

(1999) 06 BOM CK 0006

In the Bombay High Court

Case No : Summons for Judgment No. 344 of 1997 in Summary Suit No. 742 of 1997

Mafatlal Finance Limited, Mumbai

APPELLANT

Vs

Express Industrial Services Private Limited, Mumbai

RESPONDENT

Date of Decision : 09-06-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 2

Citation : (1999) 06 BOM CK 0006

Hon'ble Judges : F. I. Rebello, J

Bench : Single Bench

Advocate : P. K. Samdani with Desai instructed by M/s Manilal Kher Ambalal and Co, for the Appellant; Ms. Rajani Iyer instructed by M/s Singhania and Co., for the Respondent

Judgement

F. I. Rebello, J.—The Plaintiffs herein have filed this summary suit for recovery of the amount as set out in the particulars of claim. The amounts are Rs. 50 lacs which were given to the Defendants as security and an amount of Rs. 10,55,000/- by way of interest at the rate of 18% p.a. from 15th October, 1995 till the filing of the suit i.e. 17th December, 1996. The Plaintiffs have also applied for Summons for Judgment. The Defendants have appeared, shown cause and have filed their affidavit in reply.

2. A brief narration of facts may be necessary to deal with the issue which has been raised on behalf of the Plaintiffs herein insofar as leave to defend is concerned.

The Plaintiffs admittedly were occupying certain premises belonging to the Defendants between the period 9th June, 1995 to 14th October, 1995. In terms of the agreement between the Plaintiffs and the Defendants the compensation payable was Rs. 5 lacs per month. The Plaintiffs had requested the Defendants permission to occupy the premises for a period of four months from 1st April, 1995 till 31st July, 1995. By letter dated 15th March, 1995 the Plaintiffs sent a

cheque for Rs. 10 lacs being advance rent for occupation of the premises. The Defendants were informed that the balance of Rs. 10 lakhs would be paid on 1st April 1995, along with the deposit. The Defendants were also informed that the Plaintiffs plan to occupy the office from 3rd April, 1995 for a period of four months. The other facts are not material as they are not required for the purpose of deciding the issue in controversy. I will now advert to the reply filed on behalf of the Defendants for the defences which have been raised by them. In the first instance the Defendants have contended that the suit cannot be maintained as a summary suit as there is no agreement in writing between the Plaintiffs and the Defendants. It is further contended that the particulars of claim annexed to the plaint do not correctly reflect the claim of the Plaintiff and no relief of any nature can be granted to the Plaintiffs and in the light of that matter Summons for Judgment ought to R.F. 5 be dismissed and unconditional leave has to be granted to the Defendants to defend the suit. It is further contended that the monthly compensation would be Rs. 10 lakhs per month from 1st April, 1995 and that the Plaintiffs would pay for other services available like telephone, telex, fax, etc. It is then contended that at the request of the Plaintiffs the Defendants have carried out certain work and incurred expenditure of Rs. 6.34 lakhs which the Plaintiffs have to reimburse to the Defendants. It is also contended that the Defendants are entitled to forfeiture of the entire deposit. Lastly, it is contended that the dues from the Plaintiffs to the Defendants upto October, 1995 aggregate to Rs. 83,00,102/-. I have merely referred to the said defences. To my mind the various defences except the first defence at this stage need not be gone into.

3. The only question therefore that has to be decided is whether the suit as framed is maintainable as a summary suit. Secondly, the contention on behalf of the Plaintiffs that even if a part of the relief if it does not fall within the ambit of the summary procedure, it is always open to the Court to grant conditional leave insofar as that part of the claim which could be covered by a summary procedure and unconditional leave insofar as that which would not fall. Learned counsel for the purpose has relied on order XXXVII, Rule 3(4) of the CPC as amended by this Court. Learned Counsel for the purpose has relied on a Judgment of a learned single Judge of this Court in *Banque Indosuez vs. M/s Neptune Exports*, and others in Summons for Judgment No. 516 of 1997 in Summary Suit No. 813 of 1997 decided on 8th February, 1999 and another Judgment of the same learned Single Judge in *Bank of Baroda vs. M/s Dawood Company & Others* in Summons for Judgment No. 580 of 1998 in Summary Suit No. 2949 of 1998 decided on 15th April, 1998. It may be mentioned that insofar as the Judgment in *Banque Indosuez* (supra) is concerned in appeal the order was set aside on a different ground.

On the other hand on behalf of the Defendants their learned Counsel contends that the matter is no longer *res integra*. For that purpose reliance is placed on the Judgment of the Division Bench of this Court in *M/s Randerian & Sing Pvt. Ltd. vs. Indian Overseas Bank and others*, in Appeal No. 1060 of 1986 in Summons for Judgment No. 307 of 1986 in Summary Suit No. 3212 of 1985

dated 24th February, 1987 and the Judgment of another Division Bench of this Court in Hydraulic and General Engineering Ltd. and another vs. UCO Bank. (1998) ILJ 793. Relying on the said Judgments, learned Counsel contends that if part of the relief does not fall under the summary procedure, then this Court cannot treat the suit as a summary suit to grant any conditional leave. The only course open in such an event is for the Plaintiffs to withdraw the summons for judgment and apply to the Court to amend the plaint to exclude the relief which cannot be granted and then reapply for summons for judgment and the other option to grant unconditional leave to defend.

4. Considering what has been set out above. The contentions of the parties may now be considered. Order XXXVII, Rule 2 of the CPC as amended by this Court sets out that all suits upon bills of exchange, hundies or promissory notes and all suits in which the Plaintiffs seek only to recover a debt or liquidated demand in money payable by the Defendants, with or without interest, arising on the written contract or on an enactment, where sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty or on a guarantee where claim against the principal is in respect of a debt or a liquidated demand only may in case the Plaintiffs desire to proceed hereunder be instituted by presenting a plaint with a specific averment therein that the suit is filed under this order and, that no relief not falling within the ambit of this rule, has been claimed. What is therefore clear is that a summary suit can be filed only in the event a relief can be claimed in terms of Order XXXVII, Rule 2 of the Code of Civil Procedure. I may at this stage mention that the amendment by this Court is of 30th September, 1966. The CPC has thereafter been amended in the year 1973. Section 97 of the Amending Act provides that any rule or amendment made either by the State or by the High Court which is inconsistent with amendment of 1973 stands repealed. A perusal however of the amended provisions and the Order XXXVII, Rule 2 as amended by this Court would show that in fact they are in pari materia. Therefore section 97 of the Amending Act will not stand in the way of considering Order XXXVII, Rule 2 as it stands today as amended by Notification of this Court. The point which is sought to be contended by the learned Counsel for the Plaintiffs is based on sub-rule (6) of Rule 3 as amended by this Court. Sub-rule (6) provides that at the hearing of such Summons for Judgment if the Defendant has not applied for leave to defend or if such application has been made and refused the Plaintiff shall be entitled to Judgment forthwith or if the Defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge shall direct that on failure to give the security (if any) or to carry out such other directions as the Court or the Judge may have given within the time limited in the order, the Plaintiffs shall be entitled to Judgment forthwith. It is sub-rule (6)(b) which is pressed into service by learned counsel on behalf of the Plaintiffs to contend that the Court can permit leave to defend either as to the whole or any part of the claim. It is based on this that the learned Counsel has contended that if apart of the relief is not available than to the extent of the relief which can fall under Order XXXVII Court can make

an order directing the defendants to deposit said amount which would fall in terms of Order XXXVII.

The Judgment in Randerian & Singh (supra) and Hydraulic & General Engineering Ltd. (supra) had come up for consideration before me in the case of Bank of India Finance Limited vs. Padma Alloy Casting Pvt. Ltd., in Summons for Judgment No. 662 of 1994 in Summary Suit No. 2289 of 1993 decided on 26th March, 1999. One of the contentions was the very contention which has been raised on behalf of the Plaintiffs. The issue as pointed out earlier is the jurisdiction of this Court to entertain the suit as a summary suit. This is not merely a procedural requirement. It is a requirement for the Court to assume jurisdiction and grant reliefs in a special category of suits which are designated as summary suits. In that context Order XXXVII has specifically set out that when such a suit is filed it is incumbent on the Plaintiffs to aver that no relief is claimed which is not falling within the ambit of the Rule. In other words the relief must be in terms of Rule 2 of Order XXXVII. In the instant case the claim for interest is not based on any agreement or by any enactment. Even if it is contended on behalf of the learned counsel for the Plaintiffs that by virtue of the provisions of the Interest Act on demand being made they are entitled to interest that would be a matter for investigation and what interest the Court may ultimately award. That does not mean that such claim for interest under the Interest Act is interest pursuant to an agreement or pursuant to an enactment. It is in this context that the Division Bench Judgment took the view which has been taken in the case of M/s Randerian & Singh Pvt. Ltd. (supra) which has been reiterated in M/s Hydraulic and General Engineering Ltd. (supra). Insofar as the Judgment of the learned Single Judge in Banque Indosuez (supra) is concerned. I had also considered the said Judgment in Bank of India Finance Ltd. (supra). I therein had held that if the Judgment of the learned Single Judge (Kochar, J.) was to be so construed it would be contrary to the Division Bench Judgments referred to earlier. In fact there was no reference in the aforesaid judgment to the law as decided by the Division Bench Judgments. Even in the case of Bank of Baroda vs. M/s Dawood & Co. (supra), the issue which had arisen and decided in the two Division Bench Judgments was not in issue. Those two Judgments relied on by the Plaintiffs therefore are of no assistance. The contention on behalf of the Plaintiffs can be accepted only if the reliefs prayed for fell within the summary procedure. It is in these circumstances that the Court could grant leave in respect of whole or a part of the claim. That is the view taken by the Apex Court in the case of Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, .

5. Considering the above, I am clearly of the opinion that as the interest claimed was not pursuant to any agreement or was not recoverable pursuant to any statute that part of the relief would not fall within the summary procedure and no summary suit could have been filed insofar-as the interest portion is concerned. The need for such a stand can be seen from the observations of the Division Bench of this Court in M/s Randerian & Singh Pvt. Ltd. (supra) are as

under :--

"Under the Rules of this Court strict conditions are imposed on the Defendants in a summary suit. They must file their appearance in Court within a short specified period and failure to do so entitles the Plaintiffs to obtain an ex parte decree against them. It must logically follow that there must be equally stringent requirements postulated on the Plaintiffs. One of those requirements would be that they must not in the suit make a claim not warranted by the contract or under a statutory provision. If it can be demonstrated, as it can be in the instant case, that the plaintiffs have in the plaint made a claim for interest not warranted by the statutory provision or by the contractual document, then the suit must be one which cannot be accepted as a summary suit. If this can be done, it would follow that plaintiffs have filed as summary suit a suit which was not really a summary suit. Once this is demonstrated, one of the consequences must follow. The first and the more obvious is to grant to Defendants unconditional leave to defend the suit and transfer the same to the appropriate cause list - long cause, short cause or commercial cause. The present case would fall in the last category. There is another way open and that is for the Plaintiffs who are faced with such defences in the affidavits made on the Summons for Judgment with liberty to take out fresh Summons for Judgment after amending the plaint and putting their house in order."

6. In that light of the matter the Defendants are entitled to unconditional leave to defend. Hence the following order:-

"Suit transferred to the list of commercial causes. Defendants to file written statement within 12 weeks from today. Parties will file affidavits of documents within eight weeks thereafter. Inspection and discovery will be completed within eight weeks thereafter."

7. In the circumstances of the case there shall be no order as to costs.

8. Issuance of certified copy expedited.