

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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IA.No.13284/2006 in CS(OS) 1702/2001

%16.04.2009

Date of decision:16th April,2009

M/S ASHOKA ESTATE PVT LTD & ORS Plaintiffs

Through: Mr. Harish Uppal, Advocate

Versus

**M/S DEWAN CHAND BUILDERS PVT LTD
AND OTHERS Defendants**

Through: Ms Amrita Sanghi and Mr Devendra
Singh, Advocates for Defendants 1, 3 and 4.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may
be allowed to see the judgment? YES
2. To be referred to the reporter or not? YES
3. Whether the judgment should be reported
in the Digest? YES

RAJIV SAHAI ENDLAW, J.

1. The plaintiffs in this suit for recovery of Rs 40 lacs as principal amount, Rs 3,51,250/- as interest @ 15% p.a. till the date of institution of suit and for pendente lite interest and costs, claim decree under Order 12 Rule 6 of the CPC.

2. It is not in dispute that an agreement dated 1st March, 1972 was entered into between the plaintiffs 2 to 17 on the one hand and the defendant No.1 on the other hand. Under the said agreement, the plaintiffs 2 to 17 as the owners of property No.24, Barakhamba Road, New Delhi comprising of land admeasuring 0.956 acres or 4628 sq yds and a residential bungalow constructed thereon permitted/allowed the defendant No.1 company to demolish the residential bungalow existing on the said property and to, at the

costs and expense of the defendant No.1, raise construction of a multi storeyed building for commercial use on the said property, after obtaining sanction of the Government and local authorities for such development, again at the costs and expense of the defendant No.1 and with no financial commitment or liability in completing the said project on the plaintiffs 2 to 17 except as provided in the said agreement. The defendant No.1, in consideration of its expense and effort in doing the aforesaid works was to be entitled to transfer and dispose of offices, showrooms and garages covered or uncovered pertaining to 70% share in the proposed multi-storeyed building plus 3000 sq.ft. on the second floor and to appropriate the receipts therefor unto itself. Such agreements in common parlance are known as "Collaboration Agreement". The remaining 30% of the built up in the proposed building was to be of the shares of the plaintiffs 2 to 17 or the plaintiff No.1 company got incorporated by the plaintiffs 2 to 17 in terms of the said agreement.

3. Under clause 26 of the aforesaid agreement, the defendant No.1 was to be responsible to pay the commercialization charges or such other charges under any other name to the authorities concerned, as and when demanded by the authorities. Besides this, the defendant No.1 also agreed to indemnify the plaintiffs 2 to 17 against any demand with regard to liability for commercialization charges until the entire commercialization charges had been paid by the defendant No.1 to the concerned authorities, together with any interest or penalty levied by the said authorities in that behalf. It was also agreed that the defendant No.1 shall furnish such guarantee as may be mutually agreed to upon between the plaintiffs 2 to 17, to ensure payment of the said dues to the authorities concerned.

4. It is also not in dispute that the predecessor-in-interest of the defendants No.2 to 4, namely, Shri Dewan Chand and the defendants 2 and 3 also executed a surety bond dated 29th April, 1972 in favour of the plaintiffs 2 to 17 who were jointly described therein as beneficiaries. The said surety bond was executed in compliance of clause 26 aforesaid of the agreement aforesaid whereunder the defendant No.1 had undertaken to secure the beneficiaries against all losses, claims and demands with regard to the responsibility for the commercialization charges, penalty and interest detailed as aforesaid. The said Shri Dewan Chand and the defendants 2 and 3, being the persons behind the defendant No.1, undertook to indemnify the beneficiaries against all losses, claims and demands in case the defendant No.1 did not fulfill the terms and conditions of clause 26 aforesaid. Under the said surety bond, the said Shri Dewan Chand and defendants 2 and 3 agreed that all claims and demands of concerned authorities in connection with the payment of any commercialization charges or any other like charges under any other name as demanded by the authorities concerned together with all liability for interest and penalty in respect thereof shall be discharged by the defendant No.1 on demand of the same, either as a lump sum or by instalments as allowed by the concerned authorities and it was further provided that in case the defendant No.1 fails to meet the said charges in full or in part then Shri Dewan Chand and defendants 2 and 3, as surety, shall be liable to meet the same as if they were the principal debtor in respect thereof, qua the beneficiaries mentioned therein. Shri Dewan Chand and defendants 2 and 3 made themselves jointly and severally liable to pay the aforesaid commercialization charges.

5. It may be clarified that the lease of the land underneath the property aforesaid was originally for residential purposes. However, with the change in the master plan, multi storeyed commercial building had been permitted in the area where the property aforesaid was situated. However, the multi storeyed commercial building could be constructed on the said property only subject to payment to commercialization charges to the lessor of the land i.e., the L&DO. The L&DO had till then not determined the commercialization charges and hence the need arose to provide as aforesaid.

6. It is also not in dispute that the construction of the multi-storeyed building aforesaid was completed in or about 1976-77.

7. A notice dated 11th July, 1973 was issued by the L&DO to show cause as to why the lease of the land underneath the property be not re-entered. The plaintiffs alongwith the defendant No.1 filed a writ petition in this court being No.909/1973 challenging the said notice dated 11th July, 1973 of the L&DO.

8. Not only did Shri Dewan Chand and defendants 2 and 3 execute the surety bond as aforesaid, a bank guarantee was also arranged by the defendant No.1 from the then Laxmi Commercial Bank Limited. Under the said bank guarantee the bank undertook to pay unequivocally within 48 hours on demand in writing from the L&DO or any other officer authorized and competent in this behalf and addressed to the owners, namely, the plaintiff No.1 herein or to any other person having title for the time being, upto Rs 12 lacs towards commercialization charges i.e., premium on account of conversion charges for change of user from residential to commercial purposes in respect of the said property and on behalf of

the defendant No.1 who had by the time of furnishing of the bank guarantee developed the property into a multi-storeyed building. It appears that till the time of completion of construction of multi-storeyed building on the property aforesaid, the L&DO had not notified the commercialization charges and since on completion of construction the plaintiff and the defendant No.1 were to take charge/possession of their respective shares/portions of built up area in the property, it was expedient to furnish the bank guarantee aforesaid. It is also the case of the plaintiffs that the defendants were of the view that the commercialization charges were not payable to the L&DO.

9. It is the case of the plaintiffs that the defendant No.1, Builder, after taking possession of its portion of the built up area of the property and/or after disposing of the same, lost any interest in the property and stopped pursuing the writ petition aforesaid and also did not renew the bank guarantee aforesaid.

10. The plaintiffs in the year 1980 instituted a suit, inter alia, for direction to the defendants to renew the bank guarantee.

11. The plaintiffs claim to have received a communication from L&DO in April, 1999 demanding commercialization charges plus penalty totaling to nearly Rs 5 crores. The plaintiffs claim to have learnt that the defendant No.1 stopped pursuing the writ petition aforesaid which was dismissed in default. Similar writ petitions had been filed with respect to other multi-storeyed buildings in the Connaught place area. The said writ petitions were decided by a Division Bench of this court, according to the plaintiffs laying down the manner of computation of commercialization charges. The plaintiffs realizing that the earlier writ petition had been dismissed,

plead that they had no option but to institute another writ petition in this court challenging the computation of commercialization charges. In the said writ petition being CW.No.6742/2000, the plaintiffs also sought stay of recovery of nearly Rs 4 crores demanded by the L&DO. Vide order dated 10th November, 2000 in the said writ petition, the stay of demand of the L&DO was granted subject to deposit of a sum of Rs 40 lacs by the plaintiffs. The plaintiffs claim to have deposited the said amounts and thereafter instituted the present suit for recovery of the said Rs 40 lacs from the defendant No.1 as well as the legal heirs of Shri Dewan Chand aforesaid. The plaintiffs also claim interest @ 15% per annum till the date of institution of the suit, making the aggregate sum of Rs 43,51,250/- due till the date of institution of the suit. The plaintiffs have also claimed future interest at 18% per annum.

12. The defendants filed a joint written statement. The material contents aforesaid have not been disputed / controverted by the defendants though generally denying their liability for any amount whatsoever to the plaintiffs. The defence of the defendants and on the basis whereof the application under Order 12 Rule 6 of the CPC is also contested can be summarized as under:

- (i) that the collaboration agreement contemplated the registration of Ashoka Estate Maintenance Society by the plaintiffs and the defendants and which would have charged from the owners /occupiers a monthly maintenance charges for the facilities to be provided by the said society. The benefits of such earnings were to be thus shared between the plaintiffs and the defendants. It is the averment of the defendants that the plaintiffs failed to share the earnings from the said multi-storeyed building including car parking

charges, maintenance charges, monies charged on account of facility of generator set with the defendant No.1, thereby depriving the defendants of a perpetual income from the said multi-storeyed building. The defendants claimed that on taking account a sum of Rs 4,93,72,000/- would be found due from the plaintiffs to the defendants on said account.

- (ii) that the promise/agreement of the defendants to pay commercialization charges was based on various obligations to be fulfilled by the plaintiffs and which they had failed to fulfil.
- (iii) the defendants claimed a sum of Rs 1,49,87,311/- to be due from the plaintiffs to them under various heads till December, 1998 and a further sum of Rs 3,25,15,175/- to be due for the period January 1991 to December, 2001. The said amounts are claimed as towards 70% shares of the defendants in the rents of car parking in the building and towards charges incurred by the defendants allegedly on behalf of the plaintiffs towards electric connection, erection of sub-station by NDMC, penalty for revalidation of plans, ground rent, security deposit of Rs 4 lacs not released by the plaintiffs to the defendants in terms of the collaboration agreement, transfer charges realized by the plaintiffs and on a maintenance charges and on view other heads.
- (iv) it is further contended that the defendant had agreed to pay the commercialization charges only if found to be legal, leviable and payable by the defendants. Since the challenge to the commercialization charges was stated to have been made by the plaintiffs in the writ petition filed by them, it was stated that the legality and validity of commercialization charges was subject to adjudication of the said petition and till

the same were held legal and valid, the plaintiffs could not demand the amounts from the defendants. The defendant claims to have paid a sum of Rs 1 lac towards commercialization charges to the L&DO in March, 1995.

- (v) that it was the case of the plaintiffs themselves in the writ petition that while the commercialization charges in terms of the earlier judgment of the division bench could not be beyond Rs 600/- per sq yards i.e., maximum Rs 28 lacs, the plaintiffs were illegally claiming Rs 40 lacs from the defendants. It was contended that the demand of the L&DO which was stayed by this court subject to deposit of Rs 40 lacs contained several other demands besides of commercialization charges at the rate of Rs 2400/- per sq yds. It was stated that the defendants were liable for the other demands which included for unauthorized construction in the 30% portion of the plaintiffs under the collaboration agreement.
- (vi) it was pleaded that the defendants having monetary claims against the plaintiffs were entitled to mutual adjustment.

13. The plaintiffs filed a replication denying that any amounts were due from the plaintiffs to the defendants or of there was any agreement between the parties of sharing of earnings from the building in perpetuity in the ratio of 70:30. It was denied that Ashoka Estate Maintenance Society had been agreed to be constituted under the agreement. It was further pleaded that even if such a society was to be constituted, it was to run on no loss no profit basis and there could be no question of sharing of any profits from the maintenance charges of the building. It was further pleaded that false, vexatious pleas had been taken by the defendant in the written statement when the defendants had not even paid any court

fees on their claims and that the claims of the defendants were in any case barred by time.

14. Not much progress was made in the suit for the reason of the substitution of legal representatives. After about 5 years of the institution of the suit and in which issues have not been framed as yet, the application under consideration was filed. The reply of the defendants to the application further states that there is no clear, unequivocal and unconditional admission and in fact the written statement of the defendants disputed the liability of the defendants and the admissions, if any, therein were conditional and the parties were to be necessarily put to trial. It was argued that the admissions by the defendants of execution of the collaboration agreement, clause 26 thereof, of the execution of surety bond and of furnishing the bank guarantee could not be read in isolation and have to be read subject to the other pleas in the written statement and as per which huge amounts were due from the plaintiffs to the defendants.

15. The counsel for the defendants has also filed written submissions and had during the hearing as well as in written submissions relied upon (a) **Dudh Nath Pandey Vs Suresh Chandra Bhattasali** AIR 1986 SC 1509 on the proposition that the admission has to be taken as a whole and it is not permissible for the court to rely on a part of the admission, ignoring the other. (b) **Western Coalfields Ltd Vs Swati Industries** AIR 2003 Bombay 369 in support of the proposition that if the admission is conditional, it is not unequivocal to enable the court to pass a decree under Order 12 Rule 6 of the CPC. (c) **State Bank of India Vs M/s Midland Industries** AIR 1988 Delhi 153 in support of the proposition that where the defendants raised objections going to the root of the matter, it is not proper to exercise the discretion under

Order 12 Rule 6 of the CPC, and lastly (d) **Chikkam Koteswara Rao Vs Chikkam Subbarao** AIR 1971 SC 1542 to canvas that before the right of a party can be considered to have been defeated on the basis of the alleged admission by him, implication of the statement made by him must be clear and conclusive.

16. Per contra, the counsel for the plaintiffs relied upon **Uttam Singh Duggal & Co. Ltd Vs United Bank of India** (2000) 7 SCC 120 and on **Sudershan Sinha Vs Kuldeep Singh** 133(2006) DLT 183 and lastly **Rajiv Saluja Vs M/s Bhartia Industries Ltd** 98 (2002) DLT 720.

17. The plaintiffs have also filed before this court, inter alia, the collaboration agreement, surety bond, bank guarantee, the letters dated 24th April, 2000 and 31st July, 2000 of the L&DO, the copy of the order dated 10th November, 2000 in Civil Writ No.6742/2000 instituted by the plaintiffs and the receipts showing payment of Rs 40 lacs by the plaintiffs.

18. The suit instituted by the plaintiffs upon the failure of the defendants to have the bank guarantee renewed was on change of pecuniary jurisdiction transferred to the District Court and has since been decided but since the appeal where against preferred by the defendant is pending, no reference thereto is being made.

19. The present suit is for recovery of commercialization charges which under the agreement between the parties, the defendants had undertaken to pay. To this extent there is no dispute.

20. The defendants even now state that commercialization charges are not payable. However, the fact remains that a demand therefor had been issued by the L&DO and non compliance thereof would

have had the effect of the lease of the land underneath the property being re-entered and/or proceedings under the Public Premises Act being initiated/continued. The said lease is in the name of the plaintiffs. The liability for payment to the L&DO is of the plaintiffs only. It is for this reason that the agreement provided for the defendants indemnifying the plaintiffs with respect thereto. The denial by the defendants of the entitlement of the L&DO to claim or recover commercialization charges is meaningless. The defendants did not do anything about it. The defendants who had undertaken to pay the said commercialization charges and who had agreed to keep the plaintiffs indemnified against all demands with respect thereto, if of the opinion that the commercialization charges were not payable or due, ought to have challenged the same. The defendants did not do to. It is common knowledge that the builders such as the defendants, immediately upon the completion of construction or even prior thereto sell their entire share/portion/entitlement in the building. However, owners generally retain whole or part of their entitlement of built up area. It is thus the owners such as the plaintiffs who are affected by non-payment. The defendants have nothing to lose. If the commercialization charges are not paid and the lease of the land is re-entered and the proceedings for eviction taken under the Public Premises Act, the defendants have nothing to suffer, having already sold their entitlement of built up area and having realized the sale proceeds thereof. Similarly, the demand being not in the name of the defendants, the L&DO cannot recover the said amounts from the defendants. The plaintiffs on the basis of their agreement with the defendants cannot ask the L&DO to recover the said amounts from the defendants with whom L&DO has no privity.

21. I have considered, that since the contention of the counsel for the plaintiffs also in the writ petition was that the commercialization charges were payable at the rate of Rs 600/- per sq yrds instead of at the rate of Rs 2400/- per sq yrds as claimed by the L&DO, should the claim of the plaintiffs against the defendants who also have taken the same stand, be restricted to Rs 28 lacs only. On further consideration, I find, that would not be the right approach. On the basis of claim of commercialization charges at the rate of Rs 2400/- per sq yrds, the demand therefor would be of Rs 1,11,07,200/- lacs. The plaintiffs have, however, been made to deposit Rs 40 lacs only. Since the defendants have undertaken to pay the said monies within 48 hours of demand in writing of the L&DO and further since the defendants had agreed to keep the plaintiffs indemnified in this regard, there is no reason for not making the defendants liable for the entire sum of Rs 40 lacs, subject of course to the right of the refund, if any, also being of the defendants only. Since the plaintiffs as of today are out of pocket for a sum of Rs 40 lacs on account of demand of L&DO of commercialization charges and which, as per their agreement with the defendants, the defendants were to bear, there is no reason to keep the plaintiffs out of pocket for the amount in excess of Rs 28 lacs, during the interregnum also till when the writ petition aforesaid is decided.

22. The contention of the defendants of demand being sub-judice also does not find favour. Even if it is to be presumed that no commercialization charges are payable, the risk therefor was of the defendants. It is the defendants who have to pay the said amounts and if they succeed in persuading the court or the L&DO to hold that no commercialization charges are payable, it is the defendants who will benefit. However, pending the same no burden which under the

agreement was to be borne by the defendants can be imposed on the plaintiffs.

23. Though the defendants have made claims of over Rs 20 crores against the plaintiffs and have used the words of set off / adjustment/ claims therein but neither any counter claim has been preferred nor any court fees on set off paid. In the absence thereof, there is no such plea of the defendants for consideration before this court.

24. Even otherwise, I find that the construction of the building was completed in or about 1976. There is neither any pleading nor any document to show that the defendants have at any time asserted any rights or made any claims on the basis whereof now the admitted liabilities to the plaintiffs are being sought to be denied/contested. The present suit itself has been pending for the last over 7 years. The claims against which the dues to the plaintiffs are sought to be set off or adjusted would be now barred by time and no set off or adjustment against time barred claims even, if any, is permissible.

25. The plaintiffs have denied the said claims of the defendants against the plaintiffs. The plaintiffs have not claimed any adjudication thereof. In the face of the denial and the failure of the defendants to seek adjudication thereof, again as of today there are no claims or demands against which the admitted dues of the plaintiffs can be adjusted or set off.

26. The plaintiffs if otherwise found entitled to a decree on admissions, cannot be deprived thereof by astute drafting of the written statement and/or by taking pleas therein which have no legs to stand upon. This court is to read the pleadings of the parties meaningfully. Issues are to be framed on material and not all propositions of law and fact. A plea, which on the face of it is found

by the court to be untenable, does not require the framing of any issue. The pleas of the defendants in the present case are found by me to be such, without calling for any trial whatsoever. If the said pleas of the defendants on the basis whereof the admitted liability of the defendants is sought to be defeated, are found to be untenable, naturally the impediment to the passing off a decree on the basis of admissions disappear. The apex court in **T. Arvindam Vs. T.V. Satyapal** AIR 1977 SC 2421 has held that if on a meaningful-not formal-reading, claim is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, the trial court should ensure that bogus litigation is shot down at the earliest stage. Again, in **Liverpool & London S.P. & I Association Ltd. Vs. M.V. Sea Success I & Another** (2004) 9 SCC 512 it was held that when no cause of action is disclosed, the courts will not unnecessarily protract the hearing of suit; the court should interpret the provisions in such a manner so as to save expenses, achieve expedition and avoid the courts resources being used up in cases which will serve no useful purpose. It was further held that a litigation which in the opinion of the court is doomed to fail should not further be allowed to be used as a device to harass. The said propositions equally apply to written statements/defence to the claim also.

27. The bulk of the claims of the defendants against the plaintiff pleaded in the written statement are on account of the profits from operating the maintenance services in the multi-storeyed building. Not only is there no clause in the admitted agreement between the parties in this regard but even otherwise I find the Delhi Apartment Ownership Act, 1986 to have intervened in between and which would override the agreement, if any, between the plaintiffs as owners of the land and the defendant No.1 as the builder. There can be no

doubt that the said Act would be applicable to the building in question. Under the said Act the maintenance of common areas and facilities and which as per the definition in the Act would include the car parking spaces also, vests in an association of apartment owners. This court in **Sagar Apartment Flat Owners Society (Registered) Vs Sequoia Construction P Ltd** 1993 RLR 446 has held that the Apartment Act is in force and the rights of the parties agreed under the said Act have to be taken into consideration and the purchasers of the apartments must get protection and the court has to ensure that the legislative intent is fulfilled rather than allow it to be flouted. This court, whenever approached has been enforcing the rights of the apartment owners. The judgments of this court in **Star Estate Management P Ltd Vs Neo Securities Ltd** FAO(OS) 390/1996 decided on 31.10.1996, in **Ganesh Prasad Seth Vs Karam Chand Thapar** 1998 IV ADD 657, **Om Prakash Charaya Vs Ashok Kamal Capital Builders P Ltd** 2000 VII ADD 67, **Municipal Corporation of Delhi Vs A.M. Khanwilkar** 2002 65 DRJ 38, **R.L. Bhardwaj Vs Shivalik Co-operative Group Housing Society Ltd** 56 1994 DLT 600 and **Dhawan Deep Residential Welfare Association Vs Star Estate Management Ltd** IA 8139/2006 in CS (OS) 1474/2006 decided on 20th September, 2007 can be cited in this regard.

28. I have in **M/s DCM LTD Vs R.K. Tower India P Ltd** Arb.P 415/2006 and OMP 362/2006 decided on 22nd August, 2008 held that claim of the builder for appointment of an arbitrator to adjudicate the disputes between the builder and the owner of the land qua maintenance, to be not maintainable for the reason of the said Act.

29. Thus it will be seen that the claim of the defendants for maintenance charges, not only is not found in terms of the

agreement but is also contrary to law. Thus, the said claims on the basis whereof the admitted dues to the plaintiffs are sought to be adjusted are found to be not tenable at all.

30. I may notice that besides order 12 Rule 6 of the CPC, Order 15 of the CPC also empowers the court to, where it appears that the parties are not at issue on any question of law or fact, pronounce judgment at once.

31. I find the present case to be such. The plaintiffs have therefore become entitle to recover the sum of Rs 40 lacs admittedly paid by them to the L&DO towards commercialization charges, from the defendants who had undertaken the said liability and who failed to discharge the same leaving the plaintiffs with no option but to save their property and deposit the same as directed by the court.

32. The next question is as to the rate of interest. The plaintiffs have claimed interest till the date of institution of the suit at 15% per annum. That was in consonance with the rate of interest prevailing then. However, since then there has been a fall in the rate of interest. The plaintiffs are thus entitled to interest on the principal amount from the date of institution of the suit and till the date of payment @ 10% per annum. The plaintiffs are also found entitled to costs of the suit against the defendants. Counsels fee assessed at Rs 50,000/-. The decree sheet be drawn up.

**RAJIV SAHAI ENDLAW
(JUDGE)**

April 16, 2009
M