vat

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

APPEAL No. 168 OF 2014
IN
SUMMONS FOR JUDGMENT No. 213 OF 2010
IN
SUMMARY SUIT No. 1273 OF 2010

WITH
NOTICE OF MOTION No. 502 OF 2014
IN
APPEAL No. 168 OF 2014
IN
SUMMONS FOR JUDGMENT No. 213 OF 2010
IN
SUMMARY SUIT No. 1273 OF 2010

WITH
NOTICE OF MOTION (L) No. 2439 OF 2014
IN
APPEAL No.168 OF 2014
IN
SUMMONS FOR JUDGMENT No. 213 OF 2010
IN
SUMMARY SUIT No. 1273 OF 2010

WITH
CHAMBER SUMMONS No. 1303 OF 2015
IN
NOTICE OF MOTION (L) No. 2439 OF 2014
IN
APPEAL No. 168 OF 2014
IN
SUMMONS FOR JUDGMENT No. 213 OF 2010
IN
SUMMARY SUIT No.1273 OF 2010

Hathibhai Bulakhidas Pvt. Ltd. ...Appellant/ Applicant

Vs.

Tata Capital Financial Services Ltd. ...Respondent

****

Mr.Cherag Balsara a/w. Usha Gadagkar & Hamza Tatti i/b. Diamondwala and Co. for Appellant / Applicant
Mr.D.D. Madon, Senior Counsel a/w. Mr. Ashok Paranjpe a/w. Mr. Ms. Aparna Wagle a/w. Ms. Radhika Dixit i/b. MDP & Partners for Respondent

****

CORAM : V. M. KANADE &
REVATI MOHITE DERE, JJ.

DATE : NOVEMBER 18, 2015

P.C. :

1. Heard the learned counsel for the Appellant (Original Defendant in the Summary Suit) and the learned Senior Counsel for the Respondent (Original Plaintiff in the Summary Suit).

2. Shri Balsara, learned counsel for the Appellant has submitted that the Appellant has taken out one Notice of Motion and one Chamber Summons for bringing on record the additional documents under Order 21 Rule 47 of CPC viz. Notice of Motion (L) 2439 of 2014 and Chamber Summons No. 1303 of 2015. It is submitted that after the Learned Single Judge was pleased to pass the impugned order, certain facts came to their knowledge, which are relevant for the purpose of deciding the appeal and, therefore, he has submitted that the said documents may be taken on record under Order 21 Rule 47 of CPC. In

the Notice of Motion (L) No. 2439 of 2014, the Appellant seeks to bring on record two affidavits of one Kanaiyalal D. Shah, who is a director of the Appellant /Applicant. In affidavit dated 13th October, 2014, the Director has narrated how they discovered the invoices, incorporated in the bill of exchange, were forged and fabricated and that the fraud has been played by Biotor Industries Ltd. It is submitted that the statement of the said Director was recorded by the Economic Offences Wing -EOW and a criminal complaint has been lodged against the Director and other officers of Biotor Industries Ltd. He has submitted that another affidavit of the same director may also be allowed to be brought on record since additional facts have been mentioned in the said affidavit dated 29th September, 2015, which are relevant for the purpose of deciding the present issue and for the purpose of bringing on record the fraud that has been played by the said Biotor Industries Ltd. and the Respondent. Various documents have been annexed to both the affidavits of the said director of the Applicant.

3. This application for bringing the said affidavit on record is opposed by Shri Madon, learned Senior Counsel appearing on behalf of the Respondent / Original Plaintiff. It is submitted that only two points were urged by the Learned Single Judge in the order passed in the Summons for judgment which was taken out by the Plaintiff and the two points viz. (i) there being a running account between the Plaintiff / Biotor Industries Ltd. (ii) Biotor Industries Ltd. has paid Rs.14 crores towards claim against the Plaintiff, were

not raised before the Learned Single Judge and, therefore, it is submitted that these documents are not relevant and are not germane for deciding the application in question.

4. We have perused both the affidavits; one dated 29th September, 2015 and other dated 13th October, 2014. Firstly, these affidavits have been affirmed after the impugned order was passed by the Learned Single Judge. Secondly, strictly speaking, these affidavits and the subsequent events are not relevant for the purpose of deciding the appeal against the impugned order. Thirdly, now a new point of jurisdiction is sought to be raised before this Court. No application was made for seeking clarification from the Learned Single Judge or no application was filed for speaking to the minutes and, as such, therefore, we are not inclined to allow the Appellant/Applicant to bring on record the said two affidavits which contain certain additional documents. Even assuming that the said documents are taken into consideration, they do not, in our humble opinion, alter the case of the Appellant in any manner.

5. Brief facts are that the Respondent / Original Plaintiff had filed the summary suit against the Appellant/ Defendant herein for the judgment and decree for an amount of Rs.13,38,37,998/- with further interest at the rate of 17% p.a. from the due date till payment and/or realization.

6. The case of the Plaintiff is that the Defendant used to supply Castor Seeds/ Goods to one Biotor Industries Ltd. and that upon a request being made by Biotor, it granted a bill discounting facility to Biotor Industries

Limited to the tune of Rs.50,00,00,000/- so as to facilitate payments to its vendors towards supply of raw materials/ goods. The Plaintiff's specific case is that Biotor furnished to the Plaintiff an approved list of its vendors who desired to enter into such an agreement of the payment by the Plaintiff for supply of raw materials / goods by the vendors to Biotor. The Defendant is admittedly an approved vendor of Biotor Industries Ltd. who supplies goods / Castor seeds.

7. The Plaintiff's further case is that in pursuance to the agreement between the Plaintiff, Biotor Industries Ltd. and Biotor's Vendors, including the Defendant, invoices were raised by the Defendant on Biotor upon supply of raw materials / goods and simultaneously, the bills of exchange were drawn by the Defendant for valuable consideration which were accepted by Biotor for payment on the due date/s specified therein. These bills of exchange were discounted with the Plaintiff and the amount after deducting such discounting charges was disbursed and credited in the account of the Defendant by the plaintiff. The Plaintiff's specific case is that Biotor being the drawee of bills of exchange, was under the obligation to repay the outstanding amounts due under each bills of exchange on the respective due dates, failing which Biotor and the Defendant were jointly and/or severally liable to make the payment of the outstanding bill amount to the Plaintiff along with the penal interest applicable thereon.

8. The Plaintiff's case is that in all eight bills of exchange, drawn by the

Defendant, were duly and unconditionally accepted by the Biotor on the respective due dates. However, the amount, which was due and payable was not paid by the Defendant since the liability for the payment of the bills of exchange which were discounted from the drawer under section 30 of the Negotiable Instruments Act was absolute and unconditional. Notice of dishonoure was waived by the Defendant. According to the Plaintiff, despite letters being written, amount was not paid. Certain cheuqes issued by Biotor Industries Ltd. were dishonoured and, therefore, proceedings under section 138 of the Negotiable Instruments Act have been initiated in respect of the dishonour of 23 cheques. The Plaintiff has further stated in paragraph 11 of the plaint that despite admitting liability, Biotor disputed the amounts due and payable to the Plaintiff vide its letter dated 29th September, 2009 and 1st October, 2009.

9. Arbitration proceedings have been initiated against Biotor Industries Ltd. and they are pending. The Defendant filed its written statement-cum -affidavit in reply to the summons for judgment. Since written statement could not be filed in Summary Suit without leave of the Court, the written statement was treated as an affidavit in reply to the summons for judgment. In the written statement, in paragraphs 5, 6 and 7, it was specifically contended by the Defendant that upon representation being made by Biotor Industries Ltd., the Defendant signed the bills of exchange since an assurance was given by Biotor Industries Ltd. that they would pay the money which was due and

payable to them. It was contended in paragraph 6 of the said written statement that the Defendant had only lended its name to the bills of exchange in order to accommodate the Biotor Industries Ltd. and bills were drawn by Defendant without any consideration. It was contended that the Defendant who has already sold the castor seeds on the contrary is required to be paid for the sale of castor seeds and, therefore, cannot be made liable to pay for the castor seeds supplied by it and, therefore, there was no consideration between the parties. In paragraph 7, it was contended that it is inconceivable that the party who had supplied the goods also was made to pay for the same. It was also contended that Biotor Industries Ltd had assured the Defendant that in the event of default under bills of exchange, Biotor Industries Ltd. would be liable and not the Defendant. In paragraph 13 of the written statement (affidavit in reply), it was contended that Biotor had already disbursed the amount of Rs.13.5 crores which was mentioned by Biotor in their reply/ written statement submitted in the Arbitration proceedings initiated by the Plaintiff towards the goods received by them from the Defendant to the Plaintiff. It is submitted that there was no question of payment of any further amount since the amount has already been disbursed by Biotor to the Plaintiff.

10. Shri Balsara, learned counsel appearing on behalf of the Appellant submitted that in paragraph 11 of the plaint, a reference is made to the certain documents and that these documents reveal that there was running

account between the Plaintiff and Biotor and that the amount has been paid by Biotor to the Plaintiff. It is submitted that these facts were not brought to the notice of the Learned Single Judge. It is submitted that if there is a running account, then in such cases summary suit is not maintainable. He has relied upon the Division Bench's order passed in Appeal No. 712 of 1986 in Summons for Judgment No. 274 of 1986 in Summary Suit No. 2506 of 1985 dated 11th August, 1986, wherein it has observed that the Summary Suit was not maintainable if there is running account between the parties. He submitted that the Appellant was entitled to raise this question because it was a new question and it was raised for the first time before the Appellate Court. He has then invited our attention to the bills of exchange and has submitted that the invoices which were mentioned in the bills of exchange, were fabricated and fraud played by Biotor Industries Ltd. Secondly, he has submitted that the Plaintiff had no right to adjust the said amount of Rs.14 crores to the other debts of Biotor Industries Ltd. He has also invited our attention to the letter dated 24th December, 2009 written by Wadia Ghandy & Co. to the Defendant, in which, in paragraphs 2 (vii) and 2 (viii), there is a reference to the running account and reconciliation of accounts, though it is mentioned that the Defendant was not concerned in any manner about the said amount since it was the issue between the Plaintiff and Biotor. He has also invited our attention to the letter dated 9th December, 2009 written by the Defendant to Wadia Ghandy & Co. and more particularly, paragraph 9, in which it was mentioned that the Plaintiff had not reconciled the accounts and despite the fact that Biotor have paid Rs.14 crores to their clients, they have failed to take into account the same as informed by Biotor. He has submitted that even on merits, the impugned order was liable to be quashed and set aside since it has not taken into consideration all these points, more particularly, the documents which were referred to in paragraph 11.

11. On the other hand, Shri Madon, learned Senior Counsel appearing on behalf of the Respondent has submitted that the two points now urged, were not argued before the Learned Single Judge and also were not mentioned in appeal. The Defendant having signed the bills of exchange and being the drawer of the bills of exchange, was not entitled to raise now a plea that Biotor, to whom the said bills of exchange were given, had filled in information which was not true and correct. He has submitted that it is not now open for the Defendant to raise such plea. He has relied on section 30 of the Negotiable Instruments Act. He has submitted that so far as payment of Rs.14 crores is concerned, Biotor had not informed the Plaintiff that the said amount would be adjusted towards dues of the Defendant and accordingly in the reply filed by the Plaintiff, specifically it was mentioned that Plaintiff had adjusted Rs.14 crores to the first invoice which was there in the list since the total amount which was due was Rs.50 crores. He has submitted that the Plaintiff was entitled to do so in view of section 60 of the Contract Act.

12. In our view, the submissions made by Shri Balsara, learned counsel for

the Appellant cannot be accepted. In the impugned order, it was clearly mentioned that the Defendant had raised only two defences. Paragraph 3 of the impugned order reads as under:

"3. The Defendant has raised the following defences:

(i) At the request of BIOTOR, the Defendant had merely lent its name to the Bills of Exchange and the Bills were drawn only to accommodate BIOTOR; there was no consideration for drawing of the said Bills;

(ii) The liability to make payment under the Bills of Exchange rests with BIOTOR alone; BIOTOR had assured the Defendant that BIOTO alone would be liable under the Bills."

The issue, which is now sought to be raised, is that there was a running account between the parties. Strictly speaking, the said issue cannot be allowed to be raised in the appeal. However, if the said submission is taken into consideration, it can be said that the said running account is not between the Plaintiff and Defendant but the said running account is between the Defendant and Biotor. The bills of exchange have admittedly been drawn by the Defendant. In the written statement, there is an admission in paragraph Nos. 5 and 6 that they had drawn the said bills of exchange. In the additional affidavits of the director, it is now sought to be contended that the said bills of exchange were blank when the same were signed by the Defendant and that the fraud has been played by Biotor against the Defendant. In our view, the said submission and additional information, which is according to the Defendant brought to their notice after the impugned order was passed, does not change the position in any manner whatsoever. It has to be noted that it is the settled position in law that the drawer of the bill of exchange has an absolute and unconditionally liable to pay the amount drawn under the bill of exchange under section 30 of the Negotiable Instruments Act and, as such, even assuming that the Defendant has chosen to sign on the blank bills of exchange drawn on Biotor and Biotor had incorporated fabricated invoices, the liability of the drawer is not altered in any manner which is evident from the provisions of Section 30 of the Negotiable Instruments Act. Secondly so far as payment of Rs.14 crores is concerned, there is no material brought on record to show that amount of Rs. 14 crores was paid towards the bill of exchange, which were drawn by the Defendant. The Plaintiff has come out with a specific case that the bill discounting facility upto the tune of Rs.50 crores was given to Biotor in order to enable its vendors to supply Castor seeds/goods and to receive their monies and therefore, the Plaintiff is entitled to use the said Rs.14 crores towards other debts which were payable by Biotor to the Plaintiff.

14. In our view, the order of the Division Bench dated 11th August, 1986 in Appeal No. 712 of 1986 on which the reliance is placed by the learned counsel for the Appellant / Defendant will not apply to the facts of the present case. It is not in dispute that there is no running account between the Plaintiff

and the Defendant. The Summary Suit has been filed by the Plaintiff against the Defendant since it is the drawer of the bill of exchange which was discounted and monies were received by the Defendant. Though it is sought to be contended that the Defendant has not received any amount, the fact remains that the bills of exchange were discounted and monies were to be paid to the vendor or the suppliers of Castor seeds. The Defendant, therefore, cannot turn around and say that there was no consideration or that the bills of exchange were filled up fraudulently after it had signed the bills of exchange. Looking at the matter from any angle, it is not possible for this Court to interfere with the impugned order passed by the Learned Single Judge. The Learned Single Judge has given cogent reasons and has rightly held that there is no bonafide defence was raised and there is no triable issue. The Appeal, therefore, is dismissed. Notice of Motion (L) No. 2439 of 2014 and Chamber Summons No.1303 of 2015 taken out therein do not survive and are accordingly disposed of. Time to deposit an amount is extended by five weeks.

[REVATI MOHITE DERE, J.] [V. M. KANADE, J.]

Vaishali Tikam