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

Decided on: 07.07.2017

+ **FAO(OS) (COMM) 134/2017**

DINESH GUPTA & ORS

..... Appellants

Through: Mr. Anil Sapra, Sr. Adv. with
Ms. Nandita Abrol, Ms. Vrishti Gupta, Mr. Kartik
Bhardwaj, Ms. Piyusha Singh and Mr. Jaideep
Singh, Advs.

versus

RAKESH KUMAR JAIN & ORS

..... Respondents

Through: Mr. A.K. Bajpai with Mr. Praveen
Gupta, Advs. for R-1.
Mr. Sachin Midha, Adv. for R-2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE S.P.GARG

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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Caveat No.606/2017

Learned counsel for the caveator has entered appearance.

Caveat stands discharged.

CM No.23526/2017 (*exemption*)

Allowed, subject to just exceptions.

FAO(OS) (COMM) No.134/2017

1. The appellants are aggrieved by a judgment of the Single Judge who affirmed the award of the Arbitral Tribunal dated 12.10.2015. The appellants were arrayed as respondents in the arbitration proceedings.

2. Briefly, the facts are that the first respondent in this appeal (hereafter referred to as “Jain”) entered into an agreement with the appellant group, for the sale of his shareholding in two companies i.e. Metcalfe Properties Pvt. Ltd. and Metcalfe Developers Ltd. (hereafter called “the companies”). The companies were not party to the agreement; they were with consent impleaded in the arbitration proceedings. They were incorporated with the primary object of development of land measuring 135 acres at Amritsar, Punjab. Jain’s claim was that in terms of the agreement (dated 13.01.2007), he was obliged to part with the shares held by him for a total sum of Rs.16.20 crores. The agreement spelt out the payment terms which were linked with the stages of development of the land. Concededly, Rs.58.30 lakhs was paid to Jain; the ninth respondent in the proceedings was a Chartered Accountant who was entitled to 2% of the amount (of Rs.16.2 crores). Complaining of default and breach of contract, Jain invoked the arbitration clause and claimed amounts in excess of Rs.41 crores (i.e. the balance under the agreement together with interest). The appellants resisted the claim. Urged principally that the claims were barred; they also set up an oral agreement in terms of which they had to receive a share proportionate to their capacity after the land was developed and the profits realized. The Tribunal after considering the oral and documentary evidence, partly accepted the objections to limitation, after rendering a finding that the

amount of Rs.10.37 crores, relatable to the period, which was the amount payable after development permission was granted in 2011, alone were admissible. The other claims towards Rs.6 odd crores were held to be time barred. The appellants' other objections on the merits were declined and the Tribunal granted in addition to the principal amount of Rs.10.37 crores, interest @ 18% p.a. from November, 2011 till the date of award and future/post award interest at the same rate. The appellants' objections under Section 34 of the Arbitration and Conciliation Act, 2015 were rejected by the impugned order.

3. Mr. Sapra, learned senior counsel for the appellants contends firstly that the claim, per se, was inadmissible because Jain had not parted with the shares. Highlighting the terms of the agreement, it was contended that at no stage did Jain, plead or show willingness to sell the shares and the corresponding there was a refusal on the part of the appellants to purchase the shares. In these circumstances, a simple claim for money, was not maintainable; rather the claimant could if at all, file a suit for specific performance. Since Jain did not do so, the Arbitral Tribunal fell into an error in directing payment in excess of Rs.10.37 crores with interest. It was submitted that this i.e. failure on the part of Jain to adopt the appropriate forum of action, went into the root of the matter and rendered the award patently erroneous in law. In support of this submission, Mr. Sapra relied upon portions of the written submissions made to the Arbitrator and also the objections urged in support of the petition under Section 34 of the Arbitration and Conciliation Act, 2015. It was secondly urged that the Tribunal – as well as Single Judge, committed an error in chopping and

segregating different periods of time within one agreement as constituting separate causes of action for payment of money. In this regard, it was highlighted that the relevant Articles i.e. Article 54 and Article 26 had to be seen in the context of the facts. Here the parties entered into a composite agreement, on 13.01.2007. That clearly delineated the respective obligations of both Jain and the appellants. Once Jain was aware that the appellants had allegedly defaulted, that date was the determinative point in time for fixing the period of limitation. The Tribunal – as well as the Single Judge, according to Mr. Sapra, fell into error in tracing the roots of the cause of action to the various dates of default, based upon separate conditions in the same contract. Such a fragmented view, according to him, is impermissible and in any event amounts to a patent error of law.

4. So far as the first submission in support of the appeal goes, the Court notices that no objection as to the form of the action i.e. its maintainability in the manner which is being argued was made before the Tribunal. The closest that the appellants reached to address this issue, can be seen in Paragraphs 6 to 8 of its reply (to Jain's claim). Paragraphs 6 to 8 read as follows:-

“6. That it is submitted that the claims as raised in the Claim Statement are time-barred and are liable to be rejected on this ground alone. It is further submitted that the claims raised in the Claim Statement are based on Agreement dated 13.01.2007 (which agreement besides being an inadmissible document, was in any case cancelled and substituted by a new understanding). Thus, though not admitting but even if it is assumed for the sake of arguments that the Agreement dated 13.01.2007 is valid and subsisting then also no claim can be based on the said

Agreement dated 13.01.2007 as the same are time-barred. The cock and bull story about alleged fraud by the Claimant's counsel is nothing but a fraud perpetrated by the Claimant on this Hon'ble Court, the Hon'ble High Court as well as the Respondents themselves so as to somehow extend limitation to the time barred claims of the Claimant. Therefore, the Claim Petition is liable to be dismissed forthwith on this ground alone only.

7. That it is submitted that the entire story set up for filing the present Claim Statement is false as the so called Agreement relied upon by the Claimant would itself show that no cause of action has arisen for filing of the Claim Statement. It is further submitted that the entire show of conspiracy has been set up at the behest of the Claimant and is a false and concocted story set up by the Claimant himself in connivance with his counsel and for this reason both the Claimant and the counsel are liable to be proceeded against for making false and purgatory averments and as such the Claim Statement is liable to be dismissed forthwith.

8. That it is further submitted that even if the contents of the Agreement are taken at the face value for the sake of arguments (and not admitting the agreement as such) the stage of making the payments has admittedly not even arrived. It is pertinent to mention herein that as per the said Agreement dated 13.01.2007 it was agreed between the parties that the payments as enumerated under the said Agreement were to become due and payable only after the License / Letter of Intent / Permission from the requisite authorities was obtained. It is well within the knowledge of the Claimant that on the date of filing of the petitions under Section 9 and Section 11 of the Arbitration Act the requisite License / Letter of Intent / Permission from the requisite authorities had not been obtained

and, therefore, no cause of action had arisen in favour of the Claimant herein to prefer the instant Claim Petition. It is further submitted that it is well within the knowledge of the Claimant that the Letter of Intent for the proposed project had been issued only on 01.07.2011 and the requisite License had been obtained only on 19.07.2011. Thus, no cause of action has arisen in favour of the Claimant and against the Non-Claimant entitling the Claimant to prefer the instant Claim Petition and on this ground alone the Claim Petition is liable to be dismissed.”

5. During the course of hearing in this appeal, counsel for the respondent/Jain submitted that there was no dispute about the liability to convey the shares to the appellants, in the light of the award – that even after the publication of the award and judgment of the Single Judge, letters in that regard were written. This Court is of the opinion that the objection urged in the present appeal (which does not find place in the reply submission or the defence before the arbitration proceedings) cannot be countenanced. As to the manner in which the plaintiff premises his claim depends upon or its judgment as to its tenability and soundness. The forum i.e. either the Court or the Arbitral Tribunal may take a decision having regard to the rival grievance. The appellant never set up the plea that without offering the shares Jain was disentitled to claimed amounts. In other words, there was no dispute or lis on this aspect. Such being the case, the question was whether on the basis of the understanding of the parties that shares were to be offered, the appellant, had breached the contract term not paying the sums agreed to within the time. In these circumstances, having regard to these facts, the submission that the form of the claim was improper and that the

claimant/Jain was disentitled to the amounts, is insubstantial. The plea is therefore rejected.

6. So far as the second argument addressed with respect to the claim being time barred goes, the Court notices that the agreement between the parties outlined the payments in terms of instalments. Crucially, the first payment was made by the appellant at the stage the agreement was entered into when Rs.58.30 lakhs was paid. The payment terms in the contract are as follows:-

“1) Total amount of Rs. 16 Crore lac shall be payable by First Party collectively to the second party as follows:

(a) That out of Rs. 16 Crores lac total value, the principal cost and interest i.e. capital account invested by second party till 31.12.2016 of their 15% shareholdings, i.e. their entire shareholding lying credited with Metcalfe Properties Pvt. Ltd. and Metcalfe Developers Ltd. comes to 583.00 lac will be payable by the first party to the second party as under:-

(i) Rs. 58.30 lac i.e. 10 percent of the Principal / Capital including interest amount of Rs.583.00 lac shall be paid by first party on or before 14.01.2007 by means of cheque in favour of Shri Rakesh Jain & Shri Mukesh Aggarwal or their nominee(s)

(ii) Rs. 291.50 lac i.e. 50 percent of the total capital amount of Rs.583.00 lac shall be paid by first party on or before 28.02.2007 by means of nominee(s). This amount of Rs.291.50 lac shall be paid after adjusting proportionate registration

charges which may come to the share of the Second Party in respect of the said land.

(iii) Rs. 233.20 lac i.e. 40 percent of the Capital amount of Rs.583.00 lac shall be paid by first party on or before 30.04.2007 by means of cheques in favour of Shri Rakesh Jain and Shri Mukesh Aggarwal or their nominee(s).

(b) Remaining balance of Rs.10.37 Cr. (out of Rs.16.20 Cr) as profit, in the fully paid land value of about 135 acres of land as mentioned above will be paid by the first party to Shri Rakesh Jain, Shri Mukesh Aggarwal or their nominee(s) by means of cheques in 4 equal instalments in the following manner:-

i) First instalment is payable by first party to second party by issuing cheques within 3 months from the date of launching of the project or 15 days after obtaining the license from the concerned authority whichever is earlier by Metcalfe Properties Pvt. Ltd. the tentative date of the launching of the project is about 28.2.2007.

ii) Second instalment is payable by first party to second Party by issuing cheques within six months of the launching of the project.

iii) Third instalment is payable by first party to second party by issuing Cheques within 9 months of launching of the project.

iv) Fourth and final instalment is payable of first party to the second party by issuing Cheque within 12 months of launching of the project.”

7. It is clear, therefore, that the payments under Clause 1(a), were different in nature and character from the payments in Clause (b). Clause (a) was connected with one set of events whereas Clause (b) was connected with the development of the land and the steps taken for launching the project. The Tribunal noted that this nuanced recognition of the payment obligation meant that the causes of action with regard to Clause (a) and Clause (b) were different. In this respect, the Court notices Article 26 and Article 27 of the Schedule to the Limitation Act, which read as follows:-

	Description of suit	Period of limitation	Time from which period begins to run
26.	For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.	Three years	When the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.
27.	For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.	Three years	When the time specified arrives or the contingency happens.

It is evident that when amounts are payable by agreement of the parties, on the happening of an event specified by them, the cause of action for the purposes of reckoning limitation arise on that point of time. In the present case, the cause of action for claiming the payments contemplated under Clause 1(b) of the contract arose in 2011. Therefore, in the opinion of this Court, the Tribunal was justified in holding that the claims vis-a-vis those amounts fall within the period of limitation. There is no error of law - patent or otherwise - which vitiates the award.

8. For the foregoing reasons, the Court sees no cause to interfere with the impugned judgment of the learned Single Judge.

The appeal is therefore dismissed.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

JULY 07, 2017
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