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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

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FIRST APPEAL NO.1356 OF 2019

ACC Ltd. ...Appellant
V/s.
Dr. Rustum Samboyce And Ors. ...Respondents

WITH
CIVIL APPLICATION (CAF) NO.2062 OF 2017
IN
FIRST APPEAL NO.1356 OF 2019

Mr. Zal Andhyarujina, Senior Advocate a/w Ms. Serena Jethmalani, Counsel, Mr. Nishit Dhruva, Ms. Khushbu Chhajer, Mr. Shahbaz Malbari and Mr. Yash Dhruva i/by MDP & Partners for Appellant.

Mr. Sheroy M. Bodhanwalla, Counsel a/w Mr. Sakshi Sharma and Mr. Burjis Doctor i/by M/s. Bodhanwalla & Co. Advocates & Solicitors for Respondent No.1.

Mr. U. Mannadiar i/by M/s. Mannadiar & Co. for Respondent No.2.

Mr. Sameer Pandit a/w Mr. Sarrah Khambati and Mr. Vaibhav Hari i/by M/s. Wadia Ghandy & Co. for Respondent No.3.

CORAM : AMIT BORKAR, J.

DATED : FEBRUARY 03, 2023

PC.:

1. Arguable questions are raised.
2. **Admit.**
3. The appellant to file private paper book within one (1) year from today.

4. In case the appellant fails to file private paper book within one (1) year from today, the appeal shall stand dismissed without further reference to the court.

CIVIL APPLICATION (CAF) NO.2062 OF 2017

5. The applicant is challenging judgment and decree dated 27th March 2017 holding that the respondent is entitled to retrieve 3912 and 6250 shares of defendant no.1-company along with accrual rights, bonus, dividends, etc. since 1st November 2005. According to defendant no.1, the essential ingredients of finding of negligence are as follows:-

- (i). Duty of care;
- (ii). Duty owe to the plaintiff;
- (iii). Careless breach of such duty;

6. According to the appellant in the impugned judgment there is no discussion about either the duty of care or duty owed to the plaintiff. The court while passing decree has considered oral evidence led by the plaintiff and based on communication made on behalf of plaintiff that the shares are stolen, recorded a finding of negligence.

7. According to the plaintiff, the defendant no.1 owes fiduciary liability to take care. According to him, the trial court has taken overall view of the matter and recorded finding of negligence and, therefore, present appeal neither raises question of fact nor question of law and is, therefore, liable to be dismissed under Order XLI Rule 11 of the Code of Civil Procedure, 1908.

8. Having considered the submission made on behalf of both parties, in my opinion, the factors necessary to prove negligence have been succinctly led down in the case of **Rajkot Municipal Corporation Vs. Manjulben Jayantilal Nakum & Ors**, reported in (1997 (9) SCC 552). The Apex Court has observed that not every carelessness conduct which causes damage will give rise to tortious liability. Claim for injury and damage may be founded on breach of contract or tort. The degree of liability depends on degree of mental element. The elements of tort of negligence consist.

- (a). Duty of care;
- (b). Duty owed to the plaintiff;
- (c). Careless breach of such duty;

9. It is held that negligence does not entail liability unless the law exacts a duty in the given circumstances to observe care. Duty is obligation recognized by law to avoid conduct fraught with unreasonable risk of damage to others.

10. In paragraph no.57, the Apex Court observed that each case requires to be examined in the light of special circumstances which are whether the defendant owed a duty of care to the plaintiff, whether the plaintiff is a person or a class of persons to which the defendant owed a duty of care, whether the defendant was negligent in performing that duty or omitted to take such reasonable care in the performance of the duty, whether damage must have resulted from that particular duty of care which the defendant owed to the particular plaintiff or class of persons.

11. On perusal of the impugned judgment, it appears that none of the factors which are necessary to record finding of negligence have been considered by the trial court. *Prima-facie*, perusal of the plaint does not show that the claim of the plaintiff is based either on a right created under statute or under the contract. In absence of pleading or legal right or finding to that effect by the trial court, such decree, *prima-facie*, could not have been passed.

12. For the aforesaid reasons, there shall be interim relief in terms of prayer clause (b) during pendency of appeal.

13. Civil Application is disposed of. No costs.

(AMIT BORKAR, J.)