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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM CHAMBER SUMMONS (L) NO. 312 OF 2019
IN
COMM NOTICE OF MOTION NO. 2505 OF 2018
IN
COMM EXECUTION APPLICATION NO. 88 OF 2017
IN
SUIT NO. 172 OF 2009

Deep Construction Co ...Applicant/ Plaintiff

Versus

Jitendra N Patel & Ors ...Respondents/ Defendants

WITH
CHAMBER SUMMONS NO. 785 OF 2018
IN
SUIT NO. 172 OF 2009

Deep Construction Co ...Applicant/ Plaintiff

Versus

Jitendra N Patel & Ors ...Respondents/ Defendants

Mr M Rathod, *i/b Jain & Jain Law Associates, for Applicants/ Plaintiffs.*
Ms Purvi Jain, *i/b Navdeep Vora and Associates, for Defendant No.1*
Ms Nimita Shirke, *i/b Jaydeep Thakkar, for Defendant No.2.*

CORAM: G.S. PATEL, J
DATED: 2nd April/3rd April 2019

PC:-

CHAMBER SUMMONS NO. 785 of 2018:

1. At the request of the Applicant, Chamber Summons is dismissed as withdrawn.

COMM NOTICE OF MOTION NO. 2505 OF 2018:

2. There is a completely unnecessary controversy between the Plaintiff and the 2nd Defendant relating to sharing of the costs, charges and expenses of the Receiver appointed pending the suit.

3. The suit itself was for specific performance of an Memorandum of Understanding dated 30th April 2007 for sale of an immovable property at Ghatkopar. There was a companion Suit No.2292 of 2009 where the present 2nd Defendant was the Plaintiff. At the interim stage, the matter travelled to the Supreme Court and it was there in the Special Leave Petition that on 20th September 2011 a Court Receiver was appointed. The Supreme Court order said that all three parties would share the costs of the Court Receiver equally.

4. Ultimately, after negotiations Consent Terms were entered in the present Suit No. 172 of 2009. On 14th February 2017, Consent Terms were filed in the other Suit No. 2292 of 2009. There was a default. In May 2017, the present Plaintiff, Deep Construction moved in execution of the Consent Decree in its suit. The matter continued till November 2017 to the stage of an attempted auction of the suit property when the parties once again opened negotiations.

5. These ultimately did fructify. According to the Plaintiff, Deep Construction agreed to forgo its claim for accumulated interest, an amount of over Rs.50 lakhs, and the parties agreed that the 2nd Defendant, Maruti Vikas Enterprises would pay Deep Construction an amount of Rs.1,71,50,000/- in full and final satisfaction of the decretal claim. Consent Terms to this end were filed in Chamber Summons No. 331 of 2017 in Deep Construction's Execution Application No. 88 of 2017. Everybody seems to have forgotten about the Receiver at this time. It was he, the Court Receiver, who pointed out to the parties that they should have obtained an order of the discharge of the Receiver.

6. It is at this stage that the matter came before me on 26th July 2018 at the instance of the 2nd Defendant, Maruti Vikas Enterprises. All were present at that time. The order I passed that day was by consent and it was that the Receiver's charges would be paid by the 2nd Defendant. This is justified today on the basis of three arguments: (i) that the amount that Maruti Vikas Enterprises was to pay Deep Construction was final net figure; (ii) that Deep Construction was foregoing its interest claim and (iii) that the entire property was going to Maruti Vikas Enterprises although it was Deep Construction that had come to Court seeking specific performance.

7. Thereafter, at the request of the Defendants, Deep Construction sought a withdrawal of the lis pendens notice that it had registered and served.

8. On 26th September 2018, Maruti Vikas Enterprises filed a praecipe ostensibly for speaking to the minutes saying that there was an error in my 26th July 2018 order and the Receiver's costs and expenses should be borne by all three parties equally. I did not make any order on that application on praecipe but directed Maruti Vikas Enterprises to file an appropriate application. On 15th November 2018, Maruti Vikas Enterprises filed Notice of Motion No. 2505 of 2018 seeking a modification of the 26th July 2018 order specifically requesting that an order be made that all three parties share the Receiver's expenses equally. The Receiver himself stood discharged by the end of January 2019. On 15th January 2019, Maruti Vikas Enterprises filed a praecipe for a listing of its Notice of Motion No. 2505 of 2018. The Court assigned a date and it was listed on 15th February 2019. The Plaintiff was not present at that time and I made an order then that the Receiver's costs and expenses would be borne by all three parties. The Plaintiff, Deep Construction has thereafter filed the present Chamber Summons (L) No. 312 of 2019 seeking in essence to recall the order of 15th February 2019 and restore the 26th July 2018 order, the very order that Maruti Vikas Enterprises wants modified. In other words Maruti Vikas Enterprises wants the 26th July 2018 order substituted by the 15th February 2019 order, and Deep Construction wants the 15th February 2019 order substituted by the 26th July 2018 order. Both orders are mine.

9. It seems to me that what Deep Construction says is not only correct but is eminently reasonable and is also equitable. The only justification that Maruti Vikas Enterprises provides for making this change is that Supreme Court, while appointing the Receiver as far back as in 2011, said that all three parties would have to bear costs equally. But that was at a time when parties were being maintained in status quo. What has happened thereafter cannot be ignored. Consent Terms were filed in the suit. There was a default. Deep Construction had to take it to execution and carry it all the way to the stage of an auction through the Court before Consent Terms were filed again, this time in execution. The result of the second round of settlement is for a predetermined price. Maruti Vikas Enterprises has got the entire property and undoubtedly any monetary claim that Deep Construction may have had, whether for interest or otherwise, it has given up totally. I cannot understand how it could possibly be equitable for Maruti Vikas Enterprises to now say that what it has paid to the Plaintiff should be reduced by recovering from the Plaintiff some component of Receiver's charges. After all, Maruti Vikas Enterprises has the property and it cannot get this property at a discount or reduction never agreed. If the property has been protected for all this period of time that is an advantage that has inured to the benefit of Maruti Vikas Enterprises, and it should pay for this benefit. There is no reason why Deep Construction should have to subsidise the benefit accrued to Maruti Vikas Enterprises. Maruti Vikas Enterprises has after all paid a fixed sum as the one time one-off amount in full and final satisfaction.

That is the entire decretal amount and in paying this amount, it cannot be overlooked that by the time there was a settlement on 12th April 2018, Deep Construction had already accumulated a claim for interest on the decretal amount, which it clearly gave up. What Deep Construction gave up in terms of the interest on its decretal claim is far in excess of its share of the Receiver's expenses.

10. Consequently I will have to hold for the Plaintiff, Deep Construction Company. Its Chamber Summons is made absolute in terms of prayer clause (a). Correspondingly, Maruti Vikas Enterprises's Notice of Motion No. 2505 of 2018 is dismissed. There will be no order as to costs. Nobody will apply hereafter on a praecipe under any circumstances for any purposes whatsoever.

11. There is no doubt that the 2nd Defendant has in fact paid of the Receiver's costs, charges and expenses. On the previous occasion I had directed the Plaintiff to deposit its share of these expenses, an amount of Rs.5,29,254/- with the Prothonotary and Senior Master. The Plaintiff did so. This amount will now be refunded to the Plaintiff with accumulated interest, if any.

12. All concerned will act on an authenticated copy of this order.

13. No costs.

(G. S. PATEL, J)