



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
SUMMONS FOR JUDGMENT NO. 73 OF 2021

Tiscon Realty Private Limited

Address at 12/1-D, Indraprastha Cooperative

Housing Society Ltd, Jitendra Road,

Malad (E), Mumbai – 400097

.....Applicant

In the matter between:

Address at 12/1-D, Indraprastha Cooperative

Housing Society Ltd, Jitendra Road,

Malad (E), Mumbai – 400097

.....Plaintiff

Vs.

1. C. G. Edifice

Office at: B-507, Tanishka, Diamond Compound,

Near Dahisar Petrol Pump, S. V. Road,

Dahisar East, Mumbai 400 068.

Administrative Office at:

214, Second floor, Hari Om Plaza,

M. G Road, Omkareshwar Temple,

Borivali (E), Mumbai – 400 066.

(Through Partners)

2. Ajay Jagannath Thakur

A-901, Radha Madhav,

Radha Residency Co-operative Housing Society,

Sidharth Nagar, Borivali (E), Mumbai – 400066.

3. Shyam Kumar Shah,
Flat No: M-1102, 11th floor,
Jasmin Jalvayu Vihar P-1,
Sector-20, Kharghar,
Navi Mumbai – 410210.

.....Defendants

WITH

COMMERCIAL SUMMARY SUIT NO. 34 OF 2021

Tiscon Realty Private Limited
Address at 12/1-D, Indraprastha Cooperative
Housing Society Ltd, Jitendra Road,
Malad (E), Mumbai – 400097

.....Plaintiff

Vs.

1. C. G. Edifice
Office at: B-507, Tanishka, Diamond Compound,
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Flat No: M-1102, 11th floor,
Jasmin Jalvayu Vihar P-1,

Sector-20, Kharghar,
Navi Mumbai – 410210.

.....Defendants

Mr. Pradeep J. Thorat a/w Aditi S. Naikare for Plaintiff.

Mr. Firoz Bharucha a/w Atithi Abhay i/by Aditya Pratap for Defendants.

CORAM : ARIF S. DOCTOR, J.
RESERVED ON : 19th APRIL, 2023
PRONOUNCED ON : 9th JUNE, 2023

P.C.:-

1. The Plaintiff has filed the captioned Summary Suit seeking a decree against the Defendants for an amount of Rs.1,70,93,880/- as more particularly set out in the particulars of claim annexed as Exhibit-6 to the Plaint. The Suit is based on the dishonour of 6 cheques, all dated 31st December 2019 (the said cheques) issued by the Defendants to the Plaintiff. The details of the said 6 cheques are as follows viz.,

Sr. No.	Cheque No.	Amount	Date of Cheque	Cheques Drawn On
1.	000108	Rs.31,64,000/-	31.12.2019	HDFC Bank Ltd., Borivali (W), Boriwali, Mumbai-400066

2.	000109	Rs.28,00,000/-	31.12.2019	HDFC Bank Ltd., Borivali (W), Borivali, Mumbai- 400066
3.	000110	Rs.28,00,000/-	31.12.2019	HDFC Bank Ltd., Borivali (W), Borivali, Mumbai- 400066
4.	000111	Rs.28,00,000/-	31.12.2019	HDFC Bank Ltd., Borivali (W), Borivali, Mumbai- 400066
5.	000112	Rs.5,00,000/-	31.12.2019	HDFC Bank Ltd., Borivali (W), Borivali, Mumbai- 400066
6.	000107	Rs.27,00,000/-	31.12.2019	HDFC Bank Ltd., Borivali (W), Borivali, Mumbai- 400066

2. The facts in the present case lie within a very narrow compass. It is the Plaintiff's case that, in the year 2018, Defendant Nos.2 and 3 had approached the Plaintiff with a request for financial help for funding the Defendants' construction business. The Plaintiff considering the request of Defendant Nos.2 and 3, had extended financial assistance to Defendant No.1 to the tune of Rs.1,20,64,000/-. Subsequently, it is the Plaintiff's case that the Defendants had

agreed to repay the amount advanced along with compensation as more particularly set out in the letter dated 10th October, 2019. The said cheques were sent to the Plaintiff by the Defendants along with this letter.

3. However, when the said cheques were presented for clearance on 27th March, 2020, they were all returned dishonored with the caption "Insufficient Funds". The Plaintiff thereafter vide their advocate's notice dated 9th July, 2020, called upon the Defendants to make payment of the amounts mentioned in the said cheques. However, despite due receipt of the advocate's notice, the Defendants failed and neglected to either respond to the same or make payment in terms of the work in respect of which the said cheques were drawn.

4. It is thus that the present Summary Suit came to be filed.

Submissions of Mr. Thorat, on behalf of the Plaintiff.

5. Mr. Thorat learned counsel appearing on behalf of the Plaintiff at the outset invited my attention to the letter dated 10th October, 2019 and pointed out that the Defendants had unequivocally admitted and acknowledged receipt

of an amount of Rs.1,20,64,000/- from the Plaintiff. He then pointed out that the Defendants had, by the said letter, agreed to repay the said amount to the Plaintiff alongwith compensation. He submitted that it was thus and in keeping with the said agreement arrived at between the parties that the said cheques had been issued by Defendant No.1 to the Plaintiff for the total amount of Rs.1,47,64,000/-.

6. From the said letter, learned counsel pointed out the details of the said cheques were set out in Annexure A thereto and that the said letter in respect of Annexure A specifically recorded as follows;

“(i) Repayment of loan Annexure A.

(ii) Repayment of investment now considered as current liabilities Annexure A.”

He thus submitted that the consideration for which the said cheques had been issued had already been clearly set out in the said letter. Learned counsel then pointed out that the Defendants had at no time prior to the filing of the Reply to the Summons for Judgment, ever disputed and/or denied their liability to make payment of the said amounts advanced. He pointed out that the Defendants had also not replied to the Plaintiff’s advocate’s notice dated 9th July, 2020. Learned

counsel thus submitted that the Defendants did not and could not have any defence on merit and thus submitted that the Summons for Judgment was required to be made absolute on this ground alone.

7. Learned counsel then pointed out that, it was well settled that a Summary Suit based on dishonored cheques was maintainable. He further submitted that the moment payment in respect of a loan is made by cheque, a distinct and new liability arises which is independent and can be sued upon. In support of his contention, he placed reliance upon a judgment of this Court in the case of *Motilal Laxmichand Salecha HUF Vs. M/s Mour Marbles Industries Pvt. Ltd. & Ors.*¹ (S. C. Gupte, J.), which *inter alia* held as follows viz.,

"5 Merely because while narrating the facts of the case the grant of loan by the Plaintiff to the Defendants finds a mention, merely as a historical narration, it cannot be said that the suit is for recovery of loan. The moment payment is made by a cheque or another negotiable instrument of a loan, the liability under the loan is substituted by the liability to honour the cheque or the negotiable instrument, as the case may be. In fact, in a sense, the original liability to pay the loan is discharged by means of execution of the negotiable instrument. If this negotiable instrument is not honoured upon presentation for payment, a

1 Summons for Judgment No.64 of 2016 (18th April, 2018)

distinct and new liability arises under the provisions of the Negotiable Instruments Act.

Learned counsel then submitted that the said judgment had been upheld by a Division Bench of this Court. Basis this, learned counsel submitted that the present Suit was not only maintainable but also that, there was no dispute and/or denial to the Plaintiff's claim either in fact or in law.

8. He then, without prejudice to the above, submitted that the Defendants had only for the first time in the Affidavit-in-Reply to the Summons for Judgment raised various frivolous contentions which were both legally and factually untenable. He submitted that the same was done only in an attempt to confuse and obfuscate the undisputed facts of the case. He submitted that given the fact that the Plaint was in fact based on the dishonor of the said cheques admittedly issued by the Defendants to the Plaintiff, none of the contentions raised in the Affidavit-in-Reply were relevant and/or tenable in the facts of the present case. He reiterated that there was no denial and/or dispute to the factum of issuance of the said cheques or to the dishonor thereof. He therefore

submitted that in keeping with the ratio laid down by this Court in the case of *Motilal Laxmichand Salecha HUF* (supra) the Summons for Judgment must necessarily be allowed as prayed for.

Submissions of Mr. Bharucha, appearing on behalf of Defendants

9. Mr. Bharucha, learned counsel for the Defendants at the outset submitted that though various defences had been raised in the Affidavit-in-Reply, he was confining his submissions to only three grounds i.e. (i) that the transaction between the parties was an investment and not a loan (ii) that the cheques were to be deposited only with the prior concurrence of the Defendants and (iii) that the letter dated 10th October, 2019 annexed as 'Exhibit-A' to the Plaintiff was a fraudulently altered document and thus incapable of being relied upon.

10. Insofar as his first contention was concerned, Mr. Bharucha invited my attention to the letter dated 10th October, 2019 and pointed out therefrom that the same in terms made reference to the fact that the Plaintiff had agreed to

invest in certain projects of Defendant No.1 and thus the amounts, save and except an amount of Rs.50,00,000/- were advanced as investments and not loans. He submitted that given the fact that the amounts advanced were investments, the same were neither *“a debt”* nor *“a liquidated demand of money”* and would thus clearly fall outside the scope of the provisions of Order 37 of the Code of Civil Procedure, 1908 (CPC). He submitted that, from a plain reading of the said letter, it was clear that the parties had agreed to share the profits from the joint venture proportionately. He therefore submitted the cheques were issued in keeping with the agreement between the parties and not as and by way of repayment of any loan. Learned counsel then submitted that, given the express wordings used in the said letter, there was no doubt that the amounts transferred by the Plaintiff to Defendant No.1 were purely investments and not loans.

11. He then, in respect of his second contention, submitted that even assuming that the said letter was valid and binding the same being the contract between the parties must (a) be read as a whole and (b) construed strictly in

terms thereof. He then invited my attention to the said letter and pointed out that the same categorically provided that the said cheques were to be deposited only with the consent of the Defendants. He pointed out that the Plaintiff had however proceeded to deposit the said cheques without obtaining the Defendants' consent and thus in violation of the terms of the said letter. He then placed reliance upon the following judgments of the Hon'ble Supreme Court in the case of *Bank of India Vs. K. Mohandas*² and *Rajasthan State Industrial Development and Investment Corporation & Anr. Vs. Diamond & Gem Development Corporation Limited & Anr.*³ to submit that the true construction of a contract will depend upon the import of the words used therein and not what parties choose to do or say afterwards. He therefore submitted that the Plaintiff having deposited the said cheques without obtaining to the consent of the Defendants had acted contrary to the agreed terms and were therefore not entitled for any relief.

12. Insofar as the third contention, that the letter dated 10th October, 2019 relied upon by the Plaintiff had been fraudulently altered, he invited my

2 (2009) 5 SCC

3 (2013) 5 SCC

attention to Exhibit-C of the Affidavit-in-Reply which according to the Defendants was the letter executed between the parties. He pointed out from the letter annexed as Exhibit – C to the Reply that the same (i) mentioned the name of Manish Bhawani on the first page and (ii) did not mention the amount of Rs.27,00,000/- in the Annexure to the said letter. He then pointed out that in the letter relied upon by the Plaintiff which was annexed as Exhibit – A to the Plaintiff that (i) white ink had been applied over the name of Manish Bhawani and the name of Tejal V. Bhawani had been overwritten in place of the name of Manish Bhawani and (ii) the amount of Rs. 27,00,000/- had been added in Annexure A to the said letter. He submitted that since the Plaintiff had relied upon a fraudulently altered document, the Defendants on this ground alone were entitled to unconditional leave to defend the Suit.

13. Learned counsel then submitted that the Plaintiff had not produced the original documents along with the Plaintiff and therefore secondary evidence was required to be led to prove the documents relied upon by the Plaintiff. He submitted that, this fact alone, would require evidence to be led in the matter and

thus unconditional leave would necessarily have to be granted to the Defendants.

In support of his contention he placed reliance upon a judgment of the Hon'ble Supreme Court in the case of *Neebha Kapoor Vs. Jayantilal Khandwala & Ors.*⁴,

which held as follows;

“10. Admissibility of secondary evidence would be subject matter to evidence. Only if a court is to go into the evidence, presumptive evidence could also be taken into consideration. Although the burden may be on the defendant, he may discharge the same only when it is raised. The Code does not put any embargo on the courts exercising a suo motu power of granting leave in a case of this nature. If a court does so even when an application was not filed, keeping in view the admitted position of the case, we do not see any illegality therein. As a decree in summary suit may not be automatic and the court can always refuse to exercise its discretionary as the original documents were not produced and, thus, the plaintiff is called upon to prove that the documents are lost in the criminal proceedings.”

14. Basis the above submissions, learned counsel submitted that several triable issues had arisen in the present case and thus the Defendants were entitled to unconditional leave to defend the present Suit.

15. I have heard learned counsel, perused a copy of the pleadings as also the documents relied upon and case laws cited and find that the Defendants

4 MANU/SC/7090/2008

have disentitled themselves from obtaining leave to defend the present Suit solely on the ground that the Defendants have made a false statement on oath in the Affidavit-in-Reply. One of the contentions taken by the Defendants was that the Plaintiff has fraudulently altered the letter dated 10th October, 2019 which is annexed by the Plaintiff as Exhibit-A to the Plaint. The Defendants have in the Affidavit-in-Reply produced what they claim is “the original letter” which is annexed as Exhibit – C thereto. It is the Defendants’ contention that the Plaintiff has in Exhibit A to the Plaint overwritten the name of Tejal V. Bhawani in place of the name of Mr. Manish Bhawani which appears on page 1 of the letter at Exhibit – C to the Affidavit-in-Reply. In this context, the Defendants have in the Affidavit-in-Reply specifically stated viz.

*“The Defendants further stated that they never executed the said instrument with “Tejal V. Bhawani”. **Further the Defendants do not know who is “Tejal V. Bhawani”.** Thus, it is overwhelmingly evident that the Plaintiff altered the said instrument in order to file a malicious proceeding before this Hon’ble Court.”*

Now while the Defendants have gone on oath to state they do not know who Tejal V. Bhawani is, the Defendants have themselves, in the letter which they

contend is “the original letter” produced by them, mentioned the name of Tejal V. Bhawani on the third page of the said letter. The Affidavit-in-Reply is completely silent on this aspect. The “original letter” as per the Defendants’ own contention is on the Defendants’ letter head and is prepared by the Defendants. Therefore clearly, the statement made in the Affidavit-in-Reply that the Defendants do not know who Tejal V. Bhawani is, is a patently false and misleading statement. Even otherwise, the letter relied upon by the Defendants in the Affidavit-in-Reply is a clearly a draft of the letter, in which, the name of Manish Bhawani had inadvertently been mentioned on the first page. The fact that the name of Manish Bhawani was inadvertently been mentioned is evident from the fact that the name of Tejal V. Bhawani was mentioned on the last page and was to be executed by Vipul Bhawani and Tejal Bhavani. Thus, the Defendants’ contention that the letter has been fraudulently altered by the Plaintiff is patently false. Most importantly the said letter also refers to the said cheques in Annexure A as being issued for repayment of loan.

16. Given the fact that the Defendants have chosen to make a false statement on oath, the necessary consequences must follow. The Hon’ble

Supreme Court in *S. P. Chengalvaraya Naidu V/s. Jagannath (Dead) by LRS*⁵ had set out the consequences which must follow in cases where a parties case is based on falsehood and in that context observed as follows viz.,

“5. We are constrained to say that more often than not, process of the Court is being abused. Property-grabbers, taxevaders, bank loandodgers and other unscrupulous persons from all walks of life find the Court process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who’s case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation.”

The Apex Court and this Court have, on many occasions, stated that if a party comes to the Court with unclean hands or basis its case and/or defence on falsehood, as has been done in the present case, the party should be dealt with very strongly and substantial costs also should be imposed on the party. The conduct of a party intends to impede and prejudice the administration of justice the same must be dealt with finally. Judiciary is the bedrock and handmaid of orderly life and civilized society. In *Sciemed Overseas Inc. V/s. BOC India Ltd.*⁶ the Apex Court has lamented about the unhealthy trend in filing of affidavits which are not truthful. Paragraph 2 of the said judgment reads as under:

5 (1994) 1 SCC 1

6 2016 AII SCR 370

“2. A global search of cases pertaining to the filing of a false affidavit indicates that the number of such cases that are reported has shown an alarming increase in the last fifteen years as compared to the number of such cases prior to that. This is illustrative of the malaise that is slowly but surely creeping in. This ‘trend’ is certainly an unhealthy one that should be strongly discouraged, well before the filing of false affidavits gets to be treated as a routine and normal affair.”

Thus, in keeping with the law laid down by the Hon’ble Supreme Court, I find that the Defendants having chosen to make a false statement on oath have dis-entitled themselves not only to the grant of leave to defend the present Suit, but also from having their defences considered on merit.

17. Be that as it may, I find that even on merit, defences raised by the Defendants are really frivolous and/or vexatious. Even Exhibit C to the Affidavit-in-Reply which the Defendants contend is the agreement between the parties makes reference to the cheques set out in Annexure A thereto as being repayment of loan and not investment. Thus, it is clear that the Defendants at all times had agreed to treat the said cheques as being repayment towards loans and not investments. Additionally, as has been held in the case of ***Motilal Laxmichand Salecha HUF*** (supra) that once a party issues a cheque for repayment of a loan, then the liability under the loan is substituted by the liability to honor the cheque and in a sense the original liability to pay the loan is

discharged by means of execution of cheque. And in the event such cheque is not honored, a new liability arises under the provisions of the Negotiable Instruments Act. In the present case, the Defendants have not denied issuance of the said cheques but have only attempted to contend that the same were for return of investments and not loans. That argument is not open to the Plaintiff anymore in view of the ratio laid down in the case of *Motilal Laxmichand Salecha HUF* (supra). Thus even on merit the Defendants' contentions are untenable and devoid of merit.

18. Since there was no contract as regards the rate at which the interest was to be charged on the said amount of Rs.1,47,64,000/-, in my considered opinion, it would be justifiable to apply the interest at 12% per annum from 31st December, 2019, the date on which the cheques drawn by the Defendants in favour of the Plaintiff were payable. Hence, I pass following order:-

ORDER

- i. Summons for Judgment is allowed.
- ii. Suit stands decreed.
- iii. Defendants to pay the Plaintiff sum of Rs.1,47,64,000/- (Rupees One Crore Forty Seven Lakhs Sixty Four Thousand Only) along with interest at 9% per annum on the sum of Rs.1,47,64,000/- from 31st December, 2019 till realization.

- iv. The Plaintiff is entitled to refund of Court fees, if any, as per Rules.
- v. Decree be drawn up and sealed expeditiously.

(ARIF S. DOCTOR, J.)