
(2001) 10 BOM CK 0057

In the Bombay High Court

Case No : Summons for Judgment No. 922 of 1999 in Summary Suit No. 1484 of 1999

Seagate Trading and Investment (Pvt.) Ltd.

APPELLANT

Vs

Vora and Vora and Others

RESPONDENT

Date of Decision : 05-10-2001

Acts Referred:

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

Citation : (2002) 1 ALLMR 406

Hon'ble Judges : R.J. Kochar, J

Bench : Single Bench

Advocate : Shyam Mehta, Ayaz Bilawala and Bhushan Sakpal, instructed by Bilwala and Co, for the Appellant; D.V. Merchant and Sanjay jain, instructed by Lalit Jain and Tandon, instructed by . Dhruv Liladhar and Co., for the Respondent

Judgement

R.J. Kochar, J.—The plaintiffs have prayed for a decree against the defendants as under; that the defendants be jointly and severally ordered and decreed to pay to the plaintiffs the sum of Rs. 25,62,191.78 as per the particulars of Claim being Exhibit "H" hereto together with further interest thereon on the principal sum of Rs. 20,00,000/- at the rate of 18% per annum from the date of filing of the suit till payment or realisation thereof and costs of the Suit.

2. On receipt of the writ of summons, the defendants have entered their appearance to contest the suit claim. The plaintiffs have thereafter taken out the present summons for judgment on verifying the facts in affidavit in support of the summons for judgment. According to the plaintiffs, the suit claim is an admitted, ascertained and liquidated claim arising out of a written contract and dishonour of the cheque and that the defendants have no defence of any nature entitling the plaintiffs to enter a judgment in their favour.

3. The defendant No. 3 has filed an affidavit in reply on behalf of defendant Nos. 1 and 2 and on his own behalf. He has contested the summary suit on a number of points, which according to the said defendant, are triable issues and,

therefore, they have prayed for an unconditional leave to defend the suit.

4. The defendant No. 4 has also filed his affidavit in reply for and on behalf of himself and the defendant No. 5. These defendants have also contested the averments and the allegations made by the plaintiffs and have prayed for an unconditional leave to defend the suit.

5. The plaintiffs have filed affidavit in rejoinder to the affidavits filed by the above mentioned defendants.

6. I have heard the learned Counsels of both sides. I have also perused and considered the pleadings of the parties. Mr. Shyam Mehta and Mr. Merchant, both the learned Counsels for the plaintiffs and the defendant Nos. 1, 2 and 3 have also relied on the proceedings of the Suit No. 5008 of 1998 filed by M/s. Rushabh Precision Bearings Ltd. and 9 others against the present plaintiffs and 10 others. It appears that there are large number of cases filed against each other, including winding up petition, between the two groups of the companies. I have refused to get myself entangled in the mesh of the other legal battle fought by the parties and I have confined myself to the present summons for judgment and the pleadings in the suit.

7. From the averments in the plaint, it appears that the plaintiffs lent and advanced a sum of Rs. 20,00,000/- to the defendant No. 1 by a cheque bearing No. 855888 dated 16th October, 1996 drawn on Canara Bank for a period of 90 days. The said cheque was encashed by the defendants and they received the aforesaid amount of Rs. 20,00,000/-. It is further averred by the plaintiffs that the defendant No. 1 had issued and handed over a post-dated cheque dated 13th January, 1997 drawn on Union Bank of India for repayment of the aforesaid sum of Rs. 20,00,000/-. According to the plaintiffs, since the defendants were unable to repay the said sum of Rs. 20,00,000/-, they requested the plaintiffs to extend the time for repayment thereof, and accordingly, the time was extended up to 14th April, 1997. The plaintiffs have further averred that the defendants in consideration thereof had executed a security document in favour of the plaintiffs. It further appears that the defendants once again requested the plaintiffs to further extend the time for repayment of the said amount and that the plaintiffs had agreed to accommodate the defendants, after the latter executed a new set of security documents. Accordingly, the defendants had executed a new set of security documents in favour of the plaintiffs namely

- (a) The Demand Promissory Note dated 23rd May, 1997 for Rs. 20,00,000/-;
- (b) A Demand Receipt dated 23rd May, 1997 for Rs. 20,00,000/-;
- (c) A post-dated cheque for Rs. 20,00,000/- dated 24.4.1997;
- (d) A letter of assurance dated 23rd May, 1997.

The plaintiffs have relied on the aforesaid documents in support of their case and have exhibited the same with the plaint. It is further averred by the plaintiffs that

the other associated concerns of the plaintiffs had also advanced moneys to the defendants and other companies of Vora Group of Companies and the defendant Nos. 2 and 3 in their personal and individual capacity had executed a letter of guarantee in favour of the plaintiffs and their associated concerns guaranteeing repayment of the defendants and other Vora Group of Companies to the plaintiffs and their other associated concerns. The plaintiffs have, however, confined their claim in the present Suit only to the extent of Rs. 20,00,000/- and interest against the principal borrowers namely the defendants in the Suit. The plaintiffs have averred that they are initiating separate proceedings against the said guarantors.

8. It is alleged by the plaintiffs that after informing the defendants they had presented the said cheque for encashment, but the said cheque was dishonoured by the Bankers with a memo dated 12th August, 1997 indicating the remark "payment stopped by the drawer."

9. The plaintiffs have thereafter caused a notice to be sent by their Advocate on 25th August, 1997 calling upon the defendants to pay the amount of the dishonoured cheque within 15 days. The defendants, therefore, through Advocate replied on 5th September, 1997 the said notice and raised various contentions. The plaintiffs have also averred that they have initiated criminal proceedings u/s 138 and 142 of the Negotiable Instruments Act 1881 and that the said complaint is pending. The plaintiffs have also referred to the Suit No. 5008 of 1998 filed by the defendants and the Vora Group of Companies against the plaintiffs and their associated concerns for a decree of Rs. 25,28,000/-, as set out in the Particulars of Claim in the said Suit. It further appears that in the said Suit, the plaintiffs therein (present defendants) have sought a declaration that the documents set out in Schedules 2 and 3, cheques, promissory notes, receipts, personal guarantees were signed and executed without any valid consideration by use of undue influence and that the said documents were null and void and not binding on the defendants and the Vora Group of Companies and for other reliefs.

10. In the aforesaid circumstances, the plaintiffs have prayed for a decree for a sum of Rs. 25,62,191.78 as set out in the Particulars of Claim, Exh. H of the plaint.

11. The plaintiffs have specifically averred that the Suit is filed on the basis of the postdated cheque, which was in consideration of the advances made by the plaintiffs and the said cheque was dishonoured giving rise to the present Summary Suit within the ambit of Order XXXVII Rule 2 of the Civil Procedure Code.

12. Mr. Shyam Mehta, the learned Counsel for the plaintiffs has submitted on the basis of the pleadings and the documents. He has totally refuted the contentions of the defendants that the defendants have already made payment to the plaintiffs and that nothing was due and payable. According to the learned

Counsel, the said pleadings were totally false and baseless. Mr. Mehta has submitted that the plaintiffs have not received any amount from the defendants as alleged, he has further strenuously submitted that there is absolutely no documentary evidence to support the case of the defendants that they had made repayment of the loan amount of Rs. 20,00,000/-. He pointedly brought to the notice of this Court that the defendants could have straightaway produced receipts and cheque counter-foils, pass-book and Bank accounts to show that the defendants had repaid the amount of Rs. 20,00,000/-, the cheque for which was dishonoured by the Bankers. Mr. Mehta has submitted that was the easiest mode of the defence to bury the controversy before this Court. According to the learned Counsel, the defendants are taking fraudulent and misleading stand by confusing the facts and are playing on jugglery on the basis of the language in the pleadings. Mr. Mehta has further pointed out that if the defendants had made repayment as alleged by them, their Advocate in reply to the notice of the plaintiffs could have straightaway stated this fact that his client had already made payment to the plaintiffs and that their demand was totally illegal. Mr. Mehta has read out the entire reply to stress the point that there is absolutely nothing in the said reply to support the contention of the defendants that they had already made payment to the plaintiffs.

13. Mr. Mehta has further relied on Exhibit "A" of the Suit No. 5008 of i 998 filed by the present defendants. In the said Suit, the present defendants have set out the various loans received and repaid and the balance amount as per the period from 1995-96 onwards. These entries reflected in the Exh. A are pertaining to the various companies of both the groups. As far as the present plaintiffs are concerned, their account is shown, at page 81 of the said Suit, which was filed on 28th September, 1998 by the present defendants, as under :

M/s. Seagate Trading

1996-97

(a) Loan Received 2000000

(b) Loan Repaid 174205

Balance Due 1825795

1997-98

Loan opening Balance 1 825795

(a) Loan Received ____

(b) Loan Repaid 43551

Balance Due 1782244

14. The learned Counsel has, therefore, pointed out that it is an admitted fact that the defendants have received an amount of Rs. 20,00,000/- and after showing an amount of Rs. 1,74,205/- as part repayment, the net balance due to

the present plaintiffs is shown as Rs. 17,82,244/-. Mr. Mehta has pointed out that the same Schedule "A" is prepared by the present defendants giving all the details of the various receipts and payments/adjustments made between the two groups of companies/firms of both sides. Mr. Mehta, therefore, prays for a decree in favour of his client. Alternatively, he submits that if at all the defendants would be granted leave to defend the Suit, that should be only on a condition of making a deposit of the admitted amount as per Schedule "A" of the Suit No. 5008 of 1998. i.e. Rs. 17,82,244/-.

15. On the other hand, Mr. Merchant, the learned Counsel for the defendants Nos. 1 to 3 has vehemently submitted that the Suit in the frame of Summary Suit is not maintainable at all as there are running accounts between the two groups of the companies of the plaintiffs and the defendants. According to the learned Counsel there are several transactions of loans and advances, payments and repayments, mutually made by both the sides. There are cross-transactions amongst the companies of both the groups.

16. Mr. Merchant further submitted that there was no consideration for the cheque given by the defendants in favour of the plaintiffs to the tune of Rs. 20,00,000/-. The said cheque was dishonoured as there was no consideration and therefore the Suit based on the said dishonoured cheque is not maintainable.

17. From the pleadings in the Suit No. 5008 of 1998, which was filed by the present defendants, much prior jn time and before the plaintiffs have filed the present Suit, from the details given in the said Suit, according to the learned Counsel, both the sides will have to reconcile the accounts.

18. The transactions of money lending by the plaintiffs was illegal and same is hit by the provisions of the Bombay Money Lenders Act, as the plaintiffs have no valid licence under the said Act.

19. The defendant No. 1 is a private trust and no Suit would lie against the said trust, as it stood dissolved on 16.6.1995, much prior to the filing of the Suit and there cannot be any personal decree against the trustees, defendant Nos. 2 to 5.

20. No interest was agreed and therefore the claim of interest is untenable and therefore the Summary Suit is not maintainable.

21. There was no consideration for the execution of the promissory note dated 23.5.1997, as also there was no consideration for the cheque dated 24.7.1997, which was dishonoured.

22. The promissory note was by M/s. Vora & Vora Company. While, the trustees had signed the same and on that date the trust never existed.

23. The receipt dated 23.5.1997 has left blank and that indicates that there was no consideration passed to the defendants.

24. The alleged loan transaction of inter-corporate deposit of Rs. 20,00,000/- formed part of first set of transaction during the period between September,

1995 and December, 1996.

25. Mr. Merchant has pointed out from para 13 of the rejoinder filed by the plaintiffs that the said amount was repaid by the defendants.

26. Though, Mr. Merchant, the learned Counsel for the defendant Nos. 1 to 3 has laid much stress on the affidavits filed by the present plaintiffs in the Suit No. 5008 of 1998 and on para 13 of the rejoinder filed by the plaintiffs in the present Suit to bring home his point that the defendants have already made payment to the plaintiffs, I do not find any substance in the said contention of Mr. Merchant. No doubt, he has read certain portion from the aforesaid pleadings. The easiest method for Mr. Merchant was to produce a receipt or the Bank account to clinch the issue of payment made by the defendants to the plaintiffs.

27. Instead of repeated submissions Mr. Mehta, could have produced the receipt or other documentary evidence as a clinching evidence to show that the Suit was totally baseless as the plaintiffs had already received the amount of Rs. 20,00,000/-. Further, Exhibit "A" in the Suit No. 5008 of 1998 totally belies the contention of the defendants that they had already made a payment of Rs. 20,00,000/- to the plaintiffs. From the said Exhibit "A", the fact that the defendants have not made payment of Rs. 20,00,000/- as alleged is crystal clear. The net balance, according to the defendants, as reflected in the said Exhibit is Rs. 17,82,244/-. Had the defendants made the entire payment to the plaintiffs as alleged by them, the account of the plaintiffs would have shown nil as far as the present transaction was concerned.

28. Further, it is very pertinent to note that there is no such assertion in the reply sent on behalf of the defendants under their instructions in reply to the notice of the plaintiffs demanding the sum of Rs. 20,00,000/- and interest from the defendants that his client (the defendants) had already repaid the entire amount of Rs. 20,00,000/- and interest and that nothing was due and payable. It is not the case of the defendants that their Advocate had sent a wrong reply, which did not contain this crucial aspect, which would conclude the entire controversy. It is ingenuity of the learned Counsel for the defendants Nos. 1 to 3 that he has created a smokescreen of confusion to show that the present transaction formed part of the first set of transaction and according to the plaintiffs themselves the transaction of the first set was completely repaid. Instead of entering into the jugglery of words, the learned Counsel ought to have produced a receipt of repayment or Bank entries to that effect. There was no reply to the contention of Mr. Mehta that why the learned Counsel for the defendants did not assert the repayment of the said loan in reply to the notice sent by the plaintiffs. Mr. Merchant has tried to take advantage of the averments and language used in the affidavit in reply filed on behalf of the plaintiffs in Suit No. 5008 of 1998. The said affidavit was referring to the transaction between the various companies/firms of both the groups as first set of transaction of inter-corporate deposit. It was a reference made by the affiant in respect of the cross-dealings of the parties and there was no particular reference of the present

transaction. In the rejoinder dated 23rd March, 2001, filed in the present Summons for Judgment, it is clarified that no amount was advanced by the plaintiffs to the defendant No. 1 under the first set of inter-corporate deposit receipt. Instead of getting into the first set of transaction or the second set of transaction, it was the bounden duty of the defendants to have produced unshakable or unimpeachable evidence of repayment of the amount by way of receipt or Bank document. Coupled with these facts I also cannot ignore the Exhibit "A" prepared by the defendants in the Suit No. 5008 of 1998, wherein they were plaintiffs. The said statement was prepared by the defendants showing the total receipt of Rs. 20,00,000/- from the plaintiffs and according to them the net balance payable to the plaintiffs was Rs. 17,82,244/-. An amount of Rs. 20,00,000/- is not a small amount to be forgotten or to be made mistake about, if paid by the defendants to the plaintiffs. From that statement of account, the net balance admittedly payable to the present plaintiffs is Rs. 17,82,244/-.

29. The suit claim is arising from demand promissory note dated 23.5.1997, Exh. A to the present Suit. The contents of the promissory note are very clear that M/s. Vora & Vora Company have promised to pay to the plaintiffs an amount of Rs. 20,00,000/- with interest at the rate of 22.5% p.a. At this stage itself, it would be convenient to deal with the fraudulent submission on behalf of the defendants that the said promissory note was signed by the trustees of the trust, which was dissolved on 16.6.1995 and, therefore, the signatory being a trustee of the dissolved trust was not liable to stand by the said promissory note. To say least, such a defence is nothing but a dishonest defence. Mr. Rajesh Vora, who has signed this promissory note has styled himself as a trustee on 23rd May, 1997. He himself has tried to mislead the plaintiffs by continuing to pose himself as a trustee and he is trying now to disown the liability on the convenient and fraudulent pretext that he had ceased to be a trustee on the dissolution of the trust. The next document, on which the plaintiffs have relied on is the receipt signed by Mr. Rajesh Vora as a trustee on 23rd May, 1997. The receipt clearly indicates that M/s. Vora & Vora Company had received an amount of Rs. 20,00,000/- from the plaintiffs by a cheque towards inter-corporate deposit. The next document is Exh. "C", which is a cheque issued by the said M/s. Vora & Vora in favour of the plaintiffs. On the letterhead of M/s. Vora & Vora, it is written by me said Mr. Rajesh Vora on 23rd May, 1997 to the plaintiffs that it was confirmed that the balance outstanding against them for inter-corporate deposit dated 26.5.1997 for Rs. 20,00,000/- for which they had issued post-dated cheque and had assured that it will be honoured and had further undertaken to keep sufficient amount in the account with the Bankers and that it will not be dishonoured. Contrary to the said assurance and undertakings, the said cheque was dishonoured. This event was followed by a notice sent by the plaintiffs' Advocate calling upon the defendants to make payment of the dishonoured cheque. The defendants' Advocate has sent reply on 5th September, 1997. The said reply sent by the Advocate under the defendants instructions is crystal clear to read that the defendants were facing serious problems in recovering their own

outstanding and that they would settle the matter amicably with the plaintiffs. There is not even a remote whisper about the defendants having paid the entire amount of the plaintiffs, It is to the contrary, the defendants have narrated their own financial difficulties and have assured the plaintiffs to settle the dispute amicably. I have, therefore, absolutely no manner of doubt that the defence taken by the defendants is dishonest, vexatious and frivolous. There is absolutely no basis to place reliance on the defence that the defendants have made payment to the plaintiffs and that nothing is due and payable. All other points of defence raised by Mr. Merchant are also of frivolous nature. The defence is sheerly a moonshine defence. According to me, the plaintiffs are entitled to get a judgment entered in their favour and against all the defendants. The defendants who are impleaded as the trustees of the Trust will be liable in their capacity as trustees and not in their personal capacity. The plaintiffs are entitled to get interest on the sum of Rs. 20,00,000/- from the date of dishonour of the cheque i.e. 12th August, 1997 at the rate of 18% p.a. till the date of payment or realisation.

30. Mr. Shyam Mehta, the learned Counsel for the plaintiffs has produced original documents along with list, which are taken on record and marked as Exhibit "A" collectively. The original documents are allowed to be taken by the learned Counsel on his substituting the same by true copies.

31. In the aforesaid circumstances, the Summons for Judgment is made absolute and the Suit is decreed as prayed for against all the defendants with costs.

32. The plaintiffs are allowed to execute the decree without getting it sealed under the High Court (O.S.) Rules 314, provided the learned Advocate for the plaintiffs files a draft of the decree within six weeks from today. Issuance of the decree is expedited.

Summons for Judgment and the Suit both are disposed of.

After pronouncing the order Mr. Jain, the learned Counsel for the defendants, has prayed for a clarification that the defendant Nos. 2 to 5 are the trustees of the Trust and that they would not be liable in their personal capacities. It is needless to clarify that the trustees would be liable in their capacity as trustees. Mr. Jain prays for stay of the decree for a period, of eight weeks. The decree is stayed provided the defendants to deposit the whole amount in this Court within a period of eight weeks. On such deposit the Prothonotary and Sr. Master shall invest the entire amount in a fixed deposit of any nationalised Bank initially for a period of one year and to be renewed from time-to-time subject to any orders passed by the appeal Court.