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**(2012) 03 BOM CK 0093**

**In the Bombay High Court**

**Case No :** Summons for Judgement No. 516 of 2009 in Summary Suit No. 2525 of 2009

Runwal Developers Private Limited

APPELLANT

Vs

Shri Yogesh Mehta

RESPONDENT

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**Date of Decision :** 07-03-2012

**Acts Referred:**

Negotiable Instruments Act, 1881 (NI) — Section 138

**Citation :** (2012) 3 ALLMR 813 : (2012) 4 BomCR 793 : (2012) 4 MhLj 81

**Hon'ble Judges :** R.D. Dhanuka, J

**Bench :** Single Bench

**Advocate :** Alpana Ghone, instructed by M/s. Kanga and Co, for the Appellant;

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**Judgement**

R.D. Dhanuka, J.—This suit has been filed for recovery of sum of Rs. 1,60,40,822/ based on a written contract being the Agreement for Sale of TDR dated 18th August, 2006 read with the Affidavit cum Declaration and Undertaking dated 18th August, 2006 and the dishonoured cheques. Some of the relevant facts are set out hereunder :

2. By an agreement dated 3rd August, 2006 between Shiv Shahi Punarvasan Prkalp Limited and the Defendant herein, the said Shiv Shahi Punarvasan Prkalp Limited agreed to sale and transfer to the Defendant herein 3000 sq.mtrs. of TDR under DRC NO. SRA/622/Constn. dated 18th July, 2006 for the total consideration of Rs. 7,55,63,280/. It appears that out of the consideration amount agreed under the said agreement, Defendant could pay only Rs. 42,30,300/ to the said transferor Shiv Shahi Punarvasan Prkalp Limited. It is the case of the Plaintiff that Defendant thereafter approached the Plaintiff for financial help. Pursuant to the negotiations held between Plaintiff and Defendant, on 18th August, 2006, the Agreement for Sale/transfer TDR came to be arrived at between Plaintiff and Defendant. Under the said Agreement, the Defendant herein agreed to sale TDR of 3000 sq.mtrs. to the Plaintiff and in view thereof, the Plaintiff agreed to pay balance consideration of Rs. 7,13,32,980/ to the said

Shiv Shahi Punarvasan Prkalp Limited. It is agreed to adjust the sum of Rs. 5,94,17,280/ against the said amount agreed to be paid by the Plaintiff to the said transferor. Defendant herein agreed to pay Rs. 1,19,15,700/ to the Plaintiff within 30 days. In addition to the said agreement entered into between the Plaintiff and Defendant, the Defendant has also executed an Agreement cum Declaration and Undertaking on 18th August, 2006. It is the case of the Plaintiff that the Defendant issued three postdated cheques of Rs. 70 lacs, Rs. 34 lacs and Rs. 9 lacs respectively in favour of the Plaintiff. Out of three cheques, only a cheque of Rs. 9 lacs came to be honoured. It is the case of the Plaintiff that even those cheques, when deposited, were dishonoured.

3. By letter dated 21st March, 2007, addressed to the Plaintiff, the Defendant alleged that the Defendant had booked a premises orally in the under construction project of the Plaintiff and since the Defendant wanted ready possession of the premises, the Defendant thereafter requested the Plaintiff to cancel the booking of the premises. He requested the Plaintiff to return the cheques issued by the Defendant. Plaintiff by their letter dated 26th March, 2007 denied the said allegations and refused to return the cheques. The Learned Counsel for the Plaintiff states that the Defendants have not filed any proceedings for return of the said cheques. The Plaintiff thereafter issued various notices demanding payment under various dishonoured cheques u/s 138 of the Negotiable Instrument Act. Though the Defendant replied to the notice, it was contended that the cheques issued were in respect of the booking of flats orally made by the Defendant for booking of the flat for in under construction project of the Plaintiff. Finally, the Plaintiff issued notice on 7th September, 2009 calling upon the Defendant to pay a sum of Rs. 1,60,40,822/ with interest at the rate of 18% per annum. There is no reply to the said notice. The Plaintiff thereafter filed the present suit and took out Summons for Judgment No. 516 of 2009. Defendant is absent though served. I have heard the Learned Counsel appearing for the Plaintiff and I have also perused the affidavit in reply filed by the Defendant.

4. The first defence raised by the Defendant's is that suit is barred by the law of limitation contending that as the Agreement is dated 18th August, 2006, whereas the suit is filed on 15th September, 2009, i.e. after expiry of the three years. The Learned Counsel appearing for the Plaintiff pointed out that under the said agreement dated 18th August, 2006, the Defendant had agreed to pay the amount within 30 days from the date of the said agreement. The period of 30 days expired on 17th September, 2006, the suit was filed on 15th September, 2009. The Learned Counsel also placed reliance on the fact that cheques issued on 25th March, 2007, 5th April, 2007 and 30th April, 2007 towards part payment, came to be dishonoured. According to the Learned Counsel, period of limitation thus extended and suit as filed by the Plaintiff is within time. In my view cause of action to file a suit would have commenced only after period of 30 days, from the date of the execution of the said agreement. Even otherwise, in view of the part payment made by the Defendant, cause of action was extended

till 30th April, 2007. In my view, there is no substance in the defence that the suit is barred by law of limitation.

5. The next plea raised by the Defendant is that cheques issued by the Defendant were towards oral booking made by the Defendant of the flat in the proposed construction project at Ghatkopar of the Plaintiff and since these bookings were cancelled by the Defendant, Plaintiff was liable to return the said cheques. Defendant has alleged that the said payments were not made towards any consideration under the suit agreement. The Learned Counsel appearing for the Plaintiff pointed out that at no point of time the Plaintiff had any construction project at Ghatkopar as alleged by the Defendant. Defendants have not filed any proceedings for return and/or cancellation of those cheques. In my view, the Defendant never placed on record any material that at any point of time that it had booked any flat in the alleged construction project of the Plaintiff at Ghatkopar. It is very difficult to believe such plea raised by the Defendant that huge amount of Rs. 49 lacs would be paid against oral booking of flat without insisting for any writing. I, therefore, reject this defence raised by the Defendant as the same is sham, bogus and illusory.

6. The next defence raised by the Defendant is that even if suit agreement dated 18th August, 2006 is modified, it has been modified orally and therefore summary suit based on such modified agreement orally is not maintainable. The Learned Counsel appearing for the Plaintiff pointed out that for accepting lessor consideration, fresh writing was not necessary. In my view, there is no substance raised by the Defendant that fresh writing was required to be executed between the parties for accepting lessor amount. In any event, since the Plaintiff have filed the present suit not only on the basis of the agreement for sale of TDR, dated 18th August, 2006 but also on the basis of affidavit cum declaration and undertaking and also dishonoured cheques. Therefore there is no substance in this defence raised by the Defendant.

7. In my view each and every defence raised by the Defendant is sham and illusory. The Plaintiff is, therefore, entitled to order in terms of prayer (a) of Summons for Judgment. In view of the provisions in the writing dated 18th August, 2006 for interest @ 18% per annum, the Plaintiffs have rightly claimed interest @ 18% per annum.

8. I accordingly pass the following order :

- (1) Summons for Judgment is made absolute in terms of prayer clause
- (2) Decree to be drawn up accordingly.