

Shaila S. Pathak vs M/S. Oberoi Constructions Ltd. And ... on 4 June, 2014

Author: S.J. Kathawalla

Bench: S.J. Kathawalla

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 668 OF 2012

IN

SUIT NO. 641 OF 2012

Shaila S. Pathak

In the matter between:

Shaila S. Pathak ig

Vs.

M/s. Oberoi Constructions Ltd. and others

Ms. Shaila S. Pathak, Plaintiff in person.

Dr. Birendra Saraf, along with Mr. Rohan Savant, Mr. Rupesh Geet Kalyani Shukla, Ms. Bhagwati Raghani and Mr. Satyendra Kumar, instructed by

M/s. IC Legal, for Defendant No.1.

Mr. O.R. Tiwari for Defendant No.2.

Mr. Gaurav Joshi, Senior Advocate, instructed by Mr. Yogesh Adhia, Defendant No.3.

Mr. Naushad Engineer, along with Mr. Dinesh Pednekar & Mr. Malco Siganporia, instructed by M/s. Hariani & Company, for Defendant Nos. 4 and

5.

CORAM: S.J. KATHAWALLA, J.

Judgment reserved on: 21st February, 2014

Judgment pronounced on : 4th June, 2014

JUDGMENT:

1. The Plaintiff has in the present Suit inter alia sought the following declarations:

(i) That the Agreement for allotment of flat premises i.e. Flat No. 803 KPPNair 2 NMS 668 OF2012 on the 8th Floor, 'A' Wing of the building known as Oberoi Splendor, Andheri (East), Mumbai ("the suit flat") contained in the letters of allotment dated 20th September, 2006 and 8th May, 2007 (the said LOA's) addressed by Defendant No.1 to Defendant No.2 and to the Plaintiff respectively is valid and subsisting and Defendant No.1 is bound and liable to perform the same;

(ii) That the termination of the allotment of the suit flat by Defendant No. 1 vide its letter dated 8th November, 2011, is wrong, illegal, invalid, void and not binding on the Plaintiff; and

(iii) That the Agreement dated 25th November, 2011, entered into between Defendant No.1 and Defendant No.3 and the Agreement for Transfer dated 12th July, 2012, entered into between Defendant No. 3 and Defendant Nos. 4 and 5 are illegal, void, wrongful, collusive, fraudulent and liable to be cancelled.

2. In the above Notice of Motion the Plaintiff has inter alia prayed for appointment of Receiver in respect of the suit flat and also for an injunction restraining the Defendants from disposing of, alienating, encumbering or creating any third party rights in or from parting with possession of the suit flat or in the alternative in

respect of another flat of equal dimension not less than 987 sq.ft. built up area preferably in the Oberoi Splendor project.

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3. The Plaintiff, Mrs. Shaila S. Pathak, is a practicing Advocate who claims to have purchased the suit flat which was originally purchased by Defendant No.2 - Chandrika Gupta, which flat has been constructed by Defendant No.1 -

Oberoi Constructions Ltd. The husband of the Plaintiff - Santosh Pathak is an estate agent/broker and admittedly is also a Financier. Defendant No.3 claims to have purchased the flat from Defendant No.1 after Defendant No.1 terminated the allotment made in favour of Defendant No.2 and thereafter to the Plaintiff. Defendant Nos. 4 and 5 claim to have subsequently purchased the suit flat from Defendant No.3. The sister of Ms. Chandrika Gupta i.e. Ms. Saraswati Gupta is Defendant No.2 in Suit No. 403 of 2012 and is the original allottee of the another flat in the same project which is the subject matter of Suit No. 403 of 2012.

4. Although the first Defendant in this Suit is the same as the first Defendant in Suit No. 403 of 2012 and the nature of the transaction between the Plaintiff and Defendant Nos. 1 and 2 in both the suits are similar, the material facts in the two suits are different. In view thereof, this Court has first taken up the above Notice of Motion in the above Suit for final hearing and has disposed of the same by the present order.

5. The facts in the present Suit are as set out hereunder:

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5.1 In August, 2006, Defendant No.2 herein and her sister Saraswati Gupta

along with Mr. Santosh Pathak (Estate Agent and husband of the Plaintiff) approached Defendant No.1 builder for the purpose of booking flats in a project of Defendant No.1 called 'Oberoi Splendor'. Thereafter Defendant No.2 expressed her desire to book the suit flat for a consideration of Rs.

77,62,505/-. On 13th August, 2006, Defendant No.2 booked the suit flat for Rs. 77,62,505/- and paid a token amount of Rs. 7,76,251/- by cheque dated 13th August, 2006. On 1st October, 2006, Defendant No.2 paid Rs. 13,00,000/-

and Rs. 2,52,501/- respectively by two cheques of even date. On 30 th October, 2006, an allotment letter was issued by Defendant No.1 in favour of Defendant No.2 in respect of the suit flat. Clauses 5 and 7 of the allotment letter are reproduced hereunder:

"Clause 5 : It has been agreed that the time for payment of each instalment is of essence of contract. You have further confirmed to us that an intimation forwarded by us to you that a particular stage of construction is commenced or completed shall be sufficient proof that a particular stage of construction is commenced or completed. However, it is agreed by you that the failure to receive notice from us, requiring such payment shall not be a plea, or an excuse for non-payment of any amount or amounts on their respective due dates".

7. It is further agreed that you shall make payments due to KPPNair 5 NMS 668 OF2012 us, immediately on receipt of the demand notice and if payment is not made pursuant thereto, then we shall give you 7 (seven) days notice within which you shall be required to pay the amount demanded with interest on outstanding payment @ 2% (two percent) per month, from the due date till the date of actual payment and if you fail to do so then this allotment shall automatically come to an end. It has also been agreed that in case of any delay in the payment of any instalments, we shall be entitled to an additional charge of Rs.500/- (Rupees Five Hundred only) as administrative fee for every instalment delayed".

5.2 Despite demand notices/reminders dated 5th March, 2007, 26th March, 2007 and 6th April, 2007, being issued by Defendant No.1 to Defendant No.2, for a further payment of Rs. 3,88,125/-, Defendant No.2 failed and neglected to make the said payment.

5.3 On 7th April, 2007, Defendant No.2 through her Advocate addressed a letter to Defendant No.1 calling upon Defendant No.1 to execute an Agreement for Sale in respect of the suit flat. According to Defendant No.1, the demand made by Defendant No.2 was wrongful as Defendant No.2 had defaulted in making payments in terms of the allotment letter. According to Defendant No.1, thereafter Defendant No. 2 along with Mr. Santosh Pathak (Estate Agent and husband of Plaintiff) approached Defendant No. 1 and represented that Defendant No.2 was not in a position to make further KPPNair 6 NMS 668 OF2012 payments and therefore she was desirous of cancelling/selling/disposing of her allotment. By her letter dated 21st April, 2007, Defendant No. 2 requested Defendant No. 1 to transfer the allotment of the suit flat in favour of the Plaintiff. At this point of time, there were outstanding payments to be made by Defendant No.2. On 24th April, 2007, a Power of Attorney was executed by Defendant No.2 in favour of the Plaintiff to execute the Sale Agreement/Tripartite Agreement on her behalf.

5.4 In view of what is stated aforesaid, on 27 th April, 2007, Defendant No. 1 issued a receipt to the Plaintiff towards payment of Rs. 1,01,375/- as transfer charges and also issued a receipt acknowledging payment of Rs. 4,40,000/-

made by the Plaintiff.

5.5 On 30th April, 2007, Defendant No.1 issued an allotment letter in favour of the Plaintiff. Clauses 2 (a), (b) and (c) of the same are reproduced hereunder:

"2(a) The Intending Transferee shall pay to us the balance amount of Rs.54,33,753/- (Rupees Fifty Four Lacs Thirty Three Thousand Seven Hundred Fifty Three only) and the other amounts aggregating to Rs.3,45,520 (Rupees Three Lacs Forty Five Thousand Five Hundred Twenty only) as mentioned in Clause 8 of the Letter of Allotment dated 30 th KPPNair 7 NMS 668 OF2012 October, 2006 ("the said Allotment Letter") and all other amounts payable in future to us under the said Allotment Letter and the Premises Ownership Agreement / Tripartite Agreement to be executed in respect of the said premises; and 2(b) The Intending Transferee shall observe, perform, comply with and abide by all the terms, conditions, covenants, undertakings, obligations etc., including those contained in the said Allotment Letter and Premises Ownership Agreement and all other documents to be executed in respect of the said premises; and

2.c) The Intending Transferor and the Intending Transferee shall enter into, sign and execute all deeds, documents and writings including Premises Ownership Agreement /Tripartite Agreement as when requested by us".

5.6 On 25th June, 2007, Defendant No.1 issued a demand letter to the Plaintiff for payment in respect of the basement stage of construction which amount of Rs. 82,000/- was paid by the Plaintiff.

5.7 On 2nd July, 2007, Defendant No.1 received a letter from the Advocate of Defendant No.2 stating that Mr. Santosh Pathak has forged documents, made false representations to Defendant No.1 that he was acting on behalf of Defendant No.2 and had caused Defendant No.1 to transfer the suit flat in the KPPNair 8 NMS 668 OF2012 name of the Plaintiff who happens to be the wife of Mr. Santosh Pathak. It was further alleged that the same was done without the consent and knowledge of Defendant No.2. It was further alleged that a fraud was perpetrated by Mr. Santosh Pathak upon Defendant No.2 as stated in the said letter. Defendant No.1 was informed that Defendant No.2 had filed complaints with CID with regard to the fraud. Defendant No. 1 was requested that the booking in the name of the Plaintiff be cancelled and that the booking be reinstated in the name of Defendant No.2. Defendant No. 1 was also asked not to execute any further documents in the name of the Plaintiff.

5.8 On 12th July, 2007, a circular letter was sent to the flat purchasers informing them about Defendant No.1's projects. On 18 th July, 2007, Defendant No.1 sent its reply to the letter dated 2 nd July, 2007 addressed by the Advocate for Defendant No.2, (wherein Defendant No.1)expressed their shock and inter alia stated that the booking was transferred in favour of Defendant No. 2's nominee to accommodate Defendant No.2. The true and correct facts relating to the transfer of booking were narrated.

5.9 Defendant No. 1 by their Advocate's letter dated 31 st July, 2007, informed the Advocate for Defendant No.2 that they were in receipt of the letter dated 22nd July, 2007, addressed on behalf of Defendant No.2 to the Senior Inspector of Police, a copy of which was sent to Defendant No.1.

Defendant No.1 called upon Defendant No.2 to reply to the letter dated 18 th KPPNair 9 NMS 668 OF2012 July, 2007, and once again reiterated that they had acted in a bona fide manner and in pursuance of the request made by Defendant No.2, Defendant No.1 had transferred booking of Defendant No.2 in the name of her nominee i.e. the Plaintiff. Defendant No.1 by its reminder letter dated 16 th August, 2007, informed the Plaintiff that an amount of Rs. 81,223/- was due and outstanding and also intimated to the Plaintiff that delay in making payment will attract 2 per cent interest per month.

5.10 By her Advocate's letter dated 16th August, 2007, Defendant No.2 denied the contents of the letter from Defendant No.1 dated 18 th July, 2007 and repeated and reiterated the contents of her letter dated 2 nd July, 2007.

The Advocate for Defendant No. 2 addressed a letter dated 8 th October, 2007 to the Plaintiff with a copy marked to Defendant no.1 thereby repeating and reiterating what he had mentioned in his earlier letter dated 2 nd July, 2007.

On 22nd October, 2007 and 7th April, 2008, summons were issued by CID to Defendant No.1 in respect of the complaint lodged by Ms. Saraswati Gupta inter alia in relation to the suit flat.

5.11 On 3rd March, 2008, a circular letter was sent to flat purchasers informing them about the Oberoi International School.

5.12 Defendant No. 1 by its letter dated 5 th March, 2008, i

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Plaintiff that they would be receiving approval for higher floors from the authorities shortly and requested the Plaintiff to treat the said letter as an advance intimation to facilitate the arrangement for payments. In response, the Plaintiff by her letter dated 26 th April, 2008, stated that she was willing to make further payments subject to Defendant No.1 executing the sale deed with regard to the suit flat in her favour. The Plaintiff further threatened to initiate court proceedings against Defendant No.1.

5.13 In view thereof, by their letter dated 8 th May, 2008, the Advocates for Defendant No.1 informed the Plaintiff that there were inter se disputes between the Plaintiff and Defendant No.2 and that Defendant No. 1 was being unnecessarily harassed for the same. The Plaintiff was further informed that Defendant No. 1 was always ready and willing to execute the said agreement in respect of the suit flat but only if the dispute with Defendant No. 2 was resolved on or before 31st

May, 2008. It was recorded that in case the alleged disputes are not sorted out and if outstanding payments were not made, Defendant No.1 would cancel the allotment made in favour of the Plaintiff. By her letter dated 28th May, 2008, the Plaintiff replied to the above letter of Defendant No.1 dated 8th May, 2008 and contended that merely because Defendant No.2 had filed a police complaint, it did not make Defendant No.2's claim legal. The Plaintiff also recorded that she has tried her best not to drag Defendant No.1 in any issue but stated that Defendant No. 1 "are inevitable KPPNair 11 NMS 668 OF2012 part of the agreement between Chandrika Gupta and me, as they are confirming party". The Plaintiff also recorded that as far as she is concerned, there is no dispute between her and Chandrika Gupta. The Plaintiff who had written in her letter dated 26th April, 2008 that she has kept the payment ready and that it is Defendant No.1 who has failed to execute the sale agreement/sale deed in her favour in respect of the suit flat, now stated that she had not received the demand letter and is therefore unable to make the payment and is ready and willing to make the payment of all the outstanding dues within seven days of receipt of the demand letter from Defendant No.1. The Plaintiff therefore once again called upon Defendant No. to comply with her requisitions in the letter dated 26th April, 2008, and execute an agreement of sale/sale deed in her favour.

5.14 On 23rd June, 2008, again summons were issued by CID to Defendant No.1 in respect of a complaint filed by Saraswati Gupta. On 3 rd October, 2008, the Dahisar Police Station issued summons under Section 91 of the Cr.P.C. to Defendant No.1 in respect of the complaint filed by the husband of the Plaintiff Mr. Santosh Pathak.

5.15 The Plaintiff by her letter dated 21 st October, 2008, once again called upon Defendant No.1 to execute the sale deed within 7 days and further stated that in the event of Defendant No. 1 failing to do so, she would initiate KPPNair 12 NMS 668 OF2012 criminal as well as civil proceedings against Defendant No.1.

5.16 On 5th December, 2008, the Plaintiff filed a Consumer Complaint No. 707 of 2008 against Defendant No.1 seeking the execution of the agreement in her favour.

5.17 On 12th February, 2009, Defendant No.1 by their letter forwarded to the Plaintiff, the draft of the premises ownership agreement/tripartite agreement ("the said Agreement") and called upon the Plaintiff to have the same stamped as per the provisions of the Bombay Stamp Act and return the duly executed agreement. It was mentioned that an amount of Rs. 23,80,759/- was due and payable by the Plaintiff.

5.18 The Plaintiff by her letter dated 16 th February, 2009 (wrongly mentioned as 16-01-2009) raised the following issues:

- (i) that the Plaintiff would make the payment of Rs. 23,80,759/- only after execution and registration of the premises ownership agreement and upon sanction of her housing loan which was approved;

(ii) that the first purchaser (Defendant No.2) should not be made a party to the agreement and stated - "I have objection in executing tripartite agreement as it has never been your practice as well as it is against the law".

(iii) that the tripartite agreement must be only on non-judicial stamp paper.

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(v) that the agreement to be signed by her on behalf of Defendant No.2 on

the basis of the Power of Attorney executed by Defendant No.2.

(vi) The Plaintiff objected to the indemnity clause in the agreement which was to be given by her, indemnifying Defendant No.1 against any claims raised by Defendant No.2, on the ground that Banks would hesitate in giving a housing loan.

5.19 Defendant No.1 by their letter dated 4th April, 2009, responded to the Plaintiff's letter dated 16th February, 2009, and inter alia recorded that it was obvious that the Plaintiff did not have necessary funds to pay the balance consideration and requested the Plaintiff to comply with the requisitions contained in the letter dated 12th February, 2009.

5.20 The Plaintiff by her letter dated 10 th June, 2009, addressed to Defendant No.1 asserted that she had funds in her hands and her housing loan had been sanctioned. She further asserted that it was the responsibility of Defendant No.1 to get the document executed by Defendant No.2.

5.21 The Plaintiff in her Consumer Complaint had not set out all the facts with regard to the controversies between the Plaintiff and Defendant No.2. In fact, Defendant No. 2 was not even made a party to the said Complaint.

Therefore, Defendant No.2 on 12 th August, 2010 preferred an application for impleading herself as a party to the said Complaint. After taking cognizance of the facts in the matter, the consumer forum observed that there were KPPNair 14 NMS 668 OF2012 complicated questions of law and facts which prima facie appear to have been raised. The Consumer Forum observed that whether the Consumer Forum with summary jurisdiction would be competent to try the said Complaint would be a question which the Forum had to address. In light of the same, the matter was adjourned and fixed for hearing on the issue as to whether the forum had jurisdiction to entertain the said Complaint or not.

5.22 In September, 2010, the Plaintiff filed Suit No. 2028 of 2010 in the City Civil Court at Dindoshi, seeking directions against the Defendant No.1 to execute the tripartite agreement without the disputed clauses. The Plaintiff filed Notice of Motion No. 2778 of 2010 in the said Suit seeking an

order from the City Civil Court directing Defendant No.1 to execute the tripartite agreement without the disputed clauses. Defendant No.1 apart from filing its reply to the said Motion also filed its written statement dated 26 th April, 2011, wherein Defendant No.1 stated that it was ready and willing to execute the said Agreement as forwarded to the Plaintiff. However, the Plaintiff continued to stick to her stand that unless paragraphs Z, AA, 19A, 19B, 49 and 50 were deleted from the said agreement she would not execute the said agreement.

5.23 On 1st September, 2010, the Plaintiff wrote a letter to Defendant No.1 stating that the allegations made by Chandrika Gupta/Saraswati Gupta are found to be false and frivolous by the EOW and the case has been closed by the EOW as bogus complaint i.e B-Summary and therefore Defendant No. 1 should take necessary steps in the matter. In the said letter it was also KPPNair 15 NMS 668 OF2012 mentioned that the three year limitation period for filing any civil proceedings by Chandrika Gupta against the Plaintiff or Defendant No. 1 was also over. It will not be out of place to mention here that Defendant No. 2 has in her affidavit dated 27th March, 2012, mentioned that the said report of EOW has been challenged by her in Case No. 7/Summary of 2011 and the same is now pending hearing and final disposal before the concerned Criminal Court. It will also not be out of place to mention here that in November, 2010, Defendant No.2 also filed Suit No. 2320 of 2010 in the City Civil Court at Dindoshi, against Defendant No.1, the Plaintiff, Mr. Santosh Pathak and others inter alia seeking declaration that the letter dated 21 st April, 2007, and Power of Attorney dated 24th April, 2007, executed by Defendant No. 2 in favour of the Plaintiff in respect of the suit flat are fraudulent documents and for various other reliefs. In fact, prior to the filing of the said Suit, Defendant No.2 through her Advocate's notice dated 14 th October, 2010, addressed to the Plaintiff cancelled the Power of Attorney executed by her in favour of the Plaintiff.

5.24 On 19th January 2011, the State Bank of India addressed a letter to the Plaintiff informing the Plaintiff about the sanction of the loan of Rs. 45 lakhs.

By the said letter the Bank further required the Plaintiff to arrange to provide the tripartite registered agreement for sale and a NOC for disbursement of the loan.

5.25 On 22nd February, 2011, the City Civil Court, Dindoshi, r

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Notice of Motion No. 2778 of 2010 taken out by the Plaintiff by passing the following order.

"9. Both Plaintiff and Defendants relied upon many documents, but as most of the facts are admitted the documents do not need discussion. Plaintiff appears to have purchased flat from Defendant No.2 who was original allottee of the suit flat. It is not the case of Defendant No.1 that they are not ready to execute the agreement. The

apprehension of Defendant No.1 is that there is no direct contract between Plaintiff and Defendant No.1 and the original allottee is Defendant No.2. If defendant No.2 objects the transaction then Defendant No.1 cannot execute agreement in favour of Plaintiff without consent of Defendant No.2. Admittedly, there is no direct agreement between Plaintiff and Defendant No.1. AS per the case of Defendant No.1, serious allegations have been made by Defendant No.2 that fraud has been played by Plaintiff's husband and therefore, if agreement is executed and Defendant No.2 succeeds in proving the allegations then defendant No.1 would be put to loss and hardship.

10. After going through the dispute between the parties, in my view, when Defendant No.2 is challenging the transaction on the ground of not receiving the consideration from Plaintiff and Plaintiff's claim being based upon forged and false documents, then certainly defendant No.1 is required to take care of such transaction. Defendant No.1 is only insisting the Plaintiff to enter into tripartite agreement and nothing more than that.

11. It is contended by Ld. Advocate on behalf of the Plaintiff that KPPNair 17 NMS 668 OF2012 Defendant No.2 has also filed a suit and if she succeeds in the suit then Plaintiff will not be entitled to retain the suit flat and without giving opportunity to defendant no clean chit can be given to plaintiff at this stage.

12. Injunction is equitable remedy. It cannot be granted as a matter of right. The Court has to see the consequences of grant or refusal of injunction. Defendant No.2 has originally purchased the flat. When the agreement between Defendant No.1 and Defendant No.2 itself is under litigation and challenged by Defendant No.2, then in my view, Defendant No.1 cannot be compelled to execute the agreement in favour of Plaintiff. If temporary injunction is granted, it will amount to decreeing the suit at the stage of NM. Moreover, it will also affect the suit filed by Defendant No.2.

13. Moreover, if Plaintiff wants to execute the agreement then the proper remedy for the plaintiff is to file the suit for specific performance of the contract against Defendant No.2. Thus, I have no hesitation to hold that there is no prima facie case and balance of convenience in favour of Plaintiff and therefore, there is no question of causing any irreparable loss to the Plaintiff if temporary injunction is not granted in favour of Plaintiff and hence I answer point Nos.1 to 3 in the negative and following order is passed :

ORDER Notice of Motion No.2778 of 2010 stands dismissed. Cost in cause".

KPPNair 18 NMS 668 OF2012 5.26 On 19th July, 2011, a circular letter was sent by Defendant No.1 to over 1100 flat purchasers informing them that the building had received Occupation Certificate. It is submitted on behalf of Defendant No.1 that the said letter was sent in a routine manner since such letters were sent to all persons

who had made bookings of flats in the said building and the same does not in any way tantamount to condonation of breaches committed by the Plaintiff. It is submitted that in any event, upon receipt of the said letter, the Plaintiff admittedly was put to notice that the construction of the entire building had been completed.

5.27 The Plaintiff being aggrieved by the order dated 22 nd February, 2011 passed by the Learned Judge, City Civil Court at Dindoshi, dismissing the Plaintiff's Notice of Motion, preferred an Appeal from Order No. 666 of 2011 before this Court. The said Appeal from Order was disposed of by an order dated 15th September, 2011. No reliefs were granted in favour of the Plaintiff, save and except that the hearing of the Suit filed by her was expedited. The statement made by the Advocate for the Plaintiff, that the Plaintiff shall be withdrawing the Consumer Complaint No. 707 of 2008 was also recorded.

Pursuant thereto, the Plaintiff withdrew the Consumer Complaint on 18 th October, 2011.

5.28 Defendant No.1 by its letter dated 8 th November, 2011, terminated the allotment in favour of the Plaintiff. Defendant No.1 also offered to pay the money paid by the Plaintiff and enquired in whose name the same needs to be KPPNair 19 NMS 668 OF2012 returned.

5.29 On 16th November, 2011, Defendant No.1 by its letter allotted the suit flat to Defendant No. 3 for sale consideration of Rs. 1,92,99,150/-.

5.30 On 17th November, 2011, the Plaintiff addressed a letter to Defendant No.1 in response to the termination letter dated 8 th November, 2011, making various allegations against Defendant No.1. On 21 st November, 2011, the Plaintiff also issued a public notice inter alia informing the members of the public not to purchase or deal in any manner whatsoever inter alia with the suit flat.

5.31 On 25th November, 2011, Defendant No.1 executed an Agreement with Defendant No.3 for the suit flat and on the same day Defendant No.1 by its letter handed over possession of the suit flat to Defendant No.3. The Plaintiff after receipt of the letter dated 8th November, 2011, preferred a fresh Notice of Motion in Suit No. 2028 of 2010 inter alia seeking reliefs that Defendant No.1 should be restrained from creating third party rights. Defendant No. 1 filed its reply to the said Notice of Motion on 29 th November, 2011, wherein it was mentioned that the suit flat was already sold to the new purchaser. Since Defendant No.1 had already sold the suit flat, no relief was granted by the City Civil Court at Dindoshi in favour of the Plaintiff.

5.32 On 16th December, 2011, the Plaintiff addressed a letter to Defendant No.1 demanding details of the payments made by the new purchaser. On 17 th December, 2011, the Plaintiff sent a letter to Defendant No.1 rejecting the KPPNair 20 NMS 668 OF2012 receipt towards the cancellation amount.

5.33 On 10th January, 2012, Defendant No. 1 replied to the letters dated 16 th December, 2011 and 17th December, 2011 and has denied all the allegations made therein. The Plaintiff subsequently

withdrew Suit No. 2028 of 2010 filed at Dindoshi with liberty to file a fresh suit. On 12 th March, 2012, the Plaintiff filed the present Suit. On 27 th March, 2012, the application for ad-interim relief filed by the Plaintiff was rejected by the learned single Judge S.J. Vazifdar, J. The Plaintiff filed an Appeal against the order dated 27 th March, 2012, being Appeal No. 227 of 2012 and also took out Notice of Motion No. 1017 of 2012 in the said appeal. By an order dated 20 th June, 2012, the Hon'ble Appeal Court passed an order directing Defendant No.1 to reserve an alternative flat and disposed of the Appeal. On 4 th July, 2012, the Advocates for Defendant No. 1 addressed a letter informing the Plaintiff that Flat No. 1007 on the 10th floor in C Wing has been reserved as per the order dated 20 th June, 2012. On 7th July, 2012, the Advocate for the Plaintiff in reply to the letter dated 4th July, 2012, stated that Defendant No.1 should reserve a flat facing Aarey Colony.

5.34 On 12th July, 2012, Defendant No.3 entered into an Agreement with Defendant Nos. 4 and 5 for sale of the suit flat. On 24 th July, 2012, Advocate for Defendant No.1 in reply to the letter dated 7 th July, 2012 informed the Advocates for Plaintiff that there are no flats available facing Aarey Colony.

The Plaintiff therefore filed Notice of Motion No. 1864 of 2012 in Appeal No. KPPNair 21 NMS 668 OF2012 227 of 2012 seeking directions against Defendant No.1 to reserve a flat facing Aarey Colony. The said Notice of Motion was later withdrawn.

5.35 The Defendants have pointed out that on 1 st December, 2012, an article is published in Mid-day newspaper that "Builders Vikas Oberoi and three others are booked for cheating flat buyers". This is based on the information given by the Plaintiff to Mid-day. It is pointed out by Defendant No.1 that the only order made in the complaint is for issue of summons. However, summons has not been received by their clients till date.

5.36 The Notice of Motion is now taken up for hearing and final disposal.

6. The Plaintiff who is appearing in person has submitted that the allotment letter dated 30th October, 2006, which was issued to Defendant No. 2 was in total contravention of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 ("the MOFA Act") and Defendant No. 1 has contravened Sections 3 (2) (a), 3 (2)(b), 3 (2) (f), 3 (2) (h), 3 (2) (j), 3 (2) (m) and (I), Section 4 , Section 4 (1A),Section 4 (1A) (b)Section 7 and Section 10 of the MOFA Act. It is submitted that as the Plaintiff was looking for a bigger residential premise for self use after disposing of her residential flat, after negotiation she agreed to purchase the suit flat. The representation made by Defendant No.2 to the Plaintiff was also confirmed by Defendant No.1. It was decided between the Plaintiff and Defendant No. 2 that the Plaintiff shall pay a sum of Rs.

KPPNair 22 NMS 668 OF2012 37,71,072/- to Defendant No. 1 and as against the said consideration, Defendant No. 2 would surrender, release and relinquish her right in the suit flat in favour of the Plaintiff. From time to time i.e. between 30 th May, 2007 and 1st June, 2007, the Plaintiff paid to Defendant No. 1 an amount of Rs.

37,71,072/- . Referring to the fax/documents/correspondence set out hereinabove the Plaintiff submitted that Defendant No.2 and her sister Saraswati Gupta had collected various amounts and duped various people including Mr. Santosh Pathak, the husband of the Plaintiff. In fact, Defendant No. 2 had stolen cheques and jewellery from the office of Mr. Pathak at the time of purchase of the suit flat. After receipt of the entire payment in respect of the suit flat and Flat No. A/1003, Defendant No.2 and her sister lodged false complaints against the persons to whom they had to return money which they borrowed, in order to pressurize them not to ask for the same. They also lodged false police complaints against the Plaintiff and her husband. In the complaint they had alleged that they had not signed any documents and had not received any money from the Plaintiff and that the Plaintiff and her husband had cheated them, which complaint came to be closed as set out hereinabove.

6.1. It is submitted by the Plaintiff that she had not forwarded the correspondence between her and Defendant No.2 to Defendant No.1 since she did not want to involve Defendant No.1 in any litigation. After receipt of the letter from Defendant No.1 stating therein that Defendant No. 2 has made KPPNair 23 NMS 668 OF2012 serious allegations against the Plaintiff and her husband, she informed Defendant No. 1 that the representations made by Defendant No. 2 were false and incorrect. It is submitted that in spite of receipt of letters from the Advocate for Defendant No.2, Defendant No.1 continued to issue demand letters to the Plaintiff and the Plaintiff continued to make payments till August, 2007. By this time, the Plaintiff had paid Rs. 12,03,371/- to Defendant No.1. However, after September, 2007, Defendant No. 1 stopped issuing demand letters to the Plaintiff for reasons best known to them. It is submitted that as per the allotment letter dated 30th April, 2007, Defendant No. 1 was in no way concerned with the transactions entered into between the Plaintiff and Defendant No.2. At the time of transfer of the suit flat in favour of the Plaintiff, it was assured by Defendant No.1 that the presence of Defendant No. 2 would not be required thereafter and for the very same purpose, Defendant No. 2 was told to execute the Power of Attorney in favour of the Plaintiff. It is submitted that nowhere in the allotment letter dated 30 th April, 2007, Defendant No.1 has stated that the Plaintiff will have to execute the Tripartite Agreement only. In the allotment letter dated 30 th April, 2007, a mention is made by Defendant No.1 of premises ownership agreement/tripartite agreement. It is submitted that Defendant No.1 failed to send demand letter to the Plaintiff and therefore the Plaintiff vide letter dated 26 th April, 2008 called upon Defendant No.1 to issue demand letter and also informed them that her payment is ready. Defendant No. 1 was further called upon to execute the sale KPPNair 24 NMS 668 OF2012 agreement/sale deed. It is submitted that in the letter dated 8 th May, 2008, though the Plaintiff was called upon to make payment, no amount was mentioned therein, and thus the Plaintiff was unable to make payment. It is therefore clear that Defendant No. 1 was indirectly trying to pressurize the Plaintiff to succumb to the illegal demands of Defendant No.2 and her sister.

It is submitted that though Defendant No.1 in their letter dated 8 th May, 2008, showed their willingness to execute the agreement in respect of the suit flat in favour of the Plaintiff, Defendant No. 1 could not have executed the same as the mandatory documents like title certificate required to be annexed to the Agreement was not ready, as it was dated 18 th June, 2008. It is accepted by Mr. Masoom Akbar Shirzi, Project Head, Sales of Defendant No.1, that they had stopped issuing demand letters to the Plaintiff. It is submitted that despite repeated requests from the Plaintiff, Defendant

No. 1 was neither issuing demand letter nor executing Agreement for sale in favour of the Plaintiff. In the meantime, due to global economic downturn/global financial crisis in the market, the Plaintiff panicked and on 5 th December, 2008 filed a complaint with the Consumer Court, Bandra, Mumbai. After receipt of notice from the Consumer Court, Defendant No. 1 forwarded premises ownership agreement along with their covering letter dated 12 th February, 2009 to the Plaintiff and demanded an amount of Rs. 23,80,759/- without linking the stage of construction to such payment, and it was not even supported by the Architects Certificate. The said premises Ownership Agreement contained KPPNair 25 NMS 668 OF2012 various disputed clauses more particularly paragraph Nos. Z, AA, 19A, 19B, 49 and 50 and was in total contravention of the MOFA Act. Since incorporation of the said paragraphs would not create a clear and marketable title in favour of the Plaintiff, the Plaintiff requested Defendant No.1 to make necessary corrections in the same. The Plaintiff therefore by her letter dated 19th February, 2009, refused to execute a "one-sided agreement" though the Plaintiff had applied for a housing loan. At the same time she had also made arrangements for making payments from her own sources. It is submitted that the Plaintiff had also showed her readiness and willingness to make payment and also showed her willingness to execute indemnity bond in favour of Defendant No. 1 in respect of any legal claim raised by Defendant No.2.

However, Defendant No. 1 has made several false allegations against the Plaintiff in the correspondence and misinterpreted the contents of the Plaintiff's letters with mala fide intentions.

6.2 It is further submitted by the Plaintiff that at the time of entering into the transactions with Defendant Nos. 1 and 2, she was assured by Defendant No.1 that they would prepare a tripartite agreement on non-judicial stamp paper which will be signed by the Plaintiff for herself as well as Defendant No.2 as the Power of Attorney holder and thereafter Defendant No.1 would enter into an agreement for sale with the Plaintiff. It is submitted on behalf of the Plaintiff that vide her letter dated 10 th June, 2009, she again placed the entire facts on record and made it clear that she is ready and willing to make KPPNair 26 NMS 668 OF2012 the required payment. It was categorically stated in paragraph 5 of the said letter that the funds are ready in her hand for further payment and she again called upon Defendant No. 1 to make an agreement pursuant to Form V of the MOFA Act. The Plaintiff has submitted that since Defendant No.1 failed to execute the Agreement as per the provisions of the MOFA Act, she filed a suit before the City Civil Court bearing No. 2028 of 2010 and took out Notice of Motion therein, which was rejected. An Appeal was preferred therefrom to this Court which was disposed of by an order dated 15 th September, 2011. By the said order, the undertaking of the Plaintiff was recorded that she would be withdrawing the proceedings filed before the Consumer Court and the Hon'ble City Civil Court was requested to dispose of the suit within a period of six months from the date of the said order.

6.3 It is also submitted on behalf of the Plaintiff that the housing loan sanctioned on 19th January, 2011 had no connection with the housing loan which the Plaintiff has referred to in her letters dated 16 th February, 2009 and 10th June, 2009. The housing loan sanction letter dated 19 th January, 2011 was pursuant to an application made by the Plaintiff some time in the last quarter of 2010. It is submitted that the Bank had earlier not demanded the tripartite agreement and it was only after the Plaintiff expressed her willingness in the housing loan application to provide tripartite premises ownership agreement, that the Plaintiff was called upon to produce the same. It is submitted that

the Plaintiff withdrew the consumer complaint on 18th October, 2011. Defendant KPPNair 27 NMS 668 OF2012 No.1 wrongly issued the termination letter dated 8 th November, 2011 to the Plaintiff and terminated/cancelled the allotment of the suit flat in favour of the Plaintiff. It is submitted that Defendant No.1 issued a demand letter to the Plaintiff before issuing termination letter dated 8 th November, 2011. It is submitted that the Plaintiff was not liable to make further payment under Section 4 of the MOFA Act without execution of agreement for sale in her favour.

6.3 It is further submitted by the Plaintiff that the letter of termination dated 8th November, 2011 was received by the Plaintiff on 15 th November, 2011. On 17th November, 2011, Suit No. 2028 of 2010 was on Board before the City Civil Court at Dindoshi in the morning session. The Plaintiff had taken out Notice of Motion in the said suit to restrain Defendant No. 1 from creating third party interest in respect of the suit flat. The Notice of Motion was served upon the Advocate for Defendant Nos. 1 and 2 in the morning session itself. The Plaintiff had made her submissions and requested the Court to grant ad-interim relief. The Advocate for Defendant No.1 requested that the matter be placed in the afternoon session. The matter was thereafter adjourned to the afternoon session. In the afternoon session, the matter was first kept back and thereafter since some other matter went on, the matter was adjourned to 19th November, 2011. On 19 th November, 2011, the matter was adjourned to 29th November, 2011. It was only on 29 th November, 2011, that Defendant No.1 filed its reply stating that it had already disposed of the flat in KPPNair 28 NMS 668 OF2012 favour of Defendant No.3 for total consideration of Rs. 1,92,99,150/-. It is submitted that a written complaint was made by the Plaintiff against the Learned Judge of the City Civil Court, Dindoshi Branch after which his services were terminated. Since this is a very serious allegation, it will not be out of place to mention here that I have called for and perused the file containing the confidential records of the Learned Judge. The said file does not contain any complaint from the Plaintiff and the services of the Learned Judge were terminated for grounds completely unrelated to the present matter.

6.4 The Plaintiff further submitted that an allotment letter was issued by Defendant No.1 in favour of Defendant No. 3, who is a friend of the Director of Defendant No. 1, without any payment and the possession of the suit flat was given to Defendant No. 3 upon payment of Rs. 39,30,000/-, which shows the collusion between Defendant No.3 and Defendant No.1. The Plaintiff was therefore advised to withdraw the suit and file a substantive suit before this Court.

6.5 It is submitted that Defendant No.3 thereafter in collusion with Defendant Nos. 4 and 5 executed an agreement dated 12 th July, 2012, whereby Defendant No.3 purportedly sold the suit flat to Defendant Nos. 4 and 5 by suffering a loss of more than Rs. 25 lakhs. It is submitted that a scrutiny of the documents executed by and between Defendant No. 1 and Defendant Nos. 3, 4 and 5 and the documents issued in favour of ICICI Bank makes it clear that the entire exercise was done in a calculative manner with KPPNair 29 NMS 668 OF2012 the sole intention to create false and concocted documents so as to defeat the valuable rights of the Plaintiff in the suit flat. It is submitted that it cannot be believed that a person earning Rs. 94,300/- per month can pay an EMI of Rs. 1 lac on housing loan and also pay outgoings/maintenance of the suit flat which is around Rs. 15,000/-. It is submitted that this shows that the entire exercise was done with the sole intention to create false and concocted evidence so as to defeat the valuable rights of the Plaintiff.

6.6 It is therefore submitted on behalf of the Plaintiff that she was always ready and willing to perform her part of the agreement but it is Defendant No.1 who failed to do so and the Plaintiff is therefore entitled to the interim reliefs as prayed.

6.7 The Plaintiff has tendered written submissions which includes submissions which were not at all made across the bar. Defendant No. 1 has in its written submissions pointed out the submissions which have for the first time surfaced in the written submissions of the Plaintiff. This Court has in its earlier decisions expressed its concern over the trend of current advocates incorporating in their written submissions what has not even been referred to during their oral arguments and has deprecated such conduct on part of such Advocates. This conduct of the Plaintiff is therefore also strongly deprecated.

7. The Learned Advocate appearing for Defendant No. 1 submitted that the Plaintiff is guilty of breach of the allotment letter dated 30 th October, 2006 read with the allotment letter of 30th April, 2007. It is submitted that time for KPPNair 30 NMS 668 OF2012 payment of each instalment was of the essence of the contract and though no notice was required, Defendant No. 1 infact gave notice to the Plaintiff calling upon her to make payments, which she failed to do. It is submitted that clause 7 of the first LOA (reproduced in paragraph 7.1 hereinabove) is a clause which governs the charging of interest if Defendant No.1 decides to give the flat purchaser an opportunity to make payment with interest. However, this does not in any way tantamount to a permission or license to a flat purchaser to act in breach of clause 5 despite time being expressly of the essence. In any case and without prejudice, in the present case, notices under clause 7 of the 1st LOA were also issued. Infact, the Plaintiff did not have the funds to make payment. The learned Advocate for Defendant No. 1 further submitted that the Plaintiff committed further breach of the second letter of allotment by declining to execute the tripartite agreement. The Plaintiff wrongfully objected to Defendant No. 2 being added as a party to the flat sale agreement and to various clauses of the tripartite agreement and also wrongfully insisted on executing the tripartite agreement only on a non judicial stamp paper. This was in clear breach of the letters of allotment. Relying on the decisions of the Hon'ble Apex Court in Aniglase Yohannan vs. Ramlatha and others 1 and N.P. Thirugnanam vs. R. Jagan Mohan Rao (Dr.) 2 the learned advocate for Defendant No. 1 submitted that the conduct of the Plaintiff exposes a complete lack of readiness and willingness to perform her obligations under the LOA 1 (2005) 7 SCC 534 2 (1995) 5 SCC 115 KPPNair 31 NMS 668 OF2012 and is thereby not entitled to any specific performance as sought. In support of these contentions, various documents and correspondence on record were relied upon. These have been referred to when the rival contentions are considered hereinafter.

7.1. As regards the sale of the suit flat to Defendant No.3 is concerned, Defendant No.1 has submitted that after the termination of the allotment in favour of the Plaintiff, Defendant No. 1 was entitled in law to create third party rights in respect of the suit flat which Defendant No.1 has done. It is submitted that the said transaction is genuine and bona fide and the allegations made on behalf of the Plaintiff against the said transaction are incorrect and are denied.

7.2 Defendant No.1 has also tendered detailed written submissions dealing with the allegations/conduct of the Plaintiff and the learned Advocate for Defendant No. 1 has taken me

through the same.

8. The Learned Advocate appearing for Defendant No.2 submitted before the Court that his client as well as her sister were initially taken for a ride by Shri Santosh Pathak, the husband of the Plaintiff, who is a real estate agent and financier. He has thereafter fabricated several documents and has got the suit flat transferred in favour of his wife and the other flat which is the subject KPPNair 32 NMS 668 OF2012 matter of Suit No. 403 of 2012 in favour of Shri Jagdishbhai K. Patel. The amounts paid by the Plaintiff and her husband to Defendant Nos. 2 and her sister have been again taken away by the Plaintiff and her husband from the Bank accounts of Defendant No.2 and her sister. It is submitted that despite such brazen cheating and fraud perpetrated by the Plaintiff and her husband on Defendant No.2 and her sister, the Plaintiff and her husband are taking advantage of the fact that the Plaintiff is an Advocate practising on the criminal side, and not only did they file a plethora of civil and criminal cases against Defendant No.2 and her sister but the Plaintiff and her husband also managed to keep them and their family members behind bars for 15 days and by several misrepresentations also obtained a report from the EOW in their favour, which is now challenged by Defendant No.2 and/her sister before the Esplanade Court, Mumbai. It is submitted that Defendant No.2 and her sister had apprehended and were of the view that the investigations carried out by EOW were not proceeding in accordance with law and had filed a Criminal Writ Petition being No. 1794 of 2009 before this Court seeking transfer of the investigation from EOW. However, at that point of time this Court was of the view that the investigation carried out by the EOW cannot be faulted and the same be continued. It is submitted that certain criminal complaints as well as civil proceedings filed by Defendant No.2 and her sister against the Plaintiff and her husband are also pending determination. It is submitted that therefore, the Plaintiff is not entitled to any relief, interim or otherwise, and KPPNair 33 NMS 668 OF2012 the Notice of Motion filed by the Plaintiff be rejected.

9. The Learned Senior Advocate appearing for Defendant No. 3 has submitted that Defendant No.3 had purchased the suit flat pursuant to a registered Agreement dated 25th November, 2011 from Defendant No. 1 for an aggregate consideration of Rs. 1,92,99,150/-. The details of the consideration paid by Defendant No.3 are set out in the Vth Schedule to the aforesaid Agreement. It is submitted that it is not the case of the Plaintiff that the suit flat was purchased by Defendant No.3 at an undervaluation or below the market price. It is further submitted that though the Plaintiff had instituted proceedings against Defendant No.1 in respect of the suit flat prior to the aforesaid agreement for sale, the Plaintiff has failed to either register a notice of lis pendens as per Section 52 of the Transfer of Property Act read with Section 18 of the Registration Act or apply for and/or obtain any orders of injunction from any Court in respect of the suit flat. It is not the Plaintiff's case that Defendant No. 3 had prior notice of the litigation initiated by her. It is submitted that the Plaintiff admittedly had notice of the rights acquired by Defendant No.3 and a copy of the Agreement entered into between Defendant Nos. 1 and 3 on 29 th November, 2011. However, the Plaintiff filed the present suit on 12th March,2012 i.e. after more than 5 months of being put on notice of the execution of the said agreement. There is significant delay and laches on the part of the Plaintiff in filing the present Suit. The Plaintiff thereafter KPPNair 34 NMS 668 OF2012 applied for ad-interim reliefs in the present Suit which was rejected by this Court by its order dated 27 th March, 2012. The Plaintiff filed an Appeal against the said order dated 27 th March, 2012. No orders

were passed qua the suit flat also by the Appeal Court. Thus till date there has been no order passed in respect of the suit flat. In the circumstances, there was absolutely no bar on Defendant No.3 dealing with and/or disposing of the suit flat. It is submitted that Defendant No. 3 by a registered agreement of transfer dated 12 th July, 2012, has sold the suit flat to Defendant Nos. 4 and 5 for a consideration of Rs. 1,92,99,150/-. It is therefore submitted that the Plaintiff is not entitled to any reliefs against Defendant No.3.

10. The Learned Advocate appearing for Defendant Nos. 4 and 5 has submitted that Defendant Nos. 4 and 5 are bona fide purchasers for value without notice of any defect in title or the original contract or notice of any of the alleged claims made by the Plaintiff. There is no allegation against Defendant Nos. 4 and 5 that they are in any way related to or connected with Defendant No. 1 or Defendant No.3 save and except a bald allegation that Defendant No. 4 and 5 had colluded with Defendant Nos. 1 and 3. Such a bald allegation cannot be accepted. It is further submitted that the Plaintiff has sought to contend that Defendant No. 3 has sold the flat to Defendant Nos. 4 and 5 at a loss since the expenses that were incurred by Defendant No. 3 when it purchased the flat were not recovered by Defendant No.3 when it KPPNair 35 NMS 668 OF2012 sold the flat. It is submitted that this contention is patently false and erroneous. Defendant Nos. 4 and 5 in fact paid over all the expenses that were incurred such as stamp duty, club house charges and maintenance charges amounting to Rs. 12,51,420/-. It is further submitted on behalf of Defendant Nos. 4 and 5 that prior to purchasing the suit flat, the Plaintiff did not own any other flat in Mumbai. They had appointed an advocate to conduct the title search and the Advocate submitted his title certificate dated 5 th July, 2012 and opined that the title qua the suit flat is clear and marketable.

Defendant Nos. 4 and 5 have therefore raised the finances by availing of housing loans and personal loans and by selling their mutual fund, by liquidating their public provident fund and breaking the fixed deposits which were in their children's names. The Defendants have paid Rs. 1,92,99,150/-

and Rs. 12,51,420/- to Defendant No.3 and transfer charges of Rs. 2,15,000/-

to Defendant No. 1 and therefore the full consideration has been paid. The suit flat has been mortgaged to ICICI Bank. The Defendants have incurred an expense of approximately Rs. 26,00,000/- towards doing up the interiors of the suit flat. Vide letter dated 7 th August, 2012, parking was also allotted to Defendant Nos. 4 and 5. A pooja was held in the suit flat on 27 th October, 2012 and with effect from 10 th December, 2012, Defendant Nos. 4 and 5 along with their family members have moved into and are residing in the suit flat and have surrendered their staff quarters. It is therefore submitted that the Defendants are bona fide purchasers for value without notice of the original KPPNair 36 NMS 668 OF2012 contract and therefore, in view of Section 19 (b) of the Specific Relief Act, there is no question of any interlocutory reliefs being granted against Defendant Nos. 4 and 5.

11. I have considered the submissions advanced by the learned Advocates appearing for the parties. The suit flat was originally booked by Defendant No. 2 and an allotment letter dated 30 th October, 2006 was issued in favour of Defendant No.2. In booking the suit flat Defendant No.2 had taken assistance of Mr. Santosh Pathak, husband of the Plaintiff, who is a real estate broker and also a

financier. Despite repeated reminders dated 5 th March, 2007, 26th March, 2007 and 6th April, 2007, Defendant No.2 failed to pay the instalments due, and ultimately approached Defendant No.1 along with the husband of the Plaintiff and got her allotment transferred in favour of her nominee i.e. the Plaintiff. The Plaintiff tried to contend in the written submissions that since the Advocate for Defendant No. 2 had issued a notice to Defendant No.1, Defendant No.2 got scared and agreed to transfer the flat in favour of the Plaintiff which allegation is denied and dealt with on behalf of Defendant No.1. However, the same is now not at all relevant since admittedly the second LOA is admittedly issued by Defendant No. 1 on conditions set out therein, which conditions were not objected to by any party. Prior to the said transfer of allotment, Defendant No.2 had paid an amount of Rs. 23,28,752/-

to Defendant No.1. On 30th April, 2007, the second LOA was issued by Defendant No.1 in favour of the Plaintiff in respect of the suit flat. In the said KPPNair 37 NMS 668 OF2012 second LOA, the Defendant No.2 is referred to as "the intending transferor"

and the Plaintiff is referred to as "the intending transferee". It was a condition of the said second LOA as set out in clause 2 (c) therein, that the intending transferor and the intending transferee shall enter into, sign and execute all deeds, documents and writings including premises ownership agreement/tripartite agreement as and when requested by Defendant No.1. Therefore, it was Defendant No. 1 who had to decide as to when a Tripartite Agreement was required to be executed by and between Defendant No.1, Defendant No.2 and the Plaintiff and accordingly call upon the Plaintiff and Defendant No.2 to execute the same. On being so called upon to do so, they would be bound to execute the Tripartite Agreement as agreed .

It is pertinent to note that this condition in the second LOA was in fact agreed to between the parties, when no disputes had surfaced between the Plaintiff and Defendant No.2.

12. Between 27th April, 2007 and 16th August, 2007, the Plaintiff admittedly paid to Defendant No. 1 an amount of Rs. 1,01,375/- towards transfer fees and Rs. 11,01,996/- towards sale consideration. Defendant No.2 had already paid an amount of Rs. 23,28,752/- to Defendant No.1. Therefore, Defendant No.1 had received an aggregate amount of Rs. 34,30,748/- towards the sale consideration of the suit flat, as against the amount of Rs. 77,62,505/- agreed to be paid under the said LOAs by Defendant No.2/Plaintiff to Defendant No.1.

KPPNair 38 NMS 668 OF2012

13. After the second LOA was issued by the Plaintiff to Defendant No.2/Plaintiff, serious disputes erupted between Defendant No.2 and the Plaintiff. Defendant No.1 admittedly was not aware of the same until they received a letter dated 2 nd July, 2007 from the Advocate for Defendant No.2 alleging that the husband of the Plaintiff who had acted as a broker qua the transaction in respect of the suit flat had fabricated

and forged documents, had misrepresented to Defendant No.1 and caused Defendant No.1 to believe that he was acting on behalf of Defendant No.2 and has wrongly transferred allotment of the suit flat in favour of his wife i.e. the Plaintiff without the consent and knowledge of Defendant No.2 and under the guise of obtaining loan from Santosh Pathak(husband of Plaintiff) has taken certain original documents from Defendant No.2 including the tax file, pan card, cheque book and passbook of Defendant No.2. It was further recorded in the said letter that Defendant No.2 has lodged written complaints dated 11 th June, 2007, and 20th June, 2007 with the Senior Inspector of Police, General Branch, CID, EOW and the same were pending investigation. Defendant No. 1 was therefore called upon by the said notice not to accept any payment from the Plaintiff, to provide the documents on the basis of which the allotment of the suit flat was transferred in favour of the Plaintiff, to cancel the allotment made in favour of the Plaintiff and that the booking be reinstated in favour of Defendant No.2.

KPPNair 39 NMS 668 OF2012

14. Defendant No.1 vide its letters dated 18 th July, 2007 and 31st July, 2007 addressed to Defendant No.2, set out the background in which the allotment was transferred to the Plaintiff. However, Defendant No.2 by her letter dated 16th August, 2007 repeated and reiterated that the allotment made in favour of the Plaintiff was a result of fraud played by Mr. Santosh Pathak and the Plaintiff on Defendant No.2 and her sister.

15. Very serious allegations have been made by the two sisters against the Plaintiff and her husband including of fabrication and cheating. In turn, the Plaintiff and her husband also made allegations including of theft against the two sisters. In view of these disputes between the Plaintiff and Mr. Santosh Pathak with Ms. Chandrika Gupta and/or Saraswati Gupta, the Plaintiff and/or Mr. Santosh Pathak have filed several cases/complaints which are listed hereinbelow:

(i) Anticipatory Bail Application 856/2006 - Santosh Pathak vs. State of Maharashtra.

(ii) Anticipatory Bail Application 859/2006 - Santosh Pathak vs. State of Maharashtra.

(iii) Anticipatory Bail Application 860/2006 - Santosh Pathak vs. State of Maharashtra.

(iv) Criminal Writ Petition 103/2008 - Santosh Pathak vs. State of Maharashtra & Ors.

(v) Criminal Writ Petition 104/2008 - Santosh Pathak vs. State of Maharashtra

(vi) & Ors.
Criminal Writ Petition 3354/ 2012 - Santosh Pathak vs.

Maharashtra & Ors.

(vii) Criminal Writ Petition 699/2013 - Santosh Pathak vs. State of Maharashtra & Ors.

(viii) Criminal Writ Petition 931/2012 - Shaila Santosh Pathak vs. State of Maharashtra

(ix) Criminal Writ Petition 1692/2012 - Shaila Santosh Pathak vs. Credit Information Bureau of India Limited and others.

(x) Writ Petition 1625 of 2012 - Shaila Santosh Pathak vs. Credit Information Bureau of India Ltd. and others.

(xi) AO/666/2011 Mrs. Shaila S. Pathak vs. Oberoi Constructions Pvt. Ltd. and another.

(xii) Suit No. 641 of 2012 - Mrs. Shaila S. Pathak vs. Oberoi Constructions Pvt.

Ltd. and others (present suit).

(xiii) CC 223/SW/2013 filed against Shaila Pathak and Santosh Pathak

(xiv) FIR No. 255/2004 (filed at Samta Nagar Police Station) - Santosh A. Pathak vs. Saraswati A. Singh under Sections 415, 406, 418, 420, 201, 109, IPC.

(xv) FIR No. 258/2004 - Santosh A. Pathak vs. Saraswati A. Singh under Sections 415, 406, 418, 420, 201, 109 IPC.

(xvi) FIR No. 106/2005 - Santosh A. Pathak vs. Saraswati A. Singh under Sections 415, 379 IPC.

(xvii) CC No. 6854/2007 - Santosh A. Pathak vs. Saraswati A. Singh. (xviii) CC No. 217/2007 - Santosh A. Pathak vs. Saraswati Gupta @ Saraswati A. Singh. Under Sections 415 and 138.

(xix) C.C. No. 2941 of 2008 - Santosh Pathak vs. Saraswati Gupta @ Saraswati A. Singh under Sections 415 and 138.

KPPNair 41 NMS 668 OF2012 (xx) CC No. 2942 of 2008 - Santosh Pathak vs. Saraswati Gupta @ Saraswati A. Singh.

(xxi) CC No. 8573 of 2008 - Santosh Pathak vs. Saraswati Gupta @ Saraswati A. Singh.

(xxii) CC No. 4106 of 2008 - Santosh Pathak vs. Saraswati Gupta @ Saraswati A. Singh.

(xxiii)MECR No. 4/2008. CC No. 72/PW/of 2009 - Santosh Pathak vs. Saraswati Gupta @ Saraswati A. Singh.

(xxiv) MECR No. 06/2008. CC No. 817/PW of 2009. - Santosh Pathak vs. Saraswati Gupta @ Saraswati A. Singh in which summons is served on Defendant No. 1 builder.

(xxv) CR No. 20/2008 .CC No. 64 of 2008 - Santosh Pathak vs. Saraswati Gupta @ Saraswati A. Singh.

(xxvi) CC/372/SW/2012- Shaila Pathak vs. Vikas Oberoi (Defendant No. 1 builder);

(xxvii) Suit No. 2028 of 2010 filed by Shaila Pathak against Defendant No.1 Builder.

16. Defendant No.2 herein and her sister Ms. Saraswati Gupta have also filed the following cases against the Plaintiff and/or her husband Shri Santosh Pathak.

(i) Civil Suit No. 2148 of 2012 - Ms. Saraswati Gupta and others vs. M/s.

Oberoi Construction and ors. (Defendant No.1);

(ii) OW No. 4367/EOW/CB/CID/2007- Ms. Saraswati Gupta & Ors. Vs. Pathaks where summons is served on Defendant No.1 builder.

(iii) OW No. 1296/EOW/CID/VDK/2008 u/s 406, 420, 34 IPC. M/s.

Saraswati Gupta and Ors. Vs. Pathaks where summons is served on Defendant No.1 builder.

KPPNair 42 NMS 668 OF2012

17. Thereafter between October, 2007 and October 2008, repeatedly summons were issued on the Director of Defendant No.1 by the EOW and the CID, for investigation of the complaint filed by the sister of Defendant No.2 against Mr. Santosh Pathak (husband of the Plaintiff), as regards the transaction in respect of the suit flat, as well as flat No. 1003 in the same building and also in connection with a complaint filed by Mr. Santosh Pathak against Defendant No.1.

18. Defendant No.1 therefore was in the midst of a cross fire between the Plaintiff and her husband on the one hand and Defendant No.2 and her sister on the other, for no fault of theirs. Despite being dragged in various criminal investigations as a result of the inter se disputes between Defendant No. 2 and her sister and the Plaintiff and her husband, Defendant No. 1 took a very fair stand in the matter. Defendant No.1 wrote to Defendant No.2 recording the circumstances under which the first allotment letter was transferred in favour of the Plaintiff. Defendant No. 1 continued providing information to the Plaintiff as regards the developments concerning the flat purchasers including developments qua the suit flat, which is clear inter alia from circulars/letters dated 12th July, 2007, 16th July, 2007 and 5th March, 2008 addressed by Defendant No.1 to the Plaintiff.

KPPNair 43 NMS 668 OF2012

19. The Plaintiff by her letter dated 26 th April, 2008 called upon Defendant No.1 to execute a sale deed in respect of the suit flat and also threatened to initiate court proceedings against Defendant No.1. In response thereto, Defendant No.1 by their Advocate's letter dated 8 th May, 2008 inter alia recorded that there appeared to be inter se disputes between the Plaintiff and Defendant No.2 in which they have been unnecessarily harassed and dragged into. Defendant No. 1 also recorded that Defendant No.1 was always ready and willing to execute the Agreement in respect of the suit flat and called upon the Plaintiff to sort out the alleged disputes between her and Defendant No.2 on or before 31st May, 2008 and pay all the amounts payable as on 31 st May, 2008 to Defendant No.1. Defendant No.1 further recorded that if the alleged disputes are not sorted out and further payments are not made to them on or before 31st May, 2008, Defendant No.1 would be compelled to cancel the allotment in respect of the suit flat. In my view, Defendant No. 1 was absolutely justified in writing the said letter dated 8 th May, 2008 to the Plaintiff. In circumstances where serious allegations of fraud were made and criminal proceedings instituted, in which repeatedly summons were issued to Defendant No.1 for no fault of theirs, it was only fair and just on the part of Defendant No.1 to require the Plaintiff to have the disputes with Defendant No.2 resolved before execution of the Agreement. However, the Plaintiff by her letter dated 28th May, 2008, addressed to the Advocate for Defendant No. 1 KPPNair 44 NMS 668 OF2012 alleged that Defendant No. 1 is encouraging the illegal claims of Defendant No.2. There is not an iota of material on record to show that Defendant No. 1 has encouraged Defendant No.2 qua any of her claims allegedly illegal or otherwise. On the face of several complaints/proceedings filed against each other, it was ridiculous on the part of the Plaintiff to allege that according to her there existed no dispute between her and Defendant No.2. The Plaintiff also failed to approach a Court of law to seek appropriate reliefs, but instead insisted that Defendant No.1 should execute an Agreement in respect of the suit flat in her favour which Defendant No.1 correctly was hesitant in doing.

The Plaintiff thereafter on 5 th December, 2008, filed a consumer complaint against Defendant No.1 seeking execution of an agreement in respect of the suit flat in her favour. No ad-interim or interim orders were passed in favour of the Plaintiff in the said consumer complaint. The same was subsequently withdrawn as set out hereinabove.

20. Despite being in the thick of the aforestated problems/ disputes/ controversy, Defendant No. 1 by its letter dated 12 th February, 2009, forwarded to the Plaintiff the draft of the premises

ownership agreement/tripartite agreement and called upon the Plaintiff to have the same stamped as per the provisions of the Bombay Stamp Act and return the duly executed agreements, and further mentioned that an amount of Rs.

23,80,759/- was due and payable by the Plaintiff to Defendant No.1.

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21. The Plaintiff by her letter dated 16 th February, 2009 inter alia recorded as follows:

"Please take note that I have objection in executing tripartite agreement as it has never been your practice as well as it is against the law. I have gone through numerous premises ownership agreement in respect of the other projects wherein you have entered into agreement with second purchaser without making first purchaser a confirming party. It has been your practice that you prepared a tripartite agreement on a non-judicial stamp paper which is signed by the second purchaser for him/herself as well for first purchaser on the basis of power of attorney. You are requested to follow the same precedent in present matter..... As per law, a person can be made a confirming party in respect of property wherein he/she does not have any right. At several places in the draft premises ownership agreement more particularly in page Nos. 8, 21, 22, 40 and 41 several objectionable and necessary details has been incorporated.

I agree to execute indemnity bond in your favour in respect of any legal claim raised by Chandrika Gupta through court of law but it should be part of premises ownership agreement as the financial institution/Banks would hesitate in giving housing loan on the basis of documents wherein several disputed details are incurred"

22. As set out hereinabove, the Plaintiff as well as Defendant No. 2 had never raised any objection to the second LOA dated 30 th April, 2007, in which Defendant No.1 had categorically recorded that the Plaintiff and Defendant No. 2 shall execute all deeds, documents and writings including premises KPPNair 46 NMS 668 OF2012 ownership agreement/tripartite agreement as and when requested by Defendant No.1. By the said letter dated 16 th February, 2009, the Plaintiff refused to abide by the said condition in the second LOA agreed upon by her earlier and instead she backed out of the Agreement by taking a completely incorrect stand that she has objection in executing the Tripartite Agreement as it was against the law and not the practice of Defendant No. 1 to have the same executed by the parties. Interestingly after having said so, the Plaintiff has alleged that it has been the practice of Defendant No.1 to prepare a tripartite agreement on a non-judicial stamp paper which is signed by the second purchaser for himself/herself as well as for first purchaser on the basis of the power of attorney. In the second LOA there is no mention of any tripartite agreement to be executed on a non-judicial stamp paper. The Plaintiff therefore also took an incorrect stand that the tripartite agreement should be on a non-judicial stamp paper. The clauses in the tripartite agreement which the Plaintiff has termed objectionable include the narration of disputes between Defendant No.2 and the Plaintiff and the indemnity clause indemnifying Defendant No.1 from any

loss or legal proceedings arising from the said dispute. Defendant No. 1 is absolutely correct in its submission that the clauses impugned by the Plaintiff in the Tripartite Agreement were necessary and essential in the light of the disputes pending between the original allottee (Defendant No.2) and the intended transferee (Plaintiff). It was necessary for Defendant No.1 to safeguard its rights and interest and KPPNair 47 NMS 668 OF2012 protect itself from any future litigations and losses that may be caused to it on account of the disputes between Defendant No.2 and the Plaintiff. The Plaintiff's contention therefore that the disputed clauses were in contravention of MOFA and are not necessary is therefore erroneous and contrary to the facts on record. In any case even de hors these clauses, the Plaintiff declined to execute the registered Tripartite Agreement and insisted that the same be done on a non-judicial stamp paper. The Plaintiff has therefore by her letter dated 16th April, 2009 made it clear that she was not willing to perform her part of the agreement contained in the second LOA viz. to execute the Tripartite Agreement as requested by Defendant No.1. The insistence of the Plaintiff to execute the indemnity bond in favour of Defendant No.1 but not to make it a part of the premises ownership agreement as the financial institutions and Bank would hesitate in giving housing loan on the basis of documents wherein disputed details are incorporated also goes to show that the Plaintiff wanted to suppress these facts of the existence of disputes prevailing between the Plaintiff and Defendant No.2 in respect of the suit flat, from the financial institutions and also wanted Defendant No.1 to be a party to such suppression. Defendant No. 1 was fully justified in not agreeing to this.

23. The Plaintiff thereafter also filed a suit before the City Civil Court seeking directions against Defendant No.1 to execute the Tripartite Agreement KPPNair 48 NMS 668 OF2012 without the objectionable clauses. As set out hereinabove, the objections raised by the Plaintiff against the clauses in the Tripartite Agreement were absolutely baseless and untenable since Defendant No. 1 was fully justified in protecting itself in the fight/disputes between the Plaintiff and Defendant No.2. The Plaintiff failed to obtain any ad-interim /interim reliefs. The Plaintiff in the said suit did not even pray for any relief restraining Defendant No.1 from creating third party rights in respect of the suit flat. Being conscious of the same, the Plaintiff has now altered her written submissions stating that such relief was not prayed for since Defendant No. 1 had agreed and in fact there was an understanding that Defendant No. 1 would not create any third party rights in respect of the suit flat. In any event, the Plaintiff failed to obtain even the ad-interim relief sought in the suit filed by her before the City Civil Court at Dindoshi. The Plaintiff also failed to secure any reliefs from the High Court in the Appeal filed by her impugning the order passed by the City Civil Court declining to grant interim relief to the Plaintiff. In the said Appeal from the order, this Court only passed an order expediting the hearing of the Suit. However, it is pertinent to note that Defendant No.2 had also filed a suit in the City Civil Court at Dindoshi against the Plaintiff and no directions were obtained from any Court for expedition of the same. Instead, the Plaintiff took out an application under Order VII Rule 11 seeking dismissal of the suit on the ground that it was barred by limitation. The City Civil Court at Dindoshi declined to grant reliefs sought by the Plaintiff on the ground that KPPNair 49 NMS 668 OF2012 the issue of limitation was a mixed question of law and fact, and therefore framed the issue of limitation as a preliminary issue and granted liberty to the parties to lead evidence for and/or against the said issue. Again, there were several criminal complaints filed by the parties against one another. In view of these circumstances, and in view of there being no order restraining Defendant No. 1 from creating any third party rights in respect of the suit flat,

Defendant No.1 was fully justified in terminating the allotment of the suit flat in favour of the Plaintiff/ Defendant No.2 by its letter dated 8 th November, 2011. In my view, it is therefore established beyond any doubt that the Plaintiff refused to perform her part of the contract/performed her part of the agreement, the moment the Plaintiff in her letter dated 16 th February, 2009, refused to execute the Tripartite Agreement and thereafter alleged that the same should be on a non-judicial stamp paper, thereby disentitling herself from seeking relief of specific performance which is a discretionary relief.

24. Defendant No.1 has also contended that the Plaintiff has failed and neglected to make payments towards the sale consideration of the suit flat and has thereby committed breach of the terms that were agreed in the first and second LOAs. According to them, this also demonstrates lack of readiness and willingness to perform the contract. The question therefore of granting specific performance of the Agreement contained in the said LOAs as prayed for by the Plaintiff does not arise. Defendant No.1 has contended that in fact the KPPNair 50 NMS 668 OF2012 Plaintiff had no funds to make payments as agreed, and the flat was purchased by the Plaintiff (whose husband is a real estate broker/financier) only with the intention to sell the same as and when the prices would rise and make profit out of the same, which she was unable to do in view of the disputes having erupted between her and her husband on the one side and Defendant No.2 and her sister on the other.

25. Defendant No.1 - Developer received an aggregate amount of Rs.

34,30,748/- from Defendant No.2 and the Plaintiff towards sale consideration of the suit flat as against the amount of Rs. 77,62,505/- agreed to be paid under the said LOA's by Defendant No.2/Plaintiff to Defendant No.1.

26. It is contended by Defendant No. 1 that as per clause 5 of the first LOA, the Plaintiff was obliged to make the payment as the construction advanced, even if no demand notice was received from Defendant No.1. The last payment made for a sum of Rs. 82,000/- was made by the Plaintiff on 17 th August, 2007, which was only upto podium level construction. According to the Plaintiff, no notice was given to her by Defendant No.1 - Developer under clause 7 of the LOA. The Plaintiff has alleged that an employee of Defendant No.1 had given his statement to the Police that issuance of demand notice to the Plaintiff was discontinued because of the disputes between the Plaintiff and Defendant No.2 and her sister. Defendant No.1 contends that the said KPPNair 51 NMS 668 OF2012 employee is no longer in their employment and they are not aware of any such statement made by him. They have submitted that in any event, the purported statement is totally incorrect and is belied by the documents filed by the parties before this Court. It is also submitted by Defendant No.1 that reliance on clause 7 is misplaced. Clause 7 was only a clause which contemplated a situation where Defendant No.1 would condone the breach under clause 5 and choose to accept monies with interest. Clause 7 does not absolve the Plaintiff of her breach under clause 5. In any event, in the present case, according to Defendant No.1, they had in fact given notice requiring the Plaintiff to pay the outstanding amount and putting the Plaintiff to notice that failure would result in cancellation of the allotment. Despite the same, the Plaintiff failed and neglected to make payments. It is submitted by Defendant No.1, that if clause 7 which is relied upon by the Plaintiff is to be applied, then upon

demand being made and a default by the Plaintiff, the allotment "automatically" came "to an end". However, despite this position Defendant No.1 by its letter dated 8th November, 2011, cancelled the allotment in favour of the Plaintiff. According to Defendant No.1, they are therefore, fully justified in issuing the said letter dated 8th November, 2011, cancelling the allotment.

27. In view of the abovestated submissions of the parties, it has become necessary to examine as to whether the Plaintiff has failed and neglected to make payments to Defendant No.1 towards sale consideration of the suit flat and has thereby committed breach of the agreement contained in the said KPPNair 52 NMS 668 OF2012 LOAs. As set out earlier, the last payment made by the Plaintiff to Defendant No. 1 was on 17th August, 2007 for Rs. 82,000/- which was only upto podium level construction. On 5th March, 2008, Defendant No.1 by its letter informed the Plaintiff that they would be receiving approval for higher floors shortly and requested the Plaintiff to treat the said letter as an advance intimation to facilitate the arrangement for payment. By the said letter, it was also recorded that Defendant No.1 shall be sending a separate letter raising the demand for the instalments payable and the Plaintiff shall be liable to make payment within seven calendar days from the date of the demand notice. The said letter dated 5th March, 2008, was responded to by the Plaintiff by her letter dated 26th April, 2008, wherein she has after referring to the letter dated 5th March, 2008, received by her from Defendant No. 1, inter alia, stated that, "As per your request I have kept the payment ready". As set out hereinabove, the Plaintiff however insisted on the agreement being executed. It is therefore clear from the said letter that it was not the Plaintiff's case as now sought to be contended that she had not received any demand notice from Defendant No.1 or that she was not aware as to what amount was due and payable by her to Defendant No.1. In fact she stated that she was ready with the payment to be made to Defendant No.1, which payment she would make only upon execution of the sale agreement/sale deed in her favour by Defendant No.1. The Plaintiff was therefore very well aware about the payment she was required to make to Defendant No.1.

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28. As narrated hereinabove, thereafter, correspondence was exchanged between the parties as regards the execution of the agreement.

Defendant No.1 therefore correctly called upon the Plaintiff to sort out her disputes with Defendant No.2 on or before 31 st May, 2008, and to also make outstanding payments by that date failing which Defendant No.1 shall be compelled to cancel the allotment in respect of the suit flat.

29. Despite this, the Plaintiff who had allegedly "kept the payment ready" failed to make any payment to Defendant No.1 or settle her dispute between herself and Defendant No.2. Instead, the Plaintiff by her letter dated 28th May, 2008, whilst raising various meritless contentions as dealt with hereinabove, stated that she has not received any demand letter therefore she is unable to make the payment and that she is ready and willing to make all the outstanding payments within 7 days of the receipt of the demand letter from Defendant No.1. The Plaintiff called upon Defendant No.1 to execute the agreement of sale/sale deed in her favour and also to send a demand letter to her in order to enable her to make payment of the outstanding dues, as the money required for her

payment was ready. The Plaintiff then filed the Consumer Complaint.

30. Defendant No. 1 by its letter dated 12 th February, 2009, forwarded the premises ownership agreement to the Plaintiff requesting her to get the said agreement adequately stamped as per the provisions of the Bombay Stamp Act and return the same duly executed by her and Defendant No.2. By the said KPPNair 54 NMS 668 OF2012 letter, Defendant No.1 also made a specific demand for an amount of Rs.

23,80,750/-, which was due and payable by the Plaintiff to the Defendant No.1 and requested her to make the said payment immediately. By her letter dated 16th February, 2009 (wrongly dated as 16 th January, 2009), the Plaintiff who by her earlier letter had recorded that on receipt of the demand letter for payment she would pay the same as she was ready with the payment, now took a stand that she shall make payment of Rs. 23,80,759/- only after execution and registration of the premises ownership agreement and upon sanction of my housing loan which is approved. It is important to note that in this letter the Plaintiff has not disputed the amount of Rs. 23,80,759/-

payable by her to Defendant No.1 and has not raised any grievance whatsoever qua the said amount and has in fact agreed to pay the same only after the execution of the agreement for sale. Interestingly, later the Plaintiff has taken a stand that she was not informed about the stage of construction with which the said payment was linked and no Architect's Certificate was forwarded to the Plaintiff along with the said demand. However, in the said letter as mentioned aforesaid, the Plaintiff raised objections only qua execution of the Tripartite Agreement. Interestingly in the said letter, the Plaintiff has taken a stand that she will pay the said amount after registration of the agreement and upon sanction of her housing loan and in the same breath the Plaintiff has also stated that the housing loan is approved. Defendant No. 1 therefore by its letter dated 4 th April, 2009, addressed to the Plaintiff correctly KPPNair 55 NMS 668 OF2012 recorded that the Plaintiff does not have necessary funds to pay Defendant No.1 towards consideration in respect of the suit flat. In response to the aforesaid letter, the Plaintiff in her letter dated 10 th June, 2009, inter alia, contended that:

"I have the funds ready in my hand for further payment and my Housing Loan is also sanctioned..." and that "Your Clients are trying to put words in my mouth by saying that I will make payment upon sanction of housing loan this is for the record of your clients that my housing loan is sanctioned as well as I also have funds ready for making payment to your Clients and I will make payment of the outstanding dues upon execution of the Agreement of Sale".

31. There is also on record a letter dated 19 th January, 2011, from the State Bank of India to the Plaintiff which records as follows:

"With reference to your home loan application, we are glad to inform that our Bank has agreed to sanction a loan of Rs.45 lacs against Flat No. 803-A, Oberoi Splendor, Bldg No. 1. Please arrange to provide the tripartite registered agreement for sale, NOC for disbursement of loan".

(emphasis supplied).

32. From the aforesaid facts it is clear that the Plaintiff on the one hand refused to execute the sale agreement/tripartite agreement on grounds which were baseless and untenable and on the other hand refused to make payments as agreed under the LOA on the ground that she cannot be called upon to make any further payments until the sale agreement/tripartite agreement is executed by and between Defendant No.1 and the Plaintiff. In view of such conduct of the Plaintiff categorically denying the making of payment of the KPPNair 56 NMS 668 OF2012 undisputed amount of Rs.23,80,759/- unless and until the Agreement for Sale is executed, no further notice seeking the said payment was required to be served on the Plaintiff by Defendant No.1, as alleged by the Plaintiff. Again in view of the conduct on the part of the Plaintiff refusing to execute the Tripartite Agreement on grounds which are baseless and untenable and refusing to pay the sale consideration on the ground that the Sale Agreement/Tripartite Agreement is not executed, the Plaintiff cannot be heard to allege that Defendant No.1 has breached the provisions of the MOFA Act.

As already held hereinabove, I am prima facie satisfied that the Plaintiff has committed breach of the conditions set out and agreed upon in the second LOA dated 30th April, 2007 and the Plaintiff by not making payment of a specific amount claimed by Defendant No.1, which amount is not disputed by the Plaintiff in her letter dated 16th February, 2009, the Plaintiff cannot be heard to say that she cannot be called upon to make any further payments unless the Tripartite Agreement is signed. In view thereof, apart from the grounds pleaded by Defendant No.1, the Plaintiff cannot draw any support from Clause 7 of the LOA dated 30 th October, 2006. The Plaintiff has, in my view, also committed breach of the condition to make payments as set out in the LOA by not making payment of the sale consideration to Defendant No.1 and is therefore also not entitled to specific performance as sought in respect of the suit flat.

33. The Hon'ble Supreme Court has in the case of Aniglase Yohannan KPPNair 57 NMS 668 OF2012 (supra) held as under:

"12. The basic principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes a personal bar. The court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief".

34. Further, in N.P. Thirugnanam (supra), the Hon'ble Supreme Court has held as under:

"It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under s.20 of the Specific Relief Act 1963 (for short, 'the Act'). Under s.20, the court is not bound to grant the relief just because there was valid agreement of sale. Section 16(c) of the Act

envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the KPPNair 58 NMS 668 OF2012 contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of contract".

35. Applying the law enunciated by the Hon'ble Supreme Court in the aforesaid cases to the facts and circumstances of the present case, the conduct of the Plaintiff exposes a complete lack of readiness and willingness to perform her obligations under the LOA. The Plaintiff defaulted in making periodic payments of her installments, failed to execute the Tripartite Agreement and raised completely extraneous issues with the intent to cover her lapses. The conduct of the Plaintiff was far from being blameless.

36. I am also in agreement with the submission of Defendant No.1 that the Plaintiff in fact did not have funds to pay further amounts to Defendant No.1 towards the sale of the suit flat as agreed under the first and the second LOAs.

The statements recorded in the letters of the Plaintiff dated 16 th February, 2009 KPPNair 59 NMS 668 OF2012 and 10th June, 2009, that her housing loan is ready and she is ready with the funds for making payments is belied by the letter dated 19 th January, 2011 addressed to her by the State Bank of India wherein it is recorded that the Bank has agreed to sanction a loan of Rs. 45 lakhs and has called upon the Plaintiff to provide the tripartite registered agreement for sale and the NOC for disbursement of the loan. Interestingly, the Plaintiff has not produced any material before this Court in support of her contention that on 10 th June, 2009, her housing loan was sanctioned or that she was ready with the funds to make payments to Defendant No.1. The statements made in the letters dated 16 th February, 2009 and 10th June, 2009 were therefore false on the Plaintiff's own showing. The Plaintiff has therefore to conceal her inability to pay the balance consideration to Defendant No.1, has sought to raise completely false and frivolous contentions. The Plaintiff has therefore sought to contend that the housing loan sanctioned on 19th January, 2011 had no connection with the housing loan referred to by her in her letters dated 16 th February, 2010 and 10th June, 2009

and that a purported fresh application for housing loan was made by the Plaintiff in view of the complaint filed by Defendant No. 2 being closed.

The Plaintiff has not set out any facts as to how the Plaintiff had made arrangement to pay the balance consideration. Even the aspect of a second application for housing loan does not find mention in the plaint and neither has the Plaintiff provided any details of the first or second application for housing loan.

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37. I am therefore also of the view that Defendant No.1 has correctly submitted that the transaction that the Plaintiff intended to enter into, was clearly to make a quick profit by buying and selling real estate. The Plaintiff's husband is an estate agent who is also a financier. The Plaintiff's husband was admittedly involved in the transaction regarding the sale of the flat with Defendant No.2 and thereafter in the transfer of the booking in favour of the Plaintiff. The Plaintiff never intended to reside in the suit flat and has admitted this fact in Consumer Complaint No. 707 of 2008 where the Plaintiff has categorically averred:

"13. I say that due to downfall in the Real Estate Market I wanted to dispose off the said flat No. 803 as early as possible. In the first week of April 2008 I had finalized the deal for the sale of the aforesaid Flat @ of Rs. 14,000/- (base rate) per square feet (build up area). However, due to downfall in the market, virtually there is no purchaser in the market to purchase my Flat.

14. I say that I am facing immense hardship due to failure on the part of the Opposite Party to execute the Document as laid down in the Maharashtra Ownership of Flats Act, 1963, even after receipt of more 50% of the consideration amount. Due to bad condition of the Real Estate the price of my Flat has gone down from Rs.14000/-(base price) per square feet (built-up area) to Rs.10,000/- (base price) per square feet (built-up area) which is likely to go down even further. Thus an on today I have already suffered the loss of around Rs.39,48,000/-(Rupees Thirty Nine Lakhs Forty Eight Thousand only). I say that I reserve my right to initiate the necessary proceedings against the Opposite Parties KPPNair 61 NMS 668 OF2012 for the loss I have suffered due to downfall in the price of the Flat. Had the Opposite Parties executed the Agreement of Sale in my favour, on time, as per law than I would have sold the said Flat No. 803 and not only recovered my money but would have made some profit. I say that even if I was not able to sell the aforesaid Flat No. 803 then I would have taken housing loan wherein I would have to pay the interest at much lower rate".

38. I am therefore also of the prima facie view that the transaction for purchase of the suit flat by the Plaintiff was nothing more than a speculative transaction in real estate. The Plaintiff did not have the means to purchase the suit property. The Plaintiff intended to sell the suit flat on a rise in the real market price before the balance amount became payable under the allotment letters. However

due to her disputes with Defendant No. 2 and fall in the real estate prices, the Plaintiff failed to achieve her motive. The Plaintiff never contemplated that she would be required to pay the balance amounts and was neither in a position nor willing to make the said payments. The facts of the present case are similar to those in N.P. Thirugnanam versus R. Jagan Mohan Rao (Dr) (supra) where the Hon'ble Supreme court in similar facts has observed as under :

"6. In view of the aforesaid factual findings and of the legal position, the High Court has rightly concluded thus :

"We have no hesitation in recording the agreement with the finding of the learned Single Judge that the plaintiff has hopelessly failed and shown rather reluctance than readiness to perform his part of the contract. In the facts KPPNair 62 NMS 668 OF2012 that are noticed in the judgment of the trial court, which are extracted by us as above, the only possible conclusion is that the plaintiff really was rather reluctant than willing to perform his part of the contract and was at no time ready with either money or resources to fulfil his part of the contract. The other circumstances which are noticed by the learned Single Judge and are detailed by him in the judgment go to show that the very idea of entering into an agreement with the first defendant alone when the plaintiff-appellant was already informed about the death of Dr R. Surya Rao and the devolution of his interest upon the first defendant, his mother, his brothers and his sisters, was to somehow or other enter upon the property, but, the stipulated rent also was not paid by the plaintiff to the defendants. The trial court has noted that there was no legal necessity for the defendants to part with the suit property and held against the plaintiff that they very contract was speculative in nature and entered into by the plaintiff who has been dabbling in real estate transactions without the means to purchase a substantial immovable property like the suit property and we agree with the same".

(emphasis supplied).

39. I am therefore of the view that as stated hereinabove, it is the Plaintiff who has failed to comply with the Agreement as recorded in the first and second LOAs viz. to execute the Tripartite Agreement as required by Defendant No.1 and to make payments towards sale consideration of the suit flat as agreed in the first and the second LOAs. The conduct of the Plaintiff shows lack of readiness and willingness to fulfill her obligations. I am therefore prima facie satisfied that Defendant No.1 was fully justified in terminating/cancelling the allotment by letter dated 8 th November, 2011 and the said termination is KPPNair 63 NMS 668 OF2012 legal, proper and valid.

40. Since this Court has come to the conclusion that the termination of the LOA by Defendant No.1 is legal and valid, the question as to what transpired thereafter becomes irrelevant. In any event, I am not in agreement with the Plaintiff that the subsequent transfers by Defendant No.1 in favour of Defendant No. 3 and in favour of Defendant Nos. 4 and 5 by Defendant No.3 are not valid and/or bona fide. ig

41. Defendant No. 3 purchased the suit flat pursuant to a registered agreement dated 25th November, 2011 from Defendant No. 1 for an aggregate consideration of Rs. 1,92,99,100/-, the details of which have been placed before the Court on behalf of Defendant No.3. Though the Plaintiff had instituted proceedings against Defendant No.1 in respect of the suit flat prior to the agreement for sale being executed by and between Defendant Nos. 1 and 3, the Plaintiff has failed to register a notice of lis pendens and/or to obtain any orders of injunction from any Court in respect of the suit flat.

What is most relevant is that the Plaintiff had admittedly, the notice of rights acquired by Defendant No. 3 on 29 th November, 2011. The Plaintiff filed the present Suit only on 12th March, 2012, i.e. after more than five months after having notice of the execution of the said agreement. If the Plaintiff would have been serious about her allegation that the agreement between Defendant No. 1 and Defendant No.3 is not a genuine and bona fide KPPNair 64 NMS 668 OF2012 agreement/transaction, the Plaintiff who has filed a plethora of complaints/legal proceedings in the present matter would surely have moved this Court immediately seeking appropriate reliefs against Defendant No.3.

Admittedly till date there has been no order passed in respect of the suit flat.

Defendant No. 1 also had not commenced its submissions before the City Civil Court at Dindoshi on 17th and 19th November, 2011 and therefore disclosed the transaction between Defendant No.1 and Defendant No.3 only on 29 th November, 2011, when an affidavit was filed by Defendant No.1. The allegations made by the Plaintiff in respect of the transaction between Defendant Nos. 1 and 3 in respect of the suit flat including the allegation that Defendant No.1 deliberately suppressed the transaction in respect of the suit flat with Defendant No. 3 on 17 th and 19th November, 2011 before the City Civil Court, at Dindoshi, therefore cannot be accepted.

42. As regards the transaction between Defendant No. 3 and Defendant Nos. 4 and 5, the Plaintiff has alleged that Defendant No.3 has sold the flat to Defendant Nos. 4 and 5 at a loss, since the expenses that were incurred by Defendant No.3 during purchase of the suit flat were not recovered by Defendant No.3 when he sold the flat. The Learned Advocate appearing for Defendant Nos. 4 and 5 has pointed out that in fact Defendant Nos. 4 and 5 have paid all the expenses that were incurred such as stamp duty, club house charges and maintenance charges amounting to Rs. 12,51,420/-. Prior to the KPPNair 65 NMS 668 OF2012 purchase of the suit flat, Defendant Nos. 4 and 5 had no flat of their own in Mumbai. They have, prior to the purchase of the flat, conducted a title search through an Advocate qua the suit flat and the said Advocate has submitted his title certificate dated 5th July, 2012, certifying that the suit flat is clear and marketable. Defendant Nos. 4 and 5 have therefore raised the finances by availing housing loans and personal loans and by selling their mutual fund, by liquidating their public provident fund and breaking the fixed deposits which stood in their children's name. The suit flat has been mortgaged to ICICI Bank. In fact, Defendant Nos. 4 and 5 have spent an amount of approximately Rs. 26,00,000/- towards decorating the interior of the suit flat Vide letter dated 7th August, 2012, parking was also allotted to Defendant Nos. 4 and 5.

A pooja was held in the suit flat on 27 th October, 2012 and with effect from 10th December, 2012, Defendant Nos. 4 and 5 along with their family members have moved into and are residing in the suit flat and have surrendered their staff quarters. I am therefore satisfied that Defendant Nos. 4 and 5 are also bona fide purchasers of the suit flat for value without notice of the original contract.

43. The Plaintiff has not advanced any submissions before this Court in support of her contention that in the event this Court is not inclined to disturb the ownership/possession of Defendant Nos. 4 and 5, the Court should in the alternative restrain Defendant No. 1 from disposing of one of the KPPNair 66 NMS 668 OF2012 vacant flats in the suit building viz. Oberoi Splendor and ultimately hand over the said flat to the Plaintiff in the event of her succeeding in the above Suit. In any event, since I am prima facie satisfied that the Plaintiff is not entitled to specific performance of the Agreement as sought, the question of granting any interim relief in favour of the Plaintiff does not arise. The Notice of Motion is therefore dismissed. The Plaintiff shall pay costs of the Notice of Motion to Defendant Nos.1, 3 and 4 and 5 in three sets.

The Plaintiff seeks stay of this order. The Learned Advocate appearing for the Defendant No. 1 has stated that the Defendant No.1 shall not dispose of the flat which is reserved by the Defendant No.1 pursuant to the order of the Appeal Court dated 20th June, 2012 for a period of three weeks from the date of this order. The statement is accepted.

(S. J. KATHAWALLA, J.)