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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

**NOTICE OF MOTION NO. 1892 OF 2012
IN
SUIT NO. 1787 OF 2012**

Florens Containes INC. ...Applicant/Plaintiff
VS
M/s BEST Express Shipping Transport
Pvt. Ltd. & Ors. ...Defendants

.....
Mr Shrinivas Deshmukh a/w Mr Raunaq Mukherjee i/b Mulla & Mulla
& CB & C for the Applicant/Plaintiff.
None for the defendants.

.....
**CORAM : B. P. COLABAWALLA, J.
JUNE 12, 2019.**

P.C. :

This Notice of Motion has been filed seeking redelivery of the containers referred in Exh "H" to the plaint as well as for disclosing on oath their location. An injunction is also sought restraining the defendants from creating any third party rights and or interest in relation to said containers. An appointment of Receiver is also sought as well as for disclosure on oath the list of all the assets and properties belonging to the defendants.

2 When this Motion had come up on the earlier occasion, this Court had passed an order dated 18th February, 2019. By that order this Court had recorded that the preliminary issue under

Section 9-A of the Code of Civil Procedure, 1908 was framed as to whether this Court had jurisdiction to try and entertain the suit. After recording what had transpired, this Court recorded that defendant Nos.1 to 3 are not interested in proceeding with the preliminary issue framed and in these circumstances it was directed that the Notice of Motion be placed for hearing and final disposal.

3 Today, when this matter is called out, none have appeared on behalf of the defendants though all of them are duly served. As can be seen from the plaint, it is the case of the plaintiff that a total number of 528 containers were leased by the plaintiff to defendant No.4. It appears that from time to time some lease rentals were paid and some containers were returned back to the plaintiff. However, according to the plaintiff, defendants failed to return 172 containers and also defaulted in making payments of lease rentals. It is, in these circumstances, that the suit has been filed seeking various reliefs.

4 In the affidavit in reply to the above Notice of Motion filed on behalf of defendant Nos.1 to 3, the only contention raised is that there is no privity of contract between the plaintiff and said defendants. In this regard it would be appropriate to refer to the averments that have been made in paragraph 26 of the plaint which

states that defendant No.2 holds 50 % of the shareholding of defendant No.4 and defendant No.3 holds 49.9 % of the shareholding of defendant No.4. Though the lease agreement was entered into by the plaintiff with defendant No.4, it has come to light that in reality these containers were handled, managed and controlled by defendant No.1 in Mumbai and were in actual and constructive custody of defendant No.1. It has thereafter been pleaded that in order to evade the payments to the creditors the defendants have retained the containers belonging to the plaintiff for their personal use and benefit and by such conduct have converted the plaintiff's property received by the defendants as bailee and appropriated in their business. It is alleged that the defendants have therefore committed a fraud and have deployed those containers in the business of defendant No.1 which is the sister concern / alter ego/ nominee of defendant No.4. It is alleged that defendant No.1 and defendant No.4 are one and the same which is evident from the common directorship and the shareholding of both the companies as well as the common business being carried on by defendant No.1 and defendant No.4. Looking to these averments and considering the totality of the case, at least *prima facie* I am not satisfied that the defence espoused by defendant Nos.1 to 4 that they have no privity of contract with the plaintiff. In these circumstances, I think that the interest of justice would be

served if interim relief is granted in terms of prayer clauses (a), (d) and (f) of the Motion.

3 In view of the aforesaid discussion, interim relief is granted in terms of prayer clauses (a), (d) and (f) which reads thus -

- “(a) Pending the hearing and final disposal of the present suit this Hon'ble Court be pleased to order and direct the Defendants to jointly and / or severally to disclose on oath within such time as this Hon'ble Court deems fit the exact whereabouts / location of the containers referred to in Exhibit “H” to the plaint.
- (d) Pending the hearing and final disposal of the present suit this Hon'ble Court be pleased to pass an order and injunction restraining the defendants jointly and / or severally and / or their servants and/ or agents and/or assigns from using, selling, alienating, parting with, encumbering and/or creating any third party right and/or interest in relation to the containers set out in the schedule in Exhibit “H” to the plaint.
- (f) Pending the hearing and final disposal of the present suit, this Hon'ble Court be pleased to pass an order directing the defendants jointly and/or severally to disclose on oath list of all their assets and properties including bank accounts (and amounts lying to the credit of the Bank Account) within 1 week thereof or such time as this Hon'ble Court may deem fit.”

4 The reason for granting prayer clause (f) is because the claim of the plaintiff in the present suit is the substantial one. Looking at the conduct of the defendants, this relief needs to be granted otherwise it would cause grave prejudice and injustice to the plaintiff. The Notice of Motion is disposed of in the aforesaid terms. No order as to costs.

(B.P.COLABAWALLA, J.)