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

IN ITS COMMERCIAL DIVISION

SUMMONS FOR JUDGMENT NO. 69 OF 2019
IN
COMMERCIAL SUMMARY SUIT NO. 1166 OF 2019

Bharat Mehra]
Aged 50 Years, residing at]
C-601/602 Jay Palace,]
Andheri West, Mumbai – 400 061]
Through his Constituted Attorney]
Ms. Shraddha Khandhadia].. Applicant/Orig. Plaintiff

In the matter between :

Bharat Mehra]
Aged 50 Years, residing at]
C-601/602 Jay Palace,]
Andheri West, Mumbai – 400 061]
Through his Constituted Attorney]
Ms. Shraddha Khandhadia].. Plaintiff
Vs.
1. Shree Tirupati Greenfield]
(Shree Tirupati Greenfield Developers)]
Diwanchand Hansraj Compound,]
Kolshet Road, Dhokali Naka,]
Thane (W), Thane 400 607]
]
And Also at -]
Abhiman II Building Opp Karur]
Vysya Bank, Teen Hath Naka,]
Thane (W), Thane – 400 602.]
]
2. Haresh Gurbaux Daulatani]
Aged : Adult, Occ : Business,]
Residing at 1101/1102 Phase II,]
Siddhanchal Pokharan Road No.2,]
Near Vasant Vihar, Thane West]
Thane 400 602.]

3 Arvind Satpal Gupta	]
Aged : Adule, Occ : Business,	]
Residing at – Flat No.2, 5th floor,	]
Mitra Kunj, 16th Peddar Road,	]
Mumbai – 400026.	]
	]
4 Sunil Satpal Gupta	]
Aged : Adult, Occ : Business	]
Residing at Flat No.2, 5th floor,	]
Mitra Kunj, 16th Peddar Road,	]
Mumbai – 400026	]
	]
Also Having Address at :	]
	]
803, Sai Samarth, Near Vasant	]
Service Centre, Deonar Village,	]
Govandi East, Mumbai 400 088.	]
	]
And Also at :	]
	]
Plot No. 257, Building No.3,	]
Central Avenue Road, Behind Road	]
No.10, Chembur, Mumbai – 400 071	].. Defendants

Mr.Narayan Sahu i/b Adv. Shrinath Kamta Dubey for plaintiff/applicant.

Mr. Saurab Oka for defendant Nos. 1 to 4.

CORAM : N.J. JAMADAR, J.

DATE : 10th JANUARY 2020

ORAL JUDGMENT :

1. This commercial division summary suit is instituted for recovery of a sum of Rs.1,21,54,257.49 advanced to the defendants on the basis of bill of exchange.

2. The material averments in the plaint can be stated, in brief, as under :-

(a) The defendant No.1 is a partnership firm. It deals in the business of development of properties. The defendant Nos.2 to 4 are the partners of defendant No.1. The defendant No.2 is also the sole proprietor of Tirupati Developers. On the representation of the defendants that the plaintiff could earn handsome profit if investment is made with the defendants, the plaintiff had advanced a sum of Rs. 58 lakhs, over a period of time, from 1st October 2015 to 7th December 2015 against 11 bills of exchange drawn by the defendants in favour of the plaintiff. The defendants had assured to repay the said amount along with interest @ 33% per annum. In order to cover the transaction, the defendants had also issued an allotment letter in respect of a flat in the project "Marigold", being then developed by the defendants. However, the real transaction between the parties was of loan.

(b) Towards repayment of the said amount, the defendants had also drawn 11 cheques on Thane Branch of Karur Vysya Bank, payable on 1st January 2016. At the instance of the defendants, the said cheques were presented for encashment on 19th March 2016. However, the cheques were returned unencashed, on account of insufficiency of funds, on 21st March 2016. The plaintiff issued a demand notice on 13th April 2016. Instead of complying with the demand, the defendants issued reply raising false contentions. Hence, the plaintiff was constrained to lodge a complaint against the defendants for the offence punishable under section 138 of the Negotiable Instruments Act, 1881 before the learned Metropolitan Magistrate, 53rd Court at Mulund, Mumbai and also institute the instant suit for recovery of the aforesaid amount.

3. The defendants entered appearance in response to the writ of summons. The plaintiff took out the summons for judgment. The defendants have filed an affidavit in reply and sought an unconditional leave to defend.

4. The substance of the resistance put-forth by the defendants is that the plaintiff had, in fact, not advanced the sum of Rs. 58 lakhs, in cash, as averred. The plaintiff had promised to advance the said amount and, thus, placing reliance on the assurance of the plaintiff, the defendants had drawn the bills of exchange and post-dated cheques. The claim of the plaintiff of having advanced a huge sum of Rs.58 lakhs, in cash, is thus required to be adjudicated on the basis of evidence. Thus, the defendants are entitled to an unconditional leave to defend.

5. I have heard Mr.Narayan Sahu, the learned counsel for the plaintiff and Mr. Saurab Oka, the learned counsel for defendant Nos. 1 to 4, at some length.

6. Evidently, the claim of the plaintiff that he had advanced a sum of Rs. 58 lakhs to the defendants on the promise of return of the said amount along with interest @ 33% per annum finds support in the bills of exchange drawn by the defendant No.2 as a partner of defendant No.1-Shree Tirupati Greenfield Developers and accepted by the defendant No.2 in the capacity of the Proprietor of M/s. Tirupati Developers, from 1st October 2015 to 7th December 2015. The defendants have also drawn cheques payable on 1st January 2016 for an aggregate amount of Rs. 58 lakhs. In the backdrop of the aforesaid material, the nature of the defence sought to be put-forth by the defendants is required to be appreciated. The question that warrants determination is whether the defence raised by the defendants satisfies the tests for grant of leave to defend.

7. The legal position as regards the leave to defend in summary suit instituted under Order XXXVII of the Code is fairly crystallized. If the defendants disclose, *prima facie*, a fair and reasonable defence, ordinarily, the defendants are entitled to an unconditional leave. In contrast to this, if the defence raised by the defendants appears frivolous, false, or sham the leave to defend shall be refused, and the plaintiff is entitled to judgment.

8. In the case of ***IDBI Trusteeship Services Limited vs. Hubtown Limited*** [1], the Supreme Court has restated the propositions as regards the grant of leave to defend a summary suit as under :-

> *"17. Accordingly, the principles stated in paragraph 8 of Mechelec's case will now stand superseded, given the amendment of Order 37 Rule 3, and the binding decision of four judges in Milkhiram's case , as follows:*
>
> *17.1 If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit;*
>
> *17.2 If the defendant raises triable issues indicating*

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that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend;

17.3 Even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security;

17.4 If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5 <u>If the Defendant has no substantial defence and/or raises no genuine triable issues, and the court fnds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith;</u>

17.6 If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court."

(emphasis supplied)

9. On the aforesaid touchstone, reverting to the facts of the case, it becomes abundantly clear that the defendants have admitted the entire transaction, including the material terms thereof, save and except the fact that the amount of Rs.58 lakhs was paid by the plaintiff. The defendants want the Court to believe that the negotiable instruments were drawn on the promise of such an advance.

10. The aforesaid defence does not appeal to human credulity. The reasons are not far to seek. It defies comprehension that the defendants, who are dealing in the business of development of properties, would simply part with multiple negotiable instruments on a mere promise of advance. Secondly, it is imperative to note that the amounts were advanced against the bills of exchange which were drawn during the period 1st October 2015 to 7th December 2015. Whereas, the cheques were drawn towards the repayment of the said amount on 1st January 2016. In the ordinary course of the business transaction, the defendants were not expected to part with the bills of exchange and cheques, which were payable after an interval of time, simultaneously. Thirdly, if the promise was to advance a sum of Rs.58 lakhs, there was no reason to issue 11 bills of exchange of varying amounts and dates. Lastly, the defendants did not take any action for the alleged misuse of bills of exchange and cheques till the service of demand notice. Thus, the presumption contained in section 118(b) of the Negotiable Instruments Act, 1881 comes into play with full force. The defence, thus, raised on behalf of the defendants is unworthy of acceptance and falls in the category of sham and moonshine defence.

11. The defendants are, thus, not entitled to leave to defend the suit. Consequently, the plaintiff is entitled to judgment. Hence, the following order :-

O R D E R

(i) The summons for judgment is made absolute.

(ii) The suit stands decreed.

(iii) The defendants do, jointly and severally, pay a sum of Rs. Rs.1,21,54,257.49 to the plaintiff along with interest @ 18% per annum on the sum of Rs. 58 lakhs from the date of the suit till realization of the amount.

(iv) The defendants do pay costs of Rs.3,00,000/- to the plaintiff, quantified under Section 35 of the Code of Civil Procedure, 1908, as amended by the Commercial Courts Act, 2015.

(v) The plaintiff is also entitled to refund of Court fees in accordance with the rules.

(vi) The decree be drawn up and sealed expeditiously.

[N.J. JAMADAR, J.]