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

SUMMONS FOR JUDGMENT NO.26 OF 2019
AND
INTERIM APPLICATION NO.1873 OF 2020
IN
COMMERCIAL SUMMARY SUIT NO.27 OF 2019

Mohit Khabar Khabar of Mumbai Indian ...Plaintiff
vs.
M/s.Dazzler Confectionery Company Pvt. Ltd. ...Defendant

Mr. Neerav Merchant a/w. Mr. Nadeem Shama i/b. Thakordas & Madgavkar, for the Plaintiff.
Mr. Raj Patel i/b. Mr. H.S. Shinde a/w. Mr. Ruturaj Bankar, for the Defendant.

CORAM : N. J. JAMADAR, J.
RESERVED ON : 29th OCTOBER, 2021
PRONOUNCED ON : 24th JANUARY, 2022

(THROUGH VIDEO CONFERENCING)

ORDER :

1. This Commercial Division Summary Suit is instituted for recovery of a sum of Rs. 1,24,35,108/-, being the arrears of salary along with further interest at the rate of 18% p.a.

2. The material averments in the plaint can be summarized as under:

a] The defendant is a company registered under the Companies Act, 1956. It deals in the business of manufacturing and trading of edible items. The plaintiff was appointed as “Quality Assurance

Manager" pursuant to the Employment Agreement dated 14th February, 2012 executed by and between the plaintiff and defendant. Under the said agreement, the defendant had agreed to pay annual salary of Rs. 18 lakhs for the first year of employment and Rs. 24 lakhs p.a. for each of the four succeeding years. In addition, the plaintiff was entitled to reimbursement of all traveling expenses. Lock in period of five years was fixed under the said agreement of employment. Neither the plaintiff nor the defendant was entitled to terminate the contract within the said period of five years.

b] The plaintiff asserted that for the period 5th April, 2012 to 9th December, 2014, the plaintiff rendered the services in accordance with the terms of the agreement. A sum of Rs. 21,29,340/- only was paid to the plaintiff as against the due amount of Rs. 1,02,00,000/-. The defendant was in arrears of salary to the tune of Rs. 80 lakhs.

c] The plaintiff thus issued a statutory notice under section 433 and 434 of the Companies Act, 1956 calling upon the defendant to make payment of the entire due amount. The defendant company gave no reply to the statutory notice. The plaintiff thus instituted a petition, being Company Petition No. 749 of 2016, seeking winding up of the defendant company for its inability to discharge its debts.

3. By an order dated 14th March, 2018 the learned Judge, admitted the petition and gave direction to advertise the petition. Yet, the learned Company Judge, by way of indulgence, gave the defendant company an opportunity to wriggle out of the situation by making deposit of Rs. 80 lakhs within four weeks of the said order. In the event of such deposit, it was directed that the petition would stand dismissed without further reference to the Court. In terms of the said order, the defendant deposited the amount of Rs. 80 lakhs. Simultaneously, the defendant, filed appeal being Appeal (L) No. 156 of 2018, in Company Petition No. 749 of 2016, assailing the order passed by the learned Company Judge.

4. The Appeal Bench, in its order dated 9th July, 2018, after extracting the observations in paragraph 10 of the order of learned Company Judge passed in Company Petition No. 749 of 2016 dated 14th March, 2018, was persuaded to dispose off the appeal, with the following observations:

> *In the facts of the case, we observe that the respondent is entitled to file a Suit within 12 weeks from today in respect of the subject matter. In case the Suit is filed within the stipulated period of 12 weeks, the amount of Rs.80 lakhs deposited by the appellant shall be transferred to the Suit account. The deposit of the said amount shall be subject to appropriate orders to be passed by the learned Single Judge in the proposed suit. We do not express any opinion on merits of the matter. Until order is passed in the further*

> *proceeding by the learned Single Judge, the amount deposited be invested in a Fixed Deposit scheme with a nationalized bank. In case the respondent fails to file a Suit, then the appellant may resort to appropriate proceeding.*

5. Availing the aforesaid liberty, the plaintiff has instituted this suit seeking the recovery of arrears of salary alongwith interest thereon from December, 2014 to August, 2018 aggregating to Rs. 1,24,35,108/-. (Rs.80,00,000/- + Rs.44,35,108/-).

6. Consequent to service of writ of summons, the defendant company has entered appearance. Thereupon, the plaintiff has taken out the Summons for Judgment. The defendant sought an unconditional leave to defend the suit by filing an affidavit.

7. At the outset, the defendant has contested the liability to pay the arrears of salary, along with interest, as claimed by the plaintiff. It was categorically denied that the plaintiff was employed as "Quality Assurance Manager" under the employment agreement. In contrast, according to the defendant, the plaintiff was accommodated in the company as the plaintiff's father has made a substantial investment in the defendant company. The plaintiff was primarily responsible for matters relating to supplier-sourcing, as a 'sales agent' on commission basis. In the month of August, 2014 as

the defendant company faced financial difficulties, the plaintiff was clearly apprised that the company could not afford to keep him in employment and, yet, the plaintiff desired to continue as a sales agent on commission basis. Legality and enforceability of the Employment Agreement dated 14th February, 2012 was also called in question by asserting that it was forged and executed by persons, who had no proper authorization. Lastly, the claim for arrears of salary was stated to be hopelessly barred by law of limitation. The defendant thus sought an unconditional leave to defend the suit as it has a strong defence.

8. The plaintiff filed affidavit in rejoinder and controverted the contentions in the affidavit in reply.

9. In addition, the defendant has taken out Interim Application No. 1873 of 2020 seeking permission to withdraw the sum of Rs. 80 lakhs deposited by the defendant on 10th April, 2018, on the strength of the order passed by the Appeal Bench in Appeal (L) No. 156 of 2018. The prayer for withdrawal of the amount of Rs. 80 lakhs is sought to be supported by raising vary same grounds which are pressed into service for an unconditional leave to defend the suit.

10. The plaintiff has resisted the prayer for withdrawal of the said amount by filing an affidavit in reply. The plaintiff, inter alia, averred that having avoided the consequence of liquidation by depositing the amount of Rs. 80 lakhs, the defendant cannot be now permitted to seek the withdrawal of the said amount and bring everything to a naught.

11. In the backdrop of the identical issues which arise for consideration in the Summons for Judgment and the Interim Application for withdrawal of the amount of Rs. 80 lakhs, both the Summons for Judgment and the Interim Application were, with the consent of the parties, taken up for hearing together.

12. I have heard Mr. Neerav Merchant, learned counsel for the Plaintiff, and Mr. Raj Patel, the learned counsel for the Defendant at length. With the assistance of the learned counsel for the parties, I have perused the material on record including the orders passed by the Company Court and Appeal Bench.

13. Mr. Raj Patel, the learned counsel for the defendant strenuously submitted that the suit is ex facie barred by limitation. Elaborating the challenge to the suit on the ground of limitation, Mr.

Patel would urge that, from the own showing of the plaintiff, there is no proof of employment beyond December, 2014. The plaintiff has averred that till December, 2014, the salary was paid to him, in part. The suit has been instituted on 21st September, 2018. In view of the provisions contained in Article 7 of the Schedule to the Limitation Act, 1963 the period of limitation is three years from the date the salary become due. Thus, the institution of the suit in the month of September, 2018 for recovery of arrears of salary, right from February, 2012 is clearly barred by limitation. On this count alone, according to Mr. Patel, the defendant deserves an unconditional leave to defend the suit.

14. Mr. Patel, also made an endevour to draw home the point that the claim of the plaintiff that he was appointed as a "Quality Assurance Manager", is not substantiated by the contemporaneous material. Banking upon an affidavit sworn by one of the Directors of the defendant namely Mr. Jogesh Khatwani, in Company Petition No. 749 of 2016, to the effect that he had never signed the Employment Agreement dated 14th February, 2012. Mr. Patel, made an endevour to draw home the point that the question as to whether the Employment Agreement, which constitutes the substratum of the plaintiff's case is a legal and valid document, is a triable issue.

In the circumstances, the defendant can be said to have made out a fair, strong and substantial defence and, therefore, deserves an unconditional leave to defend the suit.

15. It was further urged that since the suit is clearly barred by law of limitation, there is no justification to deprive the defendant company of the use of the amount of Rs. 80 lakhs, which the defendant was made to deposit in coercive circumstances. Mr. Raj Patel would further urge that the Appeal Bench has made it abundantly clear that the deposit of the said amount of Rs. 80 lakhs shall be subject to appropriate orders to be passed by the single Judge and, thus, there is no impediment in returning the said amount to the defendant.

16. In contrast of this, Mr. Neerav Merchant, learned counsel for the plaintiff would urge that all these submissions now sought to be canvassed were made before the learned Company Judge and were repelled lock, stock and barrel. Inviting the attention of the Court to the observations of the learned Company Judge, in the order dated 14th March, 2018, Mr. Merchant, submitted, with a degree of vehemence, that the defendant can not now be urged to submit that the plaintiff was never in employment of the defendant. The very

contention of the defendant that the plaintiff worked with the defendant in a different capacity than the one set up by the plaintiff, establishes the fact that there was employer-employee relationship between the plaintiff and the defendant. Since there is no material to lend support to the bald defence that the Employment Agreement dated 14th February, 2012 is forged, the defence which is at variance with the terms of the contract, does not deserve countenance.

17. In any event, the defendant having obtained the benefit of the deposit, in the nature of avoiding the inevitable consequence of liquidation, can not now be permitted to turn around and seek refund of the said deposit. It was further urged that the defence of the suit being barred by law of limitation is also completely misconceived. According to the learned counsel for the plaintiff, the institution of the Company Petition and the order passed by the learned Company Judge and the Appeal Bench are required to be taken into account. And the cumulative effect is that the period of limitation gets excluded. Thus, the defendant is neither entitled to leave to defend the suit nor refund of the amount of Rs. 80 lakhs, submitted Mr. Merchant.

18. I have carefully considered the rival submissions canvassed across the bar.

19. To begin with, it is imperative to note that the Employment Agreement dated 14th February, 2012 incorporates the terms of the contract. It, inter alia, records that the plaintiff was appointed as "Quality Assurance Manager". The annual salary to be paid to the plaintiff, for the first year, was net sum of Rs. 18 lakhs. From second year onwords, the annual salary was to be the net sum of Rs. 24 lakhs. Clause III governed the term of the contract. It provided that duration of the said Employment Agreement was for a period of five years and, it was further agreed that, initial five years shall operate as mutual lock in period, meaning thereby neither the plaintiff nor the defendant shall terminate the said contract in any manner or at any time.

20. Evidently, the defence as regards the execution of Employment Agreement, wavered from one end to another. Firstly, an endevour was made to demonstrate that there was no contract of employment between the plaintiff and defendant and the plaintiff was merely accommodated at the instance of the father of the plaintiff, who had invested a substantial amount in the defendant company. Secondly, it was sought to be contended on behalf of the defendant that the plaintiff was in the employment of the company as sales agent on commission basis and not as a 'Quality Assurance Manager', as recorded in the Employment Agreement. Thirdly, the

very execution of the Employment Agreement was alleged to be tainted with fraud. Fourthly, as noted by the learned Company Judge, in Company Petition No. 749 of 2016, a contention was sought to be advanced that in the year 2014 when the defendant company was in financial crises the plaintiff agreed to continue to serve the company on a reduced wages. Fifthly, it was sought to be contended that the defendant had paid the plaintiff as agreed and no arrears were due.

21. In the backdrop of the aforesaid nature of the defence, at this juncture, it would be rather difficult to sustain the submission on behalf of the defendant that the defendant has made out a strong case that either there was no employer-employee relationship or the Employment Agreement is forged. On the contrary, the material on record indicates that the jural relationship between the plaintiff and the defendant is substantiated by not only the Employment Agreement but the ambivalent stand of the defendant.

22. The defence of the suit being barred by limitation as regards a substantial part of the claim for arrears of salary, however, appears to carry some substance. From the averments in the plaint, especially the table included in paragraph 8 of the plaint indicating the salary paid and reimbursement of expenses made during the

period 5th April, 2012 to 9th December, 2014, it becomes evident that the plaintiff had not been paid any amount towards salary after 9th December, 2014. Secondly, it is the claim of the plaintiff that he was paid a salary of Rs. 50,000/- p.m. for the months from April, 2012 to November, 2013, as against the agreed salary in accordance with the Employment Agreement. It implies that there was a shortfall in payment of the wages which accrued. It would be contextually relevant to note that in the Employment Agreement, it was stipulated that the salary would be payable monthly, during first five days following the month for which it fell due. Indisputably, suit came to be instituted on 27th September, 2018. Art.7 of the Limitation Act stipulates a period of three years for a suit for wages, other than a Seaman's wages, and the time begins to run when the wages accrue due.

23. The learned counsel for the plaintiff attempted to salvage the position by canvassing a two-fold submission. Firstly, under the Employment Agreement, a lock in period of three years was provided and, thus, the plaintiff was entitled to be continued in the employment and draw salary upto February, 2017. Therefore, the institution of the suit in the month of September, 2018 cannot be said to be barred by limitation. Secondly, the plaintiff had

instituted the Company Petition seeking winding up of the defendant company for its inability to discharge its debts. Preceding institution of the said petition, notice was issued by the plaintiff, on 5th May, 2016. Thus, the bar of limitation will not apply.

24. I find it rather difficult to accede to these submissions unreservedly. Even if it is assumed that the plaintiff was entitled to continue to be in employment till February, 2017 and draw salary upto the said period, the fact remains that the plaintiff categorically asserted in the plaint that no payment whatsoever has been made against the outstanding salary since 9th December, 2014. As indicated above, the salary was to be paid month by month. Thus, a substantial part of the arrears of salary is susceptible to the challenge of being barred by limitation. Even if the claim of the plaintiff that he was entitled to salary upto February, 2017 is taken at par, yet a significant part of the claim may be affected by the bar of limitation.

25. The institution of the petition for winding up, sought to be pressed into service as a ground for exclusion of the period of limitation, does not seem to advance the cause of the plaintiff. Neither can a winding up petition be equated with a recovery suit.

Nor there was any impediment for the plaintiff to institute a suit for recovery of the arrears of salary simultaneously with the institution of the petition for winding up.

26. In this context, reliance placed by the learned counsel for the defendant on the judgment of this Court in the case of **Unique Tooling Solutions Pvt. Ltd. vs. Ganesh Forgings Limited**[1] appears to be well founded. In the said case also, the Company Petition was disposed of with a direction to the defendant to deposit Rs. 25 lakhs within a stipulated period. The plaintiff was granted liberty to institute a suit within three weeks of the deposit and the amount deposited was to be taken to the credit of that suit. The deposit having been made, the plaintiff therein instituted the summary suit. Upon a defence of bar of limitation being raised, the plaintiff sought to rely on the order passed in the Company Petition. A learned single Judge of this Court, did not countenance the submission on behalf of the plaintiff based on the institution of, and order passed in, the company petition. It was, inter alia, observed as under :

> *"I do not believe it would be correct to say that the pendency of the winding up Petition would save the bar of limitation. That is not a recovery proceeding, and the law in that regard is well settled . As Ms. Mistry points out, the Summary Suit could also have*

1 2018 SCC OnLine Bom 17741

> *been filed at the same time. In any case, the plea of limitation was specifically kept at large by the order of SC Gupte, J."*

Observing thus, the Court proceeded to grant an unconditional leave to defend the suit.

27. In the case at hand also, it is imperative to note that, the Appeal Bench, in the order dated 9th July, 2018, expressly observed that the Court expressed no opinion on the merits of the matter. Thus, the fact that the Appeal Bench permitted the plaintiff to institute the suit and the amount of Rs. 80 lakhs deposited by the defendant was made to abide the order that may be passed by the Single Judge, does not inure to the benefit of the plaintiff qua the challenge on the point of limitation. The institution of the suit within the period stipulated by the Appeal Bench in the aforesaid order, is also of no avail to meet the challenge on the ground of limitation. It is trite that the Court is enjoined to examine whether the suit is instituted within the statutory period of limitation, and dismiss the same, if barred by limitation, although limitation has not been set up as a defence. Thus, the endevour on the part of the plaintiff to bank upon the order of the Appeal Bench to meet the challenge of limitation, does not merit acceptance.

28. The situation which thus obtains is that a part of the claim for arrears of salary, even if the case of the plaintiff is taken at par, appears to be susceptible to the challenge of bar of limitation. Conversely, by making deposit of Rs. 80 lakhs pursuant to the order passed by the company Court, the defendant has undoubtedly obviated the consequence of liquidation. Since the salary was payable month by month, the bar of limitation to recover the arrears of salary would operate against the salary which accrued each month. In the circumstances of the case, it would be expedient to grant leave to the defendant to defend the suit by scaling down the amount of deposit.

29. In the totality of the circumstances, in my view, it would be appropriate to grant leave to defendant on the condition of deposit Rs. 40 lakhs and refund the balance amount of Rs. 40 lakhs along with entire interest accrued on the sum of Rs. 80 lakhs till the date of refund of the amount, to the defendant.

30. The Summons for Judgment thus deserves to be partly allowed. Likewise, the Interim Application No. 1873 of 2020 also deserves to be partly allowed.

Hence, the following order:

ORDER

1] The defendant is granted leave to defend the suit subject to deposit of Rs. 40 lakhs.

2] Out of the amount of Rs. 80 lakhs, already deposited by the defendant and transferred to the credit of this suit, the Prothonotary and Senior Master is directed to refund the amount of Rs. 40 lakhs along with interest accrued on the entire amount of Rs. 80 lakhs from the date of initial deposit till the date of refund, to the defendant, and continue to hold the balance amount of Rs. 40 lakhs to the credit of the instant suit. The said amount of Rs. 40 lakhs be also invested in an interest bearing deposit.

3] The defendant shall file written statement, within a period of 30 days from today.

4] Summons for Judgment stands disposed of in the aforesaid terms.

5] The Interim Application No. 1873 of 2020 also stands partly allowed in the aforesaid terms.

6] There shall be no order as to costs.

(N. J. JAMADAR, J.)

30. At this stage, the learned counsel for the plaintiff seeks stay to the execution and operation of the order for a period of four weeks.

31. Having regard to the facts of the case and the exigency of the situation, there shall be stay to the execution, operation and implementation of this order for a period of four weeks.

(N. J. JAMADAR, J.)