

SHEPHALI

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION (L) NO. 3440 OF 2016
IN
SUIT (L) NO. 1090 OF 2016

Ramaswamy Krishnan ...Plaintiff
Versus
Jintendra Ramesh Jain & Ors ...Defendants

Mr Sham V Walve, *for the Applicant/Plaintiff.*
Mr Bipin Joshi, *a/w Mr Prayag Joshi , for the Defendants Nos. 1 to 3 ,*
5 and 7.

CORAM: G.S. PATEL, J
DATED: 27th January 2017

PC:-

1. The Suit purports to be for specific performance of two flat purchase agreements of Flat No. 1803 (1475 sq. ft saleable area) and Flat No. 1703 (of about the same area) and two car parking spaces in a project that was to be developed by the Defendants as a Slum Rehabilitation Project. This was to be called Kamala Grandeur at Mulund (West).

2. There is no dispute that the parties did enter into these flat purchase agreements. These agreements required the Plaintiff to make a down payment. The purchase price of each flat was Rs

85,55,000/-, and for each flat the down payment was Rs 21,38,750. This made a total contribution of Rs. 42,77,500/- for both flats.

3. It is even today the Plaintiff's own case that some time prior to July 2016 it received a return or refund in the amount of Rs 15,00,000/-. The present Suit was filed on 3rd December 2016. The Plaintiff then received an amount of Rs 40 lakhs on 5th December 2016, i.e., immediately after the filing the Suit, making a total compensation or repayment to the Plaintiff of Rs 55,00,000/-. This is not disputed by the Plaintiff at all. There is an additional Affidavit dated 8th December 2016 in the Suit which says so. A photocopy of the Pay Order/Demand Draft in the amount of Rs 40 Lakhs drawn at Axis Bank is in fact annexed to this Affidavit.

4. What the Plaintiff now claims is that there was an 'oral understanding' between July and October 2016 between the Plaintiff and the Defendants, by which the Defendants would pay to the Plaintiff as compensation an amount of Rs 1.5 crores for cancellation the two flat purchase agreements. Of this, Rs 55,00,000/- is claimed to have been paid in part performance.

5. The Notice of Motion, however, proceeds on the basis that the two flat purchase agreements are still valid, subsisting and binding and, therefore, seeks orders of disclosure as also the appointment of Court Receiver, injunctions and an order against the Defendants to deposit their passports in this Court.

6. The Notice of Motion and possibly the Suit itself are entirely misconceived. This is no longer a Suit for specific performance of the *flat purchase agreements*. That cannot be Plaintiff's claim. The Plaintiff's cause of action is for specific performance of the alleged oral agreement to receive compensation of Rs 1.5 Crores *for the cancellation* of the two flat purchase agreements. There is no cause of action that can be maintained on the two flat purchase agreements.

7. It is strenuously canvassed before me that there is an alternative prayer for damages. The submission is also thoroughly misconceived. Damages are granted in lieu of specific performance. In other words, the Court must find that the Plaintiff is entitled to specific performance, but that a decree of specific performance cannot for some reason be granted; it is in those circumstances that compensation or damages are awarded. That is a very different thing from suing on an a entirely different agreement such as the one that is apparently now pleaded, i.e., an oral agreement in regard to compensation for cancellation of the two previous flat purchase agreements. *Prima facie* it seems that since no suit is filed on the so-called oral agreement and, in any case, that would be a pure money claim, this Notice of Motion is being pressed into service claiming the flat purchase agreements to be alive but actually using that to compel performance of a wholly different oral agreement.

8. It is not possible to grant any relief on this Notice of Motion. The Notice of Motion is dismissed.

9. There will be no order as to costs.
10. The Suit to come up in the ordinary course for directions.

(G. S. PATEL, J.)