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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 857 OF 2016
WITH
CIVIL APPLICATION NO. 1835 OF 2016

Rishabh Sharedeal Pvt Ltd & Ors …Appellants

~ VERSUS ~

M/s P J and Sons & Ors …Respondents

Mr. Subhash Jha, *i/b Law Global Advocates, for the Appellants.*
Mr. P. J. Oswal, *Respondent No. 2 in person.*

CORAM: G.S. PATEL, J
DATED: 7th December 2016

PC:-

1. I have heard Mr. Jha in this Second Appeal at some length, although he claims that I have not heard him 'fully'. It is not my understanding that I am required to hear every Advocate till his or her desire to argue is thoroughly sated. I am required to hear him to the extent I think necessary to decide the case. Mr. Jha has a solitary point to canvas, and I have noted and considered this, as also the authorities he cites in support.

2. This Second Appeal is before me for admission. The provisions of Section 100 of the Code of Civil Procedure, 1908 are clear and unambiguous. Their interpretation is settled. A Second Appeal is not admitted as of right. It is admitted on the satisfaction of the Court that the case involves a substantial question of law. Section 100 reads:

> "**100. Second appeal.**— (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, **<u>if the High Court is satisfied that the case involves a substantial question of law</u>**.
>
> (2) An appeal may lie under this section from an appellate decree passed *ex parte*.
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> **<u>(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.</u>**
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> **<u>(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.</u>**
>
> (5) The appeal shall be heard **<u>on the question so formulated</u>** and the Respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:
>
> Provided that nothing in this sub-section shall be deemed to take away or abridge the power of

> the Court to hear, for reasons to be recorded, the appeal **on any other substantial question of law, not formulated by it**, if it is satisfied that the case involves such question."
>
> (*Emphasis added*)

3. These provisions are, as I have noted, entirely unambiguous and admit of no controversy. To begin with, one must determine from the Memorandum of Appal itself whether the Appellant has even cared to formulate, and, in the words of the statute, "precisely state" the "substantial question of law" involved. Nowhere in this Memorandum of Appeal is there any such precise statement. Mr. Jha invites me only to infer that substantial question of law from one or more of the very many grounds taken in the Memorandum of Appeal. This is impermissible. That question of law is not one that should be conjured by some convoluted reasoning, inference or conjecture. It must be stated clearly and unambiguously, for it is only on that substantial question of law that a Second Appeal can be admitted, though a court can always formulate some other substantial question of law that seems to it to arise. But the latter provision does not mean that former requirement of a precise statement can be jettisoned.

4. In any case, as we shall see, the point that Mr. Jha attempts to canvass is not really so much a question of law but a question of fact; and, more precisely, a question of the role played by the Plaintiffs and the Defendants in their dealings and the basis of their claims against each other.

5. The facts are not many although they are somewhat strange in the way that they unfolded. The Appellant, Rishabh Sharedeal Private Limited, filed Special Civil Suit No. 268 of 2004 against one M/s PJ & Sons, a proprietorship firm; one Prithviraj Jaychand Oswal; and one Rekha Prithviraj Oswal. The suit was for recovery of amounts that the Plaintiffs claimed were due to them. Mr. Oswal, the 2nd Defendant in the Suit, has throughout appeared in person. He has appeared in person before me today as well. In the Suit, the Defendants denied all liability. They filed a Counter-Claim saying that on the basis of a settlement, agreement or understanding arrived at after the Plaintiffs shut down their business, the Plaintiffs were liable to pay the Defendants the highest price of the shares purchased of different companies as set out in the counter-claim. There was an alternative prayer for possession of those shares along with other benefits such as accretions, bonus, split and interest.

6. The two matters proceeded in very different, indeed diametrically opposite, ways. The Plaintiffs led no evidence in their Suit. The Plaintiffs filed no Written Statement to the Defendants' counter-claim. There is, I find a statement in the appellate order under challenge that there was a written statement to the Counter-Claim, but it seems that in fact this written statement was not taken on record, and a writ petition challenging that refusal also failed. The Defendants led evidence in support of their counter-claim. The 2nd Joint Civil Judge, Senior Division, Kolhapur decided both matters on 8th November 2012 by a common judgement. He dismissed the Plaintiffs' Suit, as indeed I believe he was bound to do, for want of all evidence. He decreed the Defendants' counter-claim.

7. As it happens, both sides appealed the common judgment and decree. The Plaintiffs filed Regular Civil Appeal No. 114 of 2013. The Defendants filed Regular Civil Appeal No. 153 of 2013. Both Appeals were disposed by a common judgment dated 27th October 2015 of the Ad-hoc District Judge-4, Kolhapur. The present Second Appeal is directed against that Appellate Order.

8. Before the first Appellate Court, the Plaintiffs' case was, for the purposes of the present Second Appeal, that the Trial Court did not consider the plea of jurisdiction, and that an objection as to the jurisdiction was not addressed. According to the Plaintiffs, the Trial Court lacked jurisdiction to try either action, *i.e.*, the Plaintiffs' own Suit as also the Defendants' counter-claim. This was never a plea taken before the Trial Court. It seems to have been taken for the first time before the first Appellate Court. The plea was based on the argument that both parties would be bound by the Rules and Bye-laws of the Bombay Stock Exchange, which have the force of law and which provide for an arbitral forum and procedure. This, according to the Plaintiffs, in their First Appeal, would render the Trial Court bereft of all jurisdiction to entertain both the Plaintiffs' own Suit and the Defendants' counter-claim. The first Appellate Court noted that there were three other Civil Suits Nos. R.C.S. No. 302 of 2012, 307 of 2012 and 309 of 2012 pending between the parties where similar disputes were involved; and, therefore, a secondary plea was advanced before the first Appellate Court that the counter-claim ought not to have been decided till those previously instituted suits were disposed of. That argument, and the other arguments advanced before the first Appellate Court are not material today, as these are not the reasons canvassed by Mr. Jha in his challenge to the first Appellate Order. He confines himself to the question of a complete lack of jurisdiction of the Trial Court itself.

9. The Defendants' Appeal was for a limited purpose. It was only to correct the operative part of the Trial Court's judgment. From a reading of the Trial Court's decree, it is obvious that the Trial Court inadvertently granted not only the principal relief but also the alternative prayer claimed by the Defendants in the counter-claim. Clearly it could not have done both and in fairness the Defendants urged before the first Appellate Court that only one of the two reliefs claimed by the Defendants ought to have been granted. It was also the Defendants' case that the Trial Court was in error in not granting interest on costs, but there is no quarrel with that aspect of the matter before me today. The first Appellate Court framed points for determination and concluded that the dismissal of the Suit claim was proper. It dismissed the Plaintiffs' Appeal and partly allowed the Defendants' Appeal modifying the decree to the extent necessary.

10. There appears to have been no dispute that between the parties there were several transactions involving the purchase and sale of various companies even on credit. However, the rival narratives diverged at around the events of June or July 2001. The Plaintiffs claim that in July 2001 they decided to stop their business, accounts were drawn up and an amount of Rs. 6,92,562.20 was agreed as due from the Defendants. The suit is brought on this agreement, and the Plaintiffs say the Defendants requested time to pay the amount, issued a cheque which was, on presentment, dishonoured. Hence, the Plaintiffs' Suit, one that was based clearly on the amount said to be found due on accounts being taken and agreed.. The Defendants in their Written Statement said that they were investors, and that it was an account of heavy losses that the Plaintiffs closed their business in July 2001. They too say that the parties settled their accounts *inter se* but that this resulted in the Defendants being owed a large amount and several shares from the Plaintiffs. The Defendants issued a notice on 27th March 2003, Defendants Nos. 2 and 3 having separately issued independent notices in September and October 2002. The Defendants claimed that in August 2002 accounts were finally settled and that the Plaintiffs, in settlement of those accounts, issued two cheques in the aggregate of Rs. 5,70,000/- and a share delivery slip towards discharging their agreed liability to the 1st Defendant. There was a separate settlement regarding an amount of Rs. 61,954.85. The Defendants claim that an amount of Rs. 3,47,314.25 was due to the Defendants. They then said that the Plaintiffs' cheques were dishonoured. Criminal proceedings followed. The Defendants thus made a counter-claim for Rs. 45,275/- with interest of Rs. 12,411/- and also sought delivery.

11. Paragraph 18 of the first Appellate Order says that there is a Written Statement to the Counter-Claim at Exhibit "91". Mr. Oswal, the original 2nd Defendant, says that this Written Statement was not taken on file. The Plaintiffs filed Writ Petition No. 1054 of 2012 before this Court and that this Writ Petition was dismissed on 6th March 2012. In any case, this is largely inconsequential now because what is not disputed is that the Plaintiffs did not participate in the trial of the Suit at all. In paragraph 21 of its order, the first Appellate Court has said this:

"21. Firstly, it shall be noted that there is no written contract between the parties and therefore the question of having arbitration clause therein does not arise. Secondly, the Plaintiffs have never admitted or conceded the contention of the Defendants that the suit transaction was governed by the Bombay Stock Exchange Rules or by laws. Had there been any such admission, the suit could have been disposed of at threshold. The Defendants had put that issue to contest and therefore, such issue was settled. The learned Trial Court however, did not address that issue. Now the Plaintiffs are raising that issue in appeal. **While dealing with the issue of jurisdiction, the nature of the suit had to be taken into consideration so as to find out the jurisdiction of the Civil Court to entertain it. Unlike in the judgment *cited supra*, the dispute involved in the suit is pertaining to recovery of money.** Merely because, the alleged liability of the Defendants was in relation to purchase and sale of shares, there would be no scope to say that such liability is governed by any Bye laws of Bombay Stock Exchange. Neither the Plaintiff, nor the Defendants were the members of Bombay Stock Exchange nor they were registered Stock Brokers. The Plaintiffs were just service providers acting as intermediary between the registered Stock Broker and Investor. <u>**The dispute involved in the suit was in relation to the rights and liabilities arising out of inter-se oral agreement between Plaintiffs and the Defendants. There was no dispute as to sale or purchase of**</u>

> **shares but the real dispute was in relation to the liability to pay an amount as per the transaction entered into between the Plaintiffs and the Defendants. The counter claim of the Defendants is also based on the liability of the Plaintiff arising out of their mutual agreement and according to me, such a dispute has nothing to do with Bye laws of Bombay Stock Exchange as there is no dispute as to sale or purchase of shares. The dispute is confined to be alleged liability to pay certain amount or instead deliver the purchased shares as per the settlement of accounts between the parties. I think, such a suit would be purely a civil suit and the Civil Court will have ample jurisdiction to decide the same.** Thus, I find that the decision rendered by the trial Court does not suffer with any jurisdictional error."

(*Emphasis added*)

12. The portion emphasized above shows that the question before the first Appellate Court, as also before me, is about the frame of the suit and the counter-claim. There is a finding of fact that the counter-claim was on the basis of a liability said to arise from a mutual agreement once accounts were settled and drawn, and the amounts and shares said to be found due to the Defendants were on the basis of that *inter se* agreement. This is distinct, the first Appellate Court said, and I think quite correctly, from a dispute involving a share transaction. It seems to me clear that even the Plaintiffs' suit itself was brought for recovery of an amount allegedly settled on accounts being drawn between the parties and an understanding alleged in that behalf. That version was disputed and the counter-claim was also filed on the basis of a rival version of that understanding and a rival agreement said to have been arrived between the Plaintiffs and the Defendants. It is difficult to fault the reasoning of the first Appellate Court and even more difficult to see how this raises any question of law at all, let alone a substantial question of law, on the issue of jurisdiction.

13. It is in this context that I must consider Mr. Jha's submissions that the Rules and Bye-laws of the Bombay Stock Exchange, particularly Regulation 248(a) and 226, which make an arbitration mandatory. He also refers me to a considerable amount of learning on the subject all directed to the proposition that these Rules and Bye-laws have the force of statute and that share transactions between a Member and a non-Member are subject to those Rules and Bye-laws.[1] There is no dispute with any of those propositions at all. There cannot be.

14. The question is whether the Suit and the counter-claim before the Trial Court in Kolhapur and before the first Appellate Court could be said to be of the nature described. A plain reading of the plaint and the counter-claim make it clear that the dispute was not in relation to share transactions but on as to a liability arising out of a contract, agreement or understanding said to have been arrived at between the parties *pursuant* to certain past dealings and which transactions had been closed. It is on this basis that the Plaintiffs

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1 *Chandrabhai K. Bhoir & Ors v Krishna Arjun Bhoir & Ors*, (2009) 2 SCC 315; *Prashant Commercial v Rajaratan R. Mohta*, 2006 (3) All MR 32; *The Stock Exchange, Mumbai v Vinay Bubna & Ors*, AIR 1999 Bom 266.

made a money claim against the Defendants. It is on the basis of the Defendants' understanding or version of the agreement that they said that the Plaintiffs had issued cheques which were dishonoured and had agreed to provide certain shares in settlement of those liabilities. This is not a matter that could be said to be exclusively within the purview of Bye-law 248(a) or 226(a). The decision in *Prashant Commercial* stands on an entirely different footing and this is *inter alia* obvious from paragraph 2 where the transaction in question was specifically for the purchase of certain shares. Similarly, the decision of the Division Bench in *Vinay Bubna* was one in which the Stock Exchange was itself a party, having been adversely affected by an impugned order passed by the Single Judge. This arose in very peculiar facts and it is difficult to see how this decision is of any assistance to Mr. Jha in the present Second Appeal.

15. Viewed from this perspective, I do not believe there is any question of law, leave alone a substantial question of law, involved in this Second Appeal. One must not forget that it is the Plaintiffs themselves who first approached the Trial Court in Kolhapur. It seems to me now no more than a mere device to attempt to evade the consequences in law for the Plaintiffs to say that their own suit was without jurisdiction. The Plaintiffs at no point made any attempt to withdraw that Suit with liberty to adopt appropriate proceedings in a forum of competent jurisdiction. We find no evidence of any invocation of arbitration by the Plaintiffs. What the Plaintiffs suggest is that the mere existence of the Bombay Stock Exchange Rules and Bye-laws is as a complete ouster of a civil court's jurisdiction whenever there is the slightest mention of 'shares' irrespective of the nature of the claim brought, how the plaint is laid, or what cause of action is invoked in a civil suit. That is incorrect. Finally, there is the fact that before the Trial Court no attempt was made to move an application under Section 8 of the Arbitration & Conciliation Act, 1996. That was not even the case pleaded before the first Appellate Court (*viz.*, that there was any such application made). All of this is for good reason, for the claim as brought before the Trial Court in Kolhapur, founded on an alleged agreement or understanding, was not one that could ever have been taken to arbitration under Rule 248(a) of the Bombay Stock Exchange Rules and Bye-laws.

16. For these reasons, I find no merit in the Second Appeal. It is dismissed. There will be no order as to costs.

17. Mr. Jha makes an application that I should stay the proceedings in execution before the learned Judge in Kolhapur. I am not inclined to do this. I do not see how I can legitimately do so, for this is no existing proceeding in which to grant any such stay. There was an order of 12th April 2016 (NM Jamdar) that said that if the Appellants/Plaintiffs deposited the amount referred to in operative clause (2) of the Appellate Court order (paper-book page 38) within one week, the Appellants would be at liberty to seek an appropriate adjournment in the pending execution proceedings, and that after the amount was deposited and the request made for an adjournment the executing Court would grant the time sought. Mr. Jha points out that as noted in an order dated 4th October 2016, an amount of Rs. 1,31,000 and odd (noted as Exhibit 65) has been deposited in the

Trial Court. This is sufficient compliance with the previous order dated 12th April 2016.

18. For the present, since this amount is deposited I will grant the Appellants/Plaintiffs to make an application for stay of execution before the executing Court. That application is to be heard and decided on its own merits. I make it clear that I have expressed no opinion at all on that aspect of the matter.

19. The Second Appeal is disposed of in these terms. There will be no order as to costs.

20. In view of this, the Civil Application is infructuous and disposed of as such.

21. Copies of this order be conveyed by the Registry to the first Appellate Court and the executing court.

(G. S. PATEL, J.)

Dictated in open court on: **7th December 2016**
Uploaded on: **9th December 2016**