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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
SUMMONS FOR JUDGMENT NO. 2 OF 2019
IN
COMM SUMMARY SUIT NO. 744 OF 2018**

Pheroze Hormusji Kudianavala	...Plaintiff
<i>Versus</i>	
Satish Beharilal Raheja	...Defendant

Mr Zal Andhyarujina, *with Jahan Dastoor and Murtaza Somjee, i/b Jerome Merchant and Partners, for the Plaintiff.*

Mr Virag Tulzapurkar, Senior Advocate, *with Ms Upasana Vashu and Mr Pradeep Bakrhu, i/b Wadia Ghandy and Co, for the Defendant.*

CORAM: G.S. PATEL, J
DATED: 22nd April 2019

PC:-

1. The Plaintiff has filed this commercial division summary suit under Order 37 of the Code of Civil Procedure 1908 to recover Rs.7.50 crores and interest (Rs.4.05 crores) at 18% per annum.

2. The Writ of Summons and a copy of the Plaint having been served, the sole Defendant entered appearance. The Plaintiff then

filed this Summons for Judgment to which there is a Reply and a Rejoinder.

3. The Plaintiff, Kudianavala, is an architect. He entered into an agreement with the Defendant, Raheja, on 27th June 2012. This is called a Memorandum of Agreed Terms and referred through out this proceeding as the MOAT. Kudianavala lived at Juhu. The MOAT was in respect of an amalgamated plot of land of about 3329.2 square meters in Juhu. The agreement sets out the manner in which Kudianavala claimed to have acquired title to this land. Raheja agreed to buy the property in question for a total of Rs.50 crores. None of this is disputed. The only dispute is about the performance by Kudianavala of clause 6 at pages 29 and 30. This clause says that Kudianavala believed, being an architect, that the plot had additional development potential of 316.98 square meters at a defined location. He says he had reserved to himself in an earlier legal document the right to develop or construct here. These rights were part of the property sold to Raheja. However both agreed that if by 31st March 2016 — and no later — either party obtained from the MCGM (in the name of either party) sanctioned building plans for additional construction at this location with the necessary Intimation of Disapproval or IOD and Commencement Certificate, then Raheja would pay Kudianavala an additional amount of Rs.7.50 crores. If the additional construction was sanctioned for less than 316.98 square meters, there would be a proportionate reduction in this additional consideration.

4. Kudianavala says he obtained such a permission and that he had sanctioned plans, an IOD and a CC issued by the MCGM

between July 2014 and April 2015. There are some documents annexed at pages 140, 150 and 154 in this regard.

5. Mr Andhyarujina for Kudianavala says that these sanctions have been renewed periodically thereafter. Therefore there is a completely fulfilment of clause 6, entitling Kudianavala to a decree in the full amount of Rs. 7.50 crores and interest.

6. The answer from Mr Tulzapurkar for Raheja is, of course, that all is not as it seems; indeed, nothing is as Kudianavala would make it seem. After Kudianavala's Advocates wrote to Raheja's Advocate in April 2015 saying that the permission was in hand, Raheja's lawyer replied asking for the necessary documents. This correspondence went on for some time. What is immediately relevant is the letter dated 1st April 2016 (page 197), exactly one day after the clause 6 mandated deadline, from the MCGM. This says that Kudianavala's plan, the very one that he claimed to have got in fulfilment of his obligation of clause 6, contravened the Development Control Rules of 1967. He was requested to submit amended plans and to delete the benefit he had taken of a layout road. This communication is said to be pursuant to a complaint filed by one Ashwin Damania. He is Raheja's constituted attorney and it is he who has filed the Affidavit in Reply. That Raheja was similarly in correspondence even prior to that date with the MCGM is not in doubt. There are letters of February 2016 from Raheja clearly pointing out that Kudianavala's representations to the MCGM of available or permissible buildability were non-compliant, and I am using as neutral phraseology as possible.

7. On 16th May 2018 (page 198) the MCGM wrote to Damania saying that Kudianavala had been requested to submit amended plans. There followed letters from Kudianavala to the MCGM, in which he argued that his plans were consonant with all statutes, rules and norms. In particular, he said that a certain right of way had become legally available for utilisation as part of available Floor Space Index or FSI and was not therefore to be computed as an internal layout road. The details of this correspondence are not material, for it is clear that this is where matters have rested without further resolution, i.e. without Kudianavala submitting amended plans. On the contrary, there are at least two letters from the MCGM of 4th September 2016 at page 207 and again at page 221 of 11th September 2017 saying that Kudianavala's representations and contentions were found by the MCGM to be unjustified and unacceptable.

8. Mr Andhyarujina has laboured long and hard to persuade me that in law this is not the way the MCGM should go about its business of invalidating plans or calling for information. But that is not my concern in a summary suit and it cannot be. If Kudianavala was aggrieved by MCGM's action, his remedies lay elsewhere, not in this summary suit to which MCGM is not, and cannot be, a party. What is without doubt is that on 16th January 2018 Kudianavala wrote to both the Municipal Commissioner and to the Chief Secretary of the Government of Maharashtra seeking their intervention, but accepting that the MCGM actions had rendered the CC issued to him invalid. Of course he says this is illegal, ultra vires and so on, but the fact is that there is according to

Kudianavala's own letter already action by the MCGM that will not permit Raheja to use these plans for any further construction.

9. I do not think there is any merit in Mr Andhyarujina saying that Kudianavala's only obligation was to get some sort of plan passed and an IOD issued; that would amount to saying that Kudianavala carried no obligation to ensure that the IOD, CC and sanctioned plans were in conformity with law. Mr Andhyarujina does not, rightly, go quite that far, but falls back instead on a plea that the plans are indeed valid; and, second, that if they are not, then the MCGM has not followed the proper procedure for their invalidation or cancellation. That is not something I can examine in a Summons for Judgment. Further, Kudianavala's obligation in clause 6 is clear. It was not a test of his skill of persuasion. The entire clause is founded on Kudianavala's assertion that he believed there was additional buildability available. This was not agreed, and so Kudianavala was, in a sense, to run the gauntlet, with handsome reward should be succeed. His assertion was not enough. He had to do more. He had to get a valid plan, IOD and CC. Obviously, those had to be fully compliant and without objection. In every such case there are many considerations — the size of the plot, its location, general development restrictions, other restrictions placed by statutory rules such as the Coastal Zone Regulation or CRZ, available benefits and factors to be included. Once the MCGM itself pointed out, and with specific reference to one particular benefit, that what Kudianavala claimed was impermissible, then it cannot fairly be said that Kudianavala had done all he needed to do under clause 6. At the very least, there is ambivalence about the claimed right of way, and whether or not it is an internal layout road.

Kudianavala's own representation to the MCGM asserts a complex bundle of historical facts — what existed and where on the plot, and how this was affected by changing law. Therefore, merely saying there is a sanctioned plan, IOD and CC is not enough. Fairly read, clause 6 required these to be valid and without objection, that is to say such that Raheja could use them to develop further without hindrance.

10. It is not possible to say that there is no plausible or probable defence disclosed. It is not possible to hold that there is no merit in what Raheja says. The essence of the transaction is the validity of the sanction for additional construction. If this is in doubt the fundamental basis of the Complaint is in doubt.

11. The Summons for Judgment is dismissed. The Defendant is granted unconditional leave to defend. The written statement will be filed and served within the time permitted by the Commercial Courts Act, time being computed from today. List the matter for framing issues two weeks after the written statement is filed and served.

(G. S. PATEL, J)