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

SUMMONS FOR JUDGMENT NO. 80 OF 2016
IN
COMMERCIAL SUIT NO. 59 OF 2016

Marwah Finance Pvt.Ltd. ...Plaintiff/Applicant
vs.
Mukesh Kumar Agarwal & Anr. ...Defendants

Mr.Virag Tulzapurkar, Senior Advocate with Pradeep Bakhru I/b. Wadia Ghandy & Co. for Plaintiff.
Mr.Janak Dwarkadas, Senior Advocate with Mr.Pradeep Sancheti, Dr.Birendra Saraf, Sachin Mandlik, Pranav Sampat, Haabil Vahanvaty and Anvita Mishra for Defendants.

CORAM : S.C. GUPTE, J.

10 JULY 2017

P.C. :

This summons for judgment is taken out by the Plaintiff in a summary suit seeking to recover a sum of Rs.240.22 crores from the Defendants. The Defendants, who were directors of one Vipul Impex and Infrabuild Ltd., are guarantors for a loan taken by Vipul Impex and Infrabuild Ltd. from Oriental Bank of Commerce. The loan was in the nature of a packing credit facility with a limit of Rs.30 crores. Vipul Impex and Infrabuild Ltd. had created various securities in favour of Oriental Bank of Commerce in respect of this loan facility. It is the case of the Plaintiff that by way of a settlement between Oriental Bank of Commerce and Vipul Impex and Infrabuild Ltd., the loan of Oriental Bank of Commerce, for the enforcement of which it had filed even an original application before the DRT, was taken over by the Plaintiff. After making over a sum of Rs.27 crores to Oriental Bank of Commerce (in addition to the payment of Rs.3 crores by Vipul Impex and Infrabuild Ltd.), the debt owed by Vipul Impex and Infrabuild Ltd. and its directors / guarantors to Oriental Bank of Commerce stood assigned to the Plaintiff. The Plaintiff is now seeking to recover this debt by the present commercial summary suit.

2 The first defence raised by the Defendants is that this debt does not arise out of any written contract. It is submitted that this is a packing credit facility under which various advances were made and payments were received by Oriental Bank of Commerce. Finally, when the account became NPA, a suit was filed by Oriental Bank of Commerce for recovery of the amount which was claimed to be due as at the date of the suit. It is submitted that the suit claim, in any event, is a liability owed to a creditor under a packing credit facility on the basis of various borrowings made by Vipul Impex and Infrabuild Ltd. between the year 1999 and 2009. It is submitted that such a claim cannot be brought within the four corners of Order 37 of Code of Civil Procedure.

3 Secondly, it is submitted that the debt owed by the principal borrower as well as guarantors to Oriental Bank of Commerce, in the present case, stood satisfied in terms of the one time settlement offered by the bank. It is submitted that the bank accepted a sum of Rs.30 crores in full and final settlement, according to which the debt stood discharged so far as the principal borrower and the guarantors are concerned and that there was no debt in existence which could have been assigned by the bank to the Plaintiff.

4 Thirdly, and more importantly, it is submitted that the transaction of one time settlement with the bank against assignment of the debt to the Plaintiff is a fraudulent act on the part of Vipul Impex and

Infrabuild Ltd. and its directors represented by one Mr.K.G. Agarwal. In their reply to the summons for judgment as well as the additional affidavit filed by them, the Defendants have set out the circumstances in which K.G. Agarwal and his group of directors entered into a secret arrangement with the Plaintiff for discharge of their debt by involving a nominee, one Nimbus FZE, which is a UAE entity. This entity is said to be a shell company owned and controlled by one Pramod Balkishan Agarwal, an associate of K.G. Agarwal and his group of directors. Amongst other things, it is indicated that the debt was assigned to the Plaintiff in spite of the fact that the Plaintiff was a non-operational NBFC for the past 23 years. It is also indicated that the settlement amount of Rs.30 crores, which was paid by the Plaintiff to Oriental Bank of Commerce, was raised by issuing shares to this UAE entity by valuing each share of the company at an exorbitant rate of Rs.10,700/- per share of the face value of Rs.100/-. By this means, Rs.26.57 crores were brought into the Plaintiff company and paid to Oriental Bank of Commerce. True to this arrangement, it is submitted, the Plaintiff after taking over the debt, has sued only the Defendants herein, who represent another group of directors of Vipul Impex and Infrabuild Ltd. and who had a fallout long back with K.G. Agarwal and his group of directors. By this means, it is submitted, taking advantage of the one time settlement scheme of Oriental Bank of Commerce, K.G. Agarwal and his group of directors succeeded in getting a practical discharge for themselves and foisting the liability on the Defendants, who represent the other group. It is submitted that this clandestine arrangement is made in breach of their position of trust *vis-a-vis* the other directors by K.G. Agarwal and his group, with a view to cause wrongful gain unto themselves and a wrongful loss to the Defendants.

5 These are all matters, which clearly raise trial issues on which

evidence needs to be led. These triable issues indicate that the Defendants have a substantial defence or, at any rate, a fair and reasonable defence, to raise which the Defendants are entitled to an unconditional leave.

6 Mr.Tulzapurkar, learned Senior Counsel appearing for the Plaintiff, submits that, at any rate, since the Plaintiff has admittedly paid a sum of about Rs.27 crores to Oriental Bank of Commerce on behalf of Vipul Impex and Infrabuild Ltd. and its directors / guarantors, including the Defendants herein, the Defendants may at least be directed to deposit a sum of Rs.27 crores with interest in court. The defence of fraud raised by the Defendants undermines the whole of the Plaintiff's case. If one group of directors enters into a clandestine arrangement with a third party non-banking financial company and through it secures a discharge of its liability under a scheme of one time settlement with a bank, with a view to sue its rival group of directors in respect of the same debt through this third party NBFC, and that without the knowledge of the other group of directors, that may well be a clear case of fraud, which would anyway need to go to trial and for which the Defendants would deserve an unconditional leave to defend.

7 In the premises, the summons of judgment is disposed of in terms of the following order :

(I) The Defendants are granted unconditional leave to defend the suit;

(II) Written statement to be filed within four weeks from today;

(III) The suit to come up for directions after six weeks.

(S.C. Gupte, J.)