IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL APPEAL NO. 105 OF 2017

Lok Housing & Construction Ltd. ...Appellant
Versus
Trade Tech ...Respondent

WITH
NOTICE OF MOTION NO. 1275 OF 2017
IN
COMMERCIAL APPEAL NO. 105 OF 2017

Lok Housing & Construction Ltd. ...Applicant

IN THE MATTER BETWEEN :

Lok Housing & Construction Ltd. ...Appellant
Versus
Trade Tech ...Respondent

Mr. Zubin Behramkamdin a/w Mr. Deepak Singh i/b Divya Shah Associates for the Appellant

Ms. Anisha Singh a/w Mr. Vikhil Dhoka & Ms. Vaishali Sanghavi i/b Solicis Lex for the Respondent

CORAM : S. C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.
WEDNESDAY, 13th DECEMBER, 2017

***P.C.* :**

1. This is an Appeal by the original defendant in Summary Suit No. 301 of 2016 on the file of this Court. On 14th February, 2017, that Summary Suit has been decreed.

2. It is common ground that the respondent/plaintiff before us filed a suit alleging that the appellant/defendant before us was going through a financial crisis, it approached the plaintiff for an inter-corporate loan for a period of 90 days by way of a Bill Discounting facility against invoices raised by the suppliers in favour of the defendant. That is how the hundies were executed in the sum of Rs. 11 lakhs and what the plaint alleges is that on 20th May, 1996, these hundies are in the sum of Rs. 11 lakhs for 90 days with compound interest of 36% per annum against an invoice of a third party, details of which are provided in para 2(i) and (ii) of the plaint. Upon such hundies and the accompanying documents being provided, in acknowledgment of the liability, two post-dated cheques were issued by the defendant in favour of the plaintiff. Upon presentation, the cheques were returned unpaid with a remark "fund insufficient". That is an endorsement from the bank and that is also relied upon *inter alia* to claim a decree on the footing that the claim falls within Order XXXVII of the Code of Civil Procedure, 1908 (`CPC'). The plaint sets out as to how the Advocate's notice was issued and it was duly received. After the receipt of this notice in or about April, 1997, the defendant approached the plaintiff

with an offer to pay the amount. It was then informed that there is a protection/immunity sought by the defendant from the State by invoking the State's power under the Bombay Relief Undertakings Act, 1958. It was informed that this offer was made despite the precarious financial position. Once again, cheque was issued but with a request that this cheque dated 30th June, 1997 shall not be deposited until the defendant's further intimation. It is stated that even this offer was not honoured but attempt was made in the garb of seeking the immunity to completely defeat and frustrate the claim of the plaintiff.

3. The moratorium or immunity or protection under the above enactment continued and when that protection came to an end, once again, an Advocate's notice was issued calling upon the defendant to pay the sum, then aggregating to Rs. 45,28,57,747/- which included the claim in the instant suit as well.

4. There was no response to this either. Eventually, the summary suit was filed by pointing out as to how the claim would fall within Order XXXVII of the CPC.

5. As far as the plea of limitation goes, the plaint averment reads as under :

*“**6. Limitation:***

6.1 The Plaintiff submits that the cause of action first time arose in August, 1996 when the Defendant failed to pay the due as agreed by Hundies dated 20th May, 1996 and 30th May, 1996. However, the Defendant thereafter, paid certain amount towards the dues and executed an Undertaking dated 8th April, 1997 whereby the Defendant agreed to settle the outstanding due as on 31st March, 1997 within six months from 1st April, 1997. Since, the Defendant failed to settle the outstanding due within six months of 1st April, 1997 the fresh cause of action arose on 30th September, 1997.

6.2 Subsequently, the Plaintiff was informed by his Advocates and Solicitors in February, 1999 that the Defendant has been granted immunity by the Government of Maharashtra under BRU Act with effect from January, 1999 and the same could be renewed from time to time.

6.3 The Plaintiff submits that in order to avoid the legal wrangles and to run away from their liabilities the Defendant kept on renewing the said immunity under BRU Act as soon as the earlier immunity was about to cease but could not renew the same after fifteen years from January, 1999 as provided under the BRU Act. Therefore, the Plaintiff could not initiate any legal proceeding till fifteen years from January, 1999 i.e. 1st January, 2014. As a result, the fresh cause of action arose after 1st January, 2014.

6.4 The Plaintiff by their Advocates and Solicitors letters dated 2nd January, 2015 and 3rd March, 2015 called upon the

> *Defendant to settle the outstanding dues but the Defendant failed to comply with the same. Therefore, it is most respectfully submitted that the present Suit is within time."*

Eventually, with these allegations, the suit was filed on 22nd November, 2015.

6. It is common ground that once the suit is instituted invoking the summary procedure, the writ of summons is issued on receipt thereof, it is for the defendant to enter appearance, inform the plaintiff's advocate and thereafter the plaintiff's advocate applies for a Judgment in plaintiff's favour. In the event, the appearance is not entered, the only obligation on the plaintiff is then to inform the Court that the writ of summons was duly served but the defendant has failed to appear. On this, the entitlement of the plaintiff to a decree follows and which is based on the clear language of the Statute namely the allegations in the plaint are deemed to be admitted. It is on such a footing and complying with the other formalities, the plaintiff sought a decree.

7. The learned Single Judge proceeding on these lines, passed a decree in favour of the plaintiff and against the defendant.

8. Hence, this appeal.

9. We have heard Mr. Zubin Behramkamdin appearing for the appellant/defendant and Ms. Anisha Singh appearing on behalf of the respondent/plaintiff and with their assistance, we have perused the appeal paper-book and the impugned order.

10. Mr. Behramkamdin would argue that true it is that the defendant did not appear though the writ of summons was served. Further, true it is that the law does not then leave any discretion but the Court must proceed on the footing that the plaint allegations shall be deemed to be admitted and the plaintiff shall be entitled to decree. However, while decreeing the suit, the learned Judge ought to have perused the plaint averments themselves. If, upon a reading of the same, an arguable case was made out, then, the learned Judge, even in the absence of the defendant, could have called upon the plaintiff to establish and prove as to how the suit claim is within limitation. That case arises squarely from the above reproduced allegations in the plaint. That burden having not been

discharged, the order of the learned Single Judge suffers from an error apparent on the face of record and/or can safely be termed as contrary to law. Therefore, this Court must interfere in its appellate jurisdiction even though the appellant/defendant could have invoked Order XXXVII Rule 4 of the CPC which confers the power in the trial Court to set-aside its decree. However, he can still maintain an appeal against the decree in terms of Section 13 of the Act 4 of 2016. That is how this appeal could be allowed.

11. On the other hand, Ms. Singh appearing on behalf of the plaintiff would submit that there is no merit in this appeal. These are but delaying tactics, for, every single occasion this defendant had taken shelter or protection behind a Statute to defeat a legitimate and lawful claim. There is no defence at all. Even the plea of limitation as raised in the plaint does not necessarily lead to any arguable question as contended, for, this is nothing but an afterthought. She would submit that the conduct of the appellant/defendant, therefore, has an important bearing on the matter and we should not entertain this appeal. More so, in the teeth of Order XXXVII Rule 4 of the CPC.

12. After hearing both sides and perusing this appeal paper-book with their assistance, we do not decide any larger or wider question, particularly, in the facts and circumstances of the present case. Mr. Behramkamdin would argue that the above reproduced paragraph of the plaint would denote that there was at least a period wherein there was no Notification under the Bombay Relief Undertaking Act in force. The plaint allegation would denote that there are two periods within which the claim could be said to be ordinarily time barred. If the period of limitation provided by the Limitation Act, 1963 for such a suit, which is three years, is taken into consideration, then, the time would begin to run from the default and as set-out in the plaint. If the time has to stop running, there ought be a supervening circumstance in the form of admission or acknowledgment of liability or payment in part. Even if that is taken into consideration, what we find is, for a transaction which is of the year 1996, the cheques have been issued in terms of the plaint averments themselves in 1996-97, on their dishonour, then, whether the Relief Undertaking Notification and particularly, its language would keep the liability alive and enforceable, was something that the learned Judge should have taken into consideration. We

do not see any discussion on that point. The learned Judge possesses a power to decree the suit on the footing that the plaint allegations have not been denied and they are deemed to be admitted. Nonetheless, in the facts and circumstances of this case, whether the suit could have been filed as a summary suit and was maintainable as such and whether the claim was within limitation, should have been noted and discussed by the learned Single Judge. It is under these circumstances, that we find some merit in the argument of the appellant/defendant but there is equal force in the argument of the respondent/plaintiff that these are defences raised as an afterthought and no bonafides are demonstrated by the defendant, even at this stage.

13. After this argument of the respondent/plaintiff, we put it to Mr. Behramkamdin yesterday and equally today that if the appellant/defendant seeks an opportunity to defend the claim and feels that it has an arguable point on the issue of limitation, then, it has to show its bonafides by bringing in a substantial amount in this Court. Yesterday, he sought time to take instructions to speak to the defendant's representative and report back today. Hence, the matter was posted today for passing

orders in open Court. Today, Mr. Behramkamdin informs the Court that the defendant would be in a position to deposit a sum of Rs. 30 lakhs provided this Court grants a time of 8 weeks for that purpose.

14. This request is opposed by the respondent/plaintiff's counsel. She would submit that we must not allow the defendant to get away by deposit of only Rs. 30 lakhs and that too belatedly. The same is also not coming, forthwith, but time is sought to bring in the same. This conduct, all the more should lead to a dismissal of this appeal.

15. After hearing both counsel on this point as well, we find that the following order will serve the ends of justice.

ORDER

(a) In the event, the defendant deposits a sum equivalent to 50% of the decretal amount in this Court within a period of three months from today, the Prothonotary and Senior Master of this Court shall retain the amount to the credit of the suit. He can deposit the said sum in a fixed deposit in a Nationalized Bank, initially for six months and to abide by the final orders in the suit;

(b) Thereupon, the plaintiff can move an application styled as Summons for Judgment with a supporting affidavit and serve it on the defendant. Thereafter, all the steps as envisaged by Order XXXVII of the CPC would follow;

(c) In the event, there is a default, then, the impugned order as also the decree stands and it will be enforceable and executable in accordance with law;

(d) If any amount is brought in the Court, in the meanwhile, but not as directed as above and in its entirety, then, giving due credit for the sum brought in, rest of the amount be recovered by taking recourse to Order XXI of the CPC, 1908.

16. We clarify that we have not expressed any opinion on the rival contentions, but only highlighted the controversy from the pleadings in the suit.

17. We also direct that all contentions of both sides are kept open for being raised at an appropriate stage.

18. It is clarified that in the event of default, the appellant/defendant shall not have any further liberty of taking recourse to Order XXXVII Rule 4 of the CPC.

19. For a period of three months, the decree passed by the learned Single Judge and impugned before us, shall not be executed and enforced and it would be the obligation of the defendant to inform the plaintiff or its Advocate about the deposit of the sum in this Court.

20. The appeal is disposed of in the above terms.

21. In view of the disposal of the appeal, Notice of Motion also stands disposed of.

SMT. BHARATI H. DANGRE, J. ***S.C. DHARMADHIKARI, J.***