

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

SUMMARY SUIT NO. 6 OF 2021  
WITH  
SUMMONS FOR JUDGMENT NO 18 OF 2022  
WITH  
SUMMONS FOR JUDGMENT NO. 5 OF 2022  
IN  
SUMMARY SUIT NO. 6 OF 2021

Jatin Ramesh Diwan

...Plaintiff

**Vs.**

F.W.Team And Ors.

...Defendants

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Mr. Vishal Kanade (Counsel) a/w. Mr. Monil Punjabi (Counsel) & Mr. Gobinda C Mohanty (Advocate) i/b, M/s. Mohanty & Associates for Plaintiff.

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**CORAM : ABHAY AHUJA, J.**

**DATE : 6<sup>th</sup> SEPTEMBER, 2023**

**P.C. :**

1. The Summary Suit had been filed for recovery of an amount of Rs. 3,56,60,000/- (principal amount) and an amount of Rs, 1,94,97,968/- as interest from 1<sup>st</sup> April, 2017 up to 21<sup>st</sup> October, 2021 on the basis of two letters of confirmation issued by the Defendant No. 1 both dated 31<sup>st</sup> March, 2017.

2. The brief facts are that the Plaintiff through common friends and relatives came into contact with one Hetal Hakani (erstwhile partner of Defendant No. 1 Firm). Hetal Hakani, with a view to expand the

business of Defendant No. 1 ('the Firm') approached the Plaintiff for a friendly loan. The Plaintiff in good faith and at the request of Hetal Hakani advanced various amounts to Defendant No. 1 from time to time. The Defendant repaid certain amounts to the Plaintiff both towards principal and interest as more particularly set out in the Plaint. Subsequent to certain advances made by the Plaintiffs to Defendant No. 1, a Loan Agreement dated 23<sup>rd</sup> November, 2014 was entered into between the Plaintiff and Defendant No. 1, inter alia, recording that the Plaintiff would advance a loan of Rs. 2,50,00,000/- to Defendant No. 1. Under the said Loan Agreement, Defendant No. 1 created certain securities in favour of the Plaintiffs. The Plaint sets out the manner in which the amounts were advanced by the Plaintiff to Defendant No. 1 and also sets out that Defendant No. 1 had on 31<sup>st</sup> March, 2016 issued two letters of confirmation to the Plaintiff issued by Hetal Hakani which confirmed :

- i. that an amount of Rs. 3,06,60,000/- along with interest was due and payable by the Defendant No. 1 to the Plaintiff and that the same would be paid along with interest on or before 31<sup>st</sup> December, 2017.
- ii. that an amount of Rs. 50,00,000/- was due and payable by Hetal Hakani to the Plaintiff which amount would be paid along with the interest on or before 31<sup>st</sup> December, 2017.

3. Despite issuance of said letter of confirmation, no amounts were repaid by Defendant No. 1 to the Plaintiff. Thereafter, in April, 2021 Hetal Hakani passed away. The defendants No.3 to 5 are the legal heirs of deceased Hetal Hakani. The Plaintiff then learnt that the properties which were given as security to the Plaintiff under the loan agreement were in fact mortgaged with the Bank of Baroda without Plaintiff's knowledge and consent. These properties were subsequently sold by Bank of Baroda.

4. The Plaintiff filed the suit against the Defendants.

5. Mr. Kanade, Learned Counsel appearing on behalf of the Plaintiff, would submit that the loan advanced by the Plaintiff to Defendant No. 1 were evidenced by the various cheques/RTGS transactions more particularly referred to in the Plaint. He relied upon the copies of the certificates issued by Punjab National Bank (formerly known as Oriental bank of Commerce), JVPD Branch, Mumbai and HDFC Bank, Oshiwara Branch, Mumbai, which reflect the details of the amounts advanced.

6. Mr. Kanade, has also referred to the first Letter of Confirmation dated 31<sup>st</sup> March, 2017 (the first Letter of Confirmation) and

pointed out therefrom that Hetal Hakani, on behalf of Defendant No. 1 had admitted that an amount of Rs. 3,06,60,000/- was due and payable by Defendant No. 1 to Plaintiff along with interest at the rate 12% per annum. He pointed out that by the said Letter of Confirmation Defendant No. 1 had undertaken to make the repayment of the said sum along with interest on or before 31<sup>st</sup> December, 2017 at Mumbai. Mr. Kanade, submitted that despite this unequivocal admission no monies were repaid by the Defendant No. 1.

7. In respect of the second Letter of Confirmation Mr. Kanade submitted that the same was issued by Hetal Hakani in his personal capacity and not as a partner of Defendant No. 1 Firm. He, therefore, submitted that the Plaintiff would confine its claim only on the basis of the first Letter of Confirmation. He submitted that Defendant Nos.3 to 5 would being the legal heirs of the deceased Hetal Hakani be liable to the Plaintiff, for all amounts due and payable by the said Hetal Hakani. That Defendant Nos. 3 to 5 would be liable to make payment of an amount of Rs. 3,06,60,000/- in terms of the first Letter of Confirmation.

8. Mr. Kanade, learned Counsel appearing on behalf of the Plaintiff would submit that pursuant to an order dated 1<sup>st</sup> February, 2023

this Court (Coram : Arif S. Doctor J.) has after considering the arguments on behalf of the Plaintiff as well as Defendants No.3 to 5 on the basis of the first letter of confirmation issued by the Defendant No.1 dated 31<sup>st</sup> March, 2017 had decreed the Suit against Defendant No.2 as though served, Defendant No.2 did not appear nor filed any affidavit in reply contesting the Summons for Judgment.

9. Mr. Kanade, would submit that however after considering the affidavit in reply filed on behalf of the Defendants No.3 to 5 and the arguments made on behalf of the said Defendants vide the same order, the Court had despite holding that the defenses raised by the said Defendants as highly improbable, in the interests of justice, granted conditional leave to Defendants No.3 to 5 to defend the suit also since the Defendants No.3 to 5 were the legal heirs of the deceased partner not personally involved in the transaction.

10. Learned Counsel would submit that pursuant to the said order leave to defend the suit was granted to the Defendants No.3 to 5 subject to deposit of sum of Rs. 25,00,000/- in the Court within a period of eight weeks from 1<sup>st</sup> February, 2023. It was also provided in the said order that if the said deposit was made within the stipulated period, the suit would be

transferred to the list of commercial causes and the Defendants No.3 to 5 would then file written statement within a period of 30 days from the date of deposit. However, it was also provided that if the conditional order of deposit was not complied with within the aforesaid period, the plaintiff would be entitled to apply for an ex parte decree against the said Defendants No.3 to 5 after obtaining Non Deposit Certificate from the Prothonotary and Senior Master of this Court.

11. On 30<sup>th</sup> August, 2023 when this matter was listed, Mr. Vishal Kanade, learned Counsel appeared for the Plaintiff and informed this Court that the Defendants No.3 to 5 had failed to comply with the order of deposit of Rs. 25,00,000/- and, therefore, the plaintiff would be entitled to apply for an ex parte decree against Defendants No.3 to 5 as the Plaintiff had already obtained Non Deposit Certificate from the Prothonotary and Senior Master of this Court. After hearing Mr. Kanade, the following order was passed by this Court :-

“1. When the matter is called out Mr. Kanade, learned Counsel for the Plaintiff, would submit that pursuant to order dated 1<sup>st</sup> February 2023, the summons for judgment was made absolute against Defendants no.1 and 2 and conditional leave was granted with respect to Defendants no.3 to 5, who are the heirs of the erstwhile deceased partner of Defendant no.1 – firm, subject to deposit of a sum of Rs.25,00,000/- in the Court, within a period of eight weeks from 1<sup>st</sup> February 2023, and consequent orders were passed in that regard that if the

order of deposit was not complied with, the Plaintiff would be entitled to apply for an *ex-parte* decree against the Defendants no.3 to 5 after obtaining No Deposit Certificate from the Prothonotary and Senior Master of this Court.

2. This order was modified pursuant to order of speaking to the minutes of 24<sup>th</sup> April 2023 with respect to Defendants no.1 and 2 only.

3. Today, Mr.Kanade submits that although Advocate for Defendants no.3 to 5 had appeared on 1<sup>st</sup> February 2023 when the conditional leave was granted, today the said Defendants are neither present nor represented, nor have the said Defendants deposited the sum of Rs.25,00,000/- within the stipulated period, and therefore, decree may be passed against them. Learned Counsel submits that the originals of the documents relied upon in the plaint have already been tendered before this Court on an earlier occasion.

4. Considering that this matter has been listed without any particular notice to the Defendants, this Court is of the view that some time be granted, in case the Defendants no.3 to 5 want to represent their case. Accordingly, list on **6<sup>th</sup> September 2023** under the caption 'For decree'.

5. Let the Registry produce the originals that were tendered by the learned Counsel for the Plaintiff on the earlier occasion.

6. Learned Counsel would submit that the copies of the originals were attempted to be uploaded on the High Court website, however, the website has raised an objection. Let the Registry accept the said documents and the objection be removed.”

12. Today the matter has been listed for passing decree against Defendants No.3 to 5. Mr. Kanade, learned Counsel would submit that despite notice of the matter listed today, the Defendants No.3 to 5 have failed to appear or cause appearance and therefore this is a fit case for

passing of exparte decree against the Defendants No.3 to 5. Learned Counsel undertakes to file an affidavit of service in this regard within a period of one week.

13. Mr. Kanade, has also taken this Court through the originals of the documents referred to and relied upon in the plaint. In support of the claim, learned Counsel would submit that since some time has elapsed from the date of the decree passed against Defendant No.2, there is a revised particulars of claim containing additional amount of interest for the subsequent period, which he tenders across the bar and which is taken on record and marked as "X" for the purposes of identification.

14. Mr. Kanade, also furnishes a certificate of non-deposit from the learned Prothonotary and Senior Master of this Court dated 7<sup>th</sup> June, 2023.

15. I have heard Mr. Kanade and also considered the submissions made by the learned Counsel.

16. On 1<sup>st</sup> February, 2023 this Court (Coram : Arif S. Doctor J.) had passed the following order :-

### ORDER

“i. Leave to defend the suit is granted to the Defendant Nos. 3 to 5 subject to deposit of a sum of Rs. 25,00,000/- in the 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 Nos. 3 to 5 shall file written statement within a period of 30 days from the date of deposit.

iii. If this conditional order of deposit is not complied with within the aforesaid period, the Plaintiff shall be entitle to apply for an *ex-parte* decree against the Defendant Nos. 3 to 5 after obtaining Non Deposit Certificate from the Prothonotary and Senior Master of this Court.

iv. Summons for judgment stand disposed of accordingly.

v. Suit as against Defendant No. 2 stands decreed.”

17. It would also be pertinent to refer to and quote paragraphs No.15 to 17 of the order dated 1<sup>st</sup> February, 2023.

“15. I have heard learned Counsel and also perused a copy of the Plaint and the Affidavit in Reply filed by Defendant Nos. 3 to 5. At the outset I must note that Defendant Nos. 3 to 5 have not denied or disputed the fact that they are the legal heirs of the deceased i.e. Hetal Hakani, partner of Defendant No. 1 Firm. There is also no dispute Hetal Hakani had in his capacity as partner of Defendant No. 1 Firm issued the first Letter of Confirmation. The Plaintiffs has placed on record sufficient material to demonstrate that in fact amounts were advanced by the Plaintiff to Defendant No. 1. The grounds on which the Defendant Nos. 3 to 5 seek to resist the claim of the Plaintiff (a) Defendant Nos. 3 to 5 were not aware of and/or were not liable for amounts advanced to Defendant No. 1 Firm by the Plaintiffs. (b) Defendant Nos. 3 to 5 were not bound by the loan agreement since they were

neither the Executor, Administrator, Assigns of Defendant No.1. (c) that no liability would devolved upon Defendant Nos. 3 to 5 in terms of the Partnership Deed. I find that these defenses are largely untenable since, Defendant Nos. 3 to 5 are sued in their capacity as legal heirs of Hetal Hakani (deceased partner of Defendant No. 1) and therefore, Defendant Nos. 3 to 5 would be liable for any amounts which the deceased Hetal Hakani would be liable for. In so far as the contentions that the defendant Nos. 3 to 5 were not liable in terms of the Partnership Deed of the said Firm. Though this was canvassed across the bar, no copy of the Partnership Deed was relied upon. Even if the Partnership Deed contains such a stipulation, the same would only be available as a defense against the other partners of the Firm and not a third party claim.

16. Even the defense of money lending is one which is merely pleaded, the same has not been elaborated nor have any details being placed on record to demonstrate that the Plaintiffs were in the business of money lending. It is also settled that the same is largely irrelevant, since the Plaint is on the basis of Letters of Confirmation which have been executed by the deceased partner i.e. Hetal Hakani and not on the Demand Promissory Notes.

17. Hence, even though I find that the defenses raised by Defendant Nos. 3 to 5 are highly improbable. I find that the interest of justice will be met, if the the Defendant Nos.3 to 5 are granted conditional leave to defend the Suit. I am inclined to grant this leave, also since, the Defendant Nos.3 to 5 are the legal heirs of the deceased partner, who personally not involved in the transaction in question. However, in so far as the Defendant No.2 is concerned, I find that Defendant No.2 though duly served has chosen not to appear and contest the Claim. Therefore, a decree must followed against Defendant No.2. In the circumstances the following order :-”

18. As noted above, the leave to defend was granted to the Defendants No.3 to 5 subject to deposit of Rs.25,00,000/- in the Court

within a period eight weeks and if the said order was not complied with the Plaintiff was entitled to apply for an exparte decree after obtaining Non Deposit Certificate from the Prothonotary and Senior Master of this Court.

19. A perusal of the Non Deposit Certificate date 7<sup>th</sup> June, 2023 clearly indicates that the Defendants No.3 to 5 have failed to deposit the sum of Rs.25,00,000/- in the Court within the prescribed period i.e. on or before 15<sup>th</sup> March, 2023 when the period of six weeks granted by this Court ended. Mr. Kanade, has also taken this Court through the originals of the documents referred to and relied upon by the Plaintiff in the plaint. I have also perused the particulars of claim which has been marked as “X” as above. The particulars of claim contains an additional amount of interest of Rs.76,07,467/- for the period of October 21, 2021 till July 31, 2023, @ 12% on the amount of Rs.3,56,60,000/- which in my view is only fair to award.

20. I have seen also the acknowledgment of the communication on behalf of the Plaintiff to the advocate for Defendants No.3 to 5 containing the acknowledgment of receipt. The Defendants No.3 to 5 though notified that the decree would be passed today have neither

chosen to remain present nor represented.

21. In the circumstances, the Plaintiff has become entitled to an exparte decree against the Defendants No.3 to 5.

22. The Suit is accordingly decreed against Defendants No.3 to 5 with an additional amount of Rs.76,07,467/- from October 21, 2021 till July 31, 2023, @12% on the amount of Rs.3,56,60,000/-.

23. Let the affidavit of service be filed within a period of one week.

(ABHAY AHUJA, J)