



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.134 OF 2009
WITH
NOTICE OF MOTION NO.1448 OF 2011
IN
SUIT NO.134 OF 2009
WITH
NOTICE OF MOTION NO.2381 OF 2011
IN
SUIT NO.134 OF 2009
WITH
NOTICE OF MOTION NO.145 OF 2018
IN
SUIT NO.134 OF 2009

OYSTER SHIP MANAGEMENT
PRIVATE LIMITED & ORS.PLAINTIFFS

V/S
M/S. BHAVSAR CONSTRUCTION CO.
PVT. LTD. & ORS.DEFENDANTS

...
WITH
CHAMBER SUMMONS (L) NO.172 OF 2019
IN
SUIT NO.134 OF 2009

SHREE SAI DEVELOPERS & ORS.APPLICANTS

IN THE MATTER BETWEEN
M/S. OYSTER SHIP MANAGEMENT
PRIVATE LIMITED & ORS.PLAINTIFFS

V/S
M/S. BHAVSAR CONSTRUCTION CO.
PVT. LTD. & ORS.DEFENDANTS

...

WITH
CHAMBER SUMMONS NO.1425 OF 2018
IN
SUIT NO.134 OF 2009
...
WITH
INTERIM APPLICATION NO.4301 OF 2022
IN
SUIT NO.134 OF 2009

M/S. BHAVSAR CONSTRUCTION
CO. PVT. LTD. & ORS.APPLICANTS
IN THE MATTER BETWEEN
OYSTER SHIP MANAGEMENT
PVT. LTD. & ORS.PLAINTIFFS
V/S
M/S. BHAVSAR CONSTRUCTION
CO. PVT. LTD.DEFENDANTS

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Mr. Ashish Kamat, Senior Advocate with Mr. Shanay Shah with Mr. Kiran Jain, Mr. Ayush Chugh and Ms. Neha Raut i/b M/s. Kiran Jain & Co. for Plaintiffs.

Mr. Sharan Jagtiani, Senior Advocate i/b Mr. Kunal Bhanage for Defendant Nos.8 to 11.

Mr. Karl Tamboly with Mr. Girish Paryani and Mr. Shavez Mukri i/b M/s. A & G Legal Associates LLP for Defendant Nos.1 to 3.

Mr. H.V. Kumarswamy Iyer, for Defendant Nos.4 to 6.

Mr. Deepak Shukla for Defendant No.15/Union of India.

Mr. S.K. Dhekale, Court Receiver with Mrs. S.S. Chipkar, Master (Adm.), Office of the Court Receiver, present in Court.

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CORAM : **SANDEEP V. MARNE, J.**
RESERVED ON : **FEBRUARY 14, 2024.**
PRONOUNCED ON: **FEBRUARY 22, 2024.**

JUDGMENT:

1 The Suit was listed for settlement on account of submission made on Plaintiffs' behalf that the disputes are amicably resolved. Accordingly, Consent Terms are tendered jointly by the learned counsel appearing for Plaintiffs and the learned counsel appearing for the Defendant Nos. 8 to 11. However, Defendant Nos.1 to 3 have opposed compromise of the Suit by Plaintiffs with Defendant Nos.8 to 11 on the grounds, both of impermissibility to settle the Suit behind their back and also on the ground of terms of compromise affecting their rights in respect of land on which Defendant Nos.8 to 11 are proposing to carry out construction. Defendant Nos.4 to 6 are also opposed to acceptance of Consent Terms by this Court on the same grounds as that of Defendant Nos.1 to 3. Therefore, this detailed order is necessitated with a view to examine the objections raised by the Defendant Nos.1 to 3 as well as by Defendant Nos.4 to 6 to compromise of suit between the Plaintiffs and Defendant Nos.8 to 11.

2 Thirty-five Plaintiffs have filed the present Suit seeking a declaration that they are the purchasers of Units described in Exhibit-C1 to Exhibit-C7 in the proposed commercial complex building named 'Sharada Complex' to be constructed on plot of land bearing Survey

No.41-part (1)(B) bearing CTS No.444, 444/1, 444/2 and 445 at Swami Vivekanand Road, village Oshiwara, Jogeshwari, Mumbai 400 102 (**suit plot**). Plaintiffs seek direction against Defendant Nos.1 to 11 to jointly and severally comply with the statutory obligations under the Maharashtra Ownership of Flats (Regulation of the Promotion of the Construction, Sale, Management and Transfer) Act, 1963 (**MOFA**) by executing various documents and performing various acts more particularly described in prayer clause (b) of the Plaint. Various other consequential reliefs are sought by the Plaintiffs in the Suit.

3 Defendant No.1 is a Construction Company who acquired the suit plot under the Deed of Conveyance dated 17 July 1993. The Mumbai Metropolitan Regional Development Authority (**MMRDA**) acquired the suit plot on 2 December 1994 towards planning proposals for Oshiwara District Centre. Defendant No.1 applied to MMRDA for taking the suit plot on lease for carrying out development thereon. It is Plaintiffs' case that in anticipation of securing lease of the plot from MMRDA, Defendant No.1 as well as Defendant Nos.2 and 3 (who are the Directors/ Representatives of Defendant No.1) distributed pamphlets amongst public for purchase of Units in the commercial building to be constructed on the suit plot. Plaintiffs accordingly booked various Commercial Units in the proposed building named 'Sharada Complex', Wings A to G by paying various considerations as more particularly detailed in Exhibit-B1 to Exhibit-B7 to the Plaint. Plaintiffs claim that Defendant No.1 issued allotment letters in their favour in respect of various commercial units in consideration of

having received various amounts from Plaintiffs. That the total area of units allotted to the Plaintiffs is 46,715 square feet. It is Plaintiffs' case that out of the amounts paid by them to Defendant Nos.1 to 3, they paid premium amount of Rs.1,20,54,000/- to MMRDA towards lease premium and MMRDA executed a lease agreement dated 21 April 1995 with Defendant No.1 granting permission for development of the suit plot.

4 Defendant Nos.1 to 3 entered into development agreements dated 9 September 1996 and 14 August 1996 with Defendant No.4-M/s. Shri Sai Developers. Defendant Nos.5 to 7 are the partners of M/s. Shri Sai Developers. It appears that Defendant No.4 to 7 were attempting to enter into some arrangement with Defendant Nos.8 to 11 (M/s. Royal Developers). Plaintiffs claim that sometime in the year 1999/2000 Defendant Nos.1 to 3 terminated the development agreement and power of attorneys executed in favour of Defendant Nos. 4 to 7. Thereafter Defendant Nos.1 to 3 directly entered into joint venture agreement dated 10 May 2001 with Defendant Nos.8 to 11 for development of the suit plot. This is how, according to the Plaintiffs, Defendant Nos.1 to 11 are promoters within the meaning of MOFA. However as agreed, the concerned building was not constructed. In the meantime, Defendant Nos.12 and 13 (M/s. Tanna Construction Company) claimed acquisition of development rights and started construction activities on the suit plot and constructed ground plus six storied building, which according to Plaintiffs is unauthorized. That Defendant No.12 and 13 inducted various persons in such unauthorizedly constructed building known as Orion.

5 Failure on the part of Defendant Nos.1 to 11 to construct the building and handover possession of Units, in respect of which allotment letters were issued to Plaintiffs, gave rise to dispute between Plaintiffs and Defendant Nos.1 to 11.

6 In the meantime the Competent Authority under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (**SAFEMA**) initiated proceedings against Defendant Nos.2 and 3 by issuance of show-cause notice dated 10 September 1999 proposing forfeiture of two properties including the suit plot. The notice was adjudicated by the Competent Authority by order dated 22 March 2001 and both the properties were ordered to be forfeited. The said order was challenged by the Affected Parties before the Appellate Tribunal in which Plaintiffs as well as Defendant No.4-Developer also intervened. The Appellate Tribunal remanded the proceedings to the Competent Authority by order dated 27 September 2010.

7 In the above background, Plaintiffs have instituted the present Suit seeking a declaration that they are purchasers of their respective units as per the schedule annexed to the Plaint at Exhibit-C1 to Exhibit-C7 and seeking direction against Defendant Nos.1 to 11 to execute documents and perform acts as per the provisions of MOFA for sale of the respective units in their names. Alternatively, Plaintiffs have prayed for damages of Rs.36,94,00,000/- alongwith interest in the event

of refusal of decree of specific performance against Defendant Nos.1 to 11.

8 This Court passed order dated 2 December 2010 in Notice of Motion No.316 of 2009 filed in the present suit appointing Court Receiver in respect of the suit plot as well as the constructed building. It appears that one of the purposes of appointing Court Receiver in respect of the suit plot was to curb and remove encroachments on the plot. Accordingly, the Court Receiver took possession of the suit plot. This Court passed Order dated 4 December 2015 in Court Receiver's Report No.629 of 2015 directing Municipal Corporation of Greater Mumbai (**MCGM**) to remove encroachments. At the instance of the Court Receiver, the City Survey Officer has carried out measurement and has prepared a map. It appears that the Court Receiver has time and again requested the Municipal Corporation for Greater Mumbai to carry out action against unauthorized structures and encroachments on the suit plot.

9 In the meantime the proceedings remanded before the Competent Authority of SAFEMA came to be adjudicated and decided by order dated 10 October 2018. The Competent Authority passed following order:

"6.18. Order

i) Following properties are ordered to be forfeited to the Central Government under section 7 of the SAFEMA, free from all encumbrances.

1) Total commercial space of 15000 square feet super built up area in the proposed project at land Plot No.CTS No. 444, 444/1, 444/2, 445

at S.V. Road & Jogeshwari Oshiwara Link Road Corner, Oshiwara, Jogeshwari, Mumbai in the hands of Shri. Sunil Jain and Smt Archana Jain of Royal Developers.

2) Rs 10,00,000/- (Rupees Ten Lakh Only) payable to Bhavsar Construction Company and lying with Shri Sunil Jain and Archana Jain of Royal Developers.

3) Rs 20,00,000/- (Rupees Twenty Lakh Only) lying with Bhavsar Construction Company as paid by Shri Sunil Jain and Archana Jain of Royal Developers.

ii) Further, under section 19 of the SAFEMA, I hereby direct Shri. Sunil Jain and Smt Archana Jain of Royal Developers to file an undertaking in affidavit, within 30 days from the date of service of this order, that they would complete and hand over the said area at Sr. No.1 above immediately on completion of the project to the Central Government through this office. They shall also undertake that they will transfer the allotment to any person as may be directed by this office as a result of a successful auction at any time during the construction process or even before the commencement of further construction.

iii) Further, Shri. Sunil Jain and Smt Archana Jain of Royal Developers are directed under section 19 of SAFEMA to remit the sum of Rs 10,00,000/- at Sr No. 2 above to the Central Government through the undersigned by way of a Demand Draft drawn in favour of the "Competent Authority, SAFEMA, Mumbai" within 30 days from the date of service of this order.

iv) The APs 1 to 4 are directed. under section 19 of SAFEMA to remit the sum of Rs.20,00,000/- at Sr No. 3 above to the Central Government through the undersigned by way of a Demand Draft drawn in favour of the "Competent Authority, SAFEMA, Mumbai" within 30 days from the date of service of this order.

v) This order is passed only with respect to the forfeiture of property to the Central Government under the provisions of the SAFEMA and confines only to the proceedings thereof as to what is available and liable for forfeiture to the Central Government. The restrictions and prohibitions imposed by this office on the impugned property shall be lifted on execution of the undertaking in affidavit incorporating the conditions to protect the interest of the Government of India stated above.

vi) It is clarified and made clear that this order is passed without prejudice to the outcome of the Civil Suit No.134/2009 pending before the Hon Bombay

High court. It is clarified that though this office had taken over the formal possession in the year 12/7/2008, when the project was in the possession of the above Developers, through the District Collector, the same is not valid as on today in view of the appointment of Court Receiver by the Hon High Court in the above Suit. Therefore, all inter se disputes and arrangement with respect to the possession or any other issue incidental thereto shall be subject to the outcome of the said Suit since this Authority has no jurisdiction to look into the same and as such no order is passed on the same.

vi) If the Affected Persons or any other person who were before me in this proceedings are aggrieved of this order, they may appeal to the Appellate Tribunal, 4th Floor, Lok Nayak Bhavan, Khan Market, New Delhi 110 003, within 45 days of the service of this order.”

10 Thus as per the order dated 10 October 2018 passed by the Competent Authority under SAFEMA, only the commercial space admeasuring 15,000 square feet super-built-up area in the proposed building to be constructed on suit plot by Defendant Nos.8 to 11 in addition to certain other sums has been forfeited. The Competent Authority has permitted Defendant Nos.8 to 11 to carry out construction on the suit plot by holding that the transaction of JV Agreement in favour of Defendant Nos. 8 to 11 as well as with Plaintiffs are in goodfaith. The Competent Authority has accordingly protected the rights of the Plaintiffs as well as Defendant Nos.8 to 11. In this connection, following observations made by the Competent Authority in paragraphs 6.14, 6.15 and 6.17 of the order are relevant:

“6.14. As regards the genuineness of the transaction and good faith involved, I find that all the pros and cons have been duly considered and discussed while executing the deal and a plain reading of the agreement will reveal the facts. As such the intention behind the deal and the good faith is not disputed. Considering all these, it can reasonably be concluded that the property was acquired by the Developers in good faith and adequate consideration.

6.15 Further, the property is occupied by large number of protected tenants. The Development Rights have been allotted by the MMRDA with a condition of accommodating all the tenants and their rights, therefore the same are not disturbed. Similarly the Investors in the project including those who have approached the Appellate Tribunal and this Authority are also having their Right as protected under the Ownership of Flats Act and such a genuine right acquired in good faith from a builder are not altered on the basis of any illegal activity carried out by the builder, since any such action would be against natural justice. Further, these Investors have also approached the Hon Bombay High Court through the Civil Suit No 134/2009 and have been successful in apprising the court about their rights and getting a Receiver appointed by the court.

6.17. Now No it has to be examined after excluding the interests of the Developer, the Tenants and the Investors what remains in the hands of the APs as available for forfeiture. As on the date of issuance of the Show Cause Notice, the APs had already passed their rights to third parties i.e. Sunil Jain and Archana Jain of Royal Developers. What is available for forfeiture is the consideration paid and payable to the APs. It is seen that Developers have agreed to hand over 13000 sq ft area to the Central Government. But I do not agree with the same as the Agreement with the APs shows that a Super Built Up Area of 15000 sq ft super built up area is receivable by the APs. In addition they have paid a sum of Rs 20 Lakh and another sum of Rs 10 Lakh is payable to the APs. These are liable liable for forfeiture in the hands of the APs. These are properties derived out of the impugned illegally acquired property proposed for forfeiture.”

11 Thus the suit plot, which was originally forfeited vide order dated 22 March 2001 is now protected under order dated 10 October 2018 passed by the Competent Authority in the remanded proceedings only with a view to protect the interest of Plaintiffs and Defendant Nos.8 to 11. The entitlement of Defendant Nos.1 to 3 under the JV Agreement both in the form of constructed commercial space admeasuring 15,000 square feet as well as amounts receivable has however been forfeited by the Competent Authority. I am informed that Defendant Nos.1 to 3 have filed Appeal against the order dated 10 October 2018, which is pending.

12 In the above background, Plaintiffs and Defendant Nos.8 to 11 have decided to resolve the disputes amicably, under which Defendant Nos. 8 to 11 have agreed to construct new building and handover the allotted units to the Plaintiffs on terms and conditions more particularly agreed in the Consent Terms. Defendant Nos. 10 and 11 represent Defendant Nos. 8 to 11 in the Consent Terms. Paragraph nos. 1 to 21 of the Consent Terms describe the background in which the Consent Terms are filed. Paragraph nos. 22 to 25 contain the terms agreed by the Plaintiffs and Defendant Nos. 8 to 11 and read thus:

“22) The Plaintiffs and the Defendant Nos. 10 and 11 have agreed to the following terms:

(a) It is agreed by and between the parties hereto that the said construction will be carried out by the Defendant Nos.10 and 11 under the supervision of the Court Receiver, High Court, Bombay and they would follow all directions and orders passed by this Hon'ble Court from time to time.

(b) The parties hereby agree, declare and confirm that the Defendant Nos.10 and 11 shall carry out construction and complete construction of the building and apply for sanction of the plan, NOC, IOD, C.C., O.C. from MMRDA/BMC/MHADA and take into construction all the relevant factors, rules and regulations so as to carry on the construction and complete the construction on the said plot as per the arrangement between the parties as recorded in this Consent Terms.

(c) The Plaintiffs have agreed to give all co-operation, writings, NOC etc. to the Defendant Nos. 10 and 11 and to implement and adopt these Consent Terms for all purposes and intents they shall cooperate with the Defendant No.10 and 11 to complete the project in accordance with the law.

(d) The Defendant Nos. 10 and 11 agree, declare, confirm and undertake to commence construction of new building and undertake the redevelopment of the suit plot provide to the Plaintiffs the respective allotted Units within the period of 60 months after getting all approvals from the date of getting commencement certificate (C.C.) for development on the said plot of land,

however, in case if the Defendant nos. 10 and 11 cannot finish the construction work then they would get an extension/grace period of 12 months so as to complete the construction on the suit plot.

(e) The Defendant Nos. 10 and 11 shall undertake the redevelopment under the supervision of the Court Receiver High Court, Bombay appointed as per order dated 2/12/2010.

(f) It is agreed by and between the parties that for getting the possession of respective allotted units the Plaintiffs shall pay a sum of Rs.4500/- per sq. ft. to the Defendant Nos. 10 and 11 which shall be inclusive of the escalation price, construction cost and the balance consideration payable by the Plaintiffs on the basis of allotment letter issued to them.

(g) It is agreed by and between the parties hereto that the Plaintiffs in the settlement with Defendant Nos. 10 and 11 agreed by virtue of the present terms of the Consent Terms that the amount due to be paid to M/s. Kiran Jain & Company for providing legal services for the aforesaid litigation to this date will be paid by the Defendant Nos. 10 and 11 as mutually agreed and settled by and between the parties. The Defendant Nos. 10 and 11 agree and undertake to pay the said pending fees to M/s. Kiran Jain & Company on behalf of the Plaintiffs and the Plaintiffs have no objection for Defendant Nos. 10 and 11 directly paying to M/s. Kiran Jain & Company the said fees as may be mutually agreed and settled since the Plaintiffs have resolved their internal disputes and differences. Defendant no.10 and 11 cannot claim this amount from Plaintiff.

23) The parties hereto agree, declare and confirm that the Defendant Nos. 10 and 11 submit to decree on admission in terms of prayer clauses (a) to (f) and (j), (k) & (1) of the Suit.

24) In view of the aforesaid clause with the consent of the Plaintiffs prayer clauses (a) & (b) of the Notice of Motion No. 2381 of 2011 are made absolute so as to enable the Defendant Nos. 10 and 11 to undertake development of the suit property. The said order in terms of prayer clauses (a) & (b) of the said Notice of Motion No. 2381 of 2011 shall continue in execution of decree on admission in terms of prayer clauses (a) to (f) and (h) & (i) and accordingly decree be drawn up.

25) The Plaintiffs hereto agree that all the interim orders be continued subject to the aforesaid terms and to enable the Defendant Nos. 10 and 11 to complete the construction activities.”

13 Defendant Nos.1 to 3 on one hand and Defendant Nos.4 to 6 on the other have raised strong objections to acceptance of Consent Terms tendered by Plaintiffs and Defendant Nos.10 and 11.

14 Mr. Tamboly, the learned counsel appearing for Defendant Nos.1 to 3 would submit that his clients alone are entitled to carry out development in the suit plot in their capacity as Lessees of MMRDA. That Defendant Nos.1 to 3 are in fact owners of the suit plot and the plot has been acquired by MMRDA solely for the purpose of its development and the same has been leased out to Defendant Nos.1 to 3 for fulfilling the objective of carrying out development on the plot. That on account of failure on the part of MMRDA to develop the plot, the objective of acquisition has failed and therefore Defendant Nos.1 to 3 are in fact entitled to seek restoration of ownership of the suit plot from MMRDA. That Defendant Nos.8 to 11 have no right to carry out any development on the plot of Defendant Nos.1 to 3. That the JV Agreement is no longer subsisting. That Plaintiffs cannot enter into Consent Terms and confer any right on Defendant Nos.8 to 11 behind the back of the original owner and Lessee. That Defendant Nos.1 to 3 alone can carry out development on the suit plot and/or deal with Plaintiffs. That Defendant Nos.8 to 11 are not entitled to deal with Plaintiffs directly.

15 Mr. Tamboly would invite my attention to Notice of Motion No.2381 of 2011 filed by Defendant Nos.8 to 11 seeking their appointment as agent of Court Receiver for undertaking development and redevelopment of the suit plot. That the said Notice of Motion is still pending and what is sought to be achieved by filing the Consent Terms with Plaintiffs is to secure relief, which is not yet granted by this Court in that Notice of Motion which is pending since the year 2011. That under paragraph 24 of the Consent Terms, Notice of Motion No.2381 of 2011 is sought to be made absolute in terms of prayer clauses (a) and (b) thereof. Mr. Tamboly would therefore submit that the real objective of Defendant Nos.8 to 11 in filing Consent Terms with Plaintiffs is to secure rights in respect of plot by riding on the shoulders of Plaintiffs who have miniscule amount of interest in respect of vast development potential of the suit plot. That under guise of recognizing rights of Plaintiffs, which are in respect of very small constructed area, Defendant Nos.8 to 11 are actually attempting to secure the rights in respect of the entire plot by misusing the machinery of the Court. That the Consent Terms would be misused by Defendant Nos.8 to 11 to represent the world at large that it has acquired rights in respect of the plot. That Defendant Nos.8 to 11 do not have any authority to seek development permission from planning authority in absence of Consent Terms of the original Lessees. That therefore the office of Court Receiver of this Court would be misused by Defendant Nos.8 to 11 to secure such permissions bypassing the original Lessees. He would therefore further submit that unless Notice of Motion No.2381 of 2011 filed by Defendant Nos.8 to 11 for their appointment as agent of

Court Receiver is decided, Plaintiffs cannot be permitted to settle the suit only with Defendant Nos.8 to 11. Mr. Tamboly would therefore pray that Defendant Nos.1 to 3 be permitted to file Reply to Notice of Motion No.2381 of 2011 and unless the Notice of Motion is decided, the Consent Terms be not taken on record or acted upon. Mr. Tamboly would submit that the JV Agreement executed with Defendant No.8 to 11 had already been terminated and would rely upon public notice dated 7 July 2012. He would submit that even otherwise the JV Agreement is an unregistered document creating no right, title or interest in favour of Defendant Nos.8 to 11 in the suit plot. That the order passed by the Competent Authority, SAFEMA is under challenge and rights of Defendant Nos.1 to 3 are not defeated in any manner by that order.

16 Mr. Iyer, the learned counsel appearing for Defendant Nos.4 to 6 would submit that his clients are actually granted development rights in respect of the suit plot and that they are in possession thereof. That Defendant Nos.4 to 6 have better rights over Defendant Nos.8 to 11 to develop the suit plot. That the JV Agreement executed in favour of Defendant No.8 to 11 is void and nullity as the same executed on 10 May 2001 after initiation of proceeding by SAFEMA vide a show caused notice dated 10 September 1999. That therefore no rights are created in favour of Defendant Nos.8 to 11 in respect of the suit plot. That the development potential in respect of the suit plot exceeds 2,30,000 square feet as against ministerial interest of Plaintiffs in respect of area admeasuring

26,000 square feet. He would therefore submit that Plaintiffs cannot be permitted to settle the suit with Defendant Nos.8 to 11 thereby defeating the rights of Defendant Nos.4 to 6.

17 Mr. Kamat, the learned senior advocate appearing for Plaintiffs would submit that Plaintiffs have right to settle the suit against the Defendant of their choice under provisions of Order XXIII, Rule 1 of the Code of Civil Procedure, 1908 (**the Code**). That Defendant Nos.1 to 3 or Defendant Nos.4 to 6 cannot prevent Plaintiffs from compromising the suit against some of the Defendants. That Defendant Nos.1 to 3 have not even filed a Written Statement in the suit nor have filed Reply to Notice of Motion No.2381 of 2011 filed by Defendant Nos.8 to 11. That for Plaintiffs, all the Defendant Nos.1 to 11 are promoters and Plaintiffs believe that Defendant Nos.8 to 11 are entitled to develop the suit plot and would be in a position handover constructed units to them and therefore Plaintiffs cannot be prevented from compromising the suit with Defendant Nos.8 to 11. That there is no allegation of any illegality or fraud in the compromise sought to be entered into between Plaintiffs and Defendant Nos.8 to 11. That the order passed by the Competent Authority and SAFEMA also shows that development of the suit plot is permitted with the objective of protecting the interest of Plaintiffs through Defendant Nos.8 to 11. Referring to the provisions of Order XL Rule 1 of the Code, Mr. Kamat would submit that it is lawful for this Court to appoint Court Receiver both before as well as after decree. That continuation of Court Receiver in the present case is necessary for the

purpose of ensuring that the construction is carried out and Plaintiffs secure possession of constructed units as per the Consent Terms.

18 Mr. Jagtiani, the learned senior advocate appearing for Defendant Nos.8 to 11 would submit that Defendant Nos.8 to 11 are entitled to carry out development on suit plot by virtue of joint venture agreement dated 10 May 2001. That Defendant Nos.1 to 3 cannot be made party to the Consent Terms nor can be granted any benefit or amount over and above the one flowing through the joint venture agreement in view of the order passed by the Competent Authority under SAFEMA dated 10 October 2018. That entitlements of Defendant Nos.1 to 3 under JV agreement have been forfeited by the Competent Authority and therefore it is not lawful for either Plaintiffs or Defendant Nos.8 to 11 to grant any additional benefits in the form of constructed area or monetary consideration to Defendant Nos.1 to 3, which would violate the order passed by the Competent Authority. That Defendant Nos.1 to 3 have rendered themselves incapable of exercising any rights in respect of the suit plot in view of order passed by the Competent Authority. That the JV Agreement executed in favour of Defendant Nos.8 to 11, which is valid and subsisting and that the same has not been terminated in any manner by Defendant Nos.1 to 3. That no steps are taken by Defendant Nos.1 to 3 to challenge the said JV Agreement for the last 13 long years and that therefore it is too late in a day for Defendant Nos. 1 to 3 to contend in a suit filed by Plaintiffs that the JV Agreement is unenforceable. Mr. Jagtiani would submit that the notice published by

Defendant Nos.1 to 3 on 7 July 2012 does not, in any manner, terminate the JV Agreement. That Defendant Nos.1 to 3 in fact referred to termination of agreement with Defendant Nos.4 to 6 effected in the year 1999 in the said public notice. That Defendant Nos.4 to 6 have not taken any steps for challenging the termination of their development agreement and therefore Defendant Nos.4 to 6 cannot defeat or object to compromise effected between Plaintiffs and Defendant Nos.8 to 11.

19 Mr. Jagtiani would further submit that the suit plot is affected by encroachment on a large scale. That one of the objectives behind appointment of Court Receiver was to ensure removal of encroachment through MCGM. He would rely upon order passed by this Court on 12 June 2018, in Notice of Motion No.2381 of 2011 under which the MCGM is expected to remove encroachment on the suit plot. That continuation of Court Receiver would ensure removal of encroachment on the suit plot and swift development thereon so as to ensure that the obligations under the Consent Terms are fulfilled by Defendant Nos.8 to 11. That continuance of the Court Receiver actually enure to the benefit of all parties.

20 Upon a query being raised by this Court about anxiety of Defendant Nos.1 to 3 of continuation of Court Receiver as well as carrying out of development by Defendant Nos.8 to 11 as agent of Court Receiver to give a stamp of approval to the rights of Defendant Nos.8 to 11, Mr. Jagtiani would fairly submit that the Court Receiver may be

continued only for the purpose of removal of encroachment and not for the purpose of completion or supervision of construction of the building. He would further submit that Defendant Nos.8 to 11 shall not claim any equity in respect of construction carried out on the suit plot in pursuance of the Consent Decree, in any proceedings initiated by Defendant Nos.1 to 3 or by Defendant Nos. 4 to 7.

21 I have considered the submissions canvassed by the learned Counsel appearing for parties and I have gone through the Consent Terms.

22. Defendant Nos.1 to 3 as well as Defendant Nos.4 to 6 are opposing compromise of suit filed by Plaintiffs with Defendant Nos.8 to 11 alone, on the ground that the compromise effected with Defendant Nos.8 to 11 affects their rights in the suit plot. Under provisions of Order XXIII Rule 1 of the Code, it is lawful for a Plaintiff to abandon the suit or to abandon part of his claim against all or any of the Defendants. Order XXIII, Rule 1 of the Code reads thus:

“1. Withdrawal of suit or abandonment of part of claim.- (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the

effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,-

- (a) that a suit must fail by reason of some formal defect, or
- (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff-

- (a) abandons any suit or part of claim under sub-rule (1), or
- (b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.”

23 Under Order XXIII Rule 3 of the Code, the Court can pass a decree in accordance with lawful agreement or compromise signed by the parties. Order XXIII Rule 3 reads thus:

“3. Compromise of suit. - Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit:

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation.- An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.”

24 Thus so long as the Court is satisfied that the Agreement entered into between the parties is lawful, it can decree the suit in accordance with such agreement or compromise. Thus, all that the Court needs to determine while decreeing the suit on the basis of compromise arrived at between the parties is whether the agreement or compromise is lawful or not. Explanation to Order XXIII Rule 3 of the Code makes it clear that an agreement or compromise which is void or voidable under the provisions of Indian Contract Act, 1872 shall not be deemed to be lawful within the meaning of Rule 3 of Order XXIII of the Code. Therefore, limited enquiry that Court can institute while considering a compromise presented before it is about nature of the compromise i.e. whether it is lawful or not.

25 The cumulative reading of Rule 1 and Rule 3 of Order XXIII of the Code would make it clear that if a Plaintiff compromises a suit only against selected Defendants and does not wish to continue the suit *qua* rest of the Defendants, it is lawful for the Plaintiff to abandon the claim in the suit *qua* such Defendants are not parties to the compromise.

26 In the present case, Plaintiffs have decided to compromise the suit only *qua* Defendant Nos. 8 to 11. Such compromise is based on a belief that Defendant Nos. 8 to 11 are in a position to carry out construction and handover commercial units to the Plaintiffs as per allotments made in their favour. Whether such belief is correct or not and whether Defendant Nos. 8 to 11 indeed have a right to carry out construction on the plot is something which is not being decided in the compromise terms. If Defendant Nos.1 to 3 or Defendant Nos. 4 to 6 believe that Defendant Nos. 8 to 11 do not have right to carry out construction on the suit plot, they will have to adopt appropriate remedies in that regard and compromise effected by the Plaintiffs with Defendant Nos.8 to 11 will not come in the way of Defendant Nos.1 to 3 or Defendant Nos.4 to 6 from prosecuting their remedies.

27 I have gone through the Consent Terms and I do not find that any condition therein is unlawful in any manner. The agreement arrived at between Plaintiffs and Defendant Nos.8 to 11 is neither void nor voidable under the provisions of the Indian Contract Act. Therefore, this Court cannot be prevented from accepting the compromise effected with Plaintiffs and Defendant Nos. 8 to 11 and to decree the suit only *qua* Defendant Nos. 8 to 11. So far as the rest of the Defendants are concerned, the suit will have to be treated as abandoned under provisions of Order XXIII Rule 1 of the Code.

28 Much has been said about paragraph 24 of the Consent Terms under which the Notice of Motion No.2381 of 2011 is sought to be made absolute in terms of prayer clauses (a) and (b) therein. Prayer clauses (a) and (b) of the Notice of Motion read thus:

“(a) that the Defendant Nos. 10 and 11 be appointed as agent of the Court Receiver, High Court, Bombay, who is appointed in Notice of Motion No. 316 of 2009 in Suit No. 134 of 2009 by His Lordship Mr. Justice S.C. Dharmadhikari for undertaking development and redevelopment of the suit property being plot of land bearing Survey No.41 part (1) (B), bearing CTS No. 444, 444/1, 444/2 and 445 situate at Swami Vivekanand Road, Village Oshiwara, Jogeshwari, Mumbai 400102 on such terms and conditions as deemed fit and proper by this Hon'ble Court;

(b) that pending the hearing and final disposal of the suit, the order dated 2/12/2010 passed by His Lordship Mr. Justice S.C. Dharmadhikari be clarified and the Defendant Nos. 10 and 11 may be allowed to undertake the suit property for development and construction of commercial complex thereon after getting approval and sanction from the Bombay Municipal Corporation through Court Receiver, High Court, Mumbai appointed by an Order dated 2nd December 2010 as a Receiver in respect of the said immovable property viz. plot of land bearing Survey No.41 part (1) (B), bearing CTS No. 444, 444/1, 444/2 and 445 situate at Swami Vivekanand Road, Village Oshiwara, Jogeshwari, Mumbai 400102;

29 Defendants Nos.1 to 3 apprehend that grant of prayer clauses (a) and (b) in the Notice of Motion No.2381 of 2011 will be misused by Defendant No.8 to 11 to show to the world at large that they have been appointed as an agent of the Court Receiver for the purpose of carrying out construction on the suit plot. The Court Receiver was appointed by this Court essentially to preserve the suit plot so as to ensure that a building can be constructed thereon, in which Plaintiffs can be allotted units in the event of the suit being decreed. On account of various factors,

including restrictions put on Defendant Nos.1 to 3 by Competent Authority under SAFEMA, the construction of the building has not commenced after appointment of the Court Receiver. One of the major hurdles in carrying of the construction is large scale encroachment on the plot. Though this Court has passed orders directing the Municipal Corporation to remove encroachments carried out by illegal occupants on the suit plot, such encroachments are apparently not removed till date. In this connection, reference can be made to the order dated 4 December 2015 passed in Court Receiver's Report No.629 of 2015. The Court Receiver is being continued in respect of the property essentially to ensure that the encroachment on the suit plot is removed, which in fact enures to the benefit of all parties. Surely Defendant Nos.1 to 3 or Defendant Nos.4 to 6 cannot insist that encroachments on the plot must continue and that the building thereon should never be constructed. Therefore, continuance of Court Receiver in respect of suit plot will be for limited purpose of ensuring that encroachments thereon are removed. This Court is thus not contemplating carrying out construction under supervision of Court Receiver. In this regard Mr. Jagtiani has made a statement on behalf of the Respondent Nos.8 to 11 that continuance of Court Receiver be directed only for limited purpose of removal encroachments on the plot.

30 In the light of the above, even though paragraph 24 of the Consent Terms seek to make Notice of Motion No.2381 of 2011 absolute in terms of prayer clauses (a) and (b) thereof, the same would not mean

that this Court has put any stamp of approval in respect of any right of Defendant Nos.8 to 11 to carry out construction on the suit property. If rights of Defendant Nos.8 to 11 are challenged by any person/ entity including Defendant No.1 to 6, such proceedings shall be decided independent of the contents of the Consent Terms and nothing agreed therein would bind other parties, who are not signatories to the Consent Terms, in any manner. In my view, this would dispel the apprehension expressed by Mr. Tamboly about continuance of Court Receiver.

31. I am inclined to accept the Consent Terms and decree the Suit *qua* Defendant Nos. 8 to 11 in the peculiar facts and circumstances of the case, where Defendant Nos. 1 to 3 are incapacitated from developing the Plot. Rights in favour of Defendant Nos. 4 to 6 have been terminated and they have not taken any steps to challenge the termination. Entitlements of Defendant Nos. 1 to 3 under the Joint Venture Agreement with Defendant Nos. 8 to 11 are forfeited by the Competent Authority under SAFEMA. There is some degree of recognition of right of Defendant Nos. 8 to 11 to construct building(s) on the Suit Plot. Except for rights of Plaintiffs and of Defendant Nos. 8 to 11, the entire Suit Plot would have been forfeited as was done by the Competent Authority vide Order dated 22 March 2001. Therefore leaving open rights of Defendant Nos. 1 to 3 and of Defendant Nos. 4 to 6, construction of building needs to be permitted so as to ensure that Plaintiffs receive possession of Units booked by them. If Defendant Nos. 8 to 11 are willing to recognize Plaintiffs' rights under the allotment letters, I see no reason why

Defendant Nos. 8 to 11 should not be permitted to carry out construction as per the JV Agreement and as per the order of the Competent Authority.

32 In my view therefore Consent Terms submitted by Plaintiffs and Defendant Nos.10 and 11 can be accepted, subject to the observations made above and the suit can be decreed only *qua* Defendant Nos.10 and 11. So far as other Defendants are concerned, the suit will have to be treated as abandoned under provisions of Order XXIII Rule 1 of the Code.

33 I accordingly proceed to pass the following order:

i) Consent Terms tendered by Plaintiffs and Defendant Nos.10 and 11 are accepted and taken on record and marked 'X' for identification. Plaintiffs' suit is decreed only *qua* Defendant Nos. 8 to 11 as per the Consent Terms. All undertakings in the Consent Terms *qua* Defendant Nos.8 to 11 are accepted.

ii) Plaintiffs' suit *qua* rest of the Defendants shall stand abandoned under provisions of Order XXIII Rule 1 of the Code.

iii) Acceptance of Consent Terms and decree of the suit based thereon will not have any effect on the rights of any other Defendants except Defendant Nos. 8 to 11 and they shall be free to agitate their rights independently. Nothing stated in the Consent Terms shall come in the way of those Defendants from exercising their rights against Defendant Nos. 8 to 11.

iv) Court Receiver is continued in respect of the Suit Plot for the limited purpose of removal of encroachments thereon. The Court Receiver shall take steps to ensure that the encroachments on the suit plot are removed by taking aid of office of the City Survey as well as MCGM. The suit plot has already been demarcated and the Court Receiver shall take assistance of MCGM for removal of encroachments on the suit plot. After removal of such encroachments or substantial portion thereof, the Court Receiver shall apply to the Court for discharge by handing over possession of the Plot to Defendant Nos. 8 to 11.

v) Defendant Nos. 8 to 11 shall not claim any equity in respect of construction put by them on the basis of Consent Terms *qua* rights of Defendant Nos.1 to 3 and Defendant Nos.4 to 6 and all rights and contentions between them are kept open to be agitated in appropriate proceedings.

34 With the above observations, the suit is disposed of. There shall be no order as to costs. Refund of Court Fees as per rules.

35 In view of the disposal of the Suit, nothing survives in Chambers Summonses, Notices of Motion and Interim Applications, and the same are disposed of accordingly.

(SANDEEP V. MARNE, J.)