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

NOTICE OF MOTION NO. 2485 OF 2016
IN
SUMMARY SUIT NO. 881 OF 2015

Dalchand H. Gupta & Ors. ...Plaintiffs
Vs.
Sunshine Caterers Pvt.Ltd. & Ors. ...Defendants/Applicants

Mr.Rohit N. Shetty with Ms.Sharmili Mhatre for Plaintiffs.
Mr.Subhash Jha with Sanjana Pardesi and H. Mishra I/b. Law Global for Defendants/Applicants.

CORAM : S.C. GUPTE, J.

DATE : 7 FEBRUARY 2018

P.C. :

The present notice of motion is taken out in a summary suit, which has since been decreed. The decree was passed on consent. The parties tendered consent terms dated 28 September 2015 and sought a decree in terms of the consent terms. By an order passed on the same date, the consent terms were taken on record and a decree was passed in terms thereof. The Applicants herein are original Defendants, who seek to recall that consent decree on the ground that the decree was obtained fraudulently.

2 The present summary suit was filed by the Plaintiffs alleging that the Plaintiffs had invested a sum of Rs.2 crores with the Defendants and signed a Memorandum of Understanding in that behalf sometime in 2010. It is the Plaintiffs' case that the Defendants were to pay amounts by way of profit or return of investment. Further MOUs were executed

between the parties sometime in March 2012. Under these MOUs, the Plaintiffs invested sums of Rs.11.50 crores and Rs.2 crores. Whilst doing so, the earlier MOU of 2010 stood superseded and substituted. Under these MOUs, the Defendants agreed to pay to the Plaintiffs sum of Rs.6.93 crores per annum towards profit sharing for the period from 1 October 2012 to 30 September 2013. It is the Plaintiffs' case that fresh loan agreements came to be executed between the parties under which the amounts payable by the Defendants to the Plaintiffs stood frozen at Rs.30 crores. The Plaintiffs allege that there was a letter of confirmation issued by the Defendants confirming their liability to make payment under the agreements referred to above. Since there was no payment forthcoming, sometime in May 2015, the Plaintiffs filed a complaint with the Economic Offences Wing ("EOW") against all the Defendants. In pursuance of this complaint, in September 2015, an FIR was registered by EOW against the Defendants. The Plaintiffs, thereafter, filed the present suit. Simultaneously, the Plaintiffs took out a notice of motion, Notice of Motion No. 1742/2015, for attachment before judgment and other ancillary reliefs. The motion was circulated for urgent reliefs on 23 September 2015. The parties applied on that day for an adjournment and the matter was placed on 28 September 2015. On this date, the parties filed consent terms, whereunder the Defendants undertook to pay a total sum of Rs.38.34 crores in the manner stated in the consent terms. Further provisions were made in the consent terms towards securing payment under the terms, such as creation of escrow account as also creation of a charge in respect of various properties mentioned in the consent terms. The consent terms run into nearly 16 pages and were signed by individual parties to the suit as well as their respective Advocates. The terms were tendered in the presence of all parties, save and except Defendant Nos.4 and 5, who were also said to be present in court, when they signed the terms in the presence of their Advocate. The Advocate identified their signatures and vouched for the willing consent of the Defendants. The suit was accordingly disposed of in terms of the consent terms by accepting all the undertakings in the consent terms. In view of the disposal of the suit, the notice of motion was disposed of as infructuous.

3 The Defendants now approach the court in the present motion for recall of the consent decree. The Defendants' case in a nutshell is that the MOUs referred to by the Plaintiffs in the plaint were signed by the Defendants under pressure exerted by the Plaintiffs. It is submitted that after execution of these MOUs and thereby involving of the family members of the Plaintiffs as parties to the transaction, a criminal prosecution was launched against them by filing an FIR. It is submitted that in the FIR, the Plaintiffs' claim was of cheating by the Defendants in the sum of Rs.13.50 crores. It is submitted that within 10 days of the filing of the FIR, i.e. 11 September 2015, the Plaintiffs filed the present summary suit claiming a decree in the sum of Rs.25.85 crores, and after the service of the plaint and proceedings, within the next six days, the Plaintiffs made the Defendants sign consent terms for Rs.38.34 crores. It is submitted that the Defendants were pressurised to such an extent that they had no other alternative and/or option but to agree to the terms dictated by the Plaintiffs. It is submitted that accordingly, the consent terms and the decree passed in terms thereof were vitiated by fraud practiced not only on the Defendants but also on this court and in the premises, the consent decree ought to be set aside.

4 As is obvious from the narration in the affidavit in support of the notice of motion that the application is based on nothing but bald

averments. These averments are in the nature of broad generalisations, effectively nothing but slogans, without any specific details. As indicated in the notice of motion, the consent decree is being sought to be set aside on the ground of fraud. The narration in the affidavit in support of the notice of motion, however, does not make out any case of fraud. The case appears to be more of force and intimidation, again without any particulars. The consent terms were not only duly signed by the Defendants but also by their respective Advocates. The consent terms make detailed provisions not only for repayment of the Plaintiffs' dues but for securing such repayment in the interregnum. When the consent terms were filed before the court, all the Defendants were personally present and duly represented by counsel. In the premises, merely on a bare assertion that the consent terms and the decree based thereon were procured by practicing a fraud does not make out a case for recall of the decree.

5 Mr.Zha, learned Counsel appearing for the Applicants/ Defendants, seeks to point out that the original claim of the Plaintiffs itself is based on fraud or is vitiated by illegalities. That is a matter of merits. If the Plaintiffs' claim was based on fraud or vitiated by any illegality, it was for the Defendants to oppose the claim. As I have noted above, the Defendants have not only accepted the claim but by a detailed agreement in the form of consent terms, offered to make repayment in a manner, and supported by a security, as detailed therein. As far as the decree itself is concerned, learned Counsel submits at the Bar that the Defendants were given to understand that the decree was sought merely as a paper decree for showing certain entries and this decree was never meant to be acted upon. Though this case is contested by the Defendants, I have not thought it fit to analyse this case at length, since in my view, even if the

Applicants/Defendants were right in their assertion, that would not take them any forward. That would in effect imply a fraud on the court or statutory authorities to which both Plaintiffs and Defendants were party.

6 Mr.Zha relies upon several judgments of Supreme Court as well as different High Courts on the aspect of fraud on court and the doctrine of *pari delicto*. Relying on these judgments, learned Counsel submits that the original decree, which was obtained by fraud, must be reversed and no advantage could be allowed to be claimed hereunder by the Plaintiffs, who applied for such a decree. The judgments need not be discussed fully in the present order, since I have no quarrel with any of the propositions laid down therein. There is no gainsaying that fraud vitiates any decree of a court, which was obtained on its basis and that such a decree can always be recalled at the instance of the affected party. There is also no quarrel with the proposition that the parties to a legal controversy, who are in *pari delicto*, that is to say, who have together participated in any wrongdoing, may not recover damages resulting from such wrongdoing; If there are any transactions, which are illegal, no court can come to the aid of such party coming before it for any relief. It is settled that in such cases, the loss must be allowed to lie where it falls. All that is fine except that the shoe fits on the other foot. On the case canvassed by Mr.Zha, the Applicants/ Defendants themselves are party to a fraud and it is they, who are seeking a relief today that the decree obtained through their fraudulent action must be overturned. That, as the doctrine of *pari delicto* relied upon on by learned Counsel himself suggests, cannot be done.

7 On merits, not only is there any fraud made out on the part of the Plaintiffs insofar as the consent decree is concerned, but the consent

decree appears to have been submitted to by the Defendants with open eyes and deliberate intention. The Defendants were facing a serious criminal prosecution in respect of the subject matter of the present suit. They were apprehending an imminent arrest in connection with this prosecution. The consent terms provided (clause 22 thereof) that in view of the obligations undertaken by the Defendants in the consent terms, the Plaintiffs undertook not to oppose any application for bail moved by the Defendants. On the basis of the consent terms, the Defendants did move an anticipatory bail application claiming therein that after the FIR came to be registered, the Plaintiffs and the Applicants had mutually decided to put an end to all disputes between them and that the various MOUs, which were earlier entered into between them, were now merged into the consent terms of 28 September 2015. The Defendants claimed that this was towards fully and finally resolving all their past differences. The Defendants relied on the consent terms as an exhibit to their application for anticipatory bail. The Defendants also relied on the fact that the original complainant had filed the present summary suit before this court, which this court was pleased to dispose of in terms of these consent terms. Based on these consent terms and particularly relying on clause 22 thereof, the Defendants were granted anticipatory bail by the learned Additional Sessions Judge on 30 September 2015. The second crucial circumstance, that needs to be considered in this context, is the criminal writ petition filed on 4 November 2015 by the Defendants under Article 226 of the Constitution of India read with Section 482 of the Criminal Procedure Code, 1973 for quashing of the FIR. Even on that date, there was no whisper of any fraud on the part of the Plaintiffs herein for procuring the consent terms or the consent decree passed thereon. On the other hand, the Defendants relied on the consent terms taken on record in the summary suit herein by way of a full and final resolution of past differences between the parties. In other words, taking advantage of these consent terms, this court was called upon to quash the FIR pending against the Defendants. It is another matter that the criminal writ petition was finally withdrawn by the Defendants, though with liberty to file a fresh petition. After this withdrawal, another criminal writ petition was moved by Defendant No.5 herein, once again for quashing of the FIR. This petition was filed on 6 February 2016. Even in this petition, there was no whisper of any fraud insofar as the consent terms or the consent decree in the present summary suit are concerned. Thirdly, there is an affidavit sworn by Defendant No.2 herein on 29 April 2016 and filed before the Sessions Court in support of anticipatory bail that in partial compliance of the consent terms of 28 September 2015, a sum of Rs.81 lakhs mentioned therein would be paid to the complainant, i.e. Plaintiff No.1 herein. Even here, far from any grievance of a fraud committed by the Plaintiffs, the court was assured of compliance on the part of the Defendants with the consent terms and on the basis of such assurance, further relief was sought in the anticipatory bail application. It is only thereafter, i.e. on 7 September 2016, that this notice of motion appears to have been taken out. The motion clearly appears to be an afterthought.

8 In another criminal application filed for cancellation of bail under Section 439(2) of Cr.P.C. in a criminal prosecution filed against these Defendants by another complainant, the complainant referred to the consent decree in the present suit, where, in respect of certain properties, a charge was created by the Defendants herein (the accused respondents in the criminal application). It was submitted by the complainant that this charge was in breach of the MOU between the complainant and the

Defendants herein. The Defendants were represented before this court but did not urge any fraud in connection with the consent terms. On the other hand, the Defendants, through their counsel, gave an undertaking to the court to pay the amount claimed by the complainant therein as per the schedule mentioned in the affidavit. There is no explanation why Applicants/Defendants have now taken an about turn and impugned the consent terms of 28 September 2015, which, all this while, they not only stood by but which they continued to use for seeking reliefs from criminal courts.

9 There was a without prejudice meeting between the parties held on 20 January 2016 in connection with the dues payable by the Defendants to the Plaintiffs under the consent decree. After this meeting, a mail was addressed by Defendant No.6 to Plaintiff No.1, wherein the Defendants thanked the Plaintiff for agreeing to reduce the disputed amount from Rs.38.34 crores to Rs.13.50 crores. On the same date, Plaintiff No.1 by its e-mail had replied to the former mail refuting the alleged agreement to reduce the amount payable in the consent terms from Rs.38.34 croes to 13.50 crores as per mutual agreement. The claim was said to be absurd. In his rejoinder, Defendant No.6 proceeded to explain that his e-mail had been misinterpreted and misunderstood. Defendant No.6 agreed that there had been no such commitment on the part of the Plaintiffs. The email ended on a note that things could be worked out in a better way and a solution could be found to this issue in an amicable manner. Once again, the point to be noted is that there is no whisper or even a faint suggestion of any fraud in the matter of consent terms.

10 On these facts, there is no case for recall of the order and

decree dated 28 September 2015 or the consent terms of even date executed between the parties. The notice of motion is dismissed. The Applicants/Defendants shall pay costs of this notice of motion quantified at Rupees One Lakh to the Respondents / Plaintiffs.

(S.C. GUPTE, J.)