

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

SUIT NO. 145 OF 2014

M/s. Unique Constructions and ors. ... Plaintiffs
vs.
Panoramic Universal Limited ... Defendant

Ms. Anita Castellino a/w Mr. S. M. Kazi, Advocate for the plaintiffs.

Coram : Smt. R. P. SondurBaldota, J.

Date : 20th October, 2015.

P.C. :

1. This suit is for a declaration that agreement dated 20th April, 2007 and the supplementary agreement dated 20th September, 2007 stand terminated and that the defendant does not have any right to the suit properties i.e. Flats No.101, 102 and 103 on the first floor of the building Unique Heights and one parking space mentioned in the agreements and for possession of the suit property from the defendant. The plaintiffs also seek a permanent injunction to restrain the defendant inter alia from parting with possession thereof and or creating any third party rights in respect thereof. The writ of summons has been duly served upon the defendant. It has, however, failed to appear before the Court to contest the suit. Hence, by the order dated 18th November, 2014 the Prothonotary and Senior Master transferred the suit to the list of undefended suits.

2. The plaintiffs have filed affidavit of examination-in-chief of their constituent attorney and produced all the documents relied

upon in the plaint, which are taken on record and marked exhibits 'A', 'B', 'C', 'D-1', 'D-2', 'D-3', 'D-4', 'D-5', 'E', 'F', 'G', 'H', 'I', 'I-1', 'J' and 'K' respectively.

3. The plaintiffs allege in the plaint that the suit properties had been purchased by the defendant specifically for their commercial use. At the time of the sale the plaintiffs made it clear to the defendant that the building was meant for residential use but agreed to obtain the necessary Municipal and other permissions for conversion of tenure of the premises within a period of 120 days from the date of signing of the agreement. It was further agreed between the parties that on failure of the plaintiffs to obtain the necessary permission within the stipulated period, the defendant shall be entitled to terminate the agreement at its sole discretion and recover the entire amount paid to the plaintiffs without any interest. In accordance with the agreement the plaintiffs had applied to the Municipal Authorities for conversion of the tenure. Their applications were not granted. Consequently, the plaintiffs by their letter dated 10th August, 2007 informed the defendants that they were unable to procure the necessary permissions from the Mumbai Municipal Corporation for change of the user. This led to further negotiations between the parties and supplementary agreement dated 20th September, 2007 was executed under which the last date for the conversion of tenure was extended by 90 days

from 20th August, 2007. During that period the defendant approached the plaintiff and requested for permission to carry out the interior decoration of the premises so as to make it fit for running their office therefrom. Therefore, the plaintiffs permitted the defendant to enter into Flats No.101, 102 and 103 for carrying out the interior work. Since then the defendant is in possession of the premises and using the same. The plaintiffs had made several efforts to obtain N.O.C. for commercial use of the suit premises but the efforts had failed. In the meantime, the defendant by its notice dated 13th October, 2010 called upon the plaintiffs to perform their part of the contract alleging that in the absence of the requisite certificate from Mumbai Municipal Corporation, the property taxes recovered from it were at the rate of 320% as against 112%. Then, there were further negotiations between the parties and the period for obtaining permission for change of user was extended by 90 days from 29th October, 2010. Again, the plaintiffs failed to obtain the necessary permissions. Therefore the defendant filed a suit for specific performance of the obligations of the plaintiffs under the agreement. That suit is pending for hearing.

4. The plaintiffs contend that they had made utmost efforts to obtain change of the user of the suit premises from residential to commercial. When, despite their efforts they were unable to obtain the permission, they decided to put an end to the agreement by

returning the entire amount of consideration to the defendant. Therefore, by the notice dated 31st May, 2013 they terminated both the agreements and called upon the defendant to hand over the possession of the premises by accepting the amount of consideration paid by them. The plaintiffs contend that the term in the agreement for change of user of the premises from residential to commercial being not within their power, is incapable of performance and as such, the agreements are liable to be terminated. The plaintiffs also allege that the possession of the suit premises by the defendant is illegal, since, the defendant has neither paid the entire consideration under the agreements nor had been handed over possession of the premises under the agreements. Therefore, they filed the suit herein on 7th October, 2013.

5. The affidavit of examination-in-chief of the plaintiffs being incontroverted must be accepted. That coupled with the documentary evidence produced by the plaintiffs completely establishes their claim in the suit. At para 24 of the examination-in-chief, the plaintiffs have expressed their willingness to refund the entire amount of consideration received under the agreements to the defendant upon handing over of the possession of the suit property. Therefore, the suit is decreed in terms of prayer clause (a), (b), (c) and (g).