

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
SUMMONS FOR JUDGMENT NO.31 OF 2020
IN
COMM. SUMMARY SUIT NO.79 OF 2020**

Nainesh Mahendra Gandhi ... Plaintiff
versus
Prash Builders Pvt. Ltd. ... Defendants

Ms. Apurva Gupte i/by Mr. Vijay S. Sharma, for Plaintiff.
Mr. Faran Khan with Mr. Manish Doshi, Ms. Viri Shah, Ms. Shivam Trivedi i/by
Vimadalal and Co., for Defendant.

CORAM: N.J.JAMADAR, J.

DATE: 22nd NOVEMBER, 2022

P.C.:

1. This Commercial Division Summary Suit is instituted for recovery of a sum of Rs.3,54,81,200/- along with further interest from the date of the suit till payment and/or realization.

2. Shorn of unnecessary details, the Plaintiff's case runs as under :

2.1 The Plaintiff is the Karta and Manager of Nainesh Gandhi, HUF. The Defendant is a company incorporated under the Companies Act, 1956, which deals in the business of builders and developers. Praful A. Mehta is the director of the Defendant Company. The Plaintiff had known Praful A. Mehta since long.

2.2 In the year 2007, since the Defendant was in financial constraints, Praful

A. Mehta had approached the Plaintiff to provide financial assistance. Pursuant to the representation, Plaintiff had advanced a sum of Rs.3,54,81,200/- to the Defendant through banking channel. The Defendant acknowledged the liability by executing the balance confirmations from time to time. The last balance confirmation for the period 01-04-2015 to 31-03-2016 was executed on 01-04-2016. In the audited balance sheet as of 31st March, 2017 also, the Defendant had shown the said amount of Rs.3,54,81,200/- under the caption 'other current liability'.

2.3 The Plaintiff repeatedly requested the Defendant to repay the loan amount and discharge the liability. The Defendant failed and neglected to repay the amount on one and other pretext. Thus, the Plaintiff addressed a legal notice on 25th January, 2019 calling upon the Defendant to repay the loan amount of Rs.3,54,81,200/- along with interest @ 12% p.a.

2.4 Vide Reply dated 20th February, 2019, the Defendant raised false and frivolous contentions and unjustifiably denied the liability. Eventually as the pre-institution mediation resulted in a failure report, the Plaintiff was constrained to institute this suit.

3. Upon service of the writ of summons, the Defendant entered appearance. Thereupon, the Plaintiff took out the Summons for Judgment.

4. An Affidavit in Reply seeking unconditional leave to defend the Suit is filed on behalf of the Defendant. After assailing the tenability of the suit under the

provisions of Order XXXVII of the Code of Civil Procedure, 1908, the Defendant contends that, the suit suffers from the vice of *suppressio veri and suggestio falsi*. The Plaintiff has deliberately suppressed multiple transactions between the Plaintiff, Defendant and Praful A. Mehta, especially the fact that the purported loan amount of Rs.3,54,81,200/- was a mere transfer entry as on the very day of the transfer of the said amount in the account of the Defendant, the very same amount stood credited to the account of the Plaintiff from the account of Praful A. Mehta.

5. The Defendant further contends the Plaintiff had infact overdrawn an amount of Rs.5.53 Crores over and above his entitlement to profit from the account of J.P.Enterprises, a partnership firm of which Plaintiff, Praful A. Mehta and three others were the partners. Thus, Praful A. Mehta invoked arbitration and filed Commercial Arbitration Petition No.36 of 2019 against the partners of J.P.Enterprises, including the Plaintiff, wherein reliefs were sought against the Plaintiff as well. To give a counter blast to the said proceedings, the Plaintiff has instituted this Suit by falsely claiming that the amount was advanced by way of loan. The execution of the balance confirmations is disputed. In any event, the balance confirmations and the entries in balance sheet, according to the Defendant, do not constitute admission of liability.

6. Lastly, the suit is stated to be barred by limitation as the last confirmation of accounts was as of 1st April, 2016 and, even after excluding the period spent in pre-institution mediation, the suit ought to have been lodged within 25 days of the failure

report. The institution of the Suit on 10th December, 2019 is, therefore, stated to be barred by law of limitation.

7. An Affidavit in Rejoinder followed by an Affidavit in Sur-Rejoinder and two additional Affidavits on behalf of the Plaintiff came to be filed. It would be necessary to note that two additional Affidavits were filed pursuant to the directions of this Court as the Court considered it appropriate to ascertain as to how the amount which came to be credited to the account of the Plaintiff from the account of Praful A. Mehta was treated in the books of account of the Plaintiff. In the last additional Affidavit sworn on 15th November, 2022, the Plaintiff affirms that the amount received from Praful A. Mehta has been treated as loan.

8. In the wake of the aforesaid pleadings, I have heard Ms. Gupte, learned Counsel for the Plaintiff, and Mr. Faran Khan, learned Counsel for the Defendant, at some length. I have also perused the documents placed on record in support of the rival contentions.

9. Ms. Gupte, learned Counsel for the Plaintiff would urge that the fact that the Plaintiff had advanced a sum of Rs.3,54,81,200/- to the Defendant through banking channel, is not put in contest. Nor the execution of the balance confirmation as of 1st April, 2016 on behalf of the Defendant is contestible. In any event, the balance sheet of the Defendant Company for the period ending March, 2017 explicitly records that a sum of Rs.3,54,81,200/- was shown payable to the Plaintiff as of 31st

March, 2017. In the face of these clear and unequivocal admissions of debt, according to Ms. Gupte, the defence sought to be raised on behalf of the Defendant can only be said to be sham and moonshine. It was further submitted that the Defendant is taking an undue advantage of the business and familial relations between the Plaintiff and Praful A. Mehta to bolster up a false defence that the transaction is one of a mere transfer entry.

10. In contrast to this, Mr. Faran Khan, learned Counsel for the Defendant strenuously submitted that the very fact that the Plaintiff chose to suppress transfer of the loan amount from the account of Praful A. Mehta to the account of the Plaintiff on the very day of the loan advanced gives rise to a triable issue. It was incumbent upon the Plaintiff to explain the circuitous nature of the transaction. Endeavour of the Plaintiff to now turn around and offer an explanation is of no avail. The learned Counsel for the Defendant further submitted that the defence of the instant suit having been instituted with a view to give a counter blast to arbitration proceeding initiated by Praful A. Mehta is borne out by the time lag of a couple of days only in the institution of the petition under Section 11 of the Arbitration and Conciliation Act, 1996 by Praful A. Mehta and the institution of this suit. It was further submitted that an earlier endeavour on the part of the Plaintiff to obtain a decree in a summary suit in respect of an identical transaction pertaining another entity Mahavir Corporation, did not fructify. Eventually, the Plaintiff conceded to grant an unconditional leave with a

schedule being fixed for completion of pre-trial formalities. To this end, attention of the Court was invited to an order dated 13th December, 2018 in Summons for Judgment No.81 of 2018 in Comm. Summary Suit No.612 of 2018.

11. Ms. Gupte's submission that the confirmation of accounts furnishes a foundation for summary suit is impeccable. Reliance placed on a judgment of the learned Single Judge of this Court in the case of **Sun N Sand Hotel Limited M/s. V.V.Kamat, HUF**¹ wherein it was, inter alia, enunciated that the balance confirmation letter furnishes the Plaintiff a cause of action for a summary suit, appears to be well founded. A Full Bench of this Court in the case of **Jyotsna K. Valia vs. TS Parekh and Co.,**² has also expounded the law that confirmation of accounts furnishes a surer foundation for a summary suit.

12. The second limb of the submission of Ms. Gupte based on an entry in the balance sheet of the Defendant is also not without substance. In a recent pronouncement, the Supreme Court in the case of **Asset Reconstruction Company (India) Ltd. V/s. Tulip Star Hotels Ltd. and Ors.**³ has enunciated the law as under :

“85. It is well settled that entries in books of accounts and/or balance sheets of a corporate debtor would amount to an acknowledgment under Section 18 of the Limitation Act. In Bishal Jaiswal (supra) authored by Nariman, J. this Court quoted with approval the judgments, inter alia, of Calcutta Hihg Court

1 [2003(3) Mh.L.J.932]

2 2007 (3) BCR 772

3 2022 SCC Online SC 944

in Bengal Silk Mills Co. V/s. Ismail Golam Hossain Ariff and Pandem Tea Co. Ltd., the Judgment of the Delhi High Court in South Asia Industries (P) Ltd. V/s. General Krishna Shamsheer Jung Bahadur Rana and the judgment of Karnataka High Court in Hegde Golay Ltd. V/s. State Bank of India and held that an acknowledgment of liability that is made in a balance sheet can amount to an acknowledgment of debt.”

13. The aforesaid legal propositions are well recognized. However, in the case at hand, the Court is confronted with a factual controversy which bears upon the grant of leave to defend the Suit. Whether the facts borne out by record render the defence sought to be raised by the Defendant substantial or, in the least, plausible, is the core issue.

14. First and foremost, it is imperative to note that the Plaintiff approached the Court with a plain and simple case that the amount was advanced to the Defendant in the year 2007. It was not repaid till the year 2019 despite their being confirmations of accounts from time to time, and, therefore, the Plaintiff was constrained to institute the suit. There was no reference to any contemporaneous collateral transaction between the parties.

15. In the Affidavit in Reply, the Defendant categorically asserted that the amount of Rs.3,54,81,200/- which was shown to have been advanced to the Defendant on 24th August, 2007 was instantaneously withdrawn on the very day from the account

of Praful A. Mehta, maintained with Kapol Co-op. Bank Ltd. The ledger of the accounts of the Plaintiff in the books of Praful A. Mehta (Exhibit 1) and the ledger of the account of the Plaintiff in the books of account of the Defendant (Exhibit 2) were annexed to the Affidavit in Reply. The entries therein are also borne out by the copies of the extract of account of Praful A. Mehta and Defendant Company maintained with Kapol Co-op. Bank Ltd. (Exhibit B to the Affidavit in Sur-Rejoinder).

16. Can this be brushed aside as a matter of mere co-incidence ? The Plaintiff surely owes an explanation. That explanation is not forthcoming in the Plaintiff. However, the plaintiff touches upon the role of Praful A. Mehta as the key person at whose behest the Plaintiff advanced the amount to the Defendant Company as Praful A. Mehta happened to be a director of Defendant.

17. In the aforesaid backdrop, the Court desired to ascertain as to how the said amount received from Praful A. Mehta was treated in the accounts of the Plaintiff. In the additional Affidavit filed on 15th November, 2022, an endeavour was made to demonstrate that as of 2nd September, 2007 the Plaintiff owed an amount of Rs.4,80,000/- to Praful A. Mehta and, upon being inquired by the Income Tax authorities, the Plaintiff had replied that the advance of Rs.3,54,81,200/- made to the Defendant was a loan.

18. I am afraid the said explanation does not adequately address the core question as to how the receipt of the very amount of Rs.3,54,81,200/- in the

account of the Plaintiff from the account of Praful A. Mehta, has been shown in the books of account of the Plaintiff. Neither the amount is too small to pale in significance. Nor the instantaneous transfer can be wished away as a mere coincidence. The inaction on the part of the Plaintiff for almost 12 years can also not be brushed aside as immaterial or inconsequential. It does not stand to reason that for almost 12 years, the Plaintiff would not have insisted for payment of a reasonable return on the said investment, if not return of the principal amount. The Plaintiff has not admittedly claimed any interest on the said amount.

19. It is true that the fact that, in an almost identical matter, the Plaintiff conceded to grant of an unconditional leave may not by itself be decisive. However, institution of this suit within a couple of days of the institution of the Arbitration Petition by Praful A. Mehta cannot be said to be wholly irrelevant. In the Affidavit in Sur-Rejoinder, the Defendant has shown a trail of the transactions between the Plaintiff, Defendant and the related parties including Praful A. Mehta and J.P.Enterprises. Prima facie, it appears that the transactions are inextricably intermingled. To add to this, there is no satisfactory explanation by the Plaintiff.

20. In the aforesaid view of the matter, I am persuaded to hold that the Defendant has raised a fair and reasonable defence. In view of the instantaneous withdrawal of the amount from the account of Praful A. Mehta on the very day of the transaction in question, there is a cloud of doubt over the very nature of the

transaction reflected in the confirmation of accounts and the balance sheet. In the circumstances, it may not be justifiable to deprive the Defendant of an opportunity to contest the claim.

21. It is trite, admissions are not conclusive. Evidentiary admissions can be explained at the trial. In the instant case, the Defendant has offered an explanation which competes in probability with the Plaintiff's case. Therefore, leave to defend cannot be made conditional upon deposit of the amount which the confirmation of accounts and balance sheet represent, which is otherwise a norm in case of an admitted liability

22. It would be suffice to make a reference to the Judgment of the Supreme Court in the case of **B.L. Kashyap and Sons Limited vs. JMS Steel and Power Corporation and Anr.**⁴ wherein after considering the judgments of the Supreme Court in the cases of **Mechelec Engineers & Manufacturers vs. Basic Equipment Corpn.**⁵ and **IDBI Trusteeship Services Ltd. vs. Hubtown Limited**⁶, wherein the tests were reformulated, the Supreme Court enunciated the principles as under :

“33.3 Therefore, while dealing with an application seeking leave to defend, it would not be a correct approach to proceed as if denying the leave is the rule or that the leave to defend is to be granted only in exceptional cases or only in cases where the

4 (2022) 3 SCC 294

5 (1976) 4 SCC 687

6 (2017) 1 SCC 568

defence would appear to be a meritorious one. Even in the case of raising of triable issues, with the defendant indicating his having a fair or reasonable defence, he is ordinarily entitled to unconditional leave to defend unless there be any strong reason to deny the leave. It gets perforce reiterated that even if there remains a reasonable doubt about the probability of defence, sterner or higher conditions as stated above could be imposed while granting leave but, denying the leave would be ordinarily countenanced only in such cases where the defendant fails to show any genuine triable issue and the Court finds the defence to be frivolous or vexatious.”

23. If the aforesaid principles of law are applied to the facts of the present case, in my view, the Defendant is entitled to an unconditional leave to defend the Suit. Hence, the following order :

ORDER

- (i) The Defendant is granted unconditional leave to defend the suit.
- (ii) The Defendant shall file written statement within a period of 30 days from today.
- (iii) The Summons for Judgment stands disposed.

(N.J.JAMADAR, J.)