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

SUMMONS FOR JUDGMENT NO.10 OF 2020
IN
COMMERCIAL SUMMARY SUIT NO.1388 OF 2019

Extravagant Heights Realtors Private Limited
and Others ...Applicants

In the matter between

Extravagant Heights Realtors Private Limited
and Others ...Plaintiffs

vs.

M/s. Allied Construction Company and Others ...Defendants

Mr. Ruchir Tolat i/b. Vishal Acharya, for the Applicants-Plaintiffs.
Mr. R.P. Ojha, for the Defendants.

CORAM : N. J. JAMADAR, J.
RESERVED ON : 12th FEBRUARY, 2021
PRONOUNCED ON : 25th FEBRUARY, 2021

JUDGMENT:

. This Commercial Division Summary Suit is instituted for recovery of a sum of Rs. 2,45,38,176/- along with further interest.

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

a] The Plaintiff is a company incorporated under the Companies Act, 1956. The Defendant No. 1 is a partnership firm. Defendant Nos. 2 to 4 are its partners. The Defendants represented to the Plaintiff that the Defendants were developing a project, then named “Allied Business Centre”, which came to be rechristened as “Jaswanti Allied Business Centre” situated at Kanchpada, near Paras Industrial Estate, Ramchandra Lane Extension, Malad (w), Mumbai-64. Based on the representation of the Defendants, the Plaintiff booked a commercial unit, being Unit No.B/704 admeasuring 2000 sq.ft. carpet in the said building for the consideration at the rate of Rs. 7,500/- per sq.ft.

3. The Plaintiff did pay the entire consideration of Rs. 1,50,00,000/- to the Defendants. An allotment letter was issued to the Plaintiff on 1st August, 2010 which acknowledged the aforesaid payment of Rs.1,50,00,000/-. However, the Defendants failed to develop the project and handover the possession of the said office premises, as promised. Upon persuasion, the Defendants refunded a sum of Rs. 60 lakhs through R.T.G.S. during the period 16th November, 2012 to 2nd February, 2013. The balance amount remained outstanding. The Defendants allotted two separate units being Unit No. B/718 admeasuring 183.31 sq.fts. and Unit No. A/719 admeasuring 450.15 sq.fts carpet area in the said building i.e. Jaswanti Allied Business Centre for the

consideration of Rs. 41,18,000/- only, which came to be adjusted against the outstanding amount of Rs. 90 lakhs under the conveyance dated 16th August, 2016. The Plaintiff repeatedly requested the Defendants to refund the amount which still remained outstanding. The Defendants paid a sum of Rs. 3 lakhs only on 9th March, 2018 through R.T.G.S. Ultimately, the Plaintiff addressed a legal notice on 16th October, 2018 calling upon the Defendants to pay the outstanding amount along with interest accrued thereon. The Defendants unjustly denied the claim of the Plaintiff. Hence, the Plaintiff was constrained to institute the suit for recovery of the balance amount of Rs. 45,80,000/- along with interest @ 24% p.a. aggregating to Rs. 1,99,56,176/-

4. The Defendants appeared in the response to the service of writ of summons. Thereupon, the Plaintiff has taken out the instant Summons for Judgment. The Defendants have filed affidavit in reply and sought an unconditional leave to defend the suit.

5. The Defendants have affirmed that the suit claim is wholly false, frivolous and vexatious. The Plaintiff is guilty of suppression

of facts. Unconditional leave to defend the suit is sought on two principal grounds.

6. First, the entire outstanding amount of Rs. 90 lakhs came to be adjusted against the purchase of the above two office units i.e. Unit Nos. B/718 and A/719, under the conveyance executed on 16th August, 2016. In fact, it was the Plaintiff who had sought to cancel the original allotment of Unit No. B/718 and instead desired to purchase the above numbered office unit. Though, in the conveyances, the actual consideration was shown at Rs. 11,92,000/- and Rs. 29,26,000/-, the market value of the Unit No. B/718 was Rs. 28,16,500/- and that of Unit No. A/719 was Rs.69,16,000/-. The total value of the units was Rs. 97,32,500/-. However, the Defendants did not insist for the payment of balance consideration of Rs. 7,32,500/- over and above the amount of Rs. 90 lakhs which was due to the Plaintiff. The fact that the Plaintiff had sold out the above numbered units for a consideration of Rs. 98,50,000/- within a span of less than four months from the date of the aforesaid transaction, was pressed into service to bolster up the defence that the agreed consideration was much more than the consideration shown in instruments dated 16th August, 2016.

7. The second count on which an unconditional leave is sought is the bar of limitation. The Defendants contended that from the own showing of the Plaintiff, the suit is barred by law of limitation. The endeavour of the Plaintiff to bring life into the suit by placing reliance upon the alleged payment of Rs. 3 lakhs on 9th March, 2018 is stated to be legally unsustainable. The said amount of Rs. 3 lakhs, according to the Defendants, was not paid towards the alleged outstanding amount but it was by way of the refund of the amount of Rs. 2,05,800/- which the Plaintiff had paid to M/s. Ashray Investment, a joint venture partner of the Defendants while acquiring the Unit No. B/718 and A/719. The institution of the suit on 14th August, 2019 is thus stated to be beyond the period of limitation.

8. In the backdrop of the aforesaid pleadings, I have heard Mr. Tolat, the learned counsel for the Plaintiff and Mr. Ojha, the learned counsel for the Defendants at some length.

9. It was urged on behalf of the Plaintiff that the fact that the Plaintiff had parted with consideration of Rs.1,50,00,000/-, as evidenced by the letter of allotment dated 1st August, 2010, is

incontestible. Nor there is dispute over the fact that the Defendants had repaid only a sum of Rs. 60 lakhs. Thirdly, the sale of two office units, numbered B/718 and A/719, under the conveyances dated 16th August, 2016 for the consideration of Rs. 11,92,000/- and Rs. 29,26,000/-, respectively is also incontestible. In backdrop of these indubitable facts the defence now sought to be taken of adjustment of the entire outstanding amount of Rs. 90 lakhs is nothing but a moonshine defence. In fact, the liability to pay the balance outstanding amount is admitted liability. It was further urged by Mr. Tolat that the suit is instituted within three years of the execution of the agreement for sale dated 16th August, 2016. In any event, the payment of Rs. 3 lakhs on 9th March, 2018 constitutes the payment within the meaning of Section 19 of the Limitation Act, 1963 and, thus, the ground of limitation is totally misconceived. Thus, the Defendants are not entitled to leave to defend the suit.

10. In opposition to this, Mr. Ojha, the learned counsel for the Defendant Nos. 1 to 4 stoutly submitted that the Plaintiff's case suffers from the vice *suppressio veri and suggestio falsi* . Though the Plaintiff has placed on record the copies of the agreement of

sale dated 16th August, 2016, yet the Plaintiff deliberately withheld the Index II thereof. Inviting, the attention of the Court to the Index II, wherein the market value of the Unit No. A/719 is shown at Rs. 69,16,000/- and that of Unit No. B/718 is Rs. 28,16,500/-, it was urged, with a degree of vehemence, that the actual agreed consideration was far in excess of the consideration shown in the instruments and the entire liability of the Defendants stood discharged. Mr. Ojha further submitted that the fact that within a couple of months of the execution of the said conveyances the Plaintiff sold those two units at a consideration of Rs. 98,50,000/- squarely establishes that the market value of those units was more than Rs. 90 lakhs, which the Defendants owed to the Plaintiff. On this ground alone, according to Mr.Ojha, Defendants are entitled to an unconditional leave to defend the suit.

11. To being with, un-controverted facts. First and foremost, the initial allotment of Unit No. B/704 admeasuring 2000 sq.fts. for the consideration of @ Rs.7,500/- sq.fts. under the allotment letter dated 1st August, 2010 is not in dispute. Nor there any controversy over the fact that the Plaintiff had paid a sum of Rs. 1,50,00,000/- towards the consideration for the said unit.

Though, the circumstances, which led to the cancallation of the said allotment, and the question as to whose conduct was blameworthy, are sought to be disputed, yet, the fact remains that the allotment stood cancelled and the Defendants refunded the sum of Rs. 60 lakhs to the Plaintiff. The subsequent contract between the parties to sale Unit Nos. B/718 and A/719 is evidenced by the agreements of sale dated 16th August, 2016.

12. It would be contextually relevant to note that in the affidavit in reply the Defendants did not dispute that the Defendants were liable to repay the balance amount of Rs. 90 lakhs. In contrast, what the Defendants contended was that it was specifically agreed by and between the Plaintiff and Defendants that the Defendants should allot the aforesaid two units to the Plaintiff for the balance amount of Rs. 90 lakhs, which the Defendants owed to the Plaintiff and, thus, those conveyances were executed.

13. Whether the aforesaid defence, that the consideration which finds mention in the aforesaid conveyances dated 16th August, 2016 was not the real consideration and the agreed consideration was Rs. 90 lakhs, is legally sustainable. It is pertinent to note that

under the said agreement to sale, the Defendants have acknowledged to have received the consideration of Rs.11,92,000/- and Rs. 29,26,000/- on 30th July, 2010 and 30th June, 2012 through R.T.G.S. Indisputably, the stated consideration for agreements to sale is Rs. 11,92,000/- and Rs.29,26,000/-. The instruments are duly registered.

14. In the aforesaid backdrop, the bar contained in Section 92 of the Evidence Act, 1872 comes into play. Section 92(1) declares that, when the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

15. The aforesaid section is based on a fundamental principle of best rule evidence, namely, when the contract is reduced into writing or required to be embodied by law in written instrument, the instrument itself would be the repository of the terms of the

contract and parole evidence shall not be allowed to substitute, contradict or alter the terms of the contract.

16. A profitable reference, in this backdrop, can be made to a judgment of the Supreme Court in the case of **Roop Kumar vs. Mohan Thedani**[1] wherein the Supreme Court expounded the grounds of exclusion of oral evidence to contradict the terms of "dispositive document", in the following words"

> *"21. The grounds of exclusion of extrinsic evidence are (i) to admit inferior evidence when law requires superior would amount to nullifying the law, (ii) when parties have deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory."*

17. It is trite that the parties are entitled to plead that the instrument was not intended to be acted upon as it was only a sham or camouflage instrument. It is not the case that the Defendants contend that the instruments in question were never intended to operate as the conveyances and the real transaction between the parties was distinct. In the case at hand, on the contrary, however, the Defendants without disputing the nature or

1AIR 2003 Supreme Court 2418.

character of the instruments are only seeking to demonstrate that the real consideration was in excess of the consideration shown in the said instruments.

18. The evidence which the Defendants would be required to lead in support of the aforesaid defence may be vulnerable as inadmissible as, in essence, the Defendants would be seeking to prove that the terms of the transaction covered by the instrument (the consideration) are different from what is embodied in the instrument. In this view of the matter, I find it rather difficult to accede to the submission on behalf of the Defendants that the liability stood discharged with the execution of the said instruments.

19. On the ground of limitation, the Plaintiff sought to rely upon the payment of Rs. 3 lakhs, indisputably made by the Defendants on 9th March, 2018. The Defendants made endevour to draw home the point that the said payment was towards some other transaction. However, from the own showing of the Defendants, it becomes evident that the Plaintiff had paid a sum of Rs. 2,05,800/- only. The claim of the Defendants that the amount of

Rs. 3 lakhs was towards the repayment of the said amount does not appear prima facie, sustainable.

20. Nonetheless, the Plaintiff cannot draw much mileage from the fact that the Defendants had made payment of Rs. 3 lakhs on 9th March, 2018. Evidently, the said payment was made through R.T.G.S. In order to bring the case within the ambit of Section 19 of the Limitation Act, 1963 and have the benefit of a fresh period of limitation, for institution of the suit, only the payment is not, by itself, sufficient. In view of the text, and the proviso to, Section 19, two conditions must be satisfied before the period of limitation gets extended. First, the payment must be made within the prescribed period of limitation. Second, it must be acknowledged by some form of writing either in Defendant's own hand writing or signed by him. In the case at hand, the Plaintiff has not approached the Court with a case that the payment of the said amount of Rs. 3 lakhs was also acknowledged within the meaning of the proviso to Section 19 of the Limitation Act. Nor there are specific pleading to that effect, as mandated by Order VII Rule 6 of the Civil Procedure Code, 1908.

21. A useful reference, in this context, can be made to a recent judgment of the Supreme Court in the case of **Shanti Conductors Private Limited vs. Assam State Electricity Board and Others**[2] wherein the legal position was enunciated thus:

> *15. "Order VII Rule 6 uses the words "the plaint shall show the ground upon which exemption from such law is claimed". The exemption provided under Sections 4 to 20 of the Limitation Act, 1963 are based on certain facts and events. Section 19, with which we are concerned, provide for a fresh period of limitation, which is founded on certain facts, i.e., (i) whether payment on account of debt or of interest on legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy, (ii) an acknowledgement of the payment appears in the handwriting of, or in a writing signed by, the person making the payment."*
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> (emphasis supplied)

22. In the aforesaid view of the matter, in the absence of pleading regarding acknowledgement of payment, so as to bring it within the ambit of Section 19 of the Limitation Act, the reliance on the payment of Rs. 3 lakhs dated 9th March, 2018 does not advance the cause of the Plaintiff.

23. However, despite the non-availability of the benefit of Section 19 of the Limitation Act, 1963, the issue of limitation, cannot be ex facie, construed against the Plaintiff, at this stage. Indisputably, the agreements for sale, in respect of Unit A/719

2(2020) 2 Supreme Court Cases 677.

and B/718 were executed on 16th August, 2016. The suit came to be instituted on 14th August, 2019 i.e. within three years of the execution of the said instruments. It is the case of the Defendants that the Defendants did owe the sum of Rs. 90 lakhs to the Plaintiff on the date of the execution of the said instruments and the said liability stood discharged upon execution of the said conveyances. Invariably, limitation is mixed question of law and facts. In this view of the matter, the question of limitation, would be a triable issue.

24. Evidently, the Defendants seek to contest the liability on the premise that the consideration for the said conveyances was the entire outstanding amount of Rs. 90 lakhs. While leading evidence in respect of aforesaid defence the Defendants will be required to surmount the impediment of admissibility in view of the provisions contained in Section 92 of the Evidence Act. Thus, a doubt arises about the Defendants' good faith and the genuineness of the defence sought to be urged. The case would, therefore, be covered by Clause 17.3 of the judgment of the Supreme Court in the case of **IDBI Trusteeship Services Limited vs. Hubtown Limited**[3] which reads thus:

3(2017) 1 Supreme Court Cases 568.

> *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.*
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> (emphasis supplied)

Resultantly, the Defendant is not entitled to an unconditional leave to defend the suit.

25. As there was no stipulation regarding the payment of interest on the balance amount, I am of the considered view that the claim of interest at the rate of 24% p.a warrants adjudication. It would, therefore, be expedient in the interest of justice to grant conditional leave to the Defendants to defend the suit subject to deposit of the sum of Rs. 45,82,000/-, which constitutes the balance of the initial outstanding amount of Rs. 90 lakhs. Hence, the following order:

ORDER

1] Leave to defend the suit is granted to the Defendants subject to deposit of the sum of Rs. 45,82,000/- within a period of eight weeks from today.

2] If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the Defendants shall file written statement within a period of four weeks from the date of deposit;

3] If this conditional order of deposit is not complied with, within the aforesaid stipulated period, the Plaintiff shall be entitled to apply for an *ex-parte* decree against the Defendants after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.

4] Summons for Judgment stands disposed of in the aforesaid terms.

(N. J. JAMADAR, J.)