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

**SUMMONS FOR JUDGMENT NO.66 OF 2021**
**IN**
**SUMMARY SUIT NO.03 OF 2021**

Bharatrao Kamte and Another ...Applicants
*In the matter between*
Bharatrao Kamte and Another ...Plaintiffs
vs.
Charan Shetty ...Defendant



Mr. Jeshan Sinha a/w. Mr. Ayush Ghandy i/b. Wadia Ghandy & Co., for the Plaintiff.
Mr. Abhishek Adke a/w. Ms. Vibha Joshi, for the Defendant.

**CORAM : N. J. JAMADAR, J.**
**DATE : SEPTEMBER 08, 2022**

**P.C.:**

*1.* This Commercial Division Summary Suit is instituted to recover an amount of Rs. 2,50,00,000/- along with interest @ 18% p.a. from the respective date of the dishonour of the cheques drawn towards the repayment of the said amount.

*2.* The plaintiff No. 2 is the wife of the plaintiff No. 1. The plaintiffs were acquainted with the defendant. Pursuant to the requests, and assurances of timely repayment, the plaintiff No. 1 had advanced an amount of Rs. 50 lakhs on 23rd October, 2017 and the plaintiff No. 2 had advanced Rs. 2 Crores on 24th October, 2017.

*3.* Prior thereto, the plaintiffs' daughter Ms. Ashika Kamte, who had known the defendants from before had advanced a sum of Rs. 25 lakhs on 3rd July, 2017. The defendant repaid the loan of Rs. 25 lakhs to Ms. Ashika. However, the defendant committed default in repayment of the loan amount advanced by the plaintiff by March, 2018, as promised. As repeated requests by the plaintiff, did not yield any desired result, there were negotiations between the advocates for the plaintiffs and defendant. In a communication dated 7th September, 2018, addressed on behalf of the defendant, not only the advance of Rs. 2,50,00,000/- was admitted but also the liability to pay the interest thereon.

*4.* Eventually, towards the repayment of the loan amount, the defendant issued a cheque in favour of the plaintiff No. 2 for a sum of Rs. 2 Crores drawn on Standard Chartered Bank, Kemps Corner Branch payable on 25th February, 2019. The defendant had also drawn a cheque for Rs. 50 lakhs in favour of the plaintiff No. 1, payable on 15th March, 2019. However, both the cheques were returned un-encashed, on presentment, on account of insufficiency of funds. Statutory demand notice under Sec.138 of the Negotiable Instruments Act, 1881 (Act, 1881) was issued. Consequent to failure on the part of the defendant to comply with the demand therein, the plaintiffs were constrained to lodge complaint before the jurisdictional Magistrate. Simultaneously, this suit.

*5.* Upon service of the Writ of Summons, the defendant entered appearance. Thereupon, the plaintiffs have taken out a Summons for Judgment.

*6.* An affidavit in reply is filed on behalf of the defendant seeking an unconditional leave to defend the suit. The defendant has assailed the tenability of the suit on the ground that there is no written contract. The plaintiffs are stated to be guilty of *Suggestio falsi Suppressio Veri.*

*7.* On merits without contesting the fact that the plaintiffs had advanced a sum of Rs. 2,50,00,000/- to the defendant, the later contends, the relations between the plaintiffs and defendant were extremely cordial and, thus, the advance was in the nature of friendly loan and it had no trappings of a commercial transaction. According to the defendant, the said amount was to be repaid without any interest and at the defendant's will. Yet, the plaintiffs started to pester the defendant to repay the amount in the month of January, 2018 and, thus, the defendant was constrained to execute certain documents for security, to alleviate the concerns of the plaintiff, including the subject cheques. However, those cheques were not to be presented for encashment.

*8.* The defendant further contends that even post dishonour of the cheques, there were negotiations between the parties and it was, inter alia, agreed that the defendant should convey the flats in Manglore in favour of the plaintiffs in lieu of repayment of the said loan amount and, upon payment of the said amount, the plaintiffs would reconvey those flats. Pursuant to the said agreement, the draft of the instruments, to be executed between the parties, were exchanged. Lastly, it is categorically denied that there was any agreement to pay interest on the amount of loan, advanced by the plaintiffs. In the absence thereof, the claim for interest is stated to be wholly untenable. Thus, the defendant has sought an unconditional leave to defend the suit.

*9.* I have heard Mr. Jeshan Sinha, learned counsel for the plaintiffs, and Mr. Abhishek Adke, learned counsel for the defendant at some length. With the assistance of the learned counsels for the parties, I have perused the averments in the plaint, the documents annexed thereto, and affidavit in reply seeking leave to defend the suit.

*10.* To start with, the parties are not at issue over the fact that the plaintiffs had advanced a sum of Rs. 2,50,00,000/- in the aggregate, to the defendant. By and large there is not much controversy over the character of the advance as well. In the light of the cordial relations, which the parties purportedly shared, the advance was in the nature of a friendly loan. However, the parties are at issue over the period after which the said advance was to be repaid. This issue also pales in significance with the issue of the cheques by the defendant in favour of the plaintiff, which is also not in contest.

*11.* An endeavour was made by the defendant to salvage the position by raising a contention that the said cheques were issued by way of security only and they were not to be presented for encashment. The said contention is required to be stated to be rejected. In the face of clear and explicit acknowledgment of receipt of the sum of Rs. 2,50,00,000/- and also the liability to repay the same, it does not appeal to human credulity that the cheques were drawn by way of security. No other purpose than repayment of the acknowledged liability is discernible.

*12.* At this stage, the submission on behalf of the defendant that there was no stipulation for payment of interest, warrants consideration. It is imperative to note that the plaintiffs have not approached the Court with a case that the amount was lent on interest. Nor the plaintiffs assert that even at the time the cheques were drawn towards repayment of the loan amount, the parties agreed that the defendant would thence pay interest. On the contrary, the plaintiffs claimed interest on the amount from the date of dishonour of the cheques. In view of the provisions contained in section 80 of the Negotiable Instruments Act, 1881 when no rate of interest is specified in the instrument, interest on the amount due thereon shall be calculated at the rate of eighteen per centum per annum, from the date of which the same ought to have been paid by the party charged, until tender or realization of amount due thereon or until such date after the institution of a suit to recover such amount as the Court directs. Thus, the claim for interest on the basis of a statutory right is justifiable.

*13.* In the aforesaid view of the matter, the edifice of the defence sought to be built on behalf of the defendant on the premise of absence of stipulation for payment of interest also does not merit countenance.

*14.* This propels me to the consideration of defence that, even post dishonour of the cheques, there were negotiations between the parties resulting in novation of original contract between the parties. In support of the contention that the parties had agreed that, in lieu of repayment, the defendant would transfer the flats at Manglore in favour of the plaintiffs and, for the said purpose drafts of the instruments to be executed, were exchanged, the defendant has annexed a copy of the draft agreement shared by the advocate for the plaintiffs vide email dated 13th August, 2019. Undoubtedly, the said communication was in the nature of 'without prejudice' communication. Nonetheless it lends support to the case of the defendant that there were negotiations between the parties even post dishonour of the cheques. Whether there was a concluded agreement between the parties so as to constitute novation of contract is a triable issue. Thus, it can not be said that the defence raised by the defendant is a moonshine or vexatious defence. However, in view of an equivocal acknowledgment of the liability to repay the principal amount of Rs. 2,50,00,000/-, the defendant is not entitled to an unconditional leave to defend, even if it is assumed that the defendant has raised a fair and triable defence.

*15.* Hence, I am inclined to grant leave to defend the suit subject to condition of deposit of the sum of Rs. 2,50,00,000/-.

Thus the following order.

## ORDER

1] Leave to defend the suit is granted to the defendant subject to deposit of the sum of Rs. 2,50,00,000/- in this Court within a period of six weeks from today.

2] 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;

3] 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.

4] Summons for Judgment stands disposed in the aforesaid terms.

**(N. J. JAMADAR, J.)**