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

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Pronounced on: 19.5.2020

+ CS(OS)424/2017

VANDANA FARMS & RESORTS PVT. LTD. ... Plaintiff

Through Mr.Ram Singh Chauhan, Mr.Amit Singh
Chauhan and Mr.Hemant Chauhan, Advs.

versus

SHRI COLONIZER & DEVELOPERS PVT. LTD. & ANR... Defendants

Through Mr.Raman Gandhi and Ms.Harsha
Sharma, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (JUDGMENT)

IA No.12605/2017 in CS(OS)424/2017

1. This application is filed by the defendant under Order 37 Rule 3(5) of The Code of Civil Procedure (hereinafter referred as "CPC") seeking leave to defend.
2. The accompanying suit/plaint is filed by the plaintiff for recovery of Rs.8,00,00,000/- from the defendants alongwith Rs.6,83,49,498/- being interest @ 18% compounded quarterly from the date of payment till the date of filing of the suit. Pendente lite and future interest is also accordingly sought. The case of the plaintiff is that in April 2013 defendant No.2 approached a sister concern of the plaintiff V.K.R. Constructions Private Limited on behalf of defendant No.1 and offered to sell the hotel site No.1 at International Business Bay-2 having FSI area of 1,07,640 sq.ft. alongwith proportionate land area situated at IBB-2, Sushant Golf City, Sultanpur Road, Lucknow. In the course of discussions and

negotiations, the said V.K.R. Constructions agreed to purchase the hotel property for a total sale consideration of Rs.6,86,40,000/-. In confirmation thereof, the said V.K.R.Constructions paid to defendant No.1 a sum of Rs.1,00,00,000/- by way of advance/earnest money on 26.04.2013. Subsequently, an agreement to sell for the hotel property was executed between the defendant and V.K.R. Constructions Private Limited, the sister company of the plaintiff on 14.2.2014, and receipt of the advance/earnest money of Rs.1,00,00,000/- was duly acknowledged. The balance consideration of Rs.5,86,40,000/- was to be paid on or before 30.06.2014 at the time of execution of the sale deed.

3. It is further pleaded that later on defendant No.2 approached V.K.R. Constructions for immediate payment of balance consideration as defendants were in need of urgent funds and offered to also sell the residential FSI area Group Housing at Sushant Golf City, Sultanpur Road, Lucknow at a discounted price. Defendant No.2 on behalf of defendant No.1 offered to sell the said 1,00,000 sq.ft. at the rate of Rs.400 per sq.ft. The parties, namely, defendant No.1 and V.K.R. Constructions agreed to sell/purchase the said residential property for a total consideration of Rs.3,93,60,000/- on 3.3.2014. It was agreed that the entire consideration for the residential property shall be payable alongwith the balance consideration for the hotel property.

4. On 6.3.2014 V.K.R. Constructions paid a sum of Rs.1.80 crores to defendant No.1. Similarly, the plaintiff transferred a sum of Rs.1 crore. Rs.6.75 crores from another sister company Manvi Realtors Private Limited to defendant No.1. Rs.25 lacs was transferred from the account of Divya Vidhi Homes Private Limited to defendant No.1. Hence, a total amount of Rs.9.80 crore was paid and adjusted towards balance sale consideration of the hotel property i.e.

Rs.5,86,40,000/- and entire sale consideration for the residential property being Rs.3,93,60,000/-.

5. It is the case of the plaintiff that they continued to follow up with the defendants to execute the sale deed for the hotel property and the residential property. However, execution of the sale deed was delayed on one pretext or another.

6. It is claimed that defendant No.1 expressed its willingness to execute the sale deeds subject to the plaintiff allaying its apprehension regarding payment from the sister/group companies of the plaintiff as the defendant No.1 wanted to deal only with the plaintiff and V.K.R. Constructions. To avoid accounting complications and administrative difficulty the plaintiff's sister concern agreed to make adjustments and financial transfers inter se their sister group. The plaintiffs transferred an amount of Rs.7,00,00,000/- from their account to defendant No.1. These funds were reverted by the defendant to the sister/group companies of the plaintiff, namely, Manvi Realtors Private Limited and Divya Vidhi Homes Private Limited to avoid accounting complications and administrative difficulties. Thus, as on 9.1.2015, V.K.R.Constructions had made a total payment of Rs.2,80,00,000/- and the plaintiffs had paid Rs.8,00,00,000/- to the defendants after the adjustments had been made. Hence, the sale deeds for the hotel property and the residential property were to be now executed in the joint name of the plaintiff and V.K.R. Constructions Private Limited. However, the defendants failed to execute the sale deed in respect of the hotel property and the residential property in favour of the plaintiff and its sister concern V.K.R. Constructions.

7. On 29.9.2016, the plaintiff issued a legal notice to the defendants to execute the sale deed within 15 days. The notice was duly served on 3.10.2016 but there was no response.

8. It is claimed that after issuing the said legal notice, the plaintiff made independent inquiries and was taken aback to discover that the defendants had created a charge/equitable mortgage on the hotel property by depositing title deeds as bank guarantee. Defendants later on accepted the said fact. Further, it was also discovered that the title to the residential property was not clear and the same had been mortgaged to some bank. Reference is made to an advertisement which was published on 18.6.2017. It is the case of the plaintiff that the defendants had entered into a criminal conspiracy with dishonest and fraudulent intent and had no intention to sell/transfer the hotel property or the residential property to the plaintiff. The sole aim was to cheat the plaintiff and to induce it to part with a sum of Rs.8,00,00,000/-. The plaintiff thereafter got another legal notice issued on 1.12.2016 claiming refund of Rs.8.00,00,000/-. Further, V.K.R. Constructions also issued a notice of demand for Rs.2,80,00,000/-

9. Pursuant to the above, the defendants entered into an agreement/MOU with the plaintiff and its sister concern on 19.12.2016 acknowledging the amount due and agreeing to refund/make the entire repayments along with interest within a period of six months. Defendant No.2 also agreed to stand as a guarantor in the said MOU to ensure repayment of the entire amount. The defendant also sent a Statement of Account acknowledging the amounts due as on 6.8.2016. Alongwith the MOU, the defendants paid a sum of Rs.1,00,000/- by cheque dated 4.2.2017. The said cheque was presented and has duly cleared.

10. It is the case of the plaintiff that the defendants again defaulted in making the said repayment despite expiry of six months and have not returned the amounts due. Hence, the present suit.

11. The defendants have filed IA No.12605/2017 seeking leave to defend. In the said application the following defences are sought to be raised:-

- (i) It is claimed by the defendants that the MOU dated 19.12.2016 is false, concocted and is a fabricated document on which signatures of defendant No.2 have been obtained by fraudulent means. It is claimed that defendant No.2 would have never signed the alleged MOU had defendant No.2 been made aware of the correct contents of the said document. The signatures of defendant No.2 have been obtained by fraud. It is further claimed that the residential area measuring 1,00,000 sq.feet which is alleged to have been agreed to be sold is actually property worth more than Rs.10,00,00,000/-.The actual purchase price of the property is around Rs.6 to 7 crore itself. It is claimed that it is inconceivable and absolutely absurd to allege that there existed an oral agreement on account of which the defendants had agreed to sell the said property at less than the actual purchase price of the same. It is also claimed that the plaintiff and V.K.R. Constructions were aware about the mortgage of the said hotel in question for which agreement to sell dated 14.2.2014 had been entered into. It is claimed that the parties were not strangers as plaintiffs and V.K.R. Constructions had already purchased two other hotel properties from the defendant.
- (ii) It is further claimed that as per the Agreement to Sell dated 14.2.2014 which was executed between the parties, the sister concern of the plaintiff V.K.R. Constructions was required to pay an amount of Rs.6,86,40,000/-, out of which only an amount of Rs.2,80,00,000/- has been paid. The balance sale consideration has not been paid.
- (iii) It is further stated that there was no agreement between the parties for sale of the residential property.

- (iv) It is further stated that the amount of Rs.8,00,00,000/- as mentioned in the pleadings has been paid by the plaintiff for purchase of two other hotel properties which are other than the hotel property which is the subject matter of the present suit. The plaintiff is needlessly trying to claim that the sum of Rs.8,00,00,000/- has been paid by the plaintiff as a consideration for purchase of the third hotel which is subject matter of the present suit and the residential property.
- (v) It is further claimed by the defendants that if the resolution allegedly authorizing defendant No.2 on behalf of defendant No.1 is looked at, the same does not give any authority to defendant No.2 to execute the Memorandum of Understanding containing record of such transaction which never occurred between the parties and which has adverse and damaging impact on the interest of defendant No.1. It is claimed that the resolution is simply an authority to arrive at a settlement of accounts between the parties. As already pointed out, there was a transaction for sale of two other hotel properties. In addition, certain other cash transfers also took place between the parties. Hence, it is claimed that the MOU is not binding on the defendants.
- (vi) It is also claimed that the MOU in question even if accepted is actually a bond and a stamp duty of above Rs.10 lac was payable on the same. As the same has not been paid the said document cannot be relied upon and should be impounded.

12. I have heard learned counsel for the parties. Learned counsel for the defendants has broadly reiterated the submissions made in the aforementioned application seeking leave to defend. Apart from repeating the said contentions, reliance was also placed upon the judgment of the Supreme Court in the case of

Balwant Rai Saluja and Another vs. Air India Limited and Others, (2014) 9 SCC 407 to contend that a subsidiary company cannot pay on behalf of the parent company. It is also reiterated that the MOU is a bond on which stamp duty of more than Rs.10 lacs was to be paid. Reliance is placed on Article 15 of Schedule I of The Indian Stamp Act, 1899 to claim that the said MOU is a bond. Reliance is also placed on judgment of the Patna High Court in the case of ***Mst. Radha Devi and Others vs. Dhanik Lal Isser, AIR 1971 Pat 378*** to plead that the document in question is a bond and needs to be impounded by the Court as being inadequately stamped.

13. Learned counsel for the plaintiff has denied the aforesaid contentions. He has strongly urged that there is no reason to conclude that the MOU between the parties dated 19.12.2016 is vitiated by fraud. There is no cogent plea raised. Reliance is also placed upon judgment of the Full Bench of the Allahabad High Court in the case of ***Mahabir Prasad vs. Peer Bux, AIR 1972 All 466 (FB)*** to contend that the document in question is an agreement and not a bond.

14. I may now deal with the contention of the defendant. The first plea that has been strongly urged before the court was that the MOU dated 19.12.2016 is vitiated by fraud and had the full facts been revealed to defendant No.2 he would never have executed the said document. In my opinion, the plea is completely misconceived. The plea of fraud is a mere bald plea bereft of material facts as to what fraud was committed on the defendant No.2. The application for leave to defend merely states that defendant No.2 would never have signed the document had he been aware of the correct contents of the said documents. Being a Director of the company, it is not elaborated as to why he did not make himself familiar with the contents of the document before he signed the same. A perusal of the said copy of the document shows that the same has been signed by defendant No.2 on each page. The document runs into about 10 pages and each

page has been signed by defendant No.2. Some blanks and corrections have been added which have also been duly signed.

15. That apart, a separate communication dated 4.2.2017 has also been forwarded by the defendant duly signed by defendant No.2 enclosing a cheque drawn on Oriental Bank of Commerce for Rs.1,00,000/- towards initial payment as envisaged in the MOU signed on 19.12.2016. The relevant letter reads as follows:-

“Dear Sir,

Please find enclosed herewith cheque no.026993 Dated 04.02.2017 for Rs.1,00,000.00 (Rupees One Lacs Only) drawn on Oriental Bank of Commerce, M.G. Marg, Hazratganj, Lucknow towards initial payment of MOU signed on 19.12.2016.

We assure you, that we will clear all your accounts as early as possible.

Thanking you,

Yours faithfully,

SHRI COLONIZERS AND DEVELOPERS PVT LTD.

Manoj Dwivedi
(Director)”

16. Hence, the MOU was executed on 19.12.2016. A cheque dated 4.2.2017 was also given in partial payment of the dues payable under the MOU. The cheque when presented by the plaintiff was duly cleared. This subsequent act of the defendant fortifies the fact that MOU dated 19.12.2016 was executed voluntarily with full knowledge.

17. I may note that in the rejoinder to the reply filed by the plaintiff, defendant now claims that Shri Vinod Rajpaul had fabricated the MOU inasmuch as he had misused signed blank sheets of paper taken from the office

premises of defendant No.2 as defendant No.2 on several occasions used to leave blank signed sheets of papers with his office staff. This belated afterthought is clearly mischievous. No such plea has been raised in the application for leave to defend. In fact in the application the plea raised is that there is a fraud as defendant No.2 would never have signed the same had he been made aware of the correct contents of the said documents. But the rejoinder now concocts a new plea as noted above. Clearly, the plea of the defendant cannot be believed.

18. In this context, reference may be had to Order 6 Rule 4 CPC which reads as follows:-

“ORDER VI

Pleadings Generally

4. Particulars to be given where necessary - In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.”

19. Hence, where a party claims a fraud, all material particulars have to be stated in the pleadings. In the present case, it is manifest that other than making a bald plea of fraud no particulars as to why defendant No.2 was not aware of the contents of the MOU when he signed the same has been made or pleaded. An altogether new plea is taken in the Rejoinder. This plea that the said MOU dated 19.12.2016 is a fraud is a sham plea and a complete moonshine.

20. Another plea raised by the defendant is that defendant No.2 had no authority to execute the said MOU dated 19.12.2016 and hence the same is not binding. In this context reference may be had to the extract of the Minutes of the Meeting of the Board of Directors of Shri Colonizers and Developers Private

Limited held on 15.12.2016 in the registered office of the Company at S-14, Jai Hind Commercial Complex, Lal Bagh, Luknow at 10:30 AM which reads as follows:-

“RESOLVED THAT the Board Members of the company in their meeting have decided to, Mr.Manoj Dwivedi, Chairman of the Company, be and hereby fully authorized and empowered severally to represent, discuss to negotiate, and finalize, commit, terms and conditions for sign any documents on behalf of the company for the settlement the accounts of M/s.Vandana Farms & Resorts Pvt. Ltd. and V.K.R. Constructions Pvt. Ltd. of their office or at Flat No.808, 18/12, WEA Karol Bagh, New Delhi.

FURTHER RESOLVED that certified copy of the Resolution be forwarded wherever required under signature of any Director of the Company.”

21. From a perusal of the aforesaid resolution which is admitted by the defendants, it is manifest that defendant No.2 Shri Manoj Dwivedi, Chairman of the defendant No.1 company was empowered to permit negotiate, finalise and commit terms and conditions for signing any documents on behalf of the company and for settlement of the accounts of the plaintiff and V.K.R. Constructions. While settling accounts, defendant No.2 obviously would have to quantify the amount payable and spell out the period of repayment of the same. The MOU dated 19.12.2016 merely fixes the amount payable by the defendants to the plaintiffs. The amount payable to the plaintiff is quantified as Rs.8,00,00,000/- plus stated interest. The period of repayment is stipulated. Other terms and conditions are stipulated. Clearly, defendant No.2 was empowered to enter into the said MOU dated 19.12.2016. The said plea of the defendant is clearly misplaced.

22. Another plea strongly raised by learned counsel for the defendant was that the sum of Rs.8 crore paid by the plaintiff to defendant No.1 was actually the

consideration for sale of two other hotels other than the hotel which is subject matter of the present suit. It is claimed that as per Agreement to Sell for the hotel dated 14.2.2014, the plaintiff was not supposed to pay the sum of Rs.8,00,00,000/- but was liable to pay only a sum of Rs.3,93,60,000/-. It is stated that there can be no plausible reason as to why an additional amount was paid of approximately Rs.4,00,00,000/- in excess for the amount payable by the plaintiffs.

In my opinion, the above plea is misplaced and is also a bald plea being raised by the defendant without giving the full material facts. No details are mentioned as to which are the other two hotels for which the transaction took place between the plaintiff and the defendants, the sale consideration paid by the plaintiff for the said two hotels and the manner in which the payment was made. Further, when such a transaction took place, details of the payment of Rs.8,00,00,000/- made by the plaintiff would be duly acknowledged in various documents that were executed by the parties when the said sale was done. The sale deed would contain details of the instruments by which payments were made by the plaintiff to the defendant. No such material details or particulars of documents have been placed on record. Merely a bald averment is made that a sum of Rs.8,00,00,000/- was sought to be paid as consideration for sale and purchase of two other hotels.

23. I may also note the contention of the plaintiff in this regard. It has been pointed out by the plaintiff in the reply to IA No.12605/2017 that the said hotels were sold in 2014 and sale deeds were registered on 19.2.2015 in favour of the plaintiff. The details as to how the payments were made for the said hotels have been given in the reply by the plaintiff. These transactions were completed before the present transaction. Hence, the attempt of the defendant to claim that

the payment which the plaintiff has made as per the present suit were made for sale of the other two hotels is a misconceived argument. There was no reason to believe that the plaintiff would transfer consideration for purchase of the other two hotels after the sale deeds have been duly executed by the defendant. The plea being bereft of material and relevant facts and also being without merits has to be rejected being nothing but a moonshine.

24. I may now come to the last plea strongly urged by learned counsel for the defendant, namely, that the MOU dated 19.12.2016 is a bond and accordingly liable for stamp duty under Article 15 of the Schedule I of the Indian Stamp Act, 1899. Reference may be had to section 2(5) of the Indian Stamp Act, 1899 which defines a 'bond' as follows:-

“2. Definitions.-

(5) Bond – “Bond” includes –

(a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;

(b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and

(c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another;

[but does not include a debenture]”

25. Learned counsel for the plaintiff had relied upon the judgment of a Division Bench of the Patna High Court in *Mst.Radha Devi vs.Dhanik Lal Isser (supra)* to support his plea. That case pertains to a document which was a letter by the debtor to the creditor. The letter promises to repay the debt by a certain date. In those facts the court held as follows:-

“2. The dispute between the parties is not really as to the amount of the deficit stamp duty but as to the nature of the document; whether it is a bond chargeable under Article 15 or a promissory

note chargeable under Article 49. Under Article 49, promissory note “when payable on demand” is chargeable under clause (a)”, when payable otherwise than on demand” it is chargeable under clause (b). Bond is defined in S. 2(5) as follows:

“(5) Bond.— ‘bond’ includes—

- (a) any instrument whereby a person obliges himself to pay money to another on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be:
- (b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another: and
- (c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another.”

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10. In *Ram Narayan Bhagat v. Ramchandra Singh*, AIR 1962 Pat 325 a Bench of this Court repelled argument similar to one advanced before us and followed the decision in *Ramchandraseth's case*, (1905) ILR 29 Bom 82. It was held that documents having been attested by witness and there being nothing in them to show that the amounts covered by them were payable to order or to the bearer came within the term bond as defined in Section 2(5)(b) of the Act. In view of the Bench decision of this Court which is binding upon us and as I find no reason to take a view different from one taken in that case. I do not propose to discuss this question in any further detail and reject the contention of learned counsel for the petitioners that decision in *Ramchandraseth's case* (1905) ILR 29 Bom 82 is no longer good law.

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16. After having given due consideration to the arguments advanced before us by learned counsel for the parties and the ratio for the decisions in *Aiyappankutty's case*. AIR 1955 Trav-Co 65 and *MuthuGounder's case*, AIR 1961 Mad 347 I respectfully agree with the view taken by RamachandraIyer, J. in the latter case. In both these decisions it has been held that when there is no stipulation postponing the payment, the expression ‘payable on

demand' in the document means that the money becomes due forthwith at once on the execution of the document. In such a case the use of the expression "payable on demand" cannot be taken to be a condition; but where the payment cannot be enforced within a stipulated period and it is stated that the debt becomes payable after that period on demand, the use of expression 'on demand' attaches a further condition and such a document is not a promissory note within the meaning of Section 2(22) of the Stamp Act."

26. The Court hence took the view that where documents were attested by witnesses and there being nothing in them to show that the amounts covered by them were payable to order or to the bearer they came within the term of bond as defined in section 2(5)(b) of the Act. The said judgment has no application to the facts of this case.

27. Reference may also be had to the judgment relied upon by the learned counsel for the plaintiff of the Full Bench of the Allahabad High Court in ***Mahabir Prasad vs. Peer Bux (supra)***. That was a case in which Peer Bux the opposite party had agreed to sell 50 quintals of Rab to Mahabir Prasad. He had received Rs.4,000/- as advance towards the price. He agreed that he would supply the Rab. In case there is a default in making the supply he was to pay 50% of the profits by way of damages. Documents were unattested. The court held as follows:-

"15. In law the contract in the present case will be deemed to be that on Peer Bux not supplying the agreed quantity of Rab the applicant was entitled to reasonable compensation not exceeding the stated amount namely not exceeding 50 percent of the profits. So construed the transaction between the parties provided to the applicant a remedy by way of suing for compensation for breach of contract. In the case of a bond, the remedy is to recover the sum named in the bond. If the bond is conditioned on the performance of some covenant, the person recovers the actual damage which he could prove that he has

sustained. The point is that in either case, as Garth, C.J. put it in *Gisborne and Co. v. Bowri*, “not only is the bond a contract of a different form and nature from a covenant with a penal clause, but the remedy upon it, and the amount recoverable for the breach of it, is also different.” This is corroborated by the provisions of the Limitation Act Clause (d) of Sec. 2 of the Limitation Act, 1963, gives the definition of ‘bond’ in terms identical with clause (a), Sec. 2(5) of the Stamp Act. Art. 27 provides for a suit for compensation for breach of a promise to do anything within a specified time. The prescribed period of three years begins to run when the time specified arrives. Arts. 28 and 29 provide for a suit on a simple bond depending upon whether a day is specified for payment or not. The time of three years begins to run on the day so specified or the date of executing the bond. The position is the same under the Limitation Act, 1908. It will be seen that the cause of action for a suit on a bond accrues on an occasion different than the cause of action for a suit for compensation for breach of a promise. This also tends to show that the obligation to pay money as penalty for breach of a covenant is not within the purview of the definition of ‘bond’ in clause (a) of Sec. 2(5). In my Opinion the document before us was not a bond within meaning of Sec. 2(5)(a). It was chargeable to duty as an agreement.”

28. Let me look to the facts of this case. A perusal may be had to the MOU dated 19.12.2016 executed between the plaintiff and defendants and V.K.R. Constructions Private Limited. The document first narrates the facts as have been pleaded by the plaintiff above. It mentions about the Agreement for sale of the hotel property for a sale consideration of Rs.6.86 crores. It refers to the Agreement to Sell for the hotel property dated 14.2.2014. It refers to the offer of the defendant to sell 1 lac sq.ft. in the Group Housing at Sushant Golf City, Sultanpur Road, Lucknow. It refers to the consideration paid by the plaintiff and V.K.R.Constructions Private Limited and then it states that the parties have agreed that the defendant shall refund the money to the plaintiff and

V.K.R.Constructions Pvt. Ltd. The amount payable is quantified and the time period by which the payment is to be made is stipulated.

29. In this context reference may also be had to Entry 5 of Schedule 1 of the Indian Stamp Act, 1899 which stipulates the stamp duty payable for an Agreement or Memorandum of Agreement and states as follows:-

“
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SCHEDULE I: STAMP DUTY ON INSTRUMENTS

	<i>Description of Instrument</i>	<i>Proper Stamp-duty</i>
5.	<i>Agreement or Memorandum of an Agreement</i>	
	<i>(a) if relating to the sale of a bill of exchange;</i>	<i>Two annas</i>
	<i>(b) if relating to the sale of a Government security or share in an incorporated company or other body corporate;</i>	<i>Subject to a maximum of ten rupees, one anna for every Rs. 10,000 or part thereof of the value of the security or share</i>
	<i>(c) if not otherwise provided for</i>	<i>Eight annas</i>

”

30. The document in question, namely, the MOU dated 19.12.2016 is an unattested document. The document is hence not covered by the definition of bond as provided in section 2(5)(b)& 2(5)(c). It also does not fall within Section 2(5)(a) as it is not an instrument by which a person has obliged himself to pay money to another on the condition that the obligation shall be void if such a specific act is performed or not performed. On the contrary it falls in the definition of an Agreement. The MOU records a novation of Contract under section 62 of the Indian Contract Act, 1872 whereby the parties have agreed that the old agreements shall be superseded by the new Agreement. The document in

question being an agreement has been rightfully stamped. There is no merit in the pleas raised by learned counsel for the defendant on this contention.

31. In the above facts should the defendant be granted leave to defend. The relevant part of Order 37 CPC reads as follows:-

“ORDER XXXVII
Summary Procedure

.....

3. Procedure for the appearance of defendant.—(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under Rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.

(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a pre-paid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4-A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and

leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

(6) At the hearing of such summons for judgment,—

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith.

(7) The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit.

.....

32. The legal position regarding grant of leave to defend is now settled by the Supreme court in the case of ***IDBI Trusteeship Services Ltd. vs. Hubtown Ltd.***(2017) 1 SCC 568 where the Supreme Court held as follows:-

“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] , 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.)”

33. I have already dealt with the contentions raised by the defendant. I have held that the pleas raised are without merits, bereft of material facts and a moonshine. The defence is frivolous and vexatious. Para 17.5 of the above noted judgment of the Supreme Court would clearly apply to the facts of the case.

34. There is no merit in the application and the same is dismissed.

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35. As IA No.12605/2017 has been dismissed the present suit is decreed. A decree is passed in favour of the plaintiff and against the defendants for a sum of Rs.14,83,49,498/-.

36. Plaintiff shall also be entitled to pendente lite simple interest @ 12% per annum from the date of filing of the suit till the date of decree. Plaintiff shall also be entitled to future interest @ 12% per annum simple interest from the date of decree till recovery. Plaintiff shall also be entitled to costs. Suit stands disposed of. All pending applications, if any, also stand disposed of.

**JAYANT NATH
(JUDGE)**

MAY 19,2020

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