

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

% **Date of decision: 23rd March, 2020**
5th February, 2020

+ **CS(OS) 2287/2007, IA No.1651/2020(u/S.151 CPC)**

DAMYANTI DEVI

..... Plaintiff

Through: Mr. Satish Tamta, Sr. Adv. with Mr.
Swapnil Gupta & Ms. Neelambika
Singh, Advs.

Versus

**VIPUL INFRASTRUCTURE
DEVELOPERS LTD. & ORS.**

..... Defendants

Through: Mr. Atul Sharma with Ms. Harshita
Agarwal, Advs. for D-1.
Mr. Manish Sharma with Mr. Pranay
Raj Singh, Advs. for D-2.
Ms. Shobhana Takiar with Ms.
Shweta Anand, Advs. for DDA.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff, on 19th November, 2007 instituted this suit for specific performance of contract, against (a) Vipul Infrastructure Developers Ltd. (Vipul); (b) Orchid Infrastructure Developer Ltd. (Orchid); and, (c) Delhi Development Authority (DDA), pleading (i) in the beginning of the year 2005 it was represented to the plaintiff that Vipul had purchased property No.6, Aurobindo Marg and was in the process of developing the same into a residential complex comprising of flats on various floors and was desirous of selling the flats in the said project; copies of the plans showing the Lay Out and Level Plans were also handed over to the plaintiff; (ii) the plaintiff, on 31st March, 2005 verbally agreed to purchase and Vipul verbally agreed

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to sell flat No.D-7 situated in Tower 'B' measuring 4220 sq. ft. of property No.6, Aurobindo Marg @ Rs.4,100/- per sq. ft., with total sale consideration being calculated at the time of handing over of possession, as there was a possibility of 2 to 3 % variation in the area during the course of construction; a cheque dated 31st March, 2005 for Rs.5 lakhs towards part sale consideration was delivered by the plaintiff to Vipul for which Vipul issued receipt dated 4th April, 2005; (iii) the plaintiff, against receipt dated 28th October, 2005 made a further payment of Rs.15 lakhs to Vipul; both the cheques were encashed; (iv) the balance payment was to be made on receipt of demand from Vipul, based on the progress of the construction of the project; (v) the plaintiff, from time to time approached Vipul to find out the progress of the project and the balance payment and was assured that as and when any further amount was due, plaintiff shall be informed; (vi) on not getting a positive response for about six months, the plaintiff became suspicious and on making enquiry learnt that Vipul had sold the project to Orchid; (vii) on the plaintiff confronting Vipul, the plaintiff was assured that Vipul and Orchid were partners in various projects and there was a division between the two and the project in question had come to the share of Orchid, who would be completing the same and in fact Orchid demanded further payment of Rs.15 lakhs from the plaintiff which the plaintiff made vide cheque dated 6th May, 2006 from the account of her grandson which was however not encashed; (viii) the plaintiff again did not hear anything for 3-4 months and in the meanwhile certain amount was demanded in cash and since the plaintiff was not willing to make any cash payment, a sum of Rs.24 lakhs was taken in the name of one company namely Marudhara Pvt. Ltd. and a sum of Rs.21 lakhs was taken in the name of another agent of Vipul;

however subsequently the said amounts were refunded by the said agents; (ix) the plaintiff, served a legal notice dated 6th March, 2007 upon Vipul and Orchid and their agents; (x) the plaintiff, on making further enquiry learnt that only 19 flats were to be constructed on the land for the benefit of 19 persons who were the owners of the said land, as per a Scheme approved by the Supreme Court of India, showing the transaction entered into with the plaintiff to be fraudulent; and, (xi) that out of the total agreed sale consideration of Rs.1,73,02,000/-, the plaintiff has paid part sale consideration of Rs.20 lakhs and is ready and has been ready and willing to perform her part of the contract. On the said pleas, reliefs, of (i) specific performance by directing Vipul and Orchid to transfer title and possession of Flat No.D-7 in Tower 'B' situated at 6, Aurobindo Marg, New Delhi measuring 4220 sq. ft. in favour of the plaintiff against receipt of balance sale consideration and in the alternative, (ii) decree for determination of damages and for refund of Rs.20 lakhs, with interest, are claimed.

2. The suit came up first before this Court on 20th November, 2007 and thereafter on 29th November, 2007, when summons thereof were ordered to be issued. Orchid and DDA filed their separate written statements. Vipul, on 15th February, 2010 was ordered to be proceeded against *ex parte* and though applied for setting aside the order proceeding *ex parte*, but the said application was dismissed vide order dated 7th March, 2012. Vipul preferred FAO(OS) No.201/2012 against the order of dismissal of its application for setting aside of the *ex parte* but withdrew the same on 16th May, 2012, stating that it would join the proceedings in the suit.

3. On the pleadings of the plaintiff, Vipul, Orchid and DDA, vide order dated 4th October, 2012, the following issues were framed in the suit:-

“1. Whether an oral agreement was entered into for sale and purchase of the suit property? OPP

2. Whether the plaintiff gave cheque no.422974 dated 6.5.2006 amounting to Rs.15,00,000/- to the defendant no.2, if so, its effect? OPP

3. If Issue No.1 is decided in affirmative, whether the plaintiff was ready and willing to perform her part of contract? OPP

4. Whether the plaintiff is entitled to a decree for specific performance? OPP.

5. If Issue No.1 is decided in negative, whether the plaintiff is entitled to a money decree for recovery of Rs.20,00,000/- and against which defendant? OPP.

6. Whether the defendant no.2 had taken over the project regarding Tower ‘B’ measuring 4220 sq.ft. Property No.6, Aurobindo Marg, New Delhi from the defendant No.1, if so, whether the defendant no.2 is not liable to honour the agreement which was entered by defendant no.1? OPD-2.

7. Whether the suit is bad for non-joinder of Mr. Sandeep Kumar of M/s SKN properties and Mr. Aman Sharma of M/s. SVS properties? OPD-2

8. Whether the plaintiff is entitled to any interest, if so, at what rate and for what period? OPP

9. Relief.”

and the parties relegated to evidence.

4. On 10th December, 2014, PW1 Nishi Gupta, sole LR of the deceased plaintiff, tendered her affidavit by way of examination-in-chief into evidence; however before PW1 Nishi Gupta could be cross-examined, the plaintiff applied for amendment of the plaint to add the relief of recovery of damages, to prevent transfer of this suit to the Court of the District Judge on enhancement of minimum pecuniary jurisdiction of this Court. Vide order dated 29th September, 2016, the said amendment was allowed and in pursuance to the filing of the amended plaint, Vipul, who was earlier *ex parte*, also filed written statement.

5. It is the defence of Vipul in its written statement, (i) no relief of specific performance can be claimed against Vipul as it is Orchid alone which was managing, controlling and developing the subject project; (ii) there was no oral agreement dated 31st March, 2005; (iii) the amount tendered by the plaintiff was only a 'registration amount' and the plaintiff was aware that the registration money did not entitle the plaintiff to claim allotment, ownership or title to the property; (iv) no right of allotment is conferred by mere registration under a scheme; (v) Vipul and Orchid had jointly promoted the project but later on the project was taken over exclusively by Orchid; (vi) the plaintiff had approached Vipul in March, 2005 intending to invest in a property and gave a deposit of Rs.5 lakhs; no agreement of any kind was entered into by the plaintiff; subsequently the plaintiff out of her own will and volition deposited a further amount of Rs.15 lakhs; (vii) the said amounts were deposited as merely an expression of interest in the project and were paid towards registration charges for booking the flat No. D-7 in Tower 'B' in the project; (viii) Vipul did not

enter into any agreement, either oral or written with the plaintiff, for allotment of the flat to the plaintiff; (ix) the receipts dated 4th April, 2005 and 28th October, 2005 issued to the plaintiff with respect to the payments of Rs.5 lakhs and Rs.15 lakhs aforesaid also clearly provide that the payment of the said amounts did not entitle the plaintiff to claim any allotment/ownership/title to the property; (x) the amount of Rs.20 lakhs aforesaid was not a part of any sale consideration and the plaintiff had made the payments being fully aware that they were contingent; (xi) on the onus of the development of the project exclusively vesting in Orchid, the payments received from the plaintiff were duly transferred by Vipul to Orchid along with other documents relating to the project; and, (xii) the plaintiff was also informed of the same and was to subsequently approach Orchid only.

6. Orchid has defended the suit pleading, (i) that there is no privity of contract between the plaintiff and Orchid; (ii) there is no written or oral contract between the plaintiff and Orchid, of which specific performance can be sought by the plaintiff; (iii) the plaintiff has herself admitted that all her dealings had been with Vipul or its agents; and, (iv) no demand in writing or otherwise has been made by the plaintiff against Orchid.

7. Though the plaintiff has filed replication to the written statement of Vipul but need to refer thereto is not felt.

8. After the amendment permitted of the plaint, vide order dated 17th January, 2017, the following additional issues were framed in the suit:-

“5A. Whether the plaintiff, in addition to the relief of specific performance, is entitled to damages at the rate of Rs.6 lacs per annum or at any other rate and if so, from which defendant for what period? OPP.

5B. Whether the claim of the plaintiff for damages is within time? OPP.”

and the parties relegated to evidence on commission.

9. The recording of evidence on commission stood concluded and the suit listed for final hearing. On 18th December, 2019, the counsel for the plaintiff sought adjournment for addressing final arguments; the counsel for Vipul and the counsel for Orchid opposed the adjournment and informed that the property agreed to be sold had been sold to a non-party to the suit, as far back as in the year 2009, and the plaintiff in spite of being aware of the same has not impleaded the current owner of the property. In the light of the said statement, it was felt that the plaintiff, even if found entitled to the relief of specific performance, could not get a decree for specific performance either against Vipul or against Orchid inasmuch as neither of them are the owners of the property and the entitlement of the plaintiff could only be for damages. Observing so, the suit was adjourned for hearing to today.

10. Today, the senior counsel for the plaintiff has handed over a brief three page note of submissions along with compilation of case law under the following heads:

(a) Validity of an Oral Agreement

1. Aloka Bose V. Parmatma Devi (2009) 2 SCC 582

2. ***Mohinder Kumar Sharma Vs. N.K. Mann*** 2016 SCC OnLine Del 700

(b) ***Readiness and Willingness***

3. ***Bibi Jaibunisha Vs. Jagdish Pandit*** (1997) 4 SCC 481
4. ***Motilal Jain Vs. Ramdasi Devi*** (2000) 6 SCC 420
5. ***Swarnama Ramachandram Vs. Aravacode Chakungal Jayapalan*** (2004) 8 SCC 689
6. ***Azhar Sultana Vs. B.Rajamani*** (2009) 17 SCC 27
7. ***Raj Kumar Sharma Vs. Pushpa Jaggi*** (2006) 128 DLT 96
8. ***R.C.Chandiok Vs. Chuni Lal Sabharwal*** 1970 (3) SCC 140
9. ***P. Lakshmi Ammal Vs. S.Lakshmi Ammal*** AIR 1991 Mad 137

(c) ***Adverse Inference***

10. ***Gopal Krishnaji Ketkar Vs. Mohamed Haji Latof*** AIR 1968 SC 1413
11. ***Ramkrati Kuer Vs Dwarika Prasad Singh*** AIR 1967 SC 1134

11. The counsel for Vipul, besides addressing his arguments has referred to ***Braham Singh Vs. Sumitra*** 2011 SCC OnLine Del 3155, ***Aggarwal***

Hotels (P) Ltd. Vs. Focus Properties (P) Ltd. (1996) 63 DLT 52 and ***Lalit Kumar Sabharwal Vs. Ved Prakash Viji*** 2002 SCC OnLine Del 1019.

12. The counsel for Orchid has handed over a compilation of the following case law:

1. ***Harison Traders Ltd. Vs. Mrs. Raj Bhalla*** 2006 SCC OnLine Del 824.
2. ***Sobhag Narain Mathur Vs. Pragya Agrawal*** 227 (2016) DLT 511.
3. ***Satish Kumar Vs. Karan Singh*** (2016) 4 SCC 352.
4. ***N.P.Thirugnanam Vs. R. Jagan Mohan Rao*** (1995) 5 SCC 115.
5. ***Pushparani S. Sundaram Vs. Pauline Manomani James (deceased)*** (2002) 9 SCC 582.
6. ***Mayawanti Vs. Kaushalya Devi*** (1990) 3 SCC 1.
7. ***Umabai Vs. Nilkanth Dhondiba Chavan (Dead) by LRs*** (2005) 6 SCC 243.
8. ***Gopal Devi Vs. Kanta Bhatia*** 54 (1994) DLT 541.

13. During the hearing, attention has also been drawn to the receipts dated 4th April, 2005 and 28th October, 2005 of Rs.5 lakhs and Rs.15 lakhs respectively issued by Vipul to the plaintiff. It is deemed appropriate to reproduce here in below the said two receipts proved as Ex.PW1/3 and Ex.PW1/5 respectively:

“Date: 04/04/2005

RECEIPT

Received with thanks from Mrs Damyanti Devi a sum of Rs.5,00,000/- (Rupees Five Lacs only) as registration money towards booking of flat no. D-7 in Tower no. B having an approximate super area of 4220 sq. ft. in our new project at Aurbindo Marg, New delhi, vide cheque/DD as per details given below:

- 1. Cheque/DD no.107822 dated 31/03/2005 drawn on Centurion Bank Ltd. Rs.5,00,000/- (Rupees Five Lacs only)*

For Vipul Infrastructure Developers Ltd.

***Sd/-
Authorised Signatory***

Note:

- (i) This is merely acknowledgement of the above document (the cheque/draft/pay order) based on information furnished by you and this does not entitle you to claim allotment/ownership/title to the property since the above payments are part of the registration money for above booking.”*

“Date: 28/10/2005

RECEIPT

Received with thanks from Mrs Damyanti Devi a sum of Rs.15,00,000/- (Rupees Fifteen Lacs only) as registration money towards booking of flat no. D-7 in Tower no. B having an approximate super area of 4220 sq. ft. in our new project at Aurbindo Marg, New delhi, vide cheque/DD as per details given below:

- 1. Cheque/DD no.374516 dated 27/10/2005 drawn on Centurion Bank Ltd. Rs.15,00,000/- (Rupees Fifteen Lacs only)*

For Vipul Infrastructure Developers Ltd.

Sd/-

Authorised Signatory

Note:

- (i) This is merely acknowledgement of the above document (the cheque/draft/pay order) based on information furnished by you and this does not entitle you to claim allotment/ownership/title to the property since the above payments are part of the registration money for above booking.”*

14. I have immediately enquired from the senior counsel for the plaintiff, how the receipts dated 4th April, 2005 and 28th October, 2005 constitute a contract or a specifically enforceable contract. Thereunder, though Vipul has acknowledged receipts of Rs.5 lacs and Rs.15 lacs respectively from the plaintiff but only as “registration money towards booking of a flat” in the project at Aurobindo Marg and when both the receipts expressly record that the same do not entitle the plaintiff to claim any allotment, ownership or title to the property since the payments are only part of “registration money for above booking”. The senior counsel for the plaintiff has been reminded, that such bookings and payment of registration money are a well recognised practise of the real estate trade of development of immovable properties and qua which the Courts have held that no binding contract comes into existence.

15. Reference in this regard can be made to:

- (i) ***Desein P. Ltd. Vs. Ansal Prop. & Ind.*** MANU/DE/0873/1996 where also the plaintiff therein had paid Rs.10 lacs to the defendant towards booking of two commercial flats to be built by the defendant and it was held that the same did not constitute any agreement, even for payment of interest thereon.
- (ii) ***Baij Nath Vs. Ansal & Saigal Properties Pvt. Ltd.*** AIR 1993 Del 285 (DB) where also the defendant therein was retaining a sum of Rs.10,000/- of the plaintiff therein with itself towards purchase price of a flat on the thirteenth floor in a building under construction / to be constructed and it was held that it

was a case of provisional booking and did not constitute an enforceable contract.

- (iii) ***H.G. Krishna Reddy & Co. Vs. M.M. Thimmiah*** AIR 1983 Mad 169 (DB) holding that “it is now settled that if a document which is entered into between two parties and which is relied on as constituting a contract contemplates the execution of a further regular agreement between the parties, it is a matter of construction whether the execution of a further contract is a condition of the terms of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the original agreement should be performed”.
- (iv) ***State of Madras represented by the Collector of Thanjavur Vs. R. Ranganathan Chettiar*** AIR 1975 Mad 292 (DB), where finding the document to be providing that the sale of the right to cut Casuarina trees in Sodikudy Taluk was subject to confirmation by the District Forest Officer and a right had been reserved to reject any bid including the highest bid without assigning any reason, it was held that no binding enforceable contract had come into existence.
- (v) ***Haridwar Singh Vs. Bagun Sumbrui*** (1973) 3 SCC 889 where also it was held that conditional acceptance does not result in a binding enforceable contract.
- (vi) ***Union of India Vs. Bhim Sen Walaiti Ram*** (1969) 3 SCC 146 also holding that as per the relevant clauses, the contract of sale was not complete till the bid was confirmed by the Chief

Commissioner and till such confirmation, the person whose bid has been provisionally accepted is entitled to withdraw the bid and that when the bid is so withdrawn before its confirmation by the Chief Commissioner, there is no contract.

- (vii) ***Shamjibhai Vs. Jagoo Hemchand*** AIR 1952 Nag 220 (DB) where the document in writing provided for execution of a formal agreement containing the terms already recorded in the document and other usual terms and conditions by both the parties and it was held that contracts for the sale and purchase of land have three well-defined stages; first is the stage of negotiation, the second is the stage of reaching an agreement and the third is the stage of executing a formal document and on construction of the document subject matter of that case, no binding contract was found to have come into existence.
- (viii) ***Somasundaram Pillai Vs. The Provincial Government of Madras*** AIR 1947 Mad 366 (DB) also holding that provisional acceptance does not result in a binding agreement.

16. Here, the receipts dated 4th April, 2005 and 28th October, 2005 though acknowledge receipt of Rs.5 lacs and Rs.15 lacs respectively from the plaintiff but only as registration money towards booking of a flat in the then under construction / under contemplation project and expressly provide that the same did not entitle the plaintiff to claim allotment, ownership and title. Once the plaintiff accepted such receipts against payments made and did not insist upon the monies paid being received towards earnest money or advance sale consideration, as would have been the case had any Agreement

to Sell come into existence and once the plaintiff was satisfied with and did not protest against the writing on the receipts of the same not entitling the plaintiff to claim any allotment, ownership and title, the question arises how the plaintiff can be allowed to contend to the contrary now.

17. The senior counsel for the plaintiff contends that his case is of an oral Agreement to Sell.

18. It is not as if the oral Agreement to Sell is pleaded to be anything other than as mentioned in the receipt. It is also not as if the plaintiff has in the plaint or otherwise explained why, a binding oral Agreement to Sell if any reached, was not reflected in the receipts accepted by the plaintiff of the payment made. It is not the case of the plaintiff that the plaintiff, who has herself produced the said receipts, at any point of time wrote to the defendant protesting against the language of the receipts or that the plaintiff insisted on receipt in any other language as is the norm when Agreement to Sell and Purchase is arrived at. The only inference is that the plaintiff well understood the monies deposited to be towards mere registration and booking and was satisfied therewith and now, when the project has become a reality, as an afterthought has instituted this suit for specific performance.

19. Though in my view, for the reasons aforesaid, no suit for specific performance was entertainable but the suit was entertained and has gone through the rigmarole of trial.

20. I may highlight that though in the receipts aforesaid the number of the tower and the number of the flat together with approximate size of the flat are mentioned but there is no mention of the price pleaded by the plaintiff to have been verbally agreed of Rs.4,100/- per sq. ft. or of total price of the

flat, or of time of delivery of possession. Without the parties having agreed to the price, being the consideration for sale and purchase, there could be no contract or enforceable contract.

21. In ***Ganesh Seth Vs. Dr. C.S.G.K. Setty*** (1998) 3 SCC 471 followed in ***Sharad Pandharinath Mote Vs. Prakash Madhavrao Yadav*** 2000 SCC OnLine Bom 852, it was held that in a suit for specific performance, the evidence and proof of agreement must be absolutely clear and certain; to grant a decree for specific performance, the Court has got to be satisfied about the terms of understanding and they have to be clear and definite – this is because the object of specific performance is to procure a performance by the defendant which has got to be with respect to definite terms; where there is any conflict of evidence which leaves uncertainty in the mind of the Court as to what the terms of the contract were, the enforcement of the contract will have to be refused. This Court in ***Nina Garments Pvt. Ltd. Vs. Unitech Ltd.*** (2013) 196 DLT 57 also, relying on ***Mirahul Enterprises Vs. Vijaya Srivastava*** (2002) 100 DLT 290 and ***Aggarwal Hotels (P) Ltd. Vs. Focus Properties (P) Ltd.***, (63) 1996 DLT 52 held that the essential ingredients of an Agreement to Sell an immovable property are (i) identity of vendor and purchaser; (ii) complete description of the property subject matter of the agreement; (iii) amount of consideration to be paid by the purchaser to the seller; (iv) time within which the agreement is to be performed; and, (v) earnest money if any paid to the vendor – if one of these essential ingredients are missing, the agreement would not amount to concluded contract and if these ingredients are lacking, the obligations contemplated under Section 16 for specific performance for immovable property would not arise. Finding the property subject matter of agreement

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to be not identified and described and not capable of identification when the Agreement to Sell was executed, it was held that there was no valid and concluded contract for sale of immovable property. Further finding that neither the application for registration nor the receipts issued to be disclosing the consideration for sale, it was held that in the absence of an agreed consideration, there could always be dispute between the parties with respect to the price and the essential ingredient of the Agreement to Sell was missing. It was also noticed that yet another essential ingredient of a valid Agreement to Sell i.e. the time within which agreement was to be performed was not specified and thus also it was held that there could be no concluded contract.

22. The plaintiff, in the plaint has mentioned the agreed price to be at the rate of Rs.4,100/- per sq. ft. with the total price to be calculated at the time of handing over of possession, depending upon the actual size of the plot. Therefrom it is evident that according to the plaintiff also, as on the date of the agreement, there was no certainty of the size of the actual flat. There is no explanation why, if the price at the rate of Rs.4,100/- per sq. ft. had been agreed upon, the same was not mentioned in the receipts aforesaid. It is not the pleaded case at least that the price was agreed at any time subsequent to 4th April, 2005 and 28th October, 2005.

23. Ordinarily when the parties at the time of arriving at an agreement are executing a document, the document contains what has been agreed upon and which is not so in the present case.

24. I repeat, it is not the plea of the plaintiff in the plaint that the price of Rs.4,100/- per sq. ft. was orally agreed after 4th April, 2005 or 28th October,

2005, being the dates of the two receipts supra; rather it is the plea of the plaintiff in para 2 of the plaint that the oral agreement was reached between the parties on 31st March, 2005 i.e. prior to 4th April, 2005. However in the plaint there is no explanation why when the flat number, tower number and area was mentioned, the price of Rs.4,100/- per sq. ft. also stated to have been agreed on 31st March, 2005, was not mentioned in the receipts or why the plaintiff did not insist on mentioning the same in the receipt; rather the plaint proceeds on the premise that the price of Rs.4,100/- per sq. ft. is also mentioned in the receipts dated 4th April, 2005 and 28th October, 2005.

25. The plaintiff has also proved before this Court the letters dated 12th October, 2006 and 4th December, 2006 written by her to Vipul as Ex.PW1/7 and Ex.PW1/8 respectively. The plaintiff in the said letters also did not mention the price of Rs.4,100/- per sq. ft. having been agreed upon, though referring to the receipts aforesaid. The plaintiff has also proved as Ex.PW1/9, a legal notice dated 6th March, 2007 got issued by her to the defendants. The plaintiff therein also did not mention the price if any agreed upon, or the price of Rs.4,100/- per sq. ft., showing that the plaintiff, till then was honest. It is for the first time in the legal notice dated 22nd May, 2007 proved as Ex.PW1/10, got issued by the plaintiff through another advocate that it was claimed that the agreement was for sale at the price of Rs.4,100/- per sq. ft. It is quite obvious that the advocate who issued the legal notice dated 22nd May, 2007 Ex.PW1/10 and who also filed this suit on behalf of the plaintiff, realising that without any price being mentioned in the receipts, there would be no case for specific performance, that the price of Rs.4,100/- per sq. ft. was concocted. Rather in Ex.PW1/7, letter dated 4th December, 2006, Ex.PW1/8 and in Ex.PW1/9 there is no mention of any oral agreement

to sell also or oral agreement to sell of 31st March, 2005. There is no mention of the oral agreement to sell or oral agreement to sell dated 31st March, 2005 in Ex.PW1/10 also. It is quite obvious that the plaintiff has successively improved her case in Ex.PW1/10 and thereafter in the plaint and which is a absolute giveaway of the falsity of the claim of oral Agreement to Sell dated 31st March, 2005 and/or the price of Rs.4,100/- per sq. ft.

26. There is another interesting fact. The first legal notice dated 6th March, 2007 Ex.PW1/9, besides being addressed to Vipul and Orchid was also addressed to one Sandeep Kumar from SKN Properties and one Aman Sharma from S.V.S. Properties. The plaintiff in the said legal notice also stated that the said Sandeep Kumar from SKN Properties and Aman Sharma from SVS Properties had collected the amount of Rs.65 lacs claimed to have been paid by her, from the plaintiff as agent of Vipul. The plaintiff in the said legal notice also claimed to have booked/purchased the flat and to have been assured that the flat would be developed/constructed within a span of one year “and the balance amount will be payable at the time of possession of the said flat”. However the balance amount was not pleaded. In the said legal notice it was also stated that till the issuance thereof on 6th March, 2007, there was no construction activity at the site and the amounts received from her appeared to have been utilised for own benefit of the addressees. The plaintiff in the subsequent legal notice dated 22nd May, 2007 Ex.PW1/10 also addressed, besides the Vipul and Orchid, to Sandeep Kumar from SKN Properties and Aman Sharma from S.V.S. Properties claimed that Vipul, along with the said Sandeep Kumar from SKN Properties and Aman Sharma from S.V.S. Properties had represented to the

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plaintiff that Vipul had purchased property no.6, Aurobindo Marg and was in the process of developing the same by constructing flats for sale and that the said Sandeep Kumar from SKN Properties and Aman Sharma from S.V.S. Properties were authorised to act on behalf of Vipul and further claimed to have acted on the said representations. The plaintiff in the said notice further admitted that payments were made though by bank draft, but to the said Sandeep Kumar from SKN Properties and Aman Sharma from S.V.S. Properties. It is obvious therefrom that the plaintiff at no point of time dealt strictly with Vipul or Orchid and was dealing only with Sandeep Kumar from SKN Properties and Aman Sharma from S.V.S. Properties who were claiming to be the authorised agents of Vipul. The same again proves the falsity of the case of oral Agreement to Sell.

27. The plaintiff died before the framing of issues. Her heir Nishi Gupta examined herself as PW1 and she, in her affidavit by way of examination-in-chief deposed (i) that Puneet Beriwalla, Managing Director of Vipul and his agents Sandeep Kumar and Aman Sharma had approached the plaintiff in the beginning of 2005 and represented that Vipul was in the process of developing the property into a residential complex comprising of various flats; (ii) that the deceased plaintiff had agreed to purchase Flat no.D-7 in Tower-B measuring 4220 sq. ft. from Vipul at the rate of Rs.4,100/- per sq. ft. with total consideration to be calculated at the time of handing over of possession as there was a possibility of 2 to 3% variation; (iii) that oral agreement was reached on 31st March, 2005 when part sale consideration of Rs.5 lacs was paid and for which receipt was issued on 4th April, 2005; (iv) that in furtherance of the said agreement, another sum of Rs.15 lacs was paid by the deceased plaintiff to Vipul and receipt thereof issued; (v) that it

was subsequently represented to the deceased plaintiff that Orchid would be completing the project and Orchid had asked for further payment and which was made by the deceased plaintiff through her grandson vide cheque for Rs.15 lacs but which cheque was not encashed; Vipul thereafter demanded payment in cash and since the deceased plaintiff was not willing to make cash payment, on request of Vipul a sum of Rs.24 lacs was paid in the name of Marudhara Pvt. Ltd. an agent of Vipul and a further sum of Rs.21 lacs was paid in the name of another agent of Vipul; and, (vi) that after the notice dated 22nd May, 2007, the said amounts were refunded by the said agents stating that the said amounts could not be passed on to Vipul. The said Nishi Gupta filed another affidavit by way of examination-in-chief after amendment aforesaid of the plaint on the aspect of damages, but need to refer thereto is not felt.

28. It would be obvious from the aforesaid that in the affidavit by way of examination-in-chief of Nishi Gupta also no attempt was made to disclose why the price of Rs.4,100/- per sq. ft. was not mentioned in the receipts if had been agreed upon prior to the date of issuance of receipts or why the same was not mentioned in the letters and legal notice earlier got sent by the plaintiff; rather the affidavit by way of examination-in-chief of Nishi Gupta affirms that the entire dealing of the plaintiff was with Sandeep Kumar from SKN Properties and Aman Sharma from S.V.S. Properties who were claiming to be the agents of Vipul. There is also no explanation why the plaintiff, even after being informed that the project had fallen to the share of Orchid and who had also demanded payment from the plaintiff, yielded to the demand for payment of Vipul and made payments to the agents of Vipul. Rather, the conduct of the deceased plaintiff, as evident from the

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affidavit by way of examination-in-chief of her legal heir Nishi Gupta, of accepting refund of Rs.45 lacs claimed to have been paid besides the sum of Rs.20 lacs, if paid in pursuance to the Agreement to Sell, even if in the name of others but at the instance of Vipul, shows that the plaintiff was not ready and willing to perform her part of the agreement and the claim for specific performance is an afterthought. The same is also evident from the tenor otherwise of the legal notice dated 22nd May, 2007 Ex.PW1/10 in which the plaintiff claimed that the entire development of the flats was illegal, contrary to law and contrary to the orders of the Supreme Court of India and a fraud had been played by Vipul on DDA, the Supreme Court and on the prospective purchasers. The plaintiff in the said legal notice threatened the addressees with criminal action. The plaintiff cannot on the one hand claim Vipul to have acted fraudulently in the matter of transacting with the plaintiff and on the other hand claim specific performance.

29. The legal heir of the plaintiff Nishi Gupta appearing as the sole witness for the plaintiff, in her cross-examination deposed (i) that the deceased plaintiff was her mother-in-law; (ii) that she did not know the educational qualification of the deceased plaintiff; (iii) that the deceased plaintiff understood Hindi and little bit of English; the deceased plaintiff could write and read Hindi properly but so far as English was concerned, she did not know; (iv) that she did not know what newspaper the deceased plaintiff subscribed to; (v) that she did not know the source of income of the deceased plaintiff or her savings or the pension of the husband of the deceased plaintiff; (vi) that she did not know whether the deceased plaintiff was paying income tax or not; (vii) that some agents from the side of Vipul

had approached the deceased plaintiff; the said agents did not give any authority letter in their favour from Vipul; (viii) that the said agents were marketing the properties of Vipul as also of other promoters; (ix) that the deceased plaintiff was getting one English newspaper but she did not know the name thereof; (x) that the husband of the deceased plaintiff used to read the English newspaper and if there was anything interesting used to narrate it to the deceased plaintiff; (xi) that the husband of the deceased plaintiff died in March, 2009 and she did not know after his death who used to read the English newspaper and translate the same for the deceased plaintiff; (xii) that she could not tell who from Vipul demanded the cheque from the deceased plaintiff; (xiii) that there was no document to show that the deceased plaintiff had means to pay for the flat; (xiv) that she could not tell whether the deceased plaintiff had taxable income or not; (xv) that she had married the son of the deceased plaintiff in 1987 and after marriage had been living mostly in USA and had shifted back to Mumbai in October, 2006 and since then had shifted to Gurgaon in 2014; (xvi) that the deceased plaintiff was all through a housewife; (xvii) that she was not present when the deceased plaintiff met Mr. Puneet Beriwalla; (xviii) that there was no written agreement to sell the flat by Vipul in favour of the deceased plaintiff; “There was an oral agreement. When she rendered the cheques, she was given receipts from the office of the defendant no.1 specifically mentioning the amount, the Cheque No. and the property number in question”; the said receipts were Ex.PW1/3 and Ex.PW1/5; (xix) it is correct that neither Ex.PW1/3 nor Ex.PW1/5 mentioned the total sale consideration; and, (xx) that she could not tell when the construction of the building was commenced and when it finished.

30. As would be obvious from the above, the sole witness examined being the legal heir of the plaintiff, has been unable to prove or even deposed as to the oral Agreement to Sell in which the said consideration of Rs.4,100/- per sq. ft. is stated to have been agreed.

31. In this context, the claim of the deceased plaintiff in the two legal notices preceding the suit and as has emerged in the evidence of the heir of the deceased plaintiff, of the deceased plaintiff having dealt with Sandeep Kumar from SKN Properties and Aman Sharma from S.V.S. Properties becomes relevant. What emerges is that the deceased plaintiff dealt only with the said persons who claimed to be the agents of Vipul and there was no direct talk between the deceased plaintiff and Mr. Puneet Beriwalla of Vipul. The heir of the plaintiff also in her evidence admitted the fact of the deceased plaintiff having dealt with Sandeep Kumar from SKN Properties and Aman Sharma from S.V.S. Properties; there is no explanation why in the evidence the said Sandeep Kumar from SKN Properties and Aman Sharma from S.V.S. Properties who were admittedly involved in the transaction, were not called to depose. The plaintiff has also been unable to prove that the said persons had any authority from Vipul. Else the practice of the trade is of brokers marketing/selling various properties including projects of various developers of real estate, and there is no presumption of the said Sandeep Kumar from SKN Properties and Aman Sharma from S.V.S. Properties being 'agents' within the meaning of the Contract Act of Vipul. Moreover the said persons were the best persons to depose about the agreement if any as the price and other terms and conditions settled and the plaintiff having suppressed the best evidence without any explanation, adverse inference has to be drawn against the plaintiff and in favour of the

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defendants. Moreover the plaintiff claims to have paid, besides Rs.20 lacs paid to Vipul, a sum of Rs.45 lacs to the said Sandeep Kumar from SKN Properties and Aman Sharma from SVS Properties at their asking, to Marudhara Pvt. Ltd. Therefrom also it is evident that the said persons who have indeed refunded monies received in their own name to the plaintiff, are not inimical to the plaintiff.

32. Though in view of the above, need to discuss the evidence of the defendants is not felt but for the sake of completeness I proceed to do the same, to see if there is any admission in their examination-in-chief or cross-examination favouring the plaintiff.

33. Vipul has examined its employee and authorized signatory Rakesh Sharma as DW1 and Orchid examined its director Ajay Goel as DW2.

34. DW1 Rakesh Sharma has *inter alia* deposed, (i) that the deceased plaintiff on her own had approached Vipul in March, 2005 intending to invest in a property in the Aurobindo Marg project and gave a deposit of Rs.5 lacs; (ii) no agreement of any kind was entered into by Vipul with the plaintiff; (iii) subsequently the deceased plaintiff of her own will and volition deposited further amount of Rs.15 lacs with Vipul; (iv) the said amounts were deposited as merely her expression of interest in the project and were paid towards 'registration charges' for booking the flat; (v) that Vipul did not make any representation to the deceased plaintiff nor entered into any agreement oral or written with the deceased plaintiff; (vi) that the receipts Ex.PW1/3 and Ex.PW1/5 issued by Vipul to the deceased plaintiff clearly provide that the payment of the said amounts did not entitle the deceased plaintiff to claim allotment/ownership/title to the property - the

said amounts were not a part of any sale consideration; and, (vii) the payments were contingent.

35. Nothing beneficial to the plaintiff could be elicited in the cross-examination of DW1 Rakesh Sharma save that DW1 Rakesh Sharma joined the employment of Vipul in July, 2006 and was deposing on the basis of records and that Mr. Puneet Beriwalla was a director of Vipul and till then continued to be the director of Vipul and authorised to enter into agreements on behalf of Vipul.

36. DW2 Ajay Goel, Director of Orchid deposed that there was no privity of contract between the deceased plaintiff and Orchid. In his cross-examination by the counsel for the plaintiff again nothing beneficial to the plaintiff could be elicited. He however in his cross-examination by the counsel for Vipul admitted that the amount of Rs.20 lacs had been transferred to the account of Orchid.

37. Once the plaintiff has failed the prove oral Agreement to Sell, the suit for specific performance on the basis of receipt dated 4th April, 2005 Ex.PW1/3 and receipt dated 28th October, 2005 Ex.PW1/5 is not tenable owing to the same not constituting concluded contract.

38. Once there is no concluded contract, the question of breach thereof leading to damages also does not arise.

39. I now proceed to answer the issues framed:-

1. The plaintiff has failed to prove that there was an oral agreement for sale and purchase of property. The said issue is

accordingly decided against the plaintiff and in favour of the defendants.

2. The plaintiff has failed to prove having handed over cheque no.422974 dated 6th May, 2006 amounting to Rs.15 lacs to Orchid. Thus the question of effect of the said payment does not arise; rather it is admitted that the said cheque was not issued by the plaintiff in favour of Orchid and copy of the cheque proved as Ex.PW1/6 bears out the same. The issuer of the said cheque has not been examined to prove that he had issued a cheque on behalf of the deceased plaintiff. He alone could have proved the same. Resultantly Issue no.2 is decided against the plaintiff and in favour of the defendants.
3. Issue no.1 having not been decided in the affirmative, the need to decide whether the plaintiff was ready and willing to perform her part of the contract does not arise. The plaintiff has however failed to lead any evidence of readiness and willingness or of being possessed of funds to pay the balance sale consideration even though the sale consideration agreed has not been proved. Issue no.3 is accordingly decided against the plaintiff and in favour of the defendants.
4. In view of the findings on Issues no.1,2&3 above, the plaintiff is not entitled to a decree for specific performance and Issue no.4 is decided against the plaintiff and in favour of the defendants.

5. The entitlement of the deceased plaintiff to refund of Rs.20 lacs admittedly paid to Vipul has not been disputed by the defendants. To that extent the Issue no.5 did not arise. Thus Issue no.5 is decided in favour of the plaintiff by holding that the plaintiff is entitled to a money decree for recovery of Rs.20 lacs. DW2 Ajay Goel of Orchid in his cross-examination by the counsel for Vipul has admitted that the said amount, on transfer of the project from Vipul to Orchid, stood transferred from Vipul to Orchid. However in law Vipul cannot avoid liability to the plaintiff. It is thus further held under Issue no.5 that the plaintiff is entitled to refund jointly and severally from both Vipul and Orchid.
- 5A. The claim for damages by way of *mesne profits*, at the rate of Rs.6 lacs per annum has to be necessarily decided against the plaintiff and in favour of the defendants, in view of the finding of there being no concluded contract between the parties.
- 5B. The plaintiff, in the suit as originally filed on 19th November, 2007 did not seek the relief of damages. The plaintiff, on 21st December, 2015 applied for amendment of the plaint and which was allowed on 29th September, 2016 and the plaintiff filed amended plaint on 6th October, 2016. Section 21 of the Specific Relief Act, 1963 mandates the Court to, at any stage of proceeding, allow a plaintiff in a suit for specific performance to amend the plaint for including a claim for compensation for breach of contract. Section 22 similarly

allows amendment of the plaint at any stage to claim the relief of possession and refund of earnest money etc. I have in ***Ram Mohan Vs. Anil Kumar*** 2017 SCC OnLine Del 10922 held that in view of the mandate of the aforesaid Sections, the Court cannot deny the amendment on the ground of having been sought after the proceeding had commenced. For the same reasons as set out therein I am also of the view that once the legislature has mandated the amendment of the plaint, in a suit for specific performance, to include the claims of compensation for breach of contract or for refund of earnest money at any stage of the suit, the benefits so conferred on a plaintiff cannot be whittled away by holding that though the plaint can be amended at any stage to include such relief but the relief so permitted to be included would be denied on the ground of being barred by time. In fact in the order dated 29th September, 2016 allowing the amendment of plaint also attention of the counsel for the plaintiff was drawn to Section 21. Thus qua additional Issue No.5B though academic in the light of findings aforesaid, it is held that the claim for compensation and for refund of Rs.20 lacs is within time.

6. Again DW2 Ajay Goel Director of Orchid has admitted to taking over the project from Vipul. Issue no.6 is accordingly decided by holding that Orchid had taken over the project from Vipul but by further holding that since there was no agreement between the plaintiff and Vipul, the question of Orchid being

bound to honour the same does not arise. The said issue is decided accordingly.

7. Though Sandeep Kumar from SKN Properties and Aman Sharma from S.V.S. Properties were merely brokers/agents and were not a necessary party to this suit for specific performance and the suit thus cannot be said to be bad for their non-joinder but as aforesaid, were necessary witnesses to prove the case of the plaintiff and whom the plaintiff has failed to examine. Issue no.7 is decided accordingly.
8. Issue no.8 is qua entitlement if any of the plaintiff to interest on the amount of Rs.20 lacs and the date from which the plaintiff is entitled to interest. The plaintiff, as per the reliefs claimed in the amended plaint has sought refund of Rs.20 lacs with interest at 18% per annum. However no pre suit interest has been claimed. The entitlement of the plaintiff is thus only to *pendente lite* and future interest. As far as rate of interest is concerned, finding the plaintiff to have failed to prove the pleaded case of oral agreement to sell and axiomatically finding the plaintiff to have falsely claimed an oral agreement to sell with respect to total price and yet further finding that the defendants did not dispute refund of the said amount and considering the falling rates of interest, the rate of interest *pendent lite* and for a period of three months from the date the judgement is released, is limited to 7% per annum and

thereafter at 10% per annum. Issue no.8 is decided accordingly.

40. In view of the findings on the issues aforesaid, the plaintiff is held not entitled to the reliefs of specific performance or of recovery of any *mesne* profits or damages. The plaintiff however having been found entitled to refund of Rs.20 lacs with interest as aforesaid, a decree is passed in favour of the plaintiff and jointly and severally against the defendant no.1 Vipul Infrastructure Developers Ltd. and defendant no.2 Orchid Infrastructure Developer Ltd., of recovery of Rs.20 lacs with interest *pendente lite* and for a period of three months from the date of release of this judgment, at 7% per annum and thereafter at the rate of 10% per annum. The plaintiff having litigated unnecessarily and on a false plea, no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

MARCH 23, 2020

FEBRUARY 05, 2020

‘ak/gsr/pp’..