IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO. 3 OF 2014
IN
SUMMARY SUIT NO. 843 OF 2013

M/s. Ashok Commercial Enterprises & Anr. .. Plaintiffs
Vs.
Mantri Realty Ltd. .. Defendant

Mr.Virag Tulzapurkar, senior advocate i/b Subhash Pradhan & Co. for plaintiff.

None for defendant.

CORAM : K.R.SHRIRAM, J.
RESERVED FOR ORDERS ON : 30TH JUNE, 2015
FOR PRONOUNCEMENT ON : 10TH AUGUST 2015

P.C.

1 It is the case of the plaintiffs that a sum of Rs.71,65,00,000/- is due and payable by the defendant in respect of friendly accommodations granted by the plaintiffs to the defendant. The defendant, by a letter dated 27.11.2012, acknowledged receipt of the sum of Rs.71,65,00,000/- having been received from the plaintiff and assured to make the repayment with 24% interest p.a. In the said letter, the defendant has also confirmed that they had issued a cheque dated 1.04.2013 towards repayment and has further assured that upon deposit, the cheque will be honoured and the

amount of interest will be settled subsequently. A copy of the cheque and the letter are Exhibits 'A' and 'B' to the plaint. The defendant also issued a bill of exchange for the same amount in favour of the plaintiffs, copy whereof is at Exhibit 'C' to the plaint.

2 When the cheque was deposited on the due date, the same was dishonoured due to *'insufficient funds and payment stopped by drawer'.* The plaintiffs, therefore, caused a letter dated 13.05.2013 issued by their advocates under Section 138 of the Negotiable Instrument Act, 1881 (N.I.Act) calling upon the defendant to pay Rs.71,65,00,000/- and have also commenced independent proceedings under Section138 of the N.I.Act which is pending. In response, the defendant by a letter dated 13.05.2013, *inter-alia*, acknowledged that they had received Rs.71,65,00,000/- and interest was payable at 24% p.a. upto 31.03.2013 and thereafter interest was payable at 36% p.a. The defendant also issued a cheque dated 1.07.2013 for Rs.76,27,00,000/- which included the interest payable. In the said letter, the defendant also assured that the cheque of 1.07.2013 for Rs.76,27,00,000/- will be honoured and they will not issue stop payment instructions. The defendant's advocate by a letter dated 28.05.2013 confirmed that a fresh cheque for Rs.76,27,00,000/- has been issued towards the discharge of the defendant's liability and called upon the plaintiffs to withdraw the notice

under Section 138/141 of the N.I.Act.

3 In response to the notice issued by the plaintiffs on 16.07.2013 calling upon the defendant to pay the outstanding amounts, the defendant by their letter dated 20.07.2013, had taken a very curious stand inasmuch as according to them the first cheque for Rs.71,64,00,000/- with accumulative interest was handed over to the plaintiffs as and by way of collateral security against advances and so also the cheque for Rs.76,27,00,000/-. In the said letter, it is necessary to note that the defendant has not denied the liability. In fact, this letter also should be read as a confirmation of a liability to the extent of Rs.76,27,00,000/- because otherwise there is no need for the defendant to give any cheque for the said amount as collateral security. Later the defendant asked the plaintiff to return the cheque for Rs.76,27,00,000/-. The plaintiff, hence, did not deposit the cheque but did not return it either.

4 The defendant, thereafter, by a letter dated 1.08.2013 (Exhibit 'O') requested the plaintiffs to confirm that an amount of Rs.71,65,00,000/- was due to the plaintiffs as on 31.03.2013. The plaintiffs, in response, by their letter dated 30.08.2013 informed the defendant that the outstanding balance (as on 31.03.2013) was Rs.75,80,09,472/- and not Rs.71,65,00,000/-, the

defendant having omitted the interest component. All this shows that the defendant admit their liability to plaintiffs.

5 The plaintiffs have based their claim on the dishonoured cheque of Rs.71,65,00,000/-.

6 In the affidavit in reply to the summons for judgment, the stand taken by the defendant are three fold :(a) that the suit filed was in respect of a money lending transaction and does not lie in view of the provisions of the Bombay Money Lending Act as the plaintiffs did not have requisite licence when the loan was advanced; (b) the defendant maintained a lending account with the plaintiffs and the plaintiffs have incorrectly chosen only the one last transaction from the series of transaction which is impermissible; (c) there is gross suppression of material facts and events as the plaintiffs have not disclosed that the cheques and the bill of exchange was given only as a collateral security or comfort and not with an intention to provide a negotiable instrument which can be enforced by the plaintiffs.

7 All these defences were taken by the defendant (not this defendant) in an identical matter involving the plaintiffs. The plaintiffs were plaintiffs in that suit as well, (Summary Suit No.203 of 2013).

As regards the first objection, as to whether the plaintiffs have to be registered at all under the Money Lenders Act, a Single Judge of this Court (Coram : S.C. Gupte, J.)[1] and confirmed by a Division Bench of this Court (Coram S.J.Vazifdar & Revati Mohite Dere, JJ)[2] in a matter involving the plaintiffs where identical facts were involved and where identical defences were raised, has held that the Money Lenders Act is not applicable. In that case, the court had directed the defendant to deposit a sum of Rs.67 lakhs as a condition to defend. The Single Judge was of the view that as the cheques were issued for return of the amounts, it is possible to argue that the advances themselves were not on the basis of negotiable instrument because the cheques were issued much after the advances were made. At the same time, the Court also came to the conclusion that where the suit is based on dishonoured cheque (in this case also it is so), issued towards refund of loan, whilst the loan forms the consideration for these negotiable instrument, such a suit not filed for recovery of loan but for recovery of amounts covered under the Negotiable Instrument which was dishonoured upon presentation for payment is not forbidden. Paragraphs 9, 10, 11 and 12 of the judgment dated 24.02.2014 of the Singe Judge read as under :

> 9. *Coming now to the main defence of the Defendant that the suit is* barred under the provisions of the Bombay Money Lenders Act, 1946 ("said Act"), a loan is defined under Section 2(9) of the said Act as follows:

1 S.J.No.21 of 2013 in SS No.203/2013 dt. 24.02.2014.
2 Appeal (L) No. 252 of 2014 in S.J.21/2013 dt.20.11.2014

"(9) "loan" means an advance at interest whether of money or in kind but does not include-
(a) a deposit of money or other property in a Government Post Office, Bank or in any other Bank or in a Company or with a Co-operative Society;
(b)..........
(c)..........
(d).........
(cc).......
(d)........
(d1).......
(d2)........
(e).........
(ee) loan to, or by, or deposit with, anybody (being a body not falling under any of the other provisions of this clause), incorporated by any law for the time being in force in the States;
(f) an advance, of any sum exceeding rupees three thousand made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881, other than a promissory note;
(f1) ....
(f2) ...an advance made bona fide by any person carrying on any business, not having for its primary object the lending of money if such advance is made in the regular course of his business."

Section 2(17) of the said Act provides as follows : "2(17) "suit to which this Act applies" means any suit or proceeding-

(a) for the recovery of a loan made after the date on which this Act comes into force;

(b) for the enforcement of any security taken or any agreement, made after the date on which this Act comes into force in respect of any loan made either before or after the said date; or

(c) for the redemption of any security given after the date on which this Act comes into force in respect of any loan made either before or after the said date.” Section 10 of the said Act is in the following terms:

“10. No court shall pass a decree in favour of a money-lender in any suit to which this Act applies [including such suit pending in the court before the commencement of the Bombay Moneylenders (Amenment) Act, 1975] unless the court is satisfied that at the time when the loan or any part thereof, to which the suit relates was advanced, the money-lender held a valid licence, and if the court is satisfied that the money-lender did not hold a valid licence, it shall dismiss the suit.]

(5) Nothing in this section shall affect--

(a) suits in respect of loans advanced by a money-lender before the date on which this Act comes into force;

(b) the powers of a Court of Wards, or an Official Assignee, a receiver, an administrator or a Court under the provisions of the Presidency-towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920 or any other law in force corresponding to that Act, or of a liquidator under the Companies Act, 1956, to realise the property of a money-lender.”

The defence on the basis of these provisions is that the monies were advanced by the Plaintiffs to the Defendant admittedly by way of a loan; that this loan is covered under the definition of 'loan' under Section 2(9) of the said act; that the present suit is 'a suit to which this Act applies' within the meaning of Section 2(17) of the said Act; that at the time when the loan was advanced, the Plaintiffs did not have any valid licence under the said Act; and that the suit is, therefore, liable to be dismissed. The learned Counsel for the Defendant has relied on the judgments referred to above. These judgments lay down the following propositions:

(i) Loan to companies incorporated under the Companies Act are not excepted from the

> definition of 'loan' by virtue of Section 2(9)(ee) of the Act; what Section 2(9)(ee) excepts is loan to, or by, companies enacted under any law;
> (ii) In a suit to which the said Act applies, it is difficult, if not impossible, to apply the procedure of Order 37;
> (iii) The defences that the suit transaction was a money lending transaction; that the amount was not kept as a deposit with the company, but a loan advanced to it; that the amount was not advanced on the basis of a negotiable instrument, may all give rise to triable issues, in which case an unconditional leave would ordinarily be granted.

10. The central question in our case, however, is whether the suit is for recovery of a loan. It is no doubt true that the amounts originally advanced were termed as short term loans. Though cheques were issued for return of the amounts, it is possible to argue that the advances themselves were not on the basis of negotiable instruments. The cheques were issued much after the advances were made. It is also possible to argue that the advances were not in the nature of deposits of money in a company. Had the suit been a suit for recovery of a loan, these defences would have given rise to triable issues. But the suit is based on dishounoured cheques. These cheques were issued towards refund of the loan. In other words, these were negotiable instruments issued in consideration of an antecedent transaction, namely, the loan. Whilst the loan forms the consideration of these negotiable instruments, the suit is filed not for recovery of loan, but for recovery of amounts covered under the negotiable instruments which were dishonoured upon presentation for payment. The loan itself is not a forbidden consideration so as to render the negotiable instrument void.

11. A loan advanced against a negotiable instrument is in terms excepted from the application of the said Act. Such a loan is not only a valid consideration of the negotiable instrument, but

> would itself be recoverable even if the creditor were not to sue on the negotiable instrument. It would be preposterous to hold that whereas in a case where an advance is made against a negotiable instrument, recovery of both the original advance and the negotiable instrument is permissible under the said Act, in a case where a negotiable instrument is issued in consideration of an advance already made, the negotiable instrument cannot be enforced by reason of the provisions of the said Act.
>
> 12 The Judgments relied upon by Mr. Jain, the learned Counsel for the Defendant, in support of his contention that the suit is barred under Section 10 of the said Act are not relevant for our purposes, since, as explained by me above, the suit is not for recovery of a loan, but based on negotiable instruments which are dishonoured on presentation for payment. There is absolutely no substance in the defence of the bar under Section 10. It is neither a bonafide defence nor a credible defence.

8 The Division Bench of this Court (S.J.Vazifdar and Revati Dere, JJ.), by their judgment pronounced on 20.11.2014 not only up held the judgment of the Single Judge but also clarified that the mere fact that mere negotiable instrument is handed over subsequent to the loan being disbursed makes no difference if the loan was made on the basis of the negotiable instrument, where it is agreed as part of a composite agreement to advance a loan against a negotiable instrument covered by section 2(9)(f) of the Money Lenders Act. Paragraphs 18 to 21 of the said judgment read as under :

> 18 Section 10 provides that no Court shall pass a decree in favour of a money-lender to which the Act applies unless the moneylender held a licence at the relevant time. Section 2(17) states that the expression “suit to which this Act applies” means any suit or proceeding of the nature mentioned in

clauses (a), (b) and (c) thereof. Clause (a) refers to a suit or proceeding "for the recovery of a loan made after the date on which the Act comes into force." Thus if a loan falls within the ambit of the expression "suit to which this Act applies" in section 2(17), a suit or proceeding to recover the same would have to be dismissed in view of section 10 unless the money-lender holds a licence at the relevant time.

19 The question therefore, is whether the loan in the present case falls within the ambit of sections 2(17) and (10). The appellant's contention that the suit is barred by the provisions of the Bombay Money Lenders Act is not well founded. Section 2(9) defines a loan to mean an advance at interest whether of money or in kind, but does not include a loan or advance of the nature stipulated in clauses (a) to (f2) thereof. The above suit is not hit by the Bombay Money Lenders Act in view of clause (f) of section 2(9) of the Bombay Money Lenders Act. In view of clause (f), the loans do not fall within the purview of the Act as they were advances made on the basis of the negotiable instrument as defined in the Negotiable Instruments Act, 1881 viz. the cheques and the bills of exchange.

20 In our view, in the present case, the loans were advanced by the respondents to the appellants on the basis of negotiable instruments other than promissory notes. This is clear from the facts and circumstances of this case especially the manner in which the amounts were advanced and cheques were drawn. The fact that the cheques were forwarded by the appellants to the respondents after the loans were advanced by RTGS transfers makes no difference. The amounts were advanced by the respondents to the appellants and the cheques and the bills of exchange were issued by the appellant to the respondents as a part of one composite agreement. In other words, this agreement was entered into at the same time. This is not a case where the amounts were first advanced and thereafter the parties agreed that the borrower would draw the cheques and bills of exchange and execute the said writings. The entire arrangement was agreed upon at the same time. The cheques and bills of exchange were forwarded subsequently in accordance with and pursuant to this agreement which had

> already been arrived at. There is nothing on record that militates against this view. The appellant has not even pleaded anything to the contrary. It is not the appellant's case that the cheques and the bills of exchange were drawn and the writings were executed independent of the loan pursuant to any understanding arrived at subsequently. It follows therefore that the said loans were made on the basis of the said negotiable instrument viz. the cheques and the bills of exchange drawn by the appellants in favour of and payable to the respondents.
>
> 21 The mere fact that a negotiable instrument is handed over subsequent to the loan being disbursed makes no difference if the loan was made on the basis of the negotiable instrument. Where it is agreed as part of a composite agreement to advance a loan against a negotiable instrument covered by section 2(9)(f), it makes no difference that the negotiable instrument is handed over subsequently.

Therefore, this cannot be a defence at all for the defendants.

9 On the defence of running account, in the affidavit in reply, the defendant has alleged that there were several transactions of payment for the business loan from the plaintiffs to the defendant and during the period 2008-2012 there was a running account. No details were provided. This point also has been dealt with S.C.Gupte, J. in the summons for judgment no.21 of 2013 in summary suit no.203 of 2013 (supra). The Court has dismissed this defence as well. The Court has held that a running account may form a consideration of a negotiable instrument such as a cheque but the suit is still a suit on a negotiable instrument which is supported by a

lawful consideration. Paragraph 5 of the said judgment reads as under :-

> 5 As for the defence of running account, the learned Counsel relied upon the statement of account between the parties as reflected in the bank statement which shows certain debits and credits between the parties apart from the debits and credits concerning the short term loans advanced as claimed in the present suit. Even if it is assumed for the sake of argument that there were other transactions between the parties, apart from the suit transactions, the defence has no merit. As far as the present suit is concerned, the same is based on dishonoured cheques and not on any antecedent liability based on any account. The consideration for such cheques can very well be an account stated between the parties or some items in a running account. Because such consideration is based on an account between the parties, the suit based on dishonoured cheques cannot be termed as a suit on the basis of such account. In other words, a running account may well form a consideration of a negotiable instrument such as a cheque but the suit is still a suit on a negotiable instrument which is supported by a lawful consideration. The defence of running account is thus even not a statable defence to a suit filed on dishonoured cheques.

Therefore, even if it is assumed that there were other transactions between the parties, apart from the suit transactions, the defence has no merit, as the present suit is also based on dishonoured cheque and not on an antecedent liability based on any account. The consideration of such cheques can very well be an account stated between the parties or some items in the running account. This is because as the consideration may be based on an account between the parties, the suit based on the dishonoured cheques cannot be termed as a suit on the basis of such account. In other words, a running account may well form a consideration of a negotiable instrument such as a cheque but the suit is still on a negotiable instrument which is supported by a lawful consideration. The defendant, therefore, has not advanced an acceptable defence to a suit filed for a dishonoured cheque.

10 The next defence of the defendant, i.e., the cheque and bill of exchange was given only as collateral security also is without merit. On this also I gather support from the judgment of Justice S.C. Gupte in summons for judgment no.21 of 2013 in summary suit no.203 of 2013 (paragraph 6). Therefore, on the defence that the cheques were given merely as collateral security of repayment of loan, it defies sensibility because what is the purpose of giving an alleged collateral security, when it was not meant to be enforced. If a cheque is issued as a security for repayment, it would necessarily mean that in the event of non-payment of the the amount secured by the cheque, the cheque can be deposited and would be honoured.

In fact, in the two letters which are annexed to the plaint, i.e., letters dated 27.11.2012 (Exh.'A') and 13.05.2013 (Exh.'F'), the defendant has assured the plaintiffs that the cheques were given to make repayment of loan and has also assured that when the cheques will be deposited, it will be honoured. Therefore, the defence that the cheque was a mere collateral security is not only specious but also bogus.

11 The defendant has stated a lot of other things in the affidavit in reply about some flats being agreed to be sold etc. but none of those points will be of any assistance to the defendant. The counsel for the plaintiff stated that even the flats which were offered, could not have been accepted by the plaintiffs because the defendant did not have any title to the flats being offered and therefore could not be a security at all.

12 For the same amount, which is the subject matter of the suit, the plaintiffs had filed a winding up petition against the defendant bearing Company Petition No.291 of 2014, which came to be admitted by an order dated 23.12.2014. The Company Court has observed that the defendant has admitted the amount that is due and payable by the defendant to the plaintiffs. In fact, as could be seen from the order dated 15.02.2015 passed by the Company Court in the aforesaid company petition, on 9.01.2015, the advocate for the defendant had mentioned the matter before the Court and requested the Court to direct the advocate for the petitioners (plaintiffs herein) not to advertise the admission of the company petition since the defendant was desirous of paying the dues of the plaintiffs and they would provide a security of payment to the petitioners. This also confirms clear admission of liability by the defendant to the plaintiffs.

Mr.Tulzapurkar states that the plaintiffs had received some kind of an offer which was rejected.

13 Therefore, it is quite obvious from the letter dated 27.11.2012 that the cheques of Rs.71.65 crores, the bill of exchange drawn by the defendant and personally accepted by the director of the defendant Mr.Sunil Mantri and his wife in their personal capacity, the letter dated 13.05.2013 from the defendant to the plaintiffs, cheque dated 1.07.2013 issued by the defendant to the plaintiffs for Rs.76.27 lakhs, from the balance confirmation letter dated 1.08.2013 and the letter dated 30.08.2013 from the plaintiffs to the defendant, that the defendant has unequivocally admitted the liability. Therefore, none of the defences raised by the defendant is either substantial or bona-fide. The defences smacks of malafide and are sham, illusory and moonshine. The defendant has no defence. The amount of Rs.71,35,00,000/- is repayable to the plaintiff with interest. Even in the winding up petition, the defendant having agreed to settle the plaintiffs' dues, in my view, no leave to defend ought to be granted in this matter. It serves no purpose in prolonging this matter.

14 Nobody appeared for the defendant at the hearing of this summons for judgment. In fact, when the matter was listed on 8.06.2015, 16.06.2015 and 18.06.2015, nobody appeared for the defendant. Still to give a last chance to

the defendant, the matter was stood over to 25.06.2015. On 25.06.2015, Advocate Mr. Uday Warunjikar instructed by Rajani Associates appeared and stated that he has just been instructed in the matter and requested the matter be stood over by one week so that he could take instructions. Therefore, the matter was stood over to 30.06.2015. In the morning session on 30.06.2015, when the matter was called out, an advocate appeared and informed that Mr.Warunjikar was held up before another Court and requested the matter be kept back. The matter was kept back and called out again at which stage Mr.Warunjikar appeared and stated that he was informed about the matter only 10 minutes before 11.00 a.m. by the advocate on record and hence he has not been able to prepare to argue the matter and sought an adjournment. Mr.Tulzapurkar, strongly opposed the adjournment and stated that since the matter was listed on 25.06.2015 and stood over to today, i.e., 30.06.2015 at the request of Mr.Warunjikar and the fact that nobody had appeared on three occasions earlier when the matter was listed, the court should not grant any further adjournment. At this stage, Mr.Warunjikar stated that he would not be appearing in the matter and that he would be returning the brief. Therefore nobody appeared for the defendant.

15 Leave is declined when the Court is of the opinion that grant of leave would merely enable the defendant to prolong the litigation by seeking untenable and frivolous defences. In ***Mechelec Engineers and Manufacturers Vs. M/s. Basic Equipment Corporation***[3], paragraph 8 reads as under :

> 8 In Smt. Kiranmoyee Dassi & Anr. v. Dr. J. Chatterjee(1), Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 17 C.P.C. in the form of the following propositions (at p. 253):
>
> > "(a) If the Defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the Defendant is entitled to unconditional leave to defend.
> >
> > (b) If the Defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the Defendant is entitled to unconditional leave to defend.
> >
> > (c) If the Defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the Plaintiff is not entitled to judgment and the Defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or

3 1977 AIR SC 577

> mode of trial but not as to payment into Court or furnishing security.
>
> (d) If the Defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the Plaintiff is entitled to leave to sign judgment and the Defendant is not entitled to leave to defend.
>
> (e) If the Defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the Plaintiff is entitled to leave to sign judgment, the Court may protect the Plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise se- cured and give leave to the Defendant on such condition, and thereby show mercy to the Defendant by enabling him to try to. prove a defence".

16 The defence raised by the defendant is moonshine and a sham. The defendant has admitted liability and the same is also confirmed by orders passed by the Company Court. The defendant has no defence. In the circumstances, the plaintiffs shall be entitled to judgment.

17 Though the defendant had agreed to pay the plaintiffs interest at 24% per annum upto 31.03.2013 and thereafter at 36% per annum, the plaintiffs have sought interest only at the rate of 18% per annum and that too, on the principal sum of Rs.71.65 lakhs. In fact, the plaintiffs are also claiming interest only from 1.04.2013 until payment/realization. Therefore the

plaintiffs are entitled to decree in terms of prayer clause (a), which reads as under :

> *(a) that this Hon'ble Court be pleased to order and decree the defendant to pay to the plaintiffs a sum of Rs.78,52,84,000/- (Rupees Seventy Eight Crores Fifty Two Lakhs Eighty Four Thousand only) as particulars of claim (Exh. "Q" hereto), together with further interest on the principal sum of Rs.71,65,00,000/- at the rate of 18% per annum from the date of filing this suit, till payment/realization and the costs of the suit.*

18 The defendant also to pay a sum of Rs.2 lakhs as cost to the plaintiffs.

19 Decree be drawn up accordingly.

20 The summons for judgment stands disposed accordingly.

(K.R. SHRIRAM, J.)