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

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Date of Decision: 05.09.2018

+ **CS(COMM) 387/2017**

M/S. VIC ENTERPRISES LTD.

..... Plaintiff

Through Mr.Sudhir K.Makkar, Sr.Adv. with
Ms.Meenakshi Singh and
Mr.Abhishek Chaudhary, Advs.

Versus

**M/S. AEREN R REALTY PROJECTS PVT. LTD
& ANR**

..... Defendant

Through Mr.Siddharth Bhatti, Mr.Rakshit
Srivastava and Mr.Harsh Kocker,
Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (Oral)

IA No.794/2018

This is an application for condonation of delay in re-filing the suit. For the reasons stated in the application same is allowed. The delay in re-filing the suit is condoned.

IA No.793/2018

1. This application is filed by the defendants seeking unconditional leave to defend the suit. The suit is filed for recovery of Rs.16,38,41,000/-. It is pleaded in the plaint that the plaintiff entered into a Buyer's Agreement dated 19.12.2013 with the defendant in terms of which defendant No.1 company agreed to sell to the plaintiff 23 residential flats/units measuring

approximately Rs.36,794 sq.ft. super area in a Group Housing Colony with the name 'Fortune Residency at Green Escape' to be developed by defendant No.1 at Sonapat, Haryana. Defendant No.2 was the confirming party in the said Buyer's Agreement dated 19.12.2013.

2. Pursuant to the said agreement dated 19.12.2013, the plaintiff paid a sum of Rs.8,05,00,000/- to defendant No.1. It is pleaded that in terms of the agreement dated 19.12.2013 defendant No.1 had agreed to sell to the plaintiff the said 23 flats. Against the said payment the plaintiff was given three different options. The three options available to the plaintiff in terms of the agreement are as follows:

“a. Option 1:

i. To receive an amount of Rs.2,48,00,000 (Rupees Two Crores Forty Eight Lakhs only) from the Defendant no. 1 company on 18.12.2014 on release of 6 flats for which the Defendant no. 1 Company had Issued a post dated cheque bearing no. "059725" drawn on IndusInd Bank dated 18.12.2014 for a sum of Rs.2,48,00,000 (Rupees Two Crores Forty Eight Lakhs only) by giving 45 days notice to the Defendant no. 1 company;

ii. To receive a further amount of Rs.3,07,52,000 (Rupees Three Crores Seven Lakhs Fifty Two Thousand only) from the Defendant no. 1 company on 18.12.2015 on release of 6 flats for which the Defendant no. 1 had issued a cheque bearing no. "059726" drawn on IndusInd Bank dated 18.12.2015 for a sum of Rs.3,07,52,000 (Rupees Three Crores Seven Lakhs Fifty Two Thousand only) by giving 45 days notice to the Defendant no. 1 company;

iii. To receive the remaining amount of Rs.7,72,00,000 (Rupees Seven Crores Seventy Two Lakhs only) from the Defendant no. 1 company on 18.12.2016 on release of 11 flats

for which the Defendant no. 1 company had issued a cheque bearing no. "059727" drawn on IndusInd Bank dated 18.12.2016 for a sum of Rs.7,72,00,000 (Rupees Seven Crores Seventy Two Lakhs only) by giving 45 days notice to the Defendant no. 1 company;

iv. If the Plaintiff did not exercise its right to receive payment on 18.12.2014 then the Plaintiff was entitled to receive an amount of Rs.3.07,52,000 on completion of 2 years from the date of execution of the Agreement.

b. Option 2:

To receive an amount of Rs.15,34,81.000 (Rupees Fifteen Crore Thirty Four Lakhs Eighty One Thousand only) from the Defendant no. 1 company on completion of 3 years from the date of this Agreement i.e. on or after 18.12.2016 and release all 23 flats in favour of the Defendant no. 1 company.

c. Option 3:

i. The Plaintiff had the option to take possession of all 23 flats on completion.

ii. That the Plaintiff had the full right to sell the flats on completion of one year from the date of execution of this Agreement i.e. on or after 18.12.2014 and for the remaining flats proportionate value could be received on completion of 3 years from Defendant no. 1 company in reference to Option 2.”

3. Option 2 envisaged receipt of Rs.15,34,81,000/- from defendant No.1 company on completion of three years from the date of the Agreement and release of all 23 flats in favour of defendant No.1.

4. The defendant No.2 stood guarantee for performance of the contractual obligations by defendant No.1. In the eventuality that the plaintiff exercised any one of the three options and defendant No.1 was

unable to pay defendant No.2, as a guarantor was to pay the said amount to the plaintiff. Defendant No.2 also issued the following post dated cheques:-

- a. Cheque no. "335861" drawn on Indusind Bank dated 18.12.2014 for Rs.2,48,00,000 (Rupees Two Crores Forty Eight Lacs Only);
- b. Cheque no. "335862" drawn on Indusind Bank dated 18.12.2015 for Rs.3,07,52,000 (Rupees Three Crores Seven Lacs Fifty Two Thousand Only);
- c. Cheque no. "335863" drawn on Indusind Bank dated 18.12.2016 for Rs.7,72,00,000 (Rupees Seven Crores Seventy Two Lacs Only)

5. It is pleaded that at the time of entering upon the agreement, it was represented to the plaintiff that construction of the project shall be completed within three years from the date of agreement. However, defendant No.1 was unable to commence the construction of the project. In fact, it appears that defendant No.1 has neither the requisite licence or clearance or permission for construction. Hence, the plaintiff exercised option No.2 as noted above. Defendant No.1 issued a cheque for Rs.15,34,73,000/- dated 31.12.2016. However, on presentation of the said cheque it was returned dishonoured for insufficient funds. Thereafter the plaintiff is said to have presented the cheque issued by defendant No.2 dated 18.12.2016 for a sum of Rs.7,72,00,000/-. The said cheque was also returned for insufficient funds. Hence, the present suit has been filed.

6. Defendants have filed this application seeking leave to defend. In the application, it is admitted that the plaintiff has paid a sum of Rs.8.05 crores at the time of booking of the flats. However, it is pleaded that the transaction between the parties was not just contingent on the project but was contingent in terms of the payment also. It is also pointed out that defendant No.1 and

Ansal Infrastructure Ltd. had entered into an agreement dated 23.10.2013 whereby Ansal Infrastructure Ltd. transferred developing rights to defendant No.1. Substantial amount was paid by defendant No.1 to the Ansal Infrastructure Ltd. as consideration. However, the said Ansal is said to have created hurdle/problems for defendant No.1 and hence the delay.

7. I have heard learned counsel for the parties. Learned counsel for the defendant has made the following submissions in support of his application seeking leave to defend:-

- (i) He relies upon clause 3 of the agreement to contend that in terms of the said clause 3 the plaintiff was obliged to give a notice of 45 days before he could encash the cheque of Rs.7,72,00,000/- As the plaintiff failed to do the needful the present suit filed against defendant No.2 on the said returned cheque would not lie. Hence, he submits that on this account leave to defend has to be granted qua defendant No.2.
- (ii) He further submits that the cheque which is relied upon by the plaintiff to file the present suit under Order 37 is for Rs.15,34,73,000/-. However, as per the agreement dated 19.12.2013 under option 2 the plaintiff was to get a sum of Rs.15,34,81,000/-. Hence he submits that there is variation in the amounts, namely, between the amount that was payable to the plaintiff under option 2 and the cheque which is relied upon by the plaintiff for filing a suit under Order 37 CPC. Hence, it is pleaded that leave to defend should also be granted to defendant No.1 as the matter would have to go to trial.
- (iii) It is also pleaded that under section 21 of the Transfer of

Property Act the present suit would not be maintainable.

8. I will now deal with the above contentions of learned counsel for the defendant. Clause 3 of the Agreement dated 19.12.2013 between the parties reads as follows:-

“3) In the event Buyer exercise any one of the above mentioned options and the Seller shall not able to pay back the amount on exercising of option available to the Buyer in that event the Confirming Party pay the amount to the Buyer as per the option exercised by the Buyer. To securitize the amount of Buyer Confirming party has issued following Post Dated Cheques in favour of Buyer.

- I. An amount of Rs.2,48,00,000/- (Rupees Two Crore Forty eight Lacs Only) from the Seller on 18.12.14 for which Seller has issued a post dated cheque no.335861 drawn on Indusind Bank dated 18.12.14 for Rs.2,48,00,000/- (Rupees Two Crore Forty Eight Lacs Only) by giving 45 days notice.
- II. An amount of Rs.3,07,52,000/- (Rupees Three Crore Seven Lacs fifty Two Thousand Only) from the Seller on 18.12.15 for which Seller has issued a post dated cheque no.335862 drawn on Indusind Bank dated 18.12.15 for Rs.3,07,52,000/- (Rupees Three Crore Seven Lacs Fifty Two Thousand Only) by giving 45 days notice.
- III. An amount of Rs.7,72,00,000/- (Rupees Seven Crore Seventy Two Lacs Only) from the Seller on 18.12.16 for which Seller has issued a post dated cheque no.335863 drawn on Indusind Bank dated 18.12.16 for Rs.7,72,00,000/- (Rupees Seven Crore Seventy Two Lacs Only) by giving 45 days notice.”

9. In terms of the above clause to securitize the amounts payable to the plaintiff defendant No.2 issued a post dated cheque in favour of the plaintiff for an amount of Rs.7,72,00,000/- for which 45 days notice had to be issued. Some other clauses of the Agreement may also be noted. The recital of the

agreement reads as under “And whereas the Confirming Party agreed to the buyer for the fulfilment of terms and conditions stipulated in this Agreement by the Seller and in any case Seller not fulfil any condition Confirming Party guarantees to get the same done on behalf of the Seller”

10. Clearly, the defendant No.2 has undertaken to guarantee the fulfilment of the terms and conditions of the agreement by defendant No.1. Defendant No.2 has also issued a post dated cheque in favour of the plaintiff. Hence, clearly the defendant No.2 is liable to pay the dues of the plaintiff in terms of the written agreement dated 19.12.2013.

11. Even otherwise, in my opinion, 45 days’ notice as stated in clause 3 of the agreement cannot said to be a mandatory requirement. Merely because 45 days’ notice was not given before presentation of the post dated cheque for Rs.7,72,00,000/- would not wash away the liability of defendant No.2 under the said agreement dated 19.12.2013. In terms of the agreement dated 19.12.2013 defendant No.2 remains liable for the dues of the plaintiffs even if the post dated cheque was sought to be encashed. There is hence no merit in the said plea of learned counsel for the defendant.

12. The second plea raised by learned counsel for the defendant was of discrepancy in the cheque issued by defendant No.1 and the amount stated in the agreement. The agreement states that under option 2 the plaintiff would get Rs.15,34,81,000/-. However, the cheque is for Rs.15,34,73,000/-. This variation does not in any manner help the defendants. The liability of the defendant would be in terms of the agreement which is of the higher amount. Merely because the cheque was less by a nominal figure does not make a difference in the liability of defendants.

13. Coming to the third contention of the learned counsel for the

Defendant, where he argued that the Buyer's Agreement dated 19.12.2013 was a contingent agreement and would come into existence only upon the re-commencement of the project contemplated therein. For this purpose, he has placed reliance on section 21 of the Transfer of Property Act, 1881 to contend that the interest of the non-applicant/Plaintiff in the flats was contingent on the happening of specified uncertain event, i.e., government approvals and consequently actual construction of the flats by the Applicant/Defendant.

14. Section 21 of the Transfer of Property Act, 1881 reads as follows:

“21. Contingent interest.—Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

(Exception) —Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.”

15. In this regard, it is important to note the observation of the Hon'ble Supreme Court of India in ***P.K Mohan Ram vs. B.N. Ananthachary & Ors.*** (2010) 4 SCC 161, where while discussing section 19 and 21 of the Transfer of Property Act, 1882, the Hon'ble Court held as follows:

“13. A reading of the plain language of the above reproduced sections makes it clear that an `interest can be said to be a vested interest where there is immediate right of present enjoyment or a present right for future enjoyment. An interest can be said to be contingent if the

right of enjoyment is made dependent upon some event which may or may not happen. On the happening of the event, a contingent interest becomes a vested interest.”

16. The Hon’ble Apex Court in *Usha Subbarao v. B.N. Vishveswaraiah, (1996) 5 SCC 201*, a matter concerning interpretation of a will to determine whether the interest created in favour of the sons of the testator was vested or contingent, *inter alia* held as follows:

17. Under the English law where a condition can be fairly read as postponing merely the right of possession or of obtaining payment, transfer or conveyance, so that there is an express or implied distinction between the time of vesting and time of enjoyment, the gift is held to be vested at the earlier date if the rest of the context allows. But where the postponement of the gift is on account of some qualification attached to the donee, the gift is prima facie contingent on his qualification being acquired. A gift to a person ‘at’, ‘if’, “as soon as”, ‘when’ or ‘provided’ he attains a certain age, without further context to govern the meaning of the words, is contingent and vests only on the attainment of the required age, this being a quality or description which the donee must in general possess in order to claim under the gift. But if the words of a gift express a distinction between the gift itself and the event denoting the time of payment, division or transfer, and this time is the attainment by the donee of the age of twenty-one years or other age or is any other event which, assuming the requisite duration of life, must necessarily happen at a determinable time, then prima facie the gift is not contingent in respect of that event. (See: Halsbury's Laws of England, 4th Edn., Vol. 50, paras 591, 592 and 604, at pp. 396, 397, 405.) The same is the position in India.”

17. The Plaintiff has filed the present suit after exercising its Option 2 in the Agreement. It is further important to note that the Plaintiff has relied upon the Agreement dated 19.12.2013 alongwith the cheque dated 31.12.2016 of Rs. 15,34,73,000/- issued by Applicant/ Defendant and filed

the present summary suit under Order XXXVII of the Code of Civil Procedure, 1908. The Agreement creates a clear and unambiguous “*in praesenti*” right in favour of the Applicant in so far as the same pertains to the moneys payable on the exercise of the options stated therein. On expiry of three years the plaintiff was entitled to claim the money as provided in option 2. Therefore, in such circumstances the defence that the Plaintiff has a contingent interest under the Agreement has no sanctity.

18. In the context of grant of leave to defend, the principles of law applicable are well known. The basic judgment in this regard, namely, ***Mechelec Engineers & Manufacturers vs. Basic Equipment Corporation, (1976) 4 SCC 687*** wherein the Supreme Court held as follows:-

“8. In *Kiranmoyee Dassi Smt v. Dr J. Chatterjee* [AIR 1949 Cal 479 : 49 CWN 246, 253 : ILR (1945) 2 Cal 145.] Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 17 CPC in the form of the following propositions (at p. 253):

“(a) If the defendant satisfies the court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses 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 defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case 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.

(d) If the defendant has no defence or the defence 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.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.”

19. In *Neetu Aggarwal vs. R.L.Gupta*,⁹⁵ (2002) DLT 167 this Court held as follows:-

11. The defendant is, as such entitled to leave to defend unconditionally if he has a good defense, a fair or bonafide or reasonable defense, or raises a tribal issue. But if the defendant has (1) no defense at all; or (2) defense is sham; or (3) illusory and practically moonshine he will not be entitled to the leave. In case the defense raised is plausible and may be established by evidence adduced during trial the leave may still be granted putting conditions as to time of trial or mode of trial but not on deposit of such amount or furnishing security. Even where the defense put forward by the defendant seems illusory or sham or practical moonshine, in appropriate cases depending upon the peculiar facts the leave may be granted to the defendant to prove his case imposing condition as to the security either by deposit of the amount claimed in the suit in the court or it is otherwise secured.

20. The perusal of the facts of the above case show that there is no merit whatsoever in the plea raised by the defendants. Receipt of Rs.8.05 crores is

accepted. Vague pleas are sought to be raised as to why the defendants are not liable to pay dues which have been dealt with as above. These pleas have absolutely no merits. It is manifest from the reading of the agreement dated 19.12.2013 and the application filed by the defendants that the defendants are liable to pay the plaintiff a sum of Rs.16,34,81,000/-. As the defence of the defendant is a sham, this application is dismissed.

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A decree is passed in favour of the plaintiff and against the defendants jointly and severally for a sum of Rs. Rs.16,38,41,000/-. The plaintiff shall also be entitled to interest @ 10% per annum from the date of filing of the suit till decree is passed. Plaintiff shall also be entitled to 10% simple interest per annum from the date of decree till recovery.

JAYANT NATH, J

SEPTEMBER 05, 2018/n