

**(2018) 05 DEL CK 0081**

**In the Delhi High Court**

**Case No : CS(OS) 2617 OF 2012 & IA 3304 OF 2013**

HINDUSTAN PETROLEUM CORPORATION

APPELLANT

Vs

M/S.NATIONAL TEXTILE

RESPONDENT

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**Date of Decision : 09-05-2018**

**Acts Referred:**

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16(1), 17(3), 22(1), 22

Code of Civil Procedure, 1908 (CPC) — Order 7 Rule 11

**Citation : (2018) 05 DEL CK 0081**

**Hon'ble Judges : SANJEEV SACHDEVA**

**Bench : Single Bench**

**Advocate : Anjeev Sabharwal, Rajiv Kapur, Pallavi, Sandeep Sethi, Sanjay Ghose, Urvi Mohan**

**Final Decision : Disposed Of**

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## **Judgement**

1. Plaintiff has filed this Suit seeking recovery of Rs.12, 20, 10,969/-, besides pendente lite and future interest at the rate of 9% per annum.

2. Defendant has filed the subject Application under Order 7 Rule 11 Code of Civil Procedure (hereinafter referred to as the Code) seeking rejection

of the plaint inter-alia, contending that the suit is barred by limitation.

3. It is a settled position of law that limitation is a mixed question of law and fact. The statement in the plaint without addition or subtraction must show

that it is barred by any law to attract application of Order 7 Rule 11 CPC. The principle is, therefore, well settled that in order to examine whether the

plaint is barred by any law, as contemplated by clause (d) of Order 7 Rule 11 CPC, the averments made in the plaint alone have to be seen and they

have to be assumed to be correct. It is not permissible to look into the pleas raised in the written statement or to any piece of evidence. Applying the

said principle, the plea raised by the Defendant that the Suit is barred by limitation has to be examined by looking into the averments made in the Plaint alone and the defence raised in the Written Statement cannot at all be looked into.

4. Further, a plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation is a mixed question of law and fact.

5. The case of the Plaintiff is that in pursuance to a tender notice, it had submitted its bid and paid an EMD of 3.2 Crores on 02.06.1989, which was

acknowledged by the Defendant. It is contended that one of the conditions proposed by the Plaintiff was that the land use would be got changed by

the Defendant from industrial to Commercial/residential. It is also averred that the defendant had agreed to consider conversion of land use and had

even agreed to render necessary assistance in obtaining necessary permissions. Subsequently, the plaintiff is contended to have conveyed to the

Defendant on 08.09.1989 that it was willing to abide by the condition of the tender submitted by it and to conclude the purchase and have the sale

deed executed and pay the balance amount at the time of taking possession of the site after the necessary permissions were obtained by the

Defendant. On 15.09.1989 the Chairman and Managing Director of Defendant Company is alleged to have informed the Plaintiff that the said amount

has been kept in a separate account as Short Term Deposit and the interest accrued after 05.09.1989 @ 8% interest per year would be credited in the

account of the Plaintiff in the event the deal is not materialized.

6. Later by letter dated 29.03.1991, the Defendant is alleged to have informed the Plaintiff that the Government of Maharashtra had published new

Development Control Regulations-1991, which, however were stayed by the Bombay High Court on 22.03.1991 and thus the board of directors of the

defendant decided to refund back the security deposit to the Plaintiff with interest at 8 % p.a. from 05.09.1989 till the date of payment.

7. It is contended that the defendant failed to refund the EMD of Rs 3.2 Crores along with the interest. Subsequently, the Defendant is alleged to

have, on 05.03.1992 conveyed to the Plaintiff that sale deal existed between them and requested the plaintiff to take necessary action to complete the

formalities towards the sale of the land to the Plaintiff.

8. Immediately thereafter, reference was made by the defendant to BIFR for the financial year ending 31.03.1992 and after making an enquiry under

Section 16 (1) SICA, BIFR declared the Defendant company to be a sick company in the hearing held on 27.05.1993 and thus appointed IDBI, a

financial institution as the Operating Agency under Section 17(3) of the SICA to formulate a rehabilitation scheme. BIFR on 25.07.2002 sanctioned a

rehabilitation scheme for the Defendant. The claim(s) of the Plaintiff were however not included in the said scheme. Plaintiff made an Application

dated 07.06.2005 before BIFR for institution of recovery proceeding against the Defendant for recovery of Rs. 3.2 crores with interest. Said

application was misplaced in the office of BIFR, thereafter a fresh Application was filed by the Plaintiff on 25.11.2009 along with the earlier

application. By order dated 06.01.2010, BIFR directed the Defendant company to refund the earnest money of Rs. 3.2 crores within 3 weeks before

30.01.2010, failing which, granted liberty to the Plaintiff to take recourse for recovery with/ without interest of EMD. On 27.01.2010 Defendant paid

the said of Rs. 3.2 Crores being the principal amount of the said Earnest Money and is accordingly, alleged to have acknowledged its liability to pay

and its indebtedness towards the Plaintiff.

9. In the appeal filed by the Plaintiff, before AAIFR, impugning the order dated 06.01.2010 to the extent that it did not award interest to the Plaintiff,

by order dated 10.04.2012, AAIFR set aside the direction of BIFR with regard to grant of interest on the EMD and granted permission to the Plaintiff

under section 22(1) of SICA to initiate recovery proceedings against the Defendant for recovery of interest on the EMD. It further directed that if

Plaintiff obtained a decree in its favour, it would seek prior permission of the BIFR for execution of the decree, in case the Defendant was not

discharged from the purview of SICA after full implementation of the sanctioned scheme. The challenge of the Defendant to order dated 10.04.2012

of AAIFR, in WP (C) No.3288/2012, was unsuccessful and by order dated 28.05.2012, the Division Bench left it open for the defendant to oppose the

suit filed by the Plaintiff pleading the bar of limitation and the plaintiff to urge pleas to negate the plea of the claim of the defendant of bar of limitation.

10. It is contended by the Plaintiff, in the plaint that the cause of action for filing

the suit arose and accrued in favour of the Plaintiff when the Defendant in its board meeting dated 29.03.1991 decided to refund the security deposit of Rs.320 lacs with interest @8% from 05.09.1989 till date of payment. It is further alleged to have arisen when the Director of the Defendant for and on its behalf vide its letter dated 05.03.1992 advised that a sale deal existed between the Defendant and the Plaintiff and requested to take action to complete the formalities for sale of land. The cause of action is further alleged to have accrued when the Defendant Company made the reference before BIFR for the financial year 31.03.1992 and the Defendant Company was declared sick by BIFR on 27.05.1993. It is contended that the Defendant Company was under the preview of Sick Industrial Companies Act, and particularly in view of section 22 thereof, no legal proceeding for recovery against the Defendant could be initiated. The cause of action allegedly further arose when BIFR by order dated 06.01.2010 inter-alia directed the Defendant to refund earnest money without interest. Further, when the Defendant paid back the earnest money deposit on 27.01.2010 the sum of Rs.3.2 crores to the Plaintiff, which was received by the Plaintiff without prejudice to their claim for interest accrued, further on 10.04.2010, when the Plaintiff was granted permission under Section 22(1) of SICA by AAIFR by order dated 10.04.2012 to initiate appropriate recovery proceedings against the Defendant for recovery of interest on the EMD. Present Suit was filed in July 2012.

11. The contentions of the Plaintiff are that there was no bar on the Defendant Company to repay the earnest money deposited by the Plaintiff under section 22 of SICA, but the Defendant Company chose not to repay the earnest money with interest as agreed between the parties, hence the Plaintiff had no other alternative but to initiate recovery proceeding against the Defendant Company. It is contended that earnest money deposited by the Plaintiff was nothing but advance to the company and thus was squarely covered by Section 22 (1) of SICA and without the consent of BIFR, recovery proceedings could not be initiated against the Defendant Company.

12. Further, it may also be noticed that Defendant was given several opportunities to place on record the Financials as well as Form A, filed by it before BIFR, to show as to whether the amount due to the Plaintiff was included in the scheme or not. Despite several opportunities, said record has

not been produced. Defendant has filed an affidavit that despite best efforts, records were not made available by BIFR as the same were not

traceable and Registry of National Company Law Tribunal stated that the records were not received from BIFR and accordingly are misplaced.

13. When the averments in the plaint are examined in the light of the legal principles, it is evident that the question of limitation, in the present case, is a mixed question of law and facts and cannot be decided without giving an opportunity to the parties to lead evidence on the disputed questions of fact that are germane for the purposes of deciding the issue of limitation.

14. Further plea raised by the Defendant that the Plaintiff is liable to be rejected as notice inviting tender was issued by the erstwhile NTC (North

Maharashtra) Ltd which was based out of Mumbai, Maharashtra, the land is also located in Mumbai and the transactions have all occurred in the city

of Mumbai and the primary documents, witnesses and events are all located in Mumbai and thus, Mumbai is the more convenient forum and that the

Defendant shall be subject to great inconvenience and expenses and logistical hurdles to contest the case in Delhi where no material cause of action

has arisen, merits rejection at the outset. Forum non conveniens is not a principle of jurisdiction. It is a principle of convenience. It assumes in itself the

fact that both the forums have jurisdiction, however one should be preferred over the other keeping in view the administrative convenience of the

court, parties and witnesses. Since it does not hit at the very jurisdiction of the court to entertain a plaint, it cannot be taken as a ground under order 7

rule 11 to hold that the Plaintiff is liable to be rejected on the principle of being barred by law. Further, the Plaintiff has averred that the registered office

of the Defendant is at Delhi and part of cause of action to file the suit has arisen in Delhi.

15. In view of the above, I find no merit in the application it is accordingly disposed of, leaving the issue of limitation open to be framed and decided

along with the other issues to be framed in the Suit.

16. List before the Roster bench for directions on 14.05.2018.