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

**NOTICE OF MOTION NO.1029 OF 2015
IN
SUIT NO.511 OF 2015**

Smt. Nirmala Jha w/o Jawaharlal Jha	...Applicant
<u>In the matter between</u>	
Smt. Nirmala Jha w/o Jawaharlal Jha	...Plaintiff
V/s.	
Vaidehi-Akash Housing Pvt. Ltd. & Ors.	...Defendants

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Mr. Shailesh Kumar Rai for the Plaintiff.

Mr. Virag Tulzapurkar, Senior Advocate, a/w Nikhil Sakhardande, Nitesh Ranavat, Ms. Vedangi Tulzapurkar & Ms. Apeksha Munot i/b. M/s. Wadia Ghandy & Co. for Defendant no.3.

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CORAM : A. K. MENON, J.

DATE : 19th NOVEMBER, 2015.

PC.:-

1. This is a Notice of Motion moved by the plaintiff-applicant to restrain the defendants from dealing with, disposing of or parting in possession with the suit flat and for a direction to reserve one flat for the plaintiff. The plaintiff also seeks a further injunction restraining the defendants from carrying on further construction or development in the suit property. In the plaint, the plaintiff seeks a declaration that the

allotment letter dated 17th February, 2007 is a concluded contract between the plaintiff and defendant no.1 under which the defendant no.1 agreed to sell the suit flat to the plaintiff. The plaintiff also seeks further directions in respect of the said suit flat. The present suit is similar to various other suits filed in this Court against these very defendants viz Suit No.262 of 2012 and connected matters.

2. The claim in the present suit arises from a redevelopment proposal in respect of land belonging to the second defendant society and is essentially a dispute that has arisen as a result of differences between the society and defendant no.1. The suit plot bearing no.106 is situated at D. N. Nagar, Andheri (West), Mumbai. There are eight buildings of three wings each. The society had entered into an agreement with defendant no.1 to redevelop the plot by providing permanent alternate accommodation to the members of the society. There are about 60 occupants in each building and they have formed their respective co-operative societies and the occupants of each wing have organized and formed themselves into an apex co-operative society, namely, defendant no.2. Since the buildings had become dilapidated, re-development was to be undertaken in accordance with the Development Control Regulations and defendant no.1 was granted their rights to develop the societies' plots.

3. The plaintiff was looking out for residential accommodation for the personal use and she came to learnt that the suit property of defendant no.2 was being redeveloped and this is how she came in contact with defendant no.1. It is her case that she selected a flat in the proposed free sale component of the buildings to be constructed having carpet area of 1800 sq. ft. An allotment letter dated 17th February, 2007 came to be issued to her which indicated that the flat no.506 on 5th floor of New D. N. Nagar, Sagar Sahava Colony, Andheri (W), Mumbai-53 to be sold to her for a price of Rs.72,00,000/-. The plaintiff claims to have made a down payment of Rs.10,80,000/- against the issuance of the allotment letter. While she awaited the possession of her flat, she came to learn that defendant no.1 entered into an agreement with defendant no.3 transferring certain rights to defendant no.3. On making enquiries, she learnt that defendant no.1 had waived its rights in respect of the certain FSI as a result the plaintiff stands deprived of her flat.

4. Mr. Rai learned Advocate appearing for the plaintiff submitted that by virtue of the allotment letter, the plaintiff was entitled to the allotment of flat by defendant no.3. According to Mr. Rai although defendant no.2 is believed to have terminated the development agreement with defendant no.1, it had entered into a separate agreement with defendant no.3. The

said termination was challenged; however, defendant no.1 did not pursue the said challenge to its logical end. According to the plaintiff, she is entitled to the flat which defendant no.1 had agreed to sell to the plaintiff and since defendant no.3 has taken over the construction it is her case that defendant no.3 is bound and liable to construct the suit flat and hand over the same to the plaintiff in accordance with the agreement for sale executed by defendant no.1. She therefore seeks interim reliefs restraining the defendant no.2 and 3 from dealing with and disposing of flat no.506, or some other similar flat of the same area.

5. Mr. Tulzapurkar, the learned Senior Counsel appearing for defendant no.3 submitted that defendant no.1 had committed various breaches of the development agreement between defendant no.2. Whereas defendant no.3 has performed all its obligations under its agreement against defendant no.2. As a result, defendant no.3 is became entitled to the Free Sale Component which was confirmed by all defendants inter se. He submitted that first defendant appears to have issued an allotment letter independently and without any commitment from the defendant no.2 society. My attention is also been drawn by Mr. Tulzapurkar to the judgment dated 1st December, 2014 in the Notice of Motion No.961 of 2013 in Suit No.262 of 2012 and other connected

matters wherein a Single Judge of this Court (S.C. Gupte J.) has dismissed similar Notices of Motion seeking appointment of the Court Receiver and restraining the defendant no.1 including the society and defendant no.3 from creating third party rights in respect of their rights claimed by the plaintiffs in that suit.

6. The aforesaid judgment records, exhaustively, all of the factual aspects pertaining to the project including the fact that the defendant was entitled to free sale component of only 2,53,500 sq. ft. and that third party rights were claimed to have been created by defendant no.1 and held that after the agreement between the society and defendant no.1 is terminated, defendant no.3 entered into an agreement during which period defendant no.1 had right to deal with 37050 sq. ft. for residential use and 20,000 sq. ft. for commercial use. It has been held that defendant no.1 appears to have gone beyond its entitlement and oversold its position. It appears to have created rights over an area far in excess of the limited FSI available to it for disposal and some of the new purchasers have entered into registered agreements, some have unregistered agreements and there still are others who have only allotment letters in their favour. The present case falls in that category of persons claiming under allotment letters.

7. The question was whether the defendant no.1 dealt with free sale component as the agent for the society or in its own right. The learned Single Judge relied on certain clauses of the agreement, particularly clauses 5, 11, 13, 27, 28, 30, 32, 33, 38, 41 and 45 and held that on reading of the aforesaid clauses the development and sale of the free sale component by defendant no.1 was to their own account as an independent contracting party and not as an agents of the society. The contract between defendant no.1 and defendant no.2 society has been held to be a principal to principal basis and third party purchasers with whom the defendant no.1 may have entered into agreements with no privity of contract with the society. It was thus found that there was no privity of contract between the society and third party purchasers.

8. I find no reason to disagree with the said aforesaid findings and accordingly the plaintiff who relies on an allotment letter cannot enforce rights thereunder against defendant no.2 or 3. The reliefs sought in the Notice of Motion cannot be granted against defendant no.2 or 3. As far as defendant no.1 is concerned, it is no longer concerned with the development agreement, the sale of the free sale component. At best the plaintiff may have a monetary claim for refund and damages. If the plaintiff adopts proceedings for monetary reliefs the observations in this

Order shall not affect the merits of such a claim For the aforesaid reasons, the Notice of Motion is liable to be dismissed. I, therefore pass the following order:-

- i) The Notice of Motion is dismissed.
- ii) The plaintiff is at liberty to adopt appropriate proceedings against defendant no.1 without being influenced by any observations in this order.
- iii) There will be no Order as to costs.

(A. K. MENON, J.)