

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

+ **CO.APP. 22/2014**

M/S M-TECH DEVELOPERS LTD. Appellant
Through: Mr. Raman Duggal, Advocate.

versus

SWAPNA BHATTACHARYA Respondent
Through: Dr. B.K. Dash and Mr. Pawan
Kumar, Advocates.

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL
HON'BLE MS. JUSTICE PRATIBHA RANI

ORDER (ORAL)

: REVA KHETRAPAL, J.

CM No.6670/2014

Exemption granted subject to all just exceptions.

Application stands disposed of.

CO.APP. 22/2014 and CM No.6669/2014 (stay)

1. This appeal is directed against the order dated 22.01.2014 passed by the learned Company Judge in Company Petition No.54/2013 whereby the learned Company Judge directed the Registry of this Court to release the amount of ₹ 3,75,000/- deposited by the Appellant herein along with interest accrued, to the Respondent. In addition, the Appellant was directed to pay simple interest at the rate of 12% per annum from the date of the receipt of the amount till the date of deposit. The Appellant was further

directed to pay the interest within a period of four weeks from the date of the passing of the impugned order, failing which the winding up petition would stand admitted and necessary orders would follow.

2. At the outset, Mr. Raman Duggal, the counsel for the Appellant stated that though it had been asserted in the appeal that the Respondent had annexed a wrong Brochure with the Company Petition to mislead the learned Company Judge and the said Brochure was applicable for Bookings which had been made after 16.09.2006, he does not press the said averment and the Brochure annexed by the Respondent in the Company Petition be taken to be the correct Brochure.

3. On the aforesaid basis, we have heard the learned counsel for the parties.

4. In order to assail the order of the learned Company Judge, only two contentions were raised by the learned counsel for the Appellant being:

- (i) that the subject matter of the Company Petition was barred by limitation, and
- (ii) that no interest was payable by the Appellant to the Respondent, much less at the rate of 12% per annum from the date of the receipt of the amount till the date of the deposit of the amount with the Registry of this Court.

5. We do not find any merit in the first contention that the Company Petition is barred by limitation for the reason that it is an admitted fact that the Appellant company itself issued a letter dated 09.01.2012 demanding the balance payment from the Respondent. In

the said letter, the Appellant company stated that the Respondent can take possession of the flat and get their title deeds registered very soon. It is the allegation of the Respondent that the Appellant company in the said letter has attempted to show the pictures of the various flats and buildings, so as to create an impression as if the flats had been constructed and the project completed, which was contrary to the fact situation. The money taken by the Appellant company from the Respondent as well as from other investors had in fact been siphoned and diverted by the Directors and other persons responsible, for the day-to-day management of the Appellant company. The Respondent in the aforesaid circumstances was constrained to issue a legal notice dated 01.10.2012 under Sections 433 and 434 of the Companies Act, 1956. The Appellant company having failed and neglected to pay the amount due and not having responded to the said notice, the Respondent instituted the petition for winding up of the Appellant company.

6. Suffice it to note that in the reply filed by the Appellant company to the petition, the Appellant company has categorically admitted that the letter dated 09.01.2012 was sent to the Respondent informing her to make balance payment and take possession of the flat. In such circumstances, we do not see as to how the present petition is barred by limitation. We, therefore, affirm the findings of the learned Company Judge on the aspect of limitation. The said findings are, for the facility of reference, reproduced hereunder:-

“12. At the outset, the contention that the claim of the petitioner, which is subject matter of the present

petition, is barred by limitation is erroneous and is liable to be rejected. Admittedly, the respondent had received the sum of ₹ 3,75,000/- towards booking of a residential flat. The said payment was made to the respondent in terms of a construction linked plan as advertised and agreed by the respondent. In terms of the construction linked payment plan, the payments for the flat were to be made in the following manner:

“Construction Link Payment Plan – II

<i>At the time of Booking</i>	-	8%
<i>At the time of launching</i>	-	12%
<i>On start of Foundation</i>	-	5%
<i>On casting of G.F. Roof Slab</i>	-	5%+50%
		<i>car parking</i>
<i>On casting of 1st Floor Roof Slab</i>	-	5%+50%
		<i>of EDC</i>
<i>On casting of 2nd Floor Roof Slab</i>	-	5%+50%
		<i>Of PLC</i>
<i>On casting of 3rd Floor Roof Slab</i>	-	5%
<i>On casting of 4th Floor Roof Slab</i>	-	5%
<i>On casting of 5th Floor Roof Slab</i>	-	5%
<i>On casting of 6th Floor Roof Slab</i>	-	5%
<i>On casting of 7th Floor Roof Slab</i>	-	5%
<i>On casting of 8th Floor Roof Slab</i>	-	5%
<i>On casting of 9th Floor Roof Slab</i>	-	5%
<i>On casting top Floor Roof Slab</i>	-	5%
<i>On completion of Brick Work</i>	-	5% + 50%
<i>in Apptt.</i>		<i>of PLC</i>
<i>On completion of flooring work</i>	-	5% + 50%
<i>in Apptt.</i>		<i>car parking</i>
<i>On completion of internal plaster</i>	-	5%+50%
<i>Within Apartment</i>		<i>of EDC</i>
<i>At the time of Possession</i>	-	5%+Stamp
		<i>duty + any</i>
		<i>other</i>
		<i>charges as</i>
		<i>applicable.”</i>

13. The respondent demanded a sum of ₹ 2,25,000/- (12% of the consideration) by its letter dated 21.12.2006. The said letter further put the petitioner to notice that if the payment as demanded was not made within a period of 30 days, the petitioner would be liable to pay penal interest at the rate of 20% P.A.

14. Admittedly, the respondent received the payment of the booking amount and the first installment (aggregating 20% of the consideration) and thereafter, issued the letter for allotment of "Provisional Flat no. 302 on the 3rd floor measuring 1500 Sq. Ft. in Tower Beeta 6 at Camelia Garden, Bhiwadi". The respondent was obliged to carry out the construction and demand further payments according to the schedule as agreed. However, admittedly, the respondent did not carry out any construction in respect of "Tower Beeta-6" and no further demands were made on the petitioner till 09.01.2012. The respondent invited the petitioner to make the balance payment immediately by its letter dated 09.01.2012. It is apparent that the said demand was completely unjustified as the respondent had not even commenced construction of Tower Beeta-6. The respondent had also not issued any other communication with regard to altering the previous provisional allotment. In the circumstances, the contention that cause of action arose in 2007 and is barred by limitation is wholly erroneous. The petitioner has made the claim for refund of the amount paid as it was, subsequently, discovered that the respondent has not commenced the construction as represented. The petitioner could only make a claim as a reasonable period for construction had elapsed. The demand for the balance consideration in January 2012 and the discovery that the respondent had not commenced construction of tower Beeta 6 provided the petitioner the cause to seek refund of the amount paid.

In any event, the amount of ₹ 3,75,000/- is also duly acknowledged by the respondent as part consideration for a flat and the respondent still contends the booking for the same to be valid. In view of the forgoing, any claim in respect of the amount paid by the petitioner cannot be stated to be barred by limitation.

15. The only question to be addressed is whether the amount calculated by the respondent is admittedly due and payable to the petitioner. The said question has to be considered in the context of the following facts:

- (a) It is not disputed that a sum of ₹ 3,75,000/- was calculated and demanded by the respondent towards booking of a flat in measuring 1500 sq. ft.*
- (b) It is also admitted that a provisional allotment of flat on the 3rd Floor of Tower BEETA 6 was made in favour of the petitioner and the said allotment has not been modified or amended till date.*
- (c) It is also admitted by the learned counsel for the respondent that construction in respect of Tower BEETA 6 has not commenced.*
- (d) It is further admitted by the learned counsel for the respondent that a flat measuring 1500 sq. ft. was not presently available in the project currently as the towers that have been constructed comprise of flats which measure approximately 1200 sq. ft. each.*

16. Considering the above facts, it can hardly be disputed that the respondent has failed to fulfill its obligation and is not in a position to handover the possession of the flat in respect of which the amount of ₹ 3,75,000/- had been accepted. Admittedly, the petitioner was only obliged to pay 20% of the consideration till the commencement of construction as

per the construction linked plan. The amount of booking and the first installment was also demanded and accepted by the respondent as being 20% of the consideration (computed for a flat of 1500 Sq. ft. at the rate of ₹ 1250 per Sq ft.) for a flat measuring 1500 sq ft. It is thus, not open for the respondent to contend that it was not obliged to hand over a flat measuring 1500 Sq ft. A allotment letter for such flat was issued to the petitioner on 22.11.2007 and there has been no further communication by the respondent whereby the said allotment has been sought to be altered in any manner. On the contrary, respondent called upon the petitioner to pay the balance sum due immediately, by its letter dated 09.01.2012.

17. In the given circumstances, the defence raised by the respondent that he is not liable to repay the amount of ₹ 3,75,000/- to the petitioner is not credible. In my view, there is no justifiable reason or ground on which the respondent can resist the claim of the petitioner and withhold the payment of ₹ 3,75,000/-. The said amount had been paid by the petitioner for purchase of the flat, which the respondent is, admittedly, not in a position to deliver and consequently cannot withhold the amount paid by the petitioner. The contention that the allotment was only a provisional one and the respondent could amend the same also cannot be accepted as, admittedly, there is no flat measuring 1500 Sq. ft. that has been built and is available with the respondent in the residential development - "Camelia Garden". The respondent cannot now compel the petitioner to accept a residential flat measuring 1200 Sq. ft. in another Tower. The contention canvassed on behalf of the respondent is clearly without any merit and is ex-facie a sham defence raised only to avoid the obligation to refund the amount collected by the respondent."

7. On the aspect of interest also, we do not find any merit in the contention of the Appellant that the Respondent is not entitled to interest on the sums paid by the Respondent which have been utilized by the Appellant ever since the year 2007. As noted by the learned Company Judge, the Respondent had itself demanded interest at the rate of 20% in the event the first installment of ₹ 2,25,000/- was not paid within a period of 30 days from the date of the demand.

8. In the case of ***Devendra Kumar Jain v. Polar Forgings & Tools Ltd., 49 (1993) DLT 552***, the question arose as to whether in the absence of specific contract for payment of interest, can the liability to pay interest and rate thereof be adjudicated by the Company Court in a petition filed for winding up of the company and on failure of the company to make payment of interest amount as may be adjudicated, can the Company Judge direct winding up of the company or the question of interest should be left to be determined by a Civil Court where creditor should file a suit for recovery of the interest amount. After noting that there was a divergence of opinion expressed by other High Courts, it was observed as under:-

“The creditor need not be forced to initiate separate litigation for recovery of the interest amount and the interest amount can be determined by the Company Judge in the winding up proceedings and on failure of the company to pay that amount the Company can be ordered to be wound up on the ground that it is unable to pay its debts.”

9. In the case of ***Vijay Industries vs. Natl Technologies Limited, (2009) 3 SCC 527***, the Supreme Court in a case where there was no

agreement between the parties to pay interest after noting that interest was *inter alia* payable by way of restitution, observed as follows:-

“For invoking the relevant provisions i.e. Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956 in relation to winding up of a company on the ground of its inability to pay its debt, what is necessary is that despite service of notice by the creditor, the company which was indebted in a sum exceeding one lakh rupees then due, failed and/or neglected to pay the same within three weeks thereafter or to secure or compound for it to the reasonable satisfaction of the creditor. Failure of the company to pay the agreed interest or the statutory interest would come within the purview of the word “debt”. Further, Section 433(e) of the Companies Act does not state that the debt must be precisely a definite sum. It is not a requirement of the law that the entire debt must be definite and certain.

The Division Bench dismissed the company petition proceeding on the basis that the entire sum covering both the principal and the interest must be undisputed. It is one thing to say that the amount of debt is not definite or ascertainable because of the bona fide dispute raised thereabout or there exists a dispute as regards quantity or quality of supply or such other defences which are available to the purchaser; but it is another thing to say that although the dues as regards the principal amount resulting from the quantity or quality of supply of the goods stands admitted but a question is raised as to whether any agreement had been entered into for payment of interest or whether the rate of interest would be applicable or not. In the latter case, the application for winding up cannot be dismissed.”

10. In “*Bhajan Singh Samra v. Wimpy International Ltd.*”, Company Appeal No.42/2012 decided on 18.05.2012, the learned

Company Judge had declined to find any liability for interest on the principal amount of ₹ 50 Lacs on the ground that there was no written contract specifying any interest payable. Referring to the judgment of the Supreme Court in *Vijay Industries (supra)*, a Division Bench of this Court observed as follows:-

“5. The Supreme Court in Vijay Industries (supra) held that Sec. 433 of the Companies Act does not state that the debt must be precisely a definite sum; that failure to pay the agreed interest or the statutory interest would come within the purview of the word ‘debt’; that it is one thing to say that the amount of debt is not definite or ascertainable because of the bona fide dispute raised thereabout but it is another thing to say that although the dues as regards the principal amount stand admitted but a question is raised as to whether any agreement had been entered into for payment of interest or whether the rate of interest would be applicable or not – in the latter case, the application for winding up cannot be dismissed; interest is payable by way of restitution.

6. x x x x x x x

7. x x x x x x The appellant cannot be relegated to the remedy of a civil suit qua interest to which he is entitled by way of restitution. We may notice that Justice Y.K. Sabharwal speaking for this Court in **Devendra Kumar Jain v. Polar Forgings & Tools Ltd. 49 (1993) DLT 552** had also opined that where the liability to pay the principle amount is not disputed, the creditor need not be forced to initiate separate litigation for recovery of interest amount and the interest amount can be determined by the Company Judge in the winding up proceedings and on the failure of the Company to pay that amount, the Company can be ordered to be wound up on the ground that it is

*unable to pay its debts. To the same effect is the judgment of Division Bench of Punjab & Haryana High Court in **Unisystems P. Ltd. v. Stepan Chemical Ltd.** MANU/PH/0244/1985*”

11. The judgment relied upon by the counsel for the Appellant in the case of **V.K. Jain v. Richa Laboratories (P.) Ltd., (1993) 50 DLT 378** is distinguishable on facts in that the Petitioner in the said case had preferred both a suit and a winding up petition and claimed to be entitled to charge interest at the rate of 18% per annum. In these circumstances, it was held that in case the principal amount due is paid within two months from the date of the said judgment, the winding up petition would stand dismissed with liberty to the Petitioner to pursue his remedy with regard to interest in the suit instituted by him. In the present case, undisputedly no suit is pending between the parties with regard to the amount in question.

12. The reliance placed by the counsel for the Appellant on the judgment of the Karnataka High Court in **Jyothi Limited v. Boving Fouress Limited, 2001 (106) Comp. Cas. 380 (Kar)** is also misplaced. In the said case, the Respondent company had paid the entire principal amount during the pendency of the winding up petition and thereby established its financial and commercial solvency and in view of bonafide dispute regarding interest the Court held that there was no inability to pay any debt and the petition was liable to be dismissed. In any event, the said judgment rendered by the Karnataka High Court must be held to be impliedly overruled by the judgment of

the Supreme Court in the case of *Vijay Industries* referred to hereinabove.

13. We accordingly affirm the findings of the learned Company Judge on the aspect of interest payable to the Respondent and reject the contention of the Appellant that the question of interest should be left to be determined by a Civil Court. The Supreme Court in the case of *Vijay Industries (supra)* has unequivocally clarified that it is well within the domain of the Company Judge seized of a winding up petition to enter into the question of interest and the rate thereof – the application for winding up cannot be dismissed; interest is payable by way of restitution. The ratio of this judgment has been followed by this Court in *Bhajan Singh Samra (supra)*, wherein reliance has also been placed on the judgment of a learned Single Judge of this Court in *Devendra Kumar Jain (supra)*.

14. The amount of interest awarded by the learned Company Judge at the rate of 12% per annum also appears to us to be reasonable and proper and we see no reason to interfere therewith.

15. For the reasons aforesaid, we find no merit in the present appeal, which is accordingly dismissed. CM No.6669/2014 also stands disposed of.

**REVA KHETRAPAL
JUDGE**

**PRATIBHA RANI
JUDGE**

April 21, 2014
km