

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
SUMMONS FOR JUDGMENT NO. 108 OF 2018
IN
COMMERCIAL SUMMARY SUIT NO. 1215 OF 2018**

Vishal Kedia
India Inhabitant,
having his permanent address at
32, Kedia Apartments, 29-F,
Dongershi Road, Malabar Hill,
Mumbai 400 006

.. Plaintiff

Vs.

Sureshkumar S. Bafna
Indian Inhabitant,
having address at
Darya Mahal-A, Flat No.2 (1st Flr)
& 93 (16th Flr), 80, Napean Sea Road,
Mumbai – 400 006 and office at
Nagin Mahal, Churchgate,
Mumbai 400 020.

.. Defendant

Mr.Vivek V. Khemka for plaintiff.

Mr.Vivek Kantawala a/w. Mr. Amey Patil, Mr. Vivek M. Sharma,
Mr.Jash Vyas, Ms.Shanay Bafna i/b M/s. Vivek Kantawala & Company
for defendant.

CORAM : N.J. JAMADAR, J.

DATE : 26TH FEBRUARY 2020

ORAL JUDGMENT :

1. This commercial division summary suit is instituted for a recovery of a sum of Rs.2,11,51,500/- along with interest @ 18% per annum on a sum of Rs.1,77,00,000/- from the date of the suit till

realization, on the basis of a written contract.

2. The material averments in the plaint can be summarized as under :-

(a) The defendant was involved in litigation with one Mr.Aspi Sattha, over the tenancy rights in respect of a premises admeasuring 5000 sq.ft. on the ground floor of the building Beau Lieu, situated at 29, Dongersey Road, Malabar Hill, Mumbai 400 006.

(b) One Mrs.R.C. Patuck claimed to be a tenant thereof. The defendant's family had instituted R.A.E. Suit No.1430/5195/1982 in the Court of Small Causes, Mumbai for recovery of the possession of the demised premises. The acquisition proceedings were also initiated by Maharashtra Housing and Area Development (MHADA) under Chapter 8A of the Maharashtra Housing and Area Development Act, 1976 ('The Act'). Alleging forcible dispossession Mrs. Patuck had instituted a suit being Suit No.6468 of 1999 for regaining the possession of the demised

premises under section 6 of the Specific Relief Act, 1963. Mr. Sattha claimed that he was a legatee of Mrs. Patuck, who died on 15-09-2001. Mr. Sattha had filed proceedings to get himself impleaded as a party in the suit instituted by Mrs. Patuck.

(c) As multiple proceedings were, thus, pending before various forums between the defendant's family and Mr. Aspi Sattha, the defendant requested the plaintiff on 5-01-2016 to co-ordinate for an amicable resolution of the dispute between the defendant and Mr. Aspi Sattha and to bring all legal matters to an end. The plaintiff was holding a power of attorney as well, of Mr. Aspi Sattha. The defendant agreed to pay a sum of Rs.1,50,00,000/- plus applicable taxes to the plaintiff towards co-ordination fees for amicable resolution of the dispute. Thus, a Memorandum of Agreement ('MOA') came to be executed on 6-01-2016 whereunder the defendant agreed to pay the aforesaid amount towards co-ordination fees for getting the matter

settled between Mr.Aspi Sattha and the defendant.

(d) It is the claim of the plaintiff that the disputes between Mr.Aspi Sattha and the defendant's family were settled and consent terms were entered on 8-01-2016. By an order dated 12-01-2016, the Supreme Court disposed of SLP (C) No.11270/2009 in accordance with of the consent terms executed on 8-01-2016. The plaintiff, thus, claims to have successfully co-ordinated in the resolution of the dispute in terms of the MOA. The plaintiff claimed to have complied with his obligation under the MOA and delivered all the documents to the defendant. The plaintiff, thereupon, claimed to have called upon the defendant to make the payment of the agreed sum of Rs.1,50,00,000/- along with applicable taxes thereon. The defendant committed default in payment of the said amount, as agreed, despite repeated communications from the plaintiff. Hence, the suit for recovery of the said amount along with taxes and interest thereon @ 18% p.a.

3. The defendant appeared in response to the service of writ of summons. Thereupon, the plaintiff has taken out this summons for judgment. An affidavit in reply is filed on behalf of the defendant.

4. The defendant has sought an unconditional leave to defend the suit. The substance of the resistance put-forth by the defendant is that the suit does not fall within the ambit of the provisions contained in Order 37 of the Code of Civil Procedure, 1908 ('The Code'). The MOA cannot constitute the basis of the institution of the summary suit. Secondly, the MOA, being not adequately stamped, is not admissible in evidence in view of the provisions contained in section 34 of the Maharashtra Stamp Act, 1958 and the said instrument cannot be acted upon even for the purpose of summons for judgment. The instrument, according to the defendant, is chargeable with duty as prescribed in Article 5(h)(A)(iii) or in the alternative Article-5(h)(A)(iv) of the Schedule I of the Act, 1958.

5. On the aspect of the execution of the MOA, the defendant has conceded that he had agreed to pay consideration of Rs.1,50,00,000/- plus applicable taxes to the plaintiff and accordingly executed the MOA dated 6-01-2016. The defendant candidly conceded that it was

agreed under the said MOA that the defendant would pay coordination fees and applicable taxes, within six months from the date of compensation which the defendant agreed to pay to Mr.Aspi Sattha but not later than 30th June 2017.

6. A defence is sought to be raised that the defendant executed the said MOA at the plaintiff's insistence and in his desperation, for co-ordinating with Mr.Aspi Sattha so as to get all the disputes resolved. The defendant asserts that the plaintiff was entitled to the said amount under the MOA only upon resolution of all the disputes and execution of the documents. The defendant contends that the plaintiff has failed to perform his part of the contract and all the disputes have yet not been resolved. Two of the terms, according to the defendant, have not been complied with by the plaintiff. They read as under :

“(a) Withdraw all allegations, applications, affidavits as well as claim in the proceedings being Case No. LAQ/MH & AD Act/ 45 pending before the Land Acquisition Office, MHADA at Mumbai.

(b) To make an application in R.A.E. Suit No.1430/5195/1982 in the Hon'ble Small Causes Court by virtue to submit to a decree of which all tenancy rights, in the suit shall stand determined and the decree of possession be granted in favour of petitioner No.2.”

Therefore, the defendant is entitled to an unconditional leave to defend the suit.

7. An affidavit in rejoinder is filed on behalf of the plaintiff. The plaintiff avers that none of the grounds sought to be raised by the defendant are worthy of consideration for grant of an unconditional leave to defend the suit. There is neither a positive nor a reasonable and fair defence. The objection to the instrument on the count that it is not sufficiently stamped is stated to be untenable as the MOA is chargeable with duty prescribed under Article 5(h)(B) of the Maharashtra Stamp Act, 1958 and the instrument in question is thus adequately stamped. The contention of the defendant that the plaintiff has not complied with the terms of the contract is stated to be incorrect. The default on the part of the defendant in making payment to Mr.Aspi Sattha in accordance with the consent terms executed on 8-01-2016, leading to initiation of contempt proceedings against the defendant is adverted to by the plaintiff. As regards the non-compliance with term of submitting to a decree by Mr.Aspi Sattha, it is pointed out that R.A.E. Suit No.1430/5195/1982, wherein the decree was to be passed, itself stood dismissed on 7-12-2013. It was, thus, for the plaintiff in the said suit to initiate the steps. In respect of non-

compliance of the term (a), extracted above, of withdrawal of allegations and claim pending before the Land Acquisition Officer, MHADA, the plaintiff pressed into service the communication dated 19-12-2016, whereby Mr.Aspi Sattha allegedly withdrew all allegations, applications as well as claims in the proceedings bearing No. LAQ/MH & AD Act/45 pending before the Special Land Acquisition Officer, MHADA, Mumbai.

8. In the backdrop of the aforesaid pleadings, I have heard Mr.Vivek V. Khemka, the learned counsel for the plaintiff and Mr. Vivek Kantawala, the learned counsel for the defendant, at some length.

9. It was urged on behalf of the plaintiff that the defendant has acknowledged the liability to pay the amount of Rs.1,50,00,000/- plus applicable taxes thereon towards co-ordination fees for resolution of the dispute between the defendant's family and Mr.Aspi Sattha by a clear and explicit covenant under the MOA. To add to this, in the affidavit in reply, the defendant has conceded in clear and unequivocal terms that the said MOA was executed and the defendant had agreed to pay the amount thereunder. The attention of the Court

was also invited to an order dated passed by this Court on 11-12-2018, wherein, this Court had noted the contentions in paragraphs 9 and 10 of the affidavit in reply, wherein the transaction has been admitted. The learned counsel for the plaintiff urged that the defence now sought to be raised by the defendant of the plaintiff having not complied with the terms of MOA is not borne out by the material on record. On the contrary, there is material to indicate that it was the defendant, who committed default in compliance with the consent terms, and was thus hauled up in the contempt proceedings. Thus, according to the learned counsel for the plaintiff, the defendant is not entitled leave to defend the suit. To lend support to this submission, the learned counsel for the plaintiff placed reliance on the judgment of the Supreme Court in the case of *IDBI Trusteeship Services Limited Vs. Hubtwon Limited*.¹

10. In opposition to this, the learned counsel for the defendant would urge that the circumstances in which the MOA came to be executed, cannot be lost sight. The MOA was executed on 6-01-2016. On the very day after, i.e., on 8-01-2016, the consent terms came to be executed between the parties. The circumstance in which the defendant found himself when the MOA was executed and the

1 (2017) 1 SCC 568

contempt proceedings was pending before the Supreme Court are required to be taken into account. The fact that the defendant did not raise a dispute before the Supreme Court that the dispute between the defendant and Mr.Aspi Sattha was not fully resolved is required to be appreciated in the backdrop of the threat of the contempt proceedings initiated against the defendant. The learned counsel for the defendant further submitted that the plaintiff cannot be said to have fully complied with his part of the obligations as provided in clauses (e) and (g) of the agreement.

“e. withdraw all allegations, Applications, Affidavits as well as claim in the proceedings being Case No.LAQ/MH & AD Act/45 pending before the Land Acquisition Officer, MHADA at Mumbai.

....

g. submit to a decree in R.A.E. Suit No. 1430/5195/1982 pending in the Hon’ble Small Causes Court by virtue of which all tenancy rights, in the suit-premises shall stand determined and the decree of possession be granted in favour of Petitioner No.2.”

11. Apart from the aforesaid defences sought to be raised on behalf of the defendant, this Court is confronted with the very enforceability of the MOA on two counts. One, whether the consideration or object of the agreement is unlawful under section 23 of the Indian Contract Act, 1872 (‘Contract Act’). Two, since the plaintiff claimed to be a constituted attorney of Mr.Aspi Sattha, was there any conflict of duty

and interest?

12. Section 23 of the Contract Act provides that the consideration or object of an agreement is lawful, unless “it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy”.

13. It is the bold case of the plaintiff that the plaintiff had agreed to use his influence to bring about a settlement of the dispute between the defendant and Mr.Aspi Sattha. Can the agreement whereunder a person undertakes to provide services, for a consideration, to use his influence with a third party to ensure settlement of the dispute with the party to the contract be said to defeat the provisions of law or involve or imply injury to the person or property of the party to the suit or be opposed to public policy?

14. Per se, such an agreement does not seem to be opposed to either public policy or the one which defeats the provisions of any law. The situation where fiduciary relationship is involved, like a

litigant and an advocate; a trustee and a beneficiary, different considerations come into play. In the normal circumstances, where the contract is with the free consent of the parties thereto, without there being an element of fiduciary relation or public office, which one party holds, such an agreement is not rendered unlawful.

15. In one of the oldest judgments in the case of *Sayed Mahomed Zahurul Huq Vs. Shah Wazirul Huq* ², the Calcutta High Court has dealt with an identical situation. In the said case, the defendant had asked the plaintiff to intervene and have the dispute between the defendant and a third party settled. The defendant had promised to pay the plaintiff a sum of Rs.300/- as his remuneration, if the compromise was satisfactorily effected. The dispute was settled. On failure of the defendant to pay the said amount, the plaintiff had brought the action. The Calcutta High Court observed that the only question which fell for consideration was, whether the consideration or object of the agreement was lawful? The Court answered the question in the following terms :

“.....In our opinion, upon no conceivable principle can it be maintained that an agreement to remunerate a person in order that he may exercise his influence to effect a settlement between two

2 (1911-12) 16 CWN 480

persons, one of whom enters into the agreement, is in any way immoral or opposed to public policy.”

16. A profitable reference, in this context, can also be made to the judgment of the Supreme Court in the case of ***In the matter of Mr. 'G' a Senior Advocate of the Supreme Court***³, wherein a Senior Advocate of the Supreme Court was facing disciplinary action for professional misconduct for having agreed to take fees contingent upon, and commensurate to, the outcome of the litigation. The Supreme Court, in the said case observed, *inter-alia*, as under :-

“11. Now it can be accepted at once that a contract of this kind would be legally unobjectionable if no lawyer was involved. The rigid English rules of champerty and maintenance do not apply in India, so if this agreement had been between what we might term third parties, it would have been legally enforceable and good. It may even be that it is good in law and enforceable as it stands though we so not so decide because the question does not arise; but that was argued and for the sake of argument even that can be conceded. It follows that there is nothing morally wrong, nothing to shock the conscience, nothing against public policy and public morals in such a transaction per se, that is to say, when a legal practitioner is not concerned.”

17. In the case of ***Rattan Chand Hira Chand Vs. Askar Nawaz Jung (Dead) by L.Rs. & Ors.***⁴, the plaintiff therein had agreed to use his influence with the Public authorities to get a favourable consideration in the matter of declaration of the status as the legal representative of

3 A.I.R.1954 SC 557

4 1991 3 SCC 67

late Nawab Salar Jung. The observations of the Supreme Court in paragraph 19 and 23 are relevant. They read as under :

“19 The contract such as the present one which is found by the city civil court as well as the High Court to have been entered into with the obvious purpose of influencing the authorities to procure a verdict in favour of the late Nawab was obviously a "carrier" contract. To enforce such a contract although its tendencies to injure public weal is manifest is not only to abdicate one's public duty but to assist in the promotion of a pernicious practice of procuring decisions by influencing authorities when they should abide by the law. To strike down such contracts is not to invent a new head of public policy but to give effect to its true implications. A democratic society is founded on the rule of law and any practice which seeks to subvert or circumvent the law strikes at its very root. When the court discountenances such practice, it only safeguards the foundation of the society. Even assuming, therefore, that the court finds a new head of public policy to strike down such practice, its activism is not only warranted but desired.

...

23Every agreement of which the object or consideration is unlawful is void. The consideration or object of an agreement is unlawful when the court regards it as opposed to public policy. If anything is done against the public law or public policy that would be illegal in as much as the interest of the public would suffer in case a contract against public policy is permitted to stand. Public policy is a principle of judicial interpretation founded on the current needs of the community. The law relating to public policy cannot remain immutable. It must change with passage of time. A bargain whereby one party is to assist another in recovering property and is to share in the proceeds of the action and such assistance is by using the influence with the administration, irrespective of the fact that the persons intended to be influenced are not amenable to such influence is against protection and

promotion of public welfare. It is opposed to public policy. ”

18. In view of the aforesaid exposition of the legal position, reverting to the facts of the case, since there is no element of fiduciary capacity or the possible abuse of the position to influence the decision of the public officers, the agreement in question cannot be said to be either prohibited by law or opposed to public policy.

19. On the second aspect, arising out of the status of the plaintiff as an agent of Mr.Aspi Sattah, as indicated above, the consideration would be in the realm of the possible conflict of duty and interest. The jural relationship between the ‘principal’ and ‘agent’ in such matters is governed by the provisions contained in sections 215 and 216 of the Indian Contract Act. An agent is under an obligation not to act prejudicial to the interest of the principal or make a secret profit out of the business of the agency. Section 215 of the Act, provides that the principal may repudiate the transaction, if the case shows, either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to the principal. Section 216, on the other hand, confers on the principal the right to claim from the agent any benefit

which may have resulted to him from the transaction.

20. The question of enforceability of the contract, which an agent had entered into, and the principal's entitlement to recover the benefit derived by the agent would arise when the principal claims that the principal was not aware of the transaction and agent had entered into the transaction, without his consent. In the case at hand, Mr. Aspi Sattha has filed an affidavit sworn on 5-02-2020 before a Notary Public of Switzerland. In the said affidavit, Mr. Aspi Sattha has affirmed that he was fully aware of the MOA dated 6-01-2016 entered into between the plaintiff and the defendant and he never had any objection to the said arrangement and it was done with his knowledge and consent. The enforceability of the agreement is thus beyond cavil.

21. The submission based on the alleged adverse circumstances in which the agreement in question was executed by and between the plaintiff and the defendant, now warrants consideration. Once, the execution of the agreement is admitted, a heavy burden rests on the defendant to demonstrate that the agreement was executed under the circumstances which would affect its enforceability. The affidavit-in-reply is conspicuously silent on this aspect. To add to this, there is

material on record in the form of the contempt proceedings initiated against the defendant, wherein the defendant had sought time, on multiple occasions, to make payment to Mr.Aspi Sattha. Eventually, the consent terms were modified and the defendant agreed to pay an enhanced sum of Rs.12,25,00,000/- instead of the initial agreed sum of Rs.11,00,00,000/-. Evidently, no grievance was made till the filing of affidavit in reply that the defendant was coerced to enter into the agreement in question or the consent terms with Mr.Aspi Sattha on 8-01-2016. In the aforesaid view of the matter, I find it rather difficult to accede to the submission that the circumstances in which the MOA came to be executed warrant an unconditional leave to defend the suit.

22. On the substance of the defence that the plaintiff had not complied with all terms of the MOA, especially the clauses, extracted above, the submission on behalf of the plaintiff carries conviction. It is a matter of record that R.A.E. No.1430/5195/19, in which Mr. Aspi Sattha had agreed to submit to the decree that all tenancy rights, in the suit premises, stood determined, came to be dismissed by an order dated 7-12-2013. Indisputably, it is for the plaintiff in the said suit to take steps to get the suit restored and thereafter seek a decree

therein. The plaintiff, in the instant suit, in the backdrop of the aforesaid circumstance, cannot be faulted for non-compliance of the said stipulation. As regards, withdrawal of the allegations, applications etc. in Land Acquisition proceedings, being Case No.LAQ/MH & D Act/45 pending before the Land Acquisition Officer, MHADA, the plaintiff has placed on record a copy of the letter dated 19-12-2016 wherein a reference is made to the settlement of the dispute between the parties, in accordance with the consent terms executed on 8-01-2016 and the order passed by the Supreme Court on 12-01-2016 in Civil Appeal No.261 of 2016. By the said letter Mr.Aspi Sattha has withdrawn all allegations, applications, affidavits as well as claims in the proceedings being Case No.LAQ/MH & AD Act/45 pending before the Special Land Acquisition Officer (5), MHADA at Mumbai.

23. In contrast to this, there is no material on record to indicate that the defendant had called upon the plaintiff to perform the terms of the obligation, even after the plaintiff made demand of the amount under the MOA by emails dated 19-01-2017 and 3-07-2017. The defendant, on the other hand, by email dated 6th August 2018 called upon the plaintiff to prevail upon Mr.Aspi Sattha to grant extension of time in contempt proceedings. Indisputably, the resolution of the

dispute in the contempt proceedings was not part of the obligation which the plaintiff was to discharge under the MOA.

24. The conspectus of the aforesaid consideration is that the substantive defences sought to be raised on behalf of the defendant to contest his liability do not fall in the category of either positive defence or fair and reasonable defence. The clear and categorical admission of the execution of the MOA and obligation thereunder to pay a sum of Rs.1,50,00,000/- and taxes thereon towards the co-ordination fees brings the case within the ambit of the proposition 17.6 of the judgment of the Supreme Court in the case of ***Hubtown Limited*** (Supra), even if it is assumed that there is a fair and reasonable defence, which reads as under :

“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.”

25. As regards the defence of the MOA being insufficiently stamped, which is technical in nature, *prima-facie*, it seems that the instrument in question falls in the residuary category provided in Article 5(h)(B) of the Schedule-I appended to the Stamp Act, 1958. The clause (E)

and (3) of the MOA explicitly provide that the plaintiff was entitled to co-ordination fees for co-ordination work. The MOA, if construed in the backdrop of the intention of the parties, which becomes evident from the text of the agreement, properly falls within the residuary clause. Even otherwise, this Court has consistently held that the defence of insufficiency of the stamps is not available to a litigant to avoid the indisputable liability, especially at the stage of consideration of grant of leave to defend in a summary suit.

26. Thus, in the facts of the case, I am not persuaded to agree with the submission on behalf of the defendant that an unconditional leave to defend the suit is required to be granted on the count of insufficiency of stamp duty paid on the instrument in question.

27. In the aforesaid circumstances, in my considered opinion, having regard to the entire setting of the matter, especially the fact that the consent terms came to be executed a day after the execution of the MOA, the defendant deserves a conditional leave to defend the suit upon deposit of the amount of Rs.1,50,00,000/- in the Court. Hence, I am inclined to pass the following order :

O R D E R

(i) The leave to defend the suit is granted to the defendant, subject to deposit of a sum of Rs.1,50,00,000/- in Court, within a period of eight weeks from today.

(ii) In the event of the deposit of the amount, the defendant may file the written statement within a period of four weeks of deposit.

(iv) In the event, the defendant fails to deposit the amount, the suit be listed before the Court for passing the decree consequent to failure of the defendant to comply with the condition of deposit on which the leave to defend is granted.

(v) The summons for judgment stands disposed of.

[N.J. JAMADAR, J.]