

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 10th May, 2019

+ CS(COMM) 141/2016, IA No.4324/2019 (u/O VI R-17 CPC),
IA No.14020/2016 (u/O XII R-6 CPC), CC(COMM)
No.24/2017, OA Nos.65/2017 & 71/2017 & IA No.1483/2017
(u/O VII R-11(a)&(d) CPC)

AMBAWATTA BUILDWELL PVT LTD Plaintiff

Through: Mr. Pardeep Dhingra, Adv.

Versus

IMPERIA STRUCTURE LIMITED & ORS Defendants

Through: Mr. Rohit Gandhi and Mr.
Rohan Ahuja, Advs.

Mr. Rohit Ghosh, Adv. for D-6.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. On 17th December, 2018, when various applications pending in this Suit and Counter Claim were listed for hearing, the following order was passed:-

“IA No.14020/2016 (of the plaintiff under Order XII Rule 6 CPC), OA No.65/2017 along with IA No.4303/2017 (for condonation of delay of 13 days in filing the Chamber Appeal), OA No.71/2017, IA No.4764/2017 (for condonation of delay of 15 days in filing the Chamber Appeal) and IA No.1483/2017 (of the plaintiff under Order VII Rule 11 of the CPC for rejection of counter-claim)”

3. The counsel for the plaintiff and the senior counsel for the defendant no.1 have been heard.

4. The plaintiff has instituted this suit for recovery of Rs.1.85 crores claimed to have been paid by the plaintiff to the defendant no.1 under a document dated 2nd

November, 2012 titled “Re-purchase Agreement”.

5. The senior counsel for the defendant no.1 on enquiry has stated that the defendant no.1 does not controvert the receipt of Rs.1.85 crores from the plaintiff.

6. The Re-purchase Agreement inter alia provides that, (i) under the Memorandum of Understanding (MOU) dated 26th November, 2010 between the defendant no.1 and Krish Realtech Pvt. Ltd. (KRPL), defendant no.1 had agreed to purchase about 10,000 sq. yds. of land being developed by KRPL and defendant no.1 under the Re-purchase Agreement had agreed to sell out of the said 10000 sq. yds. of land, 2490 sq. yds. to the plaintiff; and, (ii) out of the agreed sale consideration under the Re-purchase Agreement, the plaintiff had paid Rs.1.20 crores to the defendant no.1 at the time of signing of the Re-purchase Agreement and another amount of Rs.4.55 crores was to be paid by the plaintiff to the defendant no.1 and the balance considered was to be paid by the plaintiff directly to KRPL.

7. The case of the plaintiff, is that since the sale was not completed, the plaintiff is entitled to refund of Rs.1.85 crores from the defendant no.1.

8. On enquiry, it is told that the said amount of Rs.1.85 crores is described in the agreement as part sale consideration.

9. At this stage, the senior counsel for the defendant no.1 states that the defendant no.1 admits receipt of Rs.1.20 crores only and does not admit the receipt of Rs.65 lac.

10. The counsel for the plaintiff states that the defendant no.1 has admitted receipt of the said Rs.65 lac from the plaintiff in the FIR lodged by the defendant no.1 against KRPL.

11. The senior counsel for the defendant no.1 states that the same is an error in the FIR.

12. On enquiry, whether any corrective steps have been taken, the senior counsel for the defendant no.1 states that it is pleaded so in the written statement in this suit but he is not aware whether any steps have been taken for correction of the error in the FIR.

13. Be that as it may, I have enquired from the senior counsel for the defendant no.1, whether not the Re-purchase Agreement mentions 'earnest money' anywhere.

14. The senior counsel for the defendant no.1 agrees that there is no provision therein for 'earnest money' or 'forfeiture'.

15. The argument of the senior counsel for the defendant no.1 is, that (i) it is a 'financial transaction'; (ii) the plaintiff was introduced to the defendant no.1 by KRPL only, with whom the defendant no.1 had entered into the MOU dated 26th November, 2010; (iii) in the entire transaction, the defendant no.1 was to get only the difference in the price between what the defendant no.1 had agreed to pay to KRPL and what the plaintiff had agreed to pay to the defendant no.1; and, (iv) since KRPL has not performed its part of the MOU dated 26th November, 2010, the defendant no.1 has made a Counter Claim in this suit against the plaintiff and KRPL for recovery of Rs.4.55 crores.

16. However, on specific enquiry, whether the defendant no.1 has sued for specific performance of MOU dated 26th November, 2010, the answer is in the negative and it is stated that the defendant no.1 has claimed only a money decree.

17. The Chamber Appeals have been preferred by the plaintiff and KRPL against the order dated 1st February, 2017 of the Joint Registrar allowing the application of defendant no.1 for impleadment of KRPL as a party to this suit.

18. IA Nos.4303/2017 and 4764/2017 for condonation of delay of 13 days and 15 days respectively in filing the

respective chamber appeals are allowed by condoning the delay for the reasons stated.

19. *The plaintiff has filed IA No.1483/2017 for rejection of the counterclaim of the defendant as barred by time.*

20. *The senior counsel for the defendant no.1 states that it is inter alia the defence of the defendant no.1 that the suit claim is also barred by time.*

21. *Prima facie, subject to the aspect of limitation, it appears that (i) the defendant no.1 is liable to forthwith refund the monies admitted to be received from the plaintiff; (ii) the defendant no.1 having admitted receipt of Rs.65 lac from the plaintiff in the FIR, cannot now be permitted to wriggle out of the said admission on the specious plea of error in the FIR; (iii) the counterclaim as made is not maintainable; (iv) attention of the senior counsel for the defendant no.1 is drawn to the dicta of the Supreme Court in **Kailash Nath Associates Vs. Delhi Development Authority** (2015) 4 SCC 136 followed in **Palm Art Apparels Vs. Enkay Builders** MANU/DE/3533/2017, **V.B. Roy Vs. Ravindra Kishore Sinha** 2017 SCC OnLine Del 10924 and **Satish Verma Vs. Garment Gift (India) Pvt. Ltd.** 2018 SCC OnLine Del 6829.*

22. *In fact, the senior counsel for the defendant no.1 has stated that the defendant no.1 is not claiming forfeiture but is claiming recovery under the Counter Claim.*

23. *It also appears that merely because a Counter Claim has been made would not be a ground for not allowing the suit claim forthwith if were to be allowed. Merely because the defendant makes a Counter Claim cannot result in a suit being put to trial if otherwise not required to be put to trial.*

24. *I have perused the FIR aforesaid at page 29 of the defendant's documents. The same describes KRPL and Amit Katiyal as accused and Ashish Bhandari as the*

complainant.

25. The senior counsel for the defendant no.1, on enquiry states that Ashish Bhandari was an employee of the defendant no.1 and Amit Katiyal is the Director of KRPL.

26. A perusal of the FIR indicates that the complaint was given in writing. However, the said written complaint has not been produced and the senior counsel for the defendant no.1 states that the same shall be filed by 21st December, 2018 with advance copy to the counsel for the plaintiff.

27. The defendants no.2 to 5 are the Directors of the defendant no.1 and the senior counsel represents all the defendants.

28. On enquiry as to which Director of the defendant no.1 has been dealing with the subject transaction, the senior counsel for the defendant no.1 states that defendants no.2 and 3 have been dealing.

29. The defendants no.2 and 3 to appear on the next date of hearing.

30. It is also the contention of the senior counsel for the defendant no.1 that plaintiff and defendant no.1 have common Directors and have transferred licences to each other.

31. List for hearing on the aforesaid aspects on 6th March, 2019.”

2. Thereafter on 6th March, 2019, the following order was passed:-
 1. *This order is in continuation of the earlier order dated 17th December, 2018.*
 2. *The counsels have been heard further.*
 3. *The counsel for the defendants states that it is the case of the defendants that the defendants are not liable for refund of Rs.1.20 crores for the reason that the transaction contained in the Re-purchase Agreement is a concluded transaction and*

nothing remained to be done by the defendants thereunder.

4. *The Re-purchase Agreement filed by the defendants themselves is as under:*

“RE-PURCHASE AGREEMENT

This re-purchase agreement (“**Agreement**”) is made and executed at New Delhi in this 2nd November 2012, Between:

Imperia Structures Limited, a company duly incorporated under the Companies Act, 1956, having its office at A-25, Mohan Cooperative Industrial Estate, New Delhi-110044 acting through Mr. Harpreet Singh Batra, Director (hereinafter referred to as “**Imperia**”, which expression shall unless repugnant to the meaning or context hereof be deemed to mean and include its successors and permitted assigns) of the FIRST PART.

AND

AMBAWATTA Buildwell Pvt. Ltd. a company duly incorporated under the Companies Act, 1956, having its office at 267 Chattarpur Mehrauli, New Delhi acting through Mr. Vinod Kumar, authorized representative (hereinafter referred to as the “**AMBAWATTA**”, which expression shall unless repugnant to the meaning or context hereof be deemed to mean and include its successors and permitted assigns) of the SECOND PART.

WHEREAS:

A. Under MOU dated 26th November 2010 entered into between **Imperia Structures Limited** and **Krrish Realtech Private Limited** (“**MOU**”), Imperia had purchased residential plots of different sizes totalling to 10,000 square yards in the Project at Sector 62, 63 at Gurgaon, Haryana at the rate of Rs.29,200 per square yard (excluding EDC/IDC/Government charges/taxes) wherein total payment of Rs.11,70,000.00/- (Rupees Eleven Crores and Seventy Lacs Only) was made by Imperia to Krrish;

B. Under this agreement Imperia has agreed to sell to **AMBAWATTA** and **AMBAWATTA** has agreed to purchase from Imperia certain residential plots of different sizes totalling to 2490 square yards in the Project at a price of Rs.42,000 per Square yard upon terms and conditions set forth herein;

C. Pursuant to this agreement, Imperia shall be left with residential plots of different sizes totalling to 7510 square yards only in the Project under the MOU out of which Imperia has entered Re-purchase agreement with ABW for some residential

plots of different sizes totalling to 4,000 square yards in the Project, The remaining consideration payable by ABW to Krrish for the 4,000 square yards Plots shall be Rs.7,00,00,000/- (Rupees Seven Crores only) AND also entered MOU with Krish for repurchase of some residential plots of different sizes totalling to 1,510 square yards in the Project. Imperia has received the complete payment against the agreement mentioned under this clause;

D. Pursuant to above said agreements, Imperia shall be left with residential plots of different sizes totalling to 2000 square yards only in the Project under the MOU;

NOW THE PARTIES HERETO AGREE AS UNDER:

1. Payment to Imperia

The total consideration payable by **AMBAWATTA** to Imperia under this re-purchase agreement shall be Rs.5,75,00,000/- (Rupees Five Crore and seventy five lacs Only) out of which Rs.1,20,00,000/- (Rs. One Crore twenty lacs only) has been paid to Imperia by **AMBAWATTA** as detailed below:

- (i) Rs.70,00,000/- (Rs. Seventy Lacs only) through Cheque number 832281 dated 31-10-2012 drawn on Syndicate Bank, Main Road, Chattarpur, New Delhi
- (ii) Rs.50,00,000/- (Rs. Fifty lacs only) in Cash
- (iii) The Balance payment of Rs.4,55,00,000/- (Rupees Four Crores and Fifty Five Lacs Only) Shall be made by **AMBAWATTA** to **Imperia** within 30 days of this agreement i.e. on or before 1st December, 2012.

2. Payment To Krrish by AMBAWATTA

The remaining payable consideration of Rs.4,70,80,000/- (Rs. Four Crore seventy lacs & eighty thousand only) will be paid by **AMBAWATTA** to Krrish directly in future.

3. **AMBAWATTA** to sign the MOU **AMBAWATTA** agrees that the said basic sale price of the plots shall be exclusive of any External Development Charges, Internal Development Charges and all other statutory fees / expenses / taxes and any PLC which shall be paid additionally to Krrish. All remaining payments for the 2490 sq. yard Plots shall be made by **AMBAWATTA** to Krrish in accordance with any separate MOU, the allotment letters and the flat buyer agreements issued by Krrish to **AMBAWATTA** in future.

4. For remaining area of 2000 square yards terms

mentioned in MOU dated November 2010 between **Imperia Structures Limited** and **Krrish Realtech Private Limited**, shall remain valid and Imperia will get plots measuring 240, 360, 500 Sq Yards in proportion of 40:40:20 and Imperia will be free to deal with and / or sell in market 2000 square yards area in any manner it deems fit.

5. **AMBAWATTA shall be free to deal with and / or sell in market 2490 sq. yards in any manner it deems fit after making balance payment of Rs.4,55,00,000/- (Rupees Four Crores and Fifty Five Lacs Only) to Imperia.**

6. Imperia has paid Rs.34,00,000/- (Rs. Thirty four Lacs only) in cash to Krrish towards the EDC/IDC charges against the area of 2000 Sq. yard which has been retained by Imperia and the same is duly acknowledged by Krrish.

7. The terms and conditions of this agreement has been confirmed by Krrish.

IN WITNESS WHEREOF the Parties have caused this Re-Purchase Agreement to be duly executed by their duly authorised representatives as of the date and year first hereinabove written:

Sd/-

IMPERIA

Sd/-

AMBAWATTA

Sd/-

KRRISH

WITNESSES:"

5. *The counsel for the defendants argues that under the agreement aforesaid, the rights of the defendant no.1 in the property subject matter of Re-purchase Agreement stood assigned to the plaintiff and the assignment was complete and thus nothing further remained to be done.*

6. *Upon attention of the counsel for the defendants being drawn to the Clause 5 in the Re-purchase Agreement aforesaid, whereunder the balance payment of Rs.4.55 crores remained to be made by the plaintiff to the defendants, the counsel for the defendants contends that merely because the said payment remained, would not convert the transaction into the category of an agreement to*

do something from a concluded one. Attention in this regard is drawn to **Rajinder Vs. Harsh Vohra** 2010 (114) DRJ 410.

7. However, the aforesaid judgment is in the context of Section 55(4) of the Transfer of Property Act, 1882 providing for a situation where the ownership of an immoveable property has passed to the buyer i.e. by registration of sale deed and which would have no application to the subject Re-purchase Agreement relating to immovable property at Gurgaon and which is an unregistered document on a stamp paper of Rs.100/-, executed at Delhi. There can be no concluded transaction relating to immoveable property, without a registered document. Even a document drafted as a sale deed, till unregistered, remains at best an agreement to sell. Reference can be made to **Kalavakurti Venkata Subbaiah Vs. Bala Gurappagari Guruvi Reddy** (1999) 7 SCC 144 and **Prem Prakash Gupta Vs. Sanjay Aggarwal** 2018 SCC OnLine Del 6730. Attention of the counsel for the defendants has also been drawn to the subsequent dicta of the Supreme Court concerning Section 55(4) of the Transfer of Property Act, in **Andhra Pradesh Industrial Infrastructure Corporation Limited Vs. S.N. Raj Kumar** (2018) 6 SCC 410. The reliance by the counsel for the defendants on the said argument is thus misconceived. Under Clause 5 supra also, the plaintiff was not permitted to deal with the property subject matter of Re-purchase Agreement, without paying balance sale consideration to defendants and thereunder also, the transaction remained akin to an agreement to sell.

8. I may also add, that according to the defendants, Krrish Realtech Pvt. Ltd. (KRPL) from whom the defendant no.1 had agreed to acquire the property, part of which was subject matter of the Re-purchase Agreement, is also a confirming party to the Re-purchase Agreement. However the said fact also does not make the transaction a concluded one. Once under the Re-purchase Agreement balance payment of Rs.4.55 crores remained to be paid by the

plaintiff to the defendants, the plaintiff could not have approached KRPL and KRPL could not have dealt with the plaintiff with respect to the property subject matter of Repurchase Agreement, without paying the said balance consideration of Rs.4.55 crores to the defendant no.1 and part of which admittedly has not been paid. Just like the plaintiff was bound to pay the balance sale consideration to the defendants, whether it be Rs.4.55 crores as contended by the defendants or less Rs.65 lacs as contended by the plaintiff, the defendants also could have restrained KRPL from dealing with the plaintiff without the plaintiff paying the said balance consideration to defendants. Thus, the factum of KRPL also does not made the transaction a concluded one.

9. *A perusal of the written statement of the defendants also shows the defendants, at pages 32 and 33 thereof, to have unequivocally pleaded that the “Plaintiff had to deal directly with Krrish Realtech Private Limited for taking allotment of plots after making balance payment of Defendant no.1” and “However, the requirement of making balance payment of Rs.4,55,00,000/- is still pending on the part of Plaintiff” and “Payment of balance amount by plaintiff to defendant No.1 under Re-Purchase Agreement dated 02.11.2012 could not have been withheld by plaintiff for any reason”. The said pleadings unequivocally show that what is being argued today, after a full-fledged hearing on 17th December, 2018, is a desperate attempt to get out of the legal position in which the defendants find themselves. The pleadings aforesaid show that not only does the Re-purchase Agreement, as per the clear language thereof remains to be executed and is not a concluded contract but also that the defendant no.1, at least at the time of filing the written statement and till the hearing on 17th December, 2018, understood it so.*

10. *The counsel for the defendant no.1 has then contended that according to the plaintiff, the Re-purchase Agreement has not been confirmed by KRPL; however according to the defendants, the same has been confirmed*

by KRPL and this dispute also is required to be adjudicated.

11. *The aforesaid controversy does not come in the way of deciding the application of the plaintiff under Order XII Rule 6 on the basis of averments and document of the defendants themselves.*

12. *The counsel for the defendants has then argued that there is no admission of the defendants within the meaning of Order XII Rule 6 of the CPC.*

13. *No person having any legal acumen, as the advocate of defendants in this case, would make unequivocal admission of the claim. What has to be seen is, whether the defence pleaded, has any chance of succeeding in law and if the answer is in the negative, a decree on admissions or under Order XV of CPC or a summary judgment under Order XIII A of the CPC as applicable to commercial disputes read with Chapter X-A of Delhi High Court (Original Side) Rules, 2018, has to follow. Reference in this regard may be made to **ING Vysya Bank Ltd. Vs. Vikram Hingorani** 2014 SCC OnLine Del 478 summarising the position in this regard and SLP(C) No.8694-8696 of 2014 preferred whereagainst was dismissed on 25th April, 2018.*

14. *The only other argument which the counsel for the defendants has made in opposition to the application under Order XII Rule 6 of the CPC is that there is also a dispute, whether the agreement has been terminated or not.*

15. *The counsel for the plaintiff, in opposition has argued that the plaintiff along with its document has filed an e-mail of KRPL terminating the agreement with the defendant no.1 and the defendants have concealed the same.*

16. *However, since the aforesaid fact has not been admitted by the defendant no.1, the same cannot be taken into consideration for the purpose of considering, whether the plaintiff is entitled to a decree forthwith.*

17. *In my view, the question whether the Re-purchase Agreement stands terminated or not is irrelevant. The fact remains that the balance payment which was to be made by*

the plaintiff thereunder, at least to the extent of Rs.3.90 crores, has not been paid and even if it were to be presumed that the plaintiff has terminated the agreement by institution of this suit, what is to be seen is whether the defendants are entitled to forfeit the amount already received and in which regard detailed reasons have already been given in the order dated 17th December, 2018 and need to reiterate the same is not felt.

18. I am therefore unable to find any defence of the defendants to a decree, insofar as the amount of Rs.1.20 crores, receipt of which is admitted, being passed.

19. The counsel for the defendants with respect to the balance amount of Rs.65 lacs and with respect whereto an admission of the defendants in the plaint / FIR lodged was disclosed by the plaintiff on the last date of hearing contends that the defendants, vide their letter dated 27th February, 2017 to the Economic Offences Wing (EOW) had informed of the error in the complaint admitting receipt of Rs.1.85 crores.

20. The counsel for the plaintiff, in response has contended, that (i) the defendants on 7th September, 2016 filed their written statement disputing the receipt of the said amount of Rs.65 lacs; (ii) the plaintiff on 4th November, 2016 filed the application under Order XII Rule 6 of the CPC and a reply dated 10th January, 2017 was filed by the defendants thereto, in which the defendants did not deny having admitted receipt of Rs.1.85 crores in the complaint lodged with the police and on which FIR was registered; (iii) it is only thereafter that the letter dated 27th February, 2017 is claimed to have been written; and, (iv) thus the change of stand on 27th February, 2017 is mala fide.

21. At this stage, the counsel for the defendants states that the document which was to be filed has been filed yesterday and has in the Court handed over a copy of the same. He also states that he yesterday has also filed an application for amendment of the counterclaim and which

has not been listed.

22. *Considering that the last order is of 17th December, 2018, filing the document as well as the application for amendment on the penultimate day of the next hearing scheduled, is nothing but a device to avoid the hearing scheduled for today.*

23. *Not only this, after the counsels have been heard fully in continuation of the hearing on 17th December, 2018 has this plea been taken.*

24. *The counsel for the defendants now states that the application for amendment is also for amendment of the written statement.*

25. *Though defendants no.2 and 3 were directed to appear in this Court but only the defendant no.2 has appeared and the defendant no.3 has not appeared.*

26. *The counsels were heard on the merits for the reason that an application for amendment of the counterclaim would not have affected the hearing of the application under Order XII Rule 6 of the CPC of the plaintiff for decree on admission on merits.*

27. *The defendants, for the aforesaid conduct are burdened with costs of Rs.1 lac payable to the plaintiff before the next date of hearing.*

28. *The defendants to ensure that the application and the document claimed to have been filed, come on record of this Court before the next date of hearing.*

29. *List on 26th March, 2019.*”

3. On 26th March, 2019, the following order was passed:-

“1. Though today’s hearing is in pursuance of the extensive hearing on 17th December, 2018 and 6th March, 2019 and the order dated 6th March, 2019 clearly records the purpose for which the hearing was adjourned to today and the defendant no.1, in accordance therewith has filed IA No.4324/2019 for amendment of counterclaim and

written statement, but the counsel for the plaintiff wants to argue his application for rejection of the counterclaim.

- 2. Issue notice of IA No.4324/2019.*
- 3. Notice is accepted by the counsel for the plaintiff.*
- 4. Reply be filed within three weeks.*
- 5. Rejoinder before the next date.*
- 6. Costs imposed on the last date of hearing have also been paid.*
- 7. A copy of IA No.4324/2019 has also been handed over to the counsel for Krrish Realtech Pvt. Ltd. on his asking.*
- 8. List for further hearing on 10th May, 2019.”*

4. The counsel for the plaintiff and the counsel for the defendant/Counter Claimant have been heard further.

5. The defendant/Counter Claimant, vide IA No.4324/2019 seeks to amend the written statement and the Counter Claim by seeking to add two paragraphs, being paragraphs 9A and 16A in the Counter Claim and to add the relief (e) in the Counter Claim, of declaration that the Termination Notice dated 21st September, 2015 issued by the plaintiff is null, void and illegal and to accordingly amend the valuation paragraph.

6. The application for amendment aforesaid though is titled as for amendment in the written statement as well as Counter Claim but a perusal thereof shows the amendments sought are only in the Counter Claim and not in the written statement. The defendant/Counter Claimant has filed its written statement and Counter Claim as separate documents and not as one single document, with both though filed on 7th September, 2016 but the Counter Claim being re-filed after removal of objections on

9th September, 2016. Axiomatically the plaintiff has also filed the replication to the written statement and the written statement to the Counter Claim as separate documents.

7. The counsel for the defendant/Counter Claimant draws attention to paras 4&5 of the amendment application where it is pleaded that the defendant/Counter Claimant intends to incorporate the same plea as sought to be taken in the Counter Claim by adding paras 9A and 16A, in the written statement as paras 5H and para 17.

8. The defendant/Counter Claimant in the proposed para 9A wants to take a plea for lifting of the corporate veil of the plaintiff and Krrish Realtech Pvt. Ltd. (KRPL) and in para 16A wants to take the plea that the plaintiff, from time to time represented to the defendant/Counter Claimant that the balance amount of Rs.4,55,00,000/- payable under the Repurchase Agreement dated 2nd November, 2012 would be paid, and the plaintiff for the first time in the Legal Notice dated 21st September, 2015 having taken a stand contrary thereto.

9. Obviously the amendment sought in para 16A is to get over the ground urged by the counsel for the plaintiff for rejection of the Counter Claim on the ground of being barred by time.

10. It is a settled principle of law that amendment sought in withdrawal of an admission is not to be allowed. Reference in this regard can be made to ***Gurucharan Kaur Vs. Ranjeet Singh Sandhu*** 2017 SCC Online Del 11489 (SLP(C) Diary No.19586/2018 preferred whereagainst was dismissed vide order dated 17th July, 2018) and ***D.P. Mahajan Vs. Alok Mahajan*** 2017 SCC Online Del 12684.

11. To determine, whether the amendment sought in para 16A of the Counter Claim is in withdrawal of any admission in the Counter Claim of the same being barred by time, I have enquired from the counsel for the defendant/Counter Claimant the Article of the Schedule to the Limitation Act, 1963 which is applicable.

12. The counsel for the defendant/Counter Claimant, on going through the Limitation Act states that Article 54 would apply because the defendant/Counter Claimant in the Counter Claim is seeking specific performance of the Re-purchase Agreement dated 2nd November, 2012.

13. I have further enquired from the counsel for the defendant/Counter Claimant the date of performance prescribed in the said Re-purchase Agreement dated 2nd November, 2012.

14. The counsel for the defendant/Counter Claimant states that the date for performance prescribed is 1st December, 2012.

15. The Counter Claim instituted on 7th September, 2016 is admittedly beyond the prescribed period of limitation of three years from the date of specific performance stipulated in the agreement of which specific performance is sought.

16. The counsel for the defendant/Counter Claimant though has weakly sought to urge that the date when the defendant/Counter Claimant had notice of breach would be the date of the Legal Notice dated 21st September, 2015 and to contend that even if a date of performance is stipulated, the limitation would commence from the date when notice of breach is received, but is unable to show the case law if any holding so.

17. The law is different. It has been held in (i) ***Gunwantbhai Mulchan Shah Vs. Anton Elis Farel*** (2006)3 SCC 634; (ii) ***Rathnavathi Vs. Kavita Ganashamdas*** (2015) 5 SCC 223; (iii) ***Madina Begum Vs. Shiv Murti Prasad Pandey*** (2016) 15 SCC 322; (iv) ***Chet Ram Vashist Vs. Ram Chander Goel*** AIR 2000 Del 96; (v) ***Ashok Kapoor Vs. Vidya Shankar Sharma*** 2008 SCC Online Del 1295; (vi) ***Hajarilal Vs. Phoolchand*** AIR 1957 MP 177; and, (vii) ***Brijpal Vs. PGF Limited*** 2018 SCC OnLine Del 7807 that if the date is fixed for performance, the second part providing “if no such date is fixed, when plaintiff has notice that performance is refused” would not apply, as is also evident from its bare language.

18. The only thing to be considered is, whether there is any plea of novation of the date for performance in the Counter Claim.

19. I do not find any. Even in the proposed paragraph 16A, what the defendant/Counter Claimant is seeking to plead is as under:-

“16A. That the plaintiff from time to time continued to represent and assure that they will pay the balance amount of Rs.4,55,00,000/- to the defendant No.1/counter claimant under the repurchase agreement dated 02.11.2012. However, contrary to their representations and assurances of payment of balance amount, the plaintiff for the first time, vide its legal notice dated 21.09.2015 demanded the refund of the amount from the defendant No.1/counter claimant.”

20. It is not the plea of the defendant/Counter Claimant in the proposed amended paragraph also that there was any novation or extension of the date fixed for performance of 1st December, 2012. The averments

regarding representations and assurances of the plaintiff “from time to time” are also vague and without any particulars. No date is prescribed and it is not specified as to who on behalf of the plaintiff, which is a juristic person, made representations. Ordinarily, the parties entering into such commercial transactions of high value and who have chosen to reproduce the same into writing, if desirous of changing any term of such agreement, are expected to do so in writing.

21. It cannot also be lost sight of that the Counter Claim has been filed as a commercial suit and with respect whereto the legislature has chosen to provide that if the Court finds no real prospect, may pass a summary judgment. Though Order XIII A of the Code of Civil Procedure, 1908 (CPC) as applicable to commercial suits provided for such summary judgment to be passed on an application, but since then the Delhi High Court (Original Side) Rules, 2018 has been amended and Rule 1 of Chapter XA whereof empowers the Court to pass summary judgment *suo motu* as well.

22. The defendant/Counter Claimant in the Counter Claim as existing has pleaded the cause of action for the Counter Claim to have accrued first on 2nd November, 2012 and thereafter on 21st September, 2015 when notice was got issued by the plaintiff. It is not the case in para 17 of the Counter Claim as existing that there were any representations or assurances or the cause of action accrued on any of the said dates. What the defendant/Counter Claimant is infact wanting to do by proposed amended paragraph 16A in the Counter Claim is to withdraw the admission and which as aforesaid cannot be permitted to be withdrawn to the prejudice of the plaintiff.

23. The defendant/Counter Claimant is thus not found entitled to amend the Counter Claim and/or the written statement as sought in paragraph 5 of IA No.4324/2019.

24. As far as the amendment sought in prayer paragraph 4 of IA No.4324/2019, with respect to the defendant/Counter Claimant being entitled to lifting of the corporate veil, once the Counter Claim is found to be barred by time, the said amendment is of no avail and the Court ought not to mechanically defer rejection of the Counter Claim by allowing such amendment which as aforesaid is of no avail on account of the Counter Claim being found to be barred by time.

25. Accordingly, IA No.4324/2018 for amendment is dismissed.

26. Consequently IA No.1483/2017 of the plaintiff under Order VII Rule 11 of the CPC for rejection of the Counter Claim is allowed and the Counter Claim No.24/2017 is rejected as barred by time.

27. Else, in the orders dated 17th December, 2018 and 6th March, 2019 reproduced above, detailed reasons have been given for the plaintiff being entitled to the amount of Rs.1,20,00,000/- and a decree therefor with interest as may be determined by this Court in the facts and circumstances of the case is entitled to be passed forthwith.

28. The claim of the plaintiff in the suit however is for the principal amount of Rs.1,85,00,000/-. It was the contention of the counsel for the plaintiff on 6th March, 2019 that as far as the balance amount of Rs.65,00,000/- is concerned, the defendant/Counter Claimant in the FIR lodged had admitted receipt of Rs.1,85,00,000/- from the plaintiff, though before this Court claimed to have received only Rs.1,20,00,000/- from the plaintiff. It was further the contention of the counsel for the plaintiff that

only after the plaintiff in its application under Order XII Rule 6 of the CPC being IA No.14020/2016 disclosed the said fact that the defendant/Counter Claimant vide their letter dated 27th February, 2017 to the Economic Offences Wing claimed that there was an error in admitting the receipt of Rs.1,85,00,000/-.

29. Thus it also has to be adjudicated whether the said part of the suit, as to recovery of Rs.65,00,000/-, is to be put to trial.

30. Mr. Ashish Bhandari claimed to be an employee of the defendant/Counter Claimant had lodged a complaint with the Economic Offences Wing against KRPL and Amit Katyal, claimed to be the director of KRPL and on the basis of which complaint, FIR No.0052 dated 2nd May, 2016 was registered. The defendant in the said complaint unequivocally admitted receipt of Rs.1,85,00,000/- from the plaintiff and further stated that a sum of Rs.3,90,00,000/- was still payable by the plaintiff to the defendant.

31. After the plaintiff in this suit sought to rely on the admission aforesaid of the defendant/Counter Claimant of receipt of Rs.1,85,00,000/-, the defendant/Counter Claimant on its letter dated 27th February, 2017 to the Economic Offences Wing, stated as under:-

“Reg. FIR No.52 of 2016 Under Section 406, 420, 120B IPC, registered at Police Station EOW, New Delhi

Sir,

I represent complainant in subject matter FIR. I submit that in aforesaid Complaint/FIR, complainant has by inadvertence stated that Ambawatta Buildwell Private Limited has paid Rs.1,85,00,000/- to complainant whereas complainant intended to say that Ambawatta Buildwell Private Limited claims to have

paid Rs.1,85,00,000/-. We clarify that Ambawatta Buildwell Private Limited has paid only an amount of Rs.1,20,00,000/- under Re-purchase Agreement dated 02.11.2012 to Complainant and the balance amount of Rs.4,55,00,000/- under aforesaid Re-purchase Agreement dated 02.11.2012 is still payable by Ambawatta Buildwell Private Limited and Krrish Realtech Private Limited to complainant.

Thanking you

*Yours faithfully,
Imperia Structures Limited*

Sd/-

Authorised Representative”

32. A perusal of the FIR shows that the same has been copied from a complaint in writing which was filed by the defendant with the Police. The counsel for the defendant/Counter Claimant on enquiry states that the defendant/Counter Claimant had lodged a complaint with the Magistrate under Section 200 read with 156(3) of the Criminal Procedure Code, 1973 (CrPC) and the FIR is the exact reproduction of the said complaint filed with the Magistrate.

33. Though the complaint has not been placed before this Court but therefrom it follows that the defendant/Counter Claimant in the complaint also must have pleaded having received Rs.1,85,00,000/- from the plaintiff and a sum of Rs.3,90,00,000/- remaining as balance. I have enquired from the counsels, whether the complaint under Section 200 read with 156(3) of the Cr.PC to the Magistrate is required to be accompanied with any affidavit.

34. While the counsel for the plaintiff answers in the affirmative, the counsel for the defendant/Counter Claimant states that earlier it was not so but it is now so. However he is unable to state as to after which date the complaints are required to be accompanied with an affidavit.

35. I find that the Supreme Court in *Priyanka Srivastava Vs. State of U.P.* (2015) 6 SCC 287 pronounced on 19th March, 2015 i.e. before the complaint/FIR by the defendant/Counter Claimant, issued directions that all applications under Section 156(3) of CrPC are to be supported by an affidavit to make the applicants more responsible and to prevent applications being filed in a routine manner without taking any responsibility whatsoever, only to harass certain persons. It was further held that the person making the application should be more cautious and endeavour to see that no false affidavit is made as once the affidavit is found to be false, the applicant will be liable for prosecution in accordance with law.

36. The counsel for the defendant/Counter Claimant states that he has in his file an unsigned copy of the complaint lodged with the Magistrate and the counsel for the defendant/Counter Claimant has been requested to hand over the same and the same is taken on record and be tagged in Part- IIIB file.

37. A perusal of the aforesaid unsigned copy of the complaint emanating from the file of the counsel for the defendant/Counter Claimant does indeed confirm that the defendant/Counter Claimant therein also pleaded that the total consideration payable by the plaintiff to the defendant/Counter Claimant under Re-purchase Agreement dated 2nd

November, 2012 was Rs.5,75,00,000/- and out of which the plaintiff had paid only Rs.1,85,00,000/- leaving a balance of Rs.3,90,00,000/- .

38. Such complaints, even if not accompanied by affidavits, drafted in advocate's office, with more than one pair of eyes scanning the same before the same are signed and also bearing the signatures of the defendant/Counter Claimant and seeking to invoke the Police machinery against another, cannot merely by a statement as has been made in the letter dated 27th February, 2017, be brushed aside. It cannot be lost sight of that FIR has not been closed as yet and is still being pursued. The letter dated 27th February, 2017 reproduced above also does not give any details as to how the error was committed. Ordinarily a figure of 1,20,00,000/- is not to be typed as 1,85,00,000/- by a typographical error. Similarly, even if there was any error, the balance amount claimed to be payable should have been on the basis of receipt of Rs.1,20,00,000/- only and not on the basis of receipt of Rs.1,85,00,000/-.

39. It has been held in ***Godfrey Phillips India Limited Vs. P.T.I. Private Limited*** 2017 SCC OnLine Del 12509, ***Mallcom (India) Limited Vs. Rakesh Kumar*** (2019) 259 DLT 1 and ***K.R. Impex Vs. Punj Llyod Ltd.*** 2019 SCC Online Del 6667 that if the Commercial Courts empowered to pass summary judgment are also to allow trial on such *mala fide* pleas taken as an afterthought, to wriggle out of admission of liability, when in fact the defendant has no real prospect of defending the claim, the same would not subserve the whole purpose of enactment of the Commercial Courts Act, 2015 and treating commercial suits differently from ordinary suits. It is not as if some officers of the defendant/Counter

Claimant sitting in the Police Station made a statement which was incorrectly recorded. Here, in the Chamber of the Advocate for the defendant/Counter Claimant, the complaint was got typed, got signed from the defendant/complainant and filed and pursued in the Court, an order of registration of FIR on the basis thereof obtained and the defendant/Counter Claimant, merely by writing a letter as the letter dated 27th February, 2017 cannot undo an admission. It has been held in **Priyanka Srivastava** supra that for false affidavit in support of an application under Section 156(3) of CrPC, the complainant will be liable for prosecution.

40. Thus, the defence of the defendant/Counter Claimant qua the said Rs.65,00,000/- also does not inspire confidence and the plaintiff is found entitled to a decree forthwith for the entire amount of Rs.1,85,00,000/-.

41. The plaintiff has not claimed any pre-suit interest.

42. It is deemed appropriate, considering the nature of the transaction, to award interest at 10% per annum from the date of institution of the suit till realisation. The plaintiff shall also be entitled to costs of the suit and Counter Claim with the professional fee for both being assessed at Rs.2,50,000/-.

43. Decree sheet be drawn up.

44. With the aforesaid, the pending Chamber Appeals and the applications have become infructuous.

45. The counsel for the defendant/Counter Claimant wants it to be recorded that he had sought passover to cite case law on Article 54 of the

Schedule to the Limitation Act but which was declined for the reason that the counsel for the defendant/Counter Claimant ought to have come prepared to argue and especially after the previous three hearings.

RAJIV SAHAI ENDLAW, J

MAY 10, 2019

‘pp’

(Corrected and released on 22nd May, 2019).

