**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**COUNTER CLAIM NO.19 OF 2015**

**IN**

**SUIT NO.2871 OF 1988**

The Bank of Nova Scotia ... Plaintiffs to the Counter Claim
(Original Defendants)

Versus

Victoria Finance Pvt. Ltd. & Anr. ... Defendants to the Counter Claim
(Original Plaintiffs)

Mr. Snehal Shah a/w Ms. Sowmya Srikrishna i/b. Kanga & Co. for the Plaintiffs to the Counter Claim.
None for the Defendants to the Counter Claim.

**CORAM : S. J. KATHAWALLA, J.**
**DATE : 18TH DECEMBER 2015**

**ORAL JUDGMENT :**

1. By this Suit, the Bank of Nova Scotia, the Plaintiffs to the Counter Claim ("the Bank"), seek reliefs of a Declaration that the agreement dated 9th September 1983 is valid, subsisting and binding and for specific performance of Clauses 2 and 7 of the said agreement dated 9th September 1983.

2. The factual background in which the Bank's claim arises is relevant and is as under :

3. Victoria Finance Pvt. Ltd. ("Victoria Finance"), had filed a Suit against the Bank, being Suit No. 2871 of 1988, *inter alia,* for a declaration that the agreements dated 14th June, 1983 and 9th September, 1983 had been validly terminated and cancelled. The Bank filed a Written Statement and Counter Claim to this Suit, being the present Counter Claim.

4. The suit of Victoria Finance came to be dismissed for default on 11th December, 1990. On a Notice of Motion filed by Victoria Finance Pvt. Ltd., the order for dismissal for default came to be set aside and the suit was restored on the file on 9th September, 1996. Thereafter, the suit came to be dismissed for default once again on 11th November, 2008. Once again, an application being Notice of Motion No. 566 of 2010 was filed for restoration thereof. However, by an order dated 13th March, 2012, the Notice of Motion as well as the Suit were dismissed by this Court and the Counter Claim of the Bank was adjourned for final hearing.

5. The Writ of Summons with respect to the Counter Claim was served on Victoria Finance sometime in 1993, but no Written Statement was filed. Thereafter, it appears that the Bank attempted to serve certain notices to Victoria Finance. However, it was noticed that Victoria Finance had moved office and the Bank was unable to serve them. By an order dated 2nd September 2015, the Bank was directed to serve a copy of the Writ of Summons by way of substituted service, which service was effected by

publication in two local newspapers viz. The Free Press Journal (English) and Navshakti (Marathi) on 19th September, 2015.

6. Thereafter, by order dated 8th October 2015, the present Counter Claim was directed to be listed for an *ex-parte* decree. The Counter Claim today is for final hearing for an *ex parte* decree.

7. The Bank has filed an affidavit of documents, a compilation of original documents and an Affidavit of Examination-in-Chief of one Mr. Vinod Achuthan, being the Authorised Representative of the Bank. The Compilation of Documents is taken on record and record and marked "Exhibit P-1 (Colly)".

8. It is submitted, on behalf of the Bank, that by an agreement dated 14th June, 1983, in consideration of an amount of Rs.1.05 crores, the Bank was put in exclusive possession of a flat, being Flat No. 5, ground floor, Mittal Tower "B", along with car parking spaces 101, 102 and 103 (jointly "the said flat"). Under the terms of this agreement, the Bank became the owner of 50% of all beneficial interest in the said flat. By clause 7 thereof, it was agreed that after a period of five years, the Bank was entitled absolutely to purchase the said flat from Victoria Finance, on payment of a further amount of Rs.11 lakhs. The said Agreement is at serial No.2 of Exhibit "P-1(Colly)".

9. This agreement came to be modified by a subsequent agreement dated 9th September, 1983 to which one National Co-operative Bank was added as a confirming party. In this agreement it was stated that one National Co-operative Bank had entered into an earlier agreement with Victoria Finance, which was annulled subsequently. The agreement dated 9th September 1983 provided that the Defendant would sell the said flat to the Plaintiff for the consideration of Rs.1.17 crores, out of which, an amount of Rs.1.05 crores was to be paid to National Co. operative Bank in consideration of National Co. operative Bank releasing all right, title and/or interest in the said flat. Clause 7 of this agreement gave the Bank an option to purchase the said flat by giving Victoria Finance notice of exercise of its option any time after a period of five years of the execution of this subsequent agreement. On the exercise of such option, Victoria Finance would be bound to sell the said flat to the bank, against the bank paying the balance consideration of Rs.11 lakhs. Under clause 8(b) thereof, the Bank was entitled to continue in possession of the said flat as a joint owner thereof in the event the bank failed to exercise such option. The said Agreement dated 9th September 1983 is at serial no. 3 of Exhibit "P-1(Colly)"

10. It is submitted that, thereafter, the Bank made various applications to the society for registration of its name as a joint owner of the said flat. The said

letters are two letters dated 19th March, 1984 and 30th March, 1984. These letters are at serial Nos. 5, 6 and 7 of the Exhibit "P-1(Colly)".

11. It appears that on 28th November, 1987, Victoria Finance terminated the agreement dated 9th September, 1983 alleging that the Bank had approached the society and got its name registered as sole holder of the shares of the society. The Bank, on its part, submits that the said termination is illegal and does not bind the Bank. The said letter is at serial no. 10 of the Exhibit "P-1(Colly)".

12. By a letter dated 11th October, 1988, the Bank exercised its option under the agreement of 9th September, 1983 ("the said agreement") in terms of clause 7 thereof and gave Victoria Finance notice of the Bank's decision to complete purchase of the said flat by paying balance consideration of Rs.11 lakhs along with the interest payable thereon in terms of the said agreement. The said letter is at serial no. 12 of the Exhibit "P-1(Colly)".

13. It is submitted that Victoria Finance did not respond to this letter and, in view of the earlier termination letter dated 28th November, 1987, filed Suit No. 2871 of 1988, which now stands dismissed for default. It is in this suit that the Bank has filed the present Counter Claim for enforcement of clause 7 of the agreement dated 9th September, 1983.

14. Heard the Learned Counsel appearing for the Bank and perused the documents produced in support of the Bank's claim. There is no Written Statement filed by Victoria Finance. The Bank has also filed the examination in chief of its witness who has testified to the above facts and relied on the relevant documents. There is no cross-examination of the said witness. The claims of the Bank set out in the Counter Claim are therefore uncontroverted.

15. In so far as the Bank's right to enforce Clause 7 of the agreement dated 9th September, 1983 is concerned, the Bank has proved execution of the said agreement and the contents thereof. The Bank has further proved a valid exercise of its option to purchase the said flat vide letter dated 11th October, 1988, which was exercised as per the period prescribed by the said agreement.

16. I therefore find that the Bank has duly and properly exercised its option to purchase the said flat in terms of Clause 7 of the agreement dated 9th September 1983 and has made out its case for enforcement thereof.

17. In view thereof, the Counter Claim is decreed in terms of prayers (a), (b), (c) and (d) of the Counter Claim in favour of the Bank, i.e. the Plaintiffs to the Counter Claim. The Plaintiffs to the Counter Claim are directed to deposit with the Prothonotary & Senior Master a sum of Rs.11,00,000/- with interest thereon computed @ 10% per annum from 11th October 1988

till 23rd December 2015 on or before 23rd December 2015. The Prothonotary and Senior Master is directed to invest this amount initially for a period of a year and to deal with the same as provided for hereafter.

18. In view of the peculiar circumstances of the case, the reliefs are moulded by this Court in addition to the reliefs prayed for. The following order is passed :

a. Should the Defendants to the Counter Claim fail to execute the conveyance in terms of prayers (a), (b), (c) and (d) of the Counter Claim in favour of the Plaintiffs to the Counter Claim, within 90 days from the date hereof, after having been called upon to do so as specified below, the Prothonotary and Senior Master shall execute the conveyance in favour of the Plaintiffs to the Counter Claim on behalf of the Defendants.

b. The Plaintiffs to the Counter Claim are permitted to serve a copy of this order and notify the Defendants of their requirement to execute a conveyance by publishing a notice to this effect in two local newspapers viz. The Free Press Journal (English) and Navshakti (Marathi). The period of 90 days referred to above will be computed from the date of publication.

c. After execution of the Conveyance, in the event Defendants apply to the Prothonotary and Senior Master, the amount deposited by the

Plaintiffs as per Clause 2 above and all interest accrued thereon, shall be paid to them by the Prothonotary and Senior Master.

19. There shall be no order as to costs.

20. The Counter Claim is decreed of in the above terms.

21. Drawn up decree dispensed with. The Prothonotary and Senior Master shall act upon a certified copy hereof.

22. The matter being disposed of, the Prothonotary and Senior Master is directed to return the original documents tendered by the Plaintiffs to the Counter Claim upon the Plaintiffs replacing them with certified true copies thereof.

**( S.J. Kathawalla, J. )**