

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 5782 OF 2015

MONA CONDUCTORS AND
METAL PVT. LTD.

...Petitioner

Versus

TAMBAWALLA METAL MART

...Respondent

....

Mr. Vishal Kanade i/b. A. Bharat & Co., for the Petitioner.

Mr. A.M. Rajabally, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 15th FEBRUARY, 2016

P.C.

1. Heard Mr. Vishal Kanade, learned Counsel for the petitioner and Mr. A.M. Rajabally, learned Counsel for the respondent, at length.

2. Rule. Mr. Rajabally waives service for the respondent. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 23.3.2015

passed by learned Judge, presiding over Court room No.24 of the Bombay City Civil Court, Bombay below Exh.X in Execution Application No.58/2013 in High Court Summary Suit No.1875/2008. By that order, learned trial Court rejected the application made by the defendant for extension of time for depositing Rs.10 Lakhs.

4. Summary Suit No.1875/2008 was instituted by the respondent, hereinafter referred to as the 'plaintiff'. The Suit was decreed on 18.7.2009. The petitioner, hereinafter referred to as the 'defendant' took out Notice of Motion No.65/2014 *inter alia* for setting aside that *ex parte* decree. By order dated 21.8.2014 the decree was set aside subject to defendant depositing Rs.10 Lakhs (near about 50% amount of the original claim) in the Court within one month. Time expired on 20.9.2015. The defendant did not deposit amount of Rs.10 Lakhs within the stipulated period.

5. They took out Notice of Motion No.3812/2014 for extension of time for depositing amount of Rs.10 Lakhs. By order dated 23.12.2014, the defendants were allowed to deposit Rs.10 lakhs on or before 9.1.2015 in the Court. Defendant did

not comply that order and sought extension of time. By order dated 9.3.2015, time to deposit Rs.10 Lakhs on or before 23.3.2015 was granted as a last chance subject to costs of Rs.2500/-. The defendant did not comply this order as well. On 23.3.2015, they took out application Exh.X seeking extension of time of one week for depositing Rs.10 Lakhs. By the impugned order, application Exh.X is rejected.

6. Mr. Kanade has invited my attention to Exh.I, page 36, to contend that the defendant had kept ready (1) Pay Order no.038534 dated 1.10.2014 of ICICI Bank in the sum of Rs.2,50,000/-; (2) Pay Order no.174782 dated 1.10.2014 of Corporation Bank in the sum of Rs.3,50,000/- and (3) Pay Order no.040097 dated 8.10.2014 of ICICI Bank in the sum of Rs.4 Lacs. He submitted that the said Pay Orders were however not deposited in the trial Court. The only explanation given by him is that as son of the defendant met with an accident, the said pay orders were not deposited in the Court.

7. Mr. Kanade invited my attention to paragraphs-3 and 7 of order dated 21.8.2014. In paragraph-3, learned trial Judge recorded submission of the plaintiff has he received

Rs.11,18,000/- in piecemeal and without any interest. In paragraph-7, the contention raised by the judgment debtor (defendant) that there was full and final settlement between the parties and amount was paid and, therefore, nothing remained to be due and payable and that the flat attached belongs to the joint family, was recorded.

8. Mr. Kanade submitted that the plaintiff had instituted criminal complaint under Section 138 of Negotiable Instruments Act, 1881 (for short, 'the Act'). On 15.2.2012, the plaintiff-complainant withdrew the complaint on the ground that the case is settled out of Court. Learned Magistrate allowed the application and permitted the plaintiff to withdraw the case against the defendant-accused. He submitted that no explanation is putforth by the plaintiff for withdrawal of the complaint. In other words, he submits that as payment was received by the plaintiff, the case was settled between the parties out of Court, and in view of the settlement the complaint was withdrawn. He submits that even according to the plaintiff the decretal amount comes to Rs.31,64,366/- and the defendant have deposited Rs.14 lakhs in pursuance of order

dated 3.2.2016 which is roughly 50% of the decretal amount. He, therefore, submits that the impugned order below Exh.X may be set aside.

9. On the other hand, Mr. Rajabally supported that the impugned order. He submitted that from the decretal amount of Rs.31,64,366/-, if the amount of Rs.11,18,000/- received in Mazgaon Court is deducted, the amounts comes to Rs.20,46,366/-. On that amount if interest @ 18% from 19.7.2009 to 10.2.2016 is added, the amount comes to Rs.44,65,339/-. The plaintiff has paid Rs.14,207/- on publication of warrant of attachment in two newspapers. Rs.10,643/- is paid by the Sheriff on publication of warrant of sale in two newspapers. The plaintiff has paid Rs.30,000/- towards valuers fees and Rs.31,643/- towards the Sherrif's poundage at 1%. In all the costs of execution proceedings comes to Rs.45,51,832/-. He, therefore, He therefore submitted that the defendant may be directed to deposit 50% of this amount.

10. I have considered rival submissions advanced by learned Counsel appearing for the parties. I have also perused

the material on record. As noted earlier, by order dated 21.8.2014, learned trial Judge allowed the Notice of Motion No.65/2014 taken out by the defendant. Learned trial Judge directed the defendant to deposit Rs.10 Lakhs (near about 50% of the original claim) in the Court within one month. Mr. Rajabally did not point out that said order was challenged by the plaintiff. In other words, the plaintiff accepted said order. It is no doubt true that the defendant did not comply the order dated 21.8.2014 by depositing Rs.10 Lakhs within one month. As noted earlier, they took out Notice of Motion No.3812/2014 for extension of time. By order dated 23.12.2014, the defendant was allowed to deposit Rs.10 Lakhs on or before 9.1.2015 in the Court. The defendant again did not comply that order and sought extension of time. By order dated 9.3.2015, time to deposit Rs.10 Lakhs on or before 23.3.2015 was granted as a last chance subject to costs of Rs.2500/-. It is not in dispute that the plaintiff did not challenge the orders dated 23.12.2014 and 9.3.2015 whereby the defendant was given extension of time to deposit Rs.10 lakhs. It is also not in dispute that the defendant has paid costs of Rs.2500/-. As the defendant did not deposit Rs.10 Lakhs, the Court rejected application Exh.X

for extension of time by one week for depositing Rs.10 Lakhs.

11. By order dated 3.2.2016, the defendant was directed to deposit Rs.10 Lakhs in this Court on or before 4.2.2016 and further amount of Rs.4 Lakhs on or before 10.2.2016. The decretal amount as on today comes to Rs.31,64,366/-. Mr. Rajabally submits that after taking into consideration the other expenses, cost of execution proceedings comes to Rs.45,51,832/- and, therefore, the defendant should be directed to deposit 50%. As noted earlier, the plaintiff never challenged the order dated 21.8.2014, 23.12.2014 and 9.3.2015. As the defendant did not comply the orders granting them extension to deposit Rs.10 Lakhs, by order dated 3.2.2016 defendant was directed to deposit amount of Rs.14 lakhs. That direction is complied by the defendant. Mr. Rajabally also fairly does not dispute this position. Having regard to the fact that the decretal amount is Rs.31,64,366/- and the defendant has deposited Rs.14 Lakhs in this Court, in my opinion, the impugned order deserves to be set aside thereby allowing application Exh.X. Hence, the following order :

[i] The impugned order dated 23.3.2015 below Exh.X is

set aside as the defendant has deposited Rs.14 Lakhs in this Court. Let that amount be transmitted to the trial Court forthwith. The trial Court will pass appropriate order in relation thereto.

[ii] Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)