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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**ORDINARY ORIGINAL CIVIL JURISDICTION**  
**NOTICE OF MOTION NO. 1205 OF 2015**  
**IN**  
**SUIT NO. 812 OF 2014**  
**WITH**  
**NOTICE OF MOTION NO. 1362 OF 2014**

Ahura Developers Private Limited ...Plaintiffs  
*Versus*  
State of India Staff Vaibhav Co-op Hsg Soc & Ors ...Defendants

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**Mr Janak Dwarkadas, Senior Advocate, a/w Mr Kamal Khata, Ms Deepa Bisht, i/b Tushar Goradia, for the Plaintiffs and for the Applicants in NMS/1362/14.**

**Mr PK Dhakephalkar, Senior Advocate, a/w Mr Naushad Engineer, Mr Jayesh Mistry, i/b RMG Law Associates, for the Defendant No. 1.**

**Mr Shishir Joshi, a/w Ms Bhakti Jugal, i/b Ms Neha Choksi, for the Defendatn No. 2(a) and Applicants in NMS/1205/15.**

**Mr Shripad Murthy, i/b Anand Nikhal, for Defendants Nos. 3 to 6.**

**Ms Shobha D Mehra, for the Defendants Nos. 7(a) and 7(b).**

**Mr Abhishek Patil, for the Defendants Nos. 10 and 11.**

**Mr Mandar Soman, i/b AA Tungare, for the Defendants Nos. 8(a) and 8(b).**

**Mr Deepak J Lulia, for the Defendant No. 9.**

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**CORAM: G.S. PATEL, J**  
**DATED: 7th April 2017**

**PC:-**

1. The heir of the original 2nd Defendant has raised an issue of limitation as a preliminary issue under Section 9A of the Code of Civil Procedure 1908.

2. The Suit is for specific performance. The Plaintiffs are builders and developers. The 1st Defendant is a Cooperative Housing Society with which the Plaintiffs have the agreements in question. There are two agreements. The first is dated 13th October 2010. There is a supplemental agreement dated 29th April 2014 (Exhibits “B” and “C” to the plaint, respectively). Prayer (a) in the suit is for a declaration that these agreements are valid, subsisting and binding and prayer (b) is for a decree of specific performance. The Plaintiffs filed Notice of Motion No. 1362 of 2014 for interim relief. It is still pending. The plaint was lodged on 7th July 2014.

3. The ground of limitation is taken in a separate Notice of Motion No. 1205 of 2015 filed by the heir of the 2nd Defendant. The prayer in this Notice of Motion is that a preliminary issue be framed and that it be decided. I proceed to make this Notice of Motion absolute. The preliminary issue framed thus:

**“Whether the Suit as filed is within limitation?”**

4. Mr Dwarkadas for the Plaintiffs says the Plaintiffs do not desire to lead evidence on the preliminary issue.

5. Mr Joshi for the Applicant, the heir of Defendant No. 2, one Anagha Kedar Gorakshakar, who raised the preliminary issue, sought to lead evidence for the limited purpose of proving certain

documents annexed to the Affidavit in Support of the Notice of Motion and documents annexed to the Further Affidavit dated 23rd February 2016. The Plaintiffs agreed that these documents may be read while deciding the preliminary issue. Accordingly, Mr Joshi for the Defendant No. 2(a), Anagha, also agreed that no separate evidence was necessary.

6. A few dates are necessary apart from the dates of the two agreements in question. The Affidavit in Support of the Notice of Motion filed Anagha says that her mother Nilima Navalkar executed an agreement dated 8th May 2007 in favour of one Nipun Thakkar, the proprietor of M/s. Avi Corporation and also a director of the Plaintiff. In paragraph 4, Anagha says that Thakkar obtained undertakings from various members of the Society. Anagha's mother Nilima also executed such an agreement dated 8th May 2007 in favour of Thakkar supporting the redevelopment. By this document, she agreed to participate in the General Body meeting to support the scheme of redevelopment. A copy of this undertaking is at Exhibit "A" to the Affidavit in Support.

7. Anagha's case is that Thakkar did not abide by the undertaking. On 30th May 2008 Thakkar called on Nilima to execute an individual agreement and Power of Attorney in his favour within seven days.

8. On 7th June 2008 Nilima terminated the undertaking and returned the amount due to Thakkar, who, Anagha says, received the termination notice. Thereafter, Thakkar filed Suit No. 1272 of

2008 in the Bombay City Civil Court at Dindoshi for orders seeking to enforce the undertaking. This litigation ended on 19th December 2009 when this Court passed an order in Civil Revision Application No. 489 of 2008 returning the plaint. Thakkar withdrew his suit on 3rd February 2010. None of this is disputed.

9. The Affidavit in Support says that from 7th June 2008, when Nilima terminated the undertaking, there were no further proceedings. It is on this basis that she says that the suit filed on 7th July 2014 (the date is wrongly mentioned in her Affidavit) is out of time.

10. Mr Joshi for Anagha has also drawn my attention to certain documents annexed to the Further Affidavit in Support. Of particular interest to him is a letter dated 5th October 2010 from Nilima to the Chairman of the 1st Defendant Society. In this, apart from asking for some documents Nilima tells the Society that her plot is no less than approximately 3,100 square meters. It was bought by her husband who constructed the bungalow. She asserts that other than herself no one other has any authority to deal with it including any benefit arising from it. This is reiterated in subsequent agreements on 30th December 2010 and again on 12th March 2011.

11. There is some dispute about whether this is a plot owners cooperative society or a tenant cooperative society, but for the purposes of the Section 9A issue, this makes no difference. Mr Joshi's submission is that on any reading of the documents, once Nilima had terminated the authority of the 1st Defendant to the

transact in respect of her plot, and which was on 5th October 2010, a Suit ought to be filed within three years of that date. The definition of the Plaintiff for the purposes of the Limitation Act in Section 2(i) includes any person from or through whom the Plaintiffs derives his right to sue. According to Mr Joshi, the present Plaintiffs derive the right to sue from the 1st Defendant Society and, therefore, the suit is out of time.

12. Mr Joshi also referred me to certain clauses of the agreement in question. So did Mr Dwarkadas for the Plaintiffs. Clauses 6.1 to 6.3 are material and these are set out below:

“6.1 The said Society hereby agrees, confirms declares and assures that the members have consented to the re-development of the said Property of the Society by the Developers herein and the members have agreed and shall vacate their respective Bungalows without any default or delay or demur, under any guise or pretext whatsoever and shall handover to the Society the quiet, vacant and peaceful physical possession of their respective Bungalows within a period of 30 days from the receipt of a written Notice (hereinafter referred to as the said “**POSSESSION NOTICE**”) upon the receipt of IOD of the Society’s Building as per DC Rules from the Municipal Corporation of Greater Mumbai (hereinafter referred to as the said “**MCGM**”) to be handed over to the Developers to carry further process of the development.

6.2 The said Society shall cause the defaulting members to hand over vacant and peaceful possession of their respective Bungalows to the Developers for the purpose of demolishing the same and commencing

construction of the proposed buildings in its place. The Developers shall extend full and necessary assistance and co-operation to the said Society in respect thereof. In the event of the said Members failing to discharge the said obligations, the Developers/Society shall take the necessary legal steps at the costs of the said Society to discharge the said obligations for getting vacant and peaceful possession of Bungalows of such Members and for that the Society shall extend all the required co-operation and assistance to the Developers.

6.3 The said Society hereby agrees, confirms and undertakes that it has informed the Members about the re-development of the said Property of the Society and that members are fully well aware of the same and further the Members/s shall take all necessary steps and co-operate with the said society and the Developers for carrying out the redevelopment of the said Property and that none of the Members after the execution of these presents shall cause any kind of hitch, hindrance, obstruction, obstacle, impediment to the process of redevelopment under any guise or pretext whatsoever, in case of any of the Members causing any kind of hitch, hindrance, obstruction, obstacle, impediment then in such case the said society shall take all adequate and necessary steps to get vacated such erring Member/s. It is further agreed between the said Society and its Members that in case of such delay caused then the said Society shall levy a penalty of a sum of Rs. 2,000/- (Rupees Two Thousand only) per day for each day of delay caused by such erring Member and the same shall be forthwith paid to the Developers.”

13. Mr Joshi's submission is that if Nilima had said that neither Thakkar nor the Society could deal with her plot then there was no question of the Society attempting to do so or of the Plaintiffs acquiring any rights to do so from the Society. Article 54 of the Limitation Act would apply and this provides for a limitation period of three years from the date fixed for performance or, if no such date is fixed, when the Plaintiff has notice that performance is refused. Nilima's letter of 5th October 2010 is the clearest possible indicator according to Mr Joshi that performance of the agreement was in fact refused.

14. The immediate difficulty in accepting this argument is that the so-called refusal of performance pre-dates the first agreement itself. Nilima's letter at Exhibit "B" to her Further Affidavit is dated 5th October 2010. The agreement for development is 13th October 2010 and the supplemental agreement is dated 29th April 2014. The first submission must, therefore, of refusal of performance must straightaway be rejected.

15. The second problem is that Clause 6.1 as we have seen requires the Society to deliver possession of individual members' plots within 30 days of receipt of a written notice of the receipt of IOD. Mr Dwarkadas invites my attention to paragraph 28 of the plaint which says that three IODs were received on 26th July 2013. These are annexed at Exhibit "H" at page 114 to the plaint. The averment in the plaint as to limitation is set out in paragraph 63:

"63. The Plaintiff states that the Defendant Nos. 2 to 12 have failed to hand over vacant possession of their

respective bungalows within the 30 day period mentioned in their letter dated 2nd September 2013. The Plaintiff has approached the Hon'ble Court at the earliest opportunity and without any delay and no part of the cause of action is barred by the law of limitation."

16. The reference here is to a letter dated 2nd September 2013 from the Plaintiffs to the 1st Defendant Society. A copy of this letter is at page 146, Exhibit "I" to the Plaint. Nilima's letter is of 2010 (before the first development agreement) and then of 2011 again assailing the provisions of the agreement. The supplemental agreement of 29th April 2014, a copy of which is at Exhibit "C" from pages 89 onwards not only reaffirms the development agreement but speaks of a supporting resolution of 25th September 2010 and the body of the document contains a declaration, confirmation and admission that the Plaintiffs have in part performance taken various steps including obtaining approvals etc. (page 93). The confirmation of the parties is to be found at Clause 9 from pages 105 to 107.

17. Now in the supplemental agreement the reference to the 'parties' is obviously a reference to the 1st Defendant and the Plaintiffs. Specific performance is sought of these agreements. It is the 1st Defendant who is called on by the Plaintiffs to perform its contractual obligations. How it does so is a matter between itself and its constituent members and is not the Plaintiffs' concern. Individual members are bound by the decisions taken in General Body and by the Managing Committee of the Society. They are governed by the Maharashtra Cooperative Societies Act 1960. They have their remedies available to them under that Act. The members

of the Society could, in their collective wisdom, decide by majority or by the requisite strength as required by that statute to terminate the development agreement, rescind it and appoint another developer. The Plaintiff would be an outsider to all this. It is not required to look to individual members' consents or to seek specific performance from each individual members on its agreement with the Society which represents their common interest.

18. I notice that Nilima did not at that time say that she was not a member of the Society. She may have had a disagreement with the Society about who was entitled to what rights in respect of her plot, but that is surely not the same as saying that specific performance was refused by the Society. It is not possible to confuse and conflate these distinct identities in law. Nilima's exchange or communication with the Society could not operate to terminate the agreement, especially one that had not even been executed at the time when she first wrote to the Society. It could not possibly furnish any cause of action to the Plaintiffs as against the Society. At best, it might furnish a cause of action to Nilima to take appropriate steps under the Maharashtra Cooperative Societies Act 1960.

19. Given the averments in paragraph 63, the date of the Plaintiffs letter dated 2nd September 2013 and the date of the supplemental agreement dated 29th April 2014, there can be no manner of doubt that the suit is filed within time.

20. The preliminary issue is answered accordingly.

21. I will now proceed to take up the main Notice of Motion for hearing and final disposal.

22. Mr Joshi requests for time to challenge this order in Appeal. I decline to grant that application or to delay the hearing of the main Notice of Motion any further.

**(G. S. PATEL, J.)**