Amk

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

SUMMONS FOR JUDGMENT NO. 82 OF 2016
IN
SUMMARY SUIT NO. 125 OF 2016

M/s. B. J. Developers and Anr. .. Plaintiffs
Vs.
M/s. Avis Motors Pvt. Ltd. & Ors. .. Defendants

Mr. Shailesh Shah, Sr. Advocate a/w. Mr. P. M. Shah, Mr. Dishang Shah and Ms. Meetal Savla i/b Piyush M. Shah for the Plaintiffs.

Mr. Rohan Cama a/w. Mr. T. N. Tripathi and Ms. Sapna Rachure i/b T. N. Tripathi & Co. for Defendant Nos.1 to 4.

CORAM : B. P. COLABAWALLA, J.
DATE : 13th NOVEMBER, 2017.

P. C. :

This Summons for Judgment has been filed by the plaintiffs seeking to enter Judgment against the defendant in sum of Rs.15 Crores together with further interest @ 18% per annum amounting to Rs.6,65,75,341/- as more particularly set out in the plaint. The cause of action in the present suit is based on amounts allegedly due under dishonoured cheques aggregating to a sum of Rs.15 Crores.

2 Plaintiff No.1 is a partnership firm duly registered with the Registrar of Firms and carry on business as builders, developers

and investors in real estate. Plaintiff No.2 is the managing partner of plaintiff No.1. Defendant No.1 is a private limited company and are also builders, developers and investors in real estate. Defendant Nos.2 to 4 are directors of defendant No.1 and are having their address mentioned in the cause title of the plaint. As far as defendant No.4 is concerned, he is the father of defendant Nos.2 and husband of defendant No.3 and expired during the pendency of the suit. In these circumstances, defendant No.4 has, therefore, been deleted from the present proceedings.

3 It is the case of the plaintiffs that defendant Nos.2 to 4 came in contact with plaintiff No.2 in the year 2010 and represented that the defendants are seized and possessed of a property bearing CTS No. 636 and Survey No.46, Hissa No. 4(C) admeasuring 1485 sq. yards; Hissa No.2(D) admeasuring 100 sq. yards; Hissa No. 5(C) admeasuring 1455 sq. yards; and Hissa No. 5(D) admeasuring 1133 sq. yards. The aggregate area of these properties was approximately 3282.80 sq. mtrs. in village of Mohili, Taluka Andheri, Registration District of Mumbai Suburban, Saki Naka, Mumbai 400 072 together with all structures, tenements and buildings known as Kailash Heights consisting of 'A' and 'B' Wings with two common lower and upper basements (hereinafter referred to as 'the said property').

4 Relying upon the representations of defendant Nos.2 to 4, the plaintiffs entered into a development agreement dated 12.04.2010 with defendant No.1 for completing the unfinished part of development of the said 'B' Wing on the said property. It appears that the 'A' Wing was completed through another developer. For the purpose of developing the "B" Wing, the defendants also signed and executed a power of attorney dated 16.04.2010 in favour of the plaintiffs to complete the said development. In furtherance of the said development agreement and as per instructions of defendant Nos.2 to 4, the plaintiffs also deposited a sum of Rs.3,50,00,000/- with defendant No.1 and further paid a sum of Rs.50,00,000/- (aggregating to a total sum of Rs.4,00,00,000/-). One of the terms of the development agreement was that in consideration of the plaintiffs agreeing to construct/complete the construction and other obligations, the defendants granted to the plaintiffs full and free transferable development rights. It was further agreed that in consideration of the development agreement, the developers were entitled to any two floors out of Floor Nos.2, 3, 6 and 7 of the said structure under development and to own, use, sell, lease, license or otherwise dispose of said floors admeasuring 11160 sq. ft. per floor of carpet area. In addition thereto, 100 number of car parking spaces were also to be given to the developers, namely, the plaintiffs.

5 It is the case of the plaintiffs that while construction work of the 5th floor was going on, the plaintiffs reliably learnt in 2011 that the defendants had also sold their rights in respect of the entire 3rd floor to one M/s. JKS Infrastructure Pvt. Ltd. Since the possession was not handed over to the said M/s. JKS Infrastructure Pvt. Ltd., the said company filed a suit in this Court against the defendants being Suit No. 1201 of 2011 seeking specific performance of the agreement entered into with the said M/s. JKS Infrastructure Pvt. Ltd. (agreement dated 10.01.2008). Thereafter, in the said suit, the defendants also executed Consent Terms dated 06.04.2011 under which a Consent Decree against the defendants was passed in a sum of Rs.7.60 Crores. Thereafter, immediately after signing of the development agreement, according to the Plaintiffs, the defendants also defaulted in timely repayment of the installments for the credit facilities obtained by them from the Bank of India and hence the said bank has classified the account of defendant No.1 as a non performing asset w.e.f. 31.12.2010 and also initiated recovery proceedings including proceedings to take possession of the entire 'B' Wing under the provisions of the SARFAESI Act, 2002. Pursuant thereto, the said Bank has taken possession of said 'B' Wing on 20.04.2011.

6 The plaintiffs have thereafter averred that due to various

defaults, misrepresentations, misdeeds of the defendants, the plaintiffs could not proceed with the development work. By the time the construction activities of the 5th floor in 'B' Wing of the said building was going on, plaintiff No.1 firm had already incurred an expenditure of Rs.13,63,00,000/- on the said project. This was in addition to the sum of Rs.4,00,00,000/- already paid to the defendants as mentioned earlier (making an aggregate sum of Rs.17,63,00,000/-). It is in these circumstances, that the plaintiffs through their Advocate called upon the defendants to either hand over the area of 22,320 sq. ft. which the plaintiffs were entitled to under the said development agreement or in the alternative to compensate the plaintiffs to the extent of loss suffered in the sum of Rs.30,00,00,000/-. The plaintiffs also filed an FIR (First Information Report) being FIR No. 58/2012 dated 29.02.2012 against defendant Nos.2 to 4. This FIR was filed inter alia for committing offences of cheating and criminal breach of trust as well as for having defrauded the plaintiffs of huge amounts.

7 It is the case of the plaintiffs that after filing of this FIR, defendant Nos.2 to 4 approached the plaintiffs in or about January, 2013 and desired to settle the matter amicably and proposed and agreed to pay a sum of Rs. 15,00,00,000/- in full and final settlement. According to the plaintiffs, the defendants also informed the Senior

Inspector of Police that the matter was being amicably settled between the plaintiffs and the defendants in the sum of Rs.15,00,00,000/-. This letter is dated 12.01.2013 and signed by defendant Nos.2 to 4 in the presence of plaintiff No.2 as well as one witness, namely, Dr. Sanjeev Maniar, who was a common friend of plaintiff No.2 and defendant Nos.2 to 4. Under this settlement, it is the case of the plaintiffs that defendant Nos.2 to 4 promised and assured plaintiff No.2 to pay the aforesaid settlement amount of Rs.15,00,00,000/- in two installments (Rs. 8,00,00,000/- on or before 25.01.2013 and Rs.7,00,00,000/- on or before 31.12.2013 respectively).

8 As per the aforesaid arrangement, it is the case of the plaintiffs that defendant No.1 issued a cheque bearing No. 246290 in the sum of Rs. 8,00,00,000/- drawn on ICICI Bank, Sakinaka Branch, Mumbai in favour of plaintiff No.1. However, when the said cheque was presented for payment on 04.04.2013, the same was dishonoured for the reason 'payment stopped by the drawer'. It is thereafter stated in the plaint that defendant No.2 issued a false and frivolous legal notice on the same day, namely on 04.04.2013, falsely and frivolously alleging therein that plaintiff No.2 forcefully obtained a blank signed cheque from defendant No.2 and apprehended that plaintiff No.2 might try to misuse the said cheque and therefore

called upon the plaintiffs to return the same. These allegations were, of course, denied by the plaintiffs through their Advocate's letter dated 10.04.2013.

9 Since the cheque of Rs.8,00,00,000/- was dishonoured on 04.04.2013, the plaintiffs issued a statutory notice under Section 138 of the Negotiable Instruments Act, 1881 dated 10.04.2013 and called upon the defendants to pay the sum of Rs.8,00,00,000/-. Since the defendants failed to comply with the said statutory notice, the plaintiffs filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 and which is still pending.

10 Similarly, the plaintiffs also then deposited four cheques of Rs.1,75,00,000/- each (aggregating to Rs.7,00,00,000/-) on 12.12.2013. These cheques were also dishonoured for the reason 'payment stopped by the drawer' and complaints under Section 138 of the Negotiable Instruments Act, 1881 with reference to these cheques are also pending.

11 After all these proceedings, the plaintiffs filed a suit in this Court for specific performance of the development agreement dated 12.04.2010 being Suit (Lodging) No. 358 of 2013. This suit was ultimately withdrawn on 07.02.2015 with liberty to file fresh

appropriate proceedings against the defendants. Accordingly, the plaintiffs invoked arbitration by their notice dated 06.02.2015 and thereafter filed a petition under Section 9 for interim reliefs. In addition thereto, the plaintiffs also filed Arbitration Application (L) No. 700 of 2015 under Section 11 seeking appointment of an arbitrator. In the Section 9 application, another Single Judge of this Court, by his order dated 18.06.2015, recorded the statement of the learned counsel for the applicants (the plaintiffs herein) that the development agreement dated 12.04.2010 was not sufficiently stamped and sought time on the ground that the said document required to be adjudicated under the provisions of the Maharashtra Stamps Act, 1958. In these circumstances, this Court granted eight weeks time to apply for adjudication of the development agreement and to pay the requisite stamp duty. This Court made it clear that the Section 9 petition as well as the Section 11 application would be heard only after the development agreement was adjudicated upon and the appropriate amount of stamp duty is paid. It is after the passing of this order that the present suit has been filed.

12 What has been brought to my notice is that after the filing of this suit, the plaintiff has not got the development agreement adjudicated but has chosen on 02.11.2017 to withdraw the Section 9 Petition (numbered as Arbitration Petition No. 1621 of 2015). The

Section 11 application being Arbitration Application (Lodging) No. 701 of 2015 is still pending in this Court and the Advocate for the plaintiffs states before me that he undertakes to withdraw the said Section 11 application.

13 Be that as it may, after the suit was filed, the Writ of Summons was duly served upon the defendants who then entered their appearance through an advocate as contemplated under Order 37 of the Civil Procedure Code, 1908. Thereafter, the plaintiffs have filed the above Summons for Judgment. To oppose the reliefs claimed in the Summons for Judgment, the defendants have also filed their affidavit-in-reply dated 12th January, 2017 through defendant No.2. The plaintiffs have also filed a rejoinder dated 31.01.2017. It is on the basis of these pleadings that I have heard the learned counsel for the parties.

14 In this factual backdrop, Mr. Shah, learned Senior Counsel appearing on behalf of the plaintiffs, submitted that there is absolutely no defence to the present suit. He has submitted that the cause of action for the present suit is based on the five dishonoured cheques which have been annexed to the plaint aggregating to a sum of Rs.15,00,00,000/-. First cheque of Rs.8,00,00,000/- was dishonoured on 04.04.2013 whereas the balance four cheques of

Rs.1,75,00,000/- each were dishonoured on 12.12.2013. Mr. Shah also placed reliance on the letter dated 12.01.2013 (Exhibit 'F' page 59 of the plaint). This letter is addressed by the defendants to the Senior Inspector of Police, Kandivali Police Station and purportedly records the settlement agreement arrived at between the plaintiffs and the defendants under which (in full and final settlement) the defendants agreed to pay the sum of Rs.15,00,00,000/- to the plaintiffs. Looking at all these facts, Mr. Shah submitted that there was absolutely no defence to the present suit and therefore Judgment be entered against the defendants in the sum of Rs.15,00,00,000/- together with interest as more particularly prayed for in the Summons for Judgment.

15 On the other hand, Mr. Cama, learned counsel appearing on behalf of the defendants, firstly submitted that there was no merit in the case of the plaintiffs and the Summons for Judgment ought to be dismissed with costs. He submitted that by the conduct of the plaintiffs themselves it was clear that they had abandoned and/or waived any claim under the so called settlement agreement dated 12.01.2013 or on the dishonour of the cheques. He brought to my attention that the purported settlement agreement was entered into on 12.01.2013 and the cheques were also dishonoured on 04.04.2013 and 14.12.2013 respectively. He has submitted that despite all this,

the plaintiffs first filed a suit for specific performance of the development agreement in this Court. This suit was subsequently withdrawn on 07.01.2015 and thereafter, they invoked arbitration by their Advocate's letter dated 04.02.2015. After invoking arbitration, the plaintiffs also filed a Section 9 Petition in which it was averred that the plaintiffs were seeking specific performance of the development agreement dated 12.04.2010. Over and above this, the plaintiffs also filed an application under Section 11 being Arbitration Application (Lodging) No. 701 of 2015 seeking appointment of an arbitrator. Mr. Cama submitted that looking to these facts it was clear even after the so called settlement, the plaintiffs gave a complete go bye to the same and had chosen to rely upon the original cause of action, namely, seeking specific performance of the development agreement dated 12.04.2010. It is only when this Court passed an order in the Section 9 petition on 18.06.2015, in which it was specifically recorded that the Section 9 petition as well as the Section 11 application would not be proceeded with unless and until the development agreement was properly adjudicated and the stamp duty is paid thereon, that, the present suit has been filed. Looking to all these facts, Mr. Cama submitted that the plaintiffs cannot rely upon the alleged settlement agreement and therefore could not be permitted to sue on the same. He has submitted that the cheques which were subsequently dishonoured also arise from this so called purported agreement and therefore would have to stand or fall with the settlement agreement. This being the case, Mr. Cama submitted that the defendants had a substantial defence in law against the plaintiffs which entitled the defendants to unconditional leave to defend the suit.

16 In the alternative to the above arguments, Mr. Cama further submitted that the dates and events in the matter would clearly indicate that the settlement agreement as well as the cheques that were given to the plaintiffs pursuant thereto were given under coercion from the plaintiffs as threats were levied against the defendants arrest. The details with reference to the same has been set out in the affidavit-in-reply from para 6.1 to 6.17. He has taken through these averments and submitted that this clearly goes to show that the settlement agreement was entered into by forcing the plaintiffs to come to the police station, Kandivali and forcing them to sign the letter as well as hand over the said cheques. He brought to my attention the copies of the cheques that were handed over to the police under cover of the letter dated 12.01.2013 (Exhibit 3, page 51 of the reply) which clearly shows that the cheques were undated and the dates have been filled up by the plaintiffs subsequently. He has submitted that it is not the job of the police to negotiate a settlement between the parties and there was no requirement of the Police

intervening if the settlement was a voluntary one. Mr. Cama submitted that the job of the police is to investigate a crime if one is purported to be committed and not to settle matters of a civil nature between two parties. Looking to all these facts he has submitted that even if the cause of action of the settlement agreement and the dishonoured cheques survive, the defendants had made out more than a plausible case of coercion on which the defendants ought to be given an opportunity to lead evidence without putting them to any terms. For all the aforesaid reasons, Mr. Cama submitted that the Summons for Judgment be dismissed and the defendants be granted unconditional leave to defend the present suit.

17 I have heard the learned counsel for the parties at length and perused the papers and proceedings in the present suit. I find considerable force in the argument of Mr. Cama on both the aforesaid contentions. It is not in dispute that the so called agreement is dated 12.01.2013. It is pursuant to this settlement agreement (which is recorded in the agreement itself) that five cheques were handed over by the defendants to the plaintiffs. First cheque of Rs.8,00,00,000/- was dishonoured on 04.04.2013. After the dishonour of the first cheque, the plaintiffs instead suing on the dishonoured cheque as well as the settlement agreement, chose instead to rely upon the original cause of action and filed a suit for specific performance of the

development agreement dated 12.04.2010. Thereafter, the balance four cheques of Rs.1,75,00,000/- each, were dishonoured on 14.12.2013. Thereafter, this suit for specific performance (Suit (Lodging) No. 358 of 2013) was withdrawn on 07.01.2015 with liberty to file appropriate proceedings against the defendants. Pursuant to this liberty, the plaintiffs invoked arbitration by their letter dated 06.02.2015 and thereafter filed a petition under Section 9 for certain interim reliefs. Along with the Section 9 petition, the plaintiffs also filed an arbitration application for appointment of an arbitrator under Section 11 of the Act. In the Section 9 petition again it was averred that the plaintiffs were seeking specific performance of the development agreement. In these circumstances I find considerable force in the argument of Mr. Cama, at least, prima facie, that the plaintiffs had given a complete go bye to the settlement agreement dated 12.01.2013. It is only when the plaintiffs were unable to get any relief under the Section 9 petition that the plaintiffs have filed the present suit and thereafter withdrawn the Section 9 petition. This is quite clear from the order passed by this Court in the Section 9 petition dated 18.06.2015 and which at page 45 of the affidavit-in-reply (Exhibit 1). This being the case and looking to these facts, I do not think that the defence raised by the defendants is illusory or moonshine and the defendants ought to be allowed to agitate this defence once unconditional leave is granted to the defendants.

18 Even on the issue of coercion I find that the argument of Mr. Cama cannot be just brushed aside. The timeline at least, prima facie, shows that the timing of the settlement agreement appears to be rather suspicious. On 10.01.2013 the defendants have written a letter (page 47 of the affidavit-in-reply) to the Senior Inspector of Police, Kandivali Police Station, Mumbai and received by the said police station on 11.01.2013. Of course, the receipt of this letter by Kandivali Police Station has been disputed by the plaintiffs. At the outset, I fail to understand how the plaintiffs can dispute receipt of this letter by the Kandivali Police Station. Be that as it may, this letter clearly disputes the entire claim of the plaintiffs and in fact it categorically states that the FIR filed by the plaintiffs against the defendants for cheating etc. are totally false and the alleged disputes between the plaintiffs and defendants are purely of a civil nature. Despite this letter received by the police on 11.01.2013, the alleged settlement has been arrived at on 12.01.2013. From the record and the timeline as more particularly mentioned in the affidavit-in-reply, it is clear that this purported settlement was arrived at in the police station itself. These details are set out with great clarity in para 6.1 to 6.17 of the affidavit-in-reply. Even the cheques, which according to the plaintiffs were dishonorued, were forwarded by the defendants

to the police and not to the plaintiffs directly. Considering that the possession of these cheques was with the plaintiffs clearly also goes to show that these cheques were then forwarded by the police to the plaintiffs. There is considerable force in the argument of Mr. Cama that the settlement agreement as well as the cheques were executed / signed as there was an eminent threat of the defendants being falsely implicated in a criminal case as well as arrested. He brought to my notice that even prior to the settlement agreement and before any of the cheques were dishonoured, the plaintiffs had in fact got the defendants arrested on 06.03.2013 and he was only released on bail on 20.03.2013 pursuant to an order passed by the Sessions Court, Dindoshi. It is immediately on the bail being granted that the undated cheque was dated and thereafter deposited knowing full well that the payment had been stopped of the said cheque. Another interesting fact is that Mr. Cama brought to my notice that under the settlement agreement the amount of Rs.8,00,00,000/- was to be paid on or before 25.01.2013 as recorded in the settlement agreement. However the cheque of Rs.8,00,00,000/- curiously is dated 25.02.2013 which is one month after the date on which the said payment had to be made under the purported settlement agreement. This is another factor which clearly goes to show that the cheques that were forwarded by the defendants to the police and which in turn were handed over to the plaintiffs, were undated and the dates have been filled in by the plaintiffs to suit their convenience. In fact, Mr. Cama also stated and brought to my attention that in the cross-examination in the Section 138 proceedings, the plaintiffs have admitted that the cheques given by the defendants to the plaintiffs were undated. This fact is also not refuted by Mr. Shah, learned counsel appearing for the plaintiffs. On the issue of coercion, I have carefully gone through the averments in the affidavit in reply and more particularly para 6.1 to 6.17 thereof. I find that considerable details have been given therein and I do not think that the argument of coercion can be brushed aside as being moonshine or illusory. Even this defence, according to me, would give rise to a substantial defence and hence the defendants on this ground also would be entitled to unconditional leave to defend the suit.

19 I must mention that Mr. Cama also submitted before me that as far as defendant Nos.2 and 3 are concerned, they are merely directors of the company and had not given any guarantee for the alleged dues payable by defendant No.1 to the plaintiffs in this suit. This being the case, he submitted that in any event no conditional order can be passed against defendant Nos.2 and 3. This argument was refuted by Mr. Shah by relying upon Clause 45 of the Consent Terms dated 23.02.2015 filed in the Mumbai Debts Recovery

Tribunal in Securitisation Application No. 173 of 2013 filed by defendant No.1 versus Edelweiss Asset Reconstruction Co. Ltd. And others. He submitted that Clause 45 of the Consent Terms clearly records that all liabilities due to any borrowers, suppliers or outsiders including the plaintiffs should be settled by the directors in their personal capacity including the dues payable to any previous developer, contractor, licensees, suppliers of cement/steel and other construction materials, fees of Architect etc. etc. Relying upon this clause, Mr. Shah submitted that even the dues payable therein are guaranteed by defendant Nos.2 and 3 and hence they cannot be absolved of their liability.

20 Considering what I have held earlier that the defendants have raised substantial defences on the issue of abandonment of the settlement agreement as well as on the issue of coercion, I do not think it is necessary for me at this stage to go into this argument at all. Both the parties will be free to canvass this argument at the trial of the suit which shall decided by the Court in accordance with law. I have not given any opinion, prima facie, or otherwise on this issue.

21 For all the foregoing reasons, unconditional leave to defend the suit is granted to the defendants. The suit is transferred to the list of Commercial Causes. The defendants shall file their

written statement within a period of eight weeks from today. I must clarify that any finding given in this order are only prima facie and all other proceedings that are pending between the parties shall be decided on their own merits without being influenced by any observations made in this order.

[B. P. COLABAWALLA, J.]