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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Reserved on: 02nd April, 2018**
Pronounced on: 10th April, 2018

\+ **CS(COMM) 243/2016**

M/S FANKAAR INTERIORS PVT LTD

..... Plaintiff

Through Mr.Rajat Joseph, Advocate.

versus

M/S DOONVALLEY TECHNOPOLIS PVT LTD

..... Defendant

Through Mr.Keshav Mohan, Mr.Rishi K. Awasthi and Ms.Ritu Arora, Advocates.

CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

O.A. 21/2017 (filed against order dated 09.12.2016 of the learned Joint Registrar);
IA No.1970/2017 (under Section 5 of the Limitation Act for condoning 45 days in moving OA No.21/2017);
IA No.8138/2017 (under Section 5/8 of the Arbitration Act);
IA No.10169/2017 (for leave to defend moved by defendant);
IA No.10170/2017 (under Section 5 of Limitation Act for condoning 369 days in moving IA No.10169/2017)

1. All four applications and Chamber Appeal No.21/2017 have been moved by the defendant. Before coming to the appeal and applications, some dates and facts relevant are noted hereunder:-

a) The plaintiff instituted this suit under Order 37 of the Civil

Procedure Code for an amount of ₹ 98,49,229/- with interest @ 12% from November, 2012 till the date of realization and costs against the defendant;

b) sometime in October, 2009, the defendant, through its representatives, commenced negotiations and discussions with the plaintiff at its Delhi Office for interior decoration / refurbishment work in the Public Areas such as the Lobby, Bar, All Day Dining, Banquet, Public Toilets, Front Office and Guest Rooms (King & Twin) of the Radisson Hotel Metropolis at Rudrapur, Uttarakhand vide letter of agreement dated 02.12.2009 bearing No.DTPL/LOI/ FANKAR/RDPR/DEC09 for a total consideration of ₹ 7.00 Crores;

c) the plaintiff commenced the work and completed it on or around 20.02.2012 and handed over the site to the defendant and gross bill to the tune of ₹ 9,95,65,243/- was raised payable by defendant to the plaintiff without Tax Deducted at Source (TDS) and other usual expenses. The net amount payable after TDS and other expenses was worked out to be ₹ 6,55,31,337/- and against this amount the defendant paid an amount of ₹ 5,56,82,108/- in many installments till October, 2011;

d) it is alleged that an amount of ₹ 98,49,229/- remained balance i.e. principal suit amount payable till May, 2014. However, after making part payment till October 2011, defendant allegedly evaded the payment due to the plaintiff and even raised false objections and complaints vide order dated 06.09.2012 regarding the work in question. The plaintiff in turn wrote to the defendant

vide letter dated 15.09.2012 and addressed each of the complaints;

e) plaintiff vide letter dated 08.11.2012 called upon the defendant to clear the principal amount of ₹ 98,49,229/-, but all in vain;

f) the defendant allegedly deducted an amount of ₹ 13,91,304/- towards TDS against the gross bill amount. The statement of account, TDS certificates and relevant VAT Forms for the year 2009-10, 2010-11, and 2012-13 have also been attached with the plaint;

g) plaintiff alleged to have asked the defendant to make the payment and even issued many letters to the defendant to clear the outstanding suit amount on many occasions viz 20.05.2013, 07.10.2013, and 17.10.2013, but to no avail. The defendant sent no reply to these letters;

h) thereafter the plaintiff issued the legal notice dated 01.04.2014 and demanded the suit amount of ₹ 98,49,229/- with interest @ 24% from November, 2012 within 21 days of the receipt of the notice, but the said legal notice was also evaded by the defendant as per the delivery report dated 03.04.2014.

2. Summons of the suit under Order 37 of the Civil Procedure Code was duly served upon the defendant on 02.02.2015 and appearance was entered into by the learned counsel for the defendant on behalf of the defendant on 09.02.2015. In the memorandum of appearance the names of the learned counsels viz Mr.N.Mahabir, Mr.Rajnish Singh and Mr.Anand Singh with their

addresses were given as that of the defendant for service of the summons for judgment.

3. The summons for judgment were served upon the learned counsels on 23.07.2016 and on 08.09.2016 at the addresses given in the memo of appearance. Since no application for leave to defend was filed till 09.12.2016, the learned Joint Registrar put up the matter before Court on 31.01.2017. In the meanwhile, on 13.01.2017, the defendant filed the OA No.21/2017 for setting aside the order dated 09.12.2016 of the learned Joint Registrar which appeal is pending till date.

4. The defendant in OA No.21/2017 made allegations viz though the summons for judgment were served upon it through its learned counsels named above but the said counsels never informed the defendant hence application for leave to defend could not be filed in time. The defendant in appeal though whispered about the arbitration agreement between the parties, but in the said appeal the defendant had asked only for setting aside the order dated 09.12.2016 of the learned Joint Registrar and to allow it to file an application for leave to defend the present suit. There was never any prayer to refer the matter to arbitration.

5. The OA No.21/2017 was filed with a delay of 45 days and hence the defendant moved IA No.1970/2017 for condonation of delay. In the meanwhile, the defendant moved an application under Section 5 and 8 of the Arbitration and Conciliation Act,

1996 (hereinafter referred as 'the Act') (IA No.8138/2017) stating *inter alia* that there was an agreement dated 16.12.2006 executed between the parties at Noida, UP and the work under the contract was to be executed at Ruderpur, Uttrakhand. Clause No.***13*** of the agreement provide for dispute resolution including the arbitration in case of a dispute or difference between the parties. The defendant also referred to clause No.***5.11.2*** of the General Conditions of the Contract of the Tender Document which stipulates the contractor i.e. the plaintiff in the present case after 90 days of his presenting the final claim on the disputed matters may demand in writing the disputes or differences be resorted to arbitration. Clause No.13 of the agreement dated 06.12.2009 and clause No.5.11.2 of the tender document are set out in IA No.8138/2017.

6. Further ***IA No.10169/2017*** was moved on 27.07.2017 by the defendant for leave to defend the suit of the plaintiff and IA No.10170/2017 was moved under Section 5 of the Limitation Act for delay condonation of 369 days in moving IA No.10169/2017.

7. The thrust of arguments on behalf of the plaintiff is four folds – ***a)*** leave to defend application is not within the statutory time and as such plaintiff is entitled to a decree; ***b)*** the defendant has not moved an application under Section 5 & 8 of the Act on the first date of his appearance and rather has moved OA No.21/2017 wherein he simply asked for setting aside order dated 09.12.2016 and sought permission to file leave to defend

application and thus submitted to the jurisdiction of this Court and hence IA No.8138/2017 ought to be dismissed on this ground alone; ***c)*** the suit of the plaintiff is based on admitted liability and as such there is no dispute which can be referred to arbitration; and ***d)*** the leave to defend application is beyond limitation and as such be rejected.

8. *M/s Johnson Rubber Ind Limited vs M/s Shree Conveyor System Private Limited* CM (M) No.960/2013 decided on 16.10.2014 notes:-

> *"7. In my opinion, but for the categorical ratio of the judgment in the case of Booz Allen (supra), this Court would have been inclined to hold that filing of any application would not amount to submission to the jurisdiction of the court, however, once the ratio of Booz Allen's case (supra) which specifically holds that filing of any application can amount to submitting to the jurisdiction of the court, and considering the categorical language in para 3 of the application filed by the petitioner/defendant for seeking annexures to the plaint for filing of the written statement, the filing of such an application clearly amounts to submitting to the jurisdiction of the court.*
>
> *8. I may note that the present case is not a case where the petitioner/defendant had only received summons of the suit without a copy of the plaint. It is an admitted position even before this Court that the petitioner/defendant had received the copy of the plaint, and therefore the petitioner/defendant very much knew what was the dispute in the suit. Also, it is not the case of the petitioner/defendant that it did not have with it the purchase order in question dated 19.5.2010 which contained the arbitration clause. Therefore, having a copy of the plaint and also having a copy of the purchase order containing the arbitration clause, and yet filing an application for seeking annexures to the plaint for filing of the written statement, in my opinion in view of the ratio of the judgment in Booz Allen's case (supra), the filing of the application by the plaintiff/ defendant clearly amounts to submission to the jurisdiction of the civil court."*

9. Further in *Maruti Udyog Limited vs Mahalaxmi Motors Limited and Another* 95 (2002) DLT 290, this Court notes:

"3. It is settled law that the arbitration clause can be invoked only when there are differences and disputes with regard to certain payments or breach of obligations of the respective parties of the terms of the agreement. However wherever there is an admitted liability, the arbitration clause cannot be invoked. The very connotation "admitted liability" suggests that there are no disputes or differences with regard to the said admitted liability.

4. xxx xxx

5. What is material for the purpose of Section 8 of the Arbitration Act is that there should be existence of difference or disputes with regard to a particular liability arising out of the terms of the agreement. If the liability is acknowledged and admitted it does not come within the meaning and ambit of disputes and differences."

10. In *M/s Fenner (India) Limited vs M/s Brahmaputra Valley Fertilizer Corporation Limited* CS (OS) No.1281/2014 decided on 08.01.2016 this Court notes:-

"19. I may now come to the two judgments of the learned Single Judges of this court while interpreting Section 8 of the Arbitration Act. The case of ***Captain Amar Bhatia vs. The Kingfisher Airlines Ltd.*** *(supra) pertained to a case where a former employee of the defendant had filed for recovery of the dues. A plea of Section 8 of the Arbitration Act was raised in the leave to defend application claiming that this is sufficient to refer the parties to arbitration. In that background, this court held as follows:-*

> *"12. It cannot be lost sight of that there is really no denial or dispute raised by the defendant to the claim of the plaintiff for recovery of arrears of his salary. There is thus really no dispute for adjudication by arbitration. I see no reason to deny to the plaintiff in this suit the relief of recovery of money which admittedly is due to the plaintiff and the chances of recovery whereof, even if a decree were to be passed in favour of the plaintiff, are remote and to compel the plaintiff to spend more monies in invoking the arbitration clause when there is really nothing for arbitration. Without thus intending this to be precedent, in the facts and circumstances of the present case, I reject said argument also of the defendant....."*

20. Similarly, in Maruti Udyog Ltd. vs. Mahalaxmi Motors Ltd. and Anr., 95 (2002) DLT 290(MANU/DE/1439/2001), the learned Single Judge of this Court on an application under Section 8 of the Arbitration Act held that where a liability is admitted, there are no disputes or differences with regard to the admitted liability. In the absence of any dispute or differences, the application under Section 8 of the Arbitration

Act cannot be allowed. The court held as follows:-

> *"3. It is settled law that the arbitration clause can be invoked only when there are differences and disputes with regard to certain payments or breach of obligations of the respective parties of the terms of the agreement. However wherever there is an admitted liability, the arbitration clause cannot be invoked. The very connotation "admitted liability" suggests that there are no disputes or differences with regard to the said admitted liability.*
>
> *21. In the light of the pronouncements of the Hon'ble Supreme Court and of this High Court, it is clear that when no disputes exist between the parties, namely, what is claimed by the plaintiff is admitted by the defendant or impliedly admitted by the defendant, the same cannot be a subject matter of arbitration proceedings. The reasons for this are quite obvious. Courts would normally frown upon frivolous and meaningless litigation between the parties when the facts on the face of it shows that there is no scope for any adjudication left."*

11. Further deduction of TDS is an admitted debt, as was held in *Smt.Sudesh Madhok vs M/s Paam Antibiotics Limited and Another* CS (OS) No.1356/1999 decided on 25.10.2010 and it notes:-

> *"15.*
>
> *(1) to (3) xxx xxx*
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> *(4) A TDS certificate was issued to the plaintiff, for the interest payment made, and tax was deducted, as of December, 1996. The letter enclosing the certificate was issued in April, 1997.*
>
> *xxx xxx*
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> *18. It is apparent from the above analysis that the payment of amount, appropriation, payment of interest, deduction of tax, issuance of certificate, disclosure of the loan amount, till 31-3-1997 are all a matter of record; they are first defendant's clear admissions. The slender thread which its entire defense - and the opposition to a summary judgment - hangs on the issuance of cheques by the second defendant, and their dishonor; the plaintiff having proceeded to file a criminal complaint, and a letter by second defendant to the plaintiff assuring repayment."*

12. Further in *Jahnvi Makwana Construction Private Limited vs Marwar Hotels Limited* Company Petition No.303/2008 decided on 17.08.2009 by Gujarat High Court notes:

> *"11. As can be seen from the correspondence referred to hereinbefore it is only on 31-07-2001 that the respondent - Company comes forward with so-called dispute in relation to the work done by the petitioner. However, before that on 14-07-2001 the respondent Company has vide communication bearing forwarding No.MHL/0001/TDS/4/4133 forwarded Tax Deduction Certificate dated 27-06-2001 to the petitioner - Company. It is necessary to take note of the fact that the payment / credit to the petitioner is at the figure of Rs.21,70,865.15 and tax of an amount of Rs.47,758/- has been deducted. The figure of payment/ credit to the account of the petitioner tallies with the figure mentioned in communication dated 27-11-2000 from the petitioner to the Company which is based on the joint measurements undertaken by the representatives of both the sides. In the circumstances, it is apparent that the stand adopted by the respondent Company is not only not bona fide but is in fact a dishonest attempt to get away from discharging its liability towards the petitioner, while at the same time, crediting the account of the petitioner in its books and claiming deduction against its taxable income so as to reduce the taxable income."*

13. The learned counsel for the plaintiff also referred to documents at pages No.8 to 26 attached with the plaint showing the TDS was deducted by the defendant on the invoices and only such amount of invoices is claimed in this suit.

14. Though the learned counsel for the defendant relied upon *N.N.Vlechha vs I G Petrochemicals Limited* 2006 SCC OnLine Bom 1289 which held:

> *"……To repeat, the certificate shows that a tax in the sum of Rs.7,544 has been deducted as against an amount of Rs.3,77,220. No doubt the respondent has not explained as to how and in what circumstances the said figure of Rs.3,77,220 came to be arrived at on which Rs.7,544 was deducted as tax at source. The total amount payable, as per the petitioner, was Rs.4,17,770. This figure is not shown on the said certificate. As per the petitioner, the petitioner has received Rs.2,37,820 and Rs.1,79,950 is payable (less Rs.7,544). Either of the said two figures are also not shown on the said certificate. The figure shown therein of Rs.3,77,220 has also not been paid to the petitioner. In other words the figure mentioned therein cannot be at all correlated to the sum claimed by the petitioner. In my view, the said certificate, as the very certificate shows, can prima facie be proof only of the tax deducted at source and not of the amount due to the petitioner*

> *more so when what is the amount mentioned therein has not been shown by the petitioner as due to him. The said certificate, therefore, in my view, cannot be taken as prima facie evidence of the debt or liability of the petitioner in the sum of Rs.3,77,220 when the very case of the petitioner is that what is due and payable to the petitioner is the sum of Rs.1,72,406. As already stated, there is a serious dispute as regards what is due and payable to the petitioner which dispute cannot be gone into in summary proceedings of this nature. …"*

15. And *Everest Electric Works vs Himachal Futuristic Communications Limited* MANU/DE/1494/2004 which notes:

> *"2. ……..Similarly, having regard to the distinct purposes, scope and object of the respective provisions of law in these two Acts, the plea of estoppel can have no application to deprive the appellants of the legitimate right to invoke an all comprehensive provision of mandatory character like Section 8 of the 1996 Act to have the matter relating to the disputes referred to arbitration, in terms of the arbitration agreement". The court had adverted to its earlier decision in P. Anand Gajapathi Raju v. P. V. G. Raju in observing that there is no bar to referral under Section 8 of the 1996 Act even where such an application had been filed after the first statement (written statement) on the substance of the dispute, on the plaintiff not objecting thereto.*

16. And *Rahul Jain vs Vasant Raj Pandit* MANU/DE/ 2281/2015 this Court notes as under:-

> *"7. In the present case, TDS certificates would be evidentiary admissions only and not judicial admissions of evidence for the same to form a basis at this stage itself for decreeing of the suit although issues have been framed with respect to disputed questions of facts and evidence is going on. …."*

But these decisions are not applicable since the facts of the cited cases do show there were serious disputes with regard to the amount payable.

17. In the circumstances IA No.8138/2017 stands dismissed as defendant did submit to the jurisdiction of this Court by filing OA No.21/2017. I am also not inclined to allow OA No.21/2017 as under Order 37 CPC the leave to defend application need to be

filed within 10 days and if not filed then the application under Order 37 Rule 7 CPC only would lie, Order 37 CPC being a complete Code. Hence, there was no need to file OA No.21/2017, the same being misconceived is also dismissed. Consequently, IA No.1970/2017 is also dismissed.

18. Similarly, IA No.10169/2017 viz the leave to defend application being highly belated is also dismissed. No cogent grounds for delay are shown, hence the delay condonation application IA No.10170/2017 is also dismissed.

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19. In view of dismissal of all applications and OA, per Order 37 Rule 3(6) (a) CPC leave no other option with this Court except to decree the suit of the plaintiff for the suit amount of ₹ 98,49,229/- with interest @ 12% from November, 2012 till the date of realization against the defendant. The costs of the suit is also awarded in favour of the plaintiff. Decree Sheet be drawn accordingly.

YOGESH KHANNA, J

APRIL 10, 2018
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