

(2022) 11 BOM CK 0015

In the Bombay High Court

Case No : Summons For Judgment No.12, 14 Of 2021 In Commercial Summary
Suit No.205, 211 Of 2020, Interim Application No.251, 261 Of 2022

Kavita G. Rajani And Others

APPELLANT

Vs

Samir N. Bhojwani

RESPONDENT

Date of Decision : 09-11-2022

Acts Referred:

Negotiable Instruments Act, 1881 — Section 80

Citation : (2022) 11 BOM CK 0015

Hon'ble Judges : N.J. Jamadar, J

Bench : Single Bench

Advocate : Karl Tamboly, Shaheda Madraswala, Zahra Padamsee, Vashi, Cherag
Balsara, D.U. Deokar, D. Parikh, Parimal K. Shroff

Final Decision : Partly Allowed/Disposed Of

Judgement

N.J. Jamadar, J

1. These Commercial Division Summary Suits are instituted by a mother-son duo against a common defendant. Since identical factual and legal issues arise for consideration in both the suits, the Summons for Judgments and Interim Applications in both the suits are decided by this common order.

Suit No. 205 of 2020 :-

2. The material averments in the plaint can be summarized as under:-

The defendant is a developer and builder. In the month of January, 2017 the defendant had approached the plaintiff for a loan of Rs. 62 lakhs. Pursuant to the representation of the defendant, the plaintiff had advanced an amount of Rs. 62 lakhs vide cheque 18th January 2017 drawn on HDFC Bank, Worli Branch against a bill of exchange dated 18th January, 2017 drawn for the said amount by the defendant. Initially the defendant paid interest on the said amount at varied rate ranging from 14.40% p.a. to 12 % p.a. for the varying periods commencing from

18th January, 2017 to 7th May, 2018. Eventually, the defendant repaid a sum of Rs. 60 lakhs and only an amount of Rs. 2 lakhs remained outstanding towards the principal amount.

3. In the month of October, 2017 the defendant had again availed a second tranche of loan of Rs. 4,09,000/- against a bill of exchange. Interest was paid on the second tranche of loan @ 12% p.a.

4. As the defendant failed and neglected to pay the outstanding principal amount of Rs. 2 lakhs of the first tranche of loan and the entire principal amount of Rs. 1,09,00,000/- of the second tranche and interest thereon, the plaintiff addressed legal notice on 13th December, 2019 calling upon the defendant to pay the due amount along with accrued interest thereon. Despite service of the notice, the defendant failed and neglected to pay the outstanding amount. Hence, the suit for recovery of the principal amount of Rs. 1,11,00,000/- along with interest thereon @ 12% p.a. till the date of the suit and future interest at the said rate.

Suit No. 211 of 2020 :-

5. Gautam, who is the son of Kavita (the plaintiff in Suit No. 205 of 2011) claimed to have advanced money to the defendant in three tranches. First, a sum of Rs. 50 lakhs was advanced in the month of November, 2015 against a bill of exchange drawn by the defendant. Second, a sum of Rs. 60 lakhs in the month of February, 2017 again against a bill of exchange dated 9th February, 2017 drawn by the defendant. And the third, a sum of Rs. 70 lakhs in the month of February, 2017 itself against a bill of exchange dated 10th February, 2017 drawn by the defendant. The plaintiff claims that against each of the aforesaid tranches of loan, the defendant paid interest for various periods in the range of 14% p.a. to 12% p.a. Eventually, when the defendant committed default in repayment of the principal amount and interest accrued thereon, the plaintiff claimed to have addressed a legal notice on 13th December, 2019 calling upon the defendant to repay the principal loan amount of all three tranches along with interest accrued thereon @ 12% p.a. The defendant paid no heed despite service of the legal notices. Hence, the suit for recovery of principal loan amount of Rs. 1,80,00,000/- along with interest @ 12% p.a.

6. It would be contextually relevant to note that the suits were decreed by an order dated 15th January, 2021. On 3rd February, 2021 the defendant took out Interim Applications (Interim Application (L) Nos. 3301 of 2021 and 3302 of 2021) seeking setting aside of the decrees. By orders dated 18th February, 2021 the decrees were set aside subject to the defendant depositing of Rs. 1.11 Crore and Rs. 1.80 Crore, respectively, with the Prothonotary and Senior Master of this Court. The defendant has made the said deposit.

7. The plaintiffs have thereupon taken out the Summons for Judgment.

8. An affidavit in reply is filed by the defendant seeking an unconditional leave to defend each of the suits by raising defences which are, in a sense, integral to

both the claims.

9. The defendant calls in question the tenability of the suit under Order XXXVII of the Code primarily on the ground that the plaintiffs are guilty of *suggestio falsi* and *suppressio veri*. The defendant contends plaintiffs have been the investors in the projects developed by the defendant and there have been multiple transactions between the parties. Therefore, the summary suits would not be tenable.

10. The defendant further contends that on 18th February, 2018 the plaintiff entered into an agreement with the defendant that the amount of Rs. 1,80,00,000/- due and payable to Gautam and the amount of Rs. 1,11,00,000/- due and payable to Kavita would be adjusted against the mutually agreed consideration of Rs. 3 Crores for purchase of Flat No. 801, 8th Floor, Rachana-A, Rachana Cooperative Housing Society Limited situated at Hill Road, Bandra, Mumbai (Flat No. 801). It was further agreed that the defendant would not be liable to pay interest on the said amount of Rs. 2,91,00,000/- from 18th April, 2018. The defendant contends suppressing the said understanding and by taking undue advantage of the situation which arose out of the dispute between the defendant and Rachana Cooperative Housing Society and Covid 19 pandemic, the plaintiffs instituted the instant suit. In fact, the defendant is still willing to convey the flat in favour of the plaintiffs and the plaintiffs are, in turn, bound to complete the transaction in accordance with the agreement between the parties. Therefore, the defendant is entitled to an unconditional leave to defend the suit.

11. In any event, since the defendant has already made the deposit of the principal amount, in both the suits, no further condition is required to be imposed in the event the Court is inclined to grant conditional leave to defend the suit.

12. Affidavits in rejoinder are also filed by the plaintiffs controverting the contentions especially the alleged agreement to adjust the amount advanced by the plaintiffs towards consideration for Flat No. 801.

13. The plaintiffs have also taken out Interim Application Nos. 251 of 2022 and 261 of 2022 seeking a decree to the extent of the principal amount of Rs. 1,11,00,000/- and 1,80,00,000/- respectively.

14. In the wake of aforesaid pleadings, I have heard Mr. Karl Tamboly, learned counsel for the plaintiffs, and Mr. Cherag Balsara, learned counsel for the defendant at some length. With the assistance of the learned counsel for the parties, I have perused the material on record.

15. Before advertng to note the submissions on behalf of the parties, it may be appropriate to note uncontroverted facts.

16. In both the suits, the primary issue of advance of sums of Rs. 1,11,00,000/- by Kavita and Rs. 1,80,00,000/- by Gautam to the defendant is incontestible. It is not in dispute that the defendant did pay interest on the said amount to the respective plaintiff for various periods of time and at varying rates as well.

Indisputably, the said advances were against the bills of exchange drawn by the defendant. The fact that in December, 2019 the plaintiffs called upon the defendant to pay the principal amount along with interest @ 12% p.a. is by and large indisputable. In the light of the aforesaid un-controverted facts, the suits based on the bill of exchange for recovery of the liquidated debt clearly fall within the ambit of Order XXXVII of the Code of Civil Procedure, 1908.

17. Mr. Balsara, learned counsel for the defendant, would however assail the tenability of the suit on the ground that the suits are based on a running account and therefore beyond the purview of Order XXXVII of the Code. Mr. Balsara took the Court through the pleadings to bolster up the case that series of transactions between the plaintiff and the defendant lead to an irresistible inference of a running account.

18. In contrast, Mr. Tamboly, learned counsel for the plaintiff would urge that the defence of running account now sought to be raised has not at all been pleaded in the affidavit in reply seeking leave to defend the suit. Such a submission without any foundation in facts does not deserve any countenance, urged Mr. Tamboly.

19. Indeed the affidavit in reply does not contain a categorical assertion that the suits are based on running accounts. In the affidavit in reply, the defendant contends that the plaintiffs have been the investors in the projects developed by the defendant for past several years and there have been transactions between the parties since the year 2005. The affidavit in reply stops at that. It is not the case that the parties maintained ledger accounts and there were series of transactions between the parties reflecting reciprocal demands and the balance was settled and carried forward at periodical intervals.

20. In Black's Law Dictionary, Eighth Edition a "Running account" is defined as 'An open, unsettled account that exhibits the reciprocal demands between the parties'.

In P Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edition a "Running Account" is defined as 'An account with a bank for money loaned, checks paid, etc., which during the time makes monthly statements, striking the balance due each month, which is carried forwarded and charged, constitutes a "running account" and is in effect but one transaction'.

21. In the case at hand, neither there is pleading nor material to show that the transactions in question, have any of the aforesaid features of a "running account". At best, there are series of transactions. The mere fact that money was advanced by the plaintiff to the defendant in tranches, by itself, is not sufficient to draw an inference of a "running account".

22. Reliance placed by Mr. Balsara on an order of the Division Bench dated 11th August, 1986 in Appeal No. 712 of 1986 in Summons for Judgment No. 274 of 1986 in Summary Suit No. 2506 of 1985 does not seem to advance the cause of

the defence. In the said order, the Division Bench had, inter alia, observed as under :-

"Mr. Tulzapurkar, on behalf of the appellants, has urged that, apart from several contentions on merits, the suit on the item of a Bill Discounting facility in respect of which there was an account maintained by the Bank, could not be filed as a Summary Suit. This is a substantial defence and not one which can be stated to be rejected or brushed aside as lacking in bona fides. Prima facie the defence seems to be one which would be required to be accepted at least at this stage.

It is to be made clear that the observations which we are making pertains to the frame of suit as a summary suit and we are not required to go into other contentions on the merits. We are satisfied that it is difficult to accept the suit as Summary Suit. The order for conditional deposit is, therefore, required to be set aside."

23. Evidently, the aforesaid observations were made in the context of peculiar facts of the said case. The transaction arose out of a bill discounting facility in respect of which there was an account maintained by the bank. In that context, the Division Bench observed that the suit to enforce liability incurred thereunder could not have been filed as a summary suit. I am afraid, the aforesaid observations govern the facts of the case even remotely.

24. Mr. Balsara would urge that the claim of the defendant that the parties had entered into an agreement for purchase of Flat No. 801 for a consideration of Rs. 3 Crores and that the sum of Rs. 2,91,00,000/-, which the defendant owed to the plaintiffs, was to be adjusted towards the said consideration, constitutes a substantial defence. An endeavour was made by Mr. Balsara to demonstrate that post the said agreement in the month of April, 2018, the defendant stopped paying interest and that is a pointer to the said agreement.

25. Mr. Tamboly, learned counsel for the plaintiff, on the other hand, would urge that the said defence is totally moonshine and sham. There is not a shred of material which would lend a semblance of credence to such a gratuitous defence, urged Mr. Tamboly.

26. Evidently, it is not the case of the defendant that there is a document to evidence the alleged agreement between the parties. The defendant wants the Court to believe that it was an oral agreement. It is imperative to note that no contemporaneous conduct and/or circumstances are pressed into service to substantiate such arrangement. It does not appeal to human credulity that in a Metropolis like Mumbai, where property commands premium, the parties would be comfortable arriving at an oral agreement to convey the property without making any record thereof. It would be legitimate to examine as to whether the defendant had the opportunity to assert that there was such an understanding between the parties, before the institution of the suit. Service of the legal notice upon the defendant, indeed provided such an opportunity to the defendant. The existence of such an oral agreement did not see the light of the day till the

defendant filed affidavit in these suits. Time lag of almost two years in between the said alleged arrangement and the institution of the suit cannot be said to be immaterial and inconsequential. In the interevening period, had there been such an arrangement, either party must have taken initiative to either enforce such agreement or resile therefrom.

27. Another factor which runs counter to the defendant's claim is that in the financial year 2018-19, in Form No. 26 AS, the defendant had booked payment of TDS qua the plaintiffs towards the interest from 1st April, 2018 to 31st March, 2019. This militates against the claim of the defendant that based on the alleged agreement for purchase of the flat, the defendant was not liable to pay interest on the loan amount.

28. Mr. Balsara attempted to salvage the position by canvassing a submission that TDS does not constitute an admission of liability. This submission is required to be appreciated in the light of the fact that admittedly the defendant paid interest on the outstanding amount since the day of advance till April, 2018 and the TDS, in the least, reflects that the said state of affairs continued even after April, 2018.

29. In the totality of the circumstances, the defence of existence of a verbal agreement between the parties to adjust the loan amount towards consideration for purchase of the flat does not appear to be either reasonable or fair defence.

30. Mr. Balsara would submit that in the absence of any agreement to pay interest, coupled with the fact that interest has been paid at varying rates, the entitlement to claim interest becomes a triable issue. It is true that the plaintiffs have not approached the Court with a case that interest was agreed to be paid at a definite rate. It is also true that the material on record indicates that interest has indeed been paid till the year 2018 at varying rates. However, the submission on behalf of the defendant that the plaintiff would not be entitled to claim interest at all, does not deserve acceptance unreservedly. We have noted that the amounts were advanced against bills of exchange. In the absence of any stipulation as to rate of interest in the Negotiable Instruments, section 80 of the Negotiable Instruments Act, 1881, may govern the aspect of entitlement to interest. However, the question as to at what rate the plaintiff would be entitled to interest and whether, in fact, the parties had agreed that interest shall not be chargeable from 12th April, 2018 are the questions which would warrant adjudication. To this extent, a triable issue qua the liability to pay interest can be said to have arisen.

31. The conspectus of aforesaid consideration is that to the extent of the principal amount of loan, in both the suits, the liability is rather indubitable. The twin defence of the transactions being in the nature of a "running account" and there being an agreement between the parties to adjust the principal amount of Rs. 2,91,00,000/- towards the consideration for Flat No. 801, are not of such quality as to warrant the leave to defend the suit. However, to the extent of

liability to pay interest on the said principal amount, triable issues may rise.

32. It is trite that at the hearing of the Summons for Judgment, the Court would be justified in passing a decree for the part of the claim and also grant conditional or unconditional leave to defend the suit in respect of rest of the claim. A profitable reference can be made to a Full Bench judgment of this Court in the case of SICOM Limited vs. Prashant S. Tanna and Others^{2004 (2) Mh.L.J. 292}, wherein the full Bench enunciated the principles as under:-

28} In the circumstances, we summarize the answer to the reference as follows:

(1)

(2) In a summary suit filed under Order XXXVII of the Civil Procedure Code, the plaintiff is entitled at any time to abandon or give-up a part of the claim unilaterally. This, the plaintiff may do by making a statement to be recorded by the Court and without the necessity of the plaintiff making a formal application for the same by withdrawing the summons for judgment, amending the plaint and thereafter taking out a fresh summons for judgment or otherwise.

(3) At the hearing of the summons for judgment, it will be open to the Court to pass a decree for a part of the claim and grant unconditional leave to defend the suit in respect of rest of the claim.

(4) At the hearing of the summons for judgment, it is open to the Court to grant conditional leave to defend in respect of a part of the claim and unconditional leave to defend for the remaining part of the claim. In such an order it would follow that in the event of the defendant failing to comply with the condition, he would suffer the consequences mentioned in Order XXXVII qua only that part of the claim for which conditional leave to defend has been granted and not in respect of that part of the claim for which unconditional leave has been granted.

(5) There may be further options available to the Court while passing an order on the summons for judgment. Our judgment does not exhaustively set out the options. Obviously, judicial discretion has to be exercised in consonance with the settled legal principles governing grant of leave to defend in summary suits.

33. In my view, in the present case, the Court would be justified in passing a decree for the indisputable principal amounts in both suits and grant unconditional leave to the defendant to defend the suit in respect of interest component only.

Hence, the following order.

ORDER

Commercial Summary Suit No. 205 OF 2020 :-

a] The Summons for Judgment stands partly allowed.

b] The suit stands decreed to the extent of the principal amount of Rs.

1,11,00,000/-.

c] The defendant do pay the sum of Rs. 1,11,00,000/- to the plaintiff. The sum of Rs. 1,11,00,000/- deposited by the defendant be paid to the plaintiff and the interest accrued thereon be refunded to the defendant.

e] The defendant is granted unconditional leave to defend the suit in respect of interest component.

f] The defendant shall file written statement within a period of thirty days from today.

g] The defendant do pay the proportionate costs of the suit to the plaintiff.

h] Decree be drawn accordingly.

i] In view of disposal of the Summons for Judgment in the aforesaid terms, the Interim Application No. 251 of 2022 also stands disposed.

Commercial Summary Suit No. 211 OF 2020 :-

a] The Summons for Judgment stands partly allowed.

b] The suit stands decreed to the extent of the principal amount of Rs. 1,80,00,000/-.

c] The defendant do pay Rs. 1,80,00,000/- to the plaintiff.

d] The sum of Rs. 1,80,00,000/- deposited by the defendant be paid to the plaintiff and the interest accrued thereon be refunded to the defendant.

e] The defendant is granted unconditional leave to defend the suit in respect of interest component.

f] The defendant shall file written statement within a period of thirty days from today.

g] The defendant do pay the proportionate costs of the suit to the plaintiff.

h] Decree be drawn accordingly.

i] In view of disposal of the Summons for Judgment in the aforesaid terms, the Interim Application No. 261 of 2022 also stands disposed.