

Ashwini

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
IN ITS COMMERCIAL APPELLATE DIVISION
COMMERCIAL APPEAL ORDER NO. 1 OF 2022
IN
NOTICE OF MOTION NO. 2231 OF 2021
IN
COMMERCIAL SUIT NO. 631 OF 2021**

One BKC Realtors Pvt Ltd	...Appellant
<i>Versus</i>	
Frost International Ltd	...Respondent

Mr Karl Tamboly, *with Monisha Mane Bhangale & Nikita Menon,*
i/b Parninam Law Associates, for the Appellant.
Mr Vishal Kanade, *with Malhar Zatakia & Sourabhi Waknis, i/b*
Aagam Doshi, for the Respondent.

**CORAM G.S. Patel &
 Gauri Godse, JJ.**
DATED: 27th July 2022

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PC:-

1. The Appellant is the property manager of a building called One BKC at Bandra Kurla Complex. The developer, Raghuleela Builders Pvt Ltd, constructed this building and entered into agreements for sale including transferring some ***Unit No.*** 709 to the Defendant. The obligation of the Defendant was to make payment

common area maintenance charges (“**CAM charges**”). The suit, by the property manager of the building, seeks recovery of these CAM charges and an order against the Defendant to regularly pay these CAM charges.

2. By the impugned order, the Trial Court directed the Defendant to pay CAM charges in future regularly. However as regards for the past dues for unit No. 709 in paragraph 6 the Trial Court said that since the Defendant had denied its liability and made part payment of Rs. 5,40,179.08/- no amount should be ordered to be deposited.

3. The principal amount due is Rs. 40,38,758/- after giving credit for the amount paid.

4. The Affidavit in Reply actually discloses no defence prima facie to the claim for the past. The Defendants say that there was a deficiency in service. What that deficiency was precisely, to what extent and for what period is unknown. No actions seems to have been taken by the Defendants to contemporaneously record the alleged deficiency in service or to seek legal redress in respect of any such alleged deficiency. It is also argued that the amount that is payable is against actuals and there is a dispute about the actuals. Again this is the defence only taken much later, i.e. in the Affidavit in Reply. Nothing is shown to us by way of contemporaneous document. The argument that this is money decree and therefore no such order can be made is unimpressive. This is not a case of seeking attachment before judgment. If the Defendant wishes to

pursue its defence, then surely it can be put to some terms at the interim stage.

5. What must be kept in mind is that the Defendant has enjoyed the benefit of all these services that are covered by CAM charges. It cannot have it both ways. It cannot enjoy those facilities and then refuse to pay for them or say that it will pay only such amount as it thinks fit. This is in fact the critical consideration at the interim or the ad-interim stage.

6. Consequently, we do not interfere with that part of the impugned order that directs the Defendant to pay monthly CAM charges regularly. As regards the other two prayers, we direct the Defendants to deposit in eight weeks with the City Civil Court Dindoshi an amount of Rs. 40,38,758/-. This will remain invested and to the credit of the Plaintiff until its final disposal. The Plaintiff will not be entitled to apply for a withdrawal of the amount having regard to the defence. All contentions in the Suit are expressly left open.

7. If the amount is not deposited, the Defendants will not be at liberty to enter a written statement. If a written statement has already been filed, it is open to the Plaintiffs to seek an order to strike out the defence for non-compliance of this order, as also to seek other remedies, including in contempt.

8. We clarify that it will always be open to Trial Court in its final decree to order a refund to the Defendant of the whole or any part

of the amount or to decree the Suit for this or any other amount and to make appropriate orders.

9. The Appeal is disposed of in these terms. There will be no order as to costs. The amount is to be deposited within a period of eight weeks.

10. *We are informed that pursuant to an order passed by the national Company law Tribunal, Mumbai Bench, all bank accounts and other assets of the Respondent are currently frozen.* We are told that on going CAM charges are paid *through* the sister concern. This is simply noted.

(Gauri Godse, J)

(G. S. Patel, J)

Note: This order is modified as per order dated 11th August 2022. The corrections are shown in bold, italics and underlined.