IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

COMMERCIAL APPEAL NO.121 OF 2017
IN
SUMMONS FOR JUDGMENT NO.82 OF 2015
IN
SUMMARY SUIT NO.883 OF 2015

Ashok M. Chheda ... Appellant
Vs.
M/s. Satyam Builders and others ... Respondents

Mr. Zubin Behramkamdin i/b. Mr. Govind Solanke for Appellant.
Mr. F. I. Devitre, Senior Advocate a/w. Mr. Anupam Surve, Mr. Vinayak Vengurlekar and Ms Nitisha Lad i/b. Nair Vengurlekar & Co. for Respondents No.1 to 4 and 6.
Mr. Som Sinha for Respondents No.8 and 9.

CORAM : NARESH H. PATIL &
R. G. KETKAR, JJ.

Reserved on : NOVEMBER 16, 2017
Pronounced on: DECEMBER 7, 2017

<u>ORDER:</u> (PER R. G. KETKAR, J.)

Heard Mr. Behramkamdin, learned Counsel for the appellant, Mr. Devitre, learned Senior Counsel for respondents No.1 to 4 and 6 and Mr. Sinha, learned Counsel for respondents No.8 and 9 at length.

2. By this Appeal under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (for short 'Act'), appellant, hereinafter referred to as 'defendant No.1', has challenged the judgment and order dated 06.12.2016 passed by the learned Single Judge in Summons for Judgment No.82 of 2015 in Summary Suit No.883 of 2015. By that order, the learned Single Judge granted conditional leave to defend to

the defendant No.1 and respondent No.7, hereinafter referred to as 'defendant No.6', subject to their depositing Rs.2,20,00,000/- with the Prothonotary and Senior Master, High Court, Bombay as a condition precedent for leave to defend, within six weeks. Upon deposit, the Prothonotary and Senior Master was directed to invest the same in a Fixed Deposit with a Nationalized Bank for a period of one year in the beginning and to renew the same from year to year until final disposal of the Suit, among other directions. The parties shall hereinafter be referred to as per their status before the learned Single Judge.

3. Plaintiff No.1 is a partnership firm. Plaintiffs No.2 to 6 and defendant No.1 are the partners of plaintiff No.1. Defendant No.6 is the wife of defendant No.1. Defendants No.6, 7 and 8 are the guarantors of the payment which according to the plaintiffs is payable by defendant No.1 to the plaintiffs. The learned Single Judge has recorded that the Suit as against the other defendants has been dropped.

4. Plaintiffs have instituted Suit for recovery of sum of Rs.2,20,00,000/- from defendants No.1 and 6 to 8 based on an undertaking dated 17.09.2012 given by the defendant No.1 as a principal debtor and as against defendants No.6 to 8 based on separate deeds of guarantee. Defendants No.6 to 8 have individually stood as guarantors for the performance of the undertaking given by the defendant No.1.

5. It is the case of the plaintiffs that plaintiff No.1 is in the business of the property development. Plaintiff No.4 and defendant No.1 were the two working partners. Sometime in 2011, defendant No.1 misused his position as a partner and unauthorizedly and surreptitiously sold two flats, namely, flats No.1102 and 1103 between 20.03.2012 and 26.03.2012 at or for a consideration of Rs.1,45,00,000/- and

Rs.1,30,00,000/- respectively. These two flats were sold at an undervalued price. The sale proceeds of Rs.2,75,00,000/- were deposited in the firm's bank account. Between 22.03.2012 and 31.03.2012, amount of Rs.2,40,00,000/- was transferred by defendants No.1 and 6 from the bank account of plaintiff No.1, partly into two personal accounts of defendant No.1 and partly in the new joint bank account held by the defendant No.1 and defendant No.6. It is further alleged that between 11.04.2010 and 13.04.2010, a sum of Rs.50,00,000/- of plaintiff No.1 was illegally transferred from the plaintiff No.1's bank account to the joint account of defendants No.1 and 6. This was subsequently transferred to the bank account of one Ketki Developers, a partnership firm in which the defendants No.2 and 3 were partners. On 12.04.2012, plaintiff No.4 lodged a complaint against defendants No.1 and 6. In pursuance thereof, Matunga Police Station registered F.I.R. No.59 of 2012 against defendants No.1 and 6 as also defendants No.2 to 5 on 14.06.2012 under Sections 380, 406, 420, 467 read with 120-B Indian Penal Code, 1860 (for short 'I.P.C.'). Defendants No.1 and 6 had filed anticipatory bail applications. Anticipatory bail application of defendant No.1 was rejected. Anticipatory bail application of defendant No.6 was allowed. Defendant No.1 was arrested and produced before the Additional Chief Metropolitan Magistrate, 37th Court Esplanade on 15.09.2012. He was remanded to police custody till 26.09.2012.

6. It is the case of the plaintiffs that Ms Anjali Patil, Advocate of defendant No.1 filed application dated 17.09.2012 before the learned Additional Chief Metropolitan Magistrate for permission to take signature of defendant No.1 on Vakalatnama and also on an undertaking. On the same day, permission was granted. On 17.09.2012, defendant No.1 also signed Vakalatnama in favour of M/s. Chitnis & Co. On the

same day, defendant No.1 and defendants No. 2 to 5, who were arrested along with defendant No.1, signed and executed Suo-moto Undertaking. They inter alia undertook to reimburse a sum of Rs.2,20,00,000/- being the amount for the loss suffered by the plaintiff No.1 for the under-priced sale of two flats within 30 days of grant of bail. In case of any default by all or any of them, bail granted to all or any of them was to stand cancelled.

7. It is the case of the plaintiffs that defendants No.1 and 2 to 5 executed guarantee on 20.09.2012. Defendants No. 6 executed a deed of guarantee and defendants No. 7 and 8 jointly executed another deed of guarantee inter alia guaranteeing the full, complete and punctual observance, performance and duties and undertaking of the principal debtor i.e. defendant No.1 and original defendants No.2 to 5 in the undertaking. It was further guaranteed that in the event of default of defendant No.1 or defendants No.2 to 5, guarantors were to make payment of the entire amount to the plaintiff No.1.

8. In view of the assurance and consideration of the undertaking and guarantees, plaintiff No.4 gave no objection to the application to be filed by the defendant No.1 and defendants No.2 to 5 for enlarging them on bail. On 24.09.2012, defendant No.1 and defendants No.2 to 5 submitted a purshis along with affidavit of plaintiff No.4 with undertaking and guarantees. Defendant No.1 filed fresh bail application reiterating that he had executed the undertaking to the plaintiff No.4. Defendants No.6 to 8 had given guarantees and the matter was settled. Plaintiff No.4 had also given an affidavit signifying no objection to the defendant No.1 for granting conditional bail. On 25.09.2012, defendant No.1 was enlarged on bail. Likewise, defendants No.2 to 5 were also enlarged on bail.

9. It is the case of the plaintiffs that defendant No.1 as also defendants No.2 to 5, in pursuance of the undertaking, did the following acts:

> "(a) On 17th October 2012, defendant no.4 and defendant no.5 executed individual Deeds of Cancellation, cancelling any right, title and interest that they purportedly claimed to have in the Flat Nos.1101 and 1104;
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> (b) On 17th October 2012, defendant no.1 sent a letter to the Society giving his No-objection for the Firm to sell the 2 flats that were claimed by defendant no.4 and defendant no.5 and gave his No objection for the Firm completing the balance work.
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> (c) On 17th October 2012, defendant no.1 sent a letter to the plaintiff no.1 confirming that the purported MOU between the plaintiff no.1 and Ketki Developers as well as purported Agreements for Sale with defendant no.4 and defendant no.5 had been cancelled;
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> (d) On 17th October 2012, defendant no.1 sent a letter to the plaintiff no.1 enclosing a cheque of Rs.84,00,000 in part payment of the sum of Rs.2,40,00,000. The balance of Rs.1,50,00,000 was already deposited in the Court and would be returned to the Firm by Ketki Developers;
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> (e) On 17th October 2012, defendant no.4 sent a declaration to the plaintiff no.1 that his purported Agreement for Flat No.1104 executed with defendant no.1 was cancelled;
>
> (f) On 17th October 2012, Ketki Developers sent a declaration to the plaintiff no.1 that their purported MOU of 13th April 2012 executed with defendant no.1 was cancelled;
>
> (g) On 17th October 2012, defendant no.5 sent a declaration to the plaintiff no.1 that his purported Agreement for Flat No.1101 executed with defendant no.1 was cancelled."

10. On 25.10.2012, defendant No.1 sent email for extension of time for complying rest of the obligations in the undertaking. Plaintiff No.4 gave extension upto 24.11.2012. On 30.10.2012, defendant No.1 and defendant No.6 filed a separate application in the Court of Additional Chief Metropolitan Magistrate for defreezing their bank account with the Indian Bank. They reiterated the undertakings and guarantees executed by them, as in compliance of clause 2 of the undertaking,

defendant No.1 had to issue a cheque for Rs.84,00,000/- which was required to be cleared. By order dated 23.11.2012, the learned Magistrate permitted defreezing of the account. By letter dated 04.12.2012 addressed to the plaintiff No.1, defendant No.1 alleged that he had performed all his obligations in the undertaking and requested discharging guarantors defendants No.6 to 8 of all their obligations under the respective guarantees. Plaintiff No.1 disputed that defendant No.1 had fulfilled all the terms of the undertaking by reply dated 11.12.2012.

11. Defendants No.1 and 6 filed Petition in this Court for quashing the F.I.R., which was dismissed by this Court by observing that defendant No.1 had not complied with the undertaking. As the defendant No.1 did not pay the amount, plaintiffs called upon defendant No.6 to pay the amount. Defendant No.6 also did not pay the amount. Petition for quashing filed by defendants No.2 and 3 also was dismissed. It is the case of the plaintiffs that in February, 2015, defendants No.1 and 6 lodged complaint with the police alleging that plaintiffs have coerced defendant No.1 to sign the undertaking. Defendant No.6 was also coerced by the plaintiffs to sign the guarantee. Plaintiffs issued notice to the defendants No.1, 6 to 8. As no payment was made, a Suit was instituted.

12. Defendants No.1, 6 to 8 filed their independent replies inter alia contending that, (a) undertaking was obtained under coercion; (b) plaintiffs had waived the payment of Rs.2,20,00,000/-; (c) there was no consideration for the undertaking given and therefore, the undertaking cannot be treated as a written contract; and (d) the claim is akin to liquidated damages and unless, plaintiffs prove some damages, no amount is payable. By the impugned order, the learned Single Judge has

granted conditional leave to defend against defendants No.1 and 6. It is against this order, defendant No.1 has preferred this Appeal.

13. In support of this Appeal, Mr. Behramkamdin reiterated the submissions that were advanced before the learned Single Judge. He submitted that on 15.09.2012, defendant No.1 was arrested. The undertaking was given by the defendant No.1 on 17.09.2012. While defendant No.1 was in custody, the plaintiff No.4 along with his lawyer and an unidentified lady came to meet him and defendants No.2 to 5 along with the Investigating Officer. Defendants No.1 and 2 to 5 were threatened that if they did not agree to the terms, defendant No.1 will languish in jail and they will ensure that he does not get bail. Defendant No.1 was coerced in signing the documents dated 17.09.2012 without even reading.

14. Mr. Behramkamdin invited our attention to paragraph 13 of the impugned order. In paragraph 13, the submissions advanced on behalf of the defendant No.1 were recorded. In particular, defendant No.1 contended that there was no consideration for the undertaking given, and therefore, the undertaking cannot be viewed as a written contract. He invited our attention to paragraph 17 of the impugned order. In paragraph 17, the learned Single Judge observed that "As regards the defence that there was no consideration for the undertaking and it is a unilateral document, and therefore, undertaking was not a contract, this also is an after thought and cannot be accepted. The consideration, in my view, is the fact **that the plaintiffs have settled the matter and granted no objection for the bail to be given to defendant No.1.**" Mr. Behramkamdin submitted that in paragraph 50, plaintiffs have themselves asserted that plaintiff No.4 gave his conditional no objection for enlarging defendants No.1 to 5 on bail on the consideration of the

undertaking and the respective guarantees. He submitted that the learned Single Judge committed patent illegality in observing that the consideration is the fact that the plaintiffs have settled the matter and granted no objection for the bail to be given to the defendant No.1. The learned Single Judge failed to appreciate that the defendant No.1 was in jail and the undertaking obtained from him was under duress and plaintiffs have exerted coercion on defendant No.1 for giving that undertaking. He relied upon Section 23 of the Indian Contract Act, 1872 (for short 'Act') to contend that the consideration of an agreement was unlawful and is against the public policy. He submitted that a perusal of the undertaking clearly shows that the defendant No.1 had given undertaking while he was in police custody.

15. Mr. Behramkamdin submitted that defendant No.6 relied upon decision in ***Velji Raghavji Patel Vs. State of Maharashtra*, AIR 1965 SC 1433** to contend that the criminal complaint against partner of the firm was not maintainable because every partner has dominion over property by reason of the fact that he is a partner and this is a kind of dominion which every owner of property has over his property. The learned Single Judge dealt with this judgment in paragraph 22 by simply observing that the Division Bench while rejecting the Petition filed by the defendant No.1 for quashing a F.I.R. also considered the said decision and still did not quash the F.I.R. Mr. Behramkamdin, therefore, criticised that the learned Single Judge did not deal with the submissions advanced on behalf of the defendant No.6 relying upon the said decision.

16. Mr. Behramkamdin invited our attention to the remarks made by the Additional Police Commissioner on 07.05.2012 to the following effect:

> "It appears to be a dispute within the family. The money has been transferred by the person who had powers to sign the cheque. I do not think it is a criminal case. The complainant can approach the Court for remedy."

17. He, therefore, submitted that though the dispute was essentially having civil profile, plaintiff No.5 lodged F.I.R. against defendants with a view to pressurizing them to concede to his illegal demands. He submitted that the plaintiff No.4 had filed application seeking cancellation of bail on the ground that there was non-compliance of undertaking given by the defendants No.1. By order dated 14.01.2015, the learned Additional Chief Metropolitan Magistrate cancelled the bail granted to the defendant No.1. Aggrieved by that decision, defendant No.1 filed revision application before the Sessions Court, which was dismissed on 30.11.2015. Aggrieved by these orders, defendant No.1 instituted Criminal Writ Petition No.4850 of 2015 in this Court. After hearing both sides, by order dated 21.07.2016, this Court allowed the Petition and restored the order dated 25.07.2012 enlarging defendant No.1 on bail. He has taken us through the order dated 21.07.2016, and in particular paragraphs 12 and 13 thereof.

10. Mr. Behramkamdin submitted that plaintiffs have instituted another Suit being Suit No.996 of 2015 against the defendants on the same cause of action in this Court and the same is pending. He invited our attention to the order dated 20.01.2016 passed by this Court (Coram : S. J. Kathawalla, J.) in Notice of Motion No.2200 of 2015 taken out by the plaintiffs. He invited our attention to the affidavit in reply dated 06.06.2016 filed by the defendant No.1 in reply to Summons for Judgment, and in particular paragraphs 5 (d), (e) and (g). In paragraph 5(d), it is asserted that plaintiff No.1 sold flat No.1001 on 13.10.2011 at or for the consideration of Rs.1,11,00,000/- to which

agreement for sale, plaintiff No.4 was a witness. Defendant No.1 in his capacity as a partner of plaintiff No.1 sold two other flats being flats No.1102 and 1103 between 20th and 26th March 2012 for a consideration of Rs.1,45,00,000/- and Rs.1,30,00,000/- respectively, which was duly deposited into plaintiff No.1's bank. Both these flats were sold for a consideration considerably higher than that of flat No.1001 despite the fact that they were of the same size as flat No.1001. In paragraph (g), it was contended that it has been the practice of the firm to take loans / advances from partners, their spouses, their family, which loans / advances were repaid as and when funds were available with the firm, whether directly by the firm or by the concerned partners appropriating the same. Keeping in mind the practice of the firm, it was unanimously decided to transfer monies from the firm's account into defendant No'1's account and thereafter to his wife's account (defendant No.6). Further since the payment to Ketki Developers became due, defendant No.1 transferred a total sum of Rs.1.5 crores (Rs.50 lac each time) from his wife's account to his account and from his account to the account of the Ketki Developers. Accordingly, on behalf of the firm, defendant No.1 made payments of Rs.1.5 crore as part-payment for the said land, all within his authority as a working partner of the plaintiff No.1 firm.

19. In support of his submissions, Mr. Behramkamdin relied upon the following decisions:

(a) ***Kamini Kumar Basu Vs. Birendra Nath Basu*, 57 IA 117**;

(b) ***Bhowanipur Banking Corporation Limited Vs. Durgesh*, AIR 1941 PC 95**; and

(c) ***V. Narasimharaju Vs. V. Gurumurthy Raju*, AIR 1963 SC 107**, and in particular paragraphs 8 to 10 thereof to contend that Section 23 provides that every agreement of which the object or consideration is unlawful is void, and it is opposed to public policy. It is further observed that agreements made by the parties for stifling prosecution are not enforced by courts on the ground that the consideration for such agreements is opposed to public policy. If a person sets the machinery of the criminal law into action on the allegation that the opponent has committed a non-compoundable offence and by the use of this coercive criminal process, he compels the opponent to enter into an agreement, that agreement would be treated as invalid for the reason that its consideration is opposed to public policy. In the present case, the F.I.R. is lodged under Section 380 I.P.C. among other Sections. Section 380 is non compoundable. He submitted that the Apex Court has considered the decisions in **Kamini Kumar Basu** *(supra)* and **Bhowanipur Banking Corporation Limited** *(supra)*.

20. He invited our attention to the decision in **Velji Raghavji Patel** (*supra*), and in particular paragraph 9 wherein it is observed that a partner has, undefined ownership along with the other partners over all the assets of the partnership. If he chooses to use any of them for his own purposes, he may be accountable civilly to the other partners. But he does not thereby commit any misappropriation. He submitted that as the learned Single Judge has not considered the arguments based on Section 23, the impugned order may be set aside and the same may be remitted for *de novo* hearing or in the alternate, appeal requires consideration.

21. Mr. Behramkamdin submitted that the learned Single Judge also did not properly apply the decision of ***IDBI Trusteeship Services Limited Vs. Hubtown Limited*, (2016) 4 BCR 266**. He submitted that in the present case, defendant No.1 has raised a substantial defence, and therefore, he is entitled to unconditional leave to defend the suit (paragraph 18-a). In any case, defendant No.1 has raised triable issues

indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend. (paragraph 18-b). Even if the defendant raises triable issues if a doubt is left with the trial Judge about the defendant's good faith or genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must also be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security. (paragraphs 18-c).

22. On the other hand, Mr. Devitre supported the impugned order. He submitted that by granting conditional leave to defend to defendants No.1 and 6, the learned Single Judge has showed indulgence. The learned Single Judge has given opportunity to the defendants No.1 and 6 to defend the Suit, though defendant No.1 has admitted liability. He submitted that after giving *suo motu* undertaking on 17.09.2012, defendant No.1 has acted upon the said undertaking. He had derived benefits under the undertaking and after two and half years when time for paying balance amount came, defendant No.1 started alleging that the said undertaking was given under coercion. Mr. Devitre has invited our attention to -

(a) letter dated 11.12.2012 addressed by the plaintiff No.1 to the defendant No.1;

(b) reply dated 20.12.2012 given by the defendant No.1;

(c) letter dated 23.02.2013 addressed by the defendant No.1 to Navin D. Shah of M/s. Satyam Builders and in particular paragraph 2 thereof;

(d) application dated 17.09.2012 made by Advocate Anjali Patil before the learned Additional Chief Metropolitan Magistrate, 19th Court, Esplanade for permission to take signature of the accused in the presence of the police office on Vakalatnama and undertaking. On the same day, the learned Magistrate allowed that application. On the same day i.e. 17.09.2012, M/s. Chitnis & Co., Advocate, High Court obtained no objection from Advocate Anjali Patil to attend the matter. The undertaking was prepared by M/s. Chitnis & Co. and was duly signed in their presence by defendant No.1 and defendants No.2 to 5. Defendants No.2 to 5 also individually gave guarantees for performance of the undertaking by defendant No.1. In pursuance of that undertaking, defendant No.1 filed application on 30.10.2012 for defreezing the bank accounts. In that application, defendant No.1 specifically asserted at various places that he along with the other defendants have given *suo motu* undertaking dated 17.09.2012, to the plaintiff No.1 and its partners. It was further stated that the defendant No.1 and others have performed most of their respective obligations and as mentioned in the *suo motu* undertaking dated 17.09.2012. As per clause 2 of the *suo motu* undertaking, defendant No.1 and others have undertaken to return the amount of Rs.2,40,00,000/- within one month of grant of bail i.e. from 25.09.2012 to the plaintiff No.1 firm. Out of Rs.2,40,00,000/-, an amount of Rs.1,50,00,000/- was received by the plaintiff No.1 firm from M/s. Ketki Developers. He submitted that the said application was drafted by M/s. Chitnis & Co. By order dated 23.11.2012, the learned Additional Metropolitan Magistrate defreezed two bank accounts of defendant No.1 and gave liberty to operate the two bank accounts. Defendant No.1 was further directed to return Rs. 84,00,000/- to the plaintiff No.1 firm. Defendant No.6 also filed similar application for defreezing bank account which was allowed on the same day by the learned Additional Metropolitan Magistrate.

23. Mr. Devitre submitted that on 23.02.2013, defendant No.1

addressed letter to Navin D. Shah of M/s. Satyam Builders alleging that he has fulfilled all obligations under the *suo motu* undertaking. He further alleged that plaintiffs agreed to relax the conditions stipulated under clauses 1 to 5 of the undertaking dated 17.09.2012. He invited our attention to the order dated 12.08.2014 passed by the Division Bench of this Court in Criminal Writ Petitions filed by the defendant No.1 and defendant No.6 for quashing F.I.R. namely C.R.No.176 of 2012. Those Petitions were dismissed by observing that *prima facie* it does appear that undertaking given by the defendant No.1 was not complied with by him. *Prima facie*, the complaint discloses ingredients of offences which have been levelled against the accused. He also invited our attention to the order dated 09.03.2015 passed by the Division Bench of this Court in Writ Petition No.423 of 2013 filed for quashing F.I.R.No.59 of 2012. He submitted that even today, M/s. Chitnis & Co. are representing defendant No.1 and still allegations are made against them.

24. Mr. Devitre submitted that before the learned Single Judge no contention, based upon Section 23 of the Act, was advanced. Even in the appeal memo, though no ground is raised to the effect that though the contention based on Section 23 was advanced before the learned Single Judge, the same was not dealt with by him. Mr. Behramkamdin countered this submission on the ground that though this contention was not specifically urged before the learned Single Judge, the same can be advanced, being a pure question of law. Mr. Devitre submitted that the reliance placed by Mr. Behramkamdin on the decisions is wholly misconceived in as much as plaintiff No.4 merely gave no objection for enlarging defendant No.1 on bail. In fact, plaintiffs are not stifling prosecution. He submitted that in fact plaintiffs were not in picture at all at the time of defendant No.1 giving *suo motu* undertaking on

17.09.2012. He submitted that plaintiffs are not stifling prosecutions and in fact it was abundantly made clear. He has taken us through the letter dated 15.01.2013 addressed on behalf of the plaintiff No.1 to the defendant No.1 and in particular paragraph 5 thereof, which was in reply to the letter dated 20.12.2012 addressed by the defendant No.1 to Navin Shah of plaintiff No.1. In paragraph 5, it was denied that plaintiff is doing anything to create a ground to avoid giving consent for withdrawing F.I.R. vide C.R.No.59 of 2012 as falsely alleged by the defendant No.1 or at all. In fact plaintiff is not under obligation of giving his consent for withdrawing F.I.R.No.59 of 2012. Plaintiff is not in fact aware of any such procedure of withdrawal of F.I.R. by consent of the complainant.

25. Mr. Devitre heavily relied upon the decision of the Madras High Court in ***Aanchal Cement Limited Vs. Gimpex Limited*, 2015 (2) Madras Weekly Notes (Civil) 434**, and in particular paragraphs 4, 5.5, 5.7, 5.8, 5.9, 5.11, 14.4, 18 and 20 thereof. He submitted that the facts obtaining in this case are identical to the facts obtaining in the present case. The learned Single Judge of Madras High Court referred to the decisions of **Kamini Kumar Basu** (*supra*), **Bhowanipur Banking Corporation Limited** (*supra*) and **V. Narasimharaju** (*supra*). In paragraph 18, it was observed that since the deed of compromise was obtained while second plaintiff was in judicial custody, that itself, is not sufficient to come to the conclusion that the deed of compromise was obtained under coercion and threat. To prove the threat / coercion, some more evidences is required, which is lacking in this case. In paragraph 20, the learned Single Judge dealt with the submissions that under the deed of compromise, it was agreed by the defendant to say no objection for the bail application filed by the second plaintiff in respect of the complaint lodged by the defendant for non-compoundable offence and

also further agreed to withdraw the criminal complaint, the proceedings under Section 139 of the Negotiable Instruments Act and other legal proceedings initiated by the defendant against the plaintiff. According to the learned Counsel for the plaintiffs, agreeing for the withdrawal of non-compoundable offence under agreement for settling the claim of a party is totally opposed to public polity and hit by Section 23 of the Act. The learned Single Judge referred to the decision in *Union Carbide Corporation Vs. Union of India*, **AIR 1992 SC 248** as also *Deb Kumar Ray Choudhary Vs. Anant Bandhu Sen*, **AIR 1931 Cal 42.** The learned Single Judge observed that from reading of the judgments, it can be seen that,

(1) Only when Criminal charges are matters of public concern, the same cannot be a subject matter of private bargain and compromise.

(2) If the dropping of the criminal prosecution in respect of non-compoundable offence is a motive for entering into the compromise agreement, but the same has not been made as a consideration, then the doctrine of stifling of prosecution will not be attracted.

(3) If there is a pre-existing civil liability, in those cases the dropping of criminal prosecution need not necessarily be a consideration.

26. In paragraph 21, the learned Single Judge referred to the decision of *Madan Mohan Abbot Vs. State of Punjab*, **2008 (4) SCC 582**, wherein it has been held that when a dispute is purely a personal one between two contesting parties and when it arose out of extensive business dealings between them then there is absolutely no public policy involved. For all these reasons, he submitted that no case is made out for interfering with the impugned order.

27. We have considered the rival submissions advanced by the learned Counsel appearing for the parties. We have also perused the material on record. Plaintiffs have instituted the present Suit for recovery of sum of Rs.2,20,00,000/- from defendants No.1, 6 to 8 based on an undertaking dated 17.09.2012 given by the defendant No.1 as a principal debtor and as against defendants No.6 to 8 based on separate deeds of guarantee. Defendants No.6 to 8 have individually stood as guarantors for the performance of the undertaking given by the defendant No.1. The principal submission advanced on behalf of the defendant No.1 is that the so called undertaking dated 17.09.2012 was obtained by the plaintiffs under coercion while he was in police custody. On 12.04.2012, plaintiff No.4 had lodged a complaint against defendants No.1 and 6. In pursuance thereof, Matunga Police Station registered F.I.R. against defendants No.1 and 6 as also defendants No.2 to 5 on 14.06.2012 under Sections 380, 406, 420, 467 read with 120-B I.P.C. Defendants No.1 and 6 had filed anticipatory bail applications. Anticipatory bail application of defendant No.1 was rejected and anticipatory bail application of defendant No.6 was allowed. Defendant No.1 was arrested and produced before the learned Additional Chief Metropolitan Magistrate on 15.09.2012. He was remanded to police custody till 26.09.2012.

28. A perusal of material on record indicates that on 17.09.2012, Ms Anjali Patil, Advocate of defendant No.1 filed application before the learned Additional Chief Metropolitan Magistrate for permission to take signature of defendant No.1 on Vakalatnama as also on undertaking. On the same day, the permission was obtained. On 17.09.2012, defendant No.1 signed Vakalatnama in favour of M/s. Chitnis & Co. who obtained no objection certificate from Ms Anjali Patil. On the same day,

defendant No.1 and defendants No.2 to 5, who were arrested along with the defendant No.1, signed and executed *suo motu* undertaking inter alia undertaking to reimburse a sum of Rs.2,20,00,000/-, within 30 days of grant of bail, being the amount for the loss suffered by the plaintiff No.1 for the under-priced sale of two flats. The said undertaking is drafted by M/s. Chitnis & Co. In fact, in pursuance of the undertaking, defendants No.2 to 5 executed guarantee on 20.09.2012. Defendant No.6 also executed a deed of guarantee. Defendants No.7 and 8 jointly executed another deed of guarantee *inter alia* guaranteeing the full, complete and punctual observance, performance and duties and undertaking of the principal debtor i.e. defendant No.1 and original defendants No.2 to 5 in the undertaking. On 24.09.2012, defendant No.1 and defendants No.2 to 5 submitted *purshis* along with affidavit of plaintiff No.4 with undertakings and guarantees. On 25.09.2012, defendant No.1 and defendants No.2 to 5 were enlarged on bail. *Prima facie*, it does not appear that plaintiffs were in picture at the time of defendant No.1 giving *suo motu* undertaking.

29. In pursuance of the undertaking, on 17.10.2012, defendants No.4 and 5 executed individual deeds of cancellation cancelling any right, title and interest that they purportedly claimed to have in flats No.1101 and 1104. On the same day, defendant defendant No.1 sent a letter to the society giving his no-objection for the defendant No.1 firm to sell the 2 flats that were claimed by defendants no.4 and 5 and also gave no objection for completing the balance work. On 17.10.2012, defendant No.1 sent a confirmation letter to the plaintiff No.1 confirming that the purported MOU between the plaintiff No.1 and Ketki Developers as also the purported agreements for sale with defendants No.4 and 5 had been cancelled. On the same day, defendant No.1 sent a covering letter enclosing therewith a cheque of Rs.84,00,000/- in part payment of the

sum of Rs.2,40,00,000/-. The balance amount of Rs.1,50,00,000/- was already deposited in the Court, which was to be returned to the defendant No.1 firm by Ketki Developers. On the same day, defendant No.4 sent a declaration to the plaintiff No.1 that his purported agreement for sale for flat No.1104 executed with defendant No.1 was cancelled. On the same day, Ketki Developers sent a declaration to the plaintiff No.1 that their purported MOU of 13.04.2012 executed with defendant No.1 was cancelled. On 17.10.2012, defendant No.5 sent a declaration to the plaintiff No.1 that his purported agreement for flat No.1101 executed with defendant No.1 was cancelled. Not only that, on 25.10.2012, defendant No.1 sent email seeking extension of time for complying rest of the obligations contained in the undertaking. Accordingly, plaintiff No.4 gave extension upto 24.11.2012 to the defendant No.1. On 30.10.2012, defendant No.1 and defendant No.6 filed separate applications in the Court of Additional Chief Metropolitan Magistrate for defreezing their bank account with the Indian Bank. A perusal of these applications shows that repeatedly in that application, it was asserted that defendant No.1 and other accused have given *suo motu* undertaking dated 17.09.2012 to the plaintiff No.1 firm. There is no whisper as regards exerting coercion by the plaintiffs in obtaining undertaking from defendant No.1. The applications were allowed by the learned Magistrate. After hearing the concerned parties, the learned Magistrate defreezed the accounts and permitted defendants No.1 and 6 to operate the bank accounts.

30. By letter dated 04.12.2012 addressed by the defendant No.1 to the plaintiff No.1, defendant No.1 contended that he had performed all his obligations in the undertaking and requested discharging guarantors, defendants No.6 to 8, of all their obligations under the respective guarantees. It has come on record that for the first time in February,

2015, defendants No.1 and 6 lodged complaint with the police alleging that plaintiffs have coerced defendant No.1 to sign the undertaking. In our opinion, prima facie, the stand taken by the defendant No.1 is totally dishonest. In the first place, defendant No.1 and other defendants acted upon the *suo motu* undertaking dated 17.09.2012. In pursuance thereof, from time to time, they took necessary steps, as indicated hereinabove. At no point of time, defendant No.1 took up a plea of plaintiff's exerting coercion on defendant No.1 for executing the *suo motu* undertaking. Secondly, on 25.10.2012, defendant No.1 sought extension of time for complying rest of the obligations in the undertaking. Plaintiff No.4 gave extension upto 24.11.2012. Thirdly, on 04.12.2012, by addressing letter to the plaintiff No.1, defendant No.1 claimed that he had performed all the obligations in the undertaking and requested discharging defendants No.6 to 8 of all their obligations under the respective guarantees. This fact was disputed by the plaintiff No.1 by reply dated 11.12.2012. In other words, had the plaintiffs not disputed this fact, defendant No.1, though was coerced, had fulfilled all the obligations in the undertaking. Defendants No.1 and 6, for the first time, while lodging the complaint with police in February, 2015 alleged that plaintiffs have coerced defendant No.1 to sign the undertaking. In our opinion, this is nothing but an after thought on the part of the defendant No.1.

31. Mr. Devitre submitted that defendant No.1 did not raise any plea based on Section 23 of the Act before the learned Single Judge. He further submitted that even in the appeal memo, no ground is raised to the effect that though the plea based on Section 23 of the Act was specifically raised before the learned Single Judge, the same was not dealt with. Mr. Behramkamdin submitted that the plea based on Section 23 being a pure question of law can be agitated for the first time in this appeal. It is not possible to accept this submission. Section 15 of the

Act defines the expression 'coercion' as under,

> "15. "Coercion" defined.- "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860), or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.
>
> Explanation.- It is immaterial whether the Indian Penal Code (45 of 1860) is or is not in force in the place where the coercion is employed."

32. A perusal of definition of 'coercion' *prima facie* shows that the contention based on the plea of coercion cannot be said to be a pure question of law. It would be a mixed question of law and fact. In our opinion, the plea based on Section 23, which was not raised before the learned Single Judge cannot be raised for the first time in appeal.

33. Even assuming that defendant No.1 can raise plea based on Section 23 of the Act before this Court, *prima facie*, we do not find any merit in this submission. A perusal of the record shows that after furnishing *suo motu* undertaking, plaintiff No.4 gave no objection for enlarging the defendants on bail. A perusal of letter dated 15.01.2013 addressed on behalf of the plaintiff No.1 to the defendant No.1 in reply to the letter dated 20.12.2012 and in particular paragraph 5 thereof clearly shows that plaintiffs denied that it was doing anything to create a ground to avoid giving consent for withdrawing F.I.R. vide C.R.No.59 of 2012. In fact plaintiff was under no obligation of giving consent for withdrawing F.I.R.No.59 of 2012. Mr. Devitre relied upon the decision of Madras High Court in **Aanchal Cement Limited** *(supra)*. The learned Single Judge of Madras High Court considered decisions of **Kamini Kumar Basu** (*supra*), **Bhowanipur Banking Corporation Limited** (*supra*) and **V. Narasimharaju** *(supra)*. In paragraph 18 of that report, it was observed that since the deed of compromise was obtained while second plaintiff was in judicial custody, that itself, is not

sufficient to come to the conclusion that the deed of compromise was obtained under coercion and threat. To prove the threat / coercion, some more evidences is required. The learned Single Judge culled out the principles in paragraph 20 of the report. We respectfully agree with the reasoning of the learned Single Judge in that decision. In our opinion, this decision applies on all fours to the present case. A perusal of the undertaking *prima facie* does not indicate that plaintiff No.4 agreed for dropping of the prosecution and therefore, cannot be said to be opposed to public policy. We, therefore, do not find any merit in the submission of Mr. Behramkamdin based on Section 23 of the Act.

34. Mr. Behramkamdin relied upon decision in **IDBI Trusteeship Services Limited** *(supra)* to contend that defendant No.1 has raised a substantial defence and is therefore, entitled to unconditional leave to defend. In any case, defendant No.1 has raised triable issues indicating that he has a fair or reasonable defence, although not a positively good defence. In any case, the learned Single Judge ought not to have directed defendants No.1 and 6 to deposit Rs.2,20,00,000/- as this amounts to shutting out by unduly severe orders as to deposit or security, as the defendants have raised the triable issues.

35. We do not find any merit in this submission. The learned Single Judge, after referring to the said decision, has recorded a categoric finding that the defence raised by defendants No.1 and 6 cannot be considered as bonafide and does not raise any triable issues. In fact defendants No.1 and 6 have no defence. The learned Single Judge in fact still gave a chance to defendants No.1 and 6 to defend the Suit.

36. While passing the impugned order, the learned Single Judge also took note of the fact that the Petitions filed by the defendants No.1 and 6

for quashing F.I.R. were dismissed by this Court. In our opinion, the defence taken by the defendants is dishonest and is also an after-thought. The same is taken with a view to protracting compliance of the undertaking given by the defendant No.1 as far back as on 17.09.2012.

37. In the case of In the case of ***Ramrameshwari Devi Vs. Nirmala Devi*, (2011) 8 SCC 249,** the Apex Court has observed that time has come for imposing realistic costs for delaying litigation as also for raising frivolous pleas. In paragraphs 52 and 54, it was observed thus:

> "52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials.
>
> A. Pleadings are foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.
>
> B. The Court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Act. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at truth of the matter and doing substantial justice.
>
> C. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.
>
> D. The Court must adopt realistic and pragmatic approach in granting mesne profits. The Court must carefully keep in view the ground realities while granting mesne profits.
>
> E. The courts should be extremely careful and cautious

in granting ex-parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the Defendants or Respondents and only after hearing concerned parties appropriate orders should be passed.

F. Litigants who obtained ex-parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No one should be allowed to abuse the process of the court.

G. The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.

H. Every case emanates from a human or a commercial problem and the Court must make serious endeavour to resolve the problem within the framework of law and in accordance with the well settled principles of law and justice.

I. If in a given case, ex-parte injunction is granted, then the said application for grant of injunction should be disposed of on merits, after hearing both sides as expeditiously as may be possible on a priority basis and undue adjournments should be avoided.

J. At the time of filing of the plaint, the trial court should prepare complete schedule and fix dates for all the stages of the suit, right from filing of the written statement till pronouncement of judgment and the courts should strictly adhere to the said dates and the said time table as far as possible. If any interlocutory application is filed then the same be disposed of in between the said dates of hearings fixed in the said suit itself so that the date fixed for the main suit may not be disturbed.

54. While imposing costs we have to take into consideration pragmatic realities and be realistic what the Defendants or the Respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopying, court fee etc."

38. In paragraph 55, the Apex Court observed that the other factor which should not be forgotten while imposing costs is for how long the

Defendants or Respondents were compelled to contest and defend the litigation in various courts. The Appellants in the instant case have harassed the Respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The Appellants have also wasted judicial time of the various courts.

39. In the case of ***Maria Margarida Sequeria Fernandes Vs. Erasmo Jack de Sequeria***, **AIR 2012 SC 1727**, the Apex Court referred to the decision of **Ramrameshwari Devi** (*supra*). In paragraphs 84 and 85, it was observed thus: -

> **<u>"False claims and false defences</u>**
>
> 84. False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent.
>
> 85. This Court in a recent judgment in Ramrameshwari Devi and Ors (AIR 2011 SC (Civ) 1776: 2011 SCW 4000) (supra) aptly observed at page 266 that unless wrongdoers are denied profit from frivolous litigation, it would be difficult to prevent it. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that Court's otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases. In this very judgment, the Court provided that this problem can be solved or at least be minimized if exemplary cost is imposed for instituting frivolous litigation. The Court observed at pages 267-268 that imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial

proceedings."

40. In the case of ***Messer Holding Limited Vs. Shyam Madanmohan Ruia*, AIR 2016 SC 1948,** in paragraph 44, the Apex Court referred to the decision of **Ramrameshwari Devi** *(supra)* and observed thus:

> "44. This case should also serve as proof of the abuse of the discretionary jurisdiction of this Court under Article 136 by the rich and powerful in the name of a 'fight for justice' at each and every interlocutory step of a suit. Enormous amount of judicial time of this Court and two High Courts was spent on this litigation. Most of it is avoidable and could have been well spent on more deserving cases."

41. In the light of the aforesaid decisions, in our opinion, this is a fit case for imposing exemplary costs against defendant No.1. Appeal fails and the same is dismissed with costs quantified at Rs.50,000/-. Costs shall be paid by the defendant No.1 to the plaintiffs within two weeks from today, failing which the learned Single Judge will pass appropriate order. Order accordingly.

42. At this stage, learned Counsel for the defendant No.1 orally prays for stay of this order for a period of 8 weeks from today. Learned Counsel for plaintiffs opposes on the ground that during the pendency of appeal, no interim order was operating in favour of the defendant No.1.

43. In view thereof, prayer made by the learned Counsel for the defendant No.1 is rejected.

(R. G. KETKAR, J.) **(NARESH H. PATIL, J.)**

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