IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

SUMMONS FOR JUDGMENT NO. 46 OF 2018
IN
COMMERCIAL SUMMARY SUIT NO. 583 OF 2017

WITH
NOTICE OF MOTION NO. 1039 OF 2018
IN
COMMERCIAL SUMMARY SUIT NO. 583 OF 2017

Nilesh Mulji Dodhia & Ors. ... Plaintiffs
Versus
Welvan Securities Pvt. Ltd. ... Defendant

Mr. Pravin Kumar Pillay for the Plaintiffs.
Ms. Ankita Singhania i/b Ashok Dhanuka for the Defendant.

CORAM : R.I. CHAGLA, J.

DATED : 27th SEPTEMBER, 2019.

P.C. :

1 This Summons for Judgment has been taken out in the Commercial Summary Suit which claims an amount of Rs.8,79,04,590/- as payable by the Defendant Company to the Plaintiffs. The Plaintiffs have referred to an alleged allotment letter which reads as receipt dated 23.04.2015 for a sum of Rs.1,98,00,000/- paid by the Plaintiffs to the

Defendant Company in support of their contention that the commercial premises had been allotted to the Plaintiffs by the Defendant Company for the said consideration of Rs.1,98,00,000/-. The receipt has been signed by only one of the Directors of the Defendant Company, Shri Tulsidas Khimji Patel, as developer. It is an admitted fact that there are three other Directors of the Defendant Company. The Plaintiffs have also relied upon the correspondence addressed with the Defendant Company by which the Plaintiffs had adverted to the facts including the Plaintiffs' claim for execution and registration of agreement for sale with the Defendant Company in respect of commercial premises situated on 9^{th} floor bearing Nos.903 and 904 in the building known as "Parth I.T. Park" situated at Plot No.86-A, Sector 15 C.B.D. Belapur, Navi Mumbai- 400 614 (the said premises) which they claim was allotted to them.

2 The Plaintiffs have relied upon a certain payment having been made by the Defendant Company to one of the Plaintiffs for a sum of Rs.11,00,000/-vide cheque dated 05.08.2016 and which they claim was by way of part re-payment of the sum of Rs.1,98,00,000/- which had been paid towards purchase of the said premises. It is to be noted that in the receipt dated 23.04.2015 which the Plaintiffs claims to be an allotment of the commercial premises, it is stated that "Possession of the above said commercial premises was to be given on 30.04.2014". The Plaintiffs have

claimed that the Defendant after having issued the receipt/allotment dated 23.04.2015 sought to evade the execution of an agreement for sale in respect of the said premises by alleging that the said Shri Tulsidas Khimji Patel and his brother had in collusion with the Plaintiffs and to take the Defendant Company for a ride received certain cheques from the Plaintiffs in a clandestine manner and deposited the same in the account of Defendant Company and kept this hidden from the Defendant Company. The Plaintiffs have referred to a letter addressed by the Defendant Company's Advocate dated 26.04.2017 whereby the Defendant Company had offered to refund the sum of Rs.1,98,00,000/- which according to the Defendant Company was only because the said sum had been credited in the account of the Defendant Company. The Defendant Company in the said letter had denied that any further sums were due and payable to the Plaintiffs. The Plaintiffs had accepted the said sum of Rs.1,98,00,000/- subject to the right to claim the balance amount of Rs.8,79,04,590/- which was the alleged balance payable to the Plaintiffs being the ready reckoner value of the said premises which it had not been transferred to the Plaintiffs. The said sum of Rs.1,98,04,590/- has, in the undated letter addressed by the Plaintiffs to the Advocates of the Defendant Company, been stated to be accepted without prejudice to their claim. By a letter dated 15.05.2017 addressed by the Advocate of the Defendant Company to the Plaintiffs' Advocate, the cheques of Rs.1,98,00,000/- were enclosed and it is stated in the said letter that with the delivery of the accompanying cheques to the Plaintiffs, the Plaintiffs shall not have any justifiable claim/ demand against the Defendant Company. The Plaintiffs have accordingly filed this Commercial Summary Suit and taken out this Summons for Judgment.

3 The learned Counsel for the Plaintiffs has stated that the deponent of the affidavit-in-reply in which the defence to the Summons for Judgment is raised has no authority to act in his individual capacity by representing the Defendant Company. This is made clear from the minutes of the meeting of the board of directors of the Defendant Company held on 10.10.2005 in which it was resolved that the deponent of the affidavit-in-reply Shri Anilkumar Khaitan could only take steps in the pending legal proceedings jointly with Shri Tulsidas Khimji Patel and/or Shri Harilal K. Sanghani. He has accordingly submitted that the affidavit-in-reply ought not to be considered by this Court having been affirmed by the deponent who had no authority to individually represent the Defendant Company in defending the Summons for Judgment. He has thus submitted that the Plaintiffs are entitled to claim the said sum of Rs.8,79,04,590/- which together with the sum of Rs.1,98,00,000/- is the approved value (ready reckoner value) of the said premises in the year 2016-2017 for which the

claim has been made. He has accordingly submitted that the Summons for Judgment taken out, be made absolute.

4 The learned Counsel for the Defendant has raised various defences to the Summons for Judgment. She has raised the issue of the summary Suit as well as the Summons for Judgment being barred by limitation. This on account of the sum of Rs.1,98,00,000/- having been paid in the year 2009-2010 for purchase of the said premises and for which the Suit was filed on 27.04.2017, for re-payment in terms of the alleged value of the said premises. The summary Suit got registered on 08.08.2017 and the Summons for Judgment for appearance was issued on the Defendant only on 14.08.2017 and came to be served on the Defendant only on 24.08.2017, i.e. four months after the filing of the Suit. The Summons for Judgment has sought payment of the sum of Rs.8,79,04,590/- which in paragraph 23 of the affidavit in support of the Summons for Judgment is stated to be payable in the shares of each of the seven Plaintiffs as it is alleged that they had paid their respective share of the sale price of the said premises. She has stated that despite separate sum claimed by each of the Plaintiffs, the Plaintiffs have together filed one Summary Suit. Thereby paying one Court fee. She has submitted that the Plaintiffs ought to have filed separate Summary Suits for the separate claims for the sums due to them. She has submitted that this is well

settled in several decisions of this Court and hence the present Summary Suit and Summons for Judgment filed ought to be rejected on this ground.

5 The learned Counsel for the Defendant Company has further submitted that there being a satisfaction on the part of the Plaintiffs by accepting re-payment of the sum of Rs.1,98,00,000/- by the Defendant Company which was the only sum paid by the Plaintiffs and although having stated that this has been accepted without prejudice to their rights and contentions, the acceptance of re-payment of the said sum should be treated as an acceptance with prejudice. She has submitted that the sum now claimed by way of Summary Suit i.e. the sum of Rs.8,79,04,590/- is as and by way of damages and is clearly an unascertained sum of money which the Plaintiffs claimed is based on the ready reckoner value in 2016-2017 of the said premises. She has submitted that the Summons for Judgment filed cannot be taken out for a claim for damages which would necessarily require a trial in order to prove that the Plaintiffs have suffered loss and/or are entitled to claim for damages. She has submitted that although the alleged allotment letter dated 23.04.2015 was executed by Shri Tulsidas Khimji Patel (Developer), the Plaintiffs have joined the Defendant Company and thus, the Suit suffers from non-joinder of necessary parties. She has submitted in any event the said Shri Tulsidas Khimji Patel could not have issued the alleged allotment letter dated

23.04.2015 by accepting payment of Rs.1,98,00,000/- and stating that possession of the said premises is to be given to the Plaintiffs. She has relied upon the authority for signing documents which had also been relied upon by the Plaintiffs and which forms part of the minutes of the meeting of board of directors of the Defendant Company held on 10.10.2005 wherein it is clearly stated that Shri Tulsidas Khimji Patel on his own cannot act in issuing allotment letters in respect of the flats which are to be allotted to respected purchaser. The authority being to act jointly with Shri Anilkumar Khaitan and/or Shreegopal J. Barasia. She has submitted that the Board of Directors of the Defendant Company in so conferring authority to act jointly were conscious of the fact that it is Shri Anilkumar Khaitan who as developer had mainly contributed towards the development of the property in which allotment the said premises is claimed. Shri Tulsidas Khimji Patel had made little or no contribution in respect of the development of the property. She has submitted that the said Shri Tulsidas Khimji Patel and his brother Shri Harilal Khimji Senghani who are directors of the Defendant Company do not hold a single share in the Defendant Company and have no authority to bind the Company in their individual capacity.

6 The learned Counsel for the Defendant has also stated that there are several disputed questions of facts which necessary require trial.

She has submitted that the conduct of the Plaintiffs is also something which this Court should consider. She has submitted that the Plaintiffs Advocate had addressed letter dated 05.02.2016 stating their case which was responded to by the Defendant Advocate's letter on 12.02.2016 stating that the said Tulsidas Khimji Patel was not authorized by the Defendant Company to enter into any such alleged allotment letter in respect of the said premises. Thereafter, the Plaintiffs and Defendant have addressed further correspondence. On 26.04.2017, the Defendant Company addressed a letter offering to return the said sum of Rs.1,98,00,000/- as the said sum was credited in the accounts of the Defendant Company. This was responded to by an undated letter whereby the Plaintiffs agreed to accept the cheques for the sum of Rs.1,98,00,000/- but stated that their acceptance to be without prejudice to their claim and, thereafter, encashed the cheque on 15.05.2017. It was only on 14.08.2017 that the Summons for Judgment was taken out by the Plaintiffs and served on the Defendant Company on 24.08.2017. Having accepted the cheques for the sum of Rs.1,98,00,000/-, the Plaintiffs cannot now claim any further sums are due from the Defendant Company. She has submitted that this further claim made by the Plaintiffs is nothing but damages which would require trial and hence the Defendant should be granted unconditional leave to defend the Suit.

7 Having considered the rival submissions, in my view the claim in the present Commercial Summary Suit is clearly a claim for damages and not a suit for an ascertained sum of money. The Plaintiffs had paid a sum of Rs.1,98,00,000/- in the year 2009-2010 and despite making such payment, the receipt for such payment was issued only on 23.04.2015 and that too by one of the directors of the Defendant Company Shri Tulsidas Khimji Patel. It is clear from the authority for signing documents in the minutes of meeting of the board of directors held on 10.10.2005 that Shri Tulsidas Khimji Patel could not act in his sole capacity but had to act jointly with Shri Anilkumar Khaitan and/or Shreegopal J. Barasia in signing the allotment letters in respect of the flats allotted to the respective purchasers. The said sum of Rs.1,98,00,000/- being the only sum paid by the Plaintiffs was thereafter repaid by the Defendant Company.

8 I do not find any merit in the preliminary objection of the Plaintiffs to the affidavit-in-reply being considered on the ground that the deponent not having the authority to individually represent the Defendant Company. This objection is raised for the first time during arguments. There is nothing on record to show any bar to the deponent of the said affidavit affirming the said affidavit-in-reply on behalf of the Defendant Company and/or lack of authority thereof.

9 The learned Counsel for the Defendant has raised the issue of the Summons for Judgment being barred by limitation in the event this Court considers the Commercial Summary Suit as a claim for repayment of moneys. The payment having been made in 2009-2010, the Suit was filed only on 27.04.2017 and hence there appears to be some merit in the contention. This issue would certainly be a mixed question of fact and law and would require a trial. The other submission of the learned Counsel for the Defendant Company is that in any event the Summons for Judgment is misconceived as it claims moneys payable to the Plaintiffs, despite the Plaintiffs having only paid the sum of Rs.1,98,00,000/- which admittedly had been repaid to the Plaintiffs by the Defendant in accord and satisfaction of the Plaintiffs claim. This submission is required to be accepted as it is an admitted position that the sum of Rs.1,98,00,000/- was the only sum paid by the Plaintiffs which had been repaid by the Defendant Company and accepted by the Plaintiffs.

10 The claim now made by the Plaintiffs in the Summary Suit and for which the Summons for Judgment is taken out being a sum of Rs.8,79,04,590/- can only be relatable to a claim for damages. This claim will require to be proved by the Plaintiffs in a trial in the Suit by the

Plaintiffs proving that they had suffered loss by non-transfer of the said premises, the value of which they have sought. It is also necessary to note that there is no agreement for sale which had been entered into between the parties although the Plaintiffs had through the correspondence sought for execution of the agreement for sale and for the Plaintiffs to be made members of the Society.

11 Another defence taken by the learned Counsel for the Defendant Company is that the Suit suffers from non-joinder of necessary parties. There appears to be prima facie some merit in this contention as the alleged allotment letter is executed by Shri Tulsidas Khimji Patel and the Plaintiffs have placed reliance upon the alleged allotment letter dated 23.04.2015 in support of their claim and hence, it would appear that he would be a necessary party. Further, in my prima facie view, the learned Counsel for the Defendant appears to be correct in her contention that the Plaintiffs having alleged that they made separate payments towards the alleged purchase of the said premises could not have filed one commercial Summary Suit for re-payment thereof and/or pay one Court fee. This would also necessarily have to be considered in the Suit.

12 In view of the above findings, the Summons for Judgment has no merit and is dismissed with no order as to costs.

13 The Defendant Company is permitted to file its written statement to the plaint which shall be filed within a period of six weeks from the date of uploading of this order.

14 Accordingly, the Suit shall thereafter be placed for necessary directions on 21.11.2019.

15 The Notice of Motion taken out by the Defendant under order XXXVII Rule 11 of the C.P.C. be placed on 07.11.2019.

(R.I. CHAGLA, J.)