

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 28.03.2011*

+ **RSA No. 339/2006**

M/S GHAI BUILDERS (REGISTERED)**Appellant**
Through: Sh. Anil Sharma, Advocate.

Versus

SHRI. BALDEV RAJ SACHDEVA & ORS.**Respondents**
Through: Sh. Satya Prakash Gupta, Advocate.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J. (Oral)

1. This appeal has impugned the judgment and decree dated 23.08.2006 which has reversed the finding of the trial judge dated 10.09.2004. Vide judgment and decree dated 10.09.2004, the suit of the plaintiff i.e. M/s Ghai Builders seeking possession and declaration to the effect that the transfer of title of the documents executed by defendant no. 1 and 2 in favour of defendant no. 3 and 4 be declared null and void and possession of the suit property (i.e. shop no. 2, built in building, on plot no. 21, Local Shopping Centre, A-Block, Preet Vihar, Delhi-92) be delivered to them had been decreed in his favour. The impugned judgment had reversed this finding. It had dismissed the suit of the plaintiff.

2. The case of the plaintiff as set out in the plaint is that he is a registered partnership firm. He was a builder by profession. The aforementioned suit shop was allotted to defendant nos. 1 and 2 on

license by way of agreement dated 20.06.86; defendant nos.1 and 2
RSA No. 339/2006

had defaulted in payments; they had sold this shop to defendant nos. 3 and 4 which they had no right to sell. Suit was accordingly filed.

3. Defendants had contested the suit. Defense of the defendant nos. 1 and 2 was that they had been allotted this shop and were the exclusive owners of the said shop; they had a further right to sell it to defendant nos. 3 and 4 which was a valid sale agreement. Under Section 6 of the Delhi Apartment Act, 1986 (hereinafter referred to as the 'Apartment Act'), they had become the absolute owners of the suit shop; present suit was not maintainable.

4. On the pleadings of the parties, 11 issues were framed which reads as follows:-

1. Whether the plaintiff has got no locus-standi to file and maintain the present suit as alleged in preliminary objection no.1 by all the defendants? (OPD)
2. Whether the plaintiff is a registered partnership firm and Sh. M.L. Ghai is a duly constituted attorney of the plaintiff firm and the suit has been signed and filed by the duly authorized person? (OPP)
3. Whether the suit has not been properly valued for the purposes of court fees and jurisdiction. If so, then what is the correct valuation of the suit for the purpose of court fee and jurisdiction? (OP parties)
4. Whether the defendant no.1 & 2 are not necessary and proper parties to this suit as alleged in preliminary objection no.7 in the written statement of the defendants? (OPD)
5. Whether the power of attorney dated 24.8.90 executed by defendants no.1 & 2 in favour of defendants no.3 & 4 is null and void? (OPP)
6. Whether the transfer of the suit shop by defendants no.1 & 2 in favour of defendants no.3 & 4 on the basis of power of attorney dated 24.8.90, is null and void as claimed by the plaintiff? (OPP)
7. Whether the plaintiff is entitled to a decree for possession of the suit shop? (OPP)
8. Whether the plaintiff is entitled to decree for declaration as prayed for in this case? (OPP)
9. Whether the plaintiff is entitled for the declaration of the cancellation of the documents as prayed? (OPP)
10. Whether defendant no.1 & 2 became the owner of shop in dispute in view of provisions of Section 6. Delhi Apartment Ownership Act 1986? (OPD)
11. Relief.

5. One witness was examined on behalf of the plaintiff and three witnesses had come in defense. The trial judge returned a finding in favour of the plaintiff holding that the defendant nos. 1

and 2 were not competent to sell this shop in favour of defendant no. 3 and 4; this transaction was void. Plaintiff was entitled to the possession of the suit shop as defendant nos. 1 and 2 were only licencees and not owners. The Apartment Act was inapplicable.

6. In the impugned judgment, this finding was reversed. The finding in the impugned judgment reads as follows:-

“17. It is to be noted that this apartment has no bye laws and there is no deed of apartment between the builder and the allottee. It was argued by the Ld. Counsel for the appellant that he has become the owner in view of Section 6 of the Act. On the contrary, Ld. Counsel for the respondents invites my attention to Section 4(2) of the Act, also. He also points out that the Section 6 clearly establishes that until the full payment is made, the allottee will not become the owner.

18. Coming to the point arising for my determination, it was argued by the respondents that the defendants 3 and 4 in the trial court have not led any evidence. The original allottee had not led any rebuttal evidence. Therefore, the Ld. Court was justified in decreeing the suit. But in view of the Section 6 of the Act, the ownership is subject to certain conditions. The first condition is that the full payment of consideration along with interest if no dues are made, the defendants 1 and 2 have no right to claim the ownership till such time of the terms and conditions of the agreement would govern them. As already pointed out that condition number 4 of the allotment prescribes that no alienation can be made without the written permission from the builder. It also shows that in case of such alienation, the same shall not bind the builder. It is admitted that the allottee was put under the possession by condition number 15. The allottee is bound to pay the charges if such charges are not paid for more than three months, allotment would be cancelled. It is to be noted that the provisions of Transfer Property Act, shall govern in so far as it is not in consistent with the provisions of the Apartment Act. Section 24 of the Act, also require a mention here.

Act to be binding on apartment owners, tenants, etc. (1) The provisions of this Act have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any contract, undertaking or other instrument and all apartment owners, tenants of owners, employees of owners and tenants, or any other person who may, in any manner, use the property or any part thereof to which this Act applies, shall be subject to provisions of this Act and the bye-laws and the rules made thereunder.

Provided that nothing contained in this sub-section shall affect the right, title or interest acquired by any allottee or other person in common areas and facilities from any promoter on or before the 28th day of February, 1986.

(2) All agreements, divisions and determinations lawfully made by the Association of Apartment Owners in accordance with the provisions of this Act and the bye-laws shall be deemed to be binding on all apartment owners.

In view of Section 24, the defendants are protected under the scheme of the Act. If this be so, the right of re-entry is vouchsafed under section 8 of the Act, in favour of the plaintiff in the trial court, who is the builder of the land. For the default of the conditions, the Section 8(7) of the Act, becomes in operation which prescribes as under:

"If the defaulting apartment owner omits or fails to refrain from committing any breach of the terms and condition of the sub-lease in respect of the land, or as the case may be, omits or fails to pay the composition in lieu thereof.

(i) in accordance with the notice issued by the lessee under sub-section (3), or

(ii) where the findings of the lessee or the person authorized to inspect the land about any breach of the terms and conditions of any sub lease in respect of the land or the amount of composition fee specified in the notice issued by the lessee are altered by the District Court on appeal or by any higher court on further appeal, in accordance with the decision of the District Court or such higher court, as the case may be, the lessee shall be entitled.

(a) where no appeal has been preferred under sub section (4), within sixty days from the date of service of the notice under sub section (3). Or

(b) where an appeal has been preferred under sub-section (b), within sixty days from the date on which the appeal is finally disposed of by the District Court or, where any further appeal is preferred to a higher court, by such higher court,

to exercise the right of re-entry in respect of the undivided interest of the lessee in the land appertinent to the apartment owned by the defaulting apartment owner, and where such right of re-entry cannot be exercised except by the ejectment of the defaulting apartment owner from his apartment, such right to re-entry shall include a right to eject the defaulting apartment owner from the concerned apartment :

Provided that no such ejectment shall be made unless the defaulting apartment owner has been paid by the lessee such amount a compensation for such ejectment as may be determined in accordance with the prescribed scales of compensation."

19. So, the right of re-entry and ejectment would be only possible under the above provisions. The above suit was filed before the Court below treating the entire transaction as a licence under the general law. In view of Section 24, the general law can not invoked. The entire evidence and the issues framed are based on the pleadings which were contested during the case as the one under general law. Further, it is to be noted that the plaintiff in the Court below has led the evidence that the conditions of the agreement dated 20.06.1986, have been violated. A mere reading of the said agreement is confusive as to classify it. It is argued that it is a case of pure licence. The document relied is not the licence deed but an agreement. After the commencement of the Act, the allottee under the agreement is protected under the Act in my humble opinion.

20. I have gone through the evidence adduced in this case. Ld. Court below came to the finding that the said shop was given to defendants 1 and 2 on licence basis. Ld. Court below opined that it is based on the findings on the fact that the condition number 6 of the agreement provided for licence fee @ 35 p. per sq. foot p.m. was allotted. But the recitals of the agreement show that the first party had agreed to allot the said space to the allottee at the 'cost' of ₹1,05,000/- in the cost of allotment. The pleadings in the suit is that the same was allotted to the defendants on the licence basis had deposited a sum of ₹1,05,000/-. If it is deposit, the agreement does not show anything with regard to the refund of the same. Therefore, it is to be concluded that the shop was allotted on licence basis cum for consideration and of-course on some charges agreed. Suffice it to say that without looking into any of the other points urged, it can be said that the Ld. Civil Judge, has misread the agreement by construing it as a mere licence.

21. From the material available on record, I am of the firm opinion that this is a allotment on consideration but subject to certain conditions. The plaintiff who is the builder of-course had the right of re-entry as provided U/s 8 of the Act. There are certain procedures prescribed which mandates such person seeking the right of re-entry to follow the procedures laid down, seeking ejectment and to assert the right of re-entry. The plaintiff having not followed the procedure U/s 8 of the Act, is not entitled to seek the relief claimed in the suit."

7. This is a second appeal. It has been admitted and on 09.07.2008, the following two substantial questions of law were formulated. They read as follows:-

- (i) Whether the transaction between the parties to the suit is governed under the provisions of the Delhi Apartment Ownership Act, 1986 and whether that act is applicable in Delhi or not ?
- (ii) Under what law the relation between the parties to the suit are to be governed ?

8. On behalf of the appellant, it has been urged that the finding in the impugned judgment is illegal and perverse; attention has been drawn to Section 4 (2) and Section 6 of the Apartment Act. It has been pointed out that what had been allotted to the defendant by the plaintiff was only the suit shop measuring 114.97 sq. ft; the common areas do not form a part of this agreement. Notice Ex. PW 1/15 dated 15.04.88 had sent by the defendant for the charges of the common areas and passages for which he had not paid and for which he was liable to pay but defendant Nos.1 & 2 paid no heed. No reply was filed to the said notice. It is pointed out that the chance to avail of the application of the Apartment Act has thus been lost; the defendants cannot now take benefit of the said Act.

9. Arguments have been countered. It is pointed out that under the aforementioned said Act, the defendant has become the absolute owner of the said shop including the adjoining and appurtenant spaces.

10. Record has been perused.

11. Ex. PW 1/3 is the application form dated 25.03.1986 by virtue

of which defendant nos. 1 and 2 had paid a sum of Rs.10,000/- as an advance for allotment of the aforementioned shop located in Local Shopping Centre, Preet Vihar, Delhi. Ex. PW 1/4 is the agreement dated 20.06.1986 entered into between the parties. In terms of this agreement, sum of Rs. 1,05,000/- had been paid by the defendant nos. 1 and 2 to the plaintiff for allotment of a shop measuring 131.75 Sq. Mtrs. It is not the case of the appellant that any balance payment was due on this agreement.

12. The Apartment Act of 1986 was an Act promulgated to provide for the ownership of an individual apartment in a multi-storeyed building and of an undivided interest in the common areas and facilities appurtenant to such apartment and to make such apartments and interest heritable and transferable and for matters connected therewith or incidental thereto. This is the object of the Act. It was notified in the Official Gazette on 01.12.1983.

Section 4(2) reads as follows:-

“4. Ownership of apartments.-

(1)

(2) Every person to whom any apartment was allotted, sold or otherwise transferred by the promoter before the commencement of this Act shall, save as otherwise provided under Section 6 and subject to the other provisions of this Act, be entitled, on and from such commencement, to the exclusive ownership and possession of the apartment so allotted, sold or otherwise transferred to him.

(3) Every person who becomes entitled to the exclusive ownership and possession of an apartment under sub section (1) or sub section (2) shall be entitled to such percentage of undivided interest in the common areas and facilities may be specified in the Deed of Apartment and such percentage shall be computed by taking, as a basis, the value of the apartment in relation to the value of the property.

(4) (a) The percentage of the undivided interest of each apartment owner in the common areas and facilities shall have a permanent character, and shall not be altered without the written consent of all the apartment owners.

(b) The percentage of the undivided interest in the common areas and facilities shall not be separated from the apartment to which it appertains and shall be deemed to be conveyed or encumbered with the apartment, even though such interest is not expressly mentioned in the conveyance or other instrument.

(5) The common areas and facilities shall remain undivided and no apartment owner or any other person shall bring any action for partition or division of any part thereof, and any covenant to the contrary shall be void.

(6) Each apartment owner may use the common areas and facilities in accordance with the purposes for which they are intended without hindering or encroaching upon the lawful rights of the other apartment owners."

Under Section 5, an apartment is inheritable and transferable.

Section 6 reads as follows:-

"6. Ownership of apartment subject to conditions.-

Where any allotment, sale or other transfer of any apartment has been made, whether before or after the commencement of this Act, in pursuance of any promise of payment, or part payment, of the consideration thereof, the allottee or transferee, as the case may be, shall not become entitled to the ownership and possession of that apartment or to a percentage of undivided interest in the common areas and facilities appurtenant to such apartment, until full payment has been made of the consideration thereof together with interest, if any due thereon, and where any such allottee or transferee has been inducted into the possession of such apartment or any part thereof in pursuance of such allotment or transfer, he shall, until the full payment of the consideration has been made, continue to remain in possession thereof on the same terms and conditions on which he was so inducted into possession of such apartment or part thereof."

Section 4 and Section 6 both have a retrospective application as is evident from the language of the Sections. The vehement contention of the learned counsel for the appellant is that provisions of Section 4 of the said Act are subject to provisions of Section 6. There is no dispute to this proposition. Section 6, for its application necessarily pre-supposes that the allotment which is made is in pursuance of "any promise of payment", or "part payment", of the consideration thereof. In this case, complete payment had been made by defendant no. 1 and 2 to the plaintiff in terms of Ex. PW 1/4 i.e. sum of Rs. 1,05,000/-. It is also not the case of the appellant that any payment was due from the defendant or there was promise of any further payment. Applicability of Section 6 of the said Act is thus excluded. In terms of Section 4

(3), (4), (5) and (6), the percentage of the undivided interest of each apartment owner for the common areas and facilities would be of a permanent character, it was inheritable; such common areas and facilities would remain undivided; each apartment owner would use the common area and facilities in accordance with the purpose for which they were intended. This is also contained in the object clause of this legislation.

Section 8 stipulates the condition where the land has been given on lease to another and there has been a breach of its terms and conditions; in such an eventuality, notice has to be served upon such a lessee who has thereafter a right to challenge it by filing an appeal in the court of the District Judge. Notice Ex. PW 1/15 is dated 15.04.88; the suit has been filed in 1997; even otherwise this notice was not the basis of the suit of the plaintiff as it had not found mention in the plaint; it was only adverted to in the replication. Procedure of Section 8 has also not been complied.

13. The provisions of Section 6 of the said Act are not attracted. Under Section 4 (3), (4), (5) and (6) of the said Act, the common areas and facilities could not be separated from the apartment i.e. shop in question; even though such interest did not specifically find mention in Ex. PW 1 / 4. The apartment owner i.e. defendant nos. 1 and 2 had a percentage of undivided interest in this common area and facility which was an inheritable interest. Defendant nos. 1 and 2 had, in terms of Ex. PW 1 / 4, become the exclusive owner of the suit shop including the common areas and the facilities. They had right and title to dispose it of in favour of defendant nos. 3 and 4 which they validly did so.

14. These findings of the impugned judgment call for no

interference. There is no perversity in the said finding. Subsequent question of law is answered accordingly. Appeal is without any merit. Dismissed.

INDERMEET KAUR, J.

MARCH 28, 2011
SS