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

SUMMONS FOR JUDGMENT NO.23 OF 2016
IN
SUMMARY SUIT NO.536 OF 2014

Mr.Suresh Vallabhji Vora ….Plaintiff

V/s.

M/s.Aryan Cargo Express Pvt. Ltd. ....Defendant

Ms.Mamta Sadh i/by Sudhakar G.Lakhani for the plaintiff.

Mr.Harish Pawar & Mr.Vinod N.Naik for the defendant.

CORAM : K.R.SHRIRAM,J
DATE : 3.10.2016

P.C.:-

1 The plaintiff has filed the suit claiming a principal amount of Rs.66,00,000/- plus interest @ 18% p.a. from 1.6.2011 till date of filing of the suit. The plaintiff is claiming interest from 1.6.2011 because the defendant has paid interest upto 31.5.2011.

2 The plaintiff had given a loan of Rs.66,00,000/- to the defendant by remitting sum of Rs.26,00,000/- from his personal account and sum of Rs.40,00,000/- from his associated company's bank account. The defendant has received the amount of Rs.66,00,000/-. It is the case of the plaintiff that the defendant wanted this amount for 10 days as a short term loan and agreed to pay interest @ 18% p.a.

3 Towards repayment the defendant also issued a cheque of Rs.66,00,000/- dated 15.10.2010. This gives support to the plaintiffs' case that the loan was only for 10 days because the plaintiff paid amount of Rs.66,00,000/- on or about 5.10.2010.

4 The defendant has not denied that it received Rs.66,00,000/- or it has issued cheque of Rs.66,00,000/- towards repayment. The cheque when deposited was dis-honoured due to insufficient funds and the plaintiff has commenced action under Section 138 of the Negotiable Instruments Act 1881 which is still pending.

5 The defendant by its e-mail dated 27.5.2011, copy whereof is at Exhibit-D to the plaint, which again has not been denied by the defendant, informed the plaintiff that they were transferring the interest amount after deducting TDS on Rs.66,00,000/- @ 18% p.a. In the e-mail the defendant has calculated the annual interest to be Rs.11,88,000/- and for 239 days that is from 5.10.2010 upto 31.5.2011, @ 18% p.a. to be Rs.7,77,896/- and after deducting 10% TDS, the net amount payable worked out to be Rs.7,00,106/-. This amount has been paid over to the plaintiff. Despite repeated reminders, the defendant failed and neglected to pay the balance amount and hence the plaintiff filed the present suit.

6 The defendant has raised the following defences :-

(a) this Court has no jurisdiction because the defendant does not carry on business within the jurisdiction of this Court and only part of the cause of action arose and since the plaintiff has not obtained leave under clause XII of the letters patent, this suit is not maintainable ; (b) the claim in the suit is barred by limitation ; (c) plaintiff has not produced any document such as negotiable instruments entered into ; (d) plaintiff is a money lender and since the plaintiff does not have a license under the Money Lending Act, the suit is not maintainable ; and (e) only Rs.26,00,000/- was paid by the plaintiff whereas Rs.40,00,000/- came from the associated company of the plaintiff and as the plaintiff has not paid entire amount of Rs.66,00,000/- without giving details of the so-called associated company and as the associated company has not been joined as a party, the suit is bad for non-joinder of necessary parties.

7 As regards jurisdiction clause, the plaintiff has obtained leave under clause-12 on 13.6.2014.

8 As regards limitation, the defendant has acknowledged the liability by e-mail dated 27.5.2011 and by transferring the interest amount on 29.5.2011 whereas the suit has been lodged on

15.5.2014. Hence the suit filed is within limitation.

9 As regards non production of documents, the plaintiff has annexed e-mail dated 27.5.2011 to the plaint and has also filed a further affidavit annexing copies of the cheques issued by the defendant to the plaintiff in the sum of Rs.66,00,000/- towards repayment of the debt and also the bank advise returning the cheque due to insufficient funds. Therefore, this defence is also bogus.

10 Coming to the defence of Money Lending Act, it is settled that the fact that money was advanced on interest on one occasion will not bring the plaintiff within the mischief of the word money lender. The burden is on the defendant to establish that the person from whom he has taken the loan is engaged in the business of advancing loan and he has been carrying on business of money lending and there is a continuity therein. The person advancing the loan will not fall under the definition of money lender simply because one occasion he lent money. I find support from the judgment of the Rajasthan High Court in the matter of [1]***Mangu Singh Vs. Mehra Ram.*** This defence of the defendant also therefore, has to be dismissed.

11 Coming to the last defence that Rs.40 lakhs was paid by

1 AIR 2002 Rajasthan 231

the associated concern and that concern not having been joined as a plaintiff, the suit is bad for non-joinder, in my view, this defence also is moonshine and misconceived. Admittedly, the defendant has received Rs.66,00,000/- from the plaintiff. It may have been paid from different sources of the plaintiff but the defendant has also acknowledged its liability to the plaintiff by issuing a cheque of Rs.66,00,000/- in favour of the plaintiff which cheque got dis-honoured due to insufficient funds. The defendant has also paid interest @ 18% upto 31.5.2011 on the entire amount. The plaintiff has also in the further affidavit stated that as the defendant was in urgent need of money, he remitted Rs.26,00,000/- from his account and associated company remitted Rs.40,00,000/-. The defendant has not even denied any of these allegations. In the circumstances, even this defence raised by the defendant cannot be accepted.

12 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.*

1. (1976) 4 SCC 687

> *(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 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."*

13 Therefore, in my view, all the points raised by the defendant are nothing but moonshine and dishonest attempt to avoid payments.

14 Despite this, I am inclined to grant the defendant a chance to defend the suit provided the defendant deposits with the Prothonotary & Senior Master, High Court, Bombay, as a pre-condition for leave to defend a sum of Rs.1 crore. This amount is including the interest because the defendant in its e-mail has admitted that interest @ 18% p.a. will be payable. This amount to be

deposited within a period of six weeks from today with the Prothonotary & Senior Master and if this amount is deposited the Prothonotary & Senior Master to invest the same in a fixed deposit with any nationalized bank initially for a period of one year and extend the same from year to year until hearing and final disposal of the suit. Within a period of two weeks of depositing the amount, the defendant shall also file its written statement. Within one week thereafter, parties to file their respective affidavit of documents. After one week, complete inspection, discovery and exchange statement of admission and denial with reasons for denial.

Suit be listed after 12 weeks for issues.

14 If the defendant does not deposit the amount as stated above within the time mentioned above, on the Friday after the expiry of six weeks, the suit to be listed for directions/ex-parte decree.

(K.R.SHRIRAM,J)