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

SUMMONS FOR JUDGMENT NO. 4 OF 2017
IN
COMMERCIAL SUIT NO. 220 OF 2016

Ram Mohan Saroj ...Applicant/Plaintiff
vs
Kartik Dhirubhai Daftari ...Defendant

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Mr K.T.Kukreja a/w Mr Mohan G. Salian i/b MGS Legal for the Plaintiff
Ms Shweta Sangtani a/w Mr O.A.Siddiqui i/b Kookada & Associates for the Defendant.

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CORAM : **B.P.COLABAWALLA, J.**
NOVEMBER 28, 2017.

P.C. :

This Summons for Judgment has been filed seeking a judgment against the Defendant in the sum of Rs.1,04,69,698/- together with further interest at the rate of 18 % per annum on the principal sum of Rs.80 Lacs from the date of the suit till payment and/or realization. The cause of action in the present suit is under a dishonoured cheque dated 15th January, 2015. At the outset I must mention that the issuance of this cheque by the Defendant has not been disputed before Me. What dispute has been raised is only under what circumstances the said cheque was issued.

2 The brief facts of this case are that the Plaintiff (being a proprietary concern of M/s Saroj Contractors & Engineers and who was *inter alia* engaged in the business of land development and construction activities) was approached by the Defendant in or about August 2012 and represented that the Defendant had negotiated with one of the beneficiaries of the Meghraj Trust Funds, namely, Mr Surendra Bhagwandas Jhunjhunwala ("Surendra") who was one of the trustees of the Meghraj Trust Funds and Narandas Trust Funds. It was represented to the Plaintiff that the said Surendra by and under a unregistered Deed of Assignment dated 18th August, 2011 agreed to sell, transfer, convey, assign and assure to the Defendant, all and whatsoever, his 33.33 % undivided share, right, title, claim and interest in the said Meghraj Trust Funds and consequently 16.66 % undivided share, right, title, claim and interest in the property jointly owned by the said trusts, namely, Land and Buildings known as Empress Mahal Building situate at Dadar

Matunga Estate, "F" Ward, Tilak Road, Dadar (East), Mumbai – 400 014 (hereinafter referred to as "the said property")

3 It is the further case of the Plaintiff that the Defendant represented to the Plaintiff that he had also negotiated with other seven beneficiaries for the purchase of their respective undivided shares in the said two trust funds and consequently the said beneficiaries have also agreed to sell, transfer, convey and assign their respective shares in the said property to the Defendant and/or their nominees. Considering that the Plaintiff was in the business of land development and construction activities, he accordingly decided and agreed to acquire the said property of the said trust funds by acquiring the undivided share, right, title and interest of the seven beneficiaries.

4 To facilitate this acquisition, the Defendant and the Plaintiff entered into a Memorandum of Understanding ("**MOU**") dated 22nd August, 2012. Under this MOU, the Plaintiff agreed to purchase and the Defendant agreed to sell to the Plaintiff the said shares of Surendra as well as the respective undivided

shares of said seven other beneficiaries on the terms and conditions mentioned therein for a total consideration of Rs.36.50 Crores. Pursuant to this MOU, from time to time, the Plaintiff towards the part payment of Rs.90 Lacs, the details of which are set out in paragraph 6 of the plaint. Thereafter, the Plaintiff also got issued public notices dated 29th November, 2012 and 17th December, 2012 in two newspapers inviting claims, if any, in respect of said property. It is the case of the Plaintiff that he also got prepared various documents such as MOUs and Deed of Assignment etc. to be executed between the said beneficiaries and the Plaintiff and also got ready the Demand Drafts of all seven beneficiaries towards part payment as agreed. However, according to the Plaintiff, the Defendant failed and neglected to have the said documents executed from the seven beneficiaries and complete the transaction as agreed.

5 Since, the Defendant was unable to complete the transaction, according to the Plaintiff, the Defendant issued to the Plaintiff for valuable consideration a cheque bearing No. 000147 dated 15th January, 2015 for Rs.80 Lacs drawn on the Bank of Baroda towards part repayment of Rs.90 Lacs and was

already given by the Plaintiff to the Defendant. This cheque was issued from the bank account of the proprietary concern of the Defendant, namely, Varsha Optics. When this cheque was presented for payment on 15th January, 2015, the same was dishonoured with the remarks "**Funds Insufficient".** The said dishonoured cheque was received by the Plaintiff on 21st January, 2015 along with his bank's memo dated 19th January, 2015. Since, this cheque was dishonoured, the Plaintiff issued a statutory notice under Section 138 of the Negotiable Instruments Act, 1881 dated 16th February, 2015 and thereafter filed a complaint before the Metropolitan Magistrates Court being Complaint No.CC/5900720 of 2015. This complaint was thereafter transferred to 3rd Metropolitan Magistrate at CBD Belapur, Konkan Bhavan and was renumbered as Complaint No.CC/10911 of 2015. This complaint is still pending. Since no payment was forthcoming from the Defendant, the Plaintiff was constrained to file the present suit.

6 After this suit was filed, the writ of summons was served upon the Defendant and the Defendant entered his appearance through their Advocate. It is thereafter that the

present Summons for Judgment was filed by the Plaintiff seeking a judgment against the Defendant in terms of the prayers set out therein.

7 To oppose the Summons for Judgment, the Defendant has filed his affidavit-in-reply dated 6th March, 2017 to which the Plaintiff has filed his rejoinder dated 24th July, 2017. The Defendant had also filed a sur-rejoinder dated 23rd November, 2017. It is on the basis of these pleadings that I have heard the parties at length.

8 In this factual drop, Mr Kukreja, learned counsel appearing on behalf of the Plaintiff submitted that there was no real dispute with reference to the claim in the present suit. He submitted that the cause of action in the present suit is based on a dishonoured cheque in the sum of Rs.80 Lacs. It was the submission of Mr Kukreja that there was no dispute with reference to either issuance of the said cheque or the signature thereon. The only explanation for issuing the said cheque was that the same was given only to accommodate the Plaintiff so that the Plaintiff would be able to raise money by showing the

cheque issued by the Defendant to other third parties. He submitted that this defence is completely moonshine and illusory and finds no basis on record and ought to be rejected outright.

9 Mr Kukreja also submitted that another defence raised by the Defendant was that the amount paid by the Plaintiff was forfeited by the Defendant as far back as on 1st March, 2013, as more particularly stated in the affidavit-in-reply. He submitted that this defence also is clearly an afterthought, considering the fact that not a single letter has been written informing the Plaintiff that the amounts paid by the Plaintiff to the Defendant have been forfeited. He submitted that this is the another factor which goes to show that this defence is clearly moonshine. For all the aforesaid reasons, he submitted that there was no merit in the defences raised in the affidavit-in-reply, and therefore, the Plaintiff was entitled to a judgment as prayed for or at the very least a conditional order directing the Defendant to deposit the amount claimed in the suit before the leave is granted to defend the suit.

10 On the other hand Ms Sangtani, learned counsel appearing on behalf of the Defendant submitted that the Defendant in this entire transaction was merely acting as a facilitator / broker, and therefore, was not liable for any amounts to the Plaintiff. She submitted that in any event, the cheque that was issued in favour of the Plaintiff was without any consideration since the said cheque was given only to accommodate the Plaintiff in order to allow the Plaintiff to raise the funds and the intention behind giving the said cheque was not for the purpose of repaying the alleged dues of the Plaintiff considering the fact that the said amount was already forfeited by the Defendant as far back as on 1st March, 2013. According to Ms Sangtani, this defence was raised at the very outset as is clear from page 155 of the affidavit-in-reply, which letter was sent to the Plaintiff and which was refused by him. In support of her defences, Ms Sangtani relied upon certain clauses of the MOU, namely, clauses 5, 8, 11, 12 and 17. For all the aforesaid reasons, Ms Sangtani submitted that the Defendant has a substantial defence to the present claim and is, therefore, entitled to unconditional leave to defend the suit. Though several other defences were raised in the affidavit-in-reply such

as the suit being not maintainable, the dispute in the present Summary Suit is not a commercial dispute or that the claim is barred by the Law of Limitation, have fairly not been pressed by Ms Sangtani before Me.

11 I have heard the learned counsel for parties at length and have perused the papers and proceedings in the present suit. As mentioned earlier, it is not in dispute that the cheque has been issued by the Defendant to the Plaintiff in the sum of Rs.80 Lacs. It is not the case of the Defendant that the Defendant was forced to issue the cheque. Be that as it may, the cheque admittedly has been issued by the Defendant to the Plaintiff. The only defence taken with reference to issuance of this cheque was that the same was issued in favour of the Plaintiff in order to enable the Plaintiff to be in a position to raise funds in his own name on the basis of issuance of the cheque issued by the Defendant. In other words it was the submission of Ms Sangtani that the cheque was issued without consideration, and therefore, there was no legal liability on the Defendant to pay the amount under the said cheque.

12 I find this defence to be moonshine and an illusory defence. It is a highly inconceivable story that the cheque was issued by the Defendant to the Plaintiff to enable the Plaintiff to raise the funds and the said cheque was never to be deposited. Even the letter that is relied upon by Ms Sangtani at page 155 of the affidavit-in-reply does not carry the case of the Defendant any further. Firstly, this letter is undated and has not been addressed to the Plaintiff. Even the envelope under which this letter has been sent, which according to the Defendant was refused, is not on the correct address of the Plaintiff. Looking to these facts, even if I was to hold that this defence is a plausible one, I am clearly of the view that it is highly improbable.

13 The next contention raised by Ms Sangtani was that the amount of Rs.90 Lacs paid by the Plaintiff to the Defendant was forfeited by the Defendant on 1st March, 2013, and therefore, there was no question of repaying the Plaintiff any of its dues.

14 As far as this defence is concerned, I am clearly of the view that the same has been raised only as an afterthought and

for the first time in the affidavit-in-reply. What is interesting to note is that there is not a single letter or any other correspondence that has been brought on record to even remotely suggest that the Defendant had forfeited the amount of Rs.90 Lacs as it sought to be contended in the affidavit-in-reply. Further more, it is even more surprising that the cheque of Rs.80 Lacs was issued much after the date of the so called forfeiture. This defence too, therefore, I am not inclined to accept as being one which raises a substantial defence or a triable issue which would entitle the Defendant to unconditional leave to defend the present suit.

15 As far as the clauses of the MOU relied upon by Ms Sangtani, namely, clauses 5, 8, 11, 12 and 17 are concerned, I find that the same does not in any way support the case of the Defendant. Clause 5 deals with rejection or acceptance of the title of the said property and stipulates that if the title is rejected by the Plaintiff he shall give 7 days' notice in writing to the Defendant and upon receipt of such notice the Defendant shall refund all the amounts that have been paid to it. This clause does not mean that the Defendant cannot refund the amount

merely because no notice has been given. It is specifically averred in the plaint that the present transaction was not going through between the Plaintiff and the Defendant and it was in these circumstances that the cheque of Rs.80 Lacs was issued for part refund of the amounts paid by the Plaintiff to the Defendant. I, therefore, find that the reliance placed on this clause does not carry case of the Defendant any further.

16 As far as clause 8 is concerned, the same only records that the Plaintiff shall enter into a separate MOU with the seven beneficiaries in respect of their respective shares into or upon the said two Trust Funds. This clause with nothing more would certainly not lead to any inference that the Defendant was acting as a facilitator/broker in the said transaction. What is important to note is that the entire consideration of Rs.36.50 Crores was to be paid to the Defendant as well as to the beneficiaries. The MOU does not even proceed on the basis that the Defendant was acting as a facilitator/broker to the entire transaction. In fact clause 3 of this MOU clearly records that the Defendant agrees to sell, transfer, give, assign and assure all and whatsoever the said share of Surendra i.e. 33.33 % undivided share, right, title, claim

and interest of the said Surendra into or upon the said Meghraj Trust Funds and consequential 16 % undivided share, right, title, claim and interest into or upon the said property. It further records that the Defendant has also agreed to sell the respective undivided share, right, title and interest of seven beneficiaries into or upon the said two Trust Funds and consequentially their respective undivided shares into or upon the said properties. This clause in fact clearly militates against the argument of Ms Sangtani that the Defendant was acting as a facilitator / broker to the transaction. In any event I find that this argument is wholly irrelevant considering that Rs.90 Lacs (out of which Rs.10 Lacs was paid in cash) was admittedly paid by the Plaintiff to the Defendant and the cause of action in the present suit is based on a cheque issued by the Defendant to the Plaintiff and which was dishonoured.

17 As far as clause 17 is concerned, it merely states that if there is breach or default of the terms and conditions of the MOU, the party aggrieved shall be entitled to the specific performance of the terms and conditions of the MOU. Ms Sangtani placed reliance on this clause to argue that the Plaintiff

was, therefore, not entitled to refund but was only entitled to the specific performance of the MOU, even assuming that the same was breached by the Defendant.

18 I find no substance in this argument whatsoever. Clause 17 only stipulates that the party aggrieved may sue for the specific performance if it so desires. This does not mean that the party cannot claim refund or would not be entitled to one. In fact in the facts of the present case, a cheque was issued by the Defendant to the Plaintiff which has been dishonoured, which at least *prima facie* would go to show that the Defendant himself was desirous of refunding of money to the Plaintiff since the transaction was not going through. This being the case the reliance placed on clause 17 also is wholly misplaced.

19 I must also mention that in the criminal case against the Defendant, the Defendant has made a categorical statement before that Court which reads thus:

> "Application on behalf of Accused to the Hon'ble Court.

Accused has paid cheque amount in the said case to original owner of the said premises and transaction of the said premises was held between the Complainant and Accused, which is terminated and for taking back the said amount from owner of the said premises. Accused has asked for two to three months time. Therefore, after receiving amount from the said original owner, for paying it to the Complainant, two to three months time may be granted.

It is prayed to the Hon'ble Court that:-

Two to three months time may be granted for paying the amount to Complainant after receiving it from original owner.

Dt.15/2/2017

Place: C.B.D. Accused.

20 This statement before the Criminal Court clearly goes to show that the Defendant is only seeking time to repay the dues of the Plaintiff which form the subject matter of the disputed cheque. This statement, to my mind, puts an end to all the defences raised by the Defendant especially with reference to forfeiture as well as the reason for which the cheque was given and which has been dealt with by me earlier in this order.

21 Looking to all these facts, I clearly find that even if I was to hold that the defences raised by the Defendant are plausible, the same are highly improbable and in view of the paragraph 17.4 of the decision of the Supreme Court in the case of **IDBI Trusteeship Services Ltd. v. Hubtown Ltd.**,[1] I would be justified in passing a conditional order of deposit before any leave is granted to the Defendant to defend the present suit.

22 In these circumstances, the following order is passed.

<u>O R D E R</u>

Conditional leave is granted to the Defendant to contest the suit subject to-

(i) The Defendant depositing in this Court a sum of Rs.1.04 Crores within a period of 12 weeks from today;

(ii) If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the Defendant shall file his Written Statement within a period of

1 2017(1) SCC 568

eight weeks from the date of deposit;

(iii) If this conditional order of deposit is not complied with within the stipulated period as mentioned earlier, the Plaintiff shall be entitled to apply for an ex-parte decree against the Defendant after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.

23 The Summons for Judgment is disposed of in the aforesaid terms. It has been brought to my notice that by an order dated 17th November, 2017, the Defendant was ordered to pay the costs of Rs.10,000/-. Those costs have been deposited in the office of the Prothonotary and Senior Master of this Court. It is ordered that the Plaintiff shall be entitled to withdraw this amount of costs of Rs.10,000/- from the office of the Prothonotary and Senior Master of this Court by making a separate application in that behalf.

(**B. P. COLABAWALLA, J.**)