IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO. 30 OF 2017

IN

COMMERCIAL SUIT NO. 52 OF 2017

Riyaz Ahmed Lambay @ R.P. Lambay … Plaintiff
vs.
M/s. Sand Piper Resorts Ltd. & 3 Ors. … Defendants

Ms. A. R. Lambay a/w. Ms. Anita Castellino i/b. Vikas K. Singh for the Plaintiff.
Mr. Rakesh Reddy for the Official Liquidator.
Mr. Karl Tamboly a/w. Mr. Yohan Limathwala and Fatima Kachwala i/b. J. Sagar and Associates for Defendant nos. 2, 3 and 4.
Mr. P. A. Ramaiah Official Liquidator.

CORAM : A.K. MENON, J.
DATE : 15th OCTOBER, 2018

P. C.

1. By this summons for judgment the plaintiff claims a decree in a sum of Rs. 2,02,32,113/-. The claim in the suit is based on 13 cheques admittedly issued by defendant no.1, a company presently under liquidation. Defendant nos. 2 to 4 are the former directors of the company in liquidation. The Company was already ordered to be wound up vide order dated 17th November, 2015 prior to filing of the suit. The suit was filed after obtaining leave of the Company Court on 14th June, 2016.

2. The plaint initially proceeded on the basis that the suit claim was payable by the defendants under these 13 cheques which were issued by defendant no. 1 and which were signed by the defendant no. 2 as its Managing director. The plaint came to be amended on or about 24th February, 2018. In the amended plaint the plaintiff have introduced averment in paragraph 14A, 16A to 16G which inter alia states that defendant nos. 2 to 4 are liable to the plaintiff.

3. The order of winding up was challenged in an appeal which was dismissed resulting in a Special Leave Petition being filed in the Supreme Court. Learned counsel for the plaintiff submitted that in the SLP, the defendant no. 2 acting as contributor proceeded to urge the SLP in the name of defendant no. 1- company though the company was in liquidation and he filed an affidavit wherein defendant no. 2 as contributor had expressed willingness to pay the entire amount as called upon by the Court.

4. Learned counsel for the plaintiff has invited my attention to the various orders passed by the Supreme Court in the said SLP and submitted that in view of the express statement in paragraph 4 of the affidavit that defendant no. 2 is willing to pay the monies owing to the plaintiff, the defendant no. 2 has no defence to the suit. As far as defendant nos. 3 and 4 are concerned, she states that there is no statement to suggest personal liability against these defendant in the SLP proceedings, however according to her they are liable as directors. She submitted that in view of the statement made in the SLP defendant no. 2 must keep up the commitment and pay the amount due to the plaintiff. In the course of her

submissions reference was made to the conduct of the defendants and also the fact that several complaints under section 138 of the Negotiable Instrument Act are pending before the Magistrate's Court. She therefore submitted that defendant have no defence at all and that plaintiff are entitled to a decree on the basis of averment in the amended plaint.

5. On behalf of defendant no. 1 company in liquidation it is seen that the liquidator has filed affidavit in reply dated 1st October, 2018. Mr. Reddy learned counsel appearing on behalf of the official liquidator relied upon averments in the said affidavit and submitted that the Official Liquidator had invited claims from workers / creditors under Rule 148 of the Company (Court) Rules, 1959 and that several claims had been received including that of the plaintiff. The plaintiff's claim has been admitted to the extent claimed and that the office of the liquidator had issued notice of admission on or about 15th June, 2017. He further submitted that the only asset of the company being immovable property in Murud Taluka, Alibaug was sold by the India SME Assets Reconstruction Company Pvt. Ltd under the SARFAESI Act that the statement of affairs filed by the ex-directors were examined but the defects yet to be complied with. Mr. Reddy submitted across the bar that the affidavit does not disclose whether the company has any other assets in terms of bank balance etc. however Mr. Reddy states on instructions that there are no funds available for disbursement.

6. On behalf of defendant nos. 2, 3 and 4 there is affidavit in reply filed by one Irshad Hussain Khatib in reply to the summons for judgment. Mr. Tamboly learned

counsel appearing on behalf of defendant 2 to 4 submits that the cheques were issued by defendant no. 1 company and that the defendant no 2 has no personal liability. He refuted the contentions in the plaint and the submissions made at the bar attributing personal liability to defendant no. 2 by virtue of the statement in paragraph 4 of the affidavit filed in the SLP.

7. Mr. Tamboly submitted that the SLP was at all times filed on behalf of the company and by defendant no. 2 as a contributory as evident from the statement in the plaint itself and also the affidavit dated 11th August, 2016. He has taken me through the orders passed by the Supreme Court from time to time in the SLP filed by defendant no. 1 through defendant no. 2 and in each of these orders it is clear that the petitioner namely the company in liquidation acting through its contributory was taking time and all along the proceedings were being conducted by and on behalf of the company by defendant no. 2 as a contributory. The willingness to pay the amount came by the applicant on behalf of the company in liquidation and not by him personally. He therefore submitted that there is no case made out for a decree against defendant no. 2 and that he is entitled to unconditional leave to defend the suit.

8. Having heard the learned counsel for the parties, I am of the view that the plaintiff cannot claim reliefs in the summons for judgment against defendant nos. 2 to 4 on the basis of the statement in the affidavit in the SLP. The suit is filed under Order 37 and within framework of order 37, the plaint has identified the cause of action as the 13 cheques which have been admittedly dishonoured for

reason of "insufficient funds" being available. The plaintiff has also proceeded to institute proceedings under the Negotiable Instruments Act and these proceedings are still pending. Although the plaint has been amended, the cause of action continues to be the dishonoured cheques and not statement on oath made in the SLP. Paragraph 20A of the plaint which identifies the cause of action reads as under:

> *20A The cause of action in the above suit is based on the amount due and payable under the dishonoured cheques which were issued by Defendant No. 1 as payments in respect of one single transaction i.e. repayment of the Plaintiff's dues.*

9. Considering the scope of Order 37 of the Civil Procedure Code it is not possible to accept the plaintiff contention that by virtue of the affidavit dated 11th August, 2016 filed in the SLP, the suit is liable to be decreed as against defendant no.2. When we test this submission of the plaintiff, I find that it is necessary also to consider the manner in which the Supreme Court construed the statement in the affidavit. The first order passed by the Supreme Court is of 8th July, 2016, when the defendant no. 2 as contributory sought time to take instructions as to whether the defendant was willing to pay the amount to the plaintiff. On 29th July, 2016 further time was sought by the defendant no. 1 acting through defendant no. 2 to file an affidavit indicating as to whether petitioners are willing and ready to pay the entire amount to the plaintiff herein admitted at 1.36 crores.

10. On 17th August, 2016 the Supreme Court considered the affidavit filed on behalf of defendant no.1. A copy of this affidavit to which reference is made in the order of the Supreme Court appears at page 24 to 29 of the affidavit in support of the Summons for judgment. It is described as "Status Report by way of Affidavit". In the affidavit defendant no. 2 states that he has inserted advertisements in the newspapers proposing to sell a certain immovable property and that he has applied to banks and institutions to obtain a loan by surrendering title deeds of the property owned by him. This affidavit is dated 19th September, 2016. The order dated 17th August, 2016 is obviously not passed on the basis of affidavit dated 19th September, 2016 but refers to the affidavit dated 11th August, 2016 which is referred to in paragraph 4 of the affidavit. Paragraph 4 reads as follows :

> *"4. Without going into the merits of the case, the deponent states that he is willing to pay the entire amount as called upon him by the Hon'ble Court to the Respondent"*

In view of the averment in paragraph 4 the Supreme Court granted further time but observed apropos the submissions on behalf of the counsel for the plaintiff that the petitioner is not likely to get any loan since the property on offer was agricultural property. The petitioner was then directed to file a further affidavit setting out progress in the matter and that is how the second affidavit dated 19th September, 2016 came to be filed. Once again adjournments were sought on 23rd September,2016 and 21st October, 2016 and thereafter on 16th November, 2016 the SLP came to be dismissed. The averment in paragraph 4 to the effect that the deponent is willing to pay entire amount as called upon by the Court was an offer made by the deponent to seek further time and on which further time was granted. In a summary suit which is filed primarily against defendant no.1 liability cannot be imposed on the other defendants. Admittedly no cause of action arises against the directors at least not against defendant no. 3 and 4.

11. The plaint does not proceed on the basis of a settlement or agreement to pay between the plaintiff and defendant no.2. Meanwhile the proceedings under the Negotiable Instruments Act will proceed in accordance with law. In my view triable issues arise including as to whether any of the defendants are personally liable . Accordingly, I pass the following order :

(i) Unconditional leave granted to the defendants who shall file their written statements within four weeks.

(ii) It is made clear that the grant of unconditional leave does not in any manner affect the pendency and outcome of the proceedings under section 138 of the Negotiable Instrument Act and it will proceed in accordance with law against all accused and will be heard and disposed of uninfluenced by the observations in this order as against defendant nos. 2 to 4.

(iii) Suit to be listed for filing affidavit of documents within a period of 8 weeks from today.

(iv) Inspection to be completed forthwith thereafter.

(v) List the suit for directions on 10^{th} December, 2018.

(A.K. MENON, J.)