

Santosh

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

**SUMMONS FOR JUDGMENT NO. 15 OF 2022
IN
COMM. SUMMARY SUIT NO. 790 OF 2019**

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KULKARNI

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Manish Nagindas Doshi ...Plaintiff

Versus

Kavya Construction Company & ors. ...Defendants

Mr. Darshan Ashar, a/w Netaji Gawade, Mehul Khetial, Ms.
Ava Kak, i/b M/s. Sanjay Udeshi & Co., for the Plaintiff.
Ms. Kausar Banatwala, a/w Yash Dhakad, i/b Tushar
Goradia, for the Defendants.

CORAM: N. J. JAMADAR, J.

DATED : 16th NOVEMBER, 2022

ORDER:-

1. This commercial division summary suit is instituted for recovery of a sum of Rs.8,74,67,342/- alongwith interest at the rate of 18% p.a. on the principal amount of Rs.5,70,00,000/- on the basis of dishonored cheques.

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

(a) Kavya Construction Company is a partnership firm registered under Indian Partnership Act, 1932. Kavya Buildcon Pvt. Ltd., Mr. Mansukhlal Vora, Mr. Nimish M. Vora and

Mr. Jignesh. M. Vora, are the partners of defendant – firm. The plaintiff was also a partner of the defendant – firm, which is engaged in the business of development and construction.

(b) On 31st December, 2015, a Deed of Retirement came to be executed whereunder the two partners of the firm namely Mr. Anil Vora, HUF and the plaintiff (party of the third part and the fourth part) agreed to retire from the partnership with the close of business on 31st December, 2015. Under the terms of the Retirement Deed, the defendants agreed to pay a lump sum amount of Rs.5,90,00,000/- to the plaintiff in full and final satisfaction of the plaintiff's claim towards his share in capital, interest on capital, profit, goodwill, etc. in the defendant – firm. Towards the payment of the said amount, the defendants had drawn nine cheques on Axis Bank Limited, Dadar, Mumbai Branch, out of which four were for an amount of Rs.1 crore each, three for an amount of Rs.50,00,000/- each and the rest two for Rs.20,00,000/- each, all payable on 20th January, 2016.

(c) Upon presentment, the aforesaid cheques were returned unencashed on account of insufficiency of funds. The plaintiff addressed demand notice under Section 138 of the Negotiable Instruments Act, 1881 ("the NI Act, 1881"). The defendants gave a false and frivolous reply to the demand

notice. Thereupon the plaintiff lodged complaints for the offence punishable under Section 138 of the NI Act, 1881. During the pendency of the complaints, the defendants made a part payment of Rs.20,00,000/-; in two tranches of Rs.10,00,000/- each, on 4th August, 2016 and 9th August, 2016. However, the balance amount of Rs.5,70,00,000/- has not been paid. Hence, this suit.

3. Upon service of the writ of summons, the defendants entered appearance. Thereupon, the plaintiff has taken out a summons for judgment. An affidavit-in-reply is filed on behalf of the defendants by Mr. Nimish Vora.

4. The tenability of the suit was assailed on the ground that the Deed of Partnership dated 5th December, 2005 under which the partnership was formed contains an arbitration clause. Hence, all subsequent deeds of partnership, including the retirement deed, are required to be read in conjunction with the said arbitration clause and, therefore, the parties must be referred to arbitration.

(a) The defendants further contend that the plaintiff's claim suffers from the vice of *suppressio veri* and *suggestio falsi*. The plaintiff has, with an oblique motive, suppressed the fact that on the very day of execution of the Deed of Retirement

a Memorandum of Understanding (MoU) was executed between the parties. Under the terms of the said MoU, upon payment of consideration of Rs.5,90,00,000/-, the plaintiff was obligated to purchase five premises developed by the partnership firm for a consideration of Rs.4,18,93,000/-. Secondly, in the event of the partnership firm committing default in the payment of consideration to the retiring partner, the latter had an option to get himself readmitted as a partner into the partnership firm.

(b) The defendant also assert that since reciprocal obligations between the continuing and retiring partners led to the partnership dispute, a summary suit is not maintainable. Therefore, the defendants are entitled to an unconditional leave to defend the suit.

5. An affidavit-in-rejoinder is filed on behalf of the plaintiff.

6. I have heard Mr. Ashar, the learned Counsel for the plaintiff and Ms. Banatwala, the learned Counsel for the defendants, at some length. With the assistance of the learned Counsel for the parties, I have perused the averments in the plaint, affidavit in support of Summons for Judgment, affidavit-in-reply and rejoinder thereto. I have also perused the documents annexed with the plaint and the affidavits.

7. Ms. Banatwala, the learned Counsel for the defendants, fairly submitted that in the instant case the defendants have not applied for reference of the dispute to the arbitration in the manner contemplated by Section 8 of the Arbitration and Conciliation Act, 1996. Ms. Banatwala submitted that in a suit arising out of identical facts, such an application under Section 8 for reference of the parties to arbitration was rejected by an order dated 17th January, 2020 in Interim Application No.1 of 2019 in Commercial Summary Suit No.375 of 2019. Ms. Banatwala, again fairly, did not dispute that in the said Summary Suit No.375 of 1996 the Court granted leave to defend the suit on the condition of deposit of the principal amount claimed therein.

8. Ms. Banatwala, however, submitted with tenacity that the defendants are entitled to an unconditional leave to defend the suit on the sole count that the plaintiff deliberately suppressed the fact that a MoU was executed between the continuing and retiring partners whereunder the plaintiff bound himself to purchase five properties which were being developed by the firm for a consideration of Rs.4,18,93,000/-. The defendants were thus not obligated to make upfront payment. But the amount to be paid to the plaintiff was to be adjusted towards the

consideration for those properties. An endeavour was made to draw home the point that the Deed of Retirement and the MoU were part of one and the same bargain. The question as to whether the plaintiff had agreed to purchase the property of the defendants for the stated consideration from out of the amount to be paid to the plaintiff is thus a matter for adjudication. This, according to Ms. Banatwala, raises a triable issue.

9. Ms. Banatwala further urged that there was no agreement to pay interest on the amount which was to be paid to the retiring partner. Charge of interest at an exorbitant rate at 18% p.a. on the principal amount of Rs.5,70,00,000/- is thus wholly unsustainable. On the aspect of the entitlement of interest, the defendants can be said to have raised a fair and reasonable defence. Therefore an unconditional leave must follow, urged Ms. Banatwala.

10. Per contra, Mr. Ashar, the learned Counsel for the plaintiff, submitted that the liability is rather indisputable. The defendants have not contested the factum of execution of Deed of Retirement. In the said Deed of Retirement, there are clear and explicit recitals that the accounts of the firm were settled as of 31st December, 2015 and in full and final settlement of the plaintiff's claim, as a partner in the firm, a sum of

Rs.5,90,00,000/- was agreed to be paid by cheques. Issue, presentment and dishonour of the cheques are also not in contest. In this view of the matter, according to Mr. Ashar, the defences now sought to be raised are sham and frivolous.

11. It was submitted that even if the aspect of the execution of MoU is taken at par, yet, the fact remains that under the said MoU also the liability of the defendant to pay a sum of Rs.5,90,00,000/- stood crystallized. At best, post payment of the said amount, the plaintiff can be said to have agreed to purchase the defendants properties. That, according to Mr. Ashar, does not extinguish the liability to make the payment towards the share and interest of the plaintiff in the partnership firm.

12. The fact that the plaintiff was a partner of the defendant - firm is incontrovertible. Retirement of the plaintiff from the partnership firm under the Deed of Retirement dated 31st December, 2015 is also not in contest. Evidently, the plaintiff had 19% share in the profits of the defendant firm. The Retirement Deed records that the partnership firm had paid a sum of Rs.5,90,00,000/- to the plaintiff in full and final satisfaction of all his claims against the partnership firm and

the continuing partners vide nine cheques. In consideration of thereof, the plaintiff stood retired from the firm.

13. It would be contextually relevant to note that the Deed of Retirement finds mention of the number of cheques, which were drawn towards aggregate payment of Rs.5,90,00,000/-. Those cheques (Exhibits C to C8) were dishonoured on presentment. The plaintiff claims is thus substantiated by the documents of unimpeachable character.

14. The submission on the strength of the alleged MoU between the parties, does not advance the cause of the defendants. Even if the case of the defendants is taken at par, and it is assumed that the MoU was executed between the plaintiff and the defendants, I am afraid the recitals therein bolster up the defence of the defendants.

15. Clause (4) of the said MoU clearly records payment of a sum of Rs.5,90,00,000/- in full and final settlement of the plaintiff's claim and towards the same nine subject cheques were drawn. Under Clause (5), it is provided that the plaintiff shall purchase the properties of the defendant – firm for a consideration of Rs.4,18,93,000/-. Sub-clause (b) of Clause (5) makes the intention of the parties explicitly clear. The plaintiff was to purchase the properties of the defendants upon receipt

and realization of the lump-sum consideration of Rs.5,90,00,000/-. This runs counter to the submission sought to be canvassed on behalf of the defendants that the defendants were not obligated to make up-front payment and the amount agreed to be paid to the plaintiff was to be adjusted against the consideration for the purchase of the properties of the defendants. In the circumstances, in my view, the defence of a contemporaneous agreement between the parties does not constitute a substantial defence. On the contrary, the liability of the defendants to pay a sum of Rs.5,90,00,000/- to the plaintiff is reiterated and underscored in the MoU as well.

16. Since the presentment and dishonour of the cheques are the matters which can hardly be controverted the tenability of the summary suit on the basis of dishonoured cheques cannot be questioned. On the aspect of interest, the submission of Ms. Banatwala that there was no agreement to pay interest does not deserve countenance as under Section 80 of the NI Act, 1881, the payee is entitled to claim interest at the rate of 18% p.a. on the dishonoured cheques.

17. Even if it is assumed that the defendants have raised triable issues about the Deed of Retirement and MoU forming part of one and the same bargain and the entitlement of the

plaintiff to claim interest at the rate of 18% p.a. yet the liability qua the principal amount of Rs.5,90,00,000/- appears to be in the nature of an admitted liability. Since the plaintiff claims to have received a sum of Rs.20,00,000/-, in my view, the defendants are not entitled to leave to defend the suit sans deposit of the balance principal amount of Rs.5,70,00,000/-.

18. Hence, the following order:

: O R D E R :

- (i) The defendants are granted leave to defend the suit on the condition of deposit of a sum of Rs.5,70,00,000/- within a period of six weeks from the date of this order.
- (ii) If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendants shall file their written statement within a period of four weeks from the date of deposit;
- (iii) If this conditional order of deposit is not complied with, within the above stipulated period, the plaintiffs 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.

- (iv) The Summons for Judgment accordingly stands disposed.

[N. J. JAMADAR, J.]