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

**NOTICE OF MOTION (L) NO. 1245 OF 2015  
IN  
SUIT (L) NO.408 OF 2015**

Sumer Buildcorp Pvt. Ltd.

...Applicant/Plaintiff

**VS**

Azam Ali Khan & Anr.

...Defendants

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Mr P.K.Samdani, Sr. Advocate a/w Chetan Kapadia, Ms Kausar Banatwala a/w Ms Swapna Roopavate i/b Tushar Goradia for the Plaintiff.

Mr K.T.Kukreja a/w Arvind F. Manghirmalani i/b Rajan Malkani for the Defendants.

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**CORAM : S.C. GUPTE, J.**

**Order reserved on : 6 July 2015**

**Pronounced on : 17 August 2015**

**ORDER :**

The Notice of Motion seeks appointment of a Court Receiver of a flat, which is the subject matter of this suit, with all powers including the power to take possession of the flat and handover the same to the Plaintiff for demolition. The Plaintiff is the developer of the land together with structures, within which the suit flat is situate.

2            The facts of the case as alleged by the Plaintiff may be outlined as follows :

- (i) Originally, Bombay Catholic Co-operative Housing Society ("Society") was the owner of a piece or parcel of land admeasuring in the aggregate 21,774.10 sq.meters, bearing City Survey Nos. H/401, H/402, H/415 to H/436, together with structures standing thereon, known as

'Willingdon Catholic Society' at Bandra in Mumbai ("the said property"). Several cottages were situated on the said property, each of which was divided into four flats, two on the ground floor and two on the first floor. The suit flat, flat No.16-B, was situated on the first floor in cottage No.16 ("suit flat") standing on the said property. The suit flat was occupied by one Mrs.Andrey Barbar.

(ii) In the year 1975, the society filed an eviction suit, being RAE Suit No.849/405/1975, against the said Mrs.Barbar, seeking her eviction from the suit flat. On 17 April 1989, the suit was decreed in favour of the society. Defendant No.1 herein obstructed execution of the decree by filing an Obstructionist Notice before the Court of Small Causes. On 8 November 2001, consent terms were arrived at between the parties *inter alia* accepting Defendant No.1 as the monthly tenant of the society.

(iii) By a registered Indenture of Conveyance dated 7 December 2009, the society conveyed the said property to M/s Sumer Associates, a partnership firm who is the predecessor-in-title of the Plaintiff herein. (The partnership firm was converted into a private limited company and incorporated as Sumer Buildcon Pvt. Ltd.. The name of the company was subsequently changed to Sumer Buildcorp Pvt. Ltd., i.e. the Plaintiff herein.)

(iv) Subsequent to the acquisition of the said property, the Plaintiff commenced negotiations with tenants in the property for the purpose of redevelopment of the same. Nearly 80 % of the tenants / occupants out of 69 existing tenants / occupants in the said property entered into settlements with the Plaintiff, pursuant to which 15 cottages out of the then existing 25 cottages in the said property were demolished by the Plaintiff. The sale by the society in favour of the Plaintiff was challenged by some of the tenants, and as a result, the development could not proceed for some time. That litigation, however, reached finality, with the Supreme Court finally dispelling the tenants' challenge, holding *inter alia* that the

obstruction to the development by the tenants was malafide and motivated at the behest of a rival builder.

(v) Pursuant to the negotiations between the Plaintiff and Defendant No.1, Defendant No.1 agreed to surrender his tenancy rights in respect of the suit flat and handover possession thereof to the Plaintiff. On 5 October 2012, the Defendant executed a deed of surrender surrendering his tenancy rights in connection with the suit flat to the Plaintiff at or for a consideration of Rs.4.90 crores. It is the case of the Plaintiff that Defendant No.1 has received the entire consideration for such surrender and handed over the possession of the suit flat to the Plaintiff and that thus the tenancy rights of the Defendant have stood extinguished, bringing to an end the relationship of landlord and tenant between the Plaintiff and Defendant No.1. On the same date, i.e. 5 October 2012, Defendant No.1 also executed a declaration confirming *inter alia* his having surrendered the tenancy rights and handed over possession of the suit flat to the Plaintiff after receipt of the entire consideration of Rs.4.90 crores. On 5 October 2012, Defendant No.1 also executed a power of attorney empowering the Plaintiff's director (then a partner of the predecessor of the Plaintiff) to do various acts, deeds and things as mentioned therein. The powers conferred thereunder included the power *inter alia* to execute and register or otherwise perfect all writings, deeds and assurances *inter alia* for recording the surrender and extinguishment of the rights of Defendant No.1 with respect to the suit flat. Defendant No.1 also executed a letter of possession dated 5 October 2012 confirming having handed over possession of the suit flat to the Plaintiff.

(vi) Defendant No.1, thereafter, by two sale deeds dated 31 December 2012, purchased two flats, bearing flat Nos.1001 and 1002, on the 10<sup>th</sup> floor of a building known as "Nebula Impress" on 5<sup>th</sup> Road, Old Khar, Khar (W), Mumbai – 400 052 and started residing therein. Defendant No.1, however, left a part of his furniture in the suit flat and requested the Plaintiff not to remove the same for some time, though physical possession of the

suit flat was already handed over to the Plaintiff, as noted above.

(vii) In or around September 2013, Defendant No.2 along with Defendant No.1 unauthorizedly entered the suit flat and started residing therein without the consent or concurrence of the Plaintiff. On 27 September 2013, the Plaintiff lodged a complaint of criminal trespass against the Defendants.

(viii) Thereafter, on or around 3 December 2013, Defendant No.1 filed a declaratory suit in the Court of Small Causes, being RAD Suit No.764 of 2013, seeking a declaration that Defendant No.1 was a tenant in respect of the suit flat and a restraint on the Plaintiff from dispossessing the Defendants from the same. Defendant No.1 took out an interlocutory application in the suit for a temporary injunction restraining his dispossession from the suit flat. By an order dated 7 May 2014, the interlocutory application was dismissed with costs by the Court of Small Causes, on a finding *inter alia* that the Defendants' tenancy rights in respect of the suit flat were surrendered and stood relinquished in favour of the Plaintiff.

(ix) Since the Plaintiff pursued his criminal complaints against the Defendants, on or about 22 January 2014, the Defendants filed an anticipatory bail application before the Court of Sessions. By an order dated 4 August 2014, the application was disposed of by granting bail to the Defendants on a condition precedent of deposit of Rs.4.90 crores in the Sessions Court. The Defendants have since deposited this amount in the Court of Sessions and are at large on an anticipatory bail. The Defendants have since lodged a Criminal Writ Petition before this Court seeking *inter alia* quashing of the FIR lodged by the Plaintiff.

3           Based on these facts, it is submitted by the Plaintiff that the Defendants are trespassers in the suit flat and have no right to occupy the same. The Plaintiff, as the owner of the suit flat, was in possession of the same, when it

was trespassed upon by the Defendants. It is submitted that the Defendants ought to be ordered to handover possession of the suit flat to the Plaintiff. It is submitted that the Defendants' failure to vacate the suit has resulted in holding up of the entire redevelopment project in accordance with sanctioned redevelopment plans and consequently, the Plaintiff's obligation to rehabilitate all the tenants in the suit property and also 161 allottees of the Plaintiff's predecessors in terms of the conveyance in favour of the Plaintiff. It is submitted that besides these obligations, the Plaintiff having propounded the redevelopment scheme under DCR 33(14) of the Development Control Rules, is required to construct and handover 530 tenements to the Slum Rehabilitation Authority, but cannot do so due to the refusal of the Defendants to vacate the tenement. In the premises, the Plaintiff prays for appointment of a receiver with all powers under Order 40 Rule 1 of the Code of Civil Procedure, 1908, including the power to take possession of the suit flat from the Defendants and handover the same to the Plaintiff.

4           The Defendants contest the Motion, raising a preliminary point of jurisdiction. Their submission is that Defendant No.1 continues to be a tenant of the Plaintiff, there being no rightful surrender of tenancy. It is submitted that alternatively, it is the case of the Plaintiff that after the drawing up of the surrender documents, the Plaintiff allowed Defendant No.1 to stay in the suit flat gratuitously. The Defendants rely upon the police statement of the Plaintiff, on the basis of which an FIR has been registered against the Defendants, in this behalf. It is submitted that the Plaintiff cannot seek to recover possession from Defendant No.1, whether as a tenant or as a licensee, by filing a suit before this Court. It is submitted that the Court of Small Causes alone has jurisdiction to try such suit. The Defendants also submit that the Plaintiff has suppressed documents. It is claimed that the Plaintiff is also guilty of delay or laches. The Motion is also contested on merits.

5           The Plaintiff has come to the Court with a specific case that the original tenancy in respect of the suit flat was surrendered by Defendant No.1 to the Plaintiff. The case of the Plaintiff further is that Defendant No.1 left some

furniture in the suit flat and requested the Plaintiff to permit him to do so for about a month; the Defendants, thereafter, in or about September 2013, entered into the suit flat and started residing there without the authority of the Plaintiff. The Plaintiff, accordingly, seeks to recover possession of the suit flat on the basis of its title, alleging that the Defendants have no authority to occupy the same. If the Defendants contest these averments and claim that the original surrender of tenancy either did not take effect or that the Defendants continue to occupy the suit flat as tenants, no preliminary issue of jurisdiction arises in the matter. If the Defendants succeed in their defence, the suit will have to be dismissed on merits on the ground that the Plaintiff has failed to establish its right to recover possession from the Defendants. This is not a question of jurisdiction, but of merits. Once it is held that Defendant No.1 is a tenant of the Plaintiff, the suit is liable to be dismissed and not sent to the Court of Small Causes for trial. The Plaintiff has no case of breach of tenancy or of any provision of the Rent Act to urge before that Court.

6           So also, it cannot possibly be suggested that the Defendants are licencees, gratuitous or otherwise, of the suit flat. The Plaintiff's case is not that the Plaintiff allowed the Defendants to use and occupy the suit flat after its surrender. The Plaintiff's case is that Defendant No.1 surrendered the tenancy and possession of the suit flat to the Plaintiff and the Plaintiff merely allowed his furniture to be kept in the flat for a short duration. This permission does not amount to any gratuitous licence to use and occupy the flat. The Plaintiff submits that the juridical possession of the suit flat was always with the Plaintiff since the date of surrender of tenancy by Defendant No.1, though the Defendant's furniture was allowed to be kept there for some time; and thereafter, some time in September 2013, the Defendants trespassed the suit flat and started residing there without the Plaintiff's authority. It is not the Defendants' case either that they are licencees of the suit flat. No preliminary issue of jurisdiction, thus, arises in the suit on this score either.

7           Let us now deal with the merits of the case. The documents on record, namely, (i) deed of surrender, (ii) declaration, (iii) power of attorney and

(iv) letter of possession, all dated 5 October 2012, leave no manner of doubt that Defendant No.1 did surrender his tenancy of the suit flat to the Plaintiff by accepting a compensation of Rs.4.90 crores and simultaneously handed over vacant and peaceful possession of the suit flat to the Plaintiff. The execution of these documents is not disputed *per se*. What is disputed is the legal effect of these documents. It is submitted that firstly, the documents are not duly registered in accordance with the applicable law. Secondly, it is submitted that the documents were got executed from Defendant No.1 by playing a fraud upon him. Thirdly, it is claimed that the possession of the suit flat was actually not handed over to the Plaintiff. Each of these submissions is examined in the following paragraphs.

8           It is submitted that a surrender deed by a tenant in respect of his tenancy, the value of which exceeds Rs.100/-, is required to be compulsorily registered. Learned Counsel for the Defendants relies upon the judgment in the cases of **Narottamdas Lallubhai Patel vs. Bai Dhanlaxmi<sup>1</sup>**, **Nadig Neelkanta Rao vs. State of Mysore<sup>2</sup>**, **B. Ahmed Maracair vs. Muthuvalliappa Chettiar<sup>3</sup>**, **M.S. Ram Singh vs. Bijoy Singh Surana<sup>4</sup>** and **Ranganatha Gounder vs. Perumal Nattar<sup>5</sup>** in support of his contention.

9           The judgments of **Narottamdas Lallubhai Patel** (supra), **Nadig Neelkanta Rao** (supra), **B. Ahmed Maracair** (supra) and **Ranganatha Gounder** (supra) deal with cases of lands which were leased and leasehold interests in which were sought to be extinguished by unregistered documents. The Courts held that these documents came within Clause (b) of Section 17(1) of the Registration Act and hence, were compulsorily registrable and could not be received in evidence for want of such registration, in view of Section 49 of that Act. **M.S. Ram Singh's** case was a case of lease of certain premises, governed by the West Bengal Premises Tenancy Act, 1956. Even in that case, it was held

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1 AIR 1926 Bombay 573

2 AIR 1960 MYSORE 87 (V 47 C 24)

3 AIR 1961 MADRAS 28 (Vol.48, C.7)

4 AIR 1972 CALCUTTA 190 (V.59 C 34)

5 AIR 1999 MADRAS 133

that the document executed by the lessee purporting to extinguish his interest was compulsorily registrable. We are dealing here with a monthly tenancy under the Maharashtra Rent Control Act, 1999 ("Rent Act"). This tenancy was recognized under the consent terms filed in RAE Suit No.849/405 of 1975. A monthly tenancy covered by the Rent Act does not amount to any interest in immovable property or require any registration either for its creation or its extinguishment under Clause (b) of Section 17(1) of the Registration Act. (Even otherwise, a month to month lease does not require a registered instrument for its creation, under Section 107 of the transfer of Property Act or require any registration under Clause (d) of Section 17(1) of the Registration Act.) The Supreme Court in the case of **Satish Kumar vs. Zarif Ahmed**<sup>6</sup> considered the combined effect of Sections 17 and 49 of the Registration Act, Sections 3 and 107 of the Transfer of Property Act, and Section 2(14) of the Stamp Act and held that an unregistered lease deed executed for a month to month tenancy for a period not exceeding 11 months, though reduced to writing and possession is delivered thereunder to a tenant, is not a compulsorily registrable instrument and therefore, the prohibition contained in Section 49 of the Registration Act is inapplicable thereto. Such document is admissible in evidence to be received as evidence of any transaction *vis-a-vis* such property. The provision of registration of such tenancy was introduced for the first time by Section 55 of the Rent Act, which provides that notwithstanding anything contained in any other law, any agreement for letting of premises, after the commencement of the Rent Act, shall be in writing and registered under the Registration Act. What Section 55 further provides is that in the absence of the written registered agreement, the contention of the tenant about the terms and conditions of such tenancy shall prevail. In other words, the tenancy, even under the provisions of Section 55, is not void for want of registration. So also, the document of tenancy cannot be said to be inadmissible in evidence under Section 49 of the Registration Act, since it is not compulsorily registrable under clause (b) of Section 17(1) of that Act, or under any provision of the Transfer of Property Act. As for surrender of such monthly tenancy, there is no provision of any compulsory writing or registration under the Rent Act. Surrender of monthly tenancy governed by the Rent Act is, thus, not

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<sup>6</sup> (1997) 3 SCC 679

required to be registered either under the Registration Act or under the Rent Act and the bar under Section 49 of the Registration Act does not apply to it. Thus, there is no substance in the contention that the instrument of surrender of tenancy in the present case cannot be relied upon by the Plaintiff.

10           The allegation that the documents relating to surrender of tenancy and possession of the suit flat were procured from Defendant No.1 fraudulently is completely vague and unsubstantiated. The case formulated in para 9 K of the affidavit in reply may be briefly outlined thus :

(i) When Defendant No.1 negotiated the matter with the Plaintiff, he was not assisted by any lawyer;

(ii) During the negotiations, the Plaintiff offered a sum of Rs.5 crores as corpus and a flat in the newly constructed building of the area mentioned in the consent terms as permanent alternative accommodation on ownership basis. The Plaintiff also assured Defendant No.1 that the Plaintiff would pay a sum of Rs.4.90 crores to Defendant No.1 against signing of preliminary documents which would be prepared by the Plaintiff's lawyers, whereas Defendant No.1 would still remain in exclusive use, occupation and possession of the suit flat;

(iii) The balance amount of Rs.10 lakhs (from out of Rs.5 crores) was to be paid against the execution of an agreement of permanent alternate accommodation, which would spell out all terms and conditions of allotment of an ownership flat. Such agreement would be duly stamped and registered and immediately against that Defendant No.1 should vacate the suit flat. In other words, what is claimed is that the balance payment of Rs.10 lakhs and execution of an agreement for permanent alternate accommodation was a condition precedent to vacating of the suit flat by Defendant No.1;

(iv) Believing bonafide the assurance and representation of the Plaintiff,

Defendant No.1 signed the various documents of 5 October 2012 as preliminary documents. These documents were not read by him at the time of signing them.

This case is *prima facie* unbelievable. In the face of express documents signed by the parties, against which a payment of a substantial amount of Rs.4.90 crores was made paid by the Plaintiff to Defendant No.1, it is entirely preposterous to suggest that there was a contemporaneous oral agreement which was at variance with the written documents. Such a case is clearly a non-starter in the wake of Sections 91 and 92 of the Evidence Act, besides being inherently improbable. It is also not believable that Defendant No.1 signed all these documents on 5 October 2012 without realising what their contents were. The so called agreement for a permanent alternative accommodation is belied also by Defendant No.1 having purchased immediately after receipt of the payment of Rs.4.90 crores two adjacent flats in a building at Khar (West), Mumbai for his residence. The Plaintiff has produced a specimen of permanent alternate accommodation agreements executed with tenants of other flats providing alternative residential premises in lieu of existing premises. These agreements merely provide for allotment of alternative residential premises of a carpet area of existing plus 20% in lieu of the existing residential premises in the new building to be constructed by the Plaintiff in the suit property and also payment of rentals of Rs.25,000/- per month to enable the tenants to acquire alternative accommodations of their choice during the period of construction of the new building. It is clearly unbelievable that in the face of such permanent alternate accommodation agreements with others the Plaintiff would agree to a full compensation of Rs.4.90 crores and also in addition, an alternative accommodation in the new building for Defendant No.1. The case is not only improbable, but there is no element of any case of fraud in these facts.

11           It is also highly improbable that Defendant No.1 continued to retain possession of the said flat even after its surrender, that is to say, between the date of surrender and September 2013. Such a case would run counter to the documents executed and also the course of conduct between the parties, as

indicated above. The evidence referred to in this behalf by the Defendants does not show that between 5 October 2012 and September 2013, the Defendants were actually in use and occupation of the suit flat.

12           The case of suppression of documents or of delay and laches on the part of the Plaintiff is also unsubstantiated and lacks merit. There is no suppression of any material document, deliberate or otherwise, on the part of the Plaintiff. Having regard to the fact that a criminal case was actively prosecuted by the Plaintiff even since the alleged trespass on the part of the Defendants, it cannot be suggested that there is any culpable delay on the part of the Plaintiff and as a result, it is disentitled to equitable relief.

13           The Defendants cannot be permitted to hold up the entire redevelopment project, which is under a Slum Rehabilitation Scheme under DCR 33(14), pending their suit. The Plaintiff has an obligation not only to rehabilitate all tenants in the suit property and also the allottees of its predecessors in title in terms of the conveyance obtained by it, but also to handover tenements to the Slum Rehabilitation Authority in accordance with the scheme under DCR 33(14). Majority of the tenants have already vacated their tenements and many are residing in transit accommodations, awaiting reconstruction of the new building. It is imperative that in the interest of justice that a Receiver is appointed of the suit flat with power to take over physical possession thereof and hand over the same to the Plaintiff for redevelopment of the suit property.

14           In that view of the matter, the Plaintiff has made out a case for grant of interlocutory relief of appointment of a Receiver.

15           Even if the Plaintiff has made out a case for appointment of an interim receiver with such powers as are prayed for, with a view to balance the equities, the Plaintiff may well be directed to set apart an alternative accommodation of an area of the suit flat plus 20 per cent in the new building proposed to be constructed at the site and not allot the same to any third party, pending the hearing and final disposal of the suit, without further orders from this

Court. This should adequately protect the interest of the Defendants pending the suit.

16           The Notice of Motion is, accordingly, made absolute in terms of prayer clause (b) subject to a direction to the Plaintiff to keep vacant a flat in the new building to be constructed on the said property of an area equivalent to the suit flat plus 20 percent and not allot the same to anyone without further orders from this Court.

17           Till the Receiver takes physical possession of the suit flat, there shall be an injunction against the Defendants from creating any third party right in, or parting with possession of, the suit flat.

18           Learned Counsel for the Defendants seeks stay of this order. Learned Counsel for the Applicant / Plaintiff opposes the application.

19           The order is stayed for a period of four weeks from today.

**( S.C.GUPTE J. )**