

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

SUMMONS FOR JUDGMENT NO. 49 OF 2019

IN

COMM. SUMMARY SUIT NO. 1030 OF 2019

(The order is corrected as per the speaking to the minutes order dtd.17/12/2019)

Dimples Infra

...Applicant

In the matter between

Dimples Infra

A partnership Firm duly registered under
The Indian Partnership Act, having it's
Principal place of business at 103, Mohan
Palace, TPS – 3, 57th Road, Borivali (West),
Mumbai – 400 092

...Plaintiff

Versus

Heer Mehta Landmark Developers Pvt. Ltd.

...Defendant

WITH

NOTICE OF MOTION NO. 2324 OF 2019

IN

COMM. SUMMARY SUIT NO. 1030 OF 2019

Heer Mehta Landmark Developers Pvt. Ltd.

...Applicant

In the matter between

Dimples Infra

A partnership Firm duly registered under
The Indian Partnership Act, having it's
Principal place of business at 103, Mohan
Palace, TPS – 3, 57th Road, Borivali (West),
Mumbai – 400 092

...Plaintiff

Versus

Heer Mehta Landmark Developers Pvt. Ltd.

A Private Limited Company, duly registered
under the Companies Act, 1956, having it's
Registered Office at – Service Road, Vile
Parle (East), Near Laxmi Narayan Temple,
Mumbai, Maharashtra – 400 099.

...Defendant

Mr. **Rashid** Khan, a/w Priyanka Kothari, i/b Sumi Soman, for the Plaintiff.

Mr. Mr. Karl Tamboley, for the Defendants.

Mr. A. Ponda, i/b Ms. U. M. Jhaveri, for the Applicant in Notice of Motion no.2324/2014.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 25th NOVEMBER, 2019.

PRONOUNCED ON: 12th DECEMBER, 2019.

JUDGMENT:-

1. This commercial summary suit is for recovery of a sum of Rs.14,07,21,403/- along with interest at the rate of 3% per month on the principal amount of Rs.8,58,00,000/- from the date of the suit till realisation, under a written agreement titled 'Deed of Cancellation' dated 25th August, 2017, annexed to the plaint.

2. The averments in the plaint can be summarised as under:

(a) The plaintiff firm deals in the business, *inter alia*, of development of properties and construction. The defendant is a private limited company registered under the Companies Act, 1956, and also deals in the business of development of properties. The defendant was developing a property situated at village Hariyali, Tal Kurla, Vikhroli (W), Mumbai, a part of which was occupied by the slum dwellers, who formed a society namely Shriram Nagar Co-operative Housing Society, under a

Slum Rehabilitation Scheme. As the project was stuck for want of funds, the defendant requested the plaintiff to infuse the funds and develop the said property.

(b) An agreement (Development Agreement) thus came to be executed on 5th June, 2014, under which the plaintiff agreed to pay an amount of Rs.10 Crore by way of consideration to the defendant for the development rights. It was, however, agreed that the plaintiff shall be entitled to 75% of free sale component and the defendant shall have right to the balance 25%. The plaintiff, in terms of the said agreement, infused funds to the tune of Rs.8,08,00,000/-, from time to time. However, the project could not be developed as the defendant could not obtain necessary permissions and get property cleared of the slums. Thus, the Deed of Cancellation came to be executed on 25th August, 2017, whereby and whereunder the parties agreed that the Development Agreement dated 5th June, 2014, shall stand cancelled. The defendant agreed to pay a sum of Rs.8,58,00,000/- to the plaintiff, inclusive of compensation for the cancellation, in full and final settlement of all the claims of the plaintiff within 180 days, from the day of the execution of the said Deed of Cancellation. It was further agreed that a grace period of 30 days would be provided to the defendant. A

stipulation for payment of interest beyond the grace period of 30 days was made in the Deed of Cancellation.

(c) The defendant failed to pay the amount as agreed under the Deed of Cancellation within the stipulated period. Initially, the plaintiff addressed a notice on 16th July, 2018, calling upon the defendant to pay the due amount. It was followed by a legal notice dated 9th October, 2018, preceding the suit. The defendant paid no heed. Hence this suit.

(d) After the writ of summons was served, the defendant appeared. The plaintiff, thereafter, took out this summons for judgment. The defendant has sought an unconditional leave to defend by filing an affidavit in support thereof.

(e) The substance of the resistance sought to be put-forth by the defendant is that though there was no default on the part of the defendant and the defendant was not obliged to repay the amount infused by the plaintiff, under the terms of the Development Agreement dated 5th June, 2014, yet, as the development could not materialise, the defendant in absolute good faith agreed to refund the amount invested by the plaintiff alongwith the compensation, by executing the Deed of Cancellation. In the peculiar facts and circumstances, in which the parties found themselves on account of the factors beyond

the control of the parties, which impeded the development of the slum rehabilitation scheme, no outer limit was stipulated for the payment of the said amount of Rs.8,58,00,000/- and, having regard to the said circumstances, it was agreed that the defendant would pay interest on the said amount, beyond the grace period, at the rate of 3% **p.a.** However, the plaintiff has forged the said clause in the deed of cancellation to make it read per month. The said interpolation in the agreement, by striking out alphabet 'a' to make it to read 'm', in handwriting, neither bears the signature of the executants nor the initials, to vouch for the correction. Since the claim of the plaintiff is based on a forged document and fabricated evidence, the defendant is entitled to an unconditional leave to defend the suit.

3. The defendant has also taken out Notice of Motion No.3224 of 2019 seeking a direction to the Prothonotary and Senior Mater / Registrar, High Court, Bombay, to lodge a complaint for the offences punishable under Sections 191, 192, 193, 196, 463, 468 and 471 before the Court of the jurisdictional Magistrate in accordance with the provisions contained in Section 195 read with Section 340 of the Code of Criminal Procedure, 1973 ('the Code').

4. In the affidavit in support of notice of motion, it is averred that the forgery of the relevant portion of clause (3) of the deed of cancellation is apparent and explicit and, thus, Mr. Rathin Patel, the partner of the plaintiff, who has committed the offences punishable under Sections 191, 192, 193, 196, 463, 468 and 471 is liable to be prosecuted for the same and, therefore, a direction for lodging the complaint be passed.

5. I have heard Mr. Khan, the learned Counsel for the plaintiff and Mr. Tamboley, the learned Counsel for the defendant in Summons for Judgment. Mr. Ponda, advanced submissions on behalf of the applicant/defendant, in the Notice of Motion.

6. From the nature of the defence raised by the defendant, it becomes evident that the prayers of an unconditional leave and the direction for lodging a complaint against the plaintiff are rested on the allegations of forgery in the Deed of Cancellation, especially the periodicity of the interest payable in the event of default. As the issue is inextricably intermingled I propose to decide the summons for judgment and the notice of motion by a common reasoning.

7. At the outset, it is imperative to note that the tenability of the claim is not questioned on the count of it not being

susceptible to summary procedure envisaged by Order XXXVII of the Code. Nor the following facts are in dispute. The execution of the development agreement dated 5th June 2014. The mutual obligations of the parties thereunder. An infusion of funds to the tune of Rs.8,08,00,000/- by the plaintiff. The slum rehabilitation project being not developed on account of certain hindrances. The agreement between the parties to cancel the development agreement by executing the Deed of Cancellation.

8. It is pertinent to note that the defendant does not dispute the fact that it had agreed to refund an amount of Rs.8,58,00,000/- to the plaintiff under the Deed of Cancellation. The non-payment of the said amount within the period stipulated under the agreement is also not in contest. The controversy between the parties revolves around the liability to pay interest over the said amount of Rs.8,58,00,000/-, after the grace period. The periodical rest at which the interest was to be paid is the bone of contention.

9. In the aforesaid backdrop, the prayer for an unconditional leave to defend is required to be appreciated. The legal position as regards the leave to defend in summary suit instituted under Order XXXVII of the Code is fairly crystallized. If the defendant

discloses, *prima facie*, fair and a reasonable defence, ordinarily, the defendant is entitled to an unconditional leave. In contrast to this, if the defence raised by the defendant appears frivolous, false, or sham the leave to defend shall be refused, and the plaintiff is entitled to judgment. The controversy, however, arises in those matters where there is a doubt as to whether the defendant has raised a triable issue, and the nature of the conditions to be imposed, if the Court comes to the conclusion to grant conditional leave to defend. There is a significant development in law, especially as regards the grant of leave on the condition as to deposit of the amount in the Court.

10. A four Judge Bench of the Supreme Court in the case of *Milkhiram (India) Private Ltd. and others vs. Chamanlal Bros.*¹ had an occasion to deal with the question of exercise of discretion in granting leave to defend a suit in accordance with the provisions contained in Order XXXVII Rule 3(3), as amended by the Bombay High Court. The Supreme Court after analysis of the provisions and the earlier pronouncements enunciated the legal position in the following words:

“It is indeed not easy to say in many cases whether the defence is a genuine one or not and, therefore, it should be left to the discretion of the trial Judge who has experience of such matters both at the bar and the bench to form his own tentative conclusion about the quality or nature of the defence

1 AIR 1965 Supreme Court 1698.

and determine the conditions upon which leave to defend may be granted. If the Judge is of opinion that the case raises a triable issue, then leave should ordinarily be granted unconditionally. On the other hand, if he is of opinion that the defence raised is frivolous, or false, or sham, he should refuse leave to defend altogether. Unfortunately, however, the majority of cases cannot be dealt with in a clear cut way like this and the Judge may entertain a genuine doubt on the question as to whether the defence is genuine or sham or in other words whether it raises a triable issue or not. It is to meet such cases that the amendment to O.37, R.2 made by the Bombay High Court contemplates that even in cases where an apparently triable issue is raised the Judge may impose conditions in granting leave to defend. Thus this is a matter in the discretion of the trial Judge and in dealing with it, he ought to exercise his discretion judiciously. Care must be taken to see that the object of the rule to assist the expeditious disposal of commercial causes to which the order applies, is not defeated. Care must also be taken to see that real and genuine triable issues are not shut out by unduly severe orders as to deposit. In a matter of this kind, it would be undesirable and inexpedient to lay down any rule of general application."

(emphasis supplied)

11. In the case of *M/s. Mechelec Engineers & Manufacturers vs. M/s. Basic Equipment Corporation*², the Supreme Court had enunciated the legal position in the following words:

"8. In *Smt. Kiranmoyee Dassi & Anr. v. Dr. J. Chatterjee*, Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 17 C.P.C. in the form of the following propositions (at p. 253):

(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the Defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the Defendant discloses such facts as may be

² (1976) 4 SCC 687.

deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the Plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the Plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the Defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the Plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the Defendant by enabling him to try to. prove a defence".

9. The case before us certainly does not fall within the class (e) set out above. It is only in that class of case that an imposition of the condition to deposit an amount in Court before proceeding further is justifiable."

12. In the case of *IDBI Trusteeship Services Limited vs. Hubtown Limited*³, the Supreme Court adverted to the question of binding efficacy of the propositions laid down in the case of *Mechelec* (supra), after the amendment of Order XXXVII of the Code in the year 1976. The Supreme Court noted that the judgment in the case of *M/s. Mechelec Engineers & Manufacturers vs. M/s. Basic Equipment Corporation*⁴, in turn, adverts to the propositions expounded in *Kiranmoyee Dassi v.*

³(2017) 1 Supreme Court Cases 568.

⁴(1976) 4 SCC 687.

*J. Chatterjee*⁵. The Supreme Court thereafter noticed the change in the provisions of Order XXXVII Rule 3, brought about in the year 1976, and concluded that the principles stated in paragraph 8 of the *Mechelec's* case (supra) would stand superseded in view of the amendment to Order XXXVII Rule 3 and binding decision of four Judges in *Milkhiram's* case (supra). The observations of the Court in paragraph 16, and restated propositions, formulated in paragraph 17, read as under:

“16. It is thus clear that O.37 has suffered a change in 1976, and that change has made a difference in the law laid down. First and foremost, it is important to remember that *Milkhiram* case is a direct authority on the amended O.37 provision, as the amended provision in O.37 Rule 3 is the same as the Bombay amendment which this Court was considering in the aforesaid judgment. We must hasten to add that the two provisos to sub-rule (3) were not, however, there in the Bombay amendment. These are new, and the effect to be given to them is something that we will have to decide. The position in law now is that the trial Judge is vested with a discretion which has to result in justice being done on the facts of each case. But Justice, like Equality, another cardinal constitutional value, on the one hand, and arbitrariness on the other, are sworn enemies. The discretion that a Judge exercises under Order 37 to refuse leave to defend or to grant conditional or unconditional leave to defend is a discretion akin to Joseph's multi-coloured coat – a large number of baffling alternatives present themselves. The life of the law not being logic but the experience of the trial Judge, is what comes to the rescue in these cases; but at the same time informed by guidelines or principles that we propose to lay down to obviate exercise of judicial discretion in an arbitrary manner. At one end of the spectrum is unconditional leave to defend, granted in all cases which present a substantial defence. At the other end of the spectrum are frivolous or vexatious defences, leading to refusal of leave to defend. In between these two extremes are various kinds of defences raised which yield conditional leave to defend in most cases. It is these

defences that have to be guided by broad principles which are ultimately applied by the trial Judge so that justice is done on the facts of each given case.

17. Accordingly, the principles stated in paragraph 8 of Mechelec's case will now stand superseded, given the amendment of Order 37 Rule 3, and the binding decision of four judges in Milkhiram's case, as follows:

17.1 If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit;

17.2 If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend;

17.3 Even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security;

17.4 If the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5 If the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith;

17.6 If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court."

(emphasis supplied)

13. In the backdrop of the aforesaid enunciation of the legal position, the defence sought to be urged in the case at hand

needs to be appreciated so as to determine in which of the aforesaid categories it would properly fall. Mr. Tamboly, urged with a degree of vehemence, that in the backdrop of the egregious forgery committed by the plaintiff in the Deed of Cancellation, which is the foundation of the claim of the plaintiff, the defendant can be said to have raised triable issues which warrant consideration. On a plain and naked reading of clause (3) of the Deed of Cancellation, an inference become inescapable that the **defendant** has a fair and reasonable defence, if not a positively good defence, and thus the defendant is entitled to an unconditional leave to defend. In short, according to Mr. Tamboly, the case of the defendant would fall within the ambit of clause **17.2** of the aforesaid propositions. In any event, according to Mr. Tamboly, the defence would fall within the ambit of clause **17.3**, if the Court comes to the conclusion that there is a doubt as regards the defendant's good faith or the genuineness of the triable issues. The Court may, in that event, impose conditions both as the time or mode of trial but in view of the fabrication of the evidence the defendant cannot be directed to make payment in the Court or furnish security, urged Mr. Tamboly.

14. In opposition to this, Mr. Khan, the learned Counsel for the plaintiff, would urge that the defendant has no substantial defence nor the defendant has raised any triable issues. The alleged forgery in the deed of cancellation is a figment of the imagination and nothing but a frivolous, vexatious and moonshine defence. Thus, the plaintiff is entitled to the summons for judgment, especially when the defendant admits in no uncertain terms that he had agreed to refund the amount of Rs.8,58,00,000/- and did not pay the same within the period stipulated under the Deed of Cancellation.

15. The learned Counsel for the plaintiff invited the attention of the Court to the corrections, in ink, carried out in the Deed of Cancellation at various places apart from clause (3). Thus, the fact that the correction in the periodicity i.e. of the payment of interest at the rate of 3% per annum to per month does not bear the counter signature or initial of the executants is not of determinative significance. Moreover, the defendant did not raise the said objection at the earliest possible opportunity when the plaintiff had served notice dated 16th July, 2018, calling upon the defendant to make the payment. Thus, the said defence is a creature of an afterthought and warrants no consideration, urged Mr. Khan.

16. Undoubtedly, the intrinsic evidence of the document dated 20th August, 2017, is of material significance. There is substance in the submission on behalf of the plaintiff that there are multiple places where insertions/corrections have been made, in ink, in the Deed of Cancellation. None of those insertions/corrections bear counter signature and/or initials of the executants. It would thus be rather hazardous to draw an inference of forgery on the basis of the fact that there is an interpolation in the periodicity of the payment of interest from alphabet 'a' to 'm', in ink.

17. There is another factor which has a material bearing upon the controversy. Clause 33.D and 33.E of the Development Agreement dated 5th June, 2014 read as under:

“33.D In the event if the party of the First Part wishes to continue the project on its own funds, the party of the First Part shall pay the entire amount infused by the Party of the Second Part in the said project without interest within six months from the date of intimation of termination.

33.E In the event if the party of the First Part fails to pay the aforesaid entire amount infused by the Party of the Second Part in the said project within six months then the Party of the First Part shall pay the entire amount with a grace period of further 3 months with interest at rate of 2% per month thereon for that particular additional period. However till such time the amounts are paid to the Party of the Second Part, this Agreement shall remain valid and subsisting and in full force and Party of Second Part shall continue to have all the rights provided in this Agreement.”

(emphasis supplied)

18. It is evident that under the Development Agreement dated 5th June, 2014 it was agreed that in the event the defendant developed the project on its own, the amount infused by the plaintiff would be returned, without interest, within six months from the date of intimation of termination. What follows is of significance. Beyond the said period of six months and grace period of three months, the defendant had agreed to pay interest on the due amount at the rate of 2% per month. Thus, it cannot be said that the parties had never intended to pay interest per month on the delayed payment.

19. Mr. Tamboly then urged that the defendant would not have agreed to pay interest at the rate of 36% p.a. on the sum of Rs.8,58,00,000/-. One, there was no obligation upon the defendant to repay the amount as the Development Agreement was not terminated till the execution of the Deed of Cancellation. Two, the defendant had already agreed to pay an amount of Rs.50,00,000/- over and above the amount infused by the plaintiff, by way of compensation. Three, the parties were aware of the difficulties in the execution of the development project and in those circumstances the defendant would never agree to pay interest such at a steep rate.

20. The argument appears attractive at the first blush. Apparently, interest at the rate of 36% p.a. is stiff one. The argument, however, loose sight of the fact that the converse is also equally vulnerable. Nobody would expect the availability of funds at the rate of **3% p.a.**, in the money market, even at the best of the times.

21. The situation which thus emerges is that the questions as to whether the defendant had agreed to pay interest at the rate of 3% per month and whether the plaintiff is guilty of forgery and fabrication of the document to make the application of interest at the rate of 3% per month, are the matters which warrant adjudication. It is neither practicable nor advisable to arrive at even a tentative finding on this aspect at this stage of the proceedings. The issue cannot be decided one way or the other sans evidence. Thus, the defendant is entitled to leave to defend.

22. The question which now come to the fore is whether the defendant is entitled to an unconditional leave. As indicated above, there is no qualm over the fact that the defendant had acknowledged the liability to pay a sum of Rs.8,58,00,000/- under the Deed of Cancellation. Whether the defendant is liable to pay interest at the rate of 3% per annum or per month has

no bearing on the said liability. The situation is thus covered by the clause 17.6 of the propositions enunciated in the case of *Hubtown Limited* (supra), which prescribes that leave shall not be granted unless the amount admitted to be due is deposited by the defendant in Court, even if triable issues or a substantial defence is raised by the defendant.

23. Mr. Tamboley, the learned Counsel for the defendant attempted to wriggle out of the situation, which arises on account of an unequivocal admission of liability, by pressing into service a submission that since the claim of the plaintiff is based on fraud, the plaintiff is not entitled to any relief. To this end, reliance was placed on the judgment of the Supreme Court in the case of *S. P. Chengalvaraya Naidu (Dead) by L.Rs. vs. Jagannath (Dead) by L.Rs. and ors.*⁶, wherein the Supreme Court had held that a person whose case is based on falsehood has no right to approach the Court and he can be summarily thrown out at any stage of the litigation.

24. There is no quarrel with the aforesaid proposition. However, as indicated above, the question as to whether the claim of the plaintiff is rested in fraud is a matter for adjudication. It is not the case of the defendant that the taint

6 1993(6) SC 331.

of fraud is attached to the liability to pay the amount of Rs.8,58,00,000/- as well. Thus, the aforesaid pronouncement does not advance the cause of the defendant, at least, at this stage of the proceeding.

25. To complete and conclude the discussion on the summons for judgment, a profitable reference can be made to a Full Bench judgment of this Court in the case of *SICOM Ltd vs. Prashant S. Tanna & others*⁷, wherein it was enunciated by this Court that at the hearing of the summons for judgment, it will be open to the Court to pass a decree for a part of the claim and grant unconditional leave to defend the suit in respect of rest of the claim.

26. I am, thus, impelled to hold that the plaintiff is entitled to a decree for the sum of Rs.8,58,00,000/-, which is an admitted liability under the written contract, and the defendant is entitled to an unconditional leave to defend the suit as regards the liability to pay interest on the said amount of Rs.8,58,00,000/- for the period, after the expiry of the grace period stipulated thereunder.

27. This propels me to the consideration of the prayer in the Notice of Motion. Mr. Ponda strenuously urged that in view of

7AIR 2004 Bombay 186.

the apparent forgery in the Deed of the Cancellation, which is sought to be tendered and relied upon as an evidence to support the claim, a direction for lodging of a complaint under Section 195 read with Section 340 of the Code is expedient in the interest of justice. Mr. Ponda further submitted that the fact that the Deed of Cancellation appears to have been forged before it is tendered in Court, ought not restrain this Court from exercising the power under Section 340 of the Code.

28. In order to lend support to the aforesaid submission, Mr. Ponda placed a strong reliance upon a recent judgment of the Supreme Court in the case of *Sasikala Pushpa & ors. vs. State of Tamil Nadu*⁸, wherein the allegations were that the Vakalatnama was forged to show that it was signed at Madurai, though the executants thereof were, on the given date, shown to be at a far place. The Supreme Court, in the said case, dealt with the submission on behalf of the State that though the forgery of the document is committed outside the precincts of the Court and long before its production in the Court, the same can be treated as the one affecting the administration of justice. The Supreme Court, after referring to the previous

8AIR 2019 SC 2280.

pronouncement, in the case of *Sachida Nand Singh and anr. vs.*

*State of Bihar and anr.*⁹ observed as under:

“17. Mr. Yogesh Kanna, the learned Counsel appearing for the State of Tamil Nadu placed reliance upon Sachida Nand Singh and submitted that even if any offence involving forgery of document is committed outside the precincts of the court and long before its production in the court, the same would also be treated as one affecting the administration of justice. After referring to various judgments, in Sachida Nand Singh, it was held as under:

11. The scope of the preliminary enquiry envisaged in Section 340(1) of the Code is to ascertain whether any offence affecting administration of justice has been committed in respect of a document produced in court or given in evidence in a proceeding in that Court. In other words, the offence should have been committed during the time when the document was in custodia legis.

12. It would be a strained thinking that any offence involving forgery of a document if committed far outside the precincts of the Court and long before its production in the Court, could also be treated as one affecting administration of justice merely because that document later reached the court records.

18. There could be no two views about the proposition that even if forgery is committed outside the precincts of the court and long before its production in the court, it would also be treated as one affecting the administration of justice.”

(emphasis supplied)

29. Banking upon the aforesaid observations in paragraph 18 that there can be no two views about the proposition that even if forgery is committed outside the precincts of the court and long before its production in the Court, it would also be treated as one affecting administration of justice, Mr. Ponda submitted that the recourse to the provisions contained in

9(1998) 2 SCC 493.

Section 340 of the Code is warranted in the facts of the case at hand, as well.

30. In the backdrop of this submission, it is imperative to consult the Constitution Bench judgment of the Supreme Court in the case of *Iqbal Singh Marwah & anr. vs. Meenakshi Marwah & Anr*¹⁰, wherein the Supreme Court dealt with the conflict of opinion between two three Judge Bench judgments of the Supreme Court in the cases of *Surjit Singh vs. Balbir Singh*¹¹ and *Sachida Nand Singh* (supra) regarding interpretation of Section 195(1)(b)(ii) of the Code.

31. In the case of *Surjit Singh* (supra) it was observed as under:

“It would thus be clear that for taking cognizance of an offence, the document, the foundation of forgery, if produced before the court or given in evidence, the bar of taking cognizance under Section 195(1)(b)(ii) gets attracted and the criminal court is prohibited from taking cognizance of offence unless a complaint in writing is filed as per the procedure prescribed under Section 340 of the Code by or on behalf of the Court. The object thereby is to preserve purity of the administration of justice and to allow the parties to adduce evidence in proof of certain documents without being compelled or intimidated to proceed with the judicial process. The bar of Section 195 is to take cognizance of the offence covered thereunder.”

32. In the case of *Sachida Nand* (supra) another three Judge Bench had expounded the legal position, in paragraphs 10 and 11 [Extracted above, in the case of *Sasikala* (supra)].

102005 (4) SCC 370.

111996 (3) SCC 533.

33. The controversy was set at rest by the Constitution Bench as under:

“25. In view of the discussion made above, we are of the opinion that Sachida Nand Singh has been correctly decided and the view taken therein is the correct view. Section 195(1)(b)(ii) Cr.P.C. would be attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in a proceeding in any Court i.e. during the time when the document was in custodia legis.”

(emphasis supplied)

34. The Supreme Court has, thus, held in unambiguous terms that the bar under Section 195(1)(b)(ii) of the Code would be attracted only when the offences enumerated in the said provision have been committed with respect of a document, *custodia legis*. The Supreme Court has held that the enunciation in the case of ***Sachida Nand*** (supra) that the bar is not attracted where forgery of document was committed before the document was produced in Court, was correct.

35. Faced with the aforesaid situation, Mr. Ponda attempted to salvage the position by advancing two submissions. First, ***Iqbal Singh Marva*** (supra) deals with a situation covered by sub-clause (ii) of clause (b) of Section 195(1) of the Code and does not deal with sub-clause (i) thereof, which governs the case at hand. Two, the recent judgment of the Supreme Court in the case of ***Sasikala*** (supra) refers to and interprets ***Iqbal Singh***

Marwah (supra), and, thus, the fact that forgery has not been committed *cutodia legis* is not determinative.

36. I am afraid to accede to the aforesaid submission. On facts, it is pertinent to note that the prayer in the notice of motion is for a direction to lodge a complaint with the jurisdictional magistrate for the offences punishable under Section 463, 468, 471 which are covered by sub-clause (ii) of clause (b) of Section 195(1) of the Code. Secondly, the alleged forgery is the substratum on which the edifice of fabrication of evidence is built. Thus, the alleged forgery of the Deed of Cancellation is the primary and foundational fact, which is required to be established to sustain the allegation that the plaintiff fabricated evidence.

37. If the analysis of the provisions of Section 195, by the Supreme Court, in the case of ***Iqbal Singh Marwah*** (supra) is properly read then it would be audacious to draw an inference that the situation contemplated by sub-clause (i) of clause (b) of Section 195(1) is not at all considered by the Supreme Court. Paragraph 9 of the judgment in the case of ***Iqbal Singh Marwah*** (supra) is instructive and reads as under:

“9. The scheme of the statutory provision may now be examined. Broadly, Section 195 Cr.P.C. deals with three distinct categories of offences which have been described in clauses (a), (b)(i) and (b)(ii) and they relate to (1) contempt of

lawful authority of public servants, (2) offences against public justice, and (3) offences relating to documents given in evidence. Clause (a) deals with offences punishable under Sections 172 to 188 IPC which occur in Chapter X of the IPC and the heading of the Chapter is 'Of Contempts Of The Lawful Authority Of Public Servants'. These are offences which directly affect the functioning of or discharge of lawful duties of a public servant. Clause (b)(i) refers to offences in Chapter XI of IPC which is headed as 'Of False Evidence And Offences Against Public Justice'. The offences mentioned in this clause clearly relate to giving or fabricating false evidence or making a false declaration in any judicial proceeding or before a Court of justice or before a public servant who is bound or authorized by law to receive such declaration, and also to some other offences which have a direct co-relation with the proceedings in a Court of justice (Sections 205 and 211 IPC). This being the scheme of two provisions or clauses of Section 195, viz., that the offence should be such which has direct bearing or affects the functioning or discharge of lawful duties of a public servant or has a direct correlation with the proceedings in a court of justice, the expression "when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in a Court" occurring in clause (b)(ii) should normally mean commission of such an offence after the document has actually been produced or given in evidence in the Court. The situation or contingency where an offence as enumerated in this clause has already been committed earlier and later on the document is produced or is given in evidence in Court, does not appear to be in tune with clauses (a)(i) and (b)(i) and consequently with the scheme of Section 195 Cr.P.C. This indicates that clause (b)(ii) contemplates a situation where the offences enumerated therein are committed with respect to a document subsequent to its production or giving in evidence in a proceeding in any Court.

(emphasis supplied)

38. Even otherwise, the expediency of the direction for initiating the prosecution by resorting to the provisions contained in Section 340 of the Code is a matter of decisive significance. A direction for lodging a complaint can be issued provided the Court finds it expedient in the interest of justice. The test is of the impact of the complained act on the

administration of justice rather than its consequence on the affected party. This critical component of exercise of jurisdiction to direct lodging of a complaint is underscored by the observations of the Supreme Court, in paragraph 18, in the case of *Iqbal Singh Marwah* (supra), which read as under:

“18. In view of the language used in Section 340 Cr.P.C. the Court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(b), as the Section is conditioned by the words "Court is of opinion that it is expedient in the interest of justice." This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the Court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195(i)(b). This expediency will normally be judged by the Court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in Court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the Court may not consider it expedient in the interest of justice to make a complaint. The broad view of clause (b)(ii), as canvassed by learned counsel for the appellants, would render the victim of such forgery or forged document remedyless. Any interpretation which leads to a situation where a victim of a crime is rendered remedyless, has to be discarded.”

(emphasis supplied)

39. In the backdrop of the aforesaid enunciation of the legal position, reverting to the facts of the case, at this juncture, the matter is in the realm of allegations. As indicated above, the

question of alleged forgery is a matter for adjudication post evidence. At this stage, there is no material of unimpeachable character which would warrant exercise of jurisdiction under Section 340 of the Code. Thus, the notice of motion does not deserve to be countenanced.

40. The conspectus of the aforesaid consideration is that the summons for judgment deserves to be made absolute to the extent of the principal amount of Rs.8,58,00,000/-. The defendant deserves an unconditional leave to defend the suit as regards the component of interest, claimed by the plaintiff. Whereas, the Notice of Motion seeking direction for lodging of complaint deserves to be dismissed. Hence, the following order.

: O r d e r :

(I) Summons for Judgment No.49 of 2019 is made absolute to the following extent:

- (a) The defendant do pay a sum of Rs.8,58,00,000/- to the plaintiff.
- (b) A decree be drawn and sealed expeditiously.
- (c) The defendant is entitled to an unconditional leave to defend the suit so far as the claim of interest, made by the plaintiff.

- (d) The defendant may file written statement within 30 days from today.
 - (e) Summary suit be listed after six weeks.
- (II) Notice of Motion No. 2324 of 2019 stands dismissed.

[N. J. JAMADAR, J.]

At this stage, the learned Counsel for the defendant seeks stay to the execution and operation of the decree.

Since the liability to pay the amount of Rs.8,58,00,000/- under the Deed of Cancellation is undisputed, the prayer for stay for execution and operation of decree does not deserve countenance.

Hence, the oral application for stay stands rejected.

[N. J. JAMADAR, J.]