

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

**INTERIM APPLICATION NO. 3531 OF 2025
IN
SUIT NO. 265 OF 2024**

**SANJAY KRISHNAKANT JAITHA)...APPLICANT /
ORI. DEFENDANT NO.5**

IN THE MATTER BETWEEN

**KRISHNA NAGAR BUILDING NO.1 CO-OPERATIVE)
HOUSING SOCIETY LIMITED AND OTHERS)...PLAINTIFFS**

V/s.

VIVEKANAND SHETTY AND OTHERS)...DEFENDANTS

WITH

**INTERIM APPLICATION NO. 3712 OF 2025
IN
SUIT NO. 265 OF 2024**

**KRISHNA NAGAR BUILDING NO.1 CO-OPERATIVE)
HOUSING SOCIETY LIMITED AND OTHERS)...APPLICANTS /
)ORI. PLAINTIFFS**

IN THE MATTER BETWEEN

**KRISHNA NAGAR BUILDING NO.1 CO-OPERATIVE)
HOUSING SOCIETY LIMITED AND OTHERS)...PLAINTIFFS**

V/s.

VIVEKANAND SHETTY AND OTHERS)...DEFENDANTS

Ms.Spenta Kapadia a/w. Mr.Viraj Jadhav i/by Mr.Chinmaya Acharya,
Advocate for the Plaintiffs.

Mr.Maulik Vora i/by Pramodkumar & Co., Advocate for the Defendants
no.2 to 4.

Mr.Divyang Shukla i/by L J Law, Advocate for the Applicant in
IA/3531/2025 / Original Defendant no.5 in S/265/2024.

CORAM : ABHAY AHUJA, J.

DATE : 26th FEBRUARY 2026

P.C. :

1. Ms.Spenta Kapadia, learned Counsel, appears for the Plaintiffs and submits that the Interim Application No.3712 of 2025 has been filed seeking a direction to the Defendants to pay the amounts mentioned in the table in paragraph 11 of the application on account of delay in vacating their respective flats as per Clause 6.3 of the Development Agreement dated 5th December 2023 or in the alternative the Applicants viz. the Plaintiffs be permitted to create a charge and a lien on the proposed new flats of such defaulting members to the extent of the outstanding amount which the Applicants shall be entitled to recover from the said defaulting members prior to possession of the proposed new flats to the said defaulting members as per Clause 6.4 of the Development Agreement.

2. Ms.Kapadia has drawn this Court's attention to Clause 6.1(a) read with Clause 3.4 of the Development Agreement as well as Clauses 6.3 and 6.4 thereof to submit that since there was a delay by the said members in vacating their respective flats, penalty of Rs.20,000/- per

day until vacation was liable to be paid by them after notice of vacating or in the alternative the society and the developer shall have a charge and a lien on the new flats of such defaulting members to the extent of the outstanding amount and shall be entitled to recover the outstanding amount from such defaulting members and will be entitled to refrain from handing over possession of the new flats to said members.

3. Ms.Kapadia submits that out of a society of 211 members, except the Defendants / Respondents, all had vacated their respective flats and only the Defendants / Respondents no.1 to 5 herein refused to vacate their respective premises, due to which the Applicants had to file the Suit along with Interim Application (Lodging) No.21659 of 2024 on 9th July 2024. That, by an order dated 13th September 2024 disposing of the said Interim Application, the Defendants were directed to vacate their respective premises within the stipulated time frame. That, the Defendants no.2, 3 and 4 vacated and handed over possession of their respective premises on 19th September 2024, the Defendant no.1 vacated and handed over possession on 20th September 2024 and the Defendant no.5 vacated and handed over possession on 26th September 2024. Ms.Kapadia submits that the PAAA was thereafter to be executed

with the Defendants, however, since there had been a delay in handing over possession in view of Clauses 6.1(a), 6.3 and 6.4, penalties were to be recovered from the said defaulting members and therefore this Interim Application No.3712 of 2025 seeking directions against the Defendants to pay the amounts in the table in paragraph 11 came to be filed.

4. Ms.Kapadia submits that the said amounts are to be paid in terms of Clause 6.3 of the Development Agreement. However, in the alternative, in accordance with Clause 6.4, a charge and a lien can be created to the extent of the outstanding amounts.

5. Ms.Kapadia submits that on 19th June 2025, the Defendant no.5 filed Interim Application No.3531 of 2025 seeking directions to the Applicants/Original Plaintiffs *inter alia* to execute and register the PAAA and for payments in terms of the Development Agreement and not to create third party rights in the saleable area under the Development Agreement. That, on 26th September 2025, a common order was passed recording the statement of the Plaintiffs that the draft PAAA would be exchanged by 30th September 2025 whereafter the Defendants would give their views by 6th October 2025 and if there was

some suggestion by the Defendants, then the parties would have a joint meeting at a neutral venue to iron out the issues and after finalization of the PAAA, the Plaintiffs were directed to get the documents registered on or before 31st October 2025 and the said direction would apply to the Defendants no.2 to 4 as well.

6. Ms.Kapadia submits that on 30th September 2025, an email was sent by the Advocate for the Plaintiffs to the Defendants enclosing draft PAAA which contained a Clause 3.2 with respect to the penalty to be paid in terms of Clause 6.3 of the Development Agreement. On 6th October 2025 and 28th October 2025, the Advocates for the Defendants objected to the inclusion of the said clause submitting that the same was not in accordance with the statement recorded in the order dated 13th September 2024, that the PAAA shall be executed with the Defendants on the same terms and at the same time when the PAAA Agreements will be executed with the other remaining members. Ms.Kapadia submits that Affidavits in reply have been filed by the Defendants no.2 to 4 confirming that they have vacated their respective premises as per order dated 13th September 2024 and that the draft PAAA is not in accordance with the statement made on 13th September 2024.

7. Ms.Kapadia has submitted that the amount of Rs.1,09,60,000/- has been calculated from 5th July 2024 till the date of vacation of the premises and handing over of the same in accordance with Clauses 6.1(b) and 6.3 of the Development Agreement. Ms.Kapadia reiterates that of all the 211 members, all except the Defendants, had vacated the premises. That Clause 6.3 provides for a situation where a member fails to vacate his/her existing premises, the defaulting member shall be liable to pay a penalty of Rs.20,000/- per day until he/she vacates and hands over his/her existing premises for the purpose of redevelopment in the manner contemplated in the Development Agreement. Ms.Kapadia submits that in the event the defaulting members fail to pay the penalty, then the societies and the developer shall have a charge and a lien on the new flats of such defaulting members to the extent of the outstanding amount and shall be entitled to recover the outstanding amount from such defaulting members and will be entitled to refrain from handing over possession of the new flats to such defaulting members. Ms.Kapadia submits that although there were timelines given in the order dated 26th September 2025 to enter into the PAAA, however, since the Defendants have not agreed to Clause 3.2 inserted in the draft PAAA, there has been a delay and that once this

Court decides the Interim Application No.3712 of 2025, the PAAAs can be executed and registered.

8. On the other hand, Mr.Shukla, learned Counsel, appears for the Defendant no.5 and at the outset submits that the notice to vacate in accordance with Clause 6.1(b) of the Development Agreement was never given and without the same, no claim for penalty could have been made by the Plaintiffs. Mr.Shukla submits that in accordance with Clause 6.1(b), if any member fails to provide the individual declaration-cum-indemnity within fifteen days of intimation from the societies, then the developer shall procure IOD for the members' area. After procurement of the IOD for the members' area, the societies through their Advocates/Legal consultant shall initiate legal proceedings against the said non-vacating member to vacate his/her existing premises and the cost of the said legal proceedings would be borne by the developer. Mr.Shukla submits that after the Court / Tribunal / Authority had passed the order against the said non-vacating member to vacate his/her premises, the developer would issue another seven days' written notice to the members of the societies to vacate their existing premises within which all the members are to vacate their respective premises. Mr.Shukla submits that the vacation of the flat by

the Defendant he represents, has been pursuant to the order dated 13th September 2024 and not pursuant to any notice. That, therefore, there is no question of being liable to pay any penalty.

9. Mr.Shukla further submits that the Suit that has been filed is for damages which is based on the very same clauses in the Development Agreement, on the basis of which the amounts in the Interim Application are being claimed and that, therefore also the Interim Application seeking payment of penalty cannot be entertained as a written statement to the Suit is yet to be filed and it is only after a trial that the damages can be ascertained. Mr.Shukla draws this Court's attention to paragraph 17 of the plaint which paragraph also recounts the very same situation that since the Defendants instead of repeated requests and reminders have failed and neglected to vacate their existing premises and as such have rendered themselves liable for compensating the Plaintiffs to pay damages for willfully delaying the redevelopment project, and the Plaintiffs have therefore quantified the damages at Rs.13,00,00,000/- for causing willful loss to the Plaintiffs for delaying the project, thereby increasing the costs of project on account of transit rent etc. Mr.Shukla submits that by order dated 13th September 2024, the Plaintiffs had made a statement that the PAAA

shall be executed with the Defendants on the very same terms and at the same time when the PAAA would be executed with the other members of the societies and the said statement was recorded in the order dated 13th September 2024 and also accepted by the Court. That, by seeking to include Clause 3.2 in PAAA in terms of Clause 6.3 of the Development Agreement, the Plaintiffs are in breach of the said statement as the said Clause 3.2 is not in the PAAA entered into with the other 204 members. Mr.Shukla, therefore, submits that the application be rejected.

10. Mr.Maulik Vora, learned Counsel appearing for the Defendants no.2 to 4 adopts the arguments of Mr.Shukla appearing for the Defendant no.5 and submits that this Court may reject the claim for payment of penalty as per Clause 6.3 of the Development Agreement or in the alternative a clause to create a charge and a lien on the proposed new flats to the extent of the outstanding amounts as per Clause 6.4 of the Development Agreement.

11. Both the learned Counsel appearing for the Defendants no.2 to 4 and 5 submit that no transit rent has been paid since the handing over of possession of the said flats, and infact, this Court may direct the Plaintiffs to make payment of the said amounts without further ado.

12. I have heard the learned Counsel appearing in the matter and considered the rival contentions.

13. It is not in dispute that under Clause 6.3 of the Development Agreement, the members/Defendants had agreed with the Plaintiffs that in the event the members fail to vacate the building, then such defaulting members shall be liable to pay Rs.20,000/- per day until he/she vacates and hands over the premises. It cannot be disputed that the Defendants have vacated and handed over possession of their respective flats only pursuant to order dated 13th September 2024 : Defendants no.2, 3 and 4 have vacated and handed over possession of their respective premises on 19th September 2024, Defendant no.1 on 20th September 2024 and Defendant no.5 on 26th September 2024. Although Clause 6.1(b) does require the developer to issue another seven days notice to the members of the societies to vacate their existing premises within which all the members would vacate their respective premises and it has been submitted on behalf of the Defendants that no such notice was given, however, the same is belied as it has been averred in paragraph 7, page 8 of the Interim Application on behalf of the Plaintiffs that on 19th June 2024 a vacation notice was issued by the developer to the societies which is evidenced by notice at

Exhibit E, page 684 to the plaint. That, despite notice, the Defendants no.2 to 5 refused to vacate their respective premises, due to which the Applicants / Plaintiffs were constrained to file the Suit on 9th July 2024. It is, therefore, clear that the Defendants refused to vacate their respective premises even after the vacation notice was issued and vacated their respective premises only when the order dated 13th September 2024 was passed by this Court directing the Defendants to vacate their respective premises within the time frame stipulated in an application filed by the Plaintiffs. No doubt, the Suit has been filed seeking damages and the damages have also been crystallized at Rs.13,00,00,000/-.

14. Mr.Shukla for the Defendant no.5 has pointed out paragraph 17 of the plaint to submit that the Suit seeks damages and the Interim Application seeks penalty for the very same cause which is delay in vacating the existing premises, and that, therefore, before filing of written statement and a proper trial giving an opportunity to the Defendants to disprove the claim, the Applicants / Plaintiffs cannot by way of Interim Application No.3712 of 2025 seek to receive the same payment.

15. I have perused paragraph 17 of the plaint. The said paragraph clearly records the submissions of the Plaintiffs that 204 members cannot be made to suffer on account of the illegal demand and non-cooperative attitude adopted by the Defendants. That, the Defendants have, inspite of repeated requests and reminders, failed and neglected to vacate their existing premises and as such, they have rendered themselves liable for compensating the Plaintiffs to pay damages for willfully delaying the development of the project. That, the Plaintiff no.3 has been paying transit rent to over 204 members, who have already vacated their existing premises in compliance of their obligation under the Development Agreement and has also engaged the services of professionals like engineers, architects, contractors, labourers etc. to carry out construction of the new building and has also applied for obtaining various approvals from the authorities. That, the entire redevelopment process is getting hampered on account of the non-cooperative attitude adopted by the Defendants. That, the Defendants are, therefore, liable to pay the Plaintiffs Rs.13,00,00,000/- as damages for causing willful loss to the Plaintiff no.3 as well as for delaying the project thereby increasing the cost of project on account of the payment of transit rent etc., and that, the Defendants are jointly and severally bound and liable to pay Rs.13,00,00,000/- to the

Plaintiffs and are also bound and liable to vacate their premises since the Development Agreement dated 5th December 2023 and the Power of Attorney are valid and subsisting and the Defendants are bound and liable to comply with the said obligations.

16. In my *prima facie* view, the Plaintiffs are seeking damages of Rs.13,00,00,000/- for causing willful loss to the Plaintiff no.3 on account of the transit rent that they have paid to the other 204 members, the costs of the professionals like engineers, architects, contractors, labourers etc. to carry out construction work of the new building and for obtaining various approvals from the authorities as well as for the delay in the project and that the said damages are not the same as the penalty that is sought to be levied for delayed vacation of the respective flats / premises as per Clause 6.3 of the Development Agreement. For the sake of convenience, Clauses 6.3 and 6.4 of the Development Agreement is usefully reproduced as under :

“6.3. The defaulting members shall be liable to pay a penalty of Rs.20,000/- (Rupees Twenty Thousand Only) per day until he / she vacates and hands over his / her / their existing premises for the purpose of redevelopment in the manner contemplated herein. In addition thereto, the penalty mentioned hereinabove shall be deducted from the hardship allowance and monthly Displacement Compensation payable by the Developer to such defaulting Member/s under the

terms of this Agreement, without prejudice to the rights of the Developer to obtain vacant and peaceful possession of their existing premises and commence Redevelopment of the Properties.

6.4 In the event the defaulting Member/s fail to pay the penalty mentioned in the clause 6.3 hereinabove, then the Societies and Developer shall have a charge and a lien on the New Flat/s of such defaulting Member/s to the extent of the outstanding amount and shall be entitled to recover the outstanding amount from such defaulting Member/s and will be entitled to refrain from handing over possession of the New Flats to such Members. The Developer shall co-operate and extend full support to the Societies to do the recovery of the same.”

17. It is clear that a defaulting member viz. a member who fails to vacate his respective flat shall be liable to pay a penalty of Rs.20,000/- per day until he/she vacates and hands over his/her existing premises for the purpose of redevelopment in the manner contemplated in the Development Agreement. As noted above, there has been a delay in vacating and handing over possession of the respective premises by the Defendants, making them liable to the penalty in Clause 6.3 of the Development Agreement.

18. By order dated 26th September 2025 this Court had recorded the Plaintiffs' statement that the PAAA drafts will be exchanged by 30th

September 2025 after which the Defendants would give their views by 6th October 2025 and the suggestions of the Defendants would be resolved by ironing out the issues at a meeting at a neutral venue and after finalization of the PAAA and the Plaintiffs were directed to get the said documents registered on or before 31st October 2025. However, as can be seen, when the email was sent by the Advocate for the Plaintiffs on 30th September 2025 enclosing the draft of the PAAA which had a clause 3.2 in view of the Interim Application No.3712 of 2025 regarding the penalty that was payable by the Defendants for delay in vacating the premises, by emails dated 6th October 2025 and 28th October 2025 the Advocates for the Defendants had objected to the inclusion of the said clause on the ground that the same was not in accordance with the statement recorded in the order dated 13th September 2024.

19. As has been noted earlier, the learned Counsel appearing for the Plaintiffs had made a statement that the PAAA shall be executed with the Defendants on the same terms and at the same time when the PAAA agreements would be executed with the other remaining members of the societies and the said statement was accepted by the Court. It needs to be observed that except the Defendants, the other 204 members had

handed over their possession within time and it is only the Defendants who have delayed the handing over of possession of the respective flats exposing themselves to the liability of penalty under Clause 6.3 of the Development Agreement.

20. Clause 3.2 of the draft PAAA which has been tendered across the bar reads as under :

“3.2 Hardship Compensation, Monthly Displacement Compensation, Reduction Cost & Brokerage:

The Developer has agreed to pay to the Existing Member, Inconvenience-cum-Hardship Allowance, Monthly Displacement Compensation, Shifting Charges & Brokerage as agreed under the Development Agreement and in the manner as set out therein.

The monetary benefits under this clause shall be paid to the existing members only upon order of the Hon'ble Court in Interim Application No.3712 of 2025 in Suit No.265 of 2024.

(emphasis supplied)

21. The learned Counsel for the Defendants have objected to the portion emphasized above. It is in view of the aforesaid objection that Ms.Kapadia is pressing and in my view rightly so for orders in Interim Application No.3712 of 2025 to submit that either the amount of penalty of Rs.1,09,60,000/- be paid by the defaulting members in terms of Clause 6.3 of the Development Agreement or in the alternative the

Plaintiffs be permitted to in place of emphasized portion include language to create a charge and a lien on the proposed new flats to the extent of the outstanding amount as per Clause 6.4 and as mentioned in the table in paragraph 11 of the Interim Application.

22. Having heard the learned Counsel and having considered the position that emerges upon a reading of the Development Agreement and keeping in mind the interest of the Defendants, this Court is of the view that the PAAA Agreement be executed by replacing the emphasized portion of Clause 3.2 by suitable clause for payment of penalty as per the table in paragraph 11 in a time bound manner in terms of Clause 6.3 of the Development Agreement, failing which, the provisions of Clause 6.4 of the Development Agreement to become effective, and thereby not only dispose of the two Interim Applications but also the Suit.

23. This Court, therefore, put it to Ms.Kapadia as to whether her clients would want to withdraw the Suit. Ms.Kapadia however submits that she has no such instructions.

24. In view of the aforesaid, the following order is passed :

ORDER

- (i) The PAAA draft after deleting the following language in Clause 3.2 as noted above and replacing it with clause for payment of penalty as per the table in paragraph 11 in a time bound manner in terms of Clause 6.3 of the Development Agreement and failing which clause in terms of 6.4 of the Development Agreement with a charge and a lien on the proposed new flats of said Defendants to the extent of the outstanding amount would automatically get created and the Applicants / Plaintiffs shall be entitled to recover the same from the Defendants prior to possession of the proposed new flats and will also be entitled to refrain from handing over possession of the new flats to them be executed and registered within a period of two weeks.
- (ii) The Interim Application No.3712 of 2025 and Interim Application No.3531 of 2025 to accordingly stand disposed.

(ABHAY AHUJA, J.)

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