

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

SUMMONS FOR JUDGMENT NO.5 OF 2016

**IN
SUMMARY SUIT NO.572 OF 2015**

Mr.Ali Mohammed Behlim & Ors.Applicants

IN THE MATTER BETWEEN :

Mr.Ali Mohammed Behlim & Ors.Plaintiffs

V/s.

Mr.Mohammad Azam Aslam Batt & Anr.Defendants

Mr.Shashank Choudhary a/w Ms.Sunitha Perumal i/by S.V.Masurkar
for applicants/plaintiffs.

Ms.Maya Dave for defendant nos.1 & 2.

CORAM : K.R.SHRIRAM,J

DATE : 25.7.2016

P.C.:-

1 In this suit the plaintiffs are claiming a sum of Rs.2,66,00,000/- with interest thereon @ 18% p.a. or as such other rates as the court may deem fit and proper.

2 Plaintiff nos.2 & 3 are residents of England. The defendant no.1 is the husband of defendant no.2. It is alleged in the plaint that defendant no.1 approached the plaintiffs with a proposal to invest money and purchase flats in a (slum Rehabilitation) SRA scheme in Khar area, Mumbai. It is averred in the plaint that the defendant no.1 represented that the scheme is viable and the plaintiffs will be

provided flats at very reasonable rates. It was also mentioned that the defendant no.1 was involved in the redevelopment project at Ambedkar Co-operative Housing Society, Khar (W), Mumbai-400 052 and if the plaintiffs desire, they will be provided flats at reasonable rates. The plaintiffs agreed to buy the flats by investing in the scheme introduced by the defendant no.1. The plaintiffs state that they invested Rs.2.66 crores through their known persons with defendant no.1 and it was agreed that defendant no.1 will provide 17 flats to all 17 intending purchasers. It is stated that the plaintiffs knew defendant no.1 for quite some time. The plaintiffs state that the defendants kept assuring that he would provide flats as agreed but at one point of time stated that he was unable to provide the flats but he shall return amount of Rs.2.66 crores to the plaintiffs. Accordingly, the plaintiffs executed Memorandum of Understanding dated 8.5.2014. Copy of the Memorandum of Understanding is at Exhibit-A to the plaint and the said Memorandum of Understanding forms the basis of this suit. As per the Memorandum of Understanding, it is the plaintiffs' case that the defendants agreed to repay Rs.2.66 crores within a period of six months and if the amount was not repaid, the defendant no.1 shall sell his flat no.4, Ashiyana Building 13, N.S.Road, Juhu, Mumbai-400 049, standing in the name of his wife.

3

It is necessary to note that the Memorandum of

Understanding is between the plaintiffs and the defendant no.1. Defendant no.2 has only signed the Memorandum of Understanding as a witness and is not a party to the Memorandum of Understanding otherwise. In my view, on this ground alone, leave to defend to defendant no.2 has to be granted and is hereby granted.

4 Coming to defendant no.1, it is alleged in the plaint that the defendant no.1 did not repay the amount of Rs.2.66 crores. The plaintiffs therefore, caused a notice dated 7.3.2015 to be issued through their Advocate to defendant nos.1 and 2. It is stated that though the notice was served, there is no reply filed.

5 The defendants have filed an affidavit in reply dated 11.2.2016. The defence taken is that ; (a) defendants have sought inspection of all the documents which has not been given and the affidavit was being filed reserving their right to file additional affidavit after inspection was given ; (b) Defendant no.1 has nothing to do with the SRA scheme ; (c) that the amount of Rs.2.66 crores has not been given at all and (d) that defendant no.1 has not signed the Memorandum of Understanding and it is a fabricated document. It is also stated that defendant no.1 had various personal problems because he was also convicted in a criminal case by the Sessions court in June-2014. It is stated that during that time the plaintiff no.2

with whom the defendant had personal relationship invited the defendants to come and reside in his place in Mumbai and at that stage defendant no.1 had left certain papers and his personal belongings with the plaintiff no.2 and it is possible that plaintiffs have mis-used the documents.

6 When the matter was heard partially on 12.7.2016, this court had directed the plaintiffs to file an affidavit annexing thereto original Memorandum of Understanding, original blank cheques which were allegedly given by the defendant no.1 to the plaintiffs, the statement of payments made which the counsel for the plaintiffs stated were made in cheque as well as in cash and also the counter foils of the cheques and bank statement confirming payment of these amounts. Affidavit was to be filed by 21.7.2016. The plaintiffs have not complied with the directions. The counsel for the plaintiffs stated that the settlement talks are going on with the defendants. The counsel for the defendants categorically denied any settlement talks going on.

7 The entire basis of the suit is that funds were given by the plaintiffs to defendant no.1 for investment in SRA scheme against which 17 flats to be allotted to the plaintiffs. The plaintiffs have not shown any document or given any explanation as to how plaintiff

nos.2 & 3 particularly residing in England, will be entitled to invest or get allotted any flat under SRA. The plaintiffs have also not produced the original of the Memorandum of Understanding. The plaintiffs have not given details as to how these payments were made to the defendant no.1. The plaintiffs have not filed the affidavit as directed by this court. The defendant no.1 has expressly denied that he had anything to do with SRA or that he ever entered into a Memorandum of Understanding.

8 In my view, triable issues have been raised by the defendant no.1. The Apex Court in ***M/s. Mechelec Engineers & Manufactures vs. M/s. Basic Equipment Corporation***¹ in paragraph 8 has stated as under :-

“8. In Smt. Kiranmoyee Dassi v. Dr. J. Chatterjee, Das J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 17 CPC in the form of the following propositions :

(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

1. (1976) 4 SCC 687

may in its discretion impose conditions as to the time or 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 secured 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.”

9 The defence raised by defendant no.1, in my view, cannot be brushed aside as moonshine or misconceived.

10 In the circumstances, unconditional leave to defend is granted to defendant no.1 as well. Summons for Judgment dismissed.

11 The defendants to file and serve a copy of the written statement within a period of four weeks. Within two weeks thereafter, parties to file their respective affidavit of documents and also complete discovery and inspection. Within one week of the expiry of two weeks, parties to file and exchange their statement of admission and denial with reasons for denial.

Suit be listed for issues on 3.10.2016.

(K.R.SHRIRAM,J)