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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

**NOTICE OF MOTION NO.1567 OF 2014
IN
SUIT NO.734 OF 2014
WITH
NOTICE OF MOTION NO.1568 OF 2014
IN
SUIT NO.734 OF 2014
WITH
NOTICE OF MOTION NO.1361 OF 2017
IN
SUIT NO.734 OF 2014
WITH
NOTICE OF MOTION (L) NO.2424 OF 2017
IN
SUIT NO.734 OF 2014**

Zephyr Peacock India And Anr. ...Plaintiffs
vs
Mr. Badal Bhupatrai Shah And Anr. ...Defendants

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Mr. Murtaza Kachwalla, a/w. Mr. Aashdin Chivalwala, i/b. HSA Associates,
for the Plaintiffs.

Mr. Vinay Bhanushali, for Defendant Nos. 1 and 2.

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CORAM : S.C. GUPTE, J.

DATED : 11 APRIL, 2018

P.C. :

. Heard learned Counsel for the parties. This suit is filed by the Plaintiffs for decree in the sum of Rs.31.50 crores together with pre-suit, *pendente lite* and future interest. The claim arises out of share subscription and shareholders agreement between the parties. Notice of Motion No.1567

of 2014 is taken out by the Plaintiffs for attachment before judgment, whilst Notice of Motion No.1568 of 2014 has been taken out for arrest before judgment. Notice of Motion No.1361 of 2017 is taken out by the Plaintiffs for a judgment for want of written statement, whilst Notice of Motion (L) No.2424 of 2017 is taken out by the Defendants for condonation of delay in filing written statement and recall of an order transferring the suit to the list of undefended suits.

2. As far as Notice of Motion No.1567 of 2014 and 1568 of 2014 are concerned, this Court, by an order dated 16 February 2018, directed the Defendants to make a disclosure of their assets. Such disclosure was to also include assets of immediate family members of Defendant No.1, that is to say, wife, son and daughter of Defendant No.1. In the meantime, an ad-interim injunction restraining the Defendants from creating third party rights or parting with possession of the flat referred to in the order, was granted until further orders. Defendant No.1 has filed an affidavit of disclosure dated 3 March 2018. The Defendant has disclosed assets which include flat bearing No.163/A, Shanti Nagar, Neapean Sea Road, Mumbai - 400 006 as well as family pension policy with one time premium paid for the same, which has a surrender value of Rs.1,66,71,062/- with accrued interest thereon. It is submitted that this policy has since been liquidated by the bank, with whom the same was placed as a collateral. The Defendant has also disclosed shares in private companies. The Defendant has also indicated ownership property of his wife. The property is a flat at 203, Jagmohan Mansion, Avantikabai Gokhale Marg, Opera House, Mumbai. The Defendant has also indicated assets of 25 companies listed in Notice of Motion No.1567 of 2014.

3. The Plaintiffs have made out a prima facie case for a decree in the suit. The circumstances disclosed in the affidavit in support of the two notices of motion also indicate that there is a case for moving for attachment before judgment. The Plaintiffs have made out a case that there is in fact an apprehension that the Defendants are likely to dispose of or shift their assets within the jurisdiction of this Court with a view to defeat any decree that may be passed against the Defendants in the present suit.

4. Accordingly, Notice of Motion No.1567 of 2014 is allowed by restraining the Defendants from transferring or alienating or creating third party rights in the properties of the Defendants disclosed in the affidavit of disclosure dated 3 March 2018. These properties shall include the receivables of the Defendants, which are disclosed or borne out by the affidavit of disclosure.

5. In view of the order passed on Notice of Motion No.1567 of 2014 as above, no order needs to be passed on the other companion notice of motion for arrest before attachment. Notice of Motion No.1568 of 2014 is, accordingly, dismissed.

6. Notice of Motion (L) No.2424 of 2017, which is for taking the Defendants' written statement on record, discloses the circumstances in which the Defendants could not file their written statement and the suit was transferred to the list of undefended suits. The affidavit in support of the notice of motion indicates that Defendant No.1, who was mainly looking after Court proceedings and instructing Advocates and Defendant No.2 (being his old mother), was in custody from 14 August 2014 to 25 December 2014. The suit appeared before the Prothonotary and Senior

Master of this Court for directions soon after the Defendant released from custody. It is submitted that, at that stage, the Defendant was suffering from depression due to his financial circumstances as well as a shocking tragedy concerning his son. It is submitted that his son was diagnosed with a rare life threatening disease of muscular dystrophy, affecting around one in million, which results in muscle degeneration and premature death typically at the age of 12 to 14 years. It is submitted that the Defendant was traveling across the globe desperately seeking a treatment for his son. The Defendant has given instances and dates of his trips abroad. It is submitted that, in the premises, the Defendant could not file his written statement or make an application for condonation of delay in filing his written statement. (There is a delay of about two years and seven months in filing the written statement.) The above narration broadly makes out a case for condonation of delay.

7. Learned Counsel for the Plaintiffs/Respondents submits that the Court ought not to take a lenient view in the present matter, since there are false statements made by the Defendant. Learned Counsel particularly draws my attention to the statement made by Defendant No.1 in para 4 of his affidavit in support of the notice of motion, which states that, at the relevant time, i.e. when the Prothonotary passed the order for written statement on 30 January 2015, the Applicant was just released from the custody and had no knowledge of the present suit. It is submitted that the order of 30 January 2015 shows the appearance of an Advocate on behalf of the Defendants. It is submitted that even in the motion taken out in the suit (Notice of Motion No.145 of 2015), the Defendants' Advocate's appearance has been shown as of 9 February 2015 before this Court.

8. It is a matter of fact that Defendant No.1 cannot possibly

suggest that he was not aware of the suit on 30 January 2015, but merely for that reason, an opportunity to defend the suit cannot be denied to him. It would be too harsh a consequence for the impropriety in making an incorrect statement concerning his knowledge of the suit. After all, just as the appearance of the Defendants' Advocates on the two dates indicated above is a matter of fact, it is equally a matter of fact that the Defendant was traveling for a medical emergency and was suffering from anxiety and trauma caused by a rare and life threatening condition of his young son. If as a result, he could not file his written statement in the suit in time, the delay would have to be excused. The Plaintiffs may be compensated with some reasonable costs for the delay caused in their trial as a result. In the premises indicated above, the defence cannot be shut out and opportunity needs to be given to the Defendants to contest the suit, subject, however, to payment of costs.

9. Accordingly, Notice of Motion (L) No.2424 of 2017 is made absolute in terms of prayer clauses (a) and (b). The Defendants are permitted to file their written statement within two weeks from today. The Defendants shall pay costs quantified at Rs.25,000/- to the Plaintiffs. Costs to be condition precedent.

10. In view of the order passed in Notice of Motion (L) No.2424 of 2017, the Plaintiffs' notice of motion for judgment for want of written statement does not survive. Accordingly, Notice of Motion No.1361 of 2017 is dismissed. No order as to costs.

(S.C. GUPTE, J.)