

Tandale

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

SUMMONS FOR JUDGMENT NO. 64 OF 2021
IN
SUMMARY SUIT NO. 02 OF 2021

I. N. Halkara H.U.F. ... Applicant/
Through its Karta Mr. Indarmal N. Halkara Plaintiff

Versus

Pradip Bastimal Chopra ... Defendant

Mr. Farhan Dubhash a/w Mr. Vishal Kanade, Kinjal Upadhyay i/by
Jayesh R. Vyas for the Plaintiff.

Mr. Chirag Mody a/w Mr. Yash Momaya, Mr. S. M. Seegarla, Mr
Swapnil Shikhare i/by RMG LAW Associates for the Defendant.

CORAM: N. J. JAMADAR, J.

RESERVED ON : 21st DECEMBER, 2021

PRONOUNCED ON : 2nd FEBRUARY, 2022

ORDER :-

1. This commercial division summary suit is instituted for recovery of aggregate amount of Rs.17,84,34,432/- along with further interest @ 18% per annum on the principal amount of Rs.4,00,00,000/- from the date of the suit.

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

(a) The plaintiff is a Hindu Undivided Family. Mr. Indarmal N.

Halkara is its Karta. The plaintiff - Karta is a Director and Shareholder of a Company, 'Halkara Builders Private Limited' ("*Halkara*"). The defendant is a partner of a registered partnership firm, M/s. Cosmos Landmarks ("*Cosmos*"). Both Halkara and Cosmos deal in the business of real estate development.

(b) On 3rd April 2010, an agreement was executed between Halkara and Cosmos for the redevelopment of a SRA Project at Forjett street, Mumbai. At the request of the defendant, to enable him to tide over the financial constraints, the plaintiff had advanced to the defendant a friendly loan of Rs.4,00,00,000/-. The plaintiff was given to understand that the defendant would use the said fund to meet its contractual obligations under the agreement dated 3rd April 2010. It was agreed that the said loan amount would carry interest @ 18% per annum. The plaintiff advanced the said amount under the cheque dated 28th January 2013 drawn on Corporation Bank (Now Union Bank of India). Upon the amount being credited in the account of the defendant, the later credited the said amount of Rs.4,00,00,000/- in the account of Cosmos on 31st January 2013. And on the very day Cosmos, in turn, transferred the said amount in the account of Halkara, to finance the contractual obligations of Cosmos.

(c) Towards repayment of the said amount the defendant had executed a promissory note dated 28th January 2013 for the sum of

Rs.4,00,00,000/- payable on demand, with interest @ 1.5% per month i.e. 18% per annum. The defendant had also drawn three cheques; bearing No. 049998 for Rs.12,20,000/- payable on 31st March 2013, No. 049999 for Rs.23,80,000/- payable on 27th July 2013, towards interest and, No.049981 towards principal loan amount of Rs.4,00,00,000/-, payable on 27th July 2013. All the three cheques were returned unencashed on presentment. Upon being apprised, the defendant sought time citing financial constraints and assured to repay the loan amount alongwith accrued interest thereon. The defendant thus confirmed the balance by executing balance confirmation letters every year, the first being on 1st April 2013 and the last being 1st April 2018.

(d) In the meanwhile, disputes arose between Halkara and Cosmos. Thus Cosmos invoked arbitration. Halkara in its counter claim made a claim of Rs.4,00,00,000/- and the accrued interest thereon. Cosmos questioned the jurisdiction of the Arbitral Tribunal as regards the said claim. Thus, on 28th March, 2021, the plaintiff addressed a legal notice to the defendant, calling upon the defendant to repay the sum of Rs.4,00,00,000/- along with accrued interest thereon. The defendant falsely denied the liability. The plaintiff thus initiated mandatory pre-institution mediation under Section 12A of the Commercial Courts Act, 2015. As the defendant failed to appear, a Non Starter Report was filed. In the meanwhile, Halkara made a statement before the Arbitral

Tribunal that the claim for the said advance of Rs. 4,00,00,000/- and interest thereon would not be pressed in the said arbitration.

(e) Thus, the plaintiff was constrained to institute this suit for recovery of the said amount of Rs.4,00,00,000/- along with interest accrued thereon at the agreed rate of 18% per annum, and future interest on the strength of the promissory note, balance confirmations and the dishonoured cheques.

3. In response to the writ of summons, the defendant appeared. Thereupon, the plaintiff took out the summons for judgment. The defendant sought an unconditional leave to defend the suit by filing an affidavit-in-reply, to which an affidavit-in-rejoinder has been filed by the plaintiff.

4. The defendant seeks unconditional leave to defend the suit by assailing the tenability of the suit on three counts. Firstly, since the plaintiff deals in the business of illegal money lending sans a licence under Maharashtra Money-Lending (Regulation) Act, 2014 (for short, "*Money-Lending Act*"), the bar under Section 13 of the said Act, 2014 comes into play and no decree can be passed to enforce the said transaction. Another instance of the plaintiff allegedly having lent money on interest has been pleaded to bolster up the defence that the plaintiff deals in the business of illegal money lending.

5. Secondly, according to the defendant, the suit is barred by

law of limitation. Since the promissory note was executed on 28th January 2013, the institution of the said suit on 28th July 2021 is clearly barred by limitation. The claim based on dishonour of cheques, which were also issued in the year 2013, is also beyond the stipulated period of limitation. The defendant asserts that the confirmation of accounts doesn't amount to an admission of liability for the purpose of extending the period of limitation and thus the balance confirmation letters also do not infuse life into the suit, which is hopelessly barred by limitation.

6. Thirdly, there is a clear breach of the mandatory provisions contained in Section 12A of the Commercial Courts Act, 2015. Since the plaintiff simultaneously prosecuted the remedies before the arbitrator as well as in the impending recovery proceedings and didn't make an election as to the proceeding, it desired to prosecute, the pre-institution mediation proceeding before the mediation centre was rendered illusory.

7. On merits, though the defendant admits that the plaintiff had advanced a sum of Rs. 4,00,00,000/- repayable with interest @ 1.5% per month, within a period of three years, on 30th January 2013, yet the nature of the transaction was put in contest. The defendant asserted that the cheques, which were dishonoured, were issued with a clear understanding that they were delivered by way of security and not to be presented for encashment. The plaintiff was aware that, the

amount of Rs.4,00,00,000/- was to be invested by the defendant in the Bhandup Project.

8. The defendant contends that, Mr. Halkara evinced interest in becoming a partner in the Bhandup Project. Thus in August 2013, it was agreed that, Mr. Halkara would invest money in the Bhandup Project and would, in return, be entitled to 25% of Cosmos Group's share of the revenue from the said project. It was further agreed that from July 2013 onwards no interest would be payable on the loan of Rs.4,00,00,000/-, which was already advanced and the said corpus would be treated as Mr. Halkara's investment in the Bhandup Project. Thus, the balance confirmations were executed for the sum of Rs.4,36,00,000/- only. The defendant further contends that, despite being called upon on multiple occasions to make further investment in the Bhandup project, Mr. Halkara reneged from his promise and, resultantly, on account of the failure of Mr. Halkara to make the committed investment, the development of Bhandup project got derailed. It was, therefore, agreed between the parties that the defendant would repay the sum of Rs.4,36,00,000/- only without any interest after the units in the Bhandup Project were sold.

9. Eventually, Mr. Halkara agreed that, on account of default on his part in investing amount in the Bhandup Project these were huge losses to Cosmos and, therefore, the said sum of Rs.4,36,00,000/-

would not be paid back to Mr. Halkara. Thus, the defendant doesn't owe any amount to the plaintiff. Hence the defendant is entitled to an unconditional leave to defend the suit.

10. In the wake of aforesaid pleadings, I have heard Mr. Farhan Dubhash, the learned counsel for the plaintiff, and Mr. Chirag Mody, the learned counsel for the defendant at some length. With the assistance of the learned counsels for the parties, I have perused the material on record including the pleadings and documents pressed into service by the parties.

11. Mr. Dubhash, the learned counsel for the plaintiff submitted that the affidavit-in-reply admits the case of the plaintiff, in its entirety. The advance of Rs.4,00,00,000/- through banking channels is unequivocally admitted. Execution of the promissory note and issue of cheques towards repayment of the principal amount and interest component are also admitted. The rate at which interest was to be charged and paid is not in contest. The execution of balance confirmation letters is also specifically admitted. Since the substance of the plaintiff's claim has gone uncontroverted, the defence that initially the plaintiff agreed that the the said amount of Rs. 4,00,00,000/- shall not carry interest beyond July 2013 and, later on, the plaintiff agreed to completely forego the sum of Rs.4,36,00,000/-, according to Mr. Dubhash, is nothing but a sham and moonshine defence. Thus, the

defendant is not entitled to leave to defend the suit.

12. Mr. Dubhash endeavoured to meet the challenges to the tenability of the suit by canvassing a submission that none of the three grounds sought to be urged by the defendant is worthy of consideration. The defence that the suit is barred by the provisions of Section 13 of the Money-Lending Act, was stated to be bald and unsubstantiated. Since the last of the balance confirmations was executed on 1st April 2018 and the plaintiff had invoked pre-institution mediation under Section 12A of the Commercial Courts Act, 2015, the institution of the suit can be said to be well within the period of limitation. The next challenge to the tenability of the suit for non-compliance with Section 12-A, Mr. Dubhash would urge, is against the weight of the record. It was submitted that, the defendant didn't participate in the pre-institution mediation proceedings, despite being duly served, and, thus, Non-Starter Report was filed. In this backdrop, according to Mr. Dubhash, the summons for judgment is required to be made absolute.

13. Mr. Chirag Mody, the learned counsel for the defendant joined the issue by canvassing a submission that, at this stage, what has to be seen is whether the defendant has made out a reasonable and bonafide defence. In the facts of the instant case, according to Mr Mody, the defendant has succeeded in demonstrating that the plaintiff has to surmount formidable challenges to the tenability of the suit on

multiple counts. Therefore, the defendant is entitled to an unconditional leave to defend the suit.

14. The aforesaid submissions now fall for consideration. The legal position as regards the grant of leave to defend a summary suit instituted under Order XXXVII of the Code of Civil Procedure (“CPC”) is fairly well settled. If the defendant presents, *prima facie*, fair and reasonable defence, ordinarily, the defendant is entitled to an unconditional leave to defend the suit. In contrast, if the defence sought to be put forth by the defendant appears to be frivolous, false or sham the leave to defend shall be refused and the plaintiff is entitled to judgment. Cases in which there is doubt as to whether the defendant has raised a triable issue, however warrant careful evaluation. Even when a triable issue is raised but the Court entertains a doubt about the bonafide or genuineness of the defence, the question of imposing appropriate conditions, including a direction for deposit and/or a stipulation of time for trial, requires to be considered.

15. In the case at hand, as indicated above, the defendant raised a three-pronged challenge to the tenability of the suit. Since the bar of limitation goes to the root of the matter, it may be apposite to deal with the same first. The plaintiff specifically averred that the suit is based on a promissory note dated 28th January 2013, dishonoured cheques and confirmation of accounts. Mr. Mody, the learned counsel

for the defendant, was justified in canvassing a submission that the claim of the plaintiff, to the extent it rests on the promissory note (Exh. “E”) dated 28th January 2013 and the cheques (Exhibits “F”, “G” and “H”), payable on 31st March 2013 and 27th July 2013, is ex-facie barred by law. The institution of the suit on 28th July 2021 solely on the strength of the promissory note executed on 28th January 2013 and cheques payable on 31st March 2013 and 27th July 2013, unaccompanied by any other instrument, is clearly beyond the stipulated period of limitation.

16. Mr. Dubhash, the learned counsel for the plaintiff would urge that the issue of limitation can not be considered *de hors* the execution of balance confirmation letters (Exhibits “M”, “N”, “O”, “P”, “Q” & “R”), whereby and whereunder the defendant acknowledged the liability as of 1st April 2013 and the succeeding years, till 1st April 2018. The confirmation of accounts, according to Mr. Dubhash, not only furnishes a fresh cause of action, but also constitutes a surer basis for a summary suit under Order XXXVII of CPC.

17. In order to lend support to this submission, Mr. Dubhash placed a strong reliance on a Full Bench judgment of this Court in the case of *Jyotsna K. Valia Vs. T. S. Parekh & Co.*¹ In the said case, the Full Bench has dealt with the questions of tenability of a summary suit on the documents of varied nature, namely :

¹ 2007(4) Mh.L.J. 517

- (i) On a settled account duly confirmed by the defendants;
- (ii) On a settled account which is not confirmed by the defendants;
- (iii) On an acknowledgment of liability;
- (iv) On honoured cheque; and
- (v) On a mere writing or a receipt;

As regards the suit based on settled accounts duly confirmed by the defendant, the Full Bench concluded as under :-

“29. In so far as the 'settled account is concerned,' it is no doubt true as noticed by the learned single Judge, that the various judgments adverted to, for holding that the summary suit would lie on a settled account, either of the Privy Council or of the Supreme Court did not arise from suits filed as summary suits. However, after the judgment of the Privy Council (Elvira L. Rodrigues) Sequeira (supra) which has been considered by the Supreme Court in Hiralal & Ors. (supra), a summary suit on a settled account, duly confirmed by the Defendant is maintainable as it is an acknowledgement by the Defendant in the ledger in which mutual accounts have been entered and the accounts settled between them. Such settling of accounts gives rise to a written contract on a fresh cause of action, with an implied promise to pay the amount settled. A summary suit would therefore lie on 'Settled accounts duly confirmed by the defendants. Issue (1) is answered accordingly.”

18. The Full Bench has enunciated in clear and explicit terms that a summary suit on a settled account, duly confirmed by the defendant, is maintainable for the reason that confirmation of accounts constitutes an acknowledgment by the defendant in the ledger in which mutual accounts have been entered and the accounts settled between

them. Such settling of accounts gives rise to written contract on a fresh cause of action, with an implied promise to pay the amount settled.

19. It is imperative to note that, in the case at hand, not only the confirmation of accounts by the defendant is admitted in unequivocal terms but a defence is sought to be built thereon to the effect that as the plaintiff agreed to forego the amount of Rs.4,36,00,000/- (as confirmed on 1st April 2018), there was no confirmation of accounts for the succeeding year. This bold defence implies that the confirmation of accounts can hardly be put in contest.

20. Mr. Mody, the learned counsel for the defendant, would further urge that even the confirmation of the accounts as of 1st April 2018 doesn't breathe life into the suit instituted on 28th July 2021, being clearly beyond three years of the said confirmation. In the plaint, the plaintiff made an endeavour to preempt the challenge on account of limitation by banking upon the order passed by the Supreme Court on 23rd March 2020 in *Suo Motu Writ Petition (Civil) No.3 of 2020*, Cognizance for Extension of Limitation, *In re*². In the order dated 23rd March 2020, in cognizance for extension of limitation, the Supreme Court gave, *inter alia*, following directions:-

“1. This Court has taken suo motu cognizance of the situation arising out of the challenge faced by the country on account of Covid19 Virus and resultant difficulties that may be faced by litigants across the country in filing their petitions/applications/suits/appeals/all other proceedings

2 Cognizance for Extension of Limitation, *In re*, (2020) 19 SCC 10 : 2020 SCC OnLine SC 343

within the period of limitation prescribed under the general law of limitation or under special laws (both Central and/or State).

2. To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective courts/tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or special laws whether condonable or not shall stand extended w.e.f. 15-03-2020 till further order(s) to be passed by this Court in present proceedings.

3. We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all courts/tribunals and authorities.”

21. In the backdrop of the nature of the controversy sought to be raised on behalf of the defendant, it would be superfluous to note the subsequent orders passed by the Supreme Court. It would suffice to record that the aforesaid order governed the facts of the case from 15th March 2020 till the date of institution of the suit. The period of limitation thus stood extended by the aforesaid order.

22. Mr. Mody, the learned counsel for the defendant, made a strenuous effort to draw home that the extension period of limitation pursuant to the aforesaid order of the Hon’ble Supreme Court is not automatic. According to Mr. Mody, the material on record indicates that there was masterly inaction on the part of the plaintiff for almost seven years of the advance. Therefore, the aforesaid order doesn’t come to the aid of the plaintiff. To bolster up the said submission, Mr. Mody

banked upon a judgment of the Supreme Court in the case of ***Sagufa Ahmed Vs Upper Assam Polywood Products Pvt. Ltd. and Ors.***³

23. I am afraid to agree with the submission of Mr. Mody. Reliance on the judgment of ***Sagufa Ahmed***, (Supra), does not seem to be well placed. In the said case, the question before the Supreme Court was, whether aforesaid order passed by the Supreme Court dated 23rd March 2020, extending the period of limitation, would assist a party in seeking the extension of period for which the delay could be condoned by a court/tribunal in exercise of discretion conferred by the statute. In the said case, the time to file appeal before NCLAT had already expired on 18th March 2020. Under the proviso to Section 421 (1) of the Companies Act, 2013, the Appellate Tribunal is empowered to entertain an appeal after expiry of the appeal period of 45 days, but within a further period not exceeding 45 days, if it is satisfied that the appellant was prevented by a sufficient cause from filing the appeal within that period. Repelling the submission of the appellant therein that even in the matter of the condonation of delay in exercise of the aforesaid discretion conferred by the statute a party can avail benefit of the aforesaid order dated 23rd March 2020 extending the period of limitation, the Supreme Court observed as under:- :-

“17. But we do not think that the appellants can take refuge under the above order in Cognizance for extension of

3 (2021) 2 SCC 317

limitation, in re⁴. What was extended by the above order of this Court was only “the period of limitation” and not the period upto which delay can be condoned in exercise of discretion conferred by the statute. The above order passed by this Court was intended to benefit vigilant litigants who were prevented due to the pandemic and the lockdown, from initiating proceedings within the period of limitation prescribed by general or special law. It is needless to point out that the law of limitation finds its root in two latin maxims, one of which is vigilantibus et non dormientibus jura subveniunt which means that the law will assist only those who are vigilant about their rights and not those who sleep over them.”

24. Evidently, the aforesaid proposition, enunciated in a totally different context of applicability of the order, in cognizance for extension of limitation, In re (supra), does not govern the facts of the case at hand. I am, therefore, persuaded to hold that the defence of the suit being barred by law does not merit acceptance so as to constitute a strong or substantial defence.

25. The second ground of the suit being barred by the provisions contained in Section 13 of the Money-Lending Act stands on a much weaker foundation. From the tenor of the defence, sought to be raised, it becomes abundantly clear that the plaintiff and defendant shared a business relationship. The defendant has endeavoured to demonstrate that they even entered into a partnership for the development of Bhandup project and, eventually, the plaintiff agreed to forego money which was advanced to the defendant. The defence of the suit falling within the mischief of Section 13(1) of the Money

⁴ (2020) 19 SCC 10 : 2020 SCC OnLine SC 343

Lending Act is required to be appraised through the aforesaid prism.

26. Mr. Mody, the learned counsel for the defendant would urge that it cannot be gainsaid that the plaintiff had advanced money on interest to the defendant. To add to this, the defendant has specifically referred to a another transaction in which Mr. Halkara and his sons, had lent money on interest to another entity called Shraddha Landmark Private Limited/ Cosmos Ashwamedh Joint Venture. Thus, the defendant can be said to have made out a reasonable and fair defence that Mr. Halkara deals in the business of money lending sans a valid licence under the Money-Lending Act. It was submitted that, since the money was indisputably advanced at interest and the transaction does not fall within any of the exclusionary clauses under Section 2(13) of the Money-Lending Act, which defines “loan”, the interdict contained in Section 13(1) of the Money-Lending Act comes into play with full force and vigour.

27. To bolster up the submissions, Mr. Mody placed a very strong reliance on the judgments of this Court in the cases of *Yallava Nagappa Kunchikorve Vs. Kantabai Malli*⁵ and *Parekh Aluminex Limited Vs. Ashok Commercial Enterprises*⁶.

28. Mr. Dubhash, the learned counsel for the plaintiff, joined the issue by stoutly submitting that the defence of illegal money lending

⁵ 2012 (3) ALL MR 815 : 2013 (1) BomCR 455 : 2012 (3) MhLj 856.

⁶ 2015 (2) ALL MR 679.

is a moonshine. Inviting the attention of the Court to clauses (l) and (j) of Sub-section (13) of Section 2 of the Money-Lending Act, Mr. Dubhash would urge that transaction in question does not fall within the tentacles of 'money lending' prohibited under the Money-Lending Act. The relevant part of Sub-section (13) of Section 2 of the Money-Lending Act, 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;

(k)

(l) an advance made bonafide by any person carrying on any business, not having for its primary object the lending of money, if such advance is made in the regular course of his business;

29. Evidently, clause (j) of Sub-section (13) of Section 2 governs the facts of the case at hand. As indicated above, it is not disputed that, the defendant had drawn the cheques (Exhs. "F", "G" & "H"). The plaintiff asserts that those cheques were drawn simultaneously with the execution of the promissory note. Issue of the cheques towards the repayment of the loan amount along with interest, as claimed by the plaintiff, apparently formed part of a composite transaction. It would thus imply that the advance was made on the basis of negotiable instruments, in addition to the promissory note (which is excluded by clause "j").

30. In the case of ***Parekh Aluminex Limited***, (supra), on which reliance was placed by Mr. Mody, this aspect was considered and even the issue of the cheques after an interval of advance was held to be part of one and the same bargain. The observations in para Nos. 20 and 21 are material and hence extracted below : -

“20. The mere fact that a negotiable instrument is handed over subsequent to the loan being disbursed makes no difference if the loan was made on the basis of the negotiable instrument. Where it is agreed as part of a composite agreement to advance a loan against a negotiable instrument covered by section 2(9)(f), it makes no difference that the negotiable instrument is handed over subsequently.

21. In the circumstances, there is in fact no defence to the suit. Despite the same, the learned Judge has granted leave conditional upon the appellants depositing only the principal sum claimed. The appellant can, therefore, have no grievance against the said order. The appeal is, therefore, dismissed.”

31. I find substance in submission of Mr. Dubhash that clause (l) which excludes the advance made bonafide in the course of business from the ambit of “loan”, proscribed by Money-Lending Act, also governs facts of the case. To fall within the mischief of illegal money lending, it has to be shown that the plaintiff deals, “in the business of money lending”. The elements of system, continuity and repetitions are required to be established. Every instance of lending money is not Money-Lending. What is of determinative significance is a course of action which partakes the character of business of money lending. Merely pointing out that, in addition to transaction in question, the

plaintiff had also advanced money on interest to another entity, does not bring the act of the plaintiff within the dragnet “illegal money lending”.

32. It is imperative to note that in the case of ***Yallava Nagappa Kunchikorve*** (supra) the fact that the plaintiff therein was dealing in the business of Money-Lending was an admitted position. The case of ***Yallava Nagappa Kunchikorve*** (Supra) is thus clearly distinguishable. Therefore, I am not persuaded to accede to the submission on behalf of the defendant.

33. The third challenge based on the non-compliance with the mandatory provisions of pre-institution mediation under Section 12-A of the Commercial Courts Act, 2015, was based on the premise that though the plaintiff had invoked pre-institution mediation yet since the plaintiff was pursuing very same claim before the Arbitrator, the said exercise was rendered meaningless.

34. Mr. Mody would urge that the purported mediation invoked by the plaintiff on 25th March 2022 was illusory, non-effective and contrary to the mandate of law, as Halkara was simultaneously pursuing an identical claim before the Arbitral Tribunal. The defendant was, thus, justified in declining to participate in the said pre-institution mediation. Mr. Mody further submitted that, it was only on 25th June 2021 Halkara made a statement that it would not be pursuing the claim

for Rs.4,00,00,000/- in the arbitration proceedings. Consequently, the Non-Starter Report dated 7th June 2021 given by the main mediation center, High Court of Bombay, is of no avail and, thus, the mandatory requirement under Section 12-A(1) of the Commercial Courts Act, 2015 can not be said to have been complied with, in letter and spirit.

35. Mr. Mody placed reliance on a Division Bench judgment of this Court in the case of *Deepak Raheja Vs. Ganga Taro Vazirani*⁷, wherein disagreeing with a learned Single Judge of this Court that the provision contained in Section 12-A of the Commercial Courts Act, 2015 is directory, the Division Bench held that the said provision is mandatory. Paragraph 34 reads as under :-

34. Thus, we hold that section 12A of the Act of 2015 is mandatory, and a commercial suit of specified value which does not contemplate any urgent interim relief under the Act of 2015, cannot not be instituted unless the plaintiff exhausts the remedy of preinstitution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government. Considering the object and purpose of Section 12A of being rooted in the public interest, there is no question of it being waived by a party. The findings in the impugned order to the contrary are set aside.
(emphasis supplied)

36. Indisputably, in the case at hand, the plaintiff invoked pre-institution mediation on 25th March 2021. The Non-Starter Report dated 7th June 2021 indicates that the matter was scheduled for appearance for the opposite party, on almost eight occasions. Lastly, noting the non appearance of the opposite party on 4th June 2021, Non-

⁷ Commercial Appeal (L) No.11950 of 2021

Starter Report was submitted.

37. It is not the case of the defendant that he was not served with the notice of pre-institution mediation proceedings. On the contrary, according to defendant, since Halkara had made a claim before the Arbitral Tribunal, he declined to participate in the mediation proceedings till an election was made by Halkara and plaintiff.

38. In the backdrop of these facts, I find difficult it to agree with the submission of Mr. Mody that there was no attempt at pre-institution mediation as envisaged by Section 12-A of the Commercial Courts Act, 2015. A party may choose not to participate in the pre-institution mediation proceedings for meriyad reasons. The justifiability of such reasons can not be, however, pressed into service to allege that there was non-compliance with the mandatory provision. What has to be seen is, whether the pre-institution mediation was explored or not.

39. The upshot of the aforesaid consideration is that none of the three grounds sought to be urged on behalf of the defendant is worthy of countenance as a strong or substantial defence to warrant an unconditional leave to defend the suit.

40. As indicated above, on merits, the defence hinges upon an understanding, which is not evidenced any document, between plaintiff and defendant that the plaintiff would forgo the claim. Implicit in this defence is an unequivocal admission of an advance of Rs.4,00,00,000/-

and the acknowledgment of the liability to pay the sum of Rs.4,36,00,000/-.

41. The acknowledgment of liability, as evidenced by the confirmation of the accounts, however, does not advance cause of the plaintiff to the extent desired by the plaintiff. The plaintiff has claimed interest on the said advance of Rs.4,00,00,000/-, at the rate of 18% per annum from the date of the advance up to date of the institution of the suit and also further interest at the same rate.

42. Since the confirmation of the accounts was restricted to the sum of Rs.4,36,00,000/- right from 1st April 2013 to 1st April 2018, the plaintiff, at this stage, can not be heard to urge that the defendant had agreed to pay interest @ 18% per annum, as evidenced by the promissory note. First and foremost, the suit based on the promissory note is simply barred by law of limitation. Secondly, the confirmation of the accounts as of 1st April 2018, which constitutes a fresh cause of action, would imply that the plaintiff also agreed that the defendant was liable to pay the amount of Rs.4,36,00,000/- only as of that day.

43. The situation which thus obtains is that the defendant can be said to have raised triable issues as regards the claim of the plaintiff towards interest on the principal sum of Rs.4,00,00,000/-. The question as to whether there was a tacit understanding between the parties that the sum of Rs.4,36,00,000/- would not carry interest

beyond 1st April 2013 is also a matter for trial. Thus, it would be in the fitness of things to grant leave to the defendant to defend the suit on the condition of deposit of Rs.4,36,00,000/- in Court, which is, by and large, an admitted liability.

44. Hence the following order :

: O r d e r :

- (i) Leave to defend the suit is granted to the defendant on the condition of deposit of the sum of Rs.4,36,00,000/- (Rupees Four Crore Thirty Six Lakhs Only) in this Court within a period of eight weeks from today.
- (ii) If the aforesaid deposit is made, within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendant shall file written statement within a period of thirty days from the date of deposit;
- (iii) If this conditional order of deposit is not complied with, within the aforesaid stipulated period, the plaintiff shall be entitled to apply for an *ex-parte* decree against the defendant after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.
- (iv) Summons for Judgment stands allowed to the aforesaid extent. No costs.

[N. J. JAMADAR, J.]