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

% *Judgment Reserved on : January 05, 2016*
Judgment Delivered on : January 19, 2016

\+ **RFA (OS) 94/2009**

V.SREENIVAS .....Appellant
Represented by: Mr.Sanjay Poddar, Sr.Advocate instructed by Mr.B.K.Chaudhary and Ms.Pavni Poddar, Advocate

versus

M/S. FELEX ENTERPRISES PVT. LTD. & ANR. .....Respondents
Represented by: Mr.Vikas Aggarwal, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. Shorn of unnecessary details, the relevant facts for the purpose of adjudication of the present appeal required to be noted (as set out in the pleadings of parties) are that Lakshmi Cement & Ceramics Industries Ltd. (hereinafter referred to as the 'Lakshmi Industries') held a mining lease to mine Lime Stone, Dolomite and Manganese over a parcel of land ad-measuring 600 acres in survey Nos.9, 42, 43, 100 and 102 of Ittigehalli Village, Mathudo Hobli, Hosadurga Taluk, Chitradurga District, Karnataka.

2. On September 23, 2004 an agreement was entered into between Lakshmi Industries and V.Sreenivas (hereinafter referred to as the 'Sreenivas') whereby Lakshmi Industries agreed to transfer 200 acres out

of 600 acres of aforesaid land for a sum of ₹1,62,00,000/- (Rupees One Crore Sixty Two Lakhs only).

3. However, the aforesaid agreement dated September 23, 2004 could not fructify since Sreenivas could not arrange the sale consideration.

4. M/s.Felex Enterprises Pvt. Ltd. (hereinafter referred to as the 'Felex Enterprises') was interested to purchase the 200 acres of land which was the subject matter of the agreement between Lakshmi Industries and Sreenivas. Negotiations were held between the parties i.e. Lakshmi Industries, Sreenivas and Felex Enterprises for sale/transfer of the said land.

5. On May 26, 2006 a tripartite agreement was entered into between Lakshmi Industries, Sreenivas and Felex Enterprises prescribing that Lakshmi Industries had agreed to transfer 200 acres of land in favour of Felex Enterprises for a sum of ₹3,71,00,000/- (Rupees Three Crore Seventy One Lakhs only); Sreenivas would facilitate the said transfer in favor of Felex Enterprises for which purpose a bilateral agreement would be entered into between Sreenivas and Felex Enterprises and (earlier) agreement dated September 23, 2004 entered into between Lakshmi Industries and Sreenivas would stand cancelled on signing of bilateral agreement between Sreenivas and Felex Enterprises.

6. Being relevant, we note following portion of the tripartite agreement dated May 26, 2006 entered into between the parties:-

> *"Whereas the **Confirming Party** has entered into an agreement with the first party on 23.09.04 for the transfer of 200 acres out of 600 acres spread on the part of Survey No. 9, 40, 43, 44, 100 and 102 of Ittigehalli Village, Mathodu Hobli, Hosadurga Taluk, Chitradurga District vide mining lease No. 1667/2260. The map of total land with the 200 Acres demarcated by red line is set out in **Enclosure 1.***

Whereas the first part has represented that due to paucity of funds and lack of resources, it is not interested in getting the above said area duly transferred in its name as per the provision of Rule 37 of Mining Concession Rule 1960. It has further represented that it will facilitate the transfer of above said area in favor of part No.2. It has further represented that on signing of bilateral agreement between second part and ***Confirming party,*** *its agreement with the* ***Confirming party*** *will stand cancelled and shall cease to have any legal effect." (Be it noted here that Sreenivas, Felex Enterprises and Lakshmi Industries have been referred as First Part, Second Part and Confirming Party in the tri-partite agreement dated May 26, 2006)."*

7. The said tripartite agreement dated May 26, 2006 entered into between the parties contained an arbitration clause, being clause No.12. The same reads as under:-

"In the event of any disputes in relation to or connected with the present agreement the same shall be referred to arbitration of sole arbitrator to be appointed by second part and the arbitration proceedings shall be held at Bangalore and shall be subject to Bangalore High Court jurisdiction."

8. On June 24, 2006 a Memorandum of Understanding was arrived at between the parties regarding payment of sale consideration by Felex Enterprises. As per said understanding, Felex Enterprises had to make payment(s) to Lakshmi Industries and Sreenivas in the following manner:-

S. No.	*Time of making payment by Felex Enterprises*	*Amount to be paid to Lakshmi Industries*	*Amount to be paid to Sreenivas*
1.	*Advance payment*	*₹85 Lakhs*	*₹31 Lakhs*
2.	*On completion of three months of obtaining pollution consent and*	*----*	*₹155 Lakhs*

	environmental clearance		
3.	*On transfer of mining lease*	*₹52 Lakhs*	*₹48 Lakhs*
		Total : ₹137 Lakhs	*Total: ₹234 Lakhs*

9. Pursuant thereto, Felex Enterprises paid a sum of ₹85 Lakhs and ₹31 Lakhs to Lakshmi Industries and Sreenivas respectively.

10. Even the tripartite agreement dated May 26, 2006 could not fructify, inasmuch as disputes and differences arose between the parties before the land in question could be transferred in favour of Felex Enterprises.

11. In this factual backdrop, Felex Enterprises filed a summary suit on the Original Side of this Court which was registered as CS (OS) No.1382/2008, claiming decree in sum of ₹42,46,575/- against Sreevinas impleaded as defendant No.1. Even though Lakhsmi Industries was impleaded as defendant No.2 in the suit no relief was claimed against it.

12. Concise, case set up by plaintiff is as follows:-

a) Sreenivas approached Felex Enterprises and represented that Lakshmi Industries is the sole and exclusive owner of land in question and that said land is free from any disputes.

b) Believing aforesaid representation made by Sreenivas to be true, Felex Enterprises agreed to buy the land in question and made an advance payment in sum of ₹1,16,000/- to Lakshmi Industries and Sreenivas (₹85 Lakhs to Lakshmi Industries and ₹31 Lakhs to Sreenivas).

c) After making aforesaid advance payment, Felex Enterprises learnt that aforesaid representation(s) made by Sreenivas were false, in that, a dispute regarding boundary of land in question was pending adjudication before a Civil Court at Bangalore.

d) When Felex Enterprises called upon Sreenivas to explain the fraud played by him, he i.e. Sreenivas agreed to return the advance payment of ₹31 Lakhs made to him by Felex Enterprises.

e) In order to discharge his liability, Sreenivas issued two cheques dated October 16, 2006 and December 11, 2006 for a sum of ₹21 Lakhs and ₹10 Lakhs respectively in favour of Felex Enterprises.

f) On being presented for encashment, the aforesaid two cheques issued by Sreenivas were dishonored hence the summary suit filed by Felex Enterprises.

13. Claiming pre-suit interest in sum of ₹11,46,575/-, decree prayed for by Felex Enterprises was in sum of ₹31,00,000/-. Pendente lite and future interest was claimed @ 18% per annum.

14. Together with its plaint, Felex Enterprises filed nine relevant documents which are being detailed herein under:-

S. No.	*Document filed by Felex Enterpries*	*Detail of document*
1.	*Agreement dated September 23, 2004 entered into between Lakhmi Industries and Sreenivas.*	*Said document has already been described in foregoing paras.*
2.	*Tripartite agreement dated May 26, 2006 entered into between Felex Enterprises, Lakshmi Industries and Sreenivas.*	*Said document has already been described in foregoing paras.*
3.	*Cheque dated October 16, 2006 in sum of ₹21 Lakhs issued by Sreenivas in favor of Felex Enterprises.*	----
4.	*Cheque dated December 11, 2006 in sum of ₹10 Lakhs issued by Sreenivas in favor of Felex Enterprises.*	----
5.	*Letter dated September 01,*	*The contents of said letter*

	2006 written by Sreenivas to Director of Felex Enterprises.	*shall be noted by us in the subsequent portion of this judgment.*
6.	*Letter dated August 31, 2006 written by Felex Enterprises to Sreenivas.*	*By way of said letter, Felex Enterprises calls upon Sreenivas to return (advance) sum of ₹31 Lakhs made by it.*
7..	*Return memo dated November 29, 2006 issued by State Bank of Mysore regarding dishonor of cheque dated October 16, 2006 in sum of ₹21 Lakhs issued by Sreenivas in favor of Felex Enterprises.*	*The memo records that said cheque was returned/dishonored on account of payment stopped by drawer i.e. Sreenivas.*
8.	*Legal notice dated December 20, 2006 under Section 138 of Negotiable Instruments Act, 1881 issued by Felex Enterprises regarding dishonor of cheque dated October 16, 2006 in sum of ₹21 Lakhs issued by Sreenivas in favor of Felex Enterprises.*	*The legal notice records that cheque dated October 16, 2006 was presented for encashment by Felex Enterprises on November 27, 2006.*
9.	*Legal notice dated January 24, 2007 under Section 138 of Negotiable Instruments Act, 1881 issued by Felex Enterprises regarding dishonor of cheque dated December 11, 2006 in sum of ₹10 Lakhs issued by Sreenivas in favor of Felex Enterprises.*	*The legal notice records that said cheque dated December 11, 2006 was presented for encashment by Felex Enterprises on December 23, 2006 and same was dishonored on account of payment stopped by drawer i.e. Sreenivas.*

15. Before proceeding further, we note that letter dated August 31, 2006 written by Sreenivas to Director of Felex Enterprises (filed by Felex Enterprises together with its plaint) reads as under:-

> *"This has reference to your letter dated 31.8.2006 regarding repayment of ₹ 31 lakhs (Rupees Thirty One only) from the undersigned and ₹85 lakhs (Rupees Eighty Five lakhs only)*

from M/s Laxmi Cement and Ceramics Industries Ltd. We acknowledge that there are boundary/area and other disputes and M/s Sreenivas Clay and others are interfering and disturbing with peaceful and lawful possession over area held under mining lease granted by State Government to M/s Laxmi Cement and Ceramics Industries Ltd.

Keeping in view the discussions we held and terms of agreement the undersigned has decided to repay ₹31 lakhs (Rupees Thirty One Lac only) and accordingly please find enclosed herewith Cheque No. 235105 dated 16.10.2006 drawn on State Bank of Mysore, Bangalore for an amount of ₹21 lakhs (Rupees Twenty One Lac only) from M/s Sreenivasa Trade & Transport of whom the undersigned is the proprietor. The balance amount of ₹10 lac will be paid by another cheque.

Please acknowledge the receipt of the cheque(s) as mentioned above." **(Emphasis Supplied)**

16. On being served with the summons of the suit in the prescribed form as contemplated by Order XXXVII Rule 2(2) of the Code of Civil Procedure, Sreenivas filed an application under Section 8 of Arbitration and Conciliation Act, 1996 stating therein that the dispute which has been raised in the suit (filed by Felex Enterprises) arising out of the tripartite agreement dated May 26, 2006, contained an arbitration clause entered into between the parties to the suit (Felex Enterprises, Sreenivas and Lakshmi Industries) and thus the parties should be referred to arbitration for resolution of dispute raised in the suit.

17. Being relevant, we note following portion of the application filed under Section 8 of the Arbitration and Conciliation Act, 1996 filed by Sreenivas:-

"7. That it is further submitted that in the meanwhile there arose some boundary dispute in respect of the mining lease area with the third party and due to some misunderstanding the plaintiff asked the defendants to refund the advance money to

the plaintiff and original agreement and other related document would be returned by the plaintiff to the defendant and thus, in order to close the contractual relation, the defendant No.1 issued two cheques for ₹21 lakhs and 10 lakhs respectively to the plaintiff at Bangalore. However, subsequently on 01.09.2006 a new understanding was reached between the parties in the minutes of the meeting dt. 01.09.2006 where the defendants were asked to settle the boundary disputes of the mining lease arose within 330-45 days. Thus, as a result of the new understanding reached between the parties, the defendant No.1 wrote a letter dated 13.10.2006 to the plaintiff asking them not to present the cheques for ₹31 lakhs till the matter is being settled and accordingly vide letter dated 29.11.2006, the defendant No.1 wrote to his banker not to pass the aforesaid cheques because the purpose for which the cheques were issued has not materialized.

8. That it is submitted that instead of waiting for the resolution of the boundary disputes, the plaintiff presented these two cheques which bounced due to the instructions of the defendant to the bank and by misusing the process of the law and court, the plaintiff filed two criminal complaints under section 138 of N.I. Act which are pending in the Patiala House Courts and the defendants no.1 had filed the Section 482 Cr.P.C. petitioner in this Hon'ble High Court for quashing of the complaints and summoning order, however, the same was dismissed on 27/8/2008.

9. That it is thus submitted that since there is an admitted tripartite agreement dt. 26.05.2006 containing Arbitration Clause providing the parties to seek arbitration proceeding at Bangalore in case of disputes relating to the said agreement, it is binding on the present plaintiff and defendants to resolve the dispute between them through arbitration proceedings at Bangalore. However, the plaintiff in gross misuse of the process of law and courts as well as that of the agreement, has filed the present suit under summary procedure by concocting and fabricating the story for creating jurisdiction at Delhi and therefore the present suit is liable to be dismissed." ***(Emphasis Supplied)***

18. Felex Enterprises filed a reply to the application under Section 8 of the Arbitration and Conciliation Act, 1996 filed by Sreenivas essentially stating therein that:- (i) tripartite agreement dated May 26, 2006 entered into between the parties came to an end when a new understanding was arrived at between Felex Enterprises and Sreenivas on September 01, 2006 whereby Sreenivas agreed to return the advance payment of ₹31 Lakhs made to it by Felex Enterprises thus arbitration clause contained in tripartite agreement dated May 26, 2006 is of no consequence; (ii) in any case, the matter relating to issuance of two cheques totaling ₹31 Lakhs by Sreenivas in favour of Felex Enterprises is not the subject-matter of tripartite agreement dated May 26, 2006 entered into between the parties and (iii) Sreenivas has admitted his liability to pay ₹31 Lakhs to Felex Enterprises in the letter dated August 31, 2006 written by him to Director of Felex Enterprises.

19. Thereafter Sreenivas filed an application under Order XXXVII Rule 3(5) of the Code of Civil Procedure seeking leave to defend the suit reiterating therein that dispute which has been raised in the suit is required to be referred to arbitration in view of arbitration clause contained in tripartite agreement dated May 26, 2006 entered into between the parties.

20. In addition thereto, it was pleaded by Sreenivas in his application seeking leave to defend that:- (i) this Court had no territorial jurisdiction to try the present suit in view of the facts that all the (three) parties to the suit are based at Bangalore and no part of cause of action to file the present suit has arisen within the territorial jurisdiction of this Court; (ii) Sreenivas had not concealed any material fact regarding land in question from Felex Enterprises and that Felex Enterprises was very much aware about existence of boundary dispute of land in question pending in a Civil

Court at Bangalore at the time of entering into tripartite agreement dated May 26, 2006; (iii) Felex Enterprises had violated its contractual obligation under the tripartite agreement May 26, 2006 and Memorandum of Understanding dated June 24, 2006 by not paying a sum of ₹1,55,00,000/- after three months of Sreenivas obtaining pollution consent and environmental clearance despite a clear prescription to this effect contained in Memorandum of Understanding dated June 24, 2006; (iv) (two) cheques in question were issued by Sreenivas only to put an end to the contractual relationship existing between the parties under the tripartite agreement May 26, 2006 and not towards discharge of any debt or liability towards Felex Enterprises and (v) soon after issuance of cheques by Sreenivas the previous arrangement leading to issuance of cheques was altered on the request/instruction of Sreenivas which would be evident from the Minutes of Meeting held between the parties on September 01, 2006.

21. Being relevant, we note following portion of the application seeking leave to defend filed by Sreenivas:-

> *"**7.** <u>It is further submitted that the defendant No.1 had issued the cheques to put an end to the contractual relationship under the tripartite agreement dt. 26.05.2006 and not towards the discharge of any debt or liability towards the plaintiff</u>, besides the plaintiff is also liable to pay ₹1.55 crores to the defendant No.1 as per the contractual obligation towards obtaining various clearances from the government agencies and facilitating the transfer of the mining lease area in favor of the plaintiff and the defendant No.1 had discharged his duties including getting pollution and environmental clearance from government agencies. Thus, in view of the clear cut commitment made by the plaintiff to the defendant No.1, the plaintiff cannot be allowed to escape their liability of paying ₹1.55 crore to the defendant No.1 and therefore, the defendant No.1 is not liable to pay any amount to the plaintiff, and therefore, the present*

suit involves several triable issues which cannot be decided under summary procedure….

9. That it is submitted that some misunderstanding arose between the plaintiff and the defendant no.1 as a result of which the plaintiff wanted to end the contractual relationship and therefore, the defendant No.1 issued two cheques worth 31 lakhs to end the relationship and the plaintiff was required to return the original agreement dt. 26.05.2006 and other document so that the lease hold rights of the defendant No.1 in the aforesaid mining areas might have been revived as per previous agreement dt. 23.09.2004. However, immediately after issuing the cheque, the previous arrangement leading to issuance of the cheques was altered on the request/instruction of the plaintiff asking the defendant No.1 & 2 to make efforts to settle the boundary problem in the mining areas which is very much evident from the minutes of meeting dt. 01.09.2006 attended by the plaintiff's representative. Thus, the aforesaid cheques were issued by the defendants not to discharge any debt or liability towards the plaintiff. Not only that, the defendant No.1 had incurred lot of expenses out of the advance money of ₹31 lakhs received, towards obtaining pollution and environmental clearance as well as other contractual works. Besides, the plaintiff is very much liable to pay ₹1.55 crore to the defendant No.1 as per the agreement. ***When the defendant NO.1 was trying his level best to settle the boundary problem on the instructions of the plaintiff, therefore, the defendant NO.1 wrote letters dt. 13.10.2006 and 22.11.2006 to the plaintiff not to present the cheques for encashment till the problem is being settled and he also wrote a letter dated 29.11.2006 to his banker to stop payment of the cheques because the purpose for which the cheques were issued has not materialized.*** *However, the plaintiff broke the trust of the defendant No.1 and instead rushed to encash the cheques issued by the defendant No.1 as a part of an arrangement to put an end to the contractual relationship ensued under the tripartite agreement and the same has been done in collusion with the defendant no.2 just to defeat the rights of the defendant no.1 under the previous agreement dated 23.09.2004 because on the one hand the plaintiff and defendant no.2 has settled the matter between themselves at the back of the defendant no.1 by* *retaining the original agreement dated 23.9.2004 as well as tripartite agreement dated 26.05.2006 on the other hand the rights of the defendant no.1 accrued under these agreements have been taken away by them resulting in huge financial losses to the defendant no.1."* **<u>(Emphasis Supplied)</u>**

22. In its reply filed to the application seeking leave to defend, Felex Enterprises essentially stated that no triable issue has been raised by Sreenivas in his application seeking leave to defend.

23. Most significantly, Felex Enterprises filed minutes of meeting dated September 01, 2006 held between Sreenivas and representatives of Felex Enterprises and Lakshmi Industries together with reply to application seeking leave to defend filed by Sreenivas. The same reads as under:-

"It has been agreed by M/s Lakshmi Cement & Ceramics Ind: Limited, Mr.V.Sreenivas & Mr. Tekriwal as under:-

1. Mr. Ramaswamy & Mr. Sreenivas have agreed to settle the Boundary courts dispute with M/s Sreenivas Clays Ind: within 30-45 days and agreed to handover post dated cheque amounting to ₹85 lakhs from Mr. Ramaswamy and ₹21 lakhs from Mr.V.Sreenivas after obtaining the letter from the agreement holder.

2. Mr. V.Sreenivas after obtaining the letter from the agreement holder.

Mr.Tekriwal agreed to return all the original agreement papers after the encashment of the above cheques. And a separate agreement will be entered between Mr.Tekriwal, Agreement holder and Mr. V. Sreenivas for balance of ₹10 lakhs due from V. Sreenivas." (<u>Be it noted here that Mr.Tekriwal referred to in the minutes of meeting held on September 01, 2006 is the representative of Felex Enterprises</u>)."

24. We note that three more documents were filed by Felex Enterprises in the suit. The same could be detailed as under:-

S. No.	*Document filed by Felex Enterpries*	*Detail of document*
1.	*Memorandum of understanding dated June 24, 2006 arrived between Felex Enterprises, Sreenivas and Lakshmi Industries.*	*Said document has already been described in foregoing paras.*
2.	*Letter dated October 13, 2006 written by Sreenivas to Felex Enterprises.*	*By way of said letter, Sreenivas requests Felex Enterprises to not to present cheque dated October 16, 2006 issued by it for encashment.*
3.	*Letter dated November 28/29, 2006 written by Sreenivas to its banker State Bank of Mysore.*	*By way of said letter, Sreenivas directs its banker to not to encash two cheques issued by it in favor of Felex Enterprises as 'purpose for issuing of cheques has not materialized'.*

25. To complete the factual narration, somewhere in the year 2009 Sreenivas filed a petition under Section 11(5) of the Arbitration and Conciliation Act, 1996 before High Court of Karnataka at Bangalore seeking reference of disputes arising out of tripartite agreement dated May 26, 2009 between him, Felex Enterprises and Lakshmi Industries to arbitration.

26. Vide order dated August 26, 2009 the High Court of Karnataka appointed an arbitrator for resolution of disputes existing between Sreenivas and Lakshmi Industries. As regards disputes between Sreenivas and Felex Enterprises, the High Court declined to appoint an arbitrator on the reasoning that *'Sreenivas and Felex Enterprises are required to take a decision at the hands of Delhi High Court.'*

27. Vide impugned judgment and decree dated September 07, 2009, the learned Single Judge has dismissed the application(s) under Section 8 of Arbitration and Conciliation Act, 1996 and Order XXXVII Rule 3(5) of the Code of Civil Procedure filed by Sreenivas seeking reference of the dispute raised in the suit to arbitration and leave to defend the suit respectively and consequently has decreed the suit filed by Felex Enterprises.

28. In so concluding, it has been held by the learned Single Judge that:-

a) On the issue of discharge of a contract containing arbitration clause, it was held by Supreme Court in the decision reported as (2009) 1 SCC 267 _National Insurance Co. Ltd. vs. Boghara Polyfab (P) Ltd._ that once the parties settle their differences and put an end to their contractual obligations, the subsequent arrangement or contract, binds them contractually not to agitate the matter further unless the subsequent arrangement or settlement is shown to have been obtained under undue influence or demonstrably made under a mistake etc.

b) The facts and circumstances of case as also the pleadings of parties, particularly paragraph 7 of application under Section 8 of Arbitration and Conciliation Act, 1996 filed by Sreenivas and minutes of meeting held between the parties and/or their representatives on September 01, 2006, unequivocally point to the fact that parties consciously and mutually agreed to end the transaction recorded in the tripartite agreement dated May 26, 2006. This constituted a valid and binding discharge of the kind spoken of by the Supreme Court in _Boghara_'s case (supra). In these circumstances, it is not open to Sreenivas to fall back upon the terms of original tripartite agreement dated May 26, 2006 and claim that there is an arbitration clause binding the parties to seek recourse to arbitration.

c) This Court has territorial jurisdiction to try the present suit in view of clear averments made by Felex Enterprises in its plaint that two cheques in question were presented for payment by Felex Enterprises with its banker in Delhi and advice(s) issued by banker informing Felex Enterprises about dishonour of cheques were received by Felex Enterprises in Delhi.

d) The defence(s) projected by Sreenivas in its application seeking leave to defend are moonshine essentially in view of the undisputed facts that Felex Enterprises was not aware about the existence of boundary disputes in relation to the land in question when he agreed to buy the land and Sreenivas admitted his liability to pay ₹31 Lakhs to Felex Enterprises as recorded in the minutes of meeting held between the parties and/or their representatives on September 01, 2006.

29. Aggrieved by the aforesaid, Sreenivas (defendant No.1 in the suit) has filed the present appeal under Section 96 of Code of Civil Procedure. Felex Enterprises (plaintiff in the suit) and Lakshmi Industries (defendant No.2 in the suit) were impleaded as respondents Nos.1 and 2 respectively in the appeal.

30. At the hearing of appeal, counsel for Sreenivas and Felex Enterprises advanced arguments essentially on lines of the pleadings of parties in the suit.

31. From the afore-noted conspectus of facts, following two questions arise for adjudication in the present appeal:-

I Whether arbitration clause contained in tripartite agreement dated May 26, 2006 entered into between Lakshmi Industries, Felex Enterprises and Sreenivas is attracted in the present case?

II Whether any triable issue has been raised by Sreenivas in his application seeking leave to defend the suit?

In Re: Question (I): Whether arbitration clause contained in tripartite agreement dated May 26, 2006 entered into between Lakshmi Industries, Felex Enterprises and Sreenivas is attracted in the present case?

32. In law, it is open to a party, suing on a negotiable instrument which has been executed in discharge of a debt, to fall back on the original cause of action, i.e. base the suit on the recovery of early debt. It is open to the party in the alternative to sue only on the negotiable instrument. No doubt, there would be submission of facts stating under what circumstances the negotiable instrument was issued, but reference thereof would be incidental i.e. as a backdrop to the suit. The cause of action would be the negotiable instrument and not the original cause. It would, therefore, all depend on what are the pleadings of the parties. However, the position in law, in respect of a cheque issued pursuant to a settlement arrived at after disputes have arisen under a contract is different.

33. A perusal of the averments made in the plaint shows that Felex Enterprises has categorically averred that the (two) cheques in question were issued pursuant to the settlement arrived at between the parties (Sreenivas and Felex Enterprises) pertaining to the dispute which had arisen under the tripartite agreement dated May 26, 2006.

34. We may at this stage also note that Sreenivas has himself stated in the application(s) filed by him in the suit seeking reference of dispute to arbitration and leave to defend the suit that *'cheques were issued by him to close contractual relation/put an end to contractual relationship under the tripartite agreement dated May 26, 2006'*.

35. From the pleadings made in the plaint filed by Felex Enterprises, it is evident that the suit is based on the two cheques issued by Sreenivas to Felex Enterprises pursuant to the settlement of disputes pending between the parties.

36. A somewhat similar situation confronted the Madras High Court in the decision reported as AIR 1983 Mad 31 *Vasanji Navji & Co. v. K.P.C. Spinners & Ors*. A contract was entered into between the parties which contained an arbitration clause. Disputes arose between the parties under the contract. Certain cheques were issued. The cheques were not honored resulting in the filing of the suit. Application under Section 34 of Arbitration Act, 1940 was filed by the defendant. The same was allowed and the suit was stayed. Matter came up in appeal before the Division Bench of the Court. It was held as under:-

> *"Though the plaint refers to the antecedent facts which give rise to the issue of the cheques by the defendants in favor of the plaintiff, the suit is in substance a suit on the dishonored cheques. Such a suit cannot be taken to arise solely out of the contract entered into by the plaintiff with the defendants for supply of cotton.*
>
> *The dishonor of the cheques is a subsequent event after the contract has been fulfilled by complete payment for the goods purchased and the suit has been filed on the subsequent cause of action i.e., the dishonoring of the cheques and, therefore, the suit cannot be taken to be a suit for recovery of the price.*"

37. The afore-noted decision was followed by the Himachal Pradesh High Court in the decision reported as AIR 1955 HP 69 *Roopak Bambha v. K.C. Bhandari.* In the said decision, it was held that notwithstanding the fact that partnership agreement between the parties contained an arbitration clause, the suit could not be stayed under Section 34 of the Arbitration Act, 1940 because of the fact that the partnership stood dissolved. The balance sheet was settled and a cheque was issued in favor of the plaintiff in settlement of the dues of the plaintiff. It was held that the cause of action of the suit was cheque in question which was dishonored.

37. A similar view was taken by a learned Single Judge of this Court in the decision reported as (1986) ILR I Delhi 382 *Saraswati Industrial Syndicate Ltd. v. Apollo Tyres Limited.* Parties were governed by an agreement which contained an arbitration clause. Disputes arose, resulting in a settlement arrived at. The cheque was dishonored. A suit for recovery was filed. An application under Section 34 of the Arbitration Act was filed praying that the suit be stayed in view of the arbitration clause between the parties. It was held that the dispute under the cheque did not relate to a dispute under the agreement. With the settlement arrived at, the dispute under the agreement between the parties stood settled. The agreement stood discharged and so did the arbitration clause. It was held that the cause of action was the settlement arrived at and not the contract.

38. The legal position which emerges from the aforesaid decisions is that an accord discharges the performance of obligations under the contract. A dispute pertaining to satisfaction furnishes a fresh and independent cause of action, until and unless it is provided that the performance of the satisfaction was a condition precedent for discharge under the contract. If promise is intended to operate in satisfaction, then there will be no satisfaction without performance. Wherever there is an accord, obligations under the original contract would be discharged until and unless it is specifically provided that the performance of the satisfaction would discharge the obligations under the contract.

39. The aforesaid decisions clearly bring out the distinction whether a particular suit is founded on a debt apart from the instrument or the instrument. It would depend on the pleadings of the parties. Pleadings in turn would depend on the circumstances under which the instrument was executed.

40. In the instant case, on May 26, 2006 a tripartite agreement was entered into between Lakshmi Industries, Sreenivas and Felex Enterprises prescribing that Lakshmi Industries agreed to transfer 200 acres of aforesaid land in favour of Felex Enterprises for a sum of ₹3,71,00,000/- (Rupees Three Crore Seventy One Lakhs only); Sreenivas would facilitate the said transfer in favor of Felex Enterprises for which purpose a bilateral agreement would be entered into between Sreenivas and Felex Enterprises and (earlier) agreement dated September 23, 2004 entered into between Lakshmi Industries and Sreenivas for transfer of said land would stand cancelled on signing of bilateral agreement between Sreenivas and Felex Enterprises. Pursuant thereto, Felex Enterprises made advance payment(s) in sums of ₹85 and 31 Lakhs to Lakshmi Industries and Sreenivas. Soon thereafter the disputes emerged between the parties and the deal fell through. A settlement was arrived at between the parties pursuant to which two cheques totaling to ₹31 Lakhs were issued by Sreenivas to Felex Enterprises. As per own admission of Sreenivas, two cheques in question were issued by him i.e. Sreenivas *to put an end to contractual relationship under the tripartite agreement dated May 26, 2006.* <u>(See the portion(s) of the application(s) filed by Sreenivas in the suit seeking reference of dispute to arbitration and leave to defend the suit quoted by us in the foregoing paras</u>).

41. Thus, it is a case of discharge of a contract by accord. Non-performance of the obligation under the accord is a separate and fresh cause of action. The suit was thus not based on the original cause i.e. under the tripartite agreement dated May 26, 2006. Reference in the plaint to the antecedent facts was by way of backdrop leading to the issuance of the cheques. In substance, the suit is based on the dishonored cheques. The suit cannot be held to be arising out of the tripartite

agreement dated May 26, 2006, in the sense, that the cause of action is not the tripartite agreement dated May 26, 2006. With the settlement arrived at between the parties, resulting in issuance of the cheques, no disputes survived between the parties with reference to tripartite agreement dated May 26, 2006 and therefore, none could be referred to for arbitration.

42. In view of above discussion, the answer to first question posed by us above viz. '*whether arbitration clause contained in tripartite agreement dated May 26, 2006 entered into between Lakshmi Industries, Felex Enterprises and Sreenivas is attracted in the present case?*' has to be NO.

<u>In Re: Question (II):</u> Whether any triable issue has been raised by Sreenivas in his application seeking leave to defend the suit?

43. We would not like to make a catalogue of judicial pronouncements on the subject of Order XXXVII of the Code of Civil Procedure concerning leave to defend, but would state that following legal principles can be culled out:-

I The question to be considered in applications under Order XXXVII Rule 3 of the Code of Civil Procedure is whether or not a triable issue is disclosed on affidavit or otherwise by the defendant. By triable issue is meant a plea which is at least plausible. The defendant must state what his defense is, and must as a rule, bring something more before the Court to show that it has a bona-fide defense and is not a mere attempt to gain time by obtaining leave to defend.

II <u>If there is a triable issue, in the sense that there is a fair dispute to be tried as to the meaning of document</u> on which the claim is based or the uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses then leave to defend should not be denied.

III If the defendant satisfies the Court that he has a good defense to the claim on merits the plaintiff is not entitled to summary judgment and the defendant is entitled to unconditional leave to defend.

IV If the defendant raises a triable issue indicating that he has a fair or bona-fide or reasonable defense although not a positively good defense the defendant is entitled to unconditional leave to defend.

V Even in cases where defendant shows that on a fair probability he has a bona-fide defense, he ought to be granted leave to defend.

VI Leave to defend should not be refused where serious conflict as to matter of fact or where any difficulty on issues as to law arises.

VII The Court should not reject the defense of the defendant merely because of its inherent implausibility or its inconsistency.

VIII At the stage of granting leave to defend, the Courts can only consider whether the facts as alleged by the defendant, if true, afford a good defense and not whether they are true or not.

IX If the defendant disclosed such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defense, yet shows a state of facts which leads to the inference that at the trial of the action he may be able to establish a defense to the plaintiff's claim the defendant is entitled to leave to defend but in such cases the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

X Leave to defend is declined where the Court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defenses. The test is to see whether the defendant raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even plausible defense on those facts.

XI If the defendant has no defense or the defense set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

XII If the defendant has no defense or the defense set up is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave sign judgment, the Court may protect the plaintiff by only allowing the defense to proceed if the amount claimed is paid into Court or otherwise secured and given leave to the defendant on defense to proceed if the amount claimed is paid into Court or otherwise secured and given leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try prove a defense.

44. In the backdrop of afore-noted legal principles, it has to be seen whether the application seeking leave to defend filed by Sreenivas discloses a bona-fide dispute or not.

45. To recap.

46 On September 23, 2004 an agreement was entered into between Lakshmi Industries and Sreenivas whereby Lakshmi Industries agreed to transfer 200 acres of aforesaid land for a sum of ₹1,62,00,000/- (Rupees One Crore Sixty Two Lakhs only). However, the aforesaid agreement dated September 23, 2004 could not fructify as Sreenivas could not arrange the sale consideration.

46. Thereafter on May 26, 2006 a tripartite agreement was entered into between Lakshmi Industries, Sreenivas and Felex Enterprises prescribing that Lakshmi Industries agreed to transfer 200 acres of aforesaid land in

favor of Felex Enterprises for a sum of ₹3,71,00,000/- (Rupees Three Crore Seventy One Lakhs only); Sreenivas would facilitate the said transfer in favor of Felex Enterprises for which purpose a bilateral agreement would be entered into between Sreenivas and Felex Enterprises and (earlier) agreement dated September 23, 2004 entered into between Lakshmi Industries and Sreenivas for transfer of said land would stand cancelled on signing of bilateral agreement between Sreenivas and Felex Enterprises. Pursuant thereto, Felex Enterprises made advance payment(s) in sums of ₹85 and 31 Lakhs to Lakshmi Industries and Sreenivas. Soon thereafter the disputes emerged between the parties and the deal fell through.

47. Both Felex Enterprises and Sreenivas agree to the fact that a meeting was held between the parties and/or their representatives on September 01, 2006 whereby a settlement was arrived at to resolve the disputes between the parties.

48. Here is the problem.

49. Whereas Felex Enteprises claims that as per settlement arrived at on September 01, 2006 Sreenivas admitted his liability to return the advance payment of ₹31 Lakhs made to him by Felex Enterprises in terms of tripartite agreement dated May 26, 2006 and unconditionally agreed to pay said amount Sreenivas claims to the contrary. It is claimed by Sreenivas that he i.e. Sreenivas has nowhere admitted his liability to return the advance payment of ₹31 Lakhs to Felex Enterprises and that success of settlement arrived at on September 01, 2006 was contingent upon him and Ramaswamy (representative of Lakshmi Industries) settling boundary disputes with third party i.e. Sreenivas Clay Industries.

50. Thus, in order to determine whether a bona-fide dispute has been raised by Sreenivas in his application seeking leave to defend one has to

closely analyze the settlement arrived at in the meeting held between the parties and/or their representatives on September 01, 2006 as recorded in the minutes of said meeting.

51. For the sake of convenience, we once again note the minutes of meeting held between the parties and/or their representatives on September 01, 2006. The same reads as under:-

> *"It has been agreed by M/s Lakshmi Cement & Ceramics Ind: Limited, Mr.V. Sreenivas & Mr. Tekriwal as under:-*
>
> *1. Mr. Ramaswamy & Mr. Sreenivas have agreed to settle the Boundary courts dispute with M/s Sreenivas Clays Ind: within 30-45 days and agreed to handover post dated cheque amounting to ₹85 lakhs from Mr. Ramaswamy and ₹21 lakhs from Mr. V. Sreenivas after obtaining the letter from the agreement holder.*
>
> *2. Mr. V. Sreenivas after obtaining the letter from the agreement holder.*
>
> *Mr.Tekriwal agreed to return all the original agreement papers after the encashment of the above cheques. And a separate agreement will be entered between Mr.Tekriwal, Agreement holder and Mr. V. Sreenivas for balance of ₹10 lakhs due from V. Sreenivas." (Be it noted here that Mr.Tekriwal referred to in the minutes of meeting held on September 01, 2006 is the representative of Felex Enterprises)."*

52. A reading minutes of meeting held between the parties and/or their representatives on September 01, 2006 does support the claim made by Sreenivas that success of settlement arrived at on September 01, 2006 was contingent upon Sreenivas and Ramaswamy (representative of Lakshmi Industries) settling boundary disputes with third party i.e. Sreenivas Clay Industries. Sreenivas is also right in claiming that there is no admission by him of his (alleged) his liability to return the advance

payment of ₹31 Lakhs to Felex Enterprises in the minutes of meeting held between the parties and/or their representatives on September 01, 2006.

53. A careful reading of minutes of meeting held between the parties and/or their representatives on September 01, 2006 brings out that settlement arrived at between the parties on September 01, 2006 consisted of following four steps:-

i) Sreenivas and Ramaswamy (representative of Lakshmi Industries) would settle boundary disputes with third party i.e. Sreenivas Clay Industries within thirty five-forty days.

ii) After such settlement, Sreenivas and Ramaswamy would hand over post dated cheques amounting to ₹31 and 85 lakhs to Mr.Tekriwal (representative of Felex Enterprises)

iii) After encashment of above cheques, Mr.Tekriwal would return original agreement entered into between the parties.

iv) A separate agreement would be entered into between Sreenivas and Tekriwal regarding remaining amount of ₹10 lakhs out of total amount of ₹31 lakhs paid by Felex Enterprises to Sreenivas at the time of entering into tripartite agreement dated May 26, 2006.

54. It is not the case of Felex Enterprises in the plaint filed by him that Sreenivas and Ramaswamy (representative of Lakshmi Industries) have settled boundary disputes with third party i.e. Sreenivas Clay Industries but despite thereto Sreenivas is not fulfilling his part of obligations under settlement arrived at between the parties on September 01, 2006. In fact, no settlement was arrived between Sreenivas and Felex Enterprises on September 01, 2006 regarding remaining amount of ₹10 lakhs out of total amount of ₹31 lakhs paid by Felex Enterprises to Sreenivas at the time of entering into tripartite agreement dated May 26, 2006.

55. Another fact which is worth noticing is that the first cheque in sum of ₹21 Lakhs issued by Sreenivas in favor of Felex Enterprises is October 16, 2006. Pertinently, on October 13, 2006 a letter was written by Sreenivas to Felex Enterprises requesting it to not to present cheque dated October 16, 2006 to its banker for encashment. (<u>Be it noted here that said letter has been filed by Felex Enterprises in the suit</u>). Admittedly, Felex Enterprises presented cheque dated October 16, 2006 for encashment only on November 27, 2006 i.e. nearly one and half months of issuance of said cheque by Sreenivas. Why such long wait on part of Felex Enterprises to present cheque dated October 16, 2006 for encashment if an unconditional settlement was arrived between the parties on September 01, 2006 as claimed by Felex Enterprises? We find no answer to the said question.

56. All this leads us to only one conclusion that a triable issue has been raised by Sreenivas in the application seeking leave to defend filed by him. As a necessary corollary thereof, Sreenivas is entitled to be granted unconditional leave to defend the suit filed by Felex Enterprises.

57. We thus allow the appeal and set aside the impugned order dated September 07, 2009 limited to application filed by Sreenivas seeking leave to defend being dismissed. We allow the application and grant Sreenivas unconditional leave to defend the suit.

58. In the appeal, while issuing notice on November 03, 2009 execution of the decree was stayed subject to Sreenivas depositing ₹31 Lakhs in this Court. The deposit was made. Due to non-prosecution the appeal came to be dismissed and in the meanwhile Felex Enterprises withdrew the amount which was deposited.

59. We therefore direct Felex Enterprises to deposit ₹31 Lakhs in this Court within two months which would be paid over by the Registry

to Sreenivas; whose claim for interest concerning the money being in the coffers of Felex Enterprises would also be decided by the learned Single Judge in the suit.

60. CS (OS) No.1382/2008 is restored. Written statement would be filed by Sreenivas within four weeks from today. Replication may be filed within four week thereafter.

61. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

JANUARY 19, 2016
mamta