
(2022) 09 BOM CK 0140

In the Bombay High Court

Case No : Summons For Judgment No.50 Of 2019 In Commercial Summary Suit
No.815 Of 2018

Parag Jyotindra Gandhi

APPELLANT

Vs

Jayant Narendra Mehta And Others

RESPONDENT

Date of Decision : 28-09-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Order 37 Rule 3
Indian Contract Act, 1872 — Section 73, 74

Citation : (2022) 09 BOM CK 0140

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

Bench : Single Bench

Advocate : Pinky M. Bhansali, Shravan Giri

Final Decision : Disposed Of

Judgement

N.J. Jamadar, J

1. This commercial division summary suit is instituted to recover a sum of Rs.1 Crore along with further interest at the rate of 18% p.a. from the date of the suit till payment and/or realization based on a negotiable instrument.

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

(a) Defendant no.1 is the proprietor of defendant no.2 – firm. Pursuant to the representation made by defendant no.1, the plaintiff agreed to purchase a Flat bearing No.901, in a building, Kamla Vihar, situated at Parekh Lane, Kandivali (W), Mumbai, then being redeveloped by defendant no.1 for a consideration of Rs.1,70,00,000/-. As instructed by defendant no.1, the plaintiff credited a sum of Rs.1 Crore by RTGS in the account of defendant no.2 and transferred a sum of Rs.46,00,000/- in the account of Jayant Mehta HUF. A further amount of Rs.22,80,000/- was also paid by the plaintiff by 30th April, 2015. Moreover, a sum of Rs.1,20,000/- was deposited with the authorities by way of TDS on 4th May, 2015. Accordingly, the entire consideration of Rs.1,70,00,000/- was parted

with by the plaintiff.

(b) Under the terms of agreement, between the parties, the defendants had agreed to deliver possession of Flat No.901 by the end of December, 2015. In the event of default, the defendants had agreed to refund the said amount along with suitable compensation.

(c) The defendants committed default. After rigorous pursuation, the defendant No. 1 eventually expressed his inability to handover the possession of Flat No.901 and instead offered to convey another flat bearing No.104 admeasuring 700 sq. ft. carpet area, in another ongoing project Samaj Darshan and also pay compensation. As Flat No.104 was not comparable in size, amenities and location advantage, which Flat No.901 would have had, the defendants agreed to pay a compensation of Rs.1 Crore in addition to transfer of Flat No.104, the value of which was stated to be around Rs.1,44,00,000/-. Thus, on 29th July, 2016 a registered Agreement for Sale of Flat No.104, Samaj Darshan, came to be executed in favour of the plaintiff, wherein the consideration was shown at Rs.1,44,00,000/-.

(d) In addition, to evidence the transaction between the parties, according to the plaintiff, on 23rd August, 2016, the defendants issued a letter acknowledging the receipt of the consideration of Rs.1,70,00,000/- from the plaintiff, the value of Flat No.104, which was conveyed to the defendants was only Rs.1,44,00,000/- and also the liability to pay a compensation of Rs.1 Crore for the delay in delivery of Flat No.901, as initially agreed. It was further agreed that, in the event the defendants executed an instrument to transfer Flat No.901 in favour of the plaintiff by 25th October, 2016, the plaintiff would re-convey Flat No.104, Samaj Darshan in favour of the defendants and then the post-dated cheque, drawn for Rs.1 Crore, towards compensation, would stand cancelled and the plaintiff would return the said cheque.

(d) The defendants failed to transfer Flat No.901 in favour of the plaintiff by the stipulated date. Instead, the defendants executed a registered Agreement for Sale in respect of Flat No.901 in favour of another transferee. Hence, the plaintiff presented the cheque for encashment. It was returned unencashed with the remarks "payment stopped by drawer". As the defendants failed to pay the amount covered by the cheque despite service of the demand notice, the plaintiff was constrained to institute this suit.

3. The defendants entered appearance upon service of writ of summons. Thereupon the plaintiff took out the Summons for Judgment.

4. An affidavit-in-reply is filed by defendant no.1 seeking an unconditional leave to defend the suit. The suit was stated to be misconceived. Maintainability of the suit under the provisions of Order XXXVII was sought to be assailed. It was contended that the plaintiff is guilty of suppression of material facts and has approached the Court with a case which does not reveal the true nature of the transaction between the parties.

5. According to defendant no.1, the plaintiff desired to invest amounts in the projects which were developed by the defendants. Initially a sum of Rs.1,25,00,000/- was invested for purchasing Flat No.104, Vardayani Apartment (Samaj Darshan). A further sum of Rs.46,00,000/- was paid by the plaintiff as an advance towards investment in a future project. By way of security, to cover the said investment, the plaintiff made defendants to deliver an undated cheque drawn for Rs.1 Crore. Eventually, in terms of the agreement between the parties, the defendants executed an Agreement for Sale of Flat No.104 Vardayani Apartment, for a consideration of Rs.1,44,00,000/- against which, the plaintiff had deposited a sum of Rs.1,24,00,000/-. However, in the month of June 2017, a dispute arose between the defendants and the trust which is the owner of the land on which Vardayani Apartment building was being constructed, leading to arbitration proceeding. Taking undue advantage of the situation, the defendant No. 1 contends, the plaintiff has instituted this suit with an ulterior motive. Since the defendant have raised bona fide, fair and triable issues, the defendants are entitled to an unconditional leave to defend the suit.

6. I have heard Ms. Bhansali, the learned Counsel for the plaintiff and Mr. Giri, the learned Counsel for the defendants, at length. With the assistance of the learned Counsels of the parties, I have perused the averments in the plaint, documents annexed thereto and affidavit-in-reply.

7. Ms. Bhansali, the learned counsel for the plaintiff, submitted that the issue and dishonour of the cheque drawn for Rs. 1 Crore towards compensation for failure to convey Flat No. 901, Kamala Vihar is indisputable. The dishonor of the cheque if read in conjunction with the letter dated 23rd August, 2018 (Exhibit B) makes it abundantly clear that the liability is, in a sense, incontestable. In this background, the defence now sought to be raised by the defendants of the cheque having been drawn by way of security only and the plaintiff allegedly taking undue advantage of the dispute between the defendants and the owner of Vardayani Apartments, are frivolous and vexatious. Inviting attention of the Court to the clear and categorical admissions in the letter dated 23rd August, 2018, Ms. Bhansali would urge that the defence now sought to be urged can only be termed to be malafide and a creature of an afterthought with a view to evade the liability. The defendants, therefore, do not deserve any leave to defend the suit. Conversely, the plaintiff is entitled to decree on the basis of the dishonoured negotiable instrument for which there is no semblance of defence, urged Ms. Bhansali.

8. As against this, Mr. Giri, learned counsel for the defendants, would submit that if the facts of the case are construed in a correct perspective, the defence sought to be raised by the defendants can only be said to be a fair, bonafide and strong defence warranting an unconditional leave to defend the suit. Mr. Giri laid emphasis on the fact that as against a consideration of Rs. 1.70 Crore paid by the plaintiff, the defendants have executed a registered agreement for sale in respect of Flat No. 104, Vardayani Apartment for the agreed consideration of Rs.

1.44 Crore. The balance amount was only by way of investment for the future project to be developed by the defendants. It is to secure the balance payment, the defendants had issued the letter dated 23rd August, 2016 whereunder a cheque, drawn for Rs. 1 Crore, was delivered with an express understanding that it would be returned on execution of the agreement for sale in respect of Flat No. 901. As the dispute arose between the defendants and owner of Vardayani Apartment, the further development could not be completed by the defendants. However, that does not imply that the defendants had acknowledged the liability to pay the huge sum of Rs. 1 Crore.

9. To bolster up the submission that dispute between the defendants and the owner of the said land resulted in the unjustifiable termination of the development agreement and the institution of the proceeding for enforcement of the arbitration clause contained therein, Mr. Giri placed on record a copy of the Development Agreement dated 7th July, 2021 executed between Khambhati Modh Vanik Samaj, the owner of the said land, and H. Rishabraj Developers, the subsequent developer appointed by the owner after allegedly terminating the agreement dated 7th December, 2015 between the defendants and the said trust. The defence raised by the defendants, therefore, can not be said to be vexatious or malafide.

10. To begin with, uncontroverted facts. The payment of a sum of Rs. 1.70 Crore by the plaintiff to the defendants during the period

10 th April, 2015 to 4th May, 2015 is rather indisputable. There is not much controversy over the fact that out of the said amount, a sum of Rs. 46 lakhs came to be deposited in the account of Jayant Mehta (HUF). The execution of a registered agreement for sale on 29th July, 2016 by the defendants in favour of the plaintiff and Mrs. Nilima Pethani, in respect of Flat No. 104 situated at 1st floor, Vardayani Apartment (Samaj Darshan) is not in contest. There is not much controversy over the fact that the consideration for the said flat was fixed at Rs. 1.44 Crore.

11. The controversy between the parties essentially revolves around the property which was allegedly initially agreed to be conveyed by the defendants to the plaintiff. It is the case of the plaintiff that he had parted with the said sum of Rs. 1.70 Crore on the representation of the defendant No. 1 that he would convey and transfer Flat No. 901, Kamala Vihar. In contrast, the defendant No. 1 contends that out of the aforesaid amount of Rs. 1.70 Crore, a sum of Rs. 1.24 Crore was paid by the plaintiff towards purchase of Flat No. 104, and the sum of Rs. 46 lakhs was paid as an advance towards future project to be developed by the defendants.

12. In the light of the aforesaid nature of controversy, it would be expedient to note the contents of the letter dated 23rd August, 2016 which forms the foundation of the plaintiff's claim. It reads as under:-

Re: Your deposits against flat No. 901, Parekh Lane, Kamala Vihar, CTS 95,

Parekh Lane, Kandivali (west), Mumbai 400 067.

With reference to the above, we had received the following amounts by RTGS to our bank account.

Date	bank	Amount	Remitting
1.	10/04/2015	Yes	Bank
50,00,000/-			
2.	17/04/2015	Yes	Bank
50,00,000/-			
3.	29/04/2015	Yes	Bank
10,00,000/-			
4.	30/04/2015	Yes	Bank
12,80,000/-			
5.	04/05/2015	TDS	Bank
1,20,000/-			

And the following deposits to Jayant Mehta HUF account.

1.	17/04/2015	Yes	Bank
6,00,000/-			
2.	17/04/2015	Yes	Bank
40,00,000/-			

Now due to certain unforeseen reasons we are not able to complete the sale and have agreed to compensate you for the same as follows:

1. Register agreement to sale in our on-going project Samaj Darshan, Parekh Lane, Kandivali (west), Mumbai 400 067, Flat No. 104, admeasuring 700 sq.ft. Carpet area for Rs. 1,44,00,000/-.

2. For the delay a sum of Rs. 1,00,00,000/- we are issuing a post-dated cheque dated 25/10/16 for Rs. 1,00,00,000/- which shall be returned on execution of agreement to sale for Flat No. 901 of Kamala Vihar.

In event of we doing the due registration of Flat No. 901, Parekh Lane, Kamala

Vihar CTS 95, Parekh Lane, Kandivali(west), Mumbai 67 with you by 25/10/2016, the above arrangement shall stand cancelled and null and void. In such event agreement of Flat No. 104 for Samaj Darshan will be de-registered and the PDC of Rs. 1,00,00,000/- will be forfeited and stands cancelled.

13. A bare perusal of the aforesaid letter would indicate that the defendants purportedly acknowledged receipt of Rs. 1.70 Crore towards transaction in respect of Flat No. 901, Kamla Vihar. The defendants expressed inability to complete the transaction on account of unforeseen reasons and, therefore, the defendants agreed as under:-

1] The execution of registered agreement for sale in respect of Flat No. 104, Samaj Darshan for consideration of Rs. 1.44 Crore.

2] Pay a sum of Rs. 1 Crore for the delay in conveying the Flat No. 901 and, accordingly, issued a cheque for a sum of Rs. 1 Crore payable on 25th October, 2016.

3] The said cheque would be returned upon execution of agreement for sale in respect of Flat No. 901.

The letter further records that in the event the defendants succeeded in executing a registered instrument in respect of Flat No. 901, Kamala Vihar in favour of the defendants by 25th October, 2016, the aforesaid arrangement would stand cancelled and thereupon the plaintiff would re-convey Flat No. 104, Vardayani Apartment in favour of the defendants and the cheque drawn for Rs. 1 Crore would then stand cancelled.

14. It would be contextually relevant to note that the parties had executed an agreement for sale in respect of Flat No. 104 on 29th July, 2016 itself and the said agreement was registered on 30th July, 2016, apparently before the issue of letter dated 23rd August, 2016 (Exhibit B). The said letter, therefore, is in the nature of an agreement to re-convey the said flat provided the defendants executed and registered an agreement for sale in respect of Flat No. 901, Kamala Vihar. In the event of default on the part of defendants to execute such an agreement before 25th October, 2016, the defendants were liable to pay a sum of Rs. 1 Crore by way of compensation for which the subject cheque was drawn; about presentment and dishonour of which there is not much controversy.

15. Prima facie, the aforesaid letter dated 23rd August, 2016 lends support to the claim of the plaintiff that the initial agreement between the parties was for the sale of Flat No. 901, Kamala Vihar and not Flat No. 104, Vardayani Apartment. Conversely, there is a registered agreement for sale of Flat No. 104, Vardayani Apartment for which a consideration of Rs. 1.44 Crore has been shown.

16. The real issue which thus arises for consideration is whether the sum of Rs. 1 Crore which was agreed to be paid by the defendants to the plaintiff as and by way of compensation in addition to execution of agreement for sale of Flat No. 104, Vardayani Apartment for default in conveying Flat No. 901, Kamala Vihar

constitutes a liquidated amount of money for the purported breach of contract ?

17. In the event of a breach of contract under section 73 of the Indian Contract Act, 1872, the party who suffers damage on account of the breach of contract is entitled to receive compensation for any loss or damage caused to him which the parties knew when they entered into the contract to be likely to result from the breach thereof. Section 73 is required to be read in conjunction with section 74 of the Contract Act which deals with a situation where a sum is named in the contract as the amount to be paid in case of such breach or any other stipulation by way of penalty. The party complaining of the breach is entitled to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or the penalty stipulated. It is imperative to note that section 74 emphasizes that, in case of breach of contract, the party complaining of breach is entitled to receive reasonable compensation whether or not any loss is proved to have been caused by such breach. The entitlement for a reasonable compensation is thus underscored.

18. If the compensation named in the contract is in the nature of penalty, a party is only entitled to reasonable compensation for the loss suffered. On the contrary, if the compensation named in the contract appears to be a genuine pre-estimate of loss, which was in the contemplation of the parties while entering into the contract, proof of loss or damage is not peremptory. The party complaining of breach would then be justified in claiming the sum so named.

19. A useful reference in this context can be made to a judgment of the Supreme Court in the case of Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Limited(2003) 5 Supreme Court Cases 705 wherein the principles which govern the award of damages in case of breach of contract were culled out as under:-

68. From the aforesaid discussions, it can be held that:-

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same;

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/ compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequences of the breach of a contract.

(4) In some contracts, it would be impossible for the Court to assess the

compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.

20. In the light of the aforesaid exposition of law, reverting to the facts of the case, the nature of the sum quantified by the parties to be paid by way of compensation in addition to agreement for sale of Flat No. 104 deserves to be appreciated. Time lag between the date of parting of consideration and the date stipulated for conveying the Flat No. 901, assumes significance.

21. In the plaint, the plaintiff averred that after receipt of the entire consideration by 4th May, 2015 the defendants had agreed to deliver the possession of Flat No. 901, by December, 2015. Under the letter dated 23rd August, 2016 the defendants undertook to transfer Flat No. 901 by 25th October, 2016. Purportedly, for the delay in transferring Flat NO. 901, or for that matter default in transferring the Flat No. 901, for a period of approximately 10 months of the initial agreement, the defendants were to pay a compensation of Rs. 1 Crore. It would be contextually relevant to note that the said amount would also cover the balance amount of Rs. 26 lakhs, which remained outstanding, after appropriation of a sum of Rs. 1.44 Crore towards Flat No. 104, Vardayani Apartment.

22. The question as to whether in the totality of the circumstances, the sum of Rs. 74 lakhs represents a genuine pre-estimate of the loss which the parties knew would occasion on account of default on the part of the defendants or it partakes the character of penalty, in my view, raises a triable issue.

23. At this juncture, the defence of the defendants that on account of dispute between the defendants and the owner of the land where Vardayani Apartment (Samaj Darshan) was being developed, there was delay in completion of said project leading to institution of proceedings, warrants consideration. A copy of the development agreement executed by and between Khambhati Modh Vanik Samaj, the owner of the said land and H. Rishabraj Developers, the subsequent developer, placed on record on behalf of the defendants, inter alia, records the fact that the defendants were the first developer of the said property at CTS Nos. 84 B and the Development Agreement dated 7th December, 2015 came to be terminated by the owner on 15th July, 2017 and arbitration was invoked. From this stand point, the defence sought to be raised by the defendants can not be said to be a frivolous or moonshine defence.

24. The tests for grant of leave to defend in a summary suit are well nigh settled. It would be suffice to note the recent pronouncement of the Supreme Court in the case of B.L. Kashyap and Sons Limited vs. JMS Steel and Power Corporation and Anr. (2022) 3 SCC 294 wherein with reference to the pronouncement of the Supreme Court in the cases of IDBI Trusteeship Services Ltd. vs. Hubtown Limited (2017) 1 SCC 568 and Mechelec Engineers & Manufacturers vs. Basic Equipment Corpn. (1976) 4 SCC 687 the tests were

reiterated. They read as under:-

33. It is at once clear that even though in the case of IDBI Trusteeship, this Court has observed that the principles stated in paragraph 8 of Mechelec Engineers' case shall stand superseded in the wake of amendment of Rule 3 of Order XXXVII 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.

33.1 As noticed, if the defendant satisfies the Court that he has substantial defence, i.e., a defence which is likely to succeed, he is entitled to unconditional leave to defend. In the second eventuality, where the defendant raises triable issues indicating a fair or bonafide or reasonable defence, albeit not a positively good defence, he would be ordinarily entitled to unconditional leave to defend. In the third eventuality, where the defendant raises triable issues, but it remains doubtful if the defendant is raising the same in good faith or about genuineness of the issues, the Trial Court is expected to balance the requirements of expeditious disposal of commercial causes on one hand and of not shutting out triable issues by unduly severe orders on the other. Therefore, the Trial Court may impose conditions both as to time or mode of trial as well as payment into the Court or furnishing security. In the fourth eventuality, where the proposed defence appear to be plausible but improbable, heightened conditions may be imposed as to the time or mode of trial as also of payment into the Court or furnishing security or both, which may extend to the entire principal sum together with just and requisite interest.

33.2 Thus, it could be seen that in the case of substantial defence, the defendant is entitled to unconditional leave; and even in the case of a triable issue on a fair and reasonable defence, the defendant is ordinarily entitled to unconditional leave to defend. In case of doubts about the intent of the defendant or genuineness of the triable issues as also the probability of defence, the leave could yet be granted but while imposing conditions as to the time or mode of trial or payment or furnishing security. Thus, even in such cases of doubts or reservations, denial of leave to defend is not the rule; but appropriate conditions may be imposed while granting the leave. It is only in the case where the defendant is found to be having no substantial defence and/or raising no genuine triable issues coupled with the Court's view that the defence is frivolous or vexatious that the leave to defend is to be refused and the plaintiff is entitled to judgment forthwith. Of course, in the case where any part of the amount claimed by the plaintiff is admitted by the defendant, leave to defend is not to be granted unless the amount so admitted is deposited by the defendant in the Court.

33.3 Therefore, while dealing with an application seeking leave to defend, it would not be a correct approach to proceed as if denying the leave is the rule or

that the leave to defend is to be granted only in exceptional cases or only in cases where the defence would appear to be a meritorious one. Even in the case of raising of triable issues, with the defendant indicating his having a fair or reasonable defence, he is ordinarily entitled to unconditional leave to defend unless there be any strong reason to deny the leave. It gets perforce reiterated that even if there remains a reasonable doubt about the probability of defence, sterner or higher conditions as stated above could be imposed while granting leave but, denying the leave would be ordinarily countenanced only in such cases where the defendant fails to show any genuine triable issue and the Court finds the defence to be frivolous or vexatious.

25. Applying the aforesaid tests to the facts of the case, I am inclined to hold that the defence raised by the defendants can not be said to be such that the defendants do not deserve leave to defend the suit. At the same time, I am not persuaded to grant an unconditional leave to defend the suit for reasons more than one.

First, there is clear and categorical admission that the plaintiff had paid a sum of Rs. 1.70 Crore by 4th May, 2015. Second, on the own showing of the defendants, a sum of Rs. 1.44 Crore is appropriated towards the consideration for Flat NO. 104, Vardayani Apartment. Thus, the defendants still hold a sum of Rs. 26 lakhs. Thirdly, it is the defendants' case that there was delay in completion of the project at Vardayani Apartment and the things came to such a pass that the owner went on terminating the Development Agreement. Fourthly, an unconditional leave to defend the suit in such a situation would leave the plaintiff in the lurch, despite there being an admission of receipt of an amount at least to the extent of Rs.26 lakhs, which is in excess of consideration for Flat No. 104.

26. I am, therefore, persuaded to grant a conditional leave to defend the suit subject to deposit of Rs. 50 lakhs to account for the aforesaid balance amount and the interest which would accrue thereon at a reasonable rate.

Hence, the following order:

ORDER

a] Leave to defend is granted to the defendants subject to deposit of a sum of Rs.50,00,000/- (Fifty Lakhs) in this Court within a period of six weeks from today.

b] If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendants shall file written statement within a period of thirty days from the date of deposit;

c] If this conditional order of deposit is not complied with, within the aforesaid period, the plaintiff shall be entitled to apply for an ex-parte decree against the defendants after obtaining a Non-Deposit Certificate from the Prothonotary and Senior Master of this Court. d] Summons for Judgment stands accordingly disposed of.