

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 03.10.2011
Judgment Pronounced on: 17.10.2011

+ CS(OS) 864/1999

INDIAN BANK **Plaintiff**

Through Ms. Seema Gupta, Adv.

versus

GAWRI CONSTRUCTION UDYOG LTD & ORS

..... **Defendants**

Through Mr. M.L. Mahajan and Mr.
Gaurav Mahajan, Advs.

+ CS(OS) 865/1999

INDIAN BANK **Plaintiff**

Through Ms. Seema Gupta, Adv.

versus

GAWRI CONSTRUCTION UDYOG LTD & ORS

..... **Defendants**

Through Mr. M.L. Mahajan and Mr.
Gaurav Mahajan, Advs.

AND

+ CS(OS) 985/1999

INDIAN BANK **Plaintiff**

Through Ms. Seema Gupta, Adv.

versus

GAWRI CONSTRUCTION UDYOG LTD & ORS

..... **Defendants**

Through Mr. M.L. Mahajan and Mr.
Gaurav Mahajan, Advs.

CORAM:-
HON'BLE MR JUSTICE V.K. JAIN

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

V.K. JAIN, J

1. By this common judgment, I will dispose of all the three suits and counter-claim referred above. Defendant No. 1 entered into construction-cum-agreements dated 23rd April, 1990 with the plaintiff-bank for construction on various properties. The sale deed was to be executed within 30 days from the date of giving possession to the plaintiff. Under the agreement, defendant No. 1 was to pay all taxes on the properties subject matter of the agreements till possession was delivered to the plaintiff-bank. The agreement provided for payment of penalty to the plaintiff-bank at the rate of 0.5% of the total sale consideration subject to ceiling of 7.5% of the total consideration if possession of the flats, to be constructed by defendant No. 1, is delayed beyond 18 months from the date of the signing of the agreement. The bank was entitled to rescind the

agreement in case of delay beyond 15 weeks and in that case the amount disbursed by it was recoverable with interest from the date of disbursement.

2. Suit No. 864/1999 pertains to construction of 10 flats on Property No. C-17, Inder Puri. Suit No. 865/1999 pertains to construction of 12 flats of Property No. C-12, Inder Puri. Suit No. 985/1999 pertains to construction of 12 flats of Property No. C-10, Inder Puri. Since defendant No. 1 has not executed the sale deeds in respect of the flats constructed by it, despite delivering their possession to the plaintiff, a decree for specific performance of the agreement by directing defendant No. 1 to execute sale deed in respect of the building constructed by it on the aforesaid plots has been sought in all the three suits. In Suit No. 864/1999, the plaintiff has also claimed a sum of Rs 5.20 lakh which it claims to have paid as arrears of property tax for the period prior to handing over of possession to the plaintiff which it has paid to Municipal Corporation of Delhi. It is also alleged that the plaintiff-bank has adjusted a sum of Rs 2,76,765/- towards price variation and liquidated damages and a sum of Rs 50,000/- is payable by it to the defendant which it is ready and willing to pay after settlement of the

accounts. .In Suit No. 865/1999, the plaintiff has, besides execution of the sale deed in his favour, also sought a direction to defendant No. 1 install meters in every flat, constructed by it. It is alleged that since possession of the flats was delayed by defendant No. 1, it was liable to pay a penalty of Rs 39,000/- which the plaintiff-bank has already adjusted. According to the bank, it was required to pay a sum of 19,033/- to the defendant which it is ready and willing to pay. In Suit No. 985/1999, the plaintiff has, in addition to execution of the sale deed in his favour, has also sought recovery of Rs 1108.76/-, being the excess amount paid to defendant No. 1. It is alleged that defendant No. 1 is liable to pay a sum of Rs 36,400/- for delay in handing over the possession which the plaintiff-bank has already adjusted.

3. The suit has been contested by defendants No. 1 and 2 who have taken a preliminary objection that the suit is bad for mis-joinder of defendants No. 2 and 3, who are neither a necessary nor a proper party to the suit. They have also denied the competence of Mr M.S. Parthasarthy to sign and verify the pleadings and institute the suit on behalf of the plaintiff-bank. They have also claimed that the suit is

barred by limitation and is not properly valued for the purpose of Court fee and jurisdiction. On merits, it is alleged that defendant No.1 has also been ready and willing to execute the sale deed and it is the plaintiff which is guilty of breach of terms of the agreement, as they have failed to pay the amount due to the defendants.

4. As regards the claim of the plaintiff for the amount paid by it to MCD towards arrears of property tax, it is alleged that no house tax was payable when the building was under construction and, therefore, the claim of the Corporation for the years 1988-89, 1989-90, 1990-91 and 1991-92 was without any basis and the plaintiff had no right to deal with the demand of MCD without involving the defendants. In Suit No. 865/1999, the defendants have denied their liability to pay any penalty to the plaintiff and have claimed that it was the plaintiff which was responsible for the delay in construction. It is also alleged that the defendants are also entitled to interest on the amount of Rs19,033/- which the plaintiffs admit to be payable to defendant No. 1 and the amount of interest comes to Rs 33,878/-. In Suit No. 985/1999 defendants have denied their liability to pay the amount of Rs 36,400/- which the

plaintiff claims to have adjusted.

5. A counter-claim of Rs 41,38,901/- had been filed by defendant No. 1 in Suit No. 864/1999. It is alleged that vide letters dated 13th August, 1988 and 1st January, 1990, the plaintiff-bank accorded sanction for purchasing 33 flats comprised in Property No. C-15, C-10 and C-12, Inder Puri and 20 flats comprised in Property No. C-17 and C-40, Inder Puri. However, on the suggestion of the plaintiff-bank, five different agreements were executed. It is alleged that the plaintiff made payment of Rs 22.35 lakh towards construction of flats on Property No. C-40, Inder Puri. It is alleged that the plaintiff-bank failed to approve the plan for further construction as a result of which, construction could not be started. The defendant raised a loan of Rs 1 crore from the bank. Since the sanction for the plans was not forthcoming from the plaintiff-bank, defendant No. 1 requested it either to return the balance duly sanctioned or cancel the agreement. While making payment towards construction of flats, the plaintiff-bank adjusted the sum of Rs 22.35 lakh which it had paid towards construction on Property No. C-40, Inder Puri along with interest amounting to Rs 11.77 lakh. It is alleged that defendant No. 1 was

forced to agree to the adjustments since original documents were with the plaintiff bank and it was not ready to part with them unless the aforesaid amount was adjusted against the other amounts payable by the bank in respect of other properties. Defendant No. 1 claimed that amount of Rs 11.77 lakh along with interest on that amount which comes to Rs 19.94 lakh. The defendants have also claimed interest amounting to Rs 50,944/- on the liability of Rs 19,003/- admitted by the plaintiff-bank and Rs 1,23,500/- towards interest on the liability of Rs 50,000/-. The defendants have also claimed a sum of Rs 7,91,927/- towards interest on delayed payment.

6. The following issues were framed on the pleadings of the parties:-

- i. Is shri M.S. Parthasathi, Assistant General Manager is competent to sign verify and institute these suits on behalf of the plaintiff bank?
- ii. Are the suits of the plaintiff bad for misjoinder of the defendants, as alleged in para 1 of the preliminary objections?
- iii. Are the suits being properly valued for the purposes of court fee and jurisdiction? If not, with what effect?

- iv. Are the suits of the plaintiff within time?
- v. Did the plaintiff entered into only one transaction in respect of 33 flats comprised in plot Nos. C-15, C-10 and C-12, Inder Puri, New Delhi and 20 flats comprised in plot Nos. C-17 and C-40, Inder Puri, New Delhi.
- vi. Whether the defendants have failed to complete all legal formalities including obtaining completion certificate in respect of the premises? OPP
- vii. Whether there are some illegal and unauthorized constructions made by the defendant and whether the defendants are liable either to get the buildings regularized or to pay damages for the loss to be suffered by the plaintiff? OPP
- viii. In view of the agreement to sell whether the defendants can refuse execution of sale deed in favour of the plaintiff? OPD
- ix. Whether the defendants are entitled to receive any amount from the plaintiff? If so, what amount? OPD
- x. Whether the counter claim, arising out of a separate contract, can be claimed in this suit by the defendants? OPD

xi. Relief.

Issue No. 1

7. Mr M.S. Parthasarthy, who has signed and verified the pleadings and instituted this suit on behalf of the plaintiff-bank, filed his affidavit by way of evidence and was partly examined on 23rd October, 2007. He was not produced thereafter and the plaintiff-bank examined PW-3 Shri P.R. Pujari, Chief Manger with the plaintiff-bank. Mr Pujari has identified the signature of Mr M.S. Parthasarthy on the plaint and has also proved the copy of Power of Attorney in favour of Mr M.S. Parthasarthy which is Ex.PW-1/2 and which has been executed by Mr M. Gopalakrishnan, Chairman and Managing Director of the plaintiff-bank at the relevant time. A perusal of the Power of Attorney Ex.PW-3/2 would show that vide this document, Mr M.S. Parthasarthy was authorized to take all legal proceedings whether civil or criminal for recovering and receiving the debts of the bank and to institute, file and prosecute all actions, including civil suits on behalf of the plaintiff-bank. He was also authorized to sign, verify and file *vakalatnama*, written statement, etc. on behalf of the plaintiff-bank. The power of attorney purports to be

executed by the Chairman and Managing Director as well as the Director and General Manager of the plaintiff-bank and authenticated by public notary. Since, the power of attorney in favour of Mr M.S. Parthasarthy has been attested by Public Notary, there is a statutory presumption under Section 85 of Evidence Act that the Power of Attorney was executed by the person by whom it purports to have been executed and the person who executed the power of attorney was fully competent in this regard.

8. In **Jugraj Singh and Anr. Vs. Jaswant Singh and Ors.**, AIR 1971 SC 761, the Power of Attorney attested by a Public Notary was disputed on the ground that it did not show on its face that the Notary had satisfied himself about the identity of the executant. Supreme Court held that there was a presumption of regularity of official acts and that the Notary must have satisfied himself in the discharge of his duties that the person who was executing it was the proper person. In **Rajesh Wadhwa vs. Sushma Govil**, AIR 1989, Delhi 144, it was contended before this Court that till it is proved that the person who signed the said power of attorney was duly appointed attorney, the court cannot draw a presumption under Section 57 and 85 of the

Evidence Act. Repelling the contention, it was held by this Court that the very purpose of drawing presumption under Sections 57 and 85 of the Evidence Act would be nullified if proof is to be had from the foreign country whether a particular person who had attested the document as a Notary Public of that country is in fact a duly appointed Notary or not. When a seal of the Notary is put on the document, Section 57 of the Evidence Act comes into play and a presumption can be raised regarding the genuineness of the seal of the said Notary, meaning thereby that the said document is presumed to have been attested by a competent Notary of that country.

In **Punjab National Bank vs. Khajan Singh**, AIR 2004 Punjab and Haryana 282, the Power of Attorney in favour of a bank, which had been duly attested, was rejected by the learned District Judge on the ground that the presumption under Section 85 of Evidence Act was available to a particular class of Power of Attorneys described in the section and was confined to its execution and authenticity alone. The High Court, however, rejected the view taken by the learned District Judge holding that absence of proof of resolution authorizing the executant to

execute the Power of Attorney could not be sustained and a presumption in favour of the attorney would arise under Section 85 Act. In **United Bank of India v. Naresh Kumar & Ors.** (1996) 6 SCC 660, which was a suit instituted by a bank, the issue which came up for consideration before the Supreme Court was as to whether the plaint was duly signed and verified by a competent person or not. The suit in that case was instituted by one Mr. L.K.Rohatgi. The Supreme Court noted that the suit had been filed in the name of the appellant bank; full amount of the Court fee had been paid by the bank; documentary as well as oral evidence had been led on behalf of the appellant bank and the trial of the suit had continued for about 02 years. Supreme Court found it difficult in these circumstances, even to presume that the suit had been filed and tried without the appellant having authorized the institution of the same. The Court felt that the only conclusion which it could come to was that Shri L.K.Rohtagi must have been authorized to sign the plaint and in any case it must be held that the bank had ratified the action of Shri L.K.Rohtagi in signing the plaint and therefore it continued with the suit. During the course of the judgment, the Court inter alia

observed as under:

Reading Order 6 Rule 14 together with Order 29 Rule 1 of the Code of Civil Procedure it would appear that even in the absence of any formal letter of authority or power of attorney having been executed a person referred to in Rule 1 of Order 29 can , by virtue of the office which he holds, sign and verify the pleadings on behalf of the corporation. In addition thereto and de hors Order 29 Rule 1 of the Code of Civil Procedure, as a company is a juristic entity, it can duly authorize any person to sign the plaint or the written statement on its behalf and this would be regarded as sufficient compliance with the provisions of Order 6 Rule 14 of the Code of Civil Procedure. A person may be expressly authorized to sign the pleadings on behalf of the company, for example by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual. In absence thereof and in cases where pleadings have been signed by one of its officers a corporation can ratify the said action of its officer in signing the pleadings. Such ratification can be express or implied. The Court can, on the basis of the evidence on record, and after taking all the circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleading by its officer.

This suit filed on behalf of Indian Bank has been pending in this Court for the last about 12 years and no one from the bank has come forward to repudiate this suit which Mr. M.S.Parthasarthy has filed on behalf of the bank. In these circumstances, it cannot be said that Mr. M.S.Parthasarthy was not competent to institute the suit on behalf of the plaintiff bank.

The issue is decided against the defendants and in favour of the plaintiff.

Issue No. 2

9. The agreements for construction and sale of the flats have been executed between plaintiff and defendant No.1. Hence, the plaintiff has no cause of action against the other defendants. The suits are bad for mis-joinder of other defendants. The names of defendants other than defendant No. 1 are therefore liable to be struck off from the array of defendants.

The issue is decided accordingly.

Issue No.3

10. The plaintiff bank has paid the requisite Court fee. No arguments on this issue were advanced. The issue is decided against the defendants and in favour of the plaintiff.

Issues No. 5, 6, 8, 9, 10 & 11

11. These issues are inter connected and can be conveniently decided together.

The main dispute between the parties is with respect to the amount of Rs 41,38,901/- for which a counter claim has been filed in CS(OS) No. 864/1999. The break up counter-claim is as under:

- (a) Interest deducted by the plaintiff on the payments which it had made to defendant No. 1 for construction of flats in Property No. C-40, Inder Puri, New Delhi: Rs. 11,77,765/-
- (b) Interest on the aforesaid amount of Rs 11,77,765/- for the period from 27th December, 1992 to 30th August, 1999: Rs 19,94,765/-
- (c) Interest on delayed payments made by the plaintiff-bank: Rs 7,91,927/-
- (d) Amount payable to defendant No. 1 in respect of Property No. C-12, Inder Puri along with interest

on that amount: Rs 50,944/-

- (e) Amount to defendant No. 1 in respect of Property No. C-17, Inder Puri along with interest on that amount: Rs 1,23,500/-

12. Defendant No.1 had entered into an agreement with the plaintiff-bank for construction of flats on property No. C-40, Inder Puri and sale of those flats to it. The case of the plaintiff, as set out in the counter claim and affirmed in affidavit by Mr Vipin Gwari, director of the defendant No. 1-company by way of evidence in this regard, is that the plaintiff-bank made payment of Rs 22.35 lakh to it for construction of flats on Property No. C-40, Inder Puri. This is also the case of defendant No. 1 that construction up to basement stage was completed by it and the plans for raising further construction were submitted to the bank for approval, but the bank failed to take action in this regard for more than 11 months, despite request by defendant No. 1. Since defendant No. 1 had taken a loan of Rs 1 crore from Citi Bank to complete the construction, it requested the bank either to approve the plans or to cancel the agreement. The bank acceding to the request of defendant No. 1, cancelled the agreement for construction of flats on

Property No. C-40, Inder Puri, New Delhi, subject to payment of interest at the rate of 18% per annum and adjusted the amount which it had paid to defendant No. 1 along with a sum of Rs 11.77 lakh towards interest. The adjustment was made out of the amount which had to pay to defendant No. 1 for construction of other flats. In his affidavit by way of evidence, Shri Vipin Gwari, Director of defendant No. 1-company has stated that defendant No. 1 was forced to agree to the adjustment of illegal demand of interest because original documents of the property were with the bank, which was not ready to part with them unless the aforesaid amount was adjusted. Ex.PW-3/D-10 is the letter dated 05th March, 1991, written by defendant No. 1 to the plaintiff-bank, requesting that either the bank may get the building constructed as per the sanctioned plan or it may get the building constructed as per their own design, at its own risk. It was further requested that in the event of the bank failing to give an early reply, they suggest that the bank may cancel the agreement and take back the amount paid so far. This letter was followed by a reminder dated 30th March, 1991 which is Ex-PW-3/D-11. Vide letter dated 22nd June, 1991, Ex.PW-3/D-26, the plaintiff-

bank, with reference to defendant No. 1's letter dated 19th May, 1991, informed defendant No. 1 that its Head Office had permitted cancellation of the agreement for C-40, Inder Puri, New Delhi after recovery of the amount paid to it along with interest. Defendant No. 1 was accordingly requested to pay back the amount which it had received from the plaintiff for this project along with interest at the rate of 18% per annum. Admittedly, defendant No. 1 agreed to adjustment of not only the principal sum which it had received from the plaintiff-bank for this project, but also for the interest on that amount. It appears from the letter dated 16th September, 1992 (Ex.DW-1/8), written by defendant No. 1 to the plaintiff that it wanted to pay interest at the rate of 18% per annum from the date of the cancellation of the agreement, i.e., 22nd June, 1991 to 22nd September, 1992, which worked out to Rs 5,02,875/-. Thus, defendant No. 1 at that time made no protest about payment of interest though it wanted to pay it only from the date the agreement came to be cancelled. As noted earlier, the agreement in respect of the flats to be constructed on Property No. C-40, Inder Puri, New Delhi was cancelled by the plaintiff-bank on the specific request of defendant No.

1. The bank cancelled the agreement subject to defendant No. 1 paying interest at the rate of 18% per annum on the amount which it had received from the bank. If the condition imposed by the plaintiff-bank for cancellation of the agreement, on the request of defendant No. 1, was not acceptable to it, defendant No. 1 could very well have refused to accept the cancellation on payment of interest and could have decided to go ahead with the agreement which it had executed with the plaintiff-bank. If defendant No. 1 was suffering any loss on account of the delay on the part of the bank in approving the building plans, defendant No. 1 could have sued the plaintiff-bank for damages. If defendant No. 1 felt that bank had committed breach of the by not approving the building plans within a reasonable time, it could have rescinded the agreement between the parties, instead of requesting the bank to cancel the agreement and then accepting that cancellation on the condition imposed by the bank. But, having accepted the conditional cancellation of the agreement, defendant No. 1 cannot deny its liability to pay interest on the amount which it had received from the plaintiff-bank. As regards the stand taken by defendant No. 1 in its letter dated 16th

September, 1992 (EX-DW-1/8), I am of the view that the bank was justified in seeking interest from the date it had made payment to defendant No. 1 towards construction on Property No. C-40, Inder Puri, New Delhi. In any case, if this was not acceptable to defendant No. 1, it ought to have rejected the conditional cancellation, instead of accepting the adjustments made by the bank. A perusal of Ex.D-A, which is the letter dated 28th November, 1992 from the plaintiff-bank, would show that the amount paid by the plaintiff-bank to defendant No. 1 towards construction of Property No. C-40, Inder Puri, New Delhi was adjusted in the following manner:

Date	Particulars	Amount
21.09.90	By 5% payment on C-15 flats at Inderpuri.	3,72,500/-
19.11.92	By 5% payment towards C-17 flats Inderpuri.	2,98,500/-
27.11.92	By adjustment of balance of payment towards C-15 flats Inderpuri.	1,00,000/-
-do-	By payment Recd. From SIDBI by Cheque No. 644731 dt. 27.11.92	26,41,765/-

It is thus evident that defendant No. 1 had

accepted the adjustments made by the plaintiff-bank. If a plaintiff-bank was unreasonably withholding the documents of title of C-40, Inder Puri, defendant No. 1 could have taken appropriate legal proceedings against the bank for recovery of those document from it, but, having accepted the term offered by the plaintiff-bank for cancellation of the agreement, defendant No. 1 cannot now avoid payment of interest to the bank on the ground that it was forced to accept the condition of the bank on account of the original documents of the property being in possession of the bank.

13. It has come in evidence that the plaintiff-bank has charged compound interest on the amount which it had advanced to defendant No. 1 towards construction of flats on Property No. C-40, Inder Puri at the rate of 18% per annum. The letter of the plaintiff-bank Ex.PW-3/D-26 does not stipulate payment of compound interest though it does stipulate payment of interest at the rate of 18% per annum. It has also come in evidence that for another project the bank charged simple interest and not compound interest on the amount which it had advanced to the builder. A perusal of the letter dated 08th January, 1993 (EX.PW-3/D-18) sent by defendant No. 1 to the plaintiff-bank would show that the

difference between the compound interest and the simple interest comes to Rs 2.18 lakh. I, therefore, hold that defendant No. 1 is entitled to payment of Rs 2.18 lakh from the plaintiff-bank.

14. As regards payment of interest on the aforesaid amount of Rs 2.18 lakh, the only provision under which defendant No. 1 can claim interest on this amount is Section 3 of Interest Act, 1978, which to the extent it is relevant, provides that in any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest: from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings.

EX-DW1/10 is the letter dated 22nd March, 1993 sent by defendant No. 1 to the plaintiff-bank, whereby defendant No. 1 reiterated the demands which it had been making to the plaintiff-bank for payments of the amounts

due to it in respect of the projects at residential flats in Inder Puri. Regarding payment of interest by the bank, this letter reads as under:

“Since this period is already over we demand the Bank to pay the same rate of interest on all delayed payments since the signing of the agreement as charged by the Bank in cases of delayed possession.”

This letter fulfils the requirement of a notice under Section 3 of Interest Act. In the facts and circumstances of the case, I am of the view that plaintiff-bank should pay interest at the rate of 12% per annum on the aforesaid of Rs 2.18 lakh to defendant No. 1 w.e.f. 8th January, 1993 till 30th August, 1999 which comes to Rs 1,73,819/-

Therefore, defendant No. 1 is entitled to recover Rs1,73,819/-

15. The case of defendant No. 1 is that the plaintiff-bank did not make payments as per the schedule fixed in the agreements and, therefore, it is entitled to interest on that amount as per the calculations made in the chart Ex.DW-1/2. I have carefully gone through the agreements executed between the plaintiff and defendant No. 1. There is absolutely no provision in the agreements for payment of

any interest by the plaintiff in case delay in payment on its part. Since there is no agreement between the parties for payment of interest on delayed payments, defendant No. 1 is not entitled to recover any amount from the plaintiff-bank in this regard.

16. Admittedly, a sum of Rs 1108.71/- is payable by the plaintiff to defendant No. 1 in respect of flats constructed on Property No. C-40, Inder Puri, New Delhi, a sum of Rs 19,032.90 is payable towards balance amount for the construction of flats on Property No. C-12, Inder Puri and a sum of Rs 50,000/- is payable to defendant No. 1 being the balance sale consideration towards purchase of flats constructed on Property No. C-17, Inder Puri, New Delhi. Defendant No. 1 is entitled to recover these amounts from the plaintiff-bank. However, no interest is payable by the plaintiff-bank on these amounts, firstly because there is no agreement between the parties for payment of interest on account of delayed payments by the plaintiff-bank and secondly because as per the agreements between the parties, 5% of the balance sale consideration was to be paid on handing over possession along with completion certificates and though possession has been handed over to

the plaintiff-bank, there is no evidence of defendant No. 1 having obtained the completion certificate at any time prior to filing of this suit. I, therefore, hold that defendant No. 1 is not entitled to interest on these amounts and can recover only a sum of Rs 70,141.61/- being the aggregate of the aforesaid sums of Rs 1108.71/-, Rs 19,032.90/-, and Rs 50,000/-.

17. In Suit No. 864/1999, the plaintiff has also claimed a sum of Rs 5.2 lakh which it had paid to MCD towards arrears of property tax for the period prior to its receiving possession of the flats from defendant No. 1. In this regard, the agreement between the parties provided that defendant No. 1 shall pay and discharge all rates, taxes, levies, etc, levied by any other local authority and any other competent authority on the property subject matter of the sale, till the possession of the same was handed over to the bank as stipulated in the agreement. After taking possession, these charges were to be borne by the plaintiff-bank. The plaintiff claims to have paid Rs 39,920/- for the year 1988-89, Rs 50,148 for the year 1989-90, Rs 2,42,140/- for the year 1990-91 and Rs 1,87,640/- for the year 1991-92 towards arrears of property tax. EX-P-D is

the notice issued by MCD to defendant No. 1, requiring it to show-cause why penalty of Rs 1,06,968/- be not imposed on it on account of its failure to pay arrears amounting to Rs 6,66,819/-. Vide this notice, defendant No. 1 was informed that on account of failure on its part to pay the arrears, by due date, it was being treated as a defaulter under Section 155 of Delhi Municipal Corporation Act. It was further informed that in case the amount was not received by prescribed date along with reply to the notice, the penalty shall be levied and further action as per Section 156(2), 158 and 162(1) of DMC Act shall follow for effecting the recovery of the tax, including the amount of penalty. EX-P-E is the letter dated 09th March, 1998, written by the plaintiff-bank to MCD informing it that they had purchased the property from defendant No. 1 in the year 1992 and had paid property tax from 01.04.1992 to 31.03.1998. MCD was requested to recover arrears prior to 01.04.1992 from defendant No. 1. A writ petition being, CW No. 1381/1998, was also filed by the plaintiff-bank against the MCD, challenging the show-cause notice dated 04th March, 1998. In the writ petition, the plaintiff-bank claimed that no action had been taken by MCD on its representation dated 09th

March, 1998. The plaintiff-bank undertook to pay the amount which was found legitimately due and payable to MCD on account of house tax. The writ petition was disposed of with the direction to MCD to dispose of the representation made by the plaintiff-bank after affording opportunity of hearing to it. It was also directed that if after hearing the plaintiff-bank, any amount was found due and payable by the bank, the same would be paid within four weeks from the date of the order. The entire amount demanded by MCD was deposited by the plaintiff-bank vide receipts Ex. P-B along with forwarding letter Ex.P-C.

This is not the case of defendant No. 1 that arrears of property tax till the date possession was handed over to the plaintiff-bank, come to less than Rs 5.2 lakh. The case of defendant No. 1 in this regard is that no property tax was payable since the building was still under construction at the relevant time. In my view, defendant No. 1 cannot deny its liability to pay property tax on the ground that it was not payable at all to MCD. Since the property in question at the relevant time stood in the name of defendant No. 1, it was for defendant No. 1 to challenge the demand raised by MCD. This is more so when the demand was raised on defendant

No. 1 and not on the plaintiffs, as is evident from the notice dated 04th March, 1998. It was not for the plaintiff-bank to dispute and contest the liability of defendant No. 1 for the period up to the date possession of the flats was received by it. In fact, the plaintiff-bank did not have locus standi to challenge the demand of property tax for the period prior to receiving possession of the flats from defendant No. 1. Neither the plaintiff bank was under a legal obligation to dispute and contest the demand of property tax raised by MCD against defendant No. 1 nor did it have legal competence to challenge that demand.

Section 69 of Contract Act, to the extent it is relevant, provides that a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other. Therefore, if it can be said that the plaintiff was interested in payment of property tax, demanded by MCD and defendant No.1 was bound by law to pay that money to MCD, it will be entitled to reimbursement of the amount which it paid to MCD on behalf of defendant No. 1. Since the bank had agreed to purchase the flats constructed on these properties from defendant No. 1, the construction of

the flats was financed by it and the possession of the flats had also been taken by it from defendant No. 1, it is difficult to dispute that the plaintiff-bank was interested within the meaning of Section 69 of Contract Act, in a payment of property tax to MCD. The payment of property tax is a charge on the property and MCD is entitled in law to attach that property to recover the arrears of property tax. Section 156(1) of DMC Act, to the extent it is relevant, provides that if the person liable for payment of tax does not pay the amount within 30 days from the service of notice of demand, the amount may be recovered by sale of immovable property of defaulter.

Since MCD could have attached these properties to recover the arrears of property tax from defendant No. 1, attachment of the properties would have adversely affected the interest of the plaintiff-bank which had not only financed from construction, but had also received possession from defendant No. 1.

In the record of MCD, the properties stood in the name of defendant No. 1 and it was the person primarily responsible for payment of property tax in respect of those properties to MCD, it cannot be disputed that defendant No.

1 was legally bound to pay the arrears of property tax, demanded by MCD. Section 69 of Contract Act is based upon the doctrine of unjust enrichment so that a person, who is unjustifiably enriched at the expense of another is made to make restitution. In fact, Section 69 of Contract Act does not require that a person, to be interested in payment, should at the same time have a legal proprietary interest in the property in respect of which the demand is made. The interest envisaged in Section 69 of Contract Act is an interest in order to avert some loss or to protect some interest which would otherwise be lost to the person making the payment. Moreover, defendant No. 1 was legally bound to pay arrears of property tax up to the date it handed over possession of the flats to the plaintiff in terms of the agreements, executed between the parties. This contractual obligation would also be covered within the expression “bound by law to pay” used in Section 69 of Contract Act.

A similar issue came up for consideration before Privy Council in **Govindram Gordhandas Seksaria and Another vs. State of Gondal** AIR (37) 1950 Privy Council 99. In that case, the appellant company had entered into a sub-agreement to purchase two mills, but no formal sale

deed had been executed in his favor. There were unpaid municipal dues in respect of those mills. Those dues were paid by the appellant. It was contended before Privy Council that a person cannot be said to be interested in payment of money within the meaning of Section 69 of Contract Act, unless he was at the same time entitled to some legal interest in the property in respect of which payment was made. The contention, however, was rejected. Setting aside the decision of the High Court, Privy Council, inter alia, held as under:

“The learned Judges of the High Court in appeal held that the appellant company could not establish a right under this section because it was not interested in the payment of the money that it paid. The view that it was not interested was based on the fact that at the date of the payment the company had no property interest in the mills in respect of which the taxes were claimed. And in accordance with this view, the company’s payment was described by the learned Judges as a voluntary one. To their Lordships it seems to have been very unlike a voluntary payment. The company had contracted to buy these mills, and they were imminently threatened with a forced sale which would, of course, defeat its purchase. Money had to be found for the taxes if the mills were to be saved. Neither the Maharajah nor the trustees showed any sign of paying the Municipality. So the

appellant company paid. But to describe it in those circumstances as having made a voluntary payment appears to their Lordships to involve some misuse of language. Nor do they appreciate why it should not properly be described as interested in the payment. In any ordinary use of language, the company was interested in the taxes being paid at the time when they were paid since only through the payment could it realize the fruit of the contract that it had entered into. The words themselves do not require about a person to be interested in a payment should at the same time have a legal proprietary interest in the property in respect of which the payment is made.

But the general purport of the section is reasonably clear; to afford to a person who pays money in furtherance of some existing interest an indemnity in respect of the payment against any other person who, rather than he, could have been made liable at law to make the payment. So interpreted, S.69 appears to their Lordships to apply to the payment made by the appellant company in this case.

Certainly too, there is authority in the Courts of India for the proposition that "bound by law" covers obligations of contract or tort. Accepting this interpretation, as their Lordships do, they hold that the act of payment by the appellant company gave to it a right of action against the Maharajah to obtain reimbursement of the sums so paid. Thus, as against him, both the plaintiffs in this suit ought to have been held to have good, though alternative, rights of action."

I, therefore, hold that that the plaintiff-bank is entitled to recover the aforesaid amount of Rs 5.2 lakh from defendant No. 1. On payment of the aforesaid amounts to it, defendant No. 1 is legally bound to execute sale deed in favour of the plaintiff-bank in respect of the flats constructed by it on properties No. C-10, C-12 and C-17, Inder Puri and it has no justification in law to refuse such execution. The issues are decided accordingly.

Issue No. 7

There is no evidence of any illegal and unauthorized construction having been made by defendant No. 1. Admittedly, no notice alleging any unauthorized construction had been received by the plaintiff-bank. Therefore, there is no question of defendant No. 1 seeking regularization of any unauthorized construction or paying any damages to the plaintiff for such construction. In any case, no particular amount has been claimed as damages in this regard.

Issue No. 4

18. Article 54 of Limitation Act provides that the period of limitation in a suit for specific performance of a contract is three years from the date fixed when the performance or if

no such date is fixed where the plaintiff has notice that performance is refused. The Court before deciding the issue of limitation has to find out what the terms of the contract between the parties were and whether there was a definite date for performing a contract. If the case is covered by first part of Article, the period of limitation would commence from the date fixed for performance of the contract and in case it is covered by second part of the Article, the period of limitation would commence from the date on which the plaintiff has noticed of refusal of performance by the defendant. The words “date fixed for performance” need not be ascertainable in the face of the document and may be ascertainable on the happening of a certain contingent event specified in the contract. “Date fixed” would, therefore, mean either the date fixed expressly in the contract between the parties or a date that can be fixed with reference to a future event which is certain to happen.

The agreement between the plaintiff and defendant No. 1 provided for execution of the sale deed within 30 days of defendant No. 1 obtaining completion certificate and putting the plaintiff-bank in possession of the property agreed to be sold to it. There is no evidence of defendant No.

1 having obtained completion certificates within three years prior to institution of these suits. Had defendant No. 1 obtained the completion certificates, the last date stipulated for execution of sale deed in favour of the plaintiff-bank would have been a date 30 days from the date completion certificate was obtained by defendant No. 1 and receipt of completion certificate by defendant No. 1 was conveyed to the plaintiff. This is not the case of defendant No. 1 that it had obtained completion certificate more than three years before filing of these suits and had informed the plaintiff-bank in this regard. Therefore, computed in terms of first part of Article 54, the period of limitation had not expired when these suits were filed.

If the period of limitation is computed in terms of second part of Article 54 of Limitation Act, the suits are still within time for the simple reason that defendant No. 1 has never refused to execute the sale deed in favour of plaintiff. The correspondence between the parties seeking shows that defendant No. 1 had time and again been expressing its willingness to execute the sale deeds in favour of the plaintiff bank. Ex. PW-2/13 is the letter of defendant No. 1 dated 28th November, 1998 seeking certain payments from

the plaintiff-bank and expressing willingness to execute the sale deed in its favour. Similar willingness was shown in the letter dated 23rd June, 1997 (EX.PW-2/11), letter dated 23rd September, 1996 (Ex.PW-2/10), letter dated 1st January, 1996 (Ex.PW-2/9), letter dated 22nd April, 1995 (Ex.PW-2/6) and letter dated 04th September, 1996 (Ex.DW-1/15). I, therefore, hold that specific performance of the agreements executed by defendant No. 1 in favour of plaintiff-bank for construction and sale of flats in properties Nos. C-10, C-12 and C-17, Inder Puri is not barred by limitation.

As regards claim of recovery of Rs 5.2 lakh paid to MCD towards arrears of property tax, since the plaintiff bank made payment only on 04th May, 1998 and had no cause of action to recover the aforesaid amount before that date, the suit having been filed in April, 1999 is well within limitation. The issue is, therefore, decided in favour of the plaintiff and against the defendant No. 1.

ORDER

In view of my findings on the issues, the names of defendants other than defendant No. 1 M/s Gawri Constructions Udyog Ltd. are struck off from the array of defendants. After adjustment of the amounts payable to

defendant No. 1, the plaintiff-bank is entitled to recover the balance amount of Rs 58,039.39/- from defendant No. 1. Defendant No. 1 is directed to execute sale deed in favour of the plaintiff-bank in respect of the buildings constructed by it on properties No. C-10, C-12 and C-17, Inder Puri, New Delhi within 8 weeks. Defendant No. 1 is also directed to pay a sum of Rs 58,039.39/- to the plaintiff-bank, along with pendente lite and future interest on that amount at the rate of 6% per annum. In the facts and circumstances of the case, there shall be no order as to costs.

Decree sheet be drawn accordingly.

(V.K. JAIN)
JUDGE

OCTOBER 17, 2011
VN/BG