

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

SUMMONS FOR JUDGMENT NO.36 OF 2021
IN
COMMERCIAL SUMMARY SUIT NO.293 OF 2020
WITH
INTERIM APPLICATION (L) NO. -29792 OF 2022

Shailesh Bhagoobhai Bhoolabhai ...Plaintiff
Executor of Tikamdas Kukreja

Vs.

Deepak Raheja ...Defendant

Mr. Shanay Shah, Mr. A Patel, Ms. V. Shah, Mr. N. Vyas, Mr.D.
Dave i/b AVP Partners, for Plaintiff.

Mr. Yash Momaya a/w M. Virjee, A. Agarwal i/b ABH Law, for
Defendant.

CORAM:

N. J. JAMADAR, J.

RESERVED ON :

17th OCTOBER, 2022

PRONOUNCED

15th DECEMBER, 2022

ON :

ORDER:-

1. This Commercial Division Summary Suit is instituted for recovery of a sum of Rs.3,39,54,794.52/-, along with further interest at the rate of 12% per annum on the principal sum of Rs.2,50,00,000/- from the date of the institution of the suit till payment and/or realisation.
2. The material averments in the plaint can be stated in brief, as under:-

a) Tikamdas Kukreja, the deceased plaintiff, had known the defendant, who deals in the business of development of real estate. In the Month of December, 2016, the defendant had approached the plaintiff for a financial assistance of Rs.2,50,00,000/-. The defendant assured to repay the said amount along with interest at the rate of 12% per annum. Based on the representations of the defendant, the plaintiff advanced a loan of Rs.2,50,00,000/-, through RTGS, against a Bill of Exchange, drawn by the defendant.

b) On 20th December, 2016, the defendant along with his wife and sons acknowledged the liability to pay outstanding loan amount along with interest and the defendant issued two cheques aggregating to the sum of Rs.2,77,00,000/-, drawn on HDFC Bank, payable on 1st January, 2018. However, on presentment, both the cheques, were dishonoured on account of “Insufficiency of Funds”, vide memo dated 27th March, 2018.

c) A demand notice under Section 138 of Negotiable Instruments Act, 1881, was issued on 19th April, 2018. It was duly served on the defendant on 20th April, 2018. The defendant neither complied with the demand nor

gave reply to the said notice. Hence, this suit for recovery of the outstanding amount based on the dishonoured cheques.

3. In response to the service of the writ of summons, the defendant appeared. Thereupon the plaintiff took out a Summons for Judgment.

4. An affidavit-in-reply is filed on behalf of the defendant raising multifold defences. First, according to defendant, the transaction in question is one of illegal money lending. The plaintiff has been engaged in the business of money lending on interest sans a valid license. It is contended that apart from the defendant, the plaintiff had lent money on interest to few entities named in the affidavit-in-reply. Therefore, the interdict contained in Section 13 of Maharashtra Money Lending (Regulation) Act, 2014 (Money-Lending Act, 2014) comes into play and no decree can be passed in favour of the plaintiff.

5. Secondly, Mr. Tikamdas Kukreja, the original plaintiff passed away on 4th February, 2021, and thus the suit instituted by Mr. Shailesh Bhagoobhai Bhoolabhai, as his constituted attorney, can not be proceeded with, as the Power of Attorney stood extinguished. Thirdly, the suit is instituted

without pre-institution mediation in breach of the mandate contained in Section 12A of the Commercial Courts Act, 2015 (“the Act, 2015”). Therefore, the suit does not deserve to be entertained.

6. Fourthly, the suit-claim suffers from multifariousness. Each of the cheques allegedly dishonoured gives rise to a distinct cause of action and, resultantly, warrants payment of separate Court fees. Lastly, it is contended that the plaintiff’s claim for interest is unconscionable and in teeth of the provisions contained in The Interest Act, 1978 and The Usurious Loans Act, 1918. All these defences raise triable issues and, therefore, the defendant is entitled to an unconditional leave to defend the suit.
7. An affidavit-in-rejoinder is filed on behalf of the plaintiff controverting the assertions in the affidavit-in-reply.
8. I have heard Mr. Shanay Shah, the learned Counsel for the plaintiff, and Mr. Yash Momaya, the learned Counsel for the defendant 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 placed on record.

9. Mr. Shanay Shah, the learned Counsel for the plaintiff submitted that the case at hand is an open and shut case. It was urged that though multi-fold defences are sought to be raised, yet the fact that the defendant had availed a loan of Rs.2,50,00,000/-, from the plaintiff is not at all disputed. In view of the clear and explicit admission as to the liability to repay the principal amount, along with agreed rate of interest, none of the defences merits any consideration. In the circumstances of the case, according to Mr. Shah, the defences are *ex facie* sham and frivolous and, therefore, the defendant does not deserve leave to defend the suit.

10. In contrast to this, Mr. Momaya, the learned Counsel for defendant would urge that the fundamental object of proscribing money lending on interest is required to be kept in view. In the case at hand, the plaintiff has resorted to device of advancing loan against the Bill of Exchange to circumvent the provisions of The Money-Lending Act, 2014. Comparing and contrasting the provisions of Section 10 of The Bombay Money-Lenders Act, 1946 and Section 13 of the Money-Lending Act, 2014, Mr. Momaya submitted that the bar under Section 13 of the Money-Lending Act, 2014, is to any suit instituted by a Money-Lender. Mr. Momaya submitted that the

defendant has furnished the names of the persons whom the plaintiff had advanced money on interest, as a business, and, therefore, the defendant deserves an opportunity to substantiate the said defence by adducing evidence.

11. Mr. Momaya further submitted that the dispute in question does not fall within the ambit of the definition of commercial dispute under Section 2(c) of the Act, 2015. Therefore, the plaint must be returned for presentment to proper Court. Lastly, since the declaration by this Court in the case of **Deepak Raheja Vs. Ganga Taro Vazirani**¹, that the provisions contained in Section 12A of Act, 2015, are mandatory, has been upheld by the Supreme Court in the case of **Patil Automation Private Limited and Others Vs. Rakheja Engineers Private Limited**,² the institution of the suit without mandatory pre-institution mediation must entail the consequence of rejection of plaint, urged Mr. Momaya.

12. To begin with, the challenge to the institution of the suit for want of pre-institution mediation mandated by Section 12A of the Act, 2015. In the case of **Deepak Raheja** (supra), a Division Bench of this Court, disagreeing with the view of a

¹ 2021 SCC Online Bom 3124

² 2022 SCC Online SC 1028

learned Single Judge that the provision of pre-institution mediation under Section 12A of the Act, 2015, is directory, ruled that Section 12A of the Act, 2015 is mandatory, and a Commercial suit of specified value which does not contemplate interim relief under the Act, 2015, can not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by Rules made by the Central Government.

13. Mr. Momaya is right in his submission that the view recorded by this Court in the case of **Deepak Raheja** (supra) was upheld by the Supreme Court in **Patil Automation Private Limited** (supra). However, the further submission of Mr. Momaya that since in the case at hand the suit was instituted without resorting to pre-institution mediation it must entail the consequence of rejection of the plaint does not merit acceptance. In the case of **Patil Automation Private Limited** (supra), the Supreme Court by invoking the doctrine of prospective overruling made the declaration that Section 12A of the Act, 2015 is mandatory itself prospective by making it operative from 20th August, 2022.

14. The declaration and directions of the Supreme Court in paragraph No. 92 set at rest the controversy sought to be raised on behalf of the defendant.

15. Paragraph No. 92 reads as under:-

....“92.Having regard to all these circumstances, we would dispose of the matters in the following manner. We declare that Section 12A of the Act is mandatory and hold that any suit instituted violating the mandate of Section 12A must be visited with rejection of the plaint under Order VII Rule 11. This power can be exercised even suo moto by the court as explained earlier in the judgment. We, however, make this declaration effective from 20.08.2022 so that concerned stakeholders become sufficiently informed. Still further, we however direct that in case plaints have been already rejected and no steps have been taken within the period of limitation, the matter cannot be reopened on the basis of this declaration. Still further, if the order of rejection of the plaint has been acted upon by filing a fresh suit, the declaration of prospective effect will not avail the plaintiff. Finally, if the plaint is filed violating Section 12A after the jurisdictional High Court has declared Section 12A mandatory also, the plaintiff will not be entitled to the relief....”

(emphasis supplied)

16. While making the declaration that Section 12A is mandatory prospective, the Supreme Court carved out certain exceptions. One of the exception was, if the plaint was filed violating Section 12A after the jurisdictional High Court had declared Section 12A mandatory. The judgment of the Division Bench of this Court in the case of **Deepak Raheja**

(supra) was delivered on 1st October, 2021. The instant suit was lodged on 30th June, 2021, before this Court declared Section 12A mandatory. Resultantly, the prospective declaration made by the Supreme Court in the case of **Patil Automation Private Limited and Others** (supra), will have full play and the plaintiff can not be deprived of the benefit of the said prospective declaration.

17. The second challenge based on the dispute not falling within the ambit of ‘commercial dispute’ under Section 2(c) of the Act, 2015, also does not carry much substance. Mr. Momaya made an endeavor to demonstrate that the dispute in question does not fall within the meaning of “commercial dispute” as envisaged by Section 2(1)(c)(i) of the Act, 2015. According to Mr. Momaya, the transaction in question is essentially of a loan simplicitor and does not partake the character of ordinary transactions of merchants, bankers, financiers and traders.

18. To bolster up of this submission, Mr. Momaya placed reliance on an order passed by Calcutta High Court in the case of **Ladymoon Towers Private Limited Vs. Mahendra Investment Advisors Private Limited** in IA No. GA/4/2021 in CS/99/2020, decided on 13th August, 2021, and another

order passed by this Court in Summons for Judgment No.9 of 2021, in Commercial Summary Suit No. 6 of 2021, **Bharat Huddanna Shetty Vs. Ahuja Properties & Developers & 2 Ors**, dated 13th July, 2021.

19. “Commercial dispute” is defined under Section 2(1)(c)(i) of the Act, 2015 as under:-

“(i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;”

20. Evidently, whether a dispute falls within the ambit of Section 2(1)(c)(i) is, by its very nature, rooted in facts. The decisions relied upon by Mr. Momaya essentially turned on the facts of those cases with which the Court was confronted. It is true that in the case of **Ambalal Sarabhai Enterprises Limited Vs. K.S. Infraspace LLP And Another**³, the Supreme Court has not approved a wide construction of the definition of “commercial dispute”. However, the issue as to whether the dispute in a given case constitutes a “commercial dispute” must necessarily be decided in the backdrop of the facts of the said case.

3(2020) 15 SCC 585

21. In the case at hand, in my view, the following factors assumes significance. First, the deceased plaintiff claimed that the loan was advanced to the defendant, who was dealing in a real estate business, to discharge his statutory dues. Second, the Bill Of Exchange against which the loan was advanced, over the drawal of which there is no dispute, clearly records that the loan was advanced for a business purpose. Third, the letter dated 20th December, 2016, suggests that the defendant availed loan from the plaintiff and his companies regularly. Fourth, the plaintiff seems to have advanced the amount to the defendant in the regular course of business as is evident from the ledger account maintained by the plaintiff. In the circumstances, I find it rather difficult to accede to the submission that the transaction in question is one of a loan advanced by an individual to another without there being any element of commercial interest therein.

22. This leads to me to the principal defence of illegal money lending. Mr. Momaya, the learned Counsel for the defendant made an earnest endeavor to draw home the point that the legislative change brought about by the Money-Lending Act, 2014, has not been properly appreciated in the judgments which have been rendered on the issue of money

lending, hitherto. The legislative change which, in essence, bars a decree in “any suit” arising out of money lending transaction, is of wide amplitude, in comparison to the bar contained in Section 10 of the Money-Lenders Act, 1946, which was restricted to a suit to which the provisions of the said Act applied.

23. Further amplifying the submission, Mr. Momaya would urge that the judgments of this Court in **Parekh Aluminex Limited Vs. M/s. Ashok commercial Enterprises & Anr⁴**, **Mour Marbles Industries Pvt Ltd Vs. Motilal Laxmichand Salech, HUF, Proprietor of M/s. Mala Investments through its Karta Motilal Laxmichand Salecha and Others⁵**, and **Mahesh P Raheja Vs. Base Industries Group⁶**, which have not adverted to the difference in the legislative mandate contained in Section 13 of the Money-Lending Act, 2014, can therefore be said to have been rendered *sub silentio*. To buttress this submission, Mr. Momaya placed a strong reliance on the judgment of the Supreme Court in the case of **Municipal**

4 (2014)SCC Online Bom 2304

5 (2018) SCC Online Bom 1387

6 2018 SCC OnLine Bom 21322

Corporation of Delhi Vs. Gurnam Kaur⁷ wherein the concept of *sub silentio* was expounded.

24. To appreciate the aforesaid submission, it may be advantageous to extract text of sub Section (1) of Section 10 of Money-Lenders Act, 1946 and sub Section (1) of Section 13 of Money- Lending Act, 2014.

10. Stay of suits by money-lenders not holding licence-

[(1)] No Court shall pass a decree in favour of a money-lender in any suit to which this Act applies [including such suit pending in the Court before the commencement of the Bombay Money-lenders (Amendment) Act, 1975] [Mah. LXXVI of 1975] unless the Court is satisfied that at the time when the loan or any part thereof, to which the suit relates was advanced, the money-lender held a valid licence, and if the court is satisfied that the money-lender did not hold a valid licence, it shall dismiss the suit.]

13. Suits by money-lenders not holding licence.-

(1) No Court shall pass a decree in favour of a money-lender in any suit unless the court is satisfied that at the time when the loan or any part thereof, to which the suit relates was lent, the money-lender held a valid licence, it shall dismiss the suit.

25. Mr. Momaya laid emphasis on the fact that the words “to which this Act applies” do not find mention in Section 13(1) of the Money-Lending Act, 2014. This omission, according to Mr. Momaya, can not be said to be unintended and inconsequential.

26. Mr. Shah, the learned Counsel for the plaintiff would urge that the aforesaid submission does not carry any

7(1989) 1 SCC 101

conviction. If a transaction does not fall within the ambit of 'loan' as defined in Section 2(13) of the Money-Lending Act, 2014, the bar under Section 13(1) of the Act would not operate. Resultantly, the omission of the words "to which this Act applies" does not make any significant change in the legislative mandate, urged Mr. Shah.

27. I find the submission of Mr. Shah well founded. In the case at hand, indisputably, the loan was advanced against the Bill of Exchange drawn by the defendant. When an advance is assailed on the ground that it suffers from the vice of illegal money lending, the primary inquiry would be whether the advance falls within the definition of 'loan' under Section 2(13) of the Act. If the advance in question is excepted by any of the exclusionary Clauses (a) to (m) of the said Section 2(13), it would not amount to a 'loan' within the meaning of the Act, and, resultantly, the interdict contained in Section 13 (1) of the Act will have no play.

28. In the instant case, the advance clearly falls within the exclusionary Clause (j) of Section 2(13), which reads as under.

“(13) “loan” means an advance at interest whether of money or in kind but does not include,-

.....

(j) an advance of any sum exceeding rupees [three lakhs] made on the

basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881 (26 of 1881), other than a promissory note;"

29. In the aforesaid view of the matter, I am not inclined to delve into the aspect of the consequences which emanate from the omission of the words "to which this Act applies" in Section 13 (1) of the Money-Lending Act, 2014. Even otherwise, on a plain reading of sub Section 13(1) of the Money-Lending Act, 2014, an inference that the application of the said Section is restricted to the 'loan' defined under Section 2 (13) becomes inescapable.

30. On the merits of the claim, as indicated above, the advance of loan is evidenced not only by the entries in the extract of account but also by the Bill of Exchange drawn by the defendant. The Bill of Exchange contains an endorsement as to the mode of receipt of the credit thereunder.

31. As noted above there is no dispute about the issue of the subject cheques towards the discharge of the liability and the dishonour of those cheques on presentment. A Summary Suit based on dishonoured cheques stands on a higher pedestal. In addition to the proof of underlying consideration, evidenced by the documents and material on record, in a given case, the plaintiff can bank upon the presumptions

contained in Section 118 of the Negotiable Instruments Act, 1881 and Section 114 illustration (c) of the Indian Evidence Act, 1872.

32. A slightly distinct position of a Summary Suit based on a dishonoured cheque has been expounded by a Division Bench of this Court in the case of **Rajesh Laxmichand Udeshi @ Bhatia Vs. Pravin Hiralal Shah**⁸ wherein the Court adverted to the effect of the statutory presumptions under the Negotiable Instruments Act, 1881, while considering the prayer for leave to defend the suit based on a negotiable instrument.

33. The observations of the Division Bench in paragraph 14 and 15 of the said judgment are material and, hence, extracted below.-

14] When a summary suit instituted is based on a cheque which is dishonoured, effect of [Sections 138](#) and [139](#) of Negotiable Instruments Act raising statutory presumption that the cheque was issued in discharge of a liability, is a relevant consideration to be kept in mind. The said Sections cast a burden upon the defendant to rebut the presumption. Summary suits instituted on cheques which are dishonoured will, therefore, stand on a higher footing than summary suits instituted on the basis of other documents. In such cases, the Court will have to take into consideration the statutory presumption which is raised when the cheques are dishonoured. The object behind providing a statutory presumption under the [Negotiable Instruments Act](#) has to be kept in mind while judging the credibility of a defence raised by the defendant in summary suit. Thus, the test of more than "shadowy" and less than "probable" as adverted to by the Apex Court cannot apply in cases where the law requires a person to explain certain state of affairs. The judgments which are relied upon by the learned

counsel do not consider the effect of the statutory presumptions raised under the [Negotiable Instruments Act](#) when a cheque is dishonoured. In our opinion, when a cheque is dishonoured, the Court is enjoined with the duty to scrutinize the defence put up by the defendant with a much higher degree of care and circumspection. Such summary suits cannot be treated as on par with the cases instituted on contracts or invoices etc. where such statutory presumptions do not operate.

15] The legislative intent behind enactment of [Sections 138](#) and [139](#) of the Negotiable Instruments Act is to prevent abuse of the banking system. Thus, one who issues a cheque extends a solemn promise to pay. Based on this promise and action, the recipients arrange their affairs and quite often enter into further transactions. Unless extra ordinary circumstances are made out, one who issues cheque is deemed to have undertaken to pay. [Negotiable Instruments Act](#) enforces the promise strictly by raising statutory presumption and treating it as an offence. This provision elevates a cheque to a higher status than the other instruments, such as written contract etc. to which no such statutory presumption is attached. What needs to be emphasized is that presumption in respect of a dishonoured cheque places a higher burden on the defendant to elucidate the defence than the burden which is cast on a defendant where the suit is filed on the basis of ordinary instruments. In the cases based on dishonour of cheques, the defendant must satisfy the conscience of the Court and cannot take shelter behind the rules formulated primarily in respect of suits based on ordinary instruments. The Court while exercising the discretion to grant leave or otherwise to the defendant in such cases cannot be oblivious of the legislative intent to place the promise made through a cheque on a higher pedestal than the promise made through an ordinary instrument. This is not to state that moment a Summary Suit is lodged based on a dishonoured cheque, it must be decreed without anything more. What needs to be emphasised is that the fact that there is a statutory presumption attached to the dishonoured cheque will constitute an important ingredient while considering the question whether leave to defend should be granted in cases of dishonoured cheques and the Court must scrutinise the defence strictly. The object of the summary procedure is ultimately to see that the defendant does not needlessly prolong the litigation by creating untenable, frivolous and casual defences so as to deprive the plaintiff of the monies due to him.

34. In the totality of the circumstances, none of the defences sought to be urged on behalf of the defendant can be said to be either substantial or fair and reasonable warranting leave to defend the suit. In view of the clear and explicit

admissions of the liability and the fact that principal defence of the transaction being one of illegal money-lending not being borne out by the record, the defendant is not entitled to leave to defend the suit.

35. Even the endeavor of Mr. Momaya to seek leave to defend by canvassing a submission that plaintiff has charged interest at an exorbitant and unconscionable rate does not advance the cause of the defendant. The plaintiff is seeking pre-suit, pendent lite, and future interest at the agreed rate of 12% per annum. In a business transaction in a commercial city like Mumbai, interest at the rate of 12% per annum can not be said to be exorbitant and unreasonable. Moreover, in the case at hand, there is an unequivocal undertaking to pay interest. In any event the award of interest on the amount covered by dishonoured cheques would be governed by the provisions contained in Section 80 of the Negotiable Instruments Act, 1881, which stipulates rate of 18 % per annum. Therefore, I am not persuaded to accede to the submission on behalf of the defendant to grant leave to defend the suit qua the interest component.

36. So far as post- suit future interest, in the entire setting of the matter, award of further interest at the rate of 9% per annum would be just and reasonable.

37. For the foregoing reasons, the Summons for judgment is required to be allowed.

38. Hence, the following order.

:-ORDER:-

- (i) The Summons for Judgment stands allowed.
- (ii) The defendant do pay to the plaintiff a sum of Rs.3,39,54,794.52/-(Rupees Three Crore Thirty Nine Lakhs Fifty Four Thousand Seven Hudred Ninety Four and Fifty Two Paisa Only) along with further interest at the rate of 9% per annum on the principal amount of Rs.2,50,00,000/- from the date of the institution of the suit till the date of the payment and/or realisation.
- (iii) The defendant do pay costs quantified at Rs.5 Lakhs to the plaintiff.
- (iv) The suit stands decreed in aforesaid terms.
- (v) Decree be drawn up accordingly.

(vi) In view of the disposal of the suit, Interim Application (L) No.29792 of 2022 also stands disposed.

[N. J. JAMADAR, J.]