(2009) 02 DEL CK 0261

Delhi High Court

Case No: IA. No. 13028 of 2007 and CS (OS) No. 197 of 2006

Madan Lal Limited		APPELLANT
	Vs	
Growth Techno Projects Ltd. and Another		RESPONDENT

Date of Decision: Feb. 26, 2009

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 8
- Civil Procedure Code, 1908 (CPC) - Order 37 Rule 3, Order 37 Rule 3(5), Order 37 Rule 5
- Limitation Act, 1963 - Article 21, 22, 19

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: Anil Kher and Rishi Manchanda, for the Appellant; Prabhjit Jauhar, Anupama Kaul and Vikrant Rana, for the Respondent

Final Decision: Dismissed

Judgement

Rajiv Sahai Endlaw, J.

Applications of the defendants in each of these suits instituted under Order 37 of the CPC are for consideration. Though, the plaintiff in each of the suits is different but the defendants are the same. The plaintiff company in each of the five suits appear to be of the same group. The transaction subject matter of each suit though different is identical. The pleadings of the parties are the same. Common submissions have been addressed by the Counsel for the plaintiffs and the Counsel for the defendants. As such the applications are being disposed of together.

2. The plaintiff in each of the cases entered into an agreement dated 18th April, 1999 with the defendant No. 1 in each suit. The recitals of the said agreements disclose that the defendant No. 1 was holding an agreement for raising construction on a plot of a land at Karkardooma, Shahdara, Delhi and under which agreement

the defendant No. 1 was entitled to certain proposed built-up area and which the defendant No. 1 was entitled to sell/agree to sell and realize consideration therefor. The agreement further discloses that the land had been notified for acquisition and a writ petition had been preferred in this court for quashing the said notification and which writ petition had been dismissed and at the time of entering into the agreement appeal was pending before the Apex court. It is also clear from the recitals of the agreement that till the date of the agreement the permissions for raising construction on the land had not been obtained.

3. Under the said agreement, the defendant No. 1 agreed to sell to the plaintiff in each of the cases, a certain portion of the proposed built-up area of the share of the defendant No. 1, on the terms & conditions contained therein. A part of the said sale consideration was paid by the plaintiff in each case to the defendant No. 1 and the balance was payable as mentioned in the said agreements. Clause 6 of the said agreement provided that the time was the essence of the contract and that the defendant No. 1 confirmed and declared to the plaintiff that it had already submitted the layout and building plans for approval to the respective authorities and that it will receive the approval/sanction in respect thereof within 90 days from the date of the signing of the agreement. The defendant No. 1 had agreed to send a written communication to the plaintiff in each case with a certified copy of the sanction layout plan and building plan and within 30 days of receiving such communication, the plaintiff in each case had agreed to make further payments to the defendant No. 1 as mentioned in the agreement. Clause 7 of the agreement provides that in the event the defendant No. 1 failed to obtain the approval/sanction of plans from the appropriate authorities within the stipulated period of 90 days, the defendant No. 1 shall pay to the plaintiff in each case on all amounts that had been paid towards part consideration, interest at 24% per annum on quarterly rests from the date of payment made till the date sanctioned layout and building plans are received by the defendant No. 1 or till such time the monies is repaid to the plaintiff in each case on termination/cancellation of the agreement by the plaintiff in each case. The defendant No. 1 under the said agreement had agreed to commence the work of construction within 30 days of receiving the sanctions and to complete the said works within 24 months of the date of commencement of construction and whereupon the possession of the flats was agreed to be delivered to the plaintiff in each case. The defendant No. 1 had in Clause 14 of the agreement meted out assurance to the plaintiff in each case of the flats agreed to be sold being free of all encumbrance and further agreed that if it is proved otherwise, the defendant No. 1 shall be liable to refund the consideration amount paid by the plaintiff in each case with interest at 24% per annum to be compounded quarterly. Clause 25 of the agreement provides that notwithstanding anything contained in the agreement, the plaintiff in each case shall be at liberty to terminate the agreement at any time by sending a written communication to the said effect to the defendant No. 1 and the defendant No. 1 had agreed to, within 180 days of receiving of such notice of

termination, refund all amounts paid by the plaintiff in each case with interest at 24% per month on quarterly rests from the date the said amount is paid by the plaintiff. It is further provided that in the event the defendant No. 1 fails to refund the said amount within the said 180 days; the plaintiff in each case shall have the right to claim and recover penal interest at 2% per annum over and above the interest of 24% per annum with quarterly interests. Though the agreement contain a number of other Clauses but the same are not relevant for the purposes of the present case.

4. That besides the aforesaid agreements, the defendant No. 2 also executed a common personal guarantee bond in favour of the plaintiff in all the five cases. Referring to the agreements aforesaid executed by the defendant No. 1 in favour of each of the plaintiffs and whereunder the plaintiffs together had paid a sum of Rs. 97,07,512.50 towards part consideration, the defendant No. 2, in consideration of the plaintiffs having paid the aforesaid sums to the defendant No. 1, guaranteed and undertook to pay to the plaintiffs on demand all principal, interest, costs, charges and expenses due or which may at any time become due to the plaintiffs from the defendant No. 1 against the payments made by the plaintiffs to the defendant No. 1. The guarantee was declared to be a continuing guarantee, not to be considered as cancelled or affected by the defendant No. 1 agreeing or renewing to pay the amount due to the plaintiffs. The defendant No. 2 as guarantor made himself liable to the plaintiffs and further agreed that the plaintiffs shall be entitled to refer their entire dues payable by the defendant No. 1 from the person or properties of the defendant No. 2, upon default in payment by the defendant No. 1. The guarantee was further declared to remain unaffected by the death of the guarantor, until the plaintiffs have received formal authentic notice thereof.

5. The defendant No. 2 died during the pendency of the suit and his legal heirs being his wife and children have been substituted in his place.

6. The plaintiffs instituted the present suits on 30th January, 2006 on the plea that the representations made by the defendants and as recorded in the agreement had turned out to be false and wrong; though the defendants had represented that they had challenged the order of dismissal of the writ petition (challenging the acquisition of land) in the Apex court but had not informed the outcome of the said proceedings; that the defendant No. 1 had however been sending letters from time to time to seek confirmation of balance of the amount paid by the plaintiffs to the defendant No. 1 as shown in the books of account maintained by the defendant No. 1; reference was made to the letter dated 17th October, 2003 sent by the defendant No. 1 and the letter dated 5th November, 2005 sent by the plaintiffs to the defendant No. 1 seeking confirmation of account and which had been duly confirmed by the defendant No. 1. The plaintiffs further stated that since the defendant No. 1 had failed to make any progress of the project as promised, the plaintiffs did not want to continue with the agreements and vide legal notice dated

27th March, 2004 had informed the defendant No. 1 that the plaintiff was not willing to proceed any further with the agreements and cancelling and terminating the agreement and calling upon the defendant No. 1 to refund the amounts paid by each of the plaintiff with interest at 24% per annum compounded quarterly. The said notices were stated to be followed with another notice dated 29th May, 2004. The defendant No. 1 was stated to have responded vide reply dated 4th June, 2004. It was further the averment in the plaint that the defendants having failed to make the payment within 180 days from demand had also become liable to pay penal interest of 2% per annum. It was further pleaded that in spite of the same the defendant No. 1 had continued to correspond with the plaintiffs and vide letter dated 5th September, 2005 had informed the plaintiffs that the Apex court had vide judgment dated 24th August, 2005 dismissed the SLP and the defendant No. 1 was contemplating to file a review petition before the Apex court. The plaintiffs claimed to have sent another notice dated 18th November, 2005 to the defendants calling upon the defendants to pay the amount with interest of 24% per annum compounded quarterly and penal interest on 2% per annum. The defendant No. 1 sent a reply dated 27th December, 2005 denying any liability.

7. Thus, the present suits were filed under Order 37 of the CPC on the basis of the written contract aforesaid between the parties. The principal amount and the interest at 24% per annum compounded quarterly and penal interest claimed in each suit till the date of institution of the suit are as under:

Sr. No.	Suit No.	Principal amount claimed	Total interest claimed till the date of institution of the su
1.	197/2006	20,69,213/-	1,20,15,443/-
2.	198/2006	19,44,000/-	1,12,88,362/-
3.	199/2006	21,14,100/-	1,22,76,094/-
4.	200/2006	17,90,100/-	1,03,94,700/-
5.	201/2006	17,90,100/-	1,03,94,700/-

8. Upon institution of the suits, summons for appearance were issued to the defendants and on 30th May, 2006 summons for judgment were ordered to be issued to the defendants. Upon service of summons for judgment applications u/s 8 of the Arbitration and Conciliation Act, 1996 came to be filed in each of the cases by both the defendants. The said applications also are identical in each case. It was inter-alia the plea of the defendants in the said applications that plaintiffs had

suppressed another agreement dated 18th April, 1999 between the parties, copy whereof was also annexed to applications in each case. A copy of the said agreement annexed to the application and which agreement was not denied by the plaintiffs discloses that in furtherance to the agreement dated 18th April, 1999 forming the basis of the suits, it had been agreed between the plaintiff in each case and the defendant No. 1 that if the plaintiff did not wish to purchase the flats, subject matter of the agreement the defendant No. 1 will buy back the said flats from the plaintiff. The said agreement provided the terms & conditions thereof as well as the consequences flowing therefrom and also contained an arbitration clause. Notice of the said applications u/s 8 of the Arbitration Act, 1996 was issued to the plaintiffs.

9. The plaintiffs before filing replies to the applications u/s 8 of the Arbitration Act filed applications in each of the cases to the effect that the defendants inspite of being served with the summons for judgments had failed to apply for leave to defend and the plaintiffs had thus become entitled to judgment forthwith.

10. This court vide order dated 24th January, 2007, having regard to the nature of the dispute felt appropriate that the plaintiff as well as the defendant No. 2 appear in the court on the next date of hearing. However, on the next date it was informed that the defendant No. 2 had expired and thereafter applications for substitution of legal representatives of defendant No. 2 were filed and allowed.

11. The applications filed by the defendants u/s 8 of the Arbitration Act, 1996 in each of the cases were dismissed vide order dated 30th October, 2007. It was inter-alia held that the agreement dated 18th April, 1999 on the basis whereof the applications u/s 8 had been filed was only a contingent agreement which could have come into force on construction of residential units as was envisaged in the agreement dated 18th April, 1999 forming the basis of the suit. It was further held that the agreement forming basis of the applications u/s 8 was distinct from the agreement forming basis of the suit and the arbitration Clause in the former did not cover the disputes subject matter of the suit. The said order has since attained finality.

12. Upon dismissal of the applications u/s 8, it was the contention of the senior Counsel for the plaintiff that the defendants having not applied for leave to defend the suits were entitled to be decreed forthwith. However, this court vide order dated 30th October, 2007, without prejudice to the said contentions of the plaintiff gave further ten days time to the defendants to apply for leave to defend. It was thereafter that the applications for leave to defend came to be filed on 12th November, 2007 (10th & 11th November, 2007 being second Saturday & Sunday). It may also be noticed that the applications though stated to be on behalf of the defendants are accompanied by the affidavit of the Director of the defendant No. 1 only and are neither signed by the legal heirs of the defendant No. 2 nor accompanying by their affidavits. After completion of pleadings on the said

applications the same are now for consideration.

13. The Counsel for the defendants has during hearing only urged that the claim in suit are not within limitation and that the defendants are entitled to leave to defend on this ground alone. It is argued that everything was disclosed by the defendants to the plaintiffs in the agreement, i.e. that the land on which the construction was to be raised being subject matter of acquisition proceedings and of the sanctions for construction having not been obtained till then. It was argued that under the agreement, the defendant No. 1 had agreed to get the sanctions for construction within 90 days thereof; that there was no plea that it was at any time represented by the defendants to the plaintiff that the sanctions had been so obtained; that the plaintiffs therefore knew on expiry of 90 days from the agreements that there was no sanction; that the plaintiffs ought to have instituted the suits for recovery of monies paid within a period of three years from the expiry of the said 90 days from the agreement to sell dated 18th April, 1999 and the suits had been instituted much later. It was further argued that the acknowledgement of liability relied upon by the plaintiffs were no acknowledgements within the meaning of Section 19 of the Limitation Act; that an acknowledgment of liability has to itself be within the period of limitation i.e. 3 years and any acknowledgement of liability after the said period of three years is no acknowledgment so as to extend the period of limitation. Attention was also drawn to first legal notice dated 27th March, 2004 of the Counsel for the plaintiffs in which it was stated that the flats were to be constructed within 24 months. It was argued that the suit was beyond three years from the expiry of 24 months from the date of agreement also. It was thus argued that the suits were barred by time and the plaints liable to be rejected and in any case the defendants were entitled to leave to defend. The Counsel for the defendants also argued that the legal heirs of the defendant No. 2 in any case will be liable only to the extent of the estate inherited from the defendant No. 2 and could not be personally liable.

14. Per contra, the senior Counsel for the plaintiffs drew attention to the letters in each case of 17th October, 2003 by the defendant No. 1 to the plaintiff seeking confirmation for income tax purposes, of the amounts standing to the credit of each of the plaintiffs in the books of the defendant No. 1 and similar confirmation given by the defendant No. 1 to each of the plaintiffs for the year ending 31st March, 2005 and 30th September, 2005. It was thus contended that it was not open to the defendants to contend that the claims were barred by time.

15. At the beginning of the hearing, it was found that the original documents on the basis whereof the suits have been filed have not been filed by the plaintiffs. However, since there is no dispute of the copies filed being true copies of their respective originals and no such dispute had been raised in the applications for leave to defend or during arguments and further since the defendants themselves had along with their applications u/s 8 of the Arbitration Act filed only a photocopy of the agreement relied upon by them, it was not felt necessary to adjourn the

hearing, though the senior Counsel for the plaintiffs stated that the original documents could be filed if so directed by the court. In the circumstances aforesaid, I do not find any such requirement; nor does Order 37 of the code prohibits proceeding in the absence of the original documents. Rule 5 of Order 37 empowers the court to order the bill, hundi or note on which the suit is found to be deposited with an office of the court; the same is indicative of there being no mandatory requirement of the original being before the court where the filing of original is deemed necessary for adjudication, of course the court can refuse to proceed.

16. Though as aforesaid the hearing was confined on the aforesaid aspect only but since vide order dated 30th October, 2007 the question as to the effect of the defendants not filing applications for leave to defend and instead of filing the application u/s 8 of the Arbitration Act, 1996, was left open, it is considered apposite to deal with the same also.

17. The application u/s 8 Arbitration Act, 1996 has since been dismissed and as aforesaid that order has attained finality. The plea of the defendants of Section 8 was found to be untenable. Be that as it may, the question which arises is as to whether the defendant, who has being served with summons for judgment, is of the opinion that the subject matter of the suit is the subject matter of an arbitration agreement, is entitled to defer filing of the application for leave to defend within the time prescribed therefore and to first call upon the court to adjudicate his plea of Section 8.

18. In my opinion, the defendant is not entitled to do so and if does so, does so at his own risk of, if not succeeding in the application u/s 8, suffering a decree forthwith.

19. It will be seen that Section 8 of the 1996 Act does not require an application thereunder to be filed before taking any step in the suit, as was the position under the 1940 Act. All that Section 8 requires is that the plea of arbitration should be raised not later than while submitting the first statement on the subsistance of the dispute. Thus, it is not as if a defendant would in any manner be prejudiced qua his rights u/s 8 of the Arbitration Act if made to file the application for leave to defend along with and application u/s 8 of the Arbitration Act, 1996. The provisions of a statute cannot be permitted to defeat the provisions of another, especially when they are capable of being harmoniously construed. Any other interpretation would interfere with the mandate of Order 37 of an application for leave to defend being required to be filed within 10 days of service for summons of judgment and providing for the consequence of a decree upon such failure. I am, thus, of the opinion that the defendants in the present case were required to file the application for leave to defend within 10 days of service of summons for judgment and having failed to do so are liable to suffer a decree forthwith.

20. Yet another factor as noticed above is that even after the order dated 30th October, 2007 there does not appear to be any application for leave to defend on behalf of the legal representatives of the defendant No. 2. Sub-rule 5 of Rule 3 of Order 37 requires the defendant to by affidavit or otherwise disclose facts sufficient to entitle him to defend the suit. There is neither any affidavit of any of the legal representative of the defendant No. 2 accompanying the leave to defend application nor is there anything to show that the signatory thereof was authorized by the said defendants. There is thus no option but to infer that there is no leave to defend of the defendant No. 2 and the suit is liable to be decreed against them for this reason alone.

21. Be that as it may, since there is an record, an application for leave to defend and purporting to be on behalf of the defendants it is deemed expedient for full and final adjudication to deal with the same also.

22. Though the Counsel for the defendant had argued on the point of limitation only but a perusal of the application for leave to defend shows that the defendants have therein also referred to the agreement dated 18th April, 1999 forming the basis of the application u/s 8 of the Arbitration Act. However, nothing further has been formulated as to how the said agreement entitles the defendants to leave to defend. Moreover, in view of this court having while dismissing the application u/s 8 held the said agreement to be a contingent agreement to come into force only in the event of construction being raised, and which contingency has not occurred, the said plea is now not open to the defendants and perhaps for this reason only was not raised by the Counsel for the defendants during arguments.

23. The leave to defend application also refers to the full disclosure having been made by the defendants to the plaintiffs and of all the steps which the defendants have taken to have the land cleared and to commence the construction. Some arguments were also raised to that effect. However, in my view, the said pleas are not relevant. The present is not a suit for damages for breach of contract in which the said questions would have been relevant, but is only for recovery of monies paid by way of advance sale consideration together with agreed interest thereon and it is immaterial whether the defendants have performed their part of the agreement or not and whether the defendants had made full disclosure or not.

24. The application for leave to defend also vaguely avers that it is the plaintiffs who have failed to perform the various covenants of the agreement; the defendants have forfeited the monies paid by the plaintiffs owing to default by the plaintiffs. Not only no argument was raised qua the same but the said pleas shall be considered while discussing the plea of limitation.

25. The agreement between the parties from the Clauses thereof highlighted herein above was that the advance sale consideration paid by the plaintiffs to the defendant No. 1 was to be non interest bearing for a period 90 days from payment;

during the said period of 90 days it was expected that the various sanctions/permissions for constructions would be obtained by the defendant No. 1; had the said sanctions been obtained and the construction had commenced within 30 days thereof, the said advance sale consideration was to still remain non-interest bearing for a period of 24 months from the date of commencement of constructions, the time agreed for completion of construction. However, the parties were aware that the sanctions may not be forthcoming within the said period of 90 days. Considerable part of the sale consideration was being paid by the plaintiffs to the defendant No. 1, without even the acquisition of the land being cleared. It was thus provided that if the sanctions were not obtained within 90 days, then interest at 24% per annum with quarterly interest would be payable. The plaintiffs were also given an option to cancel the agreement at any time and to claim refund of the monies with interest. This is so expressly provided in Clauses 7&25 of the Agreement. The defendant was given a further time of 180 days from the said demand of the plaintiff to make the payment and upon failure of the defendant to refund the money with interest within said time, provision was made for further penal interest at 2% per annum over and above the interest at 24% per annum with quarterly interest.

26. The Counsel for the defendant in spite of inquiry as to according to him under which article of Schedule-I of Limitation Act, the claim fell did not point out any article. As far as the vague plea in the application for leave to defend of the plaintiffs having failed to perform their covenants and of forfeiture is concerned, neither there are any particulars given nor is the same inconsonance with the agreement. On the contrary Clause 9 of the agreement provides that even where the sanctions for construction had been obtained and construction commenced and the plaintiffs had failed to pay the installments of sale consideration to be paid thereafter, the defendant No. 1 could terminate the agreement but even then was made liable to refund the monies paid by the plaintiffs till then with interest at 24% per annum with quarterly rests.

27. The option under the agreement of cancelation of the agreement in the event of sanctions/permissions being not obtained, as is the case, was with the plaintiffs and the liability of the defendant No. 1 to refund the money with interest was to commence from the date of the said demand of the plaintiffs. It is not in dispute that the said demand was made by the plaintiffs for the first time vide letter dated 27th March, 2004. The defendants have nowhere contended any earlier termination of the agreement or demand for refund by the defendants. The cause of action for refund would thus accrue to the plaintiffs from the date of said termination/demand for refund i.e. on 27th March, 2004. The Article of Schedule 1 of the Limitation Act applicable to such cases is Article 22 i.e. a suit for money deposited under an agreement that it shall be payable on demand. The limitation provided is of three years commencing from the date when the demand is made. The suit has admittedly been filed within three years of 27th March, 2004 and I do not find any

facts requiring trial so as to entitle the defendants to leave to defend on the said plea. The transaction was not a loan transaction so as to fall within Article 21.

28. Since the suit is found to be within time, it is not deemed expedient to go into the plea raised by the defendants of the acknowledgement of liability not being an acknowledgment within the meaning of Section 19 of the Limitation Act. Suffice, it is to state that the said documents in any case prove that the transaction between the parties was very much alive and in force and subsisting and was treated by the defendant to be so. The said documents in any case, falsify the stand of the defendant of the plaintiff having failed in their covenants and of the amount having been forfeited. In fact, the application filed by the defendant u/s 8 of the Arbitration Act, 1996 also falsifies the said stand of the defendants. Had the claim been barred by time and or had the money been forfeited, there was no occasion for the agreement on the basis whereof that application was filed being applicable or the arbitration Clause therein barring the present suit. In fact, the stand of forfeiture was not taken in the reply to the legal notices preceding the legal proceedings also.

29. The leave to defend applications otherwise do not in any manner dispute the amounts claimed in the suit. The applications for leave to defend thus do not disclose any facts as may be deemed sufficient to entitle the defendants to contest the suit and or do not disclose that the defendants have any substantial defence to raise. The applications for leave to defend are dismissed. Consequently, the plaintiffs are entitled to decree as prayed.

30. The next question is as to the pendente lite interest. Though the agreement between the parties is for interest at 24% per annum with quarterly rests as well as further penal interest at 2% per annum but the plaintiffs are entitled to pendente lite interest i.e. from the date of institution of the suit till decree at simple rate of 24% per annum only on the principal amount in each suit. However, I do not see any reason to deprive the plaintiffs of the contractual rate of interest if the defendants in spite of the decree and within reasonable time thereof do not pay the amounts. Thus, the defendants, if fail to pay the decreetal amount within 30 days of the decree, shall thereafter be again liable for interest @ 24% per annum compounded quarterly as agreed. However, in that eventuality also, I do not deem it proper to grant further penal interest of 2% per annum to the defendants. The suits of the plaintiffs are decreed in above terms with costs. Counsels fee in each case assessed at Rs. 25,000/-. Decree sheet be drawn up.