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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 714 OF 2015
IN
SUIT NO. 366 OF 2015

Tresorie Traders Pvt. Ltd. ...Plaintiffs
Versus
Rhodium Trading & Leasing Pvt. Ltd. & 3 Ors. ...Defendants

Mr. Chirag Mody, *with Mr. Aditya Mehta, & Ms. Teresa Daulat, i/b Divya Shah Associates, for the Plaintiffs.*
Dr. Birendra Saraf, *with Ms. Ferzana Behramkamdin, & Ms. Bharti Bhansali, i/b FZB & Associates, for Defendants Nos. 1 & 2.*

CORAM: G.S. PATEL, J
DATED: 22nd July 2015

PC:-

1. By consent, the Notice of Motion is taken up for hearing and final disposal.

2. I have heard Mr. Mody, learned Counsel for the Plaintiffs, and Dr. Saraf, learned Counsel for the Defendants at some length.

3. The Plaintiffs' case is that the 2nd Defendant, a Director of the 1st Defendant, is a close friend of Mr. Sandeep Raheja of the Gopal Raheja Group of Companies. Mr. Sandeep Raheja is a Director on the Plaintiffs' Board. Some time in November 2006, the 2nd Defendant asked Mr. Sandeep Raheja for finance for the 1st Defendant for its business. The request was, apparently, made for 'a friendly unsecured loan'. This is of some importance to the application now made, and this is the basis on which the plaint proceeds.

4. Mr. Sandeep Raheja in turn forwarded this request to his sister Mrs. Sonali Arora, then a Whole-Time Director of the Plaintiff. I must note that there have since arisen very sharp differences between Mr. Sandeep Raheja and Mrs. Sonali Arora culminating a series of litigations that are even now pending at various stages before me.

5. It seems that following certain discussions between the Plaintiffs and the 1st Defendant, and on the basis of some oral representations said to have been made by the 2nd Defendant as to the terms of repayment and interest, the Plaintiff gave to the 1st Defendant a 'friendly unsecured loan' in the aggregate amount of Rs. 12,10,24,500/-. Admittedly, this is on the basis of an oral agreement. According to the Plaintiff, the loan was payable on demand or, and this is important, on an 'as and when able' basis whichever was earlier. The Defendants, however, contest this. They say that there was no agreement as to the loan being payable on demand but it was only agreed to be repaid on an 'as and when able' basis. Between two corporate entities, this is undoubtedly unusual, to put it mildly. To put it more sharply: this is not a case where a plaintiff alleges that a loan was repayable on demand and the defendant alleges that it was payable on an as-and-when-able basis. This is case where the plaintiff itself claims that the basis was *either* on demand or as-and-when-able, 'whichever is earlier'; and the defendant denies that there was any agreement for repayment on demand.

6. The loan was disbursed by the Plaintiff to the 1st Defendant in November 2006. The exact amount then disbursed was Rs. 11,86,24,500/-. It was paid by cheque. A further amount of Rs. 24,00,000/- was later advanced in 2009 and this made a consolidated loan of Rs. 12,10,24,500/-.

7. It is the Plaintiff's own case that although it made no demand for repayment from February 2007 till 26th December 2011. In that time, the 1st Defendant routinely made repayments toward either principal or interest. The 1st Defendant also deducted TDS and filed the necessary forms. In December 2011, the 1st Defendant paid an amount of Rs. 30,00,000/-, and this the Plaintiff appropriated partly towards principal and partly towards interest.

8. It seems that on account of the disputes within the Raheja family *inter se*, or perhaps for some other reasons that are as yet unknown pending trial, the 1st Defendant stopped making payments either of principal or interest after December 2011.

9. The Plaintiffs claim that the amount of loan was used to purchase a substantial immovable property of roughly 35,675 square feet carpet area. These are commercial office premises on the 3rd Floor of Building No. 11 of the complex known as Interface, Link Road, Malad (West), Mumbai. It appears to be not in dispute that the 1st Defendant has given this unit on leave and licence to a third party. It is also not in dispute that the title deeds in respect of this unit (a registered Agreement for Sale dated 29th March 2006, several receipts, a supplemental allotment letter and a possession letter) were deposited by the 1st Defendant with the Plaintiff in 2006.

10. Mr. Mody's submission for the Plaintiffs is that there is an admitted liability reflected in the 1st Defendant's Annual Returns and Balance Sheet and Profit and Loss Account year on year showing the 1st Defendant's indebtedness to the Plaintiff. Most recently, this is shown in the amount of Rs. 7,26,35,080/-. He submits that the 1st Defendant is cash rich and has cash balances in excess of Rs. 2.5 crores and that there is documentation on record (the financial returns themselves) to indicate that the loan given by the Plaintiff was used to purchase the commercial premises unit in question. On this basis, he submits that the debt by the 1st Defendant is admitted. The entries in the 1st Defendant's balance sheet and profit and loss account are an adequate admission of the liability.[1] He, therefore, submits that there is no defence to the claim. Therefore, not only should the injunction previously granted in terms of prayer clause (f) on 6th May 2015 be continued, but a

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1 *Ultramatix Systems Pvt. Ltd. v State Bank of India & Ors.*, 2007 (5) Bom.C.R. 862.

Receiver should be appointed and that the 1st Defendant should be directed to deposit the license fee in Court.

11. In support of this submission, Mr. Mody relies on the decision of a Division Bench of this Court in *Iridium India Telecom Limited v Motorola nc & Ors.*[2] He submits that the Division Bench in *Iridium* made it clear that a Civil Court has sufficient powers under Section 151 of the Code of Civil Procedure, 1908 to grant an order in the nature of Order 38 Rule 5 even though the application is not strictly within the parameters of that Order. It makes no difference whether one of the entities is a foreign company or both companies are Indian. Once a strong *prima facie* case has been made out, the Court can, in a fit case, exercise the full panoply of its powers under Section 151.

12. Dr. Saraf, appearing for Defendants Nos. 1 and 2, in response points out that this is not a correct formulation. The Plaintiffs' claim is a money claim *simpliciter*. This is clear from the plain reading of the plaint and its prayers. There can never be a question of appointment of a Receiver when the Plaintiff is an unsecured creditor pursuing a pure money claim.[3] This is a rule of general application. As regards the question of Order 38 Rule 5, he submits that these provisions were interpreted by the Calcutta High Court in *Premraj Mundra v Md. Manech Gazi & Ors.*[4] a decision noted with approval by the Supreme Court in *Raman Tech & Process Engineering Company & Anr. v Solanki Traders.*[5] The object of Order

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[2] 2004 (Supp. 2) Bom.C.R. 808

[3] *Harkisondas Nanjibhai V Chaturbhuj Prabhudas*, AIR 1947 Bom. 434

[4] AIR 1951 Cal. 156

[5] (2009) 2 SCC 302

38 Rule 5 CPC is to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. As in every application for interim relief, the plaintiff must make out a *prima facie* case. This is the *sine-qua-non* for the grant of interim relief. While dealing with a money claim, the Court must be convinced that there is a reasonable chance of the suit being decreed in favour of the plaintiff. But where an order of the nature of one under Order 38 Rule 5 is sought, the plaintiff must go further. It is not enough then to just show that there exists a valid claim or a *prima facie* case. The plaintiff must also show that the defendant is attempting to dispose of his assets with the intention of defeating any decree that might be finally passed against the defendant. It is also not enough to show one or the other (i.e., only a *prima facie* case or an attempt by the defendant to dispose of his assets). Both must be demonstrated and, in addition, there must be a reasonably substantiated apprehension that the defendant's asset disposal attempts are illicit and meant to defeat a likely decretal claim. Orders of this kind are drastic, even Draconian. They are not to be lightly granted; certainly not for the mere asking. By their very nature, they demand that a Court hew closely to the statute. It is not a power that lends itself to the elevation of an unsecured creditor to the ranks of secured creditors. Nor should this power be used to coerce a settlement. As the Supreme Court said in *Raman Tech*:

> 5. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous Plaintiffs by obtaining orders of attachment before judgment and

forcing the Defendants for out of court settlement, under threat of attachment.

13. What do the Plaintiffs say in support of this application? Only that the commercial unit is the only substantial asset of the 1st Defendant; that the Plaintiffs have 'learned' (without saying how or when or in what circumstances), the 1st Defendant is attempting to sell the commercial office unit; that the income from this unit is the 1st Defendant's only apparent source of income; and that the alleged sale is to defeat or delay the 1st Defendant's creditors, including, of course, the Plaintiffs. This is the only case that is made out in paragraph 2 of the Affidavit in Support of the Notice of Motion. On the Plaintiffs' own showing, this is incorrect. The Plaintiffs hold the title deeds to the property in question. Even if the 1st Defendant wanted to sell the unit, it could not possibly do so. The submission appears to have been made as a formality. It is wholly unsupported by facts. There are absolutely no particulars to be found of any such alleged attempted sale. In any case, I do not believe that the mere filing of this suit would, of its own, debar the 1st Defendant from dealing with its property in such manner as it is able, given its inability to actually pass title in any sale, the deeds being held by the Plaintiffs. To obtain an Order 38 Rule 5 kind of order, it is essential for the Plaintiffs to show that such a sale is not only possible but is in fact being attempted, and, further, that this attempt is only to defeat a decretal claim that is all but inevitable.

14. In *Resources International v M/s. Star PVG Exports & Anr.,*[6] a learned single Judge of this Court has occasion to consider a case substantially on all fours with the present one. There, too, there

6 2009 SCC online Bom. 1343

was a documented admission of liability in a ledger account. TDS certificates had been issued. But it was held that no case was made out for invoking Order 38 Rule 5; specifically that the apprehensions of siphoning off and poor liquidity were without factual foundation. Another learned single Judge took a very similar view in *SJJ Marine Pvt. Ltd. v Pisces Exim (India) Pvt. Ltd.*[7]

15. Here, too, the assertions in paragraph 2 of the Affidavit in Support of the Notice of Motion do not sit easily with the Plaintiffs' own case: that it holds the title deeds to the unit in question completely belies any question ever arising of attempts to sell that unit; and there is, too, the discordant note regarding the terms of the oral agreement pleaded. It seems to me exceedingly peculiar that the terms of this oral agreement cannot possibly be determined without evidence. There is, indeed, a very sharp difference between the contesting parties on the repayment terms attached to the loan. The 1st Defendant says it is payable when able. The Plaintiff says it is payable either as and when able or on demand, whichever is earlier. I cannot claim to understand what exactly is meant by the Plaintiffs' own formulation of this repayment term. There can never be a presumption as to a loan being 'repayable-when-able'. Where no repayment period is specified, a reasonable time for repayment may be inferred, but that would be in a case where a plaintiff says that there was no repayment term agreed in the first place. This is not the case here. The Plaintiffs say that there was indeed a repayment term; and they posit a scenario that is, to my mind, unthinkable in any rational commercial transaction, especially between two corporate entities

7 2013 (3) Mh. L.J. 684

governed by a raft of oversight regulations. To say that repayment was 'on demand or as and when able, whichever is earlier' only seems to suggest that the repayment term was in fact only the latter. The 1st Defendant alleges that indeed the loan was only ever repayable when able and not otherwise. None of this can be determined, even *prima facie*, at this stage.

16. There is already an ad-interim injunction granted on 6th May 2015. The 1st and 2nd Defendants are agreeable to a continuation of that injunction in terms of prayer clause (f), subject to the following modification, viz., that while the 1st and 2nd Defendant will be at liberty to renew the leave and license agreement or give the unit on a fresh leave and license to any third party, their Advocates will inform the Plaintiffs' Advocates of such renewal or execution of a fresh leave and license agreement within three weeks of that event.

17. In my view, it is not possible to grant relief of a Receiver or for deposit of money. Apart from anything else, this would amount to partly decreeing the Suit at an interim stage. That can, of course, be done in a given case. This is just not one of them.

18. The Notice of Motion is disposed of in these terms. There will be no order as to costs.

(G. S. PATEL, J.)