IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY THE 04th DAY OF OCTOBER 2017

THE HON'BLE MR. JUSTICE C.V.KARTHIKEYAN

A. No.295 of 2017
in
C.S. No.28 of 2017

Mohan Breweris and Distilleries Limited,
rep. by its Senior Deputy General Manager-Accounts,
G.Samuthiram,
No.7, Selva Street,
Madurai Meenakshi Nagar,
Valasaravakkam, Chennai-600 087. ... Applicant/Plaintiff

-Versus-

M/s.Empee Distilleries Ltd.,
rep. by its Managing Director,
having registered office at
"Empee Tower", 59, Harris Road,
Pudupet, Chennai-600 002
Email id: info@empeegroup.co.in ... Respondent/Defendant

Application praying that this Hon'ble Court be pleased to direct the respondent/defendant to furnish security to the tune of Rs.4,38,34,396.10/- (Rupees four crores thirty eight lakhs thirty four thousand three hundred ninety six and paise ten only) before this Hon'ble Court failing which attach the schedule property as mentioned in the Judge's Summons.

SCHEDULE OF PROPERTY

All part and parcel of factory land admeasuring 4 acres 18 cents comprised in S. No.259 and building thereon, at

Mevaloor Kuppam Village, Sriperumbudur Taluk, Kancheepuram District owned by M/s.Empee Distilleries Ltd., the defendant herein within the jurisdiction of the District Munsif Court at Sriperambadur.

This application coming on this day before this court for hearing the court made the following order:

This Application has been filed by the plaintiff under Order XXXVII Rule 5 of CPC, for a direction against the respondent/defendant to furnish security to the value of the suit claim and on failure to furnish such security, to order attachment before judgement of the property described in the schedule to the Judges' Summons.

2. C.S.No.28 of 2017 had been filed seeking a judgement and decree against the defendant for a sum of Rs.4,38,34,396.10/-.

3. The applicant/plaintiff, M/s.Mohan Breweris and Distilleries Limited had supplied Indian Made Foreign Liquor bottles to M/s.Empee Distilleries Limited, the respondent/defendant, pursuant to the purchase orders raised between January 2013 and September 2013. The respondent had not settled the dues amounting to Rs.9,97,67,759/-. A legal notice dated 21.05.2014 was issued. The respondent had paid Rs.50,00,000/- and undertook to pay the balance. They did not make the payment. The applicant had filed C.P.No. 309 of 2014 before this Court seeking winding up of the respondent. A Memorandum of Compromise was entered into. Again the respondent defaulted in payment. The applicant had filed C.A.No.141 of 2016 to revive the Company Petition. The amount due was finally paid in September 2016.

4. The suit had been filed seeking interest for the delayed payment of admitted liability. It had been submitted that the Memorandum of Compromise provides for claim of interest for delayed payments. It had been stated that the purchase orders stipulated that payments should be made within 45 days. The applicant has claimed interest at the rate of 18% per annum, since it was a commercial transaction.

5. In the affidavit filed in support of this application, it has been further specifically stated that the respondent is in heavy debts to various creditors and its account had been declared as a Non Performing Asset by its Bankers. It has been stated that it would be difficult for the applicant to realize the decreetal amount, in the event of a decree being passed. In such circumstances, the applicant has sought a direction against the respondent to furnish security to the value of the suit claim and on failure to furnish security, for attachment before judgement of the properties mentioned in the schedule to the Judges' Summons.

6. The respondent has filed a counter claiming that the respondent had never agreed to pay interest and that it was not mentioned in the purchase orders. It has been further stated that it was normal business practice that payments would be made without interest, but within reasonable time. It has been further stated that even while entering into the Memorandum of Compromise before the Company Court, the respondent had disputed liability to pay interest on the outstanding amount. It had been claimed

that the total outstanding had been paid. It had been denied that the Memorandum of Compromise contained clause for payment of interest. It has been stated that the applicant had never demanded interest on earlier occasions when there had been delayed payment and that the suit claim is contrary to the terms of the Memorandum of Compromise. It has been further stated that the applicant had not made out any case for a direction against the respondent to furnish security. The allegations regarding the financial status are vague.
It had been prayed that the application should be dismissed.

7. This court heard Mr.G.Krishna Kumar, learned counsel for the applicant/plaintiff and Mr.Thomas T.Jacob, learned counsel for the respondent/defendant.

8. The basic facts, which are not in dispute, are that in view of existing liability, the applicant had filed C.P.No.309 of 2014, seeking winding up of the respondent company. Orders were passed on 09.09.2014 based on a memo of compromise entered into between the parties. There was a total outstanding of Rs.7,49,69,587/-. It was agreed that the respondent herein shall pay a sum of Rs.75,00,000/- on or before the 23rd of every successive month commencing from October 2015 to July 2016, with the last installment to be paid by 23.07.2016. The Company Petition shall be kept pending till payment of the last installment.

9. It was further provided in clause (4) that "In the event of the respondent disputes the other claims and claim for interest by the petitioner, the petitioner herein shall be at liberty to work out their remedies for claiming interest or any other amount claimed in the company petition before the appropriate forum." There was also a clause giving liberty to revive the company petition in case of default by the respondent. There was a default. The respondent filed C.A. No. 305 of 2016, seeking extension of time to pay the outstanding. By order dated 10.06.2016, this Court found that as a fact, there were defaults in payment of monthly installments. Installments were not paid for the months from December 2015 to March 2016. This court had also recorded the submission of the learned counsel for the respondent herein in para 10 that "Learned counsel for the applicant/respondent says that, her client is in financial difficulty, and therefore a lesser amount is offered." Finally, this Court had granted further time to pay the installments and stipulated that the last installment must be paid on or before 15.09.2016, extending the earlier undertaking given by the respondent herein.

10. It has been contended by the learned counsel for the respondent that the purchase orders do not stipulate payment of interest and that there is no practice of payment of interest. The invoices however provide for payment of interest. I hold that the parties have moved away from the terms of the purchase orders and the invoices. Payments were agreed to be made in accordance with the memorandum of compromise entered in all solemnity and produced and accepted by this Court.

11. This Court was made to believe that an order of winding up need not be passed, since the respondent came forward to settle the outstanding. The outstandings were already due for payment. However, the time period was extended till July 2016. A facility to make the payment in monthly installments was also provided and accepted by the Court. A specific clause was provided to claim interest by instituting proceedings before appropriate forum. The terms of the memorandum of compromise was not adhered to by the respondent. They again sought extension. This court noted the submission made by the learned counsel for the respondent that the company was in "financial difficulties'. Time was granted. The period for payment of installments were extended. It was actually an act of grace.

12. It is to be appreciated that during the extended period, and also during the period when money trickled in installments, the applicant had to suffer for lack of prompt payments for the goods already supplied. Naturally they have to be compensated for their loss. The parties are in business and the claim that interest shall not be paid, or is not generally paid, is incomprehensible. Interest for delayed payment might not have been insisted if there had been a foreseeable time limit within which payments would be made. However, the situation has to be analysed separately when there is a default. Defaults by the respondent, leading the applicant to initiate legal proceedings, and then again falsely holding out that payments would be made, forcing the applicant to enter into a compromise, only to commit further breach, expose the intention of the respondent herein.

13. I hold, in the above circumstances, that the applicant has made out a prima facie case for claiming interest for non payment. In fact, that it can be claimed in an appropriate forum had been agreed by the respondent in the memorandum of compromise. This court is the appropriate forum.

14. It is to be then seen whether the applicant had satisfied the court that the respondent will defeat a decree and remove or dispose assets with an intention to defeat a decree.

15. In the affidavit, the applicant has specifically stated that the bankers had declared the account of the respondent to be a non performing asset. It is for the respondent to refute such a serious allegation. They are in knowledge of their financial status. They have to disprove the claim of the applicant. It would be hardly possible for the applicant to prove the same. They have made a specific statement. The said statement, that the accounts of the respondent had been declared as a non performing asset, is a damaging statement to be made against any business venture. Normal and prudent conduct demands that the respondent cannot hide behind a screen and seek the applicant to come forward with more specific details. These details are to the exclusive knowledge of the respondent. They know their financial status. They could have produced their books and satisfied the court that the applicant had come to court with untrue allegations.

16. On the other hand, having signed the memorandum of

compromise, the respondent had fallen back on purchase orders and invoices, which have become redundant once undertakings had been given in a court of law, and more so when undertakings had been violated. I therefore hold that in the facts of the present case, the applicant has made out a prima facie case and also satisfied that there would be difficulty in enforcing any decree if it were to be passed by the court. It must also be kept in mind that furnishing security is only a guarantee that the applicant would not be again misled, as had happened before the Company Court.

17. The learned Counsel for the respondent relied on **CDJ 2007 SC 1408 (Raman Tech & Process Engg. Co., -vs- Solanki Traders)**, wherein the Honourable Supreme Court had stipulated that the plaintiff must establish both prima facie case and that the defendant was attempting to defeat any decree that may be passed by removing his assets.

18. In this case, the claim for interest before appropriate forum had been provided in the memorandum of compromise. In the application by the respondent seeking extension of time to pay the installment, their counsel had spoken about 'financial difficulties' and in the present proceedings, the respondent had not countered the charge that their bankers had declared their account as non performing asset. These are sufficient factors to hold that the applicant has made out a prima facie case for grant of the relief sought.

19. In the result, this application is allowed as prayed for. The respondent is directed to furnish security

to the value of the suit claim on or before 30.11.2017, failing which, attachment of the properties mentioned in the schedule to the Judge's Summons shall be ordered. Call on 30.11.2017.

sd/-C.V.K.J

04.10.2017

//Certified to be a true copy//

Dated this the day of 2017

R.s/21.11.2017 COURT OFFICER

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