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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON: 03.05.2012

PRONOUNCED ON: 04.01.2013

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RFA (OS) 10/2007

INDIA TRADE PROMOTION ORGANISATION Appellant
Through: Mr. A.B. Dial, Sr. Advocate
with Ms. Ananya Datta Majumdar, Advocate.

versus

INDIA INTERNATIONAL TEXTILE MACHINERY
EXHIBITIONS SOCIETY Respondent
Through: Mr. V.P. Singh, Sr. Advocate with
Mr. Mohinder Rupal, Advocate.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT

% The present appeal by the unsuccessful defendant (hereafter “ITPO”) is directed against the judgment and decree of a learned Single judge of this Court, dated 11-10-2006 in CS (OS) 1861/1994.

2. The plaintiff, a registered society (hereafter referred to variously as “the Society” and “the plaintiff”) used to promote the interests of the

textile business. ITPO is a Central Government agency and custodian of a piece of land in New Delhi which houses trade fairs, i.e. the Pragati Maidan.

3. The Society wanted to host an exhibition and approached ITPO for licensing space. The society's query was responded to by ITPO on 18.07.1990 by a telegram stating that in principle it agreed to provide an area of approximately 13,000 sq. meters. Rs. 25 lakhs as advance license fee was sought from the society. It was told that thereafter ITPO would confirm the space to be licensed as well as the duration of the license. Parties subsequently exchanged letters about the details of the space, the hall, license fee particulars such as what was to be charged per square meter, rebate, etc. At that time, during August, October and November 1990, three payments in the sum of Rs. 5 lakhs each were made by the Society to ITPO. On 26.11.1990, ITPO wrote a letter to the Society requesting that it wanted to know "*the exact space requirement*" of the Plaintiff Association for the exhibition; it also provided replies to queries made by the plaintiff. On 22.12.1990, (after the three payments were made) ITPO furnished the relevant guidelines to the plaintiff under which it used to license space to third parties Clause 1(iv) stipulated that a formal agreement would have to be signed between the parties. Despite continued correspondence, the parties could not agree on mutual terms. On 11.3.1991, ITPO sent a telex message to the plaintiff informing that it could offer the latter (i.e. the plaintiff) "*space from 27th Nov '92 till 26th Dec '92 with dates of exhibition to be 12th Dec to 20th Dec '92.*" ITPO

also requested confirmation. However, no confirmation or acceptance was given by the plaintiff.

4. On 31.7.1991, the Society wrote a letter to ITPO that it was not interested in holding an exhibition in New Delhi and that its members wanted it to hold an exhibition in Bombay. It requested refund of the sum of Rs. 15 lacs paid by it. This was replied to by the defendant, on 19.8.1991, stating that:

“....We regret to inform you that it will not be possible for us to refund Rs. 15 lacs in view of the guidelines and terms and conditions already communicated to you for organising fairs in Pragati Maidan, New Delhi.”

On 30.9.1991, ITPO wrote another letter to the plaintiff in reply to its (plaintiff's) telex dated 20-8-1991 stating that it (ITPO) had *“no objection, in principle, to the holding of ITME'92 at Bombay during the period from 27.11.92 to 6.12.92 subject to the final clearance from the Ministries of External Affairs, Home Affairs, Industry of Commerce.”* The ITPO spelt out the conditions for holding the exhibition in Bombay, in its letter dated 14.10.1991. Apparently, the plaintiff was not interested, and held the exhibition at Bombay. It wrote several letters to ITPO to refund the sum of Rs. 15 lakhs. ITPO did not refund the amount. The plaintiff instituted a suit before this Court on 17.8.1994 claiming Rs. 15 lakhs (paid to the defendant ITPO) together with interest @ 21% per annum from the date of the payment with *pendent lite* interest. The suit was premised on the claim that since there was no concluded contract between the parties, and the sum of Rs. 15 lakhs paid was to be adjusted towards license fee if a contract concluded, the amount had to be refunded by the ITPO.

5. The defendant-ITPO's position in the written statement was that a contract was concluded between the parties. It stated that the sum of Rs. 15 lakhs was earnest money for space booking. ITPO denied that executing a formal agreement was a condition precedent for conclusion of a binding contract. The contract came into existence between the parties, in terms of the guidelines. The ITPO averred that once the payment of Rs. 15 lacs was made by the Society, it was understood and implied, that it was by way of earnest money for the space booking, for which defendant reserved a slot in its calendar. It also relied on Clause 7 (iii) of the guidelines, which applied and bound the parties. That condition reads as follows:

"7(iii) In the event of cancellation of space all payment made till the cancellation will be forfeited."

It was stated that the ITPO had forfeited the earnest money of Rs. 15 lakhs.

6. The following issues were framed on 8.12.1998:

"1. Whether the suit is within limitation OPP

2. Whether the plaint has been signed and verified by a duly authorized person on behalf of the plaintiff? OPP

3. Whether there was no concluded contract between the parties? OPD

4. Whether the defendant had no right to forfeit the amount of Rs. 15 lacs deposited by the plaintiff? OPD

5. Whether the defendant is liable to pay interest? If so at what rate, on what amount and from which date? OPD

6. Relief."

During the proceedings, the parties agreed that the documents filed may be read in evidence.

7. Having regard to the state of evidence and the deposition of PW-1, Mr. Hubert D'Souza, the secretary of the plaintiff who proved Ex. PW-1/1, learned Single Judge held that the plaint had been filed by a duly authorised person. On issue No. 3, i.e. whether the plaintiff proved that a concluded contract existed between the parties, the learned Single Judge held as follows:

“...letter dated 26.11.1990, relevant part noted in para 8 above shows that the defendant wrote to the plaintiff that as per understanding of the defendant, plaintiff require space between 1500 sq.meters to 2000 sq.meters. Defendant queried the plaintiff to let it know the exact space requirement so that defendant could finalize other related details.

29. Telex message dated 11.3.1991, contents noted in para 10 above shows that the defendant wrote to the plaintiff that it was in a position to offer space between 27.11.1992 till 26.12.1992. Confirmation of acceptance of the dates was sought from the plaintiff.

30. No such confirmations were sent by the plaintiff and on 31.7.1991 plaintiff sought refund of the amount tendered.

31. From the correspondences it is evident that parties remained at the stage of negotiations and could not crystallize a concluded contract. Neither duration of the license, nor space identification nor license fee, much less terms of the license were finalized.

The impugned judgment also held that the plaintiff had no right to forfeit the amount. The Single Judge noticed that Clause 7 (iii) of the guidelines enabled forfeiture of advance payment made in the event the licensee cancelled the space which was booked. He held that this pre-supposed a

concluded contract followed by the act of cancellation by the licensee. The court accordingly decided Issue No. 4 holding that the defendant had no right to retain Rs. 15 lakhs as forfeited amount.

8. The learned Single Judge decided the first issue, holding that the suit had been instituted within the time prescribed and that the applicable provision was Article 113 of the Schedule to the Limitation Act- as contended by the Society , and not Article 24, as contended by the ITPO. On the basis of the findings rendered, the suit was decreed; the defendant was also directed to pay interest.

9. It was argued by senior counsel for ITPO that the admitted facts of the case pointed to the applicability of Article 24, and the findings of the learned Single Judge on this aspect are erroneous. He cited *A. Venkatasubba Rao and Ors. v. State of Andhra Pradesh and Ors* [1965] 2 SCR577; and an earlier decision of the Bombay High Court in *Abasbhai Shaikh Abdul Hussein v. Bhimji Malji Choksey* AIR 1932 Bom 86. Both judgments dealt with Article 62 of the Limitation Act 1908. Counsel stressed upon the fact that though the impugned judgment has noticed these decisions, it has wrongly applied the *ratio*, to hold that Article 24 is inapplicable. It was argued that the said provision was apt, and applicable because in the absence of a contract, the defendant was bound to return the amount; that position existed from the day of the payment, and continued till the date of filing of suit, which was well beyond the three year period from the date of payment to the defendant. Apart from the question of limitation, the defendant ITPO did not urge any other ground in support of the appeal, in the oral hearings.

10. On the other hand, it was argued on behalf of the plaintiff that the impugned judgment does not disclose any error of law or fact to warrant interference by this Court in appeal. It was submitted that the learned Single Judge made a thread bare analysis of the relevant case law, and correctly concluded that the suit had been filed within the period of limitation.

11. Before a fuller discussion on the merits of the rival contentions regarding the merits of the appeal, it would be necessary to notice the following relevant provisions of the Schedule to the Limitation Act:

“Article 24:

24. For money payable by the defendant to the plaintiff for money received by the defendant, for the plaintiff's use. Three years When the money is received.

Article 113

113. Any suit for which no period of limitation is provided elsewhere in this Schedule. Three years When the right to sue accrues. ”

12. In the impugned judgment, the learned Single Judge noticed that the following observations of Mookerjee, J. in *Mahomed Wahib v. Mahomed Ameer* 32 Cal 527 had been extracted by the Supreme Court:

“The Article, when it speaks of a suit for money received by the defendant for the plaintiff's use, points to the well-known English action in that form; consequently the Article ought to apply wherever the defendant has received money which in justice and equity belongs to the plaintiff under circumstances which in law render the receipt of it, a receipt by the defendant to the use of the plaintiff.”

The learned Single Judge then noticed that the Supreme Court explained the decision in *Mahomed Wahib*, as follows:

“In other words, the learned Judge held that it was not necessary in order to attract Article 62 that at the moment of the receipt the defendant should have actually intended to receive it for the use of the plaintiff and that it was sufficient if the receipt was in such circumstances that the law would impute to him an obligation to retain it for the use of the plaintiff and refund to him when demanded.”

13. The impugned judgment proceeded to analyse the Bombay High Court decision, *Abasbhai Shaikh Abdul Hussein*, and rejected the defendant ITPO’s contention that even on an assumption that no contract was formed, yet the money taken by the defendant was for use of the plaintiff. According to the Single Judge,

“the defendant has ignored the words 'under circumstances' used by Mookerjee, J. and the words 'the receipt was in such circumstances' used by the Hon'ble Supreme Court and the words 'in such circumstances' used by the Bombay High Court.

70. What these words mean is that the receipt of money by the defendant from the plaintiff has to be in circumstances where from it flows that the receipt is to the use of the plaintiff. Meaning thereby, that the plaintiff should have a right immediately on tendering the money to seek refund there and then. Under the English Law, an action for money had and received is one of assumpsit based on an implied or imputed contract. It is in the nature of an action for damages for breach of a promise, although the promise is not a real promise but one imported by fiction of law. In other words circumstances must be such that the action is based under the English Law on contract imputed by law.”

The Single Judge also elaborated that where the defendant occupied a fiduciary relationship towards the plaintiff, old Article 62 (i.e. new 24) was inapplicable and that assuming the claim could be described as the English ‘action for money had and received’, nevertheless if there are other more specific articles in the Limitation Act- e.g., Article 96

(mistake), Article 97 (consideration which fails) Article 62 would be inapplicable. It was also held that if the right to refund does not arise immediately on receipt by the defendant but arises by reason of facts which occur later, Article 62 (new 24) would not apply. That article is premised on the footing that the plaintiff has a cause of action for instituting the suit the moment of the receipt. On this reasoning, the learned Single Judge concluded that Article 24 would apply only if the money was recoverable immediately upon receipt by the defendant, and not on account of any facts which transpire subsequently.

14. The view taken by the Single judge appears to have been accepted far back by a Division Bench of this Court, in *Ram Lal Puri v Gokalnagar Sugar Mills Co. Ltd* AIR 1967 Del 91, where the question pertained to recovery of earnest money. Though the Division Bench did not cite the Supreme Court decision in *A. Venkata Subbarao*, nevertheless its reasoning was similar:

“Now the law of limitation being a disabling provision, the various Articles deserve to be construed on their plain language and a suitor approaching the Courts for adjudication of his claim is entitled to a trial on the merits unless his claim is clearly time-barred by plain reading of some provision of the Limitation Act. The statute of limitation is of course a statute of repose and is inspired by a desire not to keep indefinitely alive controversies. Dictates of substantial justice demand such a course. It is, however, not permissible to strain or stretch the language of the Limitation Act with a view to bar a suitor and the Limitation Act seems to me to call for a strict construction in favour of right to proceed if the language on plain reading permits it. It is in this background that the facts of the case and the arguments advanced at the bar have to be considered.

(5) The vendee's claim can properly be divided into two parts: one relating to the earnest money of Rs.20,000/- paid at the time of execution of the agreement to sell and the other relating to Rs.30,000/- paid later as additional advance when extension of time was sought. In the agreement to sell, it is recited that the purchaser had paid Rs.20,000/- as earnest money by cheque No. A 647572 on the Punjab Cooperative Bank Ltd., Lahore, and the balance of the price was to be paid before the Sub-Registrar at the time of the registration of the sale deed. It would thus seem that the payment of Rs.20,000/- was only by way of earnest money. The character of earnest money is well recognised and no longer seems to be in doubt.

Payment of earnest money, as the expression itself shows, is intended to serve as a proof of bona fides of the vendee so that if the transaction falls through by reason of the fault or failure of the vendee, this amount is liable to forfeiture. On the other hand, in case the transaction goes forward, the earnest money becomes a part of the purchase price. Distinction between earnest money and money paid in advance as part of the purchase price is thus both real and well-recognised. The amount of Rs.20,000/- paid in this case could, therefore, not be considered to be paid as a part of the purchase price under the contract which characteristic it could assume only when the transaction to sell went forward to the stage of completion.

It is therefore, not easy to hold that this amount could be said to have been paid upon an existing consideration which afterwards failed. In terms, therefore, Art. 97 would seem to be inapplicable. Article 62 would also seem to be inapplicable to the case of earnest money for it is somewhat difficult to hold that this money was received by the vendor-company for the vendee's use.

A faint attempt was at one stage also made by Shri Hardy to bring the case within Article 115 which provides a period of three years for compensation on the breach of any contract, express or implied, not in writing registered and not specially provided for in the Limitation Act but this residuary Article dealing with compensation for breaches of unregistered contracts would seem to me to be clearly inapplicable because the present is not a case of recovery of compensation. The only Article in the present case would thus be Article 120, the general

residuary Article. This seems to me to be the position on the language of the relevant statutory provisions.”

15. In a similar vein other High Courts too, have understood and interpreted Article 24 as applying to those cases where the money received by the defendant is of such character as can be immediately demanded back by the plaintiff. In *Shankar Moreshwar Kulkarni Chinchwadkar v. State of Maharashtra* AIR 1970 Bombay 8 the Bombay High Court held as follows while dealing with a claim for return of earnest money:

“In the present case, according to the terms of the contract, the amount was to become due on completion of the contract. It was to become due by reason of subsequent events. The right to refund did not arise immediately on receipt by the defendant. Accordingly, Article 62 will have no application to the facts of the present case. We have also stated hereinabove that Article 145 would not be applicable. The only article that would appear to us to be applicable is Article 120, which is the residuary article.

9. *Where money is deposited by way of security for the due performance of a contract or otherwise under the terms of a contract and is refundable after the completion of the contract in our opinion. Article 62 is not applicable to the suit for refund as the money was not received by the defendant for the plaintiff’s use. Such suit would be governed by the residuary Article 120 of the Indian Limitation Act, 1908.”*

Similarly, in *State of Rajasthan v. Firm Anand Construction Co., Mandi* AIR 1972 Raj 101 the Rajasthan High Court followed the Calcutta High Court, which had in *G.D. and Co. v. W.I. Theatres* (1961) 65 Cal WN 504 held that to such suits Article 146 of the Indian Limitation Act of 1908 would be applicable and if for any reason, this article is not applicable, there is no doubt that Article 120 is applicable. That too was a case for the refund

of the deposit made by the contractor. The Calcutta High Court, in that case observed that:

“A deposit made as security for due performance of a contract is refundable whether it is coupled with a promise or agreement to repay it or not. Even if nothing is agreed as to its repayment at the time the deposit is made, the obligation to repay arises upon the proper performance of the engagement by reason of the very nature of the transaction of deposit. If an express agreement is entered into for repayment of the deposit, the transaction still remains a deposit and its nature is not thereby altered. The essence of the cause of action for a suit for refund of a deposit is not the breach of the contract to repay it, but the fact that the transaction is a deposit which by its very nature is refundable. The person who holds the deposit and the person on whose behalf or for whose benefit the deposit is held as security are liable to refund it because it is a deposit. They are both in the position of depositories. Accordingly, the article applicable is Article 145 of the Indian Limitation Act and if for any reason this article is not applicable, there is no doubt that Article 120 is applicable to the present case.”

16. In the facts of the present case, this Court is of the opinion that the money received by the ITPO cannot be described as what was for the plaintiff's use. It was pure and simple, a deposit, in anticipation of a contract. When given, it was not the intention of the plaintiff to take it back. That is the true test to determine whether Article 24 applies. In the absence of application of Article 24, necessarily the governing provision was Article 113. There is no doubt that the suit was filed within the time prescribed by this latter provision.

17. For the above reasons, this Court holds that the learned Single Judge's findings and conclusions do not call for interference. The appeal is therefore, dismissed but without any order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**S.P. GARG
(JUDGE)**

JANUARY 04, 2013