

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

**SUMMONS FOR JUDGMENT NO. 116 OF 2018
IN
COMMERCIAL SUMMARY SUIT NO. 1165 OF 2018**

Sonia Rajeev Kesarwani ... Plaintiff
Versus
M/s. Patel Developers & Ors. ... Defendants

Mr. Darshan Jain a/w Mansha Bhatia for the Plaintiff.
Mr. Nirman Sharma a/w Mr. G.B. Kedia for Defendant Nos.1 to 5.

CORAM : R.I. CHAGLA, J.

DATED : 29th JULY, 2019.

P.C. :

1 The Plaintiff has filed the Commercial Division Summary Suit under Order 37 Rule 2 of the Code of Civil Procedure, 1908 to recover a sum of Rs.43,00,000/- towards refund of part payment made by the Plaintiff to the Defendants towards allotment of Flat No.1305 on 13th Floor of building known as Ra Atonia situated at City Survey No.911, Plot No.7, Street No.91/3, Off Gaiwadi Industrial Estate, S.V. Road, Goregaon (West), Mumbai - 400 062 (“the subject flat”). In addition, the Plaintiff has claimed certain payments towards cheques issued for interest and compensation of the sum of Rs.40,00,000/- and in addition outstanding

amount towards interest and compensation of Rs.10,00,000/- and interest on claim amount @ 12% from October 2017 to April 2018 of the sum of Rs.5,58,000/-. Further, damages have been claimed of Rs.5,00,000/- to bring the total claim to a sum of Rs.1,03,58,000/- i.e. to be within the pecuniary jurisdiction of this Court.

2 The learned Counsel for the Plaintiff has relied upon correspondence exchanged between the Plaintiff and the Defendants. These are briefly referred to. The Plaintiff's by their Advocate's letter dated 05.10.2015, called upon the Defendants to refund the amount of Rs.35,00,000/- with compensation being the difference of valuation i.e. current value less Rs.8,000/- per sq. ft. It was mentioned in the said letter that after almost three years, the Defendants had done nothing for the project and had committed Criminal breach of trust and were accountable to the Plaintiff for the same. A letter was addressed by the Defendant No.1 to the Advocate for the Plaintiff dated 05.11.2015 wherein the allotment of the subject flat to the Plaintiff and the allotment letter dated 09.10.2012 are referred to. Further, it is stated that there was delay in the project due to impediments in converting from industrial to residential and litigation with co-owners and once the dispute was settled, the possession of the subject flat shall be handed over to the Plaintiff upon completion of the project building. Thereafter, a legal notice has been issued by the Plaintiff's

Advocate to the Defendants dated 25.07.2017 for initiating necessary proceeding for recovery and also under RERA. A response letter had been addressed by the Defendants dated 22.08.2017 through their Advocates in which the Defendants had agreed to the demand of the Plaintiff for refund of its money invested in the project of the Defendants and which shall be refunded as and when the funds are available with the Defendants or latest by 31.03.2018. Further correspondence has been addressed by the Plaintiff to the Defendants once again calling upon them to make payment of the principle amount paid towards allotment as well as the compensation and interest as claimed. This further correspondence has been addressed by letter dated 25.09.2017 and also the said letter has been sent by e-mail to the Defendants. The learned Counsel for the Plaintiff has stated that there has been no response to this correspondence.

3 It is stated in the plaint at paragraph 16 that the Defendants had agreed to pay the principle amount of Rs.43,00,000/- along with Rs.50,00,000/- towards compensation and interest and also further interest @ 12% p.a. It is mentioned that Defendant No.1 during a meeting, in the presence of all the Defendants, issued four cheques totalling to a sum of Rs.40,00,000/- (signed by Defendant No.2) in favour of the Plaintiff, towards part compensation and interest. It is mentioned that upon handing over the cheques, the Defendants assured the Plaintiff that the

same shall be honoured upon being presented to the Bank and also assured to issue further cheques towards the remaining amount of compensation and interest and principle amount by end of September. Out of the four cheques of Rs.10,00,000/- each, three cheques were deposited and upon deposit had been dishonoured for funds insufficient. The learned Counsel for the Plaintiff has accordingly submitted that leave to defend should be refused and the Summons for Judgment be made absolute as this was an admitted liability on the part of the Defendants by issuance of these cheques towards compensation as well as admitting to the claim for the principle amount by way of refund and he has in this context relied upon the Judgment of the Supreme Court in *IDBI Trusteeship Services Ltd. vs. Hubtown Limited* (2017) 1 SCC 568. He has submitted that even in the case of blank cheques voluntarily signed and handed over to the Plaintiff which is towards payment would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of cogent evidence to show that the cheque was not issued in discharge of a debt. He has relied upon the judgment of the Supreme Court in *Bir Singh vs. Mukesh Kumar* 2019 SCC Online SC 138 in this context.

4 The learned Counsel for the Defendants has submitted that in a similar case, the learned Judge (G.S. Patel, J.) of this Court by an order

dated 27.02.2019 had granted unconditional leave to the Defendants by dismissing the Summons for Judgment. He has submitted that the learned Judge of this Court held in the facts of that case wherein the Defendants who are the same Defendants herein had issued cheques, all undated, on the clear understanding that this constituted a full and final settlement of the Plaintiff's case. In that case the Defendants had in the reply to the Summons for Judgment, submitted that this Court did not have pecuniary jurisdiction to entertain a Summary Suit as the sum of Rs.50,00,000/- (Rs. 40,00,000/- in the present case) which was a total sum of the five cheques, (four cheques in the present case) had been tendered towards the refund which had been sought by the Plaintiff of Rs.58,00,000/- (Rs. 43,00,000/- in the present case) and hence the pecuniary jurisdiction of this Court had not been satisfied. The learned Judge of this Court by order dated 27.02.2019 in paragraph 7 held thus :

“The submission from the Plaintiffs is that at least conditional leave ought to be granted and the Defendants should be put to terms by requiring a deposit of Rs.50 lakhs since this is an ‘admitted amount’. The difficulty with this, really, is the manner in which the Plaintiff proceeds by making allegations that the Defendants are habitual cheaters and so on, but, more importantly that there was an agreement to pay Rs.58 lakhs and additionally Rs.50 lakhs as compensation. Now for the purposes of pecuniary jurisdiction, the Plaintiffs cannot have it both ways. If they restrict their claim to either Rs.58 lakhs or Rs.50 lakhs, I simply do not have the jurisdiction. It cannot be that by mounting an additional

claim just slightly in excess of the limit of this Court's pecuniary jurisdiction, the Plaintiffs then use that to try and get a deposit of a lower amount. It will have to be determined whether the so-called admitted amount of Rs.50 lakhs was additional compensation as the Plaintiffs claim, or was, as the Defendants say, meant to be in full and final settlement. In a summary suit, it is not open to the Plaintiffs to say that it does not matter (or they do not much care) under what head or claim that amount lies, just so long as it is paid. I notice that the Plaintiffs are not giving up their claim that this was compensation. Therefore, this must be proved. If they are indeed giving up that claim, and accepting that this amount was in full and final satisfaction, then there is the question of pecuniary jurisdiction."

Upon so holding, the learned Single Judge went on to grant unconditional leave to defend. It is to be noted that in the said order dated 27.02.2019, the Plaintiff had also relied upon the Judgment of the Supreme Court in *IDBI Trusteeship Services Ltd.* (supra).

5 In the present case the Defendants at paragraph 4 of the affidavit in reply, have stated that as per the Plaintiff's own admission, the Plaintiff has made payment of Rs.43,00,000/- towards the allotment/investment of the subject flat and against the said payment of Rs.43,00,000/-, the Defendants have issued four blank dated cheques of Rs.10,00,000/- each aggregating to Rs.40,00,000/- towards the settlement of their claim. It has accordingly been the Defendants case as was in the

above case relied upon, that the cheques were issued towards the full and final settlement of the Plaintiff's claim of refund of the principle amount of Rs.43,00,000/- and that would give rise to an issue of pecuniary jurisdiction of this Court.

6 The learned Counsel for the Defendants has further submitted that the Plaintiff has inflated this claim by adding an amount of Rs.5,00,000/- as damages to the compensation which the Plaintiff claims are an admitted amount as cheques have been issued towards payment of compensation to bring the claim within the pecuniary jurisdiction of this Court. He has submitted that in any event the claim to compensation and damages is clearly not maintainable under a Summary Suit.

7 Having considered the submissions, it is apparent that the Summary Suit which is being filed under Order 37 of the Code of Civil Procedure clearly includes a claim for compensation as well as damages. Further, it is the Defendants case that the four cheques of Rs.40,00,000/- were issued towards the refund of sum of Rs.43,00,000/- which had been paid by the Plaintiff towards the allotment amount for the subject flat and that these cheques had been issued, all undated, on the clear understanding that this constituted full and final settlement of the Plaintiff's case. On the other hand it is the Plaintiff's case that these

cheques have been issued towards part payment of compensation and interest. It is to be noted that the Plaintiff had deposited three out of the four cheques which were dishonoured on account of funds being insufficient. It has been the Defendants' case that these cheques were only to have been deposited upon intimation by the Defendants and this was to be deposited in full and final settlement of the Plaintiff's claim for refund. Thus, it has to be determined as to whether the cheques amounting to Rs.40,00,000/- was towards payment of compensation as claimed by the Plaintiff, or as per the Defendants claim meant to be in full and final settlement of the sum of Rs.43,00,000/-. Considering that if the claim of the Plaintiff was given up, by accepting that this amount was in full and final satisfaction, then there would be a question of pecuniary jurisdiction. Accordingly, unconditional leave to defend must be granted as there are certainly triable issues. It is noted that this Court in another case which has been referred to by the learned Counsel for the Plaintiff i.e. in *Prakash Arjun Jethmalani vs. M/s. Patel Developers and others* (the Defendants being the same as herein) by order dated 01.10.2018 has taken a similar view.

8 The judgment of the Supreme Court relied upon by the learned Counsel for the Plaintiff i.e. *IDBI Trusteeship Services Ltd.* (supra) has been considered by the learned Single Judge of this Court in the above referred

case and by order dated 27.02.2019 held that the decision has been often misunderstood and misquoted. To fall within the often quoted 'admitted amount', there must be an unequivocal acceptance by both sides of an amount due to the Plaintiff i.e. not just the figure, but what that amount represents.

9 Since it is the Plaintiff's case that the amount of Rs.40,00,000/- was not in full and final settlement, but was towards payment of compensation, there is no explanation from the Plaintiff as to why the Plaintiff did not get a confirmation of liability for the cheques issued which according to them was not for the principal due but only for payment of the so called alleged compensation. Accordingly, as held in the order dated 27.02.2019 on similar facts the defence seems prima facie to be far more probable.

10 The Summons for Judgment is dismissed. Unconditional leave to defend is granted.

11 The suit to be listed for directions on 05.09.2019.

(R.I. CHAGLA, J.)