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

SUIT NO.2294 OF 2007

Sanjay Kumar Agarwal)
S/o. Late Shri Rameshchandra)
Manilal Agarwal)….Plaintiff

V/s.

Central Bank of India & Ors.)....Defendants

Mr.Faran Khan a/w Ms.Sheela K.Mistry for the plaintiff.

Ms.Usha Srivastava a/w Ms.Nupur Awasthi i/by M/s.Consulta Juris for defendants.

CORAM : K.R.SHRIRAM,J
DATE : 30.8.2016

P.C.:-

1 This suit is filed claiming a sum of Rs.6,55,70,725.95/- with interest thereon @ 15% p.a. from the date of the suit till payment on the ground that the defendant committed a breach of an understanding with the original plaintiff thereby causing loss to the plaintiff to the extent of the amount claimed. (For sake of convenience, I have referred to the original plaintiff as plaintiff and the defendant no.1 as defendant).

2 The plaintiff was the Karta of Ramesh Agarwal HUF and a director of Ramesh Agarwal Dying & Printing Mill Pvt. Limited, which was in liquidation when the suit was filed. The company is now wound up. He was also a partner of M/s.Agarwal Textile Industries.

The suit has been filed by the plaintiff in his individual capacity as well as in his capacity as Karta of the said Ramesh Agarwal HUF. The plaintiff in his personal capacity as well as Karta and Manager of Ramesh Agarwal HUF the firm M/s.Agarwal Textile Industries and the company Ramesh Agarwal Dying & Printing Mills Pvt. Ltd., enjoyed certain facilities from defendant no.1. Defendant no.2 is the daughter and legal heir of the original plaintiff. Defendant no.2 is only a formal party. The present plaintiff is the son of the original plaintiff. The original plaintiff died on 17.10.2008 when the present proceedings were pending.

3 In order to secure facilities for the said Ramesh Agarwal Dying & Printing Mill Pvt. Limited, the company had provided various securities to the defendant no.1. The plaintiff had also given security in the form of personal guarantee to defendant. The securities given to the defendant were duly insured with New India Assurance Company Limited (hereinafter referred to as Insurance Company) and the policies issued by the Insurance company were also given to defendant as security. It should be noted that it is not the plaintiff's case that the defendant was also an assured under the insurance policies. I am stating this because if it was so, defendant would have been a co-assured with the plaintiff and the policies would have been issued directly in favour of the defendant no.1. Disputes arose

between the plaintiff and the defendant on repayment of the loans and advances whereby the defendant sought to recover sum of Rs.1,81,74,292.40/- from the plaintiff, Ramesh Agarwal Dying & Printing Mill Pvt. Limited and Agarwal Textiles Industries. The defendant filed a suit, being Suit No.1631 of 1979, in this court, which, after the promulgation of Recovery of Debts due to the Banks and the Financial Institutions Act, 1993, got transferred to the Debt Recovery Tribunal. On 24.10.1979, interim reliefs were granted by this court and the Court Receiver came to be appointed before the suit was transferred to the Debt Recovery Tribunal. On 20.10.1979 a fire broke out in the factory premises of Ramesh Agarwal Dying & Printing Mill Pvt. Limited while the court receiver was in possession of the same. The loss estimated due to fire was about Rs.1 crore. A criminal complaint was filed against the plaintiff and 4 others alleging that the plaintiff had set fire to the property offered as security to the defendant. On 23.1.1980 Ramesh Agarwal Dying & Printing Mill Pvt. Limited came to be wound up and Official Liquidator was appointed. On 17.2.1983 the Additional Sessions Judge, Thane acquitted the plaintiff of all charges. The plaintiff and the defendant started correspondence with the Insurance company to pay the claim under the policy. Insurance company by letter dated 20.12.1983, more than 4 years after the fire, repudiated/rejected the claim of the plaintiff.

4 On 16.10.1984, which would be almost 5 years after the fire but within 10 months of the repudiation, the defendant filed in this court Suit No.2587 of 1984 against the insurance company claiming a sum of Rs.1,87,53,484.60 (principal was Rs.1 crore being the loss estimated due to fire and rest interest) along with interest @ 18% p.a. In the said suit the defendant has made an express statement that any amount received from the insurance company would be given credit to Ramesh Agarwal Dying & Printing Mill Pvt. Limited. The plaintiff in this suit figures nowhere either in the policy or in the suit filed by the defendant against the insurance company. In fact the plaintiff had filed an application to be joined as co-plaintiff in this suit against the Insurance Company, which application was rejected.

5 Suit No.1631 of 1979 and Suit No.2587 of 1984 were both transferred to Debt Recovery Tribunal and re-numbered as Original Application (O.A.) No.301 of 2001 and O.A No.2364 of 1999, respectively.

6 By a letter dated 22.12.2000 (part of Exhibit P-6) the plaintiff made an offer of settlement to the defendant whereby the plaintiff agreed to pay a sum of Rs.1,82,00,000/- in full and final settlement (OTS) of all the claims of the defendant. By a letter dated 12.3.2001 (part of Ex.P-6) the defendant accepted the plaintiff's offer

of settlement. The plaintiff paid the amount of Rs.1,82,00,000/- and the defendant issued No Dues Certificate dated 17.6.2002 (part of Ex.P-6) relieving the plaintiff from all liabilities. Following this the defendant also withdrew O.A No.301 of 2001 against the plaintiff and Ramesh Agarwal Dying & Printing Pvt. Ltd. which was pending before the Debt Recovery Tribunal.

7 It is the case of the plaintiff that by virtue of paying amount of Rs.1,82,00,000/- to the defendant, the plaintiff came to be subrogated to all the rights that defendant had against the insurance company and there was an agreement between the plaintiff and the defendant that the defendant would continue to prosecute the suit against the insurance company and pay over the decretal amount to the plaintiff. There is no subrogation agreement filed in evidence and the plaintiff has not even referred to any law to claim subrogation rights. No submissions were also made. It is stated by the plaintiff that despite this agreement, the defendant allowed O.A No.2364 of 1999 against insurance company to be dismissed and thereby breached the agreement with the plaintiff. It is the case of the plaintiff that the defendant had claimed Rs.1,87,00,000/- and the interest as accumulated on the said sum would work out to Rs.6,55,00,000/-, which amount, together with further interest @ 15% p.a. from the date of the suit, was payable. If one sees the particulars

of claim annexed to the plaint, the amount claimed for assets lost in fire is only Rs.1 crore but the plaintiff has been claiming interest upon interest to make the total claim of Rs.6,55,70,725.95/-.

8 The counsel for the plaintiff submitted that it is not the plaintiff's case that when the plaintiff entered into OTS with the defendant, the defendant gave an assurance that they would continue to prosecute the suit against the insurance company and that was a condition precedent for the plaintiff agreeing to enter into OTS. The case of the plaintiff is that subsequent to the OTS and withdrawal of the O.A. by the defendant, the plaintiff made a proposal vide a letter dated 16.4.2003 (Exh.P-7) which was accepted by the defendant, whereby the defendant agreed to continue to prosecute the suit against the insurance company and by not prosecuting the suit, the defendant caused loss to the plaintiff. The counsel for the plaintiff also submitted that the defendant was estoped from not prosecuting the suit. Since the estoppel will not arise unless the party claiming the benefit, adopted assumption on the basis of action and thereby place himself in a position of significant disadvantage, I asked the counsel for the plaintiff as to what action or inaction did the plaintiff adopt to plead estoppel against the defendant. The counsel said that the plaintiff did not file any proceeding against the insurance company. In my view, this submission is fallacious in as much as (a)

it is nobody's case that the plaintiff was assured under the insurance policies and therefore, he could not have sued the insurance company under the insurance policies and (b) more than 23 years had passed since the fire broke out and 19 years had passed since the claim was repudiated by the insurance company and any claim would have been grossly time barred and (c) the assured, Ramesh Agarwal Dying & Printing Pvt. Ltd. was wound up and Official Liquidator was in charge.

9 The defendant has denied that there was any such understanding with the plaintiff and has also denied the claim as made by the plaintiff. The issues were settled on 28.8.2014 and were slightly modified/corrected on 23.8.2016. The following 4 issues were settled.

ISSUES

(1) Whether the plaintiff proves that the right of defendant no.1 in the insurance policy, under which the security given by the plaintiff to defendant no.1 were insured with the New India Assurance Company Limited, stood vested and/or subrogated in favour of the original plaintiff and the amounts payable, if any, under the insurance policy by the Insurance Company is payable to the original plaintiff ?

(2) Whether the defendant no.1 proves that one time settlement entered into between the original plaintiff and defendant no.1 was comprehensive and no amount is due or payable by defendant no.1 to the plaintiff ?

(3) Whether the plaintiff proves that, the plaintiff is entitled to a decree in the sum of Rs.6,55,70,725.95 together with interest thereon at 15% per annum from the date of filing of the suit until payment and/or realization ?

(4) What decree ? What order ?

10 As regards the 1st issue, there is no evidence whatsoever presented by the plaintiff that the right of the defendant in the insurance policy stood vested and subrogated in favour of the plaintiff. The entire basis of the so-called understanding with the defendant started with the correspondence at Exhibit P-7 to the plaint. It should be remembered that the one time settlement happened sometime between 12.3.2001 and 17.6.2002. On 17.6.2002 the defendant issued No Dues Certificate to the plaintiff. For the first time, almost 10 months later on 16.4.2003, the plaintiff addressed a without prejudice letter dated 16.4.2003 (Exhibit P-7) to the defendant. It will be useful to reproduce the said letter.

RAMESH AGARWAL H.U.F.
317, KALBADEVI ROAD, 2nd FLOOR,
MUMBAI- 400 002

Date : 16.04.2003

To,

The Deputy General Manager,
Central Bank of India,
Mumbai Main Office, Fort,
Mumbai-400 023.

Dear Sir,

Re: Our OTS and claim lodged with New India Insurance Company

As you are aware, we have paid the entire dues as per sanction of our one time settlement proposal along with over due interest in terms of RBI directions.

We have also settled amicably the litigation with your Bandra Branch and have resolved the issue of rent of our Bandra premises being used by you as tenant.

Having settled the dues in O.A.No.301 of 2001 in DRT, we are eligible to get right of subrogator and we step in the bank's shoes in the pending suits arising out of transaction with the drawees and Insurance claim etc.

The OTS sanctioned by you also has been on the same complied presumption since nothing contrary to the above has either been submitted by us in our offer nor by you in the sanction letter. We are also aware that our third party intervener application has been turned down by the DRT on technical grounds. However you also will agree that having settled the compromise dues we are the rightful beneficiary of the Insurance policy and even if bank succeeds in getting the dues from Insurance Company, we shall have every right to claim the proceeds of settled claim even at a later stage as and when it occurs.

> *We have enjoyed a long standing relationship with the bank and in all fairness don't want to take disadvantage of the situation. With this in mind we offer the following for your kind consideration :-*
>
> *(1) The Bank shall pursue the suit in DRT on our behalf ;*
>
> *(2) We shall reimburse all the legal expenses incurred by the bank so far in the suit against the Insurance Company ;*
>
> *(3) We shall incur all future legal expenses which may occur in future in care of this suit against the Insurance Company and keep the Bank funded as per requirement ;*
>
> *(4) We shall be paid 90% of the claim after the suit is decreed by DRT and claim is released by bank.*
>
> *The above shall help both of us, realize the claim at an early date and bank shall get 10% of the settled claim amount and all future litigation also could be avoided on this score.*
>
> *We request you to consider the above request for mutual benefit.*
>
> *Thanking You, Yours truly,*
>
> *For Ramesh Agarwal H.U.F."*
>
> *(emphasis supplied)*

11 This letter is only an offer or suggestion from the plaintiff to the defendant with a request to consider the suggestion. This was followed two years later by a letter dated 6.7.2005 (Exh.P-8) again on without prejudice basis enquiring with the defendant the status of the suit against the insurance company. Six weeks after Exhibit P-8 was written the plaintiff follows by another letter (Exh.P-9) on without

prejudice basis to the defendant. This letter was addressed to the Deputy General Manager of the defendant and it states "Your assurance to pursue the claim on our behalf was after you succeeded in objecting to our intervener application in DRT case. Our letter dated dated 16.4.2003 (Exh.P-7) was written consequent upon your such assurance" The intervener application that the plaintiff is referring to is the intervention application that plaintiff had filed in the Debt Recovery Tribunal to join as co-plaintiff with the defendant in the Original Application filed by the defendant against the insurance company. This application was rejected by the DRT on the ground that the plaintiff cannot maintain any action in the Debt Recovery Tribunal.

In response to plaintiff's communications the defendant vide their letter dated 15.9.2005 (Exhibit P-10) informed the plaintiff that they are taking up the matter with their Advocate and recovery officer, Debt Recovery Tribunal and shall revert as soon as any information was received. To this, the plaintiff sent another without prejudice letter (Exhibit P-11) giving the defendant a last chance of one week to disclose their stand in the matter and alleging that the defendants' conduct impaired the plaintiff's subrogation rights to get reimbursed. The defendant, thereafter, vide letter dated 17.10.2005 (Exhibit P-12) informed the plaintiff that since the main account is settled as OTS, the management of the defendant has taken a decision to discontinue the suit against the insurance company. It is the case of the plaintiff that thereafter the defendants' manager informed the plaintiff that the defendant intended to restore DRT case against the insurance company but still the defendant did not do so. This being the background, let us consider the evidence.

12 The original plaintiff is dead. The person who gave evidence is the plaintiff's son. It is stated in the evidence that the defendant agreed to prosecute the suit as per the terms of agreement dated 16.4.2003 (Exhibit P-7) but Exhibit P-7 is not even an agreement. Exhibit P-7 is actually only a letter from the plaintiff to the defendant making some suggestion and asking the defendant to consider the same. Therefore, the testimony of PW-1 is not correct. The counsel for the plaintiff submitted that the plaintiff relies only on the correspondence exhibited to submit that there was an understanding. In my view none the correspondence read independently or together indicate any understanding as alleged in the plaint between the plaintiff and defendant.

It is also stated in the testimony at paragraph-24 that the original plaintiff met the bank representative Mr.Verma but in the cross-examination it is stated that the understanding was between one Mr.Arora and the plaintiff. This itself shows that the testimony of PW-1 cannot be accepted.

Moreover, the correspondence written by the plaintiff to the defendant are all on without prejudice basis. Therefore, in my view, we cannot even place reliance on such documents to conclude that there was a concluded understanding. The meaning of without prejudice has been stated in [1]***Oberoi Constructions Pvt. Ltd. Vs. Worli Shivshahi Co-op. Hsg. Society Ltd.*** Paragraph-9 reads as under :-

> "The next legal contention advanced is as to what will be the effect of the words "without prejudice". On behalf of the appellants, the learned Counsel has drawn our attention to the judgment of the Supreme Court in the case of Chairman and MD, NTPC Ltd. v.Reshmi Constructions, Builders and Contractors reported in MANU/SC/0003/2004 : AIR 2004 SC 1330. The Apex Court noted that even correspondence marked as "without prejudice" may have to be interpreted differently in different situations. The interpretation would be based amongst others according to usage in the profession and that no issue of public policy is involved. The Supreme Court quoted with approval the judgment in Rush & Tompkins Ltd. v. Greater London Council (1988) 1 All ER 549 at pp. 551g-552b. It was held that the rule which gives the protection of privilege to "without prejudice" correspondence depends partly on public policy, namely the need to facilitate compromise and partly an implied agreement. In the same judgment the exposition of definition of "without prejudice" contained in the judgment of Lindley, LJ in Walker v. Wilsher (1889) 23 QBD 335 was set out, which reads as under :
>
> > What is the meaning of the words "without prejudice" ? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established and the letter, although written without prejudice, operates to alter the old stage of things and to establish a new one.
>
> The court then noted that the term had come up for consideration in Superintendent (Tech.I), Central Excise v.

1 2008(5) Bom CR 855

Pratap Rai reported in MANU/SC/0400/1978 : 1978 CriLJ1266, wherien it was observed “without prejudice” would indicate that the order was not final and irrevocable. The definition in Black's law Dictionary was then quoted which reads as under :

> Where an offer or admission is made “without prejudice” or a motion is denied or a bill in equity dismissed “without prejudice”, it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost, except insofar as may be expressly conceded or decided. See also `Dismissal without prejudice'.

It would thus, be clear that the expression “without prejudice” is to be understood on the fact situation. When parties agree to a set of things then merely marking on the document “without prejudice” would be of no consequence. However, if the material indicates that the negotiations are still in progress and there is no finality on what was contained in the document marked “without prejudice”, then the document marked “without prejudice” cannot be considered without the consent of both the parties.”

13 Therefore, the meaning of without prejudice is if the terms proposed in the letter are not accepted, the position of the writer of the letter does not get prejudiced or if the terms are accepted, the complete contract is established. This means that when the plaintiff wrote letter dated 16.4.2003 and later, he wanted to safeguard his position. The defendant, from the correspondence at Exh.P-7 to P-12, does not appear to have accepted the proposal of the plaintiff and therefore, in my view, there is no binding agreement between the plaintiff and the defendant that the defendant will prosecute the suit against the insurance company. The answer to issue no.1 therefore, is in the negative.

14 As regards issue no.2, the counsel for the plaintiff agreed that the OTS with the defendant was a comprehensive settlement and the agreement to continue to sue insurance company as alleged by the plaintiff came up only after the one time settlement was entered into. In view thereof and considering the correspondence which are part of Exhibit P-6, Exhibit P-7 and Exhibit P-12, the answer to issue no.2 in my view, should be in the affirmative.

15 In view of the above, the issue no.3 is also answered in the negative.

16 The suit therefore, stands dismissed with no order as to costs.

(K.R.SHRIRAM,J)