

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION (L) NO. 2234 OF 2014
IN
THIRD PARTY NOTICE NO. 9 OF 2014
IN
SUIT NO. 173 OF 2014

National Spot Exchange Limited

..... Applicant

IN THE MATTER BEWTEEN

Modern India Ltd. & Ors.

..... Plaintiffs

VERSUS

Financial Technologies (India) Limited & Ors. Defendants

Mr.S.U.Kamdar, Senior Advocate, a/w.Dr.Birendra Saraf, Mr.Ameet Naik, Ms.Anuja Jhunjunwala, i/b. Naik Naik & Co. for the Applicant in CHS.

Mr.Akshay Patil, a/w. Ms.Hiral Thakkar, i/b. Federal & Rashmikant for the Plaintiffs.

Mr.S.P.Bharti, i/b. Mr.P.R.Yadav for Third Party Noticees.

CORAM : R.D. DHANUKA, J.

DATED : 23rd DECEMBER, 2014

P.C.

By this notice of motion, the applicant (original defendant no.2) seeks decree on admission in terms of order 12 rule 6 of the Code of Civil Procedure, 1908 for the sum of Rs. 22,95,00,000/- admitted to be due and payable by third party noticee no.1 to the applicant (original defendant no.2) plus interest at the rate of 18% per annum from August 2013 till the date of payment and for other reliefs.

2. Mr.Kamdar, learned senior counsel appearing for the applicant invited my attention to the proposal made by Mr.Mohit Aggarwal on behalf of Ms.Shilpa

Aggarwal for discharge of the alleged liability and to suggest the liability of Astha Minmet India Pvt. Ltd. and M/s.Juggernaut Projects Ltd. in Anticipatory Bail Application No. 1749 of 2013 before MPID Court. It is submitted in paragraph 1(b) of the said application that third party noticee no.1 has admitted liability to the extent of atleast Rs.13 crores in so far as third party noticee no.1 is concerned. In the said application the said third party noticee no.1 has also made various suggestions to discharge the said liability in favour of the applicant.

3. Learned senior counsel invited my attention to the affidavit filed by third party noticee no.1 before MPID Court on 4th August, 2014 and in particular paragraph (8) and would submit that even in the said affidavit, the third party noticee no.1 has admitted liability of Rs.13 crores. It is submitted that the dispute according to the third party noticee was that the liability of the applicant was not to the tune of Rs.23 crores but is to the tune of Rs.13 crores only. In the said paragraph, third party noticee no.1 has averred that schedule of Rs.13 crores has been given by the said party and upon reconciliation if the liability increases of third party noticee no.1 above Rs. 13 crores, the said payment would also be made as per the schedule in continuity.

4. My attention is also invited to the affidavit filed by Mrs.Shilpa Aggarwal in Anticipatory Bail Application No.1749 of 2013 on 8th August 2014 making similar averments in paragraphs (2) to (4) admitting liability atleast to the extent of Rs.13 crores.

5. The MPID court has passed an order in the said application on 12th August 2014. The MPID court has noticed that third party noticee no.1 has defaulted in the payment of Rs.26.47 crores to the applicant. In the order dated 12th August

2014 it is noted by the MPID Court that out of total outstanding of Rs.246.67, third party noticee no.1 and M/s.Juggernaut Projects Ltd. have deposited Rs.4.02 crores in the escrow account till date. The accused did not show any bonafide intention to repay the outstanding amount.

6. My attention is also invited to the notes of meeting held between parties annexed at Ex.F to the notice of motion in which the parties had discussed about outstanding liability of the third party noticee no.1. In so far as third party noticee no.1 is concerned, outstanding amount mentioned is at Rs.26.47 crores in the said minutes of the meeting. The third party noticee no.1 has made various suggestions and agreed to implement for the purpose of securing the said dues.

7. Learned senior counsel also invited my attention to the allegations made in the affidavit in reply filed by third party noticee no.1 and would submit that there is no defence. Even in affidavit in reply, the third party noticee no.1 has not explained the admission in various pleadings demonstrated under order 12 rule 6 of the Code of Civil Procedure, 1908. It is submitted that since third party noticee no.1 has admitted the liability in the various pleadings before MPID Court and also in the correspondence, this court shall exercise powers under order 12 rule 6 of the Code of Civil Procedure, 1908 in favour of the applicant.

8. Mr.Bharti, learned counsel appearing for the third party noticees on the other hand submits that none of the so called admissions referred to and relied upon by the applicant in the notice of motion are unconditional and/or unequivocal and thus no decree under order 12 rule 6 of the Code of Civil Procedure, 1908.

9. It is submitted that in any event since the proposal and/or statements made

by the third party noticees were made in bail application before the MPID court for the purpose of securing bail, the same cannot be relied upon by the applicant for securing a decree under order 12 rule 6 of the Code of Civil Procedure, 1908.

10. It is submitted that the powers granted to the court in order 12 rule 6 of the Code of Civil Procedure, 1908 are discretionary powers and in this case such powers shall not be exercised by this court for the reasons that this court has appointed a committee for the purpose of scrutinising the claims made by the applicant and for ascertaining status of the properties which exercise is being done by the said committee. It is submitted that the statement made by the third party noticees in the bail application were without prejudice to the rights and contentions of his clients and the amount mentioned therein was subject to reconciliation.

11. A perusal of the record highlighted aforesaid clearly indicates that the third party noticee no.1 has in number of affidavits filed before MPID Court and in the correspondence exchanged and the minutes of the meeting has clearly admitted the liability atleast to the extent of Rs. 13 crores. A perusal of the affidavit filed by third party noticee no.1 clearly indicates that the dispute raised by the third party noticee no.1 was in respect of the amount over and above Rs.13 crores. In the affidavit dated 4th August 2014 the third party noticee no.1 has categorically admitted that the according to the said party liability was Rs.13 crores as against the allegations of the applicant at Rs.23 crores. The said party has also given schedule of payment of Rs.13 crores and made a statement that upon reconciliation if the liability increases of third party noticee no.1 from and above Rs.13 crores, the said payment will also be made as per schedule in continuity. Similar statements are also made in the affidavit filed in Anticipatory Bail Application No. 1749 of 2013 before MPID Court by third party noticee no.1.

12. A reference to paragraphs 3 and 4 of the said affidavit dated 8th August 2014 would be useful. In the said paragraphs it is averred by the said party that if the account is reconciled within a period of 2 years and if the liability increases from Rs. 13 crores to Rs.23 crores, then that party would deposit Rs. 50 lacs on 15th of every month in continuation with the schedule. It is further stated that if the accounts were not settled within the 2 years then also that that party will deposit above Rs. 13 crores and Rs.50 lacs per month in the court in continuity to the schedule and the said amount would be disbursed only after settlement of account.

13. I am therefore not inclined to accept the submissions made by Mr.Bharti, learned counsel for the third party noticee no.1 that the admission of liability in various affidavits, letters/minutes of meeting were not unconditional and/or unequivocal. It is clear beyond reasonable doubt that to the extent of Rs.13 crores, there was no condition and/or reservation of the third party noticee no.1. The dispute raised by the third party noticee no.1 if any was only in respect of the amount over and above Rs.13 crores.

14. In so far as the submission of the learned counsel that the said proposal and/or alleged admission in the affidavit filed before MPID court was without prejudice to the rights and contentions of the parties and subject to reconciliation is concerned, in my view the reconciliation sought by the third party noticee no.1 was in respect of the liability over and above Rs.13 crores and not in respect of Rs.13 crores. If the third party noticee no.1 disputes the liability over and above Rs.13 crores, the committee appointed by this court can look into the said allegation as per order dated 2nd September, 2014.

15. One of the curious defence raised in the affidavit in reply is that the proposal

given by third party noticee no.1/admissions made in the affidavit filed before MPID Court were only for the purpose of securing bail and thus this court cannot take cognizance thereof. In my view such defence is required to be rejected without any further reasons. A party cannot make an admission of liability for the purpose of securing bail and at the same time can deny such admission for the purpose of opposing a money decree.

16. In my view this is a fit case for exercising discretion under order 12 rule 6 of the Code of Civil Procedure. Third party noticee no.1 has paid a sum of Rs.50,00,000/-. I am more than satisfied that the case is made out by the applicant for a decree of admission to the extent of Rs.12.5 crores with interest.

17. I, therefore, pass the following order :-

(a) Notice of motion is made absolute in terms of prayer (a) to the extent of Rs.12.5 crores plus interest at the rate of 18% per annum from August 2013 till the date of payment.

(b) In so far as balance amount claimed by the applicants is concerned, the third party notice to be decided on its own merits.

(c) During the pendency of the Third Party Notice No. 9 of 2014, there shall be ad-interim injunction in terms of reliefs claimed in prayer (f) which shall also be extended to the assets disclosed by the third party noticee no.1 in the affidavit of disclosure dated 19th December, 2014 in respect of the immovable property. Such injunction shall continue till

disposal of Third Party Notice No.9 of 2014.

(d) In so far as four bank accounts disclosed in the said affidavits are concerned, Mr. Bharti, learned counsel appearing for the third party noticee states that his client has no objection if the amounts lying in the bank accounts of his client disclosed in the affidavit of disclosure are transferred to escrow account of NSEL without prejudice to the rights and contentions of both parties. Statement is accepted. Third party noticee will be permitted to operate such bank accounts if the entire balance in such accounts are already transferred to the escrow account of NSEL and on the condition that the attachment order if any passed by EOW or any other authority is lifted.

(e) It is made clear that the applicant is permitted to produce an authenticated copy of this decree passed today before the committee appointed for further action.

(f) Notice of motion is disposed of. No order as to costs.

[R.D. DHANUKA, J.]