PRIYA RAJESH SOPARKAR

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**SUMMONS FOR JUDGMENT NO.23 OF 2017**

**IN**

**COMMERCIAL SUMMARY SUIT NO.294 OF 2016**

Surendra Kumar Agarwal ... Plaintiff

vs.

Alpha Lifestyle Projects Private Limited and ors. ... Defendants

Mr.Karl Tamboly a/w Mr.Anuj Desai i/b. M/s Indus Law for the Plaintiff.
Mr.Karl Shroff a/w. Mr.Sahil Mahajan for Defendant Nos.1, 2 and 6.
Mr.Prathamesh Kamat a/w. Mr.Osama Butt i/b. M/s Enata Partners for Defendant No.3.

**CORAM : A. K. MENON, J.**
**DATED : 2nd MARCH, 2022.**

**P.C. :**

1. By this Summons for Judgment, the plaintiff seeks decree in a sum of Rs.41,98,69,428/- and further interest and costs.

2. The claim in the suit is based on an agreement dated 23rd November, 2010, described as a loan agreement, read with a Supplemental Loan Agreement dated 24th July, 2012. The suit today proceeds only against defendant Nos.1 and 2 since the Summons for Judgment is not pressed against defendant Nos.4 to 6. The suit is accordingly dismissed as against

defendant Nos.4 to 6.

3. The 1st defendant is described as borrower under the loan agreement. The 2nd defendant is said to be a guarantor, who is bound to honour the obligations of the 1st defendant-borrower by virtue of being a confirming party, as provided in clause (12) of the loan agreement. Clause (12) records that the confirming party is jointly and severally responsible for performing all the obligations of the borrower in the event of borrower's failure to repay loan. The learned counsel on behalf of the plaintiff has canvassed a case of failure to repay the loan, despite paying part of the interest at the contractual rate in terms of the schedule of payment of interest annexed to the agreement which is titled as "Repayment schedule". According to the plaintiff, two installments of Rs.67,50,000/- each representing interest of 1st and 2nd quarters have been paid belatedly and thereafter, the defendants failed and neglected to pay the interest and have also failed and neglected to pay the principal sum of the agreement.

4. In view thereof, Mr.Tamboly appearing on behalf of the plaintiff submits that defendant Nos.1 and 2 are in breach of the loan agreement. The suit is filed under the provisions of Order XXXVII and the plaintiff is entitled to a decree on Summons for Judgment in terms of the plaint. On a query from

the court, it is made clear by Mr.Tamboly that the suit and Summons for Judgment proceeds on the basis of the loan agreement and not under the confirmation by the confirming party-guarantor. He has relied upon a notice on demand dated 11$^{th}$ November, 2016 Ex.O to the plaint, which is a Notice of Demand cum Invocation of Guarantee in respect of two loan agreements. Mr.Tamboly further submits that the demand notice was duly received by the defendants and that there was no response. On account of change of address of defendant No.1, it appears that a reminder was sent to the current address of defendant No.1. That notice is also annexed at Ex.P.

5. On behalf of the defendants, the learned counsel Mr.Shroff has relied upon two affidavits-in-reply to the Summons for Judgment, both dated 15$^{th}$ February, 2022. The first defence sought to be canvassed before me is that of limitation. According to Mr.Shroff, the amounts under the agreement which were said to be repayable within 12 months from date of execution. By virtue of the supplemental agreement dated 24$^{th}$ July, 2012, time for repayment was extended "before 22$^{nd}$ of November 2013". The suit was lodged on 22$^{nd}$ November, 2016, after the last date for repayment. According to Mr.Shroff therefore there is a delay of one day. One other defence taken up is that the plaintiff is a money lender. In the affidavit, he has relied upon the fact that the agreement is not a plain loan agreement that advances monies. He submits that perusal of the agreement reveals that the amount

advanced is for a particular purpose. He has invited my attention to the Definitions and Interpretation clause 1.1 in the agreement and the definition of the word "project". He has also taken me through the relevant provisions and submitted that both agreements are styled as loan agreement but the money advanced is clearly for the purpose of the Project.

6. The affidavit-in-reply sets out that the defendant No.1 has also executed a power of attorney in favour of one Anuj Agarwal of the plaintiff. Reference is made in paragraph No.7 of the affidavit-in-reply to the express provisions of clause 2.3.1(ii) & (iii) of the loan agreement, which also contemplates grant of an irrevocable power of attorney to Mr.Agarwal paragraph No.10 of the reply records that by the first defendant by letter of allotment dated dated 23rd November, 2010 allotted 50,000 sq. ft. of built up area to the plaintiff and has also executed the irrevocable power of attorney as above.

7. Mr.Shroff has also relied upon the other averments made in the affidavit which he submits will establish that the suit cannot quality as a Summary Suit. Moreover, interest @ 21% is sought to be levied and amount of interest is sought to be recovered and clearly indicated by the fact that the rate of interest is also excessive the overlooking the project cost that is

contemplated under the loan agreement. Defendant No.2 has also filed a reply opposing the Summons for Judgment. Mr.Tamboly has canvassed his case on the basis of judgment of the Supreme Court in **IDBI Trusteeship Services Limited Vs. Hubtown Limited, reported in (2017)1 Supreme Court Cases 568**. He has invited my attention to paragraph Nos.17.2 and 17.3. The learned counsel also submitted that even if a *prima facie* defence is made out, the court is not powerless to grant appropriate relief.

8. Heaving heard counsel and having perused the record I found that there is no denial of the fact that the power of attorney is still valid and has not been cancelled. The plaintiff has not filed any rejoinder and the contents of the reply read with the defendants version of the nature of the transaction has not been controverted. In these circumstances, I am of the view that there no benefit can be drawn from the Judgment in Hubtown Limited (supra). Since this is a summary suit, Mr.Tamboly had also requested for expeditious disposal. There is substance in the submission but I am unable to agree that the plaintiff is entitled to a decree. Several triable issues are raised as above including as to whether the plaintiff has acquired an interest in the project and if so whether the amount claimed is liable to be repaid in part or full. In view thereof, I pass the following order-

ORDER

i. Defendants are granted unconditional leave to defend the suit.

ii. Written statement shall be filed within four weeks from today.

iii. Affidavit of documents shall be filed within two weeks thereafter.

iv. Advocates for both the parties shall exchange affidavits of documents describing reasons for denials, if any, within a period of two weeks from today. Inspection to be completed within one week thereafter.

v. List the suit for direction after eight weeks.

**(A.K. MENON, J.)**