

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.1083/2018
IN
FIRST APPEAL (ST)NO.21803/2017

A.H. Wheeler & Co.Ltd. Appellant.
Vs.
Mr.Dilip B. Seth & Ors. ... Respondents.

Advocate Mr. SB Shetye for appellant.
Advocate Mr. Sunil C. Patel for respondent no.1.

CORAM : K.K.TATED, J.
DATED : JULY 3, 2019.

P.C.

Heard learned counsel for parties.

2. By this civil application, the applicant/defendant no.1 is seeking stay of operation and implementation of judgment and decree dated 5.5.2017 passed by Bombay City Civil Court,Mumbai in Suit no.7078/2003 holding that, applicant/defendant no.1 to pay sum of Rs.8,65,000/- with interest @ 8% p.a. to the plaintiff.

3. Learned counsel for applicant submits that in the present proceeding, the trial court erred in coming to

conclusion that applicant is liable to pay sum of Rs.8,65,000/- with interest to respondent no.1. He submits that the trial court failed to consider the fact that there was no privity of contract between plaintiff and the defendant no.1. There was contract between respondent no.1 and 2. These facts were brought on record. In spite of that, the trial court has held that applicant is liable to pay amount of Rs.8,65,000/- to the respondent No.1. In support of his contention, learned counsel for applicant relies on ground nos. (h) (i) and (j) of appeal memo which reads thus;

“h) It is respectfully submitted that was specific argument advanced before Ld.Judge that it was an admitted act that there is no privity of contract between plaintiff and defendant o.1 in respect of goods to be supplied. Admittedly, the contract entered into defendant no.2 and plaintiff clearly shows that plaintiff shall supply the defnednat no.1 the quantity of goods as per their required. The perusal of the entire judgment and order shows that ld.Judge has not referred to this argument nor has referred to the agreed terms vide clause no.4:0 between plaintiff and defendant no.2.

i)The perusal of cross examiantion makes it very clear that the contract in question wqas between plaintiff and defendant no.2, plaintiff further admitted in his cross examination that defendant no.2 nowhere informed the plaintiff, the number of copies to be supplied to defendant no.1 (vide Exh.11). It was further admitted in the cross examination

that defendant no.1 had placed order for supply of 75000 copies of time table.

j) It was further admitted by plaintiff in his cross examination that as per contention in para 19 and 20 of plaint he did receive an amount of Rs.11,30,000/- and further specifically admitted that the claim in present suit for recovery of balance amount of Rs.7,65,000/- is from defendant no.2 only.”

4. On the basis of this, learned counsel for applicant submits that, pending the hearing and final disposal of first appeal, execution of impugned judgment and decree dated 5.5.2017 be stayed. He submits that if stay is not granted irreparable loss would be caused to applicant. He submits that they have good chance of success.

5 On the other hand, learned counsel for respondent No.1/original plaintiff opposed present application. He submits that after considering the evidence on record, the trial court categorically held that applicants are liable to pay sum of Rs.8,55,000/- with interest to respondent no.1/original plaintiff. He submits that, this being money decree, there is no question of granting blanket stay. Applicant/Defendant no.1 to deposit entire decree amount, with interest in the court and respondent no.1 be permitted to withdraw the said amount. Hence, there is no substance

in the present civil application and same be dismissed with costs.

6 Heard both sides at length. Admittedly, in the present proceeding, at the time of passing judgment and decree dated 5.5.2017 following issues were framed.

“1.Does plaintiff prove that an amount of Rs.8,65,000/- is due and outstanding against the defendant? - In the affirmative.

2.Does the defendant no.1 prove that it had made excess payment to the plaintiff? – In the negative.

3.Whether the award dated 11.3.2003 passed in arbitration proceeding operates as res-judicata? – In the negative.

4.What amount if any is the plaintiff entitled? – Applicant is entitled for Rs.8,65,000/-.

5.What order? – Suit is decreed as per court order.

7. The trial court held that plaintiff proved that defendant no.1 i.e. applicant is liable to pay the said amount. In any case, this is money decree. This can not be stayed without directing defendant to deposit the entire amount. Therefore, following order is passed.

a)Operation and implementation of impugned

judgment and decree dated 5.5.2017 passed by City Civil Court at Greater Bombay, in Suit No.7078/2003 (High Court Suit No.2982/2003) is stayed till hearing and final disposal of first appeal, on condition that applicant/original defendant no.1 has to deposit entire decretal amount with interest in trial court on or before 19.10.2019 failing which civil application shall stand dismissed without referring back to the court.

b) If amount is deposited within time, trial court is directed to invest amount in a Fixed Deposit in any Nationalized bank, initially for a period of one year and thereafter same be continued till further orders.

c) If the amount is not deposited within stipulated time, respondent no.1/original plaintiff is entitled to execute the Decree according to law.

d) Liberty granted to respondents/claimants if they so desire to prefer appropriate application

for withdrawal of amount and that application will be decided on its own merits.

e)Civil application is allowed accordingly.

f)No order as to cost.

(K.K.TATED, J.)

