

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

**SUMMONS FOR JUDGEMENT NO. 7 OF 2016
IN
SUMMARY SUIT NO. 891 OF 2015**

Anil Kapoor	.. Plaintiff
Vs.	
Orbit Corporation Limited	.. Defendant

Mr.S.Bhandary i/b Bhandary & Bhandary for plaintiff.
Ms.Veenu C. Khatri for defendant.

**CORAM : K.R.SHRIRAM, J.
DATE : 13TH JUNE, 2016**

P.C.

1 The plaintiff has approached this Court for a summary decree in the sum of Rs.12,94,80,506/- made up of Rs.7,75,00,000/- towards the principle and sum of Rs.5,19,80,506/- towards interest as of 14th August 2015 with further interest at the rate of 15% per annum or at such further and other rate of interest as may be deemed fit and proper by this Court on the sum of Rs.7,75,00,000/- from the date of filing of the suit till payment/realization.

2 The plaintiff is an Indian inhabitant. The defendant is a company and is in the business of real estate developer. It is alleged in the plaint that based on the representations made by the defendant, the plaintiff booked a duplex apartment in one of the projects of the defendant known as “Orbit Ocean Parque” for a total consideration of Rs.41,25,00,000/- and the

plaintiff paid, admittedly, a sum of Rs.9,00,00,000/- in six installments. The first installment was paid sometime in October 2010 and the last installment was paid sometime in June 2011. Almost two years after receiving the first installment of Rs.4,00,00,000/- and almost 1 ½ years after receiving the last installment of Rs.1,00,00,000/-, the defendant, by its letter dated 20th November 2012, cancelled the booking of the plaintiff in the project “Orbit Ocean Parque”. The first two paragraphs of the said letter read as under :-

This refers to the residential duplex flat booked by you in the project Orbit Ocean Parque, ('Said Flat") for the total consideration of Rs.41,25,00,000/- (Rupees Forty One Crores Twenty Five Lakhs only) and the amount of Rs.9,00,00,000/- (Rupees Nine Crores only) paid by you as the booking amount.

Presently, as the project Orbit Ocean Parque has been indefinitely delayed, we have as mutually agreed, cancelled the booking of the said Flat and refunded a n amount of Rs.1,25,00,000/- out of the amount of Rs.9,00,00,000/- received from you, leaving a balance of Rs.7,75,00,000/-. While we hold the amounts, we will pay you simple interest @ 15% p.a. from the date of receipt of the same.

(emphasis supplied)

In the said letter, the defendant also made an offer to the plaintiff offering him another flat in another project and requested to confirm his acceptance to this offer to start the documentation process and complete the transaction.

3 The plaintiff rejected the same. By their letter dated 12th March 2013, the defendant also offered to pay a sum of Rs.75 lakhs around 20th April

2013 and another Rs.75 lakhs by end May 2013. Admittedly, these amounts have not been paid.

4 In response to the letter dated 1st October 2013, from the plaintiff calling upon the defendant to return the balance amount, the defendant sent an email dated 1st October 2013 whereby the defendant admitted the payments made by the plaintiff as alleged in the plaint, that the defendant has paid back only Rs.1,25,00,00,000/- of the amount of Rs.9,00,00,000/-, and that their commitment to pay Rs.75 lakhs in April 2013 and Rs.75 lakhs in May 2013 did not materialize, and that a sum of Rs. 7,75,00,000/- plus interest was payable to the plaintiff. In the said email, the defendant also gave the schedule of repayment to the plaintiff.

By an email of 2nd October 2013, the plaintiff rejected the schedule.

5 Thereafter, the plaintiff, by his Advocates' letter dated 15th July 2015, called upon the defendant to pay the amounts of Rs.7,75,00,000/- with interest at the rate of 15% p.a. The defendant, by its letter dated 7th August 2015, informed the plaintiff that they shall revert upon receiving particulars and details in the matter and by their letter dated 25th September 2015, responded. In the letter of 25th September 2015, the defendant has not disputed anywhere that the amounts are not payable. On the contrary, the

defendant had admitted that they owe the amount as claimed by the plaintiff.

The 3rd paragraph from the end of the letter reads as under :-

In view of the above, we are not dealing with your letter paragraph-wise. We confirm the amounts received by us from your client. We again reiterate that our intentions still remain the same. Once our financial position improves, we will pay the amount received from your client with reworked returns as per mutual understanding at the appropriate time of settlement.

In the entire letter, the defendant has only explained the difficulties they are facing.

6 It is the case of the plaintiff that the letter dated 20th November 2012 where the defendant admitted its liability amounts to a contract and hence a summary suit is maintainable and is praying for a summary decree.

7 In the affidavit in reply, the defendant has raised various defences apart from general denial. The defences are as under :-

(a) The plaintiff is guilty of suppression as the plaintiff did not disclose receipt of letter dated 25th September 2015 which was sent in response to the plaintiff's advocates' notice dated 15th July 2015;

(b) The defendant offered alternate premises to the plaintiff which was accepted by him and it was mutually agreed that the amounts lying with the defendant would be

treated as financial transaction and the returns on the same has to be reworked mutually and practically.

(c) The plaintiff had granted a loan to the defendant. However, the plaintiff, being an individual, requested that the said loan be shown as investment in any of the projects of the defendant which was to be repaid on mutually agreed terms.

(d) The summary suit is not maintainable because the letter dated 20th November 2012 cannot be called a written contract.

8 In my view, all the defences raised by the defendant are after-thought, bogus and moonshine.

As regards the first defence of suppression, it is true that the letter dated 25th September 2015 is not referred to in the plaint. Shri Bhandary, counsel for the plaintiff stated that it was due to oversight since this letter is referred to in the petition that the plaintiff has filed against the company under Section 434 of the Companies Act, 1956.

I also see no reason why this letter may be suppressed because in the paragraphs as quoted above, the defendant has acknowledged its liability to the plaintiff. Therefore, I would proceed on the basis that it was just due to oversight and not a deliberate suppression.

9 As regards, the second defence, the defendant, it does appear, had offered another property as could be seen from the letter dated 20th November 2012. The plaintiff had rejected the proposal. The proposal also was to have come into effect only if the plaintiff had signed a confirmation by accepting the proposal in the letter dated 20th November 2012. The plaintiff has not signed. In fact, the defendant, in its email dated 1st October 2013, has admitted that they owe to the plaintiff Rs.7,75,00,000/- which is subsequent to the offer made by the defendant and also has given the schedule of repayment. Therefore, this stand of the defendant also is not acceptable.

10 As regards the 3rd defence, there is not even a shred of evidence filed by the defendant. Therefore, this defence also cannot be accepted.

11 As regards the last defence that there is no written contract, the counsel for defendant submitted that where the applicability of Order 37 of Code of Civil Procedure Code, 1908 is in question, the grant of leave to defend may be permissible. The counsel for the defendant relied on the judgments of :

(i) State of Bank of Hyderabad Vs. Rabo Bank ¹ ;

1 2015(6) Bom.C.R.517

(ii) SICOM Ltd. Vs. Prashant S. Tanna & Ors. ² and
(iii) Lalchand Jain Vs. Smt. Gheesi³.

12 It is settled position, where the accounts between the parties having been agreed and the defendant has agreed in writing the amounts payable to the plaintiff that itself would amount to a written contract for good consideration. Such an account stated gives cause to a contract in writing on a fresh cause of action, with an implied promise to pay (**Jyotsna K. Walia Vs. T.S. Parekh** ⁴).

The defendant, by its letter dated 20th November 2012, as quoted above, agreed to pay the balance amount of Rs.7,75,00,000/- with simple interest at the rate of 15% p.a. from the date of receipt of the same. This, I would consider to be a statement of account being given by the defendant to the plaintiff and this communication would amount to a written contract for good consideration. In addition to this, the plaintiff has also sent an email dated 1st October 2013, whereby the defendant has given details of the payment made by the plaintiff, what has been refunded, how much is repayable, about the defendant not keeping up its assurances and the installment in which the defendant would repay to the plaintiff. In my view, even this communication should be considered as an account statement

² AIR 2004 Bombay 186

³ AIR 1999 Rajasthan 69

⁴ 2007 (3) Bom. C.R.772

issued by the defendant to the plaintiff and should be considered as a written contract.

13 The defendant has not denied any of the documents, copies whereof are annexed to the plaint. I have no doubt that the defences of the defendant are bogus, misconceived and moonshine and the plaintiff should be entitled to a summary decree. Notwithstanding my conclusion above, I would still grant the defendant conditional leave to defend the suit.

14 The defendant have admitted that interest at the rate of 15% p.a. is payable. The plaintiff has given the calculations of the amounts in the plaint. The defendant has also been enjoying the plaintiff's money for almost five years. Therefore, the defendant to deposit a sum of Rs.10 crores with the Prothonotary and Senior Master, High Court Bombay within four weeks from today. If the defendant deposit this amount, the Prothonotary and Senior Master to invest the same in a fixed deposit with a nationalized bank for a period of one year and renew the same from year to year until the hearing and final disposal of the suit.

Should the defendant fails to deposit the amount, the suit be listed for directions on 19th July 2016.

15 The summons for judgement accordingly stands disposed.

(K.R. SHRIRAM, J.)