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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL APPEAL LODGING NO. 8 OF 2018
IN
SUMMONS FOR JUDGMENT NO. 4 OF 2017
IN
COMMERCIAL SUIT NO. 220 OF 2016
WITH
NOTICE OF MOTION (L) NO. 51 OF 2018

Kartik Dhirubhai Daftari .. Appellant (Org.Deft.)

Versus

Ram Mohan Saroj .. Respondent (Org. Plff.)

Mr. Prasad Dani, Senior Advocate, with Mr. Harish Pandya, Mr. Pramod Bhosale, Mr. Oves Siddiqui, Mr. Rajendra Kookda and Mr. Ashish Varma i/by Kookda and Associates for appellant.

Mr. K. T. Kukreja with Mr. Mohan Salian and Mr. N. A. Gharkar i/by MGS Legal for respondent.

CORAM: NARESH H. PATIL &
NITIN W. SAMBRE, JJ.

FEBRUARY 16, 2018.

P.C.

1. The appeal is directed against the order passed by the learned Single Judge dated 28/11/2017 in Summons For Judgment No. 4 of 2017 in Commercial Suit No. 220 of 2016.

2. The respondent-plaintiff filed a Commercial Suit No. 220 of 2016 against the appellant – defendant. In short, the plaintiff's case is that in or about August, 2012, the defendant approached the plaintiff and represented that defendant had negotiated with one of the beneficiaries of the Meghraj Trust Funds viz. Mr. Surendra for purchase of his undivided shares in the above Trust funds. It was represented that defendant had made an unregistered Deed of Assignment dated 18/8/2011 whereby it was agreed to sell, transfer the subject properly to the defendant i.e. 33.33% undivided share, right, title in the said Meghraj Trust funds and 16.66% undivided share, right, title, claim and interest in the property jointly owned by the said Trust i.e. Land and Buildings known as “Empress Mahal Building situate at Dadar Matunga Estate, “F” Ward, Tilak Road, Dadar (East). Pursuant to the representations and discussions, plaintiff and defendant entered into Memorandum of Understanding dated 22/8/2012 (for short referred to as “MOU”). The plaintiff agreed and defendant agreed to sell the plaintiff the shares of Surendra and the undivided share of the said seven beneficiaries for a total consideration of Rs.36,50,00,000/- (Rupees Thirty Six Crores Fifty Lakhs Only). At the request of the defendant, the plaintiff issued a cheque of Rs.90 lakhs (Rupees Ninety Lakhs only) as per the particulars mentioned in the plaint.

Pursuant to the MOU, the plaintiff got issued a public notice inviting claims, if any.

3. The plaintiff states that though plaintiff was ready and willing to complete the transaction, the defendant neglected to get the said document executed. The defendant, instead, went on demanding more money towards further part payment. The defendant showed his unwillingness to complete the transaction. As there was enforceable debt, a cheque bearing No. 000147 dated 15/01/2015 for Rs.80 lakhs (Rupees Eighty Lakhs only) drawn on Bank of Baroda towards part refund of the payment of Rs.90 lakhs was issued by the defendant in favour of the plaintiff towards part refund of the amount of Rs.90 lakhs. According to the plaintiff, the defendant issued the said cheque of the Bank Account of his proprietary concern viz. Varsah Optics deliberately, with an intention not to honour the same though the payment was received by the defendant from the plaintiff in his individual capacity. The said cheque was received by the plaintiff on 21/1/2015 along with his Bank's memo dated 19/01/2015. It was returned with an endorsement “funds insufficient”.

4. The plaintiff thereafter filed a complaint against the defendant before the Metropolitan Magistrate at Kurla being Complaint No.

CC/5900720 of 2015 under Section 138 of the Negotiable Instruments Act. The plaintiff also filed complaint with the Senior Inspector of Police, Matunga Police Station, Mumbai. The plaintiff submitted that the cause of action in the suit was dishonour of cheque dated 15/1/2015. Hence, the present Suit under Order XXXVII of CPC was filed.

5. The plaintiff filed Summons for Judgment No. 4 of 2017 in the said Suit being Commercial Suit No. 220 of 2016.

6. The learned Senior Counsel appearing for the appellant-defendant submits that the learned Single Judge erred in referring to the contentions raised in an application filed by the appellant-defendant in the criminal proceedings. Such contention cannot form basis of the impugned order. It is submitted that in fact the defendant had a bona fide transaction of assignment of a immoveable property which was the subject matter of transaction between plaintiff and defendant. The defendant was not the owner of the subject property. There was no question of defendant deceiving the plaintiff in not executing the necessary documents in respect of the said immoveable property, shares, interest in favour of the plaintiff. The defendant had informed the plaintiff that he had also parted substantial amount with the owner with whom he had contracted and got unregistered

Deed of Assignment in his favour. Unless he secure the said amount, it would be difficult for the defendant to pay the amount to the plaintiff. The learned counsel submitted that based on the criminal complaint filed under Negotiable Instruments Act, the plaintiff was not entitled to press for Summons for Judgment. The learned Single Judge ought to have looked into the entire material on record and the facts and circumstances of the case.

7. The learned counsel appearing for the respondent-plaintiff submitted that in accordance with the settled position in law, as the cheque issued by the defendant in favour of the plaintiff was dishonoured, he was entitled to file Suit and Summons for Judgment. The learned counsel submitted that in an application filed before the criminal court, the defendant stated that after receiving the amount from the original owner, within 2 to 3 months, the said amount would be paid to the plaintiff and for which two months time be granted. In view of the admission of liability, issuance of a cheque, which is a negotiable instrument, it would not be permissible now for the defendant to raise pleas to avoid payment to the plaintiff. The learned counsel for the respondent-defendant, in support of his submissions, placed reliance on the following judgments:

(a) M/s. Larsen & Toubro Ltd. vs. Arun Kumar Mansingka [JT 2000 (4) SC 556]

(b) Seth Ramdayal vs. Laxmi Prasad [AIR 2009 SC 2463]

(c) IDBI Trusteeship Services Ltd. vs. Hubtown Limited [(2017) 1 SCC 568]

(d) Hindustan Apparel Industries vs. Fair Deal Corporation [2000 DCR 576]

8. We have perused the record placed before us, the impugned order and the judgments cited (Supra). We have also perused the relevant clauses of the MOU executed between the plaintiff and defendant, application filed by the defendant before the criminal court, legal notices issued by the parties. We find that the transaction of execution of MOU, issuance of cheque by the defendant in favour of plaintiff is not denied. It is not disputed question of fact . The dispute relates to the stand adopted by the defendant wherein it is contended that as he was merely a negotiator between the original owner and the plaintiff, unless the original owner performs his part of promise or contract, it was difficult for the defendant to act in accordance with the MOU. The defendant had parted substantial amount with the original owner with a bona fide belief that original owner would perform his part of contract. The original owner failed to do so and plaintiff is now enforcing his claim against the defendant. In the facts, we

find that consciously the defendant had issued a cheque in favour of the plaintiff which was not honoured. He may raise appropriate issues in his defence during the trial but the facts remains that the cheque was dishonoured which was a negotiable instrument and certain liabilities incur and consequences flow on the cheque getting dishonoured. We have perused the judgment in the case of IDBI Trusteeship Service Ltd. vs. Hubtown Limited (Supra). The Apex Court in paras 17.4 and 17.6 observed as under :-

> "17.4 If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.
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> 17.6 If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court."

9. The learned Single Judge has precisely considered the

controversy and the issue emerging between the parties. The learned Single Judge rightly dealt with the relevant issues and has reached a conclusion, which in our view is reasonable one. We do not notice any perversity in the view adopted by the learned Single Judge. The view is in consonance with the settled principles of law and material placed on record. We do not find any reasons to interfere in the view adopted by the learned Single Judge.

10. The appeal is dismissed. Notice of Motion (L) No. 51 of 2018 does not survive and disposed as such.

11. At this stage, the learned Senior Counsel appearing for the appellant-defendant prays for extension of time to deposit the amount as directed by the learned Single Judge for a period of eight weeks. The learned counsel for the respondent-plaintiff opposed the said prayer. In the facts, we extend the time to deposit the amount as directed by the learned Single Judge for a period of four weeks from today.

(NITIN W. SAMBRE J.) (NARESH H. PATIL,J.)