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

SUMMONS FOR JUDGEMENT NO. 38 OF 2015
IN
SUMMARY SUIT NO. 168 OF 2014

M/s. Manohar Manak Alloys Pvt. Ltd. .. Plaintiff
Vs.
Swarup Group of Industries
A Proprietary Firm through Sole Proprietor .. Defendant

Mr.Sean Wassoodew for plaintiff in both suits.
Ms.Armin Wandrewala i/b DAS Associates for defendant in both suits.

CORAM : K.R.SHRIRAM, J.
DATE : 3RD MAY, 2016

P.C.

1 The plaintiff has filed this summary suit on the basis of a Written Contract in the form of a Memorandum of Understanding (MOU) dated 12th December 2011 and a dishonoured cheque dated 6th July 2013. The MOU dated 12th December 2011 was entered into between the plaintiff, five others and the defendant. The defendant, to discharge all his liabilities to the plaintiff, agreed to transfer his rights, title and interest in respect of immovable properties mentioned in the Schedule to the MOU in favour of the plaintiff and in favour of Movies N. More India Pvt. Ltd. (MMIPL) who is the plaintiff in Summary Suit No.168 of 2014. It was also agreed between the parties that the four other (excluding the plaintiff, MMIPL & the defendant) parties to the MOU relinquished/waived/transferred/gave up all

their rights in favour of the plaintiff and MMIPL, which the defendant accepted. It was also agreed under the MOU that within three months if the property was not transferred in favour of the plaintiff and MMIPL then the defendant would pay a sum of Rs.25 crores to the plaintiff and Rs.20 crores to MMIPL. As stated in the MOU, the defendants also issued a cheque for Rs.25 crores to the plaintiff and Rs.20 crores to MMIPL. Since the plaintiff had filed proceedings under Section 138 of the Negotiable Instruments Act, 1881 at 14th Court, Metropolitan Magistrate, Girgaum against the defendant it was also agreed in the MOU that the plaintiff and other party to the MOU will withdraw all those cases upon transferring the scheduled properties. It is necessary to note that, admittedly, the parties filed before the Metropolitan Magistrate, an application for taking up the complaints before the Lok Adalat as the matter was settled between the parties. A copy of the MOU was also annexed to the said application. A Compromise Memo was also filed before the Metropolitan Magistrates' Court in those proceedings pending.

2 The defendant did not transfer the properties within the agreed three month period. The defendant, therefore, it is alleged in the plaint, addressed a letter dated 21st June 2013 to the plaintiff that the plaintiff could go ahead and deposit the cheque for Rs.25 crores.

The said letter reads as under :-

> *"Ref. : MOU dated : 12.12.2011*
>
> *Sub : Deposit of Cheque no.000225, for Rs.25,00,00,000/- and Cheque no.: 000224 for Rs.20,00,00,000/-*
>
> *Dear Sir,*
>
> *You can deposit the above referred two cheques for encashment on any date in 2nd week of July 2013. I have already arranged sufficient funds in 2nd week of July 2013. I have already arranged sufficient funds in my account to clear the cheques. I am also sorry for delay in payments and thanks for bearing with me."*

3 When the cheque was presented on 10th July 2013, the same was dishonoured with an endorsement *'Account blocked'*. The plaintiff, therefore, issued a notice dated 20th July 2013 as required under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881. The defendant did not even reply to the said notice. According to the plaintiff, the amount of Rs.25 crores is a crystallized sum and therefore, entitled to a summary decree.

4 In the affidavit in reply, for the first time, the defendant had raised various defences. According to the defendant the defences are :

> (a) that the plaintiff cannot file summary suit upon the same cause of action since there is another summary suit under the same MOU filed by another party.

Ms.Wandrewalla, counsel for the defendant, in fairness, submitted that she is not pressing this defence.

(b) As the plaint was lodged on 30th October 2013 and there has been a delay of almost two years in taking out this summons for judgement, hence , the defendant is entitled to unconditional leave to defend.

(c) As the plaintiff had “allegedly invested” certain amounts in the defendant's business and the plaintiff was entitled to a “return on his investment”. Therefore, return of investment is purely speculative and therefore cannot fall within the ambit and/or purview of Order XXXVII of CPC.

(d) There has been suppression and the plaintiff has not come out with clean hands.

(e) The plaintiff has forwarded “confirmation of accounts” for the period between 1st April 2010 until 31st March 2014 whether the amount claimed is only Rs.13,11,12,479/- whereas the plaintiff is claiming Rs.25 crores in this suit. In view of this discrepancy alone, unconditional leave has to be granted.

(f) As criminal complaints under Section 138 of the Negotiable Instruments Act in respect of the alleged dispute has been filed, this suit is not maintainable.

(g) The MOU entered into by coercion. The letter agreeing for deposit of the cheques was not written by the defendant but the plaintiff took blank signed letter heads from the defendant and the plaintiff had filled in the details.

No submissions were made on these two points by the counsel for the defendant.

5 Though these various defences have been taken in the affidavit in reply, the counsel for the defendant made submissions only on the following three points :

(a) Delay in taking out the summons for judgement;

(b) The summary suit is not maintainable as there are discrepancies and inconsistencies in confirmation of accounts;

(c) As per the plaintiff's own case, it was an investment which has its own inherent amount of risk and it was more like a gamble and speculative.

6 As regards the delay in taking out the summons for judgement, this Court has already condoned the delay by its order dated 18th June 2015 and, therefore, it is, in my view, a non-issue. In any event, in view of the judgement in ***Bankay Bihari Agrawal & Ors. Vs. Bhagwanji Meghji &***

Ors.* [1]*, that cannot be the only ground for granting unconditional leave. As held in the judgement of the Division Bench, a delay in taking out the summons for judgement beyond the period of six months as prescribed by Rule 227 of the Bombay High Court (OS) Rules does not automatically entitle the defendant to grant of unconditional leave to defend the suit; but it is a relevant factor to be considered in conjunction with the nature of the defence while granting conditional or unconditional leave to defend the suit or refusing the application for leave to defend.

7 As regards the discrepancy in confirmation of accounts and that the original amount claimed was an investment can be taken up together.

It is true that the plaintiff had invested a sum of Rs.14 crores with the defendant from time to time and the defendant had promised to give a fixed return on investment to the plaintiff. The defendant had issued cheques towards discharge of his liabilities under the various MOUs entered into for the amount of Rs.14 crores. All those cheques were dishonoured and the plaintiff had filed proceedings under the Negotiable Instruments Act, 1881. As the defendant was unable to repay the amounts, the parties entered into the MOU dated 12th December 2011 based on which the present suit has been filed. If it was a case where the plaintiff has filed a suit to recover

1 2001 (2) Bom.C.R.86

Rs.14 crores because, according to the plaintiff, it was an investment made on the basis of returns assured by the defendant, one could have accepted the submissions made by the counsel for the defendant that it was an investment with inherent risk, speculative or it was more like a gamble etc. But here is the case whether the plaintiff and the defendant had entered into an MOU whereby the defendant agreed to transfer his properties mentioned in the Schedule to the MOU within three months to discharge all his debts to the plaintiff and it was also agreed that within three months' period, if the transfer does not take place, the defendant would pay Rs.25 crores to the plaintiff. Therefore, the claim in the suit is not for return of the amount originally invested, but is for an amount of Rs.25 crores which the defendant acknowledged was payable by the defendant to the plaintiff. Therefore, I cannot accept the submissions of the counsel for the defendant that it was relating to the investment with inherent risk or that it was moreover like a gamble.

8 On the confirmation of accounts, the defendant has filed copies of the confirmation of accounts sent by the plaintiff for the period between 1st April 2010 to 31st March 2014 wherein the plaintiff had asked the defendant for confirmation that an amount of Rs.13,11,12,479/- was payable.

9 In the affidavit in rejoinder in paragraph 11, the plaintiff has attempted to explain the confirmation of accounts. According to the plaintiff, the confirmation was with respect to the principal amount invested by the plaintiff and does not take into account the interest, profit, loss and damages which would be accounted only on receipt of amounts from the defendant.

10 According to the plaintiff, the amount of Rs.25 crores factored in all those heads and if the confirmation of accounts had been sent for Rs.25 crores, without actually having received the amount, the plaintiff would be required to pay tax on the difference between Rs.25 crores and the principal amount without having received the same.

11 It is to be noted that the defendant has not disputed that the MOU was signed by the defendant or that he had issued the cheque for Rs.25 crores. But has stated that it was taken under coercion.

It is difficult to believe the defendant because the defendant has signed the application before the Metropolitan Magistrate for taking the matter before the Lok Adalat for settlement. The defendant has also signed a Compromise Memo before the Metropolitan Magistrate, 14th Court, Girgaum. Therefore, the defendant has made a false statement in the affidavit that he was coerced into signing the MOU. The defendant has also issued a letter dated 21st June 2013 asking the plaintiff to deposit the cheque for Rs.25 crores. In the affidavit in reply, it is stated that the defendant had given signature on blank letter heads to the plaintiff but when the advocate's notice after the cheque was dishonoured was issued, the defendant has not even sent a reply stating that they had never issued such a letter.

In fact, in the notice, it is also mentioned that the defendant asked the plaintiff to deposit the cheque in the 2nd week of July 2013 but the defendant has not denied the same. It is also pertinent to note that nowhere in the affidavits filed by the defendant has the defendant denied that any amount is due and payable to the plaintiff. The defences raised are all bogus and dishonest.

12 To sum up there is an MOU, admittedly, signed by the defendant agreeing to transfer certain properties, failing which, he would pay Rs.25 crores to the plaintiff. There is also the cheque for Rs.25 croes. In the MOU there is an acknowledgement of debt to the plaintiff. Admittedly, the properties were not transferred and the cheque for Rs.25 crores when deposited, has been dishonoured. On the other hand, the confirmation of accounts, which the plaintiff has sent, the plaintiff has asked the defendant to confirm a sum of Rs.13,11,12,479/- is payable to the plaintiff. At the

same time, the defendant does not deny that the amounts are payable to the plaintiff.

13 In my view, therefore, the interest of justice would be served if the defendant is granted leave to defend subject to the defendant depositing with the Prothonotary and Senior Master, High Court, Bombay a sum of Rs.13 crores within six weeks from today. If the defendant does not deposit this amount, the suit to be placed for directions on 27th June 2016.

If the defendant deposits this amount, then within two weeks thereafter, the defendant to file written statement and serve a copy thereof upon the plaintiff. Within two weeks thereafter, the parties to file their respective affidavits of documents together with compilation of documents and give inspection of the same to the other side. Within one week of taking inspection, parties to also exchange statements of admission and denial with reasons for denial. The suit to be, thereafter, listed on 25th July 2016 for issues.

14 The summons for judgement accordingly stands disposed.

(K.R. SHRIRAM, J.)