IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.04.2009

CORAM :

THE HONOURABLE MR.JUSTICE D.MURUGESAN
and
THE HONOURABLE MR.JUSTICE C.S.KARNAN

O.S.A. No.260 of 2007

1. M/s.Southern Group Industries
   (P) Ltd., Rep. By its Director
   Purushotam Das Sewag.

2. M/s.Prodapt Solutions Pvt. Ltd.
   (Formerly known as Zeetron Solutions
   (P) Ltd.), Rep. By its Director
   Vishnu Varadhan.

3. M/s.Parampara
   A registered Trust, Rep. By its
   Trustee Ganapathy Subramaniam

4. M/s.Silicon India Pvt. Ltd.,
   Rep. By its Director Vishnu Varadhan
   rep. By its Authorised Signatory.

5. M/s.Noble International Pvt. Ltd.,
   Rep. By its Director Vishnu Varadhan.

6. M/s.Talon India Pvt. Ltd.
   Rep. By its Director Vishnu Varadhan.

7. M/s.Madhu Commercial Ltd.
   Rep. By its Director Miralal Goud.

8. M/s.Artistic Products Pvt. Ltd.,
   Rep. By its Director Miralal Goud.

9. M/s.Sree Traders,
   Rep. By its partner D.K.Jhaver.

10. M/s.Aero Fashions Pvt. Ltd.,
    Rep. By its Director Srinivas Vyas.

11.M/s.Nav Bharat Marketing & Trade Ltd.,
Rep. By its Director Srinivas Vyas.

12.M/s.Surya Traders & Inventors Ltd.,
Rep. By its Director P.D.Sewag.

13.M/s.Zip Industries Limited
Rep. By its Director A.C.Baskaran. .. Appellants

-vs-

1. M/s.Creative Foundations Pvt. Ltd.,
Rep. By its Executive Director,
Harish Khanna.

2. M/s.Fiesta Properties Pvt. Ltd.
Rep. By its Executive Director,
Harish Khanna.

3. K.C.Daga (Learned Arbitrator). .. Respondents

Appeal against the Order and Decree dated 29.9.2006 made in Application No.1587 of 2003 in O.P.No.301 of 2001.

For Appellants : Mr.Habibullah Basha, S.C.
For Mr.Srinath Sridevan
For Respondent : Mr.Arvind P. Datar
for M/s.Satish Parasaran.

J U D G M E N T

D.MURUGESAN, J.

This appeal is at the instance of 13 appellants, who are group of companies. They entered into an agreement of sale with the first respondent, viz. M/s.Creative Foundations Pvt. Ltd., for conveyance of 50% of undivided share of the property situate at No.39, Kasturi Ranga Road, Teynampet, Chennai and was assigned a right under the development agreement dated 23.11.1994. An agreement of sale dated 23.9.1995 was also entered into by the first respondent with the owners of the property. The agreement of sale was terminated by the first respondent and therefore, the appellants filed a suit for specific performance in C.S.No.192 of 2000 before this Court. By consent of parties, the matter was referred to arbitration and an award was passed on 31.1.2001 directing the first respondent to convey the property in favour of the appellants. Aggrieved by the

said award, the first respondent along with the second respondent, viz., M/s.Fiesta Properties Pvt. Ltd., filed O.P.Nos.301 and 302 of 2001 before this Court under Section 34 of the Arbitration and Conciliation Act (hereinafter referred to as 'the Act').

2.During the pendency of the above O.Ps., both the appellants and the first respondent settled the dispute and the terms of the compromise was reduced into writing by way of a Memorandum of Compromise (in short 'MOC') dated 7.11.2002. By the said MOC, it was agreed that the appellants should file the MOC in this Court within ten days from 7.11.2002. On the ground that the payment as agreed in the MOC was not made by the appellants within the stipulated period, the said period for filing the MOC in Court was extended by 7 more days, i.e. till 25.11.2002. The said period was again extended till 16.12.2002 and lastly, it was extended till 31.12.2002. Admittedly, the MOC was not filed before this Court on or before 31.12.2002 and the same was filed only on 19.3.2003 in Application No.1587 of 2003 in O.P.No.301 of 2001. The application was opposed on the ground that the appellants herein, who are applicants, did not come forward to make the payments as envisaged and undertook in the MOC and the application was not filed within the last date extended period, i.e. 31.12.2002. It was also opposed that in terms of Order XXIII Rule 3 CPC, an application seeking for recording the MOC cannot be filed in a petition filed under Section 34 of the Act.

3.The learned Judge though found that such an application is maintainable, which finding is not questioned by the respondents by way of any appeal dismissed the application on the ground that "the very Memorandum of Compromise is questioned as lapsed due to efflux of time and the same was not filed before this Court within the time stipulated and extended time as agreed between the parties". The above order is put in issue in this appeal by the appellants questioning that portion of the order rejecting the application on the ground that the MOC is lapsed due to efflux of time and they did not approach this Court within the time stipulated and extended in the MOC.

4.We have heard Mr.Habibullah Basha, learned senior counsel appearing for the appellants and Mr.Arvind P.Datar, learned senior counsel appearing for the respondents.

5.Mr.Habibullah Basha, learned senior counsel, would submit that the finding of the learned Judge that the MOC itself was lapsed is without analysing the factual position and is not supported by any reason. Further, the finding of the learned Judge that the application cannot be entertained as it was not filed within the extended period, is also unsustainable in view of the fact that the time is not the essence of the contract in the given facts of the case.

6.Mr.Arvind P.Datar, learned senior counsel, would submit that no appeal could be entertained as against the order passed in an application filed in a pending OP filed under Section 34 of the Act, in view of the provisions of Section 37 (1) (a) and (b) of the Act. The learned senior counsel would submit that only when the Court passes the order either granting or refusing to grant any measure under section 9 or any order setting aside or refusing to set aside an arbitral award under section 34, an appeal shall lie to this Court and not from any other orders. Hence, the appeal is liable to be dismissed in limine. Insofar as the failure on the part of the appellants to file the MOC within time, the learned senior counsel would submit that it was agreed that the MOC should be filed within ten days from 7.11.2002 in this Court and as the appellants failed to comply with certain conditions of the MOC, it could not have been filed within the said period and therefore, it was extended to give an opportunity to the appellants to make payments finally upto 31.12.2002. When the compliance of the terms of the compromise itself was disputed and when the MOC was not filed within the stipulated period, the time must be considered to be the essence of the contract and therefore, the learned Judge had rightly rejected the application. He would submit that there was no concluded contract and there was lot of disputes regarding the MOC and the contract being the contingent contract, not complete and a complex contract, the MOC cannot be recorded by this Court. In this context, he would extensively rely upon sections 32, 55 and 63 of the Indian Contract Act. He would further submit that in the event the application is ordered, it would amount to granting a decree in respect of a immovable property without there being any Court fee paid for the same and on the facts of the case and on the basis of the MOC, even a suit for specific performance cannot be entertained.

7.As the issue of maintainability of appeal is raised, we propose to deal with the said contention at first. It may be relevant to refer Section 37 of the Act, which reads thus:-

> "37. Appealable orders. - (1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-
>
> (a) granting or refusing to grant any measure under section 9;
>
> (b) setting aside or refusing to set aside an arbitral award under section 34.
>
> (2) An appeal shall also lie to a Court from an order of the arbitral tribunal-
>
> (a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing n this section shall affect or take away any right to appeal to the Supreme Court."

By sub-section (1) of section 37, generally an appeal will lie from an order granting or refusing to grant any measure under Section 9 or against an order setting aside or refusing to set aside an arbitral award under section 34. Clause (e) of sub-section (1) of section 2 defines the Court meaning the principal civil Court of original jurisdiction in a district and also includes the High Court in exercise of its ordinary original civil jurisdiction. In case, if an order either granting or refusing to grant any measure under section 9 or setting aside or refusing to set aside an arbitral award under section 34 is made by the principal civil Court of original jurisdiction, an appeal will lie to the High Court. The question is as to whether the same principle would apply in the event, such orders are made by the High Court under the very same provisions and whether an appeal is maintainable before the Division Bench?

8.In the event a statute contemplates a provision of appeal in respect of certain enumerated orders, there cannot be any difficulty to entertain an appeal against such enumerated orders. In the event, the statute specifically bars a provision of appeal in respect of specified orders, again there cannot be any difficulty that no appeal could be entertained. However, the question would be, in the event a statute does not specifically bar a provision of appeal under the Letters Patent, even then an appeal is maintainable before this Court or not?

9.The learned senior counsel appearing for the appellant relied upon a judgment of the Full Bench of this Court in Loyal Textile Mills Ltd. v. Allenberg Cotton Company Ltd. (1993-1-L.W.132) and contended that an appeal also is maintainable in respect of interlocutory order passed in a pending proceeding before this Court under the provisions of the Act. On the other hand, the learned senior counsel appearing for the respondent relied upon the judgment of the Supreme Court in P.S.Sathappan v. Andhra Bank Ltd. [(2004) 11 SCC 672].

10.The Full Bench of this Court in Loyal Textile Mills' case (cited supra), was considering a case where a petition was filed under section 33 of the Arbitration Act, 1940 for declaration that there was no arbitration agreement between the parties and the arbitration proceedings entered into by the respondent was without jurisdiction, illegal, ab initio void and non est. The said petition

was dismissed by a learned single Judge and an appeal was filed under clause 15 of the Letters Patent of this Court. The matter was referred to the Full Bench as to the maintainability of the appeal. The Full Bench, after referring to section 39 of the Arbitration Act 1940 relating to the provisions of appeal and clause 15 of the Letters Patent of this Court, ultimately held in paragraphs 21 and 22 as follows:-

> "21. The decision in Umaji v. Radhikabai (AIR 1986 S.C. 1272) on the nature of the appellate power of the Court under Clause 15 of the Letters Patent of this Court thus concludes that an appeal will lie against the judgment of the single Judge of the Court to a Division Bench if the conditions prescribed by clause 15 in this behalf are satisfied and when there is no specific bar by any statute for filing such appeal like one under S.100-A of the Code of Civil Procedure, a provision similar to one in S.39(2) of the Arbitration Act, 1940 and not sub-S.(1) thereof.
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> 22. In the context of the origin of the Letters Patent appellate power of this Court and the scope and ambit of the appeal against a judgment on the Original Side of the Court, we have no hesitation in holding that, if all the conditions for an appeal against a judgment under clause 15 of the Letters Patent are satisfied and when there is no specific bar, merely because some other law is providing appeals against certain types of orders and says that against the other orders, there shall be no appeal to a Court, it cannot be inferred that even if it is appealable under clause 15 of the Letters Patent, since it is not appealable under S.39(1) of the Arbitration Act, 1940, there shall be no appeal. The Letters Patent law being a special law, it shall prevail against any general law, so long as there is no specific abridgement, amendment or repeal by a competent Legislature. The reference is answered accordingly."

To arrive at the above finding, the Full Bench quoted mainly the judgment of the Apex Court in Union of India v. Mohindra Supply Co. (AIR 1962 SC 256) and Shah Babulal Khimji v. Jayaben (AIR 1981 SC 1786). However, in view of the subsequent judgment of the Apex Court on the same issue rendered after elaborately discussing not only the above two judgments of the Supreme Court as well as various other judgments, we would rather refer to the judgment of the Apex Court in P.S.Sathappan's case, viz., (2004) 11 SCC 672, cited supra.

11.In P.S.Sathappan's case, cited supra, the first respondent therein filed a suit against the appellant therein before the Additional Subordinate Judge. The said suit was decreed and a execution petition was filed by the first respondent/decree holder. The validity of auction in the said execution proceedings came to be

questioned by the appellant therein praying for setting aside the Court auction sale, which was dismissed by the execution Court, against which the appellant preferred an appeal, which was also dismissed by the learned single Judge of this Court and a Letters Patent Appeal in terms of Clause 15 of the Letters Patent of this Court was filed and the same was dismissed by the Division Bench holding that in terms of Section 104(2) of C.P.C., an appeal against the order passed by the appellate Court under Order 43 Rule 1(j) C.P.C. read with Section 104 was not maintainable. The matter was taken on appeal to the Supreme Court. The Apex Court was considering the provision of Sections 100-A and 104 C.P.C. Even on facts, the Supreme Court was considering a case when appeal was filed against the order of District Court and further of the learned single Judge of the High Court. Sitting in appellate jurisdiction, we may reproduce both the sections as amended by Amendment Act, 2002, which read thus:

> "100-A. No further appeal in certain cases. - Nothwithstanding anything contained in any Letters Patent for any High Court or in any instrument having the force of law in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a Single Judge of a High Court, no further appeal shall lie from the judgment and decree of such Single Judge."
>
> 104. Orders from which appeal lies. - (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders -
>
> Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.
>
> (2) No appeal shall lie from any order passed in appeal under this section."

Section 100-A specifically restricts an appeal from original or appellate decree or order is heard and decided by a learned Single Judge of the High Court and no further appeal shall lie from the judgment and decree notwithstanding anything contained in Letters Patent for any High Court. However, the provisions of Section 104 C.P.C. is differently worded. There is no specific exclusion of Letters Patent Appeals as contemplated under Section 100-A C.P.C. Though much was argued that from the word employed in Section 37, viz., "from any other orders", which should exclude Letters Patent as well, in our opinion, by that words, the provisions of Letters Patent cannot be considered to be excluded. We may also refer the following observations of the Apex Court in P.Sathappan's case, referred supra:-

" 30. As such if an appeal is expressly saved by Section 104(1), sub-section (2) cannot apply to such an appeal. Section 104 has to be read as a whole. Merely reading sub-section (2) by ignoring the saving clause in sub-section (1) would lead to a conflict between the two sub-sections. Read as a whole and on well-established principles of interpretation it is clear that sub-section (2) can only apply to appeals not saved by sub-section (1) of Section 104. The finality provided by sub-section (2) only attaches to orders passed in appeal under Section 104 i.e. those orders against which an appeal under "any other law for the time being in force" is not permitted. Section 104(2) would not thus bar a letters patent appeal. Effect must also be given to legislative intent of introducing Section 4 CPC and the words "by any law for the time being in force" in Section 104(1). This was done to give effect to the Calcutta, Madras and Bombay views that Section 104 did not bar a Letters Patent. As appeals under "any other law for the time being in force" undeniably include a letters patent appeal, such appeals are now specifically saved. Section 104 must be read as a whole and harmoniously. If the intention was to exclude what is specifically saved in sub-section (1), then there had to be a specific exclusion. A general exclusion of this nature would not be sufficient. We are not saying that a general exclusion would never oust a letters patent appeal. However, when Section 104(1) specifically saves a letters patent appeal then the only way such an appeal could be excluded is by express mention in Section 104(2) that a letters patent appeal is also prohibited. It is for this reason that Section 4 of the Civil Procedure Code provides as follows:

"4. Savings.—(1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land."

As stated hereinabove, a specific exclusion may be clear from the words of a statute even though no specific reference is made to Letters Patent. But where there is an

express saving in the statute/section itself, then general words to the effect that "an appeal would not lie" or "order will be final" are not sufficient. In such cases i.e. where there is an express saving, there must be an express exclusion. Sub-section (2) of Section 104 does not provide for any express exclusion. In this context reference may be made to Section 100-A. The present Section 100-A was amended in 2002. The earlier Section 100-A, introduced in 1976, reads as follows:

> "100-A. No further appeal in certain cases.— Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a Single Judge of a High Court, no further appeal shall lie from the judgment, decision or order of such Single Judge in such appeal or from any decree passed in such appeal."

It is thus to be seen that when the legislature wanted to exclude a letters patent appeal it specifically did so. The words used in Section 100-A are not by way of abundant caution. By the Amendment Acts of 1976 and 2002 a specific exclusion is provided as the legislature knew that in the absence of such words a letters patent appeal would not be barred. The legislature was aware that it had incorporated the saving clause in Section 104(1) and incorporated Section 4 CPC. Thus now a specific exclusion was provided. After 2002, Section 100-A reads as follows:

> "100-A. No further appeal in certain cases.— Notwithstanding anything contained in any Letters Patent for any High Court or in any instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a Single Judge of a High Court, no further appeal shall lie from the judgment and decree of such Single Judge."

To be noted that here again the legislature has provided for a specific exclusion. It must be stated that now by virtue of Section 100-A no letters patent appeal would be maintainable. However, it is an admitted position that the law which would prevail would be the law at the relevant time. At the relevant time neither Section 100-A nor Section 104(2) barred a letters patent appeal."

In Gulab Bai v. Puniya, (AIR 1966 SC 637), the Apex Court while considering the provisions of Section 47 and 48 of the Guardians and Wards Act, observed that the provisions of appeal under Letters Patent cannot be excluded by implication. In the same judgment, while considering the scope of Section104 (1) C.P.C., the Apex Court further held that the right to appeal against judgments under the Letters Patent was not affected by Section 104(1) C.P.C.

12.In this context, we may also refer to the observations of the Apex Court in paragraph 22 of the decision in P.S.Sathappan's case, supra, as follows:-

> "22. Thus the unanimous view of all courts till 1996 was that Section 104(1) CPC specifically saved letters patent appeals and the bar under Section 104(2) did not apply to letters patent appeals. The view has been that a letters patent appeal cannot be ousted by implication but the right of an appeal under the Letters Patent can be taken away by an express provision in an appropriate legislation."

Then, in the very same judgment in paragraph 96, the Apex Court has held as follows:-

> "96.To put it pithily, if there is a conflict between an appeal under the Code and the Letters Patent both the provisions have to be read harmoniously so as to save an appeal which is not otherwise provided for. By way of example, it may be noticed that when an appeal is maintainable under the Letters Patent by reason of its being a "judgment" within the meaning of Letters Patent, such an appeal would be maintainable despite the fact that no provision therefor has been made in Section 104 thereof. In a case, however, where an appeal may be maintainable both under sub-section (1) of Section 104 as also the Letters Patent a difficulty may arise to the extent that where the order sought to be appealed against is not a "judgment" whether Order 43 Rule 1 would come into play. But if both the provisions are read together, it may be held that Order 43 Rule 1 provides for an additional right. So construed, a harmonious meaning can be attributed both to Section 104 of the Code and to Letters Patent but we have no doubt in our mind that if a right of appeal is availed under sub-section (1) of Section 104 of the Code, no further appeal would be maintainable."

13.Even in a case, like Section 104(1) C.P.C., which employs the words "save as otherwise expressly provided in the body of this Code or by any law for the time being in force", the Apex Court had found an appeal would be maintainable under Clause 15 of the Letters Patent

as against orders passed under Section 104(1) C.P.C. Section 37 of the Act has merely stated that an appeal shall lie from the following orders "(and from no others)", and it does not in our opinion, mean and exclude the provisions of appeal under the Letters Patent or there cannot be an exclusion of Letters Patent appeal by implication. Hence, for all these reasons, we find no merit in the contention of the respondent that the appeal under Clause 15 of the Letters Patent is not maintainable.

14.This takes us to the next contention whether the application for recording the MOC could be entertained after the last date agreed to between the parties. It is not in dispute that the appellant ought to have filed an application to record the MOC in the Court on or before 31.12.2002 and in fact, such application was not filed, as it was filed only on 19.3.2003. Incidentally, we may also refer to the argument of Mr.Arvind P.Datar, learned senior counsel, that if such is maintainable, it should have been filed with a petition for condonation of delay. It is the contention of Mr.Habibullah Basha, learned senior counsel for the appellants that on the facts of this case, the time is not the essence of the contract and therefore, the application should have been entertained. Per contra, it is the contention of Mr.Arvind P.Datar, learned senior counsel for the respondents that the application cannot be entertained as it was agreed by the parties that it should be filed on or before 31.12.2002.

15.To determine whether the time is the essence of the contract, the intention of the parties must be considered. The question required to be considered is with regard to the factual situation obtaining in each case. In M/s.Damodar Ropeways & Constructions Co. (P) Ltd. v. Christoper Martin Desgranges Martin & Others, (JT 1989 (4) SC 53), where the parties decided to file an application for compromise before the Court pending appeal beyond the agreed time, the Apex Court observed in paragraph 6 as follows:-

> "6.The delay in filing the compromise petition in Court has been attempted to be explained on behalf of the School and the builder. If the compromise is genuine and lawful, the delay in presentation in Court could at the most, if at all, be in the realm of equity and would not be otherwise material. The resolution of the Board of the Association of 11th September, 1985, extracted above is a complete answer to the second ground as it clarifies the position that all parties had agreed to the compromise and it was intended to be presented before this Court for permission to enter into compromise. Mr.Anjan Dey had been authorised to associate himself for the purpose. It is not the contention of the Association that the whole or any part of the agreement is unlawful nor is it the contention of any of the parties that the petition has not been signed by him or them. The

compromise is, therefore, in accordance with the provisions of Order XXIII, rule 3 of the Code of Civil Procedure and can be acted upon."

16.A similar question came up before the Apex Court in M/s.Hind Construction Contractors v. State of Maharashtra (AIR 1979 SC 720), as to whether the time is the essence of the contract in respect of immovable properties and it has been held in paragraph 8 as follows:-

"8.It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of the contract. ..."

In Panchanan Dhara v. Monmatha Nath Maity, (2006) 5 SCC 340, the Apex Court again considered the question as to whether the time is the essence of the contract for sale of immovable property and held in paragraph 21 that the time is not the essence of the contract. Similar view has been taken by a Constitution Bench in Chandrani v. Kamalrani (1993) 1 SCC 519, where the Apex Court has observed that in a sale of immovable property, time is not the essence of the contract unless contrary intention is expressed in unequivocal language. We may also refer yet another judgment of the Apex Court in Mc.Dermolt International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181 for the same proposition of law.

17.A careful reading of the above judgments would show that the time is not the essence of the contract as depend upon the intention of the parties and the express provision made in the contract for compliance within the stipulated time. On the facts of this case, though the MOC ought to have been filed in the Court on or before 7.11.2002, the said date was not strictly adhered to by both the parties. The said time was extended upto 25.11.2002. Again the parties have decided to extend the time till 6.12.2002 and thereafter again till 31.12.2002. It is not as if that the parties have understood and agreed that the time prescribed in the contract should be strictly adhered to, as the intention of the parties are clear that the time could be extended by mutual consent. To determine whether the time is the essence of the contract in such situation,

the intention of the parties to extend the said time is relevant. There is no agreement unequivocally stipulating the time beyond which the agreement could not be enforced. In the absence of such agreement as understood by the parties, in the given set of facts, in our opinion, the time cannot be considered to be the essence of the contract for filing MOC in the Court.

18.In this context, we may also refer that the parties have not disputed the terms of the contract and equally the genuineness and lawfulness of the contract are also not disputed. The dispute is only with reference to whether the terms are complied with or not. Hence, the finding of the learned Judge that by efflux of time, the MOC cannot be presented in Court is unsustainable. The finding of the learned Judge that the contract itself is lapsed is also not supported by any reason. Hence, the order under appeal is liable to be set aside.

19.Though Mr.Arvind P.Datar, learned senior counsel, would argue on the merits by referring to various provisions of the Indian Contract Act relating to the contingent contract, the contract is not complete and it is a complex contract and that there was a default on the part of the appellants and therefore, the MOC cannot be enforced in the eye of law, we are not inclined to go into that question as those were neither raised nor argued before the learned single Judge for consideration. Similarly, the contentions that in the event the application is ordered, it would amount to granting a decree in respect of a immovable property without there being any Court fee paid for the same and on the facts of the case and on the basis of the MOC, even a suit for specific performance cannot be entertained were also neither raised nor considered by the learned Judge. Hence, all those issues are left open for consideration by the learned Judge and both the parties are at liberty to canvass their respective contentions.

20.With the above observations, the appeal is allowed and the order under appeal is set aside. The matter is remitted back to the learned single Judge to entertain the application and consider the same on its merits without reference to the fact that the application was not filed in time. No costs.



Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

sra

To

The Sub Assistant Registrar,
Original Side,
High Court, Madras.

1 cc To Mr.Srinath Sridevan, Advocate, SR.20040.
1 cc To Mr.Satishparasaran, Advocate, SR.19858.

O.S.A.No.260 of 2007

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RVL 09.06.2009