

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
IN ITS COMMERCIAL DIVISION**

**COMM SUMMARY SUIT NO. 40 OF 2020**

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Shabbir Sharafali Golawala ...Plaintiff

**Versus**

Neptune Ventures & Developers Pvt. Ltd. &  
ors. ...Defendants

Mr. Yahya Ghoghari, a/w Mustafa Sahbbir Shamim, for the  
Plaintiff.

None for the Defendants.

**CORAM: N. J. JAMADAR, J.**

**RESERVED ON : 26<sup>th</sup> July, 2022**

**PRONOUNCED ON: 21<sup>st</sup> September, 2022**

**ORDER:-**

1. This commercial division summary suit is instituted for recovery of a sum of Rs.1,74,96,000/- along with interest at the rate of 24% p.a. on the principal amount of Rs.81,00,000/-.

2. Defendant no.1 is a Private Limited Company. Defendant nos.2 and 3 are the Directors of defendant no.1. Defendant no.4 is the Company Secretary. Defendant nos.2 to 4 are in-charge of and responsible to the affairs of defendant no.1 Company.

3. In the month of September/October, 2014, defendant no.3 approached the plaintiff, through Mr. Juzer Golawala, and induced the plaintiff to purchase Flat No.1501 admeasuring

about 959 sq. ft. on the 15<sup>th</sup> floor of the building Neptune Eleve to be constructed on a plot of land situated at LBS Marg, Bhandup (W), for a consideration of Rs.1,62,22,475/-. The plaintiff was assured that in the event the said project could not be completed, within the specified time, the defendants would pay interest at the rate of 24% p.a. on the investment, till the refund of the said amount. Based on the representations of the defendants the plaintiff made payment of a sum of Rs.81,00,000/- towards part consideration, vide three cheques, each of which was drawn on HSBC Bank Limited, Mumbai, for Rs.27,00,000/-. Thereupon an allotment letter was issued on 5<sup>th</sup> May, 2016 in favour of the plaintiff.

4. The plaintiff repeatedly inquired with the defendants about the progress of the said project. Initially, the defendants informed the plaintiff that they were negotiating a deal with TATA Housing Development Company for development of the said project. In the month of February, 2018 the defendants addressed a letter to the plaintiff informing him that they would be shifting investors/purchasers of flats in Neptune Eleve to Wing 'C' or 'D' as the latter buildings would be completed sooner. Realizing that the defendants were deceiving him, the plaintiff addressed a legal notice on 10<sup>th</sup> March, 2018 calling

upon the defendants to refund the entire amount of Rs.81,00,000/- along with interest at the rate of 24% p.a.

5. The defendants kept on assuring the plaintiff that the investment was safe. He was given to understand that the investment made by him had earned profit of Rs.93,96,000/- calculated at the rate of 24% p.a. as of 30<sup>th</sup> September, 2019. Again the defendants represented to the plaintiffs that they were entering into a joint venture agreement with Shapoorji Pallonji. Even the said arrangement did not materialize. Pursuant to repeated demands, the defendants eventually issued a revised allotment letter on 26<sup>th</sup> April, 2019, wherein the defendants offered Flat No.3103 on the 31<sup>st</sup> Floor in the 'D' wing to the plaintiff. The plaintiff asserts the defendants have failed to refund the principal amount along with interest accrued thereon, on one or the other pretext. Hence, this suit based on the acknowledged liability.

6. The writ of summons was duly served on the defendant nos.1 and 2 and affidavit of service is filed on behalf of the plaintiff.

7. Since the writ of summons was served on the defendants during lock-down by an order dated 24<sup>th</sup> March, 2021, two weeks time was granted to the defendants to enter appearance.

On that day, Mr. Mayur Thorat had appeared for the defendants. However, the defendants have not entered appearance.

8. In view of the provisions contained in Order XXXVII Rule 2(3) of the Code of Civil Procedure, 1908, in the event of default on the part of the defendants to enter appearance, the averments in the plaint are required to be deemed to be admitted and the plaintiff becomes entitled to a decree.

9. The plaintiff has tendered an affidavit in support of the claim, affidavit of documents and a compilation of documents. I have heard Mr. Ghoghari, the learned Counsel for the plaintiff.

10. The learned Counsel for the plaintiff submitted that the claim of the plaintiff that he had paid a sum of Rs.81,00,000/- towards part consideration for purchase of Flat No.1501 in Neptune Eleve is substantiated by the receipts (Exhibit P1/2 to P1/4) executed on behalf of defendant no.1. The allotment letter dated 5<sup>th</sup> May, 2016 (Exhibit P1/5) further fortifies the said claim as it contains the material terms of the contract between the parties. Defendant no.1 allotted Flat No.1501 admeasuring 959 sq. ft. East Wing 1 in Neptune Eleve for consideration of Rs.1,62,22,457/-. The allotment letter records that the plaintiff had deposited with the defendant a sum of Rs.81,00,000/-, till that date.

11. Taking the Court through the record, which evidences the subsequent developments in the nature of the proposed shifting of the investors/purchasers from Wing 'B' to Wing 'C' or Wing 'D', negotiations with developers like Shapoorji Pallonji, and the revised allotment letter dated 26<sup>th</sup> April, 2019, wherein instead of Flat No.1501 the defendants professed to allot Flat No.3103 on 31<sup>st</sup> Floor in 'D' Wing, for the consideration of Rs.1,59,23,595/- which also acknowledges the fact that the plaintiff had already paid a sum of Rs.1,28,58,816/- by way of earnest, Mr. Ghoghari would urge that quantification of the said amount of Rs.1,28,58,816/- lends credence to the case of the plaintiff that the defendants had agreed to pay interest on principal amount of Rs.81,00,000/-. This, according to Mr. Ghoghari, constitutes a clear acknowledgment of liability.

12. I have perused the original documents tendered by the plaintiff in support of his claim. A conjoint reading of the receipts (Exhibit P1/2 to P1/4) with the initial allotment letter dated 5<sup>th</sup> May, 2016 makes it abundantly clear that the plaintiff had deposited with the defendants a sum of Rs.81,00,000/-. The allotment letter further records that Flat No.1501 in East Wing 1 Neptune Eleve was allotted to the plaintiff for a consideration of Rs.1,62,22,475/-. Thus, the claim of the

plaintiff that he had paid a sum of Rs.81,00,000/- towards part consideration of Flat No.1501 in a building to be developed by the defendant is established beyond the pale of controversy.

13. On the aspect of the alleged agreement to pay interest at the rate of 24% p.a. on the said amount, in the event of failure to handover the flat within the specified period, there is no document which could constitute a written contract to pay interest. The developments, in the intervening period, in the nature of proposal to shift the purchasers to different buildings and issue of legal notice by the plaintiff to the defendants calling upon them to refund the amount along with interest do not bear upon this issue.

14. Revised allotment letter dated 26<sup>th</sup> April, 2019 however provides requisite support to the claim of the plaintiff. Clause (i) of paragraph 'D' of the letter dated 26<sup>th</sup> April, 2019 reads as under:

"D) Brief of revised allotment letter are as follows:

i. You have already paid the Earnest money of Rs.1,28,50,816/- (Rupees One Crore Twenty-eight lakh Fifty thousand Eight hundred and sixteen only) towards the earlier allotted Flat No.1501, on 15<sup>th</sup> Floor in East Wing 1/A Wing having Carpet Area of 959 Sq. Feet of "100 above Building" vide allotment letter dated 05.05.2016 and paid Earnest Money, which shall be adjusted against the total consideration payable towards the allotment/sale of said premises by us. The balance consideration amount is to be paid by you as per payment Schedule annexed herewith as Annexure "A", wherein no payment will be made by you till the completion of plinth."

(emphasis supplied)

15. The aforesaid stand of the defendants that the plaintiff had till date paid an earnest money of Rs.1,28,50,816/- towards Flat No.1501, which was initially allotted to the plaintiff, in the context of the positive assertion of the plaintiff that he had only paid a sum of Rs.81,00,000/- to the defendant on 10<sup>th</sup> November, 2014, contains an implicit admission that the amount over and above the principal amount of Rs.81,00,000/- was in the nature of return/interest on the said amount. This constitutes an admission of liability to the extent of Rs.1,28,50,816/-.

16. Since the plaintiff's claim and documents tendered in support thereof have gone unimpeached and the said amount of Rs.1,28,50,816/- represents the principal amount plus the return thereon, which the defendants acknowledged as the liquidated amount, I am persuaded to pass the decree.

17. Hence, the following order:

**: O R D E R :**

(i) The suit stands partly decreed against defendant nos.1 to 3.

(ii) Defendant nos.1 to 3 do pay the sum of Rs.1,28,50,816/- along with further interest at the rate of

9% p.a. on the principal amount of Rs.81,00,000/- from the date of the institution of the suit till payment and/or realization.

(iii) Defendant nos.1 to 3 do pay the costs of the suit to the plaintiff.

(iv) The suit stands dismissed against defendant no.4.

(v) The plaintiff is entitled to refund of Court-fees, if any, in accordance with Rules.

(vi) Decree be drawn and sealed expeditiously.

**[N. J. JAMADAR, J.]**