REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4997 OF 2016
(ARISING OUT OF SLP(C) NO.32544 OF 2015)

MUKUL SHARMA ....APPELLANT

VERSUS

ORION INDIA (P.) LTD. THROUGH ITS MANAGING DIRECTOR ...RESPONDENTS

J U D G M E N T

Leave granted.

2. The appellant filed Title Suit No.195 of 1998 before the Civil Judge (Senior Division) No.1 at Guwahati praying for specific performance of the instrument dated 25.8.1992 between the appellant and the respondent.

3. The dispute is only on a narrow compass. As per paragraph (1) of the aforesaid agreement, half of the built up area on the ground floor of the proposed North Block of the complex as per the drawing No.GBA/891/03A dated 14.12.1990 and half of the built up area on the mezzanine floor of the same building and complete built up area on the first floor in the same building, were liable to be handed over to the appellant. On a dispute as to what is the built up area, the appellant filed the

civil suit. The suit was decreed. Aggrieved by the same, the respondent-defendant filed first appeal before the High Court. The following points for determination were found to arise in the first appeal :

> (i) Whether the parties had entered into agreement knowing that 'built up area' as mentioned in Ext.1 agreement includes the common area?
> (ii) Whether the plaintiff is entitled to specific performance as claimed?
> (iii) Whether plaintiff is entitled to a money decree as prayed for?

4. As per the impugned order, the High Court has taken the view that the built up area includes the common area as understood by the parties. Reliance is placed on Ex.'H' letter dated 15.9.1997 written by the appellant-plaintiff to the respondent-defendant. As per the said letter, indisputably, the built up area has been understood to include the common area.

5. However, the High Court has failed to appreciate Ex.3 letter dated 9.3.1998 and Ex.4 letter dated 16.3.1998 in the correct perspective. The relevant portion of annexure Ex.3 letter dated 9.3.1998 reads as follows :

> "(1) That the "built-up area" as in clause 1(i), (ii) & (iii) of the Agreement between yourself and the Company (Deed No.5581 dated 25/8/98) should be defined as "the area within the four walls excluding the common area

as lift well, lobby, corridor, etc.

(2) That our method of calculation and the area so calculated is not acceptable to you.

Since we wish to resolve this long outstanding issue as early as possible, we agree to your definition of "built-up area" and shall recalculate the area to be allotted to you and shall inform you shortly."

6. This was followed by Ex.4 letter dated 16.3.1998 wherein it is stated in the very opening paragraph of the said letter as follows :

"Further to our letter No.ORION/44-1/98/028 dt.9/3/98, we furnish below the built-up areas calculated for drg. Nos.GBA/891/03A, GBA/891/04A and GBA/891/05A using our accepted definition of "built-up area". Please note that all common area such as lift well, corridor, lobby, duct, etc., have been excluded as suggested by you."

(All emphasis supplied)

7. It is unfortunate that the High Court has gone by the earlier understanding of the plaintiff on the concept of built-up area and wholly ignoring the understanding mutually entered into between the plaintiff and the defendant on a later date. According to the High Court, since the plaintiff had once accepted the position that built-up area included common areas, he is always bound by the same. If plaintiff had once accepted the position in regard to the concept of 'built-up area' he cannot resile subsequently in view of bar under section 5 of the Indian Contract Act, 1872, once offer and acceptance is

complete, it is held.

8. The relevant consideration by the High Court at para 26 of the impugned judgment reads as follows :

> "If Ext.3 and Ext.4 are studied and compared it would appear that prima facie, defendant undertook to accept the definition of 'built up area' given by the plaintiff and therafter deferred the matter for recalculation of the entitlement on the light of such definition. But in the subsequent communication, the defendant made recalculation as to entitlement of the plaintiff by applying his own definition of the 'built up area' and thus included common areas in the 'built up area'. This letter was written on 16.3.1998. But prior to that it is the plaintiff who had accepted the concept of 'built up area' as given by the defendant in his letter dated 15.9.1997 and made his own calculation about the entitlement of 'built up area'. According to the version of the plaintiff in the said letter dated 15.9.1997 (Ext.H), he was allotted possession of 8726.43 sq.ft of 'built up area' in total in three floors, namely, first floor, mezzanine floor and the third floor. Out of this total 'built up area' of 8726.43 sq.ft., plaintiff himself admitted in the said letter that there was 558.19 sq.ft. common area in the first floor, 544.74 sq.ft common area in the mezzanine floor and 540 sq.ft in the third floor. Thus, out of 8726.43 sq.ft 'built up area' handed over to the plaintiff, there was 558.19 sq.ft + 554.74 sq.ft + 540 sq.ft = 1652.93 sq.ft common areas and balance 7083.50 sq.ft under exclusive possession of the plaintiff. The plaintiff after showing this calculation claimed thereafter that he was still entitled to 3445.57 sq.ft in the top floor i.e. eighth floor. The sum of 8726.43 sq.ft + 3445.57 sq.ft is 12172 sq.ft and so there is logic behind this calculation shown by the plaintiff. Once this calculation is accepted, it is clear that prior to issuance of letter 9.3.1998, the plaintiff had accepted the proposition that built up area would include common areas. If plaintiff had accepted the proposition of the defendant in regard to concept of 'built up area' he cannot resile subsequently in view of bar under section 5 of the Indian Contract Act, 1872."

9. It is not a case where the plaintiff resiled from the agreement. It is a case where the defendant himself subsequently accepted the dispute raised by the plaintiff with regard to the concept of 'built-up area'. In express terms, the respondent-defendant has subsequently agreed that the built-up area will not include the common area like lift well, corridor, lobby, duct, etc. Admittedly, the expression "built up area" is not defined in the sale deed. It is something to be deciphered from the conduct of the parties. No doubt, the appellant plaintiff had, after five years of the sale deed, as per letter Ex.'H' dated 15.9.1997 understood the built up area as including common area. But subsequently, he disputed the position and it was the respondent-defendant who accepted and agreed to the position that built up area does not include common area. It is not as if an attempt is made for interpreting the express terms of an agreement, by subsequent conduct. It is a situation where there is a dispute on a concept relating to an expression/concept which is not explained in the agreement. The plaintiff had initially understood the concept in a particular angle or manner. But that does not prevent him from raising a dispute. And on raising such a dispute, nothing prevented the defendant from insisting the plaintiff to stick to his original stand. On the contrary, it is the defendant who changed his stand as per Ex.3 and Ex.4 and accepted the position as raised by the plaintiff.

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Thereafter and therefor, under the true spirit of section 5 of the Contract Act, defendant cannot resile from the mutually agreed position.

10. In *Abdulla Ahmed vs. Animendra Kissen Mitter* – AIR 1950 SC 15, this Court has dealt with a similar situation and it has been held that "

> **"Extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning. Evidence of the acts done under it is a guide to the intention of the parties in such a case and particularly when acts are done shortly after the date of the instrument."**

This was followed in *The Godhra Electricity Co. Ltd & Anr. vs. The State of Gujarat & Anr.* - AIR 1975 SC 32 :

> **"In these circumstances, we do not think we will be justified in not following the decision of this Court in *Abdulla Ahmed vs. Animendra Kissen Mitter* – 1950 SCR 30 at p.46 = (AIR 1950 SC 15 at p.21), where this Court said that extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning and that evidence of the acts done under it is a guide to the intention of the parties, particularly, when acts are done shortly after the date of the instrument."**

11. We, accordingly, allow this appeal, set aside the impugned judgment of the High Court with regard to the finding on the 'built-up area' and restore that of the trial court.

12. We find that the High Court has remanded the matter to the trial court for the purpose of calculation of the built up area to be handed over to the plaintiff-appellant. We direct the trial court to make the calculation in terms of this judgment and accordingly, dispose of the suit expeditiously.

No costs.

.....J
[KURIAN JOSEPH]

.....J
[ROHINTON FALI NARIMAN]

NEW DELHI;
MAY 10, 2016.

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