IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.03.2024

Pronounced on :28.03.2024

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

Application No.622 of 2024 in C.S. No.46 of 2018

G.Sreevidhya .. Applicant/plaintiff

vs.

1.M/s.Karismaa Foundations Pvt. Ltd.,
rep. by its Managing Director
2.Rakesh P.Sheth
3.Roshini P.Sheth
4.Premsai Chandur .. Respondents/defendants

For Applicant : Mr.R.Parthasarathy,
Senior Counsel
Assisted by Ms.Madhu Preetha Elango

For Respondents : Mr.Nithyaesh Nataraj

ORDER

This application has been filed by the plaintiff seeking for summary judgment against the defendants in terms of the suit prayers as the plaintiff contends that the defendants have no real prospect of successfully defending the suit claim.

2.In the forthcoming paragraphs, the parties are described as per their litigative status in the main suit. The plaintiff is the land owner and the first defendant is the builder. The defendants 2 to 4 are the Directors of the first defendant company. The plaintiff had paid a sum of Rs.1,50,00,000/- as advance to the first defendant, for construction of a building. The plaintiff thought it fit not to proceed with the construction thereafter and therefore, sought for refund of the advance from the first defendant. The first defendant had also not commenced the construction work on receipt of the advance amount of Rs.1,50,00,000/- from the plaintiff. The cheque issued by the first defendant towards refund of the advance amount to the plaintiff was also returned dishonoured for 'insufficiency of funds', which resulted in the plaintiff filing the suit as well as filing parallel proceedings before the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016. The National Company Law Tribunal had dismissed the application of the plaintiff and aggrieved by the same, the plaintiff had preferred an appeal before the National Company Law Appellate Tribunal. The National Company Law Appellate Tribunal, after setting aside the order of the National Company Law Tribunal, remanded the matter back to the National Company Law

Tribunal for fresh consideration. The above stated facts are un-disputed facts.

3.However, before the National Company Law Tribunal (NCLT), subsequent to the order of remand passed by the National Company Law Appellate Tribunal, the plaintiff and the first defendant represented by the second defendant entered into a Memorandum of Compromise dated 14.09.2019. Under the Memorandum of Compromise, the first defendant undertook to pay towards full and final settlement of the plaintiff's claim a sum of Rs.1,25,00,000/- in two tranches, as detailed hereunder:

a)Rs.55,00,000/- (Rupees Fifty Five Lakhs) on withdrawal of the Company Petition vide two Demand Drafts dated 13.09.2019 bearing D.D. No.102847 for Rs.20,00,000/- drawn on Axis Bank and D.D. No.000910 for Rs.35,00,000/- drawn on Axis Bank;

b)Rs.70,00,000/- (Rupees Seventy Lakhs) vide Cheque No.001114 dated 31.03.2020 drawn on ICICI Bank Limited.

4.The plaintiff and the first defendant had also entered into another Memorandum of Compromise dated 14.09.2019 in respect of the interest amount payable by the first defendant to the plaintiff, which was quantified at Rs.45,00,000/-. The Memorandum of Compromise dated 14.09.2019 was recorded by the National Company Law Tribunal and after recording the same, the Company Petition stood dismissed as withdrawn by the order of the National Company Law Tribunal dated 16.09.2019. In terms of the Memorandum of Compromise dated 14.09.2019, the plaintiff encashed the Demand Draft for a sum of Rs.55,00,000/- given by the first defendant under the Memorandum of Compromise dated 14.09.2019. However, the post-dated cheque dated 31.03.2020 given by the first defendant for a sum of Rs.70,00,000/- towards the balance principal amount, on presentation by the plaintiff was returned dishonoured for the reason 'insufficient funds'.

5.The plaintiff filed Interlocutory Application before the National Company Law Tribunal in I.A. No.936 of 2021 seeking to revive the insolvency proceedings, which was dismissed as withdrawn earlier on account of the Memorandum of Compromise entered into between the plaintiff and the first defendant dated 14.09.2019. By order dated 15.02.2022, the National Company Law Tribunal dismissed the I.A. No.936 of 2021 filed by the plaintiff on the ground of maintainability. An appeal against the said order dated 15.02.2022 passed in I.A. No.936 of 2021 has also been filed by the plaintiff, before the National Company Law Appellate Tribunal in Company Appeal (AT) Insolvency No.106 of

2022, which is still pending.

6.According to the plaintiff, being an admitted debt as per the Memorandum of Compromise dated 14.09.2019 entered into between the plaintiff and the first defendant, which was recorded by the National Company Law Tribunal, there is no probable defence available to the defendants to defend the suit claim. Being an admitted liability, the plaintiff claims that the instant application seeking for summary judgment is maintainable. The plaintiff has claimed that as on 13.07.2023, a sum of Rs.1,10,24,520.54 is due and payable by the defendants jointly and severally and the details are set out hereunder:

- Principal - Rs.70,00,000/-
- Rate of interest - 15% p.a.
- Number of days - 1399 days (14.092019 - 13.07.2023)
- Total interest as on 13.07.2023 - Rs.40,24,520.54
- Total amount due as on 13.07.2023 - Rs.1,10,24,520.54

7.On the other hand, it is the contention of the defendants that the application for summary judgment is not maintainable for the following reasons:

a)There was a duty cast on the plaintiff to withdraw the suit C.S. No.46 of 2018 under the Memorandum of Compromise dated 14.09.2019. Instead of withdrawing the present suit as per the Memorandum of Compromise, the plaintiff has chosen to continue prosecuting the suit and has also chosen to file this application seeking for summary judgment which amounts to abuse of process of law;

b)Having elected to exercise her right before the National Company Law Tribunal to initiate insolvency proceedings and that too when the plaintiff has committed breach of the Memorandum of Compromise dated 14.09.2019, having not withdrawn this suit as per the said Memorandum of Compromise, the application seeking for summary judgment is not maintainable;

c)When it is an admitted fact that under the Memorandum of Compromise dated 14.09.2019, the plaintiff had agreed to withdraw the suit, the plaintiff cannot now contend that just because such a plea was not taken by the defendants in their written statement, the instant application seeking for summary judgment cannot be held to be maintainable.

d)In the Counter affidavit filed in this application, the defendants have specifically pleaded about the breach of Memorandum of Compromise committed by the plaintiff as she has not withdrawn this suit as per the terms and conditions of the Memorandum of Compromise. Therefore, the suit is barred by limitation. The Memorandum of Compromise was executed on 14.09.2019 and the applications for amendment of plaint were filed by the plaintiff seeking to amend the pleadings and the plaint prayers were filed by the plaintiff only on 24.07.2023, whereas the amendment applications ought to have been filed on or before 14.09.2022 for the purpose of saving limitation.

e)A careful perusal of the Hon'ble Supreme Court's order to save limitation issue would show that the Government imposed lock down on account of Covid-19, which does not apply to the facts of the instant cast as pleaded by the plaintiff. Only in cases where the limitation expired between 15.03.2020 and 28.02.2022, the order of the Hon'ble Supreme Court will get attracted.

f)According to the defendants, since the limitation period for filing the amendment applications seeking to amend the pleadings, plaint and the suit claim expired for the plaintiff after 28.02.2022, the order of the Hon'ble Supreme Court saving the limitation on account of Covid-19 will not apply to the plaintiff's case.

g)Having filed applications seeking for amendment before this Court only on 28.07.2023, the amendment applications and the suit are barred by limitation.

h)The defendants 2 and 3 are not proper and necessary parties to the suit. They had earlier taken out an application under Order I Rule 10 of C.P.C. seeking for deletion of their names from the array of parties defendants in A.No.3274 of 2021 and by order dated 17.02.2022, this Court dismissed the said application and while dismissing the said application, this Court has held that burden lies on the plaintiff to prove her allegations against the defendants 2 and 3 at the time of trial. Therefore, without going for trial, the plaintiff cannot file this application seeking for summary judgment against all the defendants jointly and severally.

i)There is absolutely no basis for the plaintiff to claim interest at the rate of 15% per annum. A separate Memorandum of Compromise dated 14.09.2019 was entered into between the plaintiff and the first defendant with regard to the payment of the interest component, which was crystallised under the Memorandum of Compromise at Rs.45,00,000/-.

j)The first defendant has already paid the plaintiff the interest amount of Rs.45,00,000/- and therefore, the question of once again paying interest at the rate of 15% to the plaintiff will not arise, which can be demonstrated by the defendants only during trial.

8.Heard Mr.R.Parthasarathy, learned Senior Counsel, Assisted by Ms.Madhu Preetha Elango for the plaintiff and Mr.Nithyaesh Nataraj, learned counsel for the defendants.

9.Learned Senior Counsel for the plaintiff, during the course of his submissions, after referring to the documents filed along with the plaint as well as the documents filed subsequently, which have been allowed to be received by this Court, would re-iterate the contentions of the plaintiff. He would submit that, being an undisputed debt and there being no real prospect for the defendants in defending the suit claim, the application filed for summary judgment is maintainable and the same has to be allowed by directing the defendants jointly and severally to pay the plaintiff a sum of Rs.70,00,000/- as per the Memorandum of Compromise together with interest at 15% per annum as prayed for in this application.

10.In response to the defences raised by the defendants in this application, the learned Senior Counsel for the plaintiff would submit as follows:

a)The suit was originally filed on time within the limitation period i.e. in November 2017. The plea of limitation cannot be invoked insofar it concerns the amendment of the quantum of the claim. While the Memorandum of Compromise is relied on for admission of liability by the defendants, the suit bases itself on the fact that monies were advanced under a Construction Agreement dated 10.11.2014 and the said monies were liable to be repaid once the agreement did not fructify. Therefore, the contention of the defendants that the plaintiff's amended claim is solely based on the Memorandum of Compromise dated 14.09.2019 is fallacious. Once the suit has been filed on time, the plea of limitation is not maintainable insofar as subsequent amendment of quantum of claim is concerned, which is purely to record the subsequent developments.

b)Without prejudice to the above, even if amendment of plaint was to be considered for the plea of limitation, this application has been filed well within the period of limitation and it is evident as seen from the following events:

Date	Events
14.09.2019	Memorandum of Compromise entered into by the plaintiff and the first defendant
31.03.2020	Due date for payment of Rs.70,00,000/- as per the Memorandum of Compromise
20.01.2021	First defendant filed its written statement wherein neither the Memorandum of Compromise nor the default of payment of Rs.70,00,000/- is mentioned
24.07.2023	Plaintiff files an application for amendment of plaint and for taking on record additional documents (A.Nos.3800 and 3801 of 2023)

c)While the defendants have not even mentioned how the filing of the aforesaid applications have been made belatedly, even if the earliest date viz., 14.09.2019 is taken into account, the application has been filed on time since the entire period from 15.03.2020 till 28.02.2022 stands excluded in view of the order of *Suo Motu* extension of limitation dated 10.01.2022 passed by the Hon'ble Supreme Court. Therefore, the application has been filed within 23 months/694 days (after excluding time period between 15.03.2020-28.02.2022) which is well within 36 months/3 years contemplated under the Limitation Act.

d)The defendants have erroneously pressed into service Section 5(iii) in the *Suo Motu* extension Order of the Hon'ble Supreme Court. However, the said direction comes to the aid of the plaintiff in as much as it clearly states that in cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2020, notwithstanding the actual balance period, all persons shall have 90 days extension of the limitation period from 01.03.2022. In the event the actual balance period of limitation remaining with effect from 01.03.2022 is greater than 90 days, the longer period shall apply.

e)In the present case, as on 01.03.2022, the plaintiff had unexpired 2.5 years available to bring the main Memorandum of Compromise on record. Being the larger of the two years, the plaintiff is entitled to the longer period.

f)Therefore, the contention of the defendants that there is a mixed question of fact and law required to be decided is baseless, which is evident from a bare perusal of the dates and the Order of the Hon'ble Supreme Court. The plea of limitation taken by the defendants is therefore not maintainable.

g)The withdrawal of the suit as contemplated under Clause V of the Memorandum of Compromise was not a precondition for the payment of the admitted liability of Rs.70,00,000/- that was pending to be paid as on the said date. It is evident from the fact that the cheque dated 31.03.2020 for Rs.70,00,000/- was provided to the plaintiff on the date of execution of the Memorandum of Compromise and the sole question was whether the first defendant was going to honour the said cheque.

h)If the plaintiff had withdrawn the suit, the plaintiff would have taken efforts to restore the said suit once the defendants failed to make payments as per the Memorandum of Compromise dated 14.09.2019. Therefore, raising the said plea now is hyper-technical, irrelevant, immaterial and it is a clear dilatory tactics employed by the defendants to delay the payment of the admitted debt.

i)The issue of withdrawal of the suit was never raised by the defendants, neither in their written statement nor in their additional written Statement. While that being an admitted position, the defendants cannot now contend that there are triable issues involved in the suit.

j)The contention of the defendants, relying upon the decision in Machado Brothers, rendered by the Hon'ble Supreme Court is misplaced. The suit has not become infructuous in view of the Memorandum of Compromise for the reasons stated earlier.

k)Since the applications seeking for amendment filed by the plaintiff in A.Nos.3800 and 3801 of 2023 have been allowed, the question of raising the disputes in this application will not arise and therefore, the contention of the defendants in their counter has to be rejected.

l)The initiation of proceedings under the Insolvency and Bankruptcy Code, 2016 is an independent proceeding. The proceedings under Insolvency and Bankruptcy Code is not a money recovery proceedings, but rather is pursued for the dissolution of a company, which is unable to pay its dues. Once the same is admitted into

Insolvency Resolution Process, the said proceedings become a proceeding in-rem and moratorium takes effect.

m)Section 7 of the Insolvency and Bankruptcy Code, 2016 does not bar the filing of an application in respect of a financial debt under that provision in spite of a pending dispute, unlike Section 9 read with Section 8(2) of the Insolvency and Bankruptcy Code, 2016 which specifically bars filing of an application by an operational creditor if there was a pre-existing dispute.

n)In support of the aforesaid submission, the decision rendered by the National Company Law Tribunal in **Karan Goel v. M/s Pashupathi Jewellers and another reported in 2019 SCC OnLine NCLAT 934** was relied upon.

o)Clause 4 of the Memorandum of Compromise dated 14.09.2019 in respect of principal amount makes it clear that if the first defendant defaults in the payment of Rs.70,00,000/-, then the first defendant would be liable to pay interest at the rate of 10% on the principal amount. Having committed default in the payment of Rs.70,00,000/-, the first defendant is liable to pay interest. The second Memorandum of

Compromise dated 14.09.2019 is only the crystallised amount towards interest payable by the defendants upto 31.03.2020. A harmonious construction of both the Memorandum of Compromise will not support the interpretation sought to be canvassed by the defendants. Assuming but not admitting to the earlier, whether the first defendant is liable to pay 15% interest as claimed by the plaintiff or 10% interest as provided for in the Memorandum of Compromise can alone be referred to trial. The admitted amount insofar as it pertains to the principal has not been disputed by the defendants.

11.Per contra, the learned counsel for the defendants reiterate the contents of the counter affidavit filed by the defendants in this application by contending as follows:

a)The plaintiff having undertaken to withdraw the suit under the Memorandum of Compromise dated 14.09.2019, the present application seeking for summary judgment is not maintainable on the ground of estoppel;

b)The suit is barred by limitation. The mixed question of fact and law required in the suit can be adjudicated only after trial when Order

XIII-A Rule 4(3) states that the defendants in any application of the present nature shall file a reply in which the defendants can state the reasons as to why the relief sought for should not be granted.

c)In the counter filed to the present application, the defendants have specifically pleaded about the breach of Memorandum of Compromise committed by the plaintiff by not withdrawing the suit and therefore, under no stretch of imagination it can be said that the defendants never took such a plea.

d)A decision rendered by the Hon'ble Supreme Court in the case of ***Director General of Civil Aviation reported in (2011) 5 SCC 435*** was relied upon. Relying upon the said decision, it is submitted that the ‘doctrine of election’ is based on the ‘rule of estoppel’ and by that law, a person may be precluded by his action or conduct or silence when it is his duty to speak from asserting a right which he otherwise would have had. Taking inconsistent pleas by a party makes their conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily.

e)In the application filed for summary judgment, except for making a bald assertion that the defendants have no real prospect of successfully defending the claim, the plaintiff has not specifically dealt with the defence raised by the defendants. Therefore, the present Application is not in conformity with the mandatory procedure prescribed under Order XIII-A C.P.C., 1908 (as amended by the Commercial Courts Act, 2015).

f)A careful perusal of the Hon'ble Supreme Court's order would show that in cases where limitation did not expire between 15.03.2020 to 28.02.2022, it cannot be construed that the entire period would remain under suspended animation for the purpose of computation of limitation period. Such an interpretation would result in patent absurdity as it would result in enlargement of time when the order infact only provides for exclusion of the above time period for cases where limitation would have expired between 15.03.2020 to 28.02.2022. The Hon'ble Supreme Court's order can never be relied upon to revive claims which did not expire between 15.03.2020 to 28.02.2022 and became time bared much later. For this proposition, the decision rendered by the National Company Law Tribunal, Ahmedabad dated 07.03.2024 in the case of **State Bank of India vs. *Ansuyaben Mansukhlal*** was relied upon. In the case on hand, the cause of action to sue arose on 14.06.2019, whereas the amendment application was filed seeking to amend the claim only on 24.07.2023, which is beyond the period of limitation.

g)The interpretation given by the plaintiff will also lead to absurd result because suppose limitation for a party is expiring on 28.02.2022, then he would have time only till 30.05.2022, whereas for a person whose limitation is expiring on 01.03.2022 will have the entire period from 15.03.2020 to 28.02.2022 completely set off. This could never have been the intended consequence of the Supreme Court's order.

h)It is also pertinent to mention that during the Covid period, the plaintiff has been continuously litigating and therefore, the plaintiff cannot be heard to say that she would require the benefit of the Supreme Court's extension order.

i)The plea of limitation, being a mixed question of law and fact is very much a triable issue and even on this score, the plaintiff is not entitled for a Summary Judgment.

j)In support of the said contention, a decision of the Bombay High Court dated 31.01.2023 in the case of ***Ashok Commercial Enterprises vs. Rajesh Jugraj Madhani*** was relied upon, wherein, it has been held that when an issue is raised with regard to the limitation, the same would not put the claim of plaintiff as one which is impossible of being defended.

k)The defendants 2 and 3 have contended right from the inception of the suit that they are not proper and necessary party defendants to the suit. Infact, they had taken out an application under Order I Rule 10 of C.P.C. seeking for deletion of their names from the array of party defendants through A. No.3274 of 2021 and vide order dated 17.02.2022, though the application came to be dismissed, it was held that the burden lies on the plaintiff to prove their allegations against the defendants 2 and 3 at the time of trial. The burden on the plaintiff cannot be circumvented by seeking for a decree jointly and severally against the defendants summarily.

l)As regards the interest component claimed by the plaintiff, there is absolutely no basis for them to claim interest at the rate of 15%. The Memorandum of Compromise pertaining to the interest claims was crystallized at Rs. 45,00,000/- and was also paid by the first defendant to the plaintiff. Therefore, the plaintiff cannot claim any further interest and the basis for claiming 15% interest is something, which has to be demonstrated and proven by the plaintiff at the time of trial.

m)The decision of the Hon'ble Supreme Court in ***Machado Brothers reported in 2004 11 SCC 168*** was also relied upon for the purpose of the defendants' contention that by exercising the powers under Section 151 of C.P.C., the suit can be disposed of as it has now become infructuous due to the subsequent development pursuant to the Memorandum of Compromise dated 14.09.2019 entered into between the plaintiff and the first defendant as there are several triable issues involved in the suit and therefore, the question of entertaining this application filed by the plaintiff seeking for summary judgment does not arise.

Discussion:

12.The following are the undisputed facts:

a)The first defendant has agreed to refund the advance amount to the plaintiff paid under the Construction Agreement dated 10.11.2014 since the construction did not fructify;

b)The plaintiff had paid an advance amount of Rs.1,50,00,000/- to the first defendant towards part payment for the construction costs. But the construction did not fructify and the plaintiff sought for refund of the advance amount of Rs.1,50,00,000/-;

c)A cheque was issued by the defendants towards part refund of the advance amount in favour of the plaintiff. The cheque got returned dishonoured;

d)There arose disputes between the parties, which resulted in the plaintiff initiating proceedings both before the National Company Law Tribunal as well as before this Court by filing the instant suit.

e)The disputes between the parties got partially resolved by virtue of the Memorandum of Compromise dated 14.09.2019 entered into between the plaintiff and the first defendant before the National Company Law Tribunal, Chennai in the Insolvency Proceedings initiated by the plaintiff.

f)Under the Memorandum of Compromise dated 14.09.2019, the plaintiff agreed to withdraw the Insolvency Proceedings as well as the present suit and the first defendant had paid Rs.55,00,000/- to the plaintiff on the date of the Memorandum of Compromise and had agreed to pay the balance amount of Rs.70,00,000/- and for the said amount, a post-dated cheque was given.

g)The first instalment amount of Rs.55,00,000/- paid in the form of Demand Draft from the date of signing of the Memorandum of

Compromise was encashed by the plaintiff.

13.Admittedly, the second instalment of Rs.70,00,000/- towards full and final settlement could not be realised by the plaintiff as the cheque issued by the first defendant to the plaintiff got returned dishonoured for insufficiency of funds. The plaintiff has also issued a Legal Notice to the first defendant cautioning the defendants that appropriate civil and criminal proceedings will be initiated if the value of the dishonoured cheque is not paid.

14.The Memorandum of Compromise dated 14.09.2019 was also recorded by the National Company Law Tribunal and the Company Petition pending before the National Company Law Tribunal was dismissed as withdrawn after recording the Memorandum of Compromise. Though the defendants contend that certain payments have been made to the plaintiff by the first defendant subsequent to the Memorandum of Compromise, there is no evidence produced by the defendants to prove the same.

15.On the other hand, the plaintiff has filed documents, which records the subsequent developments pursuant to the date of signing of the Memorandum of Compromise dated 14.09.2019, which will reveal that a sum of Rs.70,00,000/- is still due and payable to the plaintiff by the first defendant. Though under the Memorandum of Compromise dated 14.09.2019, the plaintiff had undertaken to withdraw the suit on receipt of the first instalment of Rs.55,00,000/- from the first defendant, there is no time frame fixed in the Memorandum of Compromise for withdrawal of the suit by the plaintiff.

16.In this application, the defendants have taken the following defences:

a)Since the amendment applications filed by the plaintiff seeking to amend the claim pursuant to the Memorandum of Compromise dated 14.09.2019 were filed only on 24.07.2023 beyond the period of three years from the date of Memorandum of Compromise, this application seeking for summary judgment is not maintainable and the suit is barred by limitation.

b)Under the Memorandum of Compromise dated 14.09.2019, the plaintiff has undertaken to withdraw the suit as well as the Company Petition on the file of the National Company Law Tribunal, but the plaintiff has withdrawn only the Company Petition, but not the suit, which has become infructuous in view of the Memorandum of Compromise dated 14.09.2019.

c)There are other triable issues involved in the suit since the defendants 2 to 4 are not parties to the Memorandum of Compromise and this Court by its order dated 17.02.2022 passed in A.No.3274 of 2021, wherein the defendants 2 and 3 had sought for deletion of their names from the array of party defendants, had observed that the burden is on the plaintiff to prove the allegations against the defendants 2 and 3 at the time of trial. Therefore, the burden of the plaintiff cannot be circumvented by seeking for joint and several decree against the defendants summarily.

d)The interest amount has already been paid to the plaintiff under a separate Memorandum of Compromise dated 14.09.2019 entered into between the first defendant and the plaintiff. According to the defendants, they are not liable to pay interest to the plaintiff.

17.However, insofar as the sum of Rs.70,00,000/- claimed by the plaintiff is concerned, the Memorandum of Compromise dated 14.09.2019 will establish that a sum of Rs.70,00,000/- is still due and payable by the first defendant to the plaintiff. Even though the defendants would contend that certain part payments were made subsequent to the Memorandum of Compromise dated 14.09.2019 towards the principal amount due and payable to the plaintiff, the defendants have not produced any evidence to prove the same.

18.The amendment applications were filed by the plaintiff seeking to amend the claim pursuant to the Memorandum of Compromise dated 14.09.2019 only on 24.07.2023 beyond the period of three years from 14.09.2019. The limitation issue raised by the defendants being a mixed question of fact and law cannot be adjudicated in this summary judgment application even before trial.

19.The plaintiff contends that in view of the order passed by the Hon'ble Supreme Court saving the limitation from 15.03.2020 to 28.02.2022, the plaintiff's amendment applications filed on 24.07.2023 are well within the period of limitation, if the period disclosed in the order of the Hon'ble Supreme Court is excluded.

20.On the other hand, the learned counsel for the defendants contends that the amendment applications have been filed beyond the period of limitation and that the order of the Hon'ble Supreme Court saving the limitation will not apply to the case on hand since the limitation period expired only after 28.02.2022.

21.The contentions of both the parties with regard to the limitation issue cannot be decided in this Interlocutory Application as there are merits and demerits in both their contentions with regard to the limitation issue and therefore that issue can be decided only after trial

22.This Court is not expressing its view in this Interlocutory Application as the issue of limitation can be decided only after trial as the plea of limitation taken by the defendants cannot be totally disregarded considering the fact that the amendment applications were filed by the plaintiff only on 24.07.2023.

23.The Hon'ble Supreme Court in the case of **Life Insurance Corporation vs. Sanjeev Builders Private Limited reported in (2018) 11 SCC 722** has also framed general guidelines for Courts while adjudicating amendment applications filed under Order VI Rule 17 of C.P.C. wherein it has been held that if a time barred claim is sought to be introduced, in which case, the fact that the claim would be time barred becomes a relevant factor for consideration.

24.Though in the instant case, amendment applications have already been allowed permitting the plaintiff to amend the suit claim and the said order also has not been challenged, this Court is of the considered view that just because the amendment applications are allowed, the plea of limitation taken by the defendants cannot be totally ignored and therefore, the limitation issue can be decided only after trial.

25.Therefore, the issue of limitation raised by the defendants requires further examination and cannot be decided in this Interlocutory

Application as the plea of limitation taken by the defendants cannot be held to be moonshine.

26.The defendants have contended that the plaintiff has flouted the Memorandum of Compromise dated 14.09.2019 by not withdrawing the suit as undertaken by them under the Memorandum of Compromise.

27.Admittedly, the plaintiff has withdrawn only the Company Petition, which they have filed before the National Company Law Tribunal subsequent to the signing of the Memorandum of Compromise dated 14.09.2019 with the first defendant though they have undertaken to withdraw this suit as well. Under the Memorandum of Compromise dated 14.09.2019, there is no deadline fixed for the plaintiff to withdraw the suit.

28.Admittedly, it has been established through the plaintiff's through her documentary evidence that the first defendant defaulted in the payment of Rs.70,00,000/- payable to the plaintiff under the

Memorandum of Compromise dated 14.09.2019. The cheque issued by the first defendant to the plaintiff for the said amount has also got returned dishonoured for insufficiency of funds. The plaintiff therefore contends that there is no necessity to withdraw the suit as per the Memorandum of Compromise since under the Memorandum of Compromise, the plaintiff is having the right to restore the suit on account of the breach of the Memorandum of Compromise committed by the first defendant.

29.Whether the said explanation given by the plaintiff is proper and acceptable cannot be adjudicated in this Interlocutory Application and can be adjudicated only after trial.

30.Though the learned counsel for the defendants may contend that by virtue of the decision rendered by the Hon'ble Supreme Court in Machado Brothers reported in 2004 11 SCC 168, the suit has become infructuous on account of the non withdrawal of the same by the plaintiff as per the Memorandum of Compromise dated 14.09.2019, this Court is of the considered view that it cannot be as simple as the learned counsel for the defendants portrays. But necessarily, it is a triable issue, which cannot be decided in this Interlocutory stage and can be decided only after trial.

31.It is also noted that in Order I Rule 10 of C.P.C. application taken out by the defendants 2 and 3, this Court, in its order dated 17.02.2022 while dismissing the said application, has also observed that the burden lies on the plaintiff to prove the allegations against the defendants 2 and 3 during trial.

32.Therefore, after giving due consideration to the fact that the plea of limitation raised by the defendants is not a moonshine defence as it requires further consideration for which oral evidence of the parties is required, the plaintiff is not entitled for a summary judgment as prayed for in this application. However, considering the fact that Rs.70,00,000/- is an un-disputed amount, the first defendant must be put on terms for allowing them to defend the suit, on merits.

33.Though the plaintiff has claimed the interest at the rate of 15%

per annum, the Memorandum of Compromise dated 14.09.2019, which is the basis of this application, does not provide for payment of 15% interest. Clause IV of the Memorandum of Compromise dated 14.09.2019 in respect of principal amount discloses that if the first defendant defaults in the payment of Rs.70,00,000/-, the first defendant would be liable to pay interest at the rate of 10% per annum on the principal amount. The second Memorandum of Compromise dated 14.09.2019 has crystallised the amount towards interest payable by the first defendant upto 31.03.2020.

34.In view of the fact that a separate Memorandum of Compromise has been entered into for the payment of interest, which has been quantified at Rs.45,00,000/-, whether the plaintiff and the first defendant have agreed in addition to that amount, an additional interest at 10% per annum under the Memorandum of Compromise dated 14.09.2019 insofar as the principal amount is concerned, is a debatable issue, which can be considered only after trial. Hence, the question of passing summary judgment insofar as the interest amount is concerned does not arise as it can be adjudicated only after trial.

35.The defendants 2 to 4 though being the directors of the first defendant company, in their individual capacity are not parties to any of the contracts entered into with the plaintiff, which includes the construction contract and the Memorandum of Compromise, which are the basis of this summary judgment application. Through this summary judgment application, the defendants 2 to 4 cannot be made liable. Infact this Court, while dismissing the application filed by the defendants 2 and 3 under Order I Rule 10 of C.P.C. to remove from the array of party defendants, has held that only after trial, the liability of the defendants 2 and 3 can be adjudicated upon. Since they are not parties to any of the contracts entered into with the plaintiff, this summary judgment application filed against them is baseless and is without any merit.

36.Insofar as the limitation plea is concerned, the first defendant has made out a probable case for defending the suit on the ground that the suit is barred by limitation since the amendment applications seeking amendment of the claim was filed beyond the period of three years from the date of the Memorandum of Compromise.

37.For the foregoing reasons, without expressing any opinion on the merits of the respective contentions, this application is disposed of as against the first defendant by directing the first defendant to deposit to the credit of the suit a sum of Rs.70,00,000/- within a period of two weeks from the date of receipt of a copy of this order, failing which there shall be a summary judgment for a sum of Rs.70,00,000/- in favour of the plaintiff against the first defendant.

38.However, this application filed against the defendants 2 to 4 is dismissed as the suit claim against the defendants 2 to 4 can be adjudicated only after trial.

Post the suit for filing of affidavit of admission/denial of documents on 12.04.2024.

28.03.2024

Index: Yes/ No
Speaking order / Non speaking order
Neutral citation : Yes / No
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ABDUL QUDDHOSE, J.

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pre-delivery order in Application No. 622 of 2024 in C.S. No.46 of 2018

28.03.2024