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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

**NOTICE OF MOTION NO. 206 OF 2016
IN
SUIT NO. 403 OF 2012**

Mrs Saraswati Gupta	...Applicant
In the matter between	
Jagdish Kanjibhai Patel	...Plaintiff
VS	
Oberoi Constructions Ltd. & 3 Ors.	...Defendants
And	
Santosh Adyaprasad Pathak & Ors.	...Respondents.

.....
Mr O.R.Tiwari for the Applicant/Defendant No.2.
Mr Pratik Sakseria a/w Mr Rohan Sawant & Mr Pratik Kothari I/b
I.C.Legal for defendant No.1.

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**CORAM : B. P. COLABAWALLA, J.
JULY 03, 2019.**

P.C. :

This Notice of Motion has been filed by the original defendant No.2 *inter alia* seeking to set aside the order dated 25th March, 2015 along with the Consent Terms dated 24th March, 2015, executed between the plaintiff, defendant No.1 and respondent Nos.1 and 2 to the Notice of Motion. The other prayer sought is directing the plaintiff to forthwith deposit in this Court a sum of Rs.2 Crores paid by defendant No.1 to the plaintiff and the above suit be restored to file. The further prayer that is sought is that respondent Nos.1 and

2 also be joined as defendant Nos. 5 and 6 to the suit.

2 The learned advocate appearing on behalf of defendant No.2 submitted that the Consent Terms dated 24th March, 2015 have not been signed by defendant No.2 and despite this the rights of defendant No.2 are affected by the said Consent Terms. In these circumstances, he submitted that the Consent Terms be set aside as they clearly affect the rights of defendant No.2.

3 On the other hand, Mr Sakseria, the learned advocate appearing on behalf of defendant No.1 submitted that these Consent Terms do not, in any way, affect any rights of defendant No.2 inasmuch as the same are not binding on her as she is not a signatory to the Consent Terms. Mr Sakseria submitted that it is defendant No.2's own case that she is not seeking any interest in the suit flat No.1003 and is only claiming refund of the amount paid by her to defendant No.1. In this regard, Mr Sakseria brought to my notice paragraph 14 of the affidavit in support of the Notice of Motion.

4 Mr Sakseria then submits that to recover this amount, defendant No.2 filed Suit No.2389 of 2012 in the City Civil Court, Dindoshi. That suit has been rejected by the said Court vide its order

dated 26th April, 2016 under the provisions of Order VII Rule 11 of the Code of Civil Procedure, 1908. The rejection order passed by the City Civil Court has been challenged before this Court by filing Writ Petition No. 9662 of 2017 and which is pending. He submitted that this being the factual scenario the reliefs sought for in the present Notice of Motion are wholly misconceived and accordingly the same be dismissed.

5 I have heard the learned counsel for parties at some length and have perused the papers and proceedings in the Notice of Motion. It is not in dispute that the Consent Terms dated 24th March, 2015 are not executed by defendant No.2. In fact the order taking the Consent Terms on record (dated 25th March, 2015) specifically records that the above suit is withdrawn against defendant Nos.2,3 and 4. Considering that defendant No.2 is not a signatory to these Consent Terms, these Consent Terms certainly do not bind defendant No.2. They have already sought to adjudicate their rights for refund of moneys by filing an independent suit bearing Suit No.2389 of 2012. As on today, even though the said suit is rejected, the Writ Petition challenging the rejection of the suit is pending in this Court. In these circumstances it is clarified that in the event defendant No.2 succeeds in the aforesaid Writ Petition No. 9662 of 2017 and consequently Suit

No.2389 of 2012 is restored to file of the City Civil Court, Dindoshi, these Consent Terms shall in no way prejudice defendant No.2 from seeking the relief of refund of moneys from the defendants in said suit. Needless to clarify that if Suit No. 2389 of 2012 filed in the City Civil Court at Dindoshi is restored to the file, the same shall be decided on its own merits and in accordance with law. I think this adequately protects defendant No.2, and therefore, there is absolutely no necessity for setting aside the Consent Terms that were voluntarily entered into between the plaintiff and defendant No.1.

6 The Notice of Motion is accordingly disposed of. No order as to costs.

(B.P.COLABAWALLA, J.)