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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.576 OF 2018

IN

SUIT NO.2823 OF 2009

WITH

SUIT NO.2823 OF 2009

WITH

NOTICE OF MOTION (L) NO.984 OF 2018

IN

SUIT NO.2823 OF 2009

SBI Global Factors Ltd. (Formerly known
as M/s. Global Trade Finance Ltd.)

...Plaintiff

vs.

M/s. Minar International Ltd. And Ors.
Through Official Liquidator

...Defendants

.....

Mr. Dhaval A. Patil, a/w. Ms. Sarita D'Lima, i/b. M/s. K. Ashar & Co., for the
Plaintiff.

Mr. Mathews J. Nedumpara, a/w. Mr. Amritpal Singh, for Defendant Nos. 2
and 3/Applicants in NMSL/984/18 and NMS/576/18.

Mr. Pola Raghunath, Deputy OL, Defendant No.1 present.

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CORAM : S.C. GUPTE, J.

DATED : 27 APRIL, 2018

P.C. :

. Heard learned Counsel for the parties. This notice of motion is
taken out in a suit filed for recovery of a sum of about Rs.41.58 crores from
original Defendant No.1 Company, which is represented through the Official
Liquidator, as a principal debtor and against Defendant Nos. 2 to 5, as
guarantors. During the pendency of the suit, the first Defendant Company

was ordered to be wound up and Official Liquidator was appointed as a liquidator of the Company. The Plaintiff, thereafter, applied for leave under Section 446 of the Companies Act, 1956 and pursuant to an order passed thereafter on a chamber summons, brought the Official Liquidator on record. The present application is made on behalf of original Defendant No.2 to the suit, who is sued as a guarantor.

2. By an order dated 9 April 2014, passed by this Court in the suit herein, Court Receiver, High Court, Bombay has been appointed a receiver of the suit property, which includes 16 acres of coffee plantation at Kodagu in South Canara in the State of Karnataka, which was a collateral security of the Plaintiff. The Receiver was directed to sell the property by public auction. By further orders passed in the suit, a draft advertisement was approved by the Court; sale by public auction was advertised in local newspapers; valuation of the suit property was made; its reserve price was fixed; and finally the offer of one Diakem India Pvt. Ltd. for purchase of the suit property was accepted by this Court subject to the condition of deposit of the amount of EMD and balance amount within a specified period and the Receiver was directed to handover possession of the suit property to M/s. Diakem India Pvt. Ltd. and execute a conveyance/sale certificate in favour of the parties after receipt of the full consideration by the Plaintiff. M/s. Diakem India Pvt. Ltd. have since paid the entire consideration and are now awaiting delivery of possession of the suit property and execution of conveyance/sale certificate in their favour. At this stage, the Applicant (original Defendant No.2) has moved the present notice of motion. The motion seeks various reliefs concerning orders passed by this Court from time to time in the present suit as well as in the company application for leave under Section 446. Learned Counsel for the Applicant submits that all

these orders including grant of leave to the Plaintiff to prosecute the suit against the Company in liquidation and various directions towards the sale of the suit property including the acceptance of the bid of M/s. Diakem India Pvt. Ltd. and sanction of sale in their favour, are void *ab initio* as they are violative of Part III of the Constitution of India.

3. The application, as canvassed by learned Counsel for the Applicant, is on two footings: Firstly, it is submitted that the directors of the Company in liquidation, who are sued in their individual capacity as guarantors of the corporate debtor, are discriminated against insofar as the prosecution of the creditor's claim against them as guarantors is concerned. It is submitted that whereas in the case of a proceeding under the Companies Act, 2013 or under the Insolvency and Bankruptcy Code, the tribunals constituted thereunder are courts of exclusive jurisdiction and can grant the benefit of a moratorium even to the guarantors of the corporate debtor, the orders impugned herein deny a similar benefit to the directors sued as guarantors of the corporate debtor. Learned Counsel for the Applicant relies on an order passed by the National Company Law Appellate Tribunal in the case of **State Bank of India vs. Mr. V. Ramakrishnan and Anr.**¹ Relying on this judgment, it is submitted that moratorium available under the Insolvency and Bankruptcy Code to a corporate debtor is not only applicable to the property of the corporate debtor but even to the property of personal guarantors of the corporate debtor. Learned Counsel submits that under the Civil Procedure Code, under which the Applicant herein and other directors are sued as personal guarantors of the corporate debtor, namely, the Company in liquidation, no such relief is available and, in the premises, the provisions of law permitting suing of personal guarantors without the benefit of moratorium during the pendency of

¹ Company Appeal (AT) (Insolvency) No.213 of 17 dated 28/2/2018.

liquidation of the corporate debtor in pursuance of a winding up order, are discriminatory and violative of Article 14 of the Constitution of India. Learned Counsel submits that this Court, sitting as a civil court and having plenary powers to decide the issues of jurisdiction as well as adjudication, is empowered to declare the particular provisions of law, which are discriminatory and violative of Article 14 of the Constitution of India, as invalid and on that basis, even declare orders passed by a co-ordinate court in the suit herein as null and void *ab initio*. Learned Counsel relies on the judgment of the Supreme Court in the case of **Dhulabhai v/s. State of Madhya Pradesh**² and submits that constitutionality of any provision of law can very well be challenged in a suit. Learned Counsel also relies on the case of **A.R. Antulay vs. R.S. Nayak**³ in this behalf.

4. In the first place, it is impermissible for me, sitting as a co-ordinate court and in the very suit in which the impugned orders are passed, to declare them as void *ab initio* or violative of the Constitution of India. It is one thing for a civil court to say that any particular order or direction of the Court, even if such court be a co-ordinate court, which is cited as a judicial precedent, is not binding for any reason or to disregard any order or direction of the Court, which is *void ab initio* for any reason, including any constitutional ground, in a collateral proceeding, but quite another to apply that logic to any order passed in the very suit or proceeding, which I am hearing. Though, sitting as a civil court with plenary jurisdiction and a High Court at that, I am very much entitled to analyze and consider if any statutory provision cited before me meets the constitutional mandate of equality before law or not, it is impermissible for me to scrutinize orders passed by co-ordinate courts in that light in the same proceeding which is

² AIR 1969 Supreme Court 78

³ (1988) 2 Supreme Court Cases 692

before me and where my jurisdiction is invoked.

5. Alternatively, it is submitted by learned Counsel for the Applicant that this is the only Court to which an application such as this can be made. It is submitted that a writ court cannot be approached for two reasons. Firstly, it is submitted that, no writ can be issued to a civil court, and a High Court at that, in a matter pertaining to a judicial exercise and, secondly, prerogative writs, which can be issued under Article 226 of Constitution of India, do not envisage a declaration of invalidity concerning any judicial order or direction of the Court. Learned Counsel also submits that it is only in a civil proceeding such as this that a declaration can be issued. If a litigant is aggrieved by any order passed by a court of law on the ground that the order is either not legal or *void ab initio*, the most obvious remedy is to take the matter in appeal before a superior court. The Applicant herein has obviously not followed that course. Mr. Nedumpara, learned Counsel for the Applicant, submits that he can do so only if this application is considered by the Court and the declaration prayed for is declined. That is no ground why the original order sought to be declared void was not carried in appeal.

6. It is pertinent to note at this stage that a challenge to the orders passed by this Court on the ground that this Court is a *coram non judice* and at any rate, was duty bound to make the claimant opt for one particular remedy by electing between the various fora which were taken recourse to, was already preferred by one of the Defendants as an applicant before this Court. Various legal contentions, some of which have a bearing on the submissions made in the present notice of motion, were considered by this Court in its order dated 30 November 2017 when the application was

dismissed by a speaking order.

7. For all these reasons, there is no merit in the present notice of motion. The notice of motion is dismissed.

8. Pending the hearing of the present notice of motion, the Court Receiver was directed to stay his hands. Now that I have decided the present notice of motion after hearing the parties at length, the Court Receiver may proceed to handover possession of the suit property to M/s. Diakem India Pvt. Ltd. and also execute a conveyance/sale certificate in their favour. The Court Receiver to act on the authenticated copy of this order.

9. Learned Counsel for the Applicant applies for stay of this order. The application is refused.

(S.C. GUPTE, J.)