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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.85 OF 2017
IN
COMMERCIAL SUMMARY SUIT NO.479 OF 2017

Bharat S. Shah ...Plaintiff
vs
B.R. Films And 2 Ors. ...Defendants

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Mr. Ashish Kamat, a/w. Mr. Kunal Parekh, i/b. Thakore Jariwala And Associates, for the Plaintiff.

Mr. Nausher Kohli, a/w. Ms. Mansi Vyas, Mr. Aman Kacheria and Mr. Harsh Gokhale, i/b. DSK Legal, for the Defendants.

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CORAM : S.C. GUPTE, J.

DATED : 16 APRIL 2018

P.C. :

. Heard learned Counsel for the parties. This summons for judgment is taken out in a summary suit based on a written contract to pay.

2. Under an agreement titled as "A World Rights Controller Agreement" and executed between the parties, the Plaintiff advanced a sum of Rs.5 crores to the Defendants, who were in the process of producing a feature film titled "POCKETMAR". The World Rights Controller Agreement provided for various rights to the Plaintiff described therein as the World Rights Controller. Since this film did not

materialise, the Plaintiff became entitled to refund of the amount advanced to the Defendants. A letter was addressed in that behalf by the Plaintiff to the Defendants on 17 September 2012 recording the mutual agreement between the parties that the advances were to be repaid by the Defendants to the Plaintiff along with interest at the rate of 15% per annum. The Defendants' acceptance of this agreement was endorsed on this writing. There is no dispute between the parties as to the writing or to the endorsement of the Defendants thereon. Subsequently, there was correspondence exchanged between the parties for payment of this amount. The payment, however, was not forthcoming from the Defendants. In the premises, by a separate agreement dated 18 July 2014, (titled as Film Assignment Agreement), the Defendants assigned to the Plaintiff rights described in the agreement in respect of 33 feature films produced by the Defendants. This agreement was executed on 18 July 2014. By another writing executed on the same day, i.e. 18 July 2014, the parties confirmed having executed the assignment agreement assigning various rights in the films referred to therein to the Plaintiff for such term and territory as mentioned in the agreement for a sum of Rs.4.90 crores. The writing records an agreement between the parties that the sum of Rs.5 crores paid by the Plaintiff to the Defendants under the World Rights Controller Agreement stood adjusted against the consideration of Rs.4.90 crores due and payable by the Plaintiff to the Defendants under the assignment agreement. The writing recorded that, by this means, the World Rights Controller Agreement stood mutually terminated and that the Plaintiff would not have any claim or demand of any nature against the Defendant under the World Rights Controller Agreement or otherwise.

The writing further records an agreement between the parties by which the Defendants agreed to pay an additional compensation of Rs.2.10 crores within a period of 18 months from the date thereof. If this amount was not paid within the stipulated period, the Defendants were liable to pay interest at the rate of 15% per annum on the amount due as on the 19th month till payment or realisation. The assignment agreement as well as this writing of the same day are not matters of dispute. Based on this writing, there have been at least two acknowledgements of liability executed by the Defendants in favour of the Plaintiff. These are dated 23 May 2016 and 17 June 2016. In both these writings, the Defendants assured to make payment of the agreed sum of Rs.2.10 crores. It is an admitted position that this amount has not been paid by the Defendants to the Plaintiff.

3. In the face of these facts, it is the case of the Defendants in their reply to the summons for judgment that the amount purportedly payable under the writing of 18 July 2014 is in the nature of damages. It is submitted that damages cannot be claimed in a summary suit. Secondly, it is submitted that the amount is not a genuine pre-estimate of the loss or damages suffered by the Plaintiff and is in the nature of penalty on which a summary suit does not lie. None of these defences has any substance or can be described even as a statable defence. This is not a suit where the Plaintiff seeks to recover damages. This is a suit where the Plaintiff seeks to recover monies due on an express agreement to pay within a stipulated period. This agreement is certainly supported by consideration, the consideration being the original transaction between the parties, namely, the World Rights Controller Agreement,

under which the Plaintiff suffered damages. There is no question of this being a genuine pre-estimate of damages. In the first place, it is not a pre-estimate, but a post-estimate of the loss or damages suffered by the Plaintiff. The agreement was executed after, and in consideration of, the loss was suffered by the Plaintiff. The parties assessed or ascertained the damages and, thereafter, entered into the agreement for recovery of the amount so determined.

4. Learned Counsel for the Defendants relies on a judgment of our Court in the case of **Mahindra British Telecom Ltd. vs. Prabhat Gupta**[1]. In that case, this court held that a summary suit is not maintainable for claiming liquidated damages. A claim of liquidated damages has to be ascertained and established whatever may have been the agreed quantum of such damages. The liquidated damages covered by an agreement between the parties are not in the nature of liquidated amount or claim within the meaning of Order 37 Rule 2 of the Code of Civil Procedure. There is no quarrel with the proposition. The point is that this is not a case seeking recovery of liquidated damages. In the case before our Court in **Mahindra British Telecom Ltd.,** there was an agreement between the parties, which provided for a sum named as "liquidated damages" in the event of its breach. This was contained in an executory agreement. When the agreement was breached, the sum of liquidated damages was claimed. The Plaintiff contended that this amounted to liquidated sum payable under a written contract. The court held that though the sum named as liquidated damages, the extent of damages still needs to be proved. It is an established principle of law

1 2001 SCC OnLine Bom 819

that even in a case, where the contract between the parties has fixed liquidated damages, the sum may in fact be in the nature of penalty, if the sum named cannot be seen as a genuine pre-estimate of damages. That is not a case here, as I have noted above. Here the damages have already been incurred by a party and the resultant compensation for such damages has been mutually worked out and, on the basis of which, a written contract has been executed between them for payment of a named sum within a stipulated period.

5. Learned Counsel for the Defendant contends that the so called agreement contained in the writing of 18 July 2014 is on an unstamped document. The writing of 18 July 2014 merely records a commitment given by the Defendants to pay the sum named therein within a stipulated period. The document does not require payment of any stamp duty. In any event, payment of stamp duty, is really a matter for the revenue to worry out and not a defence which the opponent can be said to be armed with. A reference may be made in this behalf to the judgment of our Court in the case of **Wolstenholme International Ltd. vs. Twin Stars Industrial Corporation**[2] (para 14). No unconditional leave can be prayed for on this defence alone.

6. Learned Counsel also relies on the case of **Raj Duggal vs. Ramesh Kumar Bansal**[3]. Relying on this case, it is submitted that on an application for leave to defend the real test is to see whether the defence raises a real issue and not a sham one, in the sense that if the court is satisfied that the facts alleged by the defendant are established, there will

2 2001(4) Bo.C.R. 114

3 1991 Supp (1) Supreme Court Cases 191

be a good or even a plausible defence on those facts. This was originally the law laid down in **Mechalec Engineering**[4]. We have come a long way since. The principles of law for consideration of grant of leave to defend are now crystallized in the judgment of the Supreme Court in the case of **IDBI Trusteeship Services Limited vs. Hubtown Limited**[5]. The Defendants have now to make out not just a plausible defence but a probable defence so as to claim unconditional leave to defend as of right. Sadly, in the present case, there is not even a plausible or, for that matter, even statable defence, leave aside a probable defence.

7. In the premises, this Court would be perfectly justified to allow the summons for judgment by passing a decree in the commercial summary suit. However, with a view to give one opportunity to the Defendants, only by way of mercy, this Court is of the view that though leave may be granted to the Defendants, it must be on the condition of deposit of the entire principal amount of Rs.2.10 crores agreed to be paid under the writing of 18 July 2014.

8. In the premises the following order is passed :

(i) The Defendants are granted leave to defend on and subject to the condition of deposit in this Court of a sum of Rs.2.10 crores within a period of six weeks. The amount, if any, deposited by the Defendants, may be invested by the Prothonotary and Senior Master in fixed deposit/s of nationalized bank/s, initially for a period of 13 months and,

4 AIR 1977 S.C. 577

5 (2017) 1 Supreme Court Cases 568

thereafter, to be renewed from time to time and to abide by further orders that may be passed in this suit.

(ii) The Defendants may file their written statement within four weeks after deposit of the amount as stated above.

(iii) Place the suit for directions after ten weeks.

(iv) The summons for judgment is disposed of.

(S.C. GUPTE, J.)