Sh. Arun Jaitly vs M/S. Ishwar Industries & Ors. on 24 July, 2009

Author: Aruna Suresh

Bench: Aruna Suresh

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*           HIGH COURT OF DELHI AT NEW DELHI

+                CS (OS) No. 3276/1989


                          Date of decision : July 24, 2009


#     SH. ARUN JAITLY                        ..... PLAINTIFF
!               Through : Mr. Ravi Sikri, Advocate with
                          Mr. Saket Sikri, Advocate


                          Versus


$     M/S. ISHWAR INDUSTRIES & ORS. ......DEFENDANTS
^               Through : Mr. N.K. Kantawala, Advocate
                          with Mr. Sanjay K. Shandilya,
                          Adv. for D-1.
                          Mr. J.M. Bari, Advocate for D-2.

%
      CORAM:
      HON'BLE MS. JUSTICE ARUNA SURESH

     (1) Whether reporters of local paper may be
         allowed to see the judgment?

     (2) To be referred to the reporter or not?        Yes

     (3) Whether the judgment should be reported       Yes
         in the Digest ?

                         JUDGMENT
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ARUNA SURESH, J.

1. Plaintiff filed this suit under Order 37 of the Civil Procedure Code (hereinafter referred to as CPC) for recovery of Rs.28,30,000/- against the defendants along with interest @18% per annum from the date of institution of the suit till realisation. Defendant No.3 being a bank was a proforma party and its name was deleted from the array of parties vide order dated 6.9.1990 and this Court ordered the registration of the suit under Order 37 CPC. Summons in the prescribed proforma were duly

served upon the defendants. Both the defendants filed their application for leave to defend. The defendants were granted unconditional leave to defend the present suit.

2. Briefly narrated, the case of the plaintiff is that he is an architect and developer by profession. Defendant No.1 engaged professional services of the plaintiff. An agreement dated 8.1.1985 was executed between defendant No.1 and Sh. R.C. Goenka for the development of Tribhuvan Industrial Cum Commercial Complex with approval from the Bank of India vide their letter dated 23.4.1985 so as to complete flatted factories/commercial buildings etc. Vide letter dated 29.5.1985, R.C. Goenka permitted defendant No.1 to engage the services of any other party or builder for development of the said land. The same was confirmed by defendant No.1 on 29.5.1985 itself.

3. Thereafter an agreement dated 20.8.1985 was executed between the plaintiff and defendant No.1 for the said work of additions, alterations and renovation as per specifications and plans mutually agreed at a cost of Rs.4 lacs to be borne by the plaintiff. As against the deposit of Rs.10 lacs security, plaintiff deposited Rs. 5 lacs and remaining Rs.5 lacs were to be deposited by him on receipt of approval from Bank of India in his name for redevelopment of the property and the possession of the site was to be given to the plaintiff on 20.8.1985.

4. Defendant No.1 entered into an agreement with defendant No.2 on 4.2.1986 without the knowledge of the plaintiff for the development of the same block and the name of the plaintiff featured in sub- clause 8 of the said agreement to the effect that plaintiff would be consulted as an architect from time to time.

5. On 12.7.1986 defendant No.1 made a proposal to the plaintiff and on 14.7.1986 he gave in writing that out of the total sum of Rs.15 lacs agreed to be paid, Rs.5 lacs to 8 lacs would be paid by 17.8.1986 and balance amount would be paid by December 1986 and further area of 1275 square feet would be retained by the plaintiff in the proposed complex against security deposit of Rs. 5 lacs.

6. Plaintiff sent a letter on 17.12.1986 to defendant No.1 asking him not to disturb the possession of the structure since defendant No.1 had failed to make any payment till that date. A memorandum of understanding was executed inter se the parties on 18.12.1986 and it was agreed that Rs.15 lacs would be paid by defendant No.1 or by defendant No.2 in the following manner:

(a) Rs. 3 lakhs by cheque/cash on or before 22.12.1986;

(b) Rs. 2 lakhs by cheque/cash on or before 31.12.1986;

(c) Rs.2.5 lakhs by cheque/cash by 31st January 1987.

(d) Thereafter further monthly installment of Rs.1.5 lakhs is to be paid on or before the end of each month commencing from February 1987 to June 1987.

7. Plaintiff received only a sum of Rs.3 lacs from defendant No.2 in part compliance of the memorandum of understanding and thereafter he did not receive any amount from the defendants.

Plaintiff wrote a letter dated 9.7.1987 and another letter dated 10.7.1989 calling upon the defendants to make the payment as per MoU. He also wrote a letter dated 28.10.1988 to defendant No.1 asking him to mark the area of the flat which would be allotted to him in the new complex under construction. Thereafter plaintiff sent a legal notice dated 12.11.1989 to the defendants asking them to make payments along with possession of 1275 square feet in Tribhuvan Complex within seven days of receipt of notice which was duly received by the defendants on 15.11.1989. Since defendants failed to honour the MoU, plaintiff filed the present suit for recovery of money.

8. Defendant No.2 sent a letter to the plaintiff on 20.7.1989 admitting that possession of the office block Phase-I was taken over from the plaintiff with his consent along with defendant No.1 in terms of the MoU and he also admitted his liability to pay Rs.25 lacs to the plaintiff out of the money recovered from the sale of owners allocation and also confirmed the payment of Rs.3 lacs to the plaintiff.

9. Defendant No.1 has contested the suit of the plaintiff contending inter alia that the suit is not maintainable as there is no privity of contract between the plaintiff and defendant No.1 in respect of the subject matter of the suit as it is based on the memorandum of understanding, fulfillment of which is based on the conditions that it would be reduced to a written regular agreement and that no such written agreement was executed, that without execution of the regular agreement as stipulated in the MoU and in the absence of a resolution of the company authorizing such execution it is not bound to transfer the property, that the said memorandum of understanding in the absence of an agreement and resolution is not enforceable against it, that the alleged memorandum of understanding is without any consideration, vague, uncertain, unfair and unconscionable being against public policy, being illegal and void is not enforceable in law, that it is defendant No.2 who is solely liable to the plaintiff under the memorandum of understanding dated 18.12.1986, that defendant no.2 admitted his liability in reply to the notice received from plaintiff and part payment was also received by the plaintiff from defendant No.2, that therefore it stood released of its liability in regard to the alleged debt, that the suit is barred by period of limitation.

10. The defendant No.1 had obtained necessary sanction from the Bank of India on 14.9.1985 but plaintiff failed to pay the security amount of Rs.5 lacs as per the agreement, though the demand for deposit of security was made vide letter dated 13.9.1985. Plaintiff never carried out any work at Sahibabad property from his own money totalling Rs.4 lacs. The work at Sahibabad was carried out in the premises of another company namely M/s Allied Fiber Glass Products Pvt. Ltd. by Sh. Navin Jaitly under the name and style Jaitly Construction, Engineers and Contractors. The plaintiff therefore, had no connection with the said transaction at Sahibabad.

11. On approval granted by the Bank of India for development of the property an agreement dated 4.2.1986 was entered into between defendant No.1 company and R.C. Goenka in supersession of the earlier agreement dated 5.1.1985. Plaintiff never performed his part of the contract dated 20.8.1985. A fresh contract was entered into between plaintiff and defendant No.1 on 12.7.1986 whereby the parties gave up their rights under the previous agreement dated 20.8.1985 and Rs.5 lacs deposited earlier were to be treated as consideration for sale by way of allotment of area of 1250 sq. ft. in the Delhi property developed in terms of the agreement. The plaintiff also agreed to forego the interest

as defendant company had confirmed allotment of the said land to the plaintiff. In the meantime, construction as per agreement dated 4.2.1986 had started but due to circumstances beyond control, the same got delayed. Agreement dated 12.7.1986 still continued as it was neither revoked nor cancelled. Therefore, both the parties were bound by the said agreement. The written note dated 14.7.1986 was not written by defendant No.1 and was not binding upon it. There was no occasion at all for the payment of Rs.15 lacs to be made to the plaintiff as claimed. Defendant No.1 has also challenged the validity of the written note being in violation of Section 23 of the Contract Act. It is also denied that letter dated 10.7.1986 had any reference to the alleged MoU. It is the defendant No.2 who has admitted his liability of Rs.25 lacs towards the plaintiff and therefore, the matter was between defendant No.2 and plaintiff and defendant No.1 had no concern with the same. The suit as against the defendant No.1 is liable to be dismissed.

12. Defendant No.2 in his written statement has contended inter alia that in the MoU dated 18.12.1986, he is only a confirming party and no decree can be passed against him as he is not liable to satisfy the claim of the plaintiff. He is neither liable on the original cause of action nor he is surety or guarantor for and on behalf of defendant No.1. Agreement dated 4.2.1986 was entered into between defendant No.1 and M/s. B.D. Developers, an Association of persons including the defendant No.1 with the knowledge, consent and intimation of the plaintiff. The alleged agreement dated 18.12.1986 is without consideration, is unenforceable against defendant No.2 and is only a memorandum and parties never intended to enforce the same and is therefore not binding on the parties. Regular agreement regarding the terms contained in the MoU was to be entered into between the parties. It was incumbent upon the parties to file said MoU with appropriate authorities in Form 37 to seek permission under Section 269 UC of the Income Tax Act within a period of 15 days and since Form 37-I was not filed, the document lost its force and therefore, the suit is not maintainable. The property at Ishwar Nagar was mortgaged with Bank of India. Therefore, defendant No.1 and defendant No.2 had entered into an agreement dated 4.2.1986 for development of the property with a view to repay the loan amount. For that purpose defendant No.2 had deposited Rs.42 lacs with defendant No.1 as security for development of the property. The agreement was entered into with a tacit understanding with the Bank of India that out of the sale proceeds by selling the developed property the debt of the bank would be paid by defendant No.1. Defendant No.1 was to receive 80% of the sale proceeds and defendant No.2 was to receive 20% for adjusting the security amount deposited and the interest accrued thereon. Vide letter dated 2.12.1988, the Bank of India had objected the claims or lien of the plaintiff. It was the absolute liability of defendant No.1 to satisfy the claim if any of the plaintiff. Defendant No.2 has no objection if the claims, if any, of the plaintiff are directed to be satisfied for allocation of defendant No.1. Bank of India has not recognized earlier, the agreement dated 20.8.1985 as it was entered into without the approval and consent of the bank who is the mortgagee of property of defendant No.1 at Ishwar Nagar. Memorandum of understanding had no genesis in the agreement dated 8.1.1985 and 20.8.1985. It was alleged that MoU was not executed with a view to save the agreement dated 4.2.1986 as alleged though the name of the plaintiff appears in clause 8 in the said agreement as architect consultant. There is no cause of action for filing the suit against defendant No.2. Defendant No.2 was not in a position to make any payment for and on behalf defendant No.1 without the permission of Bank of India or of defendant No.1 with prior approval of Bank of India. The suit of the plaintiff as against defendant No.2 is without any cause of action and is not maintainable and is

liable to be dismissed.

13. Plaintiff filed his replication in answer to the written statements of both defendants wherein he has reasserted his stand taken in the plaint and has denied the averments of the defendants as contained in their respective written statements.

14. Upon the pleadings of the parties, the following issues were settled for adjudication of the disputes inter se them:

> 1. Whether the plaintiff is entitled to a sum of Rs.28,30,000/- as claimed in the suit? OPP
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> 2. Whether the plaintiff is entitled to receive interest on the said amount, if so, at what rate and for which period? OPP
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> 3. Whether in the alternative, the plaintiff is entitled to a sum of Rs.18,30,000/- together with interest @18% p.a. from the date of suit together with vacant possession of space in the Tribhuvan Complex measuring 1275 sq.ft. as per the memorandum of understanding dated 18.12.1986 along with interest o@18% on Rs.10 lacs being the cost of the space, as the same was to be handed over on or before 30.9.1987? OPP
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> 4. Whether the defendants 1 and 2 are jointly and severally liable for the dues to the plaintiff? OPP
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> 5. Whether the memorandum of understanding dated 18.12.1986 is without consideration as against defendant No.2 and is not enforceable as set out in paras 3 and 4 of the preliminary objections of the written statement of defendant No.2? OPP
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> 6. Whether the plaint does not disclose any cause of action against defendant No.2? OPD
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> 7. Whether the memorandum of understanding dated 18.12.1986 was not executed on behalf of defendant No.1 and as such is not binding on defendant No.1?
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> 8. Whether the suit is barred by limitation ? OPD
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> 9. Relief.

15. I have heard Mr. Ravi Sikri, learned counsel for the plaintiff, Mr. N.K. Kantawala, learned counsel for the defendant No.1 and Mr. J.M. Bari, learned counsel for Defendant No.2 and have carefully perused the record. My observations on the issues as above are as follows:

16. Defendant No.1 has challenged the maintainability of the suit on the grounds that it is barred by period of limitation. Learned counsel for the defendant No.2 conceded that defendant No.2 has not joined any issue on the aspect of limitation.

17. Period of limitation for filing a suit for recovery of money is three years from the date when the work is done by the plaintiff for the defendant at his request where no time has been fixed for payment.

18. By virtue of Section 18 of the Limitation Act (hereinafter referred to as Act) where before the expiration of the prescribed period for a suit in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed or by any person through whom he derives his title or liability, a fresh period of limitation starts running against the party who is to discharge the liability from the time when the acknowledgment is so signed. Under section 19 of the Act where a part payment on account of debt has been made, fresh period of limitation is to be computed from the time when the payment is made. Section 20 of the Act speaks of effect of acknowledgment of payment made by another person for and on behalf of the person who under the law is liable to make payment in discharge of his liability.

19. Defendant No.1 had entered into an agreement with the plaintiff on 20.8.1985 (Ex.-P5). Thereafter another agreement dated 12.7.1986 (Ex.-P8) was executed between the plaintiff and defendant No.1 whereby the parties revoked all their rights and liabilities arising out of the agreement dated 20.8.1985 and defendant No.1 agreed to provide 1250 sq. ft. covered area to the plaintiff in consideration of the security deposit of Rs.5 lacs already made by him. An acknowledgment letter was issued on 14.7.1986 (Ex.-P9) by defendant No.1 through its director Bharat Bhaskar wherein it admitted its liability towards the plaintiff and agreed to the terms along with the time schedule for making the payments whereby complete payment of Rs.15 lacs was to be made by December, 1986 and the flat was to be allotted to the plaintiff. However, no deadline was set for the allotment of the house. As per the said letter, proper agreement for allotment was to be signed by the plaintiff when defendant No.1 required the same to be signed.

20. In the meantime, defendant No. 1 and defendant No.2 entered into a development agreement dated 4.2.1986 and they agreed among themselves to retain the plaintiff as their consultant architect on behalf of defendant No.1. This resulted into execution of a Memorandum of Understanding dated 18.12.1986 (Ex.-P1) between the plaintiff and defendants No. 1 and 2. In this memorandum of understanding defendant No.1 admitted its liability to pay sum of Rs.15 lacs to the plaintiff in installments. Parties admit having executed the MoU dated 18.12.1986. Defendant No.2 made payment of Rs.3 lacs being the first installment in terms of the MoU in the last week of December 1986. However, no payment was made later on. The present suit was filed by the plaintiff on 4.12.1989. Therefore, under the circumstances, fresh period of limitation started running against the defendants on execution of memorandum of understanding as well as when part payment of Rs.3 lacs was made by defendant No.2.

21. Since the present suit has been filed on 4.12.1989, the acknowledgment was lastly made on 18.12.1986 and the part payment was made in the last week of December, 1986, the suit having been filed within three years of the acknowledgment and part payment is well within the period of limitation.

22. Learned counsel for the defendant No.2 has argued that plaintiff has no right to sue defendant No.2 as he had acted as an agent for and on behalf of defendant No.1 and was not a party to the property development agreement dated 4.2.1986 executed between the plaintiff and defendant No.1. It is further argued that primary liability to pay the dues is that of defendant No.1. Defendant No.2 only became a collection agent for defendant No.1 from the owners of the site and payment to the plaintiff was to be made by him from the amount so collected. It is impressed upon that under the circumstances there is no cause of action for the plaintiff to file the present suit against him.

23. Learned counsel for the plaintiff has submitted that plaintiff has filed the present suit for recovery of amounts due and payable to the plaintiff by defendants No. 1 and 2 which were admitted by defendants and reduced to writing in the form of MoU dated 18.12.1986 wherein defendant No.2 agreed to make payment to the plaintiff due from defendant No.1 and therefore, a cause of action has accrued in favour of the plaintiff and against the defendant No.2 to file the present suit for recovery of money against him.

24. Before MoU was executed on 18.12.1986 defendant No.1 had written in hand that 1275 sq. ft. to be retained and Rs.15 lacs to be paid in cash in installments. Rs.8 lacs to be paid by 17th August, 1986 and balance amount was to be paid by December, 1986. This document is dated 14.7.1986 (Ex.-P9) and is signed by Mr. Bharat Bhaskar, the director of defendant No.1 company. Though initially defendant No.1 denied having executed any such writing but at the stage of admission and denial of the documents, Bharat Bhaskar admitted this document. MoU dated 18.12.1986 (Ex.-P1) is an admitted document. In the MoU defendant No.2 has been described as confirming party. The relevant part of the MoU qua defendant No.2 reads as follows:

> "This understanding supersedes all other previous agreements, understandings, writings or any other document executed between the first party and the second party or confirmed by the third party in respect of the property at Ishwar Nagar belonging to Ishwar Industries Ltd. Broadly the terms as agreed are:
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> A sum of Rs.15,00,000/- (Fifteen lakhs) payable to the second party, will be paid either by the first party or the confirming party in the following manner....."

25. Since defendant No.2 has admitted the execution of this MoU and also admits that this amount was payable by defendant No.1 to plaintiff and had undertaken to make the payment for and on behalf of defendant No.1, the defendant No.2 admitted his liability.

26. Cause of action consists of bundle of facts which give cause to the plaintiff to enforce his legal rights for settlement in a court of law. The cause of action therefore means a right to sue. In Meenu Bhar v.

Renu Khosla & Anr. bearing CS (OS) No.1033/2004 decided on 7.11.2008, I have discussed the meaning of cause of action. The

relevant paragraphs of the said case read as follows:

> 25. Cause of action consists of bundle of facts which give cause to enforce the legal injuries for redress in a court of law. The 'cause of action' means, therefore, every fact, which if traversed, would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them, gives the plaintiff a right to claim relief against the defendants. It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or would arise.

27. What is a cause of action has been summed up in reference to its various judgments by the Supreme Court in Om Prakash Srivastava v. Union of India and Anr. - 2006(7) SCALE 318 in the following manner:

> "9. By "cause of action" it is meant every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, a bundle of facts, which it is necessary for the plaintiff to prove in order to succeed in the suit (See Bloom Dekor Ltd. v. Subhash Himatlal Desai and Ors. (1994 (6) SCC 322).
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> 10. In a generic and wide sense (as in Section 20 of the Civil Procedure Code, 1908) "cause of action" means every fact, which it is necessary to establish to support a right to obtain a judgment (See Sadanandan Bhadran v. Madhavan Sunil Kumar (1998 (6) SCC 514).
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> 11. It is settled law that "cause of action" consists of bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to claim relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or would arise. (See South East Asia Shipping Co. Ltd. v. Nav Bharat Enterprises Pvt. Ltd. and others (1996 (3) SCC 443).
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> 12. The expression "cause of action" has acquired a judicially settled meaning. In the restricted sense "cause of action" means the circumstances forming the infraction of the right or the immediate occasion for the reaction. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but also the infraction coupled with the right itself. Compendiously, as

noted above the expression means every fact, which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary to prove each fact, comprises in "cause of action". (See Rajasthan High Court Advocates Association v. Union of India and Ors. (2001 (2) SCC 294).

13. The expression "cause of action" has sometimes been employed to covey the restricted idea of facts or circumstances which constitute either the infringement or the basis of a right and no more. In a wider and more comprehensive sense, it has been used to denote the whole bundle of material facts, which a plaintiff must prove in order to succeed. These are all those essential facts without the proof of which the plaintiff must fail in his suit. (See Gurdit Singh v. Munsha Singh (1977 (1) SCC 791).

14. The expression "cause of action" is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more bases of suing; a factual situation that entitles one person to obtain a remedy in court from another person. (See Black s Law Dictionary). In Stroud s Judicial Dictionary a "cause of action" is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact, which if traversed, the plaintiff must prove in order to obtain judgment. In "Words and Phrases" (4th Edn.) the meaning attributed to the phrase "cause of action" in common legal parlance is existence of those facts, which give a party a right to judicial interference on his behalf. (See Navinchandra N. Majithia v. State of Maharashtra and Ors. (2000 (7) SCC 640).

15. In Halsbury Laws of England (Fourth Edition) it has been stated as follows:

"Cause of action has been defined as meaning simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. „Cause of action has also been taken to mean that particular act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject matter of grievance founding the action, not merely the technical cause of action .

16. As observed by the Privy Council in Payana v. Pana Lana (1914) 41 1A 142, the rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action or different causes of action, even though they arises from the same transaction. One great criterion is, when the question arises as to whether the cause of action in the subsequent suit is identical with that in the first suit whether the same evidence will maintain both actions. (See Mohammad Khalil v. Mahbub Ali Mian (AIR 1949 PC 78).

28. The cause of action has no relation either to the defence that may be raised by the defendant nor does it depend on the character of relief prayed for by the plaintiff. It only refers to facts upon which the plaintiff basis his claim before the Court to arrive at a conclusion in his favour.

29. In this case it is the defence raised by defendant No.2 that he was acting as an agent for and on behalf of defendant No.1 and had agreed to make payment due to the plaintiff in terms of MoU (Ex.-P1) after realization of the amount from the owners of the site and he in no manner is individually liable to pay the amount claimed by the plaintiff.

30. Defendant No.2 in his written statement also admitted that he was to pay a sum of Rs.25 lacs to the plaintiff as per MoU. This admission itself is a relevant fact to reach to a conclusion that plaint discloses cause of action against defendant No.2.

31. Under these circumstances, I conclude that in view of the admitted facts and documents a cause of action has accrued in favour of the plaintiff and against defendant No.2 as is apparent from the pleadings contained in the plaint. Hence, this issue is accordingly decided against defendant No.2 and in favour of the plaintiff.

32. An agreement was executed between the plaintiff and defendant No.1 through Mr. Bharat Bhaskar, its director, on 20.8.1985 (Ex.-P5/D1/6). This agreement was executed for renovation of property erected on plot bearing Khasra No.264, Village Bahapur, New Delhi (now known as Ishwar Nagar) on terms and conditions laid down in the agreement. Plaintiff in his cross examination has stated that on 24.8.1985, there was a newspaper publication in Hindustan Times wherein it was stated that Mr. Bharat Bhaskar was not authorised to enter into an agreement for redevelopment of the property in question. With the result plaintiff wrote a letter on 12.9.1985 to Bharat Bhaskar to clarify his stand in regard to the publication which appeared in the paper. Admittedly this letter was replied by defendant No.1 company on 13.9.1985 (Ex.-D1/21) duly signed by Bharat Bhaskar as director of the company. Letter dated 13.9.1985 is an admitted document (Ex.-D1/21). The relevant part of this letter reads:

> "We are pleased to inform you that the publication of the notice in the Hindustan Times dated 24th August 1985 was wrongly made and without any authority and as such, the said S/Shri Rajeev Bhaskar, Sanjeev Bhaskar and Sunil Johar have subsequently on 6-9-1985 withdrawn and cancelled the earlier notice published by them in the Hindustan Times of 24th August, 1985. A photocopy of the notice dated 6-9- 1985 is enclosed for your information and perusal.
>
> Further, in clarification, a resolution was passed in the meeting of the Board of Directors of the Company on 6-9-1985 clarifying the necessary authority pursuant to the publication in the Hindustan Times, a copy of which is also enclosed for your information."

33. This letter clarified the confusion created by the publication appearing in the newspaper „Hindustan Times and Mr. Bharat Bhaskar continued to deal with the plaintiff as director of

defendant No.1.

34. In its written statement defendant No.1 has nowhere objected to the authority of Bharat Bhaskar to act as director of defendant No.1 company and have business dealings with the plaintiff or enter into the impugned agreements for and on behalf of the company. The only plea which has been raised in the written statement is that plaintiff by virtue of his dominant position executed his influence on Bharat Bhaskar who, without actual verification of the accounts and the work signed the writing dated 14.7.1986. According to the defendant No.1, it is also not a party to the MoU dated 18.12.1986 (Ex.-P1).

35. Vinay Bhaskar DW-1 has denied execution of writing dated 14.7.1986 (Ex.-P9). He has deposed that the said writing was executed by Bharat Bhaskar under the influence of the plaintiff without actual verification of the account and without the authority of defendant No.1 and therefore it has no binding effect on defendant No.1. In his cross examination he did admit that Mr. Bharat Bhaskar is one of the directors of defendant No.1. He also admitted that Bharat Bhaskar had dealt with all the transactions including execution of all the agreements and subsequent correspondences with the plaintiff on behalf of defendant No.1 company. Thus, it is clear that Bharat Bhaskar as director of defendant No.1 continued to represent the company while dealing with the plaintiff. He was duly authorised by the company to act on its behalf. MoU (Ex.-P1) dated 18.12.1986 is signed by Bharat Bhaskar as director of defendant No.1. Defendant No.1 has not been able to prove its case that Bharat Bhaskar was not authorized by defendant No.1 company to enter into an agreement for renovation on 20.8.1985 and subsequent agreements and to indulge into correspondences for and on behalf of defendant No.1 company with the plaintiff. Learned counsel for the defendant No.1 has argued that no resolution was passed in favour of Bharat Bhaskar authorizing him to act on behalf of the company. As pointed out above these submissions are without any force specially when defendant No.1 has admitted that Bharat Bhaskar has been dealing for and on behalf of defendant No.1 with the plaintiff. Neither he nor any other director of the company dealt with the plaintiff for renovation of the properties at Ishwar Nagar owned by defendant No.1 company.

36. Learned counsel for the defendant No.1 has argued that MoU does not bear any stamp of Ishwar Industries and it was executed by Bharat Bhaskar in his individual capacity. Therefore, this MoU is not binding on defendant No.1. He has referred to G. Subba Rao v. M/s. Rasmi Die-Castings Ltd. - AIR 1998 AP 95 to support his submissions.

37. I do not agree with the contentions of the learned counsel for the defendant No.1. From the contentions of the parties it is clear that MoU was executed. The opening lines of the MoU (Ex.-P1) suggest that it was between the plaintiff and Ishwar Industries Ltd. The relevant lines are:

> "This understanding supersedes all other previous agreements, understandings, writings or any other document executed between the first party and the second party or confirmed by the third party in respect of the property at Ishwar Nagar belonging to Ishwar Industries Ltd...."

38. The recital of the MoU therefore clarifies that Bharat Bhaskar was acting on behalf of defendant No.1 company and not in his personal capacity. It is true that Resolution of the Board dated 6.9.1985 has not been placed on record. It was for the defendant No.1 to produce it as it finds reference in the letter dated 13.9.1985 (Ex.-P7) written by Bharat Bhaskar on behalf of defendant No.1 company to the plaintiff informing him that he had been authorized to enter into agreements on behalf of defendant No.1. It was for the defendant No.1 to discharge the onus of proving that Bharat Bhaskar was not authorized by it to enter into agreement or transaction or writing etc. with the plaintiff which it has miserably failed.

39. In G. Subba Rao v. M/s Rashmi Die-Castings Ltd. - AIR 1998 Andhra Pradesh 95 who can be a managing director of a company is defined. Besides, in the said case it was questioned if the MoU could be treated as a settlement between two individuals or Chartered Accountant and the respondent company. The Court held MoU as not binding on the company with the observations that preamble did not describe the signatory of the MoU as the managing director of the company. Besides the petitioner was director of the company till the year 1993. The court presumed that under the circumstances the two individuals wanted to settle certain disputes of the respondent company on the basis of this MoU. Besides the observations were made in a writ petition filed by the petitioner seeking winding up of the company. Therefore, the observations made in the said case were in the context whether the company under such circumstances on the basis of MoU should be wound up or not. This judgment therefore is of no help to defendant No.1.

40. The signatory of the MoU happened to be the director of Ishwar Industries. The contents of the MoU also indicate that the terms and conditions were settled for and on behalf of defendant No.1. Therefore, it is not acceptable that Bharat Bhaskar had no authority to act on behalf of the company for want of resolution of the company.

41. Under these circumstances, I conclude that MoU (Ex.-P1) was executed by Bharat Bhaskar on behalf of defendant No.1 and it is binding on it. This issue is accordingly decided against defendant No.1 and in favour of the plaintiff.

42. Mr. Ravi Sikri, counsel appearing for the plaintiff has submitted that the present suit has been filed by the plaintiff for recovery of professional fee. All the documents executed between the plaintiff and defendant No.1 are admitted and proved in evidence. Defendant No.1 admitted its liability to pay a sum of Rs.15 lacs in its writing dated 14.7.1986 (Ex.-P9) in two installments by the end of December 1986 and also an area of 1275 sq. ft. was to be retained by the plaintiff in the proposed Tribhuvan Complex, Ishwar Nagar, Delhi against the security amount of Rs.5 lacs deposited by the plaintiff in pursuance of the agreement dated 20.8.1985 (Ex.-P5). He further argued that defendant No.1 also admitted its liability to pay the due amount when memorandum of understanding was executed between the plaintiff and defendant No.1 and defendant No.2 and that defendant No.1 is legally bound to pay the admitted amount along with interest of Rs.6,21,000/- @18% per annum as on 15.11.1989 as agreed inter se the parties. Learned counsel for the plaintiff has referred to following judgments:

1. United India Insurance Co.

Ltd. & Anr. v. Andrew Vivera - AIR 1990 Kerala 139.

2. Gopal Krishnaji Ketkar v.

Mahomed Haji Latif & Ors. -

(1968) 3 SCR 862.

3. Sports Authority of India v.

Sports Authority of India Kamgar Union & Ors. - 2005 III AD (Delhi)

55.

43. Mr. N.K. Kantawala, counsel appearing for the defendant No.1, has argued that plaintiff is an architect and builder. His services were engaged for purpose of addition/alteration/renovation of the existing office block, phase-I at a cost of Rs.4 lacs which were to be borne by the plaintiff and later on to be paid by defendant No.1. This agreement is absolutely silent about any work to be carried out at M/s Allied Fiber Glass Products Pvt. Ltd. at Sahibabad.

44. It is argued that plaintiff did not complete the construction work and has raised bills for the work done at Sahibabad by one Navin Jaitly. Therefore, he is not entitled to the amount claimed for the work done at Sahibabad. On the failure of the plaintiff to complete his work, defendant No.1 had to enter into a second agreement with defendant No.2 on 4.2.1986. Plaintiff never objected to this agreement though he has tried to argue that the said agreement was executed without his consultation and previous knowledge. Plaintiff has not placed on record any document nor has adduced any evidence to prove that the total cost of the work executed by him at Mathura Road and at Sahibabad was Rs.4 lacs. He has also pointed out that there was no written agreement between the plaintiff and defendant No.1 for executing any work at Sahibabad and the work at Sahibabad was with Navin Jaitly, a cousin of the plaintiff.

45. It is further argued that plaintiff has committed breach in the enforcement of the agreement as he only deposited Rs.5 lacs as security amount against Rs.10 lacs as per the terms contained in clause 3 of the agreement dated 12.7.1986. Learned counsel for the defendant No.1 has submitted that MoU dated 18.12.1986 cannot be enforced in law because there is a clause contained in the said MoU that a regular agreement would be executed but no such agreement was executed. He has referred to letter dated 10.7.1989 wherein there is no mention of any MoU having been entered into by the parties whereby defendant No.1 admitted its liability to pay the suit amount and for the first time vide this letter that plaintiff has clubbed both the claims as against Tribhuvan Complex and construction at Sahibabad unit. He argued that vide letter dated 5.10.1989 claim of the plaintiff made in letter dated 10.7.1989 has been specifically refuted and liability if any to pay the amount is that of defendant No.2. He has submitted that MoU is to be read as it is and cannot be given any other meaning in view of Sections 91 and 92 of the Evidence Act.

46. It is further argued that plaintiff has not led any evidence to show that any forgery or fraud has been played by the MD of the company and no evidence has been led to show that defendant No.1 is liable to pay the amount. To support his submissions he has referred to M.V. Shankar Bhat and another v. Claude pinto (D.) by L.Rs. and others - AIR 2004 SC 636 and National Properties Ltd. v. Bata India Limited - AIR 2001 Calcutta 177.

47. As per the agreement dated 20.8.1985 plaintiff was to carry out the renovation/alteration of the first part of the existing office block, phase-I owned by the company at Ishwar Nagar, New Delhi. It was agreed between the parties that plaintiff would be responsible to make additions/alterations/ renovations in the existing office block, phase-I as per the specifications and plans mutually agreed between the parties along with a covered area of 1275 sq. ft. approximately at his own cost which was assessed at Rs.4 lacs. It was also agreed that defendant No.1 would clear all the structures, machines and other items lying in the said office block on execution of the agreement and the work was to be completed within four months from the date of the handing over of the possession of the impugned property to the plaintiff. Plaintiff agreed to deposit security of Rs.10 lacs carrying interest @15% per annum for three months i.e. during the period of completion of the work. Out of this Rs.10 lacs, Rs. 2 lacs were deposited at the time of signing of the agreement, Rs.3 lacs were to be deposited on or before 10.9.1985 and balance amount of Rs.5 lacs was to be deposited by the plaintiff immediately on receipt of approval from the Bank of India in its name as builders for redevelopment of the total land of the owner.

48. Clause 5 of this agreement finds mention that necessary sanction and approval of Bank of India, Khan Market Branch, with which the property was mortgaged for lease/transfer, had already been granted in favour of the defendant No.1, the owner, vide letter dated 2.8.1985. In case the approval of the Bank was not obtained in favour of the builder, the security deposit of Rs.5 lacs was to be returned back to the builder i.e. plaintiff. Para 7 of the agreement also contains a narration of fact that necessary sanction and approval for redevelopment of the property has already been accorded by the Bank of India in favour of the owner vide letter dated 23.4.1985.

49. Letter (Ex.-P6) is dated 20.8.1985 written by defendant No.1 to the plaintiff on the same day when the agreement (Ex.-P5) was executed inter se the parties. As per this letter, physical possession of the office block was handed over to the plaintiff and in acknowledgment of having received the physical possession, plaintiff had appended his signatures. In this letter defendant No.1 undertook to remove the material/furniture/equipments etc. in due course. Perusal of letter dated 13.9.1985 (Ex.- P7) makes it clear that the equipments etc. installed in the premises were not completely removed by the defendant No.1 and it undertook to remove them on 21.9.1985.

50. Plaintiff in his cross-examination admitted that he did not deposit the balance security amount of Rs.5 lacs but volunteered that since the necessary approval from Bank of India as well as municipal corporation in his name was not received, he did not deposit the balance security amount of Rs.5 lacs. He was confronted with the letter dated 14.9.1985 (Ex.-D1/20) written by Bank of India to defendant No.1. To this he replied that this letter was not approval of the Bank of India in his name. Perusal of this letter makes it clear that the bank did not give any approval to the plaintiff to carry out necessary work in the suit premises. It permitted defendant No.1 to lease out the

administrative block of the property (present built up area with certain conditions). In fact this letter does not relate in any manner to the renovation work to be carried out by the plaintiff in the office block. It has come in evidence that Bank of India never gave any approval in the name of the plaintiff for execution of the work as agreed. Under these circumstances, therefore, plaintiff was right when he did not deposit the balance security amount of Rs.5 lacs as agreed because the pre-requisite condition for deposit was not fulfilled by defendant No.1.

51. Ex.-D1/7 to Ex.-D1/16 are the bills purportedly raised by N.K. Jaitly on M/s. Allied Fibre Glass Products (P) Ltd. for the construction work carried out by him in the premises of the said firm at Sahibabad for the period from 31.1.1996 onwards. Defendant No.1 has produced these bills to prove in evidence that Sahibabad work was carried out by Naveen Kumar Jaitly and this work was never allocated to the plaintiff. True, that there is no mention of any work to be carried out by the plaintiff at M/s. Allied Fibre Glass Products (P) Ltd. Sahibabad which is a sister concern of defendant No.1. The fact remains that this work was carried out by Navin Jaitly on behest of the plaintiff.

52. As per clause 9 of the agreement (Ex.-D1/6/Ex.-P5) plaintiff was at liberty to appoint in consultation with the owner engineers, supervisors, workers and other staff in connection with the said work to be carried out under the joint supervision of the owner and the builder. Plaintiff was to provide workmanship required, labour and material etc. Plaintiff has stated that he engaged the services of Navin Jaitly as he was entitled to do under the said agreement. Plaintiff accordingly took the services of Mr. Navin Jaitly and he was making payment.

53. Navin Jaitly in his affidavit on oath as PW-2 has affirmed that in September 1985 he was appointed by Arun Jaitly to carry out addition/alteration work in one of the factory complex belonging to Ishwar Industries, Okhla. Since the scope of work was not defined, no specific contract was signed and it was agreed that he would be paid by Arun Jaitly on the cost plus basis i.e. actual expenses incurred by him on the work plus 15% as the contractor s profit. He carried out the work under the instructions of Mr.Arun Jaitly in the presence of Bharat Bhaskar who was having his office in the same premises. However, in December 1985 though his work was not complete he was asked to stop his incomplete work and shift all the material procured by him and the old salvage structural material to the site of M/s. Allied Fibre Glass Products (P) Ltd., sister concern of M/s. Ishwar Industries in which Bharat Bhaskar happened to be the director. He carried out the construction work there on item rate basis. However no agreement was executed despite his persistent requests. He has further declared that he never received any payment from M/s. Allied Fibre Glass Products (P) Ltd. or Bharat Bhaskar against the bills raised by him. He received all the payments from Arun Jaitly for the work done by him at Okhla unit and Sahibabad unit. Admittedly no written agreement was executed between him and the plaintiff.

54. It is significant to note that when agreement dated 20.8.1985 (Ex.-P5/D1/6) was enforced, defendant No.1 without prior intimation or consultation with the plaintiff entered into an agreement dated 4.2.1986 (Ex.-P-2/D1/22) with Mr.R.C. Goenka and others forming a consortium, by virtue of which the original agreement entered into between R.C. Goenka and others dated 8.1.1985 (Ex.-D1/19) was sought to be restored. This was so done after finalising the terms and conditions of the consortium between the two on 22.11.1985. This fact is admitted by defendant No.2 in his cross-

examination. The said agreement dated 4.2.1986 (Ex.-D1/22) was executed by B.D. Steel Castings Ltd., Acharya Arun Dev and others with Ishwar Industries Ltd. This agreement, therefore, was executed between defendant No.1 and defendant No.2 in utter violation of the terms and conditions of the agreement dated 20.8.1985, without giving the statutory period of four months to the plaintiff to complete the work.

55. When agreement dated 4.2.1986 (Ex.-P2) was executed between the defendants, they had agreed to retain the services of the plaintiff as architect/builder. Plaintiff must have been executing his work properly and that must have been the reason for the defendants to continue with the services of the plaintiff despite the fact that agreement entered into between the plaintiff and defendant No.1 on 20.8.1985 was still in force when agreement dated 4.2.1986 (Ex.-P2) was executed. Defendant No. 2 has not placed on record any document to indicate that the payment of the bills Ex.-D1/7 to Ex.-D1/16 was directly paid by it to Naveen Jaitly and not to the plaintiff. Viney Bhaskar DW-1 in his cross-examination has avoided giving any specific reply to the questions put to him and rather has shown his ignorance about various documents executed and correspondence exchanged between the parties. Viney Bhaskar in his cross examination admitted that he and Bharat Bhaskar are the directors of M/s Allied Fiber Glass Products Pvt. Ltd. Viney Bhaskar was given opportunity to go through the relevant record of the company but he was evasive when he said that record was an old one and old employees had left the company. He could not do the same. When asked as to whether any payment was made by defendant No.1 for the work done at Sahibabad unit, he could not give any specific reply. He also could not answer if there was any agreement with the plaintiff or Mr. Naveen Jaitly for execution of work at Sahibabad unit.

56. In Gopal Krishnaji Ketkar v. Mahomed Haji Latif & Ors. (supra), it was observed that even if the burden of proof does not lie on a party, the court is within its rights and powers to draw an adverse inference, if he withholds important documents in his possession which can throw light on facts at issue. The Supreme Court detested the practice for those desiring to rely upon a certain set of facts to withhold from the court, the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.

57. In Sports Authority of India v. Sports Authority of India Kamgar Union & Ors. (supra) this Court drew an adverse inference against the management for withholding the attendance register which was in the power and possession of the management to decide the objections filed to the award by the petitioner.

58. Since defendant No.1 failed to produce the record about the work executed by the plaintiff, an adverse inference is drawn against the defendant No.1 that had the record been produced, it would have gone against the defence of defendant No.1 that plaintiff did not complete the work in terms of agreement dated 20.8.1985 and that Naveen Jaitly was separately engaged by M/s Allied Fiber Glass Products Pvt. Ltd. to carry out work at Sahibabad.

59. Therefore, I do not find any reason to disbelieve the testimony of Naveen Jaitly that he had received all the payments of the bills from plaintiff only.

60. The other significant factor in this case is the execution of an agreement between plaintiff and defendant No.1 on 12.7.1986 (Ex.-P8). By virtue of this agreement, defendant No.1 did acknowledge that plaintiff had deposited a sum of Rs.5 lacs carrying interest @15% per annum in the manner mentioned in the agreement dated 20.8.1985. Both the parties to this agreement (Ex.-P8), released themselves of their obligations and gave up their rights under the said agreement against each other. The agreement dated 20.8.1985 was superseded vide agreement dated 12.7.1986. By virtue of this agreement deposit of security amount of Rs.5 lacs was to be treated as consideration for allotment/ sale of 1250 sq. ft. of covered area in favour of the plaintiff. Its value was worked out at Rs.4000 per sq. ft. and plaintiff agreed to forego his interest which was receivable by him on security deposit from defendant No.1 in terms of agreement dated 20.8.1985 because plaintiff had paid the full value of the said area in advance. Letter (Ex.-P9) dated 14.7.1986 is an acknowledgment by Bharat Bhaskar, director of defendant No.1 to the fact that besides the agreement (Ex.-P8) dated 12.7.1986, defendant No.1 had agreed to make payment of Rs.15 lacs in cash to the plaintiff in two installments; one to be paid by 17.8.1986 and the balance amount to be paid by December, 1986 along with handing over 1275 sq. ft. area to the plaintiff.

61. Defendant No.1 has raised a plea that acknowledgment dated 14.7.1986 (Ex.-P9) was obtained by plaintiff and executed by Bharat Bhaskar without verification of accounts, on plaintiff exercising undue influence by virtue of his dominant position on Bharat Bhaskar.

62. Order VI Rule 4 CPC provides that in cases where a party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary, the particulars with dates and items if necessary have to be stated in the pleading.

63. In M/s. United India Insurance Co. Ltd. v.

Andrew Vivera (supra), it was observed:

> "6. Order 6, Rule 4, C.P.C.
>
> provides that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading. The position admits no doubt that allegation of fraud, undue influence and coercion must be set forth in full particulars and not vaguely. The allegation must be fully stated so that the case be decided on the particulars pleaded. There cannot be any departure from what has been ordained under O. 6, R.
>
> 4. Any allegation in a sweeping manner will hardly suffice for the Court to act....."

64. In the present case written statement of defendant No.1 does not contain any particulars regarding the alleged undue influence or misrepresentation or fraud or breach of trust or willful default. Therefore, the argument raised by the defendant No.1 at this stage regarding undue

influence having been exercised on Bharat Bhaskar in getting acknowledgment (Ex.-P9) executed from him cannot be looked into and is of no relevance. It is not disputed by defendant No.1 that this document was written and signed by Bharat Bhaskar on 14.7.1986 in his own writing and under his signature. Plaintiff being the builder of the property was working in terms of the agreement executed inter se the parties on 20.8.1985 (Ex.-P5). In what manner he could be in a dominant position to exercise undue influence on Bharat Bhaskar is not known or explained or proved in evidence by defendant No.1.

65. Viney Bhaskar has admitted that the entire transaction in this case i.e. execution of agreements and correspondences were dealt with by Bharat Bhaskar and no other director of the company. He as a director did not even attend a single meeting held between Bharat Bhaskar and the plaintiff. Bharat Bhaskar is still working as a director in the company. Why he did not step in the witness box is not known. He was the only person who could explain the circumstances in which letter dated 14.7.1986 (Ex.-P9) was written by him. Bharat Bhaskar s conduct in not appearing as a witness in the case raises an adverse inference against defendant No.1 that had he appeared in the witness box his testimony would have gone against the defence raised by defendant No.1.

66. Under these circumstances, it is clear that pleadings pertaining to undue influence are not specific and lack material particulars. Such pleadings cannot be looked into by the court. The document (Ex.-P9), which is an acknowledgment of liability by Bharat Bhaskar on behalf of defendant No.1, proves that defendant No.1 had agreed to pay the amount due to the plaintiff and also allot space measuring 1275 sq. ft. to the plaintiff.

67. Since defendant No.1 failed to honour its acknowledgment made in the agreement dated 12.7.1986 (Ex.-P8) and acknowledgment dated 14.7.1986 (Ex.-P9), plaintiff wrote a letter dated 17.12.1986 (Ex.-D1/3) calling upon defendant No.1 not to disturb the possession of the structure with the plaintiff. Consequently, parties to the suit entered into a tripartite agreement i.e. MoU on 18.12.1986 (Ex.-P1). Broadly the terms as agreed between the parties as per the MoU are:

> "A sum of Rs.15,00,000/-
>
> (fifteen lakhs) payable to the second party, will be paid either by the first party or the confirming party in the following manner.
>
> ```
> a.    Rs.3,00,000/- by cheque/cash
> on or before 22 Dec. 1986
> b.    Rs.2,00,000/- ---- do ----
> --- on or before 31st Dec. 1986.
> c.    Rs.2,50,000/- ---- do ----
> (Two and half only) --- on or before
> 31st Jan. 1987.
> Thereafter        further        monthly
> ```
>
> instalments Rs.1.50 lakhs (one and half) on or before the end of each month i.e. 28 Feb, 1987, 31st March, 1987, 30 April, 1987, 31 may 1987, 30 June, 1987."

68. It was also agreed in the MoU that the plaintiff by way of security for due payment would have lien over the sale proceeds recovered by Ishwar Industries Ltd. of which Bharat Bhaskar is the director, out of the sale of the area/flats in Tribhuvan Complex, Ishwar Nagar, New Delhi. It was also agreed that defendant No.1 would furnish sale statements to the plaintiff so that the installments as decided in the MoU could be regularly remitted to the plaintiff by defendant No.1.

69. The other term settled in the MoU was that defendant No.1 would provide the plaintiff with area of 1275 sq. ft. in Tribhuvan Complex on or before 30th September, 1987 and two percent brokerage was to be paid to Bharat Bhaskar as the sale proceeds by the plaintiff. In default of allotment of the space as agreed, defendant No.1 was to pay to the plaintiff the value of the said space @Rs.775/- per sq. ft.

70. Last lines of the MoU read as follows:

> "This is only understanding and the parties will enter into regular agreement embodying the above terms on or before 15th Jan, 1987."

71. Admittedly, no regular agreement was executed into between the parties after execution of the MoU on 18.12.1986. Thus, it is clear that defendant No.1 admitted its liability to pay a sum of Rs.15 lacs and also to allot a space measuring 1275 sq. ft. to the plaintiff within the specified period as above. The MoU was acted upon partially when, defendant No.2, the confirming party to the MoU paid a sum of Rs.3 lacs to the plaintiff in part performance of the settled terms at the end of December, 1986. Plaintiff handed over the physical possession of the suit property to defendant No.2. Vide letter dated 20.7.1989 (Ex.-P3), defendant No.2 acknowledged having received the physical possession of the office block, phase-I from the plaintiff with the consent of the plaintiff and Bharat Bhaskar of Ishwar Industries Ltd. in terms of the MoU. Though, no agreement was executed between the parties, but since MoU has been acted upon by parties, it has a binding force on the parties. Thus, it is proved on record that defendant No.1 acknowledged its liability to pay a sum of Rs.25 lacs including cost value of the space to the plaintiff.

72. Plaintiff had earlier filed a suit for mandatory injunction against the defendants seeking direction against defendant No.1 to provide the original tripartite agreement to the plaintiff for its due compliance and implementation with a further direction to be issued to defendants No.2 and 3 to issue no objection to the defendant No.1 regarding passing over of the original tripartite agreement along with copy thereof to the plaintiff for its due implementation. Defendant No.1 in the said case was Sh. B. Mohan, who was in custody of this document. The said case was decided on 21.2.1990 by the civil judge and he decreed the suit of the plaintiff for mandatory injunction with the direction to the defendants to provide a certified copy of the tripartite agreement to the plaintiff. The copying agency was also directed to prepare a certified copy of the MoU and supply the same to the plaintiff on payment of fees as per law. Hence, MoU (Ex.-P1) stood proved in the civil court as an admitted document.

73. The acknowledgment of liability undisputedly was made by Bharat Bhaskar for and on behalf of defendant No.1 for the professional fees payable to the plaintiff whose services as an architect were

engaged for carrying out additions/alterations/ renovations etc. at Tribhuvan Complex, Ishwar Nagar. Pertinently, before filing of the suit defendant No.1 never raised any objection by way of correspondence or otherwise that plaintiff had not completed his work within the stipulated time. Therefore, I conclude that plaintiff is entitled to the balance amount of Rs.12 lacs (as three lacs have admittedly been received by him).

74. As regards the space of 1275 sq. ft. in Tribhuvan Complex, I am of the view that since the flats/space have been sold away by defendant No.1 to different people it might be that no space is available with defendant No.1 for allotment to the plaintiff. Under these circumstances, it is more appropriate that plaintiff is paid the value of the space as agreed between the parties which comes to Rs.10 lacs. Therefore, plaintiff in all is entitled to a sum of Rs. 22 lacs as claimed by him.

75. There is no agreement inter se the parties regarding payment of interest @18% per annum or any other rate on the value of the space at the agreed rate which comes to Rs.10 lacs. Hence, plaintiff is not entitled to any interest on the said amount of Rs.10 lacs before the filing of the suit.

76. Plaintiff has fastened the liability jointly and severally on defendant No.2 and defendant No.1 for the dues claimed by him in the suit on the basis of MoU (Ex.-P1) as well as the agreement dated 4.2.1986 (Ex.-P2). Plaintiff was not a party to the agreement dated 4.2.1986 (Ex.-P2) entered into between defendants No.1 and 2, R.C. Goenka and others. Even if in the said agreement defendants had agreed to retain the plaintiff as consultant architect for the project on behalf of the defendant No.1, it does not in any manner make liable defendant No.2 to make the payment which was due to plaintiff from defendant No.1. The agreement does not speak of liability of defendant No.1 to be discharged by defendant No.2. It only revived earlier agreement dated 8.1.1985 between defendant No.1 and R.C. Goenka. Defendant No.2 appeared in the scenario when he signed MoU dated 18.12.1986 as a confirming party and therefore, it can be safely said that defendant No.2 was not a party to any agreement or correspondence which took place between the plaintiff and defendant No.1 prior to MoU (Ex.-P1).

77. Learned counsel for defendant No.2 has argued that defendant No.2 was neither a guarantor nor an indemnifier for payment of the amount due from defendant No.1 to the plaintiff. At the maximum he can be considered as an agent and an agent cannot be sued where the principal is disclosed. He further argued that liability of defendant No.2 to satisfy the claim of the plaintiff in the present suit is only to the extent of payment of Rs.15 lacs out which Rs.3 lacs have been paid and defendant No.2 is not connected with the provision of the area of 1275 sq. ft. or payment of the value of the said area in lieu thereof.

78. The handing over of the possession of Office Block Phase-I by the plaintiff in terms of MoU cannot be termed as consideration nor there are any such pleadings in the plaint as defendant No.2 had received the possession of the said property by virtue of agreement dated 4.2.1986. Learned counsel for the defendant No.2 has also highlighted that MoU was merely an agreement to enter into another regular agreement which never came into light and therefore MoU is not enforceable against the defendant No.2. The MoU was never intended to create any legal relationship between the plaintiff and defendant No.2. He has referred to Punit Beriwala v. Suva Sanyal & Anr. - AIR 1998

Calcutta 44.

79. It is further argued by the learned counsel for the defendant No.2 that he was authorized to collect sale proceeds in respect of „owners allocation in proposed building Tribhuvan Complex and to use, utilise and disburse the same in terms of the agreement and arrangement between the defendants as well as other concerned parties like Bank of India. Plaintiff was also to be paid from the amount so collected by defendant No.2 for and on behalf of defendant No.1. The bank had made it clear vide letter dated 28.2.1989 that no payment was to be made to the plaintiff.

80. It is emphasised that though defendant No.2 was ready and willing to make the payment as agreed in terms of MoU but because of refusal by Bank of India he could not make the payments and it is for the defendant No.1 to clear the dues of the plaintiff which fact is also borne out from the MoU (Ex.-P1). He has referred to Rahunath Jha v. Kesori Lal and others - AIR 1934 Patna 269 and Midland Overseas v. M.V. "CMBT Tana and others - AIR 1999 Bombay 401 to support his submissions.

81. It is submitted that defendant No.2 is neither severally nor jointly liable to pay any amount to the plaintiff and the memorandum of understanding dated 18.12.1986 being without consideration is not enforceable as against defendant No.2.

82. Section 10 of the Indian Contract Act defines agreements which are contracts. All agreements are contracts if they are made by the free consent of the parties competent to contract for a lawful consideration and with a lawful object and are not declared to be void.

83. Section 48 of the Companies Act authorises a company to empower any person either generally or in respect of specific matters as its attorney to execute its deeds on its behalf at any place. A deed signed by such an attorney on behalf of the company under its seal, where sealing is required, becomes binding on the company.

84. Undisputedly MoU dated 18.12.1986 (Ex.-P1) qua defendant No.2 is without consideration. Defendant No.2 was appointed to collect money for the owners allocation. This fact finds mention in the letter dated 20.7.1989 (Ex.-P3). Vide this letter plaintiff was informed by defendant No.2 that he and Bharat Bhaskar were to pay Rs.25 lacs out of the money receivable from the sale of owners allocation and that in terms of the agreement he had already paid a sum of Rs.3 lacs. Defendant No.2 showed his inability to pay the balance amount and informed the plaintiff that Mr. Bharat Bhaskar had entered into a MoU without prior consent of Bank of India, the mortgagee bank and the bank had intimated him not to make any payments to the plaintiff. Defendant No.2 wrote another letter dated 7.10.1989 to Mr. O.P. Khadaria, Advocate that whatever money was to be paid by him to the plaintiff was on behalf of and on account of Ishwar Industries.

85. Plaintiff in his cross-examination admitted that defendant No.2 had made payment of Rs.3 lacs to the plaintiff on behalf of defendant No.1. These two letters clearly indicate that defendant No.2 was to make payment for and on behalf of defendant No.1 from the amount so collected by him from owners allocation. Therefore, he never made himself personally liable to pay the debt of the

plaintiff payable by defendant No.1.

86. Bare reading of MoU (Ex.-P1) makes it clear that defendant No.2 did not undertake to discharge the liability of defendant No.1 completely. The line appearing in the MoU "either by the first party or the confirming party" clearly indicates the liability of defendant No.2. This liability was confined to the payment of Rs.15 lacs only for and on behalf of defendant No.2. As discussed above no regular contract followed the MoU. While contracting, defendant No.2 did not undertake any personal liability. Hence his status remained as that of collecting agent and he cannot therefore be made personally liable for the alleged breach of contract. Reference is made to Rahunath Jha v. Kesori Lal and others (supra) and Midland Overseas v. M.V. "CMBT Tana and others (supra).

87. Similarly, in the facts and circumstances of this case, it cannot be said that defendant No.2 had entered into a concluded agreement with the plaintiff for valid consideration. A mere agreement to agree to pay certain amount to the plaintiff cannot be considered as a legal agreement between the parties and therefore, such an agreement is not enforceable against defendant No.2.

88. MoU was never executed with a view to create a legal relationship between the plaintiff and defendant No.2. As already stated above, no formal or regular agreement was executed between the parties after the execution of MoU (Ex.-P1). Impugned MoU is written in hand on three sheets probably torn out from some notebook. Plaintiff did not do anything for defendant No.2 which the defendant No.2 was legally bound to do so as to bind defendant No.2 to compensate him for something by him. In such circumstances therefore, MoU qua defendant No.2 is a void agreement within the meaning of Section 25 of the Contract Act. Payment of Rs.3 lacs made by defendant NO.2 to the plaintiff does not make MoU as valid contract. Reference is made to Punit Beriwala v. Suva Sanyal & Anr. (supra).

89. It is a common case of the parties that the impugned property was mortgaged with Bank of India even prior to the execution of agreement dated 20.8.1985 between plaintiff and defendant No.1. Being a mortgagee, bank is a secured creditor and has a lien over the property. Therefore, without the permission of the bank plaintiff could not have enforced any rights against the property.

90. Reference has already been made to letter dated 14.9.1985 written by Bank of India to Ishwar Industries Ltd. wherein it was made clear that in respect of areas proposed to be leased out, cheques, drafts for all interest free deposits and rentals to be received from the prospective lessees should be made out in the name of Bank of India A/c of the Ishwar Industries Ltd. and deposited with their Khan Market Branch.

91. Because of the embargo placed by the Bank of India on defendant No.1, defendant No.2 after realization of the owners allocation could not have made the payment of the due amount to the plaintiff. Therefore, no liability can be fastened on defendant No.2. Hence, I conclude that defendant No.2 is neither severally nor jointly liable to pay the suit amount to the plaintiff. Memorandum of Understanding dated 18.12.1986 (Ex.-P1) is not enforceable against defendant No.2. These two issues are accordingly decided in favour of defendant No.2 only.

92. Plaintiff has claimed interest @18% per annum on the due amount on the basis of clause 4 contained in the MoU wherein the parties agreed that if the payment was not made in time, the defendant shall be liable to pay interest @18% from the date of default till payment.

93. The amount of Rs.28,30,000/- also includes interest amounting to Rs.6,30,000/- upto 30.11.1989. As per MoU (Ex.-P1) rate of interest was agreed as 18% per annum from the date of default until payment was made. As discussed above, MoU (Ex.-P1) has been fully proved on record and being admitted document wherein defendant No.1 has acknowledged its liability to pay the amount of Rs.15 lacs and allot space of 1275 sq. ft. or in the alternative to pay the value of the space to the plaintiff within the stipulated period and in case the payment was not so made defendant No.1 agreed to pay interest @18% per annum on the due amount. Therefore, plaintiff is entitled to interest as per agreement and as claimed by him in the suit. In all plaintiff is entitled to Rs.6,30,000/- as interest upto 30.11.1989 i.e. for the period before the filing of the suit. These two issues are accordingly decided.

94. Plaintiff has claimed interest @18% per annum on the amount of Rs.22,00,000/- from the date of the institution of the suit till realization. Since parties had an agreement that defendant shall pay interest to the plaintiff @18% per annum if the installments were not made in time, plaintiff is entitled to the interest at the agreed rate on the principal amount of Rs.22,00,000/- (principal amount of Rs.12 lacs plus Rs.10 lacs, value of the space) from the date of filing of the suit i.e. 4.12.1989 till realization.

95. In view of my observations on the issues as above, I hereby pass a decree for Rs.28,30,000/- with cost in favour of the plaintiff and against defendant No.1. Suit as against defendant No.2 is hereby dismissed. Plaintiff is also awarded interest pendentelite and future interest @18% per annum on the principal amount of Rs.22,00,000/-. Decree be prepared accordingly.

ARUNA SURESH (JUDGE) July 24, 2009 jk