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Jayesh Vinod Tanna Vs Nagees Ahmed Khan

Summons For Judgment No.11 Of 2019 In Commercial Summary Suit No.136 Of 2019

Court: Bombay High Court

Date of Decision: Sept. 21, 2022

Acts Referred:
Code Of Civil Procedure, 1908 â€" Order 7 Rule 6, Order 37 Rule 1(2), Order 37 Rule 1(2)(b)#Limitation Act, 1963 â€" Section 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

Hon'ble Judges: N.J. Jamadar, J

Bench: Single Bench

Advocate: Aurup Dasgupta, Sonam Ghiya, Priyanka Pandey, Jhangiani, Narula, Puneet Chaturvedi

Final Decision: Disposed Of

Judgement

N.J. Jamadar, J

1. This Commercial Division Summary Suit is instituted to recover a sum of Rs. 6,90,00,000/- along with further interest @ 12% p.a. from the date of

the suit till payment and/or realization.

2. Shorn of unnecessary details, the plaintiffÃ¢â‚¬â„¢s case can be stated as under:-

a] The plaintiff is engaged in the business of real estate development. The defendant and his family members are the absolute owners of Hotel,

Ã¢â‚¬Å“Milan International Private LimitedÃ¢â‚¬â€‹ Santacruz(w), Mumbai. (Hotel Milan).

b] In the month of February, 2021 the defendant agreed to sell the said Ã¢â‚¬ËœHotel MilanÃ¢â‚¬â„¢ to the plaintiff for a consideration of Rs. 40,51,00,000/-.

Towards part consideration, the plaintiff paid a sum of Rs. 1,51,00,000/- to the defendant through cheques during the period 22nd March, 2011 to 24th

December, 2011. The defendant, however, reneged from the said promise to sell Ã¢â‚¬ËœHotel MilanÃ¢â‚¬â„¢ and instead agreed to refund the said amount

along with suitable compensation or transfer his right, title and interest to the extent of 232 sq.mtrs. useable carpet area of the developed property

Ã¢â‚¬Å“FulcrumÃ¢â‚¬â€‹ (Ã¢â‚¬Å“Alternate PropertyÃ¢â‚¬â€‹) in which the defendant had a share.

c] A Memorandum of Understanding (MOU) dated 21st May, 2014 incorporating the terms and conditions of the agreement between the parties

came to be executed. The MOU, inter alia, provided that the defendant would pay a lump sum amount of Rs. 7,80,00,000/- to the plaintiff inclusive of

the sum of Rs. 1,51,00,000/- paid by the plaintiff and compensation thereon. In the event of failure of the defendant to pay the said sum on or before

30th May, 2014 the defendant would transfer the aforesaid Alternate Property. If the defendant failed to transfer the said Alternate Property in favour

of the plaintiff, the defendant would sell the said Alternate Property to third party/buyer and remit the money due and payable to the plaintiff from out

of the sale proceeds on or before 31st May, 2015. If such sale of Alternate Property was effected at a rate higher than Rs.24,000/- per sq.ft, saleable

area, and Rs. 38,400/- per sq. ft. carpet area, the amount received over and above the aforesaid rates was to be equally shared by the plaintiff and the

defendant.

d] The defendant committed default in compliance with the aforesaid obligations. In the month of June, 2015, the defendant apprised the plaintiff that

he would make payment in accordance with the MOU instead of transferring the Alternate Property. On 14th August, 2015, the defendant paid a sum

of Rs. 70 lakhs vide cheque bearing No.745127 drawn on DCB Bank, Bandra (w), Mumbai. Thereafter the defendant, despite numerous assurances,

again committed default.

3. Thus the plaintiff called upon the defendant to execute the conveyance in accordance with the terms of MOU and forwarded the draft of the

agreement for sale. The defendant again assured to make the payment and, after much persuasion, a further sum of Rs. 20 lakhs was paid by the

defendant to the plaintiff again by cheque bearing No. 745198 drawn on DCB Bank, Bandra (w). Still a sum of Rs. 6,90,00,000/- remained outstanding

under the terms of MOU. Eventually, the plaintiff addressed a legal notice calling upon the defendant to discharge his obligation. The defendant

neither complied with the demand in the notice nor gave reply thereto. Hence, this suit for recovery of the sum of Rs. 6,90,00,000/- along with further

interest based on the MOU.

4. In response to the service of Writ of Summons, the defendant entered appearance. Thereupon, the plaintiff took out the Summons for Judgment.

An affidavit in reply is filed on behalf of the defendant seeking an unconditional leave to defend the suit.

5. The defendant contends that the suit does not fall within the ambit of order XXXVII of the Code of Civil Procedure, 1908. Since the suit is based on

the MOU executed on 21st May, 2014, the institution of the suit on 10th December, 2018, according to the defendant, was clearly barred by limitation.

In any event, under the said MOU, as interest was sought to be created in the immovable property, the said instrument was required to be

compulsorily registered and, thus, the said instrument cannot affect the property. Moreover, since adequate stamp duty has not been paid on the said

MOU, it cannot be acted upon and, resultantly, the defendant becomes entitled to an unconditional leave to defend the suit.

6. On merits, the defendant contends that it was the plaintiff who was in breach of the contract to purchase Ã¢â‚¬Ëœ Hotel Ã¢â‚¬Ëœ MilanÃ¢â‚¬â„¢. According to the

defendant after preventing the commercial exploitation of Ã¢â‚¬Ëœ Hotel MilanÃ¢â‚¬â„¢ for years, the defendant expressed his inability to purchase Ã¢â‚¬Ëœ Hotel

MilanÃ¢â‚¬â„¢. Thus, on account of the refusal of the plaintiff to perform his part of the contract, MOU came to be executed on the basis of assurances

of the plaintiff that he would introduce a lucrative buyer who would pay approximately Rs. 55 Crores for Ã¢â‚¬Ëœ Hotel MilanÃ¢â‚¬â„¢ and thus the defendant

agreed to pay an amount of Rs. 7,80,00,000/- provided the said property was sold for a consideration of Rs. 55 Crores. The offer to provide Alternate

Property in Ã¢â‚¬Ëœ FulcrumÃ¢â‚¬â„¢ was contingent upon the sale of Hotel Milan.

7. An affidavit in rejoinder is filed on behalf of the plaintiff to controvert the contentions in the affidavit in reply.

8. I have heard Mr. Aurup Dasgupta, the learned counsel for the plaintiff, and Mr. Puneet Chaturvedi, learned counsel for the defendant, at some

length.

9. Mr. Dasgupta submitted that none of the defences sought to be raised by defendant warrants leave to defend the suit. At the outset, Mr. Dasgupta

laid emphasis on seemingly irreconcilable defences qua the execution of the MOU. At one stage in the affidavit in reply (paragraph 12), the defendant

contended that the MOU was executed on account of coercion and undue influence. At another stage, the defendant offered to set up an oral

understanding which is at variance with the terms of the MOU (paragraph 28). This ambivalent stand of the defendant, according to Mr. Dasgupta,

renders it beyond the pale of controversy that MOU was duly executed. Drawing attention of the Court to the further contentions in the affidavit in

reply wherein the defendant contends, with audacity, that he was under no obligation to respond to the demand notice much less comply with the

demand therein, Mr. Dasgupta would urge that failure to give reply to the demand notice, in the peculiar facts of the case, surely justifies an adverse

inference against the defendant that the defences sought to be raised are moonshine and vexatious defences.

10. Mr. Dasgupta would urge that there is neither any dispute about the payment of the sum of Rs. 1,51,00,000/- by the plaintiff to the defendant. Nor

there is any explanation for the repayment of Rs. 90 lakhs by the defendant to the plaintiff vide cheques. Therefore, in view of clear and explicit

acknowledgment of liability in the MOU, a decree must follow, submitted Mr. Dasgupta.

11. In opposition to this, Mr. Puneet Chaturvedi would submit that the instant suit is beyond the purview of Order XXXVII Rule 1(2) of the Code. The

suit can not be said to be either to recover a debt or liquidated demand of money. Thus, the primary requirement envisaged by clause (b) of sub Rule

(2) of Rule 1 of Order XXXVII is not at all made out.

12. Mr. Chaturvedi assailed the legality and validity of MOU by raising a slew of exceptions. First, the MOU does not bear the date of its execution.

The stamp duty of Rs. 200/- seems to have been paid on 21st May, 2014, whereas the instrument is notarized on 23rd August, 2014. Secondly, though

MOU refers to the property described in the schedule I, no schedule is appended to the said MOU. Thirdly, since the MOU provides for the execution

of a deed of transfer of interest in an immovable property, sans registration, it can not affect the immovable property comprised therein nor can it be

received as an evidence of any transaction affecting such property. Lastly, the MOU is not adequately stamped.

13. Mr. Chaturvedi further submitted that if the recitals in the agreement are read as a whole, it becomes abundantly clear that it was the plaintiff who

resiled from the transaction. Moreover, the alleged agreement to pay a sum of Rs. 7,80,00,000/- to the plaintiff can by no stretch of imagination be said

to be an agreement to pay a liquidated sum.

14. I have carefully perused the averments in the plaint, documents annexed with it, affidavit in reply and rejoinder thereto and given anxious

consideration to the submissions canvassed across the bar.

15. Before adverting to deal with the rival submissions, it may be expedient to note the facts over which, by and large, there is not much controversy.

Payment of a sum of Rs. 1,51,00,000/- by the plaintiff to the defendant in pursuance of an agreement to purchase Hotel Milan is incontestable. Though

the defendant made an endevour to contend that the MOU was not executed out of his own volition yet, the execution, as such, does not seem to be

much in contest. However, the exact date of execution, which is not evident from the MOU itself, is a matter in contest. Repayment of a sum of Rs.

90 lakhs vide cheques dated 14th August, 2015 and 24th April, 2017 is also not much in dispute. The purpose and component towards which those

amounts were paid may, however, be put in contest.

16. In the backdrop of the aforesaid facts, in order to properly appreciate the controversy between the parties, it may be apposite to extract paragraph

Nos. 2 and 3 of the MOU which contain the terms of the alleged agreement between the parties.

2] Since, the party o the Third part had decided not to continue the outright purchase of the hotel share, the party of the First Part has offered to the

partly of the Second part the following:

a) The Party of the First part has another commercial project of Sahar airport road, near Mumbai International airport called, Ã¢â‚¬Å“FulcrumÃ¢â‚¬ which is

developed by Sears construction. In this project Party of the First part Nafees Ahmed Khan ahs 20.98% share in the constructed premises subject to

Division deed agreement with Sears construction. From the said project Part of the First part will give to Party of the Second part Jayesh Tanna 232

sq.mtrs useable carpet area as security towards his obligation of payment of Rs. 1.51 cr. As mentioned in clause 2 above. Party of the First part is

well entitled to allot/sell/lien the referred area.

b) If Party of the First part pays the amount to Party of the Second part as per clause 2 mentioned above on or before 30/05/2014, otherwise in the

event of failure of payment as per Clasue 2 herein by Party of the First part, the party of the Second part will be entitled to the area in the referred

project as mentioned in clause 3(a) and Party of the First part will execute Deed of Transfer in favour of Party of the Second part or its nominee on

31/05/2015. Or in case Party of the First part has a buyer for his entire share the Party of the First part can sell without the consent of the Party of

the Second part and pay a lumpsum amount of Rs. 7.8 crores to the Party of the Second part against all his dues on or before 31/05/2015.

c) Party of the Firs part has full right to sell the said share in the said project and pay Party of the Second part a lumpsum amount of Rs. 7.8 crores

after paying this Party of the Second part will have no claims whatsoever from Party of the First part.

d) If party of the 1st part sells the said area mentioned in clause 2a above at the rate of more than Rs. 24,000/- per sq.ft. Saleable Area or Rs.

38,400/- per sq.ft. Carpet area then that amount over and above 24,000/- per sq. ft Saleable Area or Rs. 38,400/- per sq.ft. Carpet Area will be shared

in the ratio 50% to 1st party and 50% to 2nd party on or before 31/05/2015.

3]Finally Party of the First part has promised to the Party of the Second part that before 31/05/2015 party of the First part will pay to Party of the

Second part as mentioned in clause 2 above, in case of failure then party of the First part will execute deed of transfer and give 232 sq. mtrs. usable

carpet area in the said project on 31/05/2015 to party of the second part or itÃ¢â‚¬â„¢s nominee and party of the second part has agreed to all the above

terms and conditions.

17. Evidently, the MOU, especially the aforesaid clauses, are in-artistically drafted. An exercise of gathering the real intent of the parties would reveal

that, under the aforesaid terms of the MOU, firstly, the defendant was to pay the amount of Rs. 1,51,00,000/- on or before 30th May, 2014. As and by

way of security to discharge the said obligation the defendant had agreed to transfer Alternate Property. Secondly, in the event of failure to repay the

amount of Rs. 1,51,00,000/-, as agreed, the plaintiff would become entitled to the Alternate Property and the defendant would execute a conveyance

in favour of the plaintiff or his nominee, by 31st May, 2015. Thirdly, the defendant was at liberty to sell his entire share in Ã¢â‚¬ËœFulcrumÃ¢â‚¬â„¢ without the

consent of the plaintiff and pay a lumpsum amount of Rs. 7.8 Crores to the plaintiff against all his dues on or before 31st May, 2015 and, thereafter,

the plaintiff would have no claim against the defendant. Fourthly, it was further provided that if the plaintiff sold the said area of 232 sq. mtrs at the

rate more than Rs. 24,000/-per sq. ft. saleable area and Rs. 38,400/- per sq.ft. carpet area, then the amount in excess of the said threshold rate would

be shared by the plaintiff and defendant in the ratio of 50:50.

18. In the backdrop of the aforesaid nature of the agreement between the parties, the primary question which would warrant consideration is the bar

of limitation. The plaintiff has approached the Court with a case that in accordance with the terms of MOU, the defendant agreed to pay the sum of

Rs. 7.80 crores instead of transferring Alternate Property in favour of the plaintiff. Since, the said amount was to be paid on 31st May, 2015 and the

defendant made part payment of Rs. 70 lakhs vide cheque dated 14th August, 2015 and of Rs. 20 lakhs vide cheque dated 24th April, 2017, the

institution of the suit on 10th December, 2018 is within the statutory period of limitation.

19. Apparently, the plaintiff seeks to bank upon the provisions contained in section 19 of the Limitation Act, 1963 which provides for computation of

fresh period of limitation from the time of payment made on account of a debt before expiration of the prescribed period.

20. Section 19 of the Limitation Act, 1963 reads as under:-

19. Effect of payment on account of debt or of interest on legacy:Ã¢â‚¬

Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the

debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:

Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the

handwriting of, or in a writing signed by, the person making the payment.

Explanation.Ã¢â‚¬"For the purposes of this section,Ã¢â‚¬

(a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;

(b) Ã¢â‚¬Å“debtÃ¢â‚¬â€‹ does not include money payable under a decree or order of a court.

21. From a plain reading of section 19, two requirements become self-evident. First, the payment ought to have been made on account of a debt,

before the expiry of period of limitation. Second, the acknowledgment of payment should be in the handwriting of the debtor or the person making

payment under his authority. Thus, mere payment before the expiry of the period of limitation, without acknowledgment, is of no avail to bring a case

within the ambit of section 19.

22. A useful reference in this context can be made to a recent three Judge Bench judgment of the Supreme Court in the case of Shanti Conductors

Private Limited vs. Assam State Electricity Board and Others1 (2020) 2 Supreme Court Cases 677 wherein in the context of the bar of limitation, the

Supreme Court expounded the requirement of section 19 of the Limitation Act. Paragraphs 15 and 16 read as under:-

15] Order 7 Rule 6 uses the words Ã¢â‚¬Å“the plaint shall show the ground upon which exemption from such law is claimedÃ¢â‚¬. The exemption provided

under Sections 4 to 20 of the Limitation Act, 1963 are based on certain facts and events. Section 19, with which we are concerned, provides for a

fresh period of limitation, which is founded on certain facts, i.e., (i) whether payment on account of debt or of interest on legacy is made before the

expiration of the prescribed period by the person liable to pay the debt or legacy, (ii) an acknowledgement of the payment appears in the handwriting

of, or in a writing signed by, the person making the payment.

16] We may notice the judgment of this Court dealing with Section 20 of the Limitation Act, 1908, which was akin to present Section 19 of the

Limitation Act, 1963. In Sant Lal Mahton Vs. Kamla Prasad and Others, AIR 1951 SC 477, this Court held that for applicability of Section 20 of the

Limitation Act, 1908, two conditions were essential that the payment must be made within the prescribed period of limitation and it must be

acknowledged by some form of writing either in the handwriting of the payer himself or signed by him. This Court further held that for claiming benefit

of exemption under Section 20, there has to be pleading and proof. In paragraphs 9 and 10, following has been laid down (AIR p.479) :

Ã¢â‚¬Å“9. It would be clear, we think, from the language of s. 20, Limitation Act, that to attract its operation two conditions are essential : first, the

payment must be made within the prescribed period of limitation and secondly, it must be acknowledged by some form of writing either in the

handwriting of the payer himself or signed by him. We agree with the Subordinate Judge that it is the payment which really extends the period of

limitation under s. 20, Limitation Act; but the payment has got to be proved in a particular way and for reason of policy the legislature insists on a

written or signed acknowledgment as the only proof of payment and excludes oral testimony.

Unless, therefore, there is acknowledgment in the required from, the payment by itself is of no avail. The Subordinate Judge, however, is right in

holding that while the section requires that the payment should be made within the period of limitation, it does not require that the acknowledgment

should also be made within that period. To interpret the proviso in that way would be to import into it certain words which do not occur there. This is

the view taken by almost all the High Courts in India and to us it seems to be a proper view to take (See Md. Moizuddin v. Nalini Bala A.I.R. (24)

1937 Cal 284 : I.L.R. (1937) 2 Cal. 137; Lal Singh v. Gulab Rai 55 All 280, Venkata Subbhu v. Appu Sundaram 17 Mad. 92, Ram Prasad v. Mohan

Lal A.I.R. (10) 1923 Nag 117 and Viswanath Raghunath Kale vs. Mahadeo Rajaram Saraf, 1933 SCC OnLine Bom 3, ILR (1933) 57 Bom 453.

10. Ã¢â‚¬Â¦Ã¢â‚¬Â¦If the plaintiff's right of action is apparently barred under the Statute of limitation, O.7, R.6, Civil P.C. makes it his duty to state specifically in

the plaint the grounds of exemption allowed by the Limitation Act upon which he relies to exclude its operation; and if the plaintiff has got to allege in

his plaint the facts which entitle him to exemption, obviously these facts must be in existence at or before the time when the plaint is filed; facts which

come into existence after the filing of the plaint cannot be called in aid to revive a right of action which was dead at the date of the suit. To claim

exemption under s. 20. Limitation Act the plaintiff must be in a position to allege and prove not only that there was payment of interest on a debt or

part payment of the principal, but that such payment had been acknowledged in writing in the manner contemplated by that sectionÃ¢â‚¬â€‹.

23. In the case at hand, the plaintiff banked upon the payment evidenced by the cheques to avail a fresh period of limitation under section 19 of the

Act. On first principles, a payment by cheque made by the debtor in favour of the creditor, appears to satisfy the twin test envisaged by section 19.

Drawing of the cheque manifests writing to constitute an acknowledgment in writing within the meaning of section 19 of the Limitation Act.

24. In the case of Jiwanlal Achariya vs. Rameshwarlal Agarwalla AIR 1967 Supreme Court 1118 in a different context, the Supreme Court held that

there can be no doubt that where a post-dated cheque is accepted conditionally and it is honoured, the payment for purpose of section 20 of the

Limitation Act (Old Act) can only be on the date which the cheque bears and cannot be on the date the cheque is handed over, for the cheque, being

post dated, can never be paid till the date of the cheque arrives. Holding thus, in the facts of the said case, it was observed that since the cheque

therein was dated 25th February, 1954, and was honoured soon after, the date of payment for the purposes of section 20 of the Limitation Act (Old

Act) would be 25th February, 1954. The suit was, therefore, within the period of limitation.

25. Reverting to the facts of the case, in the light of the terms of the MOU (extracted above), the amount of Rs. 7,80,00,000/- was to be paid latest by

31st May, 2015. The alleged last part payment of Rs.

20 lakhs was by a cheque, payable on 24th April, 2017. This appears to be within the prescribed period of limitation. Since the said part payment,

prima facie, satisfies the requirement of section 19, I am not persuaded to accede to the submission on behalf of the defendant that the suit is ex-facie

barred by limitation.

26. The defences based on the intrinsic evidence of the MOU and the nature of the liability incurred thereunder are, however, worthy of

consideration. As noted above, the MOU does not bear the date of execution. The confusion is further confounded by the fact that though the stamp

duty is purchased on 21st May, 2014, the document seems to have been notarized on 23rd August, 2014, four months after the period stipulated for the

payment of the amount of Rs. 1,51,00,000/-.

27. If clause 2(a) and 2(b) of the MOU extracted above, are construed in a proper perspective, it becomes explicitly clear that the primary obligation

was to pay the amount of Rs. 1,51,00,000/-Crores by 30th May, 2014. Only upon failure to comply with this obligation, the succeeding and alternative

obligations would arise. From a reading of the afore-extracted clauses of the MOU, the alleged liability to pay lumpsum amount of Rs. 7.8 crores in

the event of failure to pay the sum of Rs. 1,51,00,000/- also appears to be a convoluted one. Plainly, it was in alternative to the transfer of Alternate

Property. Secondly, the said amount was to be paid after the sale of the defendantÃ¢â‚¬â„¢s share which was stated to be 20.98% in the said project

Ã¢â‚¬ËœFulcrumÃ¢â‚¬â„¢. In view of the aforesaid nature of the obligations, allegedly incurred under the MOU, I am afraid to accede to the submission on

behalf of the plaintiff that the parties had agreed at the liquidated amount, to be paid in the event of failure on the part of the defendant to repay the

sum of Rs. 1,51,00,000/-.

28. The time lag between the date by which the amount of Rs. 1,51,00,000/- was to be repaid and date by which the said amount of Rs. 7.8 crores

was to be paid, in lumpsum, also assumes critical significance i.e. a precise period was of one year only. It would be contextually relevant to note that

the parties had not provided for payment of any interest on the said principal sum of Rs. 1,51,00,000/-. Though a period of almost three years had

elapsed from the payment of the said amount by the plaintiff to the defendant, the later was enjoined to pay only the principal amount of Rs.

1,51,00,000/- by 30th May, 2014. In the event of default, however, by 31st May, 2015, within a year of the time stipulated for re-payment, the

defendant was to pay a sum of Rs. 7.8 Crores.

29. The question which thus comes to the fore is whether the said sum is a reasonable compensation for the breach of contract or is it in the nature of

penalty. In absolute numbers, under the terms of MOU, the defendant was to pay an additional sum of Rs.6,29,00,000/- for the delayed payment by

one year only. This surely raises a triable issue as to the entitlement of the plaintiff to receive the said amount allegedly by way of liquidated damages.

30. I am, therefore, inclined to grant leave to defend the suit subject to deposit of a sum of Rs. 61 lakhs, the balance amount of the principal sum of

Rs. 1,51,00,000/-, which was indubitably paid by the plaintiff to the defendant, and the liability to repay the same has been unequivocally acknowledged

in the MOU. It is for this reason I have elaborately considered the bar of limitation. Had the Court found that the suit is ex facie barred by limitation,

the defendant would have been entitled to an unconditional leave to defend the suit. Since the suit prima facie appears to be within the period of

limitation and the liability to the extent of principal amount appears to be clearly admitted, it would be expedient to grant leave on the condition of

deposit of balance amount.

Hence, the following order:

ORDER

a] Leave to defend is granted to the defendant subject to deposit of a sum of Rs.61,00,000/- (Sixty One Lakhs) in the Court within a period of six

weeks from today.

b] If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendant shall

file written statement within a period of thirty days from the date of deposit;

c] If this conditional order of deposit is not complied with, within the aforesaid period, the plaintiff shall be entitled to apply for an ex-parte decree

against the defendant after obtaining a Non-Deposit Certificate from the Prothonotary and Senior Master of this Court. d] Summons for Judgment

stands disposed of accordingly.