

MANU/MH/0575/2020

Equivalent Citation: 2020(2)ABR104

**IN THE HIGH COURT OF BOMBAY**

First Appeal No. 514 of 2014

Decided On: 16.01.2020

Appellants: **C. Radhakrishnan**  
**Vs.**

Respondent: **Richa Construction and Associates and Ors.**

**Hon'ble Judges/Coram:**

*R.D. Dhanuka, J.*

**Counsels:**

*For Appellant/Petitioner/Plaintiff: Premlal Krishnan, Sankalp Anantwar i/by Pan India Legal Services LLP*

*For Respondents/Defendant: Prasad Dani, Senior Advocate, Suraj Iyer and Debashree Mandpe i/by Ganesh & Co.*

**Case Note:**

**Civil - Agreement to sell - Execution thereof - Enforcement of Statutory obligations - Section 4 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (MOFA) - Respondent/ Defendant failing to comply with statutory obligations despite receiving payments from Appellant/ Plaintiff towards part consideration for Sale - Appellant had filed suit for enforcement of the statutory obligation under the provisions of MOFA against the Respondent No. 1 - Held, it is a statutory obligation on developer to execute registered agreement after receiving advance sum in respect of alienation of the units - MOFA was enacted to curtail the mal-practices of builders and promoters and to protect the interest of the flat purchasers - Plaintiff had tendered sum of money by way of cheque and two Pay Orders - Merely because the Defendant No. 1 did not deposit the said amount would not conclude that the plaintiff had failed to comply with his part of the obligation - Impugned judgment and decree was set aside - Appeal was allowed [82], [83], [85], [88]**

**JUDGMENT**

**R.D. Dhanuka, J.**

**1.** By this first appeal, the appellant (original plaintiff) has impugned the judgment and order dated 2nd April, 2014 passed by the learned trial Judge in Suit No. 3559 of 2006 dismissing the suit filed by the appellant inter alia for an order and decree and/or mandatory injunction directing the respondent to comply with the statutory obligations inter alia to execute agreement for sale in favour of the plaintiff in respect of the suit flat under the provisions of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short "the MOFA"). By consent of the appellant and respondent No. 1, the first appeal was heard finally at the admission stage. Some of the relevant facts for the purpose of

deciding the first appeal are as under:-

**2.** The appellant was the original plaintiff whereas the respondents herein were the original defendants before the trial Court. Parties are described in the later part of the judgment as per their original status before the trial Court.

**3.** It was the case of the plaintiff that he is a retired Bank Manager and was employed with Bank of Baroda before his retirement. The defendant No. 1 is a partnership firm engaged in the business of construction and area development. The defendant No. 2 is a co-operative society and is the owner of the building in which the suit flat is situated. MHADA had constructed a building bearing No. 3 at Survey No. 130 and CTS No. 484 (pt) at Azad Nagar, Andheri (West), Mumbai 400 053. The plaintiff visited the site office of the defendant No. 1 for purchasing a residential flat. The plaintiff noticed that the construction of the building was being carried out. The plaintiff showed interest in purchasing a flat of the said building. The defendant No. 1 offered flat No. 402 to the plaintiff. The defendant No. 1 confirmed and assured that all the facilities mentioned in the brochure would be made available to the flat purchasers.

**4.** It is the case of the plaintiff that the defendant No. 1 informed the plaintiff that the construction of the said flat No. 402 on the 4th floor of Emerald Court will be completed and possession would be handed over to the purchasers by November 2006. The plaintiff accordingly booked a Flat bearing No. 402 in the said building. According to the plaintiff, an oral agreement to purchase the said flat was entered into between the plaintiff and the defendant No. 1 for a total consideration of Rs. 40,66,000/-. The plaintiff paid a sum of Rs. 51,000/- to the defendant No. 1 towards advance payment by Cheque No. 879627 drawn on Bank of Baroda dated 12th December, 2005.

**5.** It is the case of the plaintiff that the defendant No. 1 assured that an agreement for sale shall be registered in favour of the, plaintiff at the earliest. The defendant No. 1 confirmed the sale of the said flat and issued an allotment letter dated 30th March, 2006 and allotted the said flat No. 402 for a total consideration of Rs. 40,66,000/-. According to the plaintiff, in the said allotment, the defendant No. 1 also acknowledged the receipt of Rs. 51,000/- received from the plaintiff as advance payment by cheque dated 12th December, 2005.

**6.** It is the case of the plaintiff that the defendant No. 1 asked the plaintiff to make further payment towards advance and stamp duty and gave assurance that Agreement for sale shall be executed and registered upon receipt of such payment. In view of the alleged assurance of execution of the agreement for sale and registration thereafter, the plaintiff tendered a pay order dated 4th April, 2006 for Rs. 12,05,091/- towards part consideration drawn on Bank of Baroda favoring the defendant No. 1. It is the case of the plaintiff that the defendant No. 1 also had instructed the plaintiff to deliver another pay order drawn on IDBI Bank for Rs. 1,87,060/- for payment of stamp duty. The plaintiff accordingly handed over the said pay order drawn on IDBI Bank for Rs. 1,87,060/- on 4th April, 2006 towards payment of stamp duty.

**7.** It is the case of the plaintiff that the defendant No. 1 assured the plaintiff that the Agreement for Sale would be executed and registered as soon as those payments were received by the defendant No. 1. According to the plaintiff, a draft copy of the agreement for sale was handed over by the defendant No. 1 to the plaintiff for his approval. The plaintiff immediately approved the draft agreement and returned the

copy back to the defendant No. 1 at their Sales office at Andheri (East). It is the case of the plaintiff that in the meanwhile, he got a housing loan sanctioned from Bank of Baroda which was to be disbursed at the first opportunity upon submission of the entire set of documents for creation of mortgage as required by the said Bank which include duly registered agreement for sale, no objection certificate from the defendant No. 2.

**8.** It is the case of the plaintiff that the defendant No. 1 however, failed and neglected to execute the said Agreement for Sale or present the same for registration in spite of the plaintiff making the payments as required by the defendant No. 1. It is the case of the plaintiff that the plaintiff had visited the office of the defendant No. 1 on several occasions in the month of April and May 2006 for execution and registration of the agreement for sale. The defendant No. 1 had postponed the same for one or the other flimsy reasons. The defendant failed to give any specific date for registration though was delivered two pay orders as demanded.

**9.** The plaintiff issued a letter dated 5th May 2006 calling upon the defendant No. 1 to fix a date immediately for registration of the Agreement for Sale which letter was served upon the defendant No. 1. The defendant No. 1 however, failed to make itself available for the registration of the Agreement for Sale. The defendant No. 1 sent a letter dated 24th May, 2006 to the plaintiff admitting the receipt of advance payment of Rs. 51,000/- however, contending that the receipt of advance payment would not bind them unless the rest of that payment was immediately forthcoming. It is the case of the plaintiff that the defendant No. 1 suppressed the fact of receipt of further payments made by the plaintiff by pay orders in the said letter. In the said letter, the defendant No. 1 invited the plaintiff for re-negotiation, in breach of the earlier understanding and contract.

**10.** The plaintiff issued a notice through advocate on 1st June, 2006 calling upon the defendant No. 1 to register the Agreement for Sale at the earliest and threatening the defendant No. 1 to take appropriate legal action in the event of the defendant No. 1 not complying with the said notice. The plaintiff has thereafter instituted a complaint in the 22nd Metropolitan Magistrate Court at Andheri against the defendant No. 1. The defendant No. 1 sent a reply dated 7th July, 2006 to the advocate for the plaintiff denying the allegations made by the plaintiff and also denied that the defendant No. 1 had received further payment towards part payment from the plaintiff.

**11.** In the year 2006, the plaintiff filed a suit bearing S.C. Suit No. 3559 of 2006 before the City Civil Court at Bombay inter alia praying for an order and decree and/or mandatory injunction directing the defendants to comply with statutory obligations to execute agreement for sale in favour of the plaintiff in respect of the suit flat as allotted to the plaintiff by letter dated 30th March, 2006 in accordance with the provisions of MOFA.

**12.** The defendant No. 1 filed written statement on 21st June, 2008 denying the allegations made by the plaintiff and contended that the suit filed by the plaintiff is outside pecuniary jurisdiction of the City Civil Court against the defendant No. 1 and also bad in law for misjoinder. It was the case of the defendant No. 1 in the written statement that the plaintiff had approached the defendant No. 1 and had showed his interest in purchasing one of the flats for sale. The initial booking amount for executing agreement is Rs. 7,00,000/- i.e. about 20% of total sale price of the flat and the balance payments shall be made as per the slabs set out in the Agreement for Sale that was to be executed with the intending purchaser.

**13.** It was the case of the defendant No. 1 that the plaintiff showed his interest in purchasing the suit flat and pleaded that he needs something to show the Bank from the defendant No. 1 for getting the loan sanctioned and issued a cheque for Rs. 51,000/- dated 12th December, 2005 in favour of the defendant No. 1 for which a receipt was handed over to the plaintiff to show the same to the Bank. It is the case of the defendant No. 1 that it was made clear to the plaintiff that the said payment would not be encashed until the balance earnest money was also received by the defendant No. 1. The receipt issued to the plaintiff also mentioned that the receipt was issued subject to realization of the cheque.

**14.** It was the case of the defendant No. 1 that the plaintiff contacted the defendant No. 1 in the month of January 2006 and informed the defendant No. 1 that the plaintiff lacked money and needed to make arrangement to pay. It is the case of the defendant No. 1 that the plaintiff thereafter approached the defendant No. 1 in the last week of March 2006 and told the defendant No. 1 that all his loan procedure is completed and he just required an allotment letter for disbursement of loan and made the defendant No. 1 part with an allotment letter on the pretext of facilitating the disbursal of a loan applied by the plaintiff from Bank where the plaintiff was employed as a Branch Manager and also from his provident fund.

**15.** The defendant No. 1 pointed out to the plaintiff that on that day i.e. on 30th March, 2006, the construction work unto 85% was over and the plaintiff was required to pay Rs. 29,75,000/- for executing the agreement as on that day. The plaintiff promised the defendant No. 1 that he would make necessary arrangement to pay money within a month for executing the agreement. The defendant No. 1 further stated that the plaintiff never showed his face literally about three and half months after issuing the cheque of Rs. 51,000/- to pay the balance earnest money nor corresponded in any form with the defendant No. 1. The plaintiff was fully aware that the defendant No. 1 had not encashed the cheque of Rs. 51,000/- issued by the plaintiff in December 2005 nor was any other payment made by the plaintiff. The defendant No. 1 denied that any assurance was given by it for execution of Agreement for Sale and registration or thereafter, the plaintiff had tendered pay order dated 4th April 2006 for Rs. 12,05,091/- and for Rs. 1,87,060/- towards payment of stamp duty.

**16.** The defendant No. 2 did not file any written statement before the trial Court. On 3rd March 2008, the City Civil Court passed an order of injunction against the defendant No. 1 in Notice of Motion No. 3264 of 2006 restraining the defendant No. 1 from creating any third party interest in flat No. 402 till further orders and directed the plaintiff to deposit the entire consideration amount with interest thereon @ 12% p.a. on the said amount from the date of allotment letter till the date of that order within 60 days, either with the defendant No. 1 or if it refuses, in the Court.

**17.** By an order dated 16th July 2008 passed by this Court in Civil Application No. 499 of 2008 in Appeal from Order No. 424 of 2008 filed by the plaintiff herein clarified by an order dated 12th August, 2008, this Court granted stay of the Para 2 of order passed by the City Civil Court dated 3rd March, 2008 insofar as the direction was issued against the plaintiff to deposit the entire consideration amount with interest.

**18.** By an order dated 17th September, 2013, this Court disposed of the Appeal from Order No. 424 of 2008 and held that the protection granted by this Court by interim order was sufficient to protect the case of the plaintiff as well as the property. The

defendant No. 1 did not challenge the order of injunction granted by the City Civil Court and confirmed by this Court. The defendant No. 1 also did not challenge the interim stay granted by this Court to the directions issued by the City Civil Court directing the plaintiff to deposit the entire consideration amount with interest.

**19.** Learned trial Judge framed following issues:-

Sr. No.	Issues	Findings
1.	Does the plaintiff prove that there was oral agreement between him and the defendant No.1 for purchase of flat No.402 for consideration of Rs.40,66,000/- ?	Yes
2.	Does the plaintiff prove that the defendant No.1 confirmed the sale of flat and issued allotment letter dated 30th March, 2006 ?	Yes
3.	Does the plaintiff prove that the defendant is avoiding to execute registered agreement of sale, as required, under the provisions of Maharashtra Ownership of Flats Act ?	No
4.	Does the plaintiff prove that he has made payment of Rs.51,000/- by cheque No.879627 drawn on Bank of Baroda, dated 12th December, 2005 and by pay order dated 4th April, 2006, for Rs.12,05,091/- and pay order for Rs.1,87,060/- drawn on IDBI Bank dated 4th April, 2006 towards the consideration of said flat ?	No
5.	Whether the plaintiff is entitled to mandatory injunction as prayed ?	No
6.	What order and decree ?	As per final order

**20.** The plaintiff filed his affidavit-in-lieu of examination-in-chief in the month of November 2010 and also filed additional affidavit-in-lieu of examination-in-chief before the trial Court. The plaintiff tendered various documents in evidence before the trial Court. The plaintiff was cross-examined by the learned counsel for the defendant No. 1. The plaintiff also examined Mr. Ishwar Nagrajan (PW-2) who was serving with a Bank of Baroda as a Senior Manager. The said witness was cross-examined by the learned counsel for the defendant No. 1. One of the partners of the defendant No. 1 Mr. Kailash Chandra Dholi (DW- 1) filed affidavit-in-lieu of examination-in-chief on 17th January, 2014 and tendered various documents. The said witness was cross-examined by the plaintiff's counsel.

**21.** By an order and judgment dated 2nd April 2014, the learned trial Judge dismissed the said S.C. Suit No. 3559 of 2006 filed by the plaintiff. Being aggrieved by the said order and judgment dated 2nd April, 2014, the plaintiff filed this first appeal under Section 96 of the Code of Civil Procedure, 1908. By an order dated 6th May, 2014 passed by this Court, interim protection granted by the learned trial Judge in favour of the plaintiff was continued from time to time.

**22.** Mr. Premlal Krishnan, learned counsel for the plaintiff invited my attention to the pleadings filed by both the parties, various parts of depositions made by witnesses



examined by the plaintiff, by the defendant No. 1 and various documents which were marked as Exhibits before the trial Court.

**23.** It is submitted by the learned counsel for the plaintiff that the plaintiff had initially paid a sum of Rs. 51,000/- which is reflected in the letter of allotment issued by the defendant No. 1. The plaintiff had subsequently handed over demand draft for Rs. 12,05,091/- on 4th April, 2006 drawn on Bank of Baroda and by another demand draft for Rs. 1,87,060/- towards stamp duty drawn in favour of IDBI Bank to the defendant No. 1. He submits that the defendant No. 1 had also sent a copy of the Agreement for sale for approval of the draft and assured the plaintiff that the same could be registered with the Sub-Registrar office at the earliest. He had approved the draft agreement and returned the same to the office of the defendant No. 1 at Andheri (E) immediately thereafter.

**24.** Learned counsel invited my attention to the letter dated 5th May, 2006 addressed by the plaintiff to the defendant No. 1 recording payment of Rs. 51,000/-, Rs. 12,05,091/- by demand draft dated 4th April, 2006 and Rs. 1,87,060/- by demand draft towards stamp duty. He submits that by the said letter, the plaintiff had called upon the defendant No. 1 to fix date for registration of the Agreement for sale in respect of the flat allotted to him vide letter dated 30th March, 2006 and to complete the transaction at the earliest.

**25.** Learned counsel also invited my attention to the letter dated 24th May, 2006 addressed by the defendant No. 1 to the plaintiff alleging that the plaintiff had paid an unconditional token payment of Rs. 51,000/- only in December 2005 and had informed the defendant No. 1 that the plaintiff lacked money and needed to make arrangements to pay for which draft documents were sought. The defendant No. 1 informed the plaintiff that it would welcome the plaintiff to re-negotiate all the terms and conditions for immediate sale of the said suit flat. He submits that in the said letter, the defendant No. 1 did not deny the receipt of other two payments made by the plaintiff.

**26.** Learned counsel for the plaintiff invited my attention to the letter dated 7th July, 2006 addressed by the defendant No. 1's advocate to the plaintiff's advocate alleging that payment schedule that begins with a token payment of Rs. 7,00,000/-. In the said letter, it was contended that no Agreement for sale was signed nor any consideration was received except for Rs. 51,000/- by way of a cheque that was conditionally accepted, to be encashed only after the balance Rs. 6,49,000/- was received from the plaintiff.

**27.** Learned counsel invited my attention to the cross-examination of the witness-(DW-1) of the defendant No. 1 by the plaintiff's counsel on 25th February, 2014 and would submit that the said witness had admitted that the plaintiff had given him cheque of Rs. 51,000/- on 20th December, 2005. Counterfoil of the receipt was prepared by his clerk. He had not written any letter to the plaintiff to deposit balance amount. He had issued allotment letter. When he had issued allotment letter, 85% construction was completed. The plaintiff was under obligation to pay around Rs. 30,00,000/-. He had not written any letter to the plaintiff calling upon him to pay an amount of Rs. 30,00,000/-.

**28.** Letter (Exh. 20) had been signed by one Mr. Sudhir Shetty who used to look after the account of the defendant No. 1 and was working with the defendant No. 1 as on the date of recording of the said evidence. The defendant No. 1 called the plaintiff

for renegotiation which means accepting money less than minimum, forgoing the interest etc. The said witness had admitted that he had not informed the plaintiff in writing that the allotment in his favour had been cancelled. The said flat No. 402 was not sold in favour of anybody. It is submitted that the said witness thus clearly admitted that he had not called upon the plaintiff to deposit the balance amount He had issued an allotment letter. Letter (Exh. 20) was signed by Mr. Sudhir Shetty who was looking after the account of the defendant No. 1 and that the said allotment letter issued to the plaintiff was never cancelled.

**29.** Learned counsel for the plaintiff invited my attention to the evidence of DW-2- Mr. Ramesh Dayaram Patel admitting that those demand drafts issued by the plaintiff were not encashed. He had received correspondence with the defendant No. 1 on 22nd August, 2006. He also invited my attention to the affidavit of evidence filed by the plaintiff and in particular paragraphs 7 & 8 of the depositions producing two pay orders 964798 and 964797 both dated 4th April, 2006 for Rs. 12,05,091/- & Rs. 1,87,060/- respectively acknowledged by Mr. Shetty who was authorised signatory of the defendant No. 2. In the said deposition, it was the case of the plaintiff that there was a clear understanding that the balance payment shall be payable to the defendant No. 1 only after the execution of the agreement through a bank under housing loan and the same was already sanctioned by the Bank of Baroda, Crawford Market Branch.

**30.** Learned counsel also filed an Additional Affidavit of the witness of the plaintiff in the month of April 2012 deposing that the original pay order was received by Mr. Shetty for and on behalf of the defendant No. 1 and acknowledged the same by signing the photocopy of the pay order. In the said deposition, the said witness deposed that he had again personally visited the sales office of the defendant No. 1 situated at Andheri (E) to handover the said original pay order dated 4th April, 2006 for Rs. 12,05,091/- towards part consideration of the said flat as demanded by the defendant No. 1 to Mr. Shetty who was authorised representative of the defendant No. 1. The said Mr. Shetty had signed and handed over the plaintiff a letter dated 30th March, 2006 on 9th April, 2006 demanding an amount of Rs. 31,74,000/-. The said Mr. Shetty signed photocopy of the pay order and letter dated 30th March, 2006 in his presence on 9th April, 2006. He further deposed that whenever he visited in the Sales office of the defendant No. 1, Mr. Shetty was present who had dealt with the customers for and on behalf of the defendant No. 1. The said Mr. Shetty had interacted and dealt with the plaintiff from time to time in the subject transaction for and on behalf of the defendant No. 1 as its authorised representative.

**31.** Learned counsel for the plaintiff invited my attention to the letter issued by the Bank of Baroda sanctioning the Term Loan (Housing) in favour of the plaintiff in the sum of Rs. 25,00,000/-. One of the securities mentioned in the said sanctioned letter was equitable mortgage of flat No. 402 i.e. suit flat and NOC from the builder/society to create mortgage and note the banks lien over the said flat. Learned counsel for the plaintiff would submit that expiry period of those two demand drafts handed over by the plaintiff to the defendant No. 1 was six months from the date of issuance of those demand drafts.

**32.** Learned counsel for the plaintiff invited my attention to the cross-examination of the plaintiff by the counsel for the defendant No. 1 and would submit that the deposition of the plaintiff in the affidavit-in-lieu' of examination- in-chief was not shattered in this cross-examination.

Learned counsel for the plaintiff invited my attention to the examination-in-chief of PW-2 Mr. Ishwar Nagrajan examined by the plaintiff to prove that Bank of Baroda had sanctioned an amount of Rs. 25,00,000/- as and by way of loan in favour of the plaintiff in order to purchase the flat No. 402 i.e. suit flat. He submits that the said witness in his cross-examination deposed that the Agreement to sale was not required at the time of sanctioning the loan but it was required prior to the disbursement of the loan. The borrower had tagged the copies of Partnership Deed between the promoter, reconstruction and development agreement, rectification deed, lease deed from MHADA, Deed of Supplementary lease, NOC from MHADA. The said witness volunteered that the builder had issued allotment letter and the same was tagged with loan application.

**33.** It is submitted that it is thus clear that for the suit flat, the plaintiff had made sufficient arrangement for making payment for consideration and had always ready and willing to comply with his part of the obligation under the said allotment letter. The defendant No. 1 however, failed to execute an Agreement for Sale required to be executed mandatorily under the provision of MOFA.

**34.** It is submitted by the learned counsel for the plaintiff that though the witness examined by the defendant No. 1 had deposed that at the time of issuance of letter of allotment, the defendant No. 1 had completed 85% of the total work however, no such alleged completion of 85% of total work was mentioned in the letter of allotment issued by the defendant No. 1. He submits that ever otherwise demand made by the defendant No. 1 was contrary to the provisions of the MOFA. The defendant No. 1 had never cancelled the allotment of flat in favour of the plaintiff.

**35.** Learned counsel for the plaintiff invited my attention to evidence of DW-2 examined by the defendant No. 1 who admitted in his evidence that the amount of the said demand drafts was lying in their bank and was not encashed till the date of recording the evidence. He also invited my attention to the bank's statement dated 4th April, 2006 showing that Rs. 1,87,060/- was debited to the account of the plaintiff. He also relied upon the Certificate dated 10th December, 2013 issued by the Bank of Baroda certifying that pay orders for Rs. 12,05,091/- and for Rs. 1,87,060/- were issued by the said bank at the request of the plaintiff on 4th April, 2006 showing the name of the defendant No. 1 as 'Payee.' A sum of Rs. 12,05,091/- was out of the proceeds of account closure of Capital Gains Scheme Account Nos. 14/3 and 14/5 and a sum of Rs. 1,87,060/- was out of the proceeds transferred from his Staff Overdraft Old Account No. 31019 New No. 12900400000071.

**36.** Learned counsel for the plaintiff placed reliance on Section 4 of the MOFA and would submit that whatever payment were required to be deposited under the provisions of the MOFA was already deposited by the plaintiff with the defendant No. 1. The defendant No. 1 has not denied the receipt of demand drafts mentioned in the advocate's notice of the plaintiff. He submits that in the cross-examination of the witness of the defendant No. 1, he had admitted that 20% of the sale consideration was required to be collected as booking amount. The defendant No. 1 had received Rs. 51,000/- before execution of the Agreement for sale. No demand was made by defendant No. 1 for recovery of the balance amount.

**37.** Learned counsel for the plaintiff distinguishes the judgment of the Supreme Court in the case of Hansa V. Gandhi v. Deep Shankar Roy & Ors., reported in MANU/SC/0398/2013 : AIR 2013 SC 2560 relied upon by the learned trial Judge and would submit that the said judgment was not at all applicable to the facts of this



case. He invited my attention to paragraphs 18 and 21 of the said judgment and would submit that in the facts of that case, allotment letter was cancelled by subsequent agreement between the parties. In this case, no such letter of allotment was cancelled by the defendant No. 1.

**38.** Learned counsel for the plaintiff placed reliance on the judgment of this Court in the case of Harshal Developers Pvt. Ltd. v. Manohar Gopal Bavdekar, reported in MANU/MH/1924/2012 : 2013(1) Mh LJ 855 and in particular paragraphs 7 and 8 and would submit that this Court in the said judgment, has considered the mandatory compliance of Section 4 of the MOFA and has held that the developer cannot accept more than 20% of the total consideration amount of the flat before entering into an agreement.

**39.** Mr. Dani, learned senior counsel for the defendant No. 1, on the other hand, submits that there was no concluded agreement between his client and the plaintiff under the provisions of MOFA or under the general law. He submits that at most, there was an oral agreement to enter into agreement for sale in future in compliance of various conditions and thus there cannot be any specific performance of agreement entered into of agreement for sale. He submits that the provisions of the MOFA do not bar any oral agreement between the parties. Section 4 of the MOFA does not contemplate the mode and manner of execution of Agreement for sale. He invited my attention to prayers filed by the plaintiff and would submit that on plain reading of prayer clause (a) would clearly indicate that such prayer was not at all maintainable.

**40.** Without prejudice to the aforesaid submissions, learned senior counsel for the defendant No. 1 submits that there was no readiness and willingness on the part of the plaintiff to comply with his part of the obligation under the said allotment letter nor any averments in the plaint or proof to show the alleged readiness and willingness on the part of the plaintiff. He submits that the relief for specific performance being a discretionary relief cannot be granted in favour of the plaintiff in the facts of this case.

**41.** Learned senior counsel for the defendant No. 1 submits that the plaintiff has prayed for an order and decree and/or mandatory injunction directing the respondent to comply with the statutory obligations inter alia to execute agreement for sale in favour of the plaintiff in respect of the suit flat in accordance with the provisions of the MOFA. There was no prayer for seeking specific performance of the alleged agreement. He submits that the relief sought by the plaintiff being in the nature of discretionary relief was not rightly granted by the trial Court in the facts of this case. He invited my attention to the averments made in paragraphs 5, 6, 7 and 16 of the plaint and would submit that the plaintiff had pleaded an oral agreement in respect of the said suit flat. The plaintiff did not offer the balance consideration in the prayer sought in the plaint before the trial Court.

**42.** It is submitted that the decree of such nature thus was rightly not granted by the trial Court. The plaintiff was never ready and willing to pay the balance amount at any point of time. He invited my attention to the averments made by the defendant No. 1 in paragraphs 5 and 6 in the written statement and would submit that the defendant No. 1 had not even encashed the cheque for Rs. 51,000/- dated 12th December, 2005 issued by the plaintiff till date to the knowledge of the plaintiff. The defendant No. 1 had made it clear to the plaintiff that the said payment would not be encashed until the balance earnest money was also received by the defendant No. 1 from the plaintiff in respect of the suit flat.

**43.** It is submitted that the defendant No. 1 had also pleaded that the plaintiff had disappeared in the intervening period after releasing the first payment of Rs. 51,000/- and had not turned up for fresh negotiation for quite some time. He invited my attention to the averments made in paragraph 13 of the written statement and would submit that the defendants denied the allegation of the plaintiff that the plaintiff had tendered pay orders dated 4th April, 2006 for Rs. 12,05,091/- and Rs. 1,87,060/- to the defendants towards part consideration and towards payment of stamp duty respectively. The plaintiff had failed to prove that the plaintiff had made such payment towards part consideration or towards payment of stamp duty as alleged in the plaint.

**44.** Learned senior counsel for the defendant No. 1 invited my attention to the allotment letter dated 30th March, 2006 issued by his client to the plaintiff and would submit that by the said allotment letter, the defendant No. 1 allotted the suit flat for total consideration of Rs. 40,66,000/- and on further payment of society maintenance, ascertain charges, share money etc. aggregating to Rs. 1,00,360/- and on payment of stamp duty, registration charges and service tax. He submits that the said allotment letter itself would indicate that the said writing was not executed as agreement for sale but was for booking of flat. The said writing was not a concluded agreement. The defendant No. 1 had called upon the plaintiff for fresh negotiation which was not entered into between the parties.

**45.** Learned senior counsel invited my attention to the deposition of Mr. Kailash Chandra Dholi, DW-1 examined by the defendant No. 1 in affidavit of evidence dated 17th January, 2014 and more particularly in particular paragraphs 4 and 5 thereof deposing that the plaintiff was informed that the initial booking amount for executing Agreement was Rs. 7,00,000/- i.e. about 20% of total sale price of the flat and the balance payment shall be made as per slabs more particularly set out in the Agreement for Sale that was to be executed with the intending purchaser. He submits that in the said affidavit of evidence, it was deposed that the plaintiff had pleaded that he needed some copies of the documents from the defendants to present in the bank for getting the loan sanctioned. The defendants had handed over a receipt for Rs. 51,000/- to show the said receipt to the bank. It was made clear by the defendant No. 1 to the plaintiff that the said payment would not be encashed until the balance earnest money was also received by the defendant No. 1. The said receipt was subject to realisation of the cheque.

**46.** It is submitted that there was no cross- examination of the said witness examined by the defendant No. 1 on the deposition made in paragraphs 4 and 5 of the affidavit of evidence. It was thus clear that evidence of the defendant No. 1 remained uncontroverted. A cheque of Rs. 51,000/- issued by the plaintiff was not encashed by the defendant No. 1 to the knowledge of the plaintiff admittedly.

**47.** It is submitted by the learned counsel for the defendant No. 1 that it was not the case of the plaintiff that the plaintiff though tendered pay orders towards payment of part consideration and towards stamp duty and registration charges, the defendant No. 1 had not encashed the said amount. The plaintiff had specifically pleaded that the plaintiff had made such payment to the defendant No. 1.

**48.** Learned senior counsel invited my attention to the cross-examination of the witness examined by the defendant No. 1 deposing that the defendant No. 1 used to accept 20% of the sale consideration as a booking amount. The defendant No. 1 used to accept the said amount before execution of the said agreement. The plaintiff had

visited the site 4 to 5 times. The defendant No. 1 had furnished the draft agreement to the plaintiff. He submits that the said witness also deposed in the cross-examination that when the said allotment letter was issued to the plaintiff, 85% construction was completed. The plaintiff was under an obligation to pay Rs. 30,00,000/-. The defendant No. 1 however, did not write any letter to the plaintiff calling upon him to pay an amount of Rs. 30,00,000/-. The defendant No. 1 did not inform the plaintiff in writing that the allotment in favour of the plaintiff had been cancelled.

**49.** Learned senior counsel for the defendant No. 1 invited my attention to the letter dated 22nd August, 2006 from the learned advocate for the defendant No. 2 to the Manager, Bank of Baroda (Bhat Bazar), Mumbai seeking clarification from the bank as to whether pay orders for Rs. 1,87,060/- and Rs. 12,05,091/- were encashed and by whom. He submits that on the said letter, an endorsement was made by the Manager of Bank of Baroda that the said two pay orders issued by the plaintiff were still subsisting in the books of account of the said bank.

**50.** Learned senior counsel for the defendant No. 1 invited my attention to the deposition of Mr. Kailash Chandra Dholi, witness examined by the defendant No. 1 and in particular paragraph 15 thereof and would submit that the said witness had deposed that when the plaintiff had made enquiries about the flats and its cost, he took a printed blank agreement under the guise of presenting the same before the concerned department of financial institutions and banks for making enquiries as to how much loan would be made available to him. He however did not return the said printed copy till the date of filing of the said affidavit of evidence by the said witness. The said witness found the said blank printed agreement with the plaintiff when the inspection of documents was given by the plaintiff. He submits that there was no cross-examination of the said witness by the defendant No. 1 on that part of the deposition in the affidavit of evidence and more particularly in paragraph 15.

**51.** It is submitted that in the evidence led by the plaintiff, the plaintiff did not refer to any endorsement alleged to have been made on the draft agreement referred in the affidavit of evidence filed by the plaintiff. He submits that in paragraph 13 of the affidavit of evidence, the said witness had referred to a Commencement Certificate issued by the Municipal Corporation of Greater Mumbai in the name of the defendant No. 2 showing that more than 85% work was completed on 27th January, 2005. He invited my attention to the averments made by the plaintiff in paragraph 5 and would submit that even according to the plaintiff, the defendant No. 1 was liable to hand over possession of the suit flat in the month of November 2006. The plaintiff has thus not made payment of consideration amount even according to the provisions of MOFA. He submits that even according to the plaintiff, loan for purchase of the flat was already sanctioned in favour of the plaintiff by the bank much prior to the date of issuance of the allotment letter by the defendant No. 1 in favour of the plaintiff. The plaintiff has thus not taken any steps for borrowing of any amount pursuant to the issuance of letter of allotment.

**52.** Learned senior counsel invited my attention to the findings rendered by the trial Court in paragraph 19 of the impugned judgment and order and would submit that after considering oral and documentary evidence led by the parties, learned trial Judge rightly rendered findings that the plaintiff had failed to show that he had advanced 20% amount before execution of an agreement to sell and in spite of receipt of payment, the defendant No. 1 was avoiding to execute a registered agreement. The plaintiff failed to show that he had tendered demand drafts towards part payment and

stamp duty and the same were accepted by the defendant No. 1 and encashed. He submits that the learned trial Judge has rightly rendered findings that cheque issued by the plaintiff was not encashed by the defendant No. 1. There was absolutely no material on record to show that any demand drafts were tendered to defendant No. 1. He strongly placed reliance on the findings rendered by the learned trial Judge in paragraph 19 that the plaintiff had failed to prove that in spite of payment by cheque and demand drafts, the defendant No. 1 avoided to execute registered agreement to sell under the provisions of the MOFA.

**53.** Mr. Krishnan, learned counsel for the plaintiff in rejoinder submits that the plaintiff had filed a suit for seeking compliance of obligations on the part of the defendant No. 1 under the provisions of the MOFA. Such suit is maintainable under the provisions of the said Act. Mr. Dani, learned senior counsel for the defendant No. 1 does not dispute this position.

**54.** Learned counsel for the plaintiff strongly placed reliance on Section 4 of the MOFA and would submit that the defendant No. 1 was under an obligation to enter into an agreement on the terms and conditions set out in Section 4 of the MOFA. The provisions of the Contract Act would not come in play. Learned counsel for the plaintiff invited my attention to the deposition made by the witness examined by the defendant No. 1 and more particularly paragraph 15 of the affidavit of evidence and also his cross-examination and more particularly in paragraph 28 and would submit that the said witness had admitted that he had furnished draft agreement for sale to the plaintiff. He submits that in the written statement, the defendant No. 1 specifically denied having handed over the said draft agreement to the plaintiff. The plaintiff had not filed a suit for specific performance of the agreement for sale but has prayed for a decree directing the defendant No. 1 to follow the provisions of the MOFA. The plaintiff had already obtained preapproved loan. Source of payment in the hands of the plaintiff for payment of amount of consideration was thus proved before the trial Court. He submits that in the month of March 2006, the plaintiff had issued a cheque for Rs. 51,000/- and in the month of April 2006 had issued those two pay orders.

**55.** Learned counsel invited my attention to the additional affidavit of evidence filed by the plaintiff in the month April 2012 and would submit that in the said additional affidavit of evidence, the plaintiff had deposed and proved as to how the plaintiff had tendered Pay Order for Rs. 1,87,060/- drawn on Bank of Baroda, Bhat Bazar Branch, Mumbai under the original allotment letter dated 30th March 2006 and another Pay Order for Rs. 12,05,091/- drawn in favour of the defendant No. 1 dated 4th April 2006 which was handed over to Mr. Shetty. Though Mr. Shetty was working with the defendant No. 1 and was available for being examined as a witness, the defendant No. 1 did not examine Mr. Shetty as a witness. The trial Court thus ought to have drawn adverse inference against the defendant No. 1 for not examining the said Mr. Shetty and ought to have considered that part of crucial evidence led by the plaintiff as proved having remained un- controverted.

**56.** Learned counsel for the plaintiff tendered a copy of unreported judgment dated 4th October 2011 in the case of Mrs. Veena S. Makhija v. Budhrani Housing Developers Pvt. Ltd. in Appeal from Order No. 796 of 2011 and other connected matters in support of the submission that under Section 4 of the MOFA, it is a statutory obligation on the part of the developer to execute registered agreement after receiving advance sum in respect of alienation of the units. The developer had failed to perform the statutory obligation under the provisions of MOFA and thus the suit filed by the plaintiff seeking decree against the developer to perform its part of

obligation under the said Act was maintainable.

#### REASONS AND CONCLUSIONS:-

**57.** I have heard the learned counsel for the plaintiff and the defendant No. 1 at length and have considered the rival contentions raised before this Court arising out of the judgment and decree passed by the learned trial Judge. A perusal of the plaint filed by the plaintiff clearly indicates that the plaintiff had prayed for an order and decree and/or mandatory injunction directing the respondent to comply with the statutory obligations inter alia to execute agreement for sale in favour of the plaintiff in respect of the suit flat under the provisions of MOFA. It is clear that the suit was filed for enforcement of the obligation of the defendant No. 1 under Section 4 of the said MOFA.

**58.** This Court in an unreported judgment delivered on 4th October, 2011 in the case of Mrs. Veena S. Makhija v. Budhrani Housing Developers Pvt. Ltd. in Appeal from Order No. 796 of 2011 has held that it is a statutory obligation on the part of the developer to execute registered agreement after receiving advance sum in respect of alienation of the units. It is also held that the defendant has failed to perform the statutory obligations under the provisions of MOFA and as such the suits presented by the plaintiffs seeking directions to the defendant to perform the obligations under the Act comes within the purview of Section 6(iv)(j) of the Bombay Court-Fees Act.

**59.** Supreme Court in the case of Harshal Developers Pvt. Ltd. (supra) has held that in a suit for specific performance based on unregistered agreement of sale, the prayers demanding registration of the document and possession are maintainable. Section 4-A has overriding effect over section 4 of the MOFA. It is held that Section 4 is mandatory Section. If the agreement is not registered, it loses its value as agreement under Section 4 of the MOFA. If agreement is registered then it can be given effect under MOFA including imposing the liabilities/obligations mentioned under the Act. MOFA Act is enacted with an object to curtail the mal-practices of the builders and promoters and to protect the interest of the flat purchasers. It is held that under Section 4 of the MOFA said unregistered agreement of sale being a void document, cannot be recognized and suit cannot be filed for the liabilities and obligations under MOFA due to the mandatory requirement of the registration.

**60.** It is also held that however in view of section 4-A of the Act the document did not become non-est or valueless. It does carry a character and value of the regular agreement of sale for immovable property. There is no specific requirement of the registration for agreement of sale of immovable property. Therefore, a suit for specific performance or performance of a contract can be instituted on the basis of an un-registered agreement of sale. The principles of law laid down by this Court in the said judgment applies to the facts of this case. I am respectfully bound by the said judgment.

**61.** It was the specific case of the plaintiff that the defendant No. 1 had received various amounts towards part consideration for Sale of the suit flat, however had failed and neglected to register the said Agreement. The defendant No. 1 had failed to comply with its obligation under the provisions of the MOFA. The defendant No. 1 had failed to execute the documents in the form of Agreement for Sale or admit/lodge such document for registration as promised to the plaintiff by the defendant No. 1. It is thus clear that the suit was filed by the plaintiff inter alia praying for enforcement of the statutory obligation under the provisions of the MOFA against the defendant



No. 1. Such suit for enforcement of statutory obligation under Section 4 read with Section 4-A is thus maintainable.

**62.** I shall now deal with rival contentions of both the parties on the correctness of various issues decided by the Trial Court. The trial Court had framed six issues for adjudication. The trial Court rendered a finding that the plaintiff had proved that there was oral agreement between him and the defendant No. 1 for purchase of suit flat for consideration of Rs. 40,66,000/- and also the defendant No. 1 confirmed the sale of flat and issued allotment letter dated 30th March, 2006. In the written statement filed by the defendant No. 1, it was alleged that the plaintiff had shown his interest in purchasing one of the flats for sale. The representative of defendant No. 1 had informed the plaintiff that the initial booking amount for executing agreement was Rs. 7,00,000/- i.e. 20% of total sale price of the flat and balance payments shall be made as per the slabs set out in the Agreement for Sale that was to be executed with the intending purchase. The plaintiff had issued a cheque for Rs. 51,000/- dated 12th December, 2005 in the name of the defendant No. 1. The defendant No. 1 had issued a receipt to the plaintiff.

**63.** It was the case of the defendant No. 1 that it was made clear to the plaintiff that the said payment would not be encashed until the balance earnest money was also received by the defendant No. 1. The defendant No. 1 had allegedly pointed out to the plaintiff that on 30th March, 2006, the construction work unto 85% was over and the plaintiff was required to pay Rs. 29,75,000/- for executing the agreement as on that date. The plaintiff has allegedly promised the defendant No. 1 that he would make necessary arrangement to pay the money within a month for executing the Agreement. The plaintiff however, did not pay the balance amount. The defendant No. 1 also denied the receipt of the payment of Rs. 12,05,091/- and also Rs. 1,87,060/- from the plaintiff.

**64.** In the affidavit-in-lieu of examination-in-chief filed by the plaintiff in the month of November 2010, the plaintiff deposed that the defendant No. 1 allotted the suit flat for total consideration of Rs. 40,66,000/- which letter of allotment was on the letter head of the defendant No. 1 and was signed by one of the Partners of the defendant No. 1. The defendant No. 1 has received token money of Rs. 51,000/- vide Cheque No. 879627 dated 12th December, 2005. The defendant No. 1 thereafter demanded from the plaintiff further payments towards advance and stamp duty and assured that the Agreement for Sale shall be executed and registered upon receipt of such payment. The plaintiff accordingly tendered two Pay Orders for Rs. 12,05,091/- towards part consideration of the said flat and for Rs. 1,87,060/- dated 4th April, 2006 towards payment of stamp duty drawn on IDBI Bank Ltd.

**65.** The said witness further deposed that there was clear understanding that the balance payment shall be payable to the defendant No. 1 only after execution of the Agreement through a bank under housing loan and the same was already sanctioned by the Bank of Baroda, Crawford Market Branch. The plaintiff also relied upon the receipt of payment towards part payment and stamp duty signed by Mr. Shetty demanding an amount of Rs. 31,74,000/-. The plaintiff also relied upon a draft copy of the Agreement for Sale for approval allegedly handed over by the defendant No. 1 to the plaintiff.

**66.** The said witness deposed that he immediately approved the draft agreement and returned the copy back to the defendant No. 1 at their Sales office at Andheri East. In the meanwhile, he got a housing loan sanctioned from Bank of Baroda, Crawford

Market Branch. The said amount was lying with the Bank for disbursement at the first opportunity upon submission of the entire set of documents for creation of mortgage as required by the said bank which would include duly registered agreement for sale, no objection certificate from the defendant No. 2. The defendant No. 1 however, failed and neglected to execute the said Agreement to Sale or present the same for registration.

**67.** The plaintiff also filed an additional affidavit of examination-in-chief in the month of April 2012 and deposed that Mr. Shetty had received original pay orders for and on behalf of the defendant No. 1 for Rs. 12,05,091/- & for Rs. 1,87,060/- and acknowledged the same by signing the photocopies of the pay orders as acknowledgment. He identified the signature of Mr. Shetty on the said photocopies of the pay orders. He also relied upon the letter dated 30th March, 2006 handed over to him by Mr. Shetty on behalf of the defendant No. 1. The plaintiff was cross-examined by the defendant No. 1 through counsel. The plaintiff also produced the copy of the draft Agreement for Sale with various corrections made thereon by the plaintiff in evidence before the learned trial Judge.

**68.** In his cross-examination, the plaintiff deposed that he met the defendant No. 1 in the month of August 2005 and had issued cheque for Rs. 51,000/- on 12th December, 2005. He did not know whether till filing of the suit, the said cheque was not encashed by the defendant No. 1. He did not verify from the passbook whether the cheque issued by him was debited. The plaintiff admitted that at the time of filing suit, the defendant No. 1 had not received cheque amount. He denied various suggestions put to him by the learned counsel for the defendant No. 1 in the cross-examination. He deposed that he had submitted necessary documents to obtain pre-sanctioned loan from bank. He denied the suggestion that he had never given demand drafts to the defendant No. 1. He deposed that in order to get pre-sanctioned plan, one has to furnish salary slip, building plan, details of flat and title clearance certificate issued by the advocate.

**69.** The said witness deposed that he had submitted all the necessary documents through bank. The said witness also denied that the defendant No. 1 had never instructed him to see Mr. Shetty for completion of transaction. The plaintiff had also examined Mr. Ishwar Nagrajan (PW-2) who was serving with a Bank of Baroda as a Senior Manager. In his examination-in-chief, he deposed that the proposal of the plaintiff for loan was considered favourably by the bank and had sanctioned an amount of Rs. 25,00,000/- as loan in order to purchase the suit flat. In his cross-examination, the said witness deposed that the agreement to sale was not required at the time of sanctioning loan but it was required prior to the disbursement of the loan. The plaintiff had tagged the copies of Partnership Deed between the promoter, reconstruction and development agreement, rectification deed, lease deed from MHADA, Deed of Supplementary lease, NOC from MHADA. The plaintiff had also tagged an allotment letter with loan application.

**70.** A perusal of the evidence of PW-2 clearly indicates that various documents were annexed by the plaintiff to the loan application including some of the documents which were handed over by the defendant No. 1 to the plaintiff relating to the title of the defendant No. 1 to the entire property including the suit flat. The plaintiff had applied for loan of Rs. 25,00,000/- for purchase of the suit flat which was duly sanctioned by the Bank of Baroda.

**71.** The defendant No. 1 had examined Mr. Kailash Chandra Dholi (DW-1) who had

filed affidavit in lieu of examination-in-chief. The said witness was cross-examined by the plaintiff's counsel. In the cross-examination, he had admitted that the defendant No. 1 had a office on the site itself and the willing customers used to visit the site and to negotiate the terms for purchase the flat. The defendant No. 1 used to accept 20% of the sale consideration as a booking amount. The defendant No. 1 used to accept the said amount before execution of the said agreement. The plaintiff had visited the site 4 to 5 times. The plaintiff was interested to purchase 2BHK flat. The said witness had furnished the draft agreement to the plaintiff personally. The plaintiff had given a cheque of Rs. 51,000/- on 20th December, 2005. Counterfoil of the receipt was prepared by Mr. Rajesh Patkar.

**72.** The said witness had admitted that when he had issued allotment letter, 85% construction was completed. He did not write any letter to the plaintiff calling upon him to pay an amount of Rs. 30,00,000/- which according to the witness, the plaintiff was under an obligation to pay. The witness admitted that the letter at Exhibit-20 relied upon by the plaintiff was signed by Mr. Shetty who used to look after the accounts. Mr. Shetty was not working with the plaintiff as on the date of recording the said evidence. He had admitted that some of the flat purchaser had purchased the flat by raising the home loan. The defendant No. 1 had called the plaintiff for renegotiation i.e. by accepting money less than minimum, forgoing the interest etc. He had admitted that he had not informed the plaintiff in writing that the allotment in his favour had been cancelled by the defendant No. 1.

**73.** The defendant No. 1 had also examined Mr. Ramesh Dayaram Patel (DW-2) whose examination-in-chief was recorded in Court. He was a Branch Manager of Bank of Baroda, Bhat Bazar. He deposed that Mr. Mehta was the Branch Manager at the relevant time. In his cross-examination, he deposed that demand drafts were valid for six months from the date of issuance. Those demand drafts were not encashed. He had correspondence with the defendant No. 1 on 22nd August, 2006.

**74.** A perusal of the aforesaid evidence indicates that though a suggestion was put to the plaintiff that the defendant No. 1 had never instructed the plaintiff to see Mr. Shetty for completion of transaction, the defendant No. 1 did not examine Mr. Shetty. It was not the case of the defendant No. 1 that though the defendant No. 1 had taken steps to examine Mr. Shetty as a witness, he had refused to give evidence. The evidence of the plaintiff that the Pay Orders for Rs. 12,05,091/- and for Rs. 1,87,060/- were handed over to Mr. Shetty who accepted the said two pay orders on behalf of the defendant No. 1 and acknowledged thereof on the copy of the said pay orders remained un- controverted and was proved.

**75.** The witness examined by the defendant No. 1 had also admitted that he had neither called upon the plaintiff to pay the balance amount of Rs. 30,00,000/- nor had cancelled the letter of allotment in writing. The plaintiff had established before the Trial Court that he had applied for loan of Rs. 25,00,000/- which was sanctioned by the Bank of Baroda. He had also proved that large number of the documents furnished by the defendant No. 1 relating to the entire property on which the said flat was constructed were handed over I by the defendant No. 1 to the plaintiff to enable the plaintiff to apply for loan. The plaintiff had also proved the sanctioned letter issued by the Bank of Baroda sanctioning loan of Rs. 25,00,000/- repayable in installment.

**76.** It is thus clear that the plaintiff had tendered a cheque of Rs. 51,000/- and two Pay Orders for Rs. 12,05,091/- and for Rs. 1,87,060/- both dated 4th April 2006 in

favour of the defendant No. 1 which was duly received by the defendant No. 1. Loan of Rs. 25,00,000/- was also sanctioned in favour of the plaintiff by the Bank of Baroda. Merely because the defendant No. 1 did not deposit the said amount tendered by the plaintiff would not conclude that the plaintiff had failed to comply with his part of the obligation under the said letter of allotment. The plaintiff would not have issued pay orders of substantial amount including pay orders for payment of stamp duty and would not have applied for loan which was duly sanctioned subsequently for purchase of the suit flat if there would not have been any transaction between the plaintiff and the defendant No. 1 in respect of the suit flat.

**77.** The witness examined by the defendant No. 1 had admitted in his evidence that the draft Agreement for Sale was handed over to the plaintiff by him. Letter of allotment executed in favour of the plaintiff by defendant No. 1 also was not disputed. Trial Court in the impugned judgment and order has rendered a finding that there was dispute on the point that by accepting cheque of Rs. 51,000/-, the defendant No. 1 had agreed to sell the said suit flat for consideration of Rs. 40,66,000/-. Testimony of the plaintiff was not shaken in the cross-examination. Trial Court also held that the plaintiff had produced the original allotment letter which disclosed that the defendant No. 1 had allotted the suit flat for consideration of Rs. 40,66,000/- to the plaintiff. There was no cross-examination on the point of booking of the suit flat by the defendant No. 1. The witness examined by the defendant No. 1 had also admitted that the plaintiff had visited their site on 4 to 5 times and was interested in purchasing 2BHK flat.

**78.** In paragraph 10 of the impugned judgment and order, the Trial Court rendered a finding that the plaintiff had proved that there was an agreement between the plaintiff and the defendant No. 1 to purchase the suit flat for consideration of Rs. 40,66,000/- and by accepting cheque of Rs. 51,000/-, the defendant No. 1 had issued allotment letter. However, after recording the findings in favour of the plaintiff, on Issue Nos. 1 and 2, learned Trial Judge has held that the plaintiff in his cross-examination revealed that he did not know whether till the date of filing of the suit, the said pay orders were encashed by the defendant No. 1 or not. Trial Court did not appreciate that the defendant No. 1 had neither cancelled the letter of allotment nor had made an attempt to return the said amount received by the defendant No. 1 from the plaintiff.

**79.** Though the learned trial Judge appreciated the evidence of PW-2 Mr. Ishwar Nagrajan who in his cross-examination, revealed that the bank had sanctioned the loan of Rs. 25,00,000/- in favour of the plaintiff and that the Agreement to sale was not required at the time of sanctioning the loan but it was required prior to the disbursement of the loan, learned trial Judge dismissed the suit filed by the plaintiff. Learned trial Judge erroneously believed the evidence of Mr. Kailash Chandra Dholi (DW-1) on the ground that not a single question was put to the said witness regarding tendering two demand drafts by the plaintiff to the defendant No. 1. Though it was a specific case of the plaintiff that those two demand drafts were handed over to Mr. Shetty whose signature was proved by the plaintiff in his evidence, the defendant No. 1 did not bother to examine Mr. Shetty to prove its case and to counter the evidence of the plaintiff.

**80.** In my view, merely because the defendant No. 1 had not encashed the demand drafts, that would not prove that those demand drafts were not even received by the defendant No. 1. The fact remains that the defendant No. 1 never returned those demand drafts to the plaintiff for cancellation or the letter of allotment. In my view,

insofar as the finding of the learned trial Judge that there was no receipt of payment of demand drafts is concerned, the plaintiff has proved that both those demand drafts were handed over to Mr. Shetty on behalf of defendant No. 1 on which there was no cross-examination of the plaintiff.

**81.** The finding of the learned trial Judge that the plaintiff had failed to prove that he had paid 20% or more amount and in spite of payment, the defendant No. 1 failed to execute the registered agreement is contrary to the evidence on record and is erroneous. Payment of Rs. 51,000/- along with Pay Orders for Rs. 12,05,091/- and for Rs. 1,87,060/- made by the plaintiff was more than 20% of the consideration amount. Learned trial Judge was thus required to direct the defendant No. 1 to perform the statutory obligation of the defendant No. 1 under the provisions of MOFA. The finding of the learned trial Judge that there was no material to show that no demand drafts were tendered to the defendant No. 1 is contrary to the evidence on record.

**82.** Insofar as the submission of the learned senior counsel for the defendant No. 1 that there was no concluded agreement between the plaintiff and the defendant No. 1 under the provisions of MOFA or under General Law is concerned, the same has no merit. The plaintiff has established before the trial Court that the defendant No. 1 had executed the letter of allotment in favour of the plaintiff and made an assurance to execute Agreement for Sale under Section 4 of MOFA upon payment of the amount required under the said provision. In my view, there is no substance in the submission of the learned senior counsel for the defendant No. 1 that the suit was filed for specific performance of an agreement to enter into an Agreement for Sale but the suit is for performance of the statutory obligation under the provisions of MOFA. Learned senior counsel did not dispute before this Court that the provisions of MOFA do not bar on oral agreement between the parties.

**83.** There is no substance in the submission made by the learned senior counsel for the defendant No. 1 that prayer clause (a) was not maintainable. No prayer was made for the alleged specific agreement under the provisions of Specific Reliefs Act, 1963 in view of the suit for enforcement of the statutory obligation under Section 4 of the MOFA. In my view, there is no merit in the submission of the learned senior counsel for the defendant No. 1 that in this case, learned trial Judge rightly did not exercise his discretion in granting discretionary relief in favour of the plaintiff. The enforcement of statutory obligation under Section 4 of the MOFA would not fall under the discretionary relief under the provisions of the Specific Reliefs Act, 1963 as sought to be canvassed by the learned senior counsel for the defendant No. 1.

**84.** Insofar as the averments made in the written statement by the defendant No. 1 denying the factum of receipt of Pay Orders for Rs. 12,05,091/- and for Rs. 1,87,060/- is concerned, the plaintiff had proved the factum of delivery of the said two demand drafts. The defendant No. 1 had failed to lead any counter evidence by examining Mr. Shetty that no such demand drafts were received by him on behalf of the defendant No. 1. The learned Trial Judge ought to have drawn an adverse inference against the defendant No. 1 for not leading the best evidence. In my view, the learned trial Judge has not appreciated the evidence led by the plaintiff and cross-examination of the witness examined by the defendant No. 1 in right perspective. The findings rendered on Issue Nos. 3 and 4 by the learned trial Judge are inconsistent with and contrary to the findings rendered on Issue Nos. 1 and 2.

**85.** There is no merit in the submission of the learned senior counsel for the



defendant No. 1 that though more than 85% construction was completed on 27th January, 2005, the plaintiff had not made payment in accordance with the progress of the work. In my view, the defendant No. 1, in that event, would not have even issued letter of allotment merely on the receipt of payment of Rs. 51,000/- against the consideration amount of 20% of the total consideration. In my view, the plaintiff had proved the source of payment in the hands of the plaintiff by tendering the substantial amount to the defendant No. 1 and also by showing the sanctioned of pre-approved loan specifically for purchase of the suit flat.

**86.** Insofar as the judgment of the Supreme Court in the case of Hansa v. Gandhi v. Deep Shankar Roy & Ors. (MANU/SC/0398/2013 : AIR 2013 SC 2873) (supra) relied upon by Mr. Dani, learned senior counsel for the defendant No. 1 is concerned, a perusal of the said judgment indicates that the allotment letter issued by the developer was subsequently cancelled by his subsequent agreement between the parties. In this case, admittedly the witness examined by the defendant No. 1 was admitted that he had not addressed any letter of cancellation of allotment letter. The judgment in the case of Hansa V. Gandhi v. Deep Shankar Roy & Ors. (supra) thus is clearly distinguishable in the facts of this case and would not assist the case of the defendant No. 1.

**87.** In my view, the plaintiff has thus made out a case for decree as prayed in the suit filed by the plaintiff.

**88.** I therefore pass the following order:-

(i) The impugned judgment and decree dated 2nd April, 2014 passed by the learned trial Judge is set aside.

(ii) S.C. Suit No. 3559 of 2006 filed by the plaintiff is decreed in terms of prayer clause (a) with costs.

(iii) The plaintiff shall deposit the consideration amount with the trial Court within eight weeks from today.

(iv) The defendant No. 1 is directed to comply with statutory obligation on the part of the defendant No. 1 under the provisions of the MOFA within four weeks from the date of the plaintiff depositing the consideration amount with the trial Court. Till such time, the defendant No. 1 shall not create any third party rights or shall not hand over possession of the suit flat in favour of any third party.

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