

\$~

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

RESERVED ON: 15.12.2014
PRONOUNCED ON: 24.12.2014

%

+ RFA (OS) 68/2011

**INDO SOVIET MEDICAL EDUCATION CARE & RESEARCH
FOUNDATION** Appellant
Through: Mr. L.K. Singh, Advocate.

versus

ANJU JAIN & ORS. Respondents
Through: Mr. Dinesh Agnani, Sr. Advocate
with Mr. Gaurav Bahl and Ms. Leena Tuteja,
Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VIPIN SANGHI
S.RAVINDRA BHAT, J.

1. The present appeal is directed against a limited portion of the common judgment and order dated 06.12.2010 of a learned single judge, disposing off two suits, i.e. CS (OS) 2105/1994, and CS (OS) 260/1994. The first suit was instituted by the Appellant and the second, by the respondent (claiming damages). For convenience, the suit filed by the Appellant (hereafter called “the Trust”) would be referred to as the “the recovery suit” and the other suit, filed by the respondent, (hereafter “the Jains”) would be referred to as “the damages suit”, or “the second suit”. The Trust is aggrieved by the

impugned judgment, to the extent it denies any interest upon the money directed to be refunded by the respondent.

2. The facts briefly are that the Trust undertakes scientific research, in areas of medical science, technology and health care. The Jains approached it, for sale of their hospital “Udyan Medical Centre” - owned by a Private Limited Company i.e Udyan Diagnostic and Therapeutic Consultancy Private Limited (hereinafter referred to as “UDTC”). The Jains are directors of UDTC. The Trust alleged that, based on the negotiations held between its representatives and the Jains, it was agreed to acquire the hospital, consisting of the site No. B-18, Surya Nagar, Ghaziabad (“Ghaziabad Property”) admeasuring 579.71 square meters, with a construction, i.e., a 20 bed hospital; expensive medical equipments fittings and fixtures; laboratory equipments; physiotherapy equipment; and a X-ray machine. The land was owned by Mrs. Anju Jain, while the building with medical equipment minus the X-ray machine was owned by UDTC. The X-ray equipment was owned by Dr V K Jain. The parties agreed that the total consideration for purchase of land, the building and medical equipment, as also the X-ray equipment was to be ₹42 lakhs.

3. The terms of the agreement between the Trust and the Jains was recorded in a receipt-cum-agreement dated 09.01.1993. This document was marked as Ex P-1 during the trial. At the stage of the agreement, ₹2 lakhs was paid by the Trust to Dr V K Jain. The agreement also recorded that ₹2 lacs which was received in cash, was in the nature of non-refundable earnest money, and that balance sum of ₹40 lakhs was

payable by the Trust by 26.02.1993; failing which, the transaction would be deemed to be cancelled, and the earnest money paid in cash would stand forfeited. The agreement further provided that in case the transaction was rescinded by Dr V K Jain, he would be liable to pay a penalty equivalent to twice the amount (i.e., ₹2 lakhs) received as earnest money. The Jains, apart from receiving that amount of ₹2 lakhs, also received further sums of money. Of the total sum of ₹13 lakhs alleged to have been paid by the Trust to Jains, (in addition to ₹2 lakhs paid in cash on 09.01.1993), ₹12 lakhs was evidently paid through pay orders, while the balance amount of ₹1 lakh allegedly by way of cash. The Jains have disputed the receipt of ₹1 lakh by way of cash. Resultantly, there is a dispute as to the total amount received by them from the Trust pursuant to the execution of the agreement (Exhibit P-1). The Trust alleged that it paid to the Jains a sum of ₹15 lakhs (including ₹2 lakhs in cash paid initially), whereas the Jains accepted to receiving ₹14 lakhs in all.

4. The Trust filed the first suit- for recovery of amounts, alleging that the defendant Jains did not take requisite steps to obtain necessary permissions from the local authorities qua the Ghaziabad property or from the Income Tax Authorities as was required at that point in time. The suit claimed refund of sum of ₹15 lakhs paid to the Jains; interest on that sum for the period January-February, 1993 till 20.09.1994 at the rate of 24%, (quantified at ₹5,55,000/-); compensation for loss of business @ ₹9,45,000; and compensation for price escalation, and

damages for loss of reputation-pegged at ₹15 lacs. The total quantified claim by the Trust was ₹45 lakhs.

5. The Jains denied the Trust's claim alleging that the agreement encompassed three separate transactions, i.e sale of hospital equipment, fixtures and furniture and machines owned by UDTC the consideration for which was fixed at ₹9 lakhs; the sale of X-Ray machine owned by Dr V K Jain, the price for which was fixed at ₹1 lakh; and lastly, Ghaziabad property and super structure built thereon, which was owned by Mrs Anju Jain for ₹32 lakhs. The Jains contended that as a result, on the date of execution of the agreement i.e., 09.01.1993, ₹2 lakhs which was received from the Trust was received by Dr V K Jain on behalf of UDTC. According to the Jains, the sale of the hospital equipment, furniture and fixtures was completed as UDTC had received the agreed amount of ₹9 lakhs in that behalf. Similarly, in respect of the X-Ray machine owned by Dr V K Jain, ₹1 lakh by way of a cheque was received by him, resulting in completion of that transaction. However, it was alleged that as far as the land was concerned, the balance amount of ₹28 lakhs was not paid before the due date, i.e., 26.02.1993 leading to forfeiture of ₹4 lakhs. The Jains countered the Trust's claim stating that the latter breached its obligations. They also filed the second suit, claiming damages.

6. Both suits were eventually consolidated and evidence was recorded. Apart from documentary evidence, oral deposition of witnesses was also recorded. The learned single judge disposed of both the suits, holding that the second suit for damages filed by the

Jains had no merit; he dismissed it. As far as the first suit- for refund of money, with compensation/damages filed by the Trust went, he decreed it in part. The material discussion on merits in this regard is as follows:

29.2 On this aspect of the matter i.e., as to whether the Jains suffered damages the Court record shows that on 16.01.1998 Court vacated its injunction dated 06.01.1997 whereby, it had restrained the Jains from selling, transferring or parting with possession of the Ghaziabad Property, by ordering that they could sell the said property on furnishing a security in the sum of Rs 20 lacs. By the very same order a further liberty was granted to the Jains, which was that if the Jains purchased a new property they could take leave of the Court to furnish it as a security as against deposit of the sum of Rs 20 lacs. This position obtained greater clarity in the order of the Court dated 13.09.2005 whereby the Jains were given permission to furnish security in the form of a new property which it had purchased being 7-Todar Mal Lane. Interestingly, by the same order liberty had been given to Jains to hand over the machinery to the plaintiff. Since the Trust said that the machinery had become useless at that point in time and they were not interested in taking over the machinery, Mrs Anju Jain was permitted to sell the machinery and deposit the sale proceeds in Court. Whether the Jains sold the machinery thereafter and if they did; the price that they obtained is not known. Furthermore, it is also not known as to the price that the Jains obtained on the sale of Ghaziabad Property. The evidence in this regard was surely available with the Jains. The Jains have not placed any evidence on record that they suffered a loss on account of breach committed by the Trust in consummating the sale of the Ghaziabad Property. That being so, the only inference which can be drawn is that the Jains did not

suffer any loss. Therefore, no damages are payable to Jains.

29.3 Damages claimed by Jains at the rate of Rs 50,000 per month for storage charges is not payable. The reason being Mrs Anju Jain in her testimony deliberately stonewalled attempts at disclosing the date on which the hospital was closed which she accepted in her testimony that the hospital was running, no evidence is placed on record to show that she wanted the hospital to be closed so that the equipment could be removed by the Trust. However, much Mrs Anju Jain may attempt to distance herself from UDTC; the fact remains that Mrs Anju Jain and Dr V K Jain control the company, which is, undoubtedly their alter ego.

29.4 Therefore, forfeiture of money paid by Jains would be dependent on having their suffered injury and consequent damages on that account. There being no evidence of the same, the Jains are required to return the monies forfeited. This would, as indicated above, apply both to Rs 4 lacs which the Jains forfeited against the purchase of property and Rs 10 lacs which Jains had received purportedly against sale of office equipment and X-Ray machine. The offer made by the Jains to the Trust to remove the hospital equipment and Xray machine was made in Court only in September, 2005 by which time the Trust rightly refused to accept the equipment as it would have depreciated to a large extent on account of lack of use. Accordingly, in my view, the Jains are obliged to return a sum of Rs.14 lacs that they received from the Trust. The Trust, on the other hand, has claimed interest on the refund that it has sought. In my view, since I have come to a conclusion that the Trust was in breach, no interest is payable to the Trust.”

7. The Trust, in its appeal, argues that the denial of interest was unjustified in the circumstances, because the learned single judge noticed that the Jains had the benefit of the money, unfairly kept by them, for a considerable period and that it was even used by them to pay of the loan obtained from the Bank. Highlighting the evidence and observations in the impugned judgment, Mr. L.K. Singh, learned counsel submitted that given that the refund directed in the suit, was based really on failed consideration, and the further fact that Jain's plea of forfeiture was rejected, there was no reason not to direct payment of interest, which ought to have been made on application of the principle of restitution. It was also submitted that there was no justification for the Jains to keep the money, because their claim for damages had not been substantiated.

8. Mr. Dinesh Agnani, learned counsel for the Jains, submitted that this court should not interfere with the impugned judgment and decree. It was argued that the question of payment of interest did not arise, because there was no material on record to show that the amounts were unjustly retained. Having held that the Trust had breached its obligation to pay the full consideration, which led to denial of damages to it, the claim for interest should not, in effect, become an indirect route to some compensation which the Trust is not entitled to. It was also urged that the Jains have filed cross objections with respect to the dismissal of their suit, CS (OS) 260/1994.

9. The above discussion would reveal that the extent of the dispute which this court has to adjudicate upon is limited one: whether the

Trust is entitled to any interest on the amount directed to be refunded to it, i.e. ₹14 lakhs. The impugned judgment would reveal that the Trust's claim for compensation and damages for default in regard to the non-performance of the agreement with the Jains did not succeed. However, the learned single judge held that the respondent/Jains claim for damages - which could have legitimized the retention of the amount, to some extent, had not been proved. The impugned judgment also held that the Jains had not established the basis for claiming that the amounts, or any part of it, could be legally forfeited. In these circumstances, the question is whether the single judge erred in denying any interest to the Trust.

10. Long ago, the Privy Council in *Alexander Rodger v. Comptoir d'Escompte De Paris* (1871) LR 3 PC 465 explained the applicability of restitutionary principles in such circumstances, as follows:

"...The perfect judicial determination which it must be the object of all courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them, with interest during the time that the money has been withheld. "

Likewise, it has been held that claim for restitution encompasses the return of the principal amount and the related money value that the decree holder was deprived of from the use of that principal amount. This is not an independent claim which goes beyond the decree, but rather, one that ensures that the return ordered in the decree itself makes the relief complete. As the Supreme Court noted in *Secretary,*

Irrigation Department, Government of Orissa and Others v. GC Roy, (1992) 1 SCC 508:

" 47. XXXXXX XXXXXX XXXXXX

(i) [a] person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name....."

11. Such a claim for the "time value of money" was also recognized in *Sempra Metal Limited v. Her Majesty's Commissioners of Inland Revenue and Another*, [2007] UKHL 34) as a restitutionary claim. The Supreme Court has labelled this as "*unjust impoverishment*" in the decision reported as *South Eastern Coalfields Ltd. v. State of Madhya Pradesh & Ors.*, AIR 2003 SC 4482. The claim, consequently, flows naturally and inevitably from the claim for the principal amount, and is not distinct from it. Interest is awarded to compensate the falling value of money on account of inflation.

12. This court notices that the claim for interest (though placed at 24% per annum) was made by the Trust in the legal notice issued to the Jains, on 22.03.1993. Furthermore, the learned single judge noticed, apart from the fact that the Jains could not prove the damages claimed by them, that ₹14 lakhs was received by them and that the "*amount was used by her to pay back the loan taken from the bank*". In the circumstances, the single judge, by the impugned judgment should not have denied any interest at all. This deprivation - besides negating the restitutionary principle (which goes beyond Section 144 CPC and has to be applied by the courts in India: See *Kavita Trehan &*

Anr vs Balsara Hygiene Products Ltd. AIR 1995 SC 441) acts harshly upon the Appellant Trust, which has been deprived of the substantial value of its property – in the form of ₹14 lakh for nearly 17 years.

13. So far as the cross objection filed by the Jains is concerned, this court notices that the same raises grounds relating to the claim for dismissal of their suit for damages (CS (OS) 260/1994). Such cross objection to that extent, is clearly not maintainable, because the dismissal has resulted in a decree against which the Jains ought to have, but did not, prefer, an appeal. As far as the other grounds – dealing with refund of amounts are concerned, the court notices that besides reiterating the facts and arguments made before the learned single judge, the Jains have not shown how they could have retained the amount of ₹14 lakh, given that the transaction could not materialize.

14. The Trust has filed an application, IA-11464/2011 for permission to produce an additional document i.e., a certified copy of a transfer deed for lease rights dated 09.03.1979 and contended that this contradicted the Jains' stand that Ms. Jain was an owner of the suit property. It is submitted that this establishes that she was only a lessee - a fact withheld assiduously from the court. The substance of the claim is that this document was unknown to the applicant Appellants, and consequently should now be permitted to be taken on record and considered. This court is of the opinion that given the narrow parameters of Order 41 Rule 27, CPC, which require exercise

of due diligence, it is too late in the day to grant permission. Here, it is not as if the applicant/Appellant was constrained in any manner, or could not by reason of some hindrance seek a copy of the document earlier, when the suit was filed and remained pending. That due diligence was not exercised in respect of a document, now deemed vital, is no excuse to allow a slumbering litigant to improve its case. The application is consequently dismissed as unmerited.

15. For the foregoing reasons, the appeal has to succeed. The plaintiff/Trust is held entitled to interest @ 10 % p.a. from the date of filing of the suit (CS (OS) 2105/1994), i.e. 20.09.1994 till date of payment, on the amount of ₹14 lakhs payable by the respondent/defendant, i.e. the Jains. The decree directed by the learned single judge shall stand modified to that extent.

16. The appeal is allowed in the above terms, with costs throughout to be borne by the respondent/Defendants.



**S. RAVINDRA BHAT
(JUDGE)**

**VIPIN SANGHI
(JUDGE)**

DECEMBER 24, 2014