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

SUMMONS FOR JUDGMENT NO.27 OF 2019
IN
COMMERCIAL SUMMARY SUIT NO.354 OF 2019

Weavings Manpower Solutions Private Limited .. Applicant/Plaintiff
v/s.
Euphoria Technologies Private Limited .. Defendant

Dr. Abhinav Chandrachud a/w Akash Menon, Ms. Bency Ramakrishna and Unnati Ghia for the plaintiff.
Ms. Jennifer Michael a/w Som Sinha i/b. M/s. Som Sinha & Associates for the defendant.

CORAM : A. K. MENON, J.
DATED : 30TH JUNE, 2022.

P.C. :

1. In a suit, the plaintiff seeking a decree in a sum of Rs.1,77,88,827/- and further interest thereon, the plaintiff has filed this Summons for Judgment seeking a decree. The factual background leading up to the present suit is as follows;

2. On 13th July, 2016 the parties entered into a Service Agreement

under which the plaintiff agreed to provide certain contract staffing and manpower solutions to the defendant. On 30th September, 2016, an addendum came to be executed modifying clause 18(f) of the Service Agreement. A further addendum was executed on 11th May, 2017. Eventually in June 2017, the parties met and agreed that the service agreement would be mutually terminated with effect from 1st May, 2017. Thereafter correspondence ensued and a demand notice dated 18th October, 2017 came to be issued. Post the demand, the plaintiff said to have filed the Company Petition no.46/9/NCLT/AHM/2018 under Section 9 of the Insolvency and Bankruptcy Code, 2016 against the defendant company.

3. In the Company Petition, the parties arrived at a settlement and on 24th May, 2018 and a settlement agreement came to be executed. A copy of the settlement agreement is annexed at Exhibit 'A' to the plaint in accordance with which the defendant was to pay a total sum of Rs.2.35 crores in certain installments. A payment schedule was provided which specified the dates on which some payment to be made. Upon failure of the payment of any of the installments, the entire sum was liable to be paid over along with interest @ 18% p.a. This settlement agreement has not been

honoured. The defendant made part payments on 26th May, 29th May, 31st May and 11th June, 2018 totaling to Rs.45 lakhs leaving a balance of Rs.1,90,00,000/- due to be paid in 9 installments commencing from 27th June, 2018 and ending on 27th February, 2019.

4. Thereafter once again the defendant sought extension of time and on 11th July, 2018 a further sum of Rs.14 lakhs was paid. Thus, effectively a total sum of Rs.59 lakhs was paid. As on that date, it was obvious that the defendant had not paid all the installments that a substantial amount i.e. Rs.1,76,00,000/- remained outstanding. Further correspondence ensued between parties as set out in the plaint between 17th July, 2018 and 12th August, 2018. In this exchange of emails the defendant had requested the plaintiff to defer the deposit of two cheques till 20th August, 2018 promising to pay interest on the delayed payments. Eventually the cheques were dishonoured and this present suit came to be filed. The Summons for Judgment was then taken out on 7th June, 2019. An affidavit in reply is seen to have been filed dated 8th June, 2022 by one Ankit Panchal.

5. Dr. Chandrachud appearing in support contended that the entire balance is of Rs.2,00,02,936.99. He has tendered an interest

worksheet as of 29th June, 2022 which sets out the principal sum after giving credit for the part-payment of Rs.59 lakhs. The balance of Rs.1,76,00,000/- is said to accrue and interest @ 18% p.a. It appears that between November 2020 and January 2021 further amounts were paid as set out in the tabulated sheet totaling to Rs.1 crore. After appropriating the sum of Rs.1 crore towards interest and giving credit for the aforesaid amounts Dr. Chandrachud submits the total sum due is Rs.20,002,936.99. Dr. Chandrachud submits that the plaintiffs have exercised their right to appropriate part payments towards interest because the payments were not made towards the principal sum or with any other direction as to appropriation. The plaintiff as the recipient of the monies was entitled to appropriate it in any manner. It is further submitted that there is no denial of the fact that the settlement agreement is an agreement in writing and based on which a Summary suit is maintainable.

6. The only defence Dr. Chandrachud states is that the amount of Rs.1 crore was paid in full and final settlement of the claim. The defendant has in his affidavit in reply set out a preliminary objection to the effect that under Section 12A of the Commercial Courts Act, the mandatory pre-institution mediation had not been

conducted. Therefore institution of the suit is itself bad for want of attempting statutorily mandated mediation. At the hearing of the Summons for Judgment, I had directed the defendant to file an affidavit in reply which is now on record. As far as the preliminary objection is concerned, Dr. Chandrachud submits that there is no merit in this objection inasmuch as the framework and the infrastructure conducting mediation was not in place when the suit was filed but was to be in place after the suit was filed.

7. Dr. Chandrachud invites my attention to the Gazette of India dated 3rd July, 2018 which published the notification of the Commercial Courts (Pre-institution Mediation Settlement) Rules, 2018. These were brought into force on 3rd July, 2018 being the date of publication whereas the suit is seen to be filed on or before 12th October, 2018. Although the notification was issued on 3rd July, 2018 it is the contention of the plaintiff that there was no infrastructure in place which could have been availed of. The infrastructure required for conducting mediation in the Act was not in place. He relied upon the decision of this court in the case of *Deepak Raheja v/s. Ganga Taro Vazirani*[1] in which the

1 2021 SCC OnLine Bom 3124

Division Bench upon hearing an objection on behalf of the plaintiff had directed the legal services authority to report on the facilities and infrastructure available for undertaking pre-institution mediation. The State Legal Services Authority thereafter filed a report which indicated that at Mumbai the necessary premises, furniture and staff for conducting mediation were in place from 15th February, 2019. Meanwhile this suit had already been filed. Dr. Chandrachud therefore contended that the preliminary objection has no merit.

8. It is further submitted that by virtue of the decision of the Supreme Court in *IDBI Trusteeship Servicess Ltd. v/s. Hubtown Ltd.*[2] which has been consistently followed including in the Supreme Court decision in *B.L. Kashyap And Sons Ltd. v/s. JMS Steels And Power Corporation and another*[3] the principles laid down in *Hubtown* (supra) have been reiterated. He submits that even assuming the case of the defendant plaintiffs in full and final settlement is correct, upon admission of the fact that the settlement agreement was executed and that the balance payable under the settlement agreement had not been paid, the court is empowered, if it is left with a doubt as to the defendant's good

2 (2017) 1 SCC 568
3 (2022) 3 SCC 294

faith or the genuineness of the triable issues, to impose conditions as to time or mode of trial or furnishing security as well as payment into court. Dr. Chandrachud therefore suggested that the court exercises this option in support of the case that there is no prima facie defence that can be established by the defendant.

9. Inviting my attention to the one other defence set up by the defendant viz. the parties have arrived at a settlement even after the suit was filed Dr. Chandrachud submits that without prejudice negotiations were attempted but they failed. On 30th March, 2021 when both sides informed the court that parties were in settlement talks and that the Summons for Judgment may be adjourned the negotiations were without prejudice to the rights and contentions of the parties. He submits that in view of the defendants case that the mediation was mandatory, these negotiations would at best to be treated part of mediation and no evidence could be adduced in respect thereof.

10. Dr. Chandrachud therefore submits that this is a case of an admitted liability and failure and neglect to remit the balance amount payable. It is contended that by virtue of paragraph 17.3 of the principles culled out in the decision of the Supreme Court

in *Hubtown* (supra) a deposit should be ordered and conditional leave can be granted.

11. On behalf of the defendant Ms. Michael has opposed the summons by contending that after the settlement agreement, a sum of Rs.59 lakhs paid between 26th May, 2018 and 11th July, 2018 and in relation to the balance Rs.1.76 crores, the parties once again held negotiations at Surat. Ms. Michael states that the affidavit of Panchal sets out that one Mr. Hitesh Reshamwala, Director of the plaintiff and Mr. Rishikesh Vyas, legal counsel of the plaintiff along with one Mayank Desai, a representative of the plaintiff, had gone over to Surat and held negotiations. The parties are said to have agreed to a full and final lump sum settlement of Rs.1 crore of which Rs.25 lakhs was to be paid to the plaintiff and Rs.75 lakhs to be paid to the plaintiffs' nominees in accordance with directions given by the plaintiffs' representative Mr. Mayank Desai. Ms. Michael points out that in affidavit in rejoinder although there is a denial that a full and final settlement in a lump sum of Rs.1 crore was agreed, the plaintiff has not denied the visit to Surat by the plaintiffs' representative.

12. I have perused the affidavit in rejoinder which in

paragraph 7(c) deals with the claims in paragraph 4(e) of the affidavit, alluding to the lump sum settlement arrived at. In this respect, there is no denial that such a meeting took place. It is denied that they agreed to a lump sum settlement. While the defendant seeks to put the plaintiff to the strict proof thereof, the defendant has not set out what exactly was decided at the said meeting. It is in support of the proceedings at that meeting and the subsequent negotiations that the defendants have relied upon the WhatsApp messages. Contents of the chat have been annexed at Exhibit 'B' to the affidavit in reply. The WhatsApp chat commenced at Exhibit 'B' to the reply indicates that certain amounts were transferred by bank transfer and screenshots of the bank's website intimating payments have been shared by Mr. Desai, C.A. with the recipient and one Mayur Gohel, the defendant's Director who was engaged in negotiations. Particulars of these are to be found in the affidavit in reply in paragraph 4(g).

13. During these chats, diverse amounts have seen to be transferred to certain third parties who are said to be beneficiaries. The defendants' affidavit set out the names of the third party recipients. Initially a payment of Rs.20 lakhs is seen to have been made to the plaintiff. Thereafter a further sum of

Rs.5 lakhs is paid to the plaintiff. Both payments are made on 10th November, 2020 post the meeting. The remaining ten remittances amounting to Rs.75 lakhs is seen to be made to six other entities. 4 payments have been made to one Rajesh Karariya and one to Anyata Gujariya and so on and so forth. Exhibit 'D' which is annexed to the affidavit in reply is based on averments to be found in paragraph 4(h) of the reply. It sets out that the defendant paid the entire amount of Rs.1 crore in full and final settlement. The defendant relies upon copy of its bank statement showing evidence of such payments in which the deponent contends that the defendant has paid the entire agreed full and final settlement amount. The contents of paragraph 4(h) is dealt with in paragraph 7(e) of the affidavit in rejoinder. There is no denial of the fact that there was an amount agreed upon although no amount is specified. The affidavit goes on to repeat that there was no agreement between the parties that a sum of Rs.1 crore will be paid in full and final settlement of all dues owed by it to the plaintiff in terms of the settlement agreement. There is no explanation as to why the contents of Exhibit 'D' have not been dealt with.

14. It appears strange that when the defendant has set up a

case of payment of Rs.75 lakhs to unconnected third parties the plaintiff does not deny it. The plaintiff would have responded to the contents in paragraph 4(h) read with Exhibit 'D' with surprise if Rs.75 lakhs had been paid to third parties unconnected with the plaintiff. This must be read along with WhatsApp exchanges which have not been denied by the plaintiff. In that exchange it is seen that the draft of a final settlement agreement is said to have been furnished on 9th June, 2021 at about 6.01 p.m., received by the plaintiffs' representative who was engaged in the WhatsApp conversation with the aforesaid Mayank Desai, representative of the plaintiff. This indicates that a settlement agreement consisting of three pages was received from the plaintiffs' representatives to which a response is sent at 6.17 p.m. The response was in context of clause 3 of the Draft Final Settlement Agreement wherein the plaintiff acknowledges receipt from the defendant of a sum of Rs.25 lakhs. Thus, the draft which emanated from the plaintiff contemplates that they have received the "agreed due" from the defendant and that in fulfillment of the same, the defendant has paid an amount of Rs.25 lakhs as set out in clause 3.

15. The defendant has responded calling upon the said Mayank Desai to read the draft while informing him that the defendant

had paid Rs.1 crore and not Rs.25 lakhs. There is further indication that it was difficult for the defendant to justify the payment in the books (presumably books of account) since the amount was paid from "company account". The defendants' representative has then requested the plaintiff to call him and the plaintiff's representative has confirmed that he would call. The parties agreed to then speak on the next day. There is a clear indication that the defendants' version that the sum of Rs.1 crore was in full and final settlement was a distinct possibility. The fact that amount of Rs.75 lakhs out of the amount of Rs.25 lakhs were paid is not in doubt since Exhibit 'D' has not been denied. There is no explanation forthcoming from the plaintiff, accept to state that these were without prejudice negotiations. In that respect Dr. Chandrachud had relied upon the decision of the Supreme Court in *Peacock Plywood (P) Ltd. v/s. Oriental Insurance Co.Ltd.*[4] in which judgment in paragraph 43 quotes from *Phipson on Evidence, 16th Edition* as to the effect of without prejudice privilege.

16. It is contended that these are all without prejudice communications held pursuant to the adjournment sought before

4 (2006) 12 SCC 673

this court on 30th March, 2021 if the dates of the WhatsAppp messages are seen with the duration it will be clear that on 9th June, 2021 parties were in negotiations. In my view, it is not necessary to enter into the aspect on the requirement of mandatory pre-institution mediation in the facts of the present case since the defendant has participated and has effectively defended the suit. A reply has been filed to the Summons for Judgment and at no stage was any attempt made to seek time on the basis that the mediation process had not been initiated. While it may be true that the mandatory provisions of the Act may not have been followed having reached the stage of hearing and disposal of the Summons for Judgment and having agitated the defence, I am of the view that the inability of the plaintiff to avail of pre-institution mediation for reasons canvassed before me by Dr. Chandrachud will not be of any assistance in the facts of the case.

17. Clearly in my view the defendants have made out a case for unconditional leave. The issue pertaining to payment of the lump sum amount is fairly one that is triable issue the manner in which the contentions of the plaintiff in the rejoinder itself leave no manner of doubt of the defendants good faith or the genuineness

of the issues to be tried and in that respect I am of the view that the principle culled out in paragraph 17.3 of *Hubtown* (supra) is not satisfied.

18. Accordingly, I pass the following order;

(i) Defendants are granted unconditional leave to defend the suit.

(ii) Written statement to be filed within eight weeks from today.

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

(iv) List the suit for framing issues after 12 weeks.

(A. K. MENON, J.)