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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 967 OF 2018
IN
SUMMONS FOR JUDGMENT NO. 88 OF 2015
IN
SUMMARY SUIT NO. 754 OF 2015

Kishore Bhabutmal Shah

...Applicant/
Original Defendant
No.3

In the matter between

Jaganath Hegde

...Plaintiff

Versus

In Depth Entertainment Arts & Ors

...Defendants

Mr Ajay Panicker, *with Mr Amit Kakri, i/b Ajay Law Associates, for the Plaintiff.*

Mr Prasad Rao, *i/b Yogesh B Dandekar, for the Applicant/Original Defendant No. 3.*

CORAM: G.S. PATEL, J
DATED: 12th December 2018

PC:-

1. Heard.

2. Mr Rao for the Applicant, Original Defendant No. 3 mentioned the matter yesterday for urgent circulation for today. I granted that request and listed the Notice of Motion for ad-interim reliefs today. The Motion is by the 3rd Defendant to the suit. These are the prayers.

(a) that in view of the *prima facie* evidence substantiating the element of fraud as disclosed from the "Exhibit 24" i.e., alleged Promissory Note dated 26th December 2012 produced by the Plaintiff in CC No. 863/PW/2016, the Judgment and Orders dated 1st August 2016 and the Orders dated 24th January 2017 passed in the above Summons for Judgment No.88 of 2015 be quashed and set-aside, and this Defendant be granted unconditional leave to defend the above Summary Suit;

(b) that pending the hearing and final disposal of this Notice of Motion, this Hon'ble Court be pleased to stay the operation and effect of the Judgment and Orders dated 1st August 2016 and Orders dated 24th January 2017 in the Summons for Judgment No. 88 of 2015, and the execution proceedings consequent therewith;

(c) for the costs of this application;

(d) for such further and other directions, or orders, in the facts and circumstances of the case that this Hon'ble Court may deem fit and proper and in the interests of justice;

3. Copies of the orders in question mentioned in these prayers, of 1st August 2016 and 24th January 2017, are not annexed to the Affidavit in Support but are part of the record of the Summons for Judgment and the Summary Suit. The case of the 3rd Defendant in

this Motion is that the Plaintiff has obtained a decree allegedly in collusion with the 2nd Defendant. The Applicant (Original 3rd Defendant) alleges that a fraud was played on him by the Plaintiff and the 2nd Defendant. He and says that the 2nd Defendant is supposedly a Director of the 1st Defendant, a company in liquidation. There is also a complaint that the Plaintiff held a high public office in Mumbai and is politically influential. Then in paragraph 6, the 3rd Defendant says that some documents annexed to the Plaint in the Summary Suit, specifically, Promissory Notes dated 14th August 2012 and 26th December 2012 and a Memorandum of Settlement dated 9th May 2013 are forgeries. He claims that this has come to light in subsequent criminal proceedings. The 3rd Defendant therefore seeks that the decree in the Summary Suit be set aside on the ground that it is a nullity and vitiated by fraud and forgery.

4. The suit itself sought a decree jointly and severally against the Defendants in an amount of Rs.1,62,70,833/- with interest on a principal amount of Rs.1 crore in terms of the Particulars of Claim set out at page 69. The principal amount is described in that Statement of Particulars as being due under Promissory Notes, dishonoured cheques and the Memorandum of Settlement. As regards the 3rd Defendant, the averment in the Plaint is that he undertook to repay the amount and signed the memorandum as a guarantor.

5. For reasons that will shortly become obvious, I cannot today venture into a reassessment or a fresh appreciation of the factual material. The reason is simple. After the Summary Suit was filed

and the Writ of Summons was served, the 3rd Defendant entered appearance. The Plaintiff filed a Summons for Judgment and served that on the Defendants too, including the 3rd Defendant. All parties were before KR Shriram J on 1st August 2016 when he heard them at length and in a detailed 18-page order decided the Summons for Judgment. As regards the 3rd Defendant in paragraph 22, the learned Judge found:

22 Similarly, when the anticipatory bail application of defendant no.3 came up for hearing on 9th June 2015, 24th June 2015, 1st July 2015 and 15th July 2015, the defendant no.3 also has admitted that the amounts were payable to the plaintiff and they were making efforts to reconcile the transactions. In the affidavit in reply the defendant no.3 has not given any explanation as to how and why these statements were made on behalf of the defendant no.3.

6. Then in paragraphs 27 and 28 KR Shriram J said this:

"27 Admission is the best form of evidence and an admission does not require any proof. The admission made by the defendant nos. 2 and 3 as recorded in the orders passed by this court that they owed money to the plaintiff and they are trying to settle the claim with the plaintiff, is an admission of fact which requires no proof. The defendant nos. 2 and 3 cannot take the defences which they have raised in their affidavit in reply.

28 At the same time, I would grant the defendant nos. 2 and 3 a chance to defend the suit but subject to a condition that defendant nos. 2 and 3 jointly or severally deposit a sum of Rs.1 crore with the Prothonotary and Senior Master, High Court, Bombay, within six weeks from today and the Prothonotary and Senior Master will invest

the same in fixed deposit with a nationalised bank initially for a period of one year and renew it year to year until the hearing and final disposal of this suit.

If this amount is deposited, leave to defend to defendant nos. 2 and 3 is granted. If this amount is deposited, then the defendant nos. 2 and 3 to file their written statement within two weeks of depositing the said amount. Within one week thereafter, parties will file and exchange affidavit of documents and within one week thereafter complete discovery and inspection and file and exchange their statement of admission and denial with reasons for denial. The suit be listed for issues 12 weeks thereafter."

7. Clearly, therefore, Defendants Nos. 2 and 3 were given conditional leave to defend. The 3rd Defendant was thus heard fully on merits after he opposed the Summary Suit and the Summons for Judgment.

8. The 3rd Defendant filed Commercial Appeal No. 24 of 2017 against KR Shriram J's order. On 17th July 2017, the Division Bench disposed of the appeal for the simple reason that in the meantime the suit itself had already been decreed by SJ Kathawalla J by his order of 24th January 2017.

9. By that order, SJ Kathawalla J noted the decision on the Summons for Judgment of KR Shriram J of 1st August 2016. Before SJ Kathawalla J, a non-deposit certificate was tendered and taken on record. Observing that the suit was based on a Promissory Note issued by the 2nd Defendant and a Memorandum of Settlement

signed by Defendants Nos. 2 and 3 and further that the suit stood withdrawn against the 1st Defendant, SJ Kathawalla J decreed the suit jointly and severally against Defendants Nos. 2 and 3. I am informed that the 3rd Defendant has filed another appeal against the order of SJ Kathawalla J and this is pending admission even today but no stay has been sought.

10. As will be seen from the prayers in the Motion, which I have set out above, what the 3rd Defendant now wants is that I should reverse the decisions of SJ Kathawalla J and KR Shriram J on both the Summary Suit and the Summons for Judgment. In essence, the argument is that there is a Promissory Note at pages 19 and 20 of the Plaint rendered in a photocopy which does not bear the 3rd Defendant's signature. However in separate criminal proceedings another version of this document has been produced showing the 3rd Defendant's signature. How can this be? Cries Mr Rao, unless it is all a forgery. But what is the forgery, and where is it? The Plaintiff did not ever say the promissory note at pages 19 and 20 was signed by the 3rd Defendant. Indeed, he said the exact opposite. The decree in question was thus not on the basis of a promissory note bearing the 3rd Defendant's signature, and which the 3rd Defendant can say is forged. How the lack of a signature on a document amounts to a forging of the signature is unclear. Mr Panicker has some complicated explanation about how a version of the promissory note came before the criminal court, but on this he is clear: his suit is not based on the promissory note that allegedly bears the 3rd Defendant's signature and which came to be produced before the criminal court.

11. The 3rd Defendant's argument is entirely flawed foroured it proceeds on the footing that the Plaintiff's case against the 3rd Defendant is that the 3rd Defendant stood liable to the Plaintiff on the basis of this Promissory Notes. That is in fact not so. The Plaintiff has consistently said that the 3rd Defendant did *not* sign this Promissory Note, but signed an earlier Promissory Note, the one that is at page 16. This is not being disputed before me. More specifically, the Plaintiff claims that the 3rd Defendant's liability arises from the *Memorandum of Settlement*.

12. Whatever be the 3rd Defendant's case on all this, and, especially if it is now the 3rd Defendant's case that he did not sign these documents or that the signatures that appear on the documents are not his, then these were or could have been points to have been argued first before KR Shriram J, then before SJ Kathawalla J, and certainly before the appeal court that heard the appeal from Shriram J's order. The 3rd Defendant did not do so.

13. The Motion is in my view, thus, completely misconceived. It is not so much an application to set aside a decree on the ground of fraud but an application that I should either review or sit in appeal over the orders of SJ Kathawalla J and KR Shriram J. I can do neither. Even if I could, I would not. Further, the 3rd Defendant has a substantive appeal against SJ Kathawalla J's order and that is even now pending. An order of the kind that the 3rd Defendant seeks before me today would, apart from anything else also have the direct effect of overreaching the Appeal Court before whom that a Appeal is listed.

14. The Notice of Motion is dismissed. There will be no order as to costs.

15. Affidavit in Reply filed by the Plaintiff is to be filed in the Registry.

(G. S. PATEL, J)