IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
SUMMONS FOR JUDGMENT NO.70 OF 2021
IN
COMM. SUMMARY SUIT NO.32 OF 2021

Hasmukh Chinubhai Sheth ... Plaintiff
Versus
Paradise Associates and Ors. ... Defendants

Mr. Piyush Shah with Mr. Dishang Shah, Mr. Chirag Unadkat, for Plaintiff.
Mr. Ashok Bhatia, for Defendant Nos.1 and 2.

CORAM: N.J.JAMADAR, J.

DATE: 19th SEPTEMBER, 2022

P.C.:

1. This commercial division Summary Suit is instituted for recovery of a sum of Rs.3,31,37,714/- along with further interest on the principal sum of Rs.2,00,00,000/- @ 12% p.a. from the date of the institution of the Suit till payment and/or realization.

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

2.1 The Plaintiff deals in diverse businesses. Defendant No.1 – M/s. Paradise Associates (Paradise) is a registered partnership firm. Defendant Nos.2 to 7 are the partners of Paradise. Defendant Nos.2, 3, 5, 6 and 7 had approached the Plaintiff, through Kantilal A. Shah – Defendant No.4, to advance a loan for the business activities of Defendant No.1, which was dealing, inter alia, in development of real estate.

2.2 Pursuant to the representations of the Defendant Nos.2 to 7 that they would repay the amount along with interest @ 12% p.a., the Plaintiff had advanced of a sum of Rs.2 Crores to the Defendant No.1, via RTGS on 18th July, 2014. Paradise duly admitted and acknowledged its liability to repay the said amount along with interest thereon, by confirming the accounts for the year 2014-15.

2.3 Paradise paid interest on the loan amount as promised till 31st March, 2017. Thereafter, Paradise committed default in payment of interest. Paradise, however, continued to acknowledge its liability by executing balance confirmation for the years 2016-17, 2017-18 and 2018-19, and deducted the tax at source.

2.4 The Plaintiff repeatedly called upon the Defendants to repay loan amount along with accrued interest thereon. As the Defendants paid no heed, the Plaintiff addressed a legal notice on 19th December, 2019. In reply, Paradise took a false and malafide defence that the said loan amount was appropriated towards part consideration for purchase of Flat No.103, Valencia Paradise, Lamington Road, Mumbai – 400 007. Hence, the Plaintiff was constrained to institute the Suit for recovery of the loan amount along with the outstanding interest till the date of the institution of the Suit and further interest.

3. The Writ of Summons was duly served on Defendant Nos.1 to 4, 6 and 7. It was returned unserved qua Defendant No.5. Defendant Nos.1, 2 and 4 entered

appearance. Thereupon, the Plaintiff took out the Summons for Judgment.

4. Defendant Nos.1 and 2 have filed an Affidavit in Reply seeking an unconditional leave to defend the Suit. At the outset, the suit was stated to be bad for mis-joinder of parties as Defendant Nos.3, 4, 6 and 7 were not the partners of Paradise. The tenability of the suit was also assailed on the ground that the suit not being based on a written contract or a negotiable instrument would not fall within the ambit of Order XXXVII of the Code of Civil Procedure, 1908.

5. Defendant Nos.1 and 2 contended that the Plaintiff's claim that Paradise had executed balance confirmation is ex-facie untenable. Laying emphasis on the intrinsic evidence of the balance confirmations, Defendant Nos.1 and 2 would contend that the genuineness and truthfulness of the contents of the balance confirmation was a matter for trial. In addition, the suit was stated to be barred by the provisions contained in Section 13 of the Maharashtra Money Lending (Regulation) Act, 2014 as the Plaintiff had been dealing in the business of illegal money lending sans a valid licence therefor.

6. On merits, without controverting the fact that the Plaintiff had paid a sum of Rs.2 Crores to Paradise, an endeavour was made to demonstrate that the said payment was made towards part consideration for acquisition of a flat in a building then proposed to be developed by Paradise, namely Valencia Paradise, Lamington Road, Mumbai. In view of the said agreement arrived at between the parties,

according to the Defendant Nos.1 and 2, the Plaintiff is not entitled to recover the amount. Conversely, the Defendant Nos.1 and 2 are entitled to an unconditional leave to defend the Suit.

7. An Affidavit in Rejoinder is filed on behalf of the Plaintiff controverting the contentions in the Affidavit in Reply. It was contended that the Defendants have raised patently false defense of a different transaction between the parties. In fact, as late as 8th February, 2022, Paradise had paid a sum of Rs.25 lakhs to the Plaintiff in part discharge of its liability.

8. I have heard Mr. Shah, learned counsel appearing for the Plaintiff, and Mr. Bhatia, learned Counsel for the Defendants. With the assistance of the learned Counsels, I have perused the averments in the plaint, documents annexed thereto, Affidavit in Reply and the Rejoinder thereto.

9. Mr. Shah would submit that the Defendants are not at all entitled to leave to defend the suit, as the entire case of the Plaintiff that the Plaintiff had advanced a sum of Rs.2 Crores to Paradise and the latter had also paid interest, as agreed, till March, 2017, has been admitted, in no uncertain terms, in the Affidavit in Reply. Thus, the defences of the transaction being in the nature of illegal money lending, there being no contract to pay interest and that the said amount was paid towards acquisition of a flat in the building to be developed by Paradise, are all false and moonshine defenses.

10. In the face of clear and explicit admission of liability as regards advance of amount in the year 2014 and payment of interest thereon for a period of three years coupled with the balance confirmation for the succeeding years as well, a decree must follow, urged Mr. Shah.

11. In contrast, Mr. Bhatia, learned Counsel appearing for Defendant Nos.1 and 2 would urge that the Suit is not properly constituted. Defendant Nos.3 to 7 have been unnecessarily dragged in the Suit as there is no jural relationship between Paradise and Defendant Nos.3 to 7. Mr. Bhatia submitted that the Plaintiff has made a bald assertion that Defendant Nos.2 to 7 are the partners of Paradise. Reliance was placed on the Partnership, Retirement and Reconstitution Deeds, filed along with Affidavit of Defendant No.2 – Jitendra Shah.

12. Mr. Bhatia would further urge that the defences raised by the Defendant Nos.1 and 2 are prima facie fair and reasonable. As regards the bar to the institution of the Suit, contained in Section 13 of the Maharashtra Money Lending (Regulation) Act, 2014, Mr. Bhatia submitted that there is material on record to show the elements of system, repetition and continuity in the amount lent by the Plaintiff and his son, on interest. Secondly, the claim of Defendant Nos.1 and 2 that the parties subsequently agreed that the amount lent by the Plaintiff shall be adjusted towards the consideration for purchase of a flat in Valencia Paradise, is a matter for trial. Therefore, the Defendants cannot be deprived of an opportunity to defend the Suit, especially when

the balance confirmations, on which the Suit primarily rests, ex-facie, appear to be untrustworthy.

13. To begin with, it would be necessary to deal with the aspect of joinder of the parties. The Plaintiff has approached the Court with a case that Defendant Nos.2 to 7 are the partners of Paradise. No endeavour was made by the Plaintiff to substantiate the said claim. In contrast, the Partnership Deeds/Retirement and Re-constitution Deeds of Paradise, placed on record by the Defendant Nos.1 and 2, positively indicate the composition of the Defendant No.1 firm, over varying periods of time. Initially, on 14th October, 2005 a partnership was formed with Yashwantkumar Babulal Shah (Defendant No.6), Mehul Yashwant Shah (Defendant No.7), Jitendra K. Shah (Defendant No.2), Lilavati K. Shah (Defendant No.3), Ibrahim Momin (Defendant No.5) and Salim Kodia as the partners of Paradise. On 1st October, 2014 Mr. Salim Kodia retired from the said partnership. Initially, Kantilal A. Shah (HUF) – Defendant No.4 was not a partner of Paradise. Kantilal A. Shah (HUF) – Defendant No.4, however, joined the partnership on 8th February, 2018, as is evident from the deed of partnership dated 8th February, 2018.

14. The situation which, thus, obtains is that the Partnership Deed and the Deeds of Retirement and Reconstitution placed on record, indicate that Defendant Nos.2 to 7 were the partners of Paradise at material points of time. Therefore, I am not persuaded to accede to the submission on behalf of Defendant Nos.1 and 2 that the

Defendant Nos.3, 4, 6 and 7 have been unjustifiably roped in.

15. As indicated above, the fact that the Plaintiff had advanced a sum of Rs.2 Crores to Paradise is rather incontrovertible. In Affidavit in Reply, Defendant Nos.1 and 2 have asserted that the Plaintiff had paid a sum of Rs.2 Crores. However, the same was towards advance payment for booking a flat in the building 'Valencia Paradise'. Interestingly, in para (IV) (ix) of the Affidavit in Reply, the Defendants have conceded in unequivocal terms that the Defendant Nos.1 and 2 had paid interest on the said amount of Rs.2 Crores to the Plaintiff till 31st March, 2017. Defendant Nos.1 and 2, however, contend that somewhere in April, 2016, it was mutually agreed between the parties that the said amount of Rs.2 Crores and further sum of Rs.50 Lakhs lent by the Plaintiff would be adjusted as consideration for purchase of flat No.1302, Valencia Paradise. Inconsistency in the defence of Defendant Nos.1 and 2 is writ large.

16. Implicit in the alleged agreement to adjust the amount of Rs.2 Crores towards part consideration which was arrived at in the month of September, 2016, is an admission that the amount of Rs.2 Crores was advanced by the Plaintiff to Paradise in the year 2014 as and by way of loan. Mr. Shah was justified in canvassing a submission that the further admission that the Defendants had paid interest on the said amount, as agreed, till March, 2017, on the one hand, lends credence to the claim of the Plaintiff and, on the other hand, demonstrates the shallowness of the defence

sought to be put forth.

17. It is pertinent to note that there is not a shred of material to show that the parties exchanged any correspondence to evidence the said transaction of purchase of Flat No.1302 in Valencia Paradise. In the very nature of the transaction, it would be naive to believe that it could have been given effect to without any document to evidence the same.

18. The aforesaid defence, in my view, also materially impairs the defence of the transaction being one of illegal money lending. If the amount was to be appropriated towards acquisition of the flat, as contended by the Defendant Nos.1 and 2, it would hardly fall within the mischief of the 'loan' under the Maharashtra Money Lending (Regulation) Act, 2014.

19. Mr. Bhatia, learned Counsel for the Defendants strenuously submitted that the fact that the Plaintiff had advanced loan on interest as a part of Plaintiff's business of illegal money lending, is borne out by the multiple transactions in respect of which two suits are instituted in this Court and one Suit is instituted by the son of the Plaintiff in the City Civil Court. Mr. Bhatia also laid emphasis on the fact that Form No.26AS placed on record by the Plaintiff, indicates that the Plaintiff has shown number of entities from whom interest was received. This substantiates the defence that the Plaintiff has been lending money as a business.

20. To bolster up this submission, Mr. Bhatia placed reliance on a judgment

of this Court in the case of **Yallava Nagappa Kunchikorve V/s. Kantabai Malli**[1]. In the said case, this Court observed that, in view of the admitted facts that the alleged transaction was governed by the provisions of the Money Lenders Act, the Defendant was entitled to unconditional leave to defend the Suit as the position was governed by another judgment of this Court in the case of **Sha Damji Deraj V/s. Megraj Bhikumchand and Co.**[2] Mr. Bhatia also placed reliance on the observations in the cases of **Base Industries Group and Anr. V/s. Mahesh P. Raheja and Ors.**[3] and **Bipin Vazirani V/s. Raheja Design Construction Pvt. Ld. And Anr.**[4] to buttress the submission that the elements of system, continuity and repetition have been fulfilled.

21. In the case of **Base Industries Group (Supra),** a learned Single Judge of this Court after adverting to series of pronouncements, culled out the legal position as under :

> "36. "From this discussion, the following propositions emerge :
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> (a) Not every loan is axiomatically a money lending transaction for the purpose of the 1946 or the 2014 Acts. There is no such presumption in law.
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> (b) It is doing of the 'business of money-lending' that attracts the provisions of the statute. In interpreting the phrase, the correct emphasis is on the word 'business', not 'money

1 2012(3) ALL M.R. 815
2 ILR 1959 Bom. 451
3 CHS 488 of 2018
4 SJ 101 of 2018 dt. 12th December, 2018

lending'. It is the word 'business', and not the expression 'money-lending', that is determinative. Simply put, every instance of lending money is not money-lending. Not every lender is a Shylock.

(c) To constitute 'business', a single isolated instance does not, and even several isolated stray instances do not, constitute 'the business of money-lending'. To be engaged in the 'business of money-lending,' the activity must be systematic, regular, repetitive, and continuous, and must generate an appreciable revenue. The fact that the borrower is a stranger to the lender does not on its own make the latter a 'money-lender'.

(d) A loan recovery action is not barred merely because there is a loan. It has to be shown that the loan was part of 'the business of money-lending'.

(e) A plaintiff seeking a recovery of a loan is not required to show that his suit is not barred by the Money Lenders Act. It is always for the defendant who puts up money-lending as a defence to show that the transaction is forbidden by the Money Lenders Act."

22. I am afraid, the aforesaid pronouncement is of any assistance to the Defendants. As is evident, the defence of Defendant Nos.1 and 2 wavered from one end to another. Undoubtedly, a Defendant is entitled to take inconsistent and, at times, contradictory defences. However, where the Defendant seeks leave to defend the suit, if defences raised are such that they work out each other's retribution, it

would be difficult to record that the defence raised by the Defendants is a strong or fair defence. The mere fact that there were a couple of advances by the Plaintiff to the Defendants and that the Plaintiff had also received interest from another entities, without anything more, would not render the advance foul of the provisions contained in Maharashtra Money Lending (Regulation) Act, 2014. I am, therefore, not impelled to accede to the submissions on behalf of Defendant Nos.1 and 2.

23. Admissions that the Defendants had received a sum of Rs.2 Crores and interest, as agreed, was paid thereon, till March 2017, coupled with the balance confirmations on which the Suit is rested, materially erode the quality of the defences. It is trite that a duly executed balance confirmation letter constitutes a surer foundation for institution of a summary suit under Order XXXVII of the Code of Civil Procedure, 1908. ***(Jyotsna K. Valia vs. TS Parekh and Co.,)***[5]

24. An endeavour was made on behalf of Defendant Nos.1 and 2 to disown the confirmation of accounts by pointing out alleged intrinsic discrepancies therein. This defence, in the face of unequivocal admission of the receipt of the sum of Rs.2 Crores and also payment of interest thereon, as agreed, in my view, does not constitute a strong defence.

25. The aspect which, however, warrants consideration is the entitlement of the Plaintiff to interest on the amount of Rs.2,39,00849/- which was confirmed under

5 2007 (3) BCR 772

confirmation of accounts dated 1st April, 2017. It is imperative to note that the subsequent balance confirmations for the financial years 2017-18 dated 1st April, 2018 (Exhibit C-1) and 2018-19 dated 1st April, 2019 (Exhibit C-2) evidence the confirmation of the very sum of Rs.2,39,00,849/-. Whether the Plaintiff would, thus, be entitled to charge interest at the rate at which the interest was admittedly paid till March, 2017, would thus be a matter for trial.

26. It could be urged that since Paradise had paid interest @ 12% p.a., in the absence of any agreement to the contrary, Paradise would be liable to pay interest at the same rate beyond 31st March, 2017 as well. In this context, a useful reference can be made to the judgment of a learned Single Judge in the case of **Sun N Sand Hotel Limited vs. M/s. V. v. Kamat, HUF**[6]**,** wherein it was observed, *inter alia,* as under:

> "**40**. There is nothing, apart from the Counsels submission, that this agreement to pay interest was restricted to the period for which it was to be paid. If interest has been paid in the past and the balance is confirmed by the debtor and the creditor, then subject to anything to the contrary it would imply a promise to continue to pay interest at that rate on the balance confirmed. It is not necessary in such circumstance for an express and independent stipulation that the balance therein would be paid with interest. This must be implied. To hold to the contrary would run counter to the basis on and the purpose for which parties have accounts stated and deprive such documents of any commercial efficacy.
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> A catena of judgments of various Courts has affirmed the principle that implied in an account stated or accepted or settled is a promise to pay. The Privy Council in Bishun Chand v. Girdhari Lal, (affirmed by the Supreme Court in Cordon Woodroffe's case (supra)

6 2003 Vol. 105(1) Bom. L. R. 625.

> observed that an account stated gave rise to a promise to pay and was one of the most ordinary business facilities which has been common to everybody who carries on business under any system which incorporates any of the ordinary principles of English Contract Law. To hold that when an account stated contains intrinsic evidence of the rate at which interest has been paid and received without demur does not imply apromise to continue to pay interest at that rate would render this facility otiose and denude the commercial efficacy of such documents recognized by these judgments."
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> (emphasis supplied)

27. Conversely, since the confirmation of the accounts was freezed at the sum of Rs.2,39,00,849/- for three financial years, it could be legitimately urged that the parties agreed not to charge and claim interest on the said amount and the liability stood crystalized. This, in my view, raises a triable issue.

28. Since the liability is admitted to the extent of the principal amount of Rs.2 Crores, even if it is assumed that the triable issues arise and the Defendant Nos.1 and 2 have raised fair and reasonable defences, unconditional leave cannot be granted. Hence, I am persuaded to grant conditional leave to defend the Suit, subject to the deposit of the aforesaid amount of Rs.2,39,00,849/-.

29. Hence, the following order.

ORDER

(i) The defendant nos.1 and 2 are granted leave to defend the suit on the condition of deposit of a sum of Rs.2,39,00,849/- 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.)