

\$~

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on : April 23, 2012
Judgment Pronounced on: April 26, 2012

+ FAO(OS) 650/2010

FILO INTERIOR DECORATIONS PVT LTD. Appellant
Represented by: Mr.Raj Shekhar Rao with Ms.Anu
Bagai, Advocates.

versus

L.K.MODI & ORS. Respondents
Represented by: Mr.Sanjiv Behl with Mr.Pravin
Bahadur, Ms.Mallika Joshi, Mr.Mohit
Mudgal, Ms.Sharavini Shekher and
Mr.Rajan Narain, Advocates for R- 1
to 3.
Ms.Sneha Jain, Advocate for R-4.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

PRADEEP NANDRAJOG, J.

1. Application under Section 10 of the Code of Civil Procedure filed by the defendants has been allowed by the learned Single Judge vide impugned order dated August 25, 2010. CS(OS)No.683/1996 filed by the appellant has been stayed till CS(OS)No.2408/1994 is decided by the Bombay High Court.

2. The appellant was awarded interior designing work as per order No.92/20 3097, requiring it to refurbish the South-East Wing at the third floor at Nirlon House, Dr.Anni Besant Road, Bombay - 400025. The premise is owned by the Modi Group of Companies, and it is the case of the appellant that the space to be refurbished was to be used by the Walt Disney.

3. Exclusive of sales tax, the price at which the work was awarded is ₹14,17,531.30 and requires the appellant to manufacture or procure; and supply furniture as also renovate at the site the place in question.

4. As per the appellant by an under another work order No.92/20 2817 on May 28, 1992 additional work was assigned and the enhanced cost of the work came to ₹29,20,041/-.

5. It is the case of the appellant that thereafter, from time to time, additional work was awarded by giving oral instructions.

6. As per the appellant, a sum of ₹18,90,261/- is due and payable to it under the original work order as amended on May 28, 1992 and further works awarded; along with pre-suit interest calculated @ 19% per annum totaling ₹5,48,744/-; suit filed is claiming decree in sum of ₹24,39,005/-.

7. The work in question was being carried out under the work order(s) issued by M/s Indofil Chemical Company, a division of Modipon Ltd. and it is the case of the appellant that the oral instruction on behalf of the company were given by Mr.L.K. Modi.

8. Suit filed by the appellant has been instituted in March 1996, and prior thereto, in the year 1994 Modipon Ltd. had instituted CS(OS) No.2408/1994 in the High Court of Judicature at Bombay. The subject matter of the suit is the work executed by the appellant at Nirlon House. Damages in sum of ₹15,00,000/- have been claimed by Modipon Ltd. against the appellant.

9. The claim in the suit filed by Modipon Ltd. is predicated on the works executed at Nirlon House by the appellant. Grievance in the suit filed by Modipon Ltd. is that

substandard and poor quality of wood has been used, workmanship is poor i.e. the entire renovation job is shoddy. Within less than a year of the work being executed, the wood has cracked at various places, wrinkles and blisters had appeared on the wood. It is stated by Modipon Ltd. that in spite of notices sent, the appellant did not rectify the work; in fact, the appellant did not even respond to the notices is the claim made by Modipon Ltd. As per Modipon Ltd., the rectification of the defective work would cost Modipon Ltd. the price intimated to the appellant as per its letter dated February 21, 1994.

10. The debate before the learned Single Judge, as is evident from the impugned order, has proceeded as if the subject matter of the suit filed by the appellant embraces more than one distinct cause vis-a-vis the suit filed by Modipon Ltd. This is the reason why the learned Single Judge has troubled himself to discuss the law, with respect to a subsequent suit being stayed, on the subject of there being overlapping in the subject matter and the cause of action in the two suits.

11. Suffice would it be to state that, as held by the Supreme Court, in the decision reported as (2004) 6 SCC 756 Gupte Cardiac Care Centre & Hospital vs. Olympic Pharma Care (P) Ltd., the test of '*directly and substantially in issue*' as per Section 10 of the Code of Civil Procedure is to see: whether the two suits arise out of the same transaction. In another word, cause of action of one party, arrayed as a plaintiff, would be its defence in the suit where it is arrayed as a defendant; not in full measure – substantially would do is the focus of attention.

12. We need not note various other authorities holding as aforesaid, for the reason duplication of authorities would serve no purpose.

13. Applying the legal norm as aforesaid, it would be apparent that the appellant would be entitled to the price of the work executed by it if it establishes having executed the work as per contract; specifications being adhered to; merchantable goods being consumed while executing the work. For, if 'A' agrees to pay 'B' ₹10,000/- to paint two doors using a particular quality paint and putting two coats, 'B' would not be entitled to ₹10,000/- if only one coat of paint is put and the material used is not as per the specification. Not only would 'B' be not entitled to any payment, but in an action by 'A' for damages in the form of incurring costs to scrap the shoddy paint and thereafter re-do the work at an increased cost, would made 'B' liable to pay damages to 'A'.

14. Applying the illustration to the facts of the instant case, it is apparent that the initial work of interior refurbishing awarded by Modipon Ltd. to the appellant at an agreed price was novated from time to time by expanding the scope of the work, and thus it is not a case as sought to be projected in the plaint, of there being distinct contracts and thus the claim of the appellant embracing distinct contracts.

15. It is a case of clever drafting, but ignoring the law that if it is the case of the appellant that its claims relate to distinct contracts, breach of each contract would give birth to a separate cause of action and for which separate suits had to be filed; if it is the case of the appellant that common questions of law and facts arise in the separate suits and hence it is entitled to maintain one common action; leave of the Court had to be obtained to do so. Further, the ad-valorem

Court fee could not be paid on the total value of the claim. Pertaining to each contract the suit had to be valued and Court fees paid separately on each claim. This has not been done.

16. Law requires pleadings to be read and understood meaningfully and not pedantically.

17. We find that the subject matter of the two suits is the same. The defence of the appellant in the suit filed against it by Modipon Ltd. is the cause of action pleaded by the appellant in the subsequent suit filed by it which has been stayed. Vice-versa, the cause of action pleaded by Modipon Ltd. in the previous suit is its defence in the subsequent suit.

18. As regards the plea that in the suit filed at Bombay, Modipon Ltd. is the plaintiff and the appellant is the defendant; in the suit filed by the appellant at Delhi, the defendants are: (i) L.K.Modi, (ii) Indofil Chemical Company, (iii) Godfrey Phillips India Ltd. and (iv) Walt Disney: and hence one ingredient of Section 10 of the Code of Civil Procedure i.e. the issue in the two suits is between the same parties is not met needs to be dealt with. The answer is simple. By merely impleading a party as a defendant would not mean that there is a cause of action against the party concerned.

19. Merely because Mr.L.K.Modi, a Director of Modipon Ltd. had entered into a joint venture with Walt Disney and that the renovation at Nirlon House was intended to be used as an office by the joint venture company which would be incorporated, would not make Walt Disney liable for any money to be paid to the appellant. There is no privity of contract between the appellant and Walt Disney.

20. A juristic entity would always act through an individual. If Mr.L.K.Modi acted on behalf of the Modipon Ltd. as its Director would not make him personally liable for any

due to the appellant. We highlight, it is not the case of the appellant that Mr.L.K.Modi stood personal guarantee.

21. M/s Indofil Chemical Company, impleaded as defendant No.2 by the appellant, is admittedly a division of Modipon Ltd.

22. Impleadment of M/s Godfrey Phillips India Ltd. as defendant No.3, upon the averment that it is a group company of the Modi Group of Companies, would likewise not make Godfrey Phillips India Ltd. liable to pay any money to the appellant, for the reason there is no privity of contract.

23. Concurring with the conclusion arrived at by the learned Single Judge, we dismiss the appeal, but guide the appellant that the proper course for it would be to move a transfer petition under Section 25 of the Code of Civil Procedure before the Supreme Court praying that the two suits should be consolidated.

24. We refrain from imposing any costs.

(PRADEEP NANDRAJOG)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

APRIL 26,2012
KA