(2012) 08 BOM CK 0203

In the Bombay High Court

Case No : Summons for Judgment No. 485 of 2010 in Summary Suit No. 1958 of 2010

Ashapura Aluminum Limited APPELLANT

Vs

Mr. Jayesh Nagindas Doshi and Others RESPONDENT

Date of Decision : 23-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 2
Negotiable Instruments Act, 1881 (NI) — Section 118

Citation : (2013) 111 BC 703 : (2013) 1 BomCR 617

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : D.H. Mehta, instructed by Mr. Y.C. Dhebar, for the Appellant; J.P. Sen alongwith Mr. Ashish Kamat, Vinod Kothari, instructed by . M/s. Apex Law Partners, for the Respondent

Judgement

R.D. Dhanuka, J.—By this Summons for Judgment, the Plaintiff seeks judgment be entered for the Plaintiff in this suit against the Defendant for a sum of Rs. 81,33,260.90. The suit is based on the dishonoured cheque, guarantee, written correspondence between the parties and on the basis of the written contract. The 1st Plaintiff is one of the group of companies of the Plaintiff No. 2. The 1st Defendant was appointed as a ?Group-Chief Financial Officer? of the Plaintiff No. 2 by its appointment letter dated 16th June, 2008 and was authorised and required to work for any of the associates or group of companies or the holding company of the Plaintiff and was conferred with the full/wide powers to carry out any and all financial decisions in respect of day-to-day affairs and to take important financial decisions on behalf of the Plaintiff independently.

2. The 1st Defendant was also appointed as Executive Director of the Plaintiff. According to the Plaintiff, Defendant No. 1 introduced the 2nd Defendant to the Plaintiff so as to arrange financial loan of Rs. 2,700 crores for the company''s project at Kutch in the State of Gujarat. Defendant No. 2 represented to the Plaintiff that on behalf of his company and its foreign investment company ''Plan

Insure Ltd.'', the Plaintiff was required to arrange for the funds for remittances to be made on behalf of the 2nd Defendant''s company M/s.Aajay Consultants to facilitate issuance of Bank Guarantee from HSBC Bank, London for raising a fund in the sum of Rs. 2,700 crores. M/s.Plan Insure Ltd. raised invoice on 6th October, 2009 demanding Euro 1,10,000 as advance payment towards insurance. According to the Plaintiff, the 1st Defendant without any authority and without consulting the Plaintiff, addressed a letter to the Chief Manager of ''Yes Bank'', Fort Branch interalia instructing therein for outward remittance of Euro 1,10,000 towards advance insurance payment and for crediting to ''Plan Insure Ltd.''. Accordingly the said amount was wire transferred by the bankers of the Plaintiff towards advance payment of insurance in the account name of ''Montreal Elegance Pte. Ltd.''.

3. The 2nd Defendant by letter dated 20th October, 2009 to the 1st Plaintiff informed that the proposal for loan of Rs. 2,700.00 crores of the Plaintiff was sanctioned for setting up of alumina refinery and requested to pay syndication fees of 7.5% of the loan amount on pro-rata basis of the receipt of the reimbursement into the bank account. The 1st Defendant by its letter dated 20th October, 2009 issued cheque dated 23rd October, 2009 for the sum of Rs. 35 crores in favour of the 1st Plaintiff by way of the release of first installment of loan. On deposit of the said cheque of Rs. 35 crores by the Plaintiff, the same was bounced on 24th October, 2009 with the remark ''Account Closed''.

4. The Second Defendant issued a cheque for Rs. 85 lacs in favour of the 1st Plaintiff so as to cover up and protect the said amount already spent by the Plaintiff as well as other expenses incurred. On deposit of the said cheque, the same was dishonoured on the ground of insufficient fund on 26th October, 2009.

5. According to the Plaintiff, the 1st Defendant who was responsible Defendant addressed a letter dated 25th November, 2009 to the Plaintiff admitting that payment of Euro 1,10,000, equivalent to Rs. 70 lacs was paid to M/s. International Invest & Trade Management Services Limited based on his authority. He admitted that he was personally responsible for the same and takes full authority. The 1st Defendant informed that he was leaving the organization and it would be improper for him not to settle the dues and leave. The 1st Defendant informed that out of Rs. 70 lacs, the 1st Defendant was entitled to receive a sum of Rs. 14,50,000/- from the Plaintiff as his dues. The 1st Defendant issued a cheque of Rs. 50 lacs in favour of the 2nd Plaintiff and admitted that the balance amount of Rs. 5,50,000/- would be paid by 15th December, 2009. The Plaintiff deposited the said cheque of Rs. 50 lacs in its bank account and was returned unpaid by the bank of the 1st Defendant with the remark ''Payment stopped by the drawer''. The 1st Defendant by his letter dated 10th December, 2009 to the Plaintiff alleged that a cheque of Rs. 50 lacs was issued by him just as a moral responsibility and to continue the follow-up for payment made by the Plaintiff to Defendant Nos.2 and 3. It is alleged that by this insistence, the Plaintiff retained a cheque of Rs. 50 lacs with an assurance

that the same would not be deposited under any circumstances as no money or amount was due and payable by the 1st Defendant to the Plaintiff.

6. The Plaintiff thereafter issued notice of demand through its advocate on 12th January, 2010 calling upon the Defendants to pay a sum of Rs. 75,65,824.15. The said notice sent by post was not claimed by the 1st Defendant. The said notice was returned by the postal authority in so far as 2nd and 3rd Defendants are concerned, as were not found at the address which was furnished to the Plaintiffs by them.

7. The Plaintiff issued notice dated 11th February, 2010 to Plan Insure Ltd., U.K. calling upon to furnish the information regarding the amount wire transferred to them and the details regarding the beneficiaries. The said company, however, did not furnish any detail. Defendant Nos.2 and 3 have not filed its appearance though served. The Plaintiff has filed affidavit of service and the same is considered by this Court. Defendant No. 1 has filed affidavit in reply and has appeared through his counsel.

8. The Learned Counsel appearing for the 1st Defendant submits as under :

(i) Letter dated 25th November, 2009 and cheque of Rs. 50 lacs issued by the 1st Defendant is without consideration. No amount was received by the 1st Defendant from the Plaintiff.

(ii) Letter and cheque dated 25th November, 2009 were issued due to undue influence, coercion and/or threat caused by the Plaintiff. Therefore purported documents were void and/or voidable at his instance.

(iii) Though the Plaintiff had assured not to deposit a cheque of Rs. 50 lacs, it was deposited contrary to such assurance and thus the 1st Defendant is not liable to pay any amount to the Plaintiff.

9. On the other hand, the Learned Counsel appearing for the Plaintiff submits that :-

(i) the 1st Defendant was appointed as ''Group Chief Financial Officer'' and he was conferred with the wide powers to take financial decisions in respect of day-to-day affairs including important financial decisions on behalf of the Plaintiff. The 1st Defendant has introduced the 2nd and 3rd Defendants to the Plaintiff for availing of loan facilities. Without consulting the Plaintiff, the 1st Defendant had issued instructions for remittance of Euro 1,10,000 during the notice period after tendering resignation.

(ii) The cheque for Rs. 50 lacs issued by the 1st Defendant was for consideration.

(iii) The 1st Defendant had voluntarily addressed the letter dated 25th October, 2009 and had issued a cheque of Rs. 50 lacs and admitted, acknowledged the liability to the tune of Rs. 70 lacs. No reply was given by the 1st Defendant to the notice dated 12th January, 2010.

(iv) The 1st Defendant did not retract his statement made in letter dated 25th November, 2009 nor filed any proceeding for cancellation and/or for return of the cheque. No other legal steps have been taken by the 1st Defendant against the Plaintiff in respect of his allegation of undue influence, coercion. Denial of claim by letter dated 10th December, 2009 was as and by way of after thought.

(v) The 1st Defendant has failed to discharge the initial onus that the cheque was without consideration.

10. From the perusal of the record produced by both the parties, it is apparent that the 1st Defendant had introduced the 2nd and 3rd Defendants to the Plaintiff. The 1st Defendant has issued instructions to the bankers for transfer of Euro 1,10,000 during the notice period of his resignation. Such instruction given by the 1st Defendant to the bank was without consulting the Plaintiff is not denied by the 1st Defendant. The 1st Defendant has also not retracted his statement made in the letter dated 25th November, 2009 at the earliest. No legal steps have been taken for cancellation and/or return of the cheque issued by the 1st Defendant. No complaint has been filed by the 1st Defendant against the Plaintiff in respect of the alleged threat, duress or coercion. Such allegations made by the 1st Defendant are by way of after thought.

11. Section 118 of the Negotiable Instruments Act, 1881 reads thus :-

118. Presumptions as to negotiable instruments.- Until the contrary is proved, the following presumptions shall be made :-

(a) of consideration.- that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

In my view, the initial onus of the proof that the cheque issued by the 1st Defendant was without consideration was on the 1st Defendant. If the 1st Defendant would have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would have been shifted to the Plaintiff who would have been oblige to prove it. In my opinion, the 1st Defendant has failed to prove non-existence of the consideration by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relied upon. First Defendant has failed to produce any material on record in this regard. In my view, thus there is no substance in the submission made by the Learned Counsel of 1st Defendant that the 1st Defendant did not receive any benefit under the loan transaction or from the Plaintiff paying Euro 1,10,000 to the Defendant Nos. 2 and 3 or that the cheque was issued without consideration. The Defendant has disputed the claim for the first time by letter dated 10th December, 2009. From the perusal of the said letter, I don''t find any substance in the stand taken by the 1st Defendant.

In my view, no triable issue is raised by the 1st Defendant. Plea raised by the 1st

Defendant is not the substantial and is moon shine.

12. In view of the fact that though Defendant Nos. 2 and 3 are served, no appearance has been filed by them and in view of the Order XXXVII Rule 2 Sub Rule 3, the allegations made in the plaint by the Plaintiff shall be deemed to be admitted and the Plaintiff is therefore entitle to the reliefs claimed in the Summons for Judgment together with interest at the rate specified. I, therefore, pass the following order :

(a) Summons for Judgment is made absolute against Defendant Nos. 2 and 3.

(b) Suit is decreed accordingly against Defendant Nos. 2 and 3.

(c) Defendant No. 1 is granted conditional leave to defend the suit on the 1st Defendant depositing a sum of Rs. Fifty lacs in this Court within a period of eight weeks from the date of this Order.

(d) If the 1st Defendant deposits the said amount in this Court as directed, the Prothonotary & Senior Master is directed to invest the same in a Fixed Deposit in a nationalised bank initially for a period of two years and thereafter for a like period after obtaining further order from this Court.

(e) 1st Defendant is directed to file Written Statement within a period of four weeks from the date of deposit of the amount as directed aforesaid.

(f) In the event of 1st Defendant committing default in making payment, the Plaintiff would be at liberty to apply for further orders.

(g) Suit is transferred to the list of commercial

(h) Office is directed to place the matter for framing issues after pleadings are completed.

(i) Summons for Judgment is disposed of accordingly.

(j) There shall be no order as to cost.