
(1999) 04 BOM CK 0039
In the Bombay High Court
Case No : Suit No. 1873 of 1985

Chandrakant Bhogilal Gohil	Vs	APPELLANT
Parushottam Mohanlal Makwana and others		RESPONDENT

Date of Decision : 26-04-1999

Acts Referred:

Contract Act, 1872 — Section 10
Limitation Act, 1963 — Article 54, 3
Specific Relief Act, 1963 — Section 15

Citation : AIR 2000 Bom 18 : (1999) 3 ALLMR 611 : (1999) 4 BomCR 439 :
(1999) 2 MhLj 846

Hon'ble Judges : R.J. Kochar, J

Bench : Single Bench

Advocate : Palan and H.R. Sharma, instructed by N.N. Vaishnava and Co, for the Appellant; S. Malik and Ms. B.H. Doshi, for the Respondent

Judgement

R.J. Kochar, J.—Heard the learned Counsel for the parties.

2. Briefly stated, according to the plaintiff, the facts are as under:-

By an agreement dated 28th May, 1981 entered into by and between the plaintiff and the 2nd defendants, the plaintiff agreed to acquire a flat bearing No. 2 on the first floor of the said building admeasuring about 550 sq. ft. (hereinafter referred as "the said flat") in the said building, which was then to be constructed by the 2nd defendants on the terms and conditions mentioned therein. Under the said agreement, though the plaintiff was required to pay total consideration amount of Rs. 94,500/- for purchase of the said flat, the plaintiff has made payment of Rs. 96,000/- to the 2nd defendants. The plaintiff has always been ready and willing to perform his obligation under the said agreement. The 2nd defendants were to hand over possession of the said flat to the plaintiff in any event in the first week of April 1985. The said agreement dated 28th May 1981 entered into by and between the plaintiff and the 2nd defendants has been registered with the Registrar of Assurances, Bombay. The 2nd defendants have

wrongly put the 1st defendant in possession of the said flat and thereby committed breach of the said agreement entered with the plaintiff. The plaintiff having performed his obligations under the said agreement is entitled to specific performance thereof. The suit has thus been filed for specific performance of the said agreement.

It is the case of the 1st defendant that he was a monthly tenant in respect of house bearing No. 2 in the building earlier situated on the same plot on which the said building has now been constructed which was then known as "PRAKASH SADAN" duly protected under the provisions of the Bombay Rent Act, 1947 at the monthly rent of Rs. 12. 10 paise. The said property belonged to the 3rd defendant and his brother, Shyam Mastakar of whom the 1st defendant was a tenant. Although the 3rd defendant has died during the pendency of the suit, for the reasons best known to the plaintiff, the heirs of the 3rd defendant have not been brought on record. The landlords of the said property permitted to 2nd defendants to develop the same and tripartite agreements were entered into by the tenants including the 1st defendant in the building known as "PRAKASH SADAN" with the 2nd defendants and the said landlords under which the tenants at the said "PRAKASH SADAN" including the 1st defendant were agreed to be provided with new accommodation in the said building then to be constructed by the 2nd defendants at the said property. Accordingly, an agreement dated 6th November, 1979 was also entered into by and between the 1st defendant, the 2nd defendants and the said landlords of the said property on the terms and conditions similar to the terms and conditions on which such agreements were entered into by the 2nd defendants and the said landlords with other tenants. Under the said agreement dated 6th November, 1979, the 1st defendant agreed to vacate and hand over to the 2nd defendants peaceful possession of the said House No. 2 at the said "PRAKASH SADAN" on the terms and conditions mentioned therein. The 2nd defendants agreed to provide the 1st defendant on ownership basis the premises admeasuring 165 sq. ft. in the said building then to be constructed at the said property free of cost. In respect of additional area of 235 sq. ft. agreed to be provided to the 1st defendant at the said building alongwith the said 165 sq. ft., the 2nd defendants agreed to charge to the 1st defendant-at the rate of 150 per sq. ft. from the 1st defendant. Accordingly, the 2nd defendants agreed to allot new premises in the said building to be constructed at the said property having an area of 165 sq. ft. free of cost and agreed to sell to the 1st defendant additional area admeasuring 235 sq. ft. at the rate of Rs. 150/- per sq. ft. of the built-up area. Thus the 2nd defendants and the said landlords agreed to provide the 1st defendant new premises at the said building then to be constructed by the 2nd defendants at the said property having area of 400/- sq. ft. (built up) for which the 1st defendant agreed to pay to the 2nd defendants an aggregate sum of Rs. 35,250/- in the manner provided for at the said agreement. The 1st defendant agreed to the request of the said landlords and the 2nd defendants had agreed to vacate the said House No. 2 at "PRAKASH SADAN" and to take allotment on ownership basis of the new

premises in the said building then to be constructed by the 2nd defendants threat as agreed to be allotted by the 2nd defendants on the terms and conditions mentioned in the said agreement. The 2nd defendants agreed to allot to the 1st defendant new premises bearing flat No. 5 on the 2nd floor of the said building on the basis of plans for construction of the new building at the said property tentatively prepared by the architects of the 2nd defendants for being submitted to the Municipal Corporation of Greater Bombay for approval thereof. The said plans being tentative, it was provided in the said agreement that the 1st defendant would not object to the required changes therein. It was also agreed by and between the parties to the said agreement that on the 1st defendant being put in possession of the new premises in the building to be constructed by the 2nd defendants at the said property, the tenancy rights of the 1st defendants in respect of the said House No. 2 would get extinguished and cease to exist. It is also the case of the 1st defendant that the 1st defendant paid to the 2nd defendants a sum aggregating to Rs. 20,000/- out of the said sum of Rs. 35,250/- required to be paid by him under the said agreement. It is the case of the 1st defendant that in the month of January, 1984, when the construction of the said building at the said property was more or less completed, the tenants in the old premises viz., the said PRAKASH SADAN including the 1st defendant were put in possession thereof. The 1st defendant was put in possession of the flat No. 2 at the said building by the 2nd defendants since the flat No. 5 originally agreed to be allotted to the 1st defendant having an area of 400 sq. ft. (built up) was not constructed by the 2nd defendants in the said building. Since then the 1st defendant has been residing in the said flat No. 2 at the said building with the members of his family in his own legal rights as lawful owner thereof. The area of the said flat No. 2 is 410 sq. ft. (built Up). The tenancy rights in respect of the said house NO. 2 which the 1st defendant was earlier occupying in the said PRAKASH SADAN extinguished and ceased to exist on the 1st defendant being allotted and put in possession of the said flat No. 2. Since the 2nd defendants did not form a society as was required to be formed by the 2nd defendants, all the tenants at the said old premises who were put in possession of the said building formed a co-operative housing society in the name of the Deepali Co-operative Housing Society Limited, (hereinafter referred as "the said society") and got the same registered under the Maharashtra Co-operative Societies Act, 1960 and became members thereof. The 1st defendant also became a member of the said society and the said society has issued share certificate to the 1st defendant as issued to other members thereof occupying flats in the said building. The certificate so issued to the 1st defendant has been issued in the name of the 1st defendant. Since the possession of the 1st defendant was sought to be disturbed by the plaintiff and as the 1st defendant apprehended that his possession in respect of the said flat No. 2 was likely to be disturbed , the 1st defendant filed a suit, being Suit No. 1830 of 1985 in the City Civil Court at Bombay and on 25th March 1985 obtained an ad-interim order of injunction not to forcibly dispossess the 1st defendant therefrom without due process of law. The said suit filed by the first defendant is still pending in that Court.

3. The defendant Nos. 2 and 3 have not filed their written statements and have not contested the suit. It, however, does appear that the defendant No. 2 had filed his affidavit in reply to the notice of motion taken out by the plaintiff. The said affidavit of the 2nd defendant builder cannot be treated as a written statement in the present suit as neither he has appeared to say so nor has he participated in the proceedings which have gone undefended on his behalf. It is also an admitted position that the 3rd defendant was deleted from the proceedings as he had expired during the pendency of the proceedings though no formal amendment appears to have been carried out and no reliefs also are sought against him by the plaintiff. On the basis of the aforesaid pleadings, the following issues were framed on 21st December 1998.

i) Whether the suit is barred by the Law of Limitation, as alleged in para 1 of the Written Statement?

ii) Whether the suit is bad for non-joinder of parties as alleged in para 3 of the Written Statement?

iii) Whether the defendant No. 1 is in unauthorised and illegal occupation of flat No. 2, 1st floor of Deepali Apartment ?

iv) Whether the defendant No. 1 is entitled to use, occupation and possession of the said flat No. 2, under tripartite agreement, referred to in para 9 of the Written Statement ?

v) Whether the defendant No. 1 was put in possession of the said flat as per terms of agreement dated 6th November 1979 ?

vi) Whether the plaintiff is entitled to specific performance of the said agreement dated 28th May 1981 ?

vii) Whether the plaintiff is entitled to reliefs and if so, what reliefs?

viii) What orders?

4. Both the parties adduced their documentary evidence as also their respective oral evidence. Neither the plaintiff nor the defendant No. 1 examined any other witnesses on their behalf. Both have examined themselves.

5. Issue No. 1 :---The plaintiff has filed the present suit on 4-4-1985 to enforce his agreement dated 28th May 1981, with the defendant No. 2 against the defendant No. 1 and the defendant No. 2. To decide the issue of the limitation, Clause 11 of the Agreement is relevant. It reads as under:-

Clause 11 :---

The said building is expected to be completed and possession of the said unit is expected to be delivered on or about June 1979/82 unless prevented by or due to any Act of God or Act of State or force-majors or labour troubles or any litigation or any objection of the Municipal or other authorities or any reason or circumstances whatsoever beyond the control of the sellers and in such event the

time for completion of the building and delivery of the possession of the said Unit shall be automatically extended for such further time as the sellers may determine. Under any circumstances the Buyer shall not be entitled to claim any damages whatsoever on account of delay or default in giving possession of the said flat."

The defendant No. 2 has reserved his right to extend this time and has subjected the delivery of the possession to several conditions. A bare reading of the said clause reveals that the time was not an essence of the contract at all. The plaintiff has made following payments to the defendant No. 2 who has accepted them. There is no dispute over these payments which are as mentioned below:-

Date Payment

6-7-1982 Rs. 21,000.00

10-7-1982 Rs. 10,000.00

22-8-1984 Rs. 20,000.00

7-11-1984 Rs. 20,000.00

13-11-1984 Rs. 20,000.00

It is, therefore, clear that the transactions continued till 13-11-1984, well after a period of 3 years from 28th May 1981. He has further said that on 24th March 1985 when he had visited the site, he saw the defendant No. 1 in occupation of his flat in violation and breach of the agreement and thereafter he has filed the present suit. Considering the last date of payment the suit is well within the limitation period. I, therefore, answer the issue No. 1 in negative.

6. As regards the issue No. 2 the plaintiff has not prayed for any reliefs against the owners of the property which is developed by the defendant No. 2 with whom the plaintiff had the agreement under consideration. The defendant No. 3 has expired and he being the joint owner of the property, his heirs are not brought on record, They are neither necessary nor proper parties and no reliefs are claimed against them: The point was not pressed seriously. The issue is therefore answered in negative.

7. As regards the Issue Nos. 3, 4, and 5, it is the case of the plaintiff that the defendant No. 1 is in unauthorised and illegal occupation of flat No. 2 on first floor of the Deepali Apartment hereinafter referred to as the "Suit Flat. It is his further case that in fact the said flat was agreed to be sold to him by the defendant No. 2 the builder, vide the agreement dated 28th May 1981 Exh. P-1 and that the flat agreed to be sold to the defendant No. 1 was the flat No. 5 on the second floor of the said apartment and that he sold that flat to an outsider for higher price and occupied the flat No. 2 on the first floor illegally and forcibly and he is therefore guilty of trespassing in the plaintiff's flat. He has also alleged collusion between the defendant No. 1 and the defendant No. 2. He has, prayed for reliefs against the defendant No. 2, the builder and has prayed for possession

of the suit flat from the defendant No. 1. To my specific query to the learned Counsel for the plaintiff, he emphatically and in no unequivocal terms, rather repeated that the plaintiff does not want any alternative reliefs in the form of any damages or compensation from the builder but he only wants the suit flat from the defendant No. 1. I was indeed surprised by the said firm stand taken by the learned Counsel for the plaintiff.

8. From the documentary and the oral evidence on record the defendant No. 1 has proved his legal and absolute right the suit flat. There is no dispute that he was a tenant residing in Room No. 2 of the building PRAKASH SADAN which was given by its owners, defendant No. 3 to the defendant No. 2 for development vide a tripartite agreement dated 6th November 1979, Exh. D-1, duly signed by the defendant Nos. 1, 2, and 3. Briefly stated, under the said agreement, the defendant No. 1 was to vacate his tenanted room and to hand over the same to the defendant No. 2 along with all the other 16 tenants of the PRAKASH SADAN. In return, the defendant No. 2 the builder had agreed to construct a new building as per the municipal sanctioned plans and to hand over back to the tenants on ownership basis the agreed flats as per the terms and conditions of the agreement. The area of the flat for the defendant No. 1 was 365 sq. ft. carpet. Under this agreement his tenancy rights were extinguished and surrendered to the builder on putting the tenant in possession of the new premises and they were to be merged with the ownership rights of the new premises, when such possession would be taken by the tenant. (vide Clause 8(e) and (f). Further, the defendant No. 1 has produced every piece of documentary evidence to strengthen his case and to prove his right, such as rent receipts, ration card, an agreement dated 13th December 1980 Exh. D-4 between the original landlord and the builder, for development of the building occupied by the 16 tenants whose names appeared in the Schedule thereto, including the name of the defendant No. 1. He has also produced the rent receipts for the subsequent periods when he, along with the other tenants, was occupying the transit accommodation. He has also produced on record the demand notices from the builder for payment and the receipts issued by the builders as a token of having received the money from the defendant No. 1. He has also produced a Bank's certificate to show the amounts credited to the Builder's account for the cheques issued by the defendant No. 1. He has further stated on oath that the builder has agreed to give 165 sq. ft. area free in lieu of his tenanted room and the additional area of 235 sq. ft. at the rate of Rs. 150/- per sq. ft. He has further narrated verbatim how slow construction work was progressing and how they were required to occupy all the, rather incomplete, building without having been provided the agreed amenities and how the tenants came together and formed their own society and completed the remaining construction work at their own cost. The defendant No. 1 has also produced on record his membership share certificate of the said society and the receipts for the payments made by him to society for the maintenance charges and also his total contribution for the incomplete work completed by the society and also for municipal taxes paid by

the society to raise the municipal attachment over the building. From the aforesaid record it is beyond any doubt that he is in possession of the flat No. 2 on the first floor. He has also produced a certified copy of the municipal plan which shows that there was no flat No. 5 on the second floor of the building. He has also further explained on oath that though in the original tripartite agreement he was allotted flat No. 5 on the second floor, the builders told him to accept and occupy flat No. 2 on the first floor as there was no flat No. 5 as per the revised plans. The defendant No. 1 has denied the suggestion that he has "allowed" the builder to sell the flat No. 5. He has also firmly denied the case put by the plaintiff that the builders had terminated his agreement by the notice dated 3rd August 1983 for non fulfilment of the terms of the said agreement. He has also stated that the builder has assured him to effect the required change in the agreement to modify the number of the flat, on the ground that the said agreement was not final. He has said that thereafter the builder has disappeared. It is very significant and crucial that the defendant Nos. 2 builder has not contested the suit, he has not filed his written statement, nor has appeared to cross-examine the defendant No. 1. No statement made by the defendant No. 1 on oath has been controverted by the Builder, the defendant No. 2, and even independently, the whole of the testimony of the defendant No. 1 is natural, consistent and truthful. He has independently established his right to have a flat in the building as its tenant and that right could not be extinguished unless he was given an alternative permanent ownership premises in the newly built up building by the builders. His rights would merge in the ownership premises alone. Even assuming the alleged notice dated 3rd August 1983 is given by the builders, that would not destroy or extinguish his right to get new premises in lieu of the tenanted premises. There is no right vested in the builders in any of the agreements to terminate the agreement with the defendant No. 1 on the failure to pay the agreed installments. In any case, it is nowhere stated by the builders what installments were not paid by the defendant No. 1. Their case has not been tested before the Court that they had a good and valid reason to terminate the agreements with the defendant No. 1.

9. The plaintiff has based his case on the so-called notice dated 3rd August 1983 allegedly issued by the defendant No. 2, builders to the defendant No. 1. This story cannot be believed at all by me for more than one reasons. Firstly, the said notice has not come from the custody of the builder. Secondly, he has not entered in the witness box to prove that the said notice was served by him on the defendant No. 1 and that any of his family members has received it and signed as token of receipt. The defendant No. 1 has denied the receipt of the same and has also denied the signature appearing thereon as having received the same. The server of the said notice is not examined to prove its service. Thirdly, the said notice was also relied upon by the defendant No. 3 and the plaintiff during the proceedings under the notice of motion taken out by the plaintiff. It is pertinent to note that at that time there was no acknowledgment signature of the defendant No. 1 on the said notice, neither on its true copy nor

the original having such signature was ever produced. Even logically it cannot be believed that only the defendant No. 1 was selected for termination of the agreement for non payment of the balance amount when almost all had not paid the whole amount and none else was sent such notice. No such case is also pleaded and proved by the builder or by plaintiff. The learned Judge (Jhunjhunwala, J.) who heard the notice has specifically observed as under:

"In the facts and circumstances of the case, prima facie, it does appear that the 2nd defendants had put the 1st defendant in possession of the said flat No. 2 in the said building. I perused the sanctioned plan in respect of the said building and I find that the 2nd defendants have not constructed any flat bearing No. 5 at the said building having an area of 400 sq. ft. which was agreed to be allotted to the 1st defendant by the 2nd defendants under the said agreement of 6th November 1979. The 1st defendant has categorically denied the receipt of alleged letter dated 3rd August, 1983 from the 2nd defendants. The 2nd defendants have not been able to prove that the alleged letter dated 3rd August, 1983 was even posted to the 1st defendant leave alone the service thereof upon the 1st defendant. It is not possible to accept the version of the 2nd defendants that the said agreement entered by the 2nd defendants with the 1st defendant was terminated by the alleged letter dated 3rd August 1983. Though the 2nd defendants now allege that the 1st defendant forcibly took possession of the said flat No. 2 and is a trespasser thereon, since January 1, 1984, the 2nd defendants have taken no action against the 1st defendant for alleged trespass on the said flat No. 2. The purported termination of the said agreement dated 6th November 1979, by the 2nd defendants on the ground of non-payment of balance of the consideration amount by the 1st defendant does not inspire any confidence also for the reason that practically all the tenants in the said building did not pay balance consideration amount to the second defendants under the agreements entered with the second defendants since the 2nd defendants did not complete the entire work of construction of the said building before putting them in possession of the respective premises agreed to be allotted to them and as such, they decided to get the work completed after being put in possession by the 2nd defendants. This fact is more possible and plausible since the 2nd defendants had themselves authorised the said tenants at the old premises to collect the arrears as is evident by the letter dated 7th November 1984, addressed by the 2nd defendants, a copy whereof is annexed and marked as Exh. "A" to the affidavit of the 1st defendant, being the affidavit dated 14th October 1991. The tenor of that letter suggests that since the work at the said building was not completed by the 2nd defendants, the occupants thereat were reluctant to pay the balance of the consideration till the incomplete work was completed and as such, they were permitted to collect and pay the same to the 2nd defendants progressively."

I am in respectful agreement with the above findings of the learned Judge though at the stage of the notice of motion as no oral or documentary evidence is brought on record in the present full dress trial to negative any of the

observations made by the learned Judge. There is the same record even at this final stage and there is no additional material or evidence to take a different view. This order was carried in appeal but not even faintly it was attempted to show the signature of the defendant No. 1 on the copy of the said alleged notice dated 3rd August 1983 which is being shown to me. It is indeed a case of fabrication of the document which is created solely with an intention to defeat the legitimate claim of the defendant No. 1 by such foul means adopted by the plaintiff. He has not come with clean hands, therefore, according to me he is not entitled to any equitable reliefs.

10. Besides, there is no privity of contract between the plaintiff and the defendant No. 1. He is seeking specific performance of his agreement dated 28th May 1981 Exh. P-1 with the defendant No. 2, builder, against the defendant No. 1 who is in possession of the flat No. 2 on the first floor of the building in his own legal and valid right under the two agreements between the landlord, the defendant No. 3 (deleted) and the defendant No. 2 and himself. The case of the defendant No. 1 that he was put in possession of the said suit flat has not been demolished and he has withstood the searching cross-examination. It would have been entirely different if the builder had filed his written statement and contested the suit and has challenged the case of the defendant No. 1 that he was put in possession of the flat No. 2 on the first floor and that he was in lawful possession and that he was not a trespasser. Having duped the plaintiff the defendant No. 2 has just disappeared though at the stage of notice of motion he made a show for the satisfaction of the plaintiff that the builder, defendant No. 2, was supporting him. His affidavit filed at the interlocutory stage cannot be relied on at the final trial stage, particularly, the defendant No. 2 has not appeared and has not filed any such affidavit to subject himself to cross-examination. No reference to or reliance on the said affidavit of the defendant No. 2 filed at the stage of the notice of motion can be allowed and to do so would be misconceived.

11. The plaintiff's case that the defendant No. 1 has forcibly taken the possession of the flat No. 2 cannot be accepted in the absence of any corroboration and better reliable evidence. There is no dispute about his agreement with the defendant No. 2, the builder, but the plan on which the said agreement appears to have been based was subsequently cancelled and in the revised new plan there is no flat No. 5 on the second floor, which was initially allotted to the defendant No. 1 who has very satisfactorily explained the change in the allotment of the flat. In no case it can be said that the defendant No. 1 was not entitled to any flat as a tenant and that he was unlawfully induced by the builder or that he was a stranger in the street having captured the flat. His right to get a flat in lieu of his tenanted premises is beyond any pale of doubt. Originally and tentatively his flat Number was fixed as flat No. 5 on the second floor. It was made subject to any changes in the plans. Subsequently, it appears from the record that plans were revised and the earlier plans were cancelled and the defendant No. 1 was put in the possession of his present flat and his right to possess and occupy the said flat is very well founded and he is therefore, in lawful possession of the said flat

No. 2 on the first floor, presently occupied by him. The plaintiff has miserably failed to dislodge the case and claim of the defendant No. 1. He has merely proved his case to the extent of his agreement with the defendant No. 2, the builder, his making the whole payment to him and that he was not given possession of the flat. He is no doubt a victim but not of the defendant No. 1 but of the defendant No. 2 who has cheated him daylight. But, he is also to share the blame for having kept quiet for a very long period after making payment. He never bothered to know what was happening at the site, if there was any change in the plans etc. Admittedly, he was busy in his business, Further, even after 24-3-1985, when he noticed that the premises allotted to him were occupied by the defendant No. 1, he did not approach the builder to enquire about the alleged illegal occupation by the defendant No. 1. There was no complaint or protest made by him to the builder. After filing of this suit also, he took out notice of motion after five long years. His evidence against the defendant Ho. 1 does not inspire any confidence in any respect. He has even gone to the extent of fabricating and forging the signature of the defendant No. 1 or his family members. In my opinion, he is not entitled to any relief against the defendant No. 1 in any case.

12. I, therefore, answer the Issue No. 3 in negative and the Issue Nos. 4 and 5 in the affirmative. The defendant No. 1 is not in unauthorised and illegal occupation of flat No. 2, first floor of Deepali Apartment and he is entitled to use, occupation and possession of the said flat No. 2 under the tripartite agreement referred in para 9 of the written statement. He was put in possession of the said flat as per the terms of the agreement dated 6th November 1979 as discussed above about the change in the flat number.

13. As far as issue No. 6 is concerned, the plaintiff is not entitled to specific performance of the agreement dated 28th May 1981 against the defendant No. 1. Though, I had repeatedly enquired from the learned Counsel for the plaintiff for any alternative relief against the defendant No. 2 the builder, I was surprised to get a negative reply from him, may be under instructions from his client who was present in the Court throughout the trial. As I have held that the defendant No. I is in lawful possession of his flat in his own independent right he cannot be ordered to vacate the suit premises to be given to the plaintiff through an order against the defendant No. 2, the builder.

14. During the course of the arguments, the learned Counsel for the plaintiff has cited the following decisions:-

- i) AIR 1929 Mad 189 Sultan Kani Rowthen v. Mahomed Meera Rowthen 6 others,
- ii) AIR 1936 Bom 285 Shriram Surajmal v. Shriram Jhunjhunwalla,
- iii) Kalyanpur Lime Workers Ltd. Vs. State of Bihar and Another,
- iv) A.L. Parthasarathi Mudaliar Vs. Venkata Kondiah Chettiar,
- v) AIR 1963 S.C. 978 Mrs. Chandnee Widya Vati Madden v. Dr. C.L. Katial &

others,

vi) Ishwari Prasad Mishra Vs. Mohammad Isa,

vii) A.L. Parthasarathi Mudaliar Vs. Venkata Kondiah Chettiar,

viii) Commissioner of Income Tax, West Bengal II Vs. Durga Prasad More,

ix) Baikunthi Devi and Others Vs. Mahendra Nath and Another,

x) 1982 M.L. J. 607 Vrindavan (Boriuali) Co-operative Housing Society Ltd. v. Karmarkar Bros. & others,

xi) Rakesh Kumar and Others Vs. Sat Pal,

xii) Maria Philomina Pereira Vs. M/s. Rodrigues Construction,

xiii) Smt. T.K. Santha and Others Vs. Smt. A.G. Rathnam and Others,

xiv) 1995(2) M.L.J. 506 Banu W/o Kutubuddin Sulemanji Vimanwala & others v. Kutubuddin Sulemanji Vimanwala.

I have carefully gone through all the aforesaid judgments. The last Judgment i.e. 1995(2) M.L.J. 506 is under the Mohamedan Law given by this Court (Vaidyanatha, J.). The learned Counsel has relied upon the observations of the learned Judge to the effect that any amendment granted automatically relates back to the date of the suit. The learned Counsel has cited these observations in the context of his submissions that though the plaintiff has amended his plaint by adding para 10-A to aver that the agreement dated 6th December 1979 between the defendant No. 1 and the defendant No. 2 was terminated by the latter by a letter dated 3rd August 1983, as the first defendant failed to comply with the terms and conditions thereof. The learned Counsel submits that this amendment has its effect from the date of the suit and the defendant No. 1 has not denied the contents of the said amended para 10-A and therefore according to him, it should be taken that there is no agreement in existence between the defendant No. 1 and defendant No. 2. It is a fact that there is no reply to the said amendment by the defendant No. 1. Since, I have already dealt with the aforesaid letter dated 3rd August 1983 and I have come to a conclusion that the said letter was a fabricated document on the face of it, in the surrounding circumstances, cannot be believed at all, the submissions of the learned Counsel are devoid of any merits. There is no quarrel with the observations made by the learned Judge.

15. All other judgments which the learned Counsel for the plaintiff has cited and relied upon have no application on the facts of the present case. There is absolutely no quarrel with the propositions of law laid down in these decisions. The facts in the present case are peculiar and have no similarity or semblance in any of these decisions. In the present case, as is clear, the plaintiff is claiming specific performance of the agreement mainly from the defendant No. 1 through defendant No. 2. I have already come to a conclusion that defendant No. 1 has a

legal and valid title under a legal and valid agreement pertaining to the flat No. 2 on first floor, and therefore, he cannot be ousted from the said premises. The plaintiff is, however, not claiming any alternative reliefs in the form of damages from defendant No. 2. As I had repeatedly asked the learned Counsel for the plaintiff whether he is praying for any alternative reliefs, he repeated that he did not want any other reliefs except the possession of the flat No. 2 on the first floor which is in the possession of the defendant No. 1. In none of the cases cited, there is semblance of the aforesaid facts to the effect that a party who is in legal and valid possession of a premises is asked to vacate the same for the plaintiff, whose case is based on rather a much weaker grounds including his attempt to fabricate documents with a view to defeat the legal title of the defendant No. 1.

16. To leave the matter at this end itself would be not in the interest of justice and my conscious does not permit me to do so. It would amount to encouraging deceitful builder to cheat the needy people by selling one flat/ premises to more than one purchasers. If I leave this matter as it is, I would be doing great dis-service to the society at large as the unscrupulous builders would go scot-free and un-scathed, unpunished and a needy middle class buyer like the plaintiff would stand punished and successfully duped by the defendant No. 2 the builder. I, therefore, hold that the defendant No. 2 is liable to repay to the plaintiff the entire amount of Rs. 96,000/- received from the plaintiff under the agreement dated 28th May 1981 with 18% interest p.a. from 28th May 1981 till payment or realisation. Though the aforesaid amount was paid by the plaintiff in some installments from 28th May 1981 onwards, I have deliberately taken that date for interest on the whole amount of Rs. 96,000/- so that the builder, defendant No. 2, shall feel some pinch if he is not that thick skinned.

17. While answering the issue No. 7, in the interest of justice, I direct the defendant No. 2 to return and repay to the plaintiff a sum of Rs. 96,000/-with interest at the rate of 18% p.a. within four weeks from today. The defendant No. 2 will be liable to pay further interest at the rate of 24% p.a. on the entire decretal amount from and after 25th April 1999, till payment is made. The suit is accordingly dismissed against the defendant No. 1. The suit is accordingly decreed against the defendant No. 2 as above.

18. The plaintiff shall pay a sum of Rs. 10,000/- to the defendant No. 1 towards the cost. Pursuant to the order passed by this Court (Jhunjhunwala J.) on 27th February 1992 in Notice of Motion No. 1561 of 1990, in the above suit, the Court Receiver, High Court, Bombay was appointed for the suit flat. The defendant No. 1 was appointed as his agent without any security and royalty. In view of the above judgment and decree, the Court receiver stands discharged.

19. The suit is accordingly dismissed. Certified copy expedited.

20. Suit dismissed.