

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO. 86 OF 2014

IN

SUMMARY SUIT NO. 587 OF 2014

Bimal B. Shah

.....Plaintiff

: V/S :

M/s. Shubh Enterprise & Ors.

.....Defendants

* * * * *

Mr. Snehal Shah a/w. Mr. Keerit Shah a/w. Mr. Delarey Sylvester a/w.
Mr. Zain Mookhi i/by. Dhru & Co., Advocate for the plaintiff.

Mr. Vivek Khemka i/by. A.A. Motiwalla, Advocate for defendants no.1, 2
and 3.

Mr. Jayesh Mestry i/by. Ashok Purohit & Co., Advocate for defendant
no.4.

* * * * *

Coram :- Smt. R.P. SondurBaldota, J.

30th September, 2015.

P.C. :-

1). This Summons for Judgment is taken out in a suit for recovery of Rs.2,80,48,424/- consisting of principal amount of Rs.66,78,000/- and the interest thereon as specified in the statement of claim annexed to the plaint.

2). The brief statement of facts giving rise to the dispute in the

suit is as follows :-

. Defendant no.1 is a partnership firm carrying on business as builders and developers. Defendants no.2, 3 and 4 were at the relevant time, partners in the firm. Defendant no.4 resigned from the partnership firm on 26th October, 2013. By the Memorandum of Understanding dated 21st October, 2007 defendants no.1 to 4 agreed to sell to the plaintiff and defendant no.5, the brother of the plaintiff six offices, each admeasuring 530 sq.ft totalling to carpet area of 3080 sq.ft and 9 car parking spaces in the building to be constructed at Shankarwadi, Jogeshwari (East) for the total consideration of Rs.3,33,90,000/-. The plaintiff and defendant no.5 paid 40% of the total consideration of Rs.1,33,56,000/- each paying Rs.66,78,000/- by separate cheque. The Memorandum of Understanding provided that, in the event, the first defendant failed to commence the work of construction by 31st January, 2008, it would pay interest at the rate of 1.5% p.m. payable from 3 months of the amount paid by the plaintiff and defendant no.5 to defendant no.1. Further, in the event of defendant no.1 failing to commence the work of construction by 1st May, 2008, it had agreed to allot office premises at Dadar admeasuring 1900 sq.ft carpet area equivalent to 2850 sq.ft super built up area @ 14,000/- per sq.ft on the ninth floor of the proposed building at C.S. No. 277, Town

Planning Scheme IV of Mahim Division situate at N.C. Kelkar Marg, Dadar, Mumbai. The Memorandum of Understanding further provided that, if defendant no.1 was unable to commence construction work at Dadar property within one year from the date of signing of Memorandum of Understanding i.e. on/or before 31st October, 2008 it was to refund the earnest money and other payments made with interest at the rate of 2% p.a. forthwith. Defendant no.1, failed to comply with any of the clauses in the MOU. Therefore, it made the payment of Rs.1,01,12,339/- consisting of Rs.66,78,000/- towards the principal amount and Rs.34,34,339/- towards interest on the principal amount as per the MOU to defendant no.5. The amounts were paid by way of RTGS. It, however, failed and neglected to refund the amount to the plaintiff.

3). There is no dispute as regards execution of the MOU, the clauses agreed thereunder, the payments made by the plaintiff and defendant no.5 and the payments made by defendant no.1 to defendant no.5. Therefore, as regards the amounts due by defendant no.1 to the plaintiff under the MOU, the same cannot be disputed.

4). Defendant no.1, despite the above undisputed facts, has contested the Summons for Judgment on two grounds. The first ground is that, the claim of the plaintiff in the suit is barred by the law of

limitation. According to defendant no.1, the liability being of the year 2008, the suit filed in the year 2014 is barred by the law of limitation. The plaintiff, relies upon two acknowledgments of liability by way of confirmation of accounts being the confirmation dated 1st April, 2009 and 1st April, 2012 issued by defendant no.4 as partner of defendant no.1. Mr. Khemka, the learned Advocate appearing for defendants no.1 to 4 submits that the document dated 1st April, 2012 is a back dated document issued by defendant no.4 in order to harass defendants no.1 to 3. According to him, from the tenor of the confirmation, it becomes obvious that, it is a got-up document and not a genuine document. He argues that, the writing mentions an incorrect date of payment made by the plaintiff to defendant no.1 by way of a cheque. The date mentioned is of 22nd October, 2007, whereas, the cheque issued by the plaintiff in the sum of Rs.68,78,000/- was dated 20th October, 2007. There is no merit in the submission of Mr. Khemka because the document of confirmation talks about receipt of money by cheque on 22nd October, 2007 and not handing over of the cheque dated 20th October, 2007. Mr. Shah, the learned Advocate appearing for the plaintiff points out that the cheque dated 20th October, 2007 was encashed by defendant no.1 and the amount received by it on 22nd October, 2007. There is nothing on record to even remotely indicate that the confirmation of accounts dated

1st October, 2007 is a bogus document.

5). As regards, defendant no.4, partner of defendant no.1 at the relevant time, though he had resigned from the partnership firm, the confirmation of the accounts is more than a year prior to his resignation from the firm. Therefore, it cannot be said that the confirmation had been given by defendant no.4 with intent to spite defendants no.1 to 3. It is thus clear that, there is no defence whatsoever to the claim in the suit and the Summons for Judgment. Hence, the Summons for Judgment is therefore made absolute and the suit is accordingly disposed off.

6). In view of the order on the Summons for Judgment and the suit, Notice of Motion No. 2854 of 2014 which is for attachment before judgment will not survive. The same is accordingly disposed off. However, at the request of Mr. Shah, the ad-interim order passed thereon is continued until 20th October, 2015 and continuation of the order further will be considered further disposing off Notice of Motion No. 1584 of 2014 in the companion Suit No. 720 of 2014.

(SMT. R.P. SONDURBALDOTA, J)

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Wednesday, 30.9.2015

CERTIFICATE

. Certified to be true and correct copy of the original signed order.