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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION NO. 4666 OF 2016
with
WRIT PETITION NO. 4667 OF 2016

M/s. Gurnanak Developers (I) Pvt. Ltd. … Petitioner.

V/s.

Mr. Jagdish Khimji Patel ... Respondent.

with
WRIT PETITION NO.3188 OF 2016
with
WRIT PETITION NO.4668 OF 2016

M/s. Gurnanak Developers (I) Pvt. Ltd. … Petitioner.

V/s.

Mr. Rajesh Hiralal Gothi. ... Respondent.

with
WRIT PETITION NO. 4665 OF 2016
with
WRIT PETITION NO. 4673 OF 2016

M/s. Gurnanak Developers (I) Pvt. Ltd. … Petitioner.

V/s.

Mr. Jayesh Hiralal Gothi. ... Respondent.

Dr. Birendra Saraf a/w. Bipin Joshi, P.J. Thorat, Ranjeev C. and Prayag Joshi for the Petitioner in all Petitions.
Mr. Kishore Jain a/w. Ms. Leena Shah i/b. Shah & Furia Assoc. for the Respondents in all Petitions.

CORAM : N.M. Jamdar, J.

04 October, 2016.

Oral Order :-

This group of Petitions have been argued together as they arise from identical facts and circumstances and identical suits which have been instituted in the City Civil Court at Bombay.

2. Writ Petition No. 3188 of 2016 arise from Suit No.3139 of 2013 and Writ Petition No. 4668 of 2016 arise from Suit No. 3140 of 2013 filed by one Rajesh Hiralal Gothi. Writ Petition No. 4673 of 2016 and Writ Petition No. 4665 of 2016 arise from Suit No. 3141 of 2013 and 3142 of 2013 filed by one Jayesh Hiralal Gothi and Writ Petition No. 4667 of 2016 arise from Suit No. 3143 of 2013 and Writ Petition No. 4666 of 2016 arise from Suit No. 3144 of 2013 filed by one Jagdish Khimji Patel.

3. These three Summary Suits were instituted essentially with the following pleadings : The Petitioner – Defendant has constructed a multi storied building known as 'Nebula Empress' at

Khar, Mumbai. The Plaintiffs were interested in purchase of the premises and they approached the office of the Petitioner. There were negotiations and the Plaintiffs decided to book a tenement and handed over certain amount of cash as specified in the plaint in each of these matters. The allotment letters were issued which were duly signed by the Director of the Petitioner. Thereafter, the Plaintiffs on various occasion met the Petitioner, however the Petitioner avoided to hand over the flats. There were negotiations between the Plaintiffs and Mr. Paresh Chabhadia, Director of the Petitioner – Company and an offer was made to return the amount and to compensate the Plaintiffs for escalation of the price and damages. Pursuant to this understanding, cheques were issued to the Plaintiffs, which were dishonoured and thereafter, a notice was given under Section 138 of the Negotiable Instruments Act which was not replied. Proceedings under the Negotiable Instruments Act, 1881 were also instituted and Summary Suits were instituted in respect of the cheques which were dishonoured

4. In these Suits, Summons for Judgment was taken out. Leave to defend was applied for by the Petitioner. It was primarily the defence of the Petitioner that one Ramesh Patel and one Mr. Mundada, were Directors of the Petitioner – Company earlier and they had certain financial dealings with the Petitioner – Company, and the Plaintiffs are close relatives of Ramesh Patel. The financial

dealings with Ramesh Patel were closed and therefore, the cheques which were given for security, need not be honoured and they were correctly stopped. Various other defences regarding the fraud stated to be played by the Plaintiffs was also taken up. The learned City Civil Court Judge held that the flats were allotted to the Plaintiffs and subsequently cancelled, deposit has been acknowledged and the cheques given for consideration of damages has been dishonoured and therefore, in these circumstances, conditional leave on deposit of the amount sought for in the plaint needs to be granted. Accordingly, by the impugned orders, the learned City Civil Court Judge has disposed of the Summons for Judgment in each of these Petitions.

5. The learned Counsel for the Petitioner submitted that the plaint is bereft of any particulars as to the exact date on which deposits were made, what was the price agreed for the flats, from where the amount of cash was withdrawn. It was contended that the Director who is stated to have issued the allotment letter and cancellation letter is acting in collusion with the Plaintiffs, which can be seen by the conduct of the Respondent – Plaintiffs in not joining him in the proceedings under Section 138 of the Negotiable Instruments Act. It was contended that the entire dealing was with Mr. Ramesh Patel and all the Plaintiffs are his brothers or cousins. It was submitted that these cheques were security for a transaction with

Ramesh Patel and before stopping of payment of the cheque, notice was duly issued. It was contended that it is inconceivable that within one and half years there will be so much of escalation of prices that as against deposit of a small amount, for instance in one case from Rs.3,00,000/-, the compensation would be Rs.19,65,000/- It was contended that therefore, on the face of the plaint an arguable case was made out by the Petitioner. The learned Counsel submitted that the observation of the learned Judge that nothing has been placed on record that Ramesh Patel was a Director, is incorrect as the documents to that effect were placed on record and clear averments were made.

6. The learned Counsel for the Respondents relying on the decision of the Division Bench of this Court in the case of *Rajesh Laxmichand Udeshi @ Bhatia v/s. Pravin Hiralal Shah* reported in *2014(1) All MR 784*, contended that the case of Summary Suit based on cheques which were dishonoured would stand on a completely different footing. It was contended that the defence taken in the affidavit, on the bare perusal, is unsustainable. The learned Counsel submitted that discretion in this matter has been properly exercised by the learned City Civil Court Judge.

7. It is an admitted position that the cheques were issued in the name of the Respondent – Plaintiff and which have not been

honoured. The suits have been filed on the basis of such dishonoured cheques. Before considering the matter further the tests laid down by the Division Bench in the case of Rajesh Laxmichand need to be noticed. The Division Bench has explained the parameters for adjudging the defence taken by the Defendant in such summary suits and has placed the requirements of demonstrating cogent defence on much higher footing than Summary Suits based on other documents. It has been held the Negotiable Instruments Act, 1881 contains special rules of evidence including section 118(a) providing that until the contrary is proved, it shall be presumed that every negotiable instrument was made or drawn for consideration. This Section also provides for punishment and grant of compensation. Section 139 of the Negotiable Instruments Act stated that when a cheque is dishonoured, there shall be a statutory presumption as regards existence of a debt or liability. It was held that the object of introducing Chapter XVII in the Negotiable Instruments Act was to ensure that persons drawing cheques to do so with responsibility by making the lapse to honour the commitment, a criminal offence. The object of the provision of section 138 of the Act is for proper and smooth functioning of business through banking transactions. In particular, that the use of cheques as negotiable instruments would primarily depend upon the integrity and honesty of the parties. The Division Bench observed that when a summary suit instituted is based on a cheque which is dishonoured, effect of Sections 138 and 139 of Negotiable Instruments Act raising statutory presumption that the cheque was issued in discharge of a liability, is a relevant consideration to be kept in mind. The said Sections cast a burden upon the defendant to rebut the presumption. Summary suits instituted on cheques which are dishonoured will, therefore, stand on a higher footing than summary suits instituted on the basis of other documents. In such cases, the Court will have to take into consideration the statutory presumption which is raised when the cheques are dishonoured. The object behind providing a statutory presumption under the Negotiable Instruments Act has to be kept in mind while judging the credibility of a defence raised by the defendant in summary suit. It was held that Section 138 and 139 of the Act elevates a cheque to a higher status than the other instruments, such as written contract etc. to which no such statutory presumption is attached. The Division Bench emphasized that the presumption in respect of a dishonoured cheque places a higher burden on the defendant than the burden which is cast on a defendant where the suit is filed on the basis of ordinary instruments. In the cases based on dishonour of cheques, the defendant cannot take shelter behind the rules formulated primarily in respect of suits based on ordinary instruments. The Court cannot be oblivious of the legislative intent to place the promise made through a cheque on a higher pedestal than the promise made through an ordinary instrument. In light of what is observed by the Division Bench of this Court, the defence of the Petitioner will have to be seen to ascertain whether there is any fundamental error committed by the learned City Civil Court Judge in exercise of the discretion.

8. Firstly, it has to be noted that though the Respondent in Writ Petition Nos.3188 of 2016 and 4668 of 2016 i.e. Rajesh Gothi and Respondent in Writ Petition Nos. 4673 of 2016 and 4665 of 2016 i.e. Jayesh Gothi are brothers of Rajesh Patel, who stated to be an erstwhile Director of the Petitioner – Company. Jagdish Patel, Respondent in Writ Petition No. 4667 of 2016 and 4666 of 2016 is stated to be cousin of Ramesh Patel. However, merely because they are related to the erstwhile Directors, presumption cannot be straight way drawn at this stage that their transaction is somehow linked with the financial dealings of the Petitioner with Ramesh Patel i.e. their Director. These persons are independent persons. As on date an allotment letter was issued in favour of the each of these Plaintiffs, under the stamp of the Petitioner and there is also a cancellation letter and pursuant to that cheques also have been issued, therefore, prima-facie, the transactions between the Petitioner and the Plaintiffs are independent transactions.

9. As far as the transactions of the Petitioner between Mr. Ramesh Patel is concerned, it is pointed out by the learned Counsel for the Respondents that in the affidavit in reply a theory put-forth is that Mr. Ramesh Patel and Mr. Mundada being Directors were in possession of certain cheques. The cheques were avoided to be returned. Though there is a mention of arrangement of allotment of seven flats, the assertion is that these cheques were somehow misused by Mr. Ramesh Patel and Mr. Mundada. When a notice was issued on 4 June 2010 for stopping payment of the cheques, issued to the Plaintiffs, the notice was not addressed to them but to Mr. Ramesh Patel. In this notice it was stated that the cheques were given by way of security to finalize the transaction. There was no such imputation that these cheques were lying with Ramesh Patel and they were used by him in favour of his relatives. Once the cheques were individually issued in the name of the Respondents – Plaintiffs, which the notice itself acknowledges, nothing stopped the Petitioner from addressing individual notice to the Respondents – Plaintiffs.

10. As far as the assertion in the plaint are concerned, adequate particulars in support of the case based on dishonour of cheques have been pleaded. It is asserted that the amounts are paid and it is pointed out by the learned Counsel for the Respondents that the reply itself acknowledges the amount were reflected in the accounts of the Petitioner. It is asserted that there was an allotment,

subsequent cancellation and issuance of cheques. These are sufficient enough assertions in the plaint and therefore, merely by trying to link some transaction between Ramesh Patel, who may be the relative of the Plaintiffs, the liability of the Petitioner which arose from the dishonoured cheques cannot be stated to be sufficiently explained at this stage for grant of unconditional leave.

11. Merely because the Director, who has signed the allotment letter and cancellation letter has not been joined as party in the proceedings under Section 138 of the Negotiable Instruments Act, will not take case of the Petitioner any further. The said Director still continues with the Petitioner. If there was fraud of such nature committed by this Director, there would be immediate action against such Director. Nothing is mentioned in the affidavit in reply that any such action is taken.

12. In the circumstances, following the dicta laid down by the Division Bench of this Court, it cannot be said that the learned City Civil Court Judge was in error in granting conditional leave to the Petitioner. The Writ Petitions therefore cannot be entertained and are rejected.

13. Needless to clarify that the observations made in the impugned order are in the context of grant of leave and the summary suits will be decided on its own merits.

14. The learned Counsel for the Petitioner seeks three months to comply with the order. Query is put to the learned Counsel for the Petitioner whether the longer time is sought to make the payment, or challenge the order higher. It was made clear that if the Petitioner is desirous of taking the challenge further. I was not inclined to grant of longer time. The learned Counsel for the Petitioner on instructions from Mr. Chabhadia, categorically states that the time is sought for making a deposit of this substantial amount, and not for taking the challenge further. Considering that the amount is substantial, time of three months as sought for is granted to make the deposit.

(N.M. Jamdar, J.)