

**IN THE COURT OF SMALL CAUSES AT MUMBAI
[BANDRA BRANCH]**

**Order Below Exhibit 37
in
R.A.E. Suit No. 210/604 of 1991
(CNR No. MHSCA3-000501-2005)**

The Rachana Co-Operative Housing Society Ltd. Plaintiff

V/s

Mrs. Rosy Fernandes Defendant

And

Mr. Samir Narain Bhojwani Applicant

Advocate for the plaintiff : Mr. R.R. Sharma

Advocate for the defendant : Mr. M.A. Chandan

Advocate for the applicant : Ms. Preeti Ramani

Coram : Mr. M.B.Oza, Judge

C.R.No.37 [B.B.]

Date : 24/01/2018

ORDER :

This is the application filed by the applicant to direct the plaintiff to join him as a party defendant in this suit.

2. It is stated in the application that the plaintiff in this matter mentioned by way of amendment of plaint in 2007 that one M/s. Saboo and Varun was appointed as developer by plaintiff to develop the suit property. It is also mentioned in the plaint by way of amendment that M/s. Saboo and Varun failed to comply with the terms and conditions of the development agreement, the plaintiff terminated the agreement. It is further stated that what is not mentioned in the amended plaint (that

applicant came to know recently) is that, pursuant to the development agreement with M/s. Saboo and Varun having been terminated, the plaintiff has entered into a development agreement with the applicant on 08/12/2006. This development agreement is a registered agreement.

3. The applicant has further stated that however the plaintiff society has on 10/10/2011 through its Secretary filed affidavit in lieu of oral evidence as per provisions of Order 18 Rule 4 of C.P.C. and at clause 16 clearly admits that the plaintiff society have entered into a development agreement with Mr. Samir Bhojwani. The applicant has further stated that the development agreement itself records that applicant is being put in possession of various portions of suit property including tenement No. 2 in the chawl (of which in fact, applicant is in actual occupation), 7 structures known as transit camps and society office. Accordingly, applicant was put in legal possession of the said portions of the suit property. Further the development agreement records that on execution the Society has attorned the tenancy and/or ownership of 11 tenants (which includes the tenancy of the present defendant since deceased) as also transferred/attorned the tenancy/ownership rights in respect of 9 occupants of transit camps in favour of the Developer Annexed hereto and marked as Annexure B is a copy of the letter of attornment issued by the plaintiff society to the tenant. The applicant has further stated that additionally vide its letter dated 27/04/2008 the plaintiff society has further confirmed that the entire suit property (excluding building B) is in applicant's possession.

4. The applicant has further stated that pursuant to the development agreement and in terms thereof, the applicant has discharged several monetary obligations in respect of the proposed development, as

enumerated hereinbelow :-

- (i) The applicant got IOD and Commencement Certificate of Building - A revalidated from 6th April, 1995 to 6th November, 2011 by paying Rs. 3,58,050/-
- (ii) The applicant got IOD and Commencement Certificate of Building - C revalidated from 5th April, 2002 to 5th April, 2011 by paying to MCGM Rs. 2,07,900/-
- (iii) The IOD's and Commencement Certificates of both Building - A and Building - C have been further revalidated by the applicant till today.
- (iv) The applicant have settled all the disputes in respect of the Flats in Building - A.
- (v) The applicant has paid to the society the entire monetary consideration of Rs. 43,00,000/- (Rs. Forty three lakhs only) agreed under the Agreement under the Agreement dated 8th December, 2006. In addition,
- (vi) The applicant has paid to 30 out of 35 members of the society building flats in Building - B Rs. 3,12,500/- each on their executing agreements with the applicant recording their consents to the Resolution passed at the General Body Meeting of the members of the society held on 10th September, 2006 and to the Agreement dated 8th December, 2006.

5. The applicant has further stated that so as not to delay the hearing of the present suit, it was mutually agreed between the plaintiff society and the applicant that in spite of the attornment of tenancy of the defendant in applicant's favour, the plaintiff shall continue with and be on record of the present proceedings and upon passing of decree in favour of

the plaintiff shall immediately handover the possession of the suit premises to enable the applicant to commence construction as per the development agreement. The applicant has also regularly paid the professional fees of the advocates engaged by the society.

6. The applicant has further stated that however now with an intent to defraud the applicant of his rights, the plaintiff without his knowledge and consent has entered into a clandestine arrangement with one M/s. Polestar Realtors Pvt. Ltd. The said Polestar filed a suit against the society being T.E. & R. Suit No. 177/192 of 2014 pending in Court Room No. 32. At the behest of M/s Polestar Realtors Pvt. Ltd the plaintiff has allegedly terminated (albeit illegally) the development agreement with the applicant. The applicant vide his letter dated 22/01/2016 denied the alleged termination and placed on record that the said development agreement is valid and subsisting. Polestar and the plaintiff herein were clandestinely, negotiating a deal with Polestar. Fortunately for the applicant, one of the members of the society informed the applicant about it and the applicant promptly made an intervention application to be joined as a party to that suit. Even whilst the intervention application was pending hearing, Polestar and the plaintiffs herein tried to file Consent Terms in said T.E. & R. Suit No. 177/192 of 2014 whereby the society would have handed over possession to the said Polestar without his knowledge or consent. The applicant moved an application to restrain Polestar and the society by an order of injunction from in any manner dealing with the property or any portion thereof under any arrangement whatsoever and which application is pending hearing.

7. The applicant has further stated that thereafter he made

inquiries in respect of stage of the proceedings in the above matter, he found that M/s. Polestar has got itself joined in the present proceedings. But that order was challenged by the plaintiff. On 04/02/2017 the plaintiff herein informed the Revision Court that it had made a settlement with Polestar Realtors P. Ltd. and hence would like to withdraw the Revision Application and accordingly made an application for withdrawal of the Revision Application. The applicant has further stated that seeing how the plaintiff herein and the said Polestar tried to take away his rights vis a vis the suit premises in the T.E. & R. Suit No. 177/192 of 2014 it is possible and the applicant apprehend that plaintiff and Polestar will try to file some Consent Terms or simply withdraw the suit and do away with his rights and possession of the property and the suit premises.

8. The applicant has further stated that he is directly and substantially concerned with the suit premises and any orders/decrees passed in the matter will prejudicially affect him. The applicant is a proper and necessary party to the proceedings. Full and effectual disposal of the proceedings is not possible without his presence in the suit. No harm, loss or prejudice will be caused to the plaintiff, if the applicant is joined as a party to the suit. However, gross loss, harm will be caused to the applicant if he is not joined in the suit as the parties hereto, will collusively part with possession of the suit premises to the plaintiff without his knowledge. In these circumstances, the applicant has prayed to direct the plaintiff to join him as a party defendant in this suit.

9. The plaintiff has filed reply at Exh. 42 and stated that application taken out by the applicant is misconceived, malafide, illegal and bad-in-law and the same is liable to be dismissed with costs. The

applicant is neither a necessary nor a proper party for adjudication of this dispute as this is suit between landlord and tenant under Bombay Rent Control Act for development of the suit property and for providing permanent alternate accommodation to the defendant in lieu of the suit premises.

10. The plaintiff has further stated that the landlords had filed a suit before Small Causes Court against the plaintiff for declaration as well as for possession of the suit property on the ground of alleged various latches and breaches, which was settled between the landlord – lessor and the plaintiff – lessees by filing a Consent Term dated 07/03/2017. In this suit, the applicant made an application to join as party - defendant in the said suit and objected filing of Consent Terms and the same was rejected by this court on the grounds more particularly set out therein. The plaintiff has further stated that the applicant challenged the said order dated 07/03/2017 and filed a Writ Petition No. 5179 of 2017 before the Hon'ble High Court and the same was also rejected.

11. The plaintiff has further stated that development agreement executed in favour of the applicant to develop the plaintiffs' property on 08/12/2006 was terminated as the applicant did not take steps to develop the said property during the tenure mentioned in the said development agreement and said agreement was cancelled by notice dated 27/10/2015. The plaintiff has further stated that the applicant has filed a suit in the Hon'ble High court for damages and other reliefs and took out Notice of Motion for ad-interim reliefs, claiming to be in possession of the plaintiffs' property and made various claims therein. The Hon'ble High court appointed Commissioner and verified the fact and came to the conclusion

that the applicant is neither in possession of the suit property nor has any concern, as the property in question is in possession of the plaintiff society and the plaintiff society has its own guards and ad-interim injunction was refused.

12. The plaintiff has further submitted that when the applicant has filed an independent suit for adjudication of his claim on account of alleged termination of development agreement dated 08/12/2006, the applicant has no right to file this application in this suit. The plaintiff has stated that the developer is an agent of the owner and he was authorized to develop the property on behalf of the owner and when he failed to develop the property on behalf of the owner and when he failed to develop the property his agency was terminated and now he is no more an agent of the plaintiff society and therefore applicant's entire claim in the present application is false. The plaintiff has denied that the applicant is in actual occupation of tenement No. 2 in the chawl and seven structures in the transit camps and society office. The plaintiff has denied that development agreement records that on execution the Society has attorned the tenancy and/or ownership of 11 tenants (which includes the tenancy of the present defendant since deceased) as also transferred/attorned the tenancy/ownership rights in respect of 9 occupants of transit camps in favour of the Developer.

13. The plaintiff has further stated that the society office is in 'B' Building and when 'B' Building, according to the applicant is excluded, in that event, the office of the society is excluded. Thus, the claim of the applicant is totally incorrect and false. So far as letter dated 27/04/2008 is concerned, it would speak for itself and falsify the claim of the applicant.

The plaintiff has further stated that if the applicant got revalidated the IOD and Commencement Certificate of Building from 6th April, 1995 to 6th November, 2011 by paying Rs. 3,58,050/-, then it can be a claim of monetary consideration. Similarly, the revalidation of IOD and Commencement Certificate of Building 'C' from 5th April, 2002 to 5th April, 2011 by paying to MCGM Rs. 2,07,900/- can be claimed by the applicant as a reimbursement. The plaintiff is not aware and not admitted that IOD's and Commencement Certificates of both Building 'A' and Building 'B' have been further revalidated by the applicant till today. The plaintiff has denied that the applicant has settled all the disputes in respect of the Flats in Building 'A'. The payments made by the applicant will be repaid.

14. The plaintiff has further denied that not to delay the hearing of the suit, it was mutually agreed between the plaintiff society and the applicant that the plaintiff shall continue with and be on record of the present proceedings. The plaintiff has stated that in the Special General Body Meeting, the applicant was very much present and was aware of the decision. The plaintiff has stated that the Consent Terms entered into between M/s. Pole Star Realtors Pvt. Ltd. and the plaintiff society is matter of record and it was challenged by the applicant in earlier proceeding bearing T.E. & R. Suit No. 177/192 of 2014 before Small Causes Court and before the Hon'ble High Court. The plaintiff has denied that M/s. Polestar Realtors Pvt. Ltd. tried to take away applicant's right vis-a-vis the suit premises in T.E. & R. Suit No. 177/192 of 2014 as alleged.

15. The plaintiff has further denied that the applicant is directly and substantially concerned with the suit premises and any orders/decrees passed in the matter will prejudicially affect him. The plaintiff's society

terminated the development agreement in 2015 and now has already appointed the Polestar Realtors Pvt. Ltd. to develop the suit property and provide better and adequate accommodation to the tenants of the plaintiff society as well as to its members. The applicant is neither necessary nor proper party. The plaintiff has finally prayed to dismiss the application. The defendant has filed say and objected the application but not stated in detail the grounds of objections.

16. The advocate for the applicant argued that the plaintiff had entered into development agreement with plaintiff on 08/12/2006 to develop the suit property and applicant was put in possession of parts of the suit premises including the tenanted premises. The advocate further argued that in furtherance of the development agreement, the plaintiff society has attorned the tenancy of tenants and issued them attornment letter. The advocate further argued that the applicant started doing necessary work of taking IOD, commencement certificate and also settled some disputes. The advocate further argued that the applicant has paid huge amount of about 43,00,000/- to the plaintiff in December, 2006 and also paid amounts to the members of the plaintiff's society. The advocate further argued that Resolution was passed in meeting of General Body of members of the Society and applicant was rights to develop the suit property. The advocate further argued that without considering the applicant the plaintiff entered into some arrangement with M/s. Polestar Realtors Pvt. Ltd. and illegally terminated the development agreement of the applicant. The advocate further argued that development agreement is still valid as per clauses in the development agreement and the applicant has filed suit in the Hon'ble High Court to enforce his rights. The advocate

further argued that M/s. Polestar Realtors Pvt. Ltd. got joined in the suit and plaintiff challenged this in Revision and later on withdraw the Revision. The advocate further argued that the applicant is having right to develop the suit property and deal with the tenants and this right will suffer if plaintiff and M/s. Polestar and defendant behind back of the applicant do any compromise in the matter. The advocate further argued that there is clause of Arbitration also which parties have still not invoked. The advocate further argued that the applicant has filed suit in the Hon'ble High Court challenging the termination and matter is sub-judice. The advocate further argued that in the development agreement the eviction suits filed against the tenants are to be continued by the applicant so that the suit property can be developed. The advocate further argued that the applicant has filed on record documents like development agreement, attornment letter and various clauses in the development agreement shows that applicant has substantial rights in the suit premises and is proper and necessary party in this suit and will suffer if applicant is not made party in the suit and giving opportunity. The advocate further argued that the case laws filed by the plaintiff are not applicable to the facts of the case and finally prayed to allow the application.

17. While the advocate for the plaintiff argued that application is not maintainable. The applicant is not necessary and proper party as this suit pertaining to eviction of the defendant under the Rent Act. The advocate further argued that the development agreement is terminated by the society and now the applicant has no right in the suit property. The advocate further argued that the society is ready to return the amount to the applicant and the applicant has got only remedy of claiming monetary

loss. The advocate further argued that the applicant's application in the T.E. & R. Suit was rejected and the applicant challenged the order before the Hon'ble High Court which also rejected by the Hon'ble High Court. The advocate further argued and relied upon the case laws and stated that applicant is not proper and necessary party. The advocate further argued that the applicant was aware of this suit and at such belated such application is made with malafide intention to delay the hearing of the suit. The advocate finally prayed to reject the application. The advocate for the defendant orally submitted that necessary order be passed.

18. Considered the application, say and arguments. It is stated in the application that one M/s. Saboo and Varun was appointed as developer by plaintiff to develop the suit property and M/s. Saboo and Varun failed to comply with the terms and conditions of the development agreement, the plaintiff terminated the agreement. It is further stated that the development agreement with M/s. Saboo and Varun having been terminated, the plaintiff has entered into a registered development agreement with the applicant on 08/12/2006.

19. The applicant has stated that the development agreement itself records that applicant is being put in possession of various portions of suit property including tenement No. 2 in the chawl (of which in fact, applicant is in actual occupation), 7 structures known as transit camps and society office. The applicant has further stated that development agreement records that on execution the Society has attorned the tenancy and/or ownership of 11 tenants (which includes the tenancy of the present defendant since deceased) as also transferred/attorned the tenancy/ownership rights in respect of 9 occupants of transit camps in favour of the

Developer and Annexure B is a copy of the letter of attornment issued by the plaintiff society to the defendant. The applicant has further stated that the plaintiff vide its letter dated 27/04/2008 confirmed that the entire suit property (excluding building B) is in applicant's possession.

20. The applicant has stated in the application that he has discharged several monetary obligations in respect of the proposed development such as :- (i) The applicant got IOD and Commencement Certificate of Building - A revalidated from 6th April, 1995 to 6th November, 2011 by paying Rs. 3,58,050/-, (ii) The applicant got IOD and Commencement Certificate of Building - C revalidated from 5th April, 2002 to 5th April, 2011 by paying to MCGM Rs. 2,07,900/-, (iii) The IOD's and Commencement Certificates of both Building - A and Building - C have been further revalidated by the applicant till today, (iv) The applicant have settled all the disputes in respect of the Flats in Building – A, (v) The applicant has paid to the society the entire monetary consideration of Rs. 43,00,000/- (Rs. Forty three lakhs only) agreed under the Agreement under the Agreement dated 8th December, 2006.

21. Here, it is necessary to mention the various clauses of the development agreement :-

“(c) A Ground Floor chawl consisting of 12 residential tenements assessed to Municipal Property Taxes under H Ward No. 128 M, is standing on a portion of the said property and 11 of the tenements therein are in the occupation of Tenants named in Annexure “B” hereto and at present one tenement in the said Chawl being Room No. 2 is in the occupation of the Society as the Owners. The said 12 Tenements are more particularly shown on the plan annexed hereto as Annexure 'A' and marked as 1 to 12 thereon.

The Society has on the execution hereof handed over the possession of the tenement being Room No. 2 more particularly shown by Red hatched lines on the plan annexed hereto as Annexure "A" to the Developer with a right to deal with and demolish the same in the manner he deems fit.

(d) The Society has on the execution hereof handed over the possession of the said 7 structures to the Developer with a right to deal with and demolish the same in the manner he deems fit.

(e) On the application of the Society, building plans for construction of:

(i) Building 'A' consisting of ground and 8 floors with 32 Flats with FSI of 1689.62 square mtrs. out of which 8 Flats were intended for 8 members on the Waiting List of the Society and the remaining Flats were intended to disposal to prospective Flat Purchasers and/or members;

(ii) Building 'B' consisting of ground and 3 upper floors with 36 Flats with FSI of 1479.32 square mtrs. (including external staircase area of 148.5 sq. mtrs.) for allotment of 35 members of the Society and allotment of the remaining one Flat to the Society;

(iii)

(g) Due to lack of co-operation from the Tenants and Occupants of the Chawl and structures standing on portions of the said property, the Society could not commence and complete construction of Building A and C within the period of validity of the Commencement Certificates in respect thereof.

(h) Under the Agreement dated 7th November, 1981 registered with the Sub-Registrar of Bombay under Serial No. BOM/S/3189/1/1981

executed between the Society and the Confirming Party with the approval of the General Body of the Society granted at its meeting held on 2nd November, 1980 as modified by the Supplemental Agreements dated 23rd January 1982, 12th July 1990 and 1st November 1991 executed between the Society and the Confirming Party, the Society granted to the Confirming Party, Development Rights of the said property and entrusted to the Confirming Party, the development and construction of Buildings 'A' and 'C' thereon in accordance with the sanctioned Plans and allowed the Confirming Party to use and utilise the balance FSI available for the said property after demolition of existing Chawl and Ground Floor structures thereon on the terms and conditions provided in the said Agreement dated 7th November, 1981 as modified by the Supplemental Agreements dated 23rd January, 1982, 12th July 1990 and 1st November 1991 executed between the Society and the Confirming Party.

(p) As a result of negotiations between the parties hereto, the Society and the Confirming Party have agreed to grant to the Developer and the Developer has agreed to acquire from the Society and the Confirming Party full and exclusive right and permission to develop the said property to the maximum permissible extent by completing the finishing items of work of Building A, consisting of suit with 9 upper floors and part 10th upper floor, such as fire fighting, PCC of the open compound surrounding the Building A constructed with FSI of 2036.73 square mtrs. in accordance with the amended building plans sanctioned by the BMC under No. GB/213/AH with further amendments which may be sanctioned by the BMC and by carrying out and completing construction of the Building C now approved of ground and 4 upper floors with FSI of 563.86 square mtrs. in accordance with the building plans sanctioned by BMC under No. GB/214/A, with such

amendments as may be approved by the BMC

**NOW THIS AGREEMENT WITNESSTH AND IT IS HEREBY AGREED,
DECLARED, RECORDED AND CONFIRMED BY AND BETWEEN THE
PARTIES HERETO AS FOLLOWS :-**

4. In consideration of the Society agreeing to grant to the Developer the development rights and other rights in respect of the said property including the attornment of the Tenancy and/or Ownership rights of the Chawl Tenants more particularly described in Annexure "B" hereto and the Ownership rights in respect of the 9 Occupants more particularly described in Annexure "C" hereto in favour of the Developer, on the terms and conditions recorded herein and in consideration of performance by the Society of its obligations hereunder, the Developer agrees to pay to the Society monetary consideration of Rs. 43,00,000/- (Rupees Forty Three Lacs Only) which sum of Rs. 43,00,000/- (Rupees Forty Three Lacs Only) has been paid by the Developer to the Society on or before the execution of this Agreement (the payment and receipt whereof the Society doth hereby admits and acknowledge and acquits, releases and discharges the Developer from the payment of the same and every part thereof).

6. On the execution hereof, the Society has attorned the tenancy and/or ownership of the 11 tenants mentioned in the list annexed hereto as Annexure "B" as also transferred/attorned the Tenancy/Ownership rights in respect of the 9 Occupants of Transit camps, as stated in the list annexed hereto as Annexure "C" in favour of the Developer. The Developer shall at his own cost provide permanent alternate accommodation to the Tenants of the Chawl and other Occupants on the said property either on the said property or outside the said property or pay them monetary compensation of deal with them in

any other manner as may be agreed between the Developer and such Tenants and Occupants. The Developer will be entitled to take the possession of the premises and/or structures, so vacated by the Tenants and the Occupants and shall be entitled to deal with the said premises and/or structures in any manner he deems fit including demolishing the same. Further the premises on the said property in which permanent alternate accommodation may be allotted to any of the Tenants and Occupants of the Chawl and structures on the said property shall belong to the Developer and shall be allotted by the Society to the Developer or his nominee and the Tenants and Occupants to whom permanent alternate accommodation may be provided therein shall be the Tenants and Occupants of the Developer or the nominees of the Developer.

.....

10. The Developer shall carry out and complete development of the said property by entering into settlements with 8 Members of the Society on its waiting list named in Annexed "F" hereto and with all the remaining Tenants in the Chawl standing on a portion of the said property and with the Occupants of Transit camp constructed by the Confirming Party on the said property and the Society and the Confirming Party shall extend to the Developer full co-operation required for the purpose, Provided that the Society and the Confirming Party shall not be required to incur any expenditure for the purpose and all amounts required to be paid and expenses required to be incurred for the purpose shall be borne and paid by the Developer.

27. On execution of this Development Agreement, the Developer shall be entitled to enter upon the said property described in the Schedule under written (except building B thereon) for carrying out the construction of 'A' and 'C' Buildings. The Developer shall be entitled to demolish the existing

Chawl and transit camps and structures standing on the said property and carry out the development and construction on the said property. All debris salvaged on the demolition of the buildings and structures on the said property shall belong to the Developer who may deal with or dispose of the same in such manner as he may in his absolute discretion deem fit. The entire development and construction of the said property shall be carried out by the Developer at his own costs and at his own responsibility in accordance with the approved plans and the permissions and sanctions granted and to be granted by the BMC and other concerned Authorities.

38. The entire development and construction work on the said property shall be carried out and completed by the Developer at his own risks, costs and expenses, as per the plans approved and to be got approved by the BMC within a period of 30 months from the date of this Agreement, in the event if the Developer fails to complete the development and construction work on the said property within 30 months as aforesaid then and in such an event, the Developer shall be liable to pay to the society liquidated damages of an amount equal to Rs. 50,000 per month, for each month of delay or part thereof by the 5th of the following month.

52. All disputes and differences between the parties hereto in connection with this Agreement and/or touching these presents and/or with regard to the interpretation of the provisions hereof or with regard to the rights, obligations or liabilities of any of the parties hereto or on account of payment to be made hereunder or as to any other matter in any way relating to or touching or concerning or arising under this Agreement or any part thereof or otherwise howsoever affecting the parties hereto shall be referred to Arbitration. Such Arbitration shall be that of a Sole Arbitrator if the parties

are agreeable to a sole Arbitrator, failing which each party to any such dispute or difference shall appoint an Arbitrator and the two Arbitrators shall appoint a third Arbitrator and such Arbitration shall be in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996 or any other statutory modification or re-enactment thereof for the time being in force. Such Arbitration shall be held in Mumbai.”

22. It is necessary to refer the contents of Letter of Attornment dated 08/12/2006 which shows that the plaintiff had informed the tenants that the applicant should be treated as landlord by the tenants and also to pay the rent and further deal with the applicant accordingly. The contents of said attornment letter are as follows :-

“ LETTER OF ATTORNMENT

From :

*Rachana Co-operative Housing Society Limited
Somnath Lane,
128, Hill Road, Bandra (West),
Mumbai 400 050.*

To,

The Tenant

Room No.

*Plot bearing CTS No. C-40, C-49 to C-54 of Village Bandra,
Somnath Lane,
128, Hill Road, Bandra (West),
Mumbai 400 050.*

Sub : Attornment of Tenancy of Room No. ---, Plot bearing CTS No. C 40, C-49 to C-54, Village Bandra, Somnath Lane, 128, Hill Road, Bandra (West), Mumbai 400 050.

Dear Sir/Madam,

We have to inform you that by an Agreement dated 8th December, 2006, executed between ourselves as the Society of the One Part, M/s. Saboo and Varun as the Confirming Part of the Second Part and Mr. Samir N. Bhojwani as the Developer of the Third Part, we have transferred the above premises being Room No. ____, Plot bearing CTS No. C-40, C-49 to C-54 of Village Bandra, Somnath Lane, 128, Hill Road, Bandra (West), Mumbai 400 050 [hereinafter referred to as the "said premises"] in your occupation, to Mr. Samir N. Bhojwani and have attorned the tenancy in respect of the said premises to Mr. Samir N. Bhojwani.

We request you to henceforth kindly pay the monthly rent including taxes and other outgoings payable in respect of the said premises in your possession/occupation to Mr. Samir N. Bhojwani at his office at Samir Complex, First Floor, St. Andrew's Road, Bandra (W), Mumbai 400 050, with immediate effect and deal with the said Mr. Samir N. Bhojwani in all matters as a Landlord of the said premises in your occupation, without any further reference or recourse to us.

Dated this 8th day of December, 2006

Yours faithfully,

For Rachana Co-Operative Housing Society Ltd."

23. The applicant has also relied on the letter dated 27/04/2008 issued by the plaintiff which shows that possession of suit property was handed over by the plaintiff to the applicant. The contents of the said letter dated 27/04/2008 are as follows :-

“ **RACHANA CO-OPERATIVE HOUSING SOCIETY LTD**
Somnath Lane, 128 Hill Road, Bandra, Mumbai – 400 050.
Regd. No. B – 2867 of 1960

27th April 2008

To,

Samir Bhojwani
Samir Complex,
St. Andrews Road,
Bandra (W), Mumbai – 400 050.

Dear Sir,

Sub : Appointment of Security Guards and installation of security gate

As per the development agreement 8th December 2006 the property of the society excluding 'B' building is in your custody for development work. As per the said agreement you are fully authorized to safeguard yours as well as society's interest by way of appointing security guards and putting up security gates wherever necessary.

Also, to take care of the many encroachments made by the tenants in our property and to avoid any further encroachments the whole premises should be securitized by appointing a reliable and strong security agency on behalf of the society and within the entire society's property to take care of the society's property and its members.

Thanking you,

Yours truly,

Secretary for RACHANA CHSL”

24. The plaintiff has not denied the execution of development

agreement and issuance of attornment letter to the tenants and other correspondence issued by the plaintiff in favour of the applicant. The plaintiff has also not denied the receipt of monetary consideration from the applicant and has also not denied the contentions that the applicant has applied to local body for necessary permission for development from time to time. There is nothing on record to show that the plaintiff has taken objection to B.M.C. against the applicant for issuing necessary permissions for development of the suit property. The plaintiff in his reply has stated that if the applicant got revalidated IOD and Commencement Certificate of Building from 6th April, 1995 to 6th November, 2011 by paying Rs. 3,58,050/-, then it can be a claim of monetary consideration. The plaintiff has also stated that the revalidation of IOD and Commencement Certificate of Building 'C' from 5th April, 2002 to 5th April, 2011 by paying to MCGM Rs. 2,07,900/- can be claimed by the applicant as a reimbursement. The plaintiff is not aware and not admitted that IOD's and Commencement Certificates of both Building 'A' and Building 'B' have been further revalidated by the applicant till today.

25. The applicant has specifically stated that with an intent to defraud the applicant of his rights, the plaintiff without his knowledge and consent has entered into a clandestine arrangement with one M/s. Polestar Realtors Pvt. Ltd. The said Polestar filed a suit against the society being T.E. & R. Suit No. 177/192 of 2014 which was pending in Court Room No. 32. At the behest of M/s Polestar Realtors Pvt. Ltd the plaintiff has allegedly terminated the development agreement with the applicant. The applicant has further stated that in this eviction suit M/s. Polestar has got itself joined in the present proceedings and aggrieved by the order passed

of joining M/s. Polestar Realtors Pvt. Ltd., the plaintiff challenged the said order by filing Revision. The applicant has further stated that on 04/02/2017 the plaintiff herein informed the Revision Court that it had made a settlement with Polestar Realtors Pvt. Ltd. and hence would like to withdraw the Revision Application and accordingly made an application for withdrawal of the Revision Application. The applicant has further stated that seeing how the plaintiff herein and the said Polestar tried to take away his rights vis a vis the suit premises in the T.E. & R. Suit No. 177/192 of 2014 it is possible and the applicant apprehend that plaintiff and Polestar will try to file some Consent Terms or simply withdraw the suit and do away with his rights and possession of the property and the suit premises. The applicant has further stated that he is directly and substantially concerned with the suit premises and any orders/decrees passed in the matter will prejudicially affect him and he is a proper and necessary party to the proceedings. Full and effectual disposal of the proceedings is not possible without his presence in the suit. No harm, loss or prejudice will be caused to the plaintiff, if the applicant is joined as a party to the suit. However, gross loss, harm will be caused to the applicant if he is not joined in the suit as the parties hereto, will collusively part with possession of the suit premises to the plaintiff without his knowledge.

26. The following case laws cited by the plaintiff :- **Vidur Impex and Traders Pvt. Ltd. & Others v/s Tosh Apartments Pvt. Ltd. & Others [2012(8) SCC 384], Maooli Land Developers and Ors. v/s Taukir Ahmed Mohammed Hanif Khan and Ors. (Chamber Summons (LODG.) No. 1237 of 2014 in Suit No. 1754 of 2006 decided on 16/01/2015), Pravat Kumar Misra v/s Prafulla Chandra Misra and another (AIR**

1977 Orissa 183), Foolchand Nanhelal Parwar v/s Shabbir Hussain s/o Mulla Akbar Ali Bohra [1998 (1) Mh.L.J. 429], Vidur Impex and Traders Pvt. Ltd. and others v/s Tosh Apartments Pvt. Ltd. and others [(2012) 10 S.C.R. 307] and Southern Roadways Ltd, Madurai v/s S.M. Krishnan (AIR 1990 Supreme Court 673). With due respects, these case laws are not applicable to the present case as the facts of all the above case laws are different and in none of these cited cases in facts there was agreed terms and conditions of the development between the aggrieved parties. In the cited cases the agreements were in violation of provisions of law, in breach of orders and parties were not having locus standi. At this stage if Order 1 Rule 10 of C.P.C. is to be considered it cannot be taken with rigidity but flexibility has to be exercised and at this stage merits of the case and rights cannot be decided without giving opportunity to the parties to put forth their case in the present suit.

27. The plaintiff has not denied the receipt of monetary obligations done by the applicant as per terms and clauses of the development agreement. Under the development agreement the applicant has paid to the plaintiff, invested large amount and had also done the work of revalidating the permissions from the Corporation. The plaintiff had not returned amount to applicant nor applicant accepted said amount. The applicant has stated that in the eviction suits filed by the plaintiff against the tenants, the Secretary of plaintiff in the affidavit of evidence admitted that the plaintiff has entered into development agreement with applicant. Merely the plaintiff has issued termination letter of cancelling the development agreement. The plaintiff has not filed any suit in the court for declaration that the applicant's development agreement is not

binding and has become void. M/s. Polestar Realtors Pvt. Ltd. previously in this suit filed an application to implead them as party defendant and said application was allowed on 13/12/2013. The plaintiff thereafter filed Revision challenging the said order of joining M/s. Polestar Realtors Pvt. Ltd. and subsequently withdraw the Revision. Because of joining third party M/s. Polestar Realtors Pvt. Ltd. there must be some transaction between the plaintiff and M/s. Polestar Realtors Pvt. Ltd. affecting the suit property's rights and obligations. The applicant is not party to the said transaction between M/s. Polestar Realtors Pvt. Ltd. and the plaintiff and there is no document showing that plaintiff had previously informed the applicant about their transaction. M/s. Polestar Realtors Pvt. Ltd. had become party to the suit but subsequently not filed reply and opposed this application. Any order passed in this suit may affect the rights of the applicant. The applicant has filed Specific Performance Suit in the Hon'ble High Court in respect of this development agreement and challenged the said termination letter and the subject matter is subjudiced before the Hon'ble High Court. Still there is disputes about the rights and obligations of both parties. There is arbitration clause in the said development agreement. There is nothing on record to show that arbitration clause was invoked to enforce rights under the development agreement by the plaintiff and the applicant. Arbitration clause remedy was not invoked by the plaintiff. The plaintiff's case in defence of this applicant's application cannot be considered at this stage as it is disputed question related to the suit property and can be considered only after trial by having all proper parties in the proceeding and as such the applicant is proper and necessary party to this suit to completely and effectively decide the suit. This suit is

still pending. There is development transaction between the plaintiff and the applicant in respect of the suit property. The subject matter between the parties is also pending before the Hon'ble High Court. If any orders passed in this suit in the absence of applicant, the applicant's right may get affected in respect of suit property. If the applicant is made party then all issues between the parties can be considered and orders can be passed by giving opportunity to all the parties. If the application is not allowed, there can be multiplicity of proceeding between plaintiff, M/s. Polestar Realtors Pvt. Ltd. and the applicant. In view of above facts and in the interest of justice to decide the matter on merits, the application needs to be allowed. Hence, the order.

:: ORDER ::

- 1) Application is allowed.
- 2) The plaintiff is directed to implead the applicant as party defendant in this suit.

Date : 24/01/2018

**(M. B. Oza)
Judge, C.R.No.37**

Typed on : 29/01/2018
Checked & signed on : 05/02/2018