

REPORTED

IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 1944/2000

SANJANA KAPOOR AND ANR. Plaintiffs
! Through: Mr.S.K.Pruthi with Mr.Manoj Ahuja,
Advocates.

VERSUS

\$ M/S.DALMIA RESORTS INTL.PVT.LTD. & ANR. Defendants
^ Through: Mr.Ajay Sharma, Advocate for D-1

% DATE OF DECISION: February 09, 2009

CORAM:

* HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: REVA KHETRAPAL, J.

The plaintiffs seek a decree in the sum of Rs.37,14,923/- (Rupees Thirty Seven Lacs Fourteen Thousand Nine Hundred Twenty Three only) in their favour and against the defendants, holding them jointly and severally liable for payment of the decretal amount with interest.

2. The background facts as set out in the plaint are as under. The defendant No.1 is a company incorporated under the Companies Act, 1956, while the defendant No.2 is stated to be its Director/Chairperson, who are engaged in the

business of developing resorts and leasing them on time-share basis at various places of tourist interest in India and abroad.

3. Allured by the attractive advertisements and representations made by the defendants, painting a very rosy picture of their proposed Scheme for purchase of time-share units at holiday resorts, the plaintiffs, in the first instance, in the months of October and December, 1987 bought three time-share unit weeks (one-bed room type unit, and two efficiency type unit weeks) for the period December-January each year at the GOA RESORT for perpetuity. The defendants thereafter contacted the plaintiffs time and again to buy some more time-share unit weeks, and the plaintiffs vide their letter dated 15th March, 1989, offered to purchase more efficiency type time-share unit weeks at THE OLD ANCHOR, Dalmia Resort at Goa, subject, however to the following terms and conditions:-

“All these time-share unit weeks will be bought on the condition that Dalmia Resorts International (P) Ltd., New Delhi and the Old Anchor, Goa (Dalmia Resort) will BUY BACK my entire lot of time-share unit weeks holdings including the 3 time-share unit weeks, that is, two efficiency type and one-bed room type already bought by me earlier in the year 1987, after a period of Ten years commencing from my first purchase, that is, 4.10.87 at the rate of Rs.1,10,000/- for each efficiency type time-share unit week and Rs.1,20,000/- for each one bed-room type time-share unit week at the OLD ANCHOR, GOA (Dalmia Resort) bought by me.”

4. The plaintiffs having sought confirmation of the above terms from the

defendants, the defendants in response to the said offer and the conditions attached therewith, vide their letter dated 3.4.1989, accepted the offer of the plaintiffs. The contents of the said letter have a crucial bearing on the controversy involved in the present suit and are accordingly reproduced hereunder for the sake of ready reference:

*“DALMIA RESORTS INTERNATIONAL PVT. LTD.
206-207M BMC HOUSE N-BLOCK, MIDDLE CIRCLE
CONNAUGHT CIRCUS, NEW DELHI-110 001*

3rd April, 1989

*Mr.Sanjay Kapoor
39, Banarasi Dass Estate
Timarpur,
Delhi-110 007*

Dear Mr.Kapoor,

Reference your meeting with our General Manager (Marketing) Mr.B.V.S.A.N. Murthy and further to your letter dated 15/03/89, I have discussed the matter with him and the following has been decided.

The company has agreed to BUY-BACK your time share unit weeks subject to your meeting the following conditions:

(a) You will buy 18 (Eighteen) efficiency time share unit weeks at the The Old Anchor, Goa (Dalmia Resorts) within a period of 90 (Ninety) days from the date mentioned above. These 18 efficiency time share unit weeks will be in addition to your earlier holding of three time-share unit room weeks, which you have already purchased earlier in the year 1987.

(b) These purchases of further 18 Efficiency time-share unit weeks will be on out right payment and not on the instalment scheme.

(c) The efficiency time-share unit weeks allotted to you will be in week no.49, week no.50 and week no.1, as there is no availability in week no.51 and week no.52.

The BUY-BACK of these 21 (Twenty one) unit weeks will be at the end of Ten years commencing from the date of your first purchase which was on 4th Oct.1987. The rate decided for BUY-BACK of these twenty one unit weeks in the year 1997 will be one bed room type (1 BR) at the rate of 1,20,000/- (One Lac Twenty Thousand only) per unit week and efficiency room unit type (EFF) at the rate of Rs.1,10,000/- (Rupees One Lac Ten Thousand only) per unit week.

You also have the option of continuing ownership after 1997, however if you do request for BUY-BACK kindly give a written notice of two months to the company.

I look forward to meeting you & assuring you of our best attention at all times.

Thanking you,

Yours faithfully,

for DALMIA RESORTS INTERNATIONAL PVT.LTD.

sd/-

ANIL SETHI

REGIONAL MANAGER

NEW DELHI”

5. The case of the plaintiffs in the plaint is that **in view of the above exchange of offer and its acceptance by the defendants, there was a concluded contract between the plaintiffs and the defendants** as to the terms and conditions of purchase of the time-share unit weeks and also their BUY-BACK. In response to the letter of the plaintiffs, the defendants had stated that the buy-back of these 21 (twenty one) time-share unit weeks will be

at the end of 10 years commencing from the date of the first purchase, which was on 4.10.1987, at the rate stated in the said acceptance letter. Further, the defendants stipulated that the plaintiffs, if they opted for dis-continuing ownership after 1997, would be required to give a written notice of two months to the company requesting for BUY-BACK.

6. The plaintiffs aver that on the above terms and conditions of the contract, the defendants allotted further 18 (eighteen) efficiency type time-share unit weeks to the plaintiffs after receiving full payment in respect of the said 18 units at the rate of Rs.19,000/- (Rupees Nineteen Thousand only) per unit week. The complete details of the said units are set out in **Annexure A-1** to the plaint as follows:-

**“DETAILS OF THE TIME SHARE UNIT WEEKS HELD BY SHRI
SANJAY KAPOOR AND SMT.SANJANA KAPOOR**

<u>S.NO</u>	<u>APPLICATION NO.</u>		<u>DATE</u>	<u>PEREMANENT IDENTIFICATION CODE NO.</u>		
1.	300821	1	09/12/87	0101	E56	1179
2.	301138	1	04/10/87	01049	B11	1088
3.	301139	1	04/10/87	01052	E34	1093
4.	301297	1	10/04/89	01050	E57	2866
5.	301298	1	10/04/89	01050	E56	2867
6.	301299	1	10/04/89	01050	E55	2868
7.	301300	1	10/04/89	01050	E54	2869
8.	301301	1	10/04/89	01049	E54	2870
9.	301302	1	10/04/89	01049	E55	2871
10.	301303	1	10/04/89	01049	E56	2872
11.	301362	1	08/06/89	01049	E14	2975

<u>S.NO</u>	<u>APPLICATION NO.</u>		<u>DATE</u>	<u>PEREMANENT IDENTIFICATION CODE NO.</u>		
12.	301363	1	08/06/89	01049	E15	2976
13.	301364	1	08/06/89	01049	E16	2977
14.	301365	1	08/06/89	01049	E17	2978
15.	301366	1	08/06/89	01050	E62	2979
16.	301367	1	08/06/89	01050	E63	2980
17.	301368	1	12/06/89	01050	E66	3001
18.	301369	1	12/06/89	01050	E67	3002
19.	301370	1	12/06/89	01050	E68	3003
20.	301405	1	29/06/89	0101	E46	3046
21.	301406	1	29/06/89	0101	E47	3047

7. The plaintiffs also deposited a sum of Rs.3,000/- (Rupees Three Thousand only) per unit week in the Escrow Maintenance Funds Account of the defendant with their bankers, towards maintenance charges as one-time payment. In this way, the plaintiffs paid a total sum of Rs.4.65 lacs (Rupees Four Lacs and Sixty Five Thousand only) against all the above 21 (twenty one) units to the defendants and all these payments were duly acknowledged by the defendants.

8. The defendants issued 21 (twenty-one) Membership Certificates in respect of each unit separately and the said Certificates entitled the plaintiffs to commence exercising their rights and privileges pursuant to and in accordance with the “Purchaser's Agreement”. In fact, no such “Purchaser's Agreement” was ever entered into between the plaintiffs and the defendants, and the

relationship of the plaintiffs and the defendants was, according to the plaintiffs, governed by the offer of the plaintiffs as contained in their letter dated 15.03.1989 and the acceptance thereof by the defendants by their letter dated 3.4.1989, the offer and the acceptance constituting a concluded contract between the parties.

9. It is further the case of the plaintiffs that in the year 1992 when the plaintiffs went for their holidays at Goa, all the representations made by the defendants were found to be totally false and untrue and their stay at the Goa Resort was miserable. On their return, the plaintiffs wrote to the defendants vide their letter dated 22.01.1993 about the poor services being provided at the aforesaid Resort and the intolerable conditions, and requested the defendants to BUY-BACK all the aforesaid 21 (twenty one) time-share unit weeks as per the agreement.

10. The defendants acknowledged the letter of the plaintiffs vide their reply dated 20.02.1993, apologizing for the inconvenience caused to the plaintiffs but with regard to the plaintiffs' request for BUY-BACK, submitted as follows:

*“With regard to your request for Buy-Back, I have discussed the matter with our Vice-President (Marketing) Ms. Neelima Chopra and Mr. Anil Sethi, General Manager (Marketing) and I regret to inform you that the **Buy-Back of your twenty one time-share unit weeks will not be possible before October, 1997 as agreed upon at the time of your purchase.** Thanking you and assuring you of our best services at all times.”*

11. It is the case of the plaintiffs that the Resort of the defendants at Goa subsequently became non-operational and as a matter of fact is lying closed since the year 1997. The plaintiffs state that they had even received a letter from the defendants dated 27.11.1999 admitting the closure of the Goa Resort and requesting the plaintiffs to exchange their time-share unit weeks with the units at some other Resort of the defendants.

12. The plaintiffs further aver that by letter dated 02.07.1997, the plaintiff No.1 once again requested the defendants to BUY-BACK the twenty-one time-share units weeks which were purchased in the years 1987 and 1989 and requested that his said letter be treated as two-months notice, as agreed upon. This was followed by a reminder dated 18.08.1997 which was to the same effect.

13. The defendants replied vide their letter dated 03.09.1997, denying that there was any agreement to BUY-BACK at the time of the purchase and stating that there was, therefore, no question of any notice period. They further stated as under:

“Please note that there is no provision of refund”

14. On 17.11.1998, the plaintiff No.1 gave a final notice for the BUY-BACK of the twenty one time-share unit weeks to the defendant No.1 Company, requesting the company again to have the cheque of Rs.23.20 lacs

(Rupees Twenty Three Lacs and Twenty Thousand only) prepared and issued immediately along with interest at the rate of 24% per annum for the delayed period, that is, 01.10.1997 till the date of actual payment, with copies of the aforesaid letter to the defendant No.2, Shri Sanjay Dalmia.

15. The defendant No.1 vide its letter dated 02.12.1998 stated that there was no policy of the Company to re-purchase or buy-back any of its units and denied that any sum of Rs.23.20 lacs or any interest thereon, was payable by it. It was also expressly stated by the defendant No.1 that at the time of purchase, the plaintiffs had agreed to abide by the terms & conditions of the “Vacations Ownership Scheme” and had also agreed to execute the “Purchaser's Agreement”. Thereafter, the plaintiffs had been regularly enjoying the vacations and, therefore, by acquiescence had bound themselves by the terms and conditions of the “Vacations Ownership Scheme” and the “Purchaser's Agreement”.

16. Summons of the suit were issued to the defendant No.1, M/s. Dalmia Resorts International Pvt. Ltd. and the defendant No.2, Mrs.Indu Dalmia. Both the defendants filed their respective written statements contesting the suit.

17. The defendant No.1 Company in its written statement, apart from raising certain preliminary objections as to the mis-joinder of parties, suppression of material facts and lack of cause of action, denied that the

defendant No.2 had anything to do with the defendant No.1 Company, either as its Chairperson or in any capacity whatsoever. It was contended that all the twenty one vacation units owned by the plaintiffs were sold to them in perpetuity, subject to the terms and conditions mentioned in the application form. It was further submitted that the relationship between the defendant No.1 and the plaintiffs was governed by the application form submitted by the plaintiffs, the Membership Certificate issued by the defendant No.1 and the terms and conditions of the Purchaser's Agreement. According to the defendant No.1 company, the plaintiffs had all along been avoiding the signing of the Purchaser's Agreement, which was given to them. The Purchaser's Agreement being a standard Agreement applicable to all Members, was, however, deemed to have been signed by the plaintiffs, once they had signed the application form which was accepted by the defendant No.1 Company and the Membership Certificate had been issued. So far as the letter dated 15.03.1989, allegedly written by the plaintiffs and addressed to the Chairperson, Mrs.Indu Dalmia is concerned, the stand of the defendant No.1 Company is that the defendant No.1 Company did not receive any such letter dated 15.03.1989 from the plaintiffs at all. So far as the letter dated 03.04.1989 is concerned also, the stand of the defendant No.1 Company is that the contents of the said letter have been fabricated by the plaintiffs in connivance with the alleged signatory to the

said letter, which was never written by the defendant No.1 Company. Thus, both the letters which form the substratum of the plaintiffs' case, have been denied by the defendant No.1 as false and fabricated.

18. The defendant No.2 also filed a written statement wherein she denied that she had been the Director or the Chairperson of the defendant No.1 Company or was in any manner connected with the management of the defendant No.1 Company. Subsequently, however, the defendant No.2 chose not to contest the proceedings and was proceeded ex parte by an order dated 02.05.2005 passed by this Court.

19. The plaintiffs filed replications to the written statements of the defendants No.1 and 2, denying the averments made in the written statements and reiterating the allegations made in the plaint.

20. On the pleadings of the parties, the following issues were framed for consideration on 23.09.2004.

- 1) Whether there is an Agreement to re-purchase the time-share units between the parties? OPP
- 2) Whether the plaintiffs are entitled to interest, if so, to what amount and for what period? OPP
- 3) To what amount the plaintiffs are entitled to recover? OPP
- 4) Relief.

21. On 01.11.2004, at the behest of the defendant No.1, the following additional issues were framed for consideration, which are being re-numbered

as issue Nos.5 to 9:-

- 5) Whether the suit is not maintainable in its present form on account of mis-joinder of defendant No.2? OPD-1
- 6) Whether the plaintiffs have suppressed material facts? OPD-1
- 7) Whether the suit lacks cause of action and is liable to be dismissed in consequence thereof? OPD-1
- 8) Whether the letters dated 03.04.1989 and 20.02.1993 have been issued without any authority of the defendant No.1 and are not binding on it? OPD-1.
- 9) Whether the plaintiffs are entitled to the relief as prayed for? OPD-1

22. On the aforesaid issues, the parties went to trial. The plaintiff No.1 Shri Sanjay Kapoor, in the meantime having expired on 12.09.2002, leaving behind him his legal heirs, namely, his wife Mrs.Sanjana Kapoor and his two children Smaran Kapoor and Surbhi Kapoor and the said legal heirs having been brought on record by an order passed by this Court on 26.03.2003, the plaintiffs filed affidavit by way of evidence of Mrs.Sanjana Kapoor (PW-1). In her affidavit, Mrs.Sanjana Kapoor reiterated and re-affirmed the contents of the plaint and tendered her affidavit in evidence as Ex.PW-1/A along with the following documents:

- (i) Letter dated 15.03.1989 whereby the plaintiffs offered to purchase efficiency time-share unit weeks at the Dalmia Resort at Goa,

subject to the terms and conditions as stipulated in the said letter -----

Ex.PW-1/1.

(ii) Letter dated 03.04.1989 whereby the defendants accepted the terms and conditions as offered by the plaintiffs in their letter dated 15.03.1989 -----Ex.PW-1/2.

(iii) Membership Certificate issued to the plaintiffs by the defendant No.1 Company -----Ex.PW-1/3.

(iv) Letter dated 22.01.1993 written by late Shri Sanjay Kapoor to the defendant No.1 Company regarding the poor condition of the Resort at Goa -----Ex.PW-1/4.

(v) Letter dated 20.02.1993 of the defendant No.1 Company acknowledging the aforesaid letter -----Ex.PW-1/5.

(vi) Letter dated 02.07.1997 whereby the plaintiffs, at the end of ten years, wrote to the defendants to Buy-Back their units as per the Agreement, signed by late Shri Sanjay Kapoor as well by Smt.Sanjana Kapoor -----Ex.PW-1/6.

(vii) Reminder dated 18.08.1997 sent by the plaintiffs to the defendant No.1 Company -----Ex.PW-1/7.

(viii) Letter dated 03.09.1997 written by the defendant No.1 Company to the plaintiffs refusing to Buy-Back the time-share unit weeks -----

Ex.PW-1/8.

(ix) Letter dated 17.11.1998 sent by the plaintiffs to the defendant No.1 Company whereby the defendants were again requested to refund the amount of Rs.23.20 lacs with interest thereon @ 24% p.a. -----

Ex.PW-1/9.

(x) Letter dated 02.12.1998 of the defendant No.1 Company acknowledging the letter dated 17.11.1998 of the plaintiffs -----Ex.PW-1/10.

(xi) Letter dated 27.11.1999 written by the defendant No.1 Company to the plaintiffs admitting that their Resort at Goa was lying closed and not operational -----Ex.PW-1/11.

23. PW-1, Smt.Sanjana Kapoor was cross-examined at great length by the learned counsel for the defendant No.1, but in her cross-examination she stuck to the stand adopted by her in her affidavit by way of evidence and categorically denied that the documents Ex.PW-1/2 and PW-1/5 were forged documents and, therefore, not binding on the defendant No.1.

24. The defendant No.1 in the course of its evidence also examined a solitary witness, namely, Shri S.C.Mittal (DW-1), who tendered his affidavit by way of evidence (Ex.DW-1/A) along with the following documents:

(i) Power of Attorney given by M/s. Dalmia Resorts International Pvt. Ltd. in his favour -----Ex.DW-1/P-1.

- (ii) Sample copy of the plaintiffs' application form ----Ex.DW-1/A.
- (iii) Membership Certificate issued by the defendant No.1 Company -----Ex.DW-1/B.
- (iv) Standard Purchase Agreement -----Ex.DW-1/C.

It may be mentioned that the learned counsel for the plaintiffs at the time of the exhibiting of the aforesaid documents, objected to the mode of proving Ex.DW-1/A to DW-1/C, stating that the same were formats only and thus, the aforesaid documents were de-exhibited at the time of the cross-examination of the witness.

25. In the course of his cross-examination DW-1, Shri Subhash Chand Mittal stated that he had joined the defendant No.1 Company on 01.11.1997 and admitted that he was not working with the defendant Company on the date of the transaction in question. On being asked to produce any resolution of the defendant Company in respect of the Power of Attorney in his favour (Ex.DW-1/P-1), he stated that he had not brought the same. He further admitted that he was not aware as to which department had been dealing with time-share units in the years 1987-89, and that he did not know if Mr.Anil Sethi was the Regional Manager of the defendant Company in April, 1989. On being shown document Ex.PW-1/1 (letter dated 15.03.1989) from the judicial record and asked as to whether he could identify the signatures as well as the stamp of the defendant Company affixed on it, he stated that he could not do so as he was

not in service at that time. So far as the letter dated 03.04.1989 (Ex.PW-1/2) was concerned, he stated that the said letter contained the address of the Registered as well as Corporate office of the defendant Company, but denied the suggestion that the letter (Ex.PW-1/2) was the reply of the letter (Ex.PW-1/1). On further cross-examination, however, he admitted that he could not identify the signatures of any of the officials working in the defendant Company in the years 1987-89 as well as 1993, and that he did not know in what capacity Ms.Indu Dalmia was associated with the defendant No.1 Company. On second thoughts, he added that he did not know any lady by the name of Ms.Indu Dalmia. As regards the letter dated 20.02.1993 (Ex.PW-1/5), he stated that the said letter was not written by the defendant No.1 Company, but admitted that the letterhead was in the same proforma as that of the defendant No.1 Company, and also that he was not working with the defendant company in the year 1993. On being asked to produce the original record, on an adjourned date, he produced the same, but admitted that the file brought by him was a clipped file, from which any document could be taken out and inserted therein. On being asked as to whether it was within his knowledge that any Purchasers Agreement was signed between the plaintiffs and the defendant Company, he admitted that it was not in his knowledge that no Purchasers Agreement was signed between the plaintiffs and the defendant Company. On

a query put to him, he stated that he did not know as to when for the first time the Resort Old Anchor at Goa was made functional and denied the suggestion that the Resort was not even functional after 1992, though he admitted that during the period 1997-98, the Resort remained closed for a period of one year.

26. The ex parte defendant No.2 did not produce any evidence to substantiate her defence.

27. The basic question which arises in the present case is whether there was any agreement inter-se the parties for the re-purchase of the time-share unit weeks purchased by the plaintiffs from the defendant No.1 Company. Issues No.1,7 and 8 which relate too the aforesaid question are accordingly being dealt with together.

ISSUES NO.1,7 AND 8:

28. The initial onus of proving that there was an agreement of re-purchase of the time-share unit weeks was upon the plaintiffs, which has been discharged by PW-1, Smt.Sanjana Kapoor by proving on the record the letter dated 15.03.1989 (Ex.PW-1/1), offering to purchase time-share unit weeks on the condition that the defendant No.1 Company will Buy-Back the entire lot of time-share unit weeks (including the three time-share unit weeks initially purchased by the plaintiffs), after a period of ten years commencing from 04.10.1987, that is , the date of the first purchase, at the rate of Rs.1,10,000/-

for each efficiency type time-share unit week and Rs.1,20,000/- for each one bedroom type time-share unit week. PW-1 further proved in evidence the acceptance of the aforesaid offer by the defendant No.1 Company vide their letter dated 03.04.1989, the contents of which have been reproduced in paragraph-4 hereinabove. Thus, the plaintiffs have discharged the initial onus of proving that there was an agreement for the re-purchase of the time-share unit weeks between the parties.

29. Thereafter, the onus of proving that the letter dated 03.04.1989 (Ex.PW-1/2) and the letter dated 20.02.1993 (Ex.PW-1/5) had been issued without any authority of the defendant No.1 and were not binding on it shifted to the defendant No.1. In this context, DW-1 Shri S.C.Mittal, no doubt in his affidavit by way of evidence (Ex.DW-1/1) stated that copies of the letters dated 03.04.1989 and 20.02.1993 did not exist in the records of the Company and the persons who were alleged to have signed the said letters had never been authorized by the defendant No.1 Company to do so, but in the course of his cross-examination, DW-1 was compelled to admit that he had joined the Company on 01.11.1997 and could not identify the signatures of any of the officials working in the Company in the years 1987-89 as well as 1993. He also candidly admitted that he could not identify the signatures and the stamp of the defendant company affixed on Ex.PW-1/2 as he was not in service at

that time. He further acknowledged that he did not know if any Purchasers Agreement was signed between the plaintiffs and the defendant No.1 Company. From the aforesaid, it must be held that the defendant No.1 has failed to discharge the onus placed upon it of proving that the letters dated 03.04.1989 and 20.02.1993 had been issued without any authority of the defendant No.1 Company and were not binding upon it and of further proving that the suit filed by the plaintiff lacks cause of action.

30. Significantly also, the letter 03.04.1989 is signed by Mr.Anil Sethi, the Regional Manager of the defendant No.1 Company, while the letter dated 20.02.1993 is signed by Mr.Deepak Seth, the Manager (Marketing Services) of the defendant Company. As regards the aforesaid officials of the defendant Company, DW-1 stated that he did not know if Mr.Anil Sethi was the Regional Manager of the defendant Company in April, 1989 and he was also not aware if Mr.Deepak Seth was the Manager (Marketing Services) of the defendant Company in the year 1993. He, however, stated that Mr.Deepak Seth was still working in the defendant No.1 Company. Thus, clearly, the best evidence would have been that of Mr.Deepak Seth, even assuming Mr.Anil Sethi could not have been produced by the defendant No.1 Company in the witness box. For reasons best known to the defendant No.1, Mr.Deepak Seth has not been produced in the witness box, nor for that matter any other official of the

defendant No.1 Company who could have identified the signatures of the officials of the defendant No.1 Company on the aforesaid letters has been produced in the witness box. The only witness who has appeared in order to prove the case of the defendant company is one who started working in the Company in November, 1997. The suppression of contemporaneous evidence is a vital fact which cannot be ignored by this Court and does not appear to be justified at all. Adverse inference, therefore, must be drawn against the defendant No.1 by holding that the letters dated 03.04.1989 and 20.02.1993 have been issued by the defendant No.1 Company and were binding on it and that the suit does not lack cause of action and is not liable to be dismissed in consequence thereof. Issues Nos.1,7 and 8 are decided accordingly in favour of the plaintiffs and against the defendant No.1.

ISSUE NO.5:

31. As regards mis-joinder of the defendant No.2, the onus of proving the same was squarely placed upon the defendant No.1. The defendant No.1 could have discharged the said onus by producing the defendant No.2 in the witness box to face the rigors of cross-examination. As stated above, the defendant No.2, instead of appearing in the witness box to depose that she had nothing to do with the defendant No.1 Company, has chosen to absent herself from the proceedings and was, accordingly, proceeded ex parte. Here again,

the best evidence has been suppressed from this Court.

32. DW-1 Shri S.C.Mittal in the course of his cross-examination stated that he did not know in what capacity Ms.Indu Dalmia (the defendant No.2) was associated with the defendant No.1 Company. On second thoughts, DW-1 again said that he did not know any lady by the name of Ms.Indu Dalmia. Thus, while the witness initially admitted that Ms.Indu Dalmia was associated with the defendant No.1 Company, but stated that he did not know in what capacity she was associated with the Company, he quickly changed his stand to say that he did not know her at all. In this view of the matter, I am not inclined to accept the fact that Ms.Indu Dalmia (the defendant No.2) had nothing to do with the defendant No.1 Company, more so, as she is claimed to be the founder Member of the defendant No.1 Company and the defendants have failed to place on the record the Memorandum and the Articles of Association of the defendant No.1 Company to disprove the aforesaid assertion of the plaintiffs. Issue No.5 is accordingly decided against the defendant No.1.

ISSUE NO.6:

33. The onus of proving that the plaintiffs had suppressed material facts was upon the defendant No.1. Far from discharging the said onus, the defendant No.1 has not even given the details in its pleadings of the facts suppressed by the plaintiffs. Issue No.6 is accordingly decided against the defendant No.1.

ISSUES No.2, 3, 4 & 9:

34. Issues Nos.2,3,4 & 9 pertain to the relief sought for by the plaintiffs. Keeping in view the fact that the plaintiffs have successfully established on the record that they had purchased time-share unit weeks subject to the terms and conditions as set out in the letter dated 15.03.1989 (Ex.PW-1/1), which were accepted by the defendant No.1 Company by its letter dated 03.04.1989 (Ex.PW-1/2), and that the existence of the said Agreement is corroborated by the letter dated 20.02.1993 (Ex.PW-1/5), I have no hesitation in holding that there was a specific agreement inter se the parties in derogation of the Scheme and in such circumstances, the specific Agreement must prevail over the Scheme.

35. It is also an admitted fact that no Purchasers Agreement was executed by the plaintiffs, and as a matter of fact, DW-1 in his cross-examination frankly admitted that it was not in his knowledge that any Purchasers Agreement was signed between the plaintiff and the defendants. The defendant No.1 in para 7 of its written statement also categorically admitted that no Purchasers Agreement was signed by the plaintiffs, though it is pleaded by the defendant No.1 that the plaintiffs all along had been avoiding signing of the Purchasers Agreement and must, therefore, be deemed to have signed the same. This logic and reasoning to say the least, is somewhat strange, more so,

as in the replication the plaintiffs have clearly pointed to the fact that it is indeed surprising that a Corporate entity like that of the defendants did not write a single letter to the plaintiffs for signing the Purchasers Agreement, which the plaintiffs had allegedly failed to sign.

CONCLUSION:

36. To conclude, it must be held that the plaintiffs have succeeded in establishing that there was a specific Agreement between the parties which was entered into consciously after deliberate discussions, the terms and conditions of which were reduced into writing in the form of exchange of letters viz., letter of the plaintiffs dated 15.03.1989, which was duly confirmed by the defendant No.1 Company vide its letter dated 03.04.1989, and subsequently acknowledged by its letter dated 20.02.93. In such circumstances, sample copies of the Application Form, Membership Certificate and Purchasers Agreement can be of no avail to the defendant No.1 Company and it must be held that the defendant No.1 Company was liable to Buy-Back the time shares of the plaintiffs on the expiry of 10 years from the date of their first purchase, that is, 04.10.1987 at the mutually agreed rates. The defendant No.1 having refused to do so, it must be held liable to honour the Buy-Back Agreement by refund of the amount of Rs.23.20 lacs. As the agreement does not spell out the agreed rate of interest for late payment, the defendant No.1 shall pay interest

on the principal amount of Rs.23.20 lacs at the rate of 9% per annum from the date of the said amount became due, i.e., from 4th October, 1997 till the date of realisation.

CS(OS) 1944/2000 stands decreed accordingly with costs, which shall be calculated by the Registry.

February 09, 2009
dc

REVA KHETRAPAL, J.