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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
SUMMONS FOR JUDGMENT NO.102 OF 2018
IN
COMM SUMMARY SUIT NO. 1122 OF 2018

Pushpa S Gindra …Plaintiff
Versus
Rainbow Constructions & Ors …Defendants

Dr A Chandrachud, *with Mr Deepak Shukla, i/b Vinod Mistry & Company, for the Plaintiff.*
Mr Ramesh Jain, *for Defendants Nos. 1 to 4.*
Mr Rajiv Narula, *i/b Jhangiani Narula & Associates, for Defendant No.5.*

CORAM: G.S. PATEL, J
DATED: 25th January 2019

PC:-

1. The matter was listed yesterday when Mr Jain sought time for a negotiation. It was agreed that if there was no settlement (and for which the matter would be listed today), the hearing of the Summons for Judgment would proceed. There being no settlement, the Summons for Judgment is taken for hearing and final disposal.

2. The suit is filed by an individual in the Commercial Division of this Court under Order XXXVII of the Code of Civil Procedure 1908 (**"CPC"**) seeking a summary decree against Defendants in the amount of Rs. 1,15,00,000/- with interest at 15% per annum. The Plaintiff says she entered into an agreement dated 14th March 2014 under the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act 1963 (**"MOFA"**) with the 1st Defendant. Under this agreement the Plaintiff agreed to purchase Flat No.704 of about 425 sq ft carpet area on the 7th floor of a building called Govind Niwas at Kandivali. The consideration for this flat purchase was Rs.49.90 lakhs. The MOFA agreement was itself stamped and registered. There is no dispute that the Plaintiff paid the entire consideration of Rs.49.90 lakhs to the 1st Defendant.

3. It seems that the 1st Defendant could not or did not deliver possession. There then followed a Deed of Cancellation dated 5th August 2015 between the Plaintiff and the 1st Defendant. A copy of this deed is at Exhibit "B" to the Plaint. It is also registered. The agreement itself makes it clear that the 1st Defendant agreed to refund the amount of Rs.49.90 lakhs "as mutually agreed" between the parties.

4. According to the Plaintiff, the Defendant made no repayment. There were apparently some meetings, or so the Plaintiff claims, between her husband and the 3rd Defendant or his son. After some discussions, the 1st Defendant issued Cheque No. 182288 dated 24th April 2018 in the amount of Rs. 1.15 crores in favour of the Plaintiff. A copy of this cheque is at Exhibit "C" at page 53. A few things about this cheque must be noted apart from its number. It is admittedly a cheque drawn by the 1st Defendant, whose name appears in print on the cheque. There is no dispute that it was signed by Defendant No. 3, and I say because in his Affidavit in Reply to the Summons for Judgment that followed, Defendant No. 3 has not once denied his signature. The other point of significance is that the cheque is drawn on the 1st Defendant's bank account with Bharat Cooperative Bank, Kandivali Branch Account No. 015012100002102. On presentment, this cheque was dishonoured because the account was apparently attached or frozen by the Economic Offences Wing.

5. The Plaintiff served the Writ of Summons. The Defendants entered appearance. The Plaintiff filed the Summons for Judgment. There is a reply and a rejoinder.

6. The reply by the 3rd Defendant is from page 9 of the Summons for Judgment paper book. In this, he says in paragraph 12 that this cheque was "misused by the Plaintiff with conspiracy with same of our financier". I do not pretend to understand what this is supposed to mean. Unfortunately, Mr Jain for Defendants Nos. 1 to 4 is unable to shed much light on this either. There is no allegation that the Plaintiff stole the cheque, or that the signature on it is forged, and it seems unlikely that the 1st Defendant's cheques would have been with its financiers with whom the Plaintiff could any hatch any such so-called conspiracy. The fact of the account being frozen cannot be disputed.

7. To the Affidavit in Reply is annexed at Exhibit "A" a copy of a notice issued by the Economic Offences Wing. There is a table in this notice which mentions the 1st Defendant and gives two account numbers. The first of these account numbers is 001512100021025. This is not the account on which the subject cheque was drawn. The second account mentioned against the 1st Defendant in that notice is the one that appears on the dishonoured cheque, viz., 015012100002102. Overleaf is a letter from the Bharat Cooperative Bank of 26th September 2018 which says that cheque No. 182288 was issued on the account ending with the digits 21025 — again, not the account number that appears on the cheque. How this can possibly afford defence to Defendants Nos. 1 to 4 is unclear. It is possible that both accounts had cheques in the same series but each cheque bore a distinct account number. The letter from the bank does not relate to the dishonoured cheque at all. The account numbers are entirely different.

8. The primary defence seems to be only that there was no agreement to pay the Plaintiff an amount of Rs. 1.15 crores. If this be so, then there is simply no explanation whatsoever for the issue of the cheque. This is not a suit for recovery of a loan given by a cheque. It is the suit for recovery of the amount of a cheque issued by the Defendant and which was dishonoured on presentment.

9. Paragraph 16 of the plaint sets out the cause of action and I believe in fairness to Mr Jain and Mr Narula for Defendant No. 5, I must address this. The relevant portion of that paragraph says that the Plaintiff is suing for the amounts due under the said cheque "pursuant to the oral agreement dated 18th April 2018". Dr

Chandrachud for the Plaintiff would have it that this is not a suit on the oral agreement at all. Had it been so, the Summary Suit would not lie. The second portion of the phrase that I have quoted, possibly redundant, and possibly ill-advised, merely explains the circumstances in which the cheque came to be issued. The suit remains one for recovery of the amount of a dishonoured cheque and that falls squarely within the frame of Order XXXVII Rule 2 of the Code of Civil Procedure 1908 as amended for Bombay. He draws my attention to the Full Bench decision in *Jyotsna K Walia v TS Parekh & Co*[1] and in particular paragraph 26 which makes the distinction between a suit filed for recovery of an amount advanced by cheque and a suit filed for recovery of an amount of a dishonoured cheque in repayment of a previous loan. His submission is that the present suit falls squarely within the latter category. There is no question of a loan. There is an admitted Deed of Cancellation. True that the Deed mentions a figure of Rs. 49.90 lakhs but that is no answer at all to a cheque issued three or four years later for a higher amount, especially if the signature on the cheque is not disputed and the name of the 1st Defendant does in fact appear on the cheque. Other than this, i.e. except for saying that there is a discrepancy between the Deed of Cancellation and the amount of cheque, there is nothing at all of substance.

10. The question perhaps would be whether this in itself raises a triable issue, or is or can fairly be said to be a plausible or probable defence. I am unable to see how it could, for the simple reason that there is no explanation at all from the Defendants Nos. 1 to 4 and particularly from Defendant No. 3 who signed the cheque and filed

1 2007 (4) Mah LJ 517.

the Affidavit and who presumably, therefore, is in the full know of circumstances in which that cheque came to be issued in the first place.

11. Defendant No. 5 has separated from the other Defendants. She is now represented by Mr Narula. He says that even at the time of the flat purchase agreement on 14th March 2014 she was not a partner. She had retired from the partnership a good 10 years earlier in 2004. Dr Chandrachud maintains on the basis of documents annexed to the Affidavit in Rejoinder that recent reports from the Registrar of Firms continue to show her as a partner. He submits that under Section 32(3) of the Partnership Act 1932 she would continue to be liable unless there was a public notice issued. I do not think that in these circumstances it would at all be reasonable to hold against Defendant No. 5. Mr Narula has produced a Deed of Reconstitution of April 2004. The present 5th Defendant is shown in that document as a retiring partner. He also has documents in this compilation to show that this Deed of Partnership was lodged with the Registrar of Firms. If that office has not updated its records or the other partners have not issued the requisite notice, on this basis I do not think it would be reasonable to read the law against Defendant No. 5.

12. As regards the other Defendants, I am unable to find any defence on merits. In fact, in my view there is no defence at all. It is not plausible and there is no triable issue that is raised.

13. Accordingly, the Summons for Judgment is made absolute jointly and severally against Defendants Nos. 1 to 4 in the amount of Rs. 1.15 crores with further interest at 18% per annum from the date of dishonour of cheque until payment or realization.

14. This being a suit under the Commercial Courts Act, the successful party is entitled to costs in view of the amended provisions of Section 35 of the Code of Civil Procedure 1908. The Plaintiff has paid court fee of Rs. 1,51,230/- on the plaint. The Plaintiff is entitled to refund in accordance with the Rules. The balance amount will constitute costs recoverable jointly and severally from Defendants Nos. 1 to 4 by the Plaintiff. In addition, there will be a decree in costs that I estimate to be reasonable litigation costs of Rs. 2.5 lakhs in favour of the Plaintiff.

15. The decree in costs will carry no interest.

16. The Summons for Judgment and the Summary Suit are both disposed of accordingly.

(G. S. PATEL, J)