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

Date of decision: 29th August, 2018.

\+ **CS (COMM) 975/2016 & I.A. 6982/2017**

ICICI HOME FINANCE CO LTD ..... Plaintiff

Through Mr. Satish Kumar, Mr. Naveen Kumar, Advocates. (Mob. 9811191050)

versus

MANOJ KUMAR & ORS ..... Defendants

Through Mr. Rahul Malhotra with Mr.Prabhakar Tiwari, Advocates. (Mob.8860553987)

CORAM:
JUSTICE PRATHIBA M. SINGH

<u>Prathiba M. Singh, J.</u> (Oral)

1. The present suit has been filed by the Plaintiff for recovery of a sum of Rs.2,21,47,283.74/- against the Defendants. The case of the Plaintiff is that it had sanctioned a loan for a sum of Rs.95,00,000/- to the Defendants No.1 to 3 for the purchase of a commercial space in the Defendant No.4's premises shop bearing No.G-12, Ground Floor, Uppal's Element – 9, Plot No.L, Sector – 2, IMT, Manesar, Gurgaon-122001 *('suit property')*.

2. The Defendant Nos.1 to 3 availed the loan facility for a sum of Rs.95,00,000/- towards the same. The loan was disbursed by the plaintiff and a payment of Rs.90,32,954/- was disbursed directly into the account of Defendant No.4. The remaining amount is stated to have been disbursed towards insurance. At that stage, it was represented to the Plaintiff that the Defendants No.1 to 3 had paid a sum of Rs.53,20,000/- in addition to the

amount received from the ICICI Bank directly. A Commercial Space Buyer's Agreement dated 1st October, 2008 was executed between the Defendant No.4 and Defendant No.1. At the time of disbursal of the loan by the Plaintiff, letter dated 1st October, 2008 was issued by the Defendant No.4. The same is extracted herein under:

" Date:1/10/2008

ICICI Bank Limited
ICICI Towers
Bandra Kurla Complex
Bandra (East)
Mumbai 400051

Regarding: application for allotment of Commercial unit No. G-12 in Element 9.

Dear Sirs,

We confirm that Mr. Manoj Kumar S/o Sh Shiam Sunder Gupta and Mrs. Kavita W/o Sh. Manoj Kumar Resident of S-12A-7A, Vishwas Park, Uttam Nagar, Delhi – 110059 has booked an commercial unit in our Element 9 Project at Plot No. 1, Sector 2, IMT Manesar, Gurgaon, under the Down Payment – payment plan.

The party has paid Rs. 53,20,000/- (Rs. Fifty three Lacs Twenty Thousand only) so far to the Company.

The above party has informed that he/she has approached ICICI for a commercial loan to enable him/her to make the full payment to, Uppal Housing Ltd. It is understood that the loan amount will be disbursed by you directly to the Company by a cheque/draft drawn in favour of Uppal Housing Limited Current A/C No: 10206 and the same shall be forwarded to us by ICICI. On receipt of the same, we shall do the following:-

We shall note the lien of ICICI on the captioned *property being acquired by the party. The Sale Deed for the said commercial unit shall be sent directly to ICICI by the Company as and when it is registered, under intimation to the party and that I will not handover the possession before the execution of sale deed.*

As already agreed by the party, in the event of cancellation of the allotment of the commercial unit by the Company for whatsoever reasons, the Company shall refund all amounts, received over and above the earnest money and other dues, which are forfeitable, as per the terms and conditions of the Agreement, directly to ICICI and thereafter ICICI shall release their lien on the above said commercial unit.

Thanking you,

Yours faithfully

AUTHORISED SIGNATORY"

3. However, the cheques to the tune of Rs. 50 lakhs issued by the Defendants 1 to 3 in favour of the Defendant no.4 were dishonoured. Thus the only payment made by Defendant 1 to 3 was a cash amount of Rs. 3 lakhs and the remaining amount was disbursed on behalf of Defendants 1 to 3, through the loan facility availed through the Plaintiff. Despite repeated notices by the bank, the Defendants did not repay the loan and accordingly, the present suit was filed by the Plaintiff seeking recovery of a sum of Rs.95,00,000/- along with interest.

4. The suit was listed on 21st November, 2014 on which date an order was passed restraining alienation and transfer of possession of the suit property. Thereafter, the suit was proceeded with but Defendants No. 1 to 3

did not put in appearance. The said Defendants were served through publication and were proceeded *ex parte*.

5. An application was filed by Defendant No.4 seeking vacation of the initial injunction order. On 6th August, 2018, the matter was listed for framing of issues and on the said date a Local Commissioner was appointed to ascertain the status of the property.

6. The Local Commissioner has submitted her report and from the said report, it is clear that the shop is kept vacant and the condition of the shop is as under;

> "................
> *Accordingly, I have visited the commercial space of Shop No. G-12, Ground Floor, Uppal's Element-9, Plot No.I, Sector-2, IMT, Manesar, Gurgaon-122001, Haryana on 7th of August 2018 at 01:00 p.m. accompanied by Shri Sanjeev Singh (Mobile No. 7042290362), the representative of the Plaintiff Bank i.e. ICICI Home Finance Co. Ltd. alongwith the support and cooperation extended by Shri Mukesh Sharma (Mobile No. 8800907949), Facility Manager of the Defendant No. 4.*
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> *I found that the commercial space of Shop No. G-12, Ground Floor, Uppal's Element-9, Plot No. I, Sector-2, IMT, Manesar, Gurgaon-122001, Haryana is lying vacant, without any door, unfurnished and in possession of Defendant No. 4.*
> ………………….."

7. The present suit, being one under the Commercial Courts Act, since none of the facts are disputed, this Court is proceeding to decide the matter finally. The execution of the Agreement, the sanctioning of the loan, the amount disbursed by the Plaintiff to Defendant no.4 are all admitted on

record. Defendant nos 1 to 3 have not appeared and are proceeded ex-parte. There is no defence from their side.

8. The suit property, as per the LC report, is identifiable but the same is not in an occupiable or useable condition. As per the letter of Defendant no.4, dated 1st October, 2010, if the flat buyer did not pay the entire amount, the Defendant No.4 was to refund the amount to the Plaintiff. However, Defendant No.4 submits that as per the Commercial Space Buyer's Agreement they are also entitled to forfeit the earnest money as also any interest which is chargeable on the amounts, which are due.

9. The Defendant No. 4 has now filed an affidavit stating that the Defendant nos. 1 to 3, had to pay an outstanding sum of Rs.57,92,046/-, which was not paid. The same was due as of 2010. What is surprising is that the Defendant No.4 has not placed on record any notice of termination or demand notice, demanding the said amount from the Defendants Nos.1 to 3. No notice has been placed on record informing the Defendants No.1 to 3 that the cheques have been dishonoured and the allotment is cancelled. On the basis of the fact that the allotment continues to stand in the name of Defendants 1 to 3, it is argued by the Ld. Counsel that Defendant No.4 is entitled to interest on the entire outstanding amount. A perusal of the flat buyers' agreement shows that as per clause 21, any breach by the flat buyers would give the Defendant No.4 the right to forfeit the earnest money. However, learned counsel relies on clause 23 to say that interest is also liable to be paid. The said clauses are reproduced hereinbelow:

> *"21. That the developer and the Space Buyer hereby agree that the payment to the extent of 20% of the total "Consideration Amount" in respect of the 'Space' made/to be made by the Space Buyer will be treated the*

'Earnest money.' Non-fulfilment by the Space Buyer of any of the terms and conditions of this Agreement may entail the forfeiture of the earnest money.

...

23. Timely payment of instalments of basic price and allied charges pertaining to the Unit is the essence of the terms of the booking/allotment. However in the event of breach of any of the terms and conditions of the allotment by the Space Buyer, the allotment will be cancelled at the discretion of Developer and the earnest money together with any interest on instalments due but unpaid and interest on delayed payments shall stand forfeited. The balance amount shall be refundable to the Space Buyer without any interest on Installments but unpaid and interest on delayed payments shall stand forfeited. The balance amount shall be refundable to the Space Buyer without any interest, but only after the space is allotted to some other Space Buyer and after compliance of requisite formalities by the new Space Buyer. The Developer in its absolute discretion, may condone the delay by charging panel interest @ 18% per annum for three months delay from the due date of payment and 24% P.A. thereafter on all outstanding dues from there."

10. A perusal of the letter dated 1st October, 2008 makes it very clear that upon the cancellation of allotment, the company would refund the entire money received as part of the loan facility, to the ICICI bank. However, the reason why the Defendant No.4 chose not to cancel the allotment is completely cryptic and there is no explanation whatsoever as to the non-cancellation of the allotment as per the Flat Buyers Agreement. Admittedly, the Defendants Nos.1 to 3 have not cleared the balance payment. All the cheques given by them for the sum of Rs. 50 lakhs are admittedly

dishonoured and there is no reason for the Defendant No.4 not to have cancelled the allotment and refund the entire amount received from the Plaintiff to it. Having not done so, at its own discretion, the Defendant No.4 cannot demand interest. At best, the submission of the Defendant No.4 would be that it would be entitled to forfeit the amount of 20% of the sale consideration, which was the earnest money deposit.

11. Under these circumstances, a decree is passed in favour of the Plaintiff and against the Defendants Nos. 1 to 3 for a sum of Rs.95,00,000/- along with interest @ 8% per annum. Out of the amounts received by Defendant no.4 from the Plaintiff, 20% of the sale consideration shall be deducted and the remaining sum shall be refunded by Defendant no.4 to the Plaintiff, within a period of eight weeks. Upon the said amount being paid, the lien of the Plaintiff on the suit property shall cease. The remaining decretal amount shall be recoverable by the Plaintiff from Defendant nos 1 to 3. Decree sheet be drawn up. The Defendant No.4's rights and remedies to recover interest or any other outstanding amounts and charges against the Defendants Nos.1 to 3 are left open.

12. Suit is decreed in the above terms. All pending I.As. also stand disposed of.

PRATHIBA M. SINGH
JUDGE

AUGUST 29, 2018
Pallavi