

(2013) 07 DEL CK 0024
In the Delhi High Court
Case No : CS (OS) 1100 of 2005

M/s. Entrepreneurs Co-Op. Group Housing Society Ltd.	APPELLANT
Vs	
M/s. Schindler India Pvt. Ltd.	RESPONDENT

Date of Decision : 10-07-2013

Acts Referred:

Contract Act, 1872 — Section 55, 74

Citation : (2013) 137 DRJ 374

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Kawal Nain, Ms. Kavita Batra and Ms. Bhavya Nain, for the Appellant; Babit Singh Jamwal and Mr. Puneet Singh Bindra, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—The plaintiff has sued for recovery of principal sum of Rs. 19 lakhs together with interest @ 24% per annum till the date of institution of the suit of Rs. 9,05,753.43 paise, i.e. total Rs. 28,05,753.43 paise pleading:

(i) that the plaintiff, a Co-operative Group Housing Society had entered into the Agreement dated 6th December, 1999 with the defendant whereunder the defendant undertook to supply, install and commission fourteen Schindler smart machine room less TM 001 lifts/elevators @ Rs. 9,30,000/- per lift for a total price of Rs. 1,30,20,000/- at the flats to be constructed for the members of the plaintiff Society at Plot No. 9, Sector-22, Dwarka, Phase-I, New Delhi;

(ii) that the aforesaid sum of Rs. 19 lakhs was paid as advance by the plaintiff to the defendant under the said Agreement;

(iii) that the plaintiff vide letters dated 1st May, 2003 and 27th May, 2003 asked the defendant to supply the lifts;

(iv) that the defendant vide letter dated 30th July, 2003 notified the plaintiff that the validity of the contract had expired and the price of the lifts had escalated since December, 1999 and it was not possible for the defendant to execute the contract at the agreed prices and further notified the plaintiff that the revised

price of the lifts was to be Rs. 10,79,000/- per lift;

(v) that the aforesaid revised price was not acceptable to the plaintiff and the plaintiff thus asked for refund of the advance which the defendant failed to refund inspite of legal notice;

Hence this suit. The plaintiff has also claimed interest @ 24% per annum from the date of institution of suit.

The defendant has contested the suit pleading:

(a) that though as per the Agreement, the entire sum of Rs. 19 lakhs was payable by the plaintiff to the defendant by 31st December, 1999 but the plaintiff paid only the first installment of Rs. 10 lakhs and paid the balance amount of Rs. 9 lakhs on or about 14th March, 2000;

(b) that the suit for recovery of the said amount of Rs. 19 lakhs thus should have been filed by 14th March, 2003 and at the time of institution on 23rd July, 2005 the claim therefore was barred by time;

(c) that the sum of Rs. 19 lakhs was paid under the Agreement dated 6th December, 1999 by way of earnest money which acted as a commitment on the part of the plaintiff that the plaintiff would honor its obligations under the Agreement failing which the defendant would incur losses; that the defendant on the basis of representations of the plaintiff had to undertake initial preliminary work so as to be ready and prepared to supply elevators of the specifications as per Agreement when intimated by the plaintiff;

(d) no refund of the said sum of Rs. 19 lakhs was envisaged under the Agreement and on the contrary the Agreement provided for forfeiture of earnest money by the defendant in the event of default by the plaintiff;

(e) that the plaintiff after inducing the defendant to commit the performance of the Agreement has failed to adhere to the terms thereof;

(f) that the plaintiff failed to place any instructions for installation of the elevators during the validity of the Agreement for a period of three years;

(g) that an Agreement containing reciprocal promises must be fulfilled by both parties to the Agreement and any party failing to perform its part of the obligations mandated under the Agreement cannot seek any remedy against the other;

(h) that the instructions for installation of the elevators were to be tendered within a reasonable time before expiry of the Agreement; the prices of the elevators were kept immune from escalation until 31st December, 2002 and the defendant subjected itself to considerable risk and losses by agreeing to a check on price escalation for nearly three years; the plaintiff however failed to instruct the defendant to install any elevators;

(i) that the plaintiff has concealed that though it had in the year 1999 entered

into an agreement for installation of 14 elevators at an agreed price of Rs. 9,30,000/- per elevator; the Agreement clearly provided that the only situation warranting a refund was if the defendant were to fail to deliver the elevators within six months from the date of written intimation by the plaintiff or an intervening force majeure event; the plaintiff however, did not place any intimation for installation of elevators under the Agreement for more than four years; the plaintiff wrote a letter dated 14th March, 2000 requesting for extension since the blocks (where the elevators were to be installed) were not ready for installation of elevators; the defendant agreed to extend the validity of the Agreement upto 14th March, 2003; the date earlier agreed of 31st December, 2002 was however kept unaltered; in or about April, 2000, the defendant reminded the plaintiff of its commitment; in response thereto the plaintiff vide its letter dated 12th April, 2000 informed that they would be constructing a basement and therefore four elevators were to be respecified for one more stop at the basement; the plaintiff further informed that instead of 14 elevators as initially agreed, only 12 elevators would need to be installed; the defendant vide its letters dated 24th April, 2000 and 9th March, 2001 informed the plaintiff of the consequent increase in price;

(j) that the defendant again vide its letter dated 29th July, 2002 drew the attention of the plaintiff that the price agreed was valid till 31st December, 2002 only; the plaintiff neither replied to the said letter nor placed any order and ultimately instructed installation vide its letters dated 1st May, 2003 and 27th May, 2003 which were beyond the validity of the Agreement which had expired on 14th March, 2003; the defendant vide its letter dated 30th July, 2003 so informed the plaintiff and intimated the revised cost of Rs. 10,79,000/- per elevator;

(k) that the defendant vide its letter dated 16th March, 2004 again called upon the plaintiff to renew/revalidate the expired Agreement since the material for installation and commissioning of elevators was ready for delivery and the defendant was incurring costs towards warehousing and other expenses;

(l) that a reply dated 26th October, 2004 was also given to the legal notice;

The defendant has also controverted the authority of the person instituting the suit, signing and verifying the plaint on behalf of the plaintiff.

2. No replication was filed.

3. On the pleadings of the parties, the following issues were framed on 26th September, 2006:

1. Whether the suit is filed by a duly authorized person? OPP

2. Whether the plaintiff is entitled to the suit amount? OPP

3. Whether the plaintiff is entitled to interest, if so, at what rate and from what date? OPP

4. Whether the plaintiff has not adhered to the terms of the agreement? OPD

4. The plaintiff examined two witnesses and closed its evidence. The defendant has examined one witness and closed its evidence. No evidence in rebuttal was led by the plaintiff.

5. The counsels for the parties have been heard.

6. My issue-wise findings are as under:

7. Re: Issue No. 1. Whether the suit is filed by a duly authorized person? OPP

7.1. The suit has been instituted and the plaint signed and verified on behalf of the plaintiff by Mr. Ashok Kumar Ralhan claiming to be the President of the plaintiff's Society. The certificate issued by the office of the Registrar, Co-operative Societies, Delhi Administration, New Delhi of registration of the plaintiff as a Society under the Delhi Co-operative Societies Act, 1972 has been proved as Ex. PW 1/2. Mr. Ashok Kumar Ralhan appearing as PW 1 in his affidavit Ex. PW 1/A by way of examination-in-chief has deposed that he was vide resolution of the members of the Managing Committee of the plaintiff Society in the meeting held on 23rd July, 2005 and extract whereof is proved as PW 1/1 authorized to file, sign and verify and institute the present suit. PW 2 Mr. Krishan Kumar Bhalla in his affidavit PW 2/A by way of examination-in-chief has deposed that he is the Vice-President of the plaintiff Society and has also proved the resolution dated 23rd July, 2005 Ex. PW 1/1 authorizing Mr. Ashok Kumar Ralhan. PW 1 in his cross-examination on 29th January, 2009 has deposed that he was appointed as the President from the year 2002 till 2006 and after about one and a half year again became the President. PW 2 was not cross-examined at all on the aspect of authority of Mr. Ashok Kumar Ralhan to institute the suit. The plaintiff besides placing the extract of the resolution dated 23rd July, 2005 authorizing Mr. Ashok Kumar Ralhan to institute the suit has also placed on record the original minute book of the meetings of the Managing Committee of the plaintiff's Society.

7.2. As would be apparent from the above, the defendant has failed to cross-examine the witnesses of the plaintiff who have deposed about the authority of Mr. Ashok Kumar Ralhan to institute the suit and sign and verify the plaint on behalf of the plaintiff. There is no challenge to the signatory of the plaint being President of the plaintiff Society also; he, for this reason also, would be competent to institute the suit and sign and verify the plaint on behalf of the plaintiff which is a juristic person.

7.3. Even otherwise it may be mentioned that the deficiency if any in authority for institution of the suit, as held in Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh and Another, , Vidyawati Gupta and Others Vs. Bhakti Hari Nayak and Others, and Grafitek International Vs. K.K. Kaura and Others, are not to be fatal to the suits. The present suit is being pursued in the name of the plaintiff Society and the recovery of monies in the event of success, would also be in favour of the plaintiff Society and the money would go to the plaintiff Society only.

7.4. I accordingly decide Issue No. 1 in favour of the plaintiff and against the defendant.

8. Re: Issue No. 2. Whether the plaintiff is entitled to the suit amount? OPP

8.1. Before discussing the respective contentions of the parties aforesaid, it is expedient to analyze the Agreement dated 6th December, 1999 Ex. P1. Under the said Agreement:

(i) The defendant agreed to sell and the plaintiff agreed to purchase elevators on the terms and conditions contained therein;

(ii) Out of the total price of Rs. 1,30,20,000/-, Rs. 10 lakhs was payable immediately on signing of the Agreement, Rs. 9 lakhs by 31st December, 1999: 60% on receipt of entire material on site at Dwarka, Delhi, 15% on physical completion of the lifts, 5% on commissioning and handing over of the lifts/elevators and balance 5% after six months of commissioning of lifts;

(iii) The quoted prices were not to be subject to any escalation till 31st December, 2002 i.e. for a period of little over three years from the date of execution of the Agreement;

(iv) The material of each lift/elevator was to be delivered within six months of the written intimation from the plaintiff to the defendant;

(v) If the defendant was to be unable to deliver the lifts beyond six months, then the plaintiff was entitled to refund of the advance of Rs. 19 lakhs along with interest @ 24% per annum and to the compensation as specified for non-delivery;

(vi) In case of force majeure, the advance paid was not to be forfeited but rather the contract was to be renegotiated giving due consideration to the payment of advance "three years ago" by the plaintiff.

8.2. It may be highlighted that the amount of Rs. 19 lakhs paid by the plaintiff, is in the Agreement described as "advance" and not as "earnest money" and there is no clause in the Agreement of forfeiture thereof.

8.3. It was at the outset enquired from the counsel for the defendant, whether the defendant in the absence of any Agreement entitling the defendant to forfeit the advance and without having made any claim against the plaintiff for recovery of compensation for any loss or damage even if any suffered by the defendant for the breach alleged by the defendant of the Agreement, could forfeit the said amount. Attention of the counsel for the defendant in this regard was invited to the judgment of the Constitution Bench of the Supreme Court in Fateh Chand Vs. Balkishan Das, laying down that even where penalty within the meaning of Section 74 of the Indian Contract Act is stipulated for breach, without proving the loss the same cannot be recovered. It was also pointed out to the counsel for the defendant that though the defendant in the written statement as aforesaid has taken a plea of the Agreement having provided for forfeiture of the earnest

money in the event of default by the plaintiff, no such clause was found.

8.4. The counsel for the defendant, though could not pinpoint any clause in the Agreement entitling the defendant to forfeit the advance, argued that the absence of a clause for refund should be read as an implied clause of forfeiture. Reliance was further placed on the force majeure clause which provides that "in case of a force majeure condition due to which the contract cannot be completed in the stipulated time, the advance shall not be forfeited" to contend that the same also implies a right otherwise of the defendant to forfeit. Reference was also made to *Shri Hanuman Cotton Mills and Others Vs. Tata Air Craft Limited*, .

8.5. Per contra, the counsel for the plaintiff has referred to:

(a) *M/s. Baldev Steel Ltd. Vs. M/s. The Empire Dyeing and Manufacturing Company Ltd.* and another, laying down in paras 29 and 30 thereof that a party is not disentitled from recovering the advance even if in breach because breach of the contract would only entitle the other party to sue for damages but not to forfeit the advance and this legal position can be altered by a special forfeiture clause which may defeat the right to recover even an advance amount. It was further held that advance is in the nature of a trust or quasi trust, earmarked for payment of price for the goods to be supplied which could not be diverted or forfeited for other purposes, including for an alleged breach of contract;

(b) *Dilip Kumar Bhargava Vs. Urmila Devi Sharma and Others*, laying down that there cannot be forfeiture even if the paying party is guilty of breach unless the receiving party has suffered loss in the bargain;

(c) *Sudhir Rawal Vs. Satish Batra*, , judgment dated 9th November, 2011 of this Court in RFA No. 422/2011 titled *Bhuley Singh Vs. Khazan Singh* and judgment dated 17th May, 2012 of this Court in RFA No. 51/2012 titled *Ms. Kriti Kohli Vs. Sh. Hari Nand*, all to the same effect.

The counsel for the plaintiff has further contended that *Shri Hanuman Cotton Mills (supra)* is not applicable to the facts of the present case since the amount paid thereunder was by way of earnest money and the Agreement contained a specific clause for forfeiture thereof.

8.6. The counsel for the defendant in rejoinder relied on *Satish Batra Vs. Sudhir Rawal*, allowing the appeal against the judgment aforesaid of this Court relied upon by the counsel for the plaintiff. However, it may be mentioned that in that case also the amount was described as "earnest" and the contract contained a provision for forfeiture thereof and in that context the Supreme Court held that where the amount represents the guarantee that the contract would be fulfilled and which is part of the contract price when the transaction is carried out and to be forfeited when the transaction falls by the reason of the default or failure of the giver, forfeiture is permissible.

8.7. The counsel for the defendant has also referred to Section 55 of the Contract Act, 1872. However, I fail to see the relevance thereof.

8.8. Before discussing the matter further, it is necessary to notice some further facts.

8.9. The defendant vide its letter dated 16th March, 2000 Ex. P4 to the plaintiff acknowledged the receipt under cover of letter dated 14th March, 2000 of the balance advance of Rs. 9 lakhs and increased the validity of the Agreement upto 14th March, 2003.

8.10. The aforesaid letter shows that the objection of the defendant to the delay on the part of the plaintiff in payment of Rs. 9 lakhs was waived by the defendant and the defendant cannot be now allowed to derive any advantage therefrom.

8.11. The Architect of the plaintiff vide their letter dated 1st May, 2003 informed the defendant that out of six blocks, shaft of 5 blocks were ready for installation of lifts and requested the defendant to inspect the same, supply the material and start the erection of the lifts. A reminder dated 27th May, 2003 was also sent by the said Architects to the defendant. Though both the said letters were denied by the defendant and no exhibit mark has been put thereon but the defendant vide its letter dated 30th July, 2003 (proved as Ex. P-5) to the plaintiff in response to the letters dated 1st May, 2003 and 27th May, 2003 informed that the validity of the contract had expired and the price of lifts had escalated substantially since December, 1999 and it was not possible for the defendant to execute the contract at the agreed price; revised price of Rs. 10,79,000/- per lift was also intimated to the plaintiff. The defendant has not proved any other letters of 1st May, 2003 and 27th May, 2003 to which the said response was sent and the letters dated 1st May, 2003 and 27th May, 2003 thus have to be held to have stood proved. 9.12. Before proceeding further with the discussion, I may notice that though the defendant in its written statement has also taken a plea of the suit claim being barred by time but neither was any issue pressed thereon nor any argument urged. However the onus to satisfy that the suit claim is within time being also on the Court, I record that the defense of the defendant of limitation is misconceived. The amount of Rs. 19 lakhs was paid in the year 1999-2000 as advance to be adjusted in the purchase price under an Agreement, the period of completion whereof, according to the defendant also was till the year 2003. The plea of having forfeited the said amount was also taken by the defendant in response to the legal notice dated 16th March, 2004 and the suit was filed about one year therefrom. The said claim in my opinion would fall in the residuary Article 113 of the Schedule to the Limitation Act with the limitation therefore being three years from the date when the right to sue accrues which in my opinion accrues only upon the defendant refusing to refund the amount and the suit has been filed within three years therefrom. Reference in this regard can be made to India Trade Promotion Organisation Vs. India International Textile Machinery Exhibitions Society, .

8.13. Coming back to, whether in the absence of any clause in the agreement of forfeiture, the amount of Rs. 19 lakhs could be forfeited or not, though a Single

Judge of the Madras High Court in Mohammad Sultan Rowther Vs. Naina Mohammad and Others, did hold, in the context of an agreement relating to sale of immovable property that in the absence of a specific clause in the contract forfeiture is not permissible, but the legal position as held by other Courts is found to be otherwise. Reference in this regard may first be made to Howe Vs. Smith [1881-1885] All ER Rep 201 which was a case of contract for sale of land without any clause as to what was to happen to the amount paid as deposit on default of the purchaser. It was held that a deposit in common parlance is understood as a security for completion of the purchase and the purchaser who has made the deposit cannot insist on abandoning the contract and yet recover the deposit because that would enable him to take advantage of his own wrong. Finding the purchaser in that case to be in default, even in the absence of a clause for forfeiture the purchaser was held not entitled to refund of the deposit. It would thus be seen that the answer to, whether in the absence of a clause for forfeiture there could be forfeiture or not was made dependant on the nature and character of the payment.

8.14. In Dies Vs. British & International Mining & Finance Corporation Ltd. [1939] 1 KB 724 which was in the context of sale of goods, an argument was raised that though in the case of contract of sale of immovable property, the existence of a clause for forfeiture was necessary to effect forfeiture, but not so in contracts of sale of goods. It was however held that there is no distinction in this respect between the contracts for sale of goods and contracts for sale of immovable property. It was further held that where the contract is silent, the matter of forfeiture has to be decided on the principle of law insofar as the intention of the parties can be ascertained from designation used to indicate the nature of the sum that was paid. A distinction was carved out between a payment designated as deposit and one designated as part payment and it was held that a deposit, in the event of the contract being performed, goes in diminution of the purchase price, and in the interval between contract and completion operates as an earnest or guarantee that the contract shall be performed i.e. acts as liquidated damages in the event of breach of contract. It was further held that while a deposit/earnest could be forfeited, part payment could not be even if the purchaser who had made part payment was in default and the only remedy of the seller was to sue for damages.

8.15. The aforesaid view was followed by the High Court of Calcutta in Naresh Chandra Guha Vs. Ram Chandra Samanta and Others, where though the payment was designated as Bayana, there was no clause neither for its forfeiture nor for its return and it was held that the agreements containing covenants or clauses of forfeiture are to be treated on the same footing as agreements without the same provided of course there is no clause for return or refund of the money in question. It was further held that the nature of the money in question has to be determined i.e. whether it was intended to serve as earnest or security for performance, necessarily implying a liability to forfeit or as part payment. It was yet further held that the said designation has to be made by applying the golden

rule of intention of the parties. Monies described as earnest or deposit, it was held are to be presumed to be earnest or security for performance liable to be forfeited even in the absence of a clause therefore. It was however held that the rule of forfeiture has no application to money received as part payment.

8.16. This Court also in *In Re: R.K. Staple Spinning Mills P. Ltd. (In Liquidation)* for the reason of the money being described as earnest, even in the absence of a clause for forfeiture held the same liable to forfeiture.

8.17. Recently again this Court in *State Bank of India Vs. Union of India and Others*, citing with approval *Howe, Dies and Naresh Chandra Guha supra* and certain other judgments held that earnest money once paid is and continues to remain the property of the recipient; it is paid under what is termed as contract of security which is distinct and separate from real or pure contract and the right to forfeiture arises under a contract of security, which could be provided expressly or impliedly.

8.18. Before applying the aforesaid principles to the facts in hand, mention may also be made of *Videocon Properties Ltd. Vs. Dr. Bhalchandra Laboratories and Others*, dealing with a contract of sale of immovable property. The Supreme Court reiterated that earnest money is part of the purchase price when the transaction goes forward and is forfeited when the transaction falls through by reason of failure or fault of purchaser and it is not the description by words used in the agreement that would be determinative of the character of the sum but really the intention of the parties and the surrounding circumstances as well will have to be looked into and what may be called advance may really be a deposit or earnest money and what is termed as deposit or earnest money may ultimately turn out to be an advance or part of purchase price.

8.19. Similarly in *Satish Batra supra* the Supreme Court held that to justify the forfeiture of advance as earnest money the terms of the contract should be clear and explicit and part payment of purchase price cannot be forfeited unless it is a guarantee for due performance of the contract.

8.20. The principle has also been succinctly crystallized in paragraphs 508 and 510 of Volume 88 of the 5th Edition of the Halsbury's Laws of England under the head "Claim by the party in breach to recover money paid":-

A party who commits a breach of contract may be able to bring a restitutionary claim against the innocent party to recover payments made to the innocent party prior to the termination of the contract. The right to recover will only arise where the contract has been discharged as a result of the innocent party electing to terminate the contract. When seeking to ascertain the rights of the party in breach to recover money paid, the courts have drawn a distinction between deposits and part payments. The distinction between the two is a matter of construction which in large part turns on the purpose for which the payment was made. Where the language used in the contract is neutral, then a payment will generally be interpreted as part payment so that it is, in principle, recoverable.

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Where the money has been paid prior to the discharge of the contract not as a deposit or earnest for performance but as a prepayment of the purchase price, the right of the party in breach to recover the sum so paid depends on the construction of the particular contract between the parties. Where the contract is one of sale and no property in the goods has passed to the buyer, the money will generally be recoverable by the purchaser either because the right of the vendor to retain the prepayment is conditional upon completion of the contract so that, when completion does not take place as a result of the discharge of the contract, the condition upon which the vendor retains the money fails with the result that the money is recoverable by the purchaser or on the ground that the consideration for the payment has wholly failed. Where the contract is one for work and materials, the prepayment is less likely to be recoverable. This is particularly so where the recipient of the money incurs expenditure in the performance of the contract: the prepayment in such a case is unlikely to be recoverable either because it is an unconditional payment or on the ground that the failure of consideration in such a case is not total.

8.21. The payment of Rs. 19 lakhs under the subject contract is described as advance and not as earnest. It is otherwise also not found to be in the nature of a guarantee for fulfilling of the contract; rather the same is only in the nature of a consideration to peg till 31st December, 2002 the prices prevalent and agreed upon in December, 1999. This is amply clear from the force majeure clause which while providing for renegotiation, provides for weightage to be given to the advance held by the defendant for three years in determining the renegotiated price.

8.22. It is also not borne out from the subject contract that the defendant thereunder was required to do any work whatsoever till receipt of written intimation from the plaintiff and which according to the defendant was not received within the period of validity of three years of the Agreement. This is obvious from the fact that after the receipt of the said written intimation from the plaintiff, the defendant had six months" time to deliver the material for each lift. If the contract had intended the defendant to keep the material for each lift ready immediately after the signing of the Agreement, there was no need for giving the period of six months to the defendant for delivery thereafter. Though the defendant in the evidence, has vaguely sought to suggest that the defendant had worked under the Agreement but no foundation for the same has been laid in the pleadings as aforesaid. The defendant has not pleaded as to what work it had done under the Agreement till the receipt of communication dated 1st May, 2003 and 27th May, 2003 from the Architects of the plaintiff. Significantly, the defendant on the expiry of the validity of the Agreement also did not issue any communication intimating to the plaintiff of the forfeiture of the advance or of any losses suffered by it. No claim for such losses has been made as aforesaid. Though the witness of the defendant Mr. Amjad Sayyed in his affidavit Ex. DW 1/

A by way of examination-in-chief has vaguely suggested that the plaintiff wanted the defendant to begin procuring the material for installation of the lifts and be in a ready state as soon as the plaintiff had completed the infrastructural requirements for installation work but has shied away from deposing as to what procurements were made at what price and as to how the same have been wasted. Further, if the defendant were to have already acquired the material, there would have been no question of escalation.

8.23. As aforesaid, the amounts received as earnest money/deposit vest in the receiver from the very day of the receipt to be applied either towards price or to be forfeited. Per contra, amounts received as purchase price are advance in the hands of the seller, subject to fulfillment of the contract. The defendant though a company, required in law to maintain accounts and have them audited, has not led any evidence of the treatment given to the sum of Rs. 19 lacs in its books of accounts. Adverse inference thus has to be drawn against the defendant that it is continuing to show the amount of Rs. 19 lacs in its books of accounts as advance.

8.24. Issue No. 2 is accordingly decided in favour of the plaintiff and against the defendant and the plaintiff is found entitled to refund from the defendant of the advance of Rs. 19 lakhs.

9. Re: Issue No. 4. Whether the plaintiff has not adhered to the terms of the agreement? OPD

9.1. In the light of the discussion above, this issue is redundant.

9.2. Even otherwise I am unable to return a finding of the plaintiff having not adhered to the terms of the Agreement. As aforesaid, the consideration for advance of Rs. 19 lakhs was not performance of the Agreement, but only to peg the price. The only effect of the failure of the plaintiff to send intimation to the defendant before 14th March, 2003 of its readiness to have the elevators installed was to disentitle the plaintiff from the price agreed to in the year 1999 and cannot have any other consequence. Upon the parties in the year 2003-2004 being unable to arrive at a consensus of the new prices, the amount of Rs. 19 lakhs paid as advance, became refundable by the defendant to the plaintiff irrespective of the failure of the plaintiff to avail of the 1999 price.

9.3. Similarly, the changes in the specifications made by the plaintiff would have no relevance in the light of the aforesaid.

9.4. The Issue No. 4 is also thus decided in favour of the plaintiff and against the defendant.

10. Re: Issue No. 3. Whether the plaintiff is entitled to interest, if so, at what rate and from what date? OPP

10.1. The plaintiff has claimed interest @ 24% per annum, not with effect from December, 1999/March, 2000 when the advance was paid but only with effect from 30th July, 2003.

10.2. I have already held above that the plaintiff, upon the parties being unable to arrive at a consensus as to the new price, became entitled to refund. Accordingly, the claim of the plaintiff to interest with effect from 30th July, 2003 is found to be justified.

10.3. As far as the rate of interest is concerned, the parties had in the contract Ex. P1 agreed to interest @ 24% per annum for default on the part of the defendant. For the said reason, I do not find any ground to interfere with the claim at the said rate for the pre-suit institution period. However, as far as the interest pendente lite and future is concerned, considering the rate of interest paid by the Nationalized Banks on fixed deposits and considering the nature of the transaction, award of interest @ 10% per annum is deemed expedient.

10.4. Issue No. 3 is decided accordingly.

Resultantly, a decree is passed in favour of the plaintiff and against the defendant for recovery of Rs. 28,05,753.43 paise together with interest @ 10% per annum on the sum of Rs. 19 lakhs from the date of institution of the suit till realization. The plaintiff shall also be entitled to costs of the suit.

Decree sheet be drawn up.