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

SUMMON FOR JUDGMENT NO. 29 OF 2022
IN
COMM. SUMMARY SUIT NO. 23 OF 2022

Ashutosh Bhatt & Co. & ors. ...Plaintiffs

Versus

Rajesh Harish Sharma ...Defendant

Mr. Aseem Naphade, i/b Ramiz Shaikh and Dipti Karadkar, for the Plaintiffs.
Mr. Neerav Merchant, a/w Mona Malvade, Hubab Sayyed, i/b Thakordas & Madgavkar, for the Defendant.

CORAM: N. J. JAMADAR, J.
DATED : 17th NOVEMBER, 2022

ORDER:-

1. This commercial division summary suit is instituted for recovery of a sum of Rs.1,30,00,000/- alongwith interest at the rate of 18% p.a. from the date of the suit till payment and/or realization.

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

(a) Plaintiff no.1 is a partnership firm. It deals in the business of trading in steel and allied products. Plaintiff nos.2 and 3 are the partners of plaintiff no.1. The defendant also deals in the business of manufacturing and trading of steel under the name and style of, "Jai Durga Steel Pvt. Ltd.".

(b) In the month of August, 2021, the defendant approached the plaintiffs for investment in the business of Jai Durga Steel Pvt. Ltd. and promised to repay the amount invested alongwith return at the rate of 30% by November/ December, 2021. Pursuant to the representation made by the defendant, plaintiff no.2 transferred an amount of Rs.1 Crore in the account of the defendant through RTGS, against two postdated cheques drawn for Rs.1 Crore and Rs.30,00,000/- respectively.

(c) In terms of the agreement between the parties, on 15th November, 2021, plaintiff no.2 sought an update from the defendant. Initially, the defendant avoided to respond. Eventually on 22nd December, 2021, the defendant through a WhatsApp message acknowledged the liability to pay the principal amount of Rs.1 Crore alongwith the agreed premium of Rs.30,00,000/- thereon. However, the defendant sought time. Despite repeated assurances, the defendant failed to return the principal amount and the agreed premium thereon. Hence, the plaintiffs presented the cheques drawn by the defendant, payable on 30th September, 2021, for encashment. Upon presentment, those cheques were returned unencashed on account of insufficiency of funds. Notices were addressed by the plaintiffs calling upon the defendant to pay the amount covered by the dishonoured cheques. The defendant neither complied with the demand nor gave reply to the notices. Hence, the plaintiffs were constrained to institute this suit for realization of the amount based on the negotiable instruments and the acknowledged liability.

3. Upon service of writ summons, the defendant entered appearance. Thereupon the plaintiffs took out a Summons for Judgment. An affidavit-in-reply is filed by the defendant seeking an unconditional leave to defend the suit.

4. The defendant assailed the tenability of the suit on the count that the cheques in question were delivered by way of security and, therefore, the suit is not maintainable under Order XXXVII of the Code of Civil Procedure, 1908 ("the Code"). Secondly, the suit is instituted without there being any cause of action. In accordance with the terms of the verbal agreement between the parties, according to the defendant, the principal amount of Rs.1 Crore was to be repaid alongwith premium of Rs.30,00,000/- either in three months from the date of remittance i.e. 27th August, 2021 or after a period of one year and/or 15 months thereof. The parties had agreed for such term of repayment as the amount availed from the plaintiffs was invested by the defendant in the business of “Nav Durga Steel Traders”, of which the defendant is the sole proprietor.

5. Contextually, the defendant contends that the averments in the plaint qua the investment of the amount in the business of Jai Durga Steel Pvt. Ltd., a company incorporated under the Companies Act, 1956, are incorrect. Comparing and contrasting the averments in the plaint and the pre-suit notice date 17th January, 2021, wherein it was, *inter alia,* asserted that the defendant had guaranteed the repayment of the aforesaid amount availed by M/s. Jai Durga Steel Pvt. Ltd., the defendant contends, there is material inconsistency in the claim of the plaintiffs.

6. The defendant further contends that the plaintiffs had unjustifiably lodged a complaint with Khar Police Station with a view to armtwist the defendant to pay the amount which had not fallen due. On these, amongst other, grounds the defendant has prayed for an unconditional leave to defend the suit.

7. I have heard Mr. Naphade, the learned Counsel for the plaintiffs and Mr. Merchant, the learned Counsel for the defendant, at some length. With the assistance of the learned

Counsel, 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 tendered on record.

8. Mr. Naphade, the learned Counsel for the plaintiffs, submitted that the present case is an open and shut case of availing loan against negotiable instruments by making representations and later on resiling therefrom. Since the factum of availing of the sum of Rs.1 Crore and the agreement to repay the same alongwith a premium of Rs.30,00,000/- are, undisputed, the defences sought to be raised by the defendant are sham and frivolous. Amplifying the submission Mr. Naphade would urge that not only the issue, presentment and dishonour of the cheques are incontrovertible but also there are clear and explicit admissions in the pre-suit correspondence between the parties and even in the affidavit-in-reply. As the plaintiffs claim based on dishonoured cheques, is further fortified by clear and explicit admissions, the defendant does not deserve leave to defend the suit and the plaintiffs are entitled to a decree, urged Mr. Naphade.

9. In opposition to this Mr. Merchant, the learned Counsel for the defendant, submitted with tenacity that the existence or otherwise of a verbal agreement as to the time for repayment is a matter which warrants adjudication and, resultantly, an unconditional leave to defend the suit deserves to be granted. Mr. Merchant would urge that though the fact that the plaintiffs had parted with a sum of Rs.1 Crore is not in dispute yet the nature of the said advance and also the time of repayment are in contest. From the own showing of the plaintiffs, the said amount was given by way of an investment. It, therefore, did not partake the character of a debt. Secondly, the parties had verbally agreed that the said amount was to be repaid either within three months or one year to 15 months of the said remittance. Both these issues, according to Mr. Merchant, warrant a trial.

10. To lend support to the aforesaid submission, Mr. Merchant banked upon a Division Bench judgment of this Court in the case of ***Gokulprasad Poddar vs.Ramrikhdas Parasrampuria and Co.***[1] In the said case, it was enunciated that when a plaintiff is relying on an oral agreement which is denied by the defendant on affidavits, ordinarily the Court should grant unconditional leave; but there may be cases where the Court may hold the contract established after perusing the affidavits. It may be held to be established by surrounding circumstances or it may be

1 AIR 1955 Bombay 276.

held to be established from the conduct of the defendant. But where the affidavits do not clearly establish the oral contract relied upon by the plaintiff, it may well be that Court should grant unconditional leave in order that the plaintiff should establish the contract by oral testimony to be tested by the Court.

11. Reliance was also placed on the recent pronouncement of the Supreme Court in the case of ***B. L. Kashyap and Sons Ltd. vs. M/s. JMS Steels and Power Corporation and Another***[2] wherein the tests to be applied while considering grant of leave to defend a summary suit were reiterated.

12. I have given anxious consideration to the aforesaid submissions. To begin with, it may be imperative to note few uncontroverted facts. The remittance of a sum of Rs.1 Crore by the plaintiffs to the defendant on 27th August, 2021 is indubitable. Secondly, there is not much controversy over the fact that the defendant had agreed to repay the said amount alongwith return/premium of Rs.30,00,000/-. Thirdly, the fact that the defendant had drawn and delivered two postdated cheques payable on 30th September, 2021, on the very day, is also not much in contest. The parties are at issue over the

2 (2022) 3 Supreme Court Cases 294.

nature of the advance, the purpose for which the cheques were drawn and the period within which the amount was to be repaid.

13. On the aspect of the nature of the advance, in the plaint, the plaintiffs have asserted that the defendant induced them to invest a sum of Rs.1 Crore by making a promise that the said amount would be returned alongwith 30% premium thereon. There may be substance in the submission on behalf of the defendant that there is an inconsistency as regards the nature of the payment in the plaint and the affidavit in support of the Summons for Judgment. However, the said discrepancy is not of much significance. It is not the case of the defendant that the plaintiffs had agreed to invest the amount and reap the benefits on the said investment as and when it yielded profit. On the contrary, it is claim of the defendant that the said amount was agreed to be repaid alongwith a fixed premium of Rs.30,00,000/- either within three months or 12 to 15 months. In the circumstances, the nature of the said advance pales in significance.

14. The only question which may arise is, whether the said remittance was in the nature of loan or deposit. In the case of a deposit, there is no immediate obligation on the debtor/depositee to seek the creditor. In the case of loan, however, the principle that the debtor must seek the creditor applies. The defendant does not contend that the amount was advanced by way of deposit for a particular period. In contrast, the defendant contends the period of repayment was variable i.e. three months or 12 to 15 months of the remittance.

15. It would be contextually relevant to note that the defendant propounds a verbal agreement as regards the period of repayment. The existence or otherwise of such an agreement is, by its very nature, a matter for adjudication. However, a mere assertion in the affidavit-in-reply that the amount was agreed to be repaid either within three months or 12 to 15 months may not by itself render the defence either substantial or fair or reasonable. In contrast, the pre-suit correspondence between the parties indicates that as early as 22nd December, 2021, the defendant had acknowledged that he had promised to pay the entire original amount lent plus the premium and the same was 100% payable and there was delay on the part of the defendant by a month due to some unforeseen issues. However, that would not change the profitability of the deal and the entire amount would be paid. In the affidavit-in-reply also, the defendant acknowledges in clear and explicit terms that he had promised to pay a premium of Rs.30,00,000/-. As regards the period of repayment, the minimum period was three months and the maximum was one year to 15 months.

16. In the face of these admissions, the contention on behalf of the defendant that the amount had not fallen due, does not merit acceptance. Likewise, it is not the case of the defendant that there was some other transaction towards security of which the subject cheques were drawn. Thus, both the defences of the cheques having been drawn towards security and the debt not having become due and payable are not worthy of sustaining an unconditional leave to defend. The situation is required to be appreciated in the backdrop of undisputed advance of a sum of Rs.1 Crore by the plaintiffs to the defendant. In the case at hand, additionally, the defendant does not dispute the return/premium, which he had promised to pay.

17. Nonetheless, the question as to whether the said amount of Rs.30,00,000/-, to be repaid by way of premium/return within a quarter of remittance, was in the nature of a reasonable recompense or assumed the character of usurious return raises a triable issue. To the extent of the amount of premium to be paid by the defendant to the plaintiffs, in my considered view, the defendant deserves an opportunity to contest the claim.

18. In view of the above, I am persuaded to grant a conditional leave to the defendant to defend the suit subject to deposit of the principal amount of Rs.1 Crore.

19. Hence, the following order:

: O R D E R :

(i) The defendant is granted leave to defend the suit on the condition of deposit of a sum of Rs.1 Crore 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 defendant shall file his 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 defendant after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.

(iv) Summons for Judgment accordingly stands disposed.

[**N. J. JAMADAR, J.**]