

**SUMMONS FOR JUDGMENT NO.38 OF 2016
IN
SUMMARY SUIT NO.10 OF 2016**

V/s.

Augustine Pascal Fernandes & Anr.Defendants

Mr.Venkatesh Dhond, Senior Advocate @ Ms.M.D'souza i/by
M/s.A.S.Dayal & Associates for plaintiff.

Mr.Sachin H.Kankal for defendant nos.1 & 2.

CORAM : K.R.SHRIRAM,J

DATE : 3.10.2016

P.C.:-

1 The defendant no.1 was an employee of the plaintiff from 1992. Sometime in the October-2012, it is alleged in the plaint, the plaintiff came to know that defendant no.1 who was General Manager (Finance), a senior and responsible position in the company, was misappropriating funds belonging to the company. When it was found that the defendant no.1 has misappropriated funds based on fabricated vouchers, with forged signatures, plaintiff questioned defendant no.1, at which time defendant no.1 admitted that he had misappropriated monies to the tune of Rs.3,42,56,038/- from the plaintiff-company. It is stated that the defendant no.1 assured the plaintiff that he would return the said sum after consulting with defendant no.2 who is the wife of defendant no.1. The plaintiff has

annexed a copy of an affidavit dated 4.12.2012 sworn by defendant no.1 wherein the defendant no.1, as it appears, has admitted that he had misused his position in the company and defalcated a sum of Rs.3,42,56,038/- over several years. In the affidavit defendant no.1 has also undertaken to hand over and transfer to the company some of his assets which were standing in his name, wife's name, singly or jointly so that the plaintiff can recover the amounts defalcated by defendant no.1. The defendant no.1 also handed over 5 blank cheques without writing the amount or the dates because it was also stated in the affidavit that if there is a short fall after disposing of the assets belonging to the defendant no.1 or defendant no.2 or the defendant no.1 and/or defendant no.2 failed to execute irrevocable power of attorney in favour of the plaintiff, the plaintiff could fill the deficit amount and the date and encash the cheques.

2 Thereafter, by letter dated 4.12.2012, the defendant no.1 forwarded to the plaintiff documents relating to six properties mentioned therein. The defendants also issued a joint power of attorney dated 10.12.2012 in favour of 3 persons viz. (1) Balasaheb Sampatrao Bongane (2) Yuvraj Rajendra Sakhare & (3) Yazdi Naushir Ghista, all employees of the plaintiff authorizing them to jointly or severally deal with the said 6 properties. It is the case of the plaintiff that 3 of the properties were sold by the plaintiff and 3

properties were transferred in the name of the plaintiff because they were unable to find buyers/fetch suitable price. The plaintiff has got those 3 properties transferred in their name at the market value as on those dates. It is the case of the plaintiff that taking into consideration the 3 properties sold and the market value of those 3 properties which were transferred in the name of the plaintiff, there was a deficit of Rs.1,26,38,000/-. The plaintiff has filled up this amount in one of the cheque and the cheque was dishonoured for want of insufficient funds. Plaintiff has therefore approached this court seeking a summary decree for this amount of Rs.1,26,38,000/-. Shri Dhond submitted that the affidavit dated 4.12.2012 read with Power of Attorney dated 10.12.2012 should be treated as a contract between the plaintiff and defendant no.1.

3 It is the case of the defendants that defendant no.1 was coerced into giving an affidavit dated 4.12.2012 by the plaintiff. The defendants have also denied that any amount was payable to the plaintiff. The defendants have also alleged that the defendant no.1 was only an employee and he was made to sign the affidavit and issue Power of Attorney under duress. The defendants have also stated that at no stage the plaintiff informed the defendants that there was a short fall of Rs.1,26,38,000/- and therefore, question of acknowledging or admitting any liability does not arise.

4 I do not find any document annexed to the plaint or in the rejoinder where the defendants are supposed to have admitted that there has been a short fall of Rs.1,26,38,000/- or that the plaintiff could fill up the said amount in one of the cheques. On this point alone, I hold that there is no acknowledgement of debt entitling the plaintiff to summary decree. Moreover, whether the affidavit dated 4.12.2012 and Power of Attorney dated 10.12.2012 were issued under duress or whether they would constitute an agreement itself is another triable issue. As regards defendant no.2, there is no writing except the Power of Attorney.

5 In the circumstances, unconditional leave to defend is granted. Summons for Judgment disposed accordingly.

6 It is further ordered as under :-

- (a) Defendants to file written statement within a period of 4 weeks ;
- (b) Within two weeks thereafter parties to file their respective affidavit of documents and complete discovery and inspection ;
- (c) Within one week thereafter parties to exchange their statement of admission and denial with reasons for denial ;
- (d) Suit be listed on 5.12.2016 for issues.

(K.R.SHRIRAM,J)