IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 48 OF 2012
IN
SUIT NO.77 OF 2008

Shri Madhavlal Narayanlal Pittie and others. ..... Plaintiffs

VERSUS

Bachhraj & Company Pvt. Ltd. & others. ..... Defendants

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Mr. Ashish Kamat a/w Mr. Abhay Jadeja, Mr. Pradeep Mane and Mr. Varun Sathiya i/b M/s. Crawford Bayley & Co., for the plaintiffs.

Mr. S. V. Mehta i/b M/s. Malvi Ranchoddas & Co. for the Defendant Nos. 1, 3, 4 & 6.

Mr. Murtuza Federal a/w. Ms. Anuja Abhyankar i/b. M/s. Federal and Rashmikant for the defendant no.2.

Mr. Kalpesh Joshi for the Defendant No.5.

Mr. Dharmesh Pandya i/b Ashwin Pandya & Associates for the Defendant No.7.

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CORAM : K. R. SHRIRAM, J.
RESERVED ON : 26th OCTOBER, 2015
PRONOUNCED ON : 28th OCTOBER, 2015

P.C.
Pronounced

1. This Notice of Motion has been taken out on behalf of defendant Nos.3 and 6 for various reliefs. The counsel appearing for the applicant, however, restricted the motion to Prayer Clause (b). The counsel further stated that the applicant would furnish bank guarantee of a Nationalized Bank for such amount, and not reduced amount, as the Court directs. He also submitted that the amount

of Rs.79,12,91,352/- which was deposited by defendant No.6 has been invested in Fixed Deposit by the Prothonotary and Senior Master and the fixed deposit is expected to mature on or before 10th December, 2015 and the matured amount will be somewhere in the region of Rs.122.63 crores and the bank guarantee can be furnished for the same amount through a Nationalized Bank. Subject to hearing the plaintiffs, the Court had asked the applicants whether they would give bank guarantee for the said amount with interest at 12% per annum and the bank guarantee to be in the format approved by the Prothonotary and Senior Master, High Court, Bombay. Shri S. V. Mehta, counsel for the applicants, on instructions agreed.

2. Though the applicant has explained in the affidavit in support the circumstances under which the amount of Rs.79,12,91,352/- came to be deposited, as per the order dated 29th December, 2008, and the changed circumstances for varying the order, in fact, the counsel stated that the applicants are not seeking variation of the order of 29th December, 2008. It was also submitted that the applicant has borrowed money from various sources to comply with the undertaking given to the court and if the applicant is permitted to substitute the amount with a bank guarantee, as mentioned above, it would save substantial cost to the applicant and at the same time would not cause any prejudice to the plaintiffs.

3. Paragraphs 1, 2, 3 and 4 of the order dated 29th December, 2008 is required to be reproduced and the same are as under:-

> 1. The Plaintiffs hold 12.5% interest in the first Defendant Company which holds shares of Bajaj Hindustan Limited. Under a certain settlement, certain shares of Defendant No.1 are to be sold at the market value tomorrow. It is common knowledge, and of which judicial notice is required to be taken, that the market value of the shares have considerably fallen since March 2008. The market value as of tomorrow would not represent the true, fair and reasonable market value of the shares of the first Defendant Company in the normal course. The Plaintiffs contend that their interest would be prejudiced by the sale of the shares as per the settlement.
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> 2. Defendants 3 and 6 undertake to deposit the market value of the shares as on 1st March, 2008 less the price, which will be obtained upon the sale of the shares to the extent of the 12.5 % interest of the plaintiffs in the Court.
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> 3. Defendant No.3, who is present in Court states that Defendants 3 and 6 have got unencumbered shares of Bajaj Auto Ltd. of the value far in excess of the value of the Plaintiffs' interest in Defendant No.1 Company.
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> 4. Defendant Nos.3 and 6 undertake not to sell, encumber or transfer the shares held by them in Bajaj Auto Ltd., to the extent of the above value for a period of 3 weeks, by which time the defendants 3 and 6 shall deposit the above value in Court.

4. The counsel appearing for the plaintiffs strongly opposed the application and his main thrust of argument was that the application is not maintainable.

5. The counsel submitted that under Order 39 Rule 4, any order for injunction can be varied only if it is necessitated by changed circumstances. The counsel submitted that the changed circumstances submitted in the affidavit in support were in all existence prior to the order of 29th December, 2008 came to be passed. The counsel, further, submitted that the order of 29th December, 2008 came to be passed on the statement and undertaking made by the defendant Nos.3 and 6 to this Court that they would deposit a sum of Rs.79,12,91,352/- in this Court and having made a statement and given an undertaking to this Court to avoid and / or obviate passing of any ad-interim injunction restraining the sale to the suit shares by defendant No.1 to defendant No.6 and having taken advantage of the same, defendant No.6 cannot now resile from his statement or undertaking. The counsel submitted that it is nothing but an attempt on the part of the defendant No.6 to circumvent the order.

6. The counsel also argued on the note of the employee of the defendant No.6 as to how it was devoid of merit, etc.

7. We need to go into all that only if the applicant had prayed for all the reliefs in the Notice of Motion.

8. As stated above, the counsel for the applicant has restricted his prayer only to permit them to withdraw the money on maturity on 10th December, 2015 together with accumulated interest amounting to approximately Rs.122.63

crores and substitute the same with a bank guarantee of a Nationalized Bank with interest thereon at 12 % per annum.

9. In my view, this does not amount to variation of the order dated 29th December, 2008. By the said order, defendant Nos.3 and 6 undertook to deposit the market value of the shares as on 1st March, 2008 less the price, which will be obtained upon the sale of the shares to the extent of 12.5 % interest of the plaintiffs. What the defendant Nos. 3 and 6 have done is only to secure the plaintiffs claim in the suit by giving cash deposit of Rs.79,12,91,352/-.

10. The same security of the plaintiffs claimed is being continued and the only difference instead of cash deposit, the plaintiffs are going to get bank guarantee as security. Therefore, it does not amount to variation or the modification of the order dated 29/12/2008. It also is not a review of the order as argued by the counsel for the plaintiffs. It is merely an application to change the form of security from cash to bank guarantee. The counsel for the plaintiffs relied on Judgment of the Calcultta High Court, in the matter of ***S.B. International Ltd. Vs. The Owners and Parties in Vessel M.T.Zaima Wavard***[1] to submit that bank guarantees in India generated litigation after litigation. In the present case, the bank guarantee is being given to the Prothonotary and Senior Master, High Court,

1. *(1998) ILR 2 Cal 222*

Bombay in the format prescribed by the Prothonotary and Senior Master. It is not like one private party giving bank guarantee to another private party.

11. In my view, no prejudice will be caused to the plaintiffs, if the defendant Nos.3 and 6/applicant is permitted to substitute the cash amount with bank guarantee. Mr. Kamat relied on the Judgments in the matter of ***Shri K.K. Modi and another Vs. Shri M.K.Modi and others***[2] ***and Delhi Administration Vs. Gurdip Singh Uban and others***[3]. Both these Judgments are not relevant to the matter in hand. In fact, in the affidavit in reply, the plaintiffs have simply stated that the defendant No.6 is not entitled to substitute cash deposit with bank guarantee and denied the statement of interest. They do not give any reason why the applicant is not entitled.

12. Under the aforesaid circumstances, the Notice of Motion is disposed of with the following order:-

ORDER

a) The applicant to give a bank guarantee in favour of Prothonotary and Senior Master, High Court, Bombay in the sum of Rs.122,65,00,000/- renewable year after year until the hearing and final disposal of the suit and valid for six months after the disposal of the suit unless otherwise ordered.

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2. *106 (2003) DLT 307*

3. *AIR 2000 SC 3737*

b) Bank guarantee to be issued by a Nationalized Bank based in Mumbai.

c) The Bank Guarantee to carry interest at 12 % per annum until the hearing and final disposal of the suit and for six months thereafter.

d) The Bank Guarantee to be renewed year after year and the same to be strictly in conformity with the format prescribed by the Prothonotary and Senior Master of this Court.

e) The Bank guarantee to be filed latest by 10/12/2015, the date on which the Term Deposit placed by the Prothonotary and Senior Master with Central Bank of India matures.

f) Within one week of the Bank Guarantee being filed, the Prothonotary and Senior Master to pay over to the applicant the amount of Rs.122,63,36,672/-.

13. The counsel for the plaintiffs seeks stay of this order. I see no reason to grant any stay.

(K. R. SHRIRAM, J.)