

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

SUIT NO.1948 OF 1983

Sociedade De Fomento Indus Pvt. Ltd. ... Plaintiff

V/s.

Tulsidas V. Patel Pvt. Ltd. & ors. ... Defendants

...

Mr.Erach Kotwal a/w. Ms.Gaurangi Poojara and Mr. O. Mohandas i/b.
M/s. Little and Co. for plaintiff.

Ms.Priyanka Kothari and Ms.Falguni Thakkar i/b. Doijode associates
for defendant nos.1 and 7.

...

CORAM : K. R. SHRIRAM, J.

DATE : 1st NOVEMBER, 2018.

P.C. :

Name : Toezer Contractor (PW-2)

Age : 53 years

Occupation : Architect

Address : 71-72 Ferena, 25, Arthur Bunder Cross Road Colaba,
Mumbai 400 005.

On S.A.

Further examination-in-chief by Mr.Erach Kotwal for plaintiff.

I say that I have affirmed an affidavit dated 22nd October 2018 in
examination-in-chief and also identify my signature.

P.C. :

1. The said affidavit is taken on record and marked as **Exhibit P2/1.**

Alongwith the said affidavit, plaintiff has filed 14 documents and serial

numbers below relate to index to the compilation of documents.

Serial Nos.1 to 14

2. Ms.Kothari for defendant nos.1 to 7 raised preliminary objections in receiving any of the documents in Court because it is her case :

- (a) These documents have not been referred to in the
 plaint.
- (b) These documents do not find mention in the affidavit
 of documents filed by plaintiff.
- (c) These documents could have been produced before in
 evidence of the first witness (PW1).
- (d) No explanation is found in the affidavit of PW2 as to
 why these documents could not have been produced
 earlier.
- (e) The attempt of plaintiff is to fill up lacuna in the
 evidence of PW1.

3. Mr.Kotwal responded and I agree with Mr.Kotwal that these are documents to support the case of plaintiff already made out by plaintiff. Plaintiff has filed the suit for specific performance and in the alternative for damages. It is plaintiff's case that defendant no.1 had agreed to sell a flat to plaintiff on 23rd floor of a building called "Kanchanjuga"

situated at Malabar Hill Division, Peddar Road, Mumbai.

4. In the written statement of defendant, defendant states that there is no flat on 23rd floor because most of the flats were either duplex or triplex and the entrance to 23rd Floor was only through the flat on 24th Floor and defendant no.1 never agreed to sell the flat on 23rd floor.

5. Mr. Kotwal states that the reason why these documents were not disclosed earlier was because plaintiff did not have these document.

6. I have perused the documents. In my view, these documents which are produced through this witness have been obtained by plaintiff, based on an application to Mumbai Municipal Corporation, Greater Bombay under Right to Information Act. These are documents filed by defendant no.1 or through it's architect. These are documents which actually belong to defendant no.1 and these documents are necessary for plaintiff to prove its case that defendant no.1 had submitted plans to have a flat on 23rd floor.

7. The reason why evidence is being recorded is to render justice to the parties and for the Court to come to a considered conclusion relying on the best evidence available before the Court. Whether these documents were filed by defendant no.1, can be dealt with in cross-

examination. These documents are, of course, absolutely necessary for plaintiff to prove its case, in view of the defence raised by defendant no.1 that it had not plan to sell a flat on 23rd floor.

8. In the circumstances, I am inclined to overrule the objections raised and receive all these documents on record which are marked as Exh.P2/2 to P2/15.

9. Registry to permit inspection of the documents by defendant nos.1 to 7 in the presence of advocate for plaintiff. If plaintiff's advocate does not remain present at the time and date fixed, Registry shall permit defendant nos.1 to 7 to take inspection in the absence of plaintiff's advocate.

10. The Commissioner already appointed to continue to record evidence in the matter on same terms and conditions and the costs to be incurred and already incurred will be costs in the suit.

11. The Commissioner to endeavor to complete recording of evidence of PW-2 by 31st December, 2018. The Commissioner to mark all documents strictly in accordance with the order. The Commissioner to fix minimum two/three dates per session for cross examination of

PW-2. If the parties do not respond promptly within 48 hours of receiving a communication from the Commissioner suggesting the subsequent dates, the Commissioner to go ahead and fix the dates convenient to the Commissioner and the parties shall make themselves available at the time and dates fixed by the Commissioner. If plaintiff or the witness does not remain present, the Commissioner should close the evidence of PW-2 as not made available for cross and if defendants do not remain present to cross examine the witness, defendants' cross examination should be treated closed as no cross. Once the dates are fixed, the Commissioner not to grant adjournment on any ground whatsoever.

12. Stand over to 4th January, 2019 for direction.

(K. R. SHRIRAM, J.)