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

+ **CS(COMM) 40/2015 & I.As. 25605-25606/2015 & 8030/2016**

SOBHA LTD.

..... Plaintiff

Through: Mr. Amitabh Chaturvedi, Advocate
with Mr. Vaibhav Gulia, Advocate.

versus

NIHO CONSTRUCTION LTD.

..... Defendant

Through: Mr. Manish Kumar, Advocate.

Reserved on : 11th October, 2018

Date of Decision: 01st November, 2018

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CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J:

1. Present suit has been filed under Order XXXVII Rules 1 & 2 of the Code of Civil Procedure for recovery of Rs.7,85,00,000/- (Rupees Seven Crore Eighty Five Lacs Only) with pendente lite and future interest @ 18% per annum along with costs.

RELEVANT FACTS

2. The relevant facts of the present case are that a Memorandum of Understanding (hereinafter referred to as 'MoU') was executed between the parties on 19th October, 2012 for development of certain properties claimed

to be owed by the defendant-company. Under the MoU, Refundable Interest Free Advance (RIFA) of rupees five crores was paid by the plaintiff to the defendant-company in two installments of rupees one crore upon signing of MoU and rupees four crores on 29th October, 2012.

3. The MoU provided for carrying out due diligence by the plaintiff of the defendant-company's title over land and also stipulated that in case the report of due diligence was not to the satisfaction of the plaintiff, the defendant-company shall refund the amount of rupees five crores. The relevant clauses of the MoU are reproduced hereinbelow:-

<i>Due Diligence of the Title</i>	<i>Joint Development Agreement (JDA) will be executed with relevant clauses within 90 days from the date of signing of this MOU and during this period of feasibility of development of the Project on it. This period can be extended by mutual consent. NCL shall provide SDL all the relevant documents required within 15 days from the signing of this MOU, in order to complete the due diligence. This MOU stand superseded upon execution of JDA.</i>
<i>Refundable Interest Free Advance (RIFA)</i>	<i>Refundable interest Free Advance (RIFA) of Rs. 5 Crores will be paid by the SDL to NCL as under:</i> <i>a) Rs. 1.00 Crore at the time of signing of this MOU is paid in favour of Niho Construction Limited by cheque No. 016904 dated 19th October, 2012 drawn on Axis Bank and NCL acknowledges the receipt of the said amount.</i>

	<i>b) Rs. 4.00 Crore within a week of signing of this MOU.</i> <i>In case the report of the due diligence is not positive and is not to the satisfaction of SDL, then SDL by way of written notice may cancel this MOU and may seek refund of Rs. 5.00 Crore paid to NCL as RIFA alongwith any other amount that SDL may have paid NCL in relation to the Project. NCL shall return all such amounts within 45 days of the receipt of the said termination notice and on refund of such amount this MOU shall stand cancelled.</i>
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4. The defendant-company informed the plaintiff vide letter dated 2nd March, 2013, that it was not able to provide documents for due diligence and sought extension of validity of MoU till 16th July, 2013.

5. According to the plaintiff, as relevant documents for due diligence were never provided, the plaintiff sought refund of the amount from the defendant-company vide notice dated 29th October, 2013. Since the amount was not paid, the plaintiff initiated proceedings for winding up of defendant-company being Co. Pet. No. 27/2015 on 19th January, 2015.

6. The Company Court directed the Managing Director of the defendant-company to file an affidavit disclosing, inter alia, details of all debtors and creditors of the defendant-company. Mr. Jayprakash Mangtani, Director of the defendant-company filed his affidavit dated 17th December, 2015 disclosing details of debtors and creditors of the defendant-company vide Annexure I (Colly.) in which, under a list of refundable deposits

received for joint development, name of the plaintiff was reflected and the amount of debt owed was also reflected as rupees five crores.

7. The present summary suit for recovery was filed by the plaintiff on 14th December, 2015. I.A. 8030/2016 has been filed for leave to defend by the defendant-company.

ARGUMENTS ON BEHALF OF THE DEFENDANT/APPLICANT IN I.A. 8030/2016

8. Mr. Manish Kumar, learned counsel for the defendant-company submitted that the present suit under Order XXXVII CPC was not maintainable as the plaintiff had not filed/produced the original documents along with the plaint. He submitted that before issuing summons under Order XXXVII CPC, the plaintiff should have filed original documents. In support of his submission, he relied upon the judgment of the Supreme Court in **Neebha Kumar Vs. Jayantilal Khandwala & Ors., (2008) 3 SCC 770** wherein it has been held as under:-

“11. For the purpose of obtaining a summary judgment in terms of Order 37 of the Code, ordinarily the original documents must be produced. Original documents are not available. The appellant, therefore, is obligated to prove the loss of documents. Only because a suit has been entertained as a summary suit, the same by itself may not be a ground for passing of a judgment on mere asking. We have noticed the fact situation obtaining herein. The High Court was of the opinion that it is a case where unconditional leave should be granted. The question as to whether the defence of the respondents is “moonshine” or not was not a matter which required consideration of the High Court at that stage. A decree could not have been granted on the basis of even photostat copies of the documents. (See Food Corporation of India v. Dena Bank [AIR 2004 MP 158] .) Presumption in regard to a negotiable instrument or a bill of exchange in terms of Section

118 of the Act is also an evidence. It is true that a presumption can be raised that a bill of exchange was correctly stamped as provided for under Clause (f) of sub-section (2) of Section 128 of the Code but a decree is to be passed by a court of law upon application of mind.”

9. Mr. Manish Kumar further submitted that the interest amount claimed as part of the suit amount could not be the subject matter of a summary suit under Order XXXVII CPC in the absence of a specific provision stipulating the rate of interest. He pointed out that out of Rs.7.85 crores (Rupees Seven Crores Eighty Five Lacs Only) sought for in the present suit, Rs.2.85 crores (Two Crores Eighty Five Lacs Only) was pre-suit interest compounded @18% per annum by the plaintiff. He emphasized that there was no interest clause or stipulation of any rate of interest in the alleged MoU dated 19th October, 2012 or in any other written document executed between the parties.

10. Mr. Manish Kumar also submitted that the present suit was barred by limitation. He pointed out that it was the case of the plaintiff that the defendant-company had to provide the plaintiff with all relevant documents within fifteen days of signing of the MoU dated 19th October, 2012 in order to complete the due diligence. He stated that nowhere was it averred by the plaintiff in the plaint that the time was ever extended by the parties.

11. Mr. Manish Kumar emphasised that as per paragraph 14 of the plaint, the suit amount included interest calculated from the date of execution of the MoU. This claim, according to him, proved that the cause of action for filing the suit arose on 19th October, 2012. Therefore, he contended that the limitation for filing the suit, if any, started on 19th October, 2012 or, at best, on 04th November, 2012 and since the suit had been filed on 14th/15th

December, 2015 i.e. after expiry of three years, the same was barred by limitation.

ARGUMENTS ON BEHALF OF THE PLAINTIFF

12. Per contra, Mr. Amitabh Chaturvedi, learned counsel for plaintiff stated that the plaintiff had not filed the original MoU earlier as it had been filed in the Complaint Case No.129/1/2014 before the Court of Mr. Ankit Singla, learned Metropolitan Magistrate, Saket Courts, New Delhi. He, however, stated that the original MoU had since been filed and taken on record vide order dated 31st July, 2018. He submitted that in accordance with the Code of Civil Procedure and the Delhi High Court Rules, prevalent at the time of filing of the present suit, the original documents were not required to be filed at the stage of issuance of summons.

13. Learned counsel for the plaintiff submitted that reliance on *Neebhi Kumar* (supra) was misplaced inasmuch as in the said case the original document had been lost and was never placed on record.

14. Mr. Amitabh Chaturvedi, learned counsel for the plaintiff stated that without prejudice to its rights and contentions, the plaintiff was willing to give up the amount of the pre-suit interest i.e. Rs.2.85 crores (Rupees Two Crores Eight Five Lacs Only) and was ready to confine its claim to Rs.5 crores (Rupees Five Crores) along with pendente lite and future interest at such rate as this Court may deem appropriate.

15. Learned counsel for the plaintiff contended that the suit was not barred by limitation inasmuch as although the MoU was dated 19th October, 2012, the suit filed on 14th December, 2015 was within limitation because:-
(i) the suit is for refund of advance of Rs.5 crores (Rupees Five Crores),

which was refundable only upon a written notice cancelling the MoU and seeking refund of Rs.5 crores (Rupees Five Crores Only) and such refund was to be made within forty-five days of such cancellation/demand notice. Thus, according to him, cause of action for filing the suit for recovery of refundable amount arose for the first time only upon expiry of forty-five days from the cancellation/demand notice sent on 29th October, 2013, which expired on 13th December, 2013 and the limitation period would expire on 12th December, 2016.

16. In the alternative, he submitted that the validity period of MoU was ninety days, which expired only on 18th January, 2013 and limitation period would run till 17th January, 2016.

17. He also pointed out that the defendant-company had made a request on 02nd April, 2013 seeking extension of validity of the MoU till 16th July, 2013 and the said request was partly accepted by plaintiff's letter dated 22nd May, 2013, advising the defendant-company to submit the required documents along with Rs.53,39,712/- (Rupees Fifty Three Lacs Thirty Nine Thousand Seven Hundred Twelve Only) towards interest @ 18% p.a. on Rs.5 crores (Rupees Five Crores Only) within fifteen days and thus, the cause of action for seeking refund had clearly not arisen till 22nd May, 2013.

COURT'S REASONING

IT IS FIRST ESSENTIAL TO OUTLINE THE PRINCIPLES FOR GRANT/REFUSAL OF LEAVE TO DEFEND APPLICATION.

18. Having heard the learned counsel for the parties, this Court is of the view that, it is first essential to outline the principles for grant/refusal of leave to defend application. The Supreme Court in **IDBI Trusteeship**

Services Ltd. Vs. Hubtown Limited, (2017) 1 SCC 568 has laid down the following principles:-

"17.1. If the defendant satisfies the court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit.

17.2. If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend.

17.3. Even if the defendant raises triable issues, if a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.

17.4. If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5. If the defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith.

17.6. If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is

raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.

(emphasis supplied)

THE PRESENT SUIT BASED ON ADMITTED MOU, CHEQUES AND BALANCE-SHEET OF THE DEFENDANT COMPANY IS COVERED UNDER CLAUSE (2)(B)(I) OF RULE 1 OF ORDER XXXVII CPC. THIS COURT, VIDE A DETAILED ORDER DATED 26th FEBRUARY, 2016, WHICH HAS ATTAINED FINALITY, HAS HELD THAT THE PRESENT SUIT IS MAINTAINABLE UNDER ORDER XXXVII CPC.

19. In the present case, this Court finds that the MoU and the encashment of two cheques dated 19th October, 2012 for Rs.1 crore (Rupees One Crore Only) and 29th October, 2012 for Rs.4 crores (Rupees Four Crores Only) are not disputed. In fact, the principal amount of Rs.5 crores (Rupees Five Crores) sought to be recovered by the plaintiff has been acknowledged by the defendant-company in its balance-sheet as on 31st March, 2014 signed on 02nd September, 2014, as well as its list of creditors filed along with an affidavit dated 22nd July, 2015, in a winding up petition filed by the plaintiff against the defendant-company, being Co.Pet.27/2015.

20. This Court is of the view that the balance-sheet of the defendant-company amounts to an acknowledgement of debt and the present suit based on admitted MoU, cheques and balance-sheet of the defendant-company is covered under Clause (2)(b)(i) of Rule 1 of Order XXXVII CPC. A Coordinate Bench of this Court in **S.C. Gupta Vs. Allied Beverages Co. Pvt. Ltd., 2007 SCC OnLine Del 655** has held as under:-

"56. From the foregoing, it is evident that the balance sheets of the defendant company clearly amounted to acknowledgement of debt in the light of the principles laid down in the foregoing

judgments. In Daya Chand Uttam Prakash Jain v. Santosh Devi Sharma (supra), this Court has held that 'an acknowledgement' would amount to 'written contract' and that acknowledgement implies present liability with an obligation to pay. Such written acknowledgement satisfies all essential elements of a written contract.

57. I therefore, find force in the submission on behalf of the plaintiff that the suit based on the balance sheets of the defendant-company would by itself be maintainable and covered under Clause 2(b)(i) of Rule 1 of Order 37 of the Code of Civil Procedure, 1908."

21. In the present case, learned Predecessor of this Court, vide a detailed order dated 26th February, 2016, which has attained finality, has held that the present suit is maintainable under Order XXXVII CPC. The relevant portion of the said order is reproduced hereinbelow:-

"I have, therefore, proceeded to examine the case of the plaintiff as to whether or not the suit falls within the parameters of Order 37 CPC. The suit for recovery is premised on the fact that the parties had entered into a Memorandum of Understanding (MoU) on 19.10.2012 where under the plaintiff was to undertake development of certain properties of the defendant. The agreement itself provided that the plaintiff had to create refundable interest free advance of Rs. 5 crores in two instalments of Rs. 1 crore at the time of signing of the MoU and of Rs. 4 crore within a week of signing of the MoU. The agreement provided for carrying out of due diligence by the plaintiff of the defendant's title of the land over which the development had to be carried out and also provided that in case the report of the due diligence is not positive to the satisfaction of the plaintiff, the defendant shall refund the amount of Rs. 5 crore paid to the defendant upon a demand being raised by the plaintiff. The further case of the plaintiff is that the amount of Rs. 1 crore was paid to the defendant vide cheque dated 19.10.2012 bearing No. 016904 drawn in favour

of the defendant from the plaintiff's bank AXIS Bank, Palam Vihar, Gurgaon. The plaintiff has placed on record photocopy of the bank statements of the plaintiff's account with Axis Bank which shows that the amount of Rs. 1 crore was debited from the account of the plaintiff on 22.10.2012. Similarly, payment of Rs. 4 crores was made vide cheque bearing No.016978 dated 29.10.2012 in favour of the defendant and the said amount was also debited from the account of the plaintiff on 01.11.2012. The plaintiff has also drawn attention of the Court to the communication received from the defendant informing that it was not able to provide the documents necessary for conduct of due diligence by the plaintiff and, consequently, sought extension of validity of the MoU till 16.07.2013 vide letter of 02.03.2013. The plaintiff states that despite the aforesaid, due diligence was never provided to the plaintiff. Consequently, the plaintiff sought the refund of the amount from the defendant on 29.10.2013. Since the amount was not paid, the plaintiff also initiated proceedings for winding up of the defendant company and in Company Petition No. 27/2015, the Company Court directed the Managing Director of the defendant company to file an affidavit disclosing, inter alia, the details of the debtors and creditors of the defendant company with their complete addresses. In compliance of these directions, Mr. Jayprakash Mangtani, one of the Directors of the defendant company, filed his affidavit disclosing the details of debtors and creditors of the defendant company with their complete addresses vide Annexure I (Colly.). Attention has been drawn to the said annexure filed by the defendant along with the said affidavit, which discloses the details of refundable deposits received from parties for joint development of lands. In the said list, the name of the plaintiff is reflected and the amount of debt owed is also reflected as Rs. 5 crores. Learned counsel for the plaintiff submits that since the plaintiff only seeks to recover a debt i.e. a liquidated demand of money payable by the defendant with interest arising out of a written contract, the suit is maintainable under Order 37 CPC. I am satisfied that the present suit is maintainable under Order 37 CPC."

22. Consequently, as the plaintiff only seeks to recover a debt i.e. a liquidated demand of money payable by defendant-company arising out of a written contract, the present suit is maintainable under Order XXXVII CPC.

DEFENCE OF ABSENCE OF ORIGINAL DOCUMENT DOES NOT SURVIVE AS THE PLAINTIFF HAS FILED THE ORIGINAL AGREEMENT AND THE SAME HAS BEEN TAKEN ON RECORD VIDE ORDER DATED 31st JULY, 2018

23. This Court is further of the opinion that the defence of absence of original document i.e. MoU dated 19th October, 2012 does not survive as the plaintiff has filed the original agreement and the same has been taken on record vide order dated 31st July, 2018.

24. This Court is of the opinion that the judgment in **Neebhi Kumar** (supra) does not apply as in the said case the original document had been lost and was never traced, whereas in the present case the original agreement has been filed by the plaintiff. Further, a Coordinate Bench of this Court in **S.M.V. Agencies Private Limited Vs. Cross Country Heritage Hotel & Anr., 2013 (137) DRJ 170** has held "As far as the dicta of the Supreme Court in **Neebha Kapoor** (supra) is concerned, it was a case where original document on which suit under Order 37 of CPC was filed was not available till the date of consideration of the application for leave to defend. What the Supreme Court held in that case was that the Court can always refuse to exercise its discretion as the original documents were not produced and can call upon the plaintiff to prove that the documents are lost. In the present case, the copy of the contract on which the suit is filed was filed along with, the suit and original has been filed along with the

reply to the application for leave to defend and about the genuineness of which there is no doubt. Thus, the said objection also has no merit."

THE ADVANCE OF RUPEES FIVE CRORES (RUPEES ONE CRORE ENCASHED ON 22nd OCTOBER, 2012 AND RUPEES FOUR CRORES ENCASHED ON 1st NOVEMBER, 2012) WAS NOT REFUNDABLE UPON EXPIRY OF FIFTEEN DAYS FROM THE MOU, BUT UPON EXPIRY OF FORTY FIVE DAYS FROM THE CANCELLATION/DEMAND NOTICE. FURTHER THE CAUSE OF ACTION TO RECOVER WOULD ONLY ARISE WHEN THE LOAN/ADVANCE IS RECALLED AND NOT WHEN LOAN IS GIVEN

25. This Court is of the view that defendant-company's contention that limitation for filing the present suit would expire on 3rd November, 2015, because all the relevant documents had to be furnished within fifteen days of signing of the MoU dated 19th October, 2012 in order to complete the due diligence, is contrary to facts and is thus untenable in law.

26. In fact, the cause of action could not have arisen on 4th November, 2012 (when fifteen days period from the of MoU dated 9th October, 2012 expired) inasmuch as the advance of Rupees Five Crores (Rs.1 Crore encashed on 22nd October, 2012 and Rs. 4 Crores encashed on 1st November, 2012) was not refundable upon expiry of fifteen days from the MoU, but was refundable upon expiry of forty five days from the cancellation/demand notice. Since the cancellation/demand notice had been issued on 29th October, 2013, the forty-five days period therefrom expired on 12th December, 2013, the present suit filed on 14th December, 2015, is within limitation.

27. Further, the defendant-company's contention that as the plaintiff is claiming interest from 19th October, 2012 on the advance amount, therefore, cause of action would arise on 19th October, 2012 and limitation would start

running from the said date, is misconceived because if such a contention is to be accepted, then no creditor who had given a loan/advance on a given date would be able to recover such loan/advance or unpaid part thereof after three years from the date of giving of such advance irrespective of the fact that the loan/advance was repayable after three years and/or had been recalled after three years. This Court is of the opinion that the cause of action to recover would only arise when the loan/advance is recalled and not when loan is given. Thus, the present suit is clearly within limitation.

28. The defence of pre-suit interest amount also does not arise for consideration as the plaintiff has given up the said claim.

SINCE THE LEAVE TO DEFEND RAISES NO GENUINE TRIABLE ISSUE, THE APPLICATION FILED BY THE DEFENDANT-COMPANY BEING I.A. 8030/2016 IS DISMISSED

29. As the loan amount of Rs.5 crores (Rupees Five Crores Only) stands admitted and the leave to defend raises no genuine triable issue, the application filed by the defendant-company being I.A. 8030/2016 is dismissed.

HOWEVER THE PLAINTIFF IS HELD ENTITLED TO PENDENTE LITE AND FUTURE INTEREST

30. However, in accordance with the judgment of this Court in *S.C. Gupta* (supra) and *M/s Brakewel Automotive Components (India) Pvt. Ltd Vs. M/s Karpagga Brakewel & Ors., 2011 SCCOnLine Delhi 392*, the plaintiff is held entitled to pendente lite and future interest. The relevant portion of the said judgments are reproduced hereinbelow:-

A) **S.C. Gupta** (supra) :-

"69. So far as interest is concerned, there is no claim of pre-suit interest. The plaintiff has prayed for pendente lite and future interest at the rate of 18% per annum. It is well settled that the power to grant pendente lite and future interest vests in the Court under Section 34 of the Code of Civil Procedure and certainly there can be no prohibition to the maintainability of the present suit on the ground that the plaintiff has incorporated a prayer for pendente lite and future interest."

B) **M/s Brakewel Automotive Components (India) Pvt. Ltd** (supra)

"10. The plaintiff has claimed interest at the rate of 18% per annum. The plaintiff has claimed interest on the basis of practice, usage, custom as well as contractual obligation of the defendant. In any case, since this is a suit for price of goods sold and delivered, interest can also be awarded to the plaintiff under Section 61 of Sale of Goods Act. Considering the nature of transaction between the parties, I am of the view that interest should be awarded at the rate of 12% per annum. Amount of interest at the rate of 12% per annum comes to Rs. 6,88,346/-...."

RELIEF

31. Consequently, for the reasons stated above, the present suit is decreed for Rs. 5 Crores (Rupees Five Crores) along with pendente lite and future interest @8% per annum. This Court may mention that it is awarding the interest @8% per annum as that is the normal rate at which the banks are lending monies now-a-days. Registry is directed to prepare a decree sheet accordingly.

MANMOHAN, J

NOVEMBER 01, 2018

js/rn