

(2013) 11 BOM CK 0113

In the Bombay High Court

Case No : Chamber Summons No. 2013 of 2011 in Suit No. 2823 of 2006

Phoenix Tower Cooperative Housing Society Limited and
Others

APPELLANT

Vs

Phoenix Construction Company and Others

RESPONDENT

Date of Decision : 19-11-2013

Acts Referred:

Citation : (2014) 1 ABR 268 : (2014) 2 ALLMR 11 : (2014) 2 MhLj 945

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Shailesh Shah, Ms. Jyoti Sinha instructed by Negandhi Shah, Himaytullah in chamber summons, Mr. Pravin Samdani, Pranaya Goyal and Bindi Dave instructed by Wadia Ghandy and Co, for the Appellant; S.U. Kamdar, Mr. Chirag Balsara, D.V. Deokar, P.K. Shroff, Subodh Joshi and Kavita Shetty instructed by y Parimal K. Shroff for defendant Nos. 1 and 2, for the Respondent

Judgement

R.D. Dhanuka, J.—By this chamber summons, the applicants seek impleadment as party defendants to the suit and also to pending Notice of Motion No. 3446 of 2006, Notice of Motion No. 3376 of 2006 and Notice of Motion No. 1004 of 2011. Defendant No. 2 is one of the partners of defendant No. 1. Defendant no. 2 was original owner of the immovable property admeasuring 15,812.95 sq. mtrs situate and being at Senapati Bapat Marg, Lower Parel, Mumbai 400 013. Defendant No. 2 who is partner of defendant no. 1 got the suit property into the partnership firm i.e. defendant no. 1. Defendant no. 1 sold various flats in the building known as Phoenix Tower Cooperative Housing Society Limited "A" and "B" Wing. Plaintiff Nos. 3 and 4 are the owners of two flats in Tower "A". Plaintiff Nos. 5 and 6 are the owners of the two flats in Tower "B". The Flat purchasers in the said two buildings formed Plaintiff No. 1 and 2 society. It is the case of the plaintiff that various agreements entered into between the flat purchasers and defendant no. 1 and 2, defendant Nos. 1 and 2 are liable to convey the suit property in favour of Plaintiff Nos. 1 and 2 jointly. Though the plaintiffs called upon the defendant Nos. 1 and 2 to convey the suit property jointly in favour of

plaintiff no. 1 and 2, defendant nos. 1 and 2 refused to comply with the same. It is the case of the plaintiff that various illegal constructions/structural changes are carried out by defendant nos. 1 and 2. It is the case of the plaintiffs that defendant nos. 1 and 2 are liable and are by contract bound to execute conveyance in respect of the suit property under the provisions of the MOFA. The basement of the said buildings had been sanctioned only for the purpose of being used for car parking of residents of plaintiff no. 1 and 2 and no commercial/industrial use whatsoever is permitted in the said basement. On 25th September, 2006, Plaintiffs filed this suit against defendant nos. 1 and 2 for execution of the deed of conveyance of the suit property in favour of plaintiff no. 1 and 2 and has prayed for order and decree to hand over quiet, vacant and peaceful possession of the suit property including the portion of the suit property shown outlined in colour yellow and earmarked as "CMP" in the plan utilized by defendant nos. 1 and/or defendant no. 2 for installing operation of the "cement mixture plant".

2. On 17th February, 2011 plaintiffs registered lis pendens with Sub Registrar. On 29th March, 2011 Plaintiffs filed Notice of Motion No. 1004 of 2001 in this suit inter alia praying for injunction from selling car parking space in the "CMP" portion by the defendants. On 22nd July, 2011 and 25th July, 2011, defendant No. 2 has alleged to have entered into 9 agreements for sale of car parking in favour of 9 entities out of 125 car parking held by defendant no. 2. On 26th July, 2011, one M/s. Excelsior Hotels Private Limited is alleged to have addressed a letter to the defendant no. 1 seeking N.O.C., for permission of the society/company for management of car parks. On 18th August, 2011, defendant no. 1 is alleged to have granted NOC to Excelsior Hotels Pvt. Ltd. On 30th August, 2011, meeting of the representatives of the 9 car parking purchasers who had alleged to have purchased the said car parking from defendant no. 2 is alleged to have been held. On 30th August, 2012 the applicant is alleged to have amended the objects clause of the memorandum of association. On 31st August, 2011, 9 car parking purchasers is alleged to have been issued 80 shares of the applicant each. On 27th September, 2011 name of the applicant was changed from Mugwort Developers Pvt. Ltd. to Mugwort Land Holdings Pvt. Ltd. On 7th December, 2011 the applicant filed this chamber summons inter alia praying for impleadment as party defendants. On 15th December, 2011 the learned Single Judge of this court disposed of Notice of Motion No. 1004 of 2011 filed by the plaintiffs inter alia praying for various reliefs including the order and direction against defendant no. 1 and 2 to remove cement mixture plant from the portion of the suit properties. At the time of hearing of the said Notice of Motion, the applicants also intervened and contended that the applicants were vitally affected by the controversy in the suit on the ground that defendant no. 1 had entered into agreement for sale of 125 car parking spaces in the independent proposed construction of the car parking area for available construction. The purchasers of the car parking space have entered into several agreements for the same in the proposed car parking lot to be constructed. The applicant being representative body of such purchasers should be heard before any orders were passed in the

said notice of motion. This court however, did not hear this chamber summons along with the said Notice of motion since the pleading was in the said chamber summons were not complete. This court in the said order dated 15th December, 2011 observed that defendant no. 2 being member of the society can deal with the spaces in terms of the resolutions of the society. It is held that it is difficult to accept the submissions of the second defendant that they can deal with the parking spaces under this agreement at this stage. It is also observed that the spaces portion of the area admeasuring 2153.50 sq. mtrs cannot be said to be saleable areas or being capable of being independently sold or disposed of. The agreement itself is questionable though not wholly illegal. It is also observed that the parking spaces allottees cannot be claimed to be member of the society on the strength of any document or authorization to utilize and use the parking space and occupy it. This court granted interim reliefs in favour of the plaintiff in terms of prayer clauses (a)(3) and (a)(4) of the Notice of Motion. It was however, clarified that defendant no. 1 and 2 can construct parking lot. By the said order, defendant nos. 1 and 2 were restrained from constructing parking lot except for car parking for members of the plaintiff society and not to sell the car parking.

3. Respondent Nos. 1 and 2 filed an appeal (126 of 2012) impugning the said order passed by the learned Single Judge. The applicant herein also filed an Appeal (L) No. 571 of 2012. By a common order dated 24th June, 2013 passed by the Division Bench of this court, this court has dealt with affidavit in reply filed by the Director of the second defendant who was also partner of the first defendant stating that the portion admeasuring 2153.5 sq. mtrs. CMP area was for car parking and had to be developed by the first defendant. It was also stated that the second defendant was one member of the plaintiff society to whom the first defendant had sold some of the car parking space in the CMP area. The Division Bench of this court dismissed the said appeals filed by defendant nos. 1 and 2 herein and also applicant. It was observed that the balance of convenience must weigh in favour of grant of injunction since what the appellants had attempted to do was prima facie breach of their statutory obligations contained in the MOFA and irreparable injury was liable to be caused if the appellants were permitted to alienate the car parking space during the pendency of the suit.

4. Defendant No. 1 and 2 filed SLP impugning the order passed by the Division Bench and the learned Single Judge (Special Leave to Appeal No. 26616 of 2013). By order dated 7th October, 2013, Supreme Court dismissed the said SLP and expedited the suit. By order dated 25th October, 2013 Supreme Court has clarified its order dated 7th October, 2013 making it clear that the High Court shall while disposing of the suit remain uninfluenced by any observations made in its order dated 15th December, 2011 passed by the learned Single Judge and that passed by the Division Bench on 24th June, 2013.

5. As far as applicant in this Chamber summons are concerned, it is the case of the applicant that the defendant no. 1 had got the building plan sanctioned for

construction of the proposed independent car parking lot being lot area No. EE/8499/A dated 18th June, 1993. Defendant no. 1 entered into agreements for sale of 125 car parking spaces in the proposed independent car parking lot. The purchasers of the car parking spaces in turn entered into several agreements for sale of car parking spaces in the proposed independent car parking lot to be constructed in the said car parking lot area by defendant no. 1. Mr. Shah, the learned senior counsel for the applicant submits that the purchasers of the car parking spaces had agreed that defendant no. 1 do acquire shares of the applicant which company is nominated to hold the said independent car parking lot for and on behalf of the purchasers of the car parking spaces in the said car parking lot area. It is submitted that the applicant being representative body of the purchasers of car parking spaces in the independent car parking lot to be constructed by defendant no. 1, 9 of such car parking spaces purchasers had become share holders of the applicant including defendant no. 2. It is submitted that the applicant as representative body of the purchasers of car parking spaces are entitled to conveyance in respect of the car parking lot area admeasuring about 2153 sq. mtrs along with common right to recreation ground area and all other common areas. It is submitted by the learned senior counsel that in the month of July, 2011, defendant no. 2 had sold 9 car parking spaces to 9 different entities. These 9 car parking purchasers space purchasers have entrusted the management of the car parking plaza to the applicant. Learned senior counsel submits that the applicant are not claiming adversely to the claim of defendant no. 2 and are necessary parties to this suit. It is submitted that out of 15,000 Sq. Mtrs area, the applicant claims only about 2000 sq. meters. The outcome of the suit would affect and bind the applicant. It is submitted that since the applicant is claiming through defendant no. 2, the applicant is entitled to be impleaded as party defendant. The learned senior counsel submits that separate suit is not necessary with a view to avoid any multiplicity of proceedings. Since the parties through whom the applicant is claiming and issue has arisen in this suit and since subject matter is the same, consent of the plaintiff for impleadment of the applicant is not necessary. It is submitted that in these proceedings, this court would not require to conduct any detailed enquiry about the rights of the applicant in the suit premises. It is submitted that this court has to only consider whether the applicant would be ultimately affected, if any order is passed in favour of the plaintiffs in this suit.

6. Mr. Shah, the learned senior counsel placed reliance on the object clause incorporated in the memorandum of association of the applicant and more particularly clause 1 and 3 and would submit that the applicant company has been set up for the purpose to organize, cooperate, manage, administer and maintain any such land, building or other properties that may be acquired or purchased by it or by its members from time to time, which includes parking lots. It is submitted that it is also one of the object of the applicant company to obtain conveyance or an assignment of title in the land and building or any other structure that may be purchased by it and/or by its members from any promoter/

builder/developer/owner of land from time to time and to receive all documents of title relating to the property which may be in its possession or power as required. The learned senior counsel submits that thus the applicants being necessary and/or proper parties and are entitled to be impleaded as party defendants to the suit.

7. Mr. Shah, the learned senior counsel placed reliance on the judgment of the Division Bench of this court delivered on 9th April, 2013 in Appeal No. 330 of 2012 in the case of M/s. Shree Kamal Constructions and Ors. Versus Shri. Kamlakar Jiwan Patil and Ors. The Division Bench of this court has held that if the proposed party to be impleaded does not claim independent title adverse to the vendors of the plaintiff but claims under the vendors, such party can be impleaded as party to the suit.

8. Mr. Shah, the learned senior counsel also placed reliance on an unreported judgment of this court delivered by the learned Single Judge on 11th October, 2011 in Chamber Summons No. 1051 of 2011 in the case of Bina Coatings Private Limited Versus Madhuri Milap Joshi and Ors in support of his submission that the applicants are claiming through defendant no. 2 and are not claiming adverse to the claim of defendant no. 2 and are thus necessary party under Order I rule 10 of the Code of Civil Procedure. Mr. Shah, the learned senior counsel also placed reliance on the judgment delivered by the learned Single Judge of this court in the case of Sumita Pradipkumar Dixit Vs. Pushpadevi G. Makharia and Others, in support of his plea that merely because the party can file separate proceeding is no ground for rejection of the application for being made a party. It is submitted that since the applicant is necessary party or in any event, proper parties in whose absence in general order can be made but his presence is necessary for complete and final decision on the question involved in the proceedings. It is submitted that if this court directs defendant nos. 1 and 2 to execute conveyance in respect of the parking space which is purchased by the share holders of the applicant, the said order would be binding on the applicant and thus without presence of the applicant no order can be made effectively in this proceedings. Mr. Shah also placed reliance on the judgment in support of his submission that exercise of the judicial discretion of whether or not the applicant should be impleaded cannot be made dependent upon outcome of the question as to whether the applicant would ultimately succeed in their defence and it would be sufficient to say that the applicant has vital interest in the subject matter of the suit and would be affected by and to be bound by any decision that is arrived at the trial of the suit.

9. Mr. Shah placed reliance on the judgment of the Supreme Court in the case of Jayantilal Investments Vs. Madhuvihar Co-operative Housing Society and Others, in support of his submission that u/s 7A of the MOFA Act, the consent of the plaintiff society was not required by defendant nos. 1 or 2 for construction of any parking lot.

10. Mr. Kamdar, the learned senior counsel appearing for defendant nos. 1 and 2

supported the case of the applicant and would submit that it was within the rights of defendant nos. 1 and 2 to sell parking spaces which right has been rightly exercised by defendant nos. 1 and 2 in favour of various parties who are now share holders of the applicant company. It is submitted that said car parking spaces are independent premises. There was no injunction against the defendant no. 2 when defendant no. 2 sold 9 car parking spaces in favour of different entities. The learned senior counsel placed reliance on judgment of the Supreme Court in the case of Thomson Press (India) Ltd. Vs. Nanak Builders and Investors P. Ltd. and Others, in support of his submission that the court has to actually see as to whether it is necessary to make a person party to the action so that he should be bound by the resolution of the action and the question to be settled must be the question in the action which cannot be effectively and completely settled unless he is party. It is submitted that the applicant are necessary parties and in their absence effective decree cannot be passed by this court. Mr. Kamdar submits that this court cannot reject the application for impleadment on the ground that the applicant may not succeed ultimately in the proceedings in which he seeks impleadment.

11. Mr. Samdani, the learned senior counsel appearing on behalf of the plaintiff opposing this chamber summons, on the other hand, submits that the applicant claim to be representing body of 9 car parking space purchasers. It is submitted that defendant no. 1 has sold flats to members of the plaintiff Nos. 1 and 2. When flats were sold, parking facility was not constructed. Mr. Samdani placed reliance on various paragraphs of the order passed by S.C. Dharmadhari, J., in the Notice of Motion filed by the plaintiffs which order has been upheld by the Division Bench and also the Supreme Court. It is submitted by learned Senior Counsel that the applicant are put up by defendant nos. 1 and 2 with a view to delay the outcome of the suit proceeding. The learned senior counsel submits that the members of the applicant and defendant no. 3 is common. It is submitted that u/s 10 of MOFA, promoter has to take steps for formation of the cooperative society or company u/s 10 of the MOFA. It is submitted that garage alone can not be construed as flat. If the garage is appurtenant to flat, then only it can form part of flat and can be sold along with the flat as appurtenant or adjoining to the flat. It is submitted that even stilt car parking is not saleable. Mr. Samdani submits that defendant no. 2 had 125 car parking spaces. Out of those 125 car parking spaces, defendant no. 2 is alleged to have sold 9 car parking spaces to their own entities so that 10 members could form a society. It is submitted that even the said 10 members of the car parking space cannot form society. The applicant company was originally controlled by the share holders of defendant no. 2 and continued to be controlled even today by defendant no. 2. More than 90% shares are held by promoters of the defendant no. 2. It is submitted that 9 car parking purchasers are controlled by Ruia Group. The learned senior counsel submits that the articles of association of the applicant are deliberately amended on 7th September, 2011 with oblique motive. It is submitted by the learned senior counsel that the applicant is not the entity

recognized under the provisions of the MOFA. The application is mala fide, not made in good faith and is misleading and thus required to be dismissed with exemplary costs. It is submitted that the applicants have not filed any rejoinder to the affidavit in reply filed by the plaintiffs. Mr. Samdani invited my attention to photo copy of the plan annexed to the plaint and also agreement for sale entered into between defendant no. 1 and one of the flat purchasers to demonstrate that IOD for construction of two multi storied buildings including car parking facility was issued by the competent authority. The property was admeasuring 15812.956 sq. mtrs. Clause 21 of the said agreement provided that defendant no. 1 would execute conveyance in favour of the society consisting of flat purchasers in respect of the said property which is inclusive of car parking.

12. Mr. Samdani, the learned senior counsel also placed reliance on the affidavit dated 14th November, 2008 in the Notice of Motion No. 3376 of 2006 and affidavit in reply to Notice of Motion No. 1004 of 2011 filed by defendant no. 1 and 2 to demonstrate that defendant no. 1 and 2 had agreed to execute conveyance deed after completion of the project. In those affidavits, it is also admitted that the project could not be completed and therefore, conveyance could not be executed. It is also stated in the affidavit that the FSI is already consumed by defendant no. 1 and 2 and therefore, there was no FSI for car parking. Mr. Samdani submits that defendant no. 1 and 2 has not filed any affidavit in reply to the chamber summons filed by the applicants which shows that the applicants are put up by defendant nos. 1 and 2 and this application is mala fide. It is submitted by the learned senior counsel that the conduct of the applicants is not above board. Defendant nos. 1 and 2 have committed violation of provisions of MOFA. In view of these facts and such conduct on the part of the applicants, the applicants cannot be impleaded as party defendant. It is submitted that the applicants are nothing but defendant no. 2 who is already party defendant to the suit. The learned senior counsel submits that this suit is for enforcement of statutory obligations of defendant no. 1 and 2 u/s 11 of MOFA. It is not the case for sale of land under the provisions of Transfer of Property Act. The learned senior counsel submits that the applicants are not claiming any title through defendant no. 2. No right is created in favour of the applicants in the property. No interest can be created except by a registered document. It is submitted that only flat purchasers can exercise the right under the provisions of MOFA and not by any the entity like the applicant.

13. Mr. Samdani, the learned senior counsel invites my attention to the agreement for sale entered into between defendant nos. 1 and 2 to demonstrate that no rights are conferred on defendant no. 2 in respect of the car parking space. My attention is invited to clause 15 of one of such agreement which provides that no right is created under the car parking space. Defendant no. 2 cannot transfer the said car parking spaces but was provided with only right to park car. It is submitted that since no rights were created in favour of defendant no. 2, defendant no. 2 in turn could not create any right in favour of any party. There is no provision for executing conveyance in favour of defendant no. 2 in

respect of car parking space. It is submitted that defendant no. 2 did not acquire any interest in car parking. It is submitted that the promoter did not agree to form separate organization of the car parking space purchasers. Even today, there exists the plot which is earmarked for car parking lot in favour of the plaintiffs. It is submitted that the share holders of the applicant did not acquire any interest in the alleged agreement entered into between defendant no. 2 and those parties. Nine car parking purchasers are not before this court for seeking impleadment.

14. Mr. Samdani, the learned senior counsel submits that in view of the stand of defendant nos. 1 and 2 who are members of the plaintiff society to convey entire property admeasuring about 15000 sq. mtrs to Plaintiff nos. 1 and 2 society in view of the admission of their such obligation before the Division Bench of this court, the stand of the applicant is adverse to the stand of defendant nos. 1 and 2 regarding conveyance of entire property in favour of the plaintiffs. It is submitted that those agreements between the plaintiff and defendant no. 2 does not create any right in favour of defendant no. 2 and thus the agreements, if any between defendant no. 2 and 9 car parking space purchasers would also not create any right in their favour. Mr. Samdani submits that it is not the case of the applicant that defendant no. 2 would collude with plaintiff in not contesting the claim of the plaintiff. It is submitted that defendant no. 2 even in this proceeding is contesting and vehemently opposing the claim of the plaintiff and is supporting the applicant. The applicants thus could not have any such apprehension of collusion of the defendant no. 2 with the plaintiffs and are thus neither necessary nor proper parties to this suit.

15. Mr. Samdani distinguished the judgments relied upon by Mr. Shah and placed reliance on some of the paragraphs of the judgment of the Supreme Court in the case of Thomson Press (*supra*).

16. Mr. Samdani submits that whether the car parking can be purchased or not is not the subject matter of the suit. The applicant are not car parking purchasers but claims to be manager on behalf of the 9 car parking space purchasers.

17. In rejoinder, Mr. Shah submits that the Supreme Court in the case of Thomson Press (*supra*) has considered the situation where inspite of injunction, defendant who had created third party rights, application for impleadment of such third party was permitted by the Supreme Court. It is submitted that the conduct of the party is irrelevant for the purpose of deciding whether he is necessary or proper party or not. He submits that the applicant is an independent legal entity. Whether the transaction between the applicant and defendant no. 2 is genuine or not can be gone into only at the stage of actual hearing of the suit and not at the stage of hearing of the chamber summons. Mr. Shah, learned senior counsel submits that in the present suit, plaintiffs have not prayed only for enforcement of application under MOFA but also seeks execution of the conveyance and possession. It is submitted that the vendor itself can form any association or can permit its members to form company and/or association.

He submits that the claim of the applicant is not adverse to the claim of the defendant no. 1 and 2. The applicants are not setting up any independent title but are claiming through defendant no. 2. Mr. Shah made attempt to distinguish the judgments relied upon by Mr. Samdani.

18. This court in the case of Bina Coatings Private Limited (supra) after adverting to the judgments of the Supreme Court in the case of Kasturi Vs. Iyyamperumal and Others, and Bharat Karsondas Thakkar Vs. Kiran Construction Co. and Others, has held that if the third party does not claim independently and adversely to the vendor and if the assertion of his rights directly affects the effectiveness of the decree in the suit, as originally framed, such third party can and ought to be joined as a party to the suit. Paragraphs 7 and 8 of the said judgment read thus:

7. In my view the ratio of this judgment would clearly apply to the case on hand. Here a third party is making a claim (a) through the vendor against whom the right for specific performance is claimed by the Plaintiff, and (b) in respect of the property which is the subject matter of such right of specific performance. It is the case of the Plaintiff that the vendor has done some act in breach of an obligation owed by him to the Plaintiff, i.e. to specifically perform their inter se contract, then surely the Plaintiff has a cause of action to challenge such act and join the third party whose alleged right arises out of such act. The right to relief arises against the third party in respect of the same cause of action, namely, the breach of an obligation owed by the vendor to the Plaintiff. To put it differently, the alleged right of the third party, which is sought to be challenged, arises out of this very breach. If such act had taken place prior to the suit, surely the Plaintiff could have arraigned the third party and challenged the agreement between the vendor and the third party. This is not a case where the third party claims independently and adversely to the vendor as in the case of Kasturi (Supra). Here the third party claims through the vendor. Any decree that may be passed in the suit against the vendor necessarily binds the third party who claims through the vendor and affects the third party's alleged right. Similarly, the assertion of the third party's alleged right directly affects the effectiveness of the decree in a suit as originally framed. That is one more reason why the third party can and ought to be joined as a party in the instant case.

8. As held by the Supreme Court in the case of Amit Kumar Shaw (Supra) the question is whether the right of a person may be effected if he is not added as a party. Alienee Pendente Lite has always been considered a necessary party to a suit because he is bound by the final decree that may be passed in the suit. Here the third party's position can certainly be compared to Alienee Pendente Lite. It is also pertinent to note that the discussions of law as to the joinder of parties in both Kasturi (Supra) and Amit Kumar Shaw (Supra) are in a context of an application by the third party. In the instant case the Plaintiff, who, in any event is the dominos lotus, should have no difficulty in impleading the third party.

19. This court in the case of Sunita Dixit (supra) on which reliance is placed by

Mr. Shah, the learned senior counsel for the applicant, has held that necessary party is one without whom no order can be made effectively and proper party is one in whose absence effective order can be made but whose presence is necessary for complete and final decision on the question involved in the matter. It is held that existence or non existence of the consent of the plaintiff to the addition of the party to the proceedings can not always be regarded as conclusive of the jurisdiction of the Court to add a party. It is held that if such party would be bound by the result of the action and the question to be settled is one which can be effectually and completely settled only if the petitioner is a party, such party would be a necessary party. This court has held that the exercise of judicial discretion on whether or not the petitioner should be impleaded cannot be made dependent upon the outcome of the question as to whether the petitioner would ultimately succeed in his defence. The court has to see whether such party has vital interest in the subject matter of the suit and would be affected by and be bound by any decision that is arrived at the trial of the suit. Paragraphs 15, 16 and 17 of the said judgment read thus:

15. In the present case, the suit which has been filed by the original plaintiff proceeds on the basis that the first and second defendants have unauthorisedly parted with the possession of the suit property in favour of the third defendant who is described in the suit as a "sub-license tenant". The plaintiffs, in the facts and circumstances of the present case, considered it fit to implead the third defendant as a party to the suit on the ground that it was the third defendant who had been inducted, according to the plaintiffs wrongfully, in the premises by the first and second defendants. The Third defendant has filed a written statement pointing out the fact that it is not the third defendant, but the petitioner before the Court in these proceedings who was inducted and who has invested her capital for the purposes of conducting the hotel business in her personal capacity with the consent of the plaintiffs. The petitioner in her application for being impleaded as a party to the suit has pointed out circumstances on the basis of which she claims an interest in the premises in pursuance of the agreement which was entered into with her. The first and second defendants are, it is common ground, closely related to the first plaintiff who is their sister. Initially, the first defendant filed a written statement opposing the claim for relief in the suit. As it now transpires the first defendant has subsequently filed an affidavit stating that both he and second defendant have no objection if the suit is decreed. The plaintiffs have then filed a petition to the effect that the name of the third defendant should be deleted from the array of parties. The submission of the petitioner is that the first and second defendant who are closely related to the first plaintiff are acting in collusion with the plaintiffs. Consequently, any collusive decree which is passed in the suit upon the deletion of the third defendant will seriously affect the rights which the petitioner seeks to assert. Having regard to the aforesaid circumstances, there can be no doubt about the fact that the petitioner herein is, within the meaning of Order 1, Rule 10 of the Code of Civil Procedure, 1908, a person whose presence before

the Court is necessary in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit. Having regard to the nature of the controversy, the third defendant has, as held by the Supreme Court, "a cause of action against the plaintiff relating to the subject matter of the existing action". The Court has the power to join the petitioner as a party so as to subserve the object of avoiding a multiplicity of actions. The petitioner has a direct interest in the subject matter of the litigation. The petitioner would be bound by the result of the action and the question to be settled is one which can be effectually and completely settled only if the petitioner is a party. 16. A reference at this stage may also be made to the judgment of a learned Single Judge of this Court, Vimadalal, J., in Jivanlal Damodardas Wani Vs. Narayan Ukha Sali, . While formulating the propositions underlying the exercise of jurisdiction under Order 1, Rule 10, the learned Single Judge, inter alia, held thus:

3. In exercising its discretion under Order 1, Rule 10, Civil P.C. the Court would not "ordinarily" and a party without the concurrence of the plaintiff. (:). I am bound by that decision of a Division Bench of this Court, and I respectfully agree with the same because the plaintiff is a dominus litus as far as the litigation in question is concerned. From this it would follow that it is only in exceptional cases that a party would be added as a party-defendant to the suit without the concurrence of the plaintiff Banarsi Dass Durga Prashad Vs. Panna Lal Ram Richhpal Oswal and Others, .

4. The Court would add a person as a party-defendant to a suit without the concurrence of the plaintiff to that suit only where the party sought to be added is a necessary party as distinguished from a mere proper party. This is the view which a Single Judge of the Punjab High Court has taken in the case of Banarsi Dass Durga Prashad Vs. Panna Lal Ram Richhpal Oswal and Others, cited above, after considering the various authorities on the point, and it is a view with which I am in agreement. Since a person can be joined as party-defendant to a suit without the concurrence of the plaintiff only in exceptional cases, the only line that the Court can draw to distinguish the ordinary rule from an exceptional case would be to distinguish between a "proper party" and a "necessary party". This distinction has been recognised in Order 1, Rule 10, Civil P.C. itself. It has been held by a Single Judge of this Court that a real owner is not a necessary party to a suit by the benamidar, but is only a proper party Rupam Pictures Vs. Chaganlal Gulabchand Chandak, .

While I am in respectful agreement with the judgment of the learned Single Judge, at the same time, it would now be necessary for this Court to have due regard to the subsequent judgments of the Supreme Court including the judgment in Kundanmal's case (supra) which have construed the scope of the power of the Court under Order 1, Rule 10. The existence or the non-existence of the consent of the plaintiff to the addition of a party to the proceeding cannot always be regarded as conclusive of the jurisdiction of the Court to add a party. The Supreme Court has adverted to the possible case of a collusion between the

plaintiff and the existing defendants to a suit, in Taraporewala's case (supra) as also in the judgment in Kundanmal's case. The facts of a given case may underline the need to add a party in order to avoid a possibility of a collusion between the plaintiff and one or more of the existing defendants. In such a case, the object of adding a party is to ensure that the existing parties, by their collusive acts do not seek orders which will have a serious bearing on the rights of persons who are not before the Court. In such a case, the fact that the plaintiff has denied his consent to the addition of a party cannot be a fetter on the power of the Court to implead a party in an appropriate case. Each case, therefore, has to be evaluated upon its own facts and that is the legal position formulated by the Supreme Court in Anwar Begum's case.

17. The learned trial Judge has commented upon the merits of the claim of the petitioner and has then held that it is open to the petitioner to agitate such right as she may claim in an independent proceeding against the plaintiffs and the defendants to the suit. With respect, that in my view is not a correct approach to the matter, nor is it consistent with the law which has been laid down by the Supreme Court. The fact that the third defendant would be at liberty even if the application for impleading her is rejected to have recourse to an independent proceeding, is no ground to exclude her from the array of parties in the suit before the trial Court if the tests laid down for impleading a party under Order 1, Rule 10 are satisfied. If the conditions which are laid down for impleading a party under Order 1, Rule 10 are satisfied, then it would be clearly contrary to the law to dismiss the application which was filed by the petitioner. The trial Court has also commented upon the nature of the documents on which the petitioner relies and some of the documents were sought to be placed before this Court in the form of a compilation. Though some of these documents were relied upon by Counsel for the respondents, this is not the appropriate stage where the weight of the evidence upon which the petitioner relies can be evaluated. The exercise of judicial discretion on whether or not the petitioner should be impleaded cannot be made dependent upon the outcome of the question as to whether the petitioner would ultimately succeed in her defence. Suffice it would to say that the petitioner has a vital interest in the subject matter of the suit and she would be affected by and be bound by any decision that is arrived at the trial of the suit.

20. The Division Bench of this court in the case of M/s. Shree Kamal Constructions & Ors. (supra) reliance on which is placed by Mr. Shah the learned senior counsel for the plaintiff, has held that if the party does not claim independent title adverse to the vendors of the plaintiff, but claim from the vendors, he would be necessary party. Paragraphs 12 and 13 of the said judgment read thus:

12. Reliance was sought to be placed on behalf of the Respondents on a judgment of the Supreme Court in Bharat Karsondas Thakkar v. Kiran 4, 2013 (3) Scale 26 Construction Co. A distinguishing feature of the case before the Supreme Court was that by the proposed amendment what was sought to be

introduced was a challenge to a consent decree which the Appellant had obtained. Although this fact was brought to the notice of the first Respondent in March 1984, no steps were taken to amend the plaint at that stage and the first Respondent waited until a consent decree was passed before applying for amendment of the plaint. In this view of the matter, the Supreme Court was of the view that the proper course of action was for the first Respondent to challenge the consent decree not in its suit for specific performance but in a separate suit for a declaration that the consent decree ought not to have been passed and was not binding on the first Respondent. Significantly however the following observations of the Supreme Court are extremely material to the issue in the present case:-

... If, as was held in Durga Prasad's case (supra), the impleadment of the appellant was only for the purpose of joining him in the conveyance if the respondent No. 1's suit ultimately succeeded, the ratio of the said decision would possibly have been applicable to the facts of this case. Unfortunately, that is not the case here, since the respondent No. 1 has by amending the plaint prayed for a declaration that the consent decree obtained by the appellant was not binding on him and also for a declaration that the consent decree was null and void and was liable to be quashed.

The judgment of the Supreme Court, therefore, clearly recognises that if impleadment was sought for the purpose of joining the Appellant there in the conveyance if the suit of the first Respondent was to ultimately succeed, the ratio of the decision in Durga Prasad's case would have been attracted.

13. The learned Single Judge was, with respect, in error in coming to the conclusion that the proposed amendment would convert what was essentially a suit for specific performance into a suit on title. The case of the Plaintiffs is that conveyances that were executed after the agreement between the Plaintiffs and their vendors were entered into by subsequent purchasers who had notice of the prior transaction. The Plaintiffs-Appellants seek a decree to the effect that subsequent purchasers must join in conveying the title to them, if the suit were to succeed. The learned Single Judge has as noted earlier recognised that if the Plaintiffs were to succeed in the suit, each one of those parties who are vendors and from whom the Plaintiffs had purchased the property and persons who derived title from such vendors will all be directed to join in so as to convey the right, title and interest in the immovable property which is the subject-matter of the agreement for sale. Once this is the position, it is impossible to conceive as to how the impleadment of those persons who claim title under the vendors of the Appellants would not be necessary parties. Again at the cost of repetition, it is necessary to note that the proposed Respondents do not claim an independent title adverse to the vendors of the Appellants but claim under the vendors. In this view of the matter, we are of the view that the learned Single Judge was in error in rejecting the Chamber Summons for amendment.

21. Mr. Shah, learned senior counsel for the applicant and Mr. Kamdar, learned

senior counsel for defendant Nos. 1 and 2 placed reliance on the judgment of the Supreme Court in the case of Thomson Press (India) (supra). Mr. Samdani, learned senior counsel also placed reliance on some of the paragraphs of the said judgment and distinguished the paragraphs relied upon by Mr. Shah and Mr. Kamdar, learned senior counsel appearing for plaintiff and defendant nos. 1 and 2 respectively. Mr. Shah and Mr. Kamdar placed reliance on the judgment of the Supreme Court in the case of Thomson Press (supra) in support of the submission that under Order I rule 10, the court is empowered to add any person as party at any stage of proceedings if the person whose presence before the court is necessary or proper for effective adjudication of the issue involved in the suit. Reference is also placed on the judgment in support of the submission that the applicant did not claim any independent right or rights adverse to the rights of defendant nos. 1 or 2 but is claiming through defendant no. 2 and in the event of this court passing any decree for execution of the conveyance in respect of the entire suit property which includes some of open parking space which is acquired by share holders of the applicants company, it would seriously affect the applicant and would be binding on the applicants. Mr. Shah, learned senior counsel laid emphasis on the judgment also in support of the plea that though the applicants who had acquired rights in the property and was claiming through the vendor having acquired such rights inspite of injunction order, during the pendency of the suit, the Supreme Court had held that such party would be necessary party and was required to be impleaded as party defendant under Order I rule 10 of the Code of Civil Procedure, 1908 and the conduct would be irrelevant for the purpose of deciding the plea of impleadment. Mr. Samdani, appearing on behalf of the plaintiff on the other hand strongly placed reliance on the statement of law laid down by the Supreme Court in the said judgment after adverting to the principles laid down by the Supreme Court in the case of Vidur Impex and Traders Pvt. Ltd. and Others Vs. Tosh Apartments Pvt. Ltd. and Others, . It is submitted by Mr. Samdani, learned senior counsel that if the court comes to the conclusion that in the suit for specific performance, the court can order impleadment of the purchaser only if his conduct is above board and if he files an application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation. It is submitted that since defendant Nos. 1 and 2 themselves had filed affidavit in this suit admitting their obligation to convey entire property to the plaintiff, have put up applicants to file such frivolous proceedings. It can not be pleaded by the applicants that they are not claiming rights adverse to the rights of the defendants vendor. It is submitted that nine car parking space purchasers are nothing but group companies of Ruia. It is submitted that even if nine car parking space could have been sold in favour of such parties by defendant no. 2, such transactions are illegal and are clandestine transactions. It is submitted that since the applicant is beneficiary of such clandestine transaction, in view of the exceptions carved out by the Supreme Court in the case of Vidur Impex and Traders (supra), such party cannot be impleaded as party defendant to the suit. It is also submitted by Mr. Samdani, learned senior counsel that in any event since nine car parking space

purchasers have not claimed impleadment before this court, such application on behalf of their so called managers of the car parking space cannot be entertained under Order I Rule 10 of the Code of Civil Procedure, 1908. Paragraphs 24, 25, 30, 34 to 37, 44, 47 and 56 of the said judgment read thus:

24. In Kasturi's case (supra) a three Judges' Bench of this Court said that in a suit for specific performance of contract for sale an impleadment petition was filed for addition as party Defendant on the ground that the Petitioners were claiming not under the vendor but adverse to the title of the vendor. In other words, on the basis of independent title in the suit property the Petitioner sought to be added as a necessary party in the suit. Rejecting the petition this Court held as under:

11. As noted herein earlier, two tests are required to be satisfied to determine the question who is a necessary party, let us now consider who is a proper party in a suit for specific performance of contract for sale. For deciding the question 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 for specific performance of the contract for sale. Thus, the question is to be decided keeping in mind the scope of the suit. The question that is to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered into between the parties to the contract. If the person seeking addition is added in such a suit, the scope of the suit for specific performance would be enlarged and it would be practically converted into a suit for title. Therefore, for effective adjudication of the controversies involved in the suit, presence of such parties cannot be said to be necessary at all. Lord Chancellor Cottenham in *Tasker v. Small* made the following observations:

It is not disputed that, generally, to a bill for specific performance of a contract for sale, the parties to the contract only are the proper parties; and, when the ground of this jurisdiction of Courts of Equity in suits of that kind is considered it could not properly be otherwise. The Court assumes jurisdiction in such case, because a Court of law, giving damages only for the non-performance of the contract, in many cases does not afford an adequate remedy. But, in equity, as well as in law, the contract constitutes the right and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the Defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it. (Emphasis supplied)

14. Keeping the principles as stated above in mind, let us now, on the admitted facts of this case, first consider whether the Respondent Nos. 1 and 4 to 11 are necessary parties or not. In our opinion, the Respondent Nos. 1 and 4 to 11 are not necessary parties effective decree could be passed in their absence as they

had not purchased the contracted property from the vendor after the contract was entered into. They were also not necessary parties as they would not be affected by the contract entered into between the Appellant and the Respondent Nos. 2 and 3. In the case of Anil Kumar Singh Vs. Shivnath Mishra alias Gadasa Guru, , it has been held that since the applicant who sought for his addition is not a party to the agreement for sale, it cannot be said that in his absence, the dispute as to specific performance cannot be decided. In this case at paragraph 9, the Supreme Court while deciding whether a person is a necessary party or not in a suit for specific performance of a contract for sale made the following observation:

9. Since the Respondent is not a party to the agreement for sale, it cannot be said that without his presence the dispute as to specific performance cannot be determined. Therefore, he is not a necessary party. (Emphasis Supplied)

25. In the case of Vidhur Impex (supra), the Supreme Court again had the opportunity to consider all the earlier judgments. The fact of the case was that a suit for specific performance of agreement was filed. The Appellants and Bhagwati Developers though totally strangers to the agreement, came into picture only when all the Respondents entered into a clandestine transaction with the Appellants for sale of the property and executed an agreement of sale which was followed by sale deed. Taking note all the earlier decisions, the Court laid down the broad principles governing the disposal of application for impleadment. Paragraph 36 is worth to be quoted hereinbelow:

Though there is apparent conflict in the observations made in some of the aforementioned judgments, the broad principles which should govern disposal of an application for impleadment are:

1. The Court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as Plaintiff or Defendant or whose presence before the Court is necessary for effective and complete adjudication of the issues involved in the Suit.
2. A necessary party is the person who ought to be joined as party to the Suit and in whose absence an effective decree cannot be passed by the Court.
3. A proper party is a person whose presence would enable the Court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.
4. If a person is not found to be a proper or necessary party, the Court does not have the jurisdiction to order his impleadment against the wishes of the Plaintiff.
5. In a Suit for specific performance, the Court can order impleadment of a purchaser whose conduct is above board, and who files Application for being joined as party within reasonable time of his acquiring knowledge about the

pending litigation.

However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the Court or the Application is unduly delayed then the Court will be fully justified in declining the prayer for impleadment.

30. In the light of the settled principles of law on the doctrine of lis pendens, we have to examine the provisions of Order 1 Rule 10 of the Code of Civil Procedure. Order 1 Rule 10 which empowers the Court to add any person as party at any stage of the proceedings if the person whose presence before the court is necessary or proper for effective adjudication of the issue involved in the suit. Order 1 Rule 10 reads as under:

10. Suit in name of wrong Plaintiff.-

(1) Where a suit has been instituted in the name of the wrong person as Plaintiff or where it is doubtful whether it has been instituted in the name of the right Plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as Plaintiff upon such terms as the Court thinks just.

(2) Court may strike out or add parties.-The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a Plaintiff suing without a next friend or as the next friend of a Plaintiff under any disability without his consent.

(4) Where Defendant added, plaint to be amended.-Where a Defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new Defendant and, if the Court thinks fit, on the original Defendant.

(5) Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877), Section, the proceedings as against any person added as Defendant shall be deemed to have begun only on the service of the summons.

34. In the light of the aforesaid discussion both on facts and law, we shall now examine some of the relevant facts in order to come to right conclusion.

35. As noticed above, even before the institution of suit for specific performance

when the Plaintiff came to know about the activities of the Sawhneys" to deal with the property, a public notice was published at the instance of the Plaintiff in a newspaper "The Hindustan Times" dated 12.02.1990 (Delhi Edn.) informing the public in general about the agreement with the Plaintiff s. In response to the said notice the sister concern of the Appellant M/s. Living Media India Limited served a legal notice on the Defendants-Sawhneys" dated 24.06.1990 whereby he has referred the "agreement to sell" entered into between the Plaintiffs and the Defendants-Sawhneys".

36. Even after the institution of the suit, the counsel who appeared for the Defendants-Sawhneys" gave an undertaking not to transfer and alienate the suit property. Notwithstanding the order passed by the Court regarding the undertaking given on behalf of the Defendants-Sawhneys", and having full notice and knowledge of all these facts, the sister concern of the Appellant namely Living Media India Ltd. entered into series of transaction and finally the Appellant M/s. Thomson Press got a sale deed executed in their favour by Sawhneys" in respect of suit property.

37. Taking into consideration all these facts, we have no hesitation in holding that the Appellant entered into a clandestine transaction with the Defendants-Sawhneys" and got the property transferred in their favour. Hence the Appellant-M/s. Thomson Press cannot be held to be a bonafide purchaser, without notice.

44. Having regard to the law discussed hereinabove and in the facts and circumstances of the case and also for the ends of justice the Appellant is to be added as party-Defendant in the suit. The appeal is, accordingly, allowed and the impugned orders passed by the High Court are set aside.

45. Before parting with the order, it is clarified that the Appellant after implement as party-Defendant shall be permitted to take all such defences which are available to the vendor Sawhneys" as the Appellant derived title, if any, from the vendor on the basis of purchase of the suit property subsequent to the agreement with the Plaintiff and during the pendency of the suit.

46. I have had the advantage of going through the order proposed by my Esteemed Brother M.Y. Eqbal, J. While I entirely agree with the conclusion that the Appellant ought to be added as a party-Defendant to the suit, I wish to add a few lines of my own.

47. There are three distinct conclusions which have been drawn by Eqbal, J. in the judgment proposed by his Lordship. The first and foremost is that the Appellant was aware of the "agreement to sell" between the Plaintiff and the Defendants in the suit. Publication of a notice in the Hindustan Times, Delhi Edition, and the legal notice which Living Media India Limited, Appellant"s sister concern, sent to the Defendants indeed left no manner of doubt that the Appellant was aware of a pre-existing agreement to sell between the Plaintiff and the Defendants. It is also beyond dispute that the sale of the suit property in favour of the Appellant was in breach of a specific order of injunction passed by

the trial Court. As a matter of fact, the sale deeds executed by the Defendants falsely claimed that there was no impediment in their selling the property to the Appellant even though such an impediment in the form of a restraint order did actually exist forbidding the Defendants from alienating the suit property. The High Court was in that view justified in holding that the sale in favour of the Appellant was a clandestine transaction which finding has been rightly affirmed in the order proposed by my Esteemed Brother, and if I may say so with great respect for good and valid reasons.

56. To the same effect is the decision of this Court in *Amit Kumar Shaw and Another Vs. Farida Khatoon and Another*, where this Court held that a transferor pendente lite may not even defend the title properly as he has no interest in the same or collude with the Plaintiff in which case the interest of the purchaser pendente lite will be ignored. To avoid such situations the transferee pendente lite can be added as a party Defendant to the case provided his interest is substantial and not just peripheral. This is particularly so where the transferee pendente lite acquires interest in the entire estate that forms the subject matter of the dispute. This Court observed:

16... The doctrine of *lis pendens* applies only where the *lis* is pending before a court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the Defendant is vitally interested in the litigation, where the transfer is of the entire interest of the Defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the Plaintiff. Hence, though the Plaintiff is under no obligation to make a *lis pendens* transferee a party, under Order 22 Rule 10 an alienee pendente lite may be joined as party. As already noticed, the court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The Court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where the transferee pendente lite is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case.

22. In support of the submission that the car parking space and or common parking areas and spaces meant for parking of vehicles whether under stilt, enclosed or open are incapable of being sold as independent unit and is therefore, not saleable area. Mr. Samdani, placed reliance on the judgment of the Supreme Court in the case of *Nahalchand Lalchand (supra)*. It is submitted that since defendant no. 2 did not have any right to retain the said car parking area, the question of transferring the same to other 9 alleged car parking purchasers did not arise. It is submitted by the learned senior counsel that in any event,

since defendants had filed affidavits in notice of motion filed by the plaintiffs in the same suit that defendant no. 1 and 2 could not complete the project and did not develop the car parking area, the conveyance of the entire property could not be executed in favour of the plaintiffs, sale of any such car parking spaces in favour of other entities is fraudulent. It is submitted that such transaction, if carried out would be a clandestine transaction and such parties who are involved in such clandestine transaction cannot be impleaded as party defendants to the suit. Mr. Samdani, learned senior counsel also invited my attention to the order dated 15th December, 2011 passed by S.C. Dharmadhikari, J. and also order passed by the Division Bench delivered on 24th June, 2013 and also order passed by the Supreme Court dismissing SLP and the clarificatory order dated 25th October, 2013.

23. On perusal of the order passed by the learned Single Judge on 15th December, 2011, it is clear that this court adverted to the judgment of the Supreme Court in the case of Nahalchand Lalchand (supra) while granting interim relief in favour of the plaintiff. In case of Nahalchand Lalchand, Supreme Court has held that the stand-alone-garage or in other words garage as an independent unit by itself is not a flat within the meaning of section 2(a-1). It is held that the garage is a place having roof and walls on three sides and does not include unenclosed or uncovered parking spaces. The Supreme Court has held that open to the sky parking area or stilted portion utilized as parking space is not a garage within the meaning of section 2(a-1) and therefore, is not saleable independently as a flat or along with the flat. Considering this judgment of the Supreme Court the learned Single Judge of this court in Notice of Motion filed by the plaintiff in this suit has held that any parking facility or portion thereof cannot be said to be saleable areas or being capable of being independently sold and disposed of.

24. The next question that arises for consideration of this court is whether the applicants are claiming title from the vendors who had sold the entire plot including the car parking space to the members of the plaintiff society or is claiming independently or whether their claim is adverse to the claim of the vendor i.e. defendant no. 2 in this case. On perusal of the affidavits filed by defendant nos. 1 and 2 in this proceedings, it is clear that it was the case of the defendant nos. 1 and 2 that the portion measuring 2153.5 sq. mts in the South-West side out of the larger property was yet to be developed by defendant no. 1 and the project was incomplete and the time for execution of conveyance under the agreements for sale executed between the defendant no. 2 and the purchasers of the flats in Phoenix Towers A and B have not become operative till date. It is also stated that defendant no. 1 is ready and willing to execute conveyance after completion of the project in accordance with the agreements executed with the purchasers of the premises. Defendant no. 2 also filed separate affidavit in which it is deposed that the portion measuring 2153.5 sq. mts., area as common car parking is yet to be developed by the defendant no. 1. It is also deposed that there is no balance FSI in the suit premises and the FSI

available has already been consumed. Similar statements have been also made by defendant nos. 1 and 2 before the Division Bench which are recorded by the Division Bench in appeals arising out of the order passed by S.C. Dharmadhari, J. It is thus clear that the claim made by the applicants in the chamber summons that defendant no. 2 has created right, title and interest in nine car parking purchasers is contrary to the stand taken by defendant no. 1 and 2 in the notice of motion filed by the plaintiff in the suit. In my view, the claim of the applicant is not under defendant no. 2 but is independent and adverse to the claim of defendant no. 2.

25. This court can not adjudicate the merits of the claim made by the applicants in this chamber summons but can certainly look into the issue whether the claims made by the applicants on the basis of which applicants seek impleadment, are independent or are adverse to the claims made by the vendor.

26. The Supreme court in the case of Thomson Press (supra) has adverted to the earlier judgment of the Supreme Court in the case of Vidur Impex and Traders (P) Ltd. (supra) in which the Supreme Court has culled out the principles governing disposal of the application for impleadment. Considering the principles laid down by the Supreme Court, this court has to examine whether this court would not be in a position to pass effective decree in the absence of applicants or not or whether presence of the applicants is necessary for effective and complete adjudication of the issues involved in the suit.

27. This court also has to examine whether the conduct of the applicants is above board or transaction between defendant no. 2 and the alleged nine car parking space purchasers can be construed as clandestine transaction in which applicants seek to take benefit of such clandestine transaction and whether such party can be impleaded as party defendant.

28. In the case of Thomson Press, the Supreme Court has held that transferee pendente lite can be added as party defendant to the proceedings provided his interest is substantial and not just peripheral. The Supreme Court has also considered the effect of section 19 of the Specific Relief Act while deciding the petition arising out of an application under Order I Rule 10 of the Code of Civil Procedure. Section 19 of Specific Relief Act provides as to when specific performance of the contract may be enforced and against whom. In the matter in hand before the Supreme Court, in case of Thomson Press the vendor had transferred the entire property in favour of third party who sought impleadment in the suit for specific performance.

29. It is not the case of the applicants that the flats which were constructed by defendant no. 1 in partnership with defendant no. 2 and were sold to various other purchasers, have been sold by defendant no. 2 to the applicants. It is also not in dispute that the plaintiffs have claimed various reliefs including mandatory order and injunction directing defendant nos. 1 and 2 to execute conveyance of the entire suit property. Defendant no. 2 is alleged to have sold nine car parking

space out of 125 car parking space to various entities. Mr. Shah, learned counsel could not dispute the submissions made by Mr. Samdani, learned senior counsel for the plaintiffs that the alleged nine car parking purchasers are entities of the Ruia Group. It is also not in dispute that these nine alleged car parking purchasers have not made any application for their impleadment to the suit. The applicants who have filed this application claim to have right to manage car parking spaces alleged to have been acquired by nine of such parties who are claiming to be the shareholders of the applicants. In my prima facie view, the transactions alleged to have been entered into between defendant no. 2 is in the nature of clandestine transaction and are also in violation of the principles laid by the Supreme Court in the case of Nahalchand Lalchand. In my view the applicants would have no locus to file any such application for impleadment on behalf of such so called car parking space purchasers on the premise that such car parking purchasers have acquired shares of the applicants company and have agreed that such car parking space be managed by the applicants. I am of the view that such claims are not substantial but are just peripheral. In my view presence of such party is not required for effectively and properly adjudicating upon the matters and issues in the suit. The suit is for enforcement of statutory obligations of the developer under the provisions of MOFA and is also for execution of the deed of conveyance in respect of entire suit property. Whether said car parking space can be sold or not by defendant no. 2 in favour of other parties is not the issue or matter which is under adjudication in the suit. In my view, effective decree can be passed by this court in the suit in the absence of the applicants. Defendant no. 2 claims to be one of the member and share holder of the applicants and who is alleged to have created some third party rights in respect of nine car parking space is already party defendant to the suit. There are no allegations of collusion made by the applicants against plaintiff and defendant nos. 1 and 2. On the contrary defendant nos. 1 and 2 are contesting the suit and interlocutory proceedings and are ex-facie supporting the case of the applicants.

30. The applicant who is part of the Ruia Group and/or is under the control and management of Ruia Group and who wants to take advantage of such clandestine transaction between defendant no. 2 and nine car parking space purchasers, can not be impleaded as party defendant to the suit. u/s 19 of the Specific Relief Act, specific performance of the contract may be enforced against the parties described. In my view applicants are not included in such category of persons. The Management of the applicants was all through out aware of the statements made by defendant nos. 1 and 2 in the Notice of Motion filed by Plaintiffs regarding car parking space. Even the car parking purchasers were also aware of such stand of defendant no. 2 before entering into such alleged transaction.

31. In my view, reliance placed by Mr. Shah, learned senior counsel on the judgment of the Supreme Court in the case of Thomson Press is of no assistance to the applicants. Said judgment on the contrary assists the plaintiffs. The facts

before the Supreme Court in that matter are totally different. The applicants had alleged to have purchased entire property which was forming subject matter of the suit, which is absent in this case.

32. Mr. Shah, learned senior counsel could not produce any documents to indicate that defendant no. 2 has created any right, title or interest in favour of the applicants in respect of the properties which are subject matter of the suit or any documents by which these nine alleged car parking purchasers have created any right, title interest in favour of the applicant in respect of the properties which are subject matter of the suit. In my view the application filed by the applicant for impleadment is thoroughly misconceived and deserves to be dismissed. Resultantly, I pass the following order:

Chamber summons is dismissed. No order as to costs.