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

SUMMONS FOR JUDGMENT NO.43 OF 2019
IN
SUMMARY SUIT NO.368 OF 2019

Mehul Jadavji Shah .. Applicant-Org. Plaintiff
Vs.
Ambe Gopal Developers and Ors. .. Defendants

Mr. Mikhail Behl, i/by Mr. Abhishek Adke and Ms. Vibha Joshi, for the Applicant-Org. Plaintiff.
Mr. Yakshay Chheda for the Defendants.

CORAM : A. K. MENON, J.
DATE : 7TH JUNE, 2022.

P.C. :

1. By this Summons for Judgment, the applicant-plaintiff seeks a decree in terms of the suit. The suit as filed seeks recovery of a sum of Rs.1,31,70,567/- along with interest thereon @ 18% p.a. from 16th October 2018 till payment or realization. The suit proceeds on the basis that the plaintiff, as a sole proprietor of one Roma Enterprises, has empowered one Girish Manilal Boradia as his constituted attorney, authorizing him to file the present suit pursuant to the Power of Attorney dated 22nd November 2014.

2. The suit is filed under Order XXXVII of the Code of Civil Procedure, 1908, since it is based on a dishonoured cheque to be read with confirmation of accounts, by which the defendants have confirmed and acknowledged liability to the extent of Rs.1,10,95,000/- as of 1st April 2018. The particulars of claim in the suit referring to

principal sum as Rs.1,00,00,000/- due under a promissory note, copy of which is annexed at Exhibit-C to the plaint. That promissory note notwithstanding, the fact remains that the defendants have a confirmed liability, thereby issued a cheque for a sum of Rs.12,691,345/-, which includes principal sum of Rs.1,00,00,000/- and interest of Rs.26,91,345/- computed as on date of the cheque.

3. According to the plaintiff, the cheque was not honoured when presented for payment and it came to be returned by the plaintiff's bankers-Bank of India along with a Return Memo dated 1st August 2018. A copy of the return memo is at Exhibit-K to the plaint. The reason for return of the cheque was that funds were insufficient. The plaintiff has relied upon a return of cheque confirmation dated 24th September 2018 issued by Bank of India – his banker, in which the plaintiff's proprietary concern – Roma Enterprises held the account in question and in which the suit cheque had been deposited. A copy of the confirmation is at Exhibit-L to the plaint. It is dated 24th September 2018 and confirms that the cheque was returned to Roma Enterprises on 1st August 2018 by a reason funds being insufficient.

4. Thus, it is Mr. Behl's case that an amount was advanced by way of a loan through banking channels. He has invited my attention to Exhibit-B to the plaint being a Statement of Accounts, which indicates that on 8th February 2008, a cheque bearing no.255 for Rs.1,00,00,000/- was paid from the account to Ambe Gopal - being defendant no.1 herein - in a sum of Rs.1 crore. Mr. Behl therefore submitted that save and apart from technical defences raised in the suit, there is no real defence to the claim. He submits that the plaintiff has computed interest @ 18% p.a. at the

statutory rate, which is due to be paid from 1st April 2017 and thereafter till payment or realization.

5. On behalf of the defendants, the learned counsel has disputed the claim. He submits that triable issues arise. Firstly, he contends that the suit as filed is not by an individual, as sought to be made out, but perusal of the cause-title would indicate that the individual claims to be a trustee of one Damji Lalji Shah Family Trust, which is said to be carrying out business in the name of Roma Enterprises of which the plaintiff is a sole proprietor. He submits that if a trust has to file a suit, all trustees ought to have been made parties. Besides, one trustee cannot be a sole proprietor of the concern Roma Enterprises. This he submits is a triable issue, especially when read with the provisions of the Indian Trusts Act 1882. He has also invited my attention to Section 47 of the Trusts Act, which provides that a trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger unless the trust deed so provides. It is also contended that the defendants sought inspection of the trust deed, which has been denied to them. He therefore submits it appears that Mehul Jadavji Shah has no authority of his co-trustees to present the suit.

6. Moreover, as the plaint is declared by one Girish Boradia, claiming to be a constituted attorney, he has also invited my attention to the contents of the power of attorney, copy of which is annexed at Exhibit-A to the plaint, which he submits makes interesting reading inasmuch as three individuals working for gain and claim to be trustees of a private trust and as such trustees, they are carrying on business in the name and style of Roma Enterprises "as sole proprietors thereof". He submits that

the power of attorney itself is invalid since the delegation of power of the trust cannot be made through a constituted attorney and that too when the plaintiff discloses that the plaint is being filed by one person namely Mehul Jadavji Shah. It is contended that apart from breach of Section 47 of the Trust Act, there is no occasion to file present suit much less seek a decree.

7. Reliance has been placed on a decision of the Gujarat High Court in *Atmaram Ranchhodbhai Vs. Gulamhusein Gulam Mohiyaddin and Anr.*[1], wherein the Full Bench of the Gujarat High Court while considering the powers of the trustees had occasion to observe that trustees cannot transfer their duties, functions and powers to some other body organization. He has invited my attention to the observations of the Full Bench in paras 3 and 4 and he submits that there is no occasion to empower Mr. Girish Boradia in the instant case when the sole trustee, who is shown as plaintiff, himself has not discharged the burden of establishing that the delegation in his favour is authorized by the Trust Deed. He therefore submits that these are serious triable issues and that unconditional leave be granted.

8. On a query from the court however it is admitted that the cheque was indeed issued by the defendants in the name of the proprietary concern - Roma Enterprises. The fact of confirmation of account having been executed is also not denied. Unconditional leave is being sought by the defendants only on the ground that the plaintiff's contentions, pleadings and documents appear to be under a cloud. There is no clarity as to who the plaintiff really is. On this basis, the learned counsel for the

1 *1972 SCC OnLine Guj 10*

defendants has canvassed his contentions to the plaint while seeking unconditional leave.

9. One other aspect that has been pressed into service is the contention that the claim is barred under the Maharashtra Money-Lending (Regulation) Act, 2014 since the plaintiff is a habitual money lender. The learned counsel for the defendants cites two other similar suits that are listed today before this court and states that the plaintiff is a habitual money lender and without a license and in the absence of such license, the suit is not maintainable. He therefore seeks unconditional leave on one more ground. No other submission was advanced.

10. Mr. Behl however responded by pointing out that the provisions of the Maharashtra Money-Lending (Regulation) Act, 2014 do not prohibit an attempt to recover monies paid over through normal banking channels. My attention has been invited to the definition of the expression "business of money lending", as defined in Section 2(3), and meaning of the term "loan", as defined under Section 2(13). The definition of "loan" excludes deposit of money in any bank or a company.

11. This court has already considered the aspect of what constitutes the business of money lending in its decision in *Base Industries Group and Anr. (Applicants) in the matter between Mahesh P. Raheja and Ors. Vs. Base Industries Group and Anr.*[2] and was prima facie of the view that the defendants have not established that the plaintiffs are in the business of money lending and that the said defence is not the one that would enable him to secure unconditional leave.

2 *OOCJ Chamber Summons No.488 of 2018 in Comm. Execution Application No.63 of 2017 in Suit No.119 of 2016 dt. 13Th / 22nd July 2018.*

12. Mr. Behl submits that the suit amount has been advanced by way of a cheque bearing no.255, as had been reflected in the bank statement, which has been annexed at Exhibit-B to the plaint. There is no dispute that the defendants had received money and had service the loan by paying interest of Rs.5,46,000/- for the period described in Confirmation of Accounts annexed at Exhibit-H to the plaint. He submits that there is no defence whatsoever to the claim. A cheque has been issued after computing the amount of interest and at the contractual rate of 18% p.a. That cheque has been dishonoured for want of funds. The cheque is seen to be signed by the two partners, both of whom are parties to the present suit, and in these circumstances, he submits that there is no defence whatsoever. The plaintiff is not a money lender. Moreover, the power of attorney is signed by all the trustees, a fact that is not disputed. There is no breach of provisions of Section 47 of the Trusts Act and the provisions of the Trusts Act do not come in the way of the plaintiff filing and prosecuting the present suit.

13. In these circumstances, Mr. Behl has reiterated that monies were advanced on 7th February 2008; a confirmation was issued by way of a receipt-cum-undertaking with the obligation to pay interest @ 18% p.a. and if the amount was not repaid on demand on the same day, a Demand Promissory Note for the sum of Rs.1,00,00,000/- has been executed. Defendants have paid interest servicing the loan between 7th February 2008 till 31st March 2017 without any demur or protest. The last amount of interest paid was Rs.5,46,000/- as of 31st March 2017. Thus, the loan is now repayable. The cheque having been dishonoured, it is now necessary to pass a decree

in the aforesaid sum. In the aforesaid circumstances, he submits that even in accordance with the law, interest @ 18% p.a. is recoverable.

14. Having heard learned counsel for the parties, I am of the view that the defence that has been set up in the claim do not merit grant of unconditional leave. The only defence that is said to be a triable one alludes to the maintainability of the suit on the basis that one trustee, who claims to be carrying on business as a sole proprietor on behalf of the entire trust, without joining other trustees, is required to be examined by this court as a trial in the light of the fact that receipt of the amount advanced in a sum of Rs.1,00,00,000/- is not being questioned; in fact, it is admitted. Furthermore, the defendants have paid interest from 2008 without demur or protest. It is only after the last cheque was dishonoured that the defendants have taken up these objections. The contentions of the defendants qua the applicability of the provisions of the Indian Trusts Act and the defence that there is a bar to prosecute the suit unless all other trustees are joined in the suit as plaintiffs does not commend itself to me to be a valid defence in the face of the cheque having been issued and being dishonoured and the interest having been paid over a number of years. The defence, to my mind, is not the one which justifies grant of leave to defend without condition since the suit amount has been advanced by cheque and unconditionally received and utilized by the defendants. In these circumstances, it is necessary that the defendants are put to terms. Accordingly, I pass the following order :-

(i) The defendants shall deposit a sum of Rs.1,31,70,567/- in this court within a period of eight weeks from today.

(ii) If the amount is so deposited, the defendants shall be entitled to defend the suit by filing a written statement within a further period of two weeks of such deposit.

(iii) If the deposit is not made, the plaintiff shall be entitled to apply for a decree after obtaining a certificate of non-deposit. If the deposit is made, the amount shall be invested by the Prothonotary and Senior Master in a nationalized bank initially for a period of one year, to be renewed year on year till final disposal of the Suit.

(iv) Summons for Judgment is disposed in the above terms.

(A.K. MENON, J.)