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

**NOTICE OF MOTION NO. 1287 OF 2016**
**IN**
**SUMMONS FOR JUDGEMENT NO. 99 OF 2010**
**IN**
**SUMMARY SUIT NO. 139 OF 2010**

Elegant Constructions .. Plaintiff
Vs.
Basant Realty Pvt. Ltd. .. Defendant

Mr.Vivek Sharma /a.w Mr.Rajeev Ray for applicant/original defendant.

Mr.B.G. Vaidya a/w. Mr.Uday Shelke i/b Shelke & Co. for respondent/original plaintiff.

**CORAM : K.R.SHRIRAM, J.**
**DATE : 8TH JUNE, 2016**

**P.C.**

1 This notice of motion has been taken out in rather peculiar circumstances.

2 The plaintiff has filed a summary suit claiming a sum of Rs.3.15 crores from the defendant. When the summons for judgement was heard, this Court, by an order dated 25th April 2011, granted conditional leave to defend. Paragraph 6 of the order reads as under :

> *6. For the aforesaid reasons, there is no substance in the defence which has been sought to be raised on behalf of the Defendant. However, in my view, having regard to the interests of justice, leave to defend the suit should be granted*

> *to the Defendant subject to a condition of deposit. Accordingly leave to defend the suit is granted to the Defendant subject to the condition of a deposit of an amount of Rs.2,00,00,000/- (Rupees Two Crores) within a period of twelve weeks from today. The amount upon deposit shall be invested in a fixed deposit of a nationalized bank which would be renewed periodically during the pendency of the suit. The Summons for Judgment is disposed of accordingly.*

3 Against this order, the defendant preferred an Appeal which came to be dismissed by an order dated 8th August 2011. The Appellate Court was pleased to observe that *"there is an unequivocal liability on the defendant to pay the amount.*"

4 Against the said order, the defendant preferred a Special Leave Petition which came to be rejected by an order dated 23rd September 2011. The Hon'ble Supreme Court refused to interfere in the order but while dismissing observed *"however we are sure that the learned Single Judge of the High Court shall decide the suit without being influenced by the observations made by the Division Bench of the High Court."* A further period of four weeks was granted to deposit the sum of Rs.2 crores which the defendant promptly complied with.

After this amount was deposited, the plaintiff took out a notice of motion bearing No.160 of 2012 in which the plaintiff prayed for leave to withdraw the amount of Rs.2 crores deposited by the defendant with the

Prothonotary and Senior Master on furnishing a bank guarantee by the plaintiff for Rs.2 crores. Prayer clause (a) of the notice of motion no.160 of 2012 reads as under :

> *(a) That this Hon'ble Court will be pleased to direct the Prothonotary & Senior Master, High Court, Bombay, to pay to the plaintiffs the sum of Rs.2,00,00,000/- (Rupees Two Crores only) deposited by the defendants on 20th October 2011 pursuant to the order of the Hon'ble Supreme Court of India in C.C. No.15277 of 2011 dated 23rd September, 2011 <u>on furnishing the Bank Guarantee by the plaintiffs for Rs.2,00,00,000/- (Rupees Two Crores only).</u>*
>
> (emphasis supplied)

5 This notice of motion came up for hearing on 21st March 2014, when this Court (Smt. Roshan Dalvi, J.) was pleased to allow the notice of motion. The defendant was not represented on that date. But while allowing the notice of motion, the Court did not direct the plaintiff to furnish the bank guarantee though in the prayer of the notice of motion, the plaintiff themselves had offered to furnish a bank guarantee in the sum of Rs.2 crores as a condition to permit withdrawal of the amount of Rs.2 crores. There is nothing in the order giving reason why this condition was dispensed with. The order also does not state as to why the order passed by this Court (Dr.D.Y.Chandrachud, J.) on 25th April 2011 directing that the amount, upon deposit, shall be invested in a fixed deposit of a nationalized bank which would be renewed periodically during the pendency of the suit requires to

be modified or dispensed with. In my view, it appears to have been missed out by the Court while passing this order dated 21st March 2015.

The present notice of motion, therefore, has been taken out to direct the plaintiff to furnish the bank guarantee for the sum of Rs.2 crores which was handed over to the plaintiff by the Prothonotary and Senior Master on 21st March 2015.

6 In the affidavit in support, it is stated that the defendant-company was started by the affiant's late father Mr.Harbans Singh Siddhu and mother who held 60:40 equity shares in the company. It is also stated that the affiant is 32 years old and was inducted and appointed as a Director of the defendant-company in the year 2005 and is looking after the business of the defendant-company after the demise of his late father Mr.Harbans Singh Siddhu. It is also stated that Mr.Harbans Singh Siddhu was suffering from cancer and expired at the age of 54 years on 4th April 2015. It is also stated that during the period of his protracted illness the attention of the entire family was focused on his failing health and medical complications and there was nobody who was really putting attention to this litigation. It is also stated that when the motion was listed for hearing on 21st March 2014, the late Mr.Harbans Singh Siddhu was ill and his Advocate also remained absent.

7 Shri Vaidya, counsel appearing for the plaintiff stated that though the prayer clause (a) in notice of motion No.160 of 2012 stated that Rs.2 crores be permitted to withdraw against furnishing the bank guarantee, the 3rd prayer in the motion provided thus : '*for such further and other orders and directions be made as the nature and circumstances of the case may require.'* He submitted probably it is for that reason, the Court chose not to direct the plaintiff to furnish the bank guarantee.

8 I have considered the affidavit in support, the reply and the submissions made by the counsels and the orders passed earlier. When the summons for judgement was disposed and conditional leave to defend was granted, the defendant was directed to deposit the amount of Rs.2 crores which amount was to be invested by the Prothonotary and Senior Master, High Court, Bombay. In the notice of motion for withdrawal of the amount also it was the plaintiff's case that they would furnish the bank guarantee against the withdrawal of the amount of Rs.2 crores. Moreover, in the order passed on 21st March 2014, there is no reference to the order dated 25th April 2011 passed by His Lordship Dr.D.Y. Chandrachud, J. that the amount of Rs.2 crores should be invested in a fixed deposit of a Nationalized Bank to be renewed periodically during the pendency of the suit.

9 Therefore, in my view, it is quite obvious that while passing the order dated 21st March 2015, it has missed out the attention of the Learned Single Judge to direct the plaintiff to furnish the bank guarantee of a nationalized bank. Therefore, I have no hesitation to direct the plaintiff to furnish the bank guarantee for a sum of Rs.2 crores as per the format prescribed by the Prothonotary and Senior Master of this Court. The bank guarantee has to be furnished within four weeks from today. If the plaintiff is unable to furnish this bank guarantee within four weeks, within one week thereafter, the plaintiff shall deposit the amount of Rs.2 crores with the Prothonotary and Senior Master, High Court, Bombay and in such case the Prothonotary and Senior Master shall invest the amount in a fixed deposit with a nationalized bank.

10 The notice of motion accordingly stands disposed.

**(K.R. SHRIRAM, J.)**