

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**SUMMONS FOR JUDGMENT NO. 13 OF 2019
WITH
COMMERCIAL SUMMARY SUIT NO. 1101 OF 2018**

Hemali Parag Mehta & Anr. ... Applicants/Orig. Plaintiffs
Versus
Ami Sunil Shah ... Defendant

Mr. Robin Jaisinghani a/w Ms. Jacinta D'Silva i/b Chetan B. Raithatha for
the Applicants/Plaintiffs.

Mr. Vinod S. Pandey i/b S.U. Pandey for the Defendant.

CORAM : R.I. CHAGLA, J.

DATED : 24th SEPTEMBER, 2019.

P.C. :

1 The Plaintiffs have filed the Commercial Summary Suit praying for a monetary decree for re-payment of money due and payable by the Defendant to the Plaintiffs. The sum of money claimed in the prayer clause of the Suit and in the Summons for Judgment is now sought to be reduced by tendering a statement which shows that the sum of Rs.14,82,50,000/- is payable after computing the correct interest amount as well as adjusting the sum of Rs.6 crores which had been paid by way of partial consent

decree in the Suit No.921 of 2015 filed by the present Plaintiffs against M/s. Ayyappa Construction Company and Mr. Sunil Rasiklal Shah.

2 The Memorandum of Understanding (MOU) dated 27.06.2015 had been entered between M/s. Ayyappa Construction Company (of the first part) and Mr. Sunil Rasiklal Shah and Mrs. Ami Sunil Shah (of the second part) and Mrs. Hemali Parag Mehta and Mrs. Premila Mahendra Shah (of the third part) and Mr. Mahendra Prataprai Shah (of the fourth part). The said MOU in the cause title where Mr. Sunil Rasiklal Shah and the current Defendant have been mentioned, they are stated to be the Ex-Director and shareholders of M/s. Ayyappa Developers Private Limited and as partner/director and/or shareholder in various Companies and as the Members and co-parceners of Mr. Sunil R. Shah HUF. Under the said MOU, the lump sum amount of Rs.14 crores was agreed to be paid in full and final settlement of the Plaintiffs claim for repayment of monies lent by inter-alia the Defendant together with interest @1.25% per month and further 1.00% towards commission/brokerage to Mahendra Prataprai Shah and further 1.00% towards penalty for damages for the delay caused for repayment. These sums were payable by inter-alia the Defendant to the Plaintiffs on account of the sums which had been lent by the Plaintiffs from time to time. Under Clause 1.1(i) a sum of Rs.10 crores was to be paid by Mr. Sunil R. Shah within one month from the date of the MOU and the

balance of Rs.4 crores payable by Mr. Sunil R. Shah within six months from the date of the MOU with interest @1.25% per month, the commission and penalty apart. Under Clause 15 of the MOU, the Defendant together with Mr. Sunil R. Shah have undertaken to be personally liable and responsible for the repayment of the principal monies and interest under the MOU and for any breach thereof by Mr. Sunil R. Shah of the terms and conditions of the said MOU. It appears that after the said MOU was executed, cheques of Rs.1 lakh each were issued by the said Mr. Sunil R. Shah totaling a sum of Rs.14 crores in favour of the Plaintiffs. It has all along been represented by the said Mr. Sunil R. Shah and the Defendant that they would be personally liable under the MOU to repay the said sum mentioned therein.

3 A subsequent MOU was executed on 25.09.2015 (referred to as the second MOU) between the said M/s. Ayyappa Construction Company and the said Mr. Sunil R. Shah with the Plaintiffs wherein Mr. Sunil R. Shah had agreed to repay the sum of Rs.15,71,32,020/- to the Plaintiffs. Under recital (x) of the second MOU, the parties had agreed that prior to execution of second MOU, they had entered into the MOU dated 27.06.2015 (inadvertently dated as 27.08.2015 which has later been corrected by this Court) and that in the event of inconsistency between the two MOUs, the terms and conditions as provided in the second MOU will prevail and terms and conditions of both will be reconciled to the

advantage of the Plaintiffs. Certain properties were also given as security under the second MOU which comprised of flats/ premises/ plots/ properties and undertakings were given by Mr. Sunil R. Shah not to sell, transfer, assign, surrender, give on leave and license, mortgage or create any lien, third party rights in any manner whatsoever against his ownership rights/ Development rights, whether in his individual capacity or as a proprietor, partner or Karta or shareholder in any of the properties listed in Annexure 'B' to the second MOU. Thus, a mortgage has been created in favour of the Plaintiffs which was an equitable mortgage of the properties as also the right title and interest of the said Mr. Sunil R. Shah in the properties set out in Annexure 'B' to the MOU.

4 The Plaintiffs had filed Suit No.921 of 2015 wherein a monetary decree was claimed in terms of the second MOU as well as for enforcement of the securities which had been created in favour of the Plaintiffs by M/s. Ayyappa Construction Company and Mr. Sunil R. Shah in the second MOU.

5 In the said Suit, consent terms were entered into between the parties which has been recorded in the order dated 28.10.2015 under which the Defendants therein agreed and accepted that as on 30.09.2015, the Defendants are liable to pay the Plaintiffs the said sum of

Rs.15,71,32,020/-. It was agreed that the MOU contemplated a charge over the unsold flats of the Defendants therein which would be held by the Plaintiffs and that the Defendants therein had acquired development rights in respect of the properties mentioned in clause 11 of the consent terms, which they agreed not to deal with till the entire dues of the Plaintiffs are paid and in default of payment, the properties shall stand vested in the Plaintiffs so as to realize the decretal claim.

6 Under Clause 19 of the consent terms it was expressly provided that the personal guarantee given by the guarantors in both the MOUs will continue. It appears that these consent terms which had been taken on record by this Court on 28.10.2015 were however set aside by this Court vide order dated 12.08.2016 on an application made by a third party Society.

7 Thereafter, the Plaintiffs entered into partial consent terms dated 25.04.2018 in Suit No.921 of 2015 whereby Plaintiffs agreed that a sum of Rs.6 crores shall stand adjusted against the 50% share of the Defendants therein in the partnership firm as provided in Clause 5 of the partial consent terms. Accordingly, this Suit was taken out by the Plaintiffs against the Defendants claiming the decretal sum payable by the Defendant under the MOU dated 27.06.2015.

8 The learned Counsel for the Plaintiffs has submitted that under the MOU dated 27.06.2015, the Defendant had although being a co-parceners of Mr. Sunil R. Shah HUF had made herself personally liable and responsible for repayment of the principal monies and interest under the MOU and/or for any breach by Mr. Sunil R. Shah (the husband of the Defendant) of the terms and conditions of the MOU. He has submitted that the Summons for Judgment which has been taken out is for a clearly admitted liability of the Defendant under the MOU dated 27.06.2015. This liability has been accepted by the husband of the Defendant Mr. Sunil R. Shah under consent terms dated 28.10.2015 under which the said Mr. Sunil R. Shah agreed and accepted that he was liable to repay the Plaintiffs sum of Rs.15,71,32,020/- under the second MOU. He has submitted that pursuant to the first MOU, the said Mr. Sunil R. Shah has also issued cheques to the tune of Rs.14 crores which thereafter were not honoured. He has submitted that the Defendant had nowhere disputed her liability for payment of the decretal sum under the said MOU and sum of Rs.6 crores has also been adjusted against the decretal sum due to the Plaintiffs.

9 He has relied upon certain case laws in support of his submissions including the decisions of this Court in *Shiv Bhagwan Moti Ram Saraoji vs. Onkarmal Ishar Dass*¹, *Mustadi Lal and others vs. Shakhir*

1 2014 BOMBAY Law Reporter page 330;

*Chand and others*², and *Gokal Kastur vz. Amarchand Jasraj*³ that a co-parcener is personally liable if the co-parcener's assents to a particular contract and if there had been acquiescence of the co-parcener in the course of dealings in which the particular contract was entered into. This would be an exception to the general law that a Karta enters into contract for the benefits of his family. He has submitted that in the present case, the Defendant had personally made herself liable and responsible for the repayment of the sum due under MOU dated 27.06.2015.

10 He has submitted that insofar as the trial suit No.921 of 2015 which had been filed by the Plaintiffs against M/s. Ayyappa Construction Company and the said Mr. Sunil R. Shah, this Suit was for enforcement of the security under the second MOU as well as sums payable under the second MOU. He has submitted that the Suit which had been filed by the plaintiffs will have no bearing on the present Suit as the present Suit has been filed against the Defendant under the MOU dated 27.06.2015 and on account of the Defendant making herself personally liable under the MOU. He has submitted that the Plaintiffs have a choice of whom they intend to sue and the MOU has not been given a go-by as it has been expressly kept alive in the second MOU as well as in the consent terms entered into

2 AIR 1935 Lahore page 735

3 1907 Vol.9 Bombay Law Reporter page 1289,

between the parties. He has relied upon recital 'X' of the second MOU which expressly refers to the first MOU and that the terms and conditions would be applicable and would be reconciled to the advantage of the Plaintiffs. He has submitted in the event that the Suit No.921 of 2015 was decreed in favour of the Plaintiffs, this decretal sum upon being paid would be adjusted from the decretal sum which is due and payable under the present Suit in which the Summons for Judgment has been taken out. He has relied upon the decision of the Supreme Court in ***Industrial Investment Bank of India Limited vs. Biswanath Jhunjhunwala***⁴ wherein the Plaintiffs/Appellants therein were held to be fully justified in initiating proceedings against the borrower company as well as the guarantor before different Courts and there was no bar to continuation of these proceedings merely because of the Suit having been filed prior in course of time against one of the parties. He has also relied upon the judgment of the Supreme Court in ***State Bank of India vs. M/s. Indexport Registered and others***⁵, wherein it was held that where there is a composite decree i.e. both a personal decree as well as a mortgage decree, the Decree Holder, in principle, cannot be forced to first exhaust the remedy by way of execution of the mortgage decree alone and then that only if the amount recovered is

4 (2009) 9 SCC 478

5 AIR 1992 SC 1740

insufficient, he can be permitted to take recourse to the execution of the personal decree.

11 He has submitted that since the prayer Clause for the monetary decree in the Summary Suit as well as in the Summons for Judgment has included the interest amount which is incorrect, a statement has been tendered. It would not be required for the Plaintiffs to amend the prayer clause in the Summons for Judgment and that a decree can be granted on the basis of the statement. He has relied upon the Full Bench decision of this Court in *SICOM Limited vs. Prashant S. Tanna and others*⁶, in support this contention. He has accordingly submitted that the Summons for Judgment be made absolute and the Suit be decreed.

12 The learned Counsel for Defendant has submitted that by filing the first Suit viz. Suit No.921 of 2015, the Plaintiffs had chosen not to sue the Defendant herein and hence, the present Suit is barred under the principles of res-judicata. He has submitted that the Plaintiffs had by filing the said Suit, willfully dropped their claim against the Defendant. He has submitted that the Plaintiffs by entering into the second MOU, a further understanding or transaction with the said Mr. Sunil R. Shah, the

6 AIR 2004 Bombay 186

Defendant cannot be made liable to pay anything to the Plaintiffs. He has submitted that the 14 cheques which were issued by Mr. Sunil R. Shah to the Plaintiffs each of which was for a sum of Rs.1 crore were issued towards payment of the dues of the Plaintiffs. The Plaintiffs were obliged to inform the Defendant of the non-fulfillment of payment under these cheques.

13 He has submitted that in the event of default on the part of Mr. Sunil R. Shah in honouring the said cheques, and the non-intimation to the Defendant thereof, the claim of the Plaintiffs does not arise against the Defendant on the due date of the said cheques i.e. 27.07.2015. Since the present Suit is filed after Suit No.921 of 2015 by the Plaintiffs, the claim of the Plaintiffs against the Defendant would if at all arise from the date of the MOU i.e. 27.06.2017 and hence the Suit having been filed beyond the three year limitation period would be barred by the law of limitation and deserves to be dismissed. He has submitted that the subsequent conduct of the Plaintiffs in entering into consent terms in Suit No.921 of 2015 with the Defendants therein, had barred them from agitating any claim against the Defendant herein, as to monies due and payable by the Defendant. He has submitted that it is only on account of the Plaintiffs not being able to arrive at suitable terms with Mr. Sunil R. Shah that they have with malafides pressurized the Defendant herein, who is wife of Mr. Sunil R.

Shah, to pay the sums due to the Plaintiffs. The Plaintiffs cannot claim the same relief in two different Suits i.e. Suit No.921 of 2015 and the present Suit, particularly when the Defendant was not impleaded in the prior Suit. He has submitted that the Plaintiffs have by their act of not suing the Defendant in the first Suit are deemed to have given up their claim against the Defendant herein and hence the Summons for Judgment taken out by the Plaintiffs, be dismissed.

14 I have considered the submissions, in my view the personal liability of the Defendant is clearly apparent from Clause 15 of the MOU, wherein the Defendant has agreed to be personally liable and responsible for the repayment of the principal monies and the interest thereon and/or for any breach, by her husband Mr. Sunil R. Shah of the terms and conditions of the said MOU.

15 The Defendant cannot feign ignorance of the acts of her husband Mr. Sunil R. Shah including the not honouring of the cheques totalling the sum of Rs.14 crores which were deposited by Mr. Sunil R. Shah under the MOU. Further, the cause of action against the Defendant is a separate cause of action from the cause of action in the Suit No.921 of 2015 against the Defendants therein. It appears from the plaint filed in Suit No.921 of 2015 that the first Suit was for enforcement of the securities

and/or charges in respect of the properties set out in Annexure -B to the second MOU dated 25.09.2015. The sum due and payable by the Defendant herein, would remain and her liability would not be overridden by the second MOU. Further, from recital 'X' of the second MOU dated 25.09.2015, it is clear that the first MOU dated 27.06.2015 has been expressly mentioned, although the date was written as 27.08.2015, this was later rectified by an order passed by this Court on 10.12.2015. It has been provided in the recital that in the event of any inconsistencies between the terms and conditions as provided in the two MOUs, the terms and conditions as provided in the second MOU will prevail and the terms and conditions of both will be reconciled to the advantage of the Plaintiffs. It is clear that in the first MOU, the Defendant has made herself personally liable and to be proceeded against in her individual capacity for the dues of the Plaintiffs. In fact in the consent terms which were entered into on 12.10.2015 and which were taken on record by this Court, the two MOUs have been clearly mentioned as well as the personal guarantee given inter-alia by the Defendant herein in the first MOU which was to continue. Although these consent terms dated 20.10.2015 were later set aside by this Court, the Defendants in the consent terms which were filed in Suit No.921 of 2015, had clearly admitted their liability to make payment of the sums under the MOU. Thereafter, further partial consent terms were entered

into in Suit No.921 of 2015 whereby the Plaintiffs agreed to adjust the total sum of Rs.6 crores on terms and conditions mentioned therein.

16 There appears to be no dispute insofar as the law cited on behalf of the Plaintiffs. The Defendant who was a co-parcener in Mr. Sunil R. Shah HUF has clearly contracted in her personal capacity and made herself personally liable for repayment of the sums which had been lent by the Plaintiffs. Thus, there is no dispute insofar as the personal liability of the Defendant herein is concerned. The submission on behalf of the Defendant that the present Suit would be barred by the principles of res-judicata on account of the prior Suit No.921 of 2015 having been filed against the husband of the Defendant and the firm M/s. Ayyappa Construction Company, cannot be accepted. The cause of action in the present Suit is a separate cause of action which arises on account of the Defendant's personal liability and/or guarantee given by the Defendant to pay sums due to the Plaintiffs under the first MOU expressly provided under Clause 15 of the first MOU. Further, the Suit No.921 of 2015 is a pending Suit and is still to be adjudicated upon and hence the principles of res-judicata cannot apply in the present case. Insofar as the contention on behalf of the Defendant that the suit is barred by limitation on account of the MOU being dated 27.06.2015 and the Suit having been filed on 26.07.2018, this submission also deserves to be rejected. It is clear from

the first MOU that the sum of Rs.10 crores which is part of Rs.14 crores was re-payable by the Defendant to the Plaintiffs was to be paid within one month from the date of the first MOU i.e. 27.07.2015 and the Suit having been filed on 26.07.2018, is clearly within the three years prescribed by the law of limitation for filing the Suit.

17 I find merit in the submission on behalf of the Plaintiffs that it is permissible for the Plaintiffs to pursue two Suits albeit for repayment of monies which had been lent by the Plaintiffs jointly to the Defendant herein as well as the Defendant in Suit No.921 of 2015. It is well settled by the Supreme Court that the Suits can be filed against a borrower and the guarantor in different Courts on the ground that the liability of the guarantor and the principle debtor is co-extensive and not in the alternative. This is supported by the judgment of the Supreme Court in the ***Industrial Investment Bank of India Limited*** (supra). Thus, the Plaintiffs are perfectly entitled to peruse this Suit and take out the Summons for Judgment in the present Suit. Insofar as the necessity to carry out amendment to the monetary sum which is claimed in the prayer clause of the plaint filed in the Summary Suit and sought to be corrected by way of a separate statement tendered to this Court, this issue has been also settled by a Full Bench of this Court in ***SICOM Limited*** (supra). This Court has held that in a Summary Suit filed under Order 37 of C.P.C., the Plaintiffs

are entitled at any time to abandon or give up a part of the claim unilaterally and the Plaintiffs can do so by making a statement to be recorded by the Court without the necessity of the Plaintiffs making a formal application for the same by withdrawing the Summons for Judgment, amending the plaint and thereafter taking out a fresh Summons for Judgment or otherwise. The mere making of an excess claim would not render the Suit not maintainable as a Summary Suit so long as the action falls within one of the classes enumerated in Order 37 Rule 1(2) of the C.P.C. In my view the claim made in the Summary Suit is clearly one which falls within the classes enumerated in Order 37 Rule 1(2) of the C.P.C.

18 The statement is accordingly taken on record and marked 'X' for identification.

19 In view thereof it would be appropriate to make the Summons for Judgment absolute as no real defence has been made out to the Summons for Judgment. The Summons for Judgment is made absolute. The Suit is decreed in terms of prayer clause (a) as amended by the statement which has been tendered to this Court and marked as 'X' and which is for the sum of Rs.14,82,50,000/- after having taken into account the sum of Rs.6 crores which has been paid to the Plaintiffs.

20 The decree will be drawn and sealed expeditiously. Liberty to the Plaintiffs to move in Execution without awaiting sealing of the decree. I am not inclined to award any cost in the circumstances in the case. The Plaintiffs are also entitled to refund of Court fees in accordance with Rules.

21 The Summons for Judgment and Commercial Summary Suit are disposed of in the above terms.

22 At this stage, the learned Counsel for the Defendant seeks a stay of the order and judgment.

23 In my view, considering that I have held that there is no real defence to the Summary Suit, the application for stay of this judgment and order is rejected.

(R.I. CHAGLA, J.)