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

\+ **CS(OS) 2078/2013 & IA No.24692/2014**

Decided on : 06.05.2015

**IN THE MATTER OF:**
M/S DUGAR GROWTH FUND PVT LTD ..... Plaintiff
Through : Mr. Sourabh Prakash, Advocate

versus

M/S MAHAMAYA BUILDERS PVT LTD & ANR. ..... Defendants
Through : None.

**CORAM**
**HON'BLE MS.JUSTICE HIMA KOHLI**

**HIMA KOHLI, J.(Oral)**

1. The plaintiff/company has instituted the present summary suit against the defendants, praying *inter alia* for a decree of Rs.1.60 crores, along with interest @ 12% p.a. w.e.f. 24.7.2009, till the date of instituting the suit, totaling to a sum of Rs.2,40,50,000/-, apart from claiming *pendent lite* and future interest @12% p.a.

2. When the present suit came up for admission on 28.10.2013, learned counsel for the plaintiff had conceded that the liability as regard the pre-suit interest was not contemplated under the agreement between the parties and therefore, he had sought to

confine the claim of interest only on the principal cheque amount, w.e.f. 16.11.2011, the date of dishonor of the said cheque. Further, it was inquired from the counsel for the plaintiff as to the reason for impleading the defendant No.2, a Director of the defendant No.1 company, when no specific allegations were made against the said defendant in the plaint. At that stage, counsel for the plaintiff had sought an opportunity to examine the issue and he had subsequently filed an amendment application seeking amendment of the plaint. The said application was duly allowed, vide order dated 29.8.2014 and thereafter summons were issued to the defendants on the amended plaint, returnable on 7.11.2014.

3. Despite service being effected on him, none had appeared for the defendant No.2. As for the defendant No.1 company, relying on the speed post report, wherein it was recorded that the said defendant had refused to accept the summons on 9.9.2014, the said defendant was deemed to have been served. Neither of the defendants had filed their applications for leave to enter appearance in the suit and as a result, the learned Joint Registrar had placed the suit before the Court on 23.1.2015.

4. The position remains the same till date as none has appeared on behalf of the defendants. In the meantime, the plaintiff had filed a misconceived application under Order XXXVII R-3(4) CPC praying *inter alia* for issuing summons of judgment on the defendants. In the order dated 28.4.2015, the learned Joint Registrar had observed that no such application would lie when the defendants have not entered appearance. Counsel for the plaintiff states that the present suit may be decreed in terms of the provisions of Order XXXVII Rule 2(3) of the CPC.

5. As per the averments made in the plaint, the plaintiff is a private limited company and the present suit has been instituted on its behalf by Shri Nitin Jain, who is duly authorized and empowered to sign, verify and institute the same. The relevant extract of the Board Resolution of the plaintiff/company dated 5.1.2012, authorizing Shri Nitin Jain to sign, verify and institute the present suit has been filed along with the list of documents dated 25.10.2013.

6. It is stated on behalf of the plaintiff/company that the defendant No.1 is a company registered under the Companies Act, 1956 and the defendant No.2 being a working Director of the defendant No.1/company ever since its incorporation on 15.7.1997, is also

personally liable for the present debt. Learned counsel states that at the time when the plaintiff/company had entered into a contract for sale of an immovable property with the defendants, it was the defendant No.2 who had played a fraud on the plaintiff and he had given a written undertaking on 22.7.2009, stating *inter alia* that he along with defendant No.1/company were personally liable to return a sum of Rs.1.60 crores to the plaintiff. Later on, the defendant No.2 had signed another settlement deed on 12.10.2011, acknowledging his personal liability *qua* the plaintiff/company.

7. As for the factual context of the case, as per the averments made in the plaint, the defendant No.1/company had entered into a written agreement with the plaintiff/company on 21.5.2008, for sale of an immovable property bearing No.21, Raj Niwas Marg, Civil Lines, Delhi, measuring 9000 sq. yards and the defendants had received two cheques for a sum of Rs.50.00 lacs from the plaintiff towards the earnest money. The sale consideration for the subject premises was fixed @ Rs.55,000/- per sq. yards, totaling to a sum of Rs.49,50,00,000/-. The aforesaid two cheques for a sum of Rs.21.00 lacs and Rs.29.00 lacs respectively, were issued by the plaintiff/company in favour of the defendant No.1/company and were duly encashed. Photocopies of the said cheques have been filed by

the plaintiff along with the list of documents at pages 5 & 6. A copy of the receipt dated 21.5.2008 signed by the defendant No.2 as a Director of the defendant No.1/company has also been filed with the list of documents at page 7. Counsel for the plaintiff states that all the original documents have been filed along with the complaint case filed by the plaintiff against the defendants under Section 138 of the N.I. Act, which is pending trial.

8. Under the terms of the agreement, the defendants were required to ensure that the aforecited property is free from all encumbrances and litigations and get the map sanctioned and thereafter, execute a sale deed in favour of the plaintiff/company. However, the defendants miserably failed to take any steps to discharge their obligations under the agreement.

9. Subsequently, the defendants had approached the plaintiff/ company for cancelling the aforesaid agreement and after some negotiations, the defendant No.2 had executed a document dated 22.7.2009, wherein he had acknowledged that the defendant No.1/company had received a sum of Rs.50.00 lacs from the plaintiff towards the advance in respect of the aforesaid immovable property and he had undertaken that he would return the said amount to the

plaintiff/company by 24.7.2009, by handing over a cheque for a sum of Rs.1.60 crores. The defendant No.2, as a Director of the defendant No.1/company, had executed a Settlement dated 12.10.2011, whereunder he had recorded that for and on behalf of the company as also on his personal behalf, he was handing over cheque bearing No.148517 dated 7.11.2011 drawn on Development Credit Bank Limited, New Delhi Branch in the sum of Rs.1.60 crores in favour of the plaintiff/company as full and final settlement of the contract for sale, which could not be executed. Defendant No.2 had also given an assurance to the plaintiff that when presented, the above cheque would be duly honoured.

10. Believing the defendants, the plaintiff/company had accepted the said cheque, but when it was presented by its bankers/HDFC Bank Ltd. to the bankers of the defendants for encashment, the same was returned with a memo dated 16.11.2011, stating *inter alia* that the cheque could not be encashed on account of 'insufficient funds' in the account of the defendants. A photocopy of the dishonoured cheque along with the return memo have been filed by the plaintiff along with the list of documents.

11. Aggrieved by the aforesaid conduct of the defendants, the plaintiff/company had served a legal notice on them under Section 138 of the Negotiable Instruments Act, 1881. The said legal notice was returned by the postal authorities with the remark 'refused', thus compelling the plaintiff/company to file a criminal complaint against the defendants, which is stated to be pending adjudication in the trial court. Subsequently, the plaintiff/company had proceeded to institute the present summary suit against the defendants for recovery of the cheque amount of Rs.1.60 crores, along with interest.

12. The Court has heard the counsel for the plaintiff and examined the documents placed on record. As noted above, the defendants were duly served with the summons in the suit but they had failed to enter appearance or to file their memo of appearance. In the absence of any contest to the suit, the averments made in the plaint have to be accepted as true and correct.

13. Having examined the averments made in the plaint and on perusing the documents placed on record and further upon considering the submissions made by the counsel for the plaintiff, it is deemed appropriate to decree the suit in favour of the plaintiff. Accordingly, the suit is decreed and the defendants are directed to pay a sum of

Rs.1.60 crores to the plaintiff along with *pendent lite* and future interest @10% p.a. w.e.f. 16.11.2011, the date when the cheque in question had been dishonoured, till realization along with costs. It is clarified that if the defendants fail to pay the decretal amount with interest at the rate noted above, within a period of three months from today, then the interest factor will be enhanced from 10% to 12% p.a., till realization. Decree sheet be drawn accordingly.

14. The suit is disposed of, along with the pending application.

**(HIMA KOHLI)**
JUDGE

**MAY 06, 2015**
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