

(2011) 01 DEL CK 0193
In the Delhi High Court
Case No : CS (OS) No. 706 of 2007

Cambridge Construction (Delhi) Ltd.

APPELLANT

Vs

MCD

RESPONDENT

Date of Decision : 18-01-2011

Acts Referred:

Citation : (2011) 169 PLR 20

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Anil Kumar Kher and I. Sidhu, for the Appellant; Sumita Kapil, for the Respondent

Judgement

V.K. Jain, J.

IA No. 967/2008 (Leave to Defend)

1. This is a suit filed under Order XXXVII of the CPC of Rs. 56,28,364/-. The Plaintiff is the owner of property No. 11, L.S.C., Masjid Moth, New Delhi, which is assessed to property tax in the Records of MCD. The Defendant vide its letter dated 09th September, 2004, confirmed that after meeting the property tax liability for the above said property for the period up to 31st March, 2004, a sum of Rs. 40,62,782/- was lying with it as on 31st March, 2004. In the meanwhile, liability of the Plaintiff towards property tax for the years 2004-05, 2005-06, 2006-07, amounting to Rs. 40,8,000/- has been adjusted from the aforesaid amount, thereby leaving a balance of Rs. 36,54,782/- with the Defendant. The Plaintiff has claimed that amount along with interest thereon at the rate of 18% per annum, amounting to Rs. 19,73,582/-.

2. In its application for leave to contest, the Defendant has alleged that the Plaintiff is not entitled to any money from it and, in fact, it owns a sum of Rs. 95,28,566/- to the Defendant, which it has not paid since 31st March, 2004. It is further alleged that the Ratable Value (RV) of property in question was revised to Rs. 1,30,00000/- w.e.f. 1st April, 1996, from the previous RV of Rs. 11,30,530/-.

Later, vide letter dated 26th March, 2000, the RV was reduced to Rs. 91,03,500/- w.e.f. 14th February, 1998. An appeal was preferred by the Plaintiff against the Assessment Order dated 26th March, 2000, being Appeal No. 354/2000. In the meanwhile, disputes started between the Plaintiff and its tenant which was later compromised and the Plaintiff filed Writ Petition No. 2474 of 2001, claiming vacancy remission. Pursuant to the directions given by this Court, an order was passed by the then Additional Assessor and Collector on 31st January, 2002 which was challenged by the Plaintiff by filing Appeal No. 109/2002. Both the appeals were disposed of by the learned Additional District Judge vide common order dated 01st July, 2002. Pursuant to the order of the learned Additional District Judge, Smt. Surbhi Varshney, the then Joint Assessor and Collector vide order dated 03rd September, 2004, fixed the RV at Rs. 48,38,400/- w.e.f. 01st March, 1997 and Rs. 11,30,530/- w.e.f. 1st April, 2001. According to the Defendant, this was a blatant error on the part of Smt. Varshney. It is also alleged that Smt. Varshney was hand in glove with the Plaintiff, was not competent to pass this order and caused major revenue loss to the department.

3. The Defendant has not disputed the letter dated 03rd September, 2004, written by Smt. Surbhi Varshney, the then Joint Assessing & Collector, South Range to the Plaintiff. The letter, to the extent it is relevant, reads as under:

Please refer to your letter dated 29.07.2004 on the subject cited above. Consequent upon finalization of assessment vide assessment order dated 03.09.2004, and after adjusting the property tax liability for the period up to 31.03.2004 in respect of subject property, a sum of Rs. 40,62,782/- (Rupees forty lacs sixty two thousand seven hundred and eighty two only) have become excess as on 31.03.2004 against subject property. This amount is adjustable against the future property tax liability.

4. This is Defendant's own case that vide order dated 03rd September, 2004, Mrs Varshney had fixed the RV of the property of the Plaintiff at Rs. 48,38,400/- w.e.f. 1st March, 1997 and Rs. 11,30,530/- w.e.f. 1st April, 2001. This is also not the case of the Defendant that calculated in terms of the order dated 09th September, 2004, the liability of the Plaintiff towards payment of property tax for the period up to 31st March, 2004 comes to more than what is indicated in the letter dated 9th September, 2004.

The only plea taken by the Defendant to dispute its liability is that Mrs Varshney was in connivance with the Plaintiff, had no administrative authority to pass the order which she passed on 3rd September, 2004 and that the order passed by her was erroneous.

It is not in dispute that MCD did not file any appeal, or other legal proceedings, challenging the order passed by Mrs Varshney on 3rd March, 2004. It is also not in dispute that the order dated 3rd March, 2004 was not recalled or modified either by Mrs Varshney or by her successor or an officer superior to her at any point of time. During the course of arguments, I specifically asked the learned

Counsel for the Defendant as to whether the order dated 3rd March, 2004 was recalled/modified at any stage or was made subject matter of challenge by way of an appeal or some other legal proceeding. She conceded that the order had neither been recalled nor challenged by way of any legal proceedings.

5. Since the order dated 3rd March, 2004 was neither challenged by the Defendant nor recalled or modified at any point of time, it attained finality and is, therefore, binding on the Defendant, irrespective of whether it was erroneous or not. If the Defendant was aggrieved on account of an erroneous order having been passed by Mrs Varshney or her acting in connivance with the Plaintiff and/or having no administrative authority to fix RV of the property owned by the Plaintiff-company, the only course of action available to it was either to recall/modify the order provided it was otherwise entitled in law to adopt such a course or to challenge that order by way of appropriate legal proceeding. Having not adopted either of these two courses of action, the Defendant cannot dispute the order passed by Smt. Varshney in these proceedings and cannot claim that it was not liable to pay a sum of Rs. 40,62,782/- to the Plaintiff on 31st March, 2004. It is not open to this Court to go into validity, correctness or otherwise of the order passed by Mrs Varshney on 3rd September, 2004 and once it is shown that the order had attained finality, the Defendant has no option, but to pay the amount of Rs. 40,62,782 to the Plaintiff after adjusting the amount of property tax in the years 2004-05, 2005-06, 2006-07.

6. During the course of arguments, I asked the learned Counsel for the Plaintiff to satisfy me that the suit on the basis of the letter dated 09th September, 2004 is maintainable under Order XXXVII of the Code of Civil Procedure. The learned Counsel for the Plaintiff relied upon the decisions on *Daya Chand Uttam Prakash Jain and Another Vs. Santosh Devi Sharma*, *Food Corporation of India Vs. Balkrishna Garg*, *S.C. Gupta v. Allied Beverages Co. Pvt. Ltd.* in IA No. 7987/2004 in Suit No. 542/2004 decided on 30th April, 2007.

7. In the case of *Daya Chand (supra)*, in a suit under Order 37 of the Code of Civil Procedure, the Plaintiff relied upon Statements of Account which contained acknowledgement of a balance, payable to the Plaintiff. It was held by this Court that a suit on the basis of a written acknowledgement of a pre-existing debt being a written contract could form a basis for recovery of an existing debt based on the said written contract in the shape of a written acknowledgement. This Court was also of the view that the acknowledgement was a promise to pay and contains all the essentials for formation of a written contract.

In *Food Corporation of India (supra)*, a Division Bench of this Court concurred with the view taken by Madras High Court in *The Commissioner of Wealth Tax Vs. Pierce Leslie and Co. Ltd.*, that Commissioner of Wealth Tax that the essential requisites of a debt are (1) an ascertained or readily calculable amount; (2) an absolute unqualified and pre-sent liability in regard to that amount with the obligation to pay forthwith or in future within a time certain; (3) the obligation must have accrued and be subsisting and should not be that which is merely

accruing.

In the case of S.C. Gupta (supra), this Court upheld a suit based on acknowledgement by the Defendant in their Books of Account, Balance Sheets and Profit & Loss Accounts, filed under Order 37 of CPC. In the case before this Court, the letter dated 09th September, 2004, written by Mrs Varshney, to the Plaintiff not only contains acknowledgement of liability of Rs. 40,62,782 as on 31st March, 2004, it also contains a promise to adjust the same against future property tax liability to the Plaintiff. The amount, mentioned in the letter, is a specific amount having been arrived after quantifying the liability of the Plaintiff towards property tax for the period ending 31st March, 2004 on the Ratable Value fixed vide order dated 03rd September, 2004 and the obligation of the Defendant to pay this amount to the Plaintiff had already been arisen when this letter was sent. Since the letter also contained an obligation on the part of the Defendant to adjust this amount towards future property tax liability of the Plaintiff, it satisfies all the requirements of the written contract as laid down in Order XXXVII Rule 1 (2) (b) (i) of the Code of Civil Procedure. The Defendant, therefore, has virtually no defence in law to the claim of the Plaintiff.

8. In Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, , the Supreme Court set out the following principles:

(a) If the Defendant satisfies the Court that he has a good defense to the claim on its merits the Plaintiff is not entitled to leave to sign judgment and the Defendant is entitled to unconditional leave to defend.

(b) if the Defendant raises a friable issue indicating that he has a fair or bona fide or reasonable defense although not a positively good defense the Plaintiff is not entitled to sign judgment and the Defendant is entitled to unconditional leave to defend.

(c) If the Defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he had a defense, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defense to the Plaintiff's claim the Plaintiff is not entitled to judgment and the Defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the Defendant has no defense or the defense set up is illusory or sham or practically moonshine then ordinarily the Plaintiff is entitled to leave to sign judgment and the Defendant is not entitled to leave to defend.

(e) If the Defendant has no defense or the defense is illusory or sham or practically moonshine then although ordinarily the Plaintiff is entitled to leave to sign judgment, the Court may protect the Plaintiff by only allowing the defense to proceed if the amount claimed is paid into Court or otherwise secured and give

leave to the Defendant on such condition, and thereby show mercy to the Defendant by enabling him to try to prove a defense.

9. Since the Defendant has virtually no legal defence to the case of the Plaintiff, it is not entitled to leave to contest the suit. The application is, hereby, dismissed.

CS(OS) No. 706/2007

In view of dismissal of IA No. 967/2008 filed by the Defendant to leave to contest, the Plaintiff has become entitled to judgment forthwith, in terms of Order XXXVII Rule 3(6) of the Code of Civil Procedure. The principal amount payable by the Defendant to the Plaintiff is Rs. 36,54,782/-. As regards interest, neither any agreement nor any custom on usage of trade for payment of interest has been pleaded by the Plaintiff. The only ground given by the Plaintiff for claiming interest is that the Defendant has legally withheld the amount payable to it. Interest, however, cannot be awarded as damages.

Section 3 of Interests Act, to the extent it is relevant, provides that in any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of" any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings.

Vide notice dated 17th January, 2007 sent to the Defendant through counsel, the Plaintiff demand the amount of Rs. 36,54,782/- along with interest at the rate of 18% per annum from the date the amount became due and payable to the Plaintiff. In the facts and circumstances of the case, I am of the view that interest should be awarded to the Plaintiff at the rate of 6% per annum. The amount of interest calculated at the rate of 6% per annum comes to Rs. 6,57,860/-. The Plaintiff, therefore, is entitled to recover a total sum of Rs. 43,12,642/- from the Defendant.

A decree for Rs. 43,12,642/- with proportionate cost is hereby passed in favour of the Plaintiff and against the Defendant. If the Defendant does not pay the aforesaid amount of Rs. 43,12,642/- to the Plaintiff within six weeks from the date of this order, the Plaintiff shall also be entitled to interest on that amount at the rate of 6% per annum from the date of filing of the suit till the payment of the decretal amount. It is made clear that this order will not come in the way of the Defendant in initiating any administrative or disciplinary action against Mrs. Surbhi Varshney or prejudice in any manner, the pending action, if any, against her.

Decree sheet be prepared accordingly.