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

SUMMONS FOR JUDGMENT NO.85 OF 2015
IN
SUMMARY SUIT NO.879 OF 2015

Radhadevi Pradeep Sekhsaria ….Plaintiff

Vs.

Basantilal Banarasilal Pvt. Ltd. ….Defendant

Mr. Vivek Kantawala a/w. Mr. Amey Patil i/b. Vivek Kantawala & Co. for the plaintiff.
Mr. Sharan Jagtiani a/w. Mr. Nirav Shah and Ms. Prachi Garg i/b. DSK Legal for the defendant.

CORAM : K.R.SHRIRAM, J.
DATE : 21st NOVEMBER, 2016

P.C.

1 The plaintiff has filed this suit for a decree in the sum of Rs.2,01,70,574/- in which the principal amount is Rs.1,59,91,007/- plus interest at 18% p.a.

2 Mr. Kantawala in fairness and at the outset conceded that there is nothing on record to show that the plaintiff is entitled to 18% interest per annum but the balance confirmation on which reliance is placed to file this suit for summary decree mentions interest at 8% p.a. only.

3 The plaintiff is the daughter-in-law and one of the executor of the Will executed by one Bhagwatiprasad Makhanlal Sekhsaria (the

deceased) who died on 5th March, 2012. The Will dated 30th March, 2010 was lodged in this court and this court granted Probate on 30th August,2013 (the said Will).

4 It is the case of the plaintiff that the deceased had invested/undertaken/granted a loan to the defendant which was a verbal and oral loan to the extent of Rs.1,48,06,488/-. It is also stated that the defendant agreed to pay interest at the rate of 8% p.a. on the said loan amount which had accumulated to Rs.1,59,91,007/-. In the said Will the deceased has mentioned that the loan outstanding was Rs.1,44,18,442/- and the figure mentioned by the plaintiff in the plaint is based on the balance confirmation dated 8th April, 2014 issued by the defendant. Relying on this document Mr. Kantawala submitted that even though the loan was based on an oral agreement, by virtue of the judgment of the Full Bench of this court in ***Jyotsna K. Valia vs. T.S. Parekh & Co.***[1], the balance confirmation is an implied contract and should also be considered as a legal contract for the purpose of Order 37 of the Code of Civil Procedure and hence the suit under Order 37 is maintainable. Mr. Kantawala also submitted that based on this document alone the plaintiff is entitled to a summary decree. Mr. Kantawala added that if the court is not inclined to grant summary decree, should direct the defendant to deposit the amount

1. 2007 (4) MH LJ 517

claimed in the suit, i.e., Rs.1,59,91,007/- as a condition precedent for leave to defend. Mr. Kantawala submitted that by a letter dated 3rd December, 2014 the plaintiff had called upon the defendant to pay this amount of Rs.1,59,91,007/- to which there was no reply. This was followed by a notice through the plaintiff's advocates on 13th May, 2015 to which also there has been no reply. Mr. Kantawala further submitted that all the defences taken by the defendant are only after thoughts and should not be entertained by this court.

5 Mr. Jagtiani, counsel appearing for the defendant submitted that the balance confirmation on which reliance is placed by the plaintiff is not admission of liability but it is only a statement confirming the amount standing to the credit of each and every stakeholder at the end of a financial year. It was also submitted that the defendant company is a family owned company, where all the stakeholders of the defendant company are members of the Sekhsaria family/group companies controlled by Sekhsaria family. Mr. Jagtiani submitted that on or about 30th October, 1943 one Mr. Basantlalji G. Sekhsaria had started a partnership firm - M/s. Basantlal Banarsilal with the family members as its partners to carry on business of supplying raw cotton F.P. Bales to textile mills in India and export and import of raw cotton F.P. Bales. The constitution of the partnership firm was changed from time to time but at all times only lineal male descendants

of late Mr. Basantlalji G. Sekhsaria were made partners in the firm. By a Trust Deed dated 1st August, 1987, Makhanlal Sekhsaria Family Trust was formed which declared all the four sons of Mr. Makhanlal Sekhsaria which included the deceased as equal beneficiaries. By a Partnership Deed dated 18th August, 1987 Makhanlal Sekhsaria Family Trust was taken as partner with 50% holding in the partnership firm and the other 50% was held by two others, viz., Mr. Satyanarayan B. Sekhsaria and Mr. Narotam S. Sekhsaria equally. It is also stated in the affidavit in reply, that, since inception and more particularly after year 1987, members of the Sekhsaria family have entered into an oral family arrangement *inter alia* with respect to the manner in which their shareholding in the defendant company was to be dealt with. According to the family arrangement, all contributions made by, and the accretions (save and except amounts needed for meeting personal expenses and tax liabilities) to the account of the stakeholders of the defendant company have to be retained and ploughed back in the defendant company in order to meet with its working capital requirement. The defendant company would pay reasonable rate of interest, fixed every year depending on the prevailing rate. Mr. Jagtiani, on instructions stated that interest paid on the amount was ploughed back as working capital requirement at times went up to as much as 21% p.a. It was submitted that the holding of stake in the defendant company and the maintaining of deposit are inter-linked.

6 To a query posed by the court as to when would this amount become payable because the statement of account shows that it was a loan paid to the company, Mr. Jagtiani submitted and it is also stated in the affidavit in reply that if any branch of Sekhsaria family/stakeholder deciding to withdraw their share of money lying to his/her credit, they are required to sell their entire shareholding in the defendant company to an existing shareholder, at fair market value and this is to be done simultaneously at the time of receiving their credit balance in the defendant company. It is also submitted that in view of the family arrangement, the plaintiff is first required to offer her shares (held directly in her name as well as the beneficial interest held through the family trust) in the defendant company to the other existing stakeholders of the defendant company before the monies standing to the credit to the account of the deceased can be demanded as payable. Mr. Jagtiani also submitted that it was for that reason there is not even a whisper in the plaint as to how this amount of loan was given and in paragraph 2 of the plaint itself it is stated that the deceased "had invested/undertaken/granted a loan". Mr. Jagtiani submitted that it was, therefore, not as straight as what Mr. Kantawala has submitted that it was a loan that was given to the defendant company. Mr. Jagtiani also relied upon two instances which are

disclosed in the affidavit in reply where two members of the family relinquished and released all their beneficial interest in the Sekhsaria Family Trust, which is a 50% stakeholder in the defendant company in favour of the remaining beneficiaries. Documents in support of this submission are also annexed to the affidavit in reply.

7 In response Mr. Kantawala submitted that even these documents on which the defendant is relying upon to show the family arrangement and how the two family members exited the company mention that the amounts are shown as “loan”. It may be so. But I cannot brush aside the defence raised particularly because it is a family company of which plaintiff is a member. In such a case it is not unusual for members of a family to put in place checks and measures and preconditions. Moreover, the defendant is also correct in submitting that it is not a straight forward loan agreement. It is not the case of the plaintiff either, otherwise the plaintiff would not say “had invested/undertaken/granted a loan.” The plaint also says verbal/oral loan.

8 Indisputably there is an amount lying to the credit of the deceased and as per the said Will it will go to the beneficiaries under the said Will of which the plaintiff is an executor. At the same time, when does the amount become payable and how does it become payable, in my view, is something which requires to be decided in trial. The defendant has

raised very valid point to state that this amount will become payable only when certain preconditions are met.

9 The Apex Court in the matter of ***IDBI Trusteeship Services Limited vs. Hubtown Limited*** in civil appeal no.10860 of 2016 arising out of SLP (civil) no.31439 of 2015 (yet to be reported) dated 15th November, 2016 has in paragraph 18 held as under :

> "18. Accordingly, the principles stated in paragraph 8 of Mechelec's case will now stand superseded, given the amendment of O.XXXVII R.3, and the binding decision of four judges in Milkhiram's case, as follows:
>
> a. If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit;
>
> b. if the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend;
>
> c. even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant's good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security;
>
> d. if the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.
>
> e. if the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall

> be refused, and the plaintiff is entitled to judgment forthwith;
>
> f. if any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court."

10 In my view, the defendant has raised triable issue which can be termed as fair, reasonable and bonafide. In the circumstances, unconditional leave to defend is granted.

11 The summons for judgment accordingly stands dismissed.

12 On or before 23rd December, 2016 the defendant to file their written statement and serve a copy thereof upon the plaintiff.

On or before 13th January, 2017 parties to file their respective affidavit of documents.

On or before 27th January, 2017 parties to complete discovery and inspection.

On or before 1st February, 2017 parties to file and exchange their statement of admission and denial with reasons for denial.

13 The suit to be listed on 6th February, 2017 for issues.

14 Parties are also put to notice that if these directions are not strictly and meticulously complied with they will be put to strict terms.

(K.R. SHRIRAM, J.)