is inconceivable that any occupation certificate or any form of certification of fitness for the purpose could ever have been granted to such basements. It may be that there now exists some form of certification. That would not mean the underlying deficiencies do not exist. The issuance of a certificate is a fact, but it does not postulate the correctness or lawfulness of the issuance of that certificate. He believes that no such occupation certificate for the basements, full or partial, could in these factual circumstances ever have been granted. He maintains that it constitutes a safety, fire and health hazard. He has a somewhat colourful description of it, but I will let that pass. He does say that there is not enough clear space for the exhaust or extractor fans to draw polluted air. In some cases he has himself seen, the vents or circulators are blocked by beams and structural elements, as also by pipes and other civil works preventing proper air flow. The carbon monoxide sensors are not calibrated. All always only show zero.



**22.3** How is it possible to say that this statement is ‘per se defamatory’? I am not assessing whether Rao is able to prove his statements. The test is whether he claims justification — he does — and whether he is able to demonstrate even prima facie that such a state of affairs exists. On what does he base this? He says he has himself seen all this. He knows first-hand of these conditions. He says that while he may not himself be an expert, he was accompanied by one such person who was, but whose name he cannot reveal. He therefore maintains that this was based first on material that he himself saw. But he does not rest at that. He not only wrote about it. He videographed it. He took photographs of it. There is, therefore, contemporaneous documentation that he asserts in justification of what he says in this context.

**22.4** For this statement, too, no injunction can be granted.

**23.** We have travelled a very great distance from where the plaint began, which is to say with a frontal assault on the Defendants personally, accusing them of being blackmailers and extortionists, all making false allegations for publicity, and without factual basis. The plaint suggests that nothing that was stated in this material was true, and almost the whole of it was defamatory; what was true was trivial and was in the nature of routine rectification. Prima facie that does not appear to be so, and Lodha must be held to have failed to make out a prima facie case even on these five statements to which Lodha has now limited its injunction application.



24. There are two other factors of cardinal importance in this regard. The first is what I have referred to already, viz., that Rao sent Lodha an advance copy of the material on 8th November 2018, and a reminder on 12th November 2018 but to which he had no reply. There is Lodha's failure to even mention this email correspondence. Lodha was not unaware that this material was coming its way. I find that wholly unacceptable. Lodha strains every nerve to give the impression it was blindsided by the publication of this material. It was not. Rao acted as would have any print journalist. He gave Lodha an opportunity to respond. Lodha did nothing. In its plaint, it suppresses all mention of this. In this factual scenario, I do not see how Lodha can be heard to say that it has any equity on its side entitling it even on these restricted five elements to a broad order gagging Rao. I am therefore clear that the only restraint under which I can conceivably place Rao today is that which he himself volunteers and which I have noted above. Beyond this not only am I unwilling to go, but I also believe the law will not let me go.

25. There is one other aspect. I believe I must mention it, though in fairness Mr Jagtiani may be correct in saying that it has not yet been placed on Affidavit. I will therefore note it only in general terms. Rao showed me some documents that indicate that another flat purchaser took the Right to Information Act route to obtain some information including copies of the sanctioned plans and occupation certificate. The Public Information Officer seems to have sent this on to Lodha for comments. To my very great surprise, I find that this request for disclosure was opposed tooth and nail even up to appellate proceedings with Lodha claiming something



called 'commercial confidence', 'trade secrets' and 'intellectual property protection'. Against a flat purchaser I do not see how any vendor of a consumer facility or product can make any such claim. The implications for Lodha are serious, and none redound to its credit. Is the flat purchaser not entitled to see a sanctioned plan? An occupancy certificate? Not entitled at all to any information about the flat in which he supposed to live? Is he supposed to simply pay money and then accept whatever he is given to him without complaint? I do not see how a builder or developer offering flats for sale is any different from a manufacturer of plastic buckets or any other consumer product. There is nothing so very special about Lodha. It has no special immunity or privileges. If there is a defect, its purchasers, like all consumers, are entitled to be entitled to complain; and they may complain often, and loudly, and in every available medium. It is no answer for the manufacturer or producer of a defective product to claim commercial secrecy, confidentiality or to shelter behind trade secrets or intellectual property protection laws. The Right to Information Act was brought into force for a reason and it has an avowed a constitutional mandate. There is no reason this should be compromised for any builder.

26. With this, let me to turn very briefly to what it is that the law mandates and what it requires of a plaintiff to succeed in such an action. Our starting point must be the early decision of BJ Wadia J in *Mitha Rustomji Murzban v Nusserwanji Nowroji Engineer*.<sup>1</sup> That was a decision at the trial of the suit. The allegation was that certain female students attending a class would have their future ruined

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<sup>1</sup> AIR 1941 Bombay 278.



because of one person. Wadia J held that no action lies against a defendant who can prove that the words complained of are a fair and bona fide comment on a matter of public interest. The defendant must show that the subject on which he commented is a matter of public interest, that the statements of fact that he makes are true, and that his comment is fair and bona fide. His criticism must be expressed fairly. Wadia J quoted Lord Esher ME in a very early decision of 1887 as saying that fair comment is that which, in the opinion of jury, is not beyond what any reasonable or fair person, however prejudiced, might say.<sup>2</sup> Every latitude must be given to opinion and to prejudice, and then we must see whether a fair or reasonable person would make such a comment. That the comment is independent, bold or exaggerated — or even grossly exaggerated — does not make it unfair.

27. Let us test this against a few of the cases to which Mr Jagtiani now restricts his case. Take for instance the question about the basements, their safety and how occupancy certificates could have been granted. As I have noted there is a material to substantiate this. When Rao says this is unsafe, a disaster waiting to happen (or words that effect), can it really be said not to be fair comment, or not in the public interest? The comment is bold. It is independent. Even if it is prejudiced, it is not unfair. At the interim stage, I must assess whether there is enough material that led Rao to believe that, in circumstances such as he noticed no reasonable, straightforward or diligent person or right-minded authority could ever have issued an occupancy certificate. Similarly, when he questions the basis on

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<sup>2</sup> *Merivale v Carson*, (1887) 20 QBD 278.



which carpet areas are calculated, and points to what he calls absurdities, and then says that this is the basis on which finance is being raised, he is well within the realm of fair comment. This is not a test of the sufficiency of his material but only a prima facie test whether such material even exists. At the trial of the suit undoubtedly what Rao saw, what material he had, and what public authorities may have said in this regard, will all be considered by the Court. I need only form a prima facie view, and I do, and it is that the comments by Rao in all five cases are not unfair, his limited acceptance of not repeating one of them notwithstanding.

28. There are other decisions that Mr Jagtiani cites, including an unreported decision of DR Dhanuka J in *Betty Kapadia & Anr v Magna Publishing Co Ltd & Ors*.<sup>3</sup> The decision required an ad-interim order to continue and made the Motion returnable. I am reluctant to accept this as an authoritative pronouncement of law. All the material was not before the judge at that time. The decision is at an ad interim stage. The learned Judge was only told the defendant would be raising a plea of justification. The defendants cited the decision of Lord Denning MR in the celebrated case of *Fraser v Evans & Ors*.<sup>4</sup> The learned single Judge agreed this assisted the defendants. This was not fully considered and the ad-interim order was merely confirmed. *Fraser v Evans* was a case of an anticipated libel in breach of confidence. Lord Denning MR wrote:

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<sup>3</sup> Notice of Motion No. \_\_\_ of 1991 in Suit No. 2152 of 1991, decided on 22nd July 1991.

<sup>4</sup> [1968] 3 WLR 1172 : [199] 1 QB 349.



In so far as the article will be defamatory of Mr Fraser, it is clear that he cannot get an injunction. The court will not restrain the publication of an article, even though it is defamatory, when the defendant says he intends to justify it or to make fair comment on a matter of public importance. ... The reason sometimes given is that the defences of justification and fair comment are for the jury, ... and not for a judge. But a better reason is the importance in the public interest that the truth should out.

29. In *Betty Kapadia*, counsel for the defendant formulated the defence even at the ad-interim stage thus: that if the defendant pleaded publication, fair comment or justification, no injunction can be granted unless the plaintiff could satisfy the Court that the defences raised was bound to fail. The learned Judge did not consider that aspect of the matter at all. At the ad-interim stage perhaps he was not required to. If that test were to be applied here, Lodha could get no injunction. Lodha cannot possibly say that Rao's and Thard's plea of justification is bound to fail. That is far from certain.

30. There is then the decision of a learned single Judge of this Court in *Shree Maheshwar Hydel Power Corporation Ltd v Chitroopa Palit & Anr.*<sup>5</sup> This had to do with an allegation made against a hydroelectric project by certain activists by the Narmada Bachao Andolan. Even there the Plaintiff did not seek a blanket injunction but restricted itself to allegations of connivance, conspiracy siphoning of funds, loot, unleashing terror etc. The matter was strongly contested. Counsel for the respondent submitted that a

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<sup>5</sup> AIR 2004 Bom 143.



mere plea of justification would be sufficient to dislodge any interim injunction application. The case was that the Court is not required at this interim stage to scrutinize the material but only to assess whether it exists, and whether the justification is in fact being pleaded. It must be remembered that this was in the context of limited five broad-based allegations for which an injunction was sought. The learned Single Judge granted the injunction referring *inter alia* to the decision in *Betty Kapadia* and drew a distinction between the law in England and law in India. He pointed out that there, a mere plea of justification is sufficient. However, courts in India are not satisfied with a mere plea. A defendant must show that the statements were bona fide in the public interest, that they have taken reasonable precautions to ascertain the truth, and that the statements were based on sufficient material that can be tested for veracity. This is Radhakrishnan J's pronouncement in paragraph 49 of *Shree Maheshwar Hydel Power*. Which of these tests can fairly be said the Defendants before me fail to satisfy at the interim stage? None. They have pleaded justification. But they have not stopped there. They have gone further. There is no doubt that these statements at least prima facie were made bona fide. Thard and Jaisingh are flat purchasers. They are concerned about the quality of their flats. Some of their allegations have been at least partly borne out by the independent Court Commissioner's Report. That all this is in the public interest I have not the slightest manner of doubt. Have they taken reasonable precautions? Indeed they have. There is videographed material. There is photographic material. There is thus ocular contemporaneous evidentiary material that can be tested. It is produced right now. The first of it was sent to Lodha in advance. Therefore, it is entirely possible to conclude at the prima





facie stage that there is sufficient material that can be tested for veracity. In *Shree Maheshwar Hydel Power* the allegation against the respondents was on five highly defamatory expressions of connivance, conspiracy etc. etc. There again the Court held that the allegations were without discernible factual basis. That is not so here. In the present case, two things have happened. The initial very broad conspectus of the plaint has narrowed at Lodha's instance to five identified issues. Even on a test of those five identified issues, except for the one on which Rao has agreed to make a qualified concession or statement on merits, I am unable to find for Lodha on any of the others sufficient to warrant an injunction.

31. There is the other dimension to this matter. It involves YouTube in particular, and social media in general. Rao's journalism is not in the more traditional form of print. But what of that? Does it make the slightest difference? There is no different standard of law that applies to online journalism or comment. If a statement is made knowing it to be false, without believing it to be true, or in reckless disregard of the truth, the medium in which it is made is entirely irrelevant. The statement is actionable. But a statement is not to be viewed as suspicious only because it is not made in print and is made only online, or using one or more of the available modern communications channels or technologies. That new technology may have made us a noisier society. Certainly there may be something to be said about the proliferation of what is known as fake news, but that does not mean that everything about the technology is evil or undesirable. We should not be misled into assuming that every recipient of news or information is completely mindless and will swallow wholeheartedly whatever comes his way. A statement is



not true merely because it is in print. It is not false merely because it is online. The only difference is that online media allows for plurality of voices. Online, everyone is a journalist, or a potential journalist. Of course, every online user is bound to the same law and the same standards. He or she runs the same risks. But that does not mean that voices must be silenced because they are online. To the contrary: it demands that we must all learn to be significantly more tolerant of opposing opinions. If there is a greater plurality of voices online this is something to be devoutly wished for, not to be suppressed. If in particular there is online comment and it can be said to be fair comment about any product or offering, then there is no reason why it should be forced to be shut down, or why the person who said it should be silenced. Whether we are manufacturers or producers or service providers, and I use this as broadly as possible to include everybody from the building industry to courts, we must be gauged not by who we are, or imagine ourselves to be, but by what we do and how we go about doing it. If there is criticism of what we do or even the manner in which we do it, unless it falls outside the realm of fair comment and squarely within the accepted definition of what is libellous or defamatory, I do not see why it is stopped merely because it is strongly worded.

**32.** Calling out someone, with fair comment and justification, is not defamation. To put it differently: to say the emperor has no clothes is not defamation. It never has been.

**33.** This is of some relevance in the context of the relief Lodha seeks against YouTube. If I am not granting the injunction against the Defendants, I am making no order of take-down against



YouTube. Any order regarding the material said to be in contempt will be addressed separately.

34. The reliefs in the main Motion have not been amended. These prayers in the way in which they are worded reject themselves. I will not and cannot grant any such omnibus injunction. I will take it in fairness to Mr Jagtiani that he has restricted himself to the five statements that I have noted above. Save for the undertaking offered by Rao, and which is accepted, Lodha's Notice of Motion (L) No. 152 of 2019 is dismissed.

35. Rao repeatedly requests me to note that this is what he calls a SLAPP suit, that is to say a Strategic Law Suit Against Public Participation. That is a known — and much decried — litigation strategy. Whether or not this suit fits that description is a matter for another day. It is wholly irrelevant to the purposes of my discussion since I have not found any merit in Lodha's Motion other than noting the limited comment that Rao made.

36. Thard and Jaisingh have filed their own Notices of Motion Nos. 1064 of 2019 and 1056 of 2019. In Notice of Motion No. 1064 of 2019, they seek — somewhat ambitiously — to attach Lodha's property and to recall an order of 21st January 2019. The Defendants also seek a recall of the order of 21st January 2019 which placed a ban or a restraint on Defendants Nos. 2 and 3 and to recall a further order of 23rd January 2019 that records an undertaking by Defendants Nos. 2 and 3 in paragraphs 1 and 4 not to address any communication to anyone in any mode regarding the



subject matter of the suit. This restraint against Defendants Nos. 2 and 3 cannot possibly continue. They are flat purchasers and they are entitled to make fair comment about the condition and nature of the flats that they purchased. The restraint on their right to comment is vacated.

37. In Notice of Motion No. 1056 of 2019, Defendants Nos. 2 and 3 they seek a direction against the Court-appointed Architects to prepare and submit a report truthfully etc. No reliefs are necessary now against the Court-appointed Architects. The Motion is infructuous and is disposed of as such.

38. The Notices of Motion are disposed of in these terms. Since there is a pending contempt proceeding, there will be no order of costs.

39. All disposed Motions on lodging numbers to be finally numbered within a week.

**(G. S. PATEL, J)**