

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

SUMMONS FOR JUDGMENT NO.24 OF 2021
IN
COMMERCIAL SUMMARY SUIT (L) NO.10938 OF 2021

Sacha Finance and Developers Co. ...Plaintiff
vs.
Jayant Bhavanji Soni (since deceased)
Through Legal Heirs and Anr. ...Defendants

Ms. Sunanda Kumbhat, for the Plaintiff
Mr. Anuj Narula i/b. M/s. Jhangiani Narula and Associates, for the
Defendants.

CORAM : N.J. JAMADAR, J.
RESERVED ON : JULY 28, 2022
PRONOUNCED ON : NOVEMBER 9, 2022

JUDGMENT:

1. This Commercial Division Summary Suit is instituted for recovery of a sum of Rs. 1,10,15,890/- along with further interest @ 18% p.a. on the sum of Rs. 1 Crore, being the amount covered by the dishonoured cheques on which the suit is instituted.

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

The plaintiff is a partnership firm registered under the Partnership Act, 1932. Jayant Soni (the deceased defendant No. 1) was the sole proprietor of Joy Builders. Defendant No. 2 Bhavin is

the son of deceased defendant No. 1 and the authorized representative / mandate holder of Joy Builders. Post demise of defendant No. 1, defendant No. 1A to 1C have been impleaded as the legal representatives of deceased defendant No. 1 apart from defendant No. 2.

3. The deceased defendant No. 1 and defendant No. 2 had approached the plaintiff to advance money to finance their then on-going projects of real estate development. The defendants had assured to repay the loan amount along with interest @ 12% p.a. and one time compensation. Pursuant to the representations of the deceased defendant No. 1, and defendant No. 2, the plaintiff had paid a sum of Rs. 50 lakhs to the defendants by a cheque bearing No. 467423 payable on 18th July, 2014, against a post dated cheque drawn by the defendants for the said amount and also a bill of exchange drawn by defendant No. 2 and accepted by Joy Builders. Initially, the defendant Nos. 1 and 2 paid interest at the agreed rate of 12% p.a. A further sum of Rs. 15 lakhs was advanced by the plaintiff to the defendant by a cheque bearing No. 000216 payable on 1st October, 2015. Thereupon, the defendants took back the post dated cheque drawn for Rs. 50 lakhs at the time of availing the first tranche of loan and issued another post dated cheque for an amount

of Rs. 65 lakhs. In addition a promissory note for a sum of Rs. 15 lakhs was also issued in favour of the plaintiff.

4. As the defendants committed default in repayment, negotiations were held between the plaintiff and defendant Nos. 1 and 2 in the presence of Mr. Lakhi Batra, the go-between. The defendants agreed to pay interest @ 15% p.a instead of 12% p.a. and replace the post dated cheques. The defendants did pay quarterly interest @ 15% p.a from April, 2017 to June, 2019 and also replaced the cheques drawn towards the repayment of the principal amount. Upon being called upon to repay the principal amount and the interest accrued thereon and compensation, as agreed, the defendants had issued two cheques bearing NO. 738578, for the sum of Rs. 65 lakhs, and No. 217657, for the sum of Rs. 30 lakhs, payable on 21st December, 2019 towards the principal amount and the compensation. Both the cheques were, however, returned unencashed on presentment.

5. Upon being approached, the defendants issued a fresh cheque bearing No. 739393 for an amount of Rs. 65 lakhs payable on 10th July, 2020. The defendants had also delivered 8 cheques for various amounts along with letter dated 7th March, 2020. The validity

period of first two cheques expired. After a rigorous follow up, the defendants agreed to repay the principal amount along with compensation of Rs. 30 lakhs and an additional sum of Rs. 5 lakhs towards interest for the delayed period. The defendants thus issued cheque Nos. 009741, 009742 for an amount of Rs. 30 lakhs and 5 lakhs respectively on Kotak Mahindra Bank. When the plaintiff presented the cheque drawn for Rs. 65 lakhs towards principal amount and the aforesaid cheques drawn towards compensation and interest, all the three cheques were dishonored. Hence, the plaintiff addressed demand notice under section 138 of Negotiable Instruments Act, 1881. Despite service of the notice, the defendants neither paid the amount nor gave reply. Hence, the plaintiff was constrained to institute this suit.

6. Initially defendant Nos. 1 and 2 entered appearance. Thereupon, the plaintiff took out the Summons for Judgment.

7. An affidavit in reply is filed by defendant No. 1A to 1C and defendant No. 2 seeking an unconditional leave to defend the suit. At the outset, the defendants contend that under the will of the deceased defendant No. 1 dated 28th May, 2021, the defendant No. 2 is the universal legatee. The defendant No. 1A to 1C have executed a

declaration accepting the will executed in favour of defendant No. 2. Therefore, the suit against defendant No. 1A to 1C is misconceived.

8. The defendants contend that the plaintiff is not entitled to a decree as the plaintiff has been dealing in the business of illegal money lending. Thus, the bar under section 13 of the Bombay Money Lending (Regulation) Act, 2014 (the Act, 2014) comes into play.

9. On merits, the defendants contend that the instant suit is based on the cheques which were duly cancelled by the defendant Nos. 1 and 2, and by abusing the custody of the cheques, which were delivered in the distant past, by way of security, the plaintiff has instituted this suit. The defendants denied that the suit is based on the dishonoured cheques. In any event, according to defendants, the defendant No.1 had issued the subject cheque in good faith as a security against repayment of an unsecured loan.

10. The defendants further contend that in the wake of recession in the market and the ill health of deceased defendant No.1 and the consequent cash flow crunch, it was mutually decided by and between the plaintiff and defendants that that the three cheques (which form the basis of the suit), would stand cancelled and the

liability to pay the interest and compensation would stand reduced, and against the aggregate liability of Rs. 1 Crore, the plaintiff would accept a sum of Rs. 78,61,098/- and the said amount would be paid in 8 installments, for which the post dated cheques were issued. Resultantly, the institution of the suit by misusing the custody of the cheques which were delivered at a prior point of time is wholly unsustainable. Thus, the defendants have raised substantial triable issues and, therefore, the defendants are entitled to an unconditional leave to defend the suit.

11. An affidavit in rejoinder is filed on behalf of the plaintiff controverting the contentions in the affidavit in reply.

12. I have heard Ms. Sunanda Kumbhat, learned counsel for the plaintiff, and Mr. Anuj Narula, the learned counsel for the defendants at some length. With the assistance of the learned counsel for the parties I have perused the pleading and documents on record.

13. Ms. Kumbhat, learned counsel for the plaintiff, would urge that in the face of overwhelming material to show that the defendant Nos. 1 and 2 had availed a loan of Rs. 65 lakhs from the plaintiff and had also drawn cheques towards the repayment of the

principal amount along with compensation and additional interest, the defence now sought to be raised by the defendant that the plaintiff has misused the custody of cheques drawn towards security can only be said to be a frivolous or sham defence. Laying emphasis on the contentions in the affidavit in reply, Ms. Kumbhat would submit that a meaningful reading of the contentions would indicate that there is an explicit admission that the defendants owed a sum of Rs. 1 Crore to the plaintiff, and, on the own showing of the defendants, the said liability was allegedly reduced to Rs. 78,61,098/-. Ms. Kumbhat would further urge that the fact that the defendants had received a sum of Rs 65 lakhs from the plaintiff is rather incontrovertible. In the circumstances, the defendants are not entitled to leave to defend the suit, submitted Ms. Kumbhat.

14. In opposition to this, Mr. Narula, the learned counsel for the defendants assailed the very tenability of the suit. It was urged that the suit does not deserve to be entertained as a summary suit as the inscription as mandated by Order 37, Rule 2 (1)(c) of the Code is conspicuous by its absence in the plaint. On this count alone, the summary suit does not deserve to be entertained and the defendants are entitled to an unconditional leave to defend the suit, submitted Mr. Narula. Secondly, according to Mr. Narula, there is a

serious dispute about the liability to pay the compensation and/or interest. Evidently, there is no document to show any contract between the parties to pay interest at a specified rate on the principal amount. Thirdly, the defence of the defendants that the plaintiff has misused the custody of the cheques drawn by way of security, which already stood cancelled, can not be said to be a sham or a moonshine defence as the letter dated 25th July, 2020 addressed on behalf of the plaintiff clearly records the fact that 8 cheques were drawn by the defendants towards repayment of the loan. If the aforesaid communication is read in conjunction with the letter dated 7th March, 2020 addressed by the defendant No. 2 to the plaintiff whereunder those 8 cheques were delivered towards repayment of the loan and interest accrued thereon, the contention of the defendants that the parties had agreed to restructure the loan and reduce the liability becomes sustainable. Since, those cheques were for the period subsequent to the period during which the subject cheques were allegedly presented and dishonoured, the defendants can be said to have raised a fair and bonafide defence.

15. To begin with, uncontroverted facts. Indisputably, the plaintiff had advanced a sum of Rs. 65 lakhs to the defendants, in two tranches. First a sum of Rs. 50 lakhs vide cheque dated 18th July,

2014. Second, a sum of Rs. 15 lakhs by a cheque dated 1st October, 2015. The first advance was against a post dated cheque drawn for Rs. 50 lakhs and also a bill of exchange. The second advance of Rs. 15 lakhs was allegedly against a cheque drawn for Rs. 65 lakhs to cover the entire principal amount. There is also not much controversy over the fact that initially the defendants paid interest at the rate of 12% p.a. and later on interest was paid at the rate of 15% p.a. from April, 2017 to June, 2019.

16. In the light of the aforesaid uncontroverted facts, the defence of the transaction being unenforceable for want of license under the Act, 2014 is simply unsustainable in as much as the advance would not fall within the definition of 'loan' as clause (j) which excludes an advance made against a Negotiable Instrument comes into play and takes the advance out of the purview of the Act 2014.

17. Mr. Narula, the learned counsel for the defendants made an endeavour to draw home the point that the fact that the subject cheques were dishonoured upon presentment is not of decisive significance. The instant suit, according to Mr. Narula, can not be said to be based on the dishonoured cheques as those cheques already stood cancelled by the issue of subsequent cheques for a reduced amount.

18. A two-pronged submission was canvassed. Firstly, in the particulars of the claim, the plaintiff has not deliberately mentioned the dates on which the cheques were drawn. Secondly, the letter dated 7th March, 2020 under which 8 cheques aggregating to a sum Rs. 78,61,098/- were drawn towards repayment of the loan and interest thereon, if read in conjunction with the letter dated 25th July, 2020 addressed by the plaintiff to the defendant, makes it explicitly clear that the liability was restricted to the aforesaid amount and those 8 cheques were drawn in supersession of the earlier instrument. Emphasis was laid on the fact that in the letter dated 25th July, 2020 the plaintiff had asserted that it would deposit all 8 cheques, (including the 2 fresh cheques that were to be issued by the defendants) on the respective dates and would not wait for confirmation. This stand of the plaintiff, according to Mr. Narula, indicates that there was no other liability except the one covered by the aforesaid 8 cheques.

19. Mr. Narula invited the attention of the Court to the assertion in the statutory notice dated 7th November, 2020, upon dishonor of the subject cheques, to the effect that the plaintiff protested the issuance of the aforesaid 8 cheques as it did not cover the amount of compensation, agreed to be paid. This claim of the plaintiff is not at

all borne out by the contemporaneous conduct and correspondence exchanged between the parties, urged Mr. Narula.

20. I have given anxious consideration to the aforesaid submissions. The submission is, at best, inferential. Since the defendants No. 1 and 2 had drawn the 8 cheques on 7th March, 2020, the defendants could not have subsequently drawn the subject cheques payable on 10th July, 2020 and 3rd October, 2020 is the thrust of the defence. Plainly, this inferential submission is in teeth of the presumption of law contained in section 118 of the Negotiable Instruments Act, 1881. Moreover, the plaintiff has categorically asserted that upon the validity period of 2 of the cheques drawn under the letter dated 7th March, 2020 having been expired, the defendants had drawn the subject cheques.

21. The defence is required to be appreciated in the light of rather incontestable fact that the plaintiff had advanced a sum of Rs. 65 lakhs to defendant No. 1. The defendants did pay interest, as agreed, up to June, 2019. In the affidavit in reply, there is a categorical contention that the parties agreed that the liability would be reduced from Rs. 1 Crore to Rs. 78,61,098/-. This contention implies that the defendants had agreed to repay the principal amount of Rs.

65 lakhs along with compensation of Rs. 30 lakhs and Rs. 5 lakhs towards interest for the delayed period. In this view of the matter, even if the defence sought to be raised by the defendants is construed rather generously, the dispute would essentially boil down to the amount to be paid by the defendants to the plaintiff, by way of return on the principal amount.

22. It is true that there is no inscription immediately below the number of the suit in the in the plaint as is envisaged by Clause (c) of the sub Rule (1) of Rule 2 of Order XXXVII of the Code. However, evidently the suit is based on dishonoured cheques. In paragraph 29 of the plaint, there are averments in conformity with sub clause (a) and (b) of sub rule (1) of Rule 2 of Order XXXVII of the Code.

23. Moreover, during the course of submissions, the learned counsel for the plaintiff sought leave to amend the plaint so as to incorporate the said inscription. It was resisted on behalf of the defendants as the defendants had already raised the said ground. In my view, in the totality of the circumstances, the omission to incorporate the said inscription does not seem to be such that it cannot be cured by permitting the plaintiff to amend the plaint. Hence, I am inclined to allow the plaintiff to amend the plaint so as

to incorporate the said inscription. The challenge to the tenability of the suit, on the said ground, thus, no more survives.

24. In the aforesaid view of the matter, the defence raised by the defendants can at best be said to be plausible yet lacking in element of probability. Certainly, the defendants have not succeeded in raising either a positively good defence or a fair and reasonable defence. It would, therefore, be expedient to grant a conditional leave to the defendants subject to deposit of the amount of Rs. 1 Crore in Court.

Hence, the following order:

ORDER

Comm Summary Suit (L) No.10938 OF 2021 :-

- a] Leave to amend the plaint so as to incorporate the inscription as envisaged by Order XXXVII Rule 2(1)(c) of the Code.
- b] Necessary amendment be carried out within a period of two weeks.
- c] Amended copy of the plaint be served to the defendants within two weeks thereafter.

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d] Leave to defend is granted to the defendants subject to deposit of a sum of Rs. 1,00,00,000/- (Rupees One Crore) in the Court within a period of six weeks from today.

e] If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendant shall file written statement within a period of thirty days from the date of deposit;

f] If this conditional order of deposit is not complied with, within the aforesaid period, the plaintiff shall be entitled to apply for an *ex-parte* decree against the defendants after obtaining a Non-Deposit Certificate from the Prothonotary and Senior Master of this Court.

g] Summons for Judgment stands disposed.

(N. J. JAMADAR, J.)