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

SUMMONS FOR JUDGMENT NO.99/2014
IN
SUMMARY SUIT NO.647/2014

Kisan Mouldings Ltd … Applicant

V/s.

Mrs. Nirjala Gunanand Mishra & Ors. … Respondents

Ms. Jayashree Surte i/b. S. Aswhinkumar & Co. for the Applicant
Mr. A. V. Anturkar, Senior Advocate a/w. Mr. Rushikesh Barge i/b. S. B. Dehmukh for the Respondents.

CORAM: K.K. TATED, J.
DATED : DECEMBER 15, 2015

P.C. :

1. Heard the learned counsel for the parties. The learned counsel for the Plaintiff filed Summary Suit for recovery of sum of Rs.1,20,00,000/- with 18% p.a. interest, wherein the Plaintiff preferred the present Summons for Judgment for a decree against the Defendant for sum of Rs.1,89,64,488/-.

2. It is the case of the Plaintiff that Defendant No.1 is a sole proprietorship of Mrs. Nirajala Gunanand Mishra. The Defendant No.2 is husband of sole proprietor of Defendant No.1. Defendant No.3 stood as a guarantor.

3. It is the case of the Plaintiff that, from time and again, they supplied the Defendant no.1 furniture and crates and there was

outstanding amount due and payable by Defendant No.1. They executed Memorandum of Undertaking (MOU) dated 11/10/2011. As per the MOU, the Defendants admitted their liability to the extent of Rs.1,20,00,000/- with 18% p.a. interest. It is the case of the Plaintiff that the Defendant No.3 also executed deed of guarantee dated 05/03/2012 for the said outstanding amount. Pursuant to the said MOU and deed of guarantee, Defendant issued 13 cheques of Rs. 4 lacs each and 19 cheques of Rs.5 lacs each towards their liability. She submits that all these cheques were dishonoured by the Bank. Hence, the Plaintiff filed the present Summary Suit on the basis of MOU dated 11/10/2011. To that effect, the Plaintiff made averment in paragraph 14 of the plaint which reads thus:

> "*14. The Plaintiff says and submits that the Plaintiff's dues are arising out of the written contract i.e. MOU being Exhibit A hereto. As such suit is filed under Order XXXVII of the Code of Civil Procedure, 1908 and that no relief not falling within the ambit of the said rule is claimed in the suit.*"

4. The learned counsel for the Plaintiff submits that the Defendants, by MOU dated 11/10/2011, deed of guarantee dated 05/03/2012 admitted their liability. Hence, they are liable to pay entire outstanding of Rs.1,20,00,000/- towards principal amount and interest @ 18% p.a. of Rs.69,64,488/-. The learned counsel for the Plaintiff submits that Defendant Nos.2 and 3 acted on behalf of Defendant No.1. Hence, all the Defendants are liable to pay the said amount jointly and severally. In support of her contention, the learned counsel for the Plaintiff relies on the judgment of the Apex Court in the matter of ***S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla & Anr. in appeal (Cri) No.664/2002 dated 20/02/2007*** and judgment in the matter of

Aneeta Hada Vs. M/s. Godfather Travels & Tours pvt. Ltd. in Criminal Appeal No.838/2008 and other connected appeals dated 27/04/2012.

5. The learned counsel for the Plaintiff submits that in both these judgments, the Apex Court held that a Director of a company who remains to be in-charge of the day-to-day affairs of the company, is also responsible to pay the outstanding amount. On the basis of this submission and the Apex Court judgment in the above mentioned matters, the learned counsel for the Plaintiff submits that this Hon'ble Court be pleased to make Summons for Judgment absolute.

6. On the other hand, the learned senior counsel for the Defendant vehemently opposed the Summons for Judgment. He submits that the Summary Suit as it is filed by the Plaintiff itself is not maintainable in law. He submits that as per Order XXXVII of the Code of Civil Procedure, 1908, Summons for Judgment is maintainable, if there is a written contract between the parties. He submits that there is no written contract between the Plaintiff and Defendants. He submits that the Plaintiff is relying on MOU dated 11/10/2011 Exhibit – A to the plaint. The said MOU is not signed by the Defendant No.1 at all. Same is signed by Defendant Nos.2 and 3. He further submits that it is specifically stated in the said MOU that the same is signed by Defendant Nos.2 and 3 for the future business. He relies on a paragraph of the said MOU, which reads thus:

> *"On behalf of M.R. Enterprises Mr. Kamlesh Kothari and Mr. G.Mishra as a surety promised to KML for a smooth and better business in future."*

7. The learned senior counsel submits that as there is no written contract between the Plaintiff and Defendant No.1, the Summary Suit as it is filed by the Plaintiff is not maintainable.

8. The learned senior counsel for the Defendants further submits that the deed of guarantee signed by the Defendant Nos.2 and 3 was in respect of future transactions. Therefore, same cannot be used for the earlier transactions entered between the Plaintiff and Defendant No.1. Apart from this, the learned senior counsel for the Defendant submits that Defendant No.1 already made entire payment to the Plaintiff. He submits that Defendant No.1 paid amount of Rs.73,11,436/- to the Plaintiff for business conducted after October 2011. He submits that earlier also the Defendant No.1 paid the amount to the Plaintiff. In support of this, he relies on pay-in-slips which are at Page Nos.41 to 53 of additional affidavit of Defendant No.2 dated 01/12/2015. He further submits that during pendency of the present matter, the Plaintiff contacted the Defendant No.2 on cell-phone for payment as claimed in the present suit. To that effect the Defendant placed on record the conversation between the Plaintiff and Defendant No.2 on page No.65 (Exhibit - I) to the additional affidavit of Defendant No.2 dated 01/12/2015. The learned senior counsel for the Defendant submits that the Apex Court, in the matter of ***Sunil Enterprises and Anr. Vs. SBI Commercial & Interntional Bank Ltd. 1998(5) SCC 354*** held that if Defendant raises a triable issue indicating that he has a fair, *bona fide* or reasonable defence, then he is entitled to unconditional leave. In support of this contention, he relies on paragraph 4 of the judgment

which reads thus:

> "*4. The position in law has been explained by thi*s Court in Santosh Kumar vs. Mool Singh [1958]1SCR1211, Milkhiram (India) Private Ltd. vs. Chaman Lal Bros. AIR1965SC1698 and Michales Enc. & Mfg. vs. Bank Equipment Corporation *[1977]1SCR1060 . The propositions laid down in these decisions may be summed up as follows:-*
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>> *a) If the defendant satisfies the Court that he has a good defence to the claim on merits, 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 possibly good defence, 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, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiff's claim, the court may impose conditions at the time of granting leave to defend the conditions being as to time of trial or made of trial but not as to payment into Court or furnishing security.*
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>> *d) If the defendant has no defence, or if the defence is sham or illusory or practically moonshine, the defendant is not entitled to leave defend. (e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured.*
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> *In fact in identical matters on the file of the said High Court is summary suit No. 2963 of 1990 Dena Bank vs. M/s. Sunil Enterprises and summary suit No. 1153 of 1989 Bank of India vs. Mahendra Sarabhai Choksi, leave to defend had been granted to defendants."*

9. On the basis of the above mentioned submission, the learned senior counsel for the Defendant submits that the Defendant has made out a case for grant of unconditional leave to defend the suit. Hence, the Summons for Judgment be dismissed.

10. Heard the learned counsel for the parties. It is to be noted that in the present proceedings the Plaintiff filed Summary Suit on the basis of written contract i.e. MOU dated 11/10/2011. As stated in paragraph 14 of the plaint, MOU dated 17/10/2011 shows that same was not signed by Defendant No.1 who is a proprietor of M/s. M. R. Enterprises. If there is no written contract between the parties, the Summary Suit itself is not maintainable under Order XXXVII of the Code of Civil Procedure, 1908. On this point only, the Defendant is entitled to unconditional leave. Hence, the following order is passed:

a. Summons for Judgment is rejected.

b. Unconditional leave is granted to the Defendants to defend the Summary Suit.

c. The Defendants to file written statement on or before 15/01/2016.

d. The Plaintiff and Defendant to file affidavit of documents and compilation and complete the inspection and discovery of documents on or before 15/02/2016.

e. Parties to file draft issues.

f. S.O. to 22/02/2016, for framing issues.

(K.K. TATED, J.)