

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

**SUMMONS FOR JUDGMENT NO.07 OF 2021
IN
COMMERCIAL SUMMARY SUIT NO.313 OF 2020**

Nandlal Hassanand Chawla	...Applicant
<i>In the matter between</i>	
Nandlal Hassanand Chawla	...Plaintiff
vs.	
Samir N. Bhojwani	...Defendant

Ms. Ankita Singhanian a/w. Mr. Rushabh Sheth and Mr. Sayeed Mulani i/b. Mulani & Co., for the Plaintiff.
Mr. Cherag Balsara a/w. Mr. D.V. Deokar, Mr. D. Parikh i/b. Parimal K. Shroff & Co., for the Defendant.

CORAM : N.J. JAMADAR, J.
DATE : NOVEMBER 28, 2022

ORAL ORDER:

1. This Commercial Division Summary Suit is instituted for recovery of a sum of Rs. 2,86,33,500/- along with further interest @ 12% p.a. on the principal sum of Rs. 2,25,00,000/- from the date of the institution of the suit till payment and/or realization.

2. The defendant is a developer/builder. Pursuant to the representation of the defendant, plaintiff, an octogenarian, had advanced a sum of Rs. 25 lakhs vide cheque dated 25th February, 2015 against a bill of exchange drawn by the defendant on himself. The defendant paid various amounts to the plaintiff as and by way of

discount calculated at varying rates of interest up to July, 2018. In the month of May, 2016, the plaintiff advanced a further sum of Rs. 1 Crore against a bill of exchange drawn by the defendant on himself. The defendant paid various amounts for varying periods as and by way of discount calculated at varying rates up to 10th July, 2018. Again in the month of May, 2016 itself, the plaintiff had advanced a further amount of Rs. 1 Crore in the same fashion. Interest was paid by the defendant at varying rates up to 8th May, 2018. Thereafter, the defendant committed default in payment of interest as well as the principal amount.

3. Thus the plaintiff called upon the defendant vide notice dated 6th February, 2020 to pay the principal amount of Rs. 2,25,00,000/- along with interest which had fallen due from the respective dates @ 12% p.a. Despite service of the legal notice, the defendant neither paid the amount nor gave reply to the notice. The plaintiff thus invoked pre-institution mediation under section 12A of the Commercial Courts Act, 2015. On account of failure of the defendant to appear before the Mediation Center, High Court, Bombay a Non-Starter Report came to be issued on 24th September, 2020. Hence, this suit.

4. Upon service of Writ of Summons, the defendant entered appearance. Thereupon the plaintiff took out a Summons for Judgment.

5. An affidavit in reply is filed by the defendant seeking an unconditional leave to defend the suit. Two-fold defence is raised by the defendant. First, the suit is based on a running account. There were numerous transactions between the plaintiff and defendant. In fact, the plaintiff being an investor in the projects development by defendant has been investing money since long. The defendant had periodically paid interest to the plaintiff against a running account maintained by the plaintiff with the defendant. Thus, a summary suit is not tenable. Secondly, in the year 2019 an agreement was arrived at between the plaintiff and the defendant to the effect that the outstanding amount as of 1st April, 2019 of Rs. 2,44,71,000/- would be adjusted against the mutually agreed consideration of Rs. 3,50,00,000/- for the sale of Flat No. 1, Ground Floor, Pali Hill Fair Co-Operative Housing Society (Flat No. 1) by the defendant to the plaintiff. The plaintiff had agreed to pay the balance consideration of Rs. 1,05,29,000/-. The plaintiff, however, failed to pay the balance consideration and get the Sale Deed executed. To preempt action for the failure on the part of the plaintiff to perform his part of the

agreement, the instant suit has been instituted. The defendant further contends that the defendant is, therefore, not liable to pay any interest on the said amount of Rs. 2,44,71,000/- from 1st April, 2019.

6. I have heard Ms. Ankita Singhania, learned counsel for the plaintiff, and Mr. Cherag Balsara, learned counsel for the defendant at some length. With the assistance of the learned counsel for the parties, I have perused the averments in the plaint, affidavit in reply and documents annexed to the plaint and affidavit in support of Summons for Judgment.

7. Ms. Singhania, the learned counsel for the plaintiff, submitted that the defendant has failed to make out any defence much less a strong or substantial defence. In fact, according to Ms. Singhania, the instant case is one of an admitted liability. Inviting the attention of the Court to the contentions in the affidavit in reply, especially to a categorical statement in paragraph No. 6.1 that as of 1st April, 2019 the defendant owed a sum of Rs. 2,44,71,000/- to the plaintiff, Ms. Singhania would urge that the defences of the suit being based on a running account and a verbal agreement between the parties to adjust the said amount towards the consideration for purchase of

Flat No. 1 are sham and moonshine. These defences are figments of imagination, urged Ms. Singhania.

8. In contrast to this, Mr. Cherag Balsara took the Court through the averments in the plaint, especially the particulars of payments made by the defendant to the plaintiff as and by way of discount at varying rates of interest over a period of time in respect of each of the advances. The series of payments, according to Mr. Balsara, clearly manifest a running account between the plaintiff and the defendant. Secondly, Mr. Balsara submitted with tenacity that the defendant has raised a positive defence that the parties entered into an Agreement for Sale in respect of Flat No. 1 and further agreed to adjust the amount which the defendant owed to the plaintiff towards part consideration. The defendant, thus, deserves an opportunity to substantiate the aforesaid defence and therefore an unconditional leave is warranted, submitted Mr. Balsara.

9. In the backdrop of the aforesaid defences, it is imperative to note that the plaintiff's claim of having advanced a sum of Rs. 2,25,00,000/- to the defendant in three tranches against bills of exchange drawn by the defendant on himself can be said to have been established beyond the pale of controversy. No endeavour was

made by the defendant to contest the factum of advance. In contrast, the defendant has endeavoured to demonstrate that the payment of interest by the defendant over a period of time qua each of the advances shows that the plaintiff had been maintaining a running account with the defendant.

10. Indeed, there are averments in the plaint to the effect that the defendant paid various amounts for varying periods and at varying rate of interest by way of discount. However, there is no material on record to show that the parties had maintained ledger account and there were series of transactions between the parties reflecting reciprocal demands, payments, settlement and carry forward of the balance at periodical intervals.

11. In Black's Law Dictionary, Eighth Edition a "Running account" is defined as

'An open, unsettled account that exhibits the reciprocal demands between the parties'.

In P Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edition a "Running Account" is defined as

'An account with a bank for money loaned, checks paid, etc., which during the time makes monthly statements, striking the balance due each month, which is carried forwarded and charged, constitutes a "running account" and is in effect but one transaction'.

12. In the case at hand, neither there is adequate pleading nor material to show that the transactions in question, have any of the aforesaid features of a “running account”. At best, there are series of transactions evidencing payment of interest by the defendant at periodical intervals. The said fact and the fact that money was advanced by the plaintiff to the defendant in tranches, are not sufficient to draw an inference of a “running account”.

13. Reliance placed by Mr. Balsara on an order of the Division Bench dated 11th August, 1986 in Appeal No. 712 of 1986 in Summons for Judgment No. 274 of 1986 in Summary Suit No. 2506 of 1985 does not seem to advance the cause of the defence. In the said order, the Division Bench had, inter alia, observed as under :-

“Mr. Tulzapurkar, on behalf of the appellants, has urged that, apart from several contentions on merits, the suit on the item of a Bill Discounting facility in respect of which there was an account maintained by the Bank, could not be filed as a Summary Suit. This is a substantial defence and not one which can be stated to be rejected or brushed aside as lacking in bona fides. Prima facie the defence seems to be one which would be required to be accepted at least at this stage.

It is to be made clear that the observations which we are making pertains to the frame of suit as a summary suit and we are not required to go into other contentions on the merits. We are satisfied that it is difficult to accept the suit as Summary Suit. The order for conditional deposit is, therefore, required to be set aside.”

14. Evidently, the aforesaid observations were made in the context of peculiar facts of the said case. The transaction arose out of a bill discounting facility in respect of which there was an account maintained by the bank. In that context, the Division Bench observed that the suit to enforce liability incurred thereunder could not have been filed as a summary suit. I am afraid, the aforesaid observations govern the facts of the case even remotely.

15. The second defence of the parties having entered into an Agreement for Sale of the flat is equally suspect. To start with, it is not the case of the defendant that any document was executed to evidence the alleged transaction between the parties. The defendant wants the Court believe that it was a verbal agreement. It would be contextually relevant to note that no contemporaneous conduct and/or circumstance are pressed into service on behalf of the defendant to lend a semblance of credence to such verbal agreement. It does not appeal to human credulity that in a Metropolis like Mumbai, where property commands premium, the parties would be comfortable arriving at an oral agreement to convey the property without making any record thereof.

16. It would be legitimate to examine as to whether the defendant

had the opportunity to assert that there was such an understanding between the parties, before the institution of the suit. Service of the legal notice upon the defendant indeed provided such an opportunity to the defendant. The existence of such an oral agreement did not see the light of the day till the defendant filed affidavit in reply. Time lag of almost two years in between the said alleged arrangement and the institution of the suit cannot be said to be immaterial and inconsequential. In the intervening period, had there been such an arrangement, either party must have taken initiative to either enforce such agreement or resile therefrom.

17. Another factor which runs counter to the defendant's claim is that in the financial year 2018-19, in Form No. 26 AS, the defendant had deducted TDS on the interest booked for the plaintiff. This militates against the claim of the defendant that pursuant to the alleged agreement for purchase of the flat the jural relationship between the parties as debtor and creditor stood altered.

18. In the aforesaid view of the matter, I find it rather difficult to accede to the submissions on behalf of the defendant that the defence of existence a verbal agreement for sale of the flat, pursuant to which the parties had agreed to adjust the outstanding loan

amount and interest thereon towards consideration for the said flat, is a substantial or strong defence. The defendant therefore does not deserve leave to defend on the said count.

19. On the aspect of liability to pay interest, on the own showing of the plaintiff, it is abundantly clear that as and by way of discount, interest on the various tranches of advance has been paid at varying rates. It is not the case of the plaintiff that the defendant had agreed to pay interest at a particular rate. It appears that based on the quantum of the amount paid, as and by way of discount, the plaintiff asserts that the said amount was paid by computing interest at a particular rate. Nonetheless in view of the provisions contained in Negotiable Instruments Act, 1881 the plaintiff would be entitled to claim interest as the loan was advanced against the bills of exchange. In my view, the defendant deserves leave to defend the suit to the extent of liability to pay the interest.

20. The upshot of the aforesaid consideration is that to the extent of principal loan amount of Rs. 2,25,00,000/- the liability is rather indubitable. The twin defence of the transaction being in the nature of a running account and there being an agreement between the parties to adjust the amount of Rs. 2,44,71,000/- towards the

consideration of the Flat No. 1 is not of such quality as to warrant the leave to defend the suit. However, to the extent of liability to pay interest on the said amount, triable issues may arise.

21. It is trite that at the hearing of the Summons for Judgment, the Court would be justified in passing a decree for the part of the claim and also grant conditional or unconditional leave to defend the suit in respect of rest of the claim. A profitable reference can be made to a Full Bench judgment of this Court in the case of **SICOM Limited vs. Prashant S. Tanna and Others**¹ wherein the full Bench enunciated the principles as under:-

28} In the circumstances, we summarize the answer to the reference as follows:

(1)

(2) In a summary suit filed under Order XXXVII of the Civil Procedure Code, the plaintiff is entitled at any time to abandon or give-up a part of the claim unilaterally. This, the plaintiff may do by making a statement to be recorded by the Court and without the necessity of the plaintiff making a formal application for the same by withdrawing the summons for judgment, amending the plaint and thereafter taking out a fresh summons for judgment or otherwise.

(3) At the hearing of the summons for judgment, it will be open to the Court to pass a decree for a part of the claim and grant unconditional leave to defend the suit in respect of rest of the claim.

(4) At the hearing of the summons for judgment, it is open to the Court to grant conditional leave to defend in respect of a part of the claim and unconditional leave to defend for the remaining part of the claim. In such an order it would follow that in the event of the

1 2004 (2) Mh.L.J. 292.

defendant failing to comply with the condition, he would suffer the consequences mentioned in Order XXXVII qua only that part of the claim for which conditional leave to defend has been granted and not in respect of that part of the claim for which unconditional leave has been granted.

(5) There may be further options available to the Court while passing an order on the summons for judgment. Our judgment does not exhaustively set out the options. Obviously, judicial discretion has to be exercised in consonance with the settled legal principles governing grant of leave to defend in summary suits.

22. In the light of the aforesaid exposition of law, in the case at hand, the Court would be justified in passing a decree for the admitted amount of Rs. 2,44,71,000/- and grant an unconditional leave to defend the suit in respect of interest component only.

Hence, the following order.

ORDER

- a] The Summons for Judgment stands partly allowed.
- b] The suit stands decreed to the extent of the amount of Rs. 2,44,71,000/-.
- c] The defendant do pay the sum of Rs. 2,44,71,000/- to the plaintiff.
- e] The defendant is granted unconditional leave to defend the suit in respect of interest component.

f] The defendant shall file written statement within a period of thirty days from the date of uploading of this order.

g] The defendant do pay the proportionate costs of the suit to the plaintiff.

h] Decree be drawn accordingly.

(N. J. JAMADAR, J.)