

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% *Date of Decision :November 01, 2012*

+ **RFA(OS) 77/2012**

M/S DÉCOR INDIA (P) LTD. Appellant

Represented by : Mr.Akhil Sibal, Advocate
with Ms. Vidhi Goel and Mr.Amit Aggarwal,
Advocates.

versus

DELHI STOCK EXCHANGE ASSOCIATION LTD.

..... Respondent

Represented by : None.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE MANMOHAN SINGH

PRADEEP NANDRAJOG, J. (Oral)

1. In spite of being served none appears for the respondent at the hearing today. Record shows that no vakalatnama has been filed by any counsel on behalf of the respondent after it was served with a notice of the appeal being admitted.

2. The respondent invited offers as per tender documents for renovation and re-doing interior works for its building at plot No.3/1, Asaf Ali Road, New Delhi as also for another building at plot No.3,4/4B, Asaf Ali Road, New Delhi.

3. Architect Ashok B.Lall and Shekhar Bhargava were appointed as 'Lead Consultant' and 'Executive Architect' respectively for the proposed works.

4. The appellant submitted its offer for the two works and after negotiations the works as per tender documents were awarded by defendant to the respondent to the plaintiff. For the first building the contract price was ₹1,77,97,347.90 and for the second it was

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₹59,73,075.90. Letter of acceptance pertaining to the first building was issued by the respondent on July 16, 1998 and for the second on August 1, 1998.

5. As per the tender documents running payments had to be made upon works being measured and certified for payment by the architect from time to time and final payment when the works were completed and the final bill, after measurement certified for payment.

6. Both tender works were alleged to have been completed by the appellant and the two buildings were occupied and inaugurated on December 13, 1999. But as regards the finalization of the final bills, the architect issued a certificate for both bills on June 23, 2000.

7. As per the certification by the architect, pertaining to the first building ₹12,92,984.82 was certified to be payable by the respondent to the appellant and for the second building the sum certified for payment was ₹4,58,517.89. We clarify, this was the amount certified to be payable after giving effect to the running payments made during execution of the works, which included the tax deducted at source.

8. The appellant did not accept the final bill certified for payment by the architect and pointed out various discrepancies and errors therein.

9. As per pleadings in the plaint, the architect admitted somewhere after July 30, 2001 that pertaining to the first building he had indeed made an error with respect to ₹4,02,179.36.

10. Exchange of letters continued, with the appellant not accepting the final certification by the architect pertaining to the two final bills. The respondent, as pleaded in the plaint, never took a categorical and unambiguous stand that it was rejecting the claims to the contrary by the appellant till letter dated September 25, 2001 was written by the respondent to the appellant.

11. Raising a grievance that the works were executed as per contract and in spite thereof full payment was not released and additionally even the admitted payments were not released, suit for recovery with pre-suit claim for interest was filed by the appellant on May 13, 2004.

12. In para 26 of the plaint the appellant pleaded cause of action as under : -

“26. Cause of action arose on 16.7.98 (Sixteen July Nineteen Ninety Eight) when the contract was given to the plaintiff for the interior works of the New building of the Defendant and on 1.8.98 (First August Nineteen Ninety Eight) when the contract was given to the plaintiff for the interior works of the Old building of the Defendant. The cause of action also arose when the letter of award was issued to the Plaintiff for the two buildings i.e. 16.7.98 (Sixteenth July Nineteen Ninety Eight) & 1.8.98 (First August Nineteen Ninety Eight) respectively. The cause of action also arose when the final bills were raised by the Plaintiff on 29th Nov. 1999 (Twenty Ninth November Nineteen Ninety Nine) for the total work done for the new building and for the old building. The cause of action also arose on 23.6.2000 (Twenty Third June Two Thousand), when the Architect of the Defendant issued a certificate for final bill for ₹2,41,34,961.82 (Rupees Two Crores Forty One Lac Thirty Four Thousand Nine Hundred Sixty One and Eighty Two Paise only). The cause of action also arose when the Plaintiff sent repeated reminders through letters dated 26.9.2001 (Twenty Sixth September Two Thousand One) and 1.10.2001 (First October Two Thousand One) to pay the outstanding payment. The cause of action finally arose on 25.09.2001 (Twenty fifth September Two Thousand One) when General Manager Shri Bajpai refused to pay the Plaintiff's case. It again accrued on various dates when communication and personal visits were made to recover the outstanding payment from the Defendant; cause of action is recurring in nature, as the Defendant till date has not paid the suit amount.”

13. Apart from a defense on merits, in the written statement filed by the respondent, it was pleaded that the suit was barred by limitation. It was pleaded that admittedly, as per pleadings in the plaint, the work was completed in both buildings by December, 1999. The final bill was certified for payment, on June 23, 2000, a fact pleaded in the plaint. It was highlighted that the suit filed in May, 2004 was accordingly barred by limitation.

14. On the pleadings of the parties, issues were stuck as per order dated March 5, 2007. They read as under: -

1. Whether the suit is patently barred by time? OPD
2. Whether the plaint has been signed, verified and filed by duly authorized person? OPP
3. Whether the plaintiff has received amount in excess of what was due to them? OPD
4. Whether the plaintiff is entitled to challenge finalization of the bills by the architect? OPP
5. Whether the plaintiff is entitled to a decree for a sum of ₹72,30,450.66? OPP
6. Whether the plaintiff is entitled to pendente lite and future interest as per the provisions of interest on delayed payments to Small Scales and Ancillary Industrial Undertaking Act, 1993? OPP
7. Whether the plaintiff is entitled to costs? OPP
8. Relief.

15. Parties proceeded to trial. The appellant filed affidavit by way of examination-in-chief of its Director Mr. Anil Dhingra (PW-1) who for reasons which we cannot fathom from the suit record were not called upon to be present for being cross-examined and the matter simply meandered.

16. In the year 2010, the respondent filed IA No.15427/2010 under Order VII Rule 11 of the Code of Civil Procedure, praying that since the suit was ex facie barred by limitation, as per pleadings in the plaint, the plaint was liable to be rejected in view of para (d) of the Rule 11 of Order VII.

17. Needless to state, as per the provision invoked, a plaint would be liable to be rejected where the suit appears from the statement in the plaint to be barred by any law, which would obviously include a suit being barred by limitation.

18. Vide impugned order dated June 1, 2012, the learned Single Judge has allowed IA No.15427/2010 and has accordingly rejected the plaint holding the same to be barred by limitation.

19. Agreeing, that for the purposes of limitation, the suit would be governed by Article 113 of the Limitation Act, 1963, the view taken by the learned Single Judge is that the cause of action would accrue when the architect certified the final bills for payment on June 23, 2000.

20. The appellant had projected that limitation would commence, when right accrued to sue i.e. on September 25, 2001, the date when the respondent, for the first time, unequivocally and using express language, not only refused to reconsider the matter with reference to the letters written by the appellant pointing out the errors in the final certification of the final bills submitted by it. Surprisingly, the respondent for the first time indicated its unwillingness even to pay the amounts which were certified for payment by the architect and thus it was claimed that limitation would commence from September 25, 2001..

21. The problem which the appellant has encountered, in our opinion, is the result of the inartistic drafting of the pleadings constituting paragraph 26 of the plaint. The inartistic drafting, is to plead that the

cause of action accrued firstly on July 16, 1998 when the contract was awarded for the first building and it accrued again on August 1, 1998 when the contract was awarded for the second building. Further, inartistic drafting is to plead that the cause of action also arose when after completing the works the appellant raised final bills on November 29, 1999, followed by pleading that the cause of action also arose on June 23, 2000 when the architect certified the two bills for payment.

22. We find that thereafter it has been pleaded that the cause of action also arose on various dates when the appellant wrote letters protesting against the certification of the final bills. It has been pleaded that the cause of action finally arose on September 25, 2001 when the General Manager of the respondent unequivocally refused to make any payment.

23. The draftsman of the plaint appears not to be aware of the fact that a cause of action is different from a cause of action accruing to sue. A cause of action would be the entire bundle of facts, if traversed by the opposite party, required to be proved to sustain a claim. But a cause of action to sue would be when the right to sue accrues i.e. a right is infringed or threatened to be infringed. The right to sue would not accrue at every time when the various facts constituting the cause of action come into being. The two are totally different concepts.

24. Article 113 of the Limitation Act, 1963 prescribes a limitation of three years. The commencement of the period of limitation is with reference to : '*When the right to sue accrues*'.

25. Way back in 1930, in the decision reported as AIR 1930 PC 270 Mt.Bolo v. Mt.Koklan, Sir Binod Mitter, speaking for the Council, with reference to Article 120 of the Limitation Act, 1908, which provision correspondence to Article 113 of the Limitation Act, 1963 stated as under: -

“There can be no “right to sue” until there is an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.”

26. The view was cited with approval the next year in the decision reported as AIR 1931 PC 89 Gobinda Narayan v. Sham Lal . It was held that the expression ‘*right to sue*’ means the right to bring the particular suit with reference to which the plea of limitation is raised and that the starting point for limitation is when the rights are invaded.

27. The aforesaid views were summed up by the Supreme Court in the decision reported as AIR 1960 SC 335 Rukhmabai v. Laxminarayan in the following words: -

“The legal position may be briefly stated thus: the right to sue under Art.120 of the Lim. Act accrues when the defendant has clearly and unequivocally threatened to infringe, the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right.”

28. Aforesaid three decisions were noted with approval by a Division Bench of this Court in the decision reported as AIR 1985 Delhi 358 Shah Construction Company Ltd., Bombay v. Municipal Corporation of Delhi.

29. In paragraph 24 of its opinion the Division Bench highlighted that a claim is not necessarily a difference between the parties unless that claim is disputed. Cause of action would therefore arise when the claim of one party, when it arises, is denied or there is a threat to deny. Only in that event it becomes a dispute and cause of action arises from that date.

30. It is well-settled principle of law that where a bare reading of the plaint reveals that the suit is ex facie barred by limitation, without any further enquiry, then alone the Court can invoke the powers so as to arrive at the conclusion that the suit is barred by limitation. However, the same very issue of limitation if requires a fact finding enquiry alongside perusal of the plaint, then the same very question becomes a mixed question of fact and law which may require enquiry during the trial.

31. In the context of limitation, the Supreme Court, in the decision reported as (2006) 5 SCC 658 Balasaria Construction (P) Ltd. v. Hanuman Seva Trust & Ors. at page 661, held that the question of limitation may be a mixed question of fact and law when ex facie reading of plaint does not denote the same to be barred by time. The Supreme Court observed :-

“8. After hearing counsel for the parties, going through the plaint, application under Order VII Rule 11(d) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. **Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time. The findings recorded by the High Court touching upon the merits of the dispute are set aside but the conclusion arrived at by the High Court is affirmed. We agree with the view taken by the trial court that a plaint cannot be rejected under Order VII Rule 11(d) of the Code of Civil Procedure.**” (Emphasis supplied)

32. Similar observations were made in the decision reported as (2007) 5 SCC 614 Hardesh Ores Pvt. Ltd. vs. M/s Hede & Company to the following effect:-

“25. The language of Order 7 Rule 11 CPC is quite clear and unambiguous. The plaint can be rejected on the ground of

limitation only where the suit appears from the statement in the plaint to be barred by any law. Mr Nariman did not dispute that “law” within the meaning of clause (d) of Order 7 Rule 11 must include the law of limitation as well. It is well settled that whether a plaint discloses a cause of action is essentially a question of fact, but whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is whether the averments made in the plaint, if taken to be correct in their entirety, a decree would be passed. The averments made in the plaint as a whole have to be seen to find out whether clause (d) of Rule 11 of Order 7 is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. As observed earlier, the language of clause (d) is quite clear but if any authority is required, one may usefully refer to the judgments of this court in (2004) 9 SCC 512 and (2005) 7 SCC 510.

33. On the facts of the instant case, suffice would it be to state that with respect to two sums which we have noted hereinabove which the architect certified for payment, no dispute whatsoever was raised by the respondent till it wrote letter dated September 25, 2001. Qua such claims, by no stretch of imagination, prima facie, it can be held that right to sue accrued prior to September 25, 2001. As regards the rest, as pleaded in the plaint, the appellant’s letters protesting against the deduction made by the architect were not refuted ever; as being baseless objections. As pleaded in the plaint, verbal assurances were repeatedly being given by the architect and the respondent, to look into the matter and in fact with respect to a deduction in sum of ₹4,02,179.36, it is pleaded that the architect had verbally admitted that the said deduction was an inadvertent error in view the explanation given by the appellant

in its letter dated July 30, 2001.

34. Thus, the view taken by the learned Single Judge that with reference to the pleadings the issue of limitation is arising as a pure question of law is an incorrect view.

35. If the evidence finally brought on record would evidence that it was for the first time on September 25, 2001 alone that the respondent unequivocally rejected the claim of the appellant, issue of limitation would accordingly have to be decided taking said date as the trigger point when the right to sue accrued. If however, the respondent is able to prove an unequivocal rejection of the claim on a date prior to September 25, 2001, the issue of limitation would accordingly have to be decided with reference to said date being the trigger point.

36. Thus, on the facts of the instant case and the pleadings, the learned Single Judge was wrong in accepting IA No.15427/2010.

37. Before terminating our discussion, we would like to highlight that lawyers should be careful while drafting the applicable paragraph of the plaint where the cause of action with reference to the right to sue accruing is pleaded. Normally, every plaint which we are witnessing contains pleadings which are akin to the pleading which we have noted in the instant plaint. The entire spectrums of facts constituting the cause of action are pleaded as if on each date the right to sue had accrued. These are wrong pleadings. The pleading with respect to the suit being within limitation must clearly bring out the date, as per the plaintiff, when the right to sue accrues and not make general averments pertaining to various facts constituting the cause of action, which is the bundle of facts required to be proved, if traversed by the defendant, to sustain the claim.

38. The appeal is accordingly allowed. The impugned order dated June 1, 2012 rejecting the plaint as being barred by limitation is set aside. IA

No.15427/2010 is dismissed with costs assessed in sum of ₹25,000/- in favour of the appellant and against the respondent.

39. Section 13 of the Court Fees Act, 1870 reads as under :-

“Refund of fee paid on memorandum of appeal-

If an appeal or plaint, which has been rejected by the lower Court on any of the grounds mentioned in the Code of Civil Procedure, is ordered to be received, or if a suit is remanded in appeal, on any of the grounds mentioned in Section 351 of the same code, for a second decision by the lower Court, the Appellate Court shall grant to the appellant a certificate, authorizing him to receive back from the Collector the full amount of fee paid on the memorandum of appeal.

Provided that, if in, the case of a remand in appeal, the order of remand shall not cover the whole of the subject-matter of the suit, the certificate so granted shall not authorize the appellant to receive back more than so much fee as would have been originally payable on the part or parts of such subject-matter in respect whereof the suit has been remanded.”

40. Under the circumstances we hold that the appellant is entitled to receive back from the Collector the full amount of court fee paid on the memorandum of appeal.

41. The Registry of this Court is directed to issue a certificate in the name of the appellant authorizing the appellant to receive back from the Collector the full amount of court fee paid on the Memorandum of Appeal. The Collector is directed to effect the refund on the strength of the certificate issued.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

OCTOBER 31, 2012

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