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

+ **CS(COMM) 85/2016**

DAP BUILDCON PVT LTD

..... Plaintiff

Through: Mr. Mukul Talwar, Sr. Adv. with Mr.
Sunil Kumar, Mr. Ankit Dixit and Mr.
Nitin Sharma, Advs.

Versus

B.B. LAL AGGARWAL

..... Defendant

Through: Mr. Kirti Uppal, Sr. Adv. with Mr.
Satish Sharma, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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16.12.2016

IAS No.9656/2016 & 9657/2016 (both of defendant for leave to defendant and for condonation of 12 days delay in applying therefor) & IA No.12094/2016 (for condonation of 12 days delay in filing reply to IA No.9656/2016)

1. The application of the defendant for leave to defend the suit under Order XXXVII of Code of Civil Procedure, 1908 (CPC) for recovery of Rs.2,76,00,000/- with interest is accompanied with an application for condonation of twelve days delay in applying for leave to defend and the application of the plaintiff for condonation of twelve days delay in filing reply to application for leave to defend are for consideration.

2. On the aspect of delay, I may notice that the defendant in this case had delayed entering of appearance in pursuance to the summons for appearance, also by two days. Even though there was no application for condonation of such delay but the counsel for the plaintiff on 11th July, 2016, for the sake of expediency, agreed to the delay in entering appearance

to be ignored subject to the defendant waiving service of summons for judgment and filing leave to defend application within the prescribed time from that date.

3. The delay of twelve days is thus the second delay on the part of the defendant in this suit. The reason given for the delay is the ailment of the wife of the defendant. The ailment of the wife of the defendant has no correlation to the timely filing of the application for leave to defend. The counsel for the defendant must have had instructions when he entered appearance and appeared before this Court on 11th July, 2016 and no such circumstance has been shown that the defendant could not spare the time to give further instruction, if any required or to sign the application for leave to defend.

4. Though the leave to defend application is liable to be dismissed on this ground alone but the senior counsel for the plaintiff, again for the sake of expediency, states that the leave to defend application be decided on merits.

5. The senior counsels for the parties have been heard.

6. The plaintiff has instituted this suit pleading (i) that it had advanced a sum of Rs.5,97,00,000/- to the defendant to enable the defendant to bid on behalf of the plaintiff for industrial plots bearing No.41/42 and 42/1 Site-4, Industrial Area, Sahibabad, Ghaziabad, Uttar Pradesh in the auction to be held by the Official Liquidator (OL) of the Allahabad High Court (AHC); (ii) that a sum of Rs.3.21 crores was paid by way of demand draft in favour of OL of the AHC, Rs.11 lakhs by way of a pay order in favour of the CS(COMM) 85/2016

defendant and Rs.2.65 crores in cash to the defendant; (iii) that a Memorandum of Understanding (MOU) dated 3rd October, 2012 and a receipt dated 3rd October, 2012 were executed by the defendant in this regard; (iv) that Clause 5 of the said MOU was as under:

“5) THAT the First Party assures the Second Party to get the “ACCEPTANCE LETTER” latest by 31st December, 2012. If the First Party fails to lawfully arrange the “Acceptance Letter” up to 31.12.2012, the First Party will return back the entire amount to the Second Party along with interest payable @ 16% P.A. from date of original payment, within a period of 7 days. The Second Party shall have first charge towards the First Party and associated entities in this respect. In case the Second Party accepts any delay beyond this date in exceptional circumstances, the First Party shall become liable for interest @ 24% P.A. from date of original payment beyond this date. The Second Party shall only be responsible for the remaining consideration.”;

(v) that the defendant was unable to get the property for the plaintiff and though represented to the plaintiff that he had deposited the entire amount with the OL of the AHC and the plaintiff can obtain refund thereof but the plaintiff on approaching the OL of AHC found only a sum of Rs.2.35 crores having been deposited on behalf of the plaintiff, though another sum of Rs.86 lakhs had been deposited on behalf of some other party; (vi) however, the plaintiff has received refund of Rs.2.35 crores from the OL of AHC and a sum of Rs.86 lakhs from the other person in whose name the defendant had deposited the said amount; (vii) that after adjusting the sum of Rs.3.21 crores so received, a sum of Rs.2.76 crores remained to be paid by the defendant to the plaintiff and which the defendant has not paid inspite of having acknowledged in writing liability therefor on 24th January, 2013.

7. The need to reproduce the contents of the application for leave to defend is not felt as the senior counsel for the defendant has fairly stated that the counsel for the defendant has in the leave to defend application admitted the entire liability and the only ground on which leave to defend is sought is that this Court does not have territorial jurisdiction to entertain the suit.

8. Upon it being enquired from the senior counsel for the defendant as to how the territorial jurisdiction of this Court is disputed when the MOU and receipt aforesaid as well as acknowledgement dated 24th January, 2013 of liability have been executed by the plaintiff at Delhi, the senior counsel for the defendant invites attention to Clause 10 of the MOU aforesaid which is as under:

“10) THAT the jurisdiction of Courts of Ghaziabad and shall be applicable.”

9. The senior counsel for the defendant has urged that once the parties had agreed to the jurisdiction of the Courts of Ghaziabad, there is an implied exclusion of the Courts at Delhi. The senior counsel for the defendant refers to *Wollaque Ventilation & Conditioning Pvt. Ltd. Vs. Sterling Tools Ltd.* 177 (2011) DLT 731 in which portions of *Rajasthan State Electricity Board Vs. Universal Petrol Chemicals Ltd.* (2009) 3 SCC 107 and *New Moga Transport Company Vs. United India Insurance Co. Ltd.* AIR 2004 SCC 2154 are set out.

10. When reliance is sought to be placed on the judgments of the Supreme Court, the said judgments should be placed before the Court, instead of a judgment of the High Court in which portions of the judgments of the Supreme Court are quoted.

11. Attention of the senior counsel for the defendant has also been invited to *ABC Laminart Vs. A.P. Agencies* (1989) 2 SCC 163 as well as to the subsequent judgments of the Supreme Court in *Hanil Era Textiles Ltd. Vs. Puromatic Filters (P) Ltd.* AIR 2004 SC 2432 and it has been enquired that whether not in the absence of the word ‘alone’, ‘only’ or ‘exclusive’, it is a matter of interference from surrounding facts and circumstances, whether the parties intended to exclude the jurisdiction of the Courts at Delhi which admittedly have jurisdiction.

12. The senior counsel for the defendant states that though it has been so held in the subsequent judgments but since the facts of the present case are similar to the facts of *Rajasthan State Electricity Board* supra and *New Moga Transport Company* supra, he is referring thereto.

13. Without going into the said aspect, I have enquired from the senior counsel for the defendant, as to how the Courts at Ghaziabad have jurisdiction.

14. The senior counsel for the defendant states that though the defendant in the application for leave to defend has not so pleaded and only pleaded that the Courts at Ghaziabad would have jurisdiction but according to him, the Courts at Allahabad and not the Courts at Ghaziabad would have jurisdiction.

15. On enquiry, as to how the Courts at Allahabad would have jurisdiction, the senior counsel for the defendant states that since the monies were taken from the plaintiff for depositing with the OL, Allahabad at Allahabad, the Court having jurisdiction would be the Courts at Allahabad.

16. The present is a suit for recovery of money paid by the plaintiff to the defendant and received by the defendant and promised to be refunded by the defendant to the plaintiff upon failure to do what the defendant had agreed to do for the plaintiff. The agreement was executed at Delhi. The demand draft and pay order aforesaid handed over by the plaintiff to the defendant are admitted to be drawn at a Bank at Delhi. The defendant acknowledged his liability at Delhi. The defendant is a resident of Delhi and the plaintiff company has its registered office at Delhi. It is not understandable as to how the Courts at Allahabad would have jurisdiction.

17. Rather, I fail to see as to how the Courts at Ghaziabad also would have jurisdiction. Even if it were to be believed that the property is situated in the jurisdiction of the Courts at Ghaziabad, the cause of action for the present suit has nothing to do with the property inasmuch as the plaintiff in the plaint is not claiming any relief with respect to or concerning the property, for the Courts within whose jurisdiction the property is situated to have jurisdiction.

18. Once the defendant admits his liability in the balance amount (for recovery of which suit is filed) to the plaintiff and there is no dispute with respect thereto, the defendant, even on the principle of 'debtor must seek the creditor' is required to pay the money to the plaintiff situated at Delhi and the defendant being in default inspite of admitting liability, cannot be permitted to take defence of such technical nature. Reference in this regard can be made to *Shradha Wassan Vs. Anil Goel* MANU/DE/0490/2009, *Maya Jain Vs. Yash Chhabra* MANU/DE/1308/2015 and judgment dated 1st July, 2015 in RFA(OS) No.60/2015 titled *Yash Chhabra Vs. Maya Jain*.
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Indeed, there are on record cheques for Rs.1,86,00,000/- issued by the defendant in favour of the plaintiff and which were returned dishonoured and which are also found to have been drawn by the defendant at a Bank situated at Delhi.

19. It thus appears that the Ghaziabad Court to whose jurisdiction the parties had agreed had no jurisdiction and once it is so, the parties could not have by consent or by agreement conferred jurisdiction on a Court which did not have jurisdiction. Supreme Court, in *Angile Insulations Vs. Davy Ashmore India Ltd.* (1955) 4 SCC 153 held that an agreement to oust absolutely the jurisdiction of the Court would be unlawful and void being against public policy but where there may be two or three Courts having jurisdiction, the parties can agree to vest jurisdiction in one of such Courts. Here, because Ghaziabad does not have jurisdiction, agreement vesting jurisdiction therein is void. The Clause in the MOU regarding jurisdiction is of no avail for this reason as well.

20. I may also add that the claim of the plaintiff, besides on the basis of MOU, is also on the basis of the acknowledgement of liability dated 24th January, 2013 and whereunder also the defendant had agreed to refund the money to the plaintiff having its registered office at Delhi.

21. Thus, drawing inference from the surrounding circumstances, it cannot be said that the parties had agreed to the exclusive jurisdiction of the Courts at Ghaziabad.

22. Thus, even on merits, on the sole ground urged, no case for grant of leave to defend is made out.

23. Accordingly, IA No.9656/2016 is dismissed on merits and the question having been considered on merits, the other two applications for condonation of delay are allowed.

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24. The application of the defendant for leave to defend having been dismissed, the plaintiff has become entitled to a decree forthwith.

25. The plaintiff has not claimed any pre-suit interest and claimed only *pendente lite* and future interest @ 24%.

26. Considering the entirety of the facts, it is deemed appropriate to award interest *pendente lite* and future to the plaintiff @ 11% per annum from the date of institution of the suit till 31st March, 2017. If the payment is not made by 31st March, 2017, the defendant thereafter shall be liable for interest @ 12% per annum.

27. The plaintiff is also awarded costs of the suit.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

DECEMBER 16, 2016

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