

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **RFA No.8/2013**

Decided on: 15.05.2014

IN THE MATTER OF :

MEERA BABA REAL ESTATE PVT LTD

..... Appellant

Through: Mr. Vikramjit Saini, Advocate with
Mr. Harish Luthra, Managing Director of the
appellant in person.

versus

SANDEEP GOEL AND ANR

..... Respondents

Through: Mr. Narinder Kumar, Advocate
with respondent No.1 in person.

CORAM

HON'BLE MS.JUSTICE HIMA KOHLI

HIMA KOHLI, J. (Oral)

1. On 27.03.2014, as the Managing Director of the appellant/company was not present despite specific directions for his presence, the matter was adjourned on imposition of costs of ₹10,000/- on the appellant and with directions that he would remain present on the next date,, i.e., 15.5.2014. The said costs have been paid to the counsel for the respondents today. However, when the matter was taken up in the morning session, the Managing Director of the appellant was absent. The explanation offered by the counsel for the appellant for his absence was that he is indisposed. However, neither has a medical certificate been furnished by him, nor has any explanation offered for not filing an application seeking his exemption. On the insistence of the Court that the

Managing Director of the appellant ought to have presented himself today, particularly, since the respondent No.1 was present on the earlier dates and even today, and the Court had wanted to interact with the parties so as to explore the possibility of a settlement between them, learned counsel for the appellant had sought a pass over.

2. On pass over, in the post-lunch session, Mr. Harish Luthra, Managing Director of the appellant has presented himself. He has been reprimanded for his absence. The Court has interacted with the parties and their counsels for some time and is of the opinion that there does not appear any scope of the matter being settled through negotiation.

3. As a result, with the consent of the parties, the appeal is being taken up for disposal today itself.

4. The appellant/defendant is aggrieved by the judgment dated 18.08.2011 passed by the trial court in a summary suit for recovery of ₹15,24,600/- instituted against it by the respondents/plaintiffs. As per the averments made by the respondents/plaintiffs in the plaint, they had approached the appellant/defendant company, that is in the business of real estate, and had launched a township project under the name and style of "Divine City Integrated Township Gannor" at Sonipat (Haryana) and had sought allotment of two residential plots in the said township, measuring 500 sq. yards and 250 sq. yards respectively. The respondents/plaintiffs claim to have paid a sum of ₹9,90,000/- to the

appellant/defendant towards the booking amounts. As per the respondents/plaintiffs, the appellant/defendant had failed to deliver the possession of the subject plots within the agreed timeline of twelve months from the date they had submitted their application, i.e., on or before 30.03.2007 and therefore, they had chosen to exercise their option as available in the Agreement, of withdrawing their applications and seeking refund of the amounts deposited by them, by giving one month's notice to the appellant/defendant and on receiving 9% interest per annum for the delayed period beyond twelve months from the date of making a request for withdrawal. It has been averred that upon the respondents/plaintiffs exercising the aforesaid option, the appellant/defendant had failed to honour its commitment in terms of the agreement between the parties contained in the Registration Form-cum-Agreement document and as a result, the respondents/plaintiffs had issued a demand letter dated 24.04.2007 seeking refund of the moneys deposited with the appellant/defendant. Since the appellant/defendant had failed to refund the amount deposited within twelve months from the date of receipt of the said notice, the respondents/plaintiffs had instituted the subject suit for recovery of amounts.

5. It is an undisputed position that the summary suit was instituted by the respondents/plaintiffs in the trial court on 26.04.2011. The appellant/defendant had received the summons in the suit on 07.06.2011,

whereafter it had filed its memo of appearance within the stipulated time and thereafter, had proceeded to file its leave to defend application on 11.07.2011, which was also well within the prescribed time. In the order dated 18.09.2012 passed by the trial court, while dismissing the appellant/defendant's application filed under Order XXXVII Rule 4 CPC, seeking setting aside of the ex-parte judgment and decree dated 18.08.2011, it had been mentioned that though the appellant/defendant had filed its leave to defend application under Order XXXVII Rule 3(5) CPC on 11.07.2011, despite repeated directions, it had failed to furnish a copy of the said application to the respondents/plaintiffs. The appellant had also failed to appear on the date fixed, i.e., on 10.08.2011. As a result, its application for seeking leave to defend was dismissed in default and for non-prosecution on the aforesaid date and subsequently, on 18.08.2011, when the appellant/defendant was again absent, the trial court had proceeded to decree the suit of the respondents/plaintiffs in the sum of ₹15,24,600/- with *pendente lite* and future interest calculated @ 9% per annum, till realization.

6. On 24.08.2011, the appellant/defendant had filed an application under Order XXXVII Rule 4 CPC praying inter alia for setting aside the judgment and decree dated 18.08.2011. The explanation offered for the absence of the counsel for the appellant/defendant on 10.08.2011 was that the learned counsel had shifted his residence as also his office from

premises No.C-3/5, Model Town to premises No.C-4/3, Model Town and in the process of shifting his residence, he had overlooked the date fixed in the present case, which had resulted in his absence. It was also explained that the representative of the appellant/defendant company, who was following up the case with the advocate, was undergoing medical treatment and he had moved to his native place in that duration, due to which, he could not pursue the matter with the advocate. Pertinently, the aforesaid application was supported by the personal affidavit of the counsel for the appellant/defendant. However, the trial court was not impressed with the explanation furnished on behalf of the appellant/defendant and vide order dated 18.09.2012, the said application was dismissed with costs of ₹2,000/-. As a result, the impugned judgment and decree attained finality. Aggrieved by the aforesaid ex-parte judgment and decree, the appellant/defendant has filed the present appeal.

7. Counsel for the appellant/defendant urges that his client ought not be penalized for the default committed by the counsel and the principles of *audi alteram partem* demand that at least one opportunity be afforded to the appellant/defendant to argue its leave to defend application on merits, before any decision is arrived at. He states that since the leave to defend application came to be dismissed by the trial court on 10.08.2011, the impugned *ex-parte* judgment delivered on 18.8.2011 does not take

into consideration the defence raised therein by the appellant/defendant. It is submitted by the counsel for the appellant/defendant that it has been stated in the application for leave to defend that the suit instituted by the respondents/plaintiffs is not maintainable having been filed beyond the prescribed period of limitation and further, their case is not covered under the ambit of Order XXXVII CPC for the reason that the respondents/plaintiffs have added an interest component of ₹5,34,600/- to the principal cheque amount of ₹9,90,000/- deposited with the appellant/defendant and they have unilaterally inflated the amount claimed, in the absence of any consent on the part of his client to pay interest @ 18% on the principal amount, which itself would be a triable issue.

8. Learned counsel for the respondents/plaintiffs fairly submits that if the Court is inclined to allow the present appeal, then to secure the interest of his clients, the appellant/defendant be called upon to deposit the decretal amount in the trial court, to which the other side is agreeable.

9. This Court is of the opinion that at least one opportunity ought to be afforded to the appellant/defendant to argue its case on the basis of the pleas raised by it on merits in the leave to defend application. Further, the records reveals that it is not as if the appellant/defendant had been indolent and had failed to enter appearance in the suit proceeding within

the stipulated time or had failed to file the leave to defend application within the period prescribed under Order XXXVII CPC. The list of dates and events as mentioned hereinabove also reveals that within one week of the leave to defend application filed by the appellant/defendant being dismissed, the suit instituted by the respondents/plaintiffs had been decreed, on 18.08.2011. The appellant/defendant had taken immediate remedial measure by filing an application under Order XXXVII Rule 4 CPC for seeking recall of the said judgment and decree. In other words, the appellant/defendant showed promptitude and acted with alacrity.

10. In such circumstances, this Court is of the opinion that the appellant/defendant deserves some latitude and is entitled to the relief prayed for. Accordingly, the present appeal is allowed. The impugned judgment and decree as also the order dated 18.08.2011 are quashed, subject to the appellant depositing in the trial court, a sum of ₹15,24,600/- along with the special costs imposed vide order dated 18.09.2012, within two weeks from today, by way of a FDR drawn in favour of the concerned court. The leave to defend application filed by the appellant/defendant is restored to its original position. To expedite the proceedings in the summary suit instituted by the respondents/plaintiffs, it is directed that the respondents/plaintiffs shall file a reply to the leave to defend application of the appellant/defendant

within four weeks from today, with a copy to the other side. Rejoinder, if any, shall be filed within two weeks thereafter.

11. List before the trial court on 4th June, 2014, for ensuring compliance of the above order of deposit of amount.

12. It is made clear that if the appellant/defendant fails to deposit the sum of ₹15,24,600/- along with the special costs as directed hereinabove, then the judgment dated 18.8.2011 shall stand revived.

13. The appeal is disposed of, while leaving the parties to bear their own costs.

A copy of this order shall be dispatched by the Registry forthwith to the trial court, for perusal and compliance.

MAY 15, 2014
rkb/mk

(HIMA KOHLI)
JUDGE