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

SUMMONS FOR JUDGMENT NO.25 OF 2016
IN
SUMMARY SUIT NO.1044 OF 2015

Pnk Space Development Pvt. Ltd.)….Plaintiffs

V/s.

Dishti Realtors Pvt. Ltd.)....Defendants

Mr.Sanjay Jain a/w Mr.D.H.Mehta & Ms.Rima Paradkar i/by D.M.Legal Associates for plaintiffs.

Mr.Arif Bookwala, Senior Advocate a/w Mr.Rajesh Kachare & Mr.Ashish Ghadge i/by M/s.Tamhane & Co. for defendants.

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

P.C.:-

1 The plaintiffs and the defendants had entered into a joint venture agreement to jointly develop several pieces and parcel of lands belonging to defendants situated in Thane district. The plaintiffs paid a sum of Rs.22,65,00,000/- to the defendants as plaintiffs' share for the joint venture. The defendants have admitted this fact. For various reasons parties could not go ahead with the joint development agreement and therefore, parties mutually decided and agreed that the defendants would refund the amount of Rs.22,65,00,000/- to the plaintiffs. This was recorded by a

writing/letter/confirmation deed dated 19.10.2012 wherein the defendants while accepting and acknowledging having received amount of Rs.22,65,00,000/- from the plaintiffs towards deposit for intended joint venture, agreed and undertook to repay the entire amount of the plaintiffs at the earliest and also further recorded of having cancelled and terminated the said intended transaction. It was further agreed by the defendants that in the meanwhile, before the refund of Rs.22,65,00,000/- happens, if the defendants proceeded with the transaction of said plots of land in any manner whatsoever either by itself or through any other person, then in that case whatever amount the defendants received, the defendants shall pay all such amount received to the plaintiffs to first clear the entire payment of the plaintiffs. The said writing/letter/confirmation deed dated 19.10.2012 has been duly signed by the plaintiffs and also confirmed and acknowledged by the defendants.

2 The defendants also, year to year issued Accounts Confirmation in favour of the plaintiffs. These were issued for period 1.4.2011 to 31.3.2012, 1.4.2012 to 31.3.2013, 1.4.2013 to 31.3.2014 and 1.4.2014 to 31.3.2015. Even the balance-sheet and annual returns filed by the defendants confirmed that amount of Rs.22,65,00, 000/- is payable to the plaintiffs. As the defendants did not pay these amounts, the plaintiffs have filed the present suit.

3 The defendants raised the following defences :-

(a) The suit is barred by limitation ;

(b) The payment as agreed in the letter of 19.10.2012 was to be made only as and when the defendants either by itself or through any other person, undertakes the development of the said property and as and when money is received, the same will be fully paid to the plaintiffs. The defendants relied upon the following portion of the letter dated 19.10.2012 in support of this defence.

> *"In meanwhile if you proceed with the transaction of the said plots of land more particularly described in the schedule hereunder written in any manner whether by yourself or through any another person then in that case whatever amount/s you receive, you shall pay entirely the same to us till our aforesaid amount of Rs.22,65,00,000/- is fully paid back to us."*

According to the defendants therefore, the suit is pre-mature ;

(c) the accounts confirmation were issued because the plaintiffs required the same for income tax purpose and the matter relating to income tax raid by the plaintiffs by the income tax authorities ; and

(d) Letter dated 19.10.2012 is an agreement and as it is not stamped, it is inadmissible in evidence and cannot be acted upon.

4 It should be noted at the outset that the defendants have not denied Rs.22,65,00,000/- was payable to the plaintiffs. But relying

upon the para quoted above, the defendants state that it is payable only in the event of development of the property either by defendants itself or through any other person if proceeded with and on receiving the amounts on the development of the property.

5 On the issue of limitation, Mr.Bookwala stated that he is not pressing the issue of limitation. At the same time claim in the suit, in any view, is not barred by limitation.

6 As regards the second ground that the suit was pre-mature, in my view the same is nothing but hog wash. The letter clearly states that the amount shall be refunded at the earliest and in the meanwhile, if the defendants proceed with the transaction of the plots of land with any 3rd party then whatever amount is received from the 3rd party shall be paid over to the plaintiffs to discharge the defendants' liability of Rs.22,65,00,000/-. It is only a supposition and that does not mean that the defendants can take forever to make the payment to the plaintiffs. It is also stated in the affidavit in reply in paragraph-4 that the defendants agreed to, without prejudice, refund amount of Rs.22,65,00,000/-. Neither the letter dated 19.10.2012 nor any other document indicates that the agreement to refund was without prejudice.

7 As regards the issuance of confirmation of accounts that it was given, at the request of the plaintiffs due to income tax raid on the plaintiffs, again these are nothing but after thoughts. If what the defendants stated has to be accepted then there is no need to mention this amount of Rs.22,65,00,000/- in all its balance-sheet as liability to the plaintiffs.

8 As regards the defence of letter dated 19.10.2012, Shri Bookwala the counsel for the defendant submitted that the agreement has not been stamped under Section 35 of the Stamp Act and hence, the document is inadmissible in evidence and cannot be acted upon. The counsel submitted that if the document suffers from any defects such as want of requisite stamp, evidence will have to be led on original consideration and in that case it ceases to be a summary suit. The counsel submitted that in the present case the document which is termed as settlement agreement attracts a stamp duty and having regard to section 34 of the Maharashtra Stamp Act 1958, the Court cannot act upon the same and on this ground alone, leave has to be granted. The counsel relied upon the judgment of this Court in the matter of [1]***Kishore Bajaj Vs. Dorab Cawasji Warden and others.***

1 1989 (1) Bom.C.R.99

The Stamp Act is a fiscal measure enacted with an object to secure revenue for the State on certain classes of instruments and it is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of initial defect in the instrument. I find support in [2]***Hindustan Steel Limited Vs. Messrs Dilip Construction (Company),*** [3]***Neolite Polymer Industries Pvt. Ltd. Vs. Standard Chartered Bank & Ors.*** ***and*** [4]***Wolstenholme International Ltd. Vs. Twin Stars Industrial Corporation & Ors.***

In my view, if the document is impounded and sent for adjudication, the technical defect alleged by the defendant has been taken care of. In view of the observations in these 3 judgments and in other judgments referred to in those judgments, the defendant cannot be given unconditional leave on such technicality.

2 1969(1) SCC 597
3 2007(6) Bom.C.R.539
4 2001(4) Bom.C.R.114

9 Paragraph-3 of the judgment of the Apex court in [5]***Raj Duggal V/s. Ramesh Kumar Bansal*** reads as under :-

> *"Leave is declined where the court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he was a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency."*

Therefore, leave to defend has to be granted only if there is a triable issue in the sense that there is a fair dispute to be tried on which the claim is based on uncertainty as to the amount actually due or where the alleged facts are of such a nature as to be entitled to the defendant to interrogate plaintiff or to cross-examine his witnesses. In this case in my view, no triable issue has been raised. There is no uncertainty on the amount involved. The debit note and the

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5 1991 Supp (1) SCC 191

settlement agreement are both rather clear as to why the amount is payable and what happens if there has been a 4th consecutive default. It only means that the defendant does not get installments to repay the amount and the plaintiff will proceed with his complaint filed under Negotiable Instruments Act. It is to be noted that between the date of the agreement and sometime in September-2014 the plaintiff did not even prosecute the complaint that they have field under Negotiable Instruments Act.

10 Having taken into consideration the entire facts and circumstances of the case, in my opinion, grant of leave to defend would hereby enable the defendant to prolong the litigation by raising untenable and frivolous defences. The defences raised as of now are all illusory, sham and practically moonshine. Though the plaintiff should be entitled to a judgment, I would still grant leave to defend to the defendant by protecting the plaintiff. The protection is that the defendant has to deposit with the Prothonotary & Senior Master, High Court, Bombay, a sum of Rs.22,65,00,000/- within six weeks from today. Once the amount is deposited, the Prothonotary & Senior Master, shall invest the same in the fixed deposit with a nationalized bank for a period of one year, to be renewed year to year, until hearing and final disposal of the suit.

Within two weeks of deposit of this amount the defendant to file written statement and serve copy thereof upon the plaintiff.

Within two weeks thereafter the parties to file their respective affidavit of documents and also complete discovery and inspection of the documents relied upon by each other and file statement of admission and denial with reasons for denial.

Suit in such a case to be listed for issues on 19.12.2016.

11 If the defendants do not deposit the amount, the suit be placed for directions on the first Friday after the expiry of six weeks period.

Summons for Judgment accordingly disposed.

12 The plaintiff has tendered the original of the settlement letter dated 19.10.2012. This document is hereby impounded. The Prothonotary and Senior Master is directed to forward this document to the Superintendent of Stamps/Collector of Stamps, Mumbai for adjudication. Copy of the forwarding letter to be sent to the Advocate for the plaintiff and the defendant. The Superintendent of Stamps/Collector of Stamps, Mumbai is directed to adjudicate within four weeks from receiving the document from the Prothonotary & Senior master, High Court, Bombay. Once adjudicated, the order be communicated to the Prothonotary & Senior Master with a copy to the Advocate of the plaintiff and the defendant.

The plaintiff to pay the amount of stamp duty including penalty etc. i.e., adjudicated amount within four weeks of receiving a copy of the order. If the plaintiff is aggrieved by any such adjudication order, the plaintiff will be entitled to challenge the adjudication in accordance with Law.

(K.R.SHRIRAM,J)