

sg

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.31 OF 2016

IN

COMMERCIAL SUIT NO.403 OF 2016

WITH

NOTICE OF MOTION (L) NO.667 OF 2017

IN

SUMMONS FOR JUDGMENT NO.31 OF 2016

IN

COMMERCIAL SUIT NO.403 OF 2016

Sachin Corporation And Anr.

...Plaintiffs

VS

Kusuma Bhandary Construction Private Limited

...Defendant

.....

Mr. Simil Purohit, a/w. Mr. Vishal Kanade and Mr. M.P. Vora, i/b. Pramodkumar & Co., for the Plaintiffs.

Mr. Sharan Jagtiani and Mr. Nirman Sharma and Ms. Nidhi Sharma, i/b. Dharam & Co., for the Defendant.

.....

CORAM : S.C. GUPTE, J.

DATED : FEBRUARY 28, 2018

P.C. :

. Heard learned Counsel for the parties.

2. This summons for judgment is taken out in a suit seeking to recover a liquidated sum arising on a written contract. The claim is for a sum of about Rs.9.55 crores, which is said to comprise of principal amount of Rs.6.35 crores. The claim arises out of a document termed as

memorandum of understanding dated 1 November 2012. It is the case of the Plaintiffs that under this document, the Plaintiffs advanced a sum of Rs.6.35 crores (out of the commitment to advance a sum of Rs. 8 crores) as a temporary loan. The loan was said to carry an interest of 15% per annum to be paid every month by cheque on or before 30th day of the month. In addition to this interest, the Defendant is said to have agreed to pay 15% of the estimated profits as a share in the profits of the Defendant Company every month in the name of the Plaintiffs. The said loan was said to have been secured against 10% of the total shareholding of the Defendant. The shares were required to be transferred to the Plaintiffs as security for this loan. In addition to this, the loan was to have been secured by 8 post-dated cheques of Rs.1 crore each. The document also provided for re-transfer or return of the shares in proportion to the repayment of the principal amount. It is the case of the Plaintiffs that the amount of principal and interest was not repaid by the Defendant. The Plaintiffs, accordingly, pray for a money decree.

3. The chief defence of the Defendant is that the transaction between the parties was of a completely different nature. The Defendant, in turn, relies upon a document produced with its affidavit in reply to the summons for judgment. This memorandum of understanding is completely different from the memorandum of understanding relied upon by the Plaintiffs in the plaint. It appears that the second page of the document, which contains execution by both sides, is the same but the first page is entirely different. In the document produced by the Defendant, the amount was said to be paid by the Plaintiffs towards investment and for which the Defendant was to give 20 constructed flats

of a total salable area of 30,130 sq.ft. to the Plaintiffs. The investment was said to be secured by 8 post-dated cheques of Rs.1 crore each. The document provides for a further amount of loan over and above the investment referred to above, which would be payable in the manner stated therein and towards a security for re-payment of this loan amount, the Defendant was to give proportionate extra shares to the Plaintiffs as also post-dated cheques.

4. From these pleadings and documents produced therewith, it is clear that the Plaintiffs and the Defendant are setting up two different documents. Obviously, the first page in the two documents is different. The chief question to be decided in the trial is which document is the correct document containing the transaction between the parties. This question will have to be typically decided on evidence to be led in the suit.

5. Learned Counsel for the Plaintiffs submits that the transaction between the parties claimed by the Defendant would be an extremely strange transaction. Learned Counsel also submits that if the transaction was really of investment and if shares were issued to the Plaintiffs against such investment, there was no reason for the Defendant to allot flats against the investment of the Plaintiffs. This is countered by the Defendant by submitting that the commitment under the document set up by it was to either give salable area in its Manipal Project or 15% sharing in the property. Learned Counsel submits that in keeping with this commitment, the letter of 13 April 2013 allocating flats to the Plaintiffs provides for a condition of re-transfer or return of shares

allotted to the Plaintiffs. This again is a matter of trial, on which evidence will have to be led.

6. Learned Counsel for the Plaintiffs further submits that the case set up by the Plaintiffs is consistent with the Defendant's own document. He relies on the balance sheet of the Defendant in this behalf. In the balance sheet, the amount of Rs.6,35,00,000/- paid by the Plaintiffs to the Defendant is shown as a loan from directors/relatives. (The Defendant, on the other hand, relies on the Plaintiffs' books, where the amount of Rs.6.05 crores is shown as advance for land.) Learned Counsel, firstly, submits that, considering the pleadings of the parties and the documents placed on record before the Court, his case is imminently probable and, on the other hand, the Defendant's case is less probable. Learned Counsel submits that, in the premises, on the principle of the case of **IDBI Trusteeship Services Ltd. vs. Hubtown Ltd.**¹, this Court should grant merely conditional leave to the Defendant. He particularly relies on paragraph 17.4 of the judgment of **Hubtown**. Learned Counsel is not right in his submission. What the **Hubtown** judgment says is that whilst assessing a defence raised by the Defendant for considering leave to defend, what the Court has to consider is whether the defence, which may be said to be plausible, is improbable. If the defence, though plausible, is considered by the Court to be improbable, the Court may impose conditions not only as to time and mode of trial, but also as to payment into court or furnishing of a security. This does not imply that the Court has to consider a mere preponderance of probabilities of the Plaintiffs' case, however substantial such preponderance may be. That is

¹ (2017) 1 Supreme Court Cases 568

accomplished by weighing the probabilities of the parties' respective cases. Upon such weighing, the Court finds balance of probabilities and upholds or rejects the Plaintiffs' claim. This is what a trial is typically expected to accomplish. This is not what is to be considered at the stage of the summons for judgment. What the Court considers at the stage of summons for judgment is not the balance of probabilities but whether the Defendant's case is at all probable.

7. Learned Counsel for the Plaintiffs further relies on the entry of Rs.6.35 crores in the Defendant's balance sheet as loan from directors and relatives. Relying on paragraph 17.6 of the **Hubtown** judgment, learned Counsel submits that since there is an admission on the part of the Defendant in its balance sheet, even if leave to defend is granted to the Defendant, such leave ought not to be granted unless the admitted principal amount is ordered to be deposited in Court. Even here learned Counsel is not right. The admission referred to by the Court in the **Hubtown** case is admission either in the pleadings of the Defendant or as may be found by the Court. In the face of such an admission, even if the Court finds that the defence for the balance claim is not only plausible but even probable, yet leave to defend the suit generally shall not be granted "unless the amount so admitted to be due is deposited in Court". The Court is not expected to consider here pre-suit admissions of the parties which are matters of contest. If an admission is contested by the Defendant, either by disputing the very factum of such admission, or the effect of such admission, that is a matter to be considered like any other defence by assessing the aspects of plausibility versus probability. As for the so-called admission itself, the defence offered is both plausible and

probable, as discussed above.

8. In the premises, the summons for judgment is disposed of in terms of the following order :-

- (i) The Defendant is granted unconditional leave to defend the suit.
- (ii) Written statement to be filed within a period of four weeks from today.
- (iii) At the request of the Plaintiffs, the suit is expedited.

9. In view of the disposal of the summons for judgment, nothing survives in the notice of motion and the same is disposed of.

(S.C. GUPTE, J.)