

\$~38

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

+ FAO(OS)No.154/2017 and CAV 485/2017 &
CM Nos.18670/2017 – 18672/2017

% Date of decision : 17th May, 2017

VIJAY CHAUDHARY Appellant
Through : Ms. Shikha Khandelwal and
Ms. Ruchika Mittal, Advs.
versus

UMA KHOSLA Respondent
Through : Mr. V.Dabas and
Mr. Ashim Vachcher, Advs.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE NAVIN CHAWLA

JUDGMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE

CM No.18672/2017 (exemption)

Allowed, subject to just exceptions.

The application is disposed of.

Caveat No.485/2017

As the Caveator is represented and has been heard, the caveat stands discharged.

CM No.18671/2017 (delay in refiling)

1. We have heard ld. counsel for the parties on this application.

2. We are satisfied that the appellants have adequately explained the circumstances in which the delay in re-filing this appeal has occasioned. The delay in re-filing the appeal is condoned.

3. The application is disposed of.

FAO(OS) 154/2017 & CM No.18670/2017 (stay)

1. The appellant assails the order dated 15th February, 2017 passed in **I.A.No.10257/2015** which was filed by the appellant herein under Order XXXVII Rule 3 (5) of the Code of Civil Procedure praying for **leave to defend CS(OS)No.1063/2014**, a suit for recovery of ₹6,12,75,179/- with *pendente lite* and future interest.

2. It is an admitted position that monetary amounts were advanced by the respondent/plaintiff to the appellant. In the plaint, the respondent/plaintiff has claimed under the agreement dated 18th March, 2011, wherein the respondent is referred to as the party of the “*first part*” and the appellant/defendant as the party of the “*second part*”. We extract hereunder the relevant clauses of this agreement:

*“4. That the Party of the **Second Part** hereby **acknowledges and admits** and agrees that the Party of the Second Part is **liable to pay a sum of Rs. 2,75,00,000/-** (Rupees Two Crore Seventy- five Lac only), inclusive of interest as on that date. However, since a compromise has been arrived at between the parties hereto, the Party of the **First Part** has agreed to reduce the rate of interest i.e **42% annual compounded quarterly**, which was originally agreed to between the parties and which was liable to be paid by Party of the Second Part, to **15% per annum compounded quarterly**.*

5. *That the Party of the Second Part hereby acknowledges and admits and agrees that the Party of the Second Part is liable to pay, as on 31.12.2010 a sum of Rs. 3,82,00,000.00 (Rupees three crores eighty two thousand only), inclusive of the agreed rate of interest of 15% per annum compounded quarterly as on that date to that date to the Party of the First Part. It has been duly acknowledged by the parties hereto that the said calculation has been arrived at by the parties by adjusting the amounts already paid by the Party of the Second Part to the party of the First Part.*

6. *That the Party of the Second Part has agreed to pay the said total outstanding dues of Rs. 3,82,00,000.00 (Rupees three crores eighty two thousand only) as on 31.12.2010, along with interest at 15% per annum compounded on a quarterly bases on the said sum, as agreed between the parties within a period of two years commencing from 1st January, 2011 on or before the 31st December, 2012.”*

(Emphasis supplied)

3. The application for leave to defend was contested by the respondent herein who filed a detailed reply. During the course of hearing on the **I.A.No.10257/2015**, on 29th November, 2016, the appellant sought time to place a proposal for settlement which was placed before the trial court by way of affidavit of January, 2017 wherein also the appellant stated as follows:

“2. I say that I had received Rs.95 Lakhs on 31.08.2007, Rs.25 Lakhs on 17.11.2007, Rs.60 Lakhs on 29.12.2007 totalling to Rs.1.80 crores from the plaintiff for

the purchase of certain land parcels for the plaintiff.

xxx

xxx

xxx

4. *I say that **I am ready and willing to pay the amount received from the plaintiff for the purchase of land parcels on her behalf after deducting the amount which was paid by me to the Defendant which comes to (Rs.1.80 crores- 35 lakhs) Rs.1.45 Crores (Rupees One Crore Forty Five Lakhs Only)***”

(Emphasis supplied)

4. It is noteworthy that in the above affidavit, the appellant agreed to no timeline within which the amount would be paid. When queried by the Id. Single Judge about the manner in which the payment, which was undertaken to be made, would be made, the appellant remained evasive.

5. The demeanour of the appellant has been noted by the Id. Single Judge in the impugned judgment dated 15th February, 2017.

We extract hereunder the relevant portion thereof:

*“In the affidavit thus filed, there is **no indication as to the timeline** within which the defendant is ready and willing to **pay the said amount of money**. On this issue being raised, and the counsel for the defendant being asked to clarify, she was totally evasive, her response being that the defendant expects receipt of some monies by March-April of this year whereafter he would be agreeable to pay the above-mentioned amount by instalments. On being repeatedly asked to specify the amount of instalments, their number and the specific timelines, the defendant who is present in person and his counsel would not come*

with any clear response. The plaintiff's counsel submitted that outside the Court he had been told by the other side that the defendant would be making the said above-mentioned payment within one and half years to two years to which he is not agreeable."

6. Persuaded, therefore, by the conduct of the appellant on 29th November, 2016 as well as the evasiveness to make firm commitment regarding the manner in which the payment would be made on the 15th of February 2017, coupled with the admissions in the memorandum of understanding dated 18th March, 2011 wherein the appellant had admitted liability to pay ₹3,82,00,000/- with interest, (such calculations as having been made by the 31st of December 2010), by the impugned judgment dated 15th February, 2017, the Id. Single Judge has granted leave to defend the suit to the appellant upon making the deposit of the said amount of ₹3,82,00,000/- within a period of one month of the order. Further directions with regard to the manner in which the said amount would be disbursed/reserved has also been made in the impugned order.

7. We have today again queried from the appellant so as to give a firm date by which the principal amount of ₹ 1.80 crores would be deposited in Court. Learned counsel is unable to give any such statement or commitment.

8. Given the facts noted by the Id. Single Judge and keeping in view the conduct of the appellant who despite the absolute admission and commitment made as far back on 18th March, 2011, has not only

failed to make payment of such amount but is not inclined even today to give firm commitment in respect of the date(s) on which the principal amount would be deposited in the court, we are of the view that the appellant is not entitled to exercise of any discretion in its favour.

9. We may note that the Memorandum of Understanding dated 18th March, 2011 has not been challenged by the appellant and binds the parties.

10. We are of the view that the appellant has rightly been granted conditional leave to defend. There is no infirmity in the impugned order dated 15th February, 2017 passed by the ld. Single Judge.

This appeal and the accompanying applications are dismissed

ACTING CHIEF JUSTICE

NAVIN CHAWLA, J

MAY 17, 2017
mk