

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
3rd December, 2019
% **Date of decision: 10th October, 2019**
+ **CS(OS) 1020/2009 & IA No.386/2019 (u/O VIII R-1A(3) CPC)**

VESTA HOLDING PRIVATE LIMITED & ANR. Plaintiffs
Through: Mr. Suhail Dutt, Sr. Adv. with Mr.
Azhar Alam, Mr. Sankalp Goswami,
Advs.

Versus

AKM ENTERPRISES PRIVATE LIMITED & ORS. Defendants
Through: Mr. Abhinav Vasisht, Sr. Adv. with Mr.
S.K. Dubey, Mr. Rajmangal Kumar and
Mrs. Akshita Sachdev, Advs.

AND

+ **CS(OS) 1016/2010 & IA No.389/2019 (u/O VII R-14 CPC)**

AKM ENTERPRISES PRIVATE LTD Plaintiff
Through: Mr. Abhinav Vasisht, Sr. Adv. with Mr.
S.K. Dubey, Mr. Rajmangal Kumar and
Mrs. Akshita Sachdev, Advs.

Versus

VESTA HOLDING PRIVATE LTD & ANR Defendants
Through: Mr. Suhail Dutt, Sr. Adv. with Mr.
Azhar Alam, Mr. Sankalp Goswami,
Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. CS(OS) No.1020/2009, as per amended plaint dated 22nd October, 2011, is filed for recovery of Rs.28,12,50,000/- along with *pendente lite* and future interest at 15% per annum and for permanent injunction. It is the case

of the plaintiffs Vesta Holding (P) Ltd. and its promoter Charnesh Kapoor @ Bobby Kapoor (both hereafter referred to as 'Vesta') therein, that (i) the defendant no.1 AKM Enterprises Pvt. Ltd. and of which defendants no.2 to 5 viz. Ashok Kumar Malhotra, Monica Malhotra Kandhari, Sonica Malhotra Kandhari and Satish Bala Malhotra are Managing Director / Directors (all of whom are hereafter together called 'AKM'), represented that AKM was developing 'MBD Neopolis Mall' at Ludhiana; (ii) Vesta, believing the representations of AKM in several meetings held, entered into a Memorandum of Understanding dated 3rd December, 2007 (MOU) with AKM for purchase of an area of 50,054 sq. mtrs. in the said Mall from AKM; (iii) it was *inter alia* represented by AKM to Vesta that anchor brands viz. (a) Home Centre, on the lower ground floor, (b) Debenhams on the ground floor, (c) Odyssey on the first floor, (d) Gigabite on the third floor, and, (e) Fame-Shringar on the third and fourth floors, would be coming in as lessees in the said Mall; (iv) Vesta, at the time of execution of the MoU paid an amount of Rs.25 crores to AKM out of the total agreed price of Rs.340.28 crores, with the balance price to be paid in various stages; (v) an addendum dated 8th December, 2007 to the MOU was signed between Vesta and AKM and whereunder the area of the Mall to be sold by AKM to Vesta was reduced by 5000 sq. mtrs. and the total sale consideration reduced to Rs.327.73 crores; (vi) in terms of the MOU, the next installment of purchase consideration of Rs.112.04 crores was to be paid by Vesta to AKM by 1st February, 2008 and was related to the progression of the construction of retail and entertainment areas, including areas leased out to the five brands viz. Home Centre, Debenhams, Odyssey, Gigabite and Fame-Shringar; at the time of the said payment a formal Agreement to Sell was

also to be entered into between the parties; (vii) the obligation of Vesta to make payment of the second installment of purchase consideration was subject to completion of construction of the retail and entertainment space and execution of lease agreements with the five brands/anchor tenants and handing over of the premises to the aforesaid anchor tenants for fit outs; (viii) the said anchor tenants are high value brands and are crowd pullers in their own right; (ix) AKM, contrary to assurances and representations made to Vesta and in breach of its contractual obligations, diverted the entire payment of Rs.25 crores received from Vesta to other projects of the MBD Group and did not complete the Mall building so as to make available for fit outs the specified areas leased to the five brands aforesaid; (x) by February, 2008, it became clear to Vesta that AKM was not in a position to hand over the possession to the five brands/anchor tenants named in the MOU and as such was not in a position to handover the symbolic possession to Vesta by 1st February, 2008; (xi) in view of the same, various tenants / prospective tenants in the Mall were also cancelling or threatening to cancel the lease / MOUs signed by them with AKM; (xii) the conduct of AKM revealed that AKM never had the intention to honour the representations made to Vesta; (xiii) AKM by its letter dated 17th March, 2008 threatened to forfeit Vesta's advance of Rs.25 crores if Vesta did not immediately pay the second installment of Rs.112.04 crores; (xiv) on Vesta approaching AKM, AKM sought an extension of time for fulfilling its obligations and a draft addendum to the MOU was sent by AKM to Vesta vide e-mail dated 3rd May, 2008; however the same was not agreeable to Vesta; (xv) in view of such developments, Vesta informed AKM that though it was ready and willing to make payment of the second installment of purchase consideration

and had sufficient money therefor but no further payments would be made without AKM complying with its obligation; (xvi) the parties continued to correspond with each other and were continuously in dialogue and pursuant thereto a fresh understanding was reached and fresh obligations were created between the parties and the parties tried to find other buyers who would be interested in buying the area of the Mall which Vesta had agreed to buy from AKM; (xvii) Vesta had agreed to purchase the area aforesaid of the Mall from AKM on being assured a fixed return by AKM on the basis of AKM representing and holding out that the said area / space already stood leased out to various tenants and Vesta would thus not have to make any efforts to find the tenants and would start getting a return on its investment immediately; and, (xviii) AKM however vide notice dated 21st August, 2008 sought to unilaterally revoke the MOU and forfeit the amount of Rs.25 crores received from Vesta.

Hence CS(OS) No.1020/2009 was filed, seeking (a) declaration as null and void of the MOU dated 3rd December, 2007, having been obtained fraudulently and under misrepresentation, (b) recovery of money jointly and severally from defendants no.1 to 5 (herein collectively referred to as AKM) of Rs.28,12,50,000/- comprising of principal amount of Rs.25 crores and interest at the rate of 15% thereon till the date of institution of the suit, and, (c) permanent injunction restraining AKM from dealing with the space / area of the Mall subject matter of MOU with Vesta.

2. CS(OS) No.1020/2009 came up first before this Court on 28th May, 2009, when summons thereof were issued and on application of Vesta, AKM restrained from disposing of, transferring, leasing, mortgaging,

creating a lien / charge in any manner over the retail and entertainment area/space of the Mall in question.

3. Vide subsequent order dated 20th July, 2009, the said *ex parte* order was modified and the restraint confined to the area specified therein.

4. AKM has contested CS(OS) No.1020/2009 pleading in the written statement dated 19th November, 2012, that (i) the MOU, as per Clause 15 provides for jurisdiction of 'Courts of Ludhiana and Chandigarh'; (ii) Ashok Kumar Malhotra, Monica Malhotra Kandhari, Sonica Malhotra Kandhari and Satish Bala Malhotra being Directors of AKM Enterprises Pvt. Ltd. which had entered into the MOU, cannot be personally liable; (iii) the earnest money of Rs.25 crores paid by Vesta stands forfeited due to breach of terms of MOU by Vesta; (iv) no misleading or false statements / representations were made to Vesta; (v) the terms and conditions settled between the parties are contained in the MOU and all the averments of Vesta contrary thereto, are incorrect; (vi) the payment of purchase consideration by Vesta to AKM was not linked to construction and the payment was to be on specified dates; (vii) it is Vesta who has failed to honour its obligations and make the payment due of Stage-II, leaving AKM with no option but to terminate the MOU and forfeit the amount in terms of Clause 13 thereof; (viii) Rs.25 crores was paid by Vesta to AKM not as advance sale consideration but by way of earnest money; (ix) the Stage-II payment was not construction linked but on the basis of assured return; (x) copies of LOI's/MOUs/ Lease Agreements with the proposed tenants were furnished by AKM to Vesta; (xi) payment at Stage-II was not based upon handing over of the possession of the premises to the anchor tenants for fit outs; (xii) Charnesh Kapoor of Vesta, at the contemporaneous time had

informed that he was unable to make payment of Stage-II owing to his funds having stood frozen pursuant to orders of the Matrimonial Court in his matrimonial disputes; (xiii) it was Vesta which had no money to make payment of Stage-II or of subsequent stages; (xiv) Vesta has not filed any document showing availability of funds to make payment of purchase consideration; (xv) no fresh understanding contrary to the MOU was ever arrived at between the parties; it was Vesta, who having no money to pay the balance purchase consideration, was searching for investors on its behalf and AKM had never agreed thereto; and, (xvi) Vesta was negotiating with AKM for a period of more than five months and had carried out its due diligence and only thereafter entered into the MOU with AKM and not on the basis of any assurances and representations of AKM.

5. Though Vesta has filed replication to the written statement aforesaid of AKM but since the same has not been referred to by either party during the hearing, need to refer thereto is not felt.

6. AKM, on 7th May, 2010 filed CS(OS) No.1016/2010 for recovery of Rs.43,51,00,000/- jointly and severally from Vesta Holding Pvt. Ltd. and Charnesh Kapoor, towards damages along with *pendente lite* and future interest *inter alia*, pleading that (a) at the time of negotiations between the parties and entering into the MOU, the market price of land of similarly situated property was Rs.1,51,000/- per sq. yds.; (b) however by September, 2008 the market price of land had fallen by 13.25%; (c) the said figures establish that there is a fall in price of real estate constructed over the land and there is thus a fall in the price of the area / space agreed to be purchased by Vesta from AKM to the extent of Rs.43.51 crores and which is attributable to breach of MOU by Vesta; and, (d) AKM is thus entitled to

recover Rs.43.51 crores with *pendente lite* and future interest at 18% per annum.

7. Pleadings in CS(OS) No.1016/2010 were also completed but the way the arguments have been advanced by the senior counsels, the need to elaborate on the same is not felt.

8. Vide order dated 1st August, 2013 in CS(OS) No.1016/2010, with the consent of the parties, the two suits were consolidated and vide common subsequent order dated 24th October, 2013, the following consolidated issues were framed in the suits:

- “i) Whether the MOU dated 03.12.2007 is vitiated by fraud and misrepresentation of the defendant? (OPP)
- ii) Whether the defendant was in breach of the MOU dated 03.12.2007? (OPP)
- iii) Whether the plaintiff was in breach of its obligations under the MOU dated 03.12.2007? (OPD)
- iv) Whether the defendant was entitled to cancel, terminate the MOU dated 03.12.2007 and forfeit the earnest money in terms of the said MOU dated 03.12.2007? (OPD)
- v) Whether the plaintiff were liable to make further payment of Rs.112.04 crores before the defendant has fulfilled its obligation under the MOU dated 03.12.2007? (OPP)
- vi) Whether the plaintiff is entitled to a decree of Rs.28,12,50,000/- in its favour and against the defendants along with interest future and pendent lite? If yes at what rate and for what period? (OPP)
- vii) Whether the suit i.e. CS(OS) 1016/2010 does not disclose cause of action and is barred by law as claimed by the plaintiff in CS(OS) 1020/2009. [OPP of CS(OS) 1020/2009]
- viii) Whether time was the essence of the MOU dated 03.12.2007? [OPD of CS(OS) 1020/2009]
- ix) Whether the defendant in CS(OS) 1020/2009 is entitled to a decree of Rs. 43,51,00,000/- in its favour as damages and against the plaintiff along with interest future and pendent lite? If yes at what rate and for what period? (OPD)
- x) Relief to the parties.”

and CS(OS) No.1016/2010 ordered to be treated as lead case and the parties relegated to leading evidence.

9. The suits came up before the undersigned on 7th May, 2019 when the application of AKM for modification of the order dated 20th July, 2009 in CS(OS) No.1020/2009 was allowed and subject to AKM furnishing a bank guarantee of a nationalized bank in the sum of Rs.36.40 crores to the satisfaction of the worthy Registrar General of this Court, the order dated 20th July, 2009 was modified and AKM, after acceptance of the said bank guarantee of this Court was ordered to be entitled to deal with the areas / spaces in the Mall which AKM vide order dated 20th July, 2009 had been restrained from selling, alienating or encumbering and the suits were to be listed for final hearing.

10. The senior counsels for AKM and Vesta have been heard on 5th August, 2019, 13th August, 2019, 6th September, 2019 and today.

11. Before proceeding further, it is deemed apposite to set out herein below the relevant parts of the MOU for the purpose of the present adjudication and to which the counsels during the hearing have drawn attention. The said portions of the MOU in which AKM Enterprises Pvt. Ltd. is described as the Seller and Vesta Holding Pvt. Ltd. as the Purchaser, are as under:

“WHEREAS

*1. The Seller is currently constructing a mixed-use development comprising Retail, Entertainment, Hotel, Parking in the city of Ludhiana (Punjab, India) under the name of ‘**MBD NEOPOLIS LUDHIANA**’ (hereinafter referred to as the ‘**Development**’). The Seller is the Owner of the under mentioned Land and the Development being constructed there upon. The details of the Development are as under:*

- i. *Land area of 16,949.50 (Sixteen Thousand Nine Hundred Forty Nine point Fifty) sq. mtrs.*
 - ii. *Total Built up Area of 66,738 (Sixty Six Thousand Seven Hundred Thirty Eighty) sq. mt. comprising of Hotel, Mall, Entertainment and Parking, out of this total 18,965 (Eighteen Thousand Nine Hundred Sixty Five) sq.mt. is towards Parking, 22,681 (Twenty Two Thousand Six Hundred Eighty One) Sq. Mt. is towards Retail and Entertainment, 8,029 (Eight Thousand and Twenty Nine) Sq. Mt. is towards Common Area (excluding Engineering Services & Back of the House Area), 4,350 (Four Thousand Three Hundred Fifty) Sq. Mt. towards Engineering Services & Back of the House (BOH) and the remaining 12,713 (Twelve Thousand Seven Hundred And Thirteen) Sq. Mtr. is towards Hotel.*
2. *The Purchaser has expressed their interest to purchase only the built up area of the Retail, Entertainment (excluding the area already sold out by the Seller) including Common Area (excluding the pro-rata share of the area already sold out by the Seller) relating thereto, Parking (excluding surface Car parking), part of Engineering Services Area & Back of the House Area and the Signage area of Retail and Entertainment (excluding the Signage Area of the Hotel and Banquets), along with proportionate land underneath.*

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the premises and the mutual covenants and agreements herein contained, it is agreed by and between the parties as follows:

1. *Only the Built up Area of Retail, Entertainment (excluding the area already sold out by the Seller) including Common Area (excluding the pro-rata share of the area already sold out by the Seller) relating thereto, Parking (excluding surface Car parking), part of Engineering Services Area & Back of the House Area, and the Signage Area of Retail and Entertainment (excluding the Signage Area of the Hotel and Banquets), along with proportionate land underneath defined below is under the scope of this MOU (Hereinafter referred to as “Demised Premises”) and is hereby agreed to be sold to the Purchaser.*

The Built up Area of the Hotel and other areas not included in the Demised Premises is excluded from the scope of this MOU.

2. *The Built up Area being sold by the Seller to the Purchaser under this MOU is as follows:*

A. Area for Outright Sale

a. Retail & Entertainment Area-	22,076 Sq. Mt. (Twenty Two Thousand and Seventy Six Sq. Mt.)
b. Common Area (excluding prorata share of Area already Sold Out).	7,814 Sq.Mt. (Seven Thousand Eight Hundred And Fourteen Sq. Mt.)
c. Parking Area	- 15,165 Sq.Mt. (Fifteen Thousand One Hundred and Sixty Five Sq. Mt.)
Total	45,055 Sq.Mt. (Forty Five Thousand and Fifty Five) Sq. Mtr.

B. Area for Outright Sale to be leased out to the Seller for Three years and Sold back only to the Seller immediately on expiry of Lease Period.

a. Parking Area	- 3,800 Sq. Mt. (Three Thousand Eight Hundred Sq.Mt.)
b. Engineering Services Area	- 1,200 Sq.Mt. (One Thousand Two Hundred Sq. Mt.)
Total	5,000 Sq. Mt. (Five Thousand Sq. Mt.)
Total (A+B)	50,055 Sq. Mt. (Fifty Thousand and Fifty Five Sq. mt.)

3. ***Built Up Area***

The Built up Area being sold by the Seller to the Purchaser and the Built up Area being retained by the Seller is defined as under:

- a. *Retail & Entertainment Area:*

Retail & Entertainment Area in the Lower Ground Floor, Ground Floor, First Floor, Second Floor, Third and Fourth Floor of the Development which is included in blue colour in Annexure A. This also includes luxury – shopping arcade, (hereinafter referred to as ‘Nuovo’) in the said Development, which is included in brown colour in Annexure-A.

The Seller has already sold 600 (Six Hundred) sq.mt. out of the Retail and Entertainment area with proportionate Common Area pertaining thereto (hereinafter referred as ‘Sold Area’). This Sold Area in the Development marked in grey colour in Annexure A, and is excluded from “Demised Premises”.

4. Purchase Consideration

*The Purchase Consideration payable to the Seller by the Purchaser shall be approximately **Rs.340.28 Crores (Rupees Three Hundred Forty Crores and Twenty Eight Lac Only)** towards the following:*

A. On Area for Outright Sale

On Retail & Entertainment (Excluding the Area Sold)	-	226.62 Crores approx.
On Parking (Excluding the Area Leased out to the Seller)	-	38.09 Crores approx.
On Common Area Revenue	-	25.90 Crores approx.
On Signage Revenue	-	37.06 Crores approx.
Total		327.73 Crores approx.
Total in words		Approx. Rupees Three Hundred Twenty Seven Crore and Seventy Three Lac Only.

B. On Area for Outright Sale to be leased out to the Seller for three years and sold back immediately thereafter to the Seller only

Parking Area:	-	9.54 Crores
Engineering Services & Back of the House Area	-	3.01 Crores
Total		12.55 Crores
Total in words		Rupees Twelve Crores Fifty Five Lacs Only
Total (A+B)	-	340.28 Crores
Total in words		Rs. Three Hundred Forty Crores And

Twenty Eight Lac Only

The Purchase Consideration for A is flexible and is subject to the actual Gross Rent receivable by the Purchaser whereas the Purchase Consideration for B is final.

The Seller on receipt of 100% (One Hundred Percent) Purchase Consideration as contained in clause 5 below inform the tenants that the Purchaser has purchased the Leased out Demised Premises (hereinafter referred to as "Symbolic Possession").

The Seller shall handover the leased out Rental & Entertainment Area to the tenants for fit outs and the Parking Area, Common Area and Signage Area shall directly be handed over to the Purchaser.

5. Payment Schedule:

The Purchaser will pay the Purchase Consideration in the following stages.

Stage I – On Signing of the MOU:

Rs.25 Crores (Rs. Twenty Five Crores Only) has been paid to the Seller as Earnest Money, vide Pay Order no.065660 dated 28th November, 2007 drawn on Standard Chartered Bank, Greater Kailash 1, New Delhi which shall be adjusted on prorata basis from the payment due to the Seller by the Purchaser at Stage III & Stage IV of the payment schedule. This payment of Earnest Money does not grant any ownership or possession, rights to the Purchaser.

Stage II – By February 1, 2008

Rs.112.04 Crores (Rs. One Hundred and Twelve Crores and Four Lac Only) of the Purchase Consideration for the following shall be payable at this stage:

- a. Rs.95.44 Crores (Rs. Ninety Five Crores and Forty Four Lac Only) as 100% (One Hundred Percent) of the Purchase Consideration shall be paid by the Purchaser to the Seller on the Retail and Entertainment areas leased out for the brands 'Home Centre' (on the Lower Ground Floor), 'Debenhams' (On the Ground Floor), 'Odyssey' (on the First Floor), 'Gigabite' (on the Third Floor), 'Fame- Shringar' (on the Third & Fourth Floor) which forms part of Area mentioned in Clause 2A and Purchase Consideration mentioned in Clause 4A of this MOU and that*

the Seller delivers the symbolic possession of such areas to the Purchaser.

- b. Rs.16.60 Crores (Rs. Sixteen Crores and Sixty Lac Only) as 100% (One Hundred Percent) of the Purchase Consideration for Common Area shall be paid to the Seller on pro-rata basis on the above areas for which the Purchase Consideration is receivable as per clause (a) above.*

Stage III – By June 15, 2008

Leased out Area

Rs.68.41 Crores (Rs. Sixty Eight Crores and Forty One Lac Only) as 100% (One Hundred Percent) of the Purchase Consideration shall be paid to the Seller on the leased out areas and on giving Symbolic possession thereof, which forms part of Area mentioned in Clause 2A and Purchase Consideration mentioned in Clause 4A of this MOU after adjusting pro-rata Earnest Money received at Stage I, discount for the fit out period and Interest Free Rent Security. this adjustment is tentative and shall be recalculated based on actual leasing done up to this stage.

Rs.38.09 Crores (Rs. Thirty Eight Crores and Nine Lac Only) as 100% (One Hundred Percent) of the Purchase Consideration shall be paid to the Seller on the Parking Area and handing over of possession of such area, which forms part of Area mentioned in Clause 2A and Purchase Consideration mentioned in Clause 4A of this MOU.

Rs.37.06 Crores (Rs. Thirty Seven Crores and Six Lax Only) as 100% (One Hundred Percent) of the Purchase Consideration shall be paid to the Seller on the Signage Area being sold to the Purchaser which forms part of Area mentioned in Clause 2A and Purchase Consideration mentioned in Clause 4A of this MOU.

Rs.9.36 Crores (Rs. Nine Crore and Thirty Six Lac Only) as 100% (One Hundred Percent) of the Purchase Consideration as Common Area shall be paid to the Seller on Pro-rata basis on the areas symbolically handed over to the Purchaser.

The Pro-rata share of Earnest Money of Rs.25 Crores (Rs. Twenty Five Crore) given by Purchaser in Stage I, discount for fit out period, Interest

Free Rent Security has been adjusted in above figures mentioned at Stage III and the balance remaining to be adjusted will be adjusted in Stage-IV.

Stage IV –

The remaining amount of Rs.25 Crores Purchase Consideration after pro-rata adjustment of Earnest Money, Interest Free Security Deposit, Discount for Fit Out Period shall be paid on the terms as follows:

a. After June 15, 2008 upto 15 (Fifteen) months from the date of this MOU

100% (One Hundred Percent) of the Purchase Consideration for the unleased area shall be paid to the Seller upon its leasing and symbolic possession to the Purchaser, which forms part of Area mentioned in Clause 2A and Purchase Consideration mentioned in Clause 4A of this MOU.

100% (One Hundred Percent) of the Purchase Consideration on Common Area being sold shall be paid to the Seller on pro-rata basis on the areas symbolically handed over to the Purchaser.

b. At the end of 15 (Fifteen) months from the date of this MOU

100% (One Hundred Percent) of the Purchase Consideration for the area remaining unleased at the end of 15 (Fifteen) months from the date of this MOU shall be worked out as per clause 6(f)(ii) to be paid to the Seller on handing over of possession, which forms part of Area mentioned in Clause 2A and Purchase Consideration mentioned in Clause 4A of this MOU.

100% (One Hundred Percent) of balance Purchase Consideration of Common Area shall be paid to the Seller on handing over of possession of the area remaining unleased.

Rs.12.55 Crores (Rs. Twelve Crores and Fifty Five Lac Only) as 100% (One Hundred Percent) of the Purchase Consideration for the Areas mentioned in Clause 2B and Purchase Consideration mentioned in Clause 4B of this MOU, shall be paid within 15 (Fifteen) days of the demand of the Seller for the payment of the said Area.

Note: The amounts mentioned in Stage III & IV are tentative; subject to final leasing and calculation in terms of Clause 6A of this MOU and the Seller shall give at least 60 days notice prior to the due date confirming the

amount to be paid by the Purchaser and the Purchaser agrees to pay the amount by the due date.

6. Calculation of Purchaser Consideration

The Purchase Consideration of approximately **Rs.340.28 Crores (Rs. Three Hundred Forty Crores and Twenty Eight Lac Only)** is total of A & B as calculated below:

A. On Area for Outright Sale

The Purchase Consideration of approximately **Rs.327.73 Crores (Rs. Three Hundred Twenty Seven Crores and Seventy Three Lac Only)** is calculated by capitalizing the below mentioned annual receivables at a return of 13.60% (Thirteen point six percent):

(Rupees in Crores per annum)

Gross Rent*	30.82 (Rupees Thirty Crore Eighty Two Lac Only) approx.
Parking revenue	5.18 (Rs. Five Crore Eighteen Lac Only)
Common Area revenue	3.53 (Rs. Three Crore Fifty Three Lac Only) approx.
Signage Revenue	5.04 (Rs. Five Crore Four Lac Only) approx.
Total Annual Receivables	44.57 (Rs. Forty Four Crore Fifty Seven Lac) per annum.

*The word Gross Rent is and shall be inclusive of Property Tax wherever Property tax is being borne by the tenants for above and subsequent calculations.

- The formulae for the calculation of the Purchase Consideration on the area for Outright sale as per clause 4A above shall be as follows:
(Total Annual Receivable (as per Clause 6A)) / 13.60% (Thirteen Point Sixty Percent).
- The Gross Rent mentioned above is worked out on the actual Gross Rent as per the LOI/MOU/Lease agreements signed for the leased out Demised Premises and estimated Gross Rent for the unleased Demised Premises inclusive of Property Tax, if borne by the Tenants as on the date of this MOU.
- Formula for the calculation of the Common Area for establishing the Purchase Consideration of such Common Area will be:

Total Common Area (excluding proportionate share of common area already sold by the Seller) X (Demised Premises for which consideration is being received) / Total Area of the Demised Premises.

- d. Service tax on the Rent shall be borne by the Lessees as per the LOI/MOU/Lease agreements signed for the Demised Premises. If Service Tax is to be borne by the Seller as per any LOI/MOU/Lease agreements then such Service Tax shall be reduced from the Gross Rent.*
- e. As on the date of this MOU, approximately 79% Seventy Nine Percent) of the Demised Premises, by floor space, has been leased out.*
- f. The Purchase Consideration for Outright Sale as per clause 4A above shall be calculated as follows:*

- i. Leased out Demised Premises*

The Purchase Consideration of the Leased out Demised Premises will be based on the Gross Rentals as per the LOI/MOU/Lease agreements signed with the Lessees.

- ii. Unleased Demised Premises*

The Seller shall continue leasing the unleased Demised Premises for a period of 15 (Fifteen) months from the date of this MOU. The Purchase Consideration of such subsequently leased out Demised Premises will be calculated on the actual Gross Rentals of these premises.

If any part of Demised Premises is left unleased beyond 15 (fifteen) months period, the Purchase Consideration of such unleased Demised Premises will be calculated on 70% (Seventy Percent) of the Average Gross Rentals of the floor on which such unleased Demised Premises is located. Anchor Lessees on such floor shall not be included for the calculation of the average rent of the floor. Anchor Spaces in each Floor are marked in Annexure A as "Anchor".

Any unleased Demised Premises falling in the luxury-shopping arcade (Nuovo) shall be calculated at 70% (Seventy Percent) of the average gross rentals of the luxury-shopping arcade excluding the luxury-shopping arcade anchor for each floor. Anchor space in each Floor in NOUVO is marked in Annexure A as "Anchor".

- j. The Seller shall offer discount on the Purchase Consideration received by the Seller at 1.133% (One Point One Hundred Thirty Three Percent) per month as monthly payouts as detailed below which shall be available 30 (Thirty) days after the date of receipt of money at Stage II.*

- i. *On the Money received at Stage I and Stage II – 30 (Thirty days) from receipt of Purchase Consideration due at Stage II till handover of Demised Premises for fit outs. No discount shall be offered for the areas of Demised Premises already handed over for fit outs to the tenants at the time of receipt of Purchase Consideration for such areas.*
- ii. *On the Parking, Common Area and Signage Revenue received – from the date of receipt of amount at Stage II till the commencement of guaranteed return by the Seller as per clause 6(h) above.*
- iii. *No discount shall be offered after handing over of Leased Out Demised Premises to the tenants for fit outs. However, discount will be extended after expiry of the fit out period until the commencement of rent, only if the delay in commencement of Rent is due to Mall not being made operational by the Seller.*
- iv. *50% (Fifty) of the discount worked out on rentals for the fit out period of any area as per the MOU/LOI/ Lease Agreements with the tenants will be given as discount from the Purchase Consideration, provided the Seller has received the total Purchase Consideration against such Demised Premises from the Purchaser.*

In case of any delay in receipt of the Purchase Consideration, the fit out period for the purpose of calculation of discount for such area would be reduced by period of delay in receipt of the Purchase Consideration on prorata basis.

7. Proposed Transaction Structure

The Seller has provided true copies of the title deeds, documents with respect to the property to the Purchaser for conducting the due diligence of the Development. This MOU is being signed on receipt of satisfactory due diligence report by the Purchaser.

12. Other Terms

- c. *The possession shall be deemed to have been given on receipt of 100% (Hundred Percent) Purchase Consideration for the area earmarked as per stages mentioned above in clause 5 of Payment Schedule of this MOU.*
- d. *All taxes including municipal tax on the Demised Premises shall be payable by the Purchaser or its tenants as the case may be.*

- e. *The transaction is subject to Completion Certificate to be issued by the Government Authority. The Purchaser shall not be liable for any infringement or violation of laws in force or for any unauthorized constructions for the entire Demised Premises. In case the Purchaser does any infringement of law or carries out any unauthorized construction after the conveyance deed is registered in its favour then the Purchaser shall be liable for such infringement or unauthorized construction.*
- f. *If the Seller is unable to obtain the Completion Certificate within 3 (three) years from the date of Completion of the Development, the Purchaser shall have the option to withdraw from this Purchase and the Seller shall be bound to refund the entire Purchase Consideration amount paid by the Purchaser to the Seller without any interest thereon subject to clause 6(j)(iii) herein.*

13. Termination

- a. *If the Purchaser fails to make the payment due at Stage II of Payment Schedule as per Clause 5 of this MOU, then this MOU/Agreement to Sell, as the case may be, shall stand automatically cancelled and the entire Earnest Money of Rs.25 Crores (Rs. Twenty Five Crores) paid by the Purchaser to the Seller at stage I shall stand forfeited.*
- b. *The Seller will intimate the Purchaser the payments to be made calculated on actual basis, for stage III & IV of Payment Schedule as per clause 5 of this MOU. This intimation to make the payment shall be given at least 60 (Sixty) days prior to due date of payment. If the Purchaser fails to make the payment on due date of payment, this MOU/ Agreement to Sell, as the case may be, shall stand automatically cancelled and the entire Earnest Money paid by the Purchaser to the Seller shall stand forfeited and the Seller shall be free to offer such area to any third party and the purchaser agreed that it shall not raise any claim thereon.*

The Purchaser shall get the ownership of only that Area for which the 100% (One Hundred Percent) Purchase Consideration has been received by the Seller as per the terms of this MOU.

15. Jurisdiction.

Courts of Ludhiana and Chandigarh.”

12. On being informed on 5th August, 2019 of the nature of the suits and in view of the law laid down in ***Kailash Nath Associates Vs. Delhi Development Authority*** (2015) 4 SCC 136 followed by me in ***Speed Track Cargo Vs. State Bank of Patiala*** 2016 SCC OnLine Del 919, ***Palm Art***

Apparels Pvt. Ltd. Vs. Enkay Builders Pvt. Ltd. 2017 SCC OnLine Del 12776, ***Mera Baba Pvt. Ltd. Vs. Ram Lubhaya Puri*** 2018 SCC OnLine Del 9502, ***Klintoz Pharmaceuticals Pvt. Ltd. Vs. Ravinder Shankar Mathur*** 2018 SCC OnLine Del 11954, ***Satish Verma Vs. Garment Craft (India) Pvt. Ltd.*** 2018 SCC OnLine Del 6829 and ***Mahendera Verma Vs. Suresh T. Kilachand*** 2019 SCC OnLine Del 9333 and summarized by me in ***Palm Art Apparels Pvt. Ltd.*** supra as under:

“16. Supreme Court in the recent past in ***Kailash Nath Associates Vs. Delhi Development Authority*** (2015) 4 SCC 136 set aside a judgment of the Division Bench of this Court allowing appeal (by relying on Section 74 of the Contract Act) against the judgment of the Single Judge of this Court ordering refund of earnest money on the ground that the seller had not suffered any loss. It was held that compensation can only be given for damages or loss suffered and if damage or loss is not suffered, law does not provide for a wind fall. It was laid down (i) that terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is not entitled to the same; (ii) that if the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract, unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation in terms of Section 73 of the Contract Act; (iii) that Section 74 of the Contract Act is to be read with Section 73 thereof and in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree; the Court is competent to award reasonable compensation in case of breach, even if no actual damage is proved to have been suffered; (iv) that in some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the Court can award the same, if it is genuine pre-estimate by the parties as the measure of reasonable compensation. I may however add that the Supreme Court also did not find the plaintiff therein to be guilty of breach and the defendant therein to be entitled to forfeit.”

the senior counsel for AKM, on 5th August, 2019 was called upon to address first.

13. It was the contention of the senior counsel for AKM that (i) it was Vesta which was in breach of the Agreement to Sell contained in the MOU of area / space in the Mall and which defaulted in payment of the second installment of Rs.112.04 crores of the purchase consideration; (ii) AKM was thus within its rights to terminate the MOU and to forfeit the earnest money of Rs.25 crores described in Clause 5 of the MOU as earnest money and adjustable only in Stage-III and Stage-IV of the agreed payment schedule and forfeitable on failure of Vesta to make payment due at Stage-II; (iii) under Clause 7(f) of the MOU, AKM had three years time i.e. till December, 2010 to complete the construction of the Mall; (iv) construction of the Mall was in fact finished in March, 2009; and, (v) the admitted documents reveal that Vesta was no longer interested in purchasing the area / space in the Mall which it had agreed to purchase under the MOU and was looking for other buyers; such conduct alone of Vesta means that AKM was not in breach of its obligations under the MOU.

14. Having heard the senior counsel for Vesta to the aforesaid extent and in view of the position in law as reproduced above, it was enquired from the senior counsel for AKM, whether AKM had been able to prove any loss having been suffered by AKM on account of breach of MOU alleged by Vesta.

15. The senior counsel for AKM fairly stated that no evidence to that effect has been led.

16. I next enquired from the senior counsel for AKM, whether in the pleadings or otherwise, it has been the plea of AKM that it was impossible for the Court to assess the compensation arising from breach of the MOU by Vesta and / or that the amount of Rs.25 crores mentioned in the MOU to be

forfeited on non-payment by Vesta of Stage-II payment, was a genuine pre-estimate by the parties as the measure of reasonable compensation.

17. The senior counsel for AKM again fairly stated that it has not been the plea.

18. It was thus enquired from the senior counsel for AKM, whether not on such basis alone, CS(OS) No.1016/2010 filed by AKM was liable to be dismissed and CS(OS) No.1020/2009 filed by Vesta was entitled to be allowed forthwith.

19. The senior counsel for AKM contended that the law prior to pronouncement of *Kailash Nath Associates* supra on 9th January, 2015 i.e. when the subject suits were filed, was different and it would be unfair to, inspite of Vesta being in breach, allow it refund of earnest money also inspite of Vesta in writing having agreed to forfeit the said earnest money of Rs.25 crores on failing to pay the Stage-II payment in terms of the MOU. It was further contended by the senior counsel for AKM on 5th August, 2019 that for the said reason alone, Vesta should not be held entitled to any interest, neither pre-suit nor *pendente lite* nor future, even if held entitled to refund of earnest money of Rs.25 crores. It was also suggested that it was not possible for AKM to prove the loss suffered on breach of MOU by Vesta. However, on enquiry whether not such loss could have been established by leading evidence of the price at which AKM sold the area / space in the Mall, which under the MOU had been agreed to be sold to Vesta and which AKM was permitted to sell by modification on 20th July, 2009 of the *ex parte* order dated 28th May, 2009 restraining sale of any part of the Mall by AKM, the senior counsel for AKM responded that AKM has

leased out the said space / area of the Mall after the order dated 20th July, 2019 but again fairly conceded that no evidence thereof also has been led.

20. Though in view of the aforesaid position emerging, the suits could have been disposed off as aforesaid, on 5th August, 2019 itself but for the sake of completeness and to not deprive the counsels of opportunity to argue, the hearing continued on 13th August, 2019, 6th September, 2019 as aforesaid and has concluded only today.

21. Though the senior counsel for AKM generally referred to *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.* (2003) 5 SCC 705 but did not rely on the said judgment further on being asked whether not in such contract, it is the public which suffers damage and which damage is very difficult / impossible to assess/compute/prove and was a fit case for a genuine pre-estimate of loss to be upheld.

22. The senior counsel for AKM further contended that while granting reliefs in the said suits, notice should also be taken of the harassment meted out by Vesta to AKM and its Directors inspite of Vesta itself being in breach of the MOU. It is contended that criminal cases were initiated by Vesta against AKM and a petition for winding up of AKM Enterprises Pvt. Ltd. was also filed.

23. The crux of the controversy between the parties, trial whereon has taken six years and which has kept the dispute pending for the last ten years is, whether at the date of Stage-II payment by Vesta to AKM stipulated in the MOU, AKM was supposed to show that the five brands viz. Home Centre, Debenhams, Odyssey, Gigabite and Fame–Shringar to have entered into agreements for taking on lease the area / space in the Mall agreed to be sold by AKM to Vesta or not. While the senior counsel for Vesta contends

that Vesta had agreed to purchase the area / space aforesaid in the Mall only on the basis of it having been represented by AKM that the said five brands/ anchor tenants had agreed to take the said space / area on rent and Vesta will immediately as stipulated start reaping rent from the said tenants and AKM defaulted in entering into binding lease agreements with the said five brands/anchor tenants and was thus in breach, it is the contention of the senior counsel for AKM that Vesta had entered into the MOU after being fully satisfied of the MOU / Agreements entered into by AKM with the said five brands and the same was the pre-condition for Stage-II payment by Vesta to AKM.

24. Though the aforesaid controversy, according to me, is purely a matter of interpretation of the terms of the MOU and no trial delaying disposal of the suits by six years was required to resolve the said controversy and the same is also evident from the senior counsels during the hearing not referring to any verbal evidence got recorded but alas, the parties, without considering the said aspect have gone through the rigmarole of recording of verbal testimonies of witnesses and to which the counsels have not even adverted to in the final hearing.

25. I have repeatedly observed in *Anil Kumar Vs. Devender Kumar* 2019 SCC OnLine Del 8782, *Yogesh Jain Vs. Satish Kumar Dhankar* 2013 SCC OnLine Del 4848, *Kawal Sachdeva Vs. Madhu Bala Rana* 2013 SCC OnLine Del 1479, *Vifor (International) Ltd. Vs. Suven Life Sciences Ltd.* 2019 SCC OnLine Del 7514 and *Tullio Giusi SPA Vs. House of Trims Pvt. Ltd.* 2019 SCC OnLine Del 9656 that the stage of framing of issues in a suit is a very vital stage, not to be neglected and if proper attention is paid by all concerned at the said stage, the time taken in the disposal of the suits would

be considerably reduced. I once again implore to all concerned to pay heed to the said aspect commented to by me in *Anil Kumar* and other judgments supra.

26. I may in this context notice another interesting aspect of the hearing, again from which much ought to be learnt by all concerned involved in adjudication of suits. Though parties in their verbose lengthy pleadings took numerous pleas and on which several issues were framed, but no argument even has been urged during the final hearing on the said issues. For instance, (a) neither counsel has raised any argument with respect to issue no.(i) on the plea of Vesta of the MOU being vitiated by fraud and misrepresentation of AKM; thus issue no.(i) is decided in favour of AKM and against Vesta; (b) neither counsel has urged any argument qua issue no.(vii), again on the plea of the plaint in CS(OS) No.1016/2010 not disclosing any cause of action and the suit being barred by time; thus, issue no.(vii) is also decided in favour of AKM and against Vesta, and, (c) neither counsel has addressed any argument on issue no.(viii) on the plea of Vesta of time being of the essence of the MOU; thus the said issue is decided in favour Vesta and against AKM.

27. The same demonstrates that if a blueprint of the entire suit is drawn up at the stage of filing of the suit and / or preparing the defence thereto, instead of the litigants at that stage taking all sorts of pleas, not only will the pleadings in the suit be sharp and concise, assisting the Courts in culling out the issues for adjudication but no unnecessary evidence will be led thereon, when ultimately at the time of final hearing no argument even with respect to the said pleas and issues got framed thereon is to be made.

28. I have during the hearing today enquired from the senior counsel for AKM, whether AKM has proved the lease agreements / MOUs with the five brands aforesaid.

29. The senior counsel for AKM has contended that there was no need for AKM to prove the same since the witness of the plaintiff i.e. PW1 Charnesh Kapoor, in his cross-examination on 29th April, 2014 stated that the same had been furnished by AKM to Vesta.

30. On enquiry, whether AKM, though admits to have not produced / proved the lease agreements / MOUs with the five brands/anchor tenants, is willing to, at least at this stage, show the same to this Court, the senior counsel for AKM states that before the judgment is corrected and released, the same would be shown to this Court.

31. In pursuance to the aforesaid, the counsel for AKM, in the morning of 11th October, 2019 i.e. before this judgment has been corrected and released, handed over photocopies of some documents and made contentions with respect thereto and the senior counsel for Vesta has also been heard in response thereto.

32. I will first proceed with the interpretation of the MOU to decipher the controversy aforesaid qua the anchor tenants.

33. A reading of the MOU shows, (i) Vesta to have agreed to purchase of the total built up area of 66,738 sq. mtrs. of the Mall comprising of 18,965 sq. mtrs. towards Parking, 22,681 sq. mtrs. towards Retail and Entertainment, 8,029 sq. mtrs. towards common area, 4,350 sq. mtrs towards Engineering Services and Back of the House and 12,713 sq. mtrs. towards Hotel, the entire built up area of Retail and Entertainment (excluding the area already sold out by AKM) including Common Area relating thereto,

Parking, part of Engineering Services Area and Back of the House Area and the Signage area of Retail and Entertainment; (ii) out of the said area agreed to be purchased by Vesta, the Retail and Entertainment area of 22,076 sq. mtrs., Common Area of 7,814 sq. mtrs. and 15,165 sq. mtrs. of Parking area was to be purchased outright and 3,008 sq. mtrs. of Parking area and 1,200 sq. mtrs. of Engineering Services area though was to be outrightly purchased by Vesta but to be leased out by Vesta to AKM for three years and to be sold back by Vesta to AKM immediately after expiry of three years; (iii) per Clause 4 the purchase consideration of the area to be outrightly purchased by Vesta was computed tentatively at Rs.340.28 crores on the basis of gross rent which the said area was expected to fetch to Vesta but was flexible subject to the actual gross rent which the said area fetched, indicating that on the date of the MOU there was no binding lease agreement with respect to the said area; (iv) as distinct therefrom, the purchase consideration agreed of Rs.12.55 crores for the area though to be outrightly purchased by Vesta but to be leased back to AKM and to be sold back to AKM after three years, was fixed and not flexible / variable depending upon any rent thereof; (v) the second part of Clause 4-B, providing that AKM on receipt of 100% purchase consideration will inform the tenants that Vesta has purchased the leased out premises and had been put in symbolic possession thereof, indicates that at the time of payment of 100% of the purchase consideration at least, the area for outright purchase was to have been let out by AKM to tenants and by which date the rent fetched thereof would be known and on the basis whereof final purchase consideration of the said area would be computed; (vi) Clause 4 further states that AKM shall hand over such area to the tenants for fit outs etc., also confirming the same; (vii) out of the

Stage-II payment of Rs.112.04 crores, per Clause 5, Rs.95.44 crores was payable by Vesta to AKM “on the Retail and Entertainment areas leased out for the brands ‘Home Centre’ (on the Lower Ground Floor), ‘Debenhams’ (on the Ground Floor), ‘Odyssey’ (on the First Floor), ‘Gigabite’ (on the Third Floor), ‘Fame-Shringar’ (on the Third & Fourth Floors)” against delivery of symbolic possession of such areas to Vesta, indicating that by that date the said area was to be leased out ‘by AKM to the five brands mentioned’; had signing of lease and delivery of possession to tenants been not agreed, the question of AKM delivering symbolic possession of the said area to Vesta would not have arisen; (viii) as distinct therefrom, with respect to payment of Rs.16.60 crores out of Stage-II payment of Rs.112.04 crores, there was no such stipulation inasmuch as the Common Areas were not to be let out; (ix) per Clause 5, out of the Stage-III payment of Rs.152.92 crores, Rs.68.41 crores was towards final payment of the leased out portions and out of the said amount, Rs.25 crores was to be deducted on prorata basis and discount for fit out period and interest free rent security was to be adjusted and to be computed based on actual leasing done up to this Stage, again indicating that the said area was expected to be leased out by that time and interest free deposit expected to be realized from the anchor tenants i.e. the five brands aforesaid, by then; (x) as distinct therefrom, the remaining components of Stage III payment were to be against delivery of actual physical possession for the area which were not to be leased out to the five brands aforesaid; (xi) Clause 5, pertaining to Stage-IV payment, indicates that by the time thereof, the areas if any remaining to be leased out, were to be leased; (xii) Clause 6 providing for computation of purchase consideration also indicates that the sale contemplated was of leased out

areas and if any part remained unleased beyond 15 months from the date of the MOU, the purchase consideration thereof was to be calculated on 70% of average gross rentals of the leased out areas; however the provision “anchor lessees on such floor was not to be included for the calculation of the average rent of the floor” coupled with the demarcation of the areas in the site plan appended to the MOU to be leased out to anchor tenants shows that the anchor tenants were definitely intended to be in place and the purchase was dependent on the said anchor tenants and leasing out where to was to be done by AKM; and, (xiii) Clause 6 (j) with respect to discounts, on which considerable emphasis was laid by the senior counsel for AKM, does not indicate the definiteness stipulated in the agreement with respect to anchor tenants and read with Clause 6(f), pertains only to tenants other than the anchor tenants.

34. On a reading of the MOU, I thus find the version of Vesta and not of AKM to be supported by the MOU and that it was incumbent upon AKM to, before demanding Stage-II payment from Vesta, have binding leases with the five brands / anchor tenants.

35. From a reading of the MOU, it is quite clear that Vesta had agreed to purchase the area / space of the Mall of AKM, not for own use or for itself but to let out the same and fetch the rents as mentioned in the MOU. However since, till the date of MOU there were no binding leases with the anchor tenants, though AKM had executed LOI/MOU, the price was made dependent upon the rent at which the leases with the anchor tenants were to be executed. However by the Stage-II payment, the binding leases with the five brands / anchor tenants were expected to have been entered into by AKM and provision was made only for the remaining areas also to be let out

by AKM by the stage of receiving Stage-IV or the final payment. The Clause in the MOU providing for computation of the unleased portions cannot be interpreted as entitling AKM to final payment without letting out an inch of the space / area agreed to be sold and was more by way of an exception.

36. Thus it was incumbent upon AKM to prove in its evidence before this Court, that binding leases had been entered into by AKM with the anchor tenants, by the Stage-II payment and which AKM has admittedly not done.

37. Even after the hearing, what has been handed over on 11th October, 2019 are:

- (i) MOU dated 20th January, 2006 between AKM and Planet Retails Holdings Pvt. Ltd. (Debenhams) and original of which has been proved as Ex.DW1/11.
- (ii) MOU/LOI dated 7th December, 2006 between AKM and Odyssey India Ltd.
- (iii) MOU dated 31st January, 2005 between AKM and Shringar Cinemas Ltd.
- (iv) MOU dated 4th October, 2005 between AKM and Pantaloon Retail (India) Ltd.
- (v) Documents to show that Gigabite is a trade name of Bright Enterprises Pvt. Ltd. and which in the index of the documents is disclosed to be a MBD Group company.

There is however nothing to show that there is any binding lease between AKM with respect to any space / area in the subject Mall and / or entered into prior to the date of Stage-II payment.

38. Needless to state that none of the aforesaid documents are binding leases and are merely agreements to enter into agreement in future and which did not have any binding effect. Reference in this regard may be made to *Speech and Software Technologies (India) Private Limited Vs. Neos Interactive Limited* (2009) 1 SCC 475, *Sobhag Narain Mathur Vs. Pragya Agrawal* (2007) 141 DLT 356, *H.S. Khan & Sons Vs. Homi J. Mukadam* 1990 SCC OnLine Bom 254 (DB) and *R. Radhakrishnan Vs. G. Ekambaram* 2011 SCC OnLine Mad 1753 (DB).

39. Thus, AKM even now has failed to prove that it had binding leases with five brands / anchor tenants.

40. The senior counsel for AKM also contended that under Clause 12(f) of the MOU, even in the event of AKM being unable to obtain Completion Certificate, Vesta only had the option to withdraw from the purchase and AKM was obliged only to refund the monies received from Vesta till then without any interest and thus AKM is not liable for any interest.

41. I am unable to agree. Clause 12(f) is clearly not attracted and it is not so contended even by the senior counsel for AKM. On the contrary, AKM has been found to be in breach and there is no reason why, having been found to be in breach and having also been found to be unnecessarily contesting this suit, delaying refund of the monies received from Vesta, for 10 years, AKM should not be liable for interest. Even otherwise, I am of the view that though an agreement not to pay any interest may be binding on an arbitration tribunal which is itself a creation of the said agreement, will not be binding on the Court, once finds monies to have been due and wrongfully withheld. In any case the said Clause would have no application to interest *pendente lite* and future interest.

42. No merit is also found in the argument of senior counsel of AKM, of the default of the Vesta being evident from Vesta looking for other buyers with respect where to documents have been proved. Merely because Vesta, instead of entering into a litigation with AKM for refund of money, was attempting to immediately realize the said monies by finding a buyer for the area/space which it had agreed to purchase on the terms of the MOU, would not disentitle Vesta which has not been found to be in breach, from seeking refund with interest.

43. The senior counsel for AKM also drew attention to the documents to show that AKM had completed the project within three months of the MOU.

44. However the said aspect is not relevant for the present purpose. This suit is concerned only with the liability of AKM to refund the earnest money received from Vesta. Though AKM has not proved any loss / damage having been suffered by it from the alleged breach of the MOU by Vesta but opportunity was given to AKM to prove that it was Vesta which was in breach. It was felt that if it is found that Vesta is in breach and even if AKM had not proved the loss suffered by it from such breach, AKM may be entitled to reasonable compensation. However AKM has failed in the same also and is found to be wrongfully contesting the suit, merely to delay the refund of Rs.25 crores.

45. In fact, the witness of AKM in his cross-examination had admitted that no leases were entered into with any of the five brands.

46. Though senior counsel for AKM has also referred to Section 51 of the Contract Act, 1872 concerning reciprocal promises and to *Nathulal Vs. Phoolchand* (1969) 3 SCC 120 but it is AKM which on interpretation of the MOU has been found to be in breach of its obligation therein.

47. The senior counsel for AKM had no response also to the query, that if AKM was contending that the damages suffered from breach of MOU were not assessable, how was AKM itself claiming damages in CS(OS) No.1016/2010 filed by it.

48. Rather, it is the contention of the senior counsel for the Vesta, that AKM is profiteering in the matter and has realized rates better than agreed with Vesta.

49. Axiomatically, (a) qua issue no.(ii), I find AKM to be in breach of the MOU and decide issue no.(ii) in favour of Vesta and against AKM and issue no.(iii) in favour of Vesta and against AKM; (b) qua issue no.(iv), I find AKM to be not entitled to forfeit the earnest money, being itself in breach of the MOU; the said issue is decided against AKM and in favour of Vesta; (c) qua issue no.(v), I hold Vesta to be not liable to make payment of Rs.112.04 crores without AKM having binding leases with respect to the area/space agreed in the MOU to be leased out before making Stage-II payment, to the five brands / anchor tenants; the said issue is decided in favour of the Vesta and against AKM; (d) qua issue no.(vi), AKM is found entitled to a decree for refund of the earnest money paid of Rs.25 crores; the question of rate of interest will be discussed hereunder; and, (e) qua issue no.(ix), AKM has failed to prove that Vesta was in breach of its obligations under the MOU; the said issue is decided against AKM and in favour of Vesta.

50. Though the transaction between the parties being a commercial transaction, there is no reason to not award pre-suit, *pendente lite* and future interest to Vesta against AKM at commercial rates; but law also requires equities arising from grant of interim relief to be balanced at the final stage. Reference in this regard may be made to ***Abhimanyoo Ram Vs. State of***

Uttar Pradesh (2008) 17 SCC 73, *Ramesh Chandra Sankla Vs. Vikram Cement* (2008) 14 SCC 58, *Ruchika Cables Vs. The Secretary (Labour)* 2010 SCC OnLine Del 1973, *Himalya International Ltd. Vs. Himalaya Drugs Company* 2017 SCC OnLine Del 12624 and *The Indian Performing Right Society Ltd. Vs. Anil Mehra* 2017 SCC Online Del 8610 [FAO(OS) 212/2017 preferred whereagainst was dismissed as withdrawn vide order dated 16th January, 2019]. Vesta, though not wanting to purchase the area / space in the Mall with respect to which it had entered into the MOU with AKM and though filed CS(OS) No.1020/2009 for refund of earnest money paid, still obtained an *ex parte* order dated 28th May, 2009 restraining AKM from disposing of any part of the Mall space. Though the said order was modified on 20th July, 2009 but under the modified order also the restraint against AKM selling two spaces / areas as mentioned therein was continued and has continued till this date unless pursuant to the order dated 7th May, 2019 bank guarantee has been furnished by AKM. However it is not as if the said two spaces / areas were not reaping any benefit to AKM. AKM claims to have let out the same and was earning rent thereof.

51. Taking all the aforesaid factors into consideration, interest at the rate of 9% per annum for the pre-suit period, *pendente lite* and for future till 31st January, 2020 at 9% per annum is deemed apposite. However if the decretal amount is not paid by AKM to Vesta on or before 31st January, 2020, the interest for the period thereafter will be at commercial rate of 15% per annum.

52. Vesta is also found entitled to costs of the suits assessed, besides the court fees paid of Rs.27,50,000/- on the plaint in CS(OS) No.1020/2010, of professional fee and expenses for both suits combined, at Rs.20 lacs.

53. A decree is accordingly passed, in favour of Vesta Holding Pvt. Ltd. and against AKM Enterprises Pvt. Ltd. of (i) dismissal of CS(OS) No.1016/2010; (ii) recovery of Rs.25 crores with interest at 9% per annum with effect from 1st February, 2008 being the date of Stage II payment, till the date of institution of CS(OS) No.1020/2009, *pendente lite* and till 31st January, 2020 and at the rate of 15% per annum with effect from 1st February, 2020 till the date of payment / realization; and, (iii) costs assessed, besides of court fees of Rs.27,50,000/- paid by AKM on plaint in CS(OS) No.1020/2009, of professional fees and expenses for the two suits assessed at Rs.20 lacs.

54. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

DECEMBER 03, 2019

OCTOBER 10, 2019

‘gsr’..

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