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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
SUMMONS FOR JUDGMENT NO. 126 OF 2018
IN
COMM SUMMARY SUIT NO. 1133 OF 2018

Vinod Kumar Sundarlal Kesarwani & Anr …Plaintiffs
Versus
Patel Developers & Ors …Defendants

Mr Darshit Jain, *i/b Mansha Bhatia, for the Plaintiffs.*
Mr Nirman Sharma, *with Mr Girish B Kedia, Ms Shivangi Kedia and Ms Trupthi Shetty, for the Defendants.*

CORAM: G.S. PATEL, J
DATED: 27th February 2019

PC:-

1. Heard. The summary suit says far too much. In a summary suit, less is always more.

2. The Plaintiffs booked a Flat No. 1004 in an under construction building at Goregaon. They paid Rs.58 lakhs at allotment. This was 50% of the consideration amount. According to the Plaintiffs, the Defendants did not construct the building or deliver possession of any flat. The Plaintiffs sent a legal notice on

5th October 2015 demanding refund. Importantly, even at this early stage the demand was for a refund *and compensation*.

3. A reminder followed in a somewhat leisurely fashion on 25th July 2017 but this time, according to the Plaintiffs, they quantified the claim for compensation at Rs.50 lakhs. Paragraph 5 of the Plaint says that the Defendants agreed to this demand for refund and Rs.50 lakhs in compensation and also further interest at 12% per annum. The Plaintiffs say that the Defendants issued cheques aggregating to Rs.50 lakhs. These were not deposited. According to the Plaintiffs, at the request of the Defendants they withheld depositing the cheques and continued to withhold depositing the cheques till after the expiry of the validity period of those instruments. Thus, there is no dishonour mentioned in the Plaint.

4. According to the Plaintiffs, there is an Agreement by virtue of issuance of these cheques under which the Defendants agreed to refund Rs.58 lakhs, grant additional compensation of Rs.50 lakhs and also agreed to interest at 12% per annum.

5. The suit was filed on 17th May 2018. The Writ of Summons having been served, the Defendants entered appearance. The Plaintiffs then filed a Summons for Judgment to which there is an Affidavit in Reply.

6. The Reply, briefly stated, says in paragraph 6 that the Plaintiffs are merely investors, and that it was pointed out that the property was under litigation. The averment in this paragraph is that the Defendants issued the five cheques for Rs.50 lakhs, all undated, on the clear understanding that this constituted a full and final settlement of the Plaintiffs' case.

7. 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 Plaint 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.

8. In my view unconditional leave to defend must be granted. There are certainly triable issues.

9. Mr Sharma for the Defendants draws my attention to a similar case decided by AK Menon J on 1st October 2018 where again unconditional leave to defend was granted.

10. Predictably, Mr Jain relies on the decision of the Supreme Court in *IDBI Trusteeship Services Limited v Hubtown Limited*,[1] and equally predictably this decision is misunderstood and misquoted. To fall within the 'admitted amount' clause of that decision, there must be an unequivocal acceptance by *both* sides of an amount due to the Plaintiffs, i.e., not just the figure, but what that amount represents.

11. The entire argument is that that there is an 'agreement' evidenced by the cheques themselves. Indeed there is not, on the Plaintiffs' own showing. The Plaintiffs' case, as we have seen, is that Rs.50 lakh was *not* in full and final settlement, but was additional compensation. There is absolutely no explanation from the Plaintiffs as to why they did not get either a confirmation of liability or cheques for what was, according to them, the principal due but only for the so-called or alleged compensation. Indeed on this analysis the defence seems to me *prima facie* to be far more probable.

12. The Summons for Judgement is dismissed, and unconditional leave to defend is granted.

1(2017) 1 SCC 568.

13. The Suit to be listed for directions on 30th April 2019.

(G. S. PATEL, J)