

dik

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

NOTICE OF MOTION NO. 1255 OF 2013
IN
SUMMONS FOR JUDGMENT NO. 357 OF 2012
IN
SUMMARY SUIT NO. 1693 OF 2012

Dighi Port Limited	...Applicant.
In the matter between	
Mr Chetraj N. Khadka	...Plaintiff
VS	
Dighi Port Limited	...Defendant

.....
Mr Y.S.Jahagirdar, Sr. Advocate i/b Mayuresh S. Lagu for the
Plaintiff
Mr Surel Shah a/w Mr Niraz Shah & Mr Aditya Singh i/b Gopal
K. Shah for the Applicant/ Defendant.
.....

CORAM : **B.P.COLABAWALLA, J.**
NOVEMBER 1, 2017.

P.C. :

This Notice of Motion has been filed by the Defendant under the provisions of Order XXXVII Rule 4 of the Code of Civil Procedure, 1908 (for short "**the CPC**") seeking to set aside the ex-parte decree dated 17th December, 2012 passed in the above Commercial Suit.

2 In this case, it is the case of the Defendant that an ex-parte decree was passed on 17th December, 2012 and the Defendant learnt about the same only in the month of January, 2013. Thereafter, the Defendant filed Notice of Motion (L) No. 340 of 2013 for setting aside the said ex-parte decree on the grounds mentioned therein. This Notice of Motion (L) No. 340 of 2013 was withdrawn with liberty to file a fresh Notice of Motion for setting aside the ex-parte decree. It is, in these circumstances, that the present Notice of Motion has been filed.

3 In the affidavit in support of this Notice of Motion in paragraph 4.12 it has been stated that the advocate who had filed his appearance in the Commercial Suit on behalf of the Defendant, on 5th November, 2012 met with an accident while he was on his way to the Court. He was admitted to one Punit Orthopedic Surgical Hospital at Borivali and the doctor considering him had diagnosed a fracture of his knee. It was due to the aforesaid accident that the said advocate could not attend the office as well as the Court up to March 2013. It is, in these circumstances, that the Advocate was not present on 17th December, 2012 when the ex-parte decree came to be passed.

4 Mr Surel Shah, learned advocate appearing on behalf of the Defendant submitted that considering the facts mentioned in paragraph 4.12 of the affidavit in support, and which has not been disputed by the Plaintiff, sufficient cause has been made out for not remaining present on the date when the ex-parte decree came to be passed. Over and above this, Mr Shah also fairly submitted that merely making out sufficient cause was not enough to set aside an ex-parte decree as contemplated under Order XXXVII Rule 4 of the CPC. He fairly submitted that the Defendant would also have to make out special circumstances before this Court to exercise its jurisdiction in setting aside the ex-parte decree. To put it simply, he submitted that in addition to establishing sufficient cause for not being present on the date when the ex-parte decree was passed, the Defendant also has to make out a case that he had good case on merits to defend the suit. The details of these merits have been set out by the Defendant in paragraph 4.1 onwards of the affidavit in support of the Notice of Motion.

5 It is the case of the Defendant that on 13th November,

2009, the Defendant awarded the contract of Excavation Works and Reclamation to one M/s Archita Infraprojects which is the proprietary concern of the Plaintiff, on the terms and conditions more particularly set out therein. It is the case of the Defendant that one Mr Datta Tambe had dealt with the Defendant for and on behalf of the Plaintiff.

6 In the course of the performance of the said contract the Running Account Bills (“R.A.Bills”) were raised by the Plaintiff upon the Defendant. According to the Defendant these R.A. bills were for much higher quantity of work done than what was actually done and also there were serious discrepancies in the actual quantities. However, since the said invoices were on a running account basis, the Defendant made on account payments to the Plaintiff to the tune of Rs.11,53,34,192/- without actually verifying the quantity and the rate per cubic meter mentioned therein at the relevant time.

7 On completion of the contract, the account of the Plaintiff was reconciled and while ascertaining the exact quantity of the work, the discrepancies were noticed by the

Defendant. Therefore, in December 2010, an independent surveyor M/s TCRC Infra Services was appointed. This independent surveyor made its report on 28th December, 2010 and *inter alia* opined that the actual work done by the Plaintiff was lesser than what was mentioned in the RA bills raised by the Plaintiff. Mr Shah submitted that looking to this report it was clear that the Plaintiff had overcharged the Defendant and in fact the Defendant was entitled to refund from the Plaintiff for the excess amount paid. Looking to all these facts he submitted that the Defendant had an excellent case on merits, and therefore, the ex-parte decree ought to be set aside and unconditional leave be granted to the Defendant for defending the above suit.

8 On the other hand, Mr Jahagirdar learned Sr. Counsel appearing on behalf of the Plaintiff brought to my attention the terms and conditions of the contract dated 13th November, 2009. He submitted that in terms of this contract, the R.A. bills were to be certified by the representative of the Defendant as mentioned in clause 11 of the contract. According to Mr Jahagirdar, this contract nowhere contemplates

appointment of the independent surveyor for determining the actual work done by the Plaintiff. He submitted that in terms of clause 11 of the contract, all the R.A. bills raised by the Plaintiff were duly certified by the Defendant's representative, and therefore, the defence raised was completely moonshine and illusory. Mr Jahagirdar submitted that on merits of the matter, the Defendant had no case whatsoever, and therefore, this Notice of Motion ought to be dismissed.

9 I have gone through the papers and proceedings in this Notice of Motion as well as perused the papers and proceedings in the plaint. The claim in the suit is for a sum of Rs.2,59,42,400.20 with further interest thereon at the rate of 21 % per annum till payment and or realization. The particulars of claim indicate that the principal amount claimed is Rs.1,96,31,863.39 whereas the amount of Rs.63,10,536.81 is claimed as and by way of interest at the rate of 21 % per annum from the date of respective R.A. bills till payment and or realization. At the outset I must state that the contract nowhere stipulates or contemplates payment of any interest for delayed payment. In this view of the matter, I find that as far as the

interest is concerned, I do not find that the Plaintiff can be put to any terms in relation thereof.

10 However, this is not the situation when it comes to the principal amount claimed. The present suit has been filed in relation to 4, 5 and 6 R.A. bills as well as the final bill and the bill for road work. All these bills have been duly certified by the representative of the Defendant. This fact is undisputed. The only explanation given by Mr Shah was that though these bills were certified the figures were to be finalized once the work was completed. This explanation I find, at least *prima facie*, not only to be an afterthought but directly contrary to the terms of the contract. The contract itself stipulates that the R.A. bills will be certified by a representative of the Defendant. This admittedly has been done. This being the case, as far as the principal sum of Rs.1,96,31,863/- is concerned, I find that there is no genuine and bona-fide dispute. However, to allow the Defendant to contest the claim of the Plaintiff on merits, I am inclined to give them one opportunity subject to the condition that they deposit the principal sum of Rs.1,96,31,863/- in this Court within a period of 12 weeks from today. In these circumstances, the

following order is passed:

O R D E R

- (i) The Defendant shall deposit in this Court a sum of Rs.1,96,31,863/- within a period of 12 weeks from today. If the said deposit is made within the aforesaid period, this Notice of Motion shall stand allowed in terms of prayer clause (a);
- (ii) If the aforesaid deposit is made within the stipulated period, the Defendant shall file its Written Statement within a period of three weeks thereafter and the suit shall be transferred to the list of Commercial Causes;
- (iii) If the aforesaid deposit is not made within the stipulated period then this Notice of Motion shall stand dismissed without further reference to the Court and the Plaintiff shall be entitled to execute the ex-parte decree dated 17th December, 2012, in accordance with law;
- (iv) The Notice of Motion is disposed of in the aforesaid terms;
- (v) For a period of 12 weeks from today, the execution of the ex-parte decree dated 17th December, 2012 shall stand stayed.

(B. P. COLABAWALLA, J.)