RAMESHWAR LAXMAN DILWALE

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO.9258 OF 2024
IN
COMMERCIAL FIRST APPEAL NO.8 OF 2024

Alleima India Pvt. Ltd. .. Applicant/Appellant
Vs.
Tarini Steel Co. Ltd .. Respondent

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Mr. Sharan Jagtiani, Senior Advocate alongwith Mr. Rohan Cama, Mr. Vishal Narichania, Ms. Debarshi Dutta, Ms. Usha Dasgupta instructed by Mr. Biswadeep Chakravarty, Advocates for the applicant.
Dr. Abhinav Chandrachud alongwith Mr. Samay Pawar for the respondent.

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CORAM : A.S. CHANDURKAR & RAJESH S. PATIL, JJ

DATE : 26th JUNE 2024.

P.C. :

1. This application has been preferred by the appellant-original defendant with a prayer for staying the effect and operation of the judgment dated 20/02/2024 passed by the learned District Judge-2, Pune in Special Civil Suit No.135 of 2016. By that judgment, the suit of specific performance of agreement dated 11/12/2010 as well as for damages and compensation for losses sustained due to breach of the contract came to be partly decreed. It was held that the respondent-plaintiff was entitled to an amount of Rs. 5,40,00,000/-(Five Crores Forty Lacs) to be paid by the defendant alongwith interest @ 10% per annum from the date of filing of

the suit till realization.

2. In support of the prayers made in the present application, it is submitted by Mr. Sharan Jagtiani, learned Senior Advocate for the defendant that the trial Court committed an error in partly decreeing the suit as filed. Referring to the issues framed by the trial Court below Exhibit-39, it was submitted that without framing any issue and without due notice to the defendant, the trial Court proceeded to record a finding that the signatory to the written statement had no authority to sign and verify it. By upholding the contention raised on behalf of the plaintiff during the course of final arguments, the trial Court held that the written statement filed at Exhibit-14 could not be taken into consideration for the reason that the signatory had signed and verified the written statement without any valid authorisation. Though the defect of non-authorisation of the signatory was curable, no opportunity in that regard were granted to the defendant. Thus by refusing to take the written statement into consideration and consequentially proceeding to accept the pleadings in the plaint as non-traversed, the suit was adjudicated. It was not permissible for the trial Court to do so especially since no issue in that regard was framed as a result of which the defendant did not have any opportunity to defend itself on that aspect or to cure that defect. On the

contrary, the act of filing the written statement through the said signatory was impliedly ratified by the defendant. This was clear from the deposition of the Vice President of the defendant-Company who was examined before the trial Court. It was further submitted that though the value of the contract entered into between the parties was for an amount of Rs.1,51,00,00/- (One Crore Fifty One Lacs), the decree passed was much in excess of that amount without indicating the basis for the same. There was no evidence led by the plaintiff to support the prayer for grant of damages. The trial Court despite noticing that there were various admissions extracted in the deposition of the plaintiff's-witnesses failed to take into consideration the same. It was urged that except the impugned judgment, the Court could not take into consideration the record of the proceedings while considering the prayer for grant of relief under Order XLI Rule 1(3) of the Code of Civil Procedure, 1908 (for short, "the Code"). Referring to various findings recorded by the trial Court which according to the learned Senior Advocate were without any supporting evidence, it was submitted that an exceptional case having been made out by the defendant, the execution of the decree ought to be stayed unconditionally. In support of aforesaid submissions, reliance was placed on the decisions in ***(Palmview Investments Overseas Limited Vs. Ravi Arya and Others), (2023) 1 HCC (Bom) 259, (United Bank of India Vs. Naresh Kumar and***

Others, (1996) 6 SCC 660, (Alcon Electronics Pvt. Ltd. Vs. Celem S. A., (2015(1) Mh.L.J., (Kailash Nath Associates Vs. Delhi Development Authority and Another, (2015) 4 SCC 136, (Modula India Vs. Kamakshaya Singh Deo, (1988) 4 SCC 619, (Sushma Arya & Ors. Vs. Palmview Investments Overseas Ltd & Ors., (Special Leave to Appeal (c) No(s). 16356/2023, (Sanjay Mishrimal Punamiya of Mumbai Indian Inhabitant Vs. Sheikhah Fadiah Saad Al Abdulla, & Ors.), 2022 SCC OnLine Bom 631 : (2022) 3 Bom CR 315, and (Sanjay Mishrimal Punamiya Vs. Sheikhah Fadiah Saad Al Abdulla & Ors.), Special Leave to Appeal (c) No.6287/2022, it was thus submitted that the Interim Application be allowed and the execution of the decree under challenge be stayed without requiring the defendant to deposit any amount.

3. Per contra, Dr. Abhinav Chandrachud, learned Advocate appearing on behalf of the plaintiff opposed the prayers made in the Interim Application. He submitted that the learned Judge of the trial Court was justified in refusing to consider the written statement as duly verified inasmuch as the signatory to the written statement had not been duly authorised to verify it. Referring to the verification clause, it was submitted that the signatory on the basis of the record available had affirmed the written statement. The signatory had no personal knowledge

of the facts of the case nor was she acquainted with the relevant facts. Reference was made to the provisions of Order VI Rules 14 and 15 as well as Order XXIX Rule 1 of the Code. It was then submitted that while considering a prayer for stay under provisions of Order XLI Rule 1 (3) of the Code it was permissible for the appellate Court to consider the entire material on record before coming to the conclusion as to whether any exceptional case for grant of stay had been made out. Referring to various exhibited documents in the form of exchange of communications between the parties, it was urged that the defendant had sought to offer an amount of Rs.50,00,000/-(Fifty Lacs) towards settlement of the plaintiff's dues. This offer was not stated to be "without prejudice" inasmuch as such stand was not taken in the communications exchanged thereafter. It was only in the written statement that it was sought to be pleaded that the offer of Rs.50,00,000/-(Fifty Lacs) towards full and final settlement was then made without prejudice. This was clearly by way of an afterthought. The learned counsel referred to the deposition of the witnesses examined before the trial Court. He also relied upon the decisions in ***(Malwa Strips Private Limited Vs. Jyoti Limited), (2009) 2 SCC 426, (Sihor Nagar Palika Bureau Vs. Bhabhlubhai Virabhai & Co.), (2005) 4 SCC 1, (State Bank of Travancore Vs. Kingston Computers India Private Limited), (2011) 11 SCC 524,(New Shelter Enterprises and Others Vs. Meenakshi w/o Sudhir Gupta***

and another), 2018 Mh.L.J., (Saritha S. Nair Vs. Hibi Eden), (2021) 14 SCC 148, (Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh and Another), (2006) 1 SCC 75, (State of Rajasthan and Others Vs. Shiv Dayal and Another), (2019) 8 SCC 637, (R. S. Anjayya Gupta Vs. Thippaiah Setty and Others), (2019) 7 SCC 300 and (M/s. Majula Pvt. Ltd. Vs. Anil Kumar Sen & Ors.), (2010) SCC OnLine Cal 3663. Since a money decree had been passed and there was no exceptional case made out by the defendant for staying effect and operation of the decree, its execution could be stayed subject to the defendant depositing the decretal amount. It was thus submitted that subject to imposing such conditions, the decree could be stayed.

4. We have heard the learned counsel for the parties on the prayer for grant of interim relief in the form of stay to the effect and operation of the impugned judgment. At the outset, it must be noted that the appeal as preferred is under Section 96 of the Code read with Section 13 of the Commercial Courts Act, 2015. The decree as passed is subject to challenge on facts as well as on law. Since the defendant claims that the effect and operation of the decree passed by the trial Court be stayed unconditionally, it would be necessary to prima facie consider whether any exceptional case in that regard has been made out. According to the

defendant, its defence as raised in the written statement has not been permitted to be relied upon on the ground that the written statement was verified by a signatory who was not acquainted with the facts of the case and that valid authorisation in her favour was not placed on record. This conclusion according to the defendant had been recorded without framing any issue and without due notice to the defendant. The plea in that regard was raised only at the stage of final arguments which took the defendant by surprise. No opportunity to cure the defect, if any, was provided to the defendant. According to the plaintiff, consideration of this aspect was permissible and that it was the defendant who was responsible for defective verification.

5. It is true that the issues framed at Exhibit-39 do not refer to any issue based upon the verification of the written statement being defective. It appears that during the course of final arguments such plea was raised on behalf of the plaintiff which aspect was thereafter considered by the trial Court. Prima facie, in absence of any issue being framed in that regard, the trial Court ought to have put the parties and especially the defendant on notice that it intended to consider the aspect of defective verification. This would have given an opportunity to the defendant to meet that ground and if necessary cure the defect in that regard. Such

opportunity was not given and the trial Court thereafter discarded the written statement filed by the defendant. It in fact proceeded to observe that all the allegations made in the plaint were required to be taken as admitted or undisputed in absence of a properly verified written statement which observation can be found in paragraph 45 of the impugned judgment. To that extent, prima facie we find that prejudice has been caused to the defendant.

6. As regards the quantum of damages, the trial Court has observed in paragraph 70 that there was no pre-estimation of liquidated damages nor there was any stipulation regarding the penalty clause if there was breach of contract. On the premise that there was such breach of contract, the plaintiff was held entitled to damages/compensation though actual loss or damages were not proved. Thus by accepting the pleadings made in the plaint, the decree in that regard came to be passed. The basis on which this finding has been recorded while determining the quantum of damages in our view, prima facie, makes out a strong case in favour of the defendant.

7. We are not in a position to accept the defendants' contention that while considering an application under Order XLI Rule 1(3) of the Code, it

is only the impugned judgment that can be looked into and not any other material on record. In our view, besides the impugned judgment the exhibited documents on record can always be taken into consideration by the Court while considering an application for stay under provisions of Order XLI Rule 1(3) of the Code. There is no prohibition from considering exhibited documents even at this interlocutory stage.

Having said that we find from the exhibited documents on record that the defendant did offer an amount of Rs.50,00,000/-(Fifty Lacs) to the plaintiff towards full and final settlement of the plaintiff's dues. We have not been shown any document by the defendant offering the aforesaid amount without prejudice to its rights. Such stand however has been taken for the first time in the written statement. The contention urged on behalf of the plaintiff that such plea was taken for the first time in the written statement thus making it doubtful has some substance. There are other communications on record in which the defendant has accepted aspects that would require consideration while determining the entitlement of the plaintiff. It is true that if an exceptional case is made out, the Court in exercise of powers under Order XLI Rule 1(3) of the Code could direct grant of unconditional stay. However, having prima facie considered the exhibited documents as well as the deposition of witnesses and after considering the ratio of the decisions cited by both sides, we are of the view that the effect and operation of the decree passed by the trial Court is liable to be stayed subject to the appellant-defendant depositing an amount of Rs.50,00,000/-(Fifty Lacs) in this Court and also furnishing solvent security to the satisfaction of the Registrar (Judicial) for a further amount of Rs.50,00,000/-(Fifty Lacs) within a period of four weeks from today. Subject to such compliance, the effect and operation of the judgment dated 20/02/2024 passed in Special Civil Suit No.135 of 2016 shall remain stay during the pendency of the First Appeal.

8. The Interim Application is disposed of in aforesaid terms.

[RAJESH S. PATIL, J] **[A.S. CHANDURKAR, J.]**