

IN THE HIGH COURT OF SINDH, KARACHI

Ind Civil Appeal No. 74 of 2012

M/s. Jabl-e-Rehmat Towers and another.....*Versus*.....Mrs. Naghamana Wajahat.

JUDGMENT

Date of hearing : 17th April, 2018
Date of Judgment : 18th July, 2018.
Appellants : Mr. Mustafa Safvi, advocate
Respondent : Khawaja Muhammad Azeem, advocate.

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Kausar Sultana Hussain, J:- This Second Appeal under Section 100 of C.P.C. assails judgment and decree dated 07.04.2012 and 09.04.2012 respectively passed by the learned IIIrd Additional District Judge Karachi East in Civil Appeal No. 105 of 2011, whereby the appeal of the appellants was dismissed.

2. Short factual background of the case is that the Civil Suit No. 1414 of 2009 was filed by the respondent/plaintiff for declaration, possession, specific performance, occupancy value and damages against the appellants/defendants; the respondent/plaintiff of that suit asserted therein that appellant No. 2/defendant No. 2 introduced a project under the name and style of Jabl-e-Rehmat Towers, to be constructed on Plot No. Z-1, Block 16-A, Scheme # 36, Gulistan-e-Jauhar, Karachi for which, he got published advertisement. In response the respondent/plaintiff on 10.06.1997 approached to the office of the appellants/defendant and requested to register her name for the allotment of apartment and ultimately deposited Rs. 45,000/- in respect of apartment No. 419, 4th Floor, Category "A", Jabl-e-Rehmat Tower, which was booked in the name of respondent/plaintiff. The total price of the said Flat

including expected loan of Rs.3,00,000/- was agreed at Rs.8,45,000/- and it was the exclusive responsibility of the appellant No. 2/defendant No. 2 to arrange for the loan facility. It is also case of the respondent/plaintiff that as per terms and conditions mentioned in application form she was required to make further payment of Rs.70,000/- within 45 days of the booking i.e. 14.7.1997, she made further payment of Rs.70,000/- and the appellant No. 2/defendant No. 2 issued letter as to allocation of said Flat. The respondent/plaintiff on different occasions/dates had paid due amount. It was assured at the time of booking that construction of the project will be completed within a period of three years from the date of start of the construction work, but despite passing of over 12 years period, the project has not been completed and the appellants/defendants just raised construction of pillars and beams etc. with the result as yet the project is not ready. In fact a fraud was played by the appellants /defendants, as there was no fourth floor of the project. According to respondent/plaintiff on 30.01.2009, attorney of the respondent/plaintiff when attended the office of the appellants/defendants at the site, he was manhandled and robbery was also committed upon him and for such incident FIR No. 177 of 2009 was lodged. It is also the case of the respondent/plaintiff that mainly due to the admitted laps on the part of the appellants /defendants in performing their part of contractual agreement, the respondent/plaintiff was suffered a lot as she is living in a rented accommodation and paying rent @ Rs.8,000/- per month since 01.01.2000, as such she is entitled to recover the occupancy value charges at the same rate. She is also entitled to claim damages of Rs.5,00,000/- from the appellants/defendants, on account of inconvenience and injury, as such the appellants/defendants are jointly and severally liable to pay the same.

3. The appellants /defendants *inter alia* pleaded that admittedly apartment/flat was booked by them in the name of respondent/plaintiff, as she alleged in her plaint, against total sale consideration of Rs.8,45,000/- payable in installments on regular basis as per schedule available in the application Form dated 10.6.1997; respondent/plaintiff paid Rs.45,000/- at the time of booking and Rs.70,000/- within 45 days, but nowhere in application form it was mentioned that the appellants /defendants will arrange any alleged loan of Rs.3,00,000/-for the respondent/Appellant, the respondent failed to pay full and final payment of the total sale consideration of suit flat as per schedule mentioned in application form dated 10.6.1997, hence appellants /defendants sent six notices to the respondent/plaintiff for payment of instalment dated 2.12.1998, 28.12.1998, 2.6.2000, 20.6.2000, 5.12.2000 and 25.12.2000, but respondent/plaintiff did not turn up, ultimately the appellants/defendants cancelled the booking of flat, vide letter dated 4.6.2008, duly served upon the respondent/plaintiff through registered post A/D with instructions to collect the amount deposited by her (annexure A/3 & A/09 respectively). Thereafter, the respondent/plaintiff has filed Civil Suit No. 1414 of 2009 against appellants/defendants for Declaration, Possession, Specific Performance, occupancy value and damages as mentioned above and the appellants/defendants contested the same. The learned trial Court after framing issues recorded statements of witnesses of both the sides and ultimately suit of the respondent/plaintiff was partly decreed with directions to her to pay a sum of Rs.4,00,000/- to the appellants/defendants within a period of thirty days of the judgment and appellants/defendants were directed to receive the said amount from respondent/plaintiff and hand over the possession of the flat to her. The learned trial Court has further directed to the respondent/plaintiff that, if the appellants/defendants fails to receive the amount of Rs.4,00,000/- from her, then

respondent/plaintiff is directed to deposit the said amount in the office of Nazir of this Court forthwith without delay, and the Nazir of the Court is directed to execute sub-lease and hand over the physical possession in favour of the respondent/plaintiff in respect of flat in question at 4th floor of the appellant's/defendant's project, as according to the appellants/defendants 4th floor has been completed.

4. The appellants/defendants had assailed the said judgment in the court of learned IIIrd Additional District Judge, Karachi East, who after providing opportunities of hearing to both the sides, upheld the said judgment dated 21.3.2011 of learned trial Court by maintaining the same, vide judgment dated 7.4.2012. Through present IInd Appeal the appellants/defendants assailed both the judgments passed by two sub-ordinate courts as discussed supra.

5. Learned counsel for the appellants/defendants has contended that impugned judgments and decrees of both courts below are absolutely illegal, contentious and solitary so much so outcome of violation of splintery provisions and the pronouncements of superior courts. During course of arguments, learned counsel entirely emphasized on the suit of non-payment of entire amount of the flat in question and per learned counsel the respondent/plaintiff inspite of receiving six notices, sent by the appellants/defendants to her but she did not pay any head, therefore, the appellants/defendants sent cancellation letter of the flat. In respect of payment of Rs.3,00,000/- the learned counsel for appellants/defendants argued that this amount was payable by the respondent/plaintiff in three installments to the appellants/defendants, who as per terms and conditions of the application form was not bound to arrange loan of such amount for respondent/plaintiff,

hence cancellation of flat was legal and as per terms and conditions prescribed in the application form and accepted by the respondent/plaintiff, hence the suit of the respondent/plaintiff may be dismissed on merits. In support of above contentions, learned counsel for the appellants/defendants has relied on case laws reported in 1) 2009 MLD 785, Karachi, (2) 2011 SCMR 249, (3) 2010 SCMR 334 (4) 2002 SCMR 361 and (5) PLD 1988 Lahore 717.

6. Conversely, the learned counsel for the respondent/plaintiff argued that the total cost of the flat in question including expected loan of Rs.3,00,000/- was agreed at Rs.8,45,000/- and it was assured by the appellants/defendants at the time of booking that construction of the project will be completed within a period of three years from the date of start of construction, but despite/passing prolong period of 12 years, the project was not completed. The learned counsel for the respondent/plaintiff has further argued that the appellants/defendants played fraud as there was no fourth floor of the project at the time of booking and further due to failure of the appellants/defendants, the respondent/plaintiff suffered a lot as she was residing in rented house and paying monthly rent of RS. 8000/-, therefore, she is entitled to claim such rent from appellants/defendants alongwith damages of Rs.5,00,000/-.

7. After hearing argument and perusal of record, I am of the view that the particulars of application form do show schedule of payments of booking amount (Rs.45,000/-), allocation amount (Rs.70,000/-) 35 installments of Rs.12,000/- per installment and further Rs.10,000/- as agreed. (Total amount of Rs.5,45,000/-).

8. The appellants/defendants did not deny this payment, rather they stated that they wrote a letter to the respondent/plaintiff to collect this amount. Now two controversies are remained to be considered that whether the respondent/plaintiff has supposed to pay the remaining amount of Rs. 3,00,000/- in three installments to the appellants/defendants or it was exclusive responsibly of the appellants/defendants to arrange for the loan facility. The other point of controversy is that whether the appellants/defendants did not complete the project within given time of three years from start of its constructions.

9. On point No. 1 of the controversy, I have gone through the application form, which reveals that no doubt except three installments of Rs.1,00,000/- each total Rs.3,00,000/-, the respondent/plaintiff had paid entire amount to the appellants/defendants in the manner as agreed between the parties, but the payment of three installments of Rs.1,00,000/- sounds unusual. As per schedule 1st installment of Rs. 1,00,000/- was agreed to be paid after 1 ½ year, second installment was due for payment after three years and third installment of Rs.1,00,000/- was required to pay after 3 ½ years. It is not clear in respect of these three installments that to whom these three payments were to be paid as according to the decided limit of completion of project the same was three years and **within such time the appellants/defendants were required to hand over the possession of the flat to the respondent/plaintiff.** Although loan facility is not mentioned in the application form, but it is a general practice of the builders in Karachi, that they apply to HBFC for loan collectively on behalf of individual flat allottee for specified amount for each flat and if sanctioned, the same is used for construction of project, the individual flat allottee/owner pay back the loan with agreed interest/profit, as the case may be, to HBFC over a long period of time. In instant matter delay of completion of the project spanning to over 12 years shows that the

appellants/defendants could not manage loan from H.B.F.C, which caused delay and the appellants/defendants by taking benefit of not mentioning the loan facility to the allottees in application form, described the reasons of not completion of the project within three years, as non-payment of installments by the allottees at agreed time, if I believe the reasons as described by the appellants/defendants as true, than the question is that why the appellants/defendants waited for a long time for cancelation of the flat. Besides, admittedly the appellants/defendants sent cancellation letter of the flat at the wrong address of the respondent/plaintiff, which tantamount to cancellation of flat without notice to the respondent/plaintiff. Record further shows that the appellants/defendants offered the respondent/plaintiff for collecting double of deposited amount as due to passing a long period value of the flat must have gone high and the benefit of increased value of the flat would go to the appellants/defendants and the respondent/plaintiff would not only be deprived from her flat but also from current value of the flat. I, therefore, deem it justified to hold that the Courts below have committed no illegality, non-reading and misreading of evidence while deciding the matter between the parties. Thus, the findings of the learned courts below on these account require no interference. Resultantly appeal in hand, stands dismissed . Order accordingly.

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