

Nitin Gupta vs.texmaco Infrastructure & Holding Limited

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SooperKanoon Citation : sooperkanoon.com/1222891

Court : Delhi

Decided On : Apr-29-2019

Appellant : Nitin Gupta

Respondent : Texmaco Infrastructure & Holding Limited

Advocate for Def. : Ms. Gunjan Sinha Jain

Advocate for Pet/Ap. : Mr. Ajay Kumar Gupta

Judgement :

* + IN THE HIGH COURT OF DELHI AT NEW DELHI CS(COMM) 1215/2016 & CC(COMM) 36/2017 Date of decision:

29. h April, 2019 NITIN GUPTA Plaintiff Through: Mr. Ajay Kumar Gupta and Ms. Versus Surbhi Gupta, Advs. TEXMACO INFRASTRUCTURE & HOLDING LIMITED Through: Ms. Gunjan Sinha Jain, Adv. Defendant CORAM: HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW IA No.9/2019 (of plaintiff u/S151CPC) 1. The plaintiff, by this application post framing of issues, seeks to file an additional document.

2. The plaintiff has instituted this suit for recovery of Rs.2,36,95,461/-. It is inter alia the case of the plaintiff, (i) that the defendant had agreed to sell an immovable property to the plaintiff and one Ashwini Kumar Somany; (ii) that the plaintiff and the said Ashwini Kumar Somany paid a sum of Rs.1,75,00,000/- in pursuance to the said Agreement to Sell; (iii) that the said amount of Rs.1,75,00,000/- along with

interest has already been returned by the defendant to the plaintiff and the said Ashwini Kumar Somany upon the Agreement of Sale of immovable property not fructifying; and, (iv) the plaintiff however, besides the said sum of Rs.1,75,00,000/- paid along with Ashwini Kumar Somany had also paid a sum of Rs.1,25,00,000/- in cash to the defendant. This suit has been instituted for recovery of the said amount of Rs.1,25,00,000/- with interest.

3. Needless to state, the defendant is contesting the suit. CS(COMM) 1215/2016
Page 1 of 14 4. Issues were framed in the suit on 13th November, 2018.

5. This application came up for hearing on 11th April, 2019, when the counsel for the defendant pointed out that the plaintiff till then had neither filed list of witnesses nor affidavits by way of examination-in-chief of his witnesses inspite of expiry of the time granted therefor.

6. The plaintiff, by this application, post framing of issues, seeks to file a letter dated 2nd September, 2013 of the defendant to the plaintiff and the said Ashwini Kumar Somany.

7. The defendant, in the hearing on 11th April, 2019 denied the letter now sought to be filed.

8. On 11th April, 2019, I had enquired from the plaintiff, then appearing in person, the proof of being possessed of a cash amount of Rs.1,25,00,000/- and the plaintiff had stated that he had in his books of accounts shown cash in hand of Rs.1,25,00,000/- on 3rd September, 2013, when according to the plaintiff the said amount in cash had been paid and that the said cash payment to the defendant was also reflected in the Income Tax Returns of the plaintiff.

9. While adjourning the hearing on the application to today on request of the plaintiff, the plaintiff was also directed to get his books of accounts and Income Tax Returns to show being possessed of Rs.1,25,00,000/- in cash on the date of payment claimed thereof.

10. Though the counsel for the plaintiff today in Court has shown some photocopies of documents in support of what was claimed by the plaintiff on the

last date of hearing but I am afraid the same do not reflect what was represented.

11. Be that as it may, the counsels have been heard further. CS(COMM) 1215/2016 Page 2 of 14 12. The counsel for the plaintiff, as in most of the cases, merely states that the document now sought to be filed remained to be filed owing to the error of the earlier Advocate for the plaintiff.

13. The counsel for the defendant has opposed the application, contending that (i) the plaintiff has instituted this suit as a commercial suit; (ii) Order XI Rule 1(5) of the Code of Civil Procedure, 1908 (CPC) as applicable to commercial suits provides that the plaintiff shall not be allowed to rely on documents which were in the plaintiffs power, possession, control or custody and not disclosed along with plaint or within the extended period if any granted, save and except by leave of Court and which leave is to be granted only on the plaintiff establishing reasonable cause for non-disclosure along with the plaint; (iii) similarly Order XI Rule 1(6) requires the plaintiff in a commercial suit to set out in detail the documents and Order XI Rule 1(2)&(3) requires declaration of documents to be made on oath; (iv) the plaintiff, while filing this suit nowhere disclosed that there was any such document addressed by the defendant to the plaintiff and Ashwini Kumar Somany, as is sought to be filed now, and which was immediately not available to him; (v) rather, the plaintiff declared that there was no document other than those filed; (vi) the document now sought to be filed, even otherwise does not inspire confidence; (vii) the plaintiff, along with the plaint has filed a photocopy of another letter also dated 2nd September, 2013 written by the defendant to the plaintiff and Ashwini Kumar Somany, containing an in-principle agreement of sale of immoveable property for a total sale consideration of Rs.11.50 crores and acknowledging receipt of advance therefor of Rs.1.75 crore, leaving the balance sale consideration of Rs.9.75 crores to be paid; (viii) an identical letter now sought to be filed, also of 2nd September, 2013, however CS(COMM) 1215/2016 Page 3 of 14 mentions the sale consideration as Rs.10.25 crores with balance remaining to be paid of Rs.8.50 crores; (ix) if the plaintiff along with the said Ashwini Kumar Somany, besides Rs.1.75 crore recorded to have been paid in the copy of the letter already on record, had paid another Rs.1.25 crore i.e. a total of Rs.3 crores out of the total sale consideration of Rs.10.25 crores, the balance payable would

have been Rs.7.25 crores and not Rs.8.50 crores; (x) the claim of the plaintiff in the plaint also is of the total sale consideration agreed being Rs.11.50 crores and not Rs.10.25 crores as is stated in the document now sought to be filed; and, (xi) the document now sought to be filed is thus clearly forged and fabricated and an afterthought.

14. The counsel for the plaintiff though has drawn attention to the photocopy of the reverse of the letter dated 2nd September, 2013 already on record, showing acknowledgment of Rs.1.25 crore in cash on 3rd September, 2013, leaving a balance of Rs.8.50 crores but has no explanation with respect to the total sale consideration shown of Rs.10.25 crores and out of which, inspite of receipt of advance of Rs.3 crores, Rs.8.50 crores still remained payable. His only contention is that the document now sought to be filed is also issued by the defendant itself.

15. I may mention that the two letters, though save for the amounts, are identical and both emanating from the defendant on the same date, are signed by different persons on behalf of the defendant.

16. The arguments aforesaid of the counsel for the defendant do raise suspicion about the authenticity of the document now sought to be filed and are also inconsistent with pleadings of the plaintiff.

17. It is the case of the plaintiff in the plaint, (i) that an Agreement to Sell of CS(COMM) 1215/2016 Page 4 of 14 immovable property, for a total sale consideration of Rs.11,50,00,000/- was entered; copy of the Agreement to Sell is filed; (ii) that the plaintiff along with Ashwini Kumar Somany paid a sum of Rs.1,75,00,000/- to the defendant, out of which Rs.1,00,00,000/- was paid from the account of the plaintiff and Rs.75,00,000/- was paid from the account of Ashwini Kumar Somany; (iii) that the defendant had also received a sum of Rs.1,25,00,000/- in cash on 3rd September, 2013 from the plaintiff; (iv) that the defendant had settled the matter with Ashwini Kumar Somany in respect of the monies paid by him; and, (v) however the matter had not been settled with the plaintiff and the defendant has paid only a sum of Rs.1,33,45,205/- to the plaintiff and the defendant is liable to pay Rs.2,36,95,461/- to the plaintiff inclusive of interest at 18% per annum from the date of payment of Rs.1,00,00,000/- as well as

Rs.1,25,00,000/-, till the institution of the suit.

18. The plaintiff, along with the plaint has filed Agreement to Sell on the letter head of the defendant as under:-

"02.09.2013 69, Engineers Enclave, Shri Nitin Gupta

1) Shri Ashwini Kumar Somany 7, Flag Staff Road, Pitampura, Delhi - 110034 Civil Lines, Delhi - 110007 Sale of Triangular Plot measuring 270 Sq. Mtrs approx., located on Mandelia Road, Kamla Nagar, Delhi - 110007.

2) Re: Sirs, We refer to our discussions with your goodselves on 21st May 2013, when in principle we agreed to sell the above plot to you at a total consideration of Rs.11.50 Crores (Rs. Eleven Crores Fifty Lacs Only). You made the following advance payment to us towards the cost of this Plot. CS(COMM) 1215/2016 Page 5 of 14

1) Cheque No.579249 dated 21.05.2013 drawn on HDFC Bank for Rs.50 Lacs. (Fifty Lacs) only from Shri Nitin Gupta.

2) Cheque No.579250 dated 21.06.2013 drawn on HDFC Bank for Rs. 50 Lacs. (Fifty Lacs) only from Shri Nitin Gupta.

3) Cheque No.348666 dated 24.05.2013 drawn on HDFC Bank for Rs. 25 Lacs. (Twenty Five Lacs) only from Shri Ashwini Kumar Somany.

4) Cheque No.348668 dated 21.06.2013 drawn on HDFC Bank for Rs. 50 Lacs. (Fifty Lacs) only from Shri Ashwini Kumar Somany. TOTAL Rs.175 Lacs. (Rs. One Crore and seventy Five Lacs Only). As per the understanding the balance payment amounting to Rs.9.75 Crores (Rs. Nine Crores and Seventy Five Lacs) only was to be made by you on or before 21st August, 2013; so that the Title Deed is registered in your favour and possession given to you. As discussed in the meeting held with your goodselves today i.e. 2nd September, 2013, we hereby agree to extend the due date for making the balance payment for which the schedule will be mutually discussed. This letter is being issued in duplicate. Kindly, sign one copy and return to us as a token of your acceptance. Thanking you Yours

Faithfully For Texmaco Infrastructure & Holdings Ltd (Hemant Kumar) On the reverse of the aforesaid document is a handwritten endorsement as under:-

"This is to confirm that Rs. 1.25 crores (Rs. one crores twenty five lacs) has been received in cash on 3.9.2013. Now balance remains to be received Rs.8.50 crores (Rs. Eight crores fifty lacs only) CS(COMM) 1215/2016 Page 6 of 14 19. The defendant, besides contesting the suit has also filed a Counter Claim of recovery of Rs.2,19,55,396/- from the plaintiff.

20. One of the issues framed in the suit and the Counter Claim is, Whether the suit and/or the Counter Claim are bad for non-joinder of Ashwini Kumar Somany?. 21. The document now sought to be filed by the plaintiff, also on the letter head of the defendant, is as under:-

"02.09.2013 Shri Ashwini Kumar Somany 69, Engineers Enclave Pitampura, Delhi - 110034

2) Shri Nitin Gupta 7, Flag staff Road, Sale of Triangular Plot measuring 270 Sq. Mtrs approx., located on Civil Lines, Delhi-11007.

1) Re: Mandelia Road, Kamla Nagar, Delhi - 110007. Sirs, We refer to our discussions with your good selves on 21st May 2013, when in principle we agreed to sell the above plot to you at a total consideration of Rs.10.25 Crores (Rs. Ten Crores Twenty Five Lacs only). You made the following advance payment to us towards the cost of this Plot:

1.

2)

3)

4) Cheque No.579249 dated 21.05.2013 drawn on HDFC Bank for Rs.50 Lacs. (Fifty Lacs) only from Shri Nitin Gupta. Cheque No.579250 dated 21.06.2013 drawn on HDFC Bank for Rs.50 Lacs. (Fifty Lacs) only from Shri Nitin Gupta. Cheque No.348666 dated 24.05.2013 drawn on HDFC Bank for Rs.25 Lacs. (Twenty Five Lacs) only from Shri Ashwini Kumar Somany. Cheque No.348668

dated 21.06.2013 drawn on HDFC Bank for Rs.50 Lacs. (Fifty Lacs) only from Shri Ashwini Kumar Somany. TOTAL Rs.175 Lacs. (Rs. One Crore and seventy Five Lacs only). As per the understanding the balance payment amounting to Rs.8.50Crores (Rs. Eight Crores and Fifty Lacs) only was to be made by you on or before 21st August, 2013; so that the Title Deed is registered in your favour and possession given to you. CS(COMM) 1215/2016 Page 7 of 14 As discussed in the meeting held with your goodselves today i.e. 2nd September, 2013, we hereby agree to extend the due date for making the balance payment for which the schedule will be mutually discussed. This letter is being issued in duplicate. Kindly, sign one copy and return to us as a token of your acceptance. Thanking you Yours faithfully For Texmaco Infrastructure & Holdings Ltd. (L.K. Jain) Sr. General Manager

22. In contradistinction to the case of the plaintiff as aforesaid in the plaint and the document filed therewith, the document now sought to be filed shows the total sale consideration agreed between the parties to be of Rs.10.25 crores, instead of Rs.11.50 crores as in the document filed along with the plaint and as pleaded in the plaint.

23. While as per the document filed along with the plaint, the balance consideration remaining unpaid was of Rs.9.75 crores, as per the document now sought to be filed, the balance sale consideration remaining payable was only of Rs.8.50 crores.

24. Even though as per the handwritten endorsement on the reverse of the document filed along with the plaint the balance sale consideration remaining unpaid was of Rs.8.50 crores as in the document now sought to be filed, but while as per the document filed with the plaint the said balance was out of total sale consideration of Rs.11.50 crores, as per the document now sought to be filed, the said balance is out of the total sale consideration of Rs.10.25 crores.

25. It is thus clear that the document now sought to be filed is also inconsistent with the pleadings and on the basis whereof issues have already been framed in CS(COMM) 1215/2016 Page 8 of 14 the suit.

26. A document is filed and can be permitted to be filed beyond the stage prescribed for filing thereof, only in proof and aid of the pleaded case. No

document which runs contrary to or is inconsistent with the pleaded case and on which issues have to be framed, can be permitted to be filed.

27. Significantly the plaintiff is not seeking to amend his pleadings.

28. There is another aspect. As per the Agreement to Sell pleaded by the plaintiff, the Agreement to Sell by the defendant was jointly and severally with the plaintiff and Ashwini Kumar Somany. Merely because the plaintiff and Ashwini Kumar Somany, jointly entering into an Agreement of Purchase with the defendant, as per their own inter se understanding or convenience paid monies payable under their agreement with the defendant to the defendant out of their separate accounts, would not constitute two separate agreements, one of the defendant with the plaintiff and the other of the defendant with Ashwini Kumar Somany. Such is not the case of the plaintiff in the plaint either. Though the plaintiff claims the defendant to have settled with Ashwini Kumar Somany but as per the document filed by the plaintiff along with the plaint also, including the handwritten endorsement on the reverse thereof, the amount of Rs.1.25 crores was received by the defendant jointly from the plaintiff and Ashwini Kumar Somany. The said endorsement does not show the amount to have been received only from the plaintiff.

29. Even as per the document now sought to be filed, though inconsistent with the pleadings and the document already on record, the agreement of the defendant was with the plaintiff as well as Ashwini Kumar Somany.

30. Section 45 of the Indian Contract Act, 1872 provides that when a person has CS(COMM) 1215/2016 Page 9 of 14 made a promise to two or more persons jointly, then unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them. Thus, as per document already on record, the right to claim refund of the balance amount due from the defendant vests jointly in the plaintiff and Ashwini Kumar Somany and the plaintiff is not entitled alone to sue the defendant for recovery thereof. It thus appears that the issue aforesaid reproduced needs to be treated as a preliminary issue though it was not ordered so while framing issues on 13th November, 2018.

31. Be that as it may, the plaintiff is not found entitled to belatedly file a document in contradiction and negation of the pleaded case.

32. Merit is found also in the contention of the counsel for the defendant, of the plaintiff, under Order XI of the CPC as applicable to Commercial Suits, being entitled to belatedly file a document only if establishes reasonable cause for non-disclosure (of the document now sought to be filed) along with the plaint.

33. The plaintiff in this application has pleaded (i) that the defendant had changed its counsel in the month of November, 2018 and engaged Mr. R.Y. Kalia, Advocate who asked the plaintiff to bring all the papers related to the above-noted case so that the proposed issues be drafted for the convenience of the Court; (ii) Mr. R.Y. Kalia, Advocate, while going through the documents brought by the plaintiff lay his hands on the document now sought to be filed and during the conference/discussion of the case the plaintiff explained to his Counsel Mr. R.Y. Kalia, Advocate that he had found this Letter signed by Mr. L.K. Jain, in the pocket of his old clothes when he was distributing his old warm clothes to poor indigent persons in the last week of August, 2018 and could not find the above-said letter at the time of filing of the above-noted Suit; (iii) the said letter was also handed over to the plaintiff by Mr. Hemant Kumar, Executive CS(COMM) 1215/2016 Page 10 of 14 Director of the defendant Company when the plaintiff again visited the office of the defendant and requested Mr. Hemant Kumar on the same day i.e. 03.09.2013 to issue receipt on the companys letterhead with respect to the amount received of Rs.1,25,00,000/- in cash; (iv) Mr. Hemant Kumar told the plaintiff that as per Income Tax Rules the defendant cannot show receipt of cash and in order to avoid any problem he had issued the letter dated 2nd September, 2013 after reducing the sale consideration from Rs.11,50,00,000/- to Rs.8,50,00,000/- as they had already received Rs.1,75,00,000/- through cheque and Rs.1,25,00,000/- in cash; and, (v) that non-filing of the document is not deliberate but due to an inadvertent bona fide mistake.

34. As would immediately be evident from the averments aforesaid, the plaintiff claims the letter now sought to be filed, to have been delivered to him only and is also pleading the circumstances in which it was so issued. The plaintiff having

himself transacted qua the said letter, at the time of institution of the suit, must have been aware of the same and even if was immediately unable to find the document now sought to be filed, should have pleaded, in terms of the document now sought to be filed and should have in the affidavit of documents disclosed another letter dated 2nd September, 2013 and further stated that the same was immediately not available or untraceable. The plaintiff did nothing of the sort and on the contrary pleaded a case contrary to what emerges now and from the document now sought to be filed. Not a whisper was made in the declaration on oath in terms of Order XI Rule 1(3) of the CPC as applicable to Commercial Suits, of there being in existence, besides the document dated 2nd September, 2013 being filed, also another document also dated 2nd September, 2013 and that the same had been lost or was not available. In this application also, there is no explanation or even a whisper as to non-disclosure along with the plaint. For a plaintiff to be entitled to leave of the Court under Order XI Rule 1(5) of the CPC for belatedly filing a document, it is essential for the plaintiff to not only plead CS(COMM) 1215/2016 Page 11 of 14 but establish reasonable cause for non-disclosure along with the plaint. Here, what to talk of establishing, the plaintiff has not even pleaded reasonable cause for non-disclosure along with the plaint.

35. There is no Vakalatnama of Mr. R.Y. Kalia, Advocate named in the application on record. The plaintiff, at one place in the application has described him as Advocate for the defendant and at another place as Advocate for the plaintiff. However this application is filed by Mr. R.Y. Kalia, Advocate on behalf of plaintiff and the presence of Mr. R.Y. Kalia, Advocate for the defendant in the order dated 13th November, 2018 is an error. The plaintiff has not even explained in the application as to why on finding the letter in the pocket of his old warm clothes in August, 2018, the plaintiff did not disclose it to his Advocate immediately after discovery and it was only in November, 2018 that Mr. R.Y. Kalia, Advocate discovered it amongst the documents handed over by the plaintiff. The story set-up, of Mr. R.Y. Kalia, Advocate in November, 2018 having asked the plaintiff to bring all papers for drafting proposed issues also does not inspire confidence. For drafting proposed issues, there is no need to call for the documents beyond those already on record.

36. The counsel for the plaintiff, during his argument has also stated that a police complaint was filed with respect to the same transaction in 2016. However on further enquiry, the counsel for the plaintiff states that the document now sought to be filed was not produced before the police also.

37. Unless, the Commercial Divisions, while dealing with the commercial suits, so start enforcing Rules legislated for commercial suits, and refuse to entertain applications for late filing of documents, especially with respect to documents of suspicious character and continue to show leniency in the name of interest of justice and a litigant ought not to suffer for default of advocate, the commercial suits will start suffering from the same malady with which the ordinary suits have come to suffer and owing whereto the need for the Commercial Courts Act, 2015 CS(COMM) 1215/2016 Page 12 of 14 was felt. Commercial Division is thus not required to entertain or allow applications for late filing of documents, without any good cause being established for non-disclosure thereof along with pleadings. The plaintiff herein has utterly failed in this regard. The application nowhere explains as to why the plaintiff, if had obtained the said letter from the defendant, did not remember the same and make disclosure of the same at the time of filing the police complaint and/or at the time of filing of this suit, even if the letter had been misplaced or was not immediately available. The form prescribed for filing affidavit of documents requires a litigant in a commercial suit to, even if not immediately possessed of a relevant document, disclose the same. A litigant who fails to do so and also does not satisfy the Court while seeking to belatedly file the document, why no disclosure of such document was made, cannot be permitted to so file documents.

38. Order XIII Rules (1) & (2) of the CPC as it existed prior to amendment with effect from 1st July, 2002, required the documents to be filed at or before the settlement of issues and no documents could be received at any subsequent stage unless good cause was shown to the satisfaction of the Court for non-production thereof. Post amendment with effect from 1st July, 2002 of CPC, vide Order VII Rule 14(1)&(3) and Order VIII Rule 1A(1)&(3) a plaintiff was required to file documents along with plaint and a defendant required to file documents along with written statement and documents were not permitted to be received thereafter

without leave of the Court. Prior to 2002, the parties, if had not filed the document prior to settlement of issues, were required to satisfy the Court as to why the document was not filed till the stage of settlement of issues and were not required by language of Order XIII Rule (2) to satisfy whether the document was within their knowledge or not. I emphasise, only reason for non-production was to be stated and not the reason for non-disclosure. Though with effect from 1st July, 2002, for late filing of documents only leave of the Court was required to be CS(COMM) 1215/2016 Page 13 of 14 taken but the test continued to be applied by the Courts for granting such leave continued to be as prior to 2002 i.e. of reasons for non-production of documents at the stage provided therefor. Order XI Rule (1) of the CPC as applicable to commercial suits brought about a radical change. The late filing of documents thereunder is permitted applying the test of reasonable cause of non-disclosure of the document at the stage provided for filing thereof. An applicant now is required to satisfy the Court as to why the document was not in his knowledge and if in his knowledge why was the document not disclosed at the appropriate time. Thereunder, documents, even if not immediately available, are required to be disclosed.

39. Rather, even if what the counsel for the plaintiff is arguing is correct, it shows an attempt to deal in unaccounted money in the matter of sale/purchase of property and in which respect again, as long as the Courts continue to lend their shoulder to tax evaders, tax evasion would continue. Time has thus come for the Courts to not come to the rescue of tax evaders, on the argument that the Civil Court is not concerned with the evasion even if any of tax, indulged in by the plaintiff.

40. No merit is also found in the contention of the counsel for the plaintiff, that the defendant is equally to blame. When two parties collude to evade tax, the party which would suffer owing to consequence thereof has to suffer and such suffering cannot be alleviated on the ground that the other party was also in collusion.

41. There is thus no merit in the application.

42. Dismissed. RAJIV SAHAI ENDLAW, J.

