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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.3810 OF 2011
IN
APPEAL NO.983 OF 2005
IN
NOTICE OF MOTION NO.842 OF 2002
IN
SUIT NO.436 OF 2000.**

Ravinder Kumar Agarwal ... Applicant.

V/s.

Ashok Kumar Agarwal and ors Respondents

Mr. Rohan Cama a/w Ms. Pinky Patel, Mr. Gunjan Shah I/by Desai and Diwanji, for the applicant..

Mr. Gautam Ankhad a/w Mr. Darshan Mehta and Ms. Nirali Sanghavi I/by Dhruve Liladhar & Co. for the Respondent No.1.

**CORAM : V.M. KANADE &
DR. SHALINI PHANSALKAR-JOSHI, JJ.**

DATE : 31st AUGUST, 2015.

P.C. :

1. This Notice of Motion is taken out by the applicant seeking clarification/modification of the order, passed by the Division Bench of this Court dated 26th October, 2005. Both the

learned Judges, who have delivered Oral Judgment, are not available. Since Hon'ble Shri. Justice F.I. Rebello has been retired and Hon'ble Shri. Justice Dr. D.Y. Chandrachud is now Chief Justice at Allahabad High Court and therefore, in accordance with the rules, the matter is now been placed before this bench.

2. The grievance of the applicant is that certain amounts become due and payable by the appellant to the society towards repayment of the income disbursed in the year 2000. It is submitted that the Division Bench of this Court by the said order dated 26th October, 2005 had directed the appellant to deposit money which may be received from the society, in this court. It is admitted position that at the relevant time, the society had received various amounts towards rent and compensation from its occupants who were given commercial/residential premises on lease and the society had received surplus funds which were being distributed to all the members of the society.

3. According to appellant, some time in 2010, the appellant had to pay an amount of Rs.56,525 in five instalments

to the society and therefore, this amount may be permitted to be deducted from the amount which has been received from the society. It is submitted that to that extent the order passed by the Division bench be modified.

4. On the other hand learned counsel appearing for the respondent has raised preliminary objection regarding the maintainability of this Notice of Motion. It is submitted that the question of the said payment by the appellant to the society is the event which took place after the impugned order dated 26th October, 2005 was passed and therefore, fresh cause of action has arisen and the appellant therefore could not seek any modification of the order passed by the Division Bench.

5. In our view there is much substance in the submission made by learned counsel for the respondents, the appellant, therefore, is at liberty to take out fresh Notice of Motion seeking further directions from the Court, for the purpose of deducting the said amount for the reasons mentioned in the affidavit in support of this Notice of Motion.

6. We further clarify that the learned Single Judge may consider the said request made by the appellant on merits and in accordance with law and may not refer the order dated 26th October, 2005, for the purpose of rejecting the request made by the appellant.

7. We decline to entertain this Motion for one of the reason that we are of the view that apart from above legal justification which has been raised by the appellant, certain factual issues may have to be considered namely documents on which reliance is placed by the appellant as well as by the respondents. After taking all these factual and legal aspects, the learned Single Judge may independently decide whether the said amount should be deducted from the amount which has been deposited by the appellant. If amount of Rs.56525/- alongwith further instalments have already been deposited by the appellant in this Court, then in that even he may seek withdrawal of the said amount which he has deposited. Appropriate directions be given to the society to reimburse the

said amount to the appellant.

8. In view of above the Notice of Motion is disposed of.
All the contentions are kept open.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [V. M. KANADE, J.]

C E R T I F I C A T E

Certified to be true and correct copy of the original signed order