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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
SUMMONS FOR JUDGMENT NO. 77 OF 2018
IN
COMMERCIAL SUMMARY SUIT NO. 640 OF 2018

Jitndra Chunnilal Jain & Ors …Plaintiffs
Versus
Niam Infra Pvt Ltd & Ors …Defendants

Mr Sharan Jagtiani, *with Ms Surabhi Agrawal, Ms Nita Solanki & Mr Ish Jain, i/b Kiran Jain &y Co, for the Plaintiffs.*
Mr Rahul Narichania, Senior Advocate, *with Mr P Ranjan, i/b Halai & Co, for Defendants Nos. 1 & 3.*

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

PC:-

1. There are 30 Plaintiffs. They filed this commercial division summary suit under Order 37 of the Code of Civil Procedure, 1908 together, each seeking a distinct decree jointly and severally against the Defendants. For each Plaintiff there is a separate set of particulars of claim.

2. The Writ of Summons and a copy of the Plaint having been served, the Defendants entered appearance. The Plaintiffs then filed the present Summons for Judgment to which there is a Reply and a Rejoinder.

3. The Plaintiffs are all either businessmen, in service or home makers. They say that Defendants Nos. 2 and 3 are directors of the 1st Defendant. There is a question raised by Mr Narichania in opposition as to the liability of Defendants Nos. 2 and 3, but I will turn to that separately.

4. The Plaint proceeds on the basis that in 2013, the Plaintiffs through estate agents engaged by the 1st Defendant, some persons named Acharya and Thakkar, came across brochures, pamphlets and other publicity material in which the 1st Defendant claimed that it was developing a property on a plot in Bhuleshwar. There was a chawl on that plot. This was to be demolished. The usual permissions were to be obtained. The Plaintiffs claim they were told that the necessary permissions were already under processing or were in hand. The brokers arranged meetings with Defendants Nos. 2 and 3 as also with other brokers. According to the Plaintiffs they acted on these representation, and in the aggregate paid to the Defendants an amount of Rs.10,78,10,600/- towards booking different flats in the Bhuleshwar re-development. Different Plaintiffs paid different amounts at different times. Details are set out in paragraph 6 of the Plaint. It seems that the 1st Plaintiff made payments between April and August 2013. Plaintiffs Nos. 2 and 3 made payments between 2013 and 2014. Plaintiffs Nos. 4, 5 and 6 made some payments in 2015 with previous payments having been made two years earlier. This carries on in regard to all the Plaintiffs.

5. These dates are important because one of the principal defences taken is of limitation. The suit itself was filed on 21st December 2017. There seems to be no dispute that there have been other proceeding in other forums against the Defendants including criminal proceedings. There seems to be also very little doubt that nothing at all has happened towards completion of the project, or that the Plaintiffs were indeed promised flats in the project.

6. Mr Narichania for the Defendants focuses his attention on the question of limitation and submits that merely by clubbing several Plaintiffs together, claims that are otherwise time-barred cannot be saved. According to him, on any fair reading, the Plaint itself will show that there is no saving of limitation for most of the Plaintiffs. He draws attention, for instance, to some of the documents annexed to the Plaint itself at Exhibit "A" to say that this is limited to the 1st Defendant and will not benefit the other Defendants. Similarly Exhibit "AA" at page 185 is a letter that is addressed by the 1st Defendant to three parties, the Vyas family, also said to be purchasers but who are not party plaintiffs. This letter is of 16th June 2016. There is a another letter, to the Vyas Family and 1st Plaintiff together, at Exhibit "BB" at page 186. According to Mr Narichania there is no question of the claim of the other Plaintiffs being thus saved suit having been filed in December 2017.

7. The Defendants do not deny having received the Plaintiffs' money. They do not deny that it was towards purchase of flats in the 1st Defendant's Bhuleshwar project. They do not deny that the building was not completed — not even begun, I am told — and that not a single purchaser has received possession. The only question is whether limitation can be said to have been saved; or, perhaps more accurately, when can it be fairly said that time began to run for the Plaintiffs? The Plaint itself says that the Defendants promised delivery and possession of the flats in December 2016. In paragraph 3 at page 10 there is a specific assertion that the promise was to deliver possession by December 2016. Therefore, in paragraph 27, the Plaintiffs say their suit is not time-barred. They also say that they were continually assured of possession until 2015, and that their claim is today based on an enactment namely the Maharashtra Ownership of Flats Act for enforcement of their statutory rights.

8. Thus, what we have today is no denial at all by the Defendants of having received these funds; no denial at all by the Defendants that these funds were received as consideration towards sale of flats promised in a new redevelopment; and a defence that the repayment of these amounts is barred by limitation. The matter does not remain merely on the Plaintiffs' assertions as to limitation. For, when Mr Narichania points to correspondence by the 1st Defendant annexed to the Plaint to say this is not addressed to any Plaintiffs other than the 1st Plaintiff, or that it is addressed to other purchasers, he overlooks the contents of what those letters from the 1st Defendant actually say. The letters are not only about responsibilities or liabilities to individuals; of course they are. But they also contain important admissions by the 1st Defendant that the Defendants took purchasers' money but did not fulfil their obligations. This is an admission of a failure to complete the transaction. Two documents put this argument completely beyond the scope of all controversy. Exhibit "DD" at page 188 is a letter of

21st June 2016 by the 1st Defendant to the Joint Commissioner of Police, Economic Offences Wing. It is true that it mentions the 1st Plaintiff but that is not all that it does. It says in terms that he, the 1st Plaintiff, was assured of delivery of the property by end-2015 — and then admits that the 1st Defendant could not fulfil that promise. That promise remained unfulfilled not only for the 1st Plaintiff but for all Defendants simply because nothing was built. The next document Exhibit "EE" at page 189 is a similar letter of 21st June 2016 by the 1st Defendant in reference to another purchaser, not a party plaintiff, the family Vyas. It contains an admission that the 1st Defendant could not fulfil its promise but, more importantly, that the delivery of the flats was to be made by end-2015. Leaving aside any question of admission of liability, this statement and date is sufficient to provide a starting point for limitation and that is all that we need. If the 1st Defendant itself says that it was to fulfil its obligations by end 2015, then it is reasonable to hold that the cause of action first accrued to every single Plaintiff on and after that date and not on some earlier date, and most certainly not on the date when the Plaintiffs made their respective payments. Indeed this is the other difficulty with Mr Narichania's arguments. Every single one of the Plaintiffs paid in different tranches over a period of time. In any flat purchase agreement, the payment of an individual component cannot itself always furnish the starting point of limitation. What must be reckoned is the time when that contract was to be performed and that date on which the defendants failed to perform that contract. A party may well pay several months or years in advance of the promised date of possession. Time cannot run from the date of payment.

9. Beyond this, there are no defences taken whatsoever. The only other question is whether a decree can passed jointly and severally against Defendants Nos. 2 and 3. Here Mr Narichania is correct that there can be no decree against Defendants Nos. 2 and 3 since they are directors. The Plaintiffs are at liberty to take such steps as available to them in law in execution but the decree can only be passed against the 1st Defendant.

10. There is no defence disclosed. The Summons for Judgment is made absolute as against Defendant No.1. The Suit is decreed in terms of prayer clauses (a) to (w) only against the 1st Defendant, but with interest decreed only at 9% per annum and not 18% per annum from the date of the suit until payment or realization. The Summons of Judgement and the Commercial Summary Suit are disposed of in these terms against the 1st Defendant.

11. Against Defendants Nos. 2 and 3, unconditional leave to defend.

12. This being a the Suit in the Commercial Division, under amended Section 35 of the Code of Civil Procedure 1908 an order of costs will also have to be made. It is true that the Plaintiffs have came together to file the Suit but I see no reason why their costs should have to be reduced only for that account. Each of Plaintiffs will be entitled to an award of legal costs and litigation expenses against the 1st Defendant in addition or his or her own individual decree in the amount of Rs. 1 lakh. There will be no interest on the amount of costs.

13. Decree to be drawn and sealed expeditiously. Liberty to move in execution without awaiting sealing of the decree.

14. Further: leave to the Plaintiffs to amend the suit to delete the name of deceased Plaintiff No. 20 and to add the name of Gulabchand Mishrimal Jain as Plaintiff No. 20 (a). Leave also to add necessary averments in paragraph 1 and make other consequential changes in terms of the draft tendered, taken on record and marked **"A1"** for identification with today's date. A copy of the amended plaint will be served on the advocates for the Defendants. Amendment to be carried out within a week without need of reverification.

(G. S. PATEL, J)