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

**CONTEMPT PETITION NO. 78 OF 2013
IN
NOTICE OF MOTION NO. 3264 OF 2009
IN
SUIT NO. 2308 OF 2009**

Tytan Cooperative Hng. Society Ltd. & Ors. ...Petitioners
(Orig. Plaintiffs)

Vs.
Nepean Estate Pvt. Ltd. & Ors. ...Defendants
(Orig. Defendant Nos. 1,2,3 to 5)

**ALONG WITH
CONTEMPT PETITION NO. 53 OF 2015
IN
NOTICE OF MOTION NO. 3264 OF 2009
IN
SUIT NO. 2308 OF 2009**

Nepean Estate Pvt. Ltd. & Ors. ...Petitioners
(Orig. Defendant Nos. 1 & 2)

Vs.

Tytan Cooperative Hng. Society Ltd. & Ors. ...Respondents
(Orig. Plaintiff Nos. 3 to 5)

Mr. Farid Karachiwala a/w. Mr. Sahil Saiyed
i/b. Wadia Ghandy & Co., for the Petitioners in
Contempt Petition No. 78 of 2013
Mr. Dinyar Madon, Sr. Counsel, Mr. Arif Doctor, Counsel
a/w. Mr. Shrikant Doijode, Mr. Rishir Daulat &
Ms. Geetanjali Joshi i/b. Doijode Associates for Respondent Nos. 1
& 2 in Contempt Petition No. 78 of 2013 and for Petitioner in
Contempt Petition No. 53 of 2015.

CORAM : MRS. ROSHAN DALVI, J.
DATED : 5TH AUGUST, 2015

P.C. :

1. The parties are a housing society and the developer. The parties entered into the consent terms in the notice of motion taken out in the above suit on 16th December, 2009. Clause 5 of the consent terms is stated to be breached by both the parties. Clause 5 of the consent terms contains 3 separate and distinct obligations. There are two obligations to be performed by the society and one obligation to be performed by the developer. They are as follows:

1. Society to pay Rs.23.13 lakhs.

It is paid. There is no contempt.

2. Society to pay inter alia lease rent in respect of the suit land.

The lease rent is not specified in the consent terms. The lease rent is not paid. The developer has alleged breach of that part of clause 5 and claims reliefs under the Contempt of Courts Act 1971 for such breach.

3. The developer to pay maintenance charges from 1st January, 2010 to the society.

The developer has paid the charges for 2 years aggregating to Rs.57 lakhs. It has thereafter not paid the charges. The society has alleged breach of that part of clause 5 for nonpayment of maintenance charges by the developer.

2. The developer claims that the maintenance charges are directly relateble to the lease rent payable by the society and must be adjusted by the society. It claims that it has paid the maintenance charges for 2 years, but has not received any lease rent, which the society is bound to pay and hence nonpayment of maintenance charges would not constitute the breach by the developer.
3. The aforesaid 2 clauses in clause 5 of the consent terms are separate and distinct. They are to be brought into effect on separate and distinct dates. The maintenance charges are payable by the developer from 1st January, 2010. The lease rent is payable by the society from the date of the consent terms ie., 16th December, 2009. Both the parties must perform their separate and distinct undertakings and obligations under the consent terms.
4. Though the parties may, if they so agree, adjust one charge against the other, the breach, if any, has to be seen

separately and distinctly.

5. The developer is, therefore, seen to be in breach of the payment of maintenance charges, after 2 years of the date of the agreement. The developer must pay the maintenance charges irrespective of the payment of the lease rent by the society.
6. The extent of the lease rent is not specified in clause 5 of the consent terms. Hence breach by the society is stated to be on the ground that the lease rent, not having been specified, could not be paid. The developer has contended that later correspondence between the developer and the society would show that the lease rent of Rs.30,000/- was agreed by the parties. This lease rent is mentioned in the email dated 30th April, 2014 of the attorneys of the society. The email shows the request made by the attorney to the society to provide the monthly statement of lease rent payable @ of Rs.30,000/- p.m. together with interest till 31st March, 2014. The email, therefore, shows the stage of consideration / negotiations of the extent of the lease rent payable. It shows that the attorney would request his client to make out a statement showing the extent of the lease rent. The agreement of the parties for payment of the lease rent, which can be enforced by another party is not reflected in the email.

7. The developer would claim that under a further email certain consent terms were sought to be sent by the society to the developer, which contained the confirmation, declaration and undertaking of the society to pay lease rentals at that rate from 1st January 2010 until the month of the draft of the consent terms, was sent. Those consent terms have yet not been executed. Hence also there is no contract between the parties for payment of the specified amount of lease rent which can be enforced by the other party to the contract.
8. Consequently breach on the part of the plaintiff society is not seen, which could result in any order under the Contempt of Courts Act to be passed against the plaintiff society.
9. The prima facie breach on the part of the developer of nonpayment of maintenance charges as per clause 5 of the consent terms is seen. However, the precise amount of maintenance charges payable by the developer and number of flats for which the developer has to pay maintenance charges has not been shown to Court and cannot be decided in this petition. The justification for nonpayment is also seen dependent upon the fact that though there are no reciprocal promises there was a liability of the society to pay lease rent which has unfortunately not being fixed by the parties.

Consequently the developer cannot be seen to be in such willful default as to attract penalty under the Contempt of Courts Act. The developer shall pay the maintenance charges, which are payable in respect of the possession of the flat/flats of the developer in the society.

10. In view of the above there shall be no other order in either of the contempt petitions.
11. No order as to costs.
12. Both Contempt Petitions are disposed off accordingly.

(ROSHAN DALVI, J.)