

**Shaival Sahay Vs. Govind Verma and ors**

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**SooperKanoon Citation :** [sooperkanoon.com/1137745](http://sooperkanoon.com/1137745)

**Court :** Delhi

**Decided On :** Apr-23-2014

**Judge :** Rajiv Sahai Endlaw

**Appellant :** Shaival Sahay

**Respondent :** Govind Verma and ors

**Judgement :**

\*IN THE HIGH COURT OF DELHI AT NEW DELHI Date of decision:

23. d April, 2014 % + CS(OS) 1412/2012 SHAIVAL SAHAY Through: ..... Plaintiff Ms. Malavika Rajkotia and Mr. Vivek Singh, Advocates. Versus GOVIND VERMA & ORS Through: ..... Defendants Ms. Anisha Upadhyay, Mr. Rajesh Chhetri and Ms. Meenakshi Rawat, Advocates. CORAM :HONBLE MR. JUSTICE RAJIV SAHAI ENDLAW RAJIV SAHAI ENDLAW, J.

IA No.1232/2013 (of the defendants for leave to defend).

1. The plaintiff has instituted this suit under Order 37 of the CPC for recovery of Rs.1,47,00,000/- jointly and severally from the six defendants, pleading:(i) that the defendants are members of a joint Hindu family and which family controls and manages M/s. Infragro Industries Ltd.; (ii) that the plaintiff from time to time advanced loan for the business of the said Company; (iii) that the defendants upon being unable to return the said loan agreed that 5593 sq. mtrs (6420 sq. yds.) of land owned by the defendants at Rahe Murtaza Road, Civil Lines Rampur, U.P.

would be jointly developed by the plaintiff and the defendants and the amount due to the plaintiff would be realized by selling the plaintiffs portion of the built-up area to be constructed on the said land and to sell part of the land ad measuring approximately 2200 sq. yds. to the plaintiff, all on the terms and conditions contained in the Agreement dated 22nd March, 2006 between the parties; (iv) the defendants however neither performed their part of the said Agreement dated 22nd March, 2006 nor liquidated their liability towards the plaintiff; (v) that on 10th October, 2008 another agreement was entered into between the parties to find a buyer for the said 2200 sq. yds. of land and the defendants therein also agreed that if the buyer is willing to buy some more land, the defendants will be willing to do so and out of the consideration received, the defendants will first return an amount of Rs.1.80 crores to the plaintiff and the said amount shall be the first charge on the consideration received from the purchaser; that it was further a term of the agreement that if no buyer is available, the total amount payable to the plaintiff shall be Rs.1.85 crores and if the defendants do not pay the said amount, the defendants will execute a Conveyance Deed in favour of the plaintiff of the said 2200 sq. yds. of land on or before 28th February, 2009 in consideration of the loan amount of Rs.1.85 crores; (vi) that however for reasons attributable to the defendants, no buyer could be located and the defendants also failed to execute the Conveyance Deed of the 2200 sq. yds. of land aforesaid in favour of the plaintiff, though out of Rs.1.85 crores returned Rs.38 lacs to the plaintiff vide cheque dated 30th November, 2009, leaving the balance amount of Rs.1,47,00,000/-; and, (vii) that the defendants in response to the legal notice preceding the suit have set-up a false defence.

2. The suit was entertained under Order 37 of the CPC and summons for appearance and upon the defendants entering appearance summons for judgment were issued to the defendants and defendants have sought leave to defend on the following grounds:(a) the plaintiff is a Chartered Accountant by profession and runs a firm in the name of Shaival Sunil & Associates, Chartered Accountants and which firm is an Auditor of the defendants and their concern M/s. Infragro Industries Ltd.; (b) the plaintiff was not only a confidant of the defendants but also a decision maker in all financial matters of the defendants and was actively involved in the businesses of the defendants since the year 1994 and had also

arranged funds for the said businesses; (c) the plaintiff was also a close friend of the younger brother of the defendant no.1 namely Shri Rajesh Verma who unfortunately died in the year 2002; (d) that the Agreement dated 22nd March, 2006 was executed by the parties to secure the sum of Rs.55 lacs due to the plaintiff and as is apparent from the terms thereof; (e) M/s. ITC Ltd. was interested in purchasing the 2200 sq. yds. of the land aforesaid of the defendants and offered to pay therefor at the rate of Rs.13,800/- per sq. yd. and whereafter the plaintiff started claiming a sum of Rs.2 crores instead of Rs.55 lacs stating that he was also entitled to a share in the profit out of the total sale value of Rs.3,03,60,000/- for the said 2200 sq. yds. of land; (f) reliance is placed on the mail dated 3rd September, 2008 of the plaintiff to contend that the plaintiff therein has admitted the loan to be of Rs.54 lacs only; (g) that the plaintiff again misusing the trust enjoyed of the defendants got the Agreement dated 10th October, 2008 executed from the defendants; (h) the defendants went about obtaining the various sanctions / permissions for development of the land but the plaintiff in spite of having made the defendants incur expenditure therein, backed out and stated that he was no more interested in the project of development of the land; (i) that thereafter negotiations for transfer by the defendants of another plot of land to the plaintiff in settlement of the dues of the plaintiff were initiated and finalized and in accordance therewith the defendants transferred 16 acres of land to the plaintiff and after transfer of which land no amount remains due from the defendants to the plaintiff; (j) that the plaintiff had only paid a sum of Rs.54 lacs to the defendants and has along with the suit not filed any document to show having loaned Rs.1.85 crores to the defendants and without such a document, the suit is not maintainable under Order 37 of the CPC; (k) that the 16 acres of land was transferred to the plaintiff on 30th November, 2009 and the plaintiff remained quiet thereafter and has, preceding filing of the suit, issued only a notice dated 20th July, 2011 i.e. after nearly three years of the transfer of the land; (l) that the present suit is a counterblast to the complaint of the defendants against the plaintiff for not finalizing the Annual Reports of M/s. Infragro Industries Ltd.; (m) that the 16 acres of land transferred by the defendants to the plaintiff was valued at Rs.11-14 lacs per acre and was transferred by the defendants to the plaintiff without receiving any consideration, to discharge past liabilities and the defendants around July,

2010 has sold the said land for Rs.1.35 crores; and, (n) there is no explanation for the long time for which the plaintiff remained quiet.

3. The plaintiff has filed a reply to the application for leave to defend and in which in response to the material averments in the leave to defend application it has been stated:A. the plaintiff was not a Chartered Accountant of the defendants or their concerns at the time when the transactions took place; B. that the plaintiff had resigned from M/s.Shaival & Sunil Chartered Accountants in the year 2000 and has no concern therewith; C. denying that the plaintiff enjoyed any position as alleged qua the defendants; D. that the defendants in the Agreement dated 10th October, 2008 had clearly agreed to pay Rs.1.85 crores to the plaintiff if they were not able to transfer the plot to the plaintiff; and, E. the 16 acres of land was transferred to the mother-in-law and wife of the plaintiff and not to the plaintiff and thus the averments with respect thereto are not relevant.

4. The plaintiff along with the plaint has filed:I. original copy of the Agreement of 22nd March, 2006; II. receipt executed by the defendants of Rs.54 lacs from the plaintiff towards sale consideration under the Agreement to Sell of 22nd March, 2006; III. site plan annexed to the Agreement; IV. original Agreement dated 10th October, 2008 between the parties along with site plan annexed thereto; V. office copy of the legal notice dated 28th July, 2011 got issued by the plaintiff to the defendants; VI. reply dated 1st September, 2011 got sent by the defendants to the legal notice aforesaid; and, VII. statement of account of the plaintiff with Indusind Bank Ltd. of 30th November, 2009.

5. The counsels in their oral agreements have reiterated the contents of their pleadings.

6. Having bestowed my consideration to the matter, I am of the view that the defendants are entitled to unconditional leave to defend for the following reasons:(i) there is no document on record, of the plaintiff having advanced any loan to the defendants. The defendants however admit the said loan and further admit the Agreement to Sell of 22 nd March, 2006 having been executed to secure the loan of Rs.54 lacs only; (ii) the Agreement to Sell of 22nd March, 2006 by the defendants in favour of the plaintiff for a sale consideration of Rs.55 lacs and the

receipt annexed thereto, though mention the receipt of Rs.54 lacs but in the form of cash payment of Rs.10 lacs between 28 th May, 2002 and till the date of execution of the receipt and of Rs.44 lacs by two cheques of Rs.22 lacs each but the particulars of which cheques have not been given. It can safely be assumed that the said cheques would also be of much prior to 22 nd March, 2006; (iii) the loan of Rs.54 lacs by the plaintiff to the defendants was thus of much prior to 22nd March, 2006; (iv) the said payment by the plaintiff to the defendants however lost the character of a loan upon the parties agreeing to adjust the same in the sale consideration under the Agreement to Sell dated 22nd March, 2006. The claim if any of the plaintiff for the said amount thus has to be under the Agreement to Sell and cannot be as a loan; (v) the subsequent Agreement dated 10th October, 2008 also records the factum of the plaintiff having loaned monies to the defendants and the same being the consideration for the execution of the Agreement to Sell dated 22nd March, 2006; however the Agreement dated 10th October, 2008 mentions the loan amount as Rs.1.80 crores without recording that after 22 nd March, 2006 any further amounts had been advanced by the plaintiff to the defendants; (vi) under the Agreement dated 10th October, 2008, the amount of Rs.1.80 crores was to be payable to the plaintiff out of the sale consideration to be received from M/s. ITC Ltd. and in the event of the deal with M/s. ITC Ltd. failing and no other buyer being readily available provides for payment of Rs.1.85 crores by the defendants to the plaintiff without again stating any consideration therefor. Not only so, the Agreement further provides that if the defendants do not pay the said amount of Rs.1.85 crores, the plaintiff, on or before 28th February, 2009 would be entitled to have the Conveyance Deed in his favour of the said 2200 sq. yds. of land for a consideration of Rs.1.85 crores; (vii) thus the claim even if any of the plaintiff of Rs.1.85 crores was to be got satisfied by the plaintiff by having a Conveyance Deed executed in his favour of 2200 sq. yds. of land of the defendants; (viii) the remedy if any of the plaintiff was thus to, upon the defendants failing to pay Rs.1.85 crores to him, sue for specific performance of the Agreement by the defendants to sell the said 2200 sq. yds. of land to the plaintiff for a consideration of Rs.1.85 crores. The plaintiff having agreed so, the plaintiff cannot at his choice choose to sue for recovery of the said Rs.1.85 crores or the balance thereof. The plaintiff is not shown to have issued any legal notice calling upon the defendants to

transfer the said 2200 sq. yds. of land to the plaintiff; (ix) that under the Agreement dated 10th October, 2008 the plaintiff was to become entitled to recover of Rs.1.85 crores from the defendants only if any defect in the title of the defendants to the said 2200 sq. yds. of land were to be found; that is not the case of the plaintiff; (x) there is no explanation as to why the plaintiff remained quiet for over three years from 10th October, 2008; (xi) the present suit was filed only on 14 th May, 2012 i.e. beyond three years of the Agreement dated 10th October, 2008; (xii) the plaintiff admits transfer by the defendants to the wife and mother-in-law of the plaintiff of 16 acres of land on 30 th November, 2009; (xiii) it is inconceivable that if an amount of Rs.1.85 crores was due from the defendants to the plaintiff, the transaction with respect to another land would take place between the parties or under the said transaction the mother-in-law and wife of the plaintiff would make any payments to the defendants; (xiv) the refund by the defendants to the plaintiff of Rs.38 lacs out of the total land due is incidentally of the same date; (xv) the defendants along with the application for leave to defend have filed a copy of the reply to the e-mail dated 22nd May, 2009 from the plaintiff wherein the plaintiff has asked the defendants to send photocopy of the alternative land documents being offered, though observing that the same should not be construed as an acceptance of any new offer being unilaterally made by the defendants; (xvi) the question whether the plaintiff under the Agreement dated 10th October, 2008 is entitled to recover of Rs.1.85 crores or to specific performance of the Agreement for purchase of 2200 sq. yds. of land is a question requiring evidence and which cannot be decided under Order 37; (xvii) in the absence of anything to show that the payment on 30th November, 2009 of Rs.38 lacs is in part payment of the loan of Rs.1.85 crores, the suit for recovery of the balance loan amount as on the date of institution thereof was barred by time; and, (xviii) the plaintiff has not filed any document to show that the said payment of Rs.38 lacs was in part payment of any loan and the same alone raises a triable issue.

7. The application is accordingly allowed. The defendants are granted unconditional leave to defend.

8. The application is disposed of. IA No.9347/2012(of the plaintiff u/O38R-5 CPC).

9. The application does not disclose the requisite ingredients for attachment before judgment. Dismissed. RAJIV SAHAI ENDLAW, J APRIL23 2014 pp

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