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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS(OS) 1214/1996

29th August, 2012

INDIAN BANK

.....Plaintiff

Through: Mr. Rajiv Mishra and Mr. Anew Francis,
Advocates.

VERSUS

M/S TAJ WORLD FAME BUILDERS & ANR

..... Defendants

Through: Mr. Sanjay Gupta, Mr. Ateev Mathur, Mr.
Ajay Monga and Mr. Ashish Kr. Mishra,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The subject suit is filed by the plaintiff seeking alternative reliefs, one for possession of the disputed flat no. 6D in the multistorey constructed building on a plot of land bearing no. 10, Bhagwan Dass Road, Mandi House, New Delhi. The second alternative relief is for a money decree of ₹ 92.97 lacs being the costs as value of the disputed flat.

2. As per the plaint, the plaintiff avers that the plaintiff/ bank agreed to purchase four flats bearing nos. 3B, 6D, 7C and 7D from the builders being the

defendant nos. 1 and 2 in the building to be constructed at 10, Bhagwan Dass Road, Mandi House, New Delhi. Para-4 of the plaint says that the agreed price was paid. Para 5 of the plaint avers that the possession of all the four flats was handed over to the plaintiff on 19th/20th July, 1991 and 29th July, 1991. In the plaint, it is further stated that the builder/defendant no.1 wanted the plaintiff /bank to give back the possession of flat no. 6D as it was required by the adjoining owner of flat no. 6C and the defendant nos. 1 and 2 (defendant no.2 being the authorized signatory of defendant no. 1) promised to handover a flat in substitution of flat no. 6D. The plaint further states that flat no. 6D remained un-allotted by the plaintiff to any of its officers and thus remained vacant for a long time because of which the defendant nos. 1 and 2 are said to have taken advantage by taking illegal possession of the same in June/July, 1993.

Originally, the suit was filed against defendant nos. 1 and 2 however subsequently, the purchasers of the flat no. 6D were added as defendant nos. 3 and 4 in the suit. The amended plaint states that the defendant nos. 1 and 2 after taking illegal possession of flat no. 6D agreed to transfer the same to defendant nos. 3 and 4 who were stated to be in an unauthorized possession of the flat. The plaint concludes that the defendant nos. 3 & 4 being in illegal possession, the defendant

nos. 1 and 2 are liable to either handover the possession of the flat 6D or the value of the flat. Plaintiff also seeks relief of mesne profits against the defendants.

3. Defendant nos.1 and 2 appeared initially and filed their written statement, however, they subsequently failed to appear and did not lead any evidence. As per the written statement filed by defendant nos. 1 and 2 averments made are that the plaintiff/ bank had committed breach of its contract in failing to pay the agreed consideration and therefore, the suit was liable to be dismissed more so it was filed after 7 years of the sale of the flat to the defendant nos. 3 and 4. In the written statement of defendant nos. 1 and 2, it is admitted that the plaintiff /bank was given possession of flat no. 6D, however, it is stated that the bank voluntarily handed over back possession of the said flat for being substituted with another flat.

4. In the written statement filed by defendant nos. 3 and 4, it has been averred that rights in the subject flat no. 6D were purchased by them under Flat Buyer's Agreements dated 26.6.1990 and 10.8.1990, and possession was given to defendant nos. 3 and 4 by defendant nos. 1 and 2 on 18.11.1991. The case of the plaintiff/ bank is denied that the plaintiff /bank was in possession of the subject flat. It is stated that the plaintiff has no right in the subject flat and therefore qua defendant nos. 3 and 4, no relief can be granted in favour of the plaintiff /bank.

5. Following issues were framed in the suit on 14.9.2000.

“1. Whether the plaint has been signed and verified by a duly authorised person?

2. Whether the plaintiff surrendered the possession of flat no. 6D as alleged for exchange of the flat 4C?

3. Whether the defendant nos. 3 and 4 purchased the flat and whether they were legally put in possession of the same?

4. Whether the defendant nos. 3 and 4 are unauthorised occupants as stated in the plaint?

5. Whether the plaintiff is entitled to possession? If not, whether the plaintiff is entitled to cost of the flat as claimed?

6. Whether the plaintiff is entitled to use and damages. If so, at what rate and from whom?

7. Whether the suit is barred by limitation?

8. Relief.

6. There are certain clarifications given on the issues framed vide order dated 18.4.2002. The issues already framed cover all the disputes between the parties.

Issue Nos.1 & 7

7. Issue nos.1 and 7 are not pressed on behalf of the defendants and are therefore decided in favour of the plaintiff.

Issue no. 2 to 5

8. Issue nos. 2 to 5 can be taken up and dealt with together and are accordingly being decided together.

9. (i) The main aspect is whether the plaintiff is entitled to possession of the subject flat no. 6D or whether that rights in the subject flat being 6D in fact vests with the defendant nos. 3 and 4. If the plaintiff establishes its rights to flat no. 6D, it would be entitled to possession, but if the plaintiff fails to establish its right to flat no. 6D, defendant nos. 3 and 4 who will be entitled to rights in the same and therefore would not be unauthorised occupants of the flat and the plaintiff will not be entitled to possession of the flat.

(ii) One thing is clear from the reading of the plaint that the plaintiff does not claim ownership rights in the flat no. 6D by means of a registered sale deed. The only thing which can be akin to ownership rights (though not exactly ownership rights) is by virtue of Section 53A of the Transfer of Property Act, 1882 as existing when the agreements of plaintiff/defendant nos. 3 & 4 with defendants 1 & 2 were entered into. The plaintiff does not even remotely make averments of the ingredients of Section 53-A of the Transfer of Property Act, 1882 in the plaint. More importantly, the plaintiff has failed to aver the important requirement of Section 53-A of the Transfer of Property Act, 1882 that the plaintiff has always

been willing to perform its part of the contract being the Agreement to Sell dated 29.11.1989 (Ex. PW1/1) entered into by the plaintiff with the defendant nos. 1 and 2 for the four flats including the subject flat no. 6D.

(iii) Once there is no registered sale deed in favour of the plaintiff and the plaintiff has failed to even make averment in terms of Section 53-A, therefore, the plaintiff cannot get any relief on the basis of ownership or Section 53-A.

10. Now let us for the sake of argument assume that the plaintiff seeks to take benefit of Section 53-A and averments have been made in the plaint. Let us examine as to whether the requirements of Section 53-A have been satisfied by the plaintiff in the facts of the present case. As the discussion hereafter will show that not only the plaintiff has failed to prove the ingredients of Section 53-A, but in fact the plaintiff has found to have made deliberate false statement. The first requirement of Section 53-A is that the proposed buyer such as the plaintiff must aver that it has wholly performed its obligations or it has partly performed its obligations and is willing to perform the balance obligations. The only obligation upon the plaintiff was to pay the price. Whereas the plaint makes an averment that the total agreed price is paid, counsel for the plaintiff today admits and does not dispute that it has come in the evidence that the plaintiff /bank has only paid 85% of the price and not the complete price for all the four flats. The averments made

by the plaintiff therefore made in para 4 of the plaint of having paid the agreed price is a deliberate false statement. Therefore, not only has the plaintiff failed to make the averment with respect to the willingness to perform its part of the contract, but it has made a deliberate false statement that it has paid the agreed price whereas balance 15% of the price is still payable.

While on this aspect I must state that even with respect to the three other flats which the plaintiff agreed to purchase vide Ex.PW1/1, plaintiff has only paid 85% of the price of these flats i.e. 15% price of each of the flats still continues to be payable to the defendant nos. 1 and 2. This aspect will be relevant because even if we balance the case on equities, the plaintiff, on the one hand at best would be out of pocket of about 55% of the value of the disputed flat inasmuch as, 45% of the value of the flat is not yet paid taking the fact that 15% of the three flats agreed to be purchased vide Ex.PW1/1 has still not been paid, on the other hand, defendant nos. 3 and 4 are out of pocket with respect to 100% of the value of the subject flat no. 6D having paid the total price to the defendant nos. 1 & 2.

Therefore, the plaintiff having failed to aver and prove the requirements of Section 53-A cannot have benefit of doctrine of part performance so as to claim back possession of the disputed flat from defendant nos. 3 and 4.

11. One vital ingredient of the provision of Section 53-A of the Transfer

of Property Act is that the plaintiff should have been put in possession pursuant to the agreement Ex.PW1/1. Whereas the case of the plaintiff is that it was put in possession, the defendant nos. 3 and 4 dispute this fact. Let us now therefore examine the aspect as to whether the plaintiff has succeeded in proving that the plaintiff had received possession of the disputed flat no. 6D from the defendant nos. 1 and 2.

12. I must note that ordinarily it would have been easy to decide this aspect if there was a possession letter of handing over and taking over in favour of the plaintiff/bank similar to the possession letter dated 18.11.1991, Ex.DW1/2 executed by the defendant nos. 1 and 2 in favour of defendant nos. 3 and 4. However, there is no specific handing over and taking over of possession letter executed between defendant nos. 1 and 2 and the plaintiff. This however is not conclusive inasmuch as, the plaintiff has relied upon a letter dated 20.7.1991 Ex.PW1/2 written by it to defendant No. 1 to buttress its case that the plaintiff /bank had received possession of the flat no.6D as this is so mentioned in this letter. A reading of this letter Ex.PW1/2 shows that there is no proof of this letter having been sent to the defendant nos. 1 and 2 or being received by defendant nos. 1 and 2. This letter does not contain any fact as to whether it was sent by registered post or whether it was delivered by hand. Admittedly, the plaintiff does not rely upon any registered postal receipt to show that this letter was sent by

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registered post, and, nor is there any endorsement of receipt on this letter by the defendant nos. 1 & 2. Therefore, though this document is exhibited as PW1/2, I would not place weight on the same to hold that by this letter it is proved that plaintiff had received possession of flat no. 6D. Proof of a document is different from the weight to be put on the contents of the same inasmuch as, a person may orally depose that he has sent such a letter Ex.PW1/2, however on the totality of the facts and circumstances a Court can come to conclusion that in spite of a document being marked and exhibited, such letter has not been proved in accordance with law as being duly sent to or served upon the defendant nos. 1 and 2 or in any case cannot be sufficient proof of possession. I thus hold that Ex.PW1/2 has not been sent or its delivery taken by the defendant nos. 1 and 2. Therefore, the plaintiff cannot be said to have received possession under Ex.PW1/2.

13. Admittedly, the agreement Ex.PW1/1 also specifically states that possession would be given to the plaintiff /bank in future i.e possession was not given under the agreement Ex.PW1/1 dated 29.11.1989. Though the defendant nos. 1 and 2 have stated in their written statement that plaintiff/ bank was given possession of flat no. 6D, and which is an aspect which is also mentioned in the letter dated 29.1.1992, Ex.P-5 sent by the defendant nos. 1 and 2 to the plaintiff, however, I again cannot place necessary weight on this letter Ex.P-5 inasmuch as

while this letter is dated 29.1.1992 ,but, the possession letter in favour of the defendant nos. 3 and 4 by the defendant nos. 1 and 2 is dated 18.11.1991 (Ex.DW1/2) i.e prior in point of time to Ex.P-5 dated 29.1.1992. The statement made by the builders-defendant nos. 1 and 2 in Ex.P-5 is obviously a convenient statement inasmuch as once the Ex.DW1/2 dated 18.11.1991 exists the possession of the said flat no. 6D could not have been with the plaintiff/ bank on 29.1.1992 when Ex.P-5 was written. It was obvious that the defendant nos. 1 and 2 knew that they had delivered possession of the disputed flat no. 6D to defendant nos. 3 and 4 on 18.11.1991 vide Ex.DW1/2, however they were misleading the plaintiff/ bank in this regard by stating that flat was with them. The actual position must be that the possession of flat no. 6D ought to have been with the plaintiff, however in reality on account of the disputes of the plaintiff /bank with the builders/defendant nos. 1 and 2 factual and actual possession of flat no. 6D did not come to the plaintiff/ bank. I am strengthened in this view of mine by reference to the cross-examination of the witnesses of the plaintiff bank. PW-2 Mr. C.Siva Prakasam, in his cross examination dated 29.11.2004 has stated that the keys of the disputed flat can be produced, but till date the keys of the disputed flat have not been produced in this Court. Further, this witness has admitted in the cross-examination of the same date that the disputed flat no. 6D was not occupied by any of the employee of the bank because there were disputes going on with the builders. Obviously,

therefore, may be on paper it may have been suggested that the possession of the disputed flat was with the plaintiff, however, in fact and reality actual physical possession of flat no. 6D was not with the plaintiff. In this regard, it is extremely important to note that the plaint makes no reference to possession of disputed flat being taken over on 20.7.1991 vide Ex.PW1/2. The plaint is conveniently silent with respect to this letter Ex. PW1/2 and as to the date on which possession of flat no. 6D was taken over. Ex.PW1/2 thus seems to be a letter which was subsequently prepared, because if this was existing on the date of filing of the plaint, the plaint would have referred to plaintiff's possession under this letter, but, that is not the position.

In the cross-examination of the bank's witness PW1 Sh. B. Natarajan, on 25.11.2004, a specific suggestion has been put that the letter Ex.PW1/2 dated 20.7.1991 is an afterthought and false document. In fact, this witness was given an opportunity to explain as to why the letter Ex.PW1/2 was not mentioned in the plaint but the witness deposed that he cannot say why. Further, this witness admits that he does not remember the mode of delivery of the letter Ex.PW 1/2. I may also state that though in the cross-examination of the witness an endeavour was made to show that bank's furniture was lying in the flat no. 6D, however, on a deeper cross-examination of this witness, ultimately, this witness admitted that he does not know what happened to the alleged furniture of

the bank which was put in flat no. 6D.

14. There are further two other important facts which lead me to conclude that the flat no. 6D was not in possession of the plaintiff /bank. The first aspect is that if the plaintiff was really in possession of this flat, surely, it would have applied for mutation of this flat no. 6D with the municipal authorities, or at least given an intimation to the municipal authorities with regard to possession of this flat inasmuch as, mutation was sought for of the other three flats in favour of the plaintiff. It was not difficult for the plaintiff /bank to have filed documents to show that it has applied to the municipal authorities for mutation of disputed flat in its name however, I find that the plaintiff has deliberately not filed such document, leading one to the conclusion that the plaintiff/bank was not in possession of flat no. 6D. The second aspect to show that the plaintiff /bank was not in possession of the fourth flat no. 6D, whereas the three other flats taken under the agreement Ex. PW1/1, is that specifically this flat was never allotted by the plaintiff /bank at any time to any of its officers. Therefore, on balance of probabilities I hold that plaintiff /bank never came in actual physical possession of the disputed flat no. 6D. If the plaintiff /bank was in actual physical possession of flat no. 6D, clearly the plaintiff /bank will not be entitled to benefit of doctrine of lis pendens contained in Section 52 of the Transfer of Property Act, Issue nos. 2 to 5 are therefore decided by holding that plaintiff was never in possession of flat no. 6D and therefore, there

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did not arise any question of surrendering of the possession of the flat no. 6D back to the builders-defendant nos. 1 & 2. The defendant nos.3 and 4 had purchased rights in the disputed flat no. 6D under the agreements dated 26.6.1990 Ex. DW1/1 and Ex. DW1/3 dated 10.8.1990. The plaintiff is therefore, not entitled to possession of the disputed flat from the defendant nos. 3 and 4.

ISSUE NO. 6.

15. Once issue nos. 2 to 5 are decided in favour of the defendant nos. 3 and 4, the defendant nos. 3 and 4 would not be liable to pay any damages to the plaintiff. The issue then arises is whether defendant nos. 1 and 2 will be liable to pay damages as claimed by the plaintiff. In a suit such as the present really the damages, if any, payable to the plaintiff would be the difference in the market price of the flat on the date of the breach. The plaintiff was bound to show the market price of the disputed flat no. 6D on the date of the breach i.e. when alleged illegal possession was taken as per the plaintiff in July, 1993. This price has to be proved to be higher than the value of the flat as found in Ex.PW1/1 dated 29.11.1989. Damages are always granted on or around the date of breach. The plaintiff, I note has miserably failed to show the value of the flat no. 6D on the date of the alleged breach i.e. in July, 1993. Plaintiff has filed valuation of certain flats to show the value of the flat in July, 1996 i.e. more than 3 years later, but this evidence, being the valuation report, is legally irrelevant.

16. Since the plaintiff is not entitled to possession of the flat, the plaintiff is also not entitled to any mesne profits.

17. The issue which next arises is that, can this Court grant a lesser relief to the plaintiff than as prayed for by applying Order 7 Rule 7 CPC. Though this aspect has not been argued on behalf of the plaintiff before me, however, I invoke my powers under Order 7 Rule 7 CPC and pass a money decree with respect to 85% of the price of the flat no. 6D paid by the plaintiff to the defendant nos. 1 and 2. This 85% price of the flat no. 6D as per the counsel for the plaintiff is ₹20,70,000/-. I would ordinarily decree the suit of the plaintiff /bank against the defendant nos. 1 and 2 for a sum of ₹ 20,70,000/-, however, from this value of ₹ 20,70,000/- the defendant nos. 1 and 2 will be held entitled to adjustment of 15% of the unpaid price of the flats 3B, 7C and 7D, being the three other flats which were agreed to be purchased vide Ex.PW1/1 dated 29.11.1989 (and admittedly with respect to which flats plaintiff is enjoying ownership and possession rights), inasmuch as only 85% of the prices of these flats have been paid by the plaintiff to the defendant nos. 1 and 2. The total 15% for each of the three flats totals to ₹11,40,000/- (as given by the counsel for the plaintiff) and therefore, this amount is liable to be reduced from the figure of ₹ 20,70,000/-. The plaintiff therefore will be entitled to a money decree against defendant nos. 1 and 2 for a sum of ₹ 9,30,000/-. The plaintiff will also be entitled to interest at 12% per annum simple

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pendente lite and future till payment on this amount of ₹ 9,30,000/- against defendant nos. 1 and 2.

RELIEF:

18. In view of the above discussion, suit of the plaintiff against the defendants is dismissed so far as the relief of possession of Flat no. 6D, 10, Mandi House, Bhagwan Dass Road, New Delhi is concerned. The suit for damages of the plaintiff against defendant nos. 1 and 2 is also dismissed. The suit of the plaintiff for mesne profits is also dismissed against the defendants. The plaintiff will however be entitled to money decree for a sum of ₹ 9,30,000/- along with interest thereon pendente lite and future till payment at 12% per annum against the defendant nos. 1 and 2 till realization. Parties are left to bear their own costs. Decree sheet be prepared.

AUGUST 29, 2012
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VALMIKI J. MEHTA, J.