

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

**SUMMONS FOR JUDGMENT NO. 74 OF 2019
IN
COMMERCIAL SUMMARY SUIT NO. 1231 OF 2019**

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|-----|------------------------------------|---|--------------------------|
| 1) | CARL PINTO DE ANDRADE, |] | |
| | of Goa, Indian Inhabitant, aged |] | |
| | 61 years, residing at G-203/204, |] | |
| | Devashri's Pintoville, Behind SBI, |] | |
| | Varsha Colony, Alto Porvorim, |] | |
| | Goa-403 501. |] | |
| 2) | SHREYA PINTO DE ANDRADE, |] | |
| | of Goa, Indian Inhabitant, aged |] | |
| | 61 years, residing at G-203/204, |] | |
| | Devashri's Pintoville, Behind SBI, |] | |
| | Varsha Colony, Alto Porvorim, |] | |
| | Goa-403 501. |] | |
| 3) | CYNTHIA PINTO DE ANDRADE, |] | |
| | of Goa, Indian Inhabitant, aged |] | |
| | 61 years, residing at G-203/204, |] | |
| | Devashri's Pintoville, Behind SBI, |] | |
| | Varsha Colony, Alto Porvorim, |] | |
| | Goa-403 501. |] | |
| 4) | MICHAEL PINTO DE ANDRADE, |] | |
| | Deleted (since deceased) |] | |
| 4a) | Cynthia Pinto De Andrade; |] | |
| 4b) | Lucille Pinto De Andrade |] | |
| | of Goa, Indian Inhabitant, aged |] | |
| | 61 years, residing at G-203/204, |] | |
| | Devashri's Pintoville, Behind SBI, |] | |
| | Varsha Colony, Alto Porvorim, |] | |
| | Goa-403 501. |] | .. Applicants/Plaintiffs |

IN THE MATTER OF :

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|----|-------------------------------|---|
| 1) | CARL PINTO DE ANDRADE, |] |
|----|-------------------------------|---|

- of Goa, Indian Inhabitant, aged 61 years, residing at G-203/204, Devashri's Pintoville, Behind SBI, Varsha Colony, Alto Porvorim, Goa-403 501.
- 2) **SHREYA PINTO DE ANDRADE**, of Goa, Indian Inhabitant, aged 61 years, residing at G-203/204, Devashri's Pintoville, Behind SBI, Varsha Colony, Alto Porvorim, Goa-403 501.
- 3) **CYNTHIA PINTO DE ANDRADE**, of Goa, Indian Inhabitant, aged 61 years, residing at G-203/204, Devashri's Pintoville, Behind SBI, Varsha Colony, Alto Porvorim, Goa-403 501.
- 4) **MICHAEL PINTO DE ANDRADE**, Deleted (since deceased)
- 4a) Cynthia Pinto De Andrade;
- 4b) Lucille Pinto De Andrade of Goa, Indian Inhabitant, aged 61 years, residing at G-203/204, Devashri's Pintoville, Behind SBI, Varsha Colony, Alto Porvorim, Goa-403 501. .. Plaintiffs

VERSUS

VENTURA SECURITIES LIMITED,
 A company registered with the Registrar of Companies, under the provisions of the Companies Act, 1956 and having its registered office at 8th Floor, B-Wing, I-Think Techno Campus, Pokhran Road No.2, Off Eastern Express Highway, Thane-400 607 and having its Head Office at A-I, Building No.2, Kailash Ind. Complex, Behind Godrej Residential Colony, Parksite, Vikroli (West), Mumbai-400 079. .. Defendant

Mr.Karl Tamboly a/w. Mrs. Yasmin Bhansali and Mr. Zaosh Irani i/b Yasmin Bhansali & Co. for applicants/plaintiffs.

Mr.Simil Purohit a/w. Mr. Vishal Pattabiraman and adv. Mukhri i/b M/s. Purohit and Co. for defendant.

CORAM : N.J. JAMADAR, J.

Reserved for Judgment on : 29th January 2021.

Judgment Pronounced on : 23rd February 2021.

JUDGMENT :

1. This commercial division summary suit is instituted for recovery of a sum of Rs.6,73,84,000/- along with further interest at the rate of 2 percent per month, on the principal sum of Rs.5,80,00,000/- from the date of the suit till realization on the basis of a written contract.

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

(a) The plaintiffs are members of one family. The defendant is a company registered under the Companies Act, 1956. It deals in the business of a brokerage house and is a corporate member of the Bombay Stock Exchange Limited and the National Stock Exchange of India Limited. The defendant had invited deposits through its business partner M/s.Crefin India Management Private Limited. It was represented to the plaintiffs that a monthly return/interest of 2 percent would be

paid on investment. The principal amount would be invested in an Index Stock Option Funds, which would ensure a guarantee on capital invested. Over a period of time, the plaintiffs invested a sum of Rs.5,80,00,000/-, the particulars of which, are tabulated in paragraph 3(a) of the plaint.

(b) The defendant acknowledged the receipt of the said amount by issuing letters dated 8th July, 2016, 15th September 2016, 1st March 2018, and 1st September 2016 ('Welcome Letters') and undertook the obligation to pay interest @ 2 percent per month from the date of investment, with a lock-in period of six months. The said letters captioned, "Welcome Letters" incorporate the contract to repay the principal amount and the interest thereon.

(c) Initially, the defendant did pay interest, at the agreed rate, through banking channels. In the month of January 2019, the plaintiffs were in pressing need of the funds. Hence, the plaintiffs sought refund of the principal amount. Despite a refund request having been lodged with the defendant, the latter not only committed default in refunding the invested amount but also stopped the payment of interest, which fell due. The plaintiffs, thus, addressed a legal notice on 10th

August 2019, and called upon the defendant to repay the principal sum along with accrued interest in terms of the contract.

(d) Despite service of the legal notice, the defendant neither paid the amount nor gave reply. Hence, the plaintiffs were constrained to institute the suit for recovery of the outstanding amount along with interest.

3. The defendant appeared in response to the service of the writ of summons. The defendant filed an affidavit in reply and sought an unconditional leave to defend the suit. Thereupon, the plaintiffs took out the summons for judgment.

4. The substance of the defence put-forth by the defendant is that there was no privity of contract whatsoever between the plaintiffs and the defendant. It was categorically denied that M/s. Crefin India Management Private Limited, through whom the plaintiffs had allegedly made the deposits, is the business partner of the defendant. The defendant never had any relationship either commercial or otherwise with the said M/s. Crefin India Management Private Limited.

5. It was denied that the plaintiffs had collectively invested the principal sum of Rs.5,80,00,000/- with the defendant. Without disputing

that the defendant is a share and stock broker, it was contended that the defendant does not accept any deposits or loans from any third party, individual or corporate and has not authorized anybody to accept any amount as and by way of deposit or otherwise in the name of the defendant.

6. The defendant contended that the Welcome Letters, which allegedly constitute the contract, were never addressed by the defendant. Those letters are forged and fabricated. Those letters appear to have been issued by one Mr.Ameet Savant. Though the said Mr.Ameet Savant was affiliated to the defendant as its franchisee/authorised person in accordance with the rules and regulations of SEBI/Stock Exchange, he had no authority to issue and sign the said letters on behalf of the defendant. Suggesting that the plaintiffs might have entered into a private arrangement with Mr.Ameet Savant, the defendant sought to deny the liability. The said Ameet Savant, according to the defendant, had indulged in fraudulent activities in respect of which criminal proceedings have been initiated at the instance of the Economic Offences Cell of Goa Police against him. On these, amongst other grounds, the defendant has prayed for an unconditional leave to defend the suit.

7. In the backdrop of the aforesaid defence, the plaintiff No.1 Mr. Carl Pinto has filed an affidavit in rejoinder and the plaintiff No.2, Shreya Pinto has filed a further affidavit in support of the summons for judgment. The Trading Member and Authorised Person Agreement, dated 11th December 2014 executed by and between the defendant and Mr. Ameet Savant was produced and relied upon to establish the jural relationship between the defendant and the said Mr.Ameet Savant. The defendant joined the issue by filing an affidavit in sur-rejoinder.

8. In the wake of the aforesaid pleadings, I have heard Mr.Karl Tamboly, the learned counsel for the plaintiffs and Mr. Simil Purohit, the learned counsel for the defendant at some length.

9. Mr. Tamboly, the learned counsel for the plaintiffs, laying emphasis on the fact that the plaintiffs had not only invested the principal sum of Rs.5,80,00,000/- with “Ventura” but had also received the interest, as agreed under the terms of the contract, urged that the defendant is trying to take up an illusory defence of lack of privity of contract to wriggle out of the liability. To this end, Mr. Tamboly invited the attention of the Court to the extracts of accounts (Exh. ‘5’ to Exh. ‘8’) which evidence the credit of the amount to, and from, the account of “Ventura”.

10. Mr. Purohit, the learned counsel for the defendant submitted with tenacity that none of the said entries pertains to the account of the defendant. As a categorical statement was made on behalf of the defendant that not a single rupee was deposited in the account of the defendant nor any amount was paid to the plaintiffs by way of interest or otherwise from the account of the defendant, the defendant was directed to share the statement of its accounts with the banks for the relevant period.

11. There is no qualm over the fact that the extracts of as many as 54 bank accounts of the defendant were made available to the plaintiffs, and they were duly inspected by the plaintiffs. In order to narrow down the controversy, it may be apposite, at this juncture itself, to note that the extracts of accounts do not reflect direct credit of the amount from the accounts of the plaintiffs to the account of the defendant and vice-versa. The controversy thus boils down to the question as to whether the defendant is liable for the transactions which were entered into through its representative namely Mr.Ameet Savant.

12. Mr. Tamboly strenuously urged that in the backdrop of the indubitable position that Mr.Ameet Savant was the authorised representative of the defendant, which is evidenced by the Trading Member and Authorised Person Agreement, dated 11th December 2014

(‘Agreement, dated 11th December 2014’), the endeavour of the defendant to contest the existence of privity of contract and disown the liability is unsustainable.

13. Amplifying the submission, Mr. Tamboly urged that unsuspecting investors were not in a position to comprehend that the formally authorised person of the defendant was not entitled to lawfully accept the deposits. Mr. Tamboly placed strong reliance on the covenants in the said Agreement, dated 11th December 2014, which cast the liability on the trading member for all acts of omission and commission of the authorised person and/or their employees. The fact that the amount was not directly credited in the account of the defendant, in the face of indisputable jural relationship between the defendant and Mr. Ameet Savant, pales in significance, urged Mr. Tamboly. It was further submitted that the general public is entitled to look upon and believe the representations of the authorised agent as that of the principal. In such a situation, it is a legally impermissible for the principal to disown the liability for the acts of the authorised agent, submitted Mr. Tamboly.

14. To bolster up the aforesaid submission, Mr. Tamboly placed reliance on a judgment of the Division Bench of Delhi High Court in the case of *Delhi International Airport P Ltd. Vs. Union of India & Ors.*¹. In

1 2017 SCC OnLine Del.7021

the said case, in the context of liability of the “franchisee” to pay service tax, the Division Bench expounded the nature of the franchisee agreement in the following words :

“58 A representational right would mean that a right is available with the franchisee to represent the franchisor. When the franchisee represents the franchisor, for all practical purposes, the franchisee loses its individual identity and would be known by the identity of the franchisor. The individual identity of the franchisee is subsumed in the identity of the franchisor. In the case of a franchise, anyone dealing with the franchisee would get an impression as if he were dealing with the franchisor.”

15. Countering the submission, Mr. Purohit, the learned counsel for the defendant urged that the edifice of the submission now sought to be built up on behalf of the plaintiffs does not find support in the plaint. The plaintiffs have categorically averred in the plaint that the defendant had invited the deposits through M/s.Crefin India Management Private Limited. The plaintiffs have themselves disowned the self-stated case. In contrast, the defendant had, at the first possible opportunity, contested the existence of privity of contract and disputed the issuance of Welcome Letters which allegedly constitute the contract. The defendant had sought to explain the fraudulent nature of the said letters relied upon by the plaintiffs. In that process, it was contended that those letters were forged and fabricated by Mr.Ameet Savant, the then authorised

representative of the defendant. This, however, does not imply that the defendant is liable for the fraudulent and criminal acts of Mr.Ameet Savant, especially in the absence of any document to show that the plaintiffs had entered into the transaction with the defendant. Since the claim of the plaintiffs requires adjudication on the existence of the privity of contract and the liability of the defendant for the fraudulent acts of Mr.Ameet Savant, multiple triable issues arise and, therefore, the defendant is entitled to an unconditional leave to defend the suit, canvassed Mr. Purohit.

16. Indisputably, a Trading Member and Authorised Person Agreement, dated 11th December 2014 was executed between the defendant and Mr. Ameet Savant. Certain clauses of the said agreement bear upon the controversy at their hand. They read as under :

“1. SCOPE OF THE ACTIVITIES :

The Trading Member and the Authorized Person shall act as per the requirements specified by SEBI and NSEIL in its Circulars issued from time to time. The Authorized Person hereby acknowledge and confirm that the Authorized Person is entitled to act as a ‘Authorised Person’ within the meaning and subject to SEBI Circular MIRSD/DR-1/Cir-16-09, dated November 06, 2009 and Circulars issued by SEBI and NSEIL from time to time. The client shall be registered with Trading Member only. The funds and securities of the clients shall be settled directly between Trading Member and client and all documents like contract note, statement of funds and securities would be issued to client by Trading Member. The Authorised Person may provide administrative assistance in procurement of documents and settlement, but shall not issue any document to client in its own name. No

fund/securities of clients shall go to account of the Authorised Person.

All acts of omission and commission of the Authorised Person shall be deemed to be of the Trading Member.

2. RESPONSIBILITIES/OBLIGATIONS OF THE AUTHORISED PERSON :

.....

(d) The Authorized Person shall not receive or pay any money or securities in its own name or account. All receipts and payments of securities and funds shall be in the name or account of Trading Member.

(e) The Authorized Person shall not to issue any documents like bill, confirmation memo, statement of funds/securities to the clients in its own name.

(f) The Authorized Person agrees that the Trading Member and NSEIL would be entitled to establish any other additional control that it desires to ensure safe and secure dealing of investors with the Authorized Person.

(g) The Authorized Person shall permit the Trading Member and NSEIL to conduct the inspection of the branch where the terminals are located and records of the operations carried out by the Authorized Person.

3. RIGHTS, RESPONSIBILITIES/OBLIGATIONS OF THE TRADING MEMBER

(a) The Trading Member shall be responsible for all acts of omission and commission of the Authorised Person and/or their employees, including liabilities arising there from.

.....”

17. Mr. Tamboly laid special emphasis on the conditions under the caption, “Scope and Activities” to the effect that all acts of omission and commission of the Authorised Person shall be deemed to be of the Trading Member. Reliance was also placed on clause 3(a), which

explicitly provides that Trading Member shall be responsible for all acts of omission and commission of the Authorised Person and/or their employees, including liabilities arising therefrom.

18. In opposition to this, Mr. Purohit laid stress on clause 2(d) and 2(e), extracted above, which prohibit the authorised person from receiving or paying any money or securities in his own name or account and from issuing any documents, bills, confirmation memo, statement of funds/securities to the clients in its own name. The aforesaid clauses further provide that all receipts and payments of securities and funds shall be in the name or account of Trading Member.

19. The aforesaid agreement explicitly provides that the client shall be registered with Trading Member only. The funds and securities of the clients shall be settled directly between the Trading Member and client and all documents like contract note, statement of funds and securities would be issued to the client by Trading Member. The aforesaid restriction appear to be in conformity with the circular issued by SEBI under the title “Regulatory Framework for Market access through Authorised Persons” in exercise of powers under section 11(1) of the Securities and Exchange Board of India Act, 1992.

20. It is imperative to note that the stated claim of the plaintiffs that the defendant had invited deposits through its business partner M/s.Crefin India Management Private Limited does not find support in the documents relied upon by the plaintiffs. The claim of the defendant that M/s. Crefin India Management Private Limited is neither its agent nor an associate could not be contested. The Welcome Letters (Exh.A to Exh. A-5) appear to have been issued by Mr.Ameet Savant. Indisputably, the plaintiffs were not registered with the defendant. Nor the amount deposited by the plaintiffs has been credited in the account of the defendant. Apparently, the amount has been credited in the account of Mr.Ameet Savant which were opened in the name of “Ventura”. The regulations incorporated in the Agreement, dated 11th December 2014 expressly prohibit the authorised person from receiving any money or securities in his own name or account.

21. In the aforesaid backdrop, the nature of the underlying transaction assumes significance. The Welcome Letter, dated 8th July 2016 (Exh. ‘A’) reads as under :

*“We thank you for your investment of **Rs.1,30,00,000/- (One Crore Thirty Lakhs only)** with VENTURA and we assure the performance of your investment with the following agreed terms :*

The Funds are invested in Index Option Funds and provides you a guarantee on the capital invested and also provides you a monthly return

of 2%. The returns will be paid on or before 10th of every month after completing one month from date of investment.

.....

Kindly note that Fund will be invested with a lock in period of 6 months and subsequently will be open for partial and full withdrawal of principal invested with VENTURA. Returns will be paid on outstanding amount available with us. In case of any withdrawal required, request of the same has to be intimated at the beginning of the month post lock in period.”

22. The nature of the transaction which can be discerned is that the amount was to be invested in Index Option Funds with a lock-in period of 6 months. It was open for the investor to withdraw, either fully or partially, invested amount after the said lock in period. The guarantee on the return of the capital was thus provided. In addition, a monthly return of 2 percent was agreed to be paid on or before 10th of every month after one month of the date of investment.

23. Evidently, the transaction was in the nature of a fixed return on the investment @ 24 percent per annum, i.e. 2 percent per month. The real nature of the transaction thus could not be camouflaged by providing that there was a guarantee of the return of the principal amount, as it was invested in the Index Option Funds. It is not the case of the plaintiffs that they had registered themselves with the defendant. Nor, the amount was directly invested in the name of the plaintiffs in Index Option Funds. It is imperative to note that the regulatory

authorities frown upon the promise of a fixed return on the investment, at an unbelievably high rate as it is fraught with the risk of default and susceptible to fraud. Nor is it the case that the defendant had invited the public deposits. In contrast, the claim of the plaintiffs that the deposits were invited through M/s. Crefin India Management Private Limited is found to be unsustainable. In the circumstances, the submission on behalf of the defendant that the plaintiffs, who are well acquainted with financial and money market, were fully aware of the nature of the transaction they were entering into with Mr. Ameet Savant, cannot be said to be totally unfounded.

24. The fact that the defendant had raised the grounds of absence of privity of contract and that no amount was deposited by the plaintiffs with the defendant in its reply to the demand notice, dated 4th September 2019, assumes significance. The subsequent developments in the nature of the scrutiny of the accounts of the defendant to ascertain whether the amounts have, in fact, been credited into the account of the defendant, indicate that there is substance in the defence of the defendant that no amount has been deposited into its account directly.

25. The learned counsel for the plaintiffs attempted to salvage the position by inviting the attention of the Court to the transactions which have taken place between the defendant and Mr. Ameet Savant. A table

indicating the date and the amount credited into the account of Ventura (Ameet Savant) and the subsequent transfer of some of the amounts into the account of the defendant was placed on record. It was submitted that a substantial part of the amount invested by the plaintiffs came to be eventually transferred to the account of the defendant. I am afraid to accede to this submission, at this stage, sans evidence. The question as to whether the amount which were transferred by Mr.Ameet Savant to the account of the defendant, represented the very money which the plaintiffs had invested with Mr.Ameet Savant, is essentially rooted in the facts and is a matter for trial. At this juncture, it would be hazardous to draw such an inference on the basis of the money trail which the plaintiffs want the Court to believe.

26. There is not much controversy over the fact that the prosecution is initiated against Mr. Ameet Savant. Whether the defendant is liable for the acts of the authorised person, in the backdrop of the allegations of fraud, raises a triable issue. The question of liability of the principal for the fraud committed by the agent, in the context of the nature of the defence and the material on record, would warrant consideration. It is not the law that the principal can be held liable for the fraudulent acts of the agent only when those acts are committed for the benefit of the principal. Even if the fraudulent acts are perpetrated to advance the

personal interest of the agent, the principal can be held liable to account for provided acts fall within the scope of the authority of the agent. In the case at hand, the material on record *prima-facie* indicates that the agent had no authority to accept the money, pay the money and promise the return thereof, on his own. In the backdrop of the nature of the transaction, adverted to above, the question as to whether the acts of Mr.Ameet Savant were within the scope of the authority is a triable issue.

27. A useful reference in this context can be made to a judgment of the Supreme Court in the case of *State Bank of Hyderabad Vs. Rabo Bank* ², wherein in the backdrop of the defence that the drawer and drawee of the Bills had perpetrated a fraud on the defendant-Bank, with the collusion of some officials of the defendant-Bank, the Supreme Court granted an unconditional leave to defend the suit. The observations in paragraphs 21 and 22 are material. They read as under :-

“21. In the case on hand, we have perused the material on record including the FIR dated 9th August, 1999 registered by the CBI at the instance of Chief Vigilance Officer, SBH and also the Charge Sheet filed by the CBI. The charge sheet indicated the involvement of Mr. Sudhir Behra, Chief Manager of the appellant Bank at Burra Bazar Branch, Calcutta. Acting at the requests of representatives from the Indian clients of the respondent’s constituent, the Chief Manager had induced some officers of the appellant Bank who were In-charge of Foreign Exchange Department to issue tested telex

2 (2015) 10 SCC 521

messages of co-acceptance. The charge sheet further alleges that these officers were not authorized to issue such co-acceptances and the motive behind their illegal and unauthorized action was to enable the constituent of the respondent to get their bills discounted by jeopardizing the interests of the appellant Bank. It is also on record that the trial of the said case was at the stage of evidence as on 13th November, 2014.

22. Apart from these, the substantial revelations of the defendant (appellant) in the affidavit coupled with the views expressed by the Division Bench of the High Court makes it clear that there are certain triable issues for adjudication and the defendant/appellant is entitled to defend the Suit. The appellate side of the High Court ought to have taken into consideration the factual matrix of the case before recording its finding. Taking into consideration the totality of the facts and circumstances of the case, we are of the opinion that the defendant/appellant has made out a prima facie case of triable issues in the Suit which needs to be adjudicated. Therefore, the defendant is entitled to grant of unconditional leave to defend the Suit.”

28. The reliance placed by the learned counsel for the defendant on the judgment of this Court in the case of *Asmi Jewellery India Ltd. Vs. Godrej Consumer Products Ltd.* ³ and the judgment of the Supreme Court in the case of *Sunil Enterprises and Ors. Vs. SBI Commercial and International Bank Ltd.* ⁴ appears to be well founded.

29. The upshot of the aforesaid consideration is that the defence raised by the defendant at the first possible opportunity that there was no privity of contract between the plaintiffs, and no amount was

³ 2016(1)Mh.L.J. 395

⁴ (1998) 5 SCC 354

invested by the plaintiffs with the defendant and the documents, which have been relied upon by the plaintiffs to buttress their case of the contract between the plaintiffs and the defendant, were forged appears to be a fair and reasonable defence, if not a positively good defence. Thus, the defendant is entitled to an unconditional leave to defend the suit.

30. Hence, the following order :-

ORDER

(i) The defendant is granted an unconditional leave to defend the suit.

(ii) The defendant shall file written statement within a period of six weeks from today.

(iii) The summons for judgment stands dismissed.

(N. J. JAMADAR, J.)

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Talekar
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