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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 22nd May, 2019
Pronounced on: 2nd July, 2019

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C.R.P. 234/2017

VERSATILE COMMOTRADE
PRIVATE LIMITED

..... Petitioner

Through: Mr. Ratan K. Singh, Mr. Nikhilesh
Krishnan, Mr. Jai Pratap & Ms.
Priyanka Solanki, Advocates.

versus

MANIRAM SH. MUNNI RAM
THR LRS & ORS

..... Respondents

Through: Mr. Vikas Yadav, Ms. Upma Yadav,
Advocates

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CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

1. The revisionist (hereinafter referred to as “the plaintiff”) assails an order of the Trial Court dated 17.07.2017, by which the respondents have been granted unconditional leave to defend a suit filed by it under Order XXXVII of the Code of Civil Procedure, 1908 ("CPC"). The respondents are the legal representatives of the original defendant in the suit.

Facts

2. The suit filed by the plaintiff arises out of an agreement dated 30.04.2013, under which one Mani Ram (the original defendant, since deceased) agreed to sell his share in the immovable property mentioned therein, to the plaintiff. The sale consideration was fixed at ₹5,36,25,000/-, out of which a sum of ₹60,00,000/- was paid by the plaintiff to the original defendant as "advance/earnest money".

3. Although it is undisputed that the transaction did not fructify, the parties are at variance as to the reasons for the same. The plaintiff contends that the original defendant failed to obtain a No Objection Certificate ("NOC"), as required under Section 5(1) of the Delhi Land (Restrictions on Transfer) Act, 1972. The respondents contend to the contrary that the plaintiff failed to pay the balance sale consideration, which resulted in the original defendant forfeiting the aforesaid amount of ₹60,00,000/-. These contentions were reflected in correspondence exchanged between the parties, including a legal notice dated 31.08.2013 sent on behalf of the original defendant to the plaintiff, response thereto dated 09.09.2013 and a reminder sent by the plaintiff dated 15.11.2013.

4. In these circumstances, the plaintiff filed the present suit (originally numbered as CS(OS) 560/2014 before this Court, and subsequently transferred to the Court of the learned Additional District Judge-04, South West, Dwarka, New Delhi as CS No. 17140/2016), claiming refund of the aforesaid amount of ₹60,00,000/- with interest at the rate of 14.25% per annum from 09.09.2013 until the date of

payment. Summons were issued in the suit on 24.02.2014. After the demise of the original defendant, the respondents were impleaded in the suit by the order of the Trial Court dated 27.07.2016 and filed an application for leave to defend in February, 2017. The application was resisted by the plaintiff but was allowed unconditionally by the impugned order of the Trial Court dated 17.07.2017.

5. Relying upon the judgment of the Supreme Court in *Mechalec Engineers & Manufacturers vs. Basic Equipment Corporation* (1976) 4 SCC 687, the Trial Court granted unconditional leave to defend with the following observations:-

“11. In the instant case, upon hearing the learned counsels and upon going through the record, it does not appear with any degree of certainty at this stage that either the suit is barred by limitation or this court does not have any territorial jurisdiction to try the suit. It does appear prima facie upon consideration of the documents on record that some part of cause of action has arisen at the office of the plaintiff at Delhi within the territorial jurisdiction of this Court. The contention of the plaintiff that defendant has deposited certain amounts with it can not be outrightly rejected without taking evidence of the parties in this regard. Therefore, it cannot be said that the suit is patently time barred. Nothing is mentioned in the application on the merits of the claim of the plaintiff. However, the contentions of the defendant also can not be brushed aside lightly. The defendant needs to be given an opportunity to prove its defence.

12. In the opinion of this court, the case of the defendant falls clearly within clause ‘c’ and ‘e’ of the judgment of the Supreme Court in M/s Mechalec Engineers’ case (Supra). The defendant deserves to be granted leave to defend.”

6. Although the agreement to sell dated 30.04.2013, entered into between the original defendant and the plaintiff, appears to be in a standard format in English, it appears from the copy placed on record that some of the details entered therein were in Hindi. The relevant provisions of the said agreement provide as follows:-

a) The second recital records that the sale consideration has been agreed at ₹3,75,000 per acre, amounting to a total of ₹5,36,25,000/-.

b) In Clause 1 of the agreement, it is recorded that out of the sale consideration, a sum of ₹60,00,000/- has been received by the original defendant from the plaintiff (₹40,00,000/- by cheque no.886019, drawn on Oriental Bank of Commerce, and ₹20,00,000/- by cash) as *“advance/earnest money and the receipt of the same is hereby admitted and acknowledged and the balance sale consideration shall be received by the first party from the second party on or before 30-4-13 days from the date of execution of this agreement to sell.”*

c) Clauses 2, 5, 6 and 7 of the agreement cast the following obligations upon the parties:-

“2. That the first party shall hand over the physical vacant possession of the said land to the second party at the time of registration of the Sale Deed. Dated 15 July 2013.

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5. That the first party shall apply and obtain the No Objection Certificate in favour of the second party or the nominee/s at his/her/their own costs and responsibility at

least 15 (fifteen) days before the date of final payment. In case the first party fails to obtain the NOC then this agreement shall stand automatically extended till the NOC is obtained.

6. *That the first party shall execute and register the sale deed and give the physical vacant possession within the said stipulated period to the second party or his/her/their nominee/s failing which the second party shall have a right to get this transaction executed through the court of law under specific performance of the contract at the cost of the first party.*

7. *That in case if the second party fails to pay the balance amount within the said stipulated period, then the advance/earnest money paid shall be forfeited by the first party. And this agreement to sell will automatically come to an end.”*

7. As one of the controversies between the parties relates to territorial jurisdiction, it may also be noted that the agreement is stated to have been executed in New Delhi, and the address of the original defendant was recorded as "VILL-SUREHRA Distt -SOUTH WEST DELHI". However, there is an endorsement at the foot of the agreement that it has been drafted by an advocate of the District and Sessions Court, Rewari.

8. An undated receipt, signed by the original defendant, has also been placed on record alongwith the aforesaid agreement, recording the receipt of the amount of ₹60,00,000/- as aforesaid. The receipt is stated to have been executed at New Delhi.

9. In the application for leave to defend filed by the respondents, the principal grounds urged relate to the maintainability of the suit

under Order XXXVII of the CPC, territorial jurisdiction, authority of the deponent to sign and verify the plaint, and also as to the merits of the claim raised by the plaintiff.

Submissions

10. Mr. Ratan Singh, learned counsel for the revisionist/plaintiff, submitted that, on a proper reading of the agreement to sell, obtaining the NOC was the responsibility of the original defendant. It is only thereafter that the balance sale consideration was required to be paid, and the physical vacant possession of the land was to be handed over to the plaintiff at the time of the registration of the sale deed. The date of 15.07.2013 has been stipulated by a handwritten insertion for this purpose. He pointed out that in the legal notice dated 31.08.2013, addressed to the plaintiff on behalf of the original defendant, it has been admitted that 15.07.2013 was the date fixed for the completion of the transaction. The nature of the payment as an advance or earnest money has also been admitted in the same communication, and the only question in controversy is as to whether the amount is required to be refunded, or is liable to be forfeited by the respondents. He also argued that the application of the defendant under Order VII Rule 11 of CPC for rejection of the plaint has been dismissed by the judgment of the Trial Court dated 15.11.2018, which has not been challenged by the respondents. Mr. Ratan Singh relied upon several authorities, dealt with hereinbelow, with respect to the factors to be taken into account while deciding an application for leave to defend and the permissibility of forfeiture of the earnest money. He also placed

reliance upon earlier judgments of this Court, to which the plaintiff is a party, where leave to defend has been declined in respect of transactions substantially similar to the present case.

11. Mr. Vikas Yadav, learned counsel for the respondents, on the other hand, argued that the respondents have made out several triable issues justifying the grant of unconditional leave to defend the suit. He sought to impeach the veracity of the agreement itself and argued that the date of 15.07.2013 inserted in Clause 2 was not part of the original agreement but an interpolation. Mr. Yadav submitted that, under Clause 5 of the agreement, the agreement was to be automatically extended until the NOC is obtained, and that the plaintiff had not given any evidence of its readiness or willingness to make payment of the balance sale consideration by the stipulated date of 30.04.2013. With regard to the contents of the legal notice dated 31.08.2013, he submitted that the present respondents, as legal representatives of the original defendant, did not have any knowledge as to whether the notice was, in fact, sent. On the question of territorial jurisdiction, Mr. Yadav argued that the agreement and the receipt were, in fact, executed at Rewari, as indicated by the endorsement of the Advocate at the foot of the agreement.

Analysis

12. Before dealing with the contentions of the parties, it may be noted that the judgment of the Supreme Court in *Mechalec* (supra), cited by the Trial Court in the impugned judgment, has been superseded by the subsequent judgment in *IDBI Trusteeship Services*

Limited vs. Hubtown Limited, (2017) 1 SCC 568. The judgment in *IDBI* (supra) does not appear to have been brought to the notice of the Trial Court. In view of the amendment of Order XXXVII Rule 3 of the CPC, and relying upon the judgment of the four-judge Bench in *Milkhiram India Pvt. Ltd. vs. Chamanlal Bros.*, AIR 1965 SC 1698, the Supreme Court in *IDBI* (supra) has formulated the tests governing an application for leave to defend in the following terms:-

“17. Accordingly, the principles stated in para 8 of Mechelec case [Mechelec Engineers & Manufacturers v. Basic Equipment Corpn., (1976) 4 SCC 687] will now stand superseded, given the amendment of Order 37 Rule 3 and the binding decision of four Judges in Milkhiram case [Milkhiram (India) (P) Ltd. v. Chamanlal Bros., AIR 1965 SC 1698 : (1966) 68 Bom LR 36] , as follows:

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.”

The defences sought to be raised on behalf of the respondents must be analyzed in the context of these tests.

13. The authorities cited on behalf of the plaintiff include two cases decided by this Court, to which the plaintiff itself was a party. Some of the issues raised by the respondents in the present case have been considered in those judgments.

14. In *Versatile Commotrade Private Limited vs. Chiranji Lal & Anr.*, (2017) 239 DLT 83, as in the present case, the Court was concerned with an application for leave to defend a suit under Order

XXXVII of the CPC for recovery of the advance paid by the plaintiff on the ground that the seller therein had not obtained the NOC within the stipulated time. The defendants in that case contended *inter alia* that the plaintiff had violated the terms of the contract and was never ready and willing to purchase the property, and to pay the full and final sale consideration, resulting in its liability for forfeiture of the amount advanced. The agreement clauses quoted in the said judgment appear to be substantially similar to the agreement in the present case. The application for leave to defend was rejected by a Coordinate Bench of this Court with the following observations:-

“7. The language of the clause clearly stipulates that the defendants had received Rs. 1,03,54,000/- out of the total consideration amount and thus the money was received towards part payment. In the latter part of the said clause although the expression used is “advance/earnest money” but the fact that the parties also noted that the “balance sale consideration was to be received”, clearly shows that parties had intended to treat this money solely as a part payment. Clause (7) of the said agreement further shows the intention of the parties that this advance payment of Rs. 1,03,54,000/- was towards part payment of the consideration money. Clause (7) of the agreement reads as under:

Clause 7. That in case if the second party fails to pay the balance amount within the said stipulated period, then the advance/earnest money paid shall be forfeited by the first party. And this agreement to sell will automatically come to an end.

8. The said advance payment was subject to forfeiture by the defendants only when the purchaser failed to pay the balance amount within stipulated period. The said stipulated period was 90 days. Clause (5) of the

agreement however put a contingent to the payment of the balance consideration amount. Clause (5) of the agreement reads as under:

Clause 5. That the first party shall apply and obtain the No Objection Certificate in favour of the second party or the nominee/s at his own costs and responsibility at least 15 (fifteen) days before the date of final payment. In case the first party fails to obtain the NOC then this agreement shall stand automatically extended till the NOC is obtained.

9. This clause clearly stipulates that the time to pay the balance amount is 90 days from the date of execution of the agreement to sell only if the seller obtains the NOC at least 15 days in advance from the date of final payment and in case the seller fails to obtain the NOC then the agreement would automatically stand extended till the period, NOC is obtained. Time therefore was not the essence of the contract and it was subject to stipulation of obtaining the NOC by the seller. It is apparent that the seller has failed to obtain the NOC and as such cannot take advantage of clause (7) of this agreement.

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11. In view of the above discussion, it is apparent that the defendants have failed to raise any triable issue. It were the defendants who have failed to comply with the terms and conditions of agreement to sell as they have failed to obtain NOC not only within the stipulated time but they were denied the permission to sell by the competent authority on their application dated 19.07.2013 by the competent authority i.e. the Additional District Magistrate (South West) Old Terminal Tax Building, Kapashera, New, Delhi - 110037 vide its order dated 23.08.2013. The defendants during the course of arguments have relied on a certificate issued by ADM (South/West), South West District, Delhi and submitted that permission to sell the property i.e. NOC has been

given to the defendants, However, this documents clearly shows that the defendants had applied again vide their application which was recorded as reference no. of SR office 4545 dated 15.10.2013, were given permission to sell only on 07.11.2013 i.e. much after the stipulated period under the agreement for obtaining NOC. All the above facts clearly show that it were the defendants who have failed to comply with the terms and conditions of the agreement to sell and therefore were at fault. Under clause (7) of the agreement to sell, the defendants could forfeit advance/earnest money paid to them by the plaintiff if they failed to pay the balance within the stipulated period.

12. As discussed the above, the plaintiff was to pay the balance consideration only after the defendants obtained the NOC within the prescribed period under the agreement or within the automatically extended period. The defendants' conduct show they repudiated the agreement to sell even without complying and fulfilling the obligation imposed upon them under the agreement to sell. Therefore the defendants cannot invoke clause 7 of the agreement to sell and forfeit the money paid to them by the plaintiff. The application stands dismissed. In the facts and circumstances of the case, the plaintiff is entitled for the refund of sum of Rs. 1,03,54,000/-. The plaintiff has also claimed pendente lite and future interest till the payment of the money at the rate of 18% per annum with effect from 02.11.2013. The plaintiff, however, has failed to prove that it is entitled for the interest at the rate of 18% per annum as there exists no agreement between the parties to show such an entitlement. The plaintiff is therefore not entitled to the interest at the rate of 18 per cent per annum and for the period from the date 02.11.2013 till the filing of the suit. However, by virtue of Section 34 of the CPC, I award interest at the rate of 9% per annum to the plaintiff on sum of Rs. 1,03,54,000/- from the date of filing of the suit till its realisation. The suit stands decreed in these terms

with no orders as to cost. Decree sheet be prepared accordingly.”

15. The aforesaid judgment of the learned Single Judge was challenged by one of the defendants in RFA(OS)(COMM) 12/2017, but the appeal was rejected by the judgment of the Division Bench dated 18.08.2017. The Division Bench considered the legal notice issued on behalf of the vendors in that case, and affirmed the judgment of the learned Single Judge, holding *inter alia* as follows:-

“10. Thus, on failure of the respondent to make payment of the balance amount within 15 days, the appellant had declared that the agreement would be treated as cancelled. The appellant and his brother late Chiranji Lal did not at any time initiate proceedings seeking specific performance. They had treated the agreement as cancelled, and the money paid as forfeited. This being the position, the respondent was justified in treating the agreement as cancelled as stated by the appellant and his brother Late Chiranji Lal. The respondent was right in asking for refund of money paid.”

Although this judgment of the Division Bench was challenged before the Supreme Court in SLP(C) No. 33758/2017, the petition was permitted to be withdrawn by an order of the Supreme Court dated 08.01.2018.

16. The only material difference between the present case and the case under consideration in the said judgment was that the vendors in that case had applied for issuance of the NOC, which had been

rejected, but had asserted to the contrary. In the present case, there is no assertion of having made an application at all.

17. The second case culminated in the judgment of this Court dated 09.01.2019, in CS(COMM) 982/2016 (*Versatile Commotrade Private Limited vs. Balraj*) and CS(COMM) 983/2016 (*Versatile Commotrade Private Limited vs. Rattan Singh*). The suits in those cases were also filed under Order XXXVII of the CPC for recovery of the advance sale consideration paid by the plaintiff to the defendants therein. The learned Single Judge has rejected the purported defence of forfeiture of the advance amounts paid on the ground that the vendors were required to prove their alleged loss, and make a claim therefor. Reliance has been placed for this purpose upon the judgment of the Supreme Court in *Kailash Nath Associates vs. Delhi Development Authority*, (2015) 4 SCC 136, which has been followed by this Court in several judgments. The learned Single Judge held the case to be covered under paragraph 17.5 of *IDBI* (supra) and therefore rejected the application for leave to defend. The suits were decreed with the following observations:

“33. Once, it is found that the defence raised in the applications for leave to defend has no merit in law, the question of grant of leave to defend does not arise.

34. As far as the other plea taken in the applications for leave to defend, of the suits being not maintainable under Order XXXVII of the CPC is concerned, the same also has no merit in law. Rule 1(2) of Order XXXVII of the CPC, while laying down the categories/classes of suits which could be instituted thereunder, includes “suits in which the plaintiff seeks only to recover a debt

or liquidated demand in money payable by the defendant, with or without interest, arising on a written contract.” It is not in dispute that there is a written contract between the plaintiff and the defendant in each of the suits. The next question is, whether the recovery sought in the suits is of a debt or liquidated demand in money. The plaintiff, under the agreement with each of the defendant, paid to the defendant advance sale consideration. Admittedly, the agreements to sell did not fructify. Once an agreement to sell does not fructify, the seller under the law as laid down above, is liable to refund to the purchaser the advance sale consideration received. The agreements to sell do not describe the payments admittedly made by the plaintiff to each of the defendant as earnest money. However, they do indeed provide for forfeiture of the monies received. However, for the defendants as sellers to forfeit, under the law, it is incumbent upon the sellers to establish loss. I have hereinabove held that the defendants have failed to establish loss. Once, it is so, the suits would be for recovery of a debt owed by the defendants to the plaintiff or for recovery of liquidated demand in money.

35. *The Division Bench of this Court in Harbans Lal Vs. Daulat Ram ILR (2007) 1 Delhi 706 was concerned with a suit filed for recovery of double of the earnest money paid under an agreement of purchase of immoveable property, on the ground of the ground of the defendant seller having breached the agreement. Finding the agreement to sell admittedly entered into between the parties to contain a clause that in the event of breach by the seller, the seller will pay twice the earnest money received to the purchaser, it was held that Order XXXVII of the CPC is attracted inasmuch as the plaintiff was seeking a decree for recovery of liquidated money payable on a written contract. Similarly, in Nandan Prasad Gupta Vs. Sunil Gupta 2003 (68) DRJ 315, a suit for recovery of the advance sale consideration paid, on breach by the defendant of the agreement to sell, was*

held to be maintainable under Order XXXVII of the CPC. My research also shows judgments in a number of other similar suits filed by the plaintiff, all under Order XXXVII of the CPC but need to refer thereto is not felt. Reference in this regard be made to Versatile Commotrade Private Limited Vs. Chiranji Lal (2017) 239 DLT 83, Versatile Commotrade Pvt. Ltd. Vs. Adharshila Country Homes Pvt. Ltd. Manu/DE/3965/2018, Versatile Commotrade Pvt. Ltd. Vs. Satpal Yadav 2018 SCC OnLine Del 13148 and Versatile Commotrade Pvt. Ltd. Vs. Angad Developers Pvt. Ltd. Manu/DE/2533/2018.

36. As far as the plea of the defendants, of the remedy of the plaintiff being to sue for specific performance only is concerned, the same did not find favour also by the Division Bench of this Court in Harbans Lal supra.

37. The plaintiff is thus found entitled to a decree against the defendant in each of the suits, for the amount claimed therein.”

18. In the present case, although the defence of forfeiture of the earnest money has not been specifically taken in the respondents' application for leave to defend, it has been urged in the legal notice dated 31.08.2013, sent on behalf of the original defendant. However, there is no assertion or proof of loss on behalf of the original defendant or the respondents. Therefore, following the above judgment of the Coordinate Bench dated 09.01.2019, the contention taken in the legal notice cannot, in any event, be sustained.

19. I also do not find any substance in the contention of the present respondents that they were not aware of the contents of the legal notice or whether it was sent at all. The said document is specifically referred to in the plaint, in response to which the respondents had filed

the application for leave to defend. They have not raised any such ground in the affidavits filed in support of that application. As stated above, in the legal notice sent on behalf of the original defendant, it has been asserted that 15.07.2013 was the last date for payment of the balance consideration and the amount of ₹60,00,000/- paid by the plaintiff was sought to be forfeited on this very basis. Consequently, it is evident that the agreement itself had stipulated that the transaction would be completed by the registration of the sale deed and handover of the physical vacant possession of the land, upon payment of the balance sale consideration by 15.07.2013. The defence sought to be urged by the respondents is contrary to their own documents.

20. The respondents have also raised a defence of territorial jurisdiction. The said ground has been considered by the Trial Court in its judgment dated 05.11.2018, rejecting the respondents' application for rejection of the plaint. The Trial Court has held *inter alia* that the address of the original defendant mentioned in the plaint was within its jurisdiction and that the execution of the agreement, having been stated to be at New Delhi, the place of drafting would be of no relevance. It may also be noted that the receipt for the amount sought to be recovered in the present suit was stated *ex facie* to have been executed by the original defendant in New Delhi. In these circumstances, this contention of the respondents also does not raise a triable issue.

21. The next defence urged by the respondents is that the agreement was not signed by both the parties and is, therefore, unenforceable.

However, the copy of the agreement placed on record does bear the signatures of the original defendant and the authorized representative of the plaintiff. Further, the respondents have sought to contend that the suit has not been filed by a duly authorized representative of the company. In response, the plaintiff has referred to a resolution dated 06.01.2014 of its Board of Directors, authorizing one Mr. Man Mohan Arora to institute the suit. A copy of the said resolution has also been placed on the record of their proceedings. In my view, therefore, these pleas also do not disclose a *bona fide* defence necessitating trial on evidence.

22. Finally, the maintainability of the suit under Order XXXVII of the CPC has been challenged by the respondents on the ground that they were not party to the agreement dated 30.04.2013, which was signed by the original defendant. I do not find this argument at all persuasive. The original defendant was alive at the time the suit was filed, and the respondents were impleaded as his legal representatives. They therefore must step into his shoes and cannot contend to the contrary. Further, the respondents have not denied that they have inherited the property which was the subject matter of the suit. The maintainability of a suit under Order XXXVII of the CPC against the heirs and legal representatives of a deceased party to a contract has been upheld in the recent judgment of a learned Single Judge in *Sanjeev Jain vs. Rajni Dhingra & Ors.*, 2018 SCC OnLine Del 13093 [CS(OS) 378/2018, decided on 19.12.2018]. The learned Single Judge followed the Division Bench decision of this Court in *Sarala Devi and*

Ors. vs. Daya Ram and Ors., 1995 (60) DLT 3 (DB) and of the Bombay High Court in *Bank of India vs. M/s Industrial Polymer*, (1991) 93 Bom LR 218. In *Sarala Devi* (supra), the Division Bench held as follows :-

“10. It is not disputed by the learned counsel for the respondents that his clients have received compensation on account of the acquisition of the land in question. This being so the heirs of Tej Ram cannot put forward a plea that Order, 37 CPC would not apply as they were not signatories to the agreement to sell. It is sufficiently clear from the arguments of the learned counsel for the parties and the averments in the plaint that an amount of Rs. 4 lacs was received by the first two respondents and Tej Ram from Brahm Parkash under the agreement to sell. It is not a case where the third and fourth respondents did not have the assets of Tej Ram deceased coming to their hands. Applying the principles laid down in Section 15(b) and 19(b) of the Specific Relief Act, 1963 and Sections 37 and 40 of the Indian Contract Act, 1872 as also the view expressed in the judgment of the Supreme Court in Ram Baran Prasad case (Supra) and the other decisions noticed above, we are of the opinion that the suit under Order, 37 instituted by the appellants against the respondents including the heirs of Tej Ram would be maintainable.”

23. Other than the above, in the application for leave to defend and the affidavit filed by the respondents in support thereof, there are bare allegations that the facts stated in the plaint are false, fabricated and incomplete, and that there are triable issues. However, there is no assertion or document to support any of these purported defences.

24. In view of the aforementioned discussion, I am of the view that the respondents have not raised any substantial defence or triable

issue, and are therefore not entitled to leave to defend the suit, in terms of the parameters laid down in paragraph 17 of *IDBI* (supra). The Trial Court, in the impugned judgment, has not only applied the wrong tests as stated hereinabove but has also proceeded on wholly inadequate reasoning. Having *prima facie* rejected the defences argued by the respondents and noting that the merits of the claim have not been addressed by the respondents, the Trial Court ought not to have granted unconditional leave to defend, merely recording that the respondents' contention "also cannot be brushed aside lightly" or that they needed to be given an opportunity to prove their defence. The mandate of Order XXXVII of the CPC requires, at the minimum, a *prima facie* assessment of the defences raised.

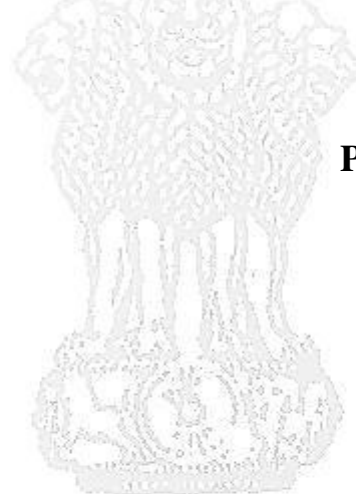
25. In addition to the amount of ₹60,00,000/-, the plaintiff has claimed interest at the rate of 14.25% per annum, from 09.09.2013 (being the date of its response to the legal notice sent by the original defendant) until actual payment. It has been noted in the judgment of the learned Single Judge in *Chiranjil Lal* (supra), relied upon by the plaintiff, that the plaintiff was not entitled to pre-suit interest in the absence of any agreement to that effect. However, the plaintiff was granted interest at the rate of 9% per annum *pendente lite* from the date of filing of the suit till its realization. Following the said judgment, the plaintiff's claim for interest from 09.09.2013 until realization is rejected, but it is held entitled to *pendente lite* and further interest at the rate of 9% per annum from the date of filing the suit until actual payment.

Conclusion

26. In the facts and circumstances aforesaid, the revision petition is allowed. The impugned judgment dated 17.07.2017 is set aside, and the respondents' application for leave to defend is rejected. Consequently, the revisionist/plaintiff is entitled to a decree in the sum of ₹60,00,000/-, alongwith interest at the rate of 9% per annum, from the date of filing of the suit until the actual payment thereof. Decree sheet be prepared accordingly. The respondents will also pay costs of these proceedings, assessed at ₹25,000/-, to the revisionist/plaintiff.

JULY 02, 2019
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PRATEEK JALAN, J.



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