IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL APPEAL NO.171 OF 2018
in
SUMMONS FOR JUDGMENT NO.86 OF 2016
in
SUMMARY SUIT NO.2526 OF 2009 with
NOTICE OF MOTION NO.339 OF 2018

Shivkant V.Chaudhary …Appellant
(Orig.Defendant)

vs

Dinesh Chandra Maingi .. Respondent
(Orig,.Plaintiff)

Mr.R.D.Soni with Mr.Sujay Gawade, Ms.Anita Dubey
I/b Shree & Co for Appellant
Mr.A.M.Vernekar with Ramesh Gogawat for Respondent

CORAM : NARESH H.PATIL AND
G.S.KULKARNI, JJ

DATED : 24th July, 2018

P.C.

1. This appeal arises from an order dated 4th December 2017 passed by the learned single Judge on a Summons for Judgment taken out in Summary suit No.2526 of 2009, whereby the learned single Judge though has held that the defences as raised by the appellant/defendant are wholly frivolous and moon-shine and that in fact it would be appropriate and that the Court forthwith passes a decree against the appellant/defendant. However the learned single Judge has held that purely as a mercy the appellant/defendant be granted leave to defend the suit on the condition of the appellant/defendant depositing in this Court a sum of Rs.3.44 crores within a period of eight weeks from the date of the order

and on the said deposit, the appellant/defendant be permitted to file a written statement and the suit in that event be transferred to the list of commercial causes. It is directed that in the event of failure to deposit the said amount the respondent/ plaintiff would be entitled to apply for a decree after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.

2. Learned counsel for the appellant/defendant in assailing the impugned order submits that accounts were not settled between the parties and there were no particulars in the plaint to that effect. It is next submitted that there are several triable issues as for the amount which was already paid and credits have not been given. It is thus submitted that the suit was not maintainable as a summary suit. In support of his submissions, reliance is placed on the decision of the learned single Judge of this Court in **Jyotsna K.Valia vs.T.S.Parekh Sanjay Co**[1] to contend that the suit ought to have filed on settled accounts only.

3. On the other hand, learned counsel for the respondent/plaintiff has supported the impugned order. It is submitted that the learned single Judge by a well-reasoned order has considered each and every plea as advanced on behalf of the appellant/defendant. It is submitted, that in fact what is important was that the appellant in the letter dated 12th September 2006 in the capacity as a Director had admitted the amounts due and payable, which was accompanied

1 Summons for judgment no.1117/2003, order dated 26.4.2007

with the statement of account. It is submitted that the personal guarantee as furnished by the appellant/defendant was specifically referred to in the said letter which accompanied the statement of account which are not disputed by the appellant. Once the appellant/defendant himself, has specified the amounts due and payable and once the statement was itself part of the appellant's letter, then, there was no question of disowning the liability of the amounts due and payable. It is submitted, that even it is not in dispute that cheques were issued and the same were dishonoured and in respect of which independent proceedings were taken out, where orders of the trial Court have resulted into conviction of the appellant/defendant. It is submitted that the company of the appellant has also suffered an order of winding up. It is thus, submitted that the defence as adopted by the appellant/defendant to oppose the summons for judgment was rightly held to be frivolous and a moon-shine.

4. We have heard learned counsel for the parties. With their assistance, we have perused the record and the impugned order.

5. It is not in dispute that the cause of action in the present suit in question, was a a deed of guarantee dated 12th September 2006 executed by the appellant/defendant. It is the case of the respondent/plaintiff in the suit that at the request of the appellant/defendant, who is a Director of one M/s Geeta Marine Services Pvt.Ltd (now in- liquidation) (hereinafter referred to as 'the company') the respondent/plaintiff had supplied Barges, Tugboats and Finance to

the company as per two agreements dated 1st January 2001 (Bare Boat Charter-cum Demise Agreement) and 13th February 2001. Both these agreements were entered between the company and the respondent/plaintiff. The respondent/plaintiff contended that the company acknowledged the liability towards the plaintiff under the said two agreements and had issued several cheques as security towards the payment. The acknowledgements are Exhibits E and G to the plaint. It is the case of the respondent/plaintiff that since the company failed to discharge its liability, the defendant gave his personal guarantee to clear the liability of the company in favour of the plaintiff. This personal guarantee was executed by the defendant on 12th September, 2006. Simultaneously, on the very same day with the execution of this guarantee, the company also addressed a letter to the respondent/plaintiff admitting and acknowledging that the company was unable to meet its commitments towards payment of dues of the plaintiff. Under the Bare Boat Charter Agreement, a cheque of Rs.95,22,693/- was drawn in favour of the respondent/plaintiff and when presented, was dishonoured and as noted above. It is the respondent/plaintiff's case that section 138 proceedings before the trial Court ended in an order of conviction. A revision was also filed and the matter is now subjudice in this Court. By a letter dated 4th January 2008 the respondent/plaintiff demanded from the company return of the Barges and Tugboats alongwith balance hire charges from 1st April 2002. The appellant/defendant replied to this letter vide letter dated 30th January 2008 and refused to redeliver the Barges and Tugboats. Consequently, the respondent/plaintiff vide a letter dated 4th February 2008 issued notice of termination of the Bare Boat Charter agreement. Further, a statutory notice dated 18th February 2008 was issued under the provisions of the Companies Act, 1956. A company petition for winding up was also filed which was admitted and by an order dated 19th March 2009 was finally ordered to be wound up. On this background, as the amounts due and payable were not forthcoming, the respondent/plaintiff vide its advocate's letter dated 12th August 2009 invoked the guarantee against the appellant/defendant. However, despite receipt of notice, amounts were not paid to the respondent/plaintiff and thus, the summary suit in question was filed. The appellant/defendant appeared and filed a reply-affidavit *inter alia* disputing the claim as made on behalf of the respondent/plaintiff. Principally, the defence is not different from what is contended before us and as noted above. The learned single Judge considering the rival pleas has passed the impugned order holding that the defence was totally illlusory and untenable.

6. Having examined the record, we find much substance in the contentions as urged on behalf of the respondent/plaintiff and the observations made by the learned single Judge in the impugned order. The only defence as contended before us is that there was no statement of accounts, is wholly unacceptable. This is, for the reason and as rightly pointed that there is a clear admission of liability on the part of the appellant/defendant as also a statement of accounts was furnished by the appellant/defendant himself which can be clearly seen from the letter dated 12th September 2006. What is important to be

seen from this letter is that the liability to pay the amount of Rs.95,22,693/- is clearly admitted by the appellant/defendant. Further, the statement of accounts is annexed to the said letter by the appellant/defendant and thus, it would not lie in the mouth of the appellant/defendant that there is no statement of account and the accounts stands admitted. In view of this clear position the decision as relied on behalf of the appellant is not applicable Admittedly, the cheque in that regard was issued and the same was dishonoured. What is pertinent to note is the last paragraph of the said letter dated 12th September 2006 page 84 where the appellant/defendant in terms admitted/accepted his liability under the personal guarantee. The said paragraph read thus:

> "The undersigned Mr.S.V.Chowdhury Director of the Company is also providing his personal guarantee towards payment of your dues. We are obliged for receiving full support from you during all these years and look forwards to a long continuing association."
>
> (emphasis supplied)

7. We have also perused the guarantee. The guarantee as furnished by the appellant/defendant appears to be clear and takes into account several agreements entered into between the parties and the commitment of the appellant/defendant to make payment payable to the respondent/plaintiff.

8. In the light of the above discussion, we see no reason to interfere in the impugned order. The appeal is wholly without merits. It is accordingly dismissed. No costs.

{G.S.KULKARNI, J} **{NARESH H.PATI, J}**