

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

% *Judgment Reserved on : 18th January, 2023*
Judgment Delivered on : 24th January, 2023

+ **CS(OS) 28/2023, I.A. 5503/2022 (O-XXXVIII R-5 of CPC)**

SUNITA SAMARIA SINGH Plaintiff
Through: Mr.Ankit Jain and Mr.Brijesh
Chaudary, Advocates.
versus

M/S ANSAL BUILDWELL LTD. Defendant
Through: Mr.Pavan Narang, Mr.Himanshu
Sethi, Ms.Aishwarya Chhabra and
Mr.Sushil Kaushik, Advocates.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL
JUDGMENT

AMIT BANSAL, J.

I.A. 9251/2022 (O-VIII R-10 of CPC) & CS(OS) 28/2023

BRIEF FACTS

1. Briefly, the case set up by the plaintiff in the plaint is as under:
 - 1.1 The plaintiff booked a Flat bearing no.F-SF019I, Second Floor, ad measuring approximately 1644 square feet (hereinafter 'the Flat') in the project "FLORENCE PREMIUM FLOORS" launched by the defendant and proposed to be constructed in Sushant Lok-II, Gurugram, Haryana. The total consideration for the Flat was Rs.1,25,00,000/- and the plaintiff opted for a construction linked payment plan. The plaintiff paid a booking amount of Rs.14,00,000/-, for which a receipt dated 23rd March, 2016 was issued.
 - 1.2 In terms of Clause 12 of 'Terms & Conditions for Allotments' attached with the application form of the defendant, the possession of the

Flat was to be handed over to the plaintiff within 3 to 3½ years.

1.3 Vide letter dated 23rd March, 2016, the defendant called upon the plaintiff to pay the second installment amounting to Rs.12,05,000/-.

1.4 On 12th April, 2016, the plaintiff paid a sum of Rs.11,80,000/- towards second installment to the defendant, for which a receipt was issued by the defendant.

1.5 Vide letter dated 1st May, 2016, the plaintiff requested the defendant to change the allotted floor i.e., second floor to a ground floor in the same building and paid the differential amount for the same. The plaintiff also furnished an advance amount of Rs.14,75,100/- towards the payment of third installment.

1.6 Vide letter dated 17th May, 2016, the defendant, allotted F-GF019I, ground floor, to the plaintiff, however with a reduced area of 1575 square feet and increased the cost to Rs.1,49,00,000. The builder/buyer agreement dated 14th May, 2016 was executed between the parties, in terms of which the price of the Flat was Rs.1,49,00,000/- inclusive of External Development Charges (EDC).

1.7 Vide letter dated 3rd December, 2016, the defendant issued a demand letter seeking payment of fourth installment seeking payment upto 40% of the total cost of the Flat.

1.8 On 21st December, 2016, 23rd January, 2017 and 1st March, 2017, pursuant to demand raised by the defendant, plaintiff paid Rs.16,84,490/-, Rs.15,57,050/- and Rs.15,63,790/- towards fourth, fifth and sixth installment respectively, for which the defendant issued receipts.

1.9 On 15th March, 2017, the plaintiff's husband, being an architect visited the construction site and noticed poor quality of construction being

carried out by the defendant. These were brought to the attention of the defendant vide emails dated 22nd March, 2017, 23rd March, 2017 and 30th March, 2017.

1.10 On 5th April, 2017, 14th December, 2017 and 21st April, 2018, pursuant to a demand raised by the defendant, the plaintiff paid Rs.15,57,050/-, Rs.16,68,800/- and Rs.18,40,859/- towards seventh, eighth and ninth installment respectively and the defendant issued receipts for the same.

1.11 Vide email dated 15th June, 2018, the defendant informed the plaintiff that the construction work of the Flat was scheduled to be completed within 30-36 months from the date of sanction of the building plan. At that point of time, the plaintiff had paid a total of 90% amount towards the cost of the Flat.

1.12 Vide communication dated 17th April, 2020, the defendant demanded tenth installment and stated therein that the Flat was almost completed including laying of vitrified tile flooring and skirting works, assuring the plaintiff that the remaining work will be completed soon.

1.13 On 24th June, 2020, plaintiff paid the tenth installment of Rs.7,45,000/- thereby making a payment of 95% of the total amount towards the cost of the Flat.

1.14 Plaintiff and her husband visited the Flat on 2nd October, 2021 and 3rd October, 2021 and was shocked to know that the construction of the Flat was yet to be completed. Further, the quality of construction carried out was also poor. Plaintiff has filed along with the plaint photographs of the Flat taken on 3rd October, 2021 to show the poor quality of construction and the fact that the Flat was not ready on the said date.

1.15 The plaintiff sent a demand letter dated 22nd November, 2021 to the defendant requesting the defendant to refund the amount of Rs.1,51,47,340/- along with interest @ 24% per annum, which was the interest rate prescribed in the allotment agreement.

1.16 In the reply dated 10th December, 2021 to the aforesaid communication, the defendant admitted that only 95% of the construction had been completed. However, the defendant refused to refund the amount.

2. Accordingly, the present suit was filed on behalf of the plaintiff as a commercial suit, seeking recovery of Rs.2,59,90,895/- along with *pendente lite* and future interest @ 15% per annum.

PROCEEDINGS IN THE SUIT

3. Summons in the suit were issued on 25th January, 2022 and defendant was served by way of speed post on 14th February, 2022 and by way of courier and email on 9th February, 2022. Despite service, no written statement was filed on behalf of the defendant. Vide order dated 18th May, 2022, the defendant was proceeded against *ex parte* and was restrained from creating any third-party rights in respect of any of the floors of the property bearing no. F-019I, FLORENCE PREMIUM FLOORS, Sushant Lok-II, Gurugram. Till date, no written statement has been filed on behalf of the defendant.

4. Subsequently, an application under Order XIII-A of the Code of Civil Procedure, 1908 (CPC) as applicable to commercial suits, was filed on behalf of the plaintiff. Notice in the said application was issued on 2nd June, 2022. It was only at that stage that the defendant appeared before Court on 18th July, 2022 and sought time to file reply to the said application. Reply to

the said application had been filed on behalf of the defendant. However, no application was filed for setting aside the *ex parte* proceedings against the defendant.

5. Parties were referred for mediation vide order dated 26th September, 2022. However, the mediation proceedings were not successful.

6. On 12th January, 2023, upon an objection raised on behalf of the defendant that the present suit is not maintainable as a commercial suit, the present suit was converted into an ordinary suit and the application filed under Order XIII-A of the CPC was directed to be treated as an application under Order VIII Rule 10 of the CPC. Accordingly, the present suit has been re-numbered as an ordinary suit by the Registry.

7. At the hearing on 12th January, 2023, counsel for the defendant was asked to take instructions as to whether Occupancy Certificate (OC) has been received in respect of the Flat. Upon taking instructions, the counsel for the defendant submitted that OC was applied by the defendant only on 27th May, 2022 and till date the OC has not been received.

SUBMISSIONS OF THE PARTIES

8. Counsel for the plaintiff has taken me through the various documents filed along with the plaint in support of his submission that the plaintiff has paid a sum of Rs.1,51,47,340/- to the defendant and the fact that the Flat was not completed by the defendant as per the agreed timelines. Reliance is placed on the judgment in ***Pioneer Urban Land & Infrastructure Ltd. v. Govindan Raghavan and Ors.***, AIR 2019 SC 1779. Therefore, he submits that the plaintiff is entitled to a decree in the suit.

9. The case of the defendant in its reply to I.A. 9251/2022 and as per the

submissions made by the counsel for the defendant can be summarized as under:

- (i) Construction could not be completed in a timely manner on account of onset of Covid-19 pandemic.
- (ii) Majority of the construction was completed by December, 2021 and the defendant was only working on the finishing of the apartment.
- (iii) Vide emails dated 4th March, 2022 and 4th May, 2022, the defendant has offered possession of the Flat to the plaintiff. However, no reply has been sent on behalf of the plaintiff.

ANALYSIS AND FINDINGS

10. I have heard the counsels for the parties and perused the record of the case.

11. In view of the fact that no written statement has been filed on behalf of the defendant, all the averments made in the plaint have to be taken to be admitted. Further, since no affidavit of admission/denial has been filed on behalf of the defendant in respect of the documents filed with the plaint, in terms of Rule 3 of the Delhi High Court (Original Side) Rules 2018, the same are deemed to have been admitted.

12. The plaint has been duly verified and is also supported by the affidavit of the plaintiff. Therefore, taking into account the nature of reliefs sought in the suit, no useful purpose would be served by directing the plaintiff to lead evidence.

13. In the present case, there is no dispute that as per the construction linked payment plan of the defendant, the plaintiff had paid a sum of Rs.1,51,47,340/- to the defendant. The aforesaid amount was paid as per the

demands raised by the defendant from time to time and the plaintiff has placed on record the receipts issued by the defendant in respect of the aforesaid amount. In the statement of account enclosed with the offer of possession dated 4th March, 2022, the defendant has admitted that it has received an amount of Rs.1,51,47,340/- towards the basic price of the Flat and Good and Service Tax (GST). The aforesaid offer of possession has been admitted by the defendant in the reply filed by defendant to I.A.9251/2022. Therefore, the only issue to be decided is whether the Flat has been constructed by the defendant as per the agreed timelines or not.

14. Counsel for the defendant submits that the reliance placed by the plaintiff on Clause 12 of Terms and Conditions attached to the application form is misplaced as the said application form is completely blank and does not bear the signatures of the plaintiff. However, in the email dated 15th June, 2018 from the defendant to the plaintiff, the defendant has admitted that the completion of construction at the Flat is scheduled within 30 to 36 months from the date of sanctioned building plan. Yet, the defendant has failed to disclose the date on which the sanctioned building plan was received by the defendant. The e-mail dated 15th June, 2018 only states that the sanctioned plan was lying in the custody of the defendant and this fact was informed to the plaintiff vide letter dated 19th May, 2017. The relevant extracts from the e-mail dated 15th June, 2018 are set out below:

“1. The completion of construction work of the said unit is scheduled within 30 to 36 months from the date of sanctioned building plan. Accordingly, the possession of said unit will be offered to you. Whereas, payment scheduled of your unit is as per the payment plan opted by you. For more details kindly ref to the builder buyer agreement executed between us.

As desired, enclosed please find our official Receipt no.389008 dt.01/04/18 for Rs.9,20,000 & Receipt no38909 dt.21/04/18 for Rs.9,20,859.45 issued against your last payment made towards the due installment of the unit.

2. The Sanctioned building plan of the unit is lying ready in our custody as was also intimated to you vide our letter dated 19/05/17. The same can be collected by you/your authorized representative between 2.00PM to 5.00 on any working days on prior intimation to the Undersigned.”

15. In the communication dated 3rd December, 2016 sent by the defendant to the plaintiff, it has been stated that “ON COMPLETION OF D.P.C.”, the next installment of the plaintiff had fallen due. It follows from the same that at this point of time i.e. 3rd December, 2016, the plaintiff would have got the sanctioned plan as without the sanction plan the defendant could not have started the construction work. Therefore, in a best case scenario for the defendant, the period of 3 to 3½ years would commence from 3rd December, 2016.

16. In the communication dated 17th April, 2020 sent by the defendant to the plaintiff, the defendant states that the construction of the Flat is at an advance stage of completion. The relevant extract from the said letter is given below:

“Please be informed that the construction of your said unit is in an advance stage of completion wherein, the Vitrified Tile flooring and skirting work in Living/Dining area & all the Bed rooms/Installation, Testing & commissioning of Over head water tank at terrace/installation of concealed cistern of EWS’s in toilets has been completed and Surface preparation & one coat of painting work has also been completed.”

17. The aforesaid communication is a clear admission by the defendant

that the Flat was not ready for its possession to be handed over even till 17th April, 2020. On 10th June, 2020, the defendant called upon the plaintiff to pay the tenth installment of Rs.7,45,000. On 26th June, 2020, the plaintiff informed the defendant that it had remitted a sum of 7,45,000/- towards the tenth installment and asked the defendant to submit photographs showing the status of work at the site.

18. The defendant failed to respond to the aforesaid communication of the plaintiff. Having not received any communication from the defendant for a long period of time, the plaintiff visited the Flat in October, 2021 along with her husband and found that the Flat was incomplete and the quality of construction is poor. The plaintiff has placed on record photographs of the property taken on 3rd October, 2021, which clearly show that the Flat was far from being complete.

19. The plaintiff vide communication dated 22nd November, 2021, addressed to the defendant, called upon the defendant to refund the entire amount paid by the plaintiff along with interest @ 24% per annum.

20. In response to the aforesaid letter, the defendant, vide communication dated 10th December, 2021 admitted that only 95% of the construction work has been completed. The relevant extracts from the said communication are set out below:

“Please be informed that the offer of possession of units booked under scheme of Florence Premium Floors, Sushant Lok-II has been started. In your case construction work of your unit is in very advance stage which has been carried as per standard specifications of the scheme and the possession of said unit is nearing completion which will be offered to you in the very near future without any discrepancies in the unit.

Kindly note, as 95% of the construction work has already been

completed and reached at the stage “on commencement of flooring”. As such, your request for refund of your paid-up amount along with 24% per annum against the said unit at this stage is not feasible. Henceforth, you may continue the booking of your said unit.”

21. The offer of possession was sent by the defendant to the plaintiff only on 4th March, 2022. As noted above, the OC was only applied for only on 27th May, 2022 and is yet to be received. Therefore, the defendant was not in a position to offer possession of the Flat to the plaintiff even on 4th March, 2022. It is apparent that even as on date the defendant is not in a position to offer possession of the Flat to the plaintiff in the absence of the OC.

22. The ground taken by the defendant that the construction of the Flat could not be completed in a timely manner on account of onset of Covid-19 pandemic is completely misconceived. Defendant has failed to place on record any material/communication in support of its submission that construction of the Flat could not be completed as per agreed time lines on account of Covid-19 pandemic. This ground was taken for the first time by the defendant in its reply to I.A. 9251/2022. In terms of the order dated 24th March, 2020 of the Ministry of Home Affairs, Government of India, a nationwide lockdown was imposed, which restricted the operation of non-essential activities with effect from 25th March, 2020 and was extended time to time. However, it is common knowledge that the construction activities were permitted to be resumed in June, 2020. Therefore, at best, the defendant could have claimed a benefit of 3-4 months only on account of Covid-19. However, in the present case, it is an admitted position that construction was yet to be completed till December, 2021 and OC has not been received till date.

23. The Supreme Court in *Pioneer Urban Land* (supra) has held that failure of a builder to hand over possession of a flat to the flat purchaser within a reasonable time and delay in obtaining Occupancy Certificate are reasons enough for the flat purchaser to terminate the agreement and not accept possession and to further seek refund of the money deposited by the purchaser along with interest thereon.

24. In view of the discussion above, the plaintiff is entitled to a decree of recovery of Rs.1,51,47,340/- along with simple interest @9% per annum.

25. At the hearing on 18th January, 2023, counsel for the plaintiff has handed over a chart showing the amount payable towards interest calculated @9% per annum on the principal amount and the same was taken on record. In terms of the said calculation, calculating interest from the date of each installment, a sum of Rs.78,86,012/- is payable towards interest.

26. Accordingly, a decree is passed in favour of the plaintiff and against the defendant for recovery of Rs.2,30,33,352/- along with future interest @ 9% per annum.

27. This court vide order dated 18th May, 2022 had granted interim injunction restraining the defendant from creating any third-party rights in the property bearing No. F-019I, Florence Premium Floors, Sushant Lok-II, Gurugram. The attachment of the aforesaid property stands confirmed and shall continue post the present judgment.

28. Decree sheet be drawn up.

29. All pending applications, if any, stand disposed of.

AMIT BANSAL, J.

JANUARY 24, 2023/dk