

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

**SUMMONS FOR JUDGMENT NO. 18 OF 2019
IN
COMM SUMMARY SUIT NO. 186 OF 2017**

Sajjad Ahmed Amir Sayyed & anr.	...Applicants
In the matter between	
Sajjad Ahmed Amir Sayyed & anr.	...Plaintiffs
Versus	
Saroj wd/o Omprakash Boob & ors.	...Defendants

Mr. Vishal Kanade, a/w Kirit Hakani, Niyati Hakani, i/b Kirit Hakani, for the Plaintiffs/Applicants.
Mr. P. R. Arjunwadkar, i/b Prabha Badadare, for Defendant nos.1 to 5.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 25th MARCH, 2022

PRONOUNCED ON: 19th APRIL, 2022

ORDER:-

1. This commercial division summary suit is instituted for recovery of a sum of Rs.6,75,33,290/- along with interest at the rate of 9% p.a. on the principal sum of Rs.5,33,00,000/-.
2. Plaintiff no.1 Mr. Sajjad deals in the business of building construction and development. Plaintiff no.2 Mr. Anees is a business partner of plaintiff no.1 and is entitled to and has interest in the suit claim. Late Omprakash Zumbarlal Boob, the husband of defendant no.1 and father of defendant nos.2 to 5

was also dealing in the business of construction and development of real estate at Pune. In the year 2007-2008 plaintiff no.1 and late Omprakash entered into a Memorandum of Undertakings/Agreements in respect of the properties situated at village Kondhava and Ambegaon, Pune. Pursuant thereto plaintiff no.1 himself and plaintiff no.2, through plaintiff no.1 invested a sum of Rs.9,95,00,000/-. As the agreements did not materialize and transactions fell through, articles of agreements were executed on 22nd September, 2011. Under the said articles of agreements late Omprakash agreed to refund to plaintiff no.1 a sum of Rs.6,25,00,000/- in installments. In discharge of the said liability late Omprakash issued post-dated cheques which were dishonored on presentment. Plaintiff no.1 was, thus, constrained to lodge a complaint under Section 138 of the Negotiable Instruments Act, 1881 ("the N.I. Act") being CC No.1975/SS/2012 before the Metropolitan Magistrate, Dadar.

3. Late Omprakash carried the matter of issue of summons to this Court in Criminal Writ Petition No.1725 of 2013. In the said petition, on 15th July, 2013 Consent Terms were executed and accordingly the petition came to be disposed. Under the Consent Terms late Omprakash had agreed to repay the entire amount aggregating to Rs.5,30,00,000/- on or before 16th

January, 2014, failing which simple interest was to be paid at the rate of 9% p.a. In view of default on the part of late Omprakash, in abiding by the Consent Terms, the complaint before the learned Metropolitan Magistrate was revived. Fresh Consent Terms were executed before the learned Magistrate in CC No.1975/SS/2012 on 13th January, 2014, whereunder late Omprakash agreed to transfer the property situated at Survey No.39/1 Thakarwadi, Taluka Khed, District Pune and Survey No.58 Hissa No.7 admeasuring about 400 Sq.Mtrs. in favour of plaintiff no.1 and issued cheques dated 28th February, 2015 and 28th April, 2015 to repay the outstanding amount. All the three cheques were dishonored on presentment.

4. Subsequently, on 18th November, 2014, fresh Consent Terms were executed by plaintiff no.1 and late Omprakash. The latter had agreed to obtain the signatures of his wife, defendant no.1, and son, defendant no.2, on the said Consent Terms. Late Omprakash had assured to keep his wife and son present before the Court for executing the said Consent Terms dated 18th November, 2014. However, on 3rd December, 2014 Omprakash passed away. Thus, those Consent Terms could not be tendered before the learned Magistrate.

5. The plaintiff asserts on the demise of Omprakash the defendants, who represent the estate of late Omprakash, are jointly and severally liable to discharge the liabilities and debts of late Omprakash. Thus, a demand notice was issued to the defendants on 24th December, 2016. The demand was not complied with. The plaintiffs aver that there are unequivocal admissions of liability by late Omprakash in the various Consent Terms and the claim is based on dishonored cheques. Hence this summary suit.

6. The defendants entered appearance in response to the service of the writ of summons. Thereupon the plaintiffs took out this Summons for Judgment.

7. An Affidavit-in-reply is filed on behalf of defendant nos.1 to 5 seeking an unconditional leave to defend the suit. Firstly, according to defendant nos.1 to 5, the suit is not properly constituted. Mr. Anees, plaintiff no.2, had no transaction of whatsoever nature with late Omprakash. There was no privity of contract between plaintiff no.2 and late Omprakash. If it is the claim of the plaintiff that the plaintiffs are the partners, then the bar under Section 69 of the Indian Partnership Act, 1872, would operate and the suit would become untenable. Secondly, the defendants contend that the Consent Terms dated

15th July, 2013, were brought about by exerting pressure and undue influence upon late Omprakash. Moreover, on account of the misrepresentation, late Omprakash had admitted the liability to pay a sum of Rs.5,30,00,000/- with interest though late Omprakash was not liable to pay any amount. According to the defendants, late Omprakash was in the *bona fide* belief that he would get back unsold 44 flats and land at village Kondhava and Ambegaon, Pune. It was denied that late Omprakash had executed the Consent Terms on 13th January, 2014 before the learned Magistrate. Intrinsic evidence of the said Consent Terms dated 13th January, 2014, not being signed by the Advocates for the parties, was pressed into service. It was contended that late Omprakash was not bound to honor the cheques allegedly drawn pursuant to the Consent Terms as the said Consent Terms and the consequent actions were all vitiated by fraud. It was denied that late Omprakash executed the Consent Terms dated 18th November, 2014 and had also agreed to keep defendant nos.1 and 2 present before the Court for executing the alleged Consent Terms. The defendants contend, at that point of time, late Omprakash was unable to move due to paralysis and was bedridden at Pune. The Consent Terms dated 18th November, 2014 were thus stated to be false and fabricated.

8. The defendants further contend that there was breach of the articles of agreements dated 22nd September, 2011. Under the terms of the articles of agreements, the plaintiff nos.1 was under an obligation to release the flats which were acquired for sale and possession to late Omprakash. The plaintiffs had no authority in law to sale those flats and appropriate the consideration thereof. Thus, the very premise of the claim becomes unsustainable.

9. The defendants thus contend that the defendants have raised triable issues and, therefore, the defence raised by the defendants are not moonshine or sham defences. In contrast, since the defendants have raised strong and substantial defences, unconditional leave to defend the suit is required to be granted.

10. I have heard Mr. Kanade, the learned Counsel for the plaintiffs and Mr. Arjunwadkar, the learned Counsel for the defendants. With the assistance of the learned Counsels for the parties, I have perused the pleadings and documents on record.

11. Mr. Kanade submitted that a peculiar feature of the instant suit is that the Consent Terms were executed before this Court and the learned Metropolitan Magistrate, repetitively, and the cheques drawn by late Omprakash pursuant to the solemn

undertakings before the Court were dishonored. Mr. Kanade submitted that in the facts of the case, the defence of fraud and exercise of undue influence is plainly untenable as the Consent Terms were voluntarily executed by late Omprakash before the Courts. Taking the Court through the articles of agreement dated 22nd September, 2011, the Consent Terms executed before this Court on 15th July, 2013, followed by the Consent Terms dated 13th January, 2014 and 18th November, 2014, Mr. Kanade submitted that these agreements and Consent Terms constitute clear and unequivocal admission of the liability. Since, the cheques drawn pursuant to the Consent Terms dated 13th January, 2014 were also dishonored, the defendants have no defence to the claim. Therefore, leave to defend is not required to be granted and the Summons for Judgment deserves to be made absolute, submitted Mr. Kanade.

12. Mr. Arjunwadkar, in the contrast, submitted that the facts of the case set up by the plaintiffs are not as simplistic as projected by the plaintiffs. Mr. Arjunwadkar mounted a two-pronged attack on the frame of the suit. First, plaintiff no.2 Mr. Anees had no transaction of whatsoever nature with late Omprakash. Neither any agreement was executed by and between plaintiff no.2 and late Omprakash nor any cheque was

drawn in favour of plaintiff no.2. In this backdrop, joining of Mr. Anees as plaintiff no.2, is a clear misjoinder of parties and no suit, much less a summary suit, at the instance of plaintiff no.2 is maintainable. Two, the defendants do not owe any liability towards plaintiff no.1. Laying emphasis on the fact that Consent Terms allegedly executed on 18th November, 2014, do not bear the signatures of defendant nos.1 and 2, who the late Omprakash allegedly represented to have guaranteed the repayment, it was submitted that the Consent Terms dated 18th November, 2014 cannot be said to have been lawfully executed to fasten the liability on defendant nos.1 and 2.

13. Mr. Arjunwadkar further submitted that the articles of agreement dated 22nd September, 2011 contain reciprocal promises. Under the terms thereof, it was incumbent on plaintiff no.1 to release the flats, the possession of which was with plaintiff no.1, and also release the original documents in respect of Ambegaon property. Evidently, plaintiff no.1 had not complied with those promises. Thus, there is a serious dispute about the entitlement of plaintiff no.1 to claim the said amount whilst holding on to the property of late Omprakash. This gives rise to a serious triable issue and, therefore, the defendants are entitled to an unconditional leave to defend the suit.

14. I have carefully considered the aforesaid submissions. The summary suit is apparently instituted on the basis of the dishonored cheques drawn for Rs.50,00,000/- payable on 28th February, 2014 and Rs.3,33,00,000/- and Rs.1,50,00,000/- both payable on 25th April, 2014. The issue and dishonor of those cheques is, however, preceded by a series of agreements between plaintiff no.1 and late Omprakash.

15. The plaintiffs claim that liability was initially incurred by late Omprakash under the articles of agreement dated 22nd September, 2011, whereby the parties agreed that late Omprakash would pay a sum of Rs.6,25,00,000/- to plaintiff no.1 in respect of the transaction pertaining to the properties at Kondhava and Ambegaon, Pune. This was to compensate plaintiff no.1 for the investment made and expenses incurred in the development of the projects at those sites. The cheques drawn thereunder were dishonored leading to filing of a complaint under Section 138 of the N. I. Act being CC No.1975/SS/2012. In the proceedings arising out of the said complaint, multiple Consent Terms were executed between plaintiff no.1 and late Omprakash. The cheques, in question, were purportedly drawn in pursuance of the Consent Terms executed

on 13th January, 2014, before the learned Metropolitan Magistrate.

16. Paragraph 4 of the said Consent Terms reads as under:

“4. In Continuation of the consent terms filed between the parties, it is further agreed that the amount of Rs.5,30,00,000/- alongwith calculated interest thereon at Rs.99,48,750/- thereon will be adjusted as under:-

a. The accused is owner of a property bearing Survey No.39/1, Thakarwadi, Taluka-Khed, Dist-Pune, admeasuring about 2 hector, 39 Aar (Guntha) valued at Rs.60,00,000/-. The accused has agreed to sell the aforementioned property to the Complainant and/or his assignee by making a 'Executing Sale Deed'. The said Sale Deed shall be executed on or before 16th January, 2014 with further undertaking that accused shal make out clear and marketable title to the same in Govt. records.

b. The accused is also in possession of the property situated at Khondwa Khurd, Taluka – Haveli, Dist. Pune and property bearing Survey No.58, Hissa No.7, admeasuring about 4 Aar (Guntha) i.e. 400 sq. mt. valued at Rs.35,00,000/-. The accused hereby agrees to execute a Sale Deed in favour of complainant and/or his assignee of the said property as per the understanding between the parties.

c. The accused hereby agrees to pay an amount of Rs.50,00,000/- & issued his vide cheque No.475516 dated 28/2/2014 drawn on UCO Bank, Mukund Nagar Branch, Pune.

d. For the balance amount of Rs.4,84,48,750/- (Rupees Four Crores eighty four lacs forty eight thousand seven hundred fifty only) out of which the accused paid Rs.1,48,750/- by cash & for the remaining amount of Rs.4,83,00,000/- the accused handover his post dated cheques the details of entire payment which are under:-

i. Rs.148,750/- (Rupees one lac forty eighty eight thousand seven hundered fifty only) paid in cash on executing this Consent Terms.

ii. Rs.3,33,00,000/- (Rupees Three crore thirty three lacs only) & issued his cheque vide cheque No.475519 dated 25/04/2014 drawn on Uco Bank, Mukund Nagar Brach, Pune.

iii. Rs.1,50,00,000/- (Rupees One crore fifty lacs only) & issued his cheque vide cheque No.475520 dated 25/04/2014 drawn on UCO Bank, Mukund Nagar Branch, Pune.”

17. It would be contextually relevant to note that plaintiff no.1 passed receipts in acknowledgment of sum of Rs.1,48,750/- in cash and adjustment of a sum of Rs.35,00,000/- and Rs.60,00,000/- against the properties mentioned at Clauses (a) and (b) of paragraph 4, extracted above.

18. The defences sought to be urged on behalf of the defendants are required to be appreciated in the aforesaid background. The challenge to the tenability of the suit at the instance of plaintiff no.2 for want of privity of contract between plaintiff no.2 and late Omprakash appears to carry some substance. It could not be shown that plaintiff no.2 had any role in the transactions with late Omprakash.

19. The endeavour of the plaintiffs to fasten the liability on defendant nos.1 to 5 is premised on their character as legal representatives of late Omprakash. It is not the case that any of the defendants had drawn the cheques. In fact, the plaint proceeds on the premise that the defendants are liable to repay the amount as they represent the estate of late Omprakash. The extent of the liability of the legal representatives to discharge the debt, it is trite, co-relates with the estate which

devolves upon the legal representatives. Sensing the difficulty on this front, the plaintiffs assert that in the Consent Terms executed on 18th November, 2014, it was represented by late Omprakash that his wife and son had guaranteed the repayment and they were also to execute the Consent Terms. In fact, the said Consent Terms purported to be executed on 18th November, 2014 bear the names of defendant no.1 and defendant no.2 as executants, sans their signatures. Indisputably, defendant nos.1 and 2 have not executed the said Consent Terms.

20. Though Mr. Arjunwadkar attempted to draw home the point that the Consent Terms dated 13th January, 2014, as well as 18th November, 2014 are of suspect probative value as none of them have been signed by the Advocates for the respective parties, and, therefore, betray the element of duress and undue influence, I am inclined to consider the prayer for grant of leave on a more substantive ground of the nature of the initial understanding arrived at between the parties, put-forth by Mr. Arjunwadkar.

21. The articles of agreement dated 24th September, 2011, as indicated above, contain reciprocal promises. Clauses 7, 8 and 11 of the articles of agreement read as under:

“7. The party of the second part agrees that on receipt of the aforesaid sum by way of realization of the cheques time to time the party of the second part shall release the flats which are acquired for sale and possession to the party of the first part with authority to sale and for appropriate consideration.

8. The party of the second part agrees and undertake that on receipt of the minimum 35% amount as stated above, he shall handover to the party of the first part original documents in respect of Ambegaon property with realization of Deed.

11. It is agreed by the party of the second part that, he shall release the proportionate square fts. of land/FSI in favour of the party of the first part”

22. Evidently, under the articles of agreements, after receipt of the sum agreed to be paid thereunder. Plaintiff no.1 was to handover the flats, which were developed in the said projects, to the plaintiff. This nature of the understanding is further echoed in the Consent Terms dated 13th January, 2014, Clause (8) thereof reads as under:

“8.It is agreed between parties that upon compliance of the consent terms and discharge of entire amount liability, the complainant shall return all the documents, original cheque, MOU pertaining to the property situated at Ambegaon Budruk, Survey No.4 and property situated at Kondhwa Khurd Survey No.46/15/1, Taluka Haveli, Dist. Pune.”

23. In this backdrop, in the affidavit-in-reply, the defendants have categorically asserted that plaintiff no.1 took possession and control of 44 unsold flats at Kondhava and Ambegaon, Pune. Out of which, plaintiff no.1 had already sold 39 flats and received consideration of Rs.8 Crores. If these contentions are considered in the backdrop of the initial case set up by the

plaintiffs that late Omprakash had agreed to repay a sum of Rs.6,50,00,000/- as the agreements for development between the parties did not work out, then a serious triable issue arises. The stipulations in the articles of agreements, extracted above, underscore the fact that plaintiff no.1 was to put late Omprakash in possession of those flats. It is not the case that plaintiff no.1 delivered possession of any of the flats after receipt of the amount under the Consent Terms dated 13th January, 2014.

24. In the aforesaid view of the matter, coupled with the fact that the liability of defendant nos.1 to 5 is restricted to the estate of the deceased Omprakash, which devolved upon them, it cannot be said that the defences urged by the defendants are moonshine or frivolous or vexatious. Serious triable issues about the entitlement of the plaintiffs to recover the amount and to do so from the defendant nos.1 to 5 crop up for consideration. Hence, I am inclined to grant unconditional leave to defend the suit.

25. Hence, the following order:

: O R D E R :

- (i) An unconditional leave to defend the suit is granted to defendant nos.1 to 5.

- (ii) The defendants shall file written statement within a period of 30 days form the date of this order.
- (iii) The Summons for Judgment stands dismissed.
- (iv) Costs in cause.

[N. J. JAMADAR, J.]