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

SUMMONS FOR JUDGMENT NO.88 OF 2015
IN
SUMMARY SUIT NO.754 OF 2015

Dr. Jagannath Ganesh Hegde ….Plaintiff

V/s.

M/s. In Depth Entertaining Arts Pvt. Ltd. & Ors. ....Defendants

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Mr. Firoz Colabawala a/w. Mr. Ajay Panicker and Ms. Megha Gawade i/b. Ajay Law Associates for the plaintiff.
Mr. K.H. Halai a/w. Mr. P. Ranjan i/b. Halai & Co. for the defendant no.2.
Mr. Yogesh B. Dandekar for the defendant no.3.

CORAM : K.R.SHRIRAM,J
DATE : 1st AUGUST, 2016

P.C.:-

1 This suit has been filed on the basis of promissory notes issued by the defendant no.2, cheques issued by the defendant no.2 and the memorandum of settlement dated 9th May, 2013 signed by the plaintiff and the defendant nos.2 and 3. The suit as against defendant no.1 has been withdrawn pursuant to order dated 7th June, 2016.

2 It is the case of the plaintiff that defendant no.3, who was a close friend of the plaintiff introduced defendant no.2 to the plaintiff at which time defendant no.2 informed the plaintiff that she was producing a movie by the name “Bandistan” for which defendant no.2 required some financial assistance of Rs.1 crore, which she would

return within two months. The plaintiff gave a sum of Rs.1 crore in cash to defendant no.2. The defendant no.2 executed a promissory note dated 14th August, 2012 in which defendant no.2 promised to pay back the amount of Rs.1 crore within the period of 60 days of executing the said promissory note. In the promissory note it is also mentioned that four blank cheques have been deposited with the plaintiff towards security for the amount of Rs.1 crores and the plaintiff was at liberty to deposit the said cheques at any time after the specific period for the amount not exceeding Rs.1 crore. Though four cheques have been mentioned in the promissory note, it appears that only two cheques of Rs.50 lacs were given to the plaintiff.

3 The defendant no.2 has not disputed that any promissory note was signed or that she has issued two cheques. Before these cheques could be encashed, defendant no.2 issued a fresh promissory note dated 26th December, 2012 in which defendant no.2 has once again confirmed having received a sum of Rs.1 crore from the plaintiff as a friendly loan for personal use before execution of the promissory note and promised to refund the said amount on or before 11th January, 2013. Alongwith the promissory note, the defendant no.2 has also issued two post dated cheques both dated 11th January,

2013 for Rs.50 lacs each. Both the cheques when presented for payment were dishonored with the endorsement “payments stopped by the drawer”. In the meanwhile, the defendant no.2 had issued three other cheques from a different bank account to the plaintiff for Rs.30 lacs, Rs.30 lacs and Rs.40 lacs. These cheques when they were deposited were also dishonored with the endorsement “payments stopped by the drawer”. After these cheques were issued, the defendant no.2 issued three other cheques, two of which were for Rs.30 lacs and one was for Rs.40 lacs. When these cheques were deposited, the cheques were dishonored with the endorsement “funds insufficient”. Thereafter, the plaintiff through his advocate caused a notice dated 22nd April, 2013 to be issued to defendant no.2, which notice was returned with the endorsement “left”. Therefore, towards repayment, the defendant no.2 issued cheques for Rs.1 crore, four times, twice Rs.50 lacs each and twice for Rs.30 lacs + Rs.30 lacs + Rs.40 lacs. The first two cheques of Rs.50 lacs were not deposited but the other cheques given on three occasions were dishonored when deposited.

4 Thereafter, the plaintiff, defendant no.2, defendant no.3 and the original defendant no.1 entered into a memorandum of

settlement dated 9th May, 2013, in which defendant nos.2 and 3 have admitted that a sum of Rs.1 crore was paid to defendant no.2, defendant no.2 promised to refund the entire amount on or before 25th March, 2013, the cheques given by defendant no.2 were dishonored due to stop payment instructions/funds insufficient and the fact of signing the two promissory notes.

5 As per the memorandum of settlement, the defendant no.2 agreed and undertook to pay an amount of Rs.1 crore in three installments, i.e., (a) Rs.30 lacs between 10th May, 2013 to 20th May, 2013, (b) Rs.30 lacs between 7th June, 2013 to 17th June, 2013 and (c) Rs.40 lacs between 28th June, 2013 to 8th July, 2013. It was also mentioned that in the event of defendant no.2 making a default in payment of the installments as aforesaid on or before the promised date, the defendant no.3 guaranteed to pay on behalf of defendant no.2 the said defaulted amount with interest at the rate of 21% p.a. from 14th August, 2012 till date of payment. It was also noted that defendant no.2 despite this guarantee shall continue to be liable alongwith defendant no.3 to pay the defaulted amount with interest. The parties also agreed that the plaintiff will be entitled to continue to prosecute the proceedings filed under Section 138 of the Negotiable

Instruments Act and those cases will be withdrawn only upon payment of the entire amount as per the said agreement.

6 Though parties to the agreement were mentioned to be plaintiff, original defendant no.1, defendant no.2, defendant no.3 and one Rajesh Ranjan, the said Rajesh Ranjan has not signed the memorandum of settlement and the counsel for the plaintiff stated that it was for that reason he is not made a party to the suit. The plaintiff has also filed complaint against defendant nos.2 and 3 with the police for offences punishable under Section 406, 420 read with Section 34 of the Indian Penal Code. The defendant nos.2 and 3 had separately applied for anticipatory bail in this court and the anticipatory bail application of both the defendant nos.2 and 3 was rejected. The defendant nos.2 and 3 were arrested and are now enlarged in bail. The orders passed while disposing the anticipatory bail application are relevant and are dealt with at a later stage in this order.

7 The defences taken by the defendant no.2 are as under :-

> "(a) the promissory note and cheques were given only as security documents for amounts given by the plaintiff to defendant no.3 and others for liasoning work for the plaintiff for various persons in Delhi for the plaintiff's own purpose of his posting.

I must add that except this bald averment, there is no explanation as to whom these amounts were paid and what was the meaning of “plaintiff's own purpose of his posting”.

(b) the amount of Rs.1 crore was given in cash and therefore, it is unaccounted and undeclared amount, plaintiff required some sort of security which was provided by defendant no.2 by executing the promissory notes and cheques at the request of defendant no.3;

(c) the source of Rs.1 crore for the plaintiff to hand over to the defendant no.2 has not been properly explained and therefore, leave to defend has to be granted; and

(d) the source of funds of plaintiff being illegal, the same cannot be recovered by way of the present suit.”

8 The defendant no.3 has raised the following defences :

“(a) the above suit is filed by the plaintiff on the basis of promissory note executed by the defendant nos.1 and 2 in favour of the plaintiff and the defendant no.3 had never executed any writing in favour of the plaintiff admitting the alleged claim of the plaintiff against defendant no.3;

(b) there is no privity of contract between the plaintiff and the defendant no.3;

(c) the suit is based on alleged promissory note dated 26th December,2012. The said promissory note is not executed by defendant no.3 in favour of the plaintiff;

(d) the alleged defendant no.3 never received any amount from the plaintiff against alleged promissory note;

(e) the alleged promissory note is executed by defendant no.2, in her individual capacity, whereas the defendant no.1 is Private Limited Company, which is separate and distinct entity. In the circumstances, the plaintiff has joined defendant no.1 unnecessarily as party defendant;

(f) the suit as filed by the plaintiff is bad in law for want of cause of action against defendant no.3;

(g) the plaintiff has not issued the alleged notice dated 22nd April, 2013 to defendant no.3 relied upon by plaintiff for cause of action against alleged claim of the plaintiff against defendant no.3;

(h) without prejudice to whatever stated herein above, the suit is barred by law of limitation;
(i) without prejudice to whatever stated herein above, the present suit shall be dismissed against defendant no.3 as contemplated in Order 7 Rule 11 (a) of Code of Civil Procedure, 1908; and

(j) without prejudice to whatever stated herein above, defendant no.3 had never executed any memorandum of settlement dated 9th May, 2013, thereby guarantee the alleged payment to the plaintiff as alleged."

9 During the hearing when I asked the counsel for the defendant no.3, if defendant no.3 is denying having signed the memorandum of settlement then, why did he admit signing the memorandum of settlement and that the amount was payable when his anticipatory bail application was heard. The counsel for the defendant no.3 stated that he has no instructions.

10 I should also add that Mr. Halai, counsel for the defendant no.2 stated that he was not pressing the defence of the plaintiff being

a money lender and he did not have license under the Money Lenders Act.

11 The counsel for the plaintiff relied on the following judgments :-

(1) Mr. Mohammed Iqbal vs. Mr. Mohammed Zahoor;[1]

(2) C.K. Antony vs. Mathai M. Paikeday[2];

(3) Krishna P. Morajkar vs. Joe Domnic Ferrao & Anr.[3];

(4) Rangappa vs. Sri Mohan[4];

(5) Lekh Raj Sharma vs. Yash Pal Gupta[5]; and

(6) Deelip Apte vs. Nilesh P. Salgaonkar[6]

12 The counsel for the defendant no.2 relied on the following judgments :-

(1) Surajmull Nargoremull vs. Triton Insurance Company Limited[7]; and

(2) Sanjay Mishra vs. Kanishka Kapoor @ Nikki & Anr.[8];

13 The only thing common in the judgments referred above is

1. ILR 2007 KAR 3614
2. 2014 SCC Online Ker. 10941
3. 2014 (2) Bom. C.R. (Cri.) 738
4. (2010) 11 SCC 441
5. 2015 SCC Online Del. 10074
6. 2006 SCC Online Bom. 664
7. MANU/PR/0044/1924
8. MANU/MH/1078/2009

that if the transaction between the parties was illegal, no court can come to the aid of the party in an illegal transaction. It is settled law that in such cases the loss must be allowed to lie whether it falls.

Was the transaction between the plaintiff and the defendants illegal, is the moot point that requires to be considered.

14 Admittedly, the plaintiff has given a crore of rupees in cash. Indeed it is a very large sum to be handed over in cash. Against payment of Rs.1 crore in cash, the plaintiff had accepted cheques from the defendant no.2. The defendant no.2 had also signed promissory notes. The defendant nos.2 and 3 had also entered into memorandum of settlement with the plaintiff. Therefore, it will not be possible for me to hold that the entire transaction was illegal.

15 The counsel for the defendant no.2 submitted that the plaintiff has not disclosed in his annual returns that he had lent a sum of Rs.1 crore to defendant no.2. The counsel further submitted that in the rejoinder what is stated is that the amount of Rs.1 crore was given to defendant no.2 through the plaintiff by three different companies and these companies also have not disclosed in their balance sheet that they had given this amount as loan to defendant no.2 or to the plaintiff. Mr. Halai, counsel for the defendant no.2 submitted that one

of the company was showing a loss and how could they hand over such a large sum in cash. All this in my view, are well said but the indisputable and admitted position is that the plaintiff has given this amount to defendant no.2. If the amounts were to be repaid in cash, I would have had no hesitation holding that the whole transaction was illegal.

16 Mr. Halai, counsel for the defendant no.2 submitted that the plaintiff has violated the provisions of Income Tax Act by paying in cash a sum of Rs.1 crore and under the provisions of Section 269 SS the plaintiff could not have given more than Rs.20,000/- in cash and therefore, it was in violation of law.

17 In my view, the Income Tax provisions do not state anywhere that there is a prohibition on recovering amounts not disclosed in the Income Tax Returns. I have not come across any provision nor did the counsel point out in the Income Tax Act, which makes an amount not shown in the Income Tax Returns unrecoverable. It ought to be seen that the moment the plaintiff seeks to recover through a cheque an amount advanced in cash it gets accounted for in the system and the revenue authorities can keep a

track of that and if necessary tax the plaintiff. I find support from the judgment of Delhi High Court in the matter of Lekh Raj Sharma vs. Yash Pal Gupta in this regard. Paragraph 21 of the said judgment reads as under :-

> “21. The finding that, as the amount of loan disbursed to the respondent was not shown in the balance sheet and ITR, the appellant could not be said to have proved its case beyond reasonable doubt, is also erroneous. In this regard, reference may be placed on the decisions of the Bombay High Court in:
> i) Deelip Apte vs. Nilesh P. Salgaonkar & Anr., 2006 (6) BomCR 653, wherein the Court observed:
>
> "The learned J.M.F.C. has also held against the complainant the fact that the complainant had not shown the amount advanced by him in his income tax returns. I do not think that every person who gives friendly loans does in all cases show such loans in their income tax returns more so if they are payable on demand after short time. The learned acquitting J.M.F.C. entirely lost sight of the several presumptions which the law has enacted in favour of the complainant."
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> ii) Mr. Krishna P. Morajkar vs. Mr. Joe Ferrao, 2013 CRIJ (NOC) 572 Bombay (Decided on 19.07.2013), wherein the Court observed:
>
> "The underlined observations do not disclose as to where can one find a prohibition on recovering amounts not disclosed in income tax returns. With utmost humility, I have to state that I have not come across any provision of Income Tax Act, which makes an amount not shown in the income tax returns unrecoverable. The entire scheme of the Income Tax Act is for ensuring that all amounts are accounted for. If some amounts Crl. L.P. 567/2014 Page 12 of 17 are not accounted for, the person would be visited with the penalty or at times even prosecution under the Income Tax Act, but it does not mean that the borrower can refuse to pay the amount which he has borrowed simply, because there is some infraction of the provisions of the Income Tax Act. Infraction of provisions of Income Tax Act would be a matter between the revenue and the defaulter and advantage thereof cannot be taken by the borrower. In my humble view, to say that an amount not disclosed in the income tax returns becomes irrecoverable would itself defeat the provisions of Section 138 of the Negotiable

Instruments Act. Apart from the purpose of this Act, which has been outlined by the learned Single Judge in Shri Deelip Apte (supra) as well as in Sanjay Mishra (supra), it ought to be seen that the moment a person seeks to recover through a cheque an amount advanced in cash it gets amounted for in the system and the revenue authorities can keep a track of that and if necessary tax the person. To brand an amount which is not shown in Income Tax Act as unaccounted money would be too farfetched and, therefore, I am in respectful disagreement with the observations in Sanjay Mishra (supra), which in fact amounts to reading an additional requirement in Section 138 of the Negotiable Instruments Act, and legislating that such amounts becomes irrecoverable. At the cost of repetition, for saying that an amount not disclosed in income tax returns cannot be legally recoverable liability, some provisions of law to that effect would have to be shown. Such provision was not noticed by me and even the learned Counsel for the respondent could not show any such provision to me."

18 I also find support in the judgment of this court in the matter of Krishna P. Morajkar vs. Joe Domnic Ferrao & Anr. Paragraph 31 of the said judgment reads as under :-

"31. Before I conclude, with all humility at my command, it has to be noted that even after noticing the object of enacting section 138 of Negotiable Instruments Act, namely to enhance the acceptability of cheques, Courts have been accepting virtually any argument advanced to nullify the liability created, like ignoring or misreading presumption under Section 139 of the Act, misreading provisions of sections 269-SS and 271-D of the Income Tax Act, unmindful of the consequence that unscrupulous individuals go on signing cheques irresponsibly. When a person signs a cheque and delivers it, even if it is a blank cheque or a post dated cheque, presumptions under sections 118(b) and 139 of the Negotiable Instruments Act would have to be raised and would have to be rebutted by the aced, albeit by raising a probability. <u>Unless the courts start discouraging flimsy defences, acceptability of cheques would not increase. The problem of unaccounted money would be reduced if transactions take place by cheque. Even a cash advance when repaid by cheque gests accounted. Making it unrecoverable, would only push the persons to extra judicial methods of recovery. The courts would thus not only be defeating the object of the provision but also indirectly be party to increase lawlessness</u>. This, in my humble view, cannot be allowed by

courts."

(emphasis supplied)

19 The defences raised by the defendants, in my view, are absolutely dishonest. The defendant nos.2 and 3 had filed anticipatory bail applications in this court. When the anticipatory bail application of defendant no.2 came up for hearing, it was recorded in the order as under :-

> *"……. The learned counsel for the applicant submits that the applicant is suffering from financial losses in her film project and still she is ready to return the money within six months. It is necessary for the applicant accused to show her bonafides by actually paying some amounts, then only this submission can be accepted……".*

20 After one week, i.e., on 24th January, 2014, when the anticipatory bail application was again heard, the counsel for the defendant no.2 submitted that the defendant no.2 and the plaintiff are ready to arrive at terms of settlement and time was sought. On 31st January, 2014 when the anticipatory bail application was finally rejected, even at that stage the defendant no.2 had admitted that the amounts were payable to the plaintiff and defendant no.2 is ready to return the amounts. Paragraph 4 of the order dated 31st January, 2014 reads as under :-

> *"4. The learned counsel for the applicant/accused has submitted that the applicant/accused has not committed any offence but it was a monetary transaction of civil nature and the applicant/accused is*

ready even today to return the amount."

21 In paragraph 6 of the said order it is noted "this shows that there was dishonest intention right from inception to cheat the complainant". In the affidavit in reply to the summons for judgment, these orders have been literally brushed aside by stating that the statements were made by the advocate in the interest of defendant no.2.

22 Similarly, when the anticipatory bail application of defendant no.3 came up for hearing on 9th June, 2015, 24th June, 2015, 1st July, 2015 and 15th July, 2015, the defendant no.3 also has admitted that the amounts were payable to the plaintiff and they were making efforts to reconcile the transactions. In the affidavit in reply the defendant no.3 has not given any explanation as to how and why these statements were made on behalf of the defendant no.3.

23 It is necessary to note that in the order dated 15th July, 2015 while disposing the anticipatory bail application of defendant no.3, in paragraph 7 the court has observed that only the defendant no.3 knew that the plaintiff had sold his bungalow and had sufficient funds and right from very inception there was an element of cheating

on the part of defendant no.2 and defendant no.3.

24 Considering these facts and circumstances of the case, I cannot come to a conclusion that the transaction between the plaintiff and the defendants was an illegal transaction. If the plaintiff has not disclosed these amounts in his Income Tax Returns, if the cheques given by defendant no.2 had been honored, the Income Tax Authorities would have asked the plaintiff to explain the source of that money and if necessary would have taxed the plaintiff.

25 The Apex Court in ***M/s. Mechelec Engineers & Manufactures vs. M/s. Basic Equipment Corporation***[9] in paragraph 8 has stated as under :-

> *"8. In* ***Smt. Kiranmoyee Dassi v. Dr. J. Chatterjee****, Das J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 17 CPC in the form of the following propositions :*
>
> *(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 inference that at the*

9. (1976) 4 SCC 687

> *trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose 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 practically 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 plaintiff 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 secured 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."*

26 In my view, the defendant no.2 having not denied the fact that the defendant no.2 had issued cheques for Rs.1 crore towards repayment of the amount of Rs.1 crore that the plaintiff had given, the defendant no.2 not having denied the promissory notes or the memorandum of settlement and the fact that the defendant nos.2 and 3 have admitted their liability when their anticipatory bail application was being heard by this court, the amount of Rs.1 crore with interest as mentioned in the memorandum of settlement, is payable to the plaintiff. The defences raised by the defendants are nothing but after thoughts. Once having admitted before this court, they cannot take a contrary view.

27 Admission is the best form of evidence and an admission

does not require any proof. The admission made by the defendant nos.2 and 3 as recorded in the orders passed by this court that they owed money to the plaintiff and they are trying to settle the claim with the plaintiff, is an admission of fact which requires no proof. The defendant nos.2 and 3 cannot take the defences which they have raised in their affidavit in reply.

28 At the same time, I would grant the defendant nos.2 and 3 a chance to defend the suit but subject to a condition that defendant nos.2 and 3 jointly or severally deposit a sum of Rs.1 crore with the Prothonotary and Senior Master, High Court, Bombay, within six weeks from today and the Prothonotary and Senior Master will invest the same in fixed deposit with a nationalised bank initially for a period of one year and renew it year to year until the hearing and final disposal of this suit.

If this amount is deposited, leave to defend to defendant nos.2 and 3 is granted. If this amount is deposited, then the defendant nos.2 and 3 to file their written statement within two weeks of depositing the said amount. Within one week thereafter, parties will file and exchange affidavit of documents and within one week thereafter complete discovery and inspection and file and exchange their statement of admission and denial with reasons for denial. The suit be listed for issues 12 weeks thereafter.

If the defendant nos.2 and 3 do not comply with the precondition for leave to defend, then the suit be listed for direction after the expiry of six weeks.

29 The summons for judgment accordingly stand disposed.

(K.R.SHRIRAM,J)