IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

IA No. GA 6 of 2022

With

GA 7 of 2022

In

CS 116 of 2017

G.S. Fertilisers Pvt. Ltd.

Versus

AKJ Minerals Limited

Mr. Avinash Kankani
Mr. Manish Shukla
Ms. Sonali Bag

… For the plaintiff.

Mr. Shuvasish Sengupta
Mr. Anurag Bagaria
Ms. Riya Debnath
Mr. Devansh Sonthalia

… For the defendant.

Hearing Concluded On : 09.04.2024

Judgment on : 13.06.2024

Krishna Rao, J.:

1. The plaintiff has filed an application being G.A. No. 6 of 2022 for summary judgment and decree against the defendant for Rs.7,23,63,548/- along with interest. The defendant has filed an application being G.A. No. 7 of 2022 praying for leave to defend the suit unconditionally being C.S. No. 116 of 2017.

2. The plaintiff has filed the suit being C.S. No. 116 of 2017 against the defendant for recovery an amount of Rs.7,23,63,548/- along with interest. The plaintiff has advanced an amount of Rs.1,70,00,000/- on 3rd January, 2011 by way of RTGS and a sum of Rs.2,35,00,000/- on 4th January, 2011 by RTGS totaling Rs.4,05,00,000/- to the defendant for purchase of immovable properties and the defendant has acknowledged the said amount. In the month of September, 2011, the defendant has informed the plaintiff that the defendant is not in a position to convey the properties to the plaintiff and the defendant agreed to return the amount received by the defendant to the plaintiff. The defendant to discharge its lability had issued two cheques being No. 117588 dated 8th April, 2014 of Rs.2,50,00,000/- of Federal Bank, Overseas Branch, Kolkata and cheque No. 117590 dated 8th April, 2014 of Rs.1,55,00,000/- of Federal Bank, Overseas Branch, Kolkata.

3. The plaintiff has presented the said cheques for encashment but the same were dishonored with the remark 'insufficient funds'. The defendant with a covering letter dated 28th April, 2014, sent two cheques being Cheque No. 128672 and cheque No. 128673 dated 20th May, 2014 of Rs.2,50,00,000/- and Rs.1,55,00,000/-. The defendant by a letter dated 29th December, 2014 by admitting the dues and expressed regret for return the said cheques and sent other two cheques being No. 117614 dated 29th January, 2015 of Rs.4,05,00,000/- being the principal amount and cheque No. 117615 dated 29th January, 2015 of Rs.2,02,71,000/- being an interest amount accrued on the principal amount. On 29th January, 2015, the director of the defendant requested the plaintiff to present the said cheques for clearance on 28th February, 2015 and the defendant has also handed over a further cheque No. 117628 dated 28th February, 2015 of Rs.13,00,000/- being further interest. As per the request of the defendant, the plaintiff has presented the cheques for encashment but all the cheques returned with the reasons 'insufficient funds'.

4. The plaintiff has initiated a proceeding against the defendant under Section 138 of the Negotiable Instrument Act, 1881 as well as filed an application under Section 156(3) of the Code of Criminal Procedure, 1971 for initiation of criminal proceeding against the defendant and as per the order of the Court, the Park Street Police Station has registered a case against the directors of the defendants under Section 420/406/120B of the Indian Penal Code, 1980. Being aggrieved with the criminal case initiated against the directors of the defendant, the directors of the defendant have preferred three separate revisional applications before the High Court being CRR No. 1397 of 2015, CRR No. 1475 of 2015 and 1476 of 2015. In the said revisional application, the High Court at the time of grant of stay of the criminal proceeding directed the directors of the defendant to deposit an amount of Rs. 3 crores and accordingly the same was deposited with the Registrar, Appellate Side of this Court. During the pendency of the Criminal Revisional applications, the police has submitted final report and thus the proceeding initiated by the directors of the defendant under Section 482 of the Code of Criminal Procedure has become infructuous. In the said application, the Counsel for the defendant prays for withdrawal of the said amount but the High Court has directed that the said amount of Rs. 3 crores shall be deemed to be seized by the Investigating Officer in the course of investigation and given liberty to the plaintiff to file protest petition against the final report. The plaintiff has also filed protest petition against the final report of the police and the proceeding under Section 138 of Negotiable Instrument Act, 1881 are pending before the concern Courts.

5. Learned Counsel for the plaintiff submitted that the defendant has no defence to the suit and the defence sought to be raised by the defendant is moonshine and sham.

6. Counsel for the plaintiff in support of his submissions relied upon the following judgments:

i. *(2022) 3 SCC 294 (B.L. Kashyap and Sons Limited –vs- JMS Steels and Power Corporation and Another).*

ii. *(2019) 7 SCC 577 (Sudin Dilip Talaulikar –vs- Polycap Wires Private Limited and Others).*

7. The defendant has filed an application being G.A. No. 7 of 2022 praying for grant of unconditional leave to defend the suit being C.S. No. 116 of 2017. The defendant received a copy of Writ of Summons along with copy of amended plaint on 12th February, 2021. The defendant filed Vakalatnama and affidavit of competency with the concern department on 7th October, 2021, by taking the benefit of the judgment passed by the Hon'ble Supreme Court dated 23rd September, 2021, during the Covid-19 period.

8. The Learned Counsel for the defendant by a letter dated 8th October, 2021 informed the Learned Counsel for the plaintiff about the appearance of the defendant but inspite of the said notice, the Counsel for the plaintiff has not served with the summons for judgment in Form No. 4A in Appendix-B. The defendant has filed an application for acceptance of written statement but the department has not accepted the same. The defendant has filed an application being G.A. No. 4 of 2021 praying for allowing the defendant to file written statement. By an order dated 14th December, 2021, this Court directed the department to accept the Written Statement but it was made clear that acceptance of Written Statement shall not prejudice the rights and contentions of the plaintiff in any other application, if the plaintiff wishes to take out in the suit.

9. Learned Counsel for the defendant submits that the suit filed by the plaintiff is not maintainable as the plaintiff has suppressed the material facts before this Court. He submits that the suit is bad for waiver, estoppel and acquiescence. He submits that the suit filed by the plaintiff is barred under the provisions of Commercial Courts Act, 2015 and this Court has no jurisdiction.

10. Learned Counsel for the defendant submits that the defendant has already deposited an amount of Rs. 3 Crores with the Registrar, Appellate Side, High Court at Calcutta and the same is lying in the interest bearing fixed deposit.

11. He submits that the plaintiff has deliberately and intentionally withheld the original tittle deeds in connection with the properties of the defendant for which the defendant is suffering huge loss and damages.

12. Learned Counsel for the plaintiff submits that there are several triable issues raised by the defendant and no judgement and decree can be passed without considering the defence raised by the defendant.

13. The plaintiff prays for summary judgment and on the other hand, the defendant prays for leave to defend the suit. As per the case of the plaintiff one broker, namely, Ramesh Sarogi informed Shri Gopal Kumar Sanei who is the one of the director of the plaintiff that the defendant is going to sell some lucrative properties in Kolkata and Asansol. The plaintiff was interested to purchase the properties, accordingly, talks between the director of the plaintiff and the defendant was held and on 3rd January, 2011 and 4th January, 2011, the plaintiff paid total amount of Rs. 4,05,00,000/- in two instalments to the defendant by transferring the amount through RTGS. On receipt of the said amount, the defendant has handed over several original deeds of Asansol Property and a deed of Dover Lane, Kolkata property to the plaintiff.

14. In the month of September, 2011, the defendant informed the plaintiff that due to some technical difficulties, the defendants are not in a position to convey the said properties to the plaintiff and the defendant agreed to return the amount to the plaintiff. The defendant has issued two cheques of Rs.2,50,00,000/- and Rs.1,55,00,000/-to the plaintiff dated 8th April, 2014. The cheques issued by the defendant were dishonored with the reasons 'insufficient finds'. After dishonored of the above cheques, the defendant has issued other two cheques in place of earlier cheques dated 20th May, 2014 but the said two cheques were also dishonored.

15. After dishonor of second cheques, the defendant by a letter dated 29th December, 2014, expressed its regret for return of cheques and agreed to refund the money of the plaintiff with interest latest by 29th January, 2015. The defendant has again issued two cheques being cheque No. 117614 dated 29th January, 2015 for Rs.4.05 Crores being the principal amount and cheque No. 117615 dated 29th January, 2015 for Rs.2,02,71,000/- being the interest accrued on the principal amount. On 29th January, 2015, the director of the defendant requested the plaintiff to present the said cheues on 28th February, 2015 instead of 29th January, 2015 and had also issued another cheque No. 117628 of Rs.13,00,000/- for further interest.

16. The plaintiff has presented the said cheques for encashment but the same were returned with the indorsement insufficient funds. The plaintiff other than the present suit has also initiated proceedings against the defendants for the offence under Section 138 of the Negotiable Instrument Act, 1881 as well as for the offence under Section 420/406/120B of the IPC, 1908.

17. The defendant has not denied with regard to receipt of amount of Rs.4,05,00,000/- from the plaintiff. With regard to issuance of cheques and dishonor of cheques are also not denied. The defendant has made out the following case:

> *"t) In or about 2010, the defendant required financial assistance and the director of the plaintiff company namely, Mr. Gopal Kumar Sanei agreed to provide an interest free financial accommodation to the defendant due to the long standing friendly relationship with the family members of both the parties herein.*
>
> *u) The defendant agreed to deposit the original title deeds of the properties belonging to the family members of directors of the defendant, particularly the Flat No. 4A of premises No. 2C, Dover Road, Kolkata-700029 and the properties situated at Asansol, West Bengal. The aforesaid properties are belonging to*

Bimal Kumar Jain, Manju Jain, Ankit Kumar Jain and Atishay Kumar Jain. Photocopies of the Title Deeds are annexed hereto and collectively marked with the letter "A".

v) Upon deposit of all the original title deeds of the aforesaid properties with Mr. Gopal Kumar Sanei, one of the directors of the plaintiff, on 3rd January, 2011, the plaintiff paid a total sum of Rs.4,05,00,000/- (Rupees Four crores five lakhs only) to the defendant.

w) The defendant faced severe financial crisis in the business and could not repay the aforesaid sum of Rs.4,05,00,000/- (Rupees Four crores five lakhs only). Though the aforesaid amount was secured by the deposit of the original title deeds, the plaintiff insisted for issuance of the post-dated cheque and accordingly, the defendant issued two cheques, being cheque No. 117588 dated 8th April, 2014 drawn on Federal Bank, Overseas Branch, Kolkata for a sum of Rs.2,50,00,000/- (Rupees Two crore fifty lakhs only) and cheque No. 117590 dated 8th April, 2014 drawn on Federal Bank, Overseas Branch, Kolkata for a sum of Rs.1,55,00,000/- (Rupees One crore fifty five lakhs only), aggregating to Rs.4,05,00,000/- as security. The defendant requested the plaintiff not to encash the cheques without prior intimation as the bank accounts had no sufficient funds to encash these cheques.

x) The plaintiff assured the defendant that upon payment of aforesaid sum of Rs. 4,05,00,000/-, the plaintiff would return the original title deeds to the defendant.

y) Despite the same, the plaintiff presented the cheques and got it dishonored. The plaintiff wrongfully and illegally filed criminal complaints in different forums and same are pending.

z) By an order dated 19th July, 2016, passed by this Hon'ble Court in CRR No. 1395 of 2016 with CRR No. 1475 of 2016 with CRR No. 1476 of 2016, the Hon'ble Court granted *liberty to the defendant to deposit Rs. 3,00,00,000/- with the Registrar General, Hon'ble High Court at Calcutta.*

hh) The plaintiff is not entitled for any money as the plaintiff is wrongfully and illegally withholding the original title deeds and due to such act of the plaintiff, the defendant has suffered huge loss and damage and hence, is entitled for damages."

18. The only defence of the defendant is that the defendant has issued the cheques for security but the plaintiff is illegally withholding the original title deeds and due to such act, the defendant has suffered severe loss and damages. The defendant has filed written statement but has not filed any counter claim with respect to his claim as mention in paragraph 3(hh) of the Affidavit-in-Opposition.

19. The defendant has raised the issue of maintainability of the suit on the ground that the suit filed by the plaintiff is commercial in nature and this Court has no jurisdiction but in the affidavit, the defendant has made out a specific case that the defendant required financial assistance and the plaintiff agreed to provide interest free financial accommodation, thus the point of maintainability does not stand.

20. As regard reciprocal obligation on the part of both the parties to return money and the original title deeds, the defendant has issued cheques thrice to the plaintiff but all time the cheques were dishonored and with regard to return of title deeds, the defendant had not filed any counter claim or separate suit for return of documents. It is pertinent to mentioned here that at the time of hearing, the Learned Counsel for the plaintiff submits that the plaintiff is not interested to keep the title deeds of the defendant and when the defendant will return the amount along with interest, the plaintiff will return original deeds to the defendant.

21. Regarding suffering of loss and damages by the defendant due to withholding of original title deeds by the plaintiff, the defendant has only made an averment that the defendant has suffered loss and damages but has not explained how the defendant has suffered such loss and damages and the defendant has also not made any claim by filing any separate suit or by way of counter claim, thus it cannot be said to be the defence of the defendant.

22. As regard payment of interest, the defendant has issued cheque No. 117614 dated 29th January, 2015 for an amount of Rs.4,05,00,000/- being the principal amount and cheque No. 117615 dated 29th January, 2015 of Rs.2,02,71,000/- as interest accrued on principal amount. The defendant has further issued cheque No. 117628 dated 28th February, 2015 of Rs.13,00,000/- being the further interest.

23. The defendant by a letter dated 29th December, 2014, admitted the said amounts which reads as follows:

> **"December 29, 2014**
>
> ***G. S. Fertilizers (P) Ltd.***
> ***113, Park Street***
> ***Kolkata-16***
>
> *Dear Sir,*

we had taken a sum of Rs 1,70,00,000 on 3.1.2011 and Rs. 2,35,00,000 on 4.1.2011 totalling Rs. 4,05,00,000.00 (Rs four crore five lakhs) from you against agreement for sale of our properties at Asansol and Dover lane Kolkata.

Due to some technical reason we could not finalise the sale deed of the above properties and therefore we had returned your money vide cheques No 117588 and 117590 dated 8.4.2014 for Rs. 2,50,00,000 and Rs. 1,55,00,000 respectively on Federal Bank, Kolkata

The above two cheques issued by us got retuned from the Bank due to reason for insufficient balance in our account.

We again issued two cheques in your favour for Rs. 1,55,00,000 and 2,50,00,000 dated 20.05.2014 respectively but these two cheques were also returned by the bank due to Insufficient balance in our A/C.

Thereafter we had discussion with you on this issue and expressed our regret for return of cheques and have finally agreed to refund your money with interest latest by 29.1.2015.

We are issuing following cheques against principal amount of Rs 4.05 crores Cheque No."117614" dated on 29.01.2015 and Rs 2,02,71,000/- (Two crores Two lakhs Seventy One thousand) only Cheque No."117615" dated on 29.01.2015, as interest accrued on the principal amount to settle the issue

Thanking You
Yours faithfully
AKJ Mineral Limited

For AKJ MINERALS LIMITED

Director."

24. In the case of ***B.L. Kashyap and Sons Limited*** (supra), the Hon'ble Supreme Court held that:

> ***"32.1.*** *The principles for consideration of a prayer for leave to defend in a summary suit were laid down by this Court in the following terms:*
>
> *"8. In Kiranmayi Dasi v. J. Chatterji CWN at p. 253 Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 17 CPC in the form of the following propositions:*
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> *'… (a) If the defendant satisfies the court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.*
>
> *(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.*
>
> *(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence yet shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend, but in such a case the Court may in its discretion impose condition as to*

the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine, then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then, although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

32.2. *In IDBI Trusteeship, this Court modulated the aforementioned principles and laid down as follows:*

"17. Accordingly, the principles stated in para 8 of Mechelec case will now stand superseded, given the amendment of Order 37 Rule 3 and the binding decision of four Judges in Milkhiram case, as follows:

17.1. If the defendant satisfies the court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit.

17.2. If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend.

17.3. Even if the defendant raises triable issues, if a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.

17.4. If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5. If the defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith.

17.6. If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court."

***33.** It is at once clear that even though in IDBI Trusteeship, this Court has observed that the principles stated in para 8 of Mechelec Engineers case shall stand superseded in the wake of amendment of Rule 3 of Order 37 but, on the core theme, the principles remain the same that grant of leave to defend (with or without conditions) is the ordinary rule; and denial of leave to defend is an exception. Putting it in other words, generally, the prayer for leave to defend is to be denied in such cases where the defendant has practically no defence and is unable to give out even a semblance of triable issues before the court."*

25. In the present case, the defendant has no defence and the defence set up by the defendant as recorded in the preceding paragraphs are illusory and sham.

26. Considering the above facts, this Court finds that the plaintiff do get decree against the defendant for a sum of Rs.7,23,63,548/- (Rupees Seven Crores Twenty Three Lakhs Sixty Three Thousand Five Hundred and Forty Eight Only). The plaintiff also entitled to get further interest at the rate of 12% per annum from 13th April, 2017, on Rs.4,05,00,000/- till the realization to the amount.

27. In view of the above, **G.A. No. 6 of 2022** is **allowed**. **G.A. No. 7 of 2022** is **dismissed**. **C.S. No. 116 of 2017** is **disposed of**. Decree be drawn accordingly.

(Krishna Rao, J.)