

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

%

Date of decision: 26th September, 2013

+

CS(OS) 1560/2010

M/S GOLD DEVELOPERS PVT. LTD. & ANR. Plaintiffs

Through: Mr. Sandeep Sethi, Sr. Adv. with
Mr. Tarun Dua, Mr. Rajesh Chugh
& Mr. Anant Garg, Adv.

Versus

M/S NITISHREE INFRASTRUCTURE LTD. & ANR.... Defendants

Through: Mr. Praveen Mahajan with Mr.
Brajesh Jha and Mr. S.R. Saxena,
Adv. for D-1.
Mr. Girish Kumar Sharma, Adv.
for D-2.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

IA No.5615/2011 (of the defendant No.1 for leave to defend)

1. The plaintiffs have instituted this suit under Order 37 of the CPC for recovery of Rs.10 crores along with *pendente lite* and future interest jointly and severally from the two defendants, pleading:

- (i) that the defendant No.1 company through its Directors Sh. Kashi Nath Shukla and Sh. Anil Jain had in early 2007 offered to jointly develop with the plaintiff No.1 various projects which defendant No.1 had in hand or were under process of acquisition;

- (ii) that the plaintiff No.1 was also interested in acquiring lands / development rights for its business purposes;
- (iii) that the defendant No.1 expressed immediate needs for funds for the purpose of acquisition of certain properties in Jalandhar, Amritsar and other places and asked the plaintiff No.1 to deposit an amount of Rs.10 crores with the defendant No.1 and assured the plaintiff No.1 that the defendant No.1 will then offer joint development rights in the ratio of 50:50 based upon the actual costs of the projects;
- (iv) that the plaintiff No.1 though agreed to so deposit a sum of Rs.10 crores with the defendant No.1 but was itself not possessed of such funds and requested its associate company plaintiff No.2 M/s Gold Hotels & Resorts Pvt. Ltd. to pay the said amount of Rs.10 crores to the defendant No.1;
- (v) that on 05.02.2007 a Memorandum of Understanding (MoU) was executed by the plaintiff No.1 and the defendant No.1 whereunder the plaintiff No.1 through the plaintiff No.2 paid a sum of Rs.10 crores to the defendant No.1 on the terms and conditions contained therein;
- (vi) that as per the terms contained in the MoU aforesaid, the said sum of Rs.10 crores was adjustable towards various projects listed in Annexure-I to the MoU and was to be allocated to individual projects upon signing of project-specific Joint

Development Agreement (JDA); it was further a term of the MoU that in case upon due diligence the plaintiff No.1 did not proceed with the JDA, the deposit of Rs.10 crores would be immediately refunded by the defendant No.1;

- (vii) that the defendant No.1 did not offer the documents to the plaintiff No.1 for carrying out the due diligence and accordingly the plaintiff No.1 vide its letter dated 27.07.2007 recalled the amount of Rs.10 crores;
- (viii) that no reply was received from the defendant No.1 to the letter dated 27.07.2007; another demand was made on 17.08.2007; no reply was given thereto also;
- (ix) that Sh. K.N. Shukla, Director of the defendant No.1 however guaranteed repayment of the said amount of Rs.10 crores to the plaintiff No.1 through defendant No.2 M/s K.N. Consultants Pvt. Ltd. in which also he was a Director and issued a letter dated 31.03.2008 accompanied with a resolution of the Board of Directors of the defendant No.2 company in this regard;
- (x) that a legal notice dated 19.08.2008 of demand on the defendant no.1 also went unheeded;
- (xi) that though the plaintiff is also entitled to interest at 18% per annum but in order to keep the suit within Order 37 was confining the claim for recovery of amount paid of Rs.10 crores only with *pendente lite* and future interest.

2. Summons for appearance and thereafter summons for judgments were issued and both defendants have applied for leave to defend and to which applications replies and rejoinders have been filed. However since the plaintiffs are not pressing their claim against the defendant No.2, need is not felt to adjudicate the application of the defendant No.2 company for leave to defend.

3. The defendant No.1 seeks leave to defend on the following grounds:

- i. that the summons for judgment were not served at the address given for service thereof in the appearance earlier filed and are thus *non est*;
- ii. that the summons served were without prescribed affidavit of the plaintiffs and are *non est* for this reason also;
- iii. that the claim in suit is barred by time; the cause of action if any accrued to the plaintiffs on 05.02.2007 when the alleged agreement was entered into between the plaintiff No.1 and the defendant no.1 and the time for filing the suit expired on 05.02.2010; the suit has however been filed on 26.07.2010;
- iv. that the plaintiffs have in the plaint wrongly computed the time for filing of the suit to have commenced from the demand letter dated 27.07.2007 issued by the plaintiff No.1 for refund of the sum of Rs.10 crores;

- v. that the demand letter dated 27.07.2007 is not of the plaintiff No.2 who is alleged to be the actual remitter of the said sum of Rs.10 crores, though receipt of demand letter dated 27.07.2007 is disputed and is for this reason also of no avail;
- vi. that the suit as well as the summons for judgment were accompanied by the affidavit of the plaintiff No.1 only and not of the plaintiff No.2;
- vii. that the agreement dated 05.02.2007 is not stamped and since the incidence to pay the stamp duty always rests on the plaintiffs alone, hence the alleged agreement is no agreement in law and is liable to be impounded;
- viii. that the plaintiffs have not approached the Court with clean hands and have concealed material facts and are not entitled to any relief on this ground alone;
- ix. that the suit is filed in collusion with the defendant no.2;
- x. that the defendant No.2 company has falsely implicated the Director of the defendant No.1 in an FIR pending adjudication before the Trial Court of Noida, Gautam Budh Nagar, Uttar Pradesh;
- xi. that the plaintiffs also have falsely implicated the Director of the defendant No.1 in an FIR, also pending adjudication before the Trial Court of Ghaziabad;

- xii. that the plaintiffs had also filed complaints with the Economic Offences Wing of the Crime Branch against the defendant No.1 relating to the present controversy and which were closed recording the same to be an attempt on the part of the plaintiffs to convert a civil dispute into a criminal dispute;
- xiv. that the defendant No.1 has already filed a cheque bouncing case against the defendant No.2 company at the Patiala House Court which is pending adjudication;
- xv. that the defendant No.1 has already invoked arbitration against the plaintiff No.1 for recovery of Rs.57,85,14,660/- from the plaintiff and invocation of the said arbitration clause was duly served upon the plaintiff on 18.07.2009; the defendant no.1 has thereafter filed Arbitration Petition No.185/2010 before this court on or about 04.06.2010 for appointment of Arbitrator to adjudicate the disputes between the defendant No.1 and the plaintiff No.1;
- xvi. that the said arbitration claim is on account of breach of contract committed by the plaintiff No.1 which is directly connected with the present suit and arising out of non performance of the contract dated 16.03.2007 which was entered into in supersession of the MoU dated 05.02.2007;
- xvii. that the MoU dated 05.02.2007 was not concluded in respect of any project; the plaintiffs had made the defendant No.1 enter

into the said MoU by making tall promises about their financial capabilities and with false commitments to bring in funds by way of FDI investment in a phased manner; however the desired funds were never brought in by the plaintiffs and resultantly no due diligence in respect of any project was ever carried out by the plaintiffs and due to which the defendant No.1 was not able to take final decision in respect of various projects managed and controlled by the defendant No.1 and all of which caused loss and damage to the defendant No.1 company;

- xviii. that the plaintiffs virtually abandoned the MoU dated 05.02.2007;
- xix. however the plaintiffs showed inclination towards the project of the defendant No.1 in the name of “Lotus Awadh” situated at Lucknow and with respect where to the agreement dated 16.03.2007 was entered into between the plaintiff No.1 and the defendant No.1;
- xx. that the supplementary agreement to the agreement dated 05.02.2007 as produced by the plaintiffs with the plaint and shown to be signed by Mr. K.N. Shukla was never entered into by the defendant No.1 and also shows the collusion between the plaintiffs and the said Sh. K.N. Shukla;
- xxi. that the said agreement dated 16.03.2007 contained an arbitration clause and the defendant no.1 has claims against the

plaintiff No.1 under the said agreement dated 16.03.2007 in the sum of Rs.57,85,14,660/- (the defendant no.1 in the leave to defend application has given elaborate details of the basis of the said claim against the plaintiff No.1 but need is not felt to reproduce the same herein and suffice it is to state that the said claims are arising from the agreement dated 16.03.2007); and,

xxii. that the plaintiffs are thus not entitled to recover Rs.10 crores from the defendant No.1.

4. The plaintiffs have replied to the aforesaid grounds on which leave to defend is sought, as under:

- (a) that the defendant No.1 has not disputed:
 - (i) the MoU dated 05.02.2007;
 - (ii) the receipt of Rs.10 crores as adjustable deposit for various projects to be taken up jointly between the plaintiff No.1 and the defendant No.1; and,
 - (iii) non adjustment of the said amount of Rs.10 crores or any part thereof towards any of the projects;
 - (iv) the material facts are thus not in dispute.
- (b) that as far as the plea of limitation is concerned, the defendant No.1 has admitted its liability in the suit amount towards the

plaintiffs in its balance sheet at least till 31.03.2009 and thus the suit claim can not be said to be barred by time;

- (c) that the plaintiffs have also learnt that there was a conciliation award in the *inter se* disputes between the defendant No.1 and the defendant No.2 whereunder their joint business and assets were apportioned and the said conciliation award also records that the payment of Rs.10 crores was received by the defendant No.1 under the MoU dated 05.02.2007 and the defendant No.1 is liable to refund the same to the plaintiffs;
- (d) that the disputes arising from the agreement dated 16.03.2007 between the plaintiff No.1 and the defendant No.1 are extraneous to the matter in controversy and cannot afford a ground to the defendant No.1 to obtain leave to defend in the instant suit;
- (e) that no triable issues had been raised; and,
- (f) that the agreement dated 16.03.2007 is independent to the MoU dated 05.02.2007.

5. Though the defendant No.1 has filed a rejoinder to the reply aforesaid but neither was any reference made thereto at the time of hearing nor is any content thereof found material enough to be stated here.

6. The counsels have been heard.

7. The counsel for the defendant No.1 has argued:

- I. that the MoU dated 05.02.2007 is unstamped; relying on *Avinash Kumar Chauhan Vs. Vijay Krishna Mishra* (2009) 2 SCC 532, *Laxmi Narain Gupta Vs. Suraj Bhan Daruka* 2002 Civil CC 311 (Delhi) and *Alen Co-operative Bank Ltd. Vs. R.H. Windsor (I) Ltd.* AIR 1988 Bom 352, it is contended that the aspect of stamp duty raises a triable issue;
- II. That the affidavit accompanying IA No.2227/2011 filed by the plaintiffs for issuance of summons for judgment is on behalf of the plaintiff No.1 company only and there is no affidavit of plaintiff No.2 company; even the affidavit of plaintiff No.1 is not as per Order 37 of the CPC; reliance is placed on *Shri Satishkumar Vs. Prism Cement Ltd.* 107 (2003) DLT 36 laying down that where there is no valid service of summons for judgment owing to the summons being unaccompanied by the requisite affidavit, the defect cannot be cured by filing of an affidavit by the plaintiff subsequently though in such case a fresh summons for judgment can be taken out by the plaintiff;
- III. that though the claim against the defendant No.2 company is on the basis of a guarantee furnished by the defendant No.2 company but the original documents of guarantee have not been filed;
- IV that the plaint and the summons for judgment are signed by different persons on behalf of the plaintiff No.1 and it will have to be adjudicated during trial whether the said persons were

duly authorized by the Board of Directors of the plaintiff No.1 company;

- V. that on the basis of the MoU dated 05.02.2007 further agreement dated 16.03.2007 was entered into between the plaintiff No.1 and the defendant No.1;
- VI. that Order 37 Rule 3(4) of the CPC requires the summons for judgment to be accompanied by the affidavit of each of the plaintiffs;
- VII. attention is invited to the pleadings in the application for leave to defend and the reply thereto regarding the MoU dated 05.02.2007 and the agreement dated 16.03.2007;
- VIII. attention is invited to the supplementary agreement dated 05.02.2007 relating to Vibhuti Khand, Gomti Nagar project at Lucknow, effective date whereof was recorded to be “from the date of signature”;
- IX. Attention is invited to the agreement dated 16.03.2007 between the plaintiff No.1 and the defendant No.1 whereunder the plaintiff No.1 made an on account payment of Rs.2 crores to the defendant No.1 and it is argued that the occasion for the plaintiff No.1 to pay the said amount of Rs.2 crores to the defendant No.1 would not have arisen if the plaintiffs were to recover back Rs.10 crores already paid to the defendant No.1 and it is contended that the same coupled with the factum of the

plaintiffs having concealed the subsequent agreement dated 16.03.2007 in the plaint raises a triable issue;

- X. that the plaintiffs have made out an entirely new case in their reply to the leave to defend application, relying on the conciliation award between the defendants No.1&2 and by producing plethora of additional documents;
- XI. Elaborate arguments are addressed on the nature of the disputes arising from the agreement dated 16.03.2007; and,
- XII. that even if it were to be held that the agreement dated 16.03.2007 is not in supersession to the MoU dated 05.02.2007, the claims of the defendant No.1 against the plaintiff No.1 under the said agreement dated 16.03.2007 and which are subject matter of arbitration are in the nature of the counter claim of the defendant No.1 and since the said counter claim of Rs.57,85,14,660/- is much in excess of the claim of Rs.10 crores in the present suit, the defendant No.1 is entitled to leave to defend on this ground alone.

- 8. The senior counsel for the plaintiffs has argued;
 - (i) that the limitation for the claim as made by the plaintiffs in the suit would be governed by Article 22 of the Schedule to The Limitation Act, 1963 which prescribes a limitation of three years commencing from the date when the demand is made, for

recovery of money deposited under an agreement that it shall be payable on demand;

- (ii) that as per the MoU dated 05.02.2007, the amount of Rs.10 crores was adjustable in a project and refundable if not so adjusted and thus the limitation for recovery of such amount shall commence from the date when refund thereof is demanded;
- (iii) that in any case, the defendant No.1 having acknowledged the liability in the said amount in its balance sheet, the claim cannot be said to be time barred; attention is invited to the schedule forming part of the balance sheet of the defendant No.1 company as on 31.03.2008 where unsecured loans as on 31.03.2007 as well as on 31.03.2008 from the plaintiffs are shown in the sum of Rs.12 crores; attention is also invited to the balance sheet of the defendant No.1 as on 31.03.2009 showing a similar position;
- (iv) that the *mala fides* of the defendant no.1 are apparent from the change made on 11.09.2011 by the defendant No.1 in its balance sheet as on 31.03.2010 by appending a note with respect to the said liability of Rs.12 crores to the effect that the same was disputed, by contending that the same is of a date after 04.03.2011 when the leave to defend application was filed by the defendant No.1 and also after 01.09.2011 when the reply thereto was filed by the plaintiffs;

- (v) it is argued that even as per the aforesaid note, the said liability of Rs.10 crores is disputed only for the reason of the claims of the defendant No.1 against the plaintiff No.1 of Rs.57,85,14,660/- and not for any other reason;
- (vi) that the agreement dated 16.03.2007 is an “Assignment Agreement” and not a Joint Development Agreement against which only the amount of Rs.10 crores under the MoU dated 05.02.2007 was to be adjusted; that thus the agreement dated 16.03.2007 is an independent transaction;
- (vii) that the reliance by the defendant No.1 on the supplementary agreement dated 05.02.2007 in the course of arguments is misconceived inasmuch as the defendant No.1 in its application for leave to defend has alleged the said supplementary agreement to be forged;
- (viii) attention is invited to the settlement agreement dated 26.04.2007 between the defendants No.1&2 whereunder also liability in the sum of Rs.10 crores to the plaintiff No.1 is admitted and it is contended that the same being of a date after 16.03.2007, had the amount of Rs.10 crores paid under the MoU dated 05.02.2007 been adjusted under the agreement dated 16.03.2007, the defendant No.1 in the settlement agreement dated 26.04.2007 would not have admitted liability thereof;

- (ix) that the sum of Rs.10 crores is not the subject matter of arbitration;
- (x) that the defendant No.1 in the reply dated 10.09.2008 to the legal notice dated 19.08.2008 got sent by the plaintiffs took the plea of the MoU dated 05.02.2007 having been abandoned and did not in its claim under the agreement dated 16.03.2007 show the said amount of Rs.10 crores to have been adjusted therein;
- (xi) attention is invited to Arbitration Petition No.185/2010 filed by the defendant No.1 to contend that the disputes therein are under the agreement dated 16.03.2007 and no mention is made therein of the MoU dated 05.02.2007;
- (xii) attention is invited to ***Zoom Motels Pvt. Ltd. Vs. Sheranwali Hotels & Resorts Ltd.*** MANU/DE/2582/2009 where the defect of non stamping / insufficient stamping of the document was cured by deposit of the deficient stamp duty with maximum penalty with the Collector of Stamps instead of by impounding the document. Attention in this regard is also invited to ***M/s SMS Tea Estates Pvt. Ltd. Vs. M/s Chandmari Tea Co. Pvt. Ltd.*** 2011 (7) SCALE 747 prescribing the procedure to be adopted where the arbitration clause is contained in a document which is not registered (but compulsorily registrable) and which is not duly stamped;

- (xiii) that the original document of guarantee executed by the defendant No.2 has been filed;
- (xiv) reliance is placed on *Deutsche Raitco Gmbh Vs. Mohan Murti* 52 (1993) DLT 288, *Suraj Sanghi Finance Ltd. Vs. Credential Finance Ltd.* AIR 2002 Bom. 481 & *Punjab & Sind Bank Vs. S.K. Tulshan* MANU/DE/0072/1990 to contend that counter claim of the defendant No.1 is no ground to grant leave to defend;
- (xv) reliance is placed on *Brakewel Automotive Components (India) Pvt. Ltd. Vs. Karpagga Brakewel* MANU/DE/0138/2011, *Bhajan Singh Samra Vs. M/s Wimpy International Ltd.* 185 (2011) DLT 428, *Rishi Pal Gupta Vs. S.J. Knitting & Finishing Mills Pvt. Ltd.* 73 (1998) DLT 593, *Sheetal Fabrics Vs. Coir Cushions Ltd.* 120 (2005) DLT 693, *Daya Chand Uttam Prakash Jain Vs. Santosh Devi Sharma* 67 (1997) DLT 13 & *Larsen & Tubro Ltd. Vs. Commercial Electric Works* 67 (1997) DLT 387 to contend that acknowledgement of liability in balance sheet extends limitation; and,
- (xvi) reliance is placed on *Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh* (2006) 1 SCC 75, *Vidyawati Gupta Vs. Bhakti Hari Nayak* (2006) 2 SCC 777, *United Bank of India Vs. Naresh Kumar* (1996) 6 SCC 660, *Ganesh Parshad Aggarwal Vs. Sushila* MANU/PH/2788/2010 & *Bal Mukund Persad*

Gupta Vs. Mathura Prasad AIR 2002 ALL 363 to contend that procedural requirements like signing of petition can be rectified, non filing of affidavit with plaint is not fatal, defective Board resolution can be ratified and errors in filing can be rectified.

9. The counsel for the defendant No.1 in rejoinder has contended:
- (a) that the plaintiffs in the plaint have not made any mention of the settlement agreement between the defendants No.1&2 and have introduced the same subsequently only by way of reply to the application for leave to defend;
 - (b) that the plaintiffs have abandoned their claim for interest for the period prior to the institution of the suit;
 - (c) that the liability admitted in the balance sheet is of Rs.12 crores and not Rs.10 crores and out of which, according to the plaintiffs also, Rs.2 crores is pursuant to the agreement dated 16.03.2007;
 - (d) attention is invited to Section 34 of The India Evidence Act, 1872 to contend that entries in books of account though are relevant but are alone not sufficient to charge any person with liability;
 - (e) reliance is placed on ***State Bank of India Vs. Midland Industries*** AIR 1988 Delhi 153 though in the context of Order

12 Rule 6 CPC to contend that admissions have to be clear, unambiguous, unconditional and unequivocal;

- (f) that the suit is a counter-blast to the arbitration petition filed by the defendant No.1;
- (g) that the question whether the agreement dated 16.03.2007 is independent of the MoU dated 05.02.2007 raises a triable issue; and
- (h) that the plea of the defendant No.1 of forgery of the supplementary agreement dated 05.02.2007 also raises a triable issue.

10. I have considered the rival contentions. As admitted by the counsel for the defendant No.1 also, the grant / non grant of leave to defend, is dependent upon:

- (i) aspect of limitation;
- (ii) aspect of the MoU dated 05.02.2007 being unstamped and the defects if any in service of the summons for judgment; and,
- (iii) the interplay of the MoU dated 05.02.2007 with the agreement dated 16.03.2007.

11. Though the defendant No.1 has set up a plea of limitation, but as the aforesaid recording of the pleadings and contentions of the defendant No.1

would show, the defendant No.1 has not even referred to the Article of the Schedule to the Limitation Act which would govern the period of limitation.

12. On the contrary, the senior counsel for the plaintiffs has referred to Article 22 and as per which, if appropriate, the suit is within time, irrespective of the reference to the balance sheets of the defendant No.1 company.

13. The only other Article of the Schedule to the Limitation Act which according to me can be said to be applicable, is Article 21 which provides a limitation of three years commencing from the date when the loan is made, for recovery of money lent under an agreement that it shall be payable on demand. It thus has to be decided whether the money admittedly paid by the plaintiffs to the defendant No.1 under the MoU dated 05.02.2007 was lent by the plaintiffs to the defendant No.1 repayable on demand or was deposited by the plaintiffs with the defendant No.1 under an agreement that it shall be payable on demand. The MoU dated 05.02.2007 in this regard records the agreement of the parties to the effect:

“that in consideration of preliminary understanding..... the plaintiff No.1 had agreed to pay to the defendant No.1 a sum of Rs.10 crore (Ten Crore) as adjustable deposit towards various projects listed in Annexure 1 the above deposit will be allocated to individual projects upon signing of Project Specific Joint Development Agreement.... In case upon due diligence plaintiff No.1 does not proceed with the defendant No.1, the deposit will be refunded.....by the defendant No.1 immediately”.

The agreement aforesaid between the parties was clearly not of a loan of Rs.10 crores by the plaintiff No.1 to the defendant No.1 but of a deposit by the plaintiff No.1 with the defendant No.1 of Rs.10 crores with the understanding that the said amount or parts thereof will be allocated towards future agreements to be entered into between the parties and that if no such future agreements are entered into, the same would be refundable by the defendant No.1 to the plaintiff No.1 on demand. Such an agreement is found to be an agreement within the meaning of Article 22 supra and the period of limitation therefor would be from the date the demand is made and not from the date when the deposit is made.

14. The plea of limitation is also not found to be raising any triable issue nor has the counsel for the defendant No.1 urged that any evidence is required in this regard.

15. On an interpretation of the admitted document being the MoU dated 5th February, 2007 between the parties, no merit is found in the plea of limitation.

16. Though in view of the aforesaid, need is not felt to refer to the balance sheets of the defendant No.1 company but even if one were to take the best possible case on behalf of the defendant No.1, of the admission in the balance sheet of liability of the said sum of Rs.10 crores to the plaintiff being subject to the note as appended in the balance sheet as on 31.03.2010, the said note is as under:

“The Company is showing a Liability towards Loans and Advances taken from Gold Resorts & Hotel P. Ltd. amounting to Rs.12,00,00,000/-. However, the Management has represented that the said liability towards Loan and Advance is not payable by company and is highly disputed. The company on the contrary has to recover an amount of approximately of Rs.57,84,04,660/- from the said Gold Resorts & Hotel P. Ltd. in respect of which the Company has already invoked the arbitration clause and matter is now Sub judice before the Hon’ble Delhi High Court. In view of above the said party owes to the Company an amount of approx of Rs.57,84,04,660/- thus the liability of said Loan and Advance is high disputed and shall be subject to outcome of the litigation, the Company has not recognized such income in its books of accounts and awaits the result of Arbitration proceedings.”

A reading of the aforesaid note would also show that the only reason for the defendant No.1 to dispute the liability otherwise admitted towards the plaintiffs in the sum of Rs.12 crores is its counter claims against the plaintiff No.1 and none other. Whether the said counter claim can be a ground or not for disputing the liability, is discussed herein below.

17. It is also not in dispute that out of the sum of Rs.12 crores admitted by the defendant No.1 in its balance sheets aforesaid, the sum of Rs.10 crores is the amount received under the MoU dated 5th February, 2007 and Rs.2 crores the amount received under the Agreement dated 16th March, 2007.

18. The argument, invoking Section 34 of the Evidence Act, appears to have been made off the cuff. The object behind Section 34 of the Evidence

Act has been aptly captured by the Supreme Court in ***Central Bureau of Investigation Vs. V.C. Shukla*** (1998) 3 SCC 410 as under:

“The rationale behind admissibility of parties' books of account as evidence is that the regularity of habit, the difficulty of falsification and the fair certainty of ultimate detection give them in a sufficient degree a probability of trustworthiness (Wigmore on Evidence § 1546). Since, however, an element of self interest and partisanship of the entrant to make a person - behind whose back and without whose knowledge the entry is made – liable, cannot be ruled out, the additional safeguard of insistence upon other independent evidence to fasten him with such liability, has been provided for in Section 34 by incorporating the words such statements shall not alone be sufficient to charge any person with liability.”

19. The rationale behind not making the books of accounts conclusive evidence of liability is to safeguard against the possibility of the same having been manipulated to fasten liability on someone else, on account of presence of elements of self-interest and partisanship. However, such a principle cannot be applied when the liability is sought to be fastened on the defendant itself, based on his own books of accounts, since in such case there can be no self-interest or possibility of partisanship involved to guard against, as it can safely be presumed that the defendant would not make an entry to his own detriment. It is also because such a case cannot be categorised as one where the books of accounts are being used to ‘charge any person with liability’, but is in substance an admission of liability by the maker of the accounts itself. Thus, in light of its object and spirit, the provision is to be invoked when a person is relying on his books of accounts to allege a liability on someone else, and it would be rather anomalous and

ironic if the same is permitted to be used as a tool by the maker of the books of accounts to wriggle out of a liability which he has fastened on himself.

20. The aforesaid view finds endorsement in the judgment of the Apex Court in ***Chandradhar Goswami Vs. The Guahati Bank*** AIR 1967 SC 1058 where while cautioning that no person can be charged with liability merely on the basis of entries in books of account and that there has to be further evidence to prove payment of the money which may appear in the books of account in order that a person may be charged with liability thereunder, the Court went on to hold that the principle is not applicable 'where the person to be charged accepts the correctness of the books of account and does not challenge them'. The question of the maker challenging his own books of accounts does not arise, and in any case the books of accounts relied upon have not been disputed by the defendant in the present case.

21. Notice may lastly be also taken of the judgment of this Court in ***The Motor & General Finance Ltd. Vs. Durga Builders Pvt. Ltd.*** MANU/DE/8805/2007, where a suit for recovery of money filed under Order 37 was decreed on admissions by placing reliance on the entries in the books of accounts and the objection thereto with respect to Section 34 of the Evidence Act was held to be misconceived. Moreover, when a suit is filed under Order 37 of CPC, it is for that person who is showing such liability in his books of account to urge grounds on the basis whereof such person contends such entries to be not conclusive. Whether such grounds have been urged or not is again the subject matter of discussion herein below.

22. As far as the defect in stamping is concerned, the cure therefor is provided in Section 35 of The Indian Stamp Act, 1899 itself. An agreement of the nature of MoU dated 05.02.2007, though the counsel for the defendant No.1 has again not pointed out, is stampable under Article 5(c) of the Schedule IA of the Stamp Act as applicable to Delhi with stamp duty of Rs.50/-. The maximum penalty provided in Section 35 of the Stamp Act is ten times. Accordingly, the only effect of document being unstamped is to direct payment of stamp of duty of Rs.50/- and maximum penalty of Rs.500/- thereon. In this regard it may be noticed that the Registrar General of this Court has been empowered to so levy and collect the stamp duty and the penalty thereon. I do not see as to how the same can be a ground for leave to defend.

23. I have perused the IA No.2227/2011 filed by the plaintiffs for issuance of summons for judgment and the affidavit on behalf of the plaintiff No.1 in support thereof and find the same to be in compliance with Order 37 Rule 3 (4) of the CPC. The said affidavit states that the defendants have no defence to the suit and verifies the cause of action. As far as the plea of the non filing of affidavit by the plaintiff No.2 is concerned, considering the nature of the claim in the present suit, where the plaintiff No.2 has been joined only for the reason of the cheques vide which monies were paid by the plaintiff No.1 under its agreement, with/to the defendant No.1 company, were of the plaintiff No.2 which is an associate company of the plaintiff No.1, the affidavit of the plaintiff No.2 in support of the application for issuance of summons for judgment is not found to be essential. The plaintiff No.2 has in the plaint itself admitted that the claim in the suit is out of an

agreement of the plaintiff No.1 with the defendant No.1. Thus there was no occasion with the plaintiff No.2 to verify the cause of action.

24. Even otherwise, I fail to see the effect of the defect even if any in non filing of affidavit by the plaintiff No.2. Even according to the judgment relied upon by the counsel for the defendant No.1, the only effect thereof is to require a fresh summons for judgment to be issued to the defendants. The defendant No.1 in the present case though has taken the said objection in the leave to defend application but has without prejudice to the same urged other grounds on which it claims to be entitled to leave to defend. The counsel for the defendant No.1 has not shown any prejudice which the defendant No.1 has suffered on account of the said defect even if any. The case law relied upon by the senior counsel for the plaintiffs is ample precedent for such defects not being fatal. Once the defects are not fatal, this Court cannot be bogged down by technicalities not affecting the outcome of the litigation and thereby cease to be a Court of justice.

25. That bring me to the aspect of interplay of the MoU dated 05.02.2007 and the Agreement dated 16.03.2007. Need is not felt to give detailed reasoning therefor since I agree with the contentions of the senior counsel for the plaintiffs in this regard and which are recorded in detail hereinabove. I may record that even prior to the reply dated 10.09.2008 supra of the advocate for the defendant No.1 and to which attention was invited by the senior counsel for the plaintiffs, the defendant No.1 had issued a letter dated 18.06.2008 to the plaintiffs and copy whereof has been filed by the defendant No.1 itself before this Court and in which also the defendant No.1

while making its claims against the plaintiff No.1 and drawing up the accounts under the agreement dated 16.03.2007 neither referred to the MoU dated 05.02.2007 nor to the payment of Rs.10 Crores thereunder. Agreement dated 16.03.2007 itself does not at all refer to the MoU dated 05.02.2007. The Arbitration Petition filed by the defendant No.1 though refers to the MoU dated 05.02.2007, pleads that the plaintiff No.1 failed to bring the funds as it had agreed to bring under the MoU dated 05.02.2007 but showed its inclination towards the “Lotus Awadh” project at Lucknow of the defendant No.1 and in pursuance to negotiations with respect thereto signed an agreement dated 16.03.2007 with the defendant No.1. The pleadings of the defendant No.1 in the said Arbitration Petition also nowhere show a case of interlinking by the defendant No.1 of the agreement dated 16.03.2007 with the MoU dated 05.02.2007 or the payment of Rs.10 crores received thereunder. The defendant No.1 has nowhere pleaded adjustment of the said sums of Rs.10 crores in pursuance of the agreement dated 16.03.2007.

26. Rather the defendant No.1 in the leave to defend application also, as noticed hereinabove, has pleaded:

“that MoU dated 05.02.2007 was not concluded in respect of any project stated therein and that the plaintiff No.1 virtually abandoned said MoU dated 05.02.2007 in respect of projects stated therein.”

When there is no pleading even of the defendant No.1 of the payment of Rs.10 crores under the MoU dated 05.02.2007 being adjusted or being consideration for the agreement dated 16.03.2007, the argument of the

counsel for the defendant No.1 of the same being a triable issue cannot be accepted.

27. Thus the claims of the plaintiffs under the MoU dated 05.02.2007 are clearly independent of the claims of the defendant No.1 against the plaintiff under the agreement dated 16.03.2007; again the judgments cited by the senior counsel for the plaintiffs, on the counter claim of the defendant in a suit under Order 37 against the plaintiff being no ground for grant of leave to defend, are ample authority to reject the claim for leave to defend on the ground of pendency of such counter claims of the defendant No.1 against the plaintiff No.1.

28. The application thus does not disclose that the defendant No.1 has any substantial defence to raise. Rather the defence raised in the arguments is not relatable to the pleadings in the leave to defend application and is frivolous and vexatious. Resultantly, the application is dismissed.

29. Axiomatically, the suit of the plaintiff for recovery of Rs.10 crores is decreed against the defendant No.1. The plaintiff having given up the claim against the defendant No.2, the suit against the defendant No.2 is dismissed as withdrawn. As far as the claim of the plaintiffs for interest *pendente lite* and future is concerned, considering that the transaction between the parties was a commercial one, relating to real estate and returns wherein owing to appreciation of value are always in excess of interest otherwise earned on fixed deposits, grant of interest from the date of institution of the suit till realization at the rate of 12% per annum is deemed apposite.

30. A decree is accordingly passed in favour of the plaintiffs and against the defendant No.1 for recovery of Rs.10 crores together with interest thereon at the rate of 12% per annum from the date of institution of the suit till realization. The plaintiff No.1 shall also be entitled to costs of the suit from the defendant No.1.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 26, 2013

‘gsr’