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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
SUMMONS FOR JUDGMENT NO. 109 OF 2018
IN
COMM SUMMARY SUIT NO. 412 OF 2018**

Gawde Constructions Private Limited	...Plaintiff
<i>Versus</i>	
Starwing Developers Private Limited	...Defendant

Mr Akshay Petkar, *for the Plaintiff.*
Ms Mallika Taly, *with Mr Nikhil Varma, i/b S Mahomedbhai & Company, for the Defendant.*

CORAM: G.S. PATEL, J
DATED: 16th January 2019

PC:-

1. The claim in the summary suit is for recovery of an amount of Rs. 1,51,52,186.88/- for the value of construction services rendered by the Plaintiff contractor. The contract in question is at Exhibit “B” to the Plaint at page 28. It is dated 2nd February 2010. It contemplated the construction of a built up area of about 139507 sq ft at a rate of Rs. 275/- per sq ft. In addition there was a swimming pool to be constructed and the aggregate contract value of both parts of this contract is Rs. 3,97,15,075.00/-. At page 32 is another document of 3rd May 2010 which relates to additional work to be

done beyond the items mentioned in the scope of work of the contract at page 28. The contract itself required the raising of running account or RA bills and these were to be paid periodically. There seems to be no dispute that the Plaintiff was paid certain amounts against its RA bills.

2. The summary of the claim at page 192 has four distinct components. The fourth component is an interest calculation and I will leave that aside for the present. The third is a claim for compensation and being in the nature of damages obviously cannot be granted as a summary relief. Items 1 and 2 of this summary require explanation. Item 2 is particularised at page 195. It is an uncertified and disputed claim in the principal amount of Rs.4.50 lakhs for additions and alterations. Obviously this will have to be proved by evidence and cannot be granted as a summary relief.

3. That leaves only Item 1 of the summary and this is a claim of Rs.89,33,115.33/-. The particulars are at pages 193 to 194 and here the claim is that since one Amruta Rahate, apparently then engaged as a consultant with the Defendant and now an architect in the employ of the Defendant, allegedly 'certified' a certain area. Therefore the Plaintiff raised a 'further final bill' on the basis of that area certification of 160266 sq ft and applied to this the contractual rate of Rs.275/- per sq ft. From the aggregate figure yielded after adding service tax and deducting TDS, the Plaintiff deducted the amounts received and gave credit to the Defendant for debit notes raised by the Defendant on the Plaintiff.

4. The defence to this portion of the claim is that the area computation is itself not accepted. Ms Taly on behalf of the Defendant draws my attention to a statement at Exhibit “1” to the Affidavit in Reply. This seems to be a comparison between what the Plaintiff previously once said was square footage constructed, claiming that it had built 157148.87 sq ft. According to the Defendant, there could be no more than 133291.70 sq ft built; a figure that, according to Ms Taly, is far more consistent with the provisions of the contract as noted above than the claim made by the Plaintiff. To this, the response from the Plaintiff is that the Defendant asked the Plaintiff to do additional work on a promise of payment. The Plaintiff did so in good faith. Hence this claim. Unfortunately that positioning of the claim places it completely outside the sphere of summary relief under Order XXXVII of the Code of Civil Procedure 1908 (“CPC”). This is a question of reconciling of accounts and statements of figures including as to area, and will require proof of how much was actually built, how much area was certified as built and what portion of it, if any, remained unpaid though due.

5. The Defendant says it has paid the Plaintiff on all RA bills and nothing is due and payable. There remains the question of what, if anything, is to be made of Amruta Rahate’s e-mail forwarding calculations and it remains to be explained whether these were sent to Defendants as a certificate or confirmation of area on an as-built basis or was simply sent for verification. These are all matters of evidence. This is, therefore, not a matter however that lends itself to either a decree or a conditional decree. The best that can be done at this stage, while granting unconditional leave to defend is to put the

Defendant to some terms so as to ensure that the suit is disposed as expeditiously as possible.

6. The Summons for Judgment is dismissed. The Defendant is granted unconditional leave to defend. The Summons for Judgment is disposed of in these terms.

7. Ms Taly in fairness states that the Written Statement of the Defendant will be filed and served on or before 8th February 2019.

8. List the suit on 15th February 2019 for framing issues and further directions.

(G. S. PATEL, J)