

IN THE HIGH COURT OF DELHI AT NEW DELHI

Order Reserved on: 19th March 2014

Order Pronounced on: 1st May, 2014

CS(OS) 2508/2012

**HOUSING DEVELOPMENT FINANCE
CORPORATION LIMITED**

....PLAINTIFF

Through: Mr Neeraj Kumar,
Advocate

VERSUS

AMRIT MISHRA & ANOTHER

...DEFENDANTS

Through: Nemo

CORAM:

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJEEV SACHDEVA, J.

1. This is suit for recovery filed under Order 37 CPC. The Defendant No. 1 has been served by affixation at the gate of the society on 28.01.2013 and also by way of affixation on the notice board of the Delhi High Court on 22.01.2013 and the process server also submitted a report dated 28.01.2013 that he had visited the society and met the guard Mr. Dineshwar Prasad, who made the process server speak to someone of flat No. B-304 over telephone. The person on the other end first

identified himself as Mr. Amrit Mishra and on hearing about the notice stated that he is the brother of Mr. Amrit Mishra and refused to permit the process server entry to the society and refused to accept the summon. The Defendant No. 1 has been duly served and no appearance on behalf of Defendant No. 1 has been filed. Appearance was entered by Defendant No. 2 and Defendant No. 2 was served with summons for judgment on 17.08.2013. No application seeking leave to defend has been filed on behalf of Defendant No. 2. As per the provision of Order 37 Rule 2 sub rule 3, the allegations in the plaint are deemed to be admitted on the part of the Defendants and the Plaintiff is entitled to a decree.

2. That the Plaintiff is a company engaged in the business of granting loans, especially loans in the category of housing loans.
3. As per the Plaintiff, the Defendants No. 1 and 2 jointly approached the Plaintiff in their capacity as borrower and builder respectively for availing housing loan by Defendant No. 1 for the purchase of a flat to be constructed by Defendant No. 2. It was represented by the Defendant No. 1 that he had satisfied himself about

the integrity and capability of the Defendant No. 2, to complete the project on time.

4. The loan amounting to Rs. 32,00,000/- (Rupees Thirty Two Lacs Only) was stated to have been sanctioned by the Plaintiff in favour of the Defendant No. 1 with the consent and acknowledgement of Defendant No. 2. The loan was sanctioned to the Defendant No. 1 for a period of 240 months with variable rate of interest.
5. In pursuance thereto, the Plaintiff disbursed Rs. 28,23,500/- (Rupees Twenty Eight Lac Twenty Three Thousand Five Hundred Only) on behalf of the Defendant No. 1 to Defendant No. 2 at the request of the former. The Defendant No. 1 executed documents such as promissory note of Rs. 32,00,000 in favour of the Plaintiff and the loan agreement namely "Dual Rate Home Loan III-Fixed to Variable".
6. Further as per the Tripartite Agreement executed between the Plaintiff and the Defendants, the Defendant No. 1 agreed that irrespective of the stage of construction of the Project and irrespective of the date of handing over the possession of the residential apartment to the Defendant No. 1 by the Defendant No. 2, the Defendant No. 1 shall be liable to pay regular

EMI to the Plaintiff. The Defendant No. 1 agreed to secure with the Plaintiff, the flat by way of mortgage, which was agreed to and confirmed by the Defendant No. 2. Defendant No. 2 also undertook not to create any third party rights or security in the said flat, without the prior consent of the Plaintiff. It is contended that it was specifically agreed to that in the event of cancellation of allotment of the flat by the Defendant No. 2, the refund of the amounts paid by the Defendant No. 1 were to be paid by the Defendant No. 2 directly to the Plaintiff. It is contended that as per the terms of the Tripartite Agreement, the Defendant No. 2 is under an obligation to return the payments/ deposits by Defendant No. 1 to the Plaintiff.

7. As per the Plaintiff the last payment made by the Defendant No. 1 towards the repayment of Loan and accounted for by the Plaintiff was on 31.12.2011 and thereafter no amount has been paid towards the repayment of the said Loan by the Defendant No. 1.
8. The Plaintiff claims to have sent a Loan Recall Notice dated 22.11.2011, to the Defendant No. 1. However neither was the notice complied with nor replied to. The Plaintiff by letter dated 26.04.2012, sent on 27.04.2012 claims to have demanded from the

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Defendant No. 2 to the refund of the amount owed by Defendant No. 1 directly to the Plaintiff, however the Defendant No. 2 has not complied with the said notice.

9. It is contended that the Defendant No. 1 has failed and defaulted in remitting the outstanding EMIs of Rs. 2,29,758/- as also the principal outstanding amount of about Rs. 27,51,436/-, the additional interest amounting to Rs. 27,322/- and incidental charges of Rs. 1,100/-, thereby totalling to Rs. 30,09,616/-.
10. The Plaintiff has prayed for a decree of Rs. 30,09,616/- against the Defendant No. 1 along with the pendente lite and future interest @ 18% per annum from the date of filing of the suit till its realization and in the alternative, in terms of the Tripartite Agreement, a decree against the Defendant No. 2 of the said amount along with the pendente lite and future interest @ 18% per annum from the date of filing of the suit till its realization.
11. Learned counsel for the Plaintiff has relied upon the Judgment dated 12.11.2013 in the case of Housing Development Finance Corporation Ltd Versus Pradeep B Bhatnagar & Another (CS (OS) 331 of 2012) and Judgment dated 06.12.2013 in the case of Housing

Development Finance Corporation Ltd. Versus
Chanchal Arya & Another (CS(OS) 126 of 2013).

12. As noted hereinabove, no appearance on behalf of Defendant No. 1 has been filed and no application seeking leave to defend has been filed on behalf of Defendant No. 2 despite service of summons for judgment. Since appearance has not been filed by the Defendant No. 1 and no application seeking leave to defend has been filed by the Defendant No. 2, the allegations of the plaintiff as noted hereinabove are deemed to be admitted on the part of the defendants and the Plaintiff is entitled to a decree forthwith.
13. It stands established that defendant No. 1 has defaulted in making payment of outstanding EMIs as per the Loan Agreement. Thus, the plaintiff is entitled to a decree of Rs. 30,09,616/- (Rupees Thirty Lakhs none Thousand six Hundred and sixteen only) as claimed in the plaint.
14. However, since the relief that is claimed against the defendant No. 2 is in the alternative, and there being nothing on record to suggest that the allotment of the flat in favour of the defendant No. 1 stood cancelled by defendant No. 2, it could not be said that the plaintiff

was entitled to seek any return of the payments/deposits of defendant No. 1 from the defendant No. 2. The obligation of the defendant No. 2 in this regard arises only in the event of the allotment in favour of defendant No. 1 having cancelled by defendant No. 2. That being not the case of the plaintiff on record, the plaintiff would be entitled to a decree of aforesaid amount against the defendant No. 1 only. Consequently, a decree of Rs. 30,09,616/- (Rupees Thirty Lakhs nine Thousand six Hundred and sixteen only) along with the pendent lite and future interest @ 18% per annum from the date of filing of suit till its realization is passed in favour of the plaintiff and against the defendant No. 1.

15. Suit is accordingly decreed. Decree Sheet be drawn up.

SANJEEV SACHDEVA, J

MAY 1, 2014
HJ