

\$~2

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment Reserved on: September 14, 2012

Judgment Pronounced on: September 17, 2012

+

RFA(OS) 76/2012

UNIVERSAL FINANCE TRADERS LTD. Appellant

Represented by: Mr.Sandeep Sethi, Sr.Advocate
instructed by Mr.Deepak Jain,
Mr.Pradeep K.B., Mr.Anil
Kaushik, and Mr.Karthik Ashok,
Advocates.

versus

LUNAR DIAMONDS LTD & ORS Respondent

Represented by: Mr.P.D.Gupta, and Mr.Kamal Gupta,
Advocates for R-5.
Mr.Akhil Sibal, Advocate for R-6.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE MANMOHAN SINGH

PRADEEP NANDRAJOG, J.

1. Late Smt.Sudesh Madhok, the wife of respondent No.5 and mother of respondent No.6 had filed a suit praying for a decree in sum of ₹1,31,07,607.00 alleging that respondent No.1, M/s.Lunar Diamonds Ltd., respondents No.2, M/s.Lunar Gold International Pvt. Ltd., respondent No.3, M/s.Lunar Finance Ltd., respondent No.4, M/s.Sunrise Securities Ltd. and the appellant were Public Limited Companies. In February 1996, respondent No.2 requested her to discount a Bill of Exchange in sum of ₹1,03,84,000/- drawn on respondent No.1 for a consideration of ₹1,00,00,000/- and she agreed. Simultaneously, respondent No.1 executed a

demand promissory note in her favour in sum of ₹1,03,84,000/- and respondent No.3 executed a deed of guarantee in her favour. Additionally, respondent No.3 executed and delivered a pledge agreement as also an irrevocable power of attorney in her favour pledging shares worth ₹4 lakhs of respondent No.4 to her. Paying ₹25 lakhs to her, respondent No.1 issued two cheques in sum of ₹78,84,000/- and ₹2,75,971/-, the latter towards interest to liquidate the liability in June 1997. The cheques were dishonoured. She pleaded that Flat No.10H, Vandana Building, Tolstoy Marg was later on secured by way of a mortgage for repayment of debt to her by the appellant and respondents No.1, 3 and 4. Stating that ₹81,59,871/- towards the cheque amounts was due to her and that she had suffered loss in sum of ₹10,00,000/- and pre-suit interest @18% per annum total ₹39,47,636/-, decree claimed by her was in sum of ₹1,31,07,607/- with interest @18% per annum till amount was received.

2. A common written statement was filed on behalf of the respondents No.1 to 4 and the appellant under the signatures of Shri S.L.Maloo, who has not disclosed in the written statement as to in what capacity he was signing and verifying the pleadings and filing the same on behalf of the defendants. But admittedly was a director in all the companies. In a rolled over pleadings in the written statement, which have to be treated as an admission of the claim in the suit, it stands pleaded that in complete satisfaction of the claim of the plaintiff Flat No.10H, Vandana Building, Tolstoy Marg was sold to the plaintiff. In other words, the plea of the plaintiff that the flat was mortgaged to her was denied and the stand taken was that the flat was sold to her.

3. In the replication filed, Smt.Sudesh Madhok reiterated the stand

taken in the plaint.

4. On January 25, 1999 while issuing summons in the suit, respondents No.1 to 4 and the appellant were restrained from transferring, selling or alienating Flat No.10H, Vandana Building, Tolstoy Marg.

5. The suit thereafter chartered a course, which is reflective of a disinterested plaintiff and disinterested defendants.

6. The claim of Smt.Sudesh Madhok not being denied in the written statement and the defence being that Flat No.10H, Vandana Building, Tolstoy Marg was transferred to her in full and final consideration of her dues, and Smt.Sudesh Madhok denying as aforesaid, had anybody drawn the attention of the Court to the fact that immovable property valued at more than ₹100/- can be sold only by a sale deed and thus the defence was of a kind which was not recognized by law, a decree could have followed on admission. But it never happened till when the impugned order was passed.

7. Respondent No.1 became a sick company and rather than stay the suit qua said respondent, the suit got stayed, but later on got revived. Stage of settling issues reached when on November 24, 2004 Mr.Neeraj K.Singh, learned counsel for respondents No.1 to 4 and the appellant made a statement that Flat No.10H, Vandana Building, Tolstoy Marg, which was given as security to secure the amount due to Smt.Sudesh Madhok, could be sold and amount realized could be paid to Smt.Sudesh Madhok in satisfaction of her claim by way of adjustment.

8. But before the order could be implemented, Smt.Sudesh Madhok died. Her legal heirs were brought on record and time was consumed till IA No.4675/2005 under Order XXII Rule 3 CPC was decided. This happened on July 18, 2005. Unfortunately, counsel for the legal heirs

of Smt.Sudesh Madhok never informed the Court that order dated November 24, 2004 had to be implemented. The matter simply lingered on, and on, and on, and on, till a learned Single Judge realized on November 11, 2010 that the order dated November 24, 2004 had to be implemented.

9. Simultaneously realizing that respondent No.1 was a company declared 'Sick' by the Board of Industrial and Financial Reconstruction, as recorded in the order dated November 11, 2010, the learned Single Judge noted that the flat in question could be sold as regards the share of respondents No.3 and 4 and the appellant.

10. Suffice would it be to state that as per the title documents, the flat in question belongs to the appellant and respondents No.1, 3 and 4.

11. The legal heirs of late Smt.Sudesh Madhok were constrained to file IA No.17384/2010 informing the Court that the flat in question which was hithertofore lying locked was in possession of N.V. Distilleries Ltd. with interior works being executed and it was learnt that the appellant and respondents No.1, 3 and 4, acting through S.L.Maloo had sold the flat. Alleging violation of the injunction, it was prayed that Shri.S.L.Maloo be directed to remain present in Court. On December 22, 2010 it was directed by the Court that Sh.S.L.Maloo should remain present in Court. He appeared in Court on April 01, 2011 and made a statement that the appellant was in exclusive possession of the flat since it was purchased by the appellant directly from the promoters. But surprisingly he simultaneously admitted that the document Ex.P-13, which we note is a deed acknowledging transfer of Flat No.10H, Vandana Building, Tolstoy Marg, from the original allottee Amrit Lal Bajaj in favour of the four companies Lunar Finance Ltd., Lunar Diamond Ltd., Sunrise Securities Ltd. and

Universal Finance Traders Ltd. bore his signatures. Indeed, Ex.P-13 reveals that on May 08, 1995 the original allottee Amruti Lal Bajaj transferred the flat in the name of the four companies and the builder M/s.Gee Vee Construction Ltd. acknowledge said fact. We also note that Ex.P-14 which is the allotment document pertaining to the flat in favour of Amrit Lal Bajaj records a transfer of the allotment in favour of the four companies and even this bears the signatures of Sh.S.L.Maloo.

12. It is unfortunate that a statement made on oath by Sh.S.L.Maloo which is ex-facie perjured, went unnoticed by the learned Single Judge.

13. The flat in question could not be sold inasmuch as it became difficult to take possession of the flat in question. Sh.S.L.Maloo was directed to remain present in Court. He played truants. Costs had to be imposed upon him to secure his presence. Praying that order dated November 24, 2004 and April 01, 2011 be recalled, Sh.S.L.Maloo filed IA No.12772/2011 in which he pleaded:-

“That the defendants had engaged Sh.Neeraj K.Singh, Advocate as their counsel to appear in the aforesaid matter and to defend as per instructions given to the said counsel. It is submitted that the instructions as given to the counsel were that property/flat bearing No.10H, Vandana Building, Tolstoy Marg, New Delhi was never mortgaged with the plaintiff as security for repayment of the loan amount, the defendant No.1 had only offered two properties including the property in question but the plaintiff never agreed to have flat bearing No.10H, Vandana Building, Tolstoy Marg, New Delhi towards discharge of the liability, because it also required to have consent of co-sharers/actual owners of the property by way of resolution.”

14. We highlight that this stand is at complete variance with the

written statement filed under the signatures of Sh.S.L.Maloo, in para 6 whereof, it is specifically pleaded:-

“The defendant No.1 offered two properties i.e. Property No.15A/30A WEA Karol Bagh New Delhi or the property bearing Flat No.10H, Vandana Building, Tolstoy Marg, New Delhi and the plaintiff agreed to have the property bearing Flat No.10H, Vandana Building, Tolstoy Marg, New Delhi and in view of that, complete liability has been discharged.”

15. It is apparent that Sh.S.L.Maloo has no regards for truth and perjures himself at his convenience, regretfully even this perjured statement made by Sh.S.L.Maloo in his pleadings, supported by an affidavit on oath was ignored by the learned Single Judge.

16. The application was rightly dismissed by the learned Single Judge as per order dated September 20, 2011.

17. Matter had to proceed for the flat to be sold when an agreed order came to be passed on October 19, 2011 and we highlight that the order records that the appellant was represented through Mr.Dinesh Agnani, Sr.Advocate and instructed by Mr.Anurag Chawla, Advocate. Shri S.L.Maloo was represented by Mr.Madan Gera, Advocate. It was agreed by the appellant that to preserve the property i.e. Flat No.10H, Vandana Building, Tolstoy Marg, New Delhi it would furnish a bank guarantee in sum of ₹2.25 crores to the satisfaction of the learned Joint Registrar.

18. The appellant thereafter sought permission to mortgage Flat No.10H, Vandana Building, Tolstoy Marg, New Delhi to obtain a bank guarantee. As per order dated November 16, 2011 the necessary permission was granted. The proposed bank guarantee was considered by the Court and its language was found to be deficient. Order dated December 01, 2011 was

RFA(OS) 76/2012

passed as under:-

“I have perused the bank guarantee furnished by defendant No.5. The bank guarantee is not appropriately worded. In my view, the bank should undertake to pay a sum up to ₹2,25,00,000/- to the Registrar General of this Court, **in the event of this suit being decreed and the judgment debtor(s) not paying the decreed amount within such time as the Court may stipulate for the purpose.....**”

19. Thereafter the bank guarantee was filed. And we note the terms of the guarantee records that the bank unconditionally undertakes to pay up to a sum of ₹2,25,00,000/- **in the event of the suit being decreed and the judgment debtors not paying the decretal amount.**

20. Suffice would it be to state that in this manner, the defendants in the suit, which includes the appellant, managed that the flat in question would not be sold.

21. Fortunately for the plaintiffs i.e. respondents No.5 and 6 in the appeal, the learned Single Judge held, vide order dated July 31, 2012 that it was a case where decree had to be passed on admission. The reason is the one which we have noted in paragraph 6 above i.e. that the claim in the suit has not been denied and the defence that Flat No.10H, Vandana Building, Tolstoy Marg, New Delhi was sold and not offered by way of mortgage was a plea not even permissible to be raised as per the law.

22. Decreeing the suit but only in sum of ₹75 lakhs and granting interest @15% per annum from February 13, 1996, and for which reasoning of the learned Single Judge is that late Smt.Sudesh Madhok had paid a sum of ₹1 crore and had received ₹25,00,000/- as admitted by her. The learned Single Judge simultaneously directed that the bank guarantee be invoked to

satisfy the decretal amount and for which the learned Single Judge held that the language of the bank guarantee so permits.

23. Defendant No.5 of the suit, M/s.Universal Finance Traders Ltd. has preferred the appeal limited to the direction in the order dated July 31, 2012 that the bank guarantee be invoked.

24. And the plea taken is that the flat in question was the sole property of the appellant as per an Agreement to Sell dated July 29, 1998 and that the shareholding of the appellant company had totally changed hands on February 13, 2007. It is pleaded in the appeal that all the shares of the appellant have been purchased by Varun Jain, Vineeta Jain, Neha Gupta, Indra Jain, Ashok Jain, Vimal Goel, and Sameer Goel for a total consideration of ₹37,50,000/-. With respect to the history to the title of Flat No.10H, Vandana Building, Tolstoy Marg, New Delhi it was pleaded that M/s.Gee Vee Enterprises, the builder transferred the ownership to Amrit Lal Bajaj who thereafter transferred the same to the appellant and respondents No.1, 3 and 4 and subsequently on July 29, 1998, respondents No.1, 3 and 4 transferred their share to the appellant. The said seven persons acquired 100% shareholding of the appellant and leased the property to a group company called N.V.Distilleries Ltd. vide lease deed dated July 1, 2008. It is pleaded by the appellant that Shri S.L.Maloo was the director of the appellant only till July 03, 2007.

25. In other words, what the appellant claims is that with the change of shareholding, the appellant would not be responsible for the acts of the previous management and additionally that the flat in question was the property of the appellant since July 29, 1998 and that the pleadings in the plaint that respondents No.1, 3 and 4, apart from the appellant, were the co-

owners of the flat is incorrect.

26. It needs to be highlighted that admittedly the only asset of the appellant as of February 13, 2007, when the alleged share transfer took place was Flat No.10H, Vandana Building, Tolstoy Marg, New Delhi and certainly its value was much more than ₹37,50,000/- i.e. the price at which the shares of the appellant were purchased. There were no liabilities of the company save and except the amount claimed in the suit. It is impossible to believe, and he who believes is bound to be a person ignorant of the law pertaining to valuation of shares of an unlisted company, that the shares of the company would be sold for ₹37,50,000/- and thereby affecting the transferring the ownership rights of the flat valued at ₹5 crores. On the fact of it the so called share transfer is a device adopted by Sh.S.L.Maloo and Varun Jain, Vineeta Jain, Neha Gupta, Indra Jain, Ashok Jain, Vimal Goel, and Sameer Goel are his cahoots. Interestingly, as pleaded by the appellant, it has leased the flat on July 01, 2008 and on expiry of the lease in June 2011 has re-let the same. Interestingly the duration of the new lease is 30 years. And what is the monthly rent? ₹11,000/- per month.

27. We need not comment. The fraud is apparent. But we have something more to say. When the appellant set up a claim as aforesaid, and since the police is investigating the affairs of Sh.S.L.Maloo, who has cheated many others, it has transpired, as per investigation conducted by the police that the Agreement to Sell on which the appellant relies i.e. Agreement to Sell dated July 29, 1998 is a fabricated document inasmuch as Mahavir Singh, the Notary Public who has ostensibly attested the document i.e. the Agreement to Sell on July 29, 1998 had expired prior thereto on May 02, 1997. The name of the person mentioned as the stamp vendor on the

stamp paper on which the document is scribed is a fictitious person inasmuch as no person by said name exists, much less was ever a stamp vendor.

28. Mr.S.L.Maloo thinks he can pull wool over the eyes of the Court. He is a fool to so think.

29. The appellants do not deny that Mr.S.L.Maloo was a director of the appellant till July 2007. In the written statement filed on behalf of all the defendants, which included the appellant; signed by Sh.S.L.Maloo (its director) it is clearly pleaded that Flat No.10H, Vandana Building, Tolstoy Marg, was given to Smt.Sudesh Madhok in full and final satisfaction of her claim. The lady asserts that the flat was mortgaged to her. In either circumstance the appellant would be bound by the fact that whether the flat would be treated as the property of Smt.Sudesh Madhok, as per the defence, or she had a mortgagee's interest therein, she would be entitled to enforce the decree qua the flat. Now, orders have already been passed in the suit that the flat had to be sold. To prevent the sale, appellant has agreed that it would offer a bank guarantee. Order dated December 01, 2011, contents whereof have been noted by us in paragraph 18 above, clearly records: 'In my view, the bank should undertake to pay a sum up to ₹2,25,00,000/- to the Registrar General of this Court, **in the event of this suit being decreed and the judgment debtor(s) not paying the decreed amount within such time as the Court may stipulate for the purpose.....**'. The bank conforms to the aforesaid and thus the learned Single Judge on the terms of the guarantee has correctly directed the guarantee to be invoked.

30. In fact, the order dated December 01, 2011 and the terms of the bank guarantee do not even permit the appellant to urge to the contrary. We

need to highlight that when order dated December 01, 2011 was passed the new management of the appellant was in place and had engaged new counsel to defend the suit.

31. That apart, we see no scope for the appellant to urge anything to the contrary in view of the fact that the appellant has instituted a suit registered as Suit No.1339/2012 in which the appellant has itself pleaded, and correctly so, that its liability to pay under the bank guarantee is upon the condition that the decree passed against respondents No.1 to 3 remains unexecuted. We highlight that in para 29 of the plaint filed by the appellant, in which it has sought the relief of being declared the owner of the flat in question and a decree that defendants No.1 to 9 be directed to furnish a bank guarantee in its favour in sum of ₹2.25 crores, it has been pleaded:-

“29. That it is the liability of Defendants 1 to 3 to pay Smt.Sudesh Madhok as the loan transaction was between them and the averments and prayer in CS(OS) No.154 of 199 is also for seeking a decree for a sum of ₹1,31,07,607.00 along with interest against Defendant No.1 to 3. No relief has been claimed against Defendant No.5 i.e. the Plaintiff herein. Hence it was not the Plaintiff, but the Defendants No.1 to 3 who were liable to provide Bank Guarantee to the tune of ₹2.25 Crores. The Plaintiff is entitled to recover the expenses incurred by it in obtaining the bank guarantee in order to secure the Flat, for no fault of its. The Plaintiff is made to suffer only because of the fraud played by Defendants No.1 to 9 by not disclosing the pendency of the litigation involving the Flat. In the interest of justice, it is necessary that the interest of the Plaintiff herein is also secured since the Plaintiff was directed to produce Bank Guarantee in order to save the Flat from being auctioned despite the fact that Plaintiff is not liable to discharge the liability of Defendants No.1 to 3 towards Smt.Sudesh Madhok for the amount due to her. Hence it is necessary that

Defendants No.1 to 9 be directed to provide a Bank Guarantee or any other appropriate security to secure the interest of the Plaintiff so that if CS(OS) No.154 of 1999 is decreed and Defendants No.1 to 3 fail to pay the decretal amount and the bank guarantee produced by the Plaintiff is invoked, the interest of the Plaintiff is secured.”

32. The appeal is dismissed. Costs assessed in favour of respondents No.5 and 6 and against the appellant in sum of ₹1,00,000/-.

33. Copy of this order be placed in the suit file, and we would request the learned Single Judge to initiate appropriate proceedings pertaining to the perjury committed by Sh.S.L.Maloo.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

SEPTEMBER 17, 2012

dk