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**(2013) 202 DLT 756**

**Delhi High Court**

**Case No:** CS (OS) 2635 of 2010

Grammy  
Communications Pvt.  
Ltd.

APPELLANT

Vs

Emaar MGF Land Ltd.

RESPONDENT

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**Date of Decision:** Aug. 13, 2013

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) & Order 12 Rule 6

**Citation:** (2013) 202 DLT 756

**Hon'ble Judges:** Vipin Sanghi, J

**Bench:** Single Bench

**Advocate:** P.P. Ahuja, for the Appellant; A.B. Dial and Ms. Ananya Datta Majumdar, for the Respondent

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**Judgement**

@JUDGMENTTAG-ORDER

Vipin Sanghi, J.

I.A. No. 4692/2013

1. This application has been filed by the plaintiff under Order 12 Rule 6, CPC to claim a decree for the principal amount of Rs. 25,81,517/- apart

from costs. The dispute between the parties arises on account of the plaintiff having applied for allotment of commercial space in a construction

project of the defendant by the name "The Palm Square" at Sector 66, Gurgaon, Haryana. The case of the plaintiff is that the plaintiff had made

some deposits as early as on 22.10.2007 and 25.4.2008" in all aggregating to Rs. 25,81,517/-. However, the project did not commence.

Consequently, vide Ex. P-6 dated 3.9.2008, the plaintiff sought refund of the amount, vide Ex. P-8 dated 15.9.2008, the defendant while disputing

the claim of the plaintiff regarding status of the project, gave an option to the plaintiff to seek refund and, for that purpose, to contact one Mr.

Amar Basra. The claim of the plaintiff is that despite repeated approaches, the amount was not refunded and the plaintiff issued legal notice dated

1.9.2010 to the defendant. Thereafter the present suit cause to be filed.

2. The submission of learned Counsel for the plaintiff is that the parties did not enter into any binding contract. Reliance is also placed on a

subsequent communication issued by the defendant being Ex. P-12 dated 31.5.2012 which, inter alia, records that total amount of Rs. 25,81,517/-

has been paid by the plaintiff, which includes earnest money of Rs. 10,32,607/-.

3. On the other hand, the defendant has sought to place reliance on several documents filed by it. Ex. D-1 is an application made by the plaintiff on

30.1.2008 for allotment of the commercial area. Along with Ex. D-1 which is the "Advance Registration Application Form for Expression", the

Schedule I contains the "Broad Terms and Conditions for Registration of a Commercial Unit in "Palm Square"". Whereas the last clause of Ex. D-

1, inter alia, states that if the applicant i.e. the plaintiff fails to execute and deliver to the defendant the signed buyers agreement, the plaintiffs

application shall be treated as cancelled and "all the sums/monies paid/deposited by me/us with Emaar MGF shall stand forfeited without any

notice/reminder", the Broad Terms and Conditions--in Clause 14, states that "the applicant(s) agrees that out of the amount(s) paid/payable by

him/her/them/it towards the sale price, the Company shall treat 10% of the sale price as earnest money to ensure due fulfilment, by the Applicant(s)

of all the terms and conditions as contained herein and in the Buyer's Agreement".

4. The further case of the defendant is that the defendant had made allotment of Unit No. 1108 of 11th floor (Commercial Section) of the Palm

Square to the plaintiff on 7.2.2008 vide Ex. D-2. In pursuance of the said agreement, the plaintiff, after a few reminders, had also made further

payment of Rs. 8,54,189/- which was acknowledged by the defendant vide Ex. D-6 dated 24.4.2008. The case of the defendant is that the

plaintiff has, thereafter, failed to make further payment.

5. The submission of learned Senior Counsel for the defendant is that the defendant is willing to deposit in this the Court the amount of Rs.

15,48,910/- i.e. after retaining 10% EMD of Rs. 10,32,607/- from total amount of Rs. 25,81,517/- deposited by the plaintiff. The defendant has

also placed reliance on the final notice dated 1.11.2010 requiring the plaintiff to make the deposit of the outstanding amounts of Rs. 67,11,942/-

and the cancellation letter dated 18.1.2011 Ex. D-18, whereby the defendant sought to forfeit the amount of Rs. 25,00,216/- from out of the

amount of Rs. 25,81,517/-.

6. Having heard learned Counsel for the parties, I am of the view that the plaintiff is entitled to partial relief in the present application. For the

purpose of Order 12 Rule 6, CPC, what is relevant is the defence set up by the defendant. It has to be examined whether the defendant had made

an admission of liability in the written statement or the documents relied upon by it, and also whether the defence set up by the defendant is

moonshine or not. This is so, because, if the defence is found to be moonshine, the Court shall be justified in passing a decree on admission on the

ground that the defendant has not disclosed a triable defence. In this regard, I may refer to the judgment relied upon by the defendant in Sh.

Mahendra Verma Vs. Sh. Suresh T. Kailachand . The Division Bench placed reliance on an earlier Division Bench judgment in P.P.A. Impex Pvt.

Ltd. Vs. Mangal Sain Mittal, , wherein the Division Bench had observed as follows:

It appears to us that the approach to be taken under Order 12 Rule 6 is akin to what has been enunciated by the Supreme Court in Mechelec

Engineers and Manufacturers Vs. Basic Equipment Corporation, in the context of Order 37 of the CPC with regard to granting Leave to Defend a

summary suit. This is that if a defence amounting to moonshine has been presented, it should be summarily dismissed by not granting Leave to

Defend and by decreeing the suit forthwith. The Courts are already groaning under the weight of bludgeoning and exponentially increasing litigation.

The weight will unvaryingly increase if moonshine defences are needlessly permitted to go to Trial.

7. The issue, whether the plaintiff was in default of the terms of the allotment -- by not making payment of the instalments called upon by the

defendant, is a triable issue. Therefore, the plaintiff cannot succeed at this stage in claiming the entire principal amount. However, Ex. D-1 is the

application made by the plaintiff on 30.1.2008 on the prescribed proforma of the defendant-- seeking allotment of commercial space. The broad

terms and conditions contained in Schedule I to this application are also in a printed format of the defendant. It is the defendant which has placed

this document on record and relies on it. The said document, as noticed hereinabove, at one stage authorises the defendant to forfeit all the

sums/monies paid/deposited by the applicant i.e. the plaintiff in the eventuality of the applicant not signing the buyers agreement within thirty days of

dispatch by the defendant. At another place, i.e. Clause 14 of Schedule I, it is clearly stated that the defendant company shall treat 10% of the sale

price as earnest money to ensure fulfilment by the applicant of the terms and conditions "contained herein and in the buyers agreement".

Apparently, there is a contradiction in the two terms. Since the defendant is the author of the said documents (Ex. D-1 and Schedule I), the said

document has to be strictly read against the defendants by application of the doctrine of contra proferentem. Consequently, the defence of the

defendant" insofar as the defendant seeks to justify forfeiture of the entire amount deposited by the plaintiff, and not just the earnest money deposit,

appears to be frivolous, moonshine and untenable. Mahendra Verma (supra) does not advance the defendants case, because the facts of that case

were materially different. In that case the plaintiff had preferred the application under Order 12 Rule 6, CPC in respect of the deposit admittedly

made by the defendant, which the defendant had claimed, was an earnest money deposit in pursuance of an oral agreement. In the present case,

the documents/terms and conditions relied upon by the defendant are in writing; the writing is also of the defendant, and; the amount claimed by the

defendant as paid towards earnest money, in any case, is not being directed to be refunded at this stage.

8. The total sale price of the property in question is contained in the letter of allotment Ex. D-2 i.e. Rs. 1,03,26,069/-. 10% of the said amount

could, at best, be the EMD, which comes to Rs. 10,32,607/-. Pertinently, Ex. D-18 also acknowledges this position by disclosing that the earnest

money is Rs. 10,32,607/-. Assuming that the breach of the agreement is on the part of the plaintiff, all that the defendant was entitled to forfeit was

the earnest money of Rs. 10,32,607/- and nothing beyond that.

9. I see no justification in the defendants submission that the defendant should be permitted to deposit the said amount in this Court, and the said

amount should not be released to the plaintiff during the pendency of the suit. Clearly, the defendant is not entitled to retain any amount beyond Rs.

10,32,607/-, even if one were to accept the defence of the defendant that the plaintiff was in breach of the allotment terms and buyers agreement.

10. Accordingly, the plaintiff is entitled to a partial decree for the amount of Rs. 15,48,910/-. The suit is accordingly partially decreed for the said

amount. The issue, whether the plaintiff is entitled to interest on the said amount, and if so, at what rate and for what period would require

consideration after trial and the same is left open. Application stands disposed of.

Further documents, if any, be filed within two weeks. List for framing of issues on 24.10.2013.

Having gone through the terms and conditions contained in the application form and letter of allotment issued by the defendant, in my view, this is a

fit case which calls for investigation by the Competition Commission to examine whether the said documents and the conduct of the defendant fall

foul of the Competition Act, 2002. The Registry is directed to send copies of the entire correspondence exchanged between the parties, which is

contained in the documents filed by the parties to the Director General of the Competition Commission, who shall take appropriate action in terms

of the Act and in accordance with law.