

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

NOTICE OF MOTION (L) NO.2163 OF 2015
IN
SUIT (L) NO.764 OF 2015

M/s. Bhilosa Industries Pvt. Ltd.	...	Applicant / Plaintiff
Vs.		
Kamanwala Housing Construction Ltd.	...	Defendant

Mr. P N Modi, Sr. Adv. a/w. Mr. Neville Laskkari, Counsel, i/b. Narayanan & Narayanan for plaintiff.
Chirag Balsara, Adv. a/w. Nishit Dhruka, Adv. a/w. Prakash Shinde, Adv. a/w. Ms. Khushbu Chhajed, Adv. i/b. MDP & Partners for defendant.

CORAM : MRS. ROSHAN DALVI, J.
DATE : 21st August, 2015.

P.C. :

1. The parties entered into an agreement on 26th December, 2007 for sale of Gala No.501 B on the 5th Floor of building Pinnacle Corporation Park admeasuring 3640 sq.ft. of carpet area inclusive of toilet, niches, electrical room, AHU etc. demarcated by red colour hatched lines on the plan annexed thereto. The plan shows the rectangular portion of gala which includes the toilet as also a duct portion. It does not show the niche area which was included in the description.

2. The consideration under the agreement was Rs.11.20 Cr. out of which the plaintiff paid Rs.5.60 Cr and had to pay Rs.5.60 Cr on completion of the building and handing over possession of the suit premises. The plaintiff also would have to pay Rs.7,00,251/- at the time of receiving the possession. Such possession would have to be

handed over as per the provisions of the Maharashtra Ownership of Flats Act, 1963 (MOFA).

3. The agreement provided for various other contingencies of delay by both the parties and liability to pay interest by both of them with which we are not concerned in this Notice of Motion.

4. The plaintiff contends that the gala which has been constructed has far lesser area and hence defendant has completely breached the agreement despite payment of 50% consideration amount at the time of the execution of the agreement itself. The plaintiff contends that Rs.5.60 Cr. has remained with the defendant since last about 8 years but the premises which was to be given on or before 30th November, 2008 has yet not been given.

5. The defendant has contended that the niche area which was included in the agreement area was at that time not regularised and hence may not have been shown in the plan. However, it has later been regularised and is consequently now shown in the plan and would form a part of the suit premises as per the agreement between the parties.

6. The parties have actually measured the premises which is constructed and of which the possession is offered by the defendant. The premises is called office premises admeasuring 2284 Sq. ft., the niche area which is regularised is 415 Sq. ft., a toilet which is included is 67 Sq. ft., the duct 105 Sq. ft. and the balcony which falls between niche and office is 699 Sq. ft in area.

7. The total of these comes to 3570 Sq. ft. instead of 3640 Sq.ft. in area. It falls short by 70 Sq. ft. of area.

8. The defendant has sought to create certain third party rights. He has accepted Rs.1 Cr. from out of total consideration of Rs.9.80 Cr. A copy of the agreement is produced. The agreement is not seen to be bonafide. The agreement with the plaintiff executed 8 years before shows total consideration of Rs.11.20 Cr. Hence later agreement showing the total consideration of Rs.9.80 Cr is not acceptable as a genuine sale transaction.

9. However the defendant has offered possession of the suit premises since it has been constructed.

10. The plaintiff does not desire to take possession on the ground that the building completion certificate is not obtained and hence under Section 3(1) (i) of MOFA the possession can neither be given by the defendant nor accepted by the plaintiff. It is contended on behalf of the defendant that since the suit property is developed under SRA project the provision would not apply.

11. Nevertheless the plaintiff demands the grant of injunction. If the plaintiff has to be granted any injunction against transfer or alienation of the suit property the plaintiff must show its readiness and willingness to perform the contract as per its terms. The plaintiff must, therefore, pay the defendant or deposit in Court Rs.5.60 Cr. plus Rs.7,00,251/-. The plaintiff would be entitled to take possession of the suit premises offered to the plaintiff upon making payment of the balance consideration and other charges payable by the plaintiff

and subject to and without prejudice to any claim with regard to the interest for delayed possession as also his defence to the interest claimed by the defendant.

12. Hence the following order :

1. The plaintiff has tendered a demand draft for Rs.5,67,00,251/- to Court. There shall be an order of injunction against the defendant from transferring, alienating or creating any third party rights or parting with possession the suit premises being Gala No.501 B in the aforesaid building.
2. The defendant shall be entitled to withdraw the said amount upon giving a bank guarantee of any nationalised bank to the extent of the said amount within 4 weeks from today. The bank guarantee shall continue to be given pending the suit. If the bank guarantee is not given within 4 weeks from today the amount of Rs.5,67,00,251/- shall be invested in any nationalised bank pending the suit.
3. Notice of Motion is disposed of accordingly.
4. The defendant shall file written statement within 30 days.
5. Suit to be on board on 7th October, 2015.

(ROSHAN DALVI, J.)