$~46

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

\+ FAO(OS) (COMM) 124/2019, CM APPL. 25599/2019

M/S ALLIED MOTORS LTD ..... Appellant

Through: Ms. Diya Kapur and Mr. Rohan Poddar, Advs.

versus

NITIN JAISWAL & ORS ..... Respondents

Through: Mr. Mukul Talwar, Sr. Adv. with Mr.Sunil Kumar, Mr. Ankit Dixit, Mr. Hansraj, Ms. Pallavi Saigal and Mr. Surender Kr. Advs.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% 22.10.2019

1. We have heard the learned counsel for the appellant as well as the learned senior counsel for the respondent Nos. 1 and 2, who are the contesting respondents before us and we proceed to dispose of the present appeal. The present appeal is preferred against the order dated 13.12.2018 passed by learned Single Judge in I.A. No.2927/2018 preferred by respondent Nos. 1 and 2 (the plaintiffs) under Order 13A CPC, seeking pronouncement of summary judgment against the appellants/defendants and other defendants. The Learned Single Judge had directed the appellants/ defendants Nos. 1,3,4 and 5 to deposit Rs. 1,97,27,525/- within six weeks in the court.

2. The respondents /plaintiffs have filed a suit for recovery of Rs. 17,91,00,750/- apart from other reliefs. The case of the plaintiffs is that they

had entered into an agreement with the defendants for the purpose of acquisition of shareholding of M/s Allied Motors Ltd. The claim of the Plaintiffs is that they have paid the aforesaid amount of Rs. 17,91,00,750/- under the agreement. So far as the defendant Nos. 1, 3, 4 and 5, who are appellant before us are concerned, an amount of Rs.4. 91 crores was initially paid and the same is also acknowledged by the said defendants/appellants in their MoU dated 05.12.2014.

3. The case of the plaintiffs is that a further amount of Rs. 2 crores was paid to the appellants, which has been acknowledged by them. Out of the said amount, Rs. 1crore was paid by cheques of Rs. 60 lacs and Rs. 40 lacs respectively, and further an amount of Rs. 1crore was paid in cash.

4. Mr. Talwar, learned senior counsel for respondent Nos. 1 and 2 points out that on the reverse of the last page of the MoU, a hand written receipt was drawn up and executed on behalf of the appellants in respect of an amount of Rs.2crore - Rs. 1 crore in cheque and Rs.1crore in cash, which document has been admitted by the appellant/defendants in the course of the admission/denial of documents vide their affidavit of admission/denial dated 10.04.2018. Thus, it is beyond any dispute that an amount of Rs. 6.91crores stands paid to the appellants/defendants under the MoU.

5. The MoU stands terminated and the respondents/plaintiffs have consequently preferred the aforesaid suit to seek recovery of the amount paid under the said MoU to all the defendants. The defence of the appellants, taken in their written statement, is that they have forfeited the amount of Rs.

4.93 crores in terms of Clause 4 of the MoU which reads as follows;

> "(4) That if the balance of Rs.35.195 crores has not been received from NJ. & SJ and AGA on or before 26th December, 2014 the said MOU would be considered as cancelled and Rs.4.93 crores as received from NJ & SJ to RTA would be considered as forfeited by RTA"

6. Further, the defence of the appellants is that since they have suffered damages, they have forfeited the remaining amount received from the plaintiffs.

7. The learned Single Judge, while passing the impugned order, has found that the appellants/ defendants had claimed forfeiture of Rs. 4,93,73,225/- in terms of the MoU and in respect of the balance amount of Rs.1,97,27,525/-, forfeiture is claimed towards damages on account of breach of contract. The learned Single Judge has passed the impugned order directing the appellants/defendants Nos. 1, 3, 4 and 5 to deposit in the Court an amount of Rs.1,97,27,525/- within six weeks.

8. The submission of learned counsel for the appellant is that the learned Single Judge had passed an order of injunction under Order 38 Rule 5 CPC to restrain the appellants/defendants from dealing with their property. An application to seek vacation of the said order of injunction was pending before learned Single Judge. She points out that on 13.12.2018- the date on which impugned order was passed, the plaintiffs' application under Order 38 Rule 5 CPC i.e. I.A. 5811/2017 was adjourned to 31.01.2019. She further points that the application on which the impugned order came to be passed,

was listed on 31.01.2019 i.e. after the impugned order was purportedly passed, and the same was also adjourned for 23.04.2019. She submits that on 13.12.2018, two orders could not be passed i.e. one – adjourning the I.A. 5811/2017 to 31.01.2019, and the other disposing of the application of respondents/Plaintiffs i.e. I.A. 2927/2018. The learned counsel submits that there could not be two restraint/ injunctive orders passed against the appellants.

9. Mr. Talwar, learned senior counsel for the respondents/ plainitffs submits that the appellants have neither filed a counter claim, nor a separate suit to claim damages. He further submits that, in fact, the respondents/plaintiffs are also aggrieved by the impugned order inasmuch, as, the learned Single Judge has directed deposit of amount of Rs. 1,97,27,525/- in the Court, whereas a decree should have been passed in respect of said amount in favour of the respondents/plaintiffs. He submits that respondents/plaintiffs have also filed a separate appeal i.e. FAO (OS) (C) 165/2019 which is also listed today before this Court for admission.

10. Having heard the learned counsels, we are not inclined to interfere with the impugned order in this appeal preferred by the appellant. There is no dispute that the appellants entered into the aforesaid MoU, which has fallen through. It is not in dispute that the appellants have received Rs. 6.91 Cr from the respondents/plaintiffs under the said MoU. The MoU in Clause 4 provides that the balance of Rs. 35.195 crores, if not received from the purchasers on or before 26.12.2014, which was eventually amended to 30.04.2015, then the said MoU would be considered as cancelled and the

amount of Rs.4.93 crores as received from the purchasers would be considered as forfeited.

11. Keeping in view, the position in law and taking note of by the learned Single Judge as emerging from ***Kailash Nath Associates v. Delhi Development Authority and Another,*** (2015) 4 SCC 136 and ***Satish Batra v. Sudhir Rawal,*** 2012 (132) DRJ 705, at the highest, the appellants/defendants may if they are able to establish sufferance of damages or losses, claim entitlement to forfeit to a maximum of Rs.4.93 crores, and no more. Thus, they are not entitled to retain, during the pendency of the suit, any amount over and above the amount of Rs.4.93 crores that they have received.

12. So far as the claim of the appellants/defendants towards damages is concerned, we find that the appellants have neither filed a counter claim, nor filed a separate suit to claim the said damages. Claim for damages has to be set up in the capacity of a plaintiff, and the same has not been done within the period of limitation. The said limitation has lapsed, since the forfeiture took place in the year 2015. We may also take note of the decision in ***M/s Shakti Residency Pvt. Ltd v. Sanjeev Anand and Another,*** FAO (OS) 9/2017 decided on 01.07.2019 wherein, in similar circumstances, this Court directed the seller to deposit the amount in the Court which was in excess of the earnest money deposit. The submission that the application was disposed of on 13.12.2018 and yet listed thereafter is of no avail. That appears to be merely a clerical error on the part of the Registry. The direction to deposit the aforesaid amount, and the injunction which would be relatable to the

power under Order 39 Rules 1 & 2, CPC are not mutually irreconcilable. That is because, the appellants cannot retain the said amount of Rs. 1,97,27,525/- in any event. The injunction is necessary, since a large claim has been made by the respondents/ plaintiffs and the Ld. Single Judge has found a prima facie case, balance of convenience and irreparable loss and injury in case the injunction is not granted in favour of the respondents/ plaintiffs. Accordingly, we find no merit in this appeal and appeal stands dismissed.

VIPIN SANGHI, J

SANJEEV NARULA, J

OCTOBER 22, 2019

Pallavi