

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

**SUMMONS FOR JUDGMENT NO. 25 OF 2021
IN
COMM SUMMARY SUIT (L) NO. 10662 OF 2021**

Crimson Interactive Pvt. Ltd. & ors. ...Plaintiffs
Versus
Jayant Bhavanji Soni & anr. ...Defendants

Mrs. Sunanda Kumbhat, a/w Mr. Kunal Kumbhat & Ms. Anita Manjrekar, for the Plaintiffs.
Mr. A. Narula, i/b M/s. Jhangiani, Narula & Associates, for the Defendants.

**CORAM: N. J. JAMADAR, J.
RESERVED ON: 2nd DECEMBER, 2021
PRONOUNCED ON: 6th JANUARY, 2022
(Video Conferencing)**

ORDER:-

1. This commercial division summary suit is instituted for recovery of an amount of Rs.2,18,80,173/- along with further interest at the rate of 18% p.a. on the amount of Rs.1,79,65,000/- covered by the dishonoured cheques, which form the basis of the suit.
2. Shorn of unnecessary details, the plaintiffs case can be stated as under:

(a) Plaintiff no.1 is a private limited company. Plaintiff no.2 is its Chief Finance Officer. Plaintiff no.3 is one of the Directors of plaintiff no.1. Defendant no.1, who expired on 20th May, 2021, was the sole proprietor of JOY Builders, under the name and style of which, the deceased defendant no.1 carried on the business of construction and redevelopment of real estate. Defendant no.2 is the son of defendant no.1 and authorised representative of JOY Builders. Defendant no.1A is the wife of deceased defendant no.1 and defendant nos.1B and 1C are the daughters of deceased defendant no.1.

(b) The plaintiffs aver that pursuant to the request of the deceased defendant no.1, the plaintiff had provided a financial assistance of Rs.3 Crore to the defendants. It was agreed by and between the plaintiffs and defendants that the said amount would be repaid along with interest at the rate of 24% p.a., payable on quarterly basis, and a one time compensation of Rs.1 Crore. The said amount of Rs.3 Crore was credited in the account of the defendants on 14th July, 2016. The defendants issued a reservation-cum-provisional allotment letter dated 14th July, 2016 in favour of plaintiff no.1 whereby Flat No.501 in Wing B, 5th Floor of JOY Legend, Dr. Ambedkar Road, Khar (West), Mumbai, was provisionally allotted by the

defendants to plaintiff no.1. It was *inter alia* recorded therein that the said amount of Rs.3 Crore was to be returned along with interest at the rate of 24% p.a. plus one time compensation of Rs.1 Crore. The defendants had also issued four cheques drawn for Rs.1 Crore each towards repayment of the principal amount of Rs.3 Crore and the compensation of Rs.1 Crore.

(c) The plaintiffs further aver that on 1st October, 2016, the defendants paid a sum of Rs.10,66,500/- towards interest on the said amount of Rs.3 Crore. On 22nd November, 2016, the defendant repaid the entire principal amount of Rs.3 Crore. However, the compensation of Rs.1 Crore, as agreed, was not paid. Eventually, the defendant paid a sum of Rs.7,02,000/- on 27th December, 2016 towards payment of interest for the balance period at the rate of 18% p.a. The amount so paid represented interest at the rate of 18% p.a. instead of 24% p.a., as agreed. Upon being confronted, the defendants undertook to pay the balance amount towards agreed interest as they were in financial constraints, at that point of time.

(d) The plaintiffs further aver that the defendants sought time to pay the said amount of Rs.1 Crore towards compensation on one or the other pretext. To compensate the loss to the plaintiff, the defendant agreed to pay interest on the

said amount of Rs.1 Crore at the rate of 25% for the delayed period. Thus, in the month of April a cheque was drawn for Rs.50,00,000/- in favour of the plaintiff no.2 towards the interest. On 1st February, 2020 another cheque for Rs.29,65,000/- was drawn in favour of plaintiff no.2. Believing the assurance of the defendants, the plaintiff presented the cheques drawn for Rs.1 Crore towards the compensation, and Rs.50,00,000/- and Rs.29,65,000/- towards interest, on 3rd February, 2020. Upon presentment, the cheques were returned un-encashed. The plaintiffs were constrained to issue a demand notice under Section 138 of the NI Act, 1881. The defendants neither complied with the demand nor gave reply to the demand notice. Hence the plaintiffs were constrained to institute the suit for recovery of the said amount of Rs.2,18,18,173/- along with further interest at the rate of 18% p.a. on the amount of Rs.1,79,65,000/-, covered by the dishonoured cheques.

3. In response to the writ of summons, the defendants appeared. As defendant no.1 expired during the pendency of the suit, his legal representatives came to be impleaded.

4. Defendant no.2 has propounded a Will of deceased no.1 and filed an affidavit seeking unconditional leave to defend the suit.

5. At the outset, the tenability of the suit is questioned on the ground that it is for recovery of alleged unsecured loans, which were never advanced by the plaintiffs. According to defendant no.2, the plaintiffs were not entitled to recover the compensation, as the contract incorporated in the letter dated 14th July, 2016 stood terminated premature as the defendants repaid the amount of Rs.3 Crore within four months of the advance. It was further contended that the instant suit was not maintainable as a commercial division summary suit.

6. On merits, defendant no.2 contended that it was agreed by and between the parties that the amount of Rs.3 Crore would stay invested with the defendants for a full period of 15 months. Only after the said lock-in period of 15 months, compensation of Rs.1 Crore, in addition to the interest as agreed between the parties, would become due and payable. In the event, the said amount of Rs.3 Crore was repaid within the stipulated period of 15 months, defendant no.1 was not liable to pay any compensation to the plaintiff over and above the interest component. With the repayment of Rs.3 Crore within four

months of the advance, according to defendant no.2, the entire transaction between the parties, as envisaged under the reservation-cum-provisional allotment letter, came to an end.

7. Defendant no.2 has further asserted that the plaintiffs have misused the custody of the blank cheque leaf, bearing No.599465 (Exhibit-I), which was admittedly undated, and the cheques bearing Nos.633529 (Exhibit-J) and 739132 (Exhibit-K) drawn for Rs.50,00,000/- and Rs.29,65,000/- were in respect of separate transactions which did not materialize. Defendant no.2 has thus prayed that having regard to the nature of the transaction, the defendants deserve an unconditional leave to defend the suit.

8. An affidavit-in-rejoinder is filed on behalf of the plaintiffs. Averments in the affidavit-in-reply adverse to the interest of the plaintiffs have been contested. It was specifically denied that the transaction came to an end with the repayment of the sum of Rs.3 Crore and the plaintiffs have misused the custody of the cheques.

9. In the backdrop of the aforesaid facts and pleadings, I have heard Ms. Sunanda Kumbhat, the learned Counsel for the plaintiffs and Mr. Narula, the learned Counsel for the defendants, at length. With the assistance of the learned

Counsels for the parties, I have perused the averments in the plaint, affidavit in support of the summons for judgment and in opposition thereto, as well as the documents on record.

10. Ms. Kumbhat, the learned Counsel for the plaintiffs strenuously submitted that the instant claim being based on dishonoured cheques squarely falls within the ambit of the provisions contained in Order XXXVII Rule 1(2)(a) of the Code of Civil Procedure, 1908 ("the Code"). According to Ms. Kumbhat, there is ample material to indicate that the defendants had drawn the cheques in question towards payment of compensation and interest for the delayed payment of compensation. Ms. Kumbhat laid emphasis on the fact that there is no dispute over the underlying transaction between the parties. Since the advance of Rs.3 Crore, payment of interest on the said amount at the rate of 18% p.a. and the repayment of the principal amount of Rs.3 Crore are all evidenced by documents of unimpeachable character and the essential terms of the contract between the parties have been further incorporated in the provisional letter of allotment, according to Ms. Kumbhat, the liability of the defendants arose out of a written contract. Therefore, the defence sought to be raised on behalf of the defendants is a frivolous and moonshine defence

and, hence the plaintiffs are entitled to a decree, submitted Ms. Kumbhat.

11. Mr. Narula, the learned Counsel for the defendants joined the issue by canvassing a submission that the very premise of the suit is flawed. Mr. Narula would urge that under the letter of reservation-cum-provisional allotment (Exhibit-C), it was specifically stipulated that the amount of Rs.3 Crore would stay invested with the defendant for the period of 15 months. However, the defendant repaid the said amount of Rs.3 Crore under four months of the said advance. Since the plaintiff had received the interest on the said amount of Rs.3 Crore, the liability to pay the compensation of Rs.1 Crore never crystallized. The claim of the plaintiffs, according to Mr. Narula, is wholly unconscionable. In substance, in addition to the interest, the plaintiffs are claiming huge compensation of Rs.1 Crore despite the fact that the amount of Rs.3 Crore remained with the defendants for a little over four months. In the circumstances, the endeavour of the plaintiffs to claim compensation is highly contentious. The claim for interest thereon stands on a much weaker foundation, urged Mr. Narula.

12. Laying emphasis on the fact that the cheques Exhibit-J and Exhibit-K were drawn in favour of the individuals, Mr.

Narula made an endeavour to demonstrate that by misusing the custody of cheques, drawn in respect of altogether different transactions in favour of the individuals, the plaintiffs have instituted this suit. Therefore, the defendants deserve an unconditional leave to defend the suit, urged Mr. Narula.

13. The facts are rather incontrovertible. One, the plaintiff no.1 had advanced a sum of Rs.3 Crore to the defendants on 14th July, 2016. The terms of the contract, it appears, were sought to be reduced into writing in the form of reservation-cum-provisional allotment letter (Exhibit-C). It is a different matter that the said exercise was in the nature of a subterfuge. This becomes evident from the fact that the said letter contained a disclaimer that it would not constitute or create relationship of promoter and purchaser between the defendants and the plaintiffs and the said letter was issued only in support and for the purpose of securing the plaintiffs monetary investment with the defendants.

14. Under the said letter (Exhibit-C), Flat No.504 was provisionally allotted in favour of the plaintiffs. In the said letter, the defendants acknowledged to have received a sum of Rs.3 Crore. The defendants undertook to pay guaranteed return at the rate of 24% p.a. on the said amount, every quarter. The

defendants also agreed to pay compensation of Rs.1 Crore as well.

15. The lock-in period for the said investment was 15 months. Upon the expiry of the lock-in period, the defendants acknowledged the liability to refund the total invested amount along with interest payable till then, either on their own or by selling the flat reserved for the plaintiffs.

16. There is not much controversy over the fact that the said amount of Rs.3 Crore was repaid by the defendants to the plaintiffs on 22nd November, 2016, after a little over four months of the advance. Nor is it in dispute that the interest on the said amount of Rs.3 Crore for the said period was paid in two tranches of Rs.10,06,500/- and Rs.7,02,000/-; the last on 27th December, 2016.

17. In the backdrop of the undisputed facts, the nature of the claim in the instant suit requires appreciation. At this juncture, in view of the presumptions contained in Section 118 of the Negotiable Instruments Act, 1881 ("the NI Act"), it may not be appropriate to delve deep into the defences sought to be raised by the defendants regarding the abuse of the custody of the undated cheque bearing No.599465 (Exhibit-I) drawn for Rs.1 Crore and two cheques bearing Nos.633529 (Exhibit-J) and

739132 (Exhibit-K) drawn in the name of Shilpa. Apparently, the suit is based on dishonoured cheques. Presumptions contained in NI Act, 1881 and Section 114 of the Evidence Act do come into play. However, the substance of the matter cannot be lost sight of.

18. The plaintiffs claim that the loan was advanced to the defendants on an express stipulation that it would be repaid along with interest at the rate of 24% p.a. and a compensation of Rs.1 Crore. The terms on which the loan was advanced, as indicated above, were incorporated in the reservation-cum-provisional allotment letter (Exhibit-C). The plaintiffs claim that the said allotment letter was issued to secure the money invested by the plaintiffs and was not to operate as a document creating interest in the Flat No.504, which was purportedly allotted provisionally thereunder. Nonetheless the said letter (Exhibit-C) records the terms of the bargain. It may be expedient to extract the relevant portion thereof:

“We confirm that we have received Rs.300,00,000/- (Rupees Three Crores only) against the reservation of above mentioned that flat from you.

In consideration of the investment of the said sum of Rs.300,00,000/- we hereby covenant and promise to pay to you a guaranteed fixed appreciation calculated @ 24% per annum on the invested amount, which shall be credited/paid to the original amount of investment at the end of every 3 months from the date of this reservation cum provisional allotment letter alongwith one time compensation or Rs.100,00,000/- (Rupees One Crores only).

The lock in period for the said investment is 15 months from the date of this reservation cum provisional allotment letter.

Upon the expiry of lock in period, we shall be liable to refund/return to you the total invested amount along with the interest payable till then either on our own or by selling the flat so reserved for the you as mentioned above. Any amount realized upon sale of the flat over and above the said invested amount and interest payable to the Investor, shall solely belong to us.”

19. The situation which thus obtains is that the said advance of Rs.3 Crore was to be refunded with interest at the rate of 24% p.a. In addition, the defendants agreed to pay a further sum of Rs.1 Crore, by way of compensation. The use of the expression compensation, however, cannot conceal the real nature of the transaction. The said amount of Rs.1 Crore was agreed to be paid only as and by way of the return on the loan advanced i.e. Rs.3 Crore. There was no other consideration for the said promise to pay the sum of Rs.1 Crore. The said amount thus constituted interest, pure and simple, on the advance of Rs.3 Crore styled as compensation.

20. In Black’s Law Dictionary, Eighth Edition, the word ‘compensate’ has been defined as:

(1) To pay (another) for services rendered.

(2) To make an amendatory payment to; to recompense (for an injury).

Whereas the word ‘compensation’ is defined as:

(1) Remuneration and other benefits received in return for services rendered; esp., salary or wages.

(2) Payment of damages or any other act that a court orders to be done by a person who has caused injury to another.

21. In Advanced Law Lexicon (P. Ramanatha Aiyar), the word 'compensation' is explained, *inter alia*, as under;

“Usually a sum of money paid in lieu of something lost (banking)

1. Remuneration and other benefits received in return for services rendered; especially, salary or wages.

2. Payment of damages, or any other act that a Court orders to be done by a person who has caused injury to another and must therefore make the other whole. (Black, 7th Edn, 1999)

Money given to compensate loss or injury' – Black's Law Dictionary as cited in *Phola Sings @ Phola Ram v State of Punjab, IV (2004) SLT 417, 423, para 13* and *Clariant International Ltd v. Securities & Exchange Board, V (2004) Slt 752, para 33.*”

Thus, the mere nomenclature of compensation, is not of decisive significance. In the factual context, the payment of compensation was nothing else than the return on the amount invested by the plaintiff.

22. What accentuates the situation is the fact that the said amount was agreed to be paid in addition to the interest at the rate of 24% p.a. From this stand point, the submission on behalf of the defendants that the contract between the parties was to the effect that the said amount would stay invested with the defendants for the period of 15 months and only thereupon compensation would become payable, cannot be said to be unsustainable. The letter (Exhibit-C) expressly records that lock-in period for the said investment was 15 months. Indisputably, the amount was refunded on 22nd November, 2016, a little over four months of the advance. The defendants did pay interest on the said amount of Rs.3 Crore in two tranches, as indicated above.

23. In this setting of the matter, can the plaintiffs seek and enforce the stipulation as to compensation of Rs.1 Crore is the pivotal question. In my considered view, the letter (Exhibit-C) is required to be read as a whole. The stipulation as to lock-in period constitutes an integral part of the bargain. The liability

to pay compensation cannot be construed disjointed from the said stipulation as to lock-in period. Essentially, it is a question of time value of money.

24. This aspect would become abundantly clear if the liability is construed as absolute irrespective of the period for which the amount would stay invested with the defendants. By way of illustration, even if the amount of Rs.3 Crore was refunded on the next day of advance, in addition to interest at the stipulated rate, the defendants would have become liable to pay a huge compensation of Rs.1 Crore for using the amount of Rs.3 Crore for one day. In that event, the compensation would partake the character of penalty. The construct sought to be put on behalf of the plaintiffs on the terms of the bargain, in my view, thus leads to anomalous and absurd consequences.

25. For the foregoing reasons, in the peculiar facts of the case, I am persuaded to hold that the defence raised by the defendants is fair and reasonable and the defendants deserve an unconditional leave to defend the suit.

26. Hence, the following order:

: O r d e r :

- (i) The defendants are granted unconditional leave to defend the suit.

- (ii) The defendants shall file written statement within a period of 30 days from today.

The Summons for Judgment stands disposed of.

[N. J. JAMADAR, J.]

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