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

SUMMONS FOR JUDGMENT NO. 17 OF 2022
IN
SUMMARY SUIT NO. 5 OF 2021

Rinku Shah and Anr. … Plaintiffs
V/s.
Vishal Gandhi and Ors. … Defendants.

Mr. Anousak Davar with Mr. Nishit Tanna, Mr. Vikas Pandey and Mr. Mahavir Deshlehra i/b M. D. Legal LLP for the Plaintiffs.
Mr. Mahesh D. Pol for Defendant No.1.
Ms. Karishni Khanna with Mr. Pratik Jani and Mr. Prince Vaishnav i/b Prime Legem for Defendants No. 2 and 3.

CORAM :ABHAY AHUJA, J.
DATED : 30th OCTOBER, 2023.

PC:-

1. This suit has been filed by the Plaintiffs claiming to be the legal heirs and representatives of one Mr. Kalpesh Shah, seeking repayment of a loan amount of Rs. 1,00,00,000/- in terms of Memorandum of Understanding (the "MOU") / Loan Agreement dated 7th / 8th October, 2015 along with interest at the rate of 18% from the due date of payment viz. 15th February, 2021. The Plaintiff No.1 is the widow of Mr. Kalpesh Shah and the Plaintiff No. 2 is the elder son of Mr. Kalpesh Shah, who died on 25th September, 2019.

2. The case of the Plaintiffs is that the Defendant No. 1 has taken a loan of Rs. 1 Cr. from Mr. Kalpesh Shah under the MOU. The Defendants No. 2 and 3 are close family cum business acquaintances of Mr. Kalpesh Shah as well as Defendant No. 1 and statedly stood guarantor for the loan advanced to Defendant No. 1 and before the loan amount could be repaid, Mr. Kalpesh Shah passed away on 25th December, 2019. The Plaintiffs submit that as the Defendants failed to repay the loan amount by 6th October, 2020, the Plaintiffs have been constrained to recover the loan amount advanced in terms of the MOU. It is also submitted that even during the life time of Mr. Kalpesh Shah several rigorous follow ups were made with Defendants No. 1 and 2 seeking repayment without any success.

3. That on 27th January, 2021, the Plaintiffs sent a legal notice to the Defendants No. 1 and 2 terminating the MOU and calling upon the Defendants to repay the outstanding amount. However, since there was no reply nor payment, this suit came to be filed on 15th March, 2021.

4. After the Defendants have entered appearance, this summons for judgment has been taken out. Replies and rejoinders have also been filed.

5. Mr. Davar, learned Counsel for the Plaintiffs would submit that the deceased Mr. Kalpesh Shah advanced a loan of Rs. 1 Cr. in favour of the Defendant No. 1 by issuing two cheques of Rs. 50 lacs each in favour of Defendants No. 2 and 3, with Defendant no. 2 acting as a sole guarantor and also the deceased and the Defendants executed the MOU dated 8th October, 2015 as a security for the monies borrowed. Being the security instrument, no specific date was assigned in the said document towards the repayment of the entire amount. However, it was a mutual understanding between the parties that the said loan was to be repaid within a reasonable time and in any case within a period of five years. But unfortunately before the loan amount could be repaid, Mr. Kalpesh Shah expired on 25th December, 2019 leaving behind the Plaintiffs as the only surviving legal heirs and representatives.

6. Learned Counsel would submit that the Plaintiff No. 1, who is the wife of the deceased was always kept informed by the deceased of the details of all the transactions whatsoever being done by him including the transaction of the Defendants as agreed to in the MOU. It is submitted that the Plaintiff No.1 was taken by shock after the sudden death of her husband who had just before his death told the Plaintiff No. 1 about the

evil intentions of the Defendants in trying to usurp the Plaintiffs money by not repaying the said loan amount. However, because of the shocked state of mind, the Plaintiff No. 1 could not immediately pursue recovery of the said loan amount. Thereafter, the entire world had fallen prey to the Covid-19 pandemic and the related shut downs imposed by the respective governments. However, soon after the relaxation came into place, the Plaintiffs decided to confront the Defendants No. 1 and 2 for the repayment and also attempted to arrange a meeting but were disappointed as the Defendants No. 1 and 2 admitted having taken the said loan amount as also their joint and several liability towards repayment, however, they failed to make any payment towards the same. Due to the said failure the legal notice dated 27th January, 2021 was issued placing on record the facts for terminating the MOU/loan Agreement and calling upon Defendants No. 1 and 2 to repay the loan amount advanced by the deceased, which statedly had not been replied to.

7. Mr. Davar, would submit that the Defendants have nowhere denied the receipt of the loan amount of Rs. 1 Cr. That admittedly, the Defendants no. 2 and 3 each, have duly received Rs. 50 lacs from the Plaintiffs and such amounts have been transferred to the Defendant No. 1.

In support, learned Counsel draws the attention of this Court to the Memorandum of Understanding/ Loan Agreement dated 7th / 8th October, 2015 at Exhibit A and Exhibit B, which is a ICICI Bank statement of Mr. Kalpesh Shah indicating deposit of two equal amounts of Rs. 50 lacs into the accounts of Defendants No. 2 and 3, at page 20 onwards of the Plaint read with paragraph no. 18(e) (page no. 18) of the reply of Defendants No. 2 and 3. That the execution of all the documents as well as the transaction is an admitted position.

8. Learned Counsel for the Plaintiff would submit that in fact the Defendants have no case on merits except perhaps the defence on limitation as all other objections defences are technical in nature and curable and therefore, the summons for judgment be made absolute.

9. With respect to the objection on limitation, learned Counsel would submit that Article 19 of the Limitation Act, which provides that in the case of a suit filed for money payable for money lent, the period of limitation shall be three years and such time begins to run when the loan is made, learned Counsel would submit that Article 19 of the Limitation Act is not hit as there was a mutual agreement between the parties that

loan was repayable within a reasonable period of time and in any event within a period of five years from the date of the subject MOU that is by 6th October, 2020. Learned Counsel would submit that the said averment has been duly recorded in paragraph 5(h) of the Plaint to which there is no specific denial by either of the Defendants.

10. Learned Counsel accordingly submits that the summons for judgment be made absolute and the Defendants be directed to jointly and severally pay the Plaintiff a sum of Rs. 1 Cr as per the particulars of claim at Exhibit A to the Plaint with further interest at the rate of 18 %.

11. On the other hand, Mr. Pol, learned Counsel appearing for the Defendant No.1 and Ms. Khanna, learned Counsel appearing for Defendants No. 2 and 3 oppose and deny the submissions made on behalf of the Plaintiffs.

12. It is submitted that the MOU is vague and ambiguous and would need to be proved through evidence. That each of the parties have provided varying narratives of the terms of the MOU.

13. That the Plaintiffs case is that the deceased advanced loan of Rs. 1 Cr in favour of Defendant No. 1 by issuing two cheques of Rs. 50 lacs each in favour of Defendants No. 2 and 3, with Defendant No. 2 acting as a sole guarantor and simultaneously the deceased and the Defendants executed the MOU, whereas from Exhibit B of the Plaint, it is seen that the monies were transferred in August, 2015 in favour of Defendants No. 2 and 3 but the MOU was executed two months thereafter on 7th / 8th October, 2015, which is not simultaneously.

14. That Defendants No. 2 and 3 assert that in August, 2015 they borrowed Rs. 1 Cr from Mr. Kalpesh Shah for purchasing a residential flat, however, subsequently the transaction was cancelled and therefore Defendants No. 2 and 3 told Mr. Kalpesh Shah that they wanted to return of the monies. But instead of returning the amount, the deceased requested that the monies being given to a common friend of the deceased and Defendant No. 2 i.e. Defendant No. 1. On transferring the monies to Defendant No.1, the Defendants No. 2 /3 were to be discharged from any liability and upon the transfer, the Defendant No. 2 was not to remain guarantor for the loan amount. That the entire loan amount was repaid in parts to Defendant No. 1 as per table set out in paragraph 18 (e) of the

reply. That upon Mr. Kalpesh Shah's death, his family started demanding the loan amount from the Defendants No. 2 and 3 even though Mr. Kalpesh Shah did not claim any sum during his life time.

15. It is submitted that the Defendant No. 1 has addressed a letter dated 16th November, 2021 unequivocally admitting that he had repaid an amount of Rs. 96 lacs to Mr. Kalpesh Shah and would repay the balance Rs. 4 lacs in cash and that the suit is a collusive one in order to claim dual payment from Defendant No. 2. Considering that Mr. Kalpesh Shah did not even address a single letter or any correspondence to Defendants No. 2 and 3 during his life time claiming the outstanding amounts, the MOU is to be analysed along with surrounding circumstances.

16. Learned Counsel for the Defendants have vehemently argued that the suit is barred by limitation. Learned Counsel refer to Article 19 of the Limitation Act, 1963, submitting that limitation period for recovery of the loan wherein no time period is specified is three years from the date on which the loan is made. In the present case the limitation period expired on 8th October, 2018 i.e. during the lifetime of Mr. Kalpesh Shah, whereas the summary suit has been filed on 15th March, 2021. That although the

Plaintiffs have alleged that the loan was to be repaid within a reasonable time and in any case within a period of five years, however, this period is not mentioned in the MOU. That the Plaintiffs were not signatories to the MOU and have merely pleaded this case without any substantiation or proof. All that has been said is that the deceased Mr. Kalpesh Shah had told about the present transaction just before his death. The Plaintiffs' entire case is based on oral and unsubstantiated pleadings warranting the need for leading evidence. That this has been pleaded only to bring the suit within limitation. In any event, since limitation is a mixed question of law and fact, a trial is required and therefore, unconditional leave to defend be granted.

17. That Defendants No. 2 and 3 are husband and wife and although Defendant No. 3 has been made a party in her capacity as beneficiary under the MOU and a decree is also claimed jointly and severally against all the Defendants, the Defendant No. 3 is neither a guarantor nor a signatory to the MOU and therefore the summary suit is not maintainable against her. That the Defendant No. 3 had already transferred the amount of Rs. 50 lacs received from the Plaintiffs to Defendant No. 1. That even the Plaintiffs were aware of this and therefore, legal notice dated 27th

January, 2021 was not addressed to her. That there is a misjoinder of Defendant No. 3 as party to the present suit and on this ground also leave to defend be granted.

18. It is submitted that the entire loan amount was repaid in parts to Defendant No. 1. In support, learned Counsel refer to the table in paragraph 18(e) of page 18 of the reply and therefore, the Defendant No. 2 has stood discharged as guarantor.

19. It is also submitted that the MOU is not stamped and therefore not enforceable and, on this basis alone leave to defend be granted without any condition.

20. Learned Counsel for the Defendants submit that in view of the decision of the Hon'ble Supreme Court in the case of ***IDBI Trusteeship Services Ltd. vs. Hubtown Limited***[1] unconditional leave to defend be granted as triable issues have *inter alia* been raised with respect to limitation as well as the oral understanding between the parties that the loan was to be paid within a reasonable time and in any case within five years.

1 (2016) 11 S.C.R. 660

21. I have heard the learned Counsel and considered the rival contentions.

22. The transaction of payment by the deceased Mr. Kalpesh Shah to Defendants No. 2 and 3 appears at Exhibit B to the Plaint, which is Mr. Kalpesh Shah's ICICI Bank statement. However, in terms of Article 19 of the Limitation Act, the limitation period for recovery of a loan where no time is prescribed is three years from the date on which the loan is made. It appears that the money was advanced as a loan in 2015, whereas the summary suit has been filed on 15th March, 2021. However, a mutual understanding has been referred to in paragraph 5(h) of the plaint, where it has been stated on behalf of the Plaintiffs that the loan was to be repaid within a reasonable time and in any case within a period of five years. This period and the mutual understanding do not find any mention in the MOU and will have to be proved by the Plaintiffs. From a perusal of the MOU at Exhibit A to the Plaint the Defendant No. 3 does not appear to be a signatory to the MOU. These and other issues including the issue of repayment / discharge by / of Defendants No. 2 and 3 by making payment to Defendant No.1, repayment by Defendant No. 1 recorded in letter dated 16th November, 2021, as contended on behalf of the parties would, in my

view require to be considered at a trial on the basis of evidence and cannot be disposed of in a summary manner.

23. In the circumstances, in view of the principles laid down by the Hon'ble Supreme Court in the case of **IDBI Trusteeship Services Ltd. vs. Hubtown Limited (supra),** as well as in the case of **BL Kashyap and Sons Ltd Vs. M/s. JMS Steels and Power Corporation and Anr.**[2]**,** the following order is passed :-

ORDER

i. Leave to defend the present suit is granted to Defendant No.1 subject to depositing a sum of Rs.50,00,000/- in this Court within a period of six weeks from the date of uploading of this order and leave to defend to the Defendants No.2 and 3 is granted subject to depositing a sum of Rs. 50,00,000/- within a period of six weeks from the date of uploading of this order.

ii. If the aforesaid deposit(s) is/are made within the stipulated period, this suit shall with respect to the concerned Defendant(s) be transferred to the list of Commercial Causes and the said Defendant(s) shall file written statement(s) within a period of six weeks from the date

2 (2022) 3 SCC 294

of deposit(s).

iii. If the conditional order of deposit is not complied with within the period stipulated above, the Plaintiff shall be entitled to apply for an ex-parte decree against the concerned Defendant(s) after obtaining non-deposit certificate(s) from the Prothonotary and Senior Master of this Court.

iv. Summons for Judgment stands disposed of in the aforesaid terms.

(ABHAY AHUJA, J.)