



J-CHS 397.19 with IA 55.19, NMS 1798.17 in S 463.16 with S 463.16 new.doc

Kavita S.J.

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

CHAMBER SUMMONS NO.397 OF 2019

IN

SUIT NO.463 OF 2016

Zenith Enterprises

...Applicant
(Intervener)

In the matter between:

Vinesh Rashmikan Shah and Ors.

...Plaintiffs

Versus

Pee Jay Traders and Ors.

...Defendants

WITH

INTERIM APPLICATION NO.55 OF 2019

IN

SUIT NO.463 OF 2016

Vinesh Rashmikan Shah and Ors.

...Applicants/
Plaintiffs

Versus

Pee Jay Traders and Ors.

...Defendants

WITH

NOTICE OF MOTION NO.1798 OF 2017

IN

SUIT NO.463 OF 2016

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Vinesh Rashmikant Shah and Ors.

...Applicants/
Plaintiffs

Versus

Pee Jay Traders and Ors.

...Defendants

WITH

SUIT NO.463 OF 2016

Vinesh Rashmikant Shah and Ors.

...Plaintiffs

Versus

Pee Jay Traders and Ors.

...Defendants

Mr. Zubin Behramkamdin, Senior Counsel a/w Ms. Jennifer Michael,
Mr. Som Sinha, Ms. Divya Vishwanath i/b Som Sinha and Associates
for the Applicant/Intervenor in CHS No.397 of 2019.

Mr. Rohaan Cama, Counsel a/w Mr. Anish Karande, Counsel a/w Mr.
Danish Qureshi i/b Mahimtura & Co., for the Plaintiff.

Ms. Purnima G. Bhatia a/w Ms. Roshan D'sa for Defendant Nos.1 and
2 in CHS No.397 of 2019.

Mr. Prabhat J. Dubey a/w Ms. Aarti Yadav for Defendant No.4.

CORAM : R.I. CHAGLA, J.

RESERVED ON : 24th JULY, 2024.

PRONOUNCED ON : 29th NOVEMBER, 2024.

JUDGMENT :

1. The Chamber Summons and the Interim Application filed in the above Suit have been heard together. By the Chamber Summons, the Applicant – M/s Zenith Enterprises (hereinafter referred to as “**Zenith**”) has sought impleadment in the Suit. Further, consequential relief has been sought in the Chamber Summons. By the Interim Application No. 55 of 2019 filed in the above Suit, the Plaintiffs have sought an Order from this Court under Order XXIII or Order XII Rule 6 of the Code of Civil Procedure (“**CPC**”), 1908, to pass a decree recording the compromise arrived at between the Plaintiffs and Defendant Nos. 1 and 2 in terms of the Consent Terms signed by the parties and their Advocates, annexed at Exhibit D to the Interim Application (hereinafter referred to as “**the Consent Terms**”), and for directions from this Court to permit the Plaintiffs to withdraw the amount of Rs.2.70 Crores deposited by the Plaintiffs with the Prothonotary and Senior Master of this Court pursuant to an Order dated 4th July, 2018 passed by this Court, together with the accrued interest thereon.

2. It is relevant to give a brief background of facts leading

up to the filing of the present Suit as well as the above Applications and relevant orders passed thereon, which are as under:

(i) A Memorandum of Understanding (“**MoU**”) had been executed between the Defendant No.1 as Vendor and Plaintiff Nos. 1 and 2 as Purchasers on 27th May, 2004 whereby Defendant No.1 agreed to sell and transfer Flat Nos. 801 and 802, 901 and 902 to be constructed on the 8th and 9th Floors together with terrace admeasuring 1000 sq.ft. attached to Flat No.901, for consideration and on the terms and conditions stated therein. This had been preceded by an MoU dated 25th July, 2002 for construction of upper floors to be carried out in the subject building.

(ii) Thereafter an MoU was executed between Defendant No.2 and Zenith on 21st August, 2008 in respect of joint development of proposed construction on “B” Wing of the subject building described as “Mangal Kunj” “B” Wing CHS Limited.

(iii) An Allotment Letter was issued by Defendant No.1 in favour of Plaintiff No.1 on 11th September, 2010 allotting the

complete 9th and 10th Floors of the subject building (floors under construction) in lieu of 8th and 9th floors which have been allotted earlier.

(iv) On 31st December, 2010 there were four registered Agreements for Sale executed by Defendant No.2 as Developer and Plaintiff Nos. 1 and 2 as Purchasers, whereby Defendant No.2 agreed to sell and transfer to Plaintiff Nos. 1 and 2, the Flat No.901, 902, 1001 and 1002 alongwith respective one open car parking space, at / or for the consideration and on the terms and conditions stated therein.

(v) Further, on 31st December, 2010, registered Agreement for Sale was executed by Plaintiff Nos. 1 and 2 as Vendors and Defendant No.2 as Purchaser, whereby Plaintiff Nos. 1 and 2, who had been transferred Flat No.G-1 in the subject building by Defendant No.1, agreed to transfer, convey and assign the said Flat No.G-1 in favour of Defendant No.2 at or for the consideration and in the manner contained therein.

(vi) Housing Loan of Rs.2.5 Crores was sanctioned by the Bank of Baroda in favour of the Plaintiffs on 18th January,

2012 in respect of purchase of the Flat Nos. 901 and 902, 1001 and 1002.

(vii) Letters dated 26th March, 2012 were addressed by Defendant No.2 giving No Objection to the Bank of Baroda giving loan to the Plaintiffs and mortgaging the Flat Nos. 901 and 902, 1001 and 1002.

(viii) The Bank of Baroda deposited / transferred on 31st March, 2012 a sum of Rs.1 Crore into bank account of Defendant No.2.

(ix) The Share Certificates bearing Nos. 14 and 15 were issued by the Society in favour of Plaintiff No.1 / Plaintiff No.2 and Plaintiff No.3 / Plaintiff No.1 respectively. Further, the Share Certificate pertaining to Flat No.G-1 was issued by the Society in favour of Plaintiff No.1 and Plaintiff No.2.

(x) A registered Sale Deed dated 27th February, 2013 was executed by Defendant No.2, as the Developer and Zenith as the Purchaser, whereby Defendant No.2 agreed to sell to Zenith Flat Nos.1001 and 1002 alongwith exclusive right for

use of one open car parking space in the compound of the subject building at or for the consideration and on the terms and conditions contained therein.

(xi) It is the Plaintiff's case that Defendant No.2 in October, 2013 handed over possession of Flat Nos. 901 and 902 for carrying out interior works.

(xii) A Registered Sale Deed was executed by Defendant No.2 as Developer and Zenith as Purchaser on 19th December, 2013, whereby Defendant No.2 agreed to sell to Zenith Flat Nos. 901 and 902 alongwith exclusive right for use of one open car parking space in the compound of the subject building, at or for the consideration and on the terms and conditions contained therein.

(xiii) A registered Agreement for Sale was executed between Zenith as Seller and one Mrs. Sabina Irfan Khandwani and Mr. Irfan Sayeed Khandwani ("Khandwanis") as purchasers on 30th December, 2013, whereby Zenith agreed to sell and transfer Flat Nos.1001 and 1002 alongwith exclusive right for use of one open car parking space in the compound of

subject building in favour of the Khandwanis, at or for the consideration and on the terms and conditions contained therein.

(xiv) A purported Receipt issued by Defendant No.2 on 26th March, 2014 in respect of sum of Rs.6 Lakh paid by Zenith towards Service Tax on VAT in respect of Flat Nos. 1001 and 1002 under the registered Sale Deed dated 27th February, 2013.

(xv) Purported Possession Letter issued by Defendant No.2 in favour of Zenith on 21st April, 2014 recording, *inter alia* the handing over possession of Flat Nos.1001 and 1002.

(xvi) There were disputes between the Plaintiffs and Defendant Nos.1 and 2 regarding the performance of the Registered Agreement for Sale dated 31st December, 2010 in respect of Flat Nos. 901 and 902, 1001 and 1002 and Flat No.G-1 situated in the subject building. This led to the Plaintiff's filing the present Suit in March, 2016 and taking out Notice of Motion No.2012 of 2016 therein, particularly since Defendant Nos. 1 and 2 had failed to take necessary steps for handing over possession of Flat Nos. 1001 and 1002 and had

illegally placed a lock on the door of Flat Nos. 901 and 902 of the subject building.

(xvii) An order was passed by this Court on 28th March, 2016 in the Notice of Motion No.2012 to 2016 appointing a Commissioner to visit the Suit Flats and verify the status of the Flats and submit Report to this Court.

(xviii) Report prepared on 30th March, 2016 by the Commissioner pursuant to directions of this Court.

(xix) A purported Possession Letter issued by Defendant Nos. 2 on 27th July, 2017 in favour of Zenith recording, *inter alia*, handing over of possession of Flat Nos.1001 and 1002.

(xx) A Notice of Motion No.1798 of 2017 was filed on 10th October, 2017 by the Plaintiffs seeking, *inter alia* to permit the Plaintiffs to peacefully enjoy and occupy Flat Nos. 901 and 902, 1001 and 1002.

(xxi) An Order dated 4th July, 2018 was passed by this Court in the said Notice of Motion No.1798 of 2017 directing

the Plaintiffs to deposit an amount of Rs. 2.70 Crores in this Court and on such deposit being made, direction to Defendant Nos.1 and 2 to forthwith handover possession of the Suit Flats to the Plaintiffs and to execute necessary documents, if any.

(xxii) The Plaintiffs deposited the said amount of Rs.2.70 Cores in this Court on 14th July, 2018.

(xxiii) An Order dated 18th July, 2018 was passed by this Court in the said Notice of Motion No.1798 of 2017 appointing a Court Receiver in respect of Flats on the 10th Floor and recorded that Zenith had handed over keys of Flat No.1001 and 1002 in this Court and directions to Defendant Nos.1 and 2 to hand over possession of 9th Floor Flats to the Plaintiffs. Pursuant to this order, the Plaintiffs claimed to have broken open the locks of Flats 901 and 902 and have been in quiet, peaceful and uninterrupted possession of the Flats since then.

(xxiv) Order dated 21st July, 2018 passed by this Court in Notice of Motion No. 1798 of 2017 directing the Court Receiver to take possession of Flat Nos. 1001 and 1002 upon the said Order dated 18th July, 2018 being lodged with the

Court Receiver.

(xxv) The above Chamber Summons No.397 of 2019 was filed by Zenith on 24th July, 2018, whereby Zenith sought impleadment in the present Suit.

(xxvi) The Orders dated 11th March, 2019 and 8th April, 2019 passed by this Court in the said Chamber Summons No.397 of 2019.

(xxvii) The undated Consent Terms executed between the Plaintiffs and Defendant Nos. 1 and 2.

(xxviii) An Order dated 20th August, 2019 passed by this Court recording statement made on behalf of the Defendant Nos. 1 and 2 that although Consent Terms were to be filed, Defendant Nos.1 and 2 were not agreeable to settle the matter in those terms. Further, that the Consent Terms had been arrived at and signed but the Defendant Nos. 1 and 2 had given instructions to their Advocates not to proceed to settle the present Suit as contemplated in the said Consent Terms.

(xxix) Interim Application No.1 of 2019 filed by Plaintiff No.1 which is now numbered as Interim Application No.55 of 2019 seeking *inter alia* that this Court be pleased to pass a Decree in terms of the compromise / Consent Teme entered into between the Plaintiffs and Defendant No.1.

3. The above Chamber Summons although heard alongwith Interim Application No.55 of 2019 is first being addressed as it seeks impleadment of Zenith in the present Suit.

4. It is the case on behalf of Zenith that when Zenith found prospective purchasers for the 10th Floor Flats viz. Khandwanis, they applied for bank loan on the basis of Agreement for Sale dated 30th December, 2013 entered into with the Khandwanis. Zenith was informed by their bankers that said 10th Floor Flats which was subject matter of the said Agreement, were also agreed to be sold by Defendant No.2 to someone else. This is when Zenith claims to have come to know for the first time about the sale of the 10th Floor Flats carried out by Defendant No.2 which they term as 'illegal sale'. It is the further case of Zenith that when they confronted Defendant No.2 regarding the aforementioned sale, Defendant No.2 admitted that he

had executed agreements with the Plaintiffs, not only in respect of 10th Floor Flats but also of the 9th Floor Flats. Zenith states that the Defendants assured Zenith that the issue will be resolved amicably, and that no detriment or prejudice shall be caused to Zenith. Further, Zenith claims that Defendant No. 2 had informed them that although the 10th Floor Flats were agreed to be sold to the Plaintiffs, the Plaintiffs had failed to pay the consideration agreed upon, which resulted in the termination of the Agreements by the Defendant No. 2.

5. Zenith has further contended that in respect of the said 9th Floor Flats, Defendant No. 2 requested Zenith to accept two Flats on the 12th Floor of the subject Building viz. Flat Nos. 1201 and 1202 in lieu of the said 9th Floor Flats. This was agreed to by Zenith.

6. It is Zenith's contention that Zenith was put into possession of 10th Floor Flat and Possession Letter dated 27th July, 2017 was issued by the Defendant No. 2 on Zenith's request, which was notarized and executed by the Defendant No. 2 in favour of Zenith, confirming the latter's possession over the said 10th Floor Flats. That it was further confirmed by Defendant No.2 in the

Possession Letter that he has received full consideration under the Sale Deed from Zenith and Zenith had full rights to occupy / deal with the 10th Floor Flats in the manner Zenith deemed fit.

7. Further the contention of Zenith is that the Defendant No.2 was not resolving the issue in respect of said 10th Floor Flats. A complaint had been filed with Bandra Police Station and upon Defendant No.2 was upon being summoned gave a statement to the police officials that the matter pertaining to the said 10th Floor Flats was settled by Defendant No.2 with the Plaintiffs and some time was required to pay the Plaintiffs the necessary consideration. Further, the Defendant No.2 had not let out a whisper regarding the pendency of a Suit filed in respect of the said 10th Floor Flats, let alone any other proceeding. Zenith claims to have only come to know of present proceedings, when the Defendant No. 2 approached the Partner of Zenith in / around 4th July, 2018 informing him that Zenith may have to vacate the said 10th Floor Flats, as possession of the same may have to be handed over to the Plaintiffs in terms of orders passed by this Court. Zenith claims to have immediately approached its Advocates for necessary steps to be taken in the present Suit. Thereafter, Chamber Summons has been filed and in which the

aforementioned orders have been passed by this Court including directing Zenith to handover the 10th Floor Flats to the Receiver as per directions of this Court.

8. Mr. Zubin Behramkamdin, learned Senior Counsel appearing for Zenith has submitted that the Plaintiffs claim to have purchased the said 10th Floor Flats under a Agreement for Sale dated 31st December, 2010. However, the said Agreements are only Agreements to sell at a future date, and not Sale Deeds/Conveyances at all, which makes the Plaintiffs incomplete Purchasers. He has in this context referred to Clauses 1(a), 2, 5, 12, 20 and 29 of the said Agreements. He has submitted that payments were infact never made and there is nothing on record to substantiate the same.

9. Mr. Behramkamdin has submitted that since the prior Agreements of the Plaintiffs are merely Agreements for Sale, they do not attract the Public Notice Doctrine set out in Section 3 of the Transfer of Property Act. He has submitted that this has been held by this Court in the case of Hirachand Himatlal Marwari Vs. Kashinath Thakurli Jadhav¹. He has submitted that the Plaintiffs'

¹ AIR 1942 Bom 339

registered Agreements are meaningless. Furthermore, when the Agreements for Sale were signed, there was no Commencement Certificate for the said 10th Floor Flats.

10. Mr. Behramkamdin has submitted that the Plaintiffs have not paid consideration for the 10th Floor Flats (as is clear from the registered Agreement for Sale) which caused the Agreement for Sale to be terminated. He has submitted that the Plaintiff has only paid a sum of Rs.5,00,000/- each under the said Agreements i.e. Rs.10,00,000/- in total. The claim of the Plaintiffs that the balance consideration payable was “adjusted” against alleged MoUs of 25th July, 2002 and 22nd May, 2004 and / or there was an “understanding” between the parties. This false stand has been exposed by the Agreements for Sale itself as there is no recording in the Agreements for Sale of such adjustments made in 2002 or 2004.

11. Mr. Behramkamdin has submitted that this false plea of the Plaintiffs of adjustments of balance consideration has to be rejected by this Court as such plea is contrary to Sections 91 and 92 of the Indian Evidence Act, particularly since such adjustment is not reflected in any of the Agreements executed

between the Plaintiffs and Defendant Nos.1 and 2, and is in fact is contrary to what is expressly stated in the said Agreements.

12. Mr. Behramkamdin has submitted that this Court did not believe the Plaintiffs' case in this regard, and the Plaintiffs were ordered to deposit monies vide Order dated 4th July, 2018. He has submitted that the contract was never performed and completed by the Plaintiffs unlike Zenith's contract which was fully completed. The Plaintiffs themselves filed Notice of Motion No.1798 of 2017 with a specific prayer that they be allowed to deposit an amount of Rs.2,70,00,000/- by way of Bank Guarantee in respect of the 9th and 10th Floor Flats respectively.

13. Mr. Behramkamdin has submitted that the non-payment of consideration clearly shows that the Plaintiffs were not ready and willing to perform their part of the Agreement. The fact that they deposited an amount in Court pursuant to the Court's direction does not change this position. This has been held by the Supreme Court in the case of *U. N. Krishnamurthy (Since deceased) through LRs Vs. A.M. Krishnamurthy*² wherein it was held that the readiness and

² 2022 SCCOnline SC 840,

willingness should be there since the beginning of the contract and depositing money pursuant to a Court order does not show readiness or willingness as stated in Section 16 of the Specific Relief Act, 1963.

14. Mr. Behramkamdin has submitted that the Plaintiffs were entitled to possession only after full payment. In this context he has placed reliance upon Clause 2 and 20 of the Agreements for Sale in respect of the 10th Floor Flats, wherein it was provided that possession was to be given to Plaintiffs only after full payment. Thus, the Plaintiffs would be entitled to enjoy the said 10th Floor Flats only after making full payment for the same, which is why they could never have been given possession of the Suit Flats.

15. Mr. Behramkamdin has submitted that Zenith on the other hand has fully performed, and has registered Sale Deeds in its favour. Zenith has also been handed over possession of the said 10th Floor Flats on 21st April, 2017.

16. Mr. Behramkamdin has referred to Section 3 of the Transfer of Property Act, wherein the phrase “a person is said to have notice” is contained. He has submitted that the meaning of the said phrase assumes importance in such a case. This Court in ***Hirachand***

Himatlal Marwari (supra) has held that if an Agreement was compulsorily registrable and was in fact properly registered, only then can it be deemed to give constructive notice, otherwise not. Therefore, there can be no deemed notice attributed to Zenith, because the Agreements dated 31st December, 2010 relied upon by the Plaintiffs do not fulfill the legal requirements of constructive notice.

17. Mr. Behramkamdin has submitted that the Plaintiffs have themselves admitted in Paragraph 36 of the Complaint that there was a finalised settlement between them and Defendant No.2 prior to filing the above Suit. The Plaintiffs have produced the Consent Terms finalised between the parties, whereunder the Plaintiffs agreed to accept money in lieu of surrendering their purported rights in respect of the said 10th Floor Flats. It means that the Plaintiffs have accepted that compensation / money is an adequate remedy for the supposed breaches committed by the Defendant Nos. 1 and 2. Having admitted this, they cannot now maintain an action for specific performance.

18. Mr. Behramkamdin has submitted that Zenith's possession amounts to constructive notice to the Plaintiffs as per Section 3 of the

Transfer of Property Act. Zenith has produced Possession Letters issued in its favour which had not been denied. The Defendant No.2 has also admitted the fact that the possession of the said Flats was with Zenith which was later handed over to the Court Receiver.

19. Mr. Behramkamdin has submitted that it is pertinent to note that the Plaintiffs in the captioned Suit have raised claims against Flat No.G-1 situated in the subject Building and have challenged illegal transfer of the said Flat by the Defendant Nos.1 and 2 in favour of the Defendant No. 3. The Plaintiffs have made Defendant No.3 a party Defendant to the Suit, and though having done so, they are opposing Zenith's Application for impleadment to the Suit who are similar transferees in respect of the 10th Floor Flats.

20. Mr. Behramkamdin has submitted that Zenith is a necessary and proper party and there cannot be an effective decree in favour of the Plaintiffs or against Defendant Nos.1 and 2 without Zenith, since it has purchased the 10th Floor Flats prior to the institution of the Suit. He has referred to Section 19(b) of the Specific Relief Act, which provides that specific relief cannot be granted against a transferee for value without notice. He has submitted

that this is an issue of relevance in the present Suit. Zenith is a necessary and proper party inasmuch as Zenith can prove that it is a bonafide purchaser for value without notice.

21. Mr. Behramkamdin has submitted that Zenith is in possession of the said 10th Floor Flats and which possession has also been confirmed by this Court's Order dated 18th July, 2018. The possession of the said 10th Floor Flats was taken from Zenith. Now, Zenith cannot be displaced in this manner by collusive Consent Terms signed between the Plaintiffs and Defendant Nos. 1 and 2. In view of the Zenith's possession, the Plaintiffs would have to make Zenith a party to the Defendant in the present Suit.

22. Mr. Behramkamdin has submitted that Zenith would be deprived of its rights under Section 53A of the Transfer of Property Act if it is not impleaded in the present Suit. Possession had been taken by this Court from Zenith and if Zenith is not made a party, then Zenith could have defended any Suit merely by its possession as specified in Section 53A of the Transfer of Property Act. He has placed reliance upon decision of this Court in **Balasaheb Manikrao**

Deshmukh Vs. Rama Lingoji Warthi ³.

23. Mr. Behramkamdin has submitted that the Plaintiffs' alleged transaction with Defendant Nos. 1 and 2 is not a genuine sale transaction. The Plaintiffs have stated in the Plaint that they are builders themselves and that the monies paid to Defendant Nos. 1 and 2 were investments for construction. Therefore, there was no real sale transaction so as to entitle them to specific performance.

24. Mr. Behramkamdin has also referred to the Judgment of this Court in ***Prem Kaliaandas Daryanani Vs. Natvarlal C. Modi*** ⁴ Page **120**, wherein this Court has held that for deciding the question as to who is a proper party in the Suit for specific performance, the guiding principle is that the presence of such a party is necessary to adjudicate the controversies involved in the Suit. He has also relied upon the decision of this Court in **Murali CHS Ltd. Vs. Ayappa Construction Company & Anr.** ⁵, in which necessary parties were added as Defendants to the Suit, as their rights were directly affected by any outcome in the Suit, as is the case in the present matter.

³ AIR 2000 Bom 337

⁴ 2015 (6) Mh.L.J.,

⁵ (2016) SCC OnLine Bom 10462

Further, in **Kasturi Vs. Iyyamperumal & Ors.** ⁶ the Supreme Court, whilst examining the scope of O.1, R.10 (2) of the CPC, held *inter alia* that a necessary party is someone in the absence of whom no effective Decree can be passed. Further, in **Ram Chandra Singh Vs. Savitri Devi & Ors.** ⁷ the Supreme Court has held that the rights of a third-party cannot be set at naught by a Consent Order, and the same are bound to be taken into consideration. In **Sumtibai & Ors. Vs. Paras Finance Co.** ⁸ the Supreme Court has held that if a party can show a fair semblance of title or interest, he can certainly file an Application for impleadment, in support of **Kasturi's case** as mentioned above.

25. Mr. Behramkamdin has submitted that Zenith has shown sufficient proof that it is the owner of the said 10th Floor Flats and has also produced supporting documents substantiating the same.

26. Mr. Behramkamdin has also referred to the Judgment of Supreme Court in **Thomson Press (India) Ltd. Vs. Nanak Builders & Investors Pvt. Ltd. & Ors.** ⁹, wherein the Supreme Court has held that

⁶ (2005) 6 SCC 733,

⁷ (2003) 8 SCC 319

⁸ (2007) 10 SCC 82,

⁹ (2013) 5 SCC 397

the Court can invoke enabling provision of O.22, R.10 of the CPC to add a party *pendente lite* as party Defendant, and furthermore, the Court is empowered to add any person as party at any stage of the proceedings if such person's presence is necessary for effective adjudication of issues involved in the Suit.

27. Mr. Behramkamdin has submitted that it is the contention of the Plaintiff that Zenith should have filed independent proceedings in respect of its claim. He has submitted that when the possession was with Zenith, it was not necessary for them to approach any court of law for any reliefs. Zenith at the relevant point in time rightly approached this Court by filing the captioned Chamber Summons when the possession of the said 10th Floors Flats was taken from it and handed over to the Court Receiver. Therefore, the said argument that Zenith should file its independent proceeding is absolutely baseless and should be rejected on the face of it.

28. Mr. Behramkamdin has submitted that this Court must take cognizance of the fact that the interest of Zenith needs to be protected as the possession of the said 10th Floor Flats were taken from it vide an order of this Court. Hence, it is of absolute

importance that the Zenith be impleaded as a party to the captioned Suit.

29. Mr. Rohaan Cama, learned Counsel appearing for the Plaintiffs has submitted that the only question in the present Chamber Summons that arises is whether Zenith being a third party to the transaction between the Plaintiffs and Defendant Nos. 1 and 2, is required to be joined as a party to the present Suit filed by the Plaintiffs for specific performance of the Agreements entered into by Defendant Nos.1 and 2 in favour of the Plaintiffs. The ancillary question that may arise, albeit not strictly necessary to be gone into, is whether the Consent Terms entered into by the Plaintiffs with Defendant Nos. 1 and 2 are in any manner binding on Zenith. If the answer to both of these questions is in the negative, then there is no question of joinder of Zenith. Any rights that Zenith claims to have would have to be asserted by Zenith in a separate Suit filed on their behalf, which in any event would be completely time barred at this stage.

30. Mr. Rohaan Cama has submitted that the arguments raised by Zenith seeking to challenge the Agreements entered into by

the Plaintiffs in respect of the said Flat Nos. 1001 and 1002 are untenable and cannot be raised by a third party in this manner. Zenith has not sought to challenge the Agreements in favour of the Plaintiffs despite having knowledge of the same.

31. Mr. Rohaan Cama has submitted that any action challenging the Agreements in favour of the Plaintiffs would be *ex facie* time barred. During the course of arguments, Zenith has accepted this position.

32. Mr. Rohaan Cama has submitted that the only arguments raised by Zenith is that it does not need to challenge the Plaintiffs' Agreements as it has allegedly paid consideration for purchase of Flat Nos.1001 and 1002. He has submitted that this contention raised by Zenith is wholly untenable. In any event, if Zenith wished to set up any claim to title based on its own Agreements and displace the Agreements of the Plaintiffs, it cannot do so unless it files its own Suit, and not even if joined as a Defendant in the present Suit.

33. Mr. Rohaan Cama has submitted that strictly without prejudice to the above submissions, and while maintaining that no such challenge has been raised by Defendant Nos.1 and 2 and cannot

be raised by a rank stranger like Zenith that too not in its own Suit, so long as it is *prima facie* shown to this Court that the Agreements entered into by the Plaintiffs with the Defendant Nos.1 and 2 are valid and proper Agreements and payments have *prima facie* been made, as is evidently the case, there is no question of this Court involving Zenith in the present Suit.

34. Mr. Rohaan Cama has submitted that at highest Zenith's involvement in the present litigation only affects Flat Nos.1001 and 1002 and will have no bearing on the Plaintiffs' claim in respect of Flat Nos.901, 902 and the sum of Rs.2.70 Crores which is to be refunded as admitted in the Consent Terms.

35. Mr. Rohaan Cama has submitted that in a Suit for specific performance against Defendant Nos. 1 and 2 in respect of the Plaintiffs' Agreements, Zenith is neither a necessary nor a proper party and has no right whatsoever in this regard merely because it claims some possessory right, which both factually and legally is not only incorrect, but also is not a ground for impleadment.

36. Mr. Rohaan Cama has submitted that the position of law in respect of impleadment of a third party, even when claiming

through the same vendor as the Plaintiff claims, in a Suit for specific performance, is now well settled and has been laid down *inter alia* in the following judgments:

(i) ***Kasturi vs. Iyyamerumal & Ors.***¹⁰

(ii) ***Gurmit Singh Bhatia vs. Kiran Kant Robinson & Ors.***¹¹

(iii) ***Jagannath Khanderao Kedar v Gopinath Bhimaji Kedar***¹²; ***Chitralekha Builders vs. G.I.C. Employees***¹³

37. Mr. Rohaan Cama has submitted that from the aforementioned Judgments, the propositions of law laid down in this regard are broadly set out as under:

(i) The Plaintiff is *dominus litus*. The Plaintiff cannot be forced to join a third party and bring into issue in its suit, the rights and issues raised by the third party and/or be forced to dispel or deal with a third party's agreement in the Plaintiff's specific performance suit against its own contracting party / vendor.

¹⁰ (2005) 6 SCC 733

¹¹ (2020) 13 SCC 773

¹² 2022 (4) ABR 551

¹³ 2021 SCC OnLine SC 153

(ii) It is a very different position when the Plaintiff in a suit for specific performance seeks to add a third party subsequent purchaser with a view to perfect its right and title and a very different position, as in the present case, when the third party seeks impleadment as a Defendant. In the former category, as the Plaintiff is *dominus litus* and as the Plaintiff has the discretion to decide whether or not to join a party in the suit, the Plaintiff is at liberty to join the said third party. However in a situation like the present where the Plaintiff does not wish to join a third party and have the third party's issues agitated in the Plaintiff's suit for specific performance, the Plaintiff cannot be foisted with having to do so.

(iii) The failure on the part of the Plaintiff or the refusal to join a party may perhaps enure to the risk of the Plaintiff but that by itself will not give any ground to a third party to insist on being impleaded.

(iv) Even if competing claims of possession are raised, it is not open to a Court to join a party who is a rank third party to the transaction of which specific

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performance is being sought, merely so as to ascertain who is in possession. The fact that a dispute arises as regards possession is not a ground to join a third party in the present Suit for specific performance, as categorically as held in *Kasturi (supra)* and *Gurmit Singh (supra)*. It is always open to the third party to take any steps available to it in law in the event that possession is decreed.

38. Mr. Rohaan Cama has submitted that the Judgment in *Prem Kaliaandas Daryanani v. Natvarlal C. Modi & Ors.*¹⁴ relied upon by Zenith, is inapposite to the facts of the present case. He has submitted that the Judgment is only an authority for the proposition that if the Plaintiff desires so, a third party may be joined. This judgment clearly holds that the Suit ought not to be enlarged beyond the scope of the decision as to enforceability of the Suit agreement according to law.

39. Mr. Rohaan Cama has submitted that the Judgment of the Supreme Court in *Mumbai International Airport Limited Private Limited vs. Regency Convention Centre and Hotels Private Limited &*

¹⁴ [2015(6) Mh.L.J. 120]

Ors. ¹⁵ relied upon by Zenith is equally inapposite. The Judgment does not state that a third party is entitled to be joined in a Suit for specific performance. The Judgment only states that a Plaintiff may join a party who is a necessary or proper party or if the Plaintiff fails to do so and if the Court feels that such party is a necessary or proper party then the Court may join that third party.

40. Mr. Rohaan Cama has submitted that the contention of Zenith that the Judgment in ***Kasturi's case (supra)*** would not apply where the third party who is seeking to be joined was claiming through the same vendor as the Plaintiff to the specific performance Suit, is contrary to the legal position as laid down in ***Jagannath and Gurmit's case (supra)***. In both those Judgments it was clearly held that the party that was seeking to be joined was a third party who claimed under a subsequent agreement to that of the respective Plaintiffs, and who claimed through the very same vendor who had entered into the transaction with the Plaintiffs. It makes no difference to the legal position qua impleadment whether the third party claims an independent right to the property or claims a right through the same vendor against whom the Plaintiff is suing.

¹⁵ (2010) 7 SCC 417

41. Mr. Rohaan Cama has submitted that Zenith's Agreement is void *ab initio* and Zenith is not a *bonafide* purchaser for value without notice who can set up any claim to rival that of the Plaintiff. He has submitted that Zenith's purported Agreement is subsequent in point in time to the Plaintiffs registered Agreements dated 31st December, 2010. The Plaintiffs having executed and registered Agreements prior in point of time, Zenith's Agreement is void *ab initio*. He has placed reliance upon Section 8 of the Transfer of Property Act, 1882, which provides that a person can transfer all interest which he is capable of passing in the property at the time of the Agreement. By virtue of the earlier Agreements in favour of the Plaintiffs, which are duly registered, on the date of the purported Agreement with Zenith in 2013, Defendant Nos.1 and 2 had no right, title or interest in the said Flat Nos. 1001 and 1002. Having no interest, there was nothing for them to pass on to Zenith and therefore Zenith can have no interest in the said flats. He has also placed reliance upon Section 48 of the Transfer Property Act, 1882, which provides that if two persons claim under, different registered agreements, the first agreement will supercede the second, and therefore on this principle as well, the second agreement is meaningless and of no effect.

42. Mr. Rohaan Cama has placed reliance upon the Judgment of the Supreme Court in ***Eureka Builders & Ors. vs. Gulabchand***¹⁶ at paragraphs 36 to 38, wherein the Supreme Court has held that it is a settled principle of law that a person can only transfer to another person a right, title or interest of which he is possessed on the date of the purported transfer. If the person does not possess any interest, there is nothing for him to transfer. In such an eventuality, subject to the contract between the parties, the subsequent second purchaser would only have a right to claim a refund from his vendor.

43. Mr. Rohaan Cama has submitted that the Supreme Court in ***Prem Singh & Ors. vs. Birbal & Ors.***¹⁷ at paragraphs 14 to 16, has held that where a document is void *ab initio*, as would be the case for Zenith's 2013 Agreement having regard to the position laid down in ***Eureka Builders (supra)***, then the said document is “...*non est in the eye of the law, as it would be a nullity*”.

44. Mr. Rohaan Cama has submitted that since 2013

¹⁶ (2018) 8 SCC 67

¹⁷ (2006) 5 SCC 353

Agreement is itself a nullity, then Zenith has no agreement which is capable of enforcement and the entire basis of its claim to be impleaded in the present Suit does not subsist or survive. Thus, Zenith has no right whatsoever to be joined as a party to the present Suit.

45. Mr. Rohaan Cama has submitted that the contention that Zenith is a *bonafide* purchaser for value without notice is misconceived in law as the Plaintiffs' Agreements are of 31st December, 2010 and have been duly registered. These registered Agreements constitute constructive notice under Section 3 of the Transfer Property Act, 1882.

46. Mr. Rohaan Cama has submitted that Zenith is deemed to have constructive notice of the registered Agreements of the Plaintiffs, and cannot claim it is an alleged purchaser 'without notice'.

47. Mr. Rohaan Cama has placed reliance upon the decision of Karnataka High Court in *Mahadevappa vs. Uday Kumar*¹⁸ at *paragraph 16*, wherein the Court has analysed the provisions of

¹⁸ ILR 2015 KAR 5767

Section 3 of the Transfer of Property Act and has conclusively held in the context of Section 48 of the Transfer of Property Act, 1882 that no man can convey a better title than that which he possesses.

48. Mr. Rohaan Cama has submitted that the contention on behalf of Zenith that the Plaintiffs' Agreements are vitiated on the ground of them allegedly not being Agreements for sale and consideration allegedly not being paid is a misconceived contention. In any event, the only person who could have questioned the Agreements, if at all, without prejudice to the aforesaid contentions on the admissions etc., was Defendant Nos. 1 and 2, which they have not. Zenith has no *locus standi* to raise these issues questioning the Agreements of the Plaintiff. If Zenith desired to challenge the Agreements executed with the Plaintiffs, it was open to Zenith to file their own suit, which they have studiously avoided doing for the last more than 10 years.

49. Mr. Rohaan Cama has then addressed the contentions on behalf of the Zenith that the Plaintiffs have not made payments for the said Flats. He has submitted that the fundamental fallacy in this argument is presuming that an alleged non-payment would vitiate an

Agreement. He has submitted that the contract between the Plaintiffs and Defendant Nos. 1 and 2 came into being immediately upon its execution and which is a valid execution as it is nobody's case that the contract has not been validly executed. Any non-payment of balance consideration by the Plaintiffs to Defendant Nos. 1 and 2, under the validly executed agreement, at the highest would give Defendant Nos. 1 and 2 a right as an unpaid seller to file a Suit for performance/recovery of the balance amount. In no circumstances and under no provision of law does the Agreement stand vitiated. In the present case, Defendant Nos. 1 and 2 have not filed a Suit for recovery or for specific performance of the sale consideration and have admitted in the Consent Terms, that the entire consideration has in fact been paid.

50. Mr. Rohaan Cama has submitted that the Plaintiffs have made payment of the purchase consideration and he has relied upon documents in support thereof. He has submitted that the deposit of Rs.2.70 Crores in the Court which has been recorded in the Order of 4th July, 2018 cannot be considered to be an admission of the fact that payments have not been made. This was as per alternate prayer in Notice of Motion No.1798 of 2017 taken out by the Plaintiffs and

purely without prejudice to the Plaintiffs' rights and contentions so as to enable the Plaintiffs to forthwith receive possession of the Flats even pending the present Suit.

51. Mr. Rohaan Cama has submitted that the contention on behalf of Zenith that the Plaintiffs' Agreements use the term '*shall pay*' does not mean that the full payment was to be made in future. The Agreements are standard form agreements as per the requirements of Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 (hereinafter referred to as "***the MOFA Act***"). This has borne out from the fact that the Agreements themselves refers to the MOFA Act in more than one place.

52. Mr. Rohaan Cama has also dealt with the contention on behalf of Zenith that the Plaintiffs' agreements are Agreements to Sell and not an Agreements for Sale. He has submitted that this contention is entirely misconceived. Agreements as aforementioned are standard format agreement as per MOFA and which format uses the terminology '*shall*' and uses words such as "*is selling*". He has submitted that holistic reading of the Agreements and the clauses

therein would show that the Agreements are nothing but Agreements for Sale. He has referred to the title to the document which itself says 'Agreement for Sale' as well as recitals and clauses therein which are clearly in format of standard form agreements of MOFA.

53. Mr. Rohaan Cama has submitted that it is not even the case of Zenith's in the Chamber Summons that there is no valid Agreements for Sale executed between the Plaintiffs and Defendant Nos. 1 and 2 and in fact, it is Zenith's case that there were valid Agreements in favour of the Plaintiffs, but Defendant No. 1 had assured Zenith that the Agreements would be cancelled.

54. Mr. Rohaan Cama has submitted that the contention of Zenith that the Agreements were optionally registered and therefore did not constitute constructive notice is completely misplaced. He has submitted that the Plaintiffs' Agreements were not optionally registered Agreements. These are evidently Agreements for Sale and were correctly registered and therefore operate as constructive notice. The Judgment relied upon on behalf of Zenith in support of its contention viz. ***Hirachand Himatlal Marwari (supra)*** is to be read in context of the document which was under consideration viz. a

mortgage document, and not an Agreement for Sale. The Court concluded on the facts of that case that the document was not compulsorily registrable and therefore did not constitute constructive notice.

55. Mr. Rohaan Cama has submitted that it is Zenith's contention that it was put in possession of Flat Nos.1001 and 1002 and that possession of these flats were taken from Zenith by the Order dated 18th July, 2018. He has submitted that this contention is completely false and cannot be believed as it is contrary to the pleadings viz. Paragraph 19 of Zenith's Rejoinder in the Chamber summons. Zenith has itself admitted that it was not in possession of Flat Nos.1001 and 1002 as the subject building did not have Occupation Certificate till date. Further, it is not the contention of Defendant Nos. 1 and 2 that Zenith was put in possession of said Flat Nos. 1001 and 1002. The Court Commissioner's Report dated 30th March, 2016 filed pursuant to the Order dated 28th March, 2016 records that the keys for Flat Nos.1001 and 1002 were with Defendant No.2 who opened the main entrance to these flats. Further, the photographs annexed to the Report show that the said flats were in bare shell condition with certain building materials

stored therein. The said Report of the learned Commissioner has not been challenged till date. Further, Zenith has besides filing Chamber Summons, made no attempt to seek a declaration of its rights to Flat Nos. 1001 and 1002 and/or to claim that it was in possession thereof. Mr. Rohaan Cama has submitted that it is well settled by the Supreme Court and confirmed in the Judgment of ***Maria Margarida Sequeira Fernandes & Ors. Vs. Erasmo Jack De Sequeira & Ors.***¹⁹ at paragraph ***66 to 70*** that possession is not to be seen in vacuum to the underlying agreement. A person is only said to be in possession and can be permitted to continue in possession if the said person claims under some valid, legal document. In the present case, as the Agreement of Zenith is void ab-initio and non-est, and hence, Zenith still would assuming that it was put in jurisdictional possession not be entitled to claim that it had any possessory rights as the underlying agreements on which it has based its alleged rights are void ab-initio and non-est.

56. Mr. Rohaan Cama has submitted that Section 53A of Transfer of Property Act relied upon by Zenith has no application in the facts of the present case as the Agreement under which Zenith

¹⁹ (2012) 5 SCC 370

claims to be in possession is itself void *ab initio*.

57. Mr. Rohaan Cama has submitted that it is not open for a Court to join a party such as Zenith who is a rank third party to the transaction of which specific performance is being sought, merely so as to ascertain who is in possession. The fact that a dispute has been raised as regards possession is not a ground to join a third party in the present Suit. It is always open to the third party to take any steps available to it in law in the event that possession is decreed.

58. He has submitted that there is no question of Zenith being a *bonafide* purchaser without notice and therefore the provisions of Section 3 of the Transfer Property Act, 1882 will kick in. Zenith has no rights whatsoever in the subject property and accordingly has no right to be impleaded in the present Suit. On these grounds alone the impleadment application ought to be rejected.

59. Mr. Rohaan Cama has made submissions on behalf of the Plaintiffs in support of the relief sought for in the Interim Application No.55 of 2019 viz. for a decree recording the compromise arrived at between the Plaintiffs and Defendant Nos. 1 and 2 in terms of the

Consent Terms signed by the parties and their Advocates, annexed at Exhibit D to the Interim Application. Further, directions have been sought permitting the Plaintiffs to withdraw the amount of Rs.2.70 Crores deposited by the Plaintiffs with the Prothonotary and Senior Master of this Court pursuant to Order dated 4th July, 2018 passed by this Court, together with the accrued interest thereon. He has submitted that though the relief sought for in the Interim Application is for a decree in terms of entire Consent Terms recording compromise arrived at in terms thereof, he has restricted the decree sought to the Consent Terms in respect of the said Flat Nos. 901, 902 and Flat Nos. 1001 and 1002 and not to the said Flat No.G-1 in the subject building.

60. Mr. Rohaan Cama has submitted that the Consent Terms entered into between the parties are an Agreement / Contract between them. The mere fact that the Consent Terms have not formally been taken on record does not alter this position. He has submitted that the Consent Terms are an agreement between the parties and when they are taken on record, they merely receive the imprimatur of the Court. Thus, the Consent Terms not yet receiving the imprimatur of the Court does not in any manner dilute their

binding nature and/or the admissions contained therein which admittedly have been made by the parties of their own free will and without any coercion, fraud or undue influence.

61. Mr. Rohaan Cama has referred to the Consent Terms and the factual assertions by Defendant Nos.1 and 2 therein viz. of having executed the Agreement, received full consideration and putting the Plaintiffs in possession of Flat Nos. 901/902 as well as the factual assertion that the sum of Rs.2.70 Crores was required to be refunded as full consideration had been received for the said Flat Nos. 901, 902 and 1001, 1002.

62. Mr. Rohaan Cama has referred to Order XXIII, Rule 3 of the CPC which contemplates a situation where parties have compromised or settled their disputes in the Suit but the compromise has not been taken on record or not being formally accepted by the Court. The proviso to Order XXIII, Rule 3 clearly contemplates a situation where a party having agreed to settle or compromise, seeks not to go ahead with the settlement, then it is for the Court to determine, without any adjournment, whether such a compromise was indeed arrived at. He has submitted that the Court in doing so

does not require the parties to lead evidence.

63. Mr. Rohaan Cama has submitted that the Supreme Court in *Prithvichand Ramchand Sablok vs. S.Y. Shinde*²⁰ at paragraph 7, has held that it is settled law that unless the terms of the contract are ambiguous, the intention of the parties must be gathered from the terms themselves. It is only where the terms are ambiguous and capable of more than one meaning that evidence aliunde can be permitted in order to gather the intention of the parties. In the present case, it is the Plaintiffs' submission that the terms of the Consent Terms themselves are clear. There is no dispute on the signature of the Defendant Nos. 1 and 2 and/or that of their Advocates. He has submitted that to accept the contention of Defendant Nos. 1 and 2 that some extraneous promise had been made to settle with Zenith as a condition for the Consent Terms, is to read into the Consent Terms matters which are evidently not provided for.

64. Mr. Rohaan Cama has submitted that under Sections 91 and 92 of the Indian Evidence Act, 1872 this Court will not permit

²⁰ (1993) 3 SCC 271

any evidence to be led by way of oral evidence to ascertain the terms of the contract. The Consent Terms are nothing but a contract between the parties, and the Court is entitled to decide whether the compromise has been entered into or not under the proviso to Order XXIII, Rule 3. He has in this context placed relied upon the decision of the Supreme Court in ***Mahalaxmi Cooperative Housing Society Limited & Ors. v. Ashabhai Atmaram Patel***²¹ at paragraph 43.

65. Mr. Rohaan Cama has also placed reliance upon the Judgment of Supreme Court in ***Dr. Renuka Datla vs. Solvay Pharmaceuticals B.V. & Ors.***²², where the Supreme Court has noted in paragraph 13 that if certain terms were desired to be added in the terms of settlement, the same ought to have been specifically and expressly mentioned in the terms of settlement.

66. Mr. Rohaan Cama has submitted that the Consent Terms in the present case are clear and unambiguous and have not been disputed as being incorrectly recorded. The contention of Defendant Nos. 1 and 2 in the Reply to the Interim Application, viz. that that the Consent Terms were executed purportedly on the representation of

21 (2013) 4 SCC 404

22 (2004) 1 SCC 149]

the Plaintiffs that they had settled with Zenith is purely an oral arbitrary contention.

67. Mr. Rohaan Cama has submitted that there is no contemporaneous material whatsoever to show that there was any agreement between the parties that the Consent Terms would be executed on the basis that the Plaintiffs would settle with Zenith. There is indeed nothing but the bare word of Defendant Nos. 1 and 2 who expect this Court to simply accept their word because they say so, without anything more.

68. Mr. Rohaan Cama has submitted that once the terms of the settlement / contract / compromise are clear, then it is not for this Court to go into the alleged intention of the parties and what they purportedly may have or may not have wanted to insert.

69. Mr. Rohaan Cama has submitted that if the settlement with Zenith was fundamental to the Consent Terms, surely there would have been at least one sentence qua Zenith somewhere in the Consent Terms, which there is not.

70. Mr. Rohaan Cama has submitted that in every case of

Order XXIII, Rule 3, proviso, the Court will be faced with a situation where the Defendants try to back out of the compromise or settlement. For the Defendants to simply argue that because they have raised a dispute in their Reply to the Interim Application, evidence is required and this Court cannot accept the compromise or hold the Defendants to the terms of the compromise, would be then to allow a party to play mischief with this Court. In every case a Defendant or a party who wishes to back out of the Consent Terms will simply say that some other term had been orally agreed between the parties and on that ground seek to vitiate signed and executed terms of compromise/settlement/consent terms. He has submitted that this ought not to be countenanced, as it would render Order XXIII Rule 3 redundant in every case.

71. Mr. Rohaan Cama has submitted that this Court be pleased to hold the Defendants to the terms of the Consent Terms under Order XXIII, Rule 3 and the proviso thereto and to record that parties had in fact validly executed the Consent Terms and, therefore, decree the present Suit in terms thereof.

72. Mr. Rohaan Cama has submitted that without prejudice

to the aforesaid submissions on Order XXIII Rule 3 and proviso thereto and for the Court to hold the Defendants to the terms of the Consent Terms under the said provision, under Order XII, Rule 6 of the CPC, this Court may pass a decree on admission. This is assuming arguendo that the Consent Terms are not taken on record by this Court as Consent Terms itself. He has submitted that the document executed between the parties and their Advocates making certain uncontroverted statements of fact, be read as an admission for the purposes of Order XII, Rule 6 of the CPC and a decree be passed in those terms. He has in support of his submission, placed reliance upon the decision of the Supreme Court in ***Jineshwar Das vs. Jagrani & Anr.***²³ at **paragraph 8**, wherein the Supreme Court has held that judgment or a decree passed as a result of consensus arrived at before the Court need not always be on a compromise or a settlement or an adjustment, but it may also sometimes be a judgment on admission. He has further relied upon the decision of the Supreme Court in ***Ashok Kumar & Ors. vs. A.D. Kumar & Ors.***²⁴ **paragraphs 12 to 14**, where the Delhi High Court has held that where a Memorandum of Compromise was sought to be resiled from, even

²³ (2003) 11 SCC 372

²⁴ 2010 (116) DRJ 222

prior to the same having been taken on record by the Court, it nonetheless constituted a valid contract between the parties and accordingly the same could be enforced.

73. Mr. Rohaan Cama has also placed reliance upon the following Judgments viz. *HSBC Bank, USA v. Silverline Technologies Ltd. & Anr.* ²⁵ at paragraphs 5, 6, 19 and 20 ; *K Kishore and Construction (HUF) v. Allahabad Bank* ²⁶ at paragraph 12 and *Karam Kapahi & Ors. vs. Lal Chand Public Charitable Trust & Anr.* ²⁷ at paragraphs 37 to 48, in support of his contention that an admission need not be contained in pleadings and it can be contained in any document executed by a party. This was on an interpretation of the words of Order XII, Rule 6 of CPC, which states that the admission may be in a pleading “or otherwise”.

74. Mr. Rohaan Cama has also placed reliance upon the decision of the Supreme Court in *Nagindas Ramdas vs. Dalpatram Ichharam & Ors.* ²⁸ at paragraphs 27 and 28, where the Supreme Court has held that admissions in pleadings or judicial admissions

²⁵ 2006(3) Mh.L.J. 107

²⁶ 1998 (44) DRJ 596

²⁷ 2010) 4 SCC 753

²⁸ (1974) 1 SCC 242

made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions.

75. Mr. Rohaan Cam has submitted that if the Consent Terms are read, they amount to an admission by Defendant Nos.1 and 2 that the Agreements are duly and validly executed, that consideration has been paid, that the Plaintiffs are entitled to Flat Nos.901, 902, and upon failure of the Defendants to purchase the Flat Nos.1001, 1002, they are also entitled to Flat Nos.1001 and 1002. The prayers in the present Suit are evidently all answered by these admissions.

76. Mr. Rohaan Cama has submitted that if the Defendants' oral claim of the Plaintiffs agreeing to settle with Zenith is accepted, it would mean that in no case would Order XXIII, Rule 3 or Order XII, Rule 6 ever be applied because in every case the party wishing to back out of the Consent Terms and/or the admission would simply file an Affidavit stating that in addition to what was agreed or admitted, some other terms were orally agreed.

77. Mr. Rohaan Cama has submitted that alternatively to the case on Order XXIII, Rule 3, this Court be pleased to decree the present Suit qua Flat Nos. 901, 902 and 1001, 1002 in terms of the

Consent Terms as a decree on admission of what is stated in those Consent Terms.

78. Mr. Rohaan Cama has submitted that in the year 2015 (much prior to Zenith coming into the picture), draft Consent Terms had been exchanged between the Plaintiffs and Defendant Nos.1 and 2 which were nearly identical to the present Consent Terms. He has submitted that the draft Consent Terms had recognized the rights of the Plaintiffs to Flat Nos. 1001 and 1002 and provided for them being given up in lieu of Rs.1.55 crores being paid to the Plaintiffs by the Defendants. The present Consent Terms executed in the year 2019 are also on identical terms, but provide a slightly higher amount for buying off the rights in respect of Flat Nos. 1001 and 1002 due to the fact that several further proceedings had been instituted by the Plaintiffs, the market value of the flats had gone up and various other litigations were pending between the parties by this stage. Thus, there is nothing unbelievable about Defendant Nos. 1 and 2 having entered into the present Consent Terms, without any alleged assurance by the Plaintiffs to settle with Zenith as is now mischievously being sought to be canvassed.

79. Mr. Rohaan Cama has submitted that qua the aforementioned flats and the sum of Rs. 2.70 Crores, the Consent Terms ought to be given effect to and/or the Suit ought to be decreed on the basis of the admissions of the Defendants.

80. Mr. Zubin Behramkamdin has submitted that Zenith had filed Intervention Application in form of the above Chamber summons on 24th July, 2018. He has submitted that during the hearing on 11th March, 2019, the Plaintiffs and Defendant Nos. 1 and 2 tried to file the Consent Terms behind Zenith's back knowing very well that Zenith's Intervention Application was pending. The said act of the Plaintiffs and Defendant Nos. 1 and 2 was strongly objected by Zenith. He has placed reliance upon the Order of Justice Menon on 11th March, 2019 which had recorded that the said 10th Floor flats are part of Consent Terms, on which Zenith is claiming rights and hence, Consent Terms were not taken on record. He has submitted that it is pertinent to note that in Paragraph 6 of the said order, the learned Judge categorically granted liberty to the parties present on that date of hearing i.e. the Plaintiffs, Defendants and Zenith to mention the matter in the event of settlement. He has submitted that much was harped upon by the Plaintiffs at the time of

hearing that the said direction was only in respect of the Plaintiffs and the Defendants, which interpretation is absolutely baseless and frivolous.

81. Mr. Behramkamdin has placed reliance upon the Order dated 8th April, 2019, which shows that Justice Menon removed the matter from the caption of Consent Terms and once again, the parties were given liberty to sign the Consent Terms and mention the matter. The Plaintiffs deliberately and intentionally tried to tender the Consent Terms on 20th August, 2019 which the Defendants rightly objected to the filing of the same and withdrew their consent in respect of filing of the same, as the Plaintiffs failed to settle the matter with the Zenith. This Court had categorically made it clear to settle the matter and once all the parties sign, then file the Consent Terms. He has submitted that by filing the captioned Interim Application, the Plaintiffs are trying to mislead this Court and seek a Decree on the basis of the same Consent Terms which were infact rejected by this Court with specific directions to settle the matter as a whole including with Zenith.

82. Mr. Behramkamdin has submitted that though the

Plaintiffs objected to Zenith having a say on the Interim Application, this Court rightly allowed Zenith to conduct its arguments. He has submitted that Zenith has paid full consideration in respect of the said 10th Floor Flats. Further, Zenith has followed the Orders of this Court and voluntarily handed over possession of the said 10th Floor Flats. Therefore, the interests of Zenith cannot be superseded by allowing such absurd Application made by the Plaintiffs. In the light of the facts and circumstances, the Plaintiffs' Interim Application deserves to be rejected.

83. Ms. Purnima G. Bhatia, learned Counsel appearing for Defendant Nos. 1 and 2 has opposed the Interim Application and supported the Chamber Summons taken out by Zenith. She has once again reiterated what has been submitted in the Affidavit-in-Reply to the Interim Application namely that the Plaintiffs have made an extraneous promise prior to entering into the Consent Terms that they would settle the matter with Zenith as a condition for the Consent Terms. She has submitted that the Consent Terms would not have been entered into without a settlement having been arrived at with Zenith. She has submitted that the prior Draft Consent Terms in 2015 had been entered into in peculiar circumstances viz. the

Defendants were faced with an FIR filed. She has submitted that otherwise, the Defendant Nos. 1 and 2 would not have entered into Draft Consent Terms knowing fully well that the said Flat Nos. 1001 and 1002 had been sold to Zenith.

84. Ms. Bhatia has accordingly submitted that there is no merit in the Interim Application taken out by the Plaintiffs for seeking a decree recording the compromise arrived at between the Plaintiffs and Defendants Nos. 1 and 2 in terms of the Consent Terms. Further, there is no merit in the the Plaintiffs placing reliance on earlier Draft Consent Terms entered into in 2015. She has submitted that unless Zenith is brought as a party in the present Suit, the Defendant Nos. 1 and 2 cannot be made to compromise the Suit in favour of the Plaintiff. She has submitted that Zenith is a necessary and proper party in the Suit in view of their having possessory rights of the said Flat Nos. 1001 and 1002. She has accordingly submitted that the Chamber Summons for impleadment of Zenith be allowed, whilst dismissing the Interim Application taken out by the Plaintiffs.

85. Having considered the rival submissions I shall first address the issue, as to whether Zenith is a necessary and proper

party required to be impleaded in the present Suit as prayed for in the above Chamber Summons. It is pertinent to note that Zenith at no point of time has adopted its own remedy for cancellation of the Agreements entered into between the Plaintiffs and Defendant Nos. 1 and 2 in respect of Flat Nos. 1001 and 1002. Zenith has by taking out the present Chamber Summons sought impleadment in the Suit filed by the Plaintiffs by raising contentions that the 2010 Agreements executed between the Plaintiffs and Defendant Nos. 1 and 2 are merely Agreements to Sell and would not amount to constructive notice to Zenith who had executed their Agreement with Defendant Nos. 1 and 2 viz. the same vendors subsequent to the 2010 Agreements. Zenith has thus sought to set up its claim to title based on its own Agreement by displacing the prior Agreement of the Plaintiffs. In my view, Zenith cannot do so unless it files its own Suit.

86. I find much merit in the submissions on behalf of the Plaintiffs that the Plaintiffs being *dominus litus* cannot be forced to join a third party and bring into issue in their Suit, the rights and issues raised by the third party. The Plaintiffs have discretion to decide whether or not to join a party in the Suit. The Plaintiffs cannot be foisted with joining the third party. and having the third parties

issues adjudicated in a Suit for specific performance. There could be a risk that the Plaintiffs may face for refusal to join the third party but that by itself will not give any ground to the third party to insist upon being impleaded. Further, where there are competing claims of possession raised, it is not open to a Court to join a party who is a rank third party to the transaction of which specific performance is sought, merely so as to ascertain who is in possession. This has been held in the decisions relied upon by Mr. Rohaan Cama on behalf of the Plaintiff viz. ***Kasturi (supra)*** and ***Gurmit Singh (supra)***. The settled law is that it is always open to the third party to take any steps available to it in law in the event that the possession is decreed.

87. The Judgments of ***Kasturi (supra)*** and ***Gurmit Singh (supra)*** were in a Suit for specific performance, where a third party sought to join. It was held that the third party had no right to be joined and cannot be considered to be a necessary party in the Suit for specific performance. Thus, given the settled law, Zenith cannot be considered to be a necessary or proper party.

88. The Judgments relied upon by Mr. Behramkamdin on behalf of Zenith viz. ***Prem Kaliaandas Daryanani (supra)*** and ***Mumbai***

International Airport Limited Private Limited (supra) do not support his contention that a third party is entitled to be joined in a Suit for specific performance. These Judgments only state that the Plaintiff may join a party who is a necessary or proper party and it is upon the Plaintiffs' desire to do so. Further, if the Court feels that such third party is a necessary or proper party then the Court may join that third party.

89. The contention on behalf of Zenith that ***Kasturi's case (supra)*** will not apply where the third party seeking to be joined was claiming through the same Vendor as the Plaintiff in the specific performance Suit is a misplaced contention, considering that this very position arose in ***Jagannath (supra)*** and ***Gurmit Singh (supra)*** where a third party was claiming through the same Vendor as the Plaintiff in the specific performance Suit. It has been held in those cases that the third party was neither a necessary nor a proper party to the Suit for specific performance, particularly where the third party is claiming right through the same Vendor as the Plaintiffs and in respect of a subsequent transaction and not the transaction in respect of which the Plaintiffs have claimed specific performance.

90. I am of the view that Zenith's Agreement being subsequent in point of time to the Plaintiffs' registered Agreements dated 31st December, 2010, Zenith's Agreement is void *ab initio*. Zenith cannot be considered to a bonafide purchaser for value without notice under the subsequent Agreement dated 27th February, 2013 entered into with Defendant Nos. 1 and 2. Section 8 of the Transfer of Property Act, 1882, provides that a person can transfer all interest which he is capable of passing in the property at the time of the Agreement. When the agreement was entered into with Zenith in 2013, Defendant Nos. 1 and 2 had already executed registered Agreements in favour of the Plaintiffs in respect of the same Flat Nos. 1001 and 1002 as in the 2013 Agreement. Hence, the Defendant Nos. 1 and 2 had no interest in the said Flats for them to pass on to Zenith and therefore Zenith cannot have interest in the said Flats. Section 48 of the Transfer Property Act, 1882, makes it clear that if two persons claim under different registered agreements, the first agreement will supercede the second, and therefore the second agreement is meaningless and of no effect.

91. The Judgments of the Supreme Court in ***Eureka Builders (supra) and Prem Singh (supra)*** relied upon by Mr. Rohaan Cama on

behalf of Plaintiffs are apposite. These Judgments lay down the settled principle of law that a person can only transfer to another person a right, title or interest of which he is possessed on the date of the purported transfer. If the person / Vendor does not possess any interest, there is nothing for him to transfer. Thus, the subsequent document seeking to transfer right, title or interest which the person / Vendor does not have, would be held to be “...*non est in the eye of the law, as it would be a nullity*”. Accordingly, Zenith’s 2013 Agreement would be a nullity and incapable of enforcement and that being the entire basis of Zenith’s claim of being impleaded in the present Suit does not subsist or survive.

92. I further find much merit in the submission on behalf of the Plaintiffs that Zenith cannot be considered to be a bonafide purchaser for value without notice. The Plaintiff’s registered Agreements dated 31st December, 2010 constitute constructive notice under Section 3 of the Transfer Property Act, 1882. Thus, Zenith is deemed to have constructive notice of the registered Agreements of the Plaintiffs and cannot claim that it is an alleged bonafide purchaser “without notice”.

93. The contention on behalf of the Zenith that the Plaintiff's Agreements are vitiated on the ground of them allegedly not being Agreements for sale and consideration allegedly not being paid is misplaced. The Plaintiffs' Agreements are standard format Agreements as per the format prescribed in Form V of the MOFA Act and would in my view be Agreements for Sale and not Agreements to Sell as contended by on behalf of the Zenith. This is a from a plain reading of the Plaintiffs' Agreement which clearly provide that these are Agreements contemplated under Section 4 of the MOFA Act. Further, Defendant Nos.1&2 have not disputed that the consideration for sale of the aforementioned Flats had in fact been paid.

94. The Judgments relied upon on behalf of Zenith to contend that the Plaintiffs' Agreements were optionally to be registered and therefore, did not constitute constructive notice in relation to the Plaintiffs' Agreement is entirely misplaced. The Plaintiffs' Agreements are not optionally registered Agreements and operate as constructive notice under Section 3 of the Transfer of Property Act, 1882, once they have been duly registered

95. The issue of whether Zenith was in possession of Flat

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Nos. 1001 and 1002 cannot be raised in the Plaintiffs' Suit as held above. In any event, this contention of Zenith is belied by its own pleadings on record i.e. its Rejoinder to the Chamber Summons where Zenith itself states that it could not actually occupy the said 10th Floor Flats because the subject building did not have Occupation Certificate till date.

96. Thus, I find no merit in the Chamber Summons of Zenith seeking its impleadment, as in my considered view, Zenith is neither a necessary nor a proper party in the Plaintiffs' Suit particularly in view of the finding that Zenith is not a bonafide purchaser and in fact is a purchaser under a subsequent agreement which is void ab initio, being a nullity in the face of the Plaintiffs' prior registered Agreements.

97. Now turning to the Interim Application No.55 of 2019 taken out by the Plaintiffs seeking passing of a decree recording compromise arrived at between the Plaintiffs and Defendant Nos. 1 and 2 in terms of the Consent Terms signed by the parties and their advocates, annexed at Exhibit-D to the Interim Application.

98. The Plaintiffs' case in the present Suit is based on the

Agreement for Sale dated 31st December, 2010 which have been duly registered and under which Plaintiffs have been sold Flat Nos. 901, 902 and 1001 and 1002. There is no dispute that the Plaintiffs and Defendant Nos. 1 and 2 had entered into the Agreements for Sale in respect of the aforementioned Flats. The present Suit has been filed on account of failure of Defendant Nos. 1 and 2 for taking steps to handover possession of Flat Nos. 1001 and 1002 and although handing over possession of Flat Nos. 901 and 902 to the Plaintiffs, they had placed a lock on the door of the said Flats.

99. In the said Consent Terms Defendant Nos. 1 and 2 have asserted that they executed the said Agreements and have received full consideration and put the Plaintiffs in possession of Flat Nos. 901 and 902. Further, they asserted that the sum of Rs.2.70 Crores which had been deposited by the Plaintiffs in this Court for grant of alternate prayer in Notice of Motion No.1798 of 2017 viz. for being immediately handed over possession of the said Flats, was required to be refunded to the plaintiffs, as full consideration had been received for the said Flat Nos. 901, 902 and 1001, 1002. Thus, the prayers sought for in the present Suit in respect of the said Flats have been compromised by entering into the Consent Terms. The dispute

now sought to be raised with regard to the compromise of the Suit is that, there was an additional term agreed to between the Plaintiffs with Defendant Nos. 1 and 2 but which finds no place in the Consent Terms viz. that the Plaintiffs had made an alleged promise to settle the dispute with Zenith as a condition for the Consent Terms. This extraneous promise to settle Zenith as a condition for the Consent Terms, is being sought by Defendant Nos. 1 and 2 to be read into the Consent Terms matter which are evidently not provided for.

100. The Interim Application seeks recording of compromise in terms of the Consent Terms under Order XXIII Rule 3. The Supreme Court in ***Prithvichand Ramchand Sablok (supra)*** has held that it is settled law that unless the terms of the contract are ambiguous, the intention of the parties must be gathered from the terms themselves. It is only where the terms are ambiguous and capable of more than one meaning that evidence aliunde can be permitted in order to gather the intention of the parties. In my view, the terms of the Contract / Consent Terms in the present case are unambiguous and do not call for any extrinsic material to gather the intention of the parties.

101. Further, Section 91 and 92 of the Indian Evidence Act, 1872 does not permit any evidence to be led by way of oral evidence to ascertain the terms of contract. The Consent Terms is nothing but a contract between the parties. The Supreme Court in ***Mahalaxmi Cooperative Housing Society Limited (supra)*** has enjoined upon the Court hearing the matter under Order XXIII, Rule 3 proviso, to decide the question forthwith without adjourning the matter, which would include adjourning the matter for leading evidence. Having held that in view of there being no dispute that Defendant Nos. 1 and 2 have executed the Consent Terms and this has also been recorded vide Order dated 20th August, 2019, the only test required to be considered by the Court under Order XXIII Rule 3 and proviso thereto has in fact been satisfied.

102. The Supreme Court in ***Dr. Renuka Datla (supra)*** has held that if certain terms were desired to be added in the terms of settlement, the same ought to have been specifically and expressly mentioned in the terms of settlement. It is not for the Court to consider, whether a particular term is to be incorporated, particularly where one of the parties has disputed that such a term was ever agreed upon. The terms of the Consent Terms being clear and

unambiguous and having not been disputed as being incorrectly recorded, is required to be given effect to. Further, I have held that Zenith is neither a necessary nor a proper party as Zenith's Agreement with Defendant Nos. 1 and 2 is subsequent in point of time to the Plaintiffs' Agreement and hence a nullity as the Defendant Nos. 1 and 2 had no interest remaining in the said flats to transfer. There is no question of the Plaintiffs settling the dispute with Zenith as a condition for entering into the Consent Terms. In accepting the Defendants' contention that the settlement with Zenith was a condition to enter into the Consent Terms which had been orally agreed upon would amount to vitiating a signed and executed Compromise / Consent Terms. This would result in rendering Order XXIII Rule 3 and its proviso redundant.

103. Having arrived at the aforesaid findings on Order XXIII and proviso thereto, it is not necessary to consider the alternate plea of the Plaintiffs that there are admissions on the part of the Defendant Nos. 1 and 2 in the Consent Terms for the purposes of Order XII Rule 6 of the CPC. In any event, it is settled law as can be seen from the Judgments relied upon on behalf of the Plaintiffs that uncontroverted statements of fact in the Consent Terms are to be

read as admissions for the purposes of Order XII Rule 6 of the CPC and a decree may be passed in terms thereof.

104. Having held that the Consent Terms record a compromise between the parties and being of the view that it is required to be taken on record under Order XXIII Rule 3 of the CPC, the Suit is required to be partially decreed in so far as Flat Nos. 901, 902 and 1001 and 1002 are concerned. There is no merit in the submissions on behalf of Zenith that the Plaintiffs are seeking a decree on basis of Consent Terms which have been rejected by this Court with specific direction to settle the matter as a whole including with Zenith. Having held that Zenith is neither a necessary nor a proper party, it has no right to raise such a contention. In fact a reading of the prior orders of this Court makes it clear that this Court had never considered that a settlement was required to be arrived at with Zenith in the Plaintiffs' Suit, particularly since the Chamber Summons had still to be heard and which has been heard and rejected by this Judgment and Order.

105. In view thereof, the following order is passed:

(i) The Chamber Summons No.397 of 2019 is dismissed.

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There shall be no orders as to costs.

(ii) The Interim Application No.55 of 2019 is partially allowed in the following terms:

(a) The Suit is partially decreed by recording the compromise between the Plaintiffs and Defendant Nos. 1 and 2 in terms of the Consent Terms viz. to the extent of Flat Nos. 901, 902 and 1001 and 1002 and permission granted to the Plaintiffs to withdraw an amount of Rs.2.70 Cores deposited by the Plaintiffs with the Prothonotary and Senior Master of this Court pursuant to Order dated 4th July, 2018 passed by this Court with accrued interest thereon till date. This is by taking on record the Consent Terms executed between the Plaintiffs and Defendant Nos. 1 and 2 being Exhibit-D to the Inteirm Application.

(b) The Prothonotary and Senior Master of this Court is directed to allow the Application of the Plaintiffs to withdraw the amount of Rs.2.70 Cores alongwith accrued interest thereon till date and which amount has been deposited pursuant to Order dated 4th July, 2018 passed by this Court, within a period of three weeks from the date of uploading of this order.

(c) The drawing up of the partial Decree is dispensed with unless the parties seek the drawn up decree/order, in which case they are entitled to apply.

(d) The Suit No.463 of 2016 and Notice of Motion No.1798 and 2017 shall continue to be proceeded with by the Plaintiffs against the Defendants in respect of Flat No.G-1 situated in Mangal Kunj, 'B' Wing CHS Limited situated at the junction of 32nd and 36th Road, Bandra (West), Mumbai 400 050.

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(e) The Interim Application No.55 of 2019
is accordingly disposed of. There shall be no
orders as to costs.

[R.I. CHAGLA, J.]

106. The Defendant Nos. 1 and 2 and the Applicant – Zenith Enterprises have applied for a stay of this Judgment and Order.

107. Having arrived at the above findings that the Applicant – Zenith Enterprises is neither a necessary nor a proper party to the Suit as well as the finding that the Defendant Nos.1 and 2 had compromised the Suit with the Plaintiffs by executing the Consent Terms, the Application for stay of the Judgment and Order is rejected.

[R.I. CHAGLA, J.]