

# **M/S Aruna Infracon Pvt Ltd vs Ravinder C.P. Navalkar on 18 January, 2019**

**Author: J.R. Midha**

**Bench: J.R. Midha**

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\* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CS(OS) 671/2012 and I.A.19953/2014, I.A. 4017/2018, 3527/2018,  
4018/2018

M/S ARUNA INFRACON PVT LTD . . . . . Plaintiff  
Through : Mr. H.L. Tiku, Sr. Adv. with  
Mr. Munish Kochhar,  
Ms. Yashmeet Kaur and  
Mr. Akshay Singh, Advs.  
versus

RAVINDER C.P. NAVALKAR . . . . . Defendant  
Through : Mr. S.M. Walvekar and  
Ms. Suman Sharma, Advs.

CORAM:  
HON'BLE MR. JUSTICE J.R. MIDHA

ORDER

% 18.01.2019

1. The plaintiff has instituted this suit for recovery of Rs.10 crores against the defendant under Order XXXVII of the Code of Civil Procedure in which the summons were issued to the defendant on 19th March, 2012.

2. On 31st January, 2014, learned counsel for the defendant appeared before this Court. On 7th February, 2014, the defendant filed I.A.No.19953/2014 for entering appearance as well as for grant of leave to defend under Order XXXVII Rule 3 of the Code of Civil Procedure. On 13th October, 2014, this Court issued notice of I.A.No.19953/2014 to the plaintiff, who accepted the same on 8th December, 2014 and was granted four weeks time to file the reply. However, no reply was filed despite opportunities granted on 6th July, 2015 and 01st September, 2015. On 28th October, 2015, the Court granted last opportunity of two weeks to the plaintiff to file the reply subject to cost of Rs.30,000/-. However, the reply was not filed by the plaintiff.

3. On 29th November, 2017, the plaintiff submitted that the defendant be treated as having entered appearance within time subject to the defendant waiving the summons for service. The defendant waived service of summons whereupon this Court took the appearance of the defendant on record

and waived the cost imposed on 28th October, 2017.

4. On 11th December, 2017, the defendant filed a fresh application for leave to defend vide diary no.527283 but the same was returned under objections. The defendant removed the objections and re-filed the same on 31st January, 2018, but the same was again returned under objections.

5. On 15th February, 2018, the counsel for the defendant submitted that the application for leave to defend had been filed but was not on record. However, this Court decreed the suit on 15th February, 2018 on the ground that the application for leave to defend was not on record.

6. On 26th February, 2018, the defendant filed I.A.No.3051/2018 under Order XXXVII Rule 4 of the Code of Civil Procedure for setting aside of the decree dated 15th February, 2018 and for grant leave to defend on the ground that the defendant had filed I.A.No.19953/2014 for leave to defend of which notice was issued to the plaintiff on 13th October, 2014 but no reply was filed by the plaintiff despite repeated opportunities. On 11th December, 2017, the defendant filed a fresh application for leave to defend vide diary no.527283 which was returned under objections. The defendant removed the objections and sent the copy of the application by speed post to the plaintiff, who made false statement before the Court on 15th February, 2018 having not received the copy. The application was re-filed after removing objections on 31st January, 2018 but the Registry again raised the objections and did not list the application before the Court on 15th February, 2018. The defendant reiterated the grounds for grant of leave to defend in this application.

7. On 1st March, 2018, this Court dismissed I.A.No.3051/2018 on the ground that leave to defend application of the defendant was still not on record.

8. On 12th March, 2018, the defendant filed I.A.3527/2018 under Order XXXVII Rule 4 of the Code of Civil Procedure for setting aside the decree dated 15th February, 2018 and for grant of leave to defend on the ground that the defendant's application I.A.No.19953/2014 for leave to defend was filed in February, 2014 in which notice was issued to the plaintiff on 13th October, 2014 but no reply has been filed despite number of opportunities and cost of Rs.30,000/- imposed on 28th October, 2015. I.A.No.19953/2014 was pending as on 15th February, 2018 when the Court passed the decree against the defendant. It was further submitted that a fresh leave to defend application was also filed by the defendant on 11th December, 2017 but the same was lying under objections. The defendant raised the grounds for leave to defend in this application also.

9. I.A.No.4017/2018 under Order XXXVII Rule 3(5) of the Code of Civil Procedure for grant of leave to defend and I.A.No.4018/2018 for condonation of delay of 65 days in re-filing the application were listed before this Court on 23rd March, 2018 when the plaintiff was directed to file the reply to the applications. The plaintiff has filed the reply to both the applications Submissions of the defendant

10. The defendant filed I.A.No.19953/2014 for entering appearance as well as for grant of leave to defend under Order XXXVII Rule 3 of the Code of Civil Procedure on 07th February, 2014 in which notice was issued to the plaintiff on 13th October, 2014. This Court granted four weeks time to the plaintiff to file the reply to I.A.No.19953/2014 on 8th December, 2014.

11. On 6th July, 2015, last opportunity of four weeks was granted to the plaintiff to file the reply but again reply was not filed.

12. On 28th October, 2015, this Court granted further last opportunity of two weeks to the plaintiff to file reply subject to costs of Rs.30,000/- but still reply was not filed.

13. On 29th November, 2017, the Court recorded the defendant's appearance to be within time and the defendant was granted time to file leave to defend application.

14. I.A.No.19953/2014 for leave to defend was already on record and was pending on 29th November, 2017. However, in terms of the directions of the Court, the defendant filed fresh leave to defend application under Order XXXVII Rule 3 of the Code of Civil Procedure on 11th December, 2017 but the same was returned under objections.

15. The defendant removed the objections and re-filed the application on 31st January, 2018 but the same was again returned under objections and was not placed before the Court on 15th February, 2018.

16. On 15th February, 2018, the defendant submitted before the Court that application for leave to defend had been filed. However, this Court passed the decree without permitting the defendant to remove the objections and place the application on record. The Court also overlooked that the plaintiff's earlier leave to defend application being I.A.No.19953/2014 was already on record and was pending on 15th February, 2018.

17. The defendant is seeking setting aside of the ex-parte decree dated 15th February, 2018 on the ground that defendant's application I.A.No.19953/2014 for leave to defend was not considered by the Court on 15th February, 2018 and secondly, the defendant had filed the second application for leave to defend on 11th December, 2017 but the Court did not permit the defendant to remove the objections.

18. The defendant is seeking unconditional leave to defend the suit on the following grounds :-

18.1 The plaintiff is the sister/ancillary company of M/s.Anirva Developers Pvt. Ltd. and all the financial transactions of the plaintiff were done through Mr.Satish Julka and plaintiff never directly dealt with the defendant. 18.2 The two dishonoured post dated cheques for Rs.5 crores which are subject matters of the suit, were given by the defendant as a collateral security under the agreement dated 16th March, 2009. However, there was no legally recoverable debt by the defendant to the plaintiff. 18.3 The cheques in question were given jointly to the plaintiff and M/s.Anirva Developers Pvt. Ltd. purely as a collateral security. The plaintiff failed to discharge its obligations whereas the defendant fully discharged his obligation under the composite agreement. 18.4 The defendant fully discharged his obligations under the agreement dated 16th March, 2009 and therefore, the post-dated cheques were not enforceable.

18.5 The plaintiff has not given the mandatory one month advance notice under clause 11 of the agreement to the defendant before presenting the cheques for payment.

18.6 The agreement dated 16th March, 2009 executed between the plaintiff, M/s.Anirva Developers Pvt. Ltd. and the defendant clearly records that the post-dated cheques were given as a collateral security in respect of three properties mentioned in the composite agreement.

18.7 The suit is bad for non-joinder of M/s.Anirva Developers Pvt. Ltd.

because the post-dated cheques were given as a collateral security in a composite agreement dated 16th March, 2009 to the plaintiff and M/s.Anirva Developers Pvt. Ltd.

18.8 The plaintiff has filed a frivolous suit to extort money from the defendant by abusing the process of law.

18.9 M/s.Anirva Developers Pvt. Ltd. filed a civil suit at Goa against the defendant in which a composite settlement was recorded and a consent decree was passed on 29th August, 2010 in which M/s.Anirva Developers Pvt. Ltd. filed a declaration-cum-undertaking that they have no claim whatsoever against the defendant. The plaintiff company was actively involved in the filing of the civil suit by M/s.Anirva Developers Pvt. Ltd. and has played fraud by filing this case despite a composite settlement having been recorded in the civil suit.

18.10 M/s.Anirva Developers Pvt. Ltd. through Mr.Satish Julka filed five cases under Section 138 of the Negotiable Instruments Act arising out of the agreement dated 16th March, 2009 which have been dismissed with the finding that the complainant has acted with fraud and the cheques are unenforceable.

18.11 The plaintiff has filed proceedings under Section 138 of the Negotiable Instruments Act in respect of the cheques in question which are pending before the Metropolitan Magistrate.

#### Submissions of the plaintiff

19. The defendant has not filed the application for leave to defend within the prescribed period. The delay in filing the application for leave to defend has not been sufficiently explained. The defendant is therefore, not entitled to leave to defend. It is submitted that the defendant be directed to deposit the decretal amount as a condition for setting aside of the decree.

20. The plaintiff paid Rs.5,65,00,000/- to the defendant to purchase the tower property at Goa which is recorded in the agreement dated 16th March, 2009. It subsequently transpired that the defendant did not have clear and marketable title to the tower property and therefore, the plaintiff filed criminal complaints against the defendant before the Economic Offences Wing whereupon the defendant agreed to refund Rs.10 crores to the plaintiff and the plaintiff agreed to withdraw the

complaint filed before the Economic Offences Wing. Reference is made to clauses 7, 8 and 11 of the agreement dated 16th March, 2009. The defendant failed to transfer a clear and marketable title to the plaintiff despite lapse of ten months and therefore, the plaintiff presented the two cheques for encashment which were dishonoured upon presentation due to insufficiency of funds. The defendant's defence is sham and moonshine and liable to be rejected.

### Findings

21. The defendant filed I.A.19953/2014 under Order XXXVII Rule 3 of the Code of Civil Procedure for entering appearance and leave to defend in which notice was issued to the plaintiff on 13th October, 2014. The plaintiff did not file any reply to this application despite opportunities granted on 08th December, 2014, 06th July, 2015 and 28th October, 2015. This application was pending on 15th February, 2018 when this Court decreed the suit without considering I.A.19953/2014.

22. On 11th December, 2017, the defendant filed a fresh application for leave to defend which was returned under objections. The defendant removed the objections and re-filed the application on 31st January, 2018. Copy of the application was sent to the plaintiff's counsel on 31st January, 2018 by speed post (the original receipt of the speed post is at page 2 of the Index). However, the application was again returned under objections and was not listed before Court on 15th February, 2018. The defendant's counsel intimated the Court having filed the application. The application was again re-filed and was registered as I.A.4017/2018.

23. The defendant has shown sufficient cause for condonation of delay in re-filing the application in I.A.4017/2018. This Court is satisfied that the defendant's applications for leave to defend, namely, I.A.19953/2014 and I.A.4017/2018 warrants consideration on merits. The I.A.19953/2014 was already pending on 15th February, 2018 whereas I.A.4017/2018 had been filed on 11th December, 2017 but was lying under objections. The decree dated 15th February, 2018 passed on the ground that the defendant has failed to file the application for leave to defend is liable to be set aside. The defendant's applications for leave to defend are considered on merits.

24. The plaintiff is seeking recovery of Rs.10 crores under Order XXXVII of the Code of Civil Procedure from the defendant on the following averments made in the plaint:

(i) In July 2007, the defendant approached the plaintiff and represented that the defendant was the owner of 68325 sq. mtrs. of land at Goa whereupon the plaintiff agreed to do business with the defendant and made a payment of Rs.5 crores to the defendant.

(ii) The defendant could not fulfil its commitments and obligations and therefore, the parties entered into an agreement dated 16th March, 2009 to settle the disputes.

(iii) The defendant issued two cheques bearing No.054795 and 054796 both dated 24th September, 2009 for Rs.5 crores each to the plaintiff in discharge of its admitted and acknowledged liability.

(iv) The plaintiff presented the aforesaid cheques as per the assurance of the defendant and as per the agreed terms. However, both the said cheques were dishonoured vide the bank memos dated 10th March, 2010.

(v) The plaintiff issued legal notices dated 23rd March, 2010 to the defendant who failed to honour the same.

(vi) The plaintiff filed complaints under Section 138 of the Negotiable Instruments Act against the defendant which are pending.

(vii) The suit is based on admitted and acknowledged liability of Rs.10 crores by the defendant.

(viii) The plaintiff has not filed any original agreement dated 16th March, 2009 along with the plaint. However, the plaintiff has filed the photocopy of the agreement dated 16th March, 2009 and certified copies of two cheques for Rs.5 crores each, dishonoured memos dated 10th March, 2010, notices dated 23rd March, 2010, replies dated 25th April, 2010, and complaints under Section 138 of the Negotiable Instruments Act.

25. The agreement dated 16th March, 2009 was executed between the plaintiff, defendant and M/s.Anirva Developers Pvt. Ltd. The agreement records that plaintiff as well as M/s.Anirva Developers Pvt. Ltd. have disputes with the defendant with respect to property transactions and all the three parties resolved the disputes by the aforesaid agreement. Para 7 of the agreement dated 16th March, 2009 records that the defendant handed over the possession of the tower property to the plaintiff and agreed to cooperate with the sale of the said property from its owner to the plaintiff. Para 9 of the agreement dated 16th March, 2009 records that the defendant released his rights in the tower property in favour of the plaintiff and M/s.Anirva Developers Pvt. Ltd. and gave them exclusive rights for negotiating sale/collaboration/joint venture to secure a total payment of Rs.20 crores with interest @ 25% per annum on the condition that recoverable amount of Rs.20 crores shall be considered as investment in the tower land. Clause 11 of the agreement dated 16th March, 2009 records that the defendant issued post-dated cheques for Rs.35 crores to the plaintiff and M/s.Anirva Developers Pvt. Ltd. on the condition that the plaintiff and M/s.Anirva Developers Pvt. Ltd. shall serve one month advance notice to the defendant before presentation of the cheques in the event of any breach of the terms of the agreement by the defendant. Clause 14 of the agreement dated 16th March, 2009 provides for resolution of disputes by a sole arbitrator. The arbitration shall be conducted at Delhi and the Courts at Delhi alone have jurisdiction in respect of the arbitration.

26. As per the agreement dated 16th March, 2009 (Clause 9), the defendant gave exclusive rights to negotiate sale/collaboration/joint venture of the tower property to the plaintiff and agreed to cooperate with the plaintiff for the sale to secure the total payment of Rs.20 crores to the plaintiff and M/s.Anirva Developers Pvt. Ltd. If the defendant has breached this obligation, the plaintiff was required to notify the defendant as well as pleaded the same before instituting the suit.

27. The plaintiff has neither issued any notice to the defendant nor pleaded in the plaint if the defendant breached the obligations of the agreement dated 16th March, 2009. The plaintiff's cause of action to encash the security would arise in the event of breach/violation of the obligations to the defendant.

28. The plaintiff has not served a mandatory one month advance notice to the defendant before presenting the cheques in terms of Clause 11 of the agreement.

29. According to the plaint, the suit is based on admitted and acknowledged liability of Rs.10 crores by the defendant. However, there is no written document to this effect.

30. M/s.Anirva Developers Pvt. Ltd. is a necessary party to this suit as the agreement dated 16th March, 2009 is between three parties, namely, plaintiff, defendant and M/s.Anirva Developers Pvt. Ltd. and the defendant gave a collateral security jointly to the plaintiff and M/s.Anirva Developers Pvt. Ltd. for Rs.35 crores.

31. The defendant is entitled to unconditional leave to defend as the defendant has a substantial defence to the suit.

#### Conclusion

32. I.A. No.3527/2018 is allowed and the decree dated 15th February, 2018 is set aside.

33. I.A. No.4018/2018 is allowed and delay in re-filing I.A.4017/2018 is condoned.

34. I.A. Nos.19953/2014 and 4017/2018 are allowed and unconditional leave to defend is granted to the defendant.

CS(OS) 671/2012

35. List for further hearing on 21st January, 2019.

36. Copy of this order be given dasti to counsel for the parties under the signature of the Court Master.

J.R. MIDHA, J.

JANUARY 18, 2019 mk/dk