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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.1980 OF 2015
IN
SUIT NO.502 OF 2015

Google India Private Limited	...Applicant
<i>In the matter between</i>	
Goldmines Telefilms Private Limited	... Plaintiff
<i>Versus</i>	
Sai Entertainment Private Limited and Others	...Defendants

Mr. Vishal Talsania, *with Mr. Kunal P. i/b Thakore Jarivala for the Plaintiff.*

Mr. Anand Mishra, *for the Applicant / Defendants Nos.1 to 4.*

Mr. Chirag Mody, *with Ms. Salakha Mali, i/b Ashok Purohit and Company for Defendant No.7.*

CORAM: G.S. PATEL, J
DATED: 12th August 2016

PC:-

1. This is the 1st Defendant's Notice of Motion to set aside an order dated 3rd December 2015. The only ground taken is that Defendants Nos. 1 to 4 were "not heard" on that day. Put in this manner, the submission seems at first reasonable. It, however, hides a far more sinister purpose and *modus operandi*, one that I find is

being used repeatedly. The general pattern seems to be this. When some defendants find that an order is likely to go against them, they and their advocates remain absent on the next date of hearing. An order comes to be passed. Then these parties and advocates come forward and say that they were “not heard” and seek to re-agitate the same issue all over again.

2. This case, perhaps more than most, demonstrates exactly this. I note today two aspects. First, that Mr. Mishra who is appearing for Defendants Nos. 1 to 4, regularly appeared at hearings. Certainly he did so in September 2015. Today, he says that he does not have his papers. He, therefore, seeks time. I also find that he has not served this Notice of Motion, one filed in October 2015, on Defendant No. 7 even till date. That cannot be accidental either. The matter was on the weekly board yesterday. It reached in the afternoon. It was stood over to today because it was low on the weekly board and all were not present when it reached. Yesterday, I was not told anything about papers not being available. Today, of course, the application is for a further adjournment. I have no doubt that all of this is designed to ensure that the Notice of Motion is kept pending and remains hanging without a decision and is only listed again and again.

3. These tactics are obvious from the order that is sought to be recalled. This is an order dated 3rd September 2015 of Mr. Justice S.J. Kathawalla. It is at Exhibit “A” and runs from pages 11 to 19 of the Affidavit in Support of this Notice of Motion.

4. What Mr. Mishra for the Applicants/Defendants Nos. 1 to 4 does not perhaps realize is that there is a discernible detailing and care in the orders passed by the Court presided over by Mr. Justice S.J. Kathawalla. Those orders have a certain trajectory: typically, every opportunity is given to a party, and all this is then meticulously noted and recorded. Every order is thoroughly complete in and of itself. Every salient fact is recorded. Nothing is left to be undisclosed or is glossed over. Every aspect is considered from every angle. These are amongst most comprehensive orders of any Court.

5. This one is no exception. It sets out that the matter pertains to a Deed of Assignment dated 5th August 2011 between the Plaintiff and 7th Defendant, by which the 7th Defendant only assigned to the Plaintiff satellite and other rights in respect of certain films. The agreement of 5th August 2011 states that only video rights in respect of these films were assigned by the 7th Defendant in favour of Defendants Nos. 1 to 4, Mr. Mishra's clients. Thereafter, the order sets out some of the facts in the matter on merits. Paragraph 3 notes that an ad-interim order was passed on 8th May 2015 (S.C. Gupte, J.). From paragraph 4 onwards, the order then discusses the conduct of the 1st Defendant and its Advocates. It sets out that the 1st Defendant in its Affidavit referred to an alleged addendum executed by the Directors of the 7th Defendant in favour of the 1st Defendant. This was controverted by the 7th Defendant saying that the document was a forgery and that no such addendum was ever executed.

6. Then comes paragraphs 5. This must be reproduced in full.

“5. The above Notice of Motion was called out for hearing and final disposal on 20th July 2015. Since the Advocate appearing for Defendants Nos. 1 to 4 was absent, this Court after hearing the learned Advocates appearing for the Plaintiff and Defendant No. 7 adjourned the matter to 24th July 2015 to enable them to file their written submissions. On 24th July 2015, Mr. Anand Mishra appeared for Defendant No. 1 and submitted that he should be heard in the matter. He was allowed to do so.”

7. As is obvious, this is precisely the pattern of conduct by parties to which I earlier alluded. In paragraph 6, Mr. Justice S.J. Kathawalla went to the next step by directing that the document in question be examined by the Additional State Chief Examiner of Documents, C.I.D., State of Maharashtra, Mumbai. The Notice of Motion was then placed for directions on 2nd September 2015. On that date, as is noted in paragraph 6, Mr. Mishra for the 1st Defendant chose to remain absent although he and his clients were aware of the previous orders. The Notice of Motion was then placed for hearing and final disposal on 3rd September 2015. Again on that day Defendants Nos. 1 to 4 chose to stay away. The Court considered the matter on merits. It held that the document was a forgery and passed an order accordingly.

8. Now let us see what the Affidavit in Support of this Notice of Motion gives as a reason (“excuse” might be more appropriate) for the absence of Defendants Nos. 1 to 4 and their Advocate on 3rd September 2015. As I have already noted, this practice of carefully staying away on selected date seems to be a deliberate ploy. In this

context, paragraph 5 of the Affidavit in Support is worth reproducing. This is what it says.

“5. I say that a careful perusal of the said order indicates that the same has been passed in the absence of the Advocate for the Defendant No. 1 who failed to appear before this Hon’ble Court. I say that in fact, the clerk of the Advocate for the Defendant No. 1 have lost track of the matter and accordingly, had failed to inform the same to the Advocate about the present matter appearing before this Hon’ble Court and it is only because of the said reasons, none remain present before this Hon’ble Court on behalf of the Defendant No. 1 on 3/9/2015.”

9. The first sentence of this paragraph is a deliberate misleading. The order has not been passed “in the absence of the Advocates for Defendant No. 1”. Every opportunity was given to the Defendant No. 1 and his Advocate. If both of them stay away despite the matter being notified repeatedly, they have only themselves to blame. No reason is given in that paragraph except to say that the Advocates’ Clerk “lost track of the matter”. For any matter listed before Mr. Justice S.J. Kathawalla, I find that exceedingly hard to believe.

10. Paragraph 6 is even more interesting. It says that due to circumstances “beyond the control” of the Advocate for the 1st Defendant he failed to remain present and this resulted in passing an *ex parte* order. This is untrue. The order is not an *ex parte* order in any sense of the word. Advocates should know better than to use such words loosely. An *ex parte* order is an order passed *without*

notice. The 1st Defendant and his Advocate had complete notice. If they chose to stay away, it is not an *ex parte* order.

11. The Affidavit then goes on to say that the order of Mr. Justice S.J. Kathawalla is based on misrepresentation. Unfortunately — or perhaps fortunately — we are not blessed by being told what this so-called misrepresentation might be. All that the Affidavit says is that despite the opinion of the State Examiner of Documents, the addendum is a genuine document. Now the 1st Defendant offers to obtain what he calls ‘the necessary handwriting expert report at his own cost’. That is too little, too late. It is out of question. It amounts to sitting in Appeal over Mr. Justice S.J. Kathawalla’s order. That I will not do, under any circumstances. It also amounts to attempting to controvert a court-ordered opinion from an official body with a private report. That is unacceptable.

12. The statement in paragraph 8 appears to be an outrageous untruth. Here, the Defendant No. 1 claims to have found out about the order having been passed from one of his clients who learned it from one of the Plaintiffs’ directors.

13. I will pause here for a moment to try and understand what exactly is being suggested in this Affidavit. This Affidavit tries to give the picture that the listing of matters in this Court is some sort of a closely-guarded secret; that lists are unknown to and kept from advocates and parties; that lists are not notified in advance; that matters are suddenly and abruptly taken up in some haphazard manner, and it is more or less a matter of chance when and whether

a matter will be called and whether an advocate will know or be present. All this overlooks and makes no mention of the fact the daily listings are published in hard copy and soft copy well in advance. The Affidavit makes no mention of the fact that the clerks of the Advocates are no longer required to “keep track” of any matters. There are electronic display boards in the Court, in the Bar rooms, in the library, in the corridors and there are also facilities of getting updates on cell phones or computers in real time. There are facilities for SMS text messages about board matter movements as well. Short of an electronic billboard at Hutatma Chowk, every other facility is available and provided, and most of them are 100% free. There is not the remotest possibility of an advocate’s clerk “missing” the matter like this; and certainly not one that was going on regularly, and was stood over from the previous day. This is not a matter that has been dusted off after years in the storerooms and suddenly been listed and taken up. I see from the CMIS, something that Mr. Mishra and his clerk knew and could have checked, that the matter was listed on 8th May 2015, 20th July 2015, 24th July 2015, 2nd September 2015 and then on 3rd September 2015.

14. In any case, the serial numbers of the matter taken up in every Court are notified on our electronic display boards. These are flat panel displays now, very like airport departures and arrivals screens, and even Mr. Mishra and his clerk should have had no trouble at all in following them or using any one of the myriad other facilities. Had the clerk actually missed the matter, he would undoubtedly informed Mr. Mishra, who could have applied to Mr. Justice S.J. Kathawalla in time; in the course of that very day, or perhaps the next day, for being heard. I note with interest, and this is also not

pointed out, that the order of 3rd September 2015 was uploaded one month later on 3rd October 2015. In other words, the 1st Defendant and his Advocate had enough time to approach the Court. They could have approached the Court Associate on that day or the next to find out what had happened in that matter. As I have noted, the Motion was regularly listed since 8th May 2015.

15. Nothing these Defendants say inspires confidence. Mr. Justice S.J. Kathawalla has gone to quite extraordinary lengths to ensure that the Defendants' case about there being an addendum is fully considered, and that every opportunity was given to test the veracity of that claim. An independent agency was appointed to examine the document in question. Now all of this is sought to be overturned without there being a shred of material on record, simply on this specious and frivolous plea that the 1st Defendant and their Advocate were "not heard" and that the order was "*ex parte*".

16. If there was a misnomer, this is it. Nothing prevented the Advocates for the 1st Defendant from being heard. He could have been heard on that day. He could have requested that the order be recalled on that day. There is nothing very unusual in that. Mr. Mishra stayed away on 2nd September 2015 — and there is no reason offered by him or his clerk for this. Mr. Mishra and his clients also stayed away the next day. This is noted with great meticulousness and taken care in paragraphs 5 to 7 of this order to which absolutely no answer in this Notice of Motion.

17. At this stage, Mr. Mishra seeks leave to withdraw the Notice of Motion. In the facts of the case, leave is refused.

18. The Notice of Motion is dismissed with costs.

(G. S. PATEL, J.)