



DES SHRI NAVALMAL FIRODIA LAW COLLEGE, PUNE

**13TH EDITION OF LOKMANYA TILAK NATIONAL APPELATE MOOT
COURT COMPETITION- 2021**

**C.A. No. _____/2021
SPECIAL C.S. No. 91/1991**

MRS. DIMPLE ANAND KAPOOR & OTHERS APPELLANT

V/S

D.G. INFRACON RESPONDENT

INDEX

SR. NO.	EXH. NO.	PARTICULARS	PAGES
2	244	Judgement	3
3	136	Evidence- Affidavit (Mr. Shekhar Anand Kapoor)	10
4	146	Evidence- Affidavit (Mr. Rajdeep Anil Roy)	18
5	205	Evidence- Affidavit (Mr. Aditya Singh Rajput)	23
6	241	Evidence- Affidavit (Mr. Rajesh Sharma)	29
7	1	Plaint with Wrapper & Amended Copy	32
8	34	Written Statement on behalf of Def.No. 1	35
9	85	Written Statement on behalf of Defendants	38

Received on: - 25-4-1991

Registered on: - 25-4-1991

Decided on: - 10-10-2020

IN THE COURT OF CIVIL JUDGE SENIOR DIVISION PUNE, AT, PUNE

SPECIAL CIVIL SUIT NO. 91/1991

EXH. NO _____

- 1) Mrs. Dimple Anand Kapoor
Age-80 Years, Occupation Nil.
Dead on 06-01-2001

- 2) Dr. Pankaj Anand Kapoor
Age-58 Years, Occupation: Profession

- 3) Mr. Shekhar Anand Kapoor
Age- 52Years, Occupation: Service,

All residing at: A-10, Queens Garden,
Kalyani Nagar, Pune-411006

.....**PLAINTIFFS**

V/s

- 1) D.G. Infracon
A partnership firm, having its office at 1/5,
East Street, Camp, Pune-411 001,
through its partners -

- 2) Mr. Aditya Singh Rajput
Age-40 Years, Occupation: Business,
R/at. 2/B Polaris, Apte Road, Pune-411 004.

- 3) Mr. Manav Sharma
Age-35 Years, Occupation: Business,
R/at.1/5, East Street, Camp, Pune-411001

.....**DEFENDANTS**

Suit for possession and injunction

JUDGMENT

(Delivered on _____/2020)

1. This is a suit initially for permanent injunction later on the relief of possession has been added.

2. The case of Plaintiffs can be summarized as follows: -

The property bearing A-10, Queens Garden, Kalyani Nagar, Pune-411006 admeasuring 296.97 Sq. Meters, was owned by the Plaintiffs. Defendant No.1 is a partnership firm carrying on a business of development and construction and sale of the properties, Defendant Nos 2 and 3 are its partners. They proposed the Plaintiffs for entrusting the work of the development of said property. The Plaintiffs also accepted the said proposal in consequence the development agreement dated

03-02-1989 came to be prepared and executed. The material terms and conditions of said agreement are as follows: -

- a) The Plaintiffs allowed the Defendants to sell 607.64 sq. Ft built up shops to the prospective buyers as a consideration of 1200 sq. ft. built up area on the first floor to the Plaintiff No. 3 and the Defendants also agreed to give Rs. 4,00,000/- to the Plaintiff No 3.
 - b) The Defendants agreed to undertake the construction work of one office of 297.93 sq. ft and also construction work of one flat admeasuring about 1200 sq. ft for Plaintiff No 2. The total cost required for construction of the said office and flat will be borne by the Plaintiff No.2.
 - c) The Defendants agreed to reserve the right of remaining F.S.I. With the Plaintiffs.
3. The Plaintiff alleged that the Defendants have constructed two shops by consuming an area of 900.22 sq. ft unauthorizedly, instead of area 607.64 sq. ft. in breach of the conditions of the agreement dated 03-02-1989. In fact, the Defendants have no right to consume an area more than 607.64 sq. ft. Defendants submitted the plan for sanction on 01-06-1989 to Pune Municipal Corporation on which Plaintiff took the objection when they came to know about bad intention of Defendants. That time the Defendant assured they may revise the plan in the light of objections but they neither revised it nor complied the assurance. Plaintiff issued letter dated 01-08-1990 and 25-11-1990 but the Defendant did not pay any heed. On the contrary, they sent evasive reply dt. 30-12-1990. Thereafter, the Plaintiff published notice in newspaper Daily Times on 10-01-1991.
4. By way of amendment dated 08-02-1996 they averred that the Defendants have filed Regular Civil Suit No. 311/95 and obtained ex-parte temporary injunction. On 26-12-1995 at about 12.45 p.m. Mr. Aditya Singh Rajput and 4-5 unknown persons approached to suit shop and took the possession forcibly. Plaintiff No. 3 immediately lodged police complaint but no use. As there was no alternative, they filed the present suit by seeking a decree that Defendants be restrained from selling, transferring in any manner and handing over possession of the area of the shops in excess of 607.64 sq. ft to any person. They also sought the restoration of possession of suit shop.
5. Defendants put up their written statement at Exh.34 and Exh.85 wherein they admit the execution of agreement dated 03-02-1989 but specifically denied the allegation and claim made by Plaintiff. As per agreement in fact two shops were to be sold by the Defendant and the area of two shops clearly shown in a plan which was part and parcel of agreement. Said agreement clearly contemplates that the Defendant No.1 firm was to construct the building as per plan attached to it and remaining F.S.I, only was to vest in the Plaintiffs. It may be correct from point of view of F. S. I. to the extent of 900.22 sq. ft is consumed as per F. S. I. Rules of Pune Municipal Corporation. In fact, the plan was sanctioned on 01-06-1989 and it was submitted to quite earlier on 01-03-1989 to Pune Municipal Corporation for sanction.

6. They further pleaded that Plaintiff Mr. Shekhar Anand Kapoor already accepted Rs. 4,00,000/- by cheque dt. 01-02-1989 after filing of present suit. Moreover, the Plaintiff Pankaj Anand Kapoor has paid the amount to Defendants as per agreement. The Defendant No. 1 also disposed of one shop to one Rishabh Patil by agreement dated 17-01-1990 The construction of building was virtually completed by the end in March 1993. By way of additional Written Statement, they averred that they never took the possession of suit shop forcibly but it is a fact that the possession was/ is with this Defendant from the beginning. While deciding Exh. 5 this Court as well as Appellate Court also confirmed the possession of this Defendant over suit shop. Lastly, they averred that without any cause of action the Plaintiff filed the present suit which needs to be dismissed with costs.
7. Taking into consideration the aforesaid rival pleading, my learned predecessor framed issues. My findings recorded thereon with the reasons as to follows: -

<u>Issues</u>	<u>Findings</u>
1. Does Plaintiff prove that Defendants have right affirmative. sell 607.64 sq. ft area only?	...In
2. Does Plaintiff prove that Defendants have consumed An area of 900.22 sq. ft. Unauthorizedly? affirmative.	...In
3. Does Plaintiff prove that Defendants have utilized excess area As agreed in the agreement dated 03-02-1989?	... In affirmative.
4. Does Defendant prove that he has performed all the terms and conditions of the agreement dated 03-02-1989?	... Partly affirmative.
5. Does Plaintiff prove that he was in possession of the suit shop? negative.	... In
6. Do Plaintiffs prove Defendant took forcibly possession forcibly on 26-12-1995?	... In negative.
7. Are Plaintiffs entitled to get a decree as prayed?	...As per final order.

REASONS

In order to substantiate the claim, the Plaintiff No.3- Shekhar lead his evidence on affidavit below Exh. 136. He examined Mr. Rajdeep Anil Roy at Exh. 146 who is Structural Engineer and photographer by name Rahul on the other hand the Defendant No.2 – Mr. Aditya Singh Rajput lead his evidence on affidavit below Exh. 205 and his witness is Mr. Rajesh Sharma. An agreement dated 03-02-1989, sanction plan, Power of attorney, letter of Plaintiff, reply of Defendant, are placed on record. Both the sides advanced their arguments at length.

As to issue No. 1:

Firstly, I would deal with undisputed facts which would assist to curtail the lengthy discussion, that the Plaintiffs are the owner of CTS No. 5072 Kalyani Nagar. Defendant No.1 is a firm and Defendant Nos. 2 and 3 are its partners. Plaintiff were intending to develop the said property. They entered into development agreement with Defendant on 03-02-1989 (at Exh. 183) They also prepared proposed map of construction which was part and parcel of agreement. In sum and substance Plaintiff allowed Defendant to sell the shops admeasuring 607.64 sq. ft to the prospective buyers for the consideration of the flat for Plaintiff No.3 on first floor admeasuring 1200 sq. ft. plus Rs. 4,00,000/- They also agreed to construct one office area 296.93 sq. ft. and one flat admeasuring 1200 sq. ft. for Plaintiff No.2 with his costs and remaining F.S.I. would be with Plaintiff.

Accordingly, the Defendant made construction. There is no dispute in regard the construction of above flat for Plaintiff No.3 as well as the payment of Rs. 4,00,000/- at the hand of Defendant. Moreover, no dispute about the construction of office admeasuring 297.93 sq. ft. And a flat of 1200 sq. ft. for Plaintiff No. 2 and handing over possession.

The dispute arises only pertaining to shops on ground floor for which the Defendant were authorized to sell. As per the case of Plaintiff the Defendant authorized to construct and sell of shop on ground floor admeasuring 607.64 sq. ft. only. But they intentionally put-up revised plan by showing excess area, without the consent of Plaintiff and get it sanctioned. In revised plan the Defendant intentionally shown the area of shop i.e., 900.22 sq. ft. In brief they made construction of those shops by using excess F.S.I. The Plaintiff sought injunction to the effect that the Defendant should not sell the premises more than area 607.64 sq. ft., they also sought restoration of possession.

In brief, the defense is denial. The Defendant based on the recital of Power of Attorney Moreover, they based on the agreement Exh. 183. No doubt, the proposed plan was put up before the Pune Municipal Corporation but they were constrained to change the measurement as per rules and regulations, with the knowledge of Plaintiff they put up the revised plan to Pune Municipal Corporation. The Plaintiffs were fully aware about it. Moreover, these Defendants were empowered to submit the plan on behalf of Plaintiff and accordingly they done their duty nothing committed error by them.

The learned counsel for Defendant placed the reliance on the case of *M/s Giridharilal & Sons Vs Dalbir Nath and others AIR 1986 SC 1499* wherein observed that primary and foremost task of Court is in interpreting statue is to ascertain the intention of the legislature, actual or imputed .The court must then strive to so interpret the statute as to promote and advance the object and purpose of the enactment Count may even depart from normal rule that plain words should be interpreted according to their plain meaning to achieve aforesaid purpose.

I read the agreement of development (Exh. 183) on page 4 one condition to the effect that the construction plan should be put up before Pune Municipal Corporation. It shall however, subject to Pune Municipal Corporation approval." Any change in the plan desired by Pune Municipal Corporation shall be subject to mutual settlement between

owner and developers ". It indicates that the construction plan which was part and parcel of said agreement was to be furnished before Pune Municipal Corporation. If change is required in the said plan desired by Pune Municipal Corporation, there should be a consent of the owner and developer. I would like to mention here that the word " shall " is used for the said condition. That means there is mandate to take consent.

The power of attorney indicates that the Defendant Nos. 1 and 2 were authorized to do all official work by making letter correspondence with concerned officer on behalf of Plaintiff. But it is not found that the above-mentioned condition in development agreement would be washed out or nullify due to said authorization. In brief the recital in POA is not prevail on condition in development agreement Exh. 183.

I have gone through the deposition as well as the documents, it reveals that Plaintiff raised an objection by way of letter dated 01-08-1990 to the effect that the Defendant have shown the excess built up area (292.88 sq. ft.) in revised plan without their consent. They also approached to Pune Municipal Corporation by letter dated 10-09-1991 and put up their grievance about the revised plan.

The Plaintiff has examined an Architect cum consultant Engineer by name Mr. Rajdeep Anil Roy at Exh. 146. He put up the report dated 30-05-1991. At the time of evidence, the counsel of Plaintiff admitted the measurement of some portion which are the subject matter in this proceeding. I read report minutely. On page 4 the measurement of built-up area has been shown, the conclusion is shown last page 4 to the effect that the extra built-up area constructed by builder under shop No.1 and 2 is 292.33 sq. ft.

The Defendant has examined the architect by name Mr. Rajesh Sharma at Exh. 241. In brief he states that he was appointed by Defendant as an architect He prepared the proposed map and got sanction vide letter 400 dated 01-06-1989, he further states that as per the rules and regulations the change was taken in original plan. He had prepared the plan by taking into consideration the intention of both the sides. In his cross-examination he says on the instruction of Defendant he prepared map. That map is at Exh. 169. it does not bear the signature of Plaintiff. The original map it was shown to this witness he admits the measurement of two shops i.e., 607.64 sq. ft.

On close scrutiny, the pleading and the deposition it appears that the Defendant had put up revised plan without consulting or consent of Plaintiff. Wherein the area of proposed construction in shop No. 1 and 2 was shown in excess i.e., 292.33 sq. ft than in initial plan which was part and parcel of development agreement. As per the agreement dated 03-02-1989 the Defendants are entitled to sell the premises of shop to the extent of 607.64 sq. ft only but he made construction of two shops each up to 900.22 sq. ft. i.e., excess area 292.88 sq. ft without the consent of Plaintiff. In result, I constrained to answer issue No.1 in affirmative.

As to issue No.2 and 3: -

In view of the aforesaid discussion and finding there is no hesitation to say that the Defendants made construction of shop No. 1 and 2 on ground floor by using excess

F.S.I. to the extent of 292.88 sq. ft. it amounts to breach of the agreement dated 03-02-1989 to some extent. Hence, I answer the issues No 2 and 3 in affirmative.

As to issue No.4: -

Taking into consideration the discussion in aforesaid paras it reveals that the Defendant performed the terms and conditions of the agreement dated 03-02-1989 except the construction of Shop No.1 and 2 on ground floor. There is no dispute about the compliance of other terms and conditions of the agreement dated 03-02-1989. Plaintiffs No. 2 and 3 already got the possession of their respective office and flats. In the light of aforesaid findings, the Defendant cannot say that he performed all the terms and conditions of the agreement. I conclude that he did not perform the terms and conditions to the extent of construction of shop No.1 and 2. In result, I answer the issue No.4 affirmative but partly.

As to issue No. 5 and 6:

By way of amendment the Plaintiff alleged that on 26-12-1995 Defendant No.2 along with 4-5 persons came to the site and took the possession of suit shop forcibly. On the other hand, the Defendant specifically denied the same. By way amendment in the year 1996 the Plaintiff sought restoration of possession of suit shop. In order to establish his dispossession forcibly the Plaintiffs have to establish first that they were put into possession by the Defendant. I read the cross-examination of the Plaintiff. He states in cross-examination that he is not aware about the agreement executed by the Defendant in respect of one shop out of two. He further admits the builder has given possession of both the shops to someone else. Moreover, the builder has fixed the shutter to the shop and put up his lock. Moreover, in the year 1993 one business started in one shop. He further admits as per agreement or otherwise they have no right to get the possession of these two shops. He admits no document was prepared in regard possession of suit shops was handed over to them by the Defendant.

The above admission clearly established that the Plaintiffs were not put into possession of suit shop. I would like to mention here that the Plaintiff had sought temporary injunction in present proceeding by putting Exh. 5 to the effect that the Defendants should not sell or create third party interest in the suit shop That application was came to be rejected on 10-09-1991. There is no whisper in Exh. 5 as well as plaint Exh. 1 that after the completion of construction the suit shops were handed over to the Plaintiffs. On the contrary, undisputed agreement categorically authorized Defendant to use and sell suit shops, hence handing over the possession to Plaintiff does not arise. The Plaintiff alleged that on 26-12-1995 the Defendant No.2 took the forcible possession of suit shops but in the light of aforesaid discussion the theory of dispossession is no digestible. Considering all these aspects I come to the conclusion that the suit shops never handed over to Plaintiff hence the question does not arise to dispossess them Hence, I answer the issues No. 5 and 6 in negative.

As to issue No.7: -

Initially the Plaintiff sought a relief of permanent injunction that Defendant should not sell or hand over the possession of shop in excess of 607.64 sq. ft. By way of amendment in addition to injunction, he sought the restoration of possession. No doubt, the Defendant made construction of suit shop by using the excess F.S.I. i.e., to the extent of 292.88 sq. ft. without consent of Plaintiff in result it amounts the breach of agreement to some extent. But to seek permanent injunction is not remedy available to Plaintiff because the construction is over long back The Plaintiffs No.2 and 3 already got their respective / flats shops as well as cash of Rs. 4,00,000/-. The remedy of restoration is also not available to Plaintiff as by way of agreement the Defendants are entitled to get two shops admeasuring 607.64 sq. ft. with a right to sell it. The so-called excess area is not divisible or separable from area 607.64 sq. ft. I would like to mention here that while passing the order by my learned predecessor vide Exh. 5 the Defendant were asked to undertake if it is found that they are consumed more area than 607.64 sq. ft. while construction two shops they will compensate the Plaintiff at the prevailing market price.

It is a contract of construction; construction is over long back. There is no grievance about the areas of shops and flats which are given to the Plaintiffs No.2 and 3. Though there is breach of agreement to some extent, the whole contract cannot be cancelled or set aside at this stage. Suppose the permanent injunction granted it would not meet the end of justice because both the sides would not get the fruits of said construction on the contrary, the Defendant would suffer irreparable loss as well as the Plaintiff would not get the amount but the suit shops would be lying vacant in order to determine the controversy finally and to end further civil matter, we have to think over the damages to be paid to Plaintiff at the rate of Government price for so called excess area.

Considering the peculiar circumstances, I am not inclined to pass a decree what Plaintiff sought but they are entitled to get a price of excess areas as per Government rate hence I answer issue no. 7 accordingly and proceed to pass the following order:

ORDER

It is hereby disposed of as under: -

- 1) The relief of permanent injunction & restoration of possession are hereby dismissed.
- 2) The Defendants are hereby directed to pay government price of area (vacant) admeasuring 292.88 sq. ft, to the Plaintiff within four months from today.
- 3) Considering the peculiar circumstances both the sides do bear their own costs.
- 4) Decree be drawn up accordingly.

Pune.

Date - 19-10-2020

**IN THE COURT OF CIVIL JUDGE, SENIOR DIVISION, PUNE,
AT PUNE**

SPECIAL CIVIL SUIT NO. 91/1991

Dimple Anand Kapoor and others

....PLAINTIFFS

Vs

D.G. Infracon and others

....DEFENDANTS

AFFIDAVIT

I, Mr. Shekhar Anand Kapoor, Age about 53 years, Occupation: Engineer, residing at 5072, Kalyani Nagar, Pune 411 006, do hereby state on solemn affirmation that -

1. I am Plaintiff No.3 in this proceeding. The Plaintiff No.2 is my real brother. The Plaintiff No.1 Mrs. Dimple Anand Kapoor died on 16.01.2001 at Pune leaving behind her Plaintiff Nos. 2 and 3 as the only legal heirs I am deposing for myself and Plaintiff No.2 Dr. Pankaj Anand Kapoor. I know the facts of the case.

2. The Plaintiffs are the owners of the property bearing City Survey No.5072, Kalyani Nagar, Pune 411 006.

3. The Defendant No.1 is a registered firm, under the Indian Partnership Act and the Defendants 2 and 3 are the partners of the Defendant No 1 Firm the Defendant No 1 is doing the business of development, construction and sale of the properties.

4.The Defendant Nos. 2 and 3 proposed the Plaintiffs for entrusting the work of development of the suit property of the Plaintiffs to Defendants. The Plaintiffs accepted the said proposal and the agreements was executed on 03-02-1989 between the Plaintiffs and Defendants. The original agreement is with the Defendants. The carbon copy of the said agreement is produced in this proceeding. It bears the signatures of Plaintiffs and Defendants. One Mr. Ajit, Pankaj Kapoor, nephew of Plaintiff No.3. i.e., myself and Mrs. M.S. Kapoor, daughter-in-law of Plaintiff No.2 and Mr. Rajesh Sharma and Mr. S. V. Navadkar signed the said agreement as witnesses. I identify their signatures. The said witnesses signed in my presence. The contents of the said agreement are true and correct.

5. As per the said agreement the Plaintiffs allowed the Defendants to sell 607.64 sq. ft. (built-up) area of Shop to the prospective buyers against the consideration of 1200 sq. ft. Built-up area on the first floor to the Plaintiff No.3 and Defendants also agreed to give Rs.4,00,000/- to the Plaintiff No.3.

6.The Defendants agreed to undertake the construction of one office of 296.93 sq. ft. and also construction work of one flat admeasuring about 1200 Sq. ft. for Plaintiff No. 2. It is also agreed that the total cost required for construction of said office and flat will be borne by Plaintiff No.2.

7. The Defendants agreed to keep the right of remaining F.S.I. with the Plaintiffs. I state that the Defendants have right to sell only 607.64 Sq. ft. Shop area (built-up) as per terms and conditions of the agreement. The Defendants have no right to sell the shops of area more than 607.64 Sq. ft.

8. The Plaintiffs state that the Defendants have constructed two shops by consuming an area of 900.22 sq. ft. unauthorizedly instead 607.64 sq. ft. in breach of the conditions of the agreement dated 03-02-1989. The Defendants have no right to consume an area more than 607.64 sq. ft. The Plaintiffs submit that the Defendants had not shown the sanctioned plan and never took the signatures of the Plaintiff on that plan before submitting it to Pune Municipal Corporation to get it sanctioned. The Defendants unauthorizedly and illegally signed on the plan as Owner of the property. The Plaintiffs submit that the sanctioned plan bears no signature of that of the Plaintiffs as the owners of the property. In the Power of Attorney, the Plaintiffs had not given any specific power to Defendants to sign on the plan as the owners of the property. The Plaintiffs state that by constructing ground floor of height of 15 feet and constructing mezzanine floor inside the two shop consumed the area more than 607.64 sq. ft. I have produced the technical report given by Mr. Rajdeep Anil Roy and Associates, Architects, Engineers and Valuers in support of my contentions. It bears the signature of Mr. Rajdeep Anil Roy. I identify his signature as he has signed in my presence. I have paid fees to said Mr. Roy towards his professional fees for inspection of site and preparing his technical report. As per the said technical report it clears that the time Defendants have consumed more F.S. I to the tune of 292.58 sq. ft. I have paid Rs 35,000/- towards fees of Mr. Rajdeep Anil Roy. I have paid the said amount in cash to Mr. Rajdeep Anil Roy who has given receipt for the same. The receipt bears the signature of Mr. Rajdeep Anil Roy as he has signed the receipts in my presence. I have also produced the certified copy of the plan sanctioned by the Pune Municipal Corporation, Certificate No.422, in respect of the said property. The sanctioned plan dated 01-06-1989

9. The Plaintiffs submit that the Pune Municipal Corporation has sanctioned the plan on 01-06-1989 and the Plaintiff took the objection later on after the knowledge of utilization of excess F.S.I. The Plaintiff submits that the Plaintiffs took objection on the same day after the knowledge of utilization of excess F.S.I for the same by issuing letter dated 01-08-1990 by registered post A.D. I have produced the office copy of the said letter. The Defendants received the said letter. It bears my signature the contents of the letter are true and correct. The Defendants gave reply dated 01-09-1990 to the said letter dated 01-08-1990. The contents of reply are not true and correct and are not admitted by me as a Defendant categorically denied the utilization of additional F.S.I. and so the built-up) which was not correct but contrary to the facts. The Plaintiffs thereafter issued legal notice dated 25-11-1990 to the Defendants and called upon the Defendant to comply with the terms and conditions laid down in the notice. It bears the signature of my Advocate. The said notice is given as per my instructions. The contents of the said notice are true and correct. The Defendants gave reply dated 30-12-1990 to the said notice. The original reply dated 30-12-1990 is produced. The contents of the said reply are not true and correct. Thereafter the Plaintiffs gave a Public notice which is published in newspaper Daily Times on 10-01-1991. The content of the said public notice are true and correct. By the said Public Notice the Plaintiffs informed the public at large not to enter into transaction with the shops in the said property.

10. The Plaintiffs thereafter issued a notice dated 25-05-1991 to the Defendants and called upon the Defendants by the said notice to abstain from committing breach of the terms of power of attorney date 03-02-1989. The Defendants received the said notice. It bears the signature of my Advocate. I Identify the same as the same is put in my presence. The said notice was prepared and sent as per my Instructions. The contents of the said notice are true and correct. The Plaintiff thereafter issued a letter dated 10-06-1991 to the City Engineer, Pune Municipal Corporation and informed the illegal acts done by the Defendants. The office copy of the said letter is produced. It bears my signature. The contents of the said notice are true and correct. The Corporation received the said notice and the Corporation acknowledged the receipt of the said notice on the office copy of the said notice.

11. I state that I never handed over the possession of the property bearing C.T.S. No. 5072, Kalyani Nagar, Pune, entirely to the Defendants. Even during the construction of the shop, I have kept my belongings in the said shop. At the time of filing the suit the Plaintiffs were in possession of suit shop. The Defendants are aware about the same and therefore never made grievance about the same. As the Plaintiffs apprehended that in spite of the possession and in spite of the ownership over the said shop the Defendants were trying to create third party interest in the said shop and therefore the Plaintiffs were required to file the present suit.

12. During the pendency of this proceeding the Defendants filed Regular Civil Suit No. 311/95 against the Plaintiffs in Civil Judge, Junior Division, Pune for declaration and injunction. The said suit was filed by the Defendants on 30-08-1995. In that suit the Defendants filed an application for temporary injunction and the Honorable Court was pleased to grant ex-parte order of status quo on 21-12-1995. I received the summons of that proceeding and appeared on 21-12-1995 and gave reply dated 23-12-1995. In the said reply the Plaintiffs have mentioned that the suit premises are in actual possession of the Plaintiffs and the Plaintiff have put their locks to the suit shop.

13. During the pendency of the proceeding the wives of Mr. Manav Sharma and Mr. Aditya Singh Rajput came on 20-03-1995 outside the suit shop and tried to open the locks by using their keys but the Plaintiff No.3 who was in the house came outside and objected for their illegal acts. The Plaintiff submits that the Plaintiff who in possession of the suit premises informed the wives of the said partners that the said Shop is in my possession and you cannot open the shop without my permission. The Plaintiff No.3 immediately filed a complaint on 20-03-1995 to the Kalyani Nagar Police Chowky narrating all the facts. The Police received the said complaint. It bears my signature. The contents of the same are true and correct. The Police received the same. It bears the endorsement of the Police on it.

14. On 26-12-1995 at about 12.45 p.m. Mr. Aditya Singh Rajput i.e., Defendant No.2 along with 4-5 unknown persons came to the suit premises with cutting hacksaw blade, hammer and other instruments. At that time the Plaintiff No.3 was present at his residence i.e., above the suit shop. The Defendant No.2 and other persons started breaking open the locks of the suit shop which were in the possession of the Plaintiffs

only. After hearing the noise, the Plaintiff No.3 immediately rushed at the suit shop and obstructed the Defendant No.3 and other persons from breaking locks of the Plaintiffs to the suit shop the and also informed them that the matter is subjudice. before the Civil Court and the Defendant No.2 cannot forcibly break open the locks unless the matter is decided by the Honorable Court but Defendant No.2 and other person did not pay heed and proceeded with cutting of locks of the said shop.

15. The Plaintiff No.3 Immediately lodged a police complaint with the Kalyani Nagar Police Chowky but the police did not take cognizance of the complaint made by the Plaintiff No.3 and did not take any action against the Defendant No.2 and others. In fact, the police did not care to visit the site and did not make Panchanama. The Plaintiff submits that the Defendants succeeded in the breaking open the locks of the suit shop and taking forcible possession of the suit shop. The Plaintiff No.3 took photographs when the Defendant No.2 was actually breaking open the locks of the suit shop. The photograph in which the person who broke open the locks of shutter of suit shop and the Plaintiff No.3 is seen standing nearby the shutter before him has been taken by the nephew of the Plaintiff No.3 The Plaintiff No.3 thereafter also filed a written complaint with the Police Commissioner.

16. The Plaintiffs submit that the Defendants were fully aware of the possession of the suit premises was with the Plaintiffs and at no time the Defendants were in possession of the suit shop. The Plaintiffs submit that the Defendants with an intention to defeat the claim and defense of the Plaintiffs in the present proceeding mischievously and forcibly took the possession of suit shop illegally. The Plaintiffs submit that on 26.12.1995 being Sunday the Defendants deliberately and with pre-planning did the said mischievous work. The Plaintiff immediately lodged a complaint on 26-12-1995 with Kalyani Nagar Police Chowky but the Police did not take any action against the Defendants. The Plaintiffs filed the copy of the said complaint in this proceeding. the contents of the said complaint are true and correct. It bears my signature. The Police received the said complaint acknowledging on the copy of the said complaint. The Plaintiffs submit that, the suit shop was in possession of the Plaintiffs till 26-12-1995. The Defendants have not taken any objection to the possession of the Plaintiff during all these years.

17. Plaintiffs submit that the Plaintiffs filed an application for amendment of the plaint which was allowed, dated 08-02-1996. Thereafter the Plaintiffs filed application for temporary injunction. The Honorable Court was pleased to allow the said application 08-06-1996.

18. I have gone through the contents of the Written Statement. The same are not true and correct.

19. The Plaintiffs pray to the Honorable Court be pleased to decree the suit of the Plaintiffs with cost as prayed for in the plaint.

Whatever stated hereinabove is true and correct to the best of my knowledge, information and belief and therefore I have signed the same at Pune on this 11th day of the month of March 2003.

I Know the Affiant

Advocate

Affiant

Cross for the defendant by advocate of defendant

20. I'm educated up to B.COM (final). Before 2-3 months of the agreement's negotiations were going on with the defendant. There was discussion between myself and Patil who was the builder most of the time I alone used to talk with the builders. There was only ground floor in the old building. There was open space at the back side of the old building.

21. Except the portion constructed by my brother, remaining portion of suit premises was demolished between April 89 to 15th May 89. The agreement with Defendant was prepared with consultation of my advocate. Prior to agreement, I obtained tentative plan of proposed construction from the Defendant. I will have to search said tentative plan. I executed a deed of power of attorney in favour of Defendants 2 and 3, for construction and development of suit property. The Defendant submitted the plan in Pune Municipal Corporation. office. After one months, from the date of sanction of the plan, I came to know this fact. I demanded copy of sanctioned plan to Defendant, however, he has not handed over the same to me. Thereafter, on 01-09-89, I obtained certified copy of the sanctioned plan from the Pune Municipal Corporation. Prior to getting certified copy, I came to know about the plan. I came to know that the area is going to be consumed more than the agreement. I have not issued notice or letter to Defendant directing him to cancel the plan. At that time, process of construction was going on the side. I have not directed the Defendant to stop the said process. At that time, the construction work was at plinth level. I came to know that ground floor area as well as mezzanine floor area was also covered more than agreement. 10 - 20 ft. excess area was covered at ground floor 292 sq. ft. excess area was covered under mezzanine floor. On 10-06-91, I filed complaint in Pune Municipal Corporation office, mentioning that the Defendant covering the area excess than sanctioned plan. Corporation has not replied about my complaint. It is true that I have not filed any proceeding against the corporation, mentioning that the corporation has wrongly sanctioned the plan.

22. At the time of construction, I was residing in portion 650 sq. ft in the structure in the said property. In the month of August 1993, the Defendant obtained completion certificate of shop and office respectively. It was decided between myself and Defendant that Defendant will give me a built up (flat) area of 1200sq. ft. and Rs.4,00,000/-. It was also decided that Defendant will give 1200sq. ft residential built-up area on first floor and office built up area admeasuring 296.97 sq. ft. on ground floor. My brother agreed to bear construction costs of both premises. In the year 1993, I got possession of my flat, and amount of Rs.4,00,000/-. My brother also got possession of flat and office in

1993. My brother has not made complaint about the area of premises got to him. After possession I started to reside in the flat got to me.

23. I do not know about the agreement allegedly executed by Defendant in respect of one shop out of two. The builder has given possession of both shops to someone else. I do not know their names. It is true that the Defendant was entitled for getting two shops out of contract between us. It is true that there are only two shops in the structure constructed by the Defendant. I was not aware about the fact of Mezzanine Floor in the shop. Mezzanine floor was shown in the map, annexed with the agreement. I had objected about the mezzanine floor, shown in the map. After discussion with builder, I signed the agreement. It is not true that same plan was submitted to the corporation,

24. All the materials for the shop were purchased by the Defendant. It is true that except two flats and one office, the builder has not given possession of any premises to us. One shop is admeasuring 550 sq. ft. and another 320 sq. ft. It is not true that I have not raised objection at the time of construction of shop. Though my objection, the Defendant constructed the shops, with mezzanine floors. I filed complaint in corporation and thereafter, I filed present suit. My complaint in corporation was about the plan submitted by the Defendant by posing himself as the owner and obtaining completion certificate by posing himself as a power of attorney. In the agreement, I authorized the Defendant to submit plan and get it sanctioned. After filing suit, I appointed Architect Roy for site inspection and submitting his report. On 10-06-91, I gave notice to Corporation. The corporation has not replied my notice.

25. In the month of March 1990, mezzanine floor was casted on the building. Second slab was casted on the first floor in the month of May 1990. Completion certificate of the ground floor and first floor was obtained by the builder on 03-04-1993. The builder has fixed shutter to shops on ground floor. The builder put his own lock to one shop. I do not know whether the builder sold one shop to Rishabh Patil. It is true that in the year 1993, one business started in one shop. I cannot state nature of said business till today. In 1993, the builder obtained completion certificate of both the shops. It is true that as per agreement, or otherwise, we had no right to get possession of the shop. It is true that no document was prepared mentioning that possession of any shop was given to us.

26. It is true that if the builder succeeds to hand over possession of shop No.2, it will be difficult for me to get restore the possession. It is not true that during pending of the suit, Defendants were using the shops. As per my view F.S.I. and built-up area are different terms. It is true as per the agreement that the builder had the liberty to sell 607.64 sq. ft. built up area. The built-up area is something different than ground coverage. It is true that as per sanctioned plan remaining F.S.I. was to remain with me. The witness again says that as per the agreement plan, it was decided that remaining F.S.I. will remain with me. It is true that in the agreement the word 'built up' refers in respect of flats and office, and shop.

Que. The builder has not given possession of the shop to you?

Ans. Possession of one shop was with me, therefore, question of giving possession of one shop to me does not arise.

As per my contention, the builder has a right to the extent of only one shop. There was no change in the agreement. I had no objection for sell of one shop. I do not feel it necessary to mention in plaint that one shop is in my possession. On the day of agreement, I had executed a power of attorney in favor of the builder, to obtain sanctioned plan from Corporation. I asked, Mr. Rajdeep Anil Roy to give me a report. It is true that Mr. Rajdeep Anil Roy could not enter in the shop. It is true that there was talk between myself and Roy that the builder consumed more F.S.I. than agreement. Mr. Roy has given report after inspection of the property. I gave fees Rs. 35,000/- to Mr. Roy. Prior to inspection myself or Roy had not informed the Defendant about the inspection.

27. It is not true that I was not in possession of the shop. It is not true that I failed to get temporary injunction order in my favour, thereafter, by way of amendment I came with a story that the builder dispossessed me. It is not true that I am deposing falsely in respect of the incident of breaking open lock by the Defendant. It is not true that I snapped the photographs while Defendants were opening the lock by their key. It is true that it is my objection that the builder should not run any business in the shop. It is not my contention that entire suit shop is constructed illegally by using extra F.S.I.

28. There is mezzanine floor in the office given to my brother. My brother has given construction costs of the mezzanine floor.

29. It is not true that ground coverage plan was submitted in the corporation, which was the same as per agreement. 50 ft. ground coverage area was enhanced. I do not remember as to whether mezzanine floor was shown in the agreement plan. It is not true that the plan like agreement plan was submitted to the corporation. The plan sanctioned by corporation was not altered or revised. It is not true that the shop given to my brother and the shop sold was in possession of D.G. Infracon. It is not true that D.G. Infracon has not taken forcible possession of the shop from me, on 26-12-95. It is true that the area of flat given to me is the same as per ground coverage area excluding balcony. It is true that as per the agreement, it was responsibility of the builder to submit the plan incorporation. In view of power of attorney executed by me, the Defendant submitted plan in corporation.

R.O.A.C

Dt. 27-1-2005.

CIVIL JUDGE SENIOR DIVISION PUNE.

Exh 146

IN THE COURT OF CIVIL JUDGE, SENIOR DIVISION, PUNE AT PUNE

SPECIAL CIVIL SUIT NO.91/91

Mrs. Dimple Anand Kapoor and others**PLAINTIFFS**

Vs.

D.G. Infracon and others**DEFENDANTS**

AFFIDAVIT

I, Mr. Rajdeep Anil Roy, Age about 76 years, Occupation: Profession Consulting Engineer, Architect and Valuer, Residing at 5/2, Erandawane, Pune 411 004. solemnly state as follows:

1. I am Chartered Structural Engineer, registered Architect and Valuer. I have worked as Demonstrator and Assistant Lecturer in Civil Engineering in the Government College of Engineering, Mumbai from 1948 to 1954. I have about 57 years of experience in Civil Engineering.

2. Mr. Shekhar Anand Kapoor, one of the owners of the property bearing CTS No. 5072, Kalyani Nagar, Pune City. Pune, requested me to visit his said property for inspection. He further requested to give him my findings, comments etc. in connection with the construction of Shop Nos. 1 (i.e., a) and 2 (i.e., b) in relation with the agreed details in the Agreement for Development dated 03-02-1989 between owners Kapoor Family and D.G. Infracon, Developers, Pune Development Control Rules, etc.

3. I had therefore visited the site on 15-09-1992 with Mr. Shekhar Anand Kapoor, who had already I understand, conveyed information regarding my said site visit to all the parties concerned.

4. I had taken the measurements of Shop Nos. 1 and 2 from outside to consider and calculate built-up (i.e., floor) area of the said part (i.e., Shop Nos. 1 and 2) mentioned in agreement and plan attached with the said agreement. These were required to calculate built up area utilized for the construction of the said two shops. The said two shops were not open at that time. I gathered that it was not possible to get them opened at that time due to some reasons only to inspect the details of Mezzanine floor constructed. The details of inside construction of mezzanine floors were noted by inspecting the same through ventilator openings on the Mezzanine floors of Shop Nos. 1 and 2 (i.e., Shops a and b).

5. Area of the Mezzanine floors constructed were therefore noted from the details accepted by the authorities of Pune Municipal Corporation on the drawing approved under Commencement Certificate No.422 dated 01-06-1989. The total area of the mezzanine floor is counted in the total floor area for calculating Floor Area Ratio (i.e., F.A.R.). The usage of the said Mezzanine floor was/is also permissible as Living Room/

s under Development Control Rules for Development Plan Pune, (R) (F) 1987 and hence the said area was taken into the calculations given in my technical report dated 15-09-1992, issued to Mr. Shekhar Anand Kapoor, Plaintiff No.3.

6. Considering the details of (i) the constructions executed on site (ii) the construction allowed by Pune Municipal Corporation and (iii) built up area of the construction of Shop Nos.1. and 2 agreed in the said agreement dated 03-02-1989, I have stated my findings and comments etc. about Shop Nos. 1 (i.e., a) and 2 (i.e., b) only in the Technical Report dated 15-09-1992. Two copies duly signed by me were issued to Mr. Shekhar Anand Kapoor, after receiving my fees in that respect. The said report is produced in this proceeding. It bears my signature. The contents of the same are true and are admitted by me. I have received Rs.3296.970/- as my professional charges from Mr. Shekhar Anand Kapoor and I have given receipt bearing RP-938 in the name of Mr. Shekhar Anand Kapoor. The said receipt is produced in this proceeding. It bears my signature. The contents of the same are true and correct.

7. As per agreed terms and area mentioned in the plan attached with the Agreement Shops were to be constructed of 607.64 Sq. ft. (built-up), but actually as per the plan sanctioned by Pune Municipal Corporation under Certificate No. 422 dated 01-06-1989 the shops are constructed of 900.22 sq. ft. (built-up). The shops are constructed by consuming excess area of 292.58 Sq. ft. (built-up). Thus, considering all the facts I am of the opinion and findings that total extra built-up area constructed and consumed was 292.58 Sq. ft. for the shop Nos. 1 and 2.

Whatever stated hereinabove is true and correct to the best of my knowledge, information and belief and therefore I have signed this at Pune on this 15th day of February 2005.

Affiant

I know the Affiant
Advocate

On S.A. Cross exam by Advocate Defendants.

1) The Plaintiff gave me agreement 03-02-1989 to me to read it. The Plaintiff had not stated me that the construction is not carried as per agreement. I had not seen a deed of power of attorney dt. 03-02-1989. I was aware that the shop No.1 and 2 admeasuring 607.64 sq. ft built up shop was permitted to sell. It is true that map was attached to the agreement. I do not know whether the map was prepared prior to the agreement. I have seen the map attached with the agreement and the sanctioned plan. I have not attached the map attached with the agreement to my report. I verified that the architect of the builder was empowered to submit the plans in corporation and to get it sanctioned. It is true that in my report, I have mentioned that the plan is submitted in the capacity of owner. I have not sent a letter to the Corporation mentioning that the Defendant report has submitted plan in the capacity of owner.

Q. Whether the plans were correct or incorrect?

A. The plans were incorrect as per the agreement. It is true that the plans were as per rules and by laws of the corporation.

Q. Whether the plans with the agreement and the plan submitted to the corporation were the same?

A. They were not the same.

Q. What is difference between plan attached with agreement and the approved plan?

A. Built up area of shops in both the plans is different. Mezzanine floor area as built-in area has been included in the sanctioned plan and that is missing in the plan with agreement.

Q. What is difference between the drawing in both the plans?

A. Difference as stated in earlier question.

It is not true that ground coverage area of shop no.1 and 2 in the agreement and sanctioned plan are same. In agreement plan ground coverage of the shops is 607.64 sq. ft. and in sanction plan it is 652.72 sq. ft. I cannot state how much area of shop No.1 is increased; Likewise, I cannot state how much area of Shop No.2 is increased. On agreement plan there is no wall thickness. It is possible that due to thickness of the wall there may be difference in the area.

2) I was not aware about the present suit. Reference of present suit is on page No.2 of my report. The present suit is in respect of Shop No.1 and 2. I do not know about the rest of the claim in the present suit. I do not know whether the suit is in respect of excess premises constructed and not to sell the shops.

3) Prior to filing the report, I visited the spot. Prior to visit to the spot, I had not issued the notice to the occupants of Shop No.1 and 2. The witness voluntarily says that he instructed the owner to inform the occupants. I inquired with the owner as whether he informed the occupants about my visit. The owner stated that he informed proprietor of Darshan Medical store occupant of Shop No.1 and the owner said that he is occupant of Shop No. 2. I have not opened the Shop No.2 as key was not available with the owner as it was misplaced. I did not feel it necessary to go into the shop and inspect it from inside. I have not written in the report that the key was displaced at the relevant time. I do-not know whether shop No.2 was in the possession of Developer. It is true that on the site there is built up are ground plus one storey. It is not true to say that the area is the same as shown in agreement plan. In agreement plan construction shown ground plus one storey. As per the agreement plan height of the shop is 15 ft. It is about the same in the sanctioned plan.

Q Whether mezzanine floor is shown in agreement plan

A. "Superfluous area Is shown in agreement plan. In a similar way, mezzanine floor is shown including the area in sanctioned plan.

4) Prior to 15-08-1987 mezzanine floor area was not considered in the built-up area. I have used the word misleading in my report. It means the area considered under development plan rules and regulations by the corporation is not shown on agreement plan schedule. F.S.I. means having no dimensions and it is ratio. Built up means it has got two dimensions so it is in square. FAR Includes area of mezzanine floor, it is constructed as per the rules of the corporation. It is true that at the relevant time, it was my conclusion that built up area or shop to 1 is more due to construction at floor level plus area of mezzanine floors. It is not true to say that mezzanine floor is not built-up area. The owner might have taken consultation of the Architect, before signing the agreement plan. I do not remember as to whether agreement plan is different from the normal plans. It is my opinion that normally, the owners used to sign the plans on believing the concern engineer, at they are not capable to read the plans properly. This is reflected in my present report. It is true that in my report I have formed the opinion that the builder has misguided the owner. I have not discussed with the owner to form my opinion. I have not checked the first floor. Today i am not able to check the first-floor area. If the coverage area is the same, the first-floor area is also the same. It is true that in a sanctioned plan, area of ground floor and first floor is the same. The witness voluntarily says that area of the balconies on the first floor is excess but not taken in built up area.

5) The built-up area of the shop is more than 607.64 sq. ft. I cannot state that area of which shop is excess than the agreement plan and sanctioned plan. It is not true to say that there may be variation in the plan submitted to corporation and sanctioned plan by the corporation. I cannot state whether in the agreement if owner has authorized the builder to change the plan if directed by the corporation. It is true that I have not measured the Carpet area of the shops. It is not true that carpet area of the shop is necessary to be measured for filing the report. My report is based on the F.S.I. permissible by the Corporation and the F.S.I. actually used. I feel it necessary that the builder should be present at the time of measurement. I see the suit premises from the Ventilator to confirm as to where the Mezzanine floors are constructed. It is not true to say that area of mezzanine floor is shown fifty percent in agreement plan. I have not measured superfluous area of mezzanine floor. I cannot say area of mezzanine floor is 40%. It is true that I do not feel it necessary to measure the area of Mezzanine floor.

6) It is not true to say that I have given opinion as desired by the owner. Owner had not asked me to pass comment as to what should be done as to consumption of extra F.S.I. The witness volunteers that, that was one of his issue in the report. The issue was not raised by the owner. The owner had not asked me to decide the compensation. It is not true to say that the builder has not built extra area than the agreement plan and agreement. It is true that the builder developer has not violated the terms as per the sanctioned plan. It was term in the agreement that construction has to be carried as per the sanctioned plan. I got my professional charges. It is not true to say that therefore, I am giving opinion as desired by the owner.

No re.

ROAC

CIVIL JUDGE SENIOR DIVISION PUNE.

dt/- 22.03.2005

Exh 205

IN THE COURT OF CIVIL JUDGE, SENIOR DIVISION PUNE, AT PUNE

SPECIAL CIVIL SUIT NO. 91/1991

Mrs. Dimple Anand Kapoor.

.....PLAINTIFFS

V/s

D.G. Infracon.

.....DEFENDANTS

AFFIDAVIT

I, Mr. Aditya Singh Rajput Age: 36 yrs. Occ.: Business, R/at. 2/B Polaris, Apte Road, Pune-411 004, state on solemn affirmation as under: -

1. I state that I am deposing for myself and on behalf of Defendant No. 1 & 3. I am a Partner of Defendant No. 1 which is a Registered Partnership Firm.
2. I state that the contents written in the Complaint are not admitted by me.
3. I state that it is true that there was an Agreement on 03-02-1989 for development of the Suit property between Plaintiff and myself Defendant No. 3 as Partners of D.G. Infracon. However, the Plaintiff has quoted only three conditions in isolation without reference to entire Agreement dated 03-02-1989 and particularly without any reference to the Plan attached along with the Agreement which was filed by the Plaintiff. I state that the Plaintiff has quoted these to make out false and fabricated case against us. I state that the Plaintiff is also not mentioning the irrevocable Power of Attorney of even date given to us with ulterior motive. I further state that the Plaintiff is also omitting to mention the word 2/ of two Shops in condition "a" (as quoted by him). I state that in fact two shops were to be sold by us and the areas of two Shops, Mezzanine floor height, length, breadth of Mezzanine floor as well as of Shops were clearly shown on the said Plan which was part and parcel of the Agreement dt. 03-02-1989.
3. I state that the Plaintiff is also silent about the fact that the two Shops in question which are constructed by us has got the same length, breadth and height as shown in the Plan attached to the Agreement dt. 03-02-1989
4. I state that the Plaintiffs have deliberately avoided to make a reference to the said Plan and with ulterior motive the Plaintiffs are interpreting the Agreement in totally wrong way. The Plaintiffs are saying about the construction of two Shops, we have committed a breach of Agreement dated 03-02-1989. I state that this is a wrong statement based on wrong assumption.
5. I state that there is no dispute about the condition [b] & [c] as given in para-No.3 of the Complaint. I state that unless one reads the entire Agreement together with the Plan attached to it and the Power of Attorney, one will not be able to understand and appreciate the significance of very term and it should not be interpreted in isolation. I state that this has been deliberately done by the Plaintiff with ulterior motive to mislead the Hon'ble Court.
6. I state that the Plaintiff is treating "built-up area" equivalent to F.S.I. which is not correct and I say that the built-up area of the shops 607.64 sq. ft. is mentioned in the Agreement with a view and clear understanding that area of the two shops (length x breadth) comes to 607.64 sq. ft. and with this sq. ft. area in mind the parties to the Agreement have used mentioned and referred the wording that I am allowed to sell two

shops of 607.64 sq. ft. built-up area and it has nothing to do with a F.S.I. calculations and, therefore, it has been mentioned in the Agreement that balance F.S.I. shall vest and reserved for the Plaintiff without any reference to calculations and figure of F.S.I. (page 3 last para of the Agreement) and this will be very clear from the fact that areas of plot No.1, Shop No. 1 and 2 and office No.1 and Flat No.2 are specifically mentioned but no mention in whatsoever manner is made about F.S.I. calculations. The said Agreement clearly contemplates that my Firm was to construct the building as per Plan attached to it and remaining F.S.I. only was to vest in the Plaintiffs.

7. I state that it is not true and correct to say that two shops are constructed by me by consuming an area of 900.22 sq. ft. unauthorizedly instead of 607.64 sq. ft. in breach of the condition of the Agreement dated 03-02-1989. It is not correct and true to say that I by constructing Mezzanine floor consumed the area more than 607.64 sq. ft. It may be correct from point of view of F.S.I., F.S.I. to the extent of 900.22 sq. ft. is consumed as per F.S.I. rules of Pune Municipal Corporation. However, thereby the Plaintiff cannot make any grievance as it was never agreed between the parties that two shops shall consume only 607.64 sq. ft. F.S.I. which shall be sold by these Defendants.

8. It is not true and correct to say that the Plaintiff took the objection to the plan submitted to Pune Municipal Corporation when the Plan was submitted for sanction. In fact, the Plan was sanctioned on 01-06-1989 and it was submitted quite earlier on 01-03-89 to Pune Municipal Corporation for sanction. I say and submit in this context that the Plaintiff would have approached to this Hon'ble Court in the year 1989 only and, therefore, their contentions that I assured the Plaintiff that they will revise the Plan in the light of objection raised by the Plaintiff is a fabricated statement and not at all true and correct statement, and, therefore, admitted by me. It is also not true to say that I neither revised the Plan nor complied with their assurance as and by laws the area of floor was reduced with certain other minor changes were made in the Plan by which the Plaintiff was benefited from point of view of F.S.I. calculations.

9. I state that it is correct that the Plaintiff have taken the objection for first time by their letter dt. 01-08-1990, 25-11-1990 and 30-12-1990 and day today thereafter. I submit that Suit for injunction brought in the present form when entire building was virtually complete is not maintainable.

10. [i] I submit that the construction begins in July 1989 and was completed in all respect in March 1993 and the completion certificate was obtained on 21/09/1993.

[ii] The part completion but for Flat No. 2 and Office No. 1 was received on 28-03-93.

[iii] The Plaintiff Shri Pankaj Anand Kapoor accepted Rs. 4,00,000/- after the filing of the Suit from Defendant in pursuance of Agreement dated 03-02-89 vide Cheque No. 8922 dated 01-02-89 drawn on HFC Bank, Shivajinagar.

[iv] The Plaintiff Shri Pankaj Anand Kapoor has paid the amount to these Defendants which he was to pay under the Agreement dated 03-02-89 for construction of office No. 1 and Flat No.2 which was to be constructed departmentally.

[v] The Defendant No.1 Firm has already dispossessed off one Shop to one Shri Rishabh Patil by Agreement dated 17 January 1990 prior to filing of Suit in which Shri Patil has already started Pharmaceutical Distributer business.

Under the circumstances stated above Plaintiff's Suit for injunction is not maintainable and more particularly so when construction of the building was virtually raised objection for the first time by his letter dated 01-08-90 &, therefore, Suit of the Plaintiff deserves to be dismissed with cost. The Plaintiff's Suit is not maintainable in view of specific provisions of Specific Relief Act Section 41 Section 20 & other Section of Specific Relief Act ,1963.

12. The Plaintiff have not even made the valuation of the Suit for the purpose of jurisdiction without which the Suit of the Plaintiff cannot be entertained any further.

13. I, therefore, pray that the Suit of the Plaintiff may be dismissed with cost.

14. The contents of the above Affidavit are true and correct to the best of my knowledge, information and belief and I have signed thereof at Pune.

PUNE,

Date:10-11-06.

AFFIANT

On oath cross-examination by Advocate for Plaintiff.

13. I have gone through the contents of my affidavit. My age is 53 years. My qualification is B. Tech. in Civil Engineer. Defendant No.1 is a partnership firm. Defendants No.2 and 3 are the partners of Defendant No.1. Defendant No.3 is educated up to B.Sc. The suit firm is registered under the partnership Act. I am ready to produce registration certificate if it is traced out. The business of Defendant No.1 was promoter and builder. At present I do not remember what was the address of Defendant No.1 in partnership deed. Defendant No.1 developed only one scheme. Now Partnership is not in existence but there is no resolution deed. Now I am not doing any business. Defendant No.3 also not doing the business. I am deposing on behalf of all Defendants.

14. In the year 1989 Shri Sharma was the Architect of our firm. I was assistant consultant. I am aware about the development control rules. 5072 Kalyani Nagar is belonging to the Plaintiff. True that on 03-02-1989 the agreement prepared between our firm and Plaintiff. One plan was attached to the agreement. Now agreement shown to me is at Exh. 183. It bears our signature. Contents are true and correct.

15] True that property 5072 Kalyani Nagar is owned by the Plaintiff. Prior to the agreement dated 03-02-89 the discussion was held in between me and Plaintiff about the terms and conditions, near about 2 to 3 months ago. Lastly, we prepared the agreement dated 03-02-1989 as per our prior discussion. Not true that except 607.64 sq. meter built up shop area the Plaintiff was owner. The plan was prepared by me it was attached to agreement. Agreement draft was prepared by me. I do not know that at the time of preparing the agreement Plaintiff has not engaged the counsel. Not true the copy of

plan was not supplied to the Plaintiff before preparing agreement. Now plan shown to me, it was attached to the agreement.

16] Not true that the plan prepared by me is not as per the terms and conditions of the agreement. Not true that I have not mentioned the thickness of the wall. Not true that from said map we cannot decide or tell the actual built-up area of the shop. There is no ratio while converting the carpet area into built up area. Not true that in map I have shown excess area. Area of balcony has been shown in the plan. True that it is mandatory to show the area of mezzanine floor in map as per the Corporation rule.

17] I do not remember that the Plaintiff has examined an architect by name Roy. I do not know that the Plaintiff has filed the report prepared by architect Mr. Rajdeep Anil Roy. Now says I know said report has been filed by the Plaintiff. I have gone through that report. Now that report is shown to me.

18] I had obtained the sanction plan of construction place on 5072 Kalyani Nagar. That plan was prepared by an Architect Sharma. That plan was prepared on the way of myself and all Defendants. All information was supplied by us to Shri. Sharma. That plan was prepared by Sharma associates and it is a firm of Mr. Rajesh Sharma. Mr. Rajesh Sharma is a brother of Defendant No.3 (Manav). That plan was submitted before the P. M. C. in the year 1989-90. That plan was sanction on 01-06-1989. Before submitting that plan to P. M. C. I had gone through it, I made construction upon suit premises as per that sanction plan. Not true I had not shown the plan to the landlord (owner) before getting it sanction. Now I do not know recollect that which signature the plan bears. Now that plan at Exh. 169 shown to me. It bears my signature. The signature of Shri. Sharma might be there. There is no signature of any member of Kapoor family (Plaintiff) There is column of owner. We made our signatures in that column. Witness volunteers that I had put my signature as a power of attorney holder but my status had not been mentioned in said plan.

19] Defendant No.1 had prepared only one scheme i.e., 5072 Kalyani Nagar. Plaintiff had executed only one power of attorney in my favour i.e. Now I do not remember that the Plaintiff never authorized me to sign on plan on their behalf. I cannot remember I never demanded in written the signature of Plaintiff on a plan. As Power of attorney is in my favour I had not obtained the signature of Plaintiff on construction plan. I cannot deny or accept that the power of attorney no authority given to me by Plaintiff to sign on construction plan on their behalf. True that as per agreement I was entitled to get commercial shop built up area 607.64 sq. ft. Not true that I have mentioned excess area in agreement plan intentionally. I have no objection if the commercial area got measured through Court commissioner.

20] There was old bungalow at the time of agreement, wherein Plaintiff No.1 where and 3 were residing. I do not know that the Plaintiff No.2 Pankaj Anand Kapoor constructed up to 607.64 sq ft. True that old roof was totally removed, in result the Plaintiff. No. I and 3 started to reside in new construction i.e., (607.64 sq. ft.) I do not know there are old material lying on spot. I do not remember I had provided some premises to the Plaintiff No. I and 3 to keep their old house articles temporarily. Not true the shop B

was given to Plaintiff No.1 and 3 by me for keeping the house articles. Not true that at the time of filing present suit B shop was in the possession of Plaintiff.

21] No possession receipt or document got from Plaintiff by me. Not true that the suit shop B was in the possession of Plaintiff till 26-12-1995.

22] In 1989 the address of Defendant No.1 was 1/5, East Street, Camp, Pune-411 001, Near Chandra Hospital. Not true that the public notice in newspapers is published by me. The address of Defendant No.3 at present is 1206/08/27 Gokhalenagar, Pune. I do not know the Defendant no.3 has published public notice in newspapers. Not true that the said notice was issued by we all Defendants.

23] True that behind the suit shop (adjacent) there is W. C. Only by going through the plan I can say the exact area of said W. C. Now sanction map Exh. 169 shown to me wherein the area of W. C is shown 0.9 Mtrs. X 1.43 Mtrs. True that the place of toilet is not include the area of shop. Now I do not remember the construction cost in the year 1989. I do not remember that time the cost of construction was near about Rs. 175/- per sq. ft. I have not seen in whose name the suit property is stand in the record of Corporation. Nobody is paying the tax of suit property. Volunteers that no assessment till date is there.

24] Without going through the record I cannot say it was my duty to pay stamp duty and registration fee of the agreement. That 1990-91 the Firm has submitted the returns. Except the suit property the Defendant No.1 had not developed the other property. Defendant No.1 developed only the suit property. Except said transaction the Defendant No.1 had not done the other business. In the year 1989 our consultant was Mr. Aditya Singh Rajput; Mr. Rajesh Sharma was appointed as an architect. In corporation also Shri Sharma had done the work as our architect. Our construction plan was prepared by our consultant and an architect with our consent. Mr. Aditya Singh Rajput prepared a plan which was placed with an agreement.

25] Not true I myself, Shri. Rajput were aware that the area of mezzanine floor includes in F.S.I. Not true even at the time of submitting our plan with Corporation, we were aware about the said fact. True that as per the agreement we have authority to sell 607.64 sq. ft built up area only. Not true that the ownership of remaining land was with Plaintiff. Not true I made excess construction up to 292.88 sq. ft. Now I have gone through the agreement wherein the Defendant agreed to bear the expenses of stamp duty, registration fee etc., True that the area of mezzanine floor has been included in the built-up area. (F. S. I.) In our plan we had shown the area of mezzanine floor. That area is considered in F.S.I. area.

26] In map which is with agreement the area of mezzanine floor is not shown separately. Note the Plaintiff had issued number of notices & letter to me wherein told that I have constructed more area than the agreement. Plaintiff issued letter dated 01-08-1990 which I received I had sent the reply. By my reply denied the contention of Plaintiff's letter.

27] True that I had agreed to hand over one flat and office to the Plaintiff No. 2 and accordingly 1 handed over the same. I do not remember whether the possession receipt was executed by Plaintiff No.2 in my favour. I do not remember whether I had taken

measurement at the time of handing over the flat and office to the Plaintiff No. 2. I am aware about the order passed by this Court (temporary injunction).

28] I cannot say on 20-03-1995 the wife of Defendants No.2 and 3 had been to suit shop. I do not remember on same day Plaintiff had lodged complaint against the wife of Defendants No.2 and 3 with Kalyani Nagar police chowki. I do not remember they were called in concerned police chowki. Not true on 20-03-1995 the wife of Defendants No. 2 and 3 had been to suit shop and tried to break the lock. I do not remember on 26-12-1995 I also came in suit shop and opened the suit shop illegally. I do not know on same day the report was lodged against me in Kalyani Nagar police chowki. Not true on 26-12-1995 I came in the suit shop and took possession illegally. Not true from 1989 to 26-12-1995 the suit shop was in the possession of Plaintiff.

29] Now I do not remember in the year 1995 I had filed the civil suit against the Plaintiff. I do not remember that the number of my civil suit was 311/95, Volunteers that I had initiated civil suit against present Plaintiff in regard present suit property but I do not know its progress. There is one shop adjacent to suit shop it is in the possession of Patil. The possession receipt was prepared at the time of handing possession to said Patil. I can produce the document pertaining to the transaction with said Patil. Not true no prior intimation was given to Plaintiff by me while enter into agreement with said Patil. Not true I have breached the terms and condition of agreement dated 03-02-1989 by making excess construction. Now I do not remember on 01-06-1989 the Plaintiff has raised an objection on the plan.

True that the Plaintiff had raised an objection before the Corporation on our sanction plan. Volunteers that subsequently. Not true that time I told the Plaintiff that the plan would be revised as per our contract. Not true as per agreement the Plaintiff is entitled to obtain possession of suit shop. No property tax being paid by me in regard suit shop. Volunteers till date no demand bill is served upon me.

Pune
Date: 01-10-607.649
PUNE

R. O. & A. C.
CIVIL JUDGE SENIOR DIVISION

IN THE COURT OF CIVIL JUDGE, SENIOR DIVISION PUNE, AT PUNE

SPECIAL CIVIL SUIT NO. 91/1991

Mrs. Dimple Anand Kapoor.

.....**PLAINTIFFS**

V/s.

D.G. Infracon.

.....**DEFENDANTS**

AFFIDAVIT

I, Mr. Rajesh Anubhav Sharma, age: 39 years, occupation- architect, residing at 1/5, East Street, Camp, Pune-411 001to hereby by state on solemn affirmation that:

1. I have been a witness for the agreement executed between Mrs. Dimple Kapoor and DG Infracon & Ors. The parties have signed the said deed and the documents attached there to including the maps of the suit property in my presence. Mr. Aditya Rajput and Manav Sharma represented and provided me a copy of the said deed along with the maps of the suit property and engaged me as an architect for getting the plans approved in respect of the suit property from the Pune Municipal Corporation. Accordingly, I prepared the necessary plans and sent them to both the parties for their perusal. And after their perusals I submitted the necessary plans to the Pune municipal corporation. The Pune Municipal Corporation sanctioned the said plans bearing No.400 dated 01-06-89. In the said plan it is provided that the ground floor shall possess an office having a net height of 15 feet along with 2 shops along with mezzanine floors attached to the said shops. The present plans are compliant with the measurements of the property given in the map of the said property, with the actual measurement and the rules and regulations provided by the Pune Municipal Corporation. The shops and the office constructed in the suit property are in accordance with the built-up area provided in the plan of the Pune Municipal Corporation. The construction of the said 2 shops and the office does not violate any of the rules and regulations of the Pune Municipal Corporation.

2. However, it is clearly stated that the agreement dated 03-02-1989 that both the parties shall have consensus while finalising the said plans. By obtaining the said consent the word mezzanine was informed and specified along with the height of the shops. No change has been made in the same. Till date I haven't received any complaint from Mrs. Kapoor.

Whatever stated herein is true and correct and to the best of my knowledge, information and belief.

I know the Affiant
Advocate.

Affiant

Examination on S.A. by Adv. For Plaintiff

Defendant No. 3 is my sibling. I am a qualified Diploma Engineer. I am having my own business since 1977. I have also worked as an Architect in the Pune Municipal Corporation. I am well acquainted with the rules of Pune Municipal Corporation. I was told by the Advocate of Defendants and not by the Defendants to appear as a witness in the court. It is not true and correct to say that whatever I have stated in my Affidavit has been told to me by my sibling and that I signed the same without going through the contents of the same. It is not true and correct to say that I have made my Affidavit based on the advice of Defendant Nos. 2 and 3.

I was not present for the meeting wherein the terms and conditions in relation to the present transaction took place between both the parties to the suit.

The Plaintiffs and Defendants have not disclosed the terms and conditions agreed between them to me. I am appointed as the Architect of the Defendants. I have received my professional fees from the Defendants. It is not true to say that the Defendants advised me to prepare the plan. I have not prepared the plan which is attached to the documents executed between the parties. The plan which was submitted to the Pune Municipal Corporation was prepared by me. I had obtained the necessary demarcations before preparing the said plan. It is true that the plan which was submitted by me to the Pune Municipal Corporation was prepared by me based on the instructions given to me by the Defendants. It is not true and correct to say that I never met the Plaintiff. It is not true and correct to say that the plan was never shown to the Plaintiffs before the same submitted to the Pune Municipal Corporation. It is not true and correct to say that the we submitted the plan to the Pune Municipal Corporation without informing the Plaintiffs. I cannot recollect whether the signature of the Plaintiffs was obtained on the said plan before submitting the same to the Pune Municipal Corporation. The plan shown to me today at the time of cross examination which is placed at Exh 169. The Plaintiff has given the defendant who is a builder the power of attorney and as a result of which the plan submitted to the Pune Municipal Corporation does not bear the signature of the Plaintiff. It is not true and correct to say that the Plaintiff never gave any authority to the Defendant to sign the plan in respect of the said property.

The construction on the said plot has been carried out as per the plan sanctioned by the Pune Municipal Corporation. I am not in a position to ascertain the measurements of the shop shown to me with the help of the plan placed at Exh 169. The measurements of both the shops include the attached W.C.s admeasuring 1.43 Mtrs. i.e., 4 x 3 sq. fts. The area F.S.I of the Mezzanine floor has not been considered in the built-up area.

I cannot comment upon any changes, if any made to the said plan. We have not obtained the consent of the Plaintiff either before or after making any changes, if any to the said plan. I, in my personal capacity state that there was no need to take such consent.

The plan shown to me shows shop Nos. 1 and 2 as admeasuring 607.64 sq. fts. It is not true and correct to say that I have not enquired about the dimensions of shop Nos. 1 and 2 before finalizing the plan. I cannot comment whether the sanctioned plan shows shop Nos. 1 and 2 admeasuring 900.22 sq. fts.

I cannot comment whether the area of the Mezzanine floor for the shop Nos. 1 and 2 have been adjusted towards the total built-up area.

BEFORE THE CIVIL JUDGE SENIOR DIVISION PUNE AT PUNE

SPECIAL CIVIL SUIT NO. 91/1991

- 1) Mrs. Dimple Anand Kapoor
Age-80 Years, Occupation Nil.
Dead on 06-01-2001

- 2) Dr. Pankaj Anand Kapoor
Age-58 Years, Occupation: Profession

- 3) Mr. Shekhar Anand Kapoor
Age-52 Years, Occupation: Service

.....PLAINTIFFS

All residing at: A-10, Queens Garden,

Kalyani Nagar, Pune-411006

V/s

- 1) D.G. Infracon
A partnership firm, having its office at 1/5,
East Street, Camp, Pune-411 001,
through its partners.
- 2) Mr. Aditya Singh Rajput
Age-40 Years, Occupation: Business,
R/at. 2/B Polaris, Apte Road, Pune-411 004.
- 3) Mr. Manav Sharma
Age-35 Years, Occupation: Business,
R/at. 1/5, East Street, Camp, Pune-411 001.

.....DEFENDANTS

Suit for possession and permanent injunction

The Plaintiffs most respectfully submit as under:

1. The Plaintiffs own and possess all the piece and parcel of the land bearing CTS No. 5072, A-10, Queens Garden, Kalyani Nagar, Pune-411006 admeasuring about 296.79 Sq. Mtrs. i.e., 3193.50 Sq. Fts.
2. The Defendant No.1 is a partnership firm carrying on the business of development and construction and sale of the properties, The Defendants 2 and 3 are the partners of the Defendant No.1 firm.
3. The Defendants 2 and 3 proposed the Plaintiffs for entrusting the work of the development of the suit property. The Plaintiffs accepted the said proposal and hence the Plaintiffs and Defendants executed an agreement on 03-02-1989. The material terms and conditions of the said agreement as follows:
 - a) The Plaintiffs allowed the Defendants to sell 607.64 Sq. ft. built-up shops to the prospective buyers as a consideration of 1200 Sq. ft. built-up area on the first floor to the Plaintiff No.3 and the Defendants also agreed to give Rs.4,00,000/- to the Plaintiff No.3.
 - b) The Defendants agreed to undertake the construction work of one office of 297.93 Sq. ft. and also construction work of one flat admeasuring about 1200 Sq. ft. for Plaintiff No.2. The total cost required for construction of the said office and flat will be borne by the Plaintiff No.2.
 - c) The Defendants agreed to reserve the right remaining F.S.I. with the Plaintiff.
4. The Plaintiffs state that the Defendants have right to sell only 607.64 Sq. ft. area (built-up). The Plaintiff's state that the Defendants have no right to sell the shops of area more than 607.64 Sq. ft.
5. The Plaintiffs state that the Defendants have constructed two shops by consuming an area of 900.22 Sq. ft. unauthorizedly, instead of 607.64 Sq. ft. in breach of the conditions of the agreement dated 03-02-1989. The Plaintiffs submit that the Defendants have no right to consume an area more than 607.64 Sq. ft. The Plaintiffs state that by constructing floor of height of 15' of first floor and constructing mezzanine floor consumed the area more than 607.64sq.ft. Thus, the Defendants have consumed more FSI to the tune of 292.58 sq. ft. illegally.

6. The Plaintiffs submit that the Defendants submitted plan for sanction on 01-06-1989 to the Pune Municipal Corporation. The Plaintiff took the objection to the said plan after the knowledge of utilization of excess area. The Defendants assured the Plaintiffs that the Defendants may revise the plan in the light of that objections raised by the Plaintiffs, but the Defendants neither revised the plan nor complied with the assurances given by the Defendants to the Plaintiffs. The Plaintiffs also took objection to the Defendant by registered letter dated 01-08-90. Again, the Plaintiffs issued legal notice dated 25-11-90 but the Defendants never complied with the requisitions of the Plaintiff's. The Defendants gave evasive reply on 30-12-90 and not made any commitment. The Plaintiffs submit that the Defendant by not giving detailed reply to notice and not making any commitment is interested in not performing the terms and conditions of the agreement dated 03-02-1989. The Plaintiffs therefore published a public notice informing the public not to deal with the Defendants in Daily Times dated 10-01-91.
- 6- A During the pendency of the present suit the Defendants have filed another suit i.e., R.C.S. No. 311/95 and obtained ex- parte temporary injunction against the Plaintiffs by concealing the material facts from the Honorable Court. The Plaintiffs have filed their say to Exhibit 5 on 23-12-1995.in the said reply the Plaintiffs specifically contended that the suit shop is in actual and physical possession of Plaintiffs. The Plaintiff also clearly mentioned in the said say that the Plaintiffs are in possession of suit shop and locks thereon are of the Plaintiffs only.
- 6-B The Plaintiffs submit that surprisingly on 26-12-1995 at about 12.45 P.M. Mr. Aditya Singh Rajput i.e., Defendant No.2 in the present suit along with 4-5 unknown persons came to the site with cutting hacksaw blade, hammer and other instruments. At that time the Plaintiff No.3 was present at his residence i.e., above the suit shop. The Defendant No.2 and other persons started breaking open the locks of the suit shop which were of the Plaintiffs only. After hearing the noise, the Plaintiff No.3 immediately rushed at the suit shop and obstructed the Defendant No.2 and other persons from breaking the locks of suit shop and also informed them that the matter is subjudice before the Civil Court and the Defendant No.2 cannot forcibly break open the locks unless the matter is decided by the Honorable Court but Defendant No.2 and other persons did not pay heed and proceeded with cutting of Locks.
- 6-C The Plaintiffs No.3 - immediately lodged a police complaint with the Kalyani Nagar Police Chowky but the Police did not take cognizance of the complaint made by the Plaintiff No.3 and did not take any action against the Defendant No.2 and others. In fact, the Police did not care to visit the site and to make Panchanama. The Plaintiffs submit that the Defendants succeeded in breaking open the locks of the suit shop and taking forcible possession of the suit shop. The Plaintiff No.3 thereafter also filed a written complaint with the Police Commissioner.
- 6-D The Plaintiffs submit that the Defendants were fully aware that the possession of the suit shop was with the Plaintiffs and at no time the Defendants were in possession of the suit Shop. The Plaintiffs submit that the Defendants with an intention to defeat the claim and defense of the Plaintiffs in the present proceeding mischievously and forcibly took the possession of the suit shop illegally. The Plaintiffs submit that on 26-12-1995 being Sunday and Defendants deliberately and with pre-planning did the said mischievous work.
- 6-E The Plaintiffs submit that the suit shop was in possession of the Plaintiffs from completion of the construction of the suit shop till 26-12-1995 It is pertinent to note that the Defendants have not taken any objection to the possession Plaintiffs during all these years.

- 6-F The Defendants have during the pendency of the proceeding have taken forcibly possession of the suit premises with a view to destroy the existing evidence and to manufacture new evidence.
7. The cause of action arose on 01-06-1989 when the Defendants got the plan sanctioned the plan and continues to arise on 01-08-90, 25-11-90 and 30-12-90 and day-today. Thereafter the cause of action arose on 26-12-1995 when the Plaintiff was forcefully disposed by the Defendant from the suit shop and continues to arise day by day. Hence the suit is within the period of limitation.
8. The suit property situates at Pune. The Plaintiffs reside in Pune. The Defendants work for gain at Pune and therefore the Honorable Court has jurisdiction to entertain and try the present suit.
9. The Plaintiffs paid prescribed court fee. The Plaintiff has valued the suit for permanent injunction of Rs. 296.97 and for possession of Rs. 1,10,00,000/- for the purpose of court fee, jurisdiction and Advocates fee and accordingly has paid proper court fee on the Plaintiff.

The Plaintiffs, therefore, pray that:

- a) the Defendants 1 to 3 themselves or through their agents, servants, representatives, etc. be permanently restrained from selling or transferring in any manner and handing over possession of the area of the suit shop in excess of 607.64 Sq. ft. to any persons.
- a-1) The Defendants be directed to restore the possession of the suit shop to the Plaintiffs;
- b) Cost of this suit be awarded to the Plaintiffs from the Defendants;

Pune

Date: 08-02-1996

Plaintiff

VERIFICATION

I Dr. Pankaj Anand Kapoor, Age- about 58 Years, Occupation: Profession, residing at: A-10, Queens Garden, Kalyani Nagar, Pune-06, do hereby state on solemn affirmation that whatever stated herein is true and correct and to the best of my knowledge, information and belief and therefore I have signed the same at Pune on the date mentioned hereinabove.

Plaintiff

IN THE COURT OF CIVIL JUDGE SENIOR DIVISION PUNE, AT PUNE

REGULAR CIVIL SUIT NO. 311/95

Mrs. Dimple Anand Kapoor

...PLAINTIFFS

V/s

D.G. Infracon

...DEFENDANTS

The Written Statement on behalf of the Defendant Nos. 1 to 3 is as under:

1. The suit of the Plaintiff is not true and correct and not maintainable in the present form.
2. The contents of the Para 1 of the Plaint are generally correct and these Defendants do not dispute about the same.
3. The contents of Para 2 are also true and correct. However, so far, the Defendant No. 3 is concerned he is and was partner in his capacity of his HUF and he is not partner in his personal capacity.
4. It is true that there was an Agreement dated 03-02-1989 for development of the suit property between Plaintiff and Defendants. However, the Plaintiff has quoted only three conditions in isolation without reference to entire agreement dated 03-02-89 and particularly without any reference to the plan attached along with the Agreement (which was signed by the Plaintiffs) to make out false and fabricated case against the Defendants. The Plaintiff is also not mentioning the irrevocable power of attorney of even date given to the Defendants with ulterior motive. The Plaintiff is also omitting to mention the word 'Two shops in condition 'a' (as quoted by him) and in fact two shops were to be sold by these Defendants and the areas of two shops, mezzanine Floor height, length, breadth of mezzanine floor as well as of shops were clearly shown on the said plan which was part and the parcel of the Agreement dated 03-02-89. The Plaintiff is also silent about the fact that the two shops in question which are constructed by the Defendant has got the same length, breadth and height the as shown in the attached plan to Agreement dated 03-02-89. The Plaintiffs have deliberately avoided to make a reference to the said plan and with ulterior motive to the Hon'ble court.
5. The Plaintiff is treating 'built up area' equivalent to F S I which is not correct and this Defendant says built up area of two shops 607.64 Sq. Ft. is mentioned in the Agreement with a view and clear understanding that area of the two shops (length x breadth) comes to 607.64 Sq. Ft. and with this Sq. Ft. area in mind the parties to the agreement have used mentioned and referred the wording that the Defendants are allowed to sell two shops of 607.64 Sq. Ft. built up area and it has nothing to do with a F S I calculations and therefore, it has been mentioned in the Agreement that balance F.S.I. shall vest and be reserved for the Plaintiff. Without any reference to calculations and figure of F.S.I. (Page 3 last para of the Agreement) and this will be very clear from the fact that areas of Flat No. 1, Shop No. 1 and 2 and Office No. 1 and Flat No. 2 are specifically mentioned but no mention in whatsoever manner is made about F.S.I. calculations. The said agreement clearly contemplates that the Defendant No. 1 firm was to construct the building as per plan attached to it and remaining F.S.I. only was to vest in the Plaintiffs.

6. It is not true and correct to say that two shops are constructed by the Defendant by consuming an area of 900.22 Sq. Ft. unauthorizedly instead of 607.64 Sq. Ft. in breach of the condition of the Agreement dated 03-02-89. It is not correct and true to say that the Defendant by constructing the mezzanine floor consumed the area more than 607.64 Sq. Ft. It may be correct from point of view of F S I, F S I to the extent of 900.22 Sq. Ft. is consumed as per F.S.I. rules of PMC. However, thereby, the Plaintiff cannot make any grievance as it was never agreed between the parties that two shops shall consume only 607.64 Sq. Ft. F.S.I.; which shall be sold by these Defendants.
7. It is not true and correct to say that the Plaintiff took the objection to the plan submitted to Pune Municipal Corporation on or about 01-06-1989 when the plan was submitted for sanction. In fact, the plan was sanctioned on 01-06-1989 and it was submitted quite earlier on 01-03-1989 to PMC for sanction. The Defendant says and submit in this context that the Plaintiff would have approached to this Hon'ble Court in the year 1989 only and therefore their contentions that the Defendant assured the Plaintiff that they will revise in the light of objection raised by the Plaintiff is a fabricated statement and not at all true and correct statement, and therefore, admitted by these Defendants. It is also not true to say that Defendant neither revised the plan nor complied with their assurance as assurance was not given. As per PMC rules, regulation and by laws the area of mezzanine floor was reduced with certain minor changes were made in the plan by which the Plaintiff was benefited from point of view of F.S.I. calculations.
8. It is correct that the Plaintiffs have taken the objection for first time by their letter dated 01-08-1990 and the Plaintiff have issued notice. (25-11-90). However, it is not correct to say that the Defendant have given evasive reply by not giving detailed reply. There was no reason for the Plaintiff to issue public notice and these Defendants to file separate suit for the same against the present Plaintiffs.
9. There is no cause of action for the Plaintiff to file the present suit and it is not correct to say that to it continues to arise on 01-08-90, 25-11-90 and 30-12-90 and day to day thereafter. The Defendant submits that suit for injunction brought in the present form when entire building was virtually complete is not maintainable.
10. (i) The Defendants started the construction in July 1989 and completed the same in all respect in March 1993 and obtained completion certificate on 909/1993.
 (ii) The Plaintiff No.3 i.e., Mr. Shekhar Anand Kapoor has accepted Rs. 4,00,000/- after the filing of the suit from Defendant in pursuance of Agreement dated 03-02-1989 vide Cheque No. 8922 dated 01-02-89 drawn on HFC Bank, Shivajinagar.
 iv) The Plaintiff Shri Pankaj Anand Kapoor has paid the amount to these Defendants which he was to pay under the Agreement dated 03-02-1989 for construction of Office No. 1 and Flat No. 2 which was to be constructed departmentally.

v.) The Defendant No. 1 firm has already disposed of one shop to one shri Rishabh Patil by Agreement dated 17-01-1990 prior to filling of suit in which Shri Patil has an already started Pharmaceutical Distributor business.

Under the circumstances stated above Plaintiff's suit for injunction is not maintainable, and more particularly so when construction of the building was virtually completed, by the end of March 1993 and Plaintiff has raised objection for the first time by his letter dated 01-08-90 and therefore suit of the Plaintiff deserves to be dismissed with cost. The Plaintiff's suit is not maintainable in view of specific provisions of Specific Relief Act Section 41, Section 20 and other Section of Specific Relief Act 1963.

11. The Plaintiff have not even made the valuation of the suit for the purpose of jurisdiction without which the suit of the Plaintiff cannot be entertained any further.
12. The Defendant may be allowed to alter, amend, add the present written statement, if necessary.
13. Therefore, the Defendant pray that the suit of the Plaintiff may be dismissed with cost. For this act of kindness this Defendant shall even remain duty bound.

Pune

Date: 23-06-1997

Defendants

Advocate for Defendant

VERIFICATION

1, Mr. Aditya Singh Rajput Partner of D.G. Infracon, age 45 yrs. Occ. Business verify on solemn affirmation that the contents written hereabove are true and correct to the best of my knowledge, information and belief and I have signed the same on the date first abovementioned.

Defendant

IN THE COURT OF CIVIL JUDGE, SENIOR DIVISION, PUNE

SPECIAL CIVIL SUIT NO. 91/91

Mrs. Dimple Anand Kapoor and Others.

...PLAINTIFFS

V/s

D.G. Infracon

...DEFENDANTS

Additional Written Statement on behalf of Defendants is as under –

1. That the Plaintiff's suit is not legal and not valid and not tenable as per the provisions of law
2. That the contents in this Suit are not true and correct and denied by these Defendants.
3. It is true that there was no agreement for development of the suit property executed between Plaintiffs and Defendants. However, the Plaintiff have not referred the entire agreement and quoted only those conditions. The Defendants submits that the Plaintiffs have concealed to state about the Plan attached along with said agreement and which is also signed by the Plaintiffs. The Plaintiffs have also concealed the irrecoverable Power of Attorney executed by the Plaintiffs in favour of Defendants to develop and do other acts in respect of the suit property. Therefore, the suit is liable to be dismissed for non -disclosing the material facts.
4. The Defendants state that the Plaintiffs have not produced the Plan with ulterior motive and mala fide intention to hide the material facts. The Defendants further submit that as per the said Agreement Defendants were to sell two shops of which the areas, mezzanine floor height, length, breadth of mezzanine floor is clearly shown on the said plan.
5. The contentions of Plaintiffs in Para No. 6 except the contention that Defendants have filed Regular Civil Suit No. 311/95 and obtained ex-parte temporary injunction against the Plaintiffs" are not true and correct and the same are specifically denied by Defendants. The Defendants states that the Plaintiffs was never in possession of suit shop and putting a lock by does not survive. The Defendants submits that the Defendants have developed the property by demolishing the existing structure. The Defendants are given right to dispose of the shops/offices etc. in the proposed building as per the development Agreement dt. 03-02-89. The Defendants have already sold one of the shops to Shri Rishabh Patil. The Defendants further submits that the Hon'ble Court has also affirmed the possession of Defendants in order dt. 10-09-1991.
6. The allegation of Plaintiffs that “surprisingly on 26-12-1995 at about 12.45 a.m. Mr. Aditya Singh Rajput i.e., Defendant No.2 in the present suit along with 4-5 unknown persons came to the site with cutting blade, hammer and other instruments” are true and correct and not admitted by the Defendants. The further allegations that- at that time the Plaintiff No.3 was present.... Unless the matter is decided by the Hon'ble Court but Defendant No.2 and other persons

did not pay heed and proceeded with cutting of locks." are baseless, imaginary and not admitted by the Defendants.

7. The Defendants submits that Defendants were and are in possession of the suit shop. Hence the above is mentioned incidence of 26-12-1995 is only hypothetical, imagination of Plaintiff and hence not admitted. The Defendants specifically denies the contention of Plaintiff in his say that " Plaintiffs are in possession of suit shop and locks thereon are of the Plaintiffs.
8. The Defendants specifically deny that Defendants have during the pendency of the proceeding, taken forcibly the possession of the suit premises.
9. The contentions in para-No.6 H are not true and correct and the same are denied by Defendant.
10. This Defendant states that as it is the plan is changed and for the sake of argument if it is true, then it is impossible for this Defendant to give the shop premises as agreed by the Agreement dated 17-01-1990 as such decree if at all passed by this Hon'ble court against the Defendant is a hollow decree which can never be executed. Hence on this count also the suit is liable to be dismissed.
11. No cause of action has arisen on 01-06-89, as alleged by Plaintiffs in para-No.7 of the Plaintiff. Further Defendants denies that the cause of action continues to arise on 01-08-90, 25-11-90 and 30-12-90 and day today.
12. There is no prima facie case thereafter mentioned in the present case. The Plaintiffs are not coming with clean hands. Plaintiffs have concealed material facts hence Plaintiffs cannot claim any equitable reliefs.
13. It is, therefore, prayed that the present suit may be dismissed with costs.

Pune

Date: 08-09-1997

Defendants

Advocate for Defendant

VERIFICATION

1, Mr. Aditya Singh Rajput Partner of D.G. Infracon, age 45 yrs. Occ. Business verify on solemn affirmation that the contents written hereabove are true and correct to the best of my knowledge, information and belief and I have signed the same on the date first abovementioned.

Defendant No.2