

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

Date of decision: 11th April, 2013.

+ **CS(OS) 281/2010 & I.A. No.2055/2010 (u/O 39 R-1 & 2 CPC)**

S.M.V. AGENCIES PVT. LTD.

..... Plaintiff

Through: Mr. Gagan Gupta and Mr. Saurabh
Gupta, Advocates.

Versus

**M/S. CROSS COUNTRY HERITAGE HOTEL
& ANR**

..... Defendants

Through: Mr. Pradeep Diwan, Sr. Adv. with
Ms. Anupam, Mr. Desh Raj and Mr.
Pradeep Desodiya, Advocates.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

J U D G M E N T

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11.04.2013

I.A. No.6070/2011 (of defendants for leave to defend)

1. The plaintiff has sued under Order 37 of the Civil Procedure Code (CPC), 1908 for recovery of Rs.68 lakhs with interest @ 12% per annum pleading:

(i) that a document titled "Basis of Negotiation" was executed on 5th February, 2007 between the plaintiff on the one hand and defendant No.1 through its Managing Director defendant No.2 on the other hand, whereunder the defendant No.2 offered to transfer 52% of

the share capital held by him in the defendant No.1 and the plaintiff paid a sum of Rs.50 lakhs to the defendant No.1 as deposit money on the condition that if the plaintiff after due diligence was not satisfied, the said amount of Rs.50 lakhs would immediately become refundable within fifteen days of such intimation and in the event of satisfactory completion of due diligence, within fifteen days a detailed Memorandum of Understanding (MoU) shall be signed;

(ii) that the plaintiff was not satisfied with the exercise of due diligence undertaken and asked for refund of the said sum of Rs.50 lakhs;

(iii) that the defendants have however not refunded the amount;

(iv) that the defendants are liable for interest @ 12% per annum from the date the amount of Rs.50 lakhs was paid till refund and on which account a sum of Rs.18 lakhs is due till the institution of the suit;

hence, the suit for recovery of Rs.68 lakhs.

2. Summons for appearance and thereafter for judgment were issued on the defendants and leave to defend application has been filed and on which the counsel for the plaintiff and the senior counsel for the defendants have

been heard.

3. The defendants seek leave to defend on the following grounds:

(a) that the application for summons for judgment is not supported by valid and proper affidavit inasmuch as the affidavit is attested on 27th August, 2010 and the application was filed in the month of March, 2011;

(b) that it is a term of the document aforesaid, “both parties agree not to go to the Court on this Basis of Negotiation” and owing whereto, the plaintiff is not entitled to maintain this suit on the basis of the document containing such a clause;

(c) that the document aforesaid was not enforceable unless a contract between the parties was executed on making payment of 10% of the part payment and after settlement of the other terms and conditions;

(d) that the plaintiff was bound to complete due diligence within 45 days of signing of the document on 5th February, 2007;

(e) that the plaintiff however did not act on the basis of the said document and owing whereto, the defendants suffered a set back and monetary loss;

- (f) that the sum of Rs.50 lakhs was adjusted against the losses and damages suffered by the defendants and the clause that “both parties agree not to go to the court on this Basis of Negotiation” was inserted for this reason only i.e. to compensate the defendants for not negotiating with any other party during the period of 60 days i.e. 45 days of due diligence and 15 days period for execution of the final agreement with a payment totalling to 10% of the agreed terms and conditions;
- (g) that the plaintiff remained silent for about three years and in which time the defendants suffered further losses;
- (h) that the plaintiff at no point of time conveyed that they were not satisfied after due diligence;
- (i) that owing to default by the plaintiff the defendants could not pay the dues of the Banks and financial institutions who took over the properties of the defendant No.1 and auctioned the same at throw away price; and,
- (j) that the real intention of the parties can be gathered only if the Managing Director of the plaintiff is allowed to be cross-examined by the defendants.

4. It is the contention of the counsel for the plaintiff at the outset that the application for leave to defend has not been filed within the prescribed time, inasmuch as the defendants were served with the summons of judgment on 5th April, 2011 and have filed the application for leave to defend on 18th April, 2011.

5. The senior counsel for the defendants has however from the calendar published by the Rohini Court Bar Association shown that this Court was closed from 9th April, 2011 till 17th April, 2011 and the application was filed on the re-opening day and is thus within time.

6. Before discussing the arguments made, it is deemed appropriate to point out that the hearing on the application was commenced on 22nd January, 2013 when it was the contention of the counsel for the plaintiff that the suit under Order 37 of CPC has been filed on the basis of the monies under the document aforesaid having been advanced by the plaintiff to the defendants by a cheque and which contention was repelled. However, it was observed in the order of that date that the plaint suggested the plaintiff to have sued on the basis of a written agreement but original of which had not been filed. The matter was then adjourned on the request of the counsel for the plaintiff.

7. The counsel for the plaintiff has today stated that the submission made on 22nd January, 2013, of the suit having been filed on the basis of a cheque vide which monies were advanced to the defendant, was an erroneous one and the suit has been filed on the basis of a written contract/ agreement within the meaning of Order 37 of CPC i.e. the document titled “Basis of Negotiation” aforesaid. He has further explained that though the plaintiff along with the plaint had filed a photocopy of the said document but neither any objection had been taken by the defendants qua non filing of original nor was it plea of the defendants in the application for leave to defend that the document was anything else than as filed by the plaintiff. It is also informed that the plaintiff as far back as on 24th August, 2011 had filed the original document also before this Court but which remained under objection and was not placed on record and of which the counsel for the plaintiff did not know and after the order dated 22nd January, 2013 the plaintiff has had the original document placed on record. Reliance is placed on *Harbans Lal Vs. Daulat Ram* ILR (2007) I Delhi 706 enunciating the nature of the documents on the basis of which a suit under Order 37 of the CPC can be maintained.

8. Per contra, the senior counsel for the defendants has argued that the

plaintiff has nowhere in the plaint pleaded that the suit is on the basis of the document titled “Basis of Negotiation”. Reliance in this regard is placed on ***Juki Singapore PTE Ltd. Vs. Jay Cee Enterprises Pvt. Ltd.*** 157 (2009) DLT 580. It is further argued that for a suit on the basis of a document to be maintainable, the said document has to be relevant within the meaning of Section 23 of the Indian Evidence Act; that the said document itself records that it is not a concluded agreement and is thus not a contract and no suit on the basis thereof can lie. Attention is invited to Clause K of the said document whereunder both the parties had agreed to keep the said agreement and all their dealings confidential and undertaken not to use the same for purposes other than contemplated by the document. It is argued that the affidavit accompanying the application for leave to defend does not verify the cause of action. Reference is made to ***Neebha Kapoor Vs. Jayantilal Khandwala*** AIR 2008 SC 1117 laying down that for obtaining summary judgment, original documents must be produced and it is argued that the suit is thus to be treated as an ordinary suit. It is yet further argued that under Clause H of the document, due diligence was to be completed within 45 days from the signing of the document on 5th February, 2007 but the plaintiff did not complete the same within the said time and on account

of which delay, the defendant has suffered losses.

9. The counsel for the plaintiff has rejoined by contending that Order 37 Rule 2(1) of CPC does not require the plaintiff to specify the document on basis of which the suit is being filed and only requires the plaintiff to plead that the suit is being filed under Order 37 of CPC and that no relief outside the ambit of the said provision is claimed in the suit. Reference is made to ***A.V.M. Sales Corporation Vs. M/s. Anuradha Chemicals Pvt. Ltd.*** (2012)

1 SCALE 349 laying down that mutual agreement intended to restrict or extinguish the right of a party to enforce his/her right under or in respect of a contract by usual legal proceedings, is void and the parties cannot contract against a statute. The counsel for the plaintiff has also argued that the defendants in the rejoinder to the application for leave to defend have falsely asserted having filed the leave to defend on 11th April, 2011.

10. The counsel for the defendants at the fag end has also argued that the decree can only be against the defendant No.1 Company and not against the defendant No.2 who is the Managing Director of the defendant No.1 Company.

11. I have weighed the rival contentions and, am of the view/find:

(i) That the application for leave to defend was filed within time

on 18th April, 2011 as this Court was closed from 9th to 17th April, 2011.

(ii) That it is not the requirement of Order 37 that the plaintiff has to expressly state that the suit is filed on the basis of a written contract or bill of exchange or a guarantee or a *hudi* or a promissory note, so long as from a reading of the plaint it is so decipherable/apparent. The observations in ***Juki Singapore PTE Ltd.*** (supra) have to be read in the factual scenario of that case. Even in the said judgment, reference is made to the averments in the plaint and the said judgment also does not lay down that the plaintiff in a suit under Order 37 of CPC has to specifically plead as to on the basis of what category of document within the meaning of Order 37 Rule 1(2) of CPC the suit lies. The only requirement under Order 37 Rule 2(1) of CPC, is to plead that the suit is filed under the said provision and that no relief which does not fall within the ambit of the said provision has been claimed in the plaint and which has been done in the present case. On a reading of the plaint in the present case, it is apparent that the suit has been filed on the basis of a written contract being the document titled “Basis of Negotiation” dated 5th February, 2007 between the

parties. The suit thus cannot be said to be not maintainable under Order 37 of CPC.

(iii) That the plaintiff undoubtedly along with the plaint did not file the original written contract on the basis of which the suit was filed but filed only a copy thereof. However, the defendants in the leave to defend application filed, neither took the plea of the original having not been filed nor disputed the said written contract. Rather, the defendants built their own ground for leave to defend on the clauses of the said contract without filing any other copy of the said document. Even today, it is not the case of the defendants that the copy filed is not the correct copy. In fact, the said argument appears to have been made taking queue from the earlier order dated 22nd January, 2013, *supra*. Moreover, the plaintiff along with its reply to the application for leave to defend filed the original document which though remained under objection but has now been got placed on record. Even in the rejoinder filed by the defendant to the leave to defend application, no such plea was taken. As far as the dicta of the Supreme Court in *Neebha Kapoor* (*supra*) is concerned, it was a case where original document on which suit under Order 37 of CPC was

filed was not available till the date of consideration of the application for leave to defend. What the Supreme Court held in that case was that the Court can always refuse to exercise its discretion as the original documents were not produced and can call upon the plaintiff to prove that the documents are lost. In the present case, the copy of the contract on which the suit is filed was filed along with the suit and original has been filed along with the reply to the application for leave to defend and about the genuineness of which there is no doubt. Thus, the said objection also has no merit.

(iv) The senior counsel for the defendants also admits that the defect even if any in verification of the affidavit accompanying the application for issuance of summons of judgment, is a curable defect. Reliance in this regard if required can be placed on ***Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh*** (2006) 1 SCC 75 and ***Vidyawati Gupta Vs. Bhakti Hari Nayak*** (2006) 2 SCC 777. Once that is found to be the position in law, the objection is merely a technical one and does not come in the way of consideration of the leave to defend on merits.

(v) Section 23 of the Evidence Act invoked by the defendants is

found to have no application. The same is concerned with the admissions if made on the condition that evidence of such admission is not to be given. The senior counsel for the defendants has been unable to explain as to how the written contract between the parties can be said to be not relevant or can be said to be an admission.

(vi) Similarly, the argument, of the written contract dated 5th February, 2007 being not a concluded contract is misconceived. The same undoubtedly is not a concluded contract insofar as the sale and purchase of shareholdings is concerned. However, the same is definitely a concluded contract qua the amount of Rs.50 lakhs which was agreed to be given by the plaintiff to the defendants pending due diligence by the plaintiff of the property of the defendants transfer whereof was under contemplation and which was agreed to be refunded, upon the plaintiff being not satisfied in due diligence and to be adjusted in the sale price, upon the plaintiff being so satisfied and a transfer agreement being signed between the parties. We, in this suit are concerned with the said sum of Rs.50 lakhs only and are not concerned with the transfer of the property which was under contemplation.

(vii) The following clauses of the said written contract in which plaintiff is described as First Party, defendant No.1 as 'Company CCHL' and the defendant No.2 as Second Party, are relevant in this regard:

"F. At the time of signing this Basis of Negotiations, the First Party has paid Rs.50 lacs vide cheque no.710934, dated on 27-01-2007, drawn on the Punjab and Sind Bank, Industrial Finance Branch located at Madras Hotel Building, Connaught Place, New Delhi 110001, as deposit money to the company CCHL.

G. The first party will commence due diligence and the second party will give full cooperation.

H. The process of due diligence shall be completed within 45 days of signing of this basis of understanding. **This agreement shall be automatically dissolved if MOU is not signed within 15 days after that.** As the deal price is finalized, the second party will not open negotiations with any other interested buyers during this period, unless both parties mutually agree to dissolve the agreement.

I. In case the first party is not satisfied after the due diligence the Rs.50 lacs as above will be returned by the company immediately, but not later than 15 days without any binding on any side.

J. Once the due diligence process is satisfactorily completed by the first party, a detailed MOU will be signed **immediately**, at which time the first party will pay 10% of the agreed amount. This money will proportionately be adjusted against shares being transferred to the first party. The earlier paid token will be adjusted in this 10%. The balance amount will be paid up as per agreed terms and conditions at this stage.

K. Both parties jointly agree and confirm that the contents of this deal, all information, data, experience and know-how, documents, secrets, dealings, transactions or affairs of or relating to the First Party, the second party or the transaction ('the confidential information'), shall be kept confidential at all times and that they shall not use any such information other than for the purposes contemplated by this document.

L. Both parties agree not to go to the Court on this Basis of Negotiation."

(viii) The contention of the senior counsel for the defendants is that though the plaintiff was to complete the due diligence within 45 days but did not do so and after remaining silent for about three year demanded back the money.

(ix) The plaintiff undoubtedly in the plaint has not given any date on which it may have intimated the defendants of it being not satisfied after the due diligence as to the title of the defendants to the property, transfer whereof was under contemplation. The plaintiff has however along with the plaint filed a list of documents along with the documents which includes a letter dated 10th September, 2008 of the plaintiff to the defendants together with proof of dispatch thereof by registered AD and copy of legal notice dated 27th October, 2009 got sent to the defendants demanding back the said amounts. It is not the

case of the defendants that the said documents were not served on the defendants as is required under Order 37 Rule 3(1) of CPC. The defendants have in the leave to defend application not controverted the said documents. For the reason of non traverse by the defendants of the documents accompanying the suit, the defendants are deemed to have admitted the same. The said letter dated 10th September, 2008 also however is much beyond 45 days from 5th February, 2007 which was to expire on or about 22nd March, 2007. The plaintiff has also filed the report of the due diligence got conducted by it and which also though is undated but records that the work of due diligence commenced on 9th March, 2007 and was completed on 24th March, 2007. It can safely be presumed that the report must have been prepared sometime thereafter. It thus stands admitted from the documents of the plaintiff itself that the due diligence extended to much beyond 45 days from 5th February, 2007;

(x) However Clause H supra of the written contract between the parties is unequivocal and provides that the said written contract shall automatically be dissolved if the MOU is not signed within 15 days after 45 days i.e. by 5th April, 2007. Though the defendants in the

leave to defend application have pleaded that the plaintiff remained silent for about three years but that was no reason for the defendants to await the plaintiff. The defendants have not filed anything to show that the plaintiff requested for any extension of time. Even if that be so, it was for the defendants to accept or not to accept the same. The defendants, after 60 days of 5th February, 2007, under the written agreement were not required to await the plaintiff any more or to not open negotiations with any other interested buyers. No merit is thus found in the plea of the defendants of the defendants owing to the plaintiff's delay, having suffered any loss. The only effect of delay if any the plaintiff, can be to deprive the plaintiff of interest on the said amount of Rs.50 lakhs, till the date the plaintiff demanded refund thereof from the defendants.

(xi) That even if the plea of the defendants were to be accepted, it is pointed out to the senior counsel for the defendants that there is no provision in the contract for forfeiture by the defendants of the said sum of Rs.50 lakhs. Reference in this regard can be made to In Re: *Narendra Dada Agro Industries Ltd.* MANU/MH/0239/2006 and *Alfa Bhoj Pvt. Ltd. Vs. NDMC* 191 (2012) DLT 548. The senior

counsel for the defendants also agrees that for the losses as claimed to be suffered, the defendants are required to file a claim against the plaintiff and the defendants cannot on the basis of its own assessment of losses, appropriate the monies of the plaintiff. The senior counsel for the defendants however states that counter claim will be filed after leave to defend has been granted. There is no reply as to why the same has not been filed earlier or by way of an independent suit. The question of limitation would also now come in. The said ground for leave to defend urged is thus but a moonshine and is not tenable in law.

(xii) The plea of the defendants on the basis of Clause L supra of the written contract is also a half-hearted one. The Agreement of the parties not to go to the Court was relatable to the contemplated agreement of sale/purchase of property and not to the concluded agreement qua Rs.50 lakhs. The counsel for the plaintiff has in this regard rightly relied upon Section 28 of the Contract Act making the contracts in restraint of legal proceedings void. If Clause L aforesaid is to be construed as an agreement by the plaintiff not to go to the Court against the defendants for recovery of sum of Rs.50 lakhs even

if not refunded by the defendants, it would undoubtedly be void.

(xiii) That brings me to the argument made at the fag end, of the liability being of the defendant No.1 only. Though the counsel for the plaintiff has not addressed any argument in this regard but I find the said ground to have been not urged in the leave to defend application and rightly so having no legs in law to stand thereon. A bare perusal of the written contract shows that the same though purportedly between the plaintiff and the defendant No.1 but in fact is between the plaintiff and the defendant No.2 and it is the defendant No.2 Mr. Vijay K. Juneja, since deceased and represented by his widow Smt. Kusuma Juneja, who is described as Mr. V.K. Juneja, the second party in the said Agreement. The same is also evident from the nature of the Agreement. The Agreement was in contemplation of transfer by the defendant No.2 Mr. Vijay K. Juneja of 52% of the equity held/controlled by him in the defendant No.1 Company to the plaintiff and not in contemplation of transfer by the defendant No.1 Company of anything to the plaintiff and the defendant No.1 Company was at best a confirmatory party. Rather, at the bottom of the said Agreement also, it is the said Mr. Vijay K. Juneja who is

described as the second party. In fact the defendants had also got issued a reply dated 11th November, 2009 to the legal notice dated 27th October, 2009 got issued by the plaintiff and which reply was on behalf of Mr. Vijay K. Juneja and not on behalf of the defendant No.1 Company. However, the defendant No.1 also remains a necessary party inasmuch as the amount taken of Rs.50 lakhs was in favour of the defendant No.1. The liability for refund of the said amount of Rs.50 lakhs cannot thus be said to be the defendant No.1 Company alone but is jointly and severally of both the defendants.

12. The plaintiff has also claimed interest @ 12% per annum. There is no written contract regarding the rate of interest. However, in the absence thereof also, interest can be awarded for the reason of the defendants having wrongfully withheld the monies of the plaintiff. It stands established as aforesaid that the plaintiff demanded back the money vide letter dated 10th September, 2008 and legal notice dated 27th October, 2009. The defendants inspite thereof did not refund the monies.

13. In the circumstances of the case, interest @ 11% per annum from 10th September, 2008 when the plaintiff first demanded the money is found to be apposite.

14. The application for leave to defend is thus found to be without any merit and is dismissed.

15. Axiomatically, the suit for recovery of Rs.50 lakhs with interest thereon @ 11% per annum from 10th September, 2008 till the date of payment is passed in favour of the plaintiff and against the defendants jointly and severally. The plaintiff shall also be entitled to costs of the suit as per the schedule.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

APRIL 11, 2013

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