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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO. 44 OF 2017

IN

COMMERCIAL SUIT NO. 19 OF 2017

Mahesh D. Vora … Plaintiff

vs.

Shree Sai Oto Tubes Mills Ltd. … Defendant

WITH

SUMMONS FOR JUDGMENT NO. 45 OF 2017

IN

COMMERCIAL SUIT NO. 26 OF 2017

Jitendra D. Vora … Plaintiff

vs.

Shree Sai Oto Tubes Mills Ltd. … Defendant

WITH

SUMMONS FOR JUDGMENT NO. 46 OF 2017

IN

COMMERCIAL SUIT NO. 18 OF 2017

Yogesh D. Vora … Plaintiff

vs.

Shree Sai Oto Tubes Mills Ltd. … Defendant

Mr. Pravin Samdani, Senior Advocate i/b. Mr. Manoj G. Agre for the Plaintiff.
Mr. Darius B. Shroff, Senior Advocate a/w. Mr. Neerav Merchant and Mr. Ishwar Ahuja i/b. Thakordas and Madgavkar for the Defendant.

CORAM : A.K. MENON, J.
DATE : 9th JULY, 2018

P. C.

At the hearing of these Summons for Judgment unconditional leave was granted in all these suits for reasons separately recorded. The reasons are set out below:-

1. These suits filed by three plaintiffs are identical as far as the factual background is concerned, the difference being in the amounts claimed by each of the plaintiff. At the outset Mr. Samdani, learned Senior Counsel appearing on behalf of the plaintiffs fairly stated that two of the plaintiffs namely those in Commercial Suit Nos. 19 and 26 of 2017 had filed winding up petitions claiming the amounts sought in the suit and that these winding up petitions had been dismissed. Appeals filed by the said two petitioners had been admitted and certain further interim orders had been passed restraining the company from disposing of their assets pending the disposal of the Appeals.

2. Mr. Samdani submitted that the filing of the Company Petitions and pendency of the Appeals would not affect the fate of Summons for Judgment No. 46 since the plaintiff in Suit No. 18 of 2017 had not filed a Company Petition. This is not disputed by the defendant. The facts being identical, save and except for the filing of the Company Petitions in the aforesaid two suits, Mr. Samdani submitted that he would proceed on the basis of facts in Commercial Suit No. 18 of 2017.

3. The claim in the suit is a sum of Rs. 1,53,00,000/-claimed towards principal sum and interest thereon @ 10% per annum from 1st April, 2013 till filing of the suit. Mr. Samdani submitted that the claim is based on admission of liability in the

balance sheet of the defendant commencing from the financial year 2011-12 and thereon. He relied upon Exhibit-A to the plaint being Part I – Form of Balance Sheet as on 31st March, 2012 and pointed out that Share Capital of the defendant was Rs. 5,00,00,000/- as of 31st March, 2012. Relevance of this, he explained, was that some of the monies advanced by the plaintiffs in these suits were towards Share Application money and the remainder as loan bearing interest @ 10% per annum. In this respect he invited my attention to Exhibit-D, copy of the Income Tax return acknowledgment for the assessment year 2015-16 and its enclosures. Mr. Samdani pointed out that the share capital as of 31st March, 2015 continued to be Rs. 5,00,00,000/-. He then invited my attention to the fact that in the note forming part of the financial statements the authorised share capital as of 31st March, 2015 is shown as Rs.2,00,00,000/- and the issued and subscribed capital is shown as Rs.5,00,00,000/-. In the column of details of shareholders holding more than 5% in the company, the names of inter alia the three plaintiffs featured. Mr. Yogesh Vora plaintiff in Suit No. 18 of 2017 held 4,30,000 shares of Rs.10/- each fully paid up thereby giving him 8.6% of the share holding and other two plaintiff held 8.20% each. This share holding has remained constant till 2014-15.

4. Mr. Samdani submitted that the relevance of the share holding is to be noted in the light of the fact that the defendants had denied that loans had been advanced. On the contrary it is the defendants case that the amount paid by the plaintiff in all the suits were by way of share application money. Mr. Samdani submitted that in the financial statements the defendant had admitted a sum of Rs. 1,74,18,223/- as loan under the heading "Loan from Shareholder, Director and Relatives". He

submitted that in the case of the other plaintiff as well, amounts were shown as loan outstanding as unsecured loan as on 31st March, 2014 and 31st March, 2015. He submitted that the defendant had also credited interest on the aforesaid loan amount @ 10% per annum and had deducted tax at source and paid the same into the treasury and thereafter issued a TDS Certificate during the financial year 2011-12. He therefore submitted the fact that payment of amounts is by the plaintiff to the defendant is not in dispute. The balance sheet does not show the amount received as share application money (save and except sum of Rs. 43,00,000/- paid towards 4,30,000 shares) that the share capital as of 31st March, 2015 had not shown any increase. He submitted that if the defendant's version of the advances being towards share capital were correct then there would have been an increase in share capital. At least the amount would have been described as share application money. In the instant case save and except the amount of Rs.43,00,000/- only was towards share capital. The rest was a loan.

5. Mr. Samdani further submitted that in the affidavit in reply filed on behalf of the company, in Exhibit-1, the defendant had itself disclosed the ledger account of the defendant in their books for the financial year 2010-11 and shown a total amount of Rs.1,97,00,025/- as being received from the plaintiff. He submitted that out of these a sum of Rs.43,00,000/- was paid towards share application money and in respect of which 4,30,000 shares had been issued. The remainder he submitted reflected the amount of the loan. A more detailed statement prepared by the plaintiff was tendered showing the payments made by the plaintiff to the defendant which reveals that a sum of Rs.1,96,00,000/- has been paid, most of them through

RTGS and one remittance of Rs.1,00,000/-in cash. The difference between Rs.1,96,00,000/- and Rs.43,00,000/- being Rs.1,53,00,000/-, he submitted represented the claim of the plaintiff in the suit.

6. Mr. Samdani then submitted that the defendant acknowledged loan given in the balance sheet and that the amount had in fact increased from Rs.1,17,00,000/- as of 31st March, 2011 to Rs. 1,74,18,223/- as of 31st March, 2015. He then submitted that further increase reflected further advances made by the plaintiff and that the balance sheet for the year ended 31st March, 2011, 31st March, 2012 and 31st March, 2013 would show the increase in the amounts of advances from Rs.1,17,00,000/- as of 31st March, 2011 to Rs. 1,74,18,223/- and finally to Rs.1,74,18,223/- which continued to be shown as advances right upto 31st March, 2015. It is the case of the plaintiff that in view of the outstanding amounts the defendant issued four cheques totaling to Rs. 1,95,00,000/- as set out below :

Sr. No	Cheque No	Date	Bank	Amount
1	350374	31.01.2014	Canara Bank,Fort Branch	35,00,000/-
2	350377	28.02.2014	Canara Bank,Fort Branch	50,00,000/-
3	350380	31.03.2014	Canara Bank,Fort Branch	50,00,000/-
4	350383	30.04.2014	Canara Bank,Fort Branch	60,00,000/-
				1,95,00,000/-

7. According to Mr. Samdani the total amount of the four cheques is higher than the principal sum since the amount is inclusive of interest @ 10% per annum. He submitted the fact that interest was payable @ 10% per annum is not in doubt since TDS certificate discloses that tax has been deducted and credited on a sum

representing 10% of the interest due as on date of remittance namely in March, 2012.

8. The said cheques were dishonoured when presented for payment and complaints under Section 138 of the Negotiable Instruments Act had since been filed. These complaints however came to be dismissed. Mr. Samdani submitted that the dismissal of the criminal complaints under Section 138 of the Negotiable Instruments Act and the dismissal of the Company Petitions will not come in the way of the plaintiff prosecuting the present suit. He submitted that the rejection of the Company Petition will not operate as res-judicata since the appeals challenging the dismissal of the Company Petitions had been admitted. Mr. Samdani submitted that the only defence of the defendant is to the effect that the share application money had not been established even prima facie because even for subsequent years the share application money it is reflected in the balance sheet of the company, whereas the balance sheet admits of diverse amount of loan outstanding even as on 31st March, 2015. He reiterated that only Rs.43,00,000/- has been paid towards equity share capital that now stands admitted in the balance sheet dated 31st March, 2015.

9. Furthermore the issuance of the post dated cheques clearly establishes that the amounts were due from the defendant to the plaintiff and that is why the post dated cheques were received in January, 2014. He submitted that the interest calculation as per the ledger would amount to Rs.44,60,461/- and that the principal

sum being Rs.1,53,00,000/-. The total outstanding would be Rs.1,97,60,461/- that is how the cheques were issued for approximate sum of Rs.1,95,00,000/- which is approximately the total outstanding as on date when the cheques were issued. In support of his case Mr. Samdani relied upon the following judgments :

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

(2) Vishnu Dutt Sharma vs. Daya Sapra [(2009) 13 SCC 729]

(3) S.P.A. Anamalay Chetty vs. B. A, Thornhill A.I.R. 1931 Privy Council 263

10. Mr. Samdani submitted that decisions in the Criminal proceedings were not relevant for the purpose of the present suit and further in view of the pendency of the appeals the present claim can proceed since in the order in the Company Petition Nos. 372 of 2014 and 376 of 2014 filed by other two shareholders Mr.Manish D. Vora and Mr. Jitendra D. Vora had not attained finality and therefore the observations of the Company Court in its order dated 16th October, 2015 is no bar to the proceeding with the suit.

11. In the case of *IDBI Trusteeship (supra)* Mr.Samdani relied upon observations in paragraph 13 to contend on the basis of test laid down in the said judgment and on considering the material placed before the Court by the defendant in this case, the defence was clearly sham and a highly improbable one. He therefore submitted, making broad reference to the observation of the Supreme Court, that the Bombay amendment Order 37 Rule 3 contemplated that even in cases where triable issues arises the trial Judge may impose conditions in granting leave.

12. On behalf of defendant Mr. Shroff submitted that the case of the plaintiff is incorrect. He submitted that the plaintiff in these three suits represents one of three groups which had decided to invest in the defendant company. The plaintiff represented one group which he described as the Vora Group, the second group consisted of the Chopra Group and the third the Vyas Group, These three groups were represented on the Board of Directors and also held shares in the defendant company. Mr Yogesh Vora the plaintiff was also a director. He invited my attention to the share holding pattern which supports the view that he has canvassed. It is submitted that all monies received were towards investment in the company and was brought in as capital for the purpose of business and not as a loan. He submitted, on the aspect of the TDS certificate that the amounts of tax deducted and paid into the treasury but the interest was not actually paid over to the plaintiff but only credit was given to the extent of the amount of interest and nothing beyond.

13. Mr. Shroff submitted that it was for same reason the amount was temporarily shown as loan and for accounting purposes. In fact it was only shown as loan pending a further decision to be taken on manner of deployment of the funds and in the light of disputes that had arisen in the meantime. He submitted that interest was credited is not paid over and tax was deducted only in the first year i.e. financial year 2011-12. Although the share application money was not reflected to the extent to which monies were paid the defendants were in the process of obtaining regulatory approvals for the relevant period and in the meantime disputes arose between the parties resulting in the plaintiff adopting a non-

cooperative stand. This is evident from the averments as more particularly set out in the affidavit in reply of Mr. Jayprakash Vyas Managing Director of the Company was thus adverted to. Mr. Shroff invited my attention to clause 2(b)xiii & xiv of the affidavit of Mr. J. P. Vyas, Managing Director of the defendant in support of his contention that three groups contributed proportionately and by September the entire contribution was received. The total contribution of the Vora Group out of the total paid up capital was Rs. 5.80 crores and the amount was shown in the balance sheet as "Loan and Advances" since permission for issuance of shares had not been obtained for at the material time. He submitted that the payments were all contributions towards capital.

14. Mr. Shroff further submitted that in the process of developing its business the defendant had approached its bankers for the purpose of Cash Credit/Working Capital loan which accounts were to be operated by the Managing Director. However the plaintiff through their Advocate addressed a letter dated 24th February, 2014 to the Bank alleging that the defendant had approached the bank to obtain a loan without an appropriate resolution of the board of directors and that the Managing Director Jayprakash P. Vyas was not authorised to deal with the bank, It was alleged that the loan application was made unilaterally without taking the other board members into confidence. Allegations were made to the effect that said Mr. Vyas had failed to maintain proper books of accounts and it was suggested that the facility proposed to be granted in a sum of Rs. 65 crores should not be released. In the meantime the plaintiffs' Advocate called upon the bank not to allow

encashment of cheques in the accounts of the company maintained in the said Canara Bank. Mr. Shroff submitted that it was in this background that the post dated cheques came to be issued in an attempt to arrive at an amicable settlement. However the settlement talks had since failed and that is how the company petitions came to be filed. Mr. Shroff relied upon the notice dated 22nd April, 2014 addressed on behalf of the plaintiff.

15. Having heard the learned counsel for the parties, I am of the view that the defendant has succeeded in establishing that they have a bonafide defence to the suit. The suit claim is a sum of Rs.2,09,63,096/- which is stated to comprise of the principal sum of Rs.1,53,00,000/- and interest thereon @ 10% per annum. The particulars of claim do not set out the manner of computation of interest. In paragraph 3 of the plaint it is contended that the plaintiff at the request of defendant no. 1 advanced diverse sums of money from September, 2010 to September, 2012 as a friendly loan. In support of this the plaintiff have relied upon particulars of various payments made in a computation tendered across the bar. during submission which indicates that an amount of Rs.1,96,00,000/- was paid in 22 installments and of which one installment was paid in cash amounting to Rs. 1 lakh. It is the plaintiff's case that 43,00,000/- from the said amount is towards equity share capital and that is how the remainder of Rs.1,53,00,000/- is to be treated as loan.

16. Furthermore it is case of the defendant that the various amounts had been admitted in the balance sheet of the company. However the amounts admitted in the balance sheet are a sum of Rs. 1,17,00,000/- as of 31st March 2011, 1,32,18,223/-.as of 31st March 2012 and Rs. 1,74.18,223/- .as of 31st March 2013. None of these amounts arrive at Rs. 1,53,00,000/- which should have been the amount as of 31st March, 2013 since it is the case of the plaintiff that a sum of Rs. 1,53,00,000/- had been paid by September,2012. Even assuming that the amount includes interest, the plaintiff's answer to this mystery is that the amount inclusive of interest is Rs. 1,74,18,223/-. In my view the contention that the amount paid over was a loan is not justified.

17. In the course of submissions I inquired with Mr. Samdani whether the plaintiff had disclosed in the plaint that the plaintiff was a Director in the first defendant company to which Mr. Samdani fairly stated that no such statement has been made in the plaint and the fact that the plaintiff is a Director cannot be denied. In fact even today it is stated that the plaintiff continues to be on the Board of Directors of the defendant company.

18. Mr. Shroff had in the course of his submissions pointed out that all the Directors of the company were required to issue personal guarantee bonds to the bank to enable the defendant to raise finances. However the plaintiff Mr. Yogesh Vora had declined to issue personal guarantee. In this behalf it is apposite to refer to the Exhibit-4 to the affidavit in reply being sanction order of the Canara Bank

dated 23rd August, 2013 whereby the bank proposed to sanction credit facility against collateral security and against prime security of hypothecation of land and building, collateral security of certain immovable property which were belonging to Vyas Group as also personal guarantees of the Directors. The name of the plaintiff in the above suit appears at Item 4 in the list of Directors. However the plaintiff had omitted to furnish the guarantee and the Canara Bank sanction order mentioned the net worth called for against the name of the plaintiff probably on account of disputes that had arisen.

19. In my view the contention of the defendant to the effect that the transaction between the plaintiff in these suits and the defendants were only friendly loan transactions cannot be accepted. There are bonafide defences and in my view not ones that can be brushed aside. I am not satisfied that the defence though triable would justify imposing any condition of deposit of monies The defence in my view is neither moonshine nor improbable. I therefore pass the following order :

(i) Defendants are entitled to unconditional leave to defend the suit.

(ii) Written Statement to be filed within 12 weeks i.e. on or before 1st October, 2018.

(iii) Discovery and inspection to be completed within four weeks thereafter.

(iv) List for framing of issues on 19th November, 2018.

Rajeshwari Ramesh Pillai

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Date: 2018.07.23 10:47:49 +0530

(A.K. MENON, J.)