IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO.25 OF 2017
IN
COMMERCIAL SUIT NO.189 OF 2016

Toucan Agro And Developers Private Limited ... Plaintiff.

Versus

Mohammed Azharuddin ... Defendant.

ALONGWITH

NOTICE OF MOTION NO.388 OF 2017

IN

COMMERCIAL SUIT NO.189 OF 2016

Mohammed Azharuddin ..Applicant
(Org. Defendant)

IN THE MATTER BETWEEN

Toucan Agro And Developers Private Limited ... Plaintiff.

Versus

Mohammed Azharuddin ... Defendant.

Mr. Zal Andhyarujina alongwith Ms.Akanksha Agarwal i/by Mr.Rajendra Singh Saluja, for the Plaintiff.
Mr.Kevic Setalvad, Sr. Advocate alongwith Mr.Rohaan Cama, Ms. Kavita Srivastav, Mr.Gaurav Srivastav and Ms. Manorama Mohanty i/by S.K. Srivastav & Co. for the Defendant.

CORAM : S.C. GUPTE, J.

DATE : 20 MARCH 2018.

P.C.:

1 Heard learned Counsel for the parties.

2 This Summary Suit is filed on the basis of a written agreement and dishonour of cheques issued in pursuance thereof by the Defendant. The Defendant has taken out a notice of motion in the Summary Suit, being Notice of Motion No.388 of 2017, under Section 8 of the Arbitration and Conciliation Act, 1996 for reference of the parties to arbitration on the ground that the subject matter of the present suit is covered by an Arbitration Agreement between the parties.

3 It is the case of the Defendant that the present suit is based on a Memorandum of Understanding ("MoU") dated 15 January 2008 (Exhibit A1 to the Plaint). It is submitted that under the MoU, it was agreed that the Defendant, who was described therein as 'Confirming Party No.1', alongwith other parties to the agreement agreed to assign and transfer unto the Plaintiff all benefits, rights and interests acquired/to be acquired by and/or available/to become available to them or any of them in respect of vacant and freehold lands admeasuring in aggregate 478 acres or thereabouts at the villages mentioned therein in Bangalore Rural District and to procure, make available and cause the owners and persons interested in the said properties to sell, convey and transfer the same to

and in favour of the Plaintiff, free from all encumbrances. The MoU provided for a consideration at the rate of Rs.1.55 crores per acre of the total area of lands procured and transferred as aforesaid. It is submitted that this MoU contained an arbitration agreement. It is submitted that in pursuance of the MoU, a further writing was executed on 7 May 2014 under which the Defendant confirmed his joint and several liability with others for payment of Rs.10 Crores to the Plaintiff on account of dues owed by the Defendant and others for non-performance of the MoU. It is submitted that since the suit is purportedly based on this writing and cheques issued in pursuance of the same and since the writing was executed and the cheques were issued in pursuance of the MoU, the subject matter of the present suit is covered by the arbitration agreement contained in it.

4 The MoU inter-alia contains an agreement on the part of the Defendant and others referred to therein, either as procurers or as confirming parties, for procuring, transferring and assigning unto the Plaintiff vacant and freehold lands admeasuring in aggregate 478 acres or thereabouts in the villages named in the MoU. The MoU affirms receipt by the Defendant and others of an aggregate sum of Rs.7.80 Crores plus a sum of Rs.1 Crores paid to the Defendant herein. The MoU provides for adjustment and appropriation of these amounts against the consideration money payable by the plaintiff to the procurers and the confirming parties including the Defendant herein for the first lot of 25 acres. It appears that after the execution of the MoU, on or about 24 October 2010, a supplementary MoU (“Supplementary MoU dated 24 October 2010”) was

executed between the same parties for extension of time by 120 days for fulfillment of the obligations of the procurers and confirming parties under the MoU. On or about 11 April 2011, a further supplementary writing ("Supplementary Writing of 11 April 2011") was executed by one A. Panchakshari Reddy, described as Confirming Party No.2 in the MoU, on behalf of all the procurers and confirming parties, for extension of time by a further period of 120 days. On or about 21 November 2012, the Defendant attended the Plaintiff's office in Mumbai and executed another supplementary writing ("Supplementary writing of 21 Novemmber 2012") acknowledging inter-alia the failure of the procurers to fulfill their obligations under the MoU. The Defendant agreed having received a sum of Rs.1 Crore directly from the Plaintiff and further sums of Rs.50,00,000/- each from the two procurers mentioned in the MoU, thus aggregating to Rs.2 Crores in all. The Defendant confirmed having issued a post-dated cheque in the sum of Rs.5 Crores being the repayment of the amount of Rs.2 Crores received by him (Rs.1 Crore from the Plaintiff under the MoU and Rs.50 Lakh each from the two procurers as mentioned above) and the balance towards his share of liquidated damages/compensation/mense profits and interest thereon. The post-dated cheque handed over to the Plaintiff was deposited by the Plaintiff on its date and was dishonoured by the drawee Bank due to insufficient funds. The Plaintiff through his Advocate thereupon caused a notice to be issued under Section 138 of the Negotiable Instruments Act ("NI Act") against the Defendant in respect of dishonour of the cheque. A few days thereafter, i.e. on 29 April 2013, the Defendant once again attended the office of the Plaintiff in Mumbai and executed a supplementary writing ("Supplementary Writing of 29 April

2013”) requesting the Plaintiff intera-alia not to initiate proceedings against him for dishonour of the cheque and confirming having handed over two post-dated cheques of 30 June 2013 in the sums of Rs.5 Crores (towards the amount accrued under the Supplementary Writing of 21 November 2012) and Rs.30,00,000/- (towards interest). Both these cheques were dishonoured by the drawee Bank due to insufficient funds. Once again, the Plaintiff caused a notice to be issued to the Defendant through the former's Advocate under Section 138 of the NI Act in respect of dishonour of the cheques. Immediately thereafter, i.e. on or about 27 July 2013, the Defendant once again attended the office of the Plaintiff in Mumbai and executed a supplementary writing (“Supplementary Writing of 27 July 2013”), once again requesting the Plaintiff not to initiate proceedings against the Defendant for dishonour of the cheques and confirming having handed over two post-dated cheques of 30 September 2013 for Rs.5 Crores (towards the original liability) and Rs.60 Lakhs (towards interest). On 30 September 2013, both these cheques were dishonoured by the drawee Bank due to insufficient funds. Once again, the Plaintiff caused a notice issued under Section 138 of the NI Act regarding dishonour of these cheques. On 20 November 2013, the Defendant again went to the office of the Plaintiff in Mumbai and executed a supplementary writing (“Supplementary Writing of 20 November 2013”), requesting the Plaintiff once again not to initiate proceedings against the Defendant for dishonour of the cheque and confirming having handed over 3 post dated cheques, one of 10 December 2013 for Rs. 1 Crore, two of 28 February 2014 for Rs. 4 Crores and Rs.1 Crore (towards interest). The Defendant thereafter requested the Plaintiff not to deposit these cheques. On 7 May

2014, the Defendant attended the office of the Plaintiff in Mumbai and executed a further writing dated 7 May 2014 ("Supplementary Writing of 7 May 2014"), confirming having handed over 3 cheques dated 15 August 2014 for Rs.1 Crore, for Rs.5 Crores and for Rs.75,00,000/- (towards further interest) to the Plaintiff. All these cheques were dishonoured by the drawee Bank upon presentation for payment due to insufficient funds. Once again, a notice under Section 138 of the NI Act was caused to be issued and criminal proceedings were initiated before the 58th Court of Metropolitan Magistrate at Bandra. These proceedings are pending before that Court. In these circumstances, the present summary suit is filed by the plaintiff for recovery of a total claim of Rs.8.27 Crores. (This amount is inslucive of further interest on the originally agreed sum of Rs. 5 Crores.)

5 The present summary suit is filed on the basis of the last dishonoured cheques (i.e. the cheques of Rs.1 Crore, Rs.5 Crores and Rs.75 Lakhs, dated 15 August 2014). The Plaintiff relies on Supplementary Writings executed from time to time including the last Supplementary Writing of 7 May 2014 in support of its case. Since the suit is based on the dishonoured cheques and not on the original MoU, the only questions which arise in this suit are whether the cheques issued in pursuance of the Supplementary Writing of 7 May 2014 were supported by lawful consideration and whether these cheques were dishonoured for the reasons stated in the plaint. None of these questions arises under or out of the MoU. None of the disputes forming part of the controversy in the suit thus can be said to be covered by the MoU.

6 Mr. Setalwad, relying on the provisions of Clause 19 of the MoU, submits that the terms of the arbitration agreement contained therein are wide and encompass all disputes and differences concerning the construction, meaning and effect of the MoU, or any deeds, documents or papers to be executed in pursuance thereof, or any act, deed, matter or thing required to be done or any payment made or received by any party thereunder, or any other act, deed, matter or thing in any manner touching the MoU. Learned Counsel submits that the Supplementary Writing dated 7 May 2014 and the three post-dated cheques issued by the Plaintiff in pursuance thereof were in pursuance of and under the MoU. Learned Counsel is not right there. Just because the reference to the execution of the MoU and its terms is made in the Plaint, or for that matter in the Supplementary Writings referred to above, in pursuance of the last of which the suit cheques were issued by the Defendant, it cannot be said that the writings themselves or the cheques issued in pursuance of the last of the writings were in pursuance of or under the MoU. The MoU and its terms merely appear by way of a historical narration of events leading to the execution of the cheques. It cannot be said that the cheques are issued as an act, matter, deed or thing done/to be done under the MoU or "payment to be made or received by any party thereunder" or as "an act touching the MoU".

7 The cheques may be said to have been executed in pursuance of the Supplementary Writing of 7 May 2014 and it may be that the writing itself recounts execution of the MoU as part of the narration but that by itself

does not make the MoU either the consideration or the basis of issuance of the suit cheques. Since the MoU could not be performed by the parties, various Supplementary Writings were executed from time to time, under which the Defendant alongwith others undertook to pay to the Plaintiff certain amounts from time to time and in pursuance of these commitments, issued post-dated cheques from time to time, the last three of which, as noted above, were dishonoured and on the basis of which the present Suit is filed. The suit, thus, cannot be said to contain any controversy which is covered under the MoU or for which any terms or conditions of the MoU need to be interpreted. The suit is, thus, not covered by the arbitration agreement contained therein. There is, thus, no merit in the Notice of motion.

8 So far as the Summons for Judgement is concerned, learned Counsel for the Defendant urges in reply to the Summons for Judgment that, firstly, the Supplementary Writing of 7 May 2014 itself provides that in the event of dishonour of the cheques issued thereunder, the Defendant and others would be jointly and severally liable alongwith other procurers to pay to the Plaintiff all the amounts due to the Plaintiff under the MoU and thus, all defences which are available to the Defendant to contest the liability under the MoU may be considered as proper defences to the present suit. That is not quite correct. The Supplementary Writing does provide for liability of the Defendant alongwith others to pay the amounts due under the MoU in the event of dishonur of the cheques referred to therein, but the present suit is not filed for enforcement of that liability.

The present suit is filed for claiming the amount due under the dishonoured cheques.

9 Secondly, it is submitted that since the supplementary writing provides for liability under the MoU in the event of dishonour of the cheques, the Plaintiff cannot sue for dishonour of cheques. This defence is merely to be stated to be rejected. The only possible conclusion to be drawn from a fair reading of Clause No.14 of the Supplementary Writing is that the liability under the MoU is in addition to, and not in substitution or to the prejudice of, the liability for dishonour of cheques. Dishonour of cheques by itself furnishes an obvious cause of action and this cause of action cannot be said to be diluted by the fact that the liability under the MoU can be revived by the Plaintiff.

10 The only other defence which reflects on the execution of Supplementary Writing of 7 May 2014 and possibly, of the cheques issued thereunder, is that these are obtained from the Defendant under coercion and accordingly, voidable at the instance of the Defendant. The case of coercion is contained in paras 8 and 9 of the Defendant's additional affidavit in reply to the Summons for Judgement. The case in short is that the Plaintiff blackmailed the Defendant by threatening to lodge a false complaint with the Economic Offences Wing and also in the media if the Defendant did not make payment, to the effect that he cheated the Plaintiff of several Crores. It is further submitted that the Plaintiff's representative informed the Defendant on telephone that they had made a film showing the Defendant distributing cash to the villagers and farmers. It is submitted

that a threat was administered to the Defendant that this film would be released to the media and posted on U Tube giving an impression that the Defendant was distributing money as part of his election campaign, tarnishing thereby the image, respect, goodwill and prospects of the political career of the Defendant. In the first place if, in the facts of this case, which are recounted above, any complaint is to be made to the Economic Offences Wing or to the Police or to media, it is difficult to see how such a complaint could be termed as malicious or false so as to sustain a plea of coercion. In fact, it would appear to be an appropriate and legitimate complaint. Secondly, these recitals and narration concern the period, when the Defendant for the first time visited the Plaintiff's office in Mumbai for settling the Plaintiff's claim. It is pertinent to note that the Defendant not only executed the Supplementary Writing on that day, i.e. on 21 November 2011 and issued post dated cheque of Rs.5 Crore to the Plaintiff, he thereafter at least on four separate occasions personally attended the Plaintiff's office and executed Supplementary Writings of 29 April 2013, 27 July 2013, 20 November 2013 and 7 May 2014 and issued on each of these four occasions post-dated cheques of appropriate amounts, which not only included the principal amount payable under the original Supplementary Writing of 21 November 2012, but interest accruing thereon from time to time. There are no allegations that on all these further occasions, similar threats were administered to the Plaintiff. In any event, it is well-nigh impossible to believe that a high profile person like the Defendant, who is a member of the Parliament, was coerced on each of these occasions. The Defendant would have us believe that on five occasions spanning over a period of two years, he went on attending the

Plaintiff's office only to be coerced and made to part with post-dated cheques of progressively incresing amounts. So much for the probability of the defence. Even if we were to desist from terming the defence as entirely moonshine and nominal and even if we were to concede further that it is even plausible, it would be a far cry to term it as a probable defence so as to merit an unconditional leave to defend. In the facts of the case, it clearly warrants a condition as to deposit of the entire principal amount in Court for allowing the Defendant to defend the suit.

11 In the premises, the following order is passed :

O R D E R

(i) Notice of Motion No.388 of 2017 is dismissed;

(ii) Costs to be costs in cause;

(iii) The Defendant is granted leave to defend on and subject to a condition of his depositing in the Court a sum of Rs.6.75 Crores within a period of 8 weeks from today;

(iv) The amount, if any, deposited by the Defendant shall be invested by the Prothonotary and Senior Master of this Court in Fixed Deposit/s of Nationalised Bank/s for a period of 13 months initially and renewable thereafter from time to time and to abide by further orders that may be passed in the suit herein;

(v) Written Statement, if any, within four weeks of such deposit;

(vi) Suit to come up on Board after twelve weeks for directions;

(vii) Summons for Judgment is disposed of accordingly.

(**S.C.GUPTE,J)**