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

SUMMONS FOR JUDGMENT NO.69 OF 2015
IN
SUMMARY SUIT NO.281 OF 2015

Ashok Kumar Damani ….Plaintiff

V/s.

Kieon Developers Pvt. Ltd. ....Defendant

Mr.Simil Purohit a/w Mr.G.Shah a/w Mr.Manish Doshi i/by M/s.Vimadalal & Co. for plaintiff.

Mr.Piyush Shah a/w Mr.M.K.Tanna for defendants.

CORAM : K.R.SHRIRAM,J
DATE : 11.4.2016

P.C.:-

1 This suit was filed by the plaintiff for a summary judgment in the sum of Rs.1,07,54,435/-. This comprises of Rs.86,00,000/- towards principal and the balance towards interest @ 12% p.a.

2 It is the case of the plaintiff that the plaintiff by two separate cheques dated 6.10.2012 for Rs.50,00,000/- and cheque dated 10.1.2013 for Rs.56,00,000/- lent and advanced to the defendant as temporary loan amounts aggregating to Rs.1,06,00,000/-. It is stated that the defendant was to repay the

amount with interest @ 12% p.a. On 2.11.2012, the defendant repaid an amount of Rs.20,00,000/-. By a letter dated 13.5.2013, the defendant forwarded to the plaintiff four copies of ledger and requested the plaintiff to verify and return 2 copies with attestation. As per the defendant's statement of confirmation of account for the period 1.4.2012 and 31.3.2013 the defendant was to pay to the plaintiff sum of Rs.88,88,789/-. The confirmation of account is at Exhibit B1 to the plaint. This amount of Rs.88,88,789/- also included Rs.3,20,877/- as interest. The defendant paid sum of Rs.32,088/- as TDS which is also reflected in Forms 26-AS of the plaintiff under the provisions of Income Tax Act.

3 The plaintiff by their Advocate's letter dated 7.11.2014 informed the defendant that as on 31.3.2013 the plaintiff had to recover sum of Rs.88,88,789/- plus further interest @ 12% p.a. In reply, the defendant has only stated that the same will be contested at appropriate time before appropriate authority. They had not denied anywhere that this amount was received by the defendant or they even issued the confirmation of account to the plaintiff whereby defendant admitted that sum of Rs.88,88,787/- was payable by them. In the affidavit in reply to the Summons for Judgment taken out by

the plaintiff, the defendant has taken the following defences :-

(a) For the amount claimed, a summary suit is not maintainable ;

(b) The suit amount which is claimed is purely entry transaction and not genuine claim and there are triable issues involved in the matter ;

(c) Suit is bad for non joinder of proper and necessary parties as the plaintiff has not joined one Yashashree Construction Company as a party defendant and there is privity of contract arising between the parties which is suppressed ;

(d) The amount claimed in the suit was supposed to be adjusted for payments to be made by the plaintiff to Yashashree Construction Company for two flats being flat no.604 & flat no.704 in the building `Vishranti Co-operative Housing Society Ltd., Chembur, Mumbai-400 071 ;

(e) Business loan was given @ 12% p.a. and under the provisions of Money Lenders Act, plaintiff has to obtain permission.

4 Shri Piyush Shah for the defendant in fairness, stated that he is not pressing the last defence.

5 As regards defence-(a) i.e., summary suit is not maintainable, Mr.Shah submitted that there is no written agreement and for a claim on confirmation of account, summary suit is not maintainable. This defence is not acceptable since Full Bench of this court in the matter [1]***Jyotsna K. Valia Vs. T.S.Parekh & Co.*** in paragraph-29 has held as under :-

> *"In so far as the `settled account is concerned' it is no doubt true as noticed by the learned single Judge, that the various judgments adverted to, for holding that the summary suit would lie on a settled account, either of the Privy Council or of the Supreme Court did not arise from suits filed as summary suits. However, after the judgment of the Privy Council (Elvira L.Rodrigues) Siqueira (supra) which has been considered by the Supreme Court in Hiralal & Ors. (supra), a summary suit on a settled account, duly confirmed by the defendant is maintainable as it is an acknowledgement by the defendant in the ledger in which mutual accounts have been entered and the accounts settled between them. Such settling of accounts gives rise to a written contract on a fresh cause of action, with an implied promise to pay the amount settled. A summary suit would therefore lie on Settled accounts duly confirmed by the defendant. Issue (1) is answered accordingly."*

1 2007 (4) ALL MR 718

6 As regards the defence (b), (c) and (d) they are all interlinked and can be dealt with together. I find these defences are nothing but bald defences with no specifics. The onus is on the defendant to explain as to why it was entry transaction and not a genuine claim, which the defendant has failed to discharge. The defendant has also contradicted itself. We will see the contradiction when we deal with the next point of defence i.e., non joinder of Yashashree Construction Company as a party defendant and the so called adjustment of amounts in the building developed by Yashashree Construction company.

7 Though the defendant has produced copies of two allotment letters issued by Yashashree Construction company to the plaintiff both dated 6.10.2012 for allotment of flat nos.604 and 704 in Vishranti Co-operative Housing Society Ltd., Chembur, Mumbai-400 071, there is no document whatsoever produced by the defendant about the so called adjustment. If there was any such adjustment to be made, then the same is contradictory to the defence raised that it was a purely entry transaction.

The defendant claims to be a partner in Yashashree

construction company but again there is no evidence whatsoever. In the rejoinder the plaintiff has confirmed that he has received letter of allotment for the 2 flats from Yashashree Construction Company but has stated that they are totally independent transactions unrelated to the defendant. In paragraph-6 of the rejoinder the plaintiff has explained that for flat no.604 the agreed price was Rs.92,80,000/- of which the plaintiff has already paid on 6.10.2012 a sum of Rs.71,00,000/-. It is also stated that for flat no.704, the agreed consideration was Rs.90,20,000/- of which the plaintiff has paid a sum of Rs.67,27,000/-. The balance amount even if you add together does not tally with the confirmation of accounts given by the defendant.

Moreover, the letters of allotment from Yashashree construction company are dated 6.10.2012 whereas confirmation of accounts given by the defendant to the plaintiff is dated 1.4.2013 for the period 1.4.2012 to 31.3.2013. If we were to accept what the defendant was saying as correct and the amount payable was to be adjusted towards the amount payable to Yashashree Construction Company, the confirmation of accounts would have certainly reflected that. The confirmation of account has been issued more than 5 months after the letter of allotment was issued by Yashashree

Construction Company. Therefore, this defence of the defendant also cannot be accepted and I see no reason why Yashashree Construction Company should be made a party.

8 The Apex court in the matter of [2]***Mechelec Engineers & Manufacturers Vs. M/s.Basic Equipment Corporation*** has laid down the tests for considering whether defendant should be granted leave to defend or not and the same reads as under :-

> *"8. In Smt. Kiranmoyee Dassi & Anr. v. Dr. J. Chatterjee(1), Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 17 C.P.C. in the form of the following propositions (at p. 253):*
>
> *"(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.*
>
> *(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 infer- ence 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 judg- ment and the Defendant is entitled to leave to defend but in such a case the Court may in its discretion impose*

2 AIR 1977 SC 577

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 practi- cally 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 Plain- tiff 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 se- cured 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".

9 In my view, the defendant has not disclosed any facts entitling him to defend the suit. The defendant on his own has issued confirmation of account by which defendant agreed that a sum of Rs.86,00,000/- is payable towards principal and interest @ 12% p.a. is also payable. The defence involving Yashashree Construction company is also a bogus defence. In my view, the defendant has no defence and the defences raised by the defendant is sham, illusory and moonshine.

The counsel for the defendant submitted that in the Notice of Motion that the plaintiff had taken out in this summary suit to restrain the defendant from disposing of a particular property, the court has granted permission to the defendant to sell the property subject to defendant depositing sum of Rs.88,88,000/- and the court

cannot come in the way by disposing of this summons for judgment. That order was passed on 28.2.2015 almost 14 months ago. I even asked the defendant when the property will be sold and the money deposited but the counsel for the defendant was unable to give a specific date or time frame. I even asked the defendant whether they will be willing to deposit the amount today in the court or in a short period but the counsel on instructions from the representative of the defendant present in court stated it was not possible.

10 In the circumstances, as the confirmation of account has also not been denied by the defendant and the defendant has admitted that Rs.86,00,000/- towards principal was payable alongwith interest thereon at 12% p.a., the plaintiff is entitled to a summary decree as under :-

> *"That the Defendant is hereby ordered and decreed to pay to the plaintiff the amount of Rs.1,07,54,435/- (Rupees one crore seven lacs fifty four thousand four hundred thirty five only) in accordance with particulars of claim Exhibit "E" to the plaint together with further interest on the principal amount of Rs.86,00,000.00 at the rate of 12% per annum from the date of the suit till payment/realization and for cost of the suit at Rs.50,000/-."*

11 Be that as it may, I will still be inclined to give the defendant an opportunity to defend provided the defendant deposits sum of Rs.1,10,00,000/- with the Prothonotary and Senior Master of this Court. The claim in the suit is for Rs.1,07,54,435/- and the plaint was lodged on 30.3.2015. So factoring some interest from the date the suit was filed, I have arrived at the figure of Rs.1,10,00,000/-. Should the defendant deposit this amount within six weeks from today, the defendant will be able to defend the suit.

Summons for Judgment stands disposed accordingly.

12 Naturally, in view of the above order, it is clarified that the injunction granted on 15.2.2015 will continue till the end of six weeks period is over and the suit will stand disposed after this six weeks period if the defendant does not deposit as stated in para 11 above.

(K.R.SHRIRAM,J)

KJ