

ssd

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION (L) NO. 2245 OF 2014
IN
THIRD PARTY NOTICE NO. 10 OF 2014
IN
SUIT NO. 173 OF 2014**

Modern India Ltd. And 3 Ors.Plaintiffs
Vs.
Financial Technologies (India) Ltd.Defendants
And 37 Ors.
Vs.
White Water Foods Pvt. Ltd and Ors.Third Party Noticee

Mr. Birendra Saraf with Mr. Ameet Naik, Mr. Chirag Kamdar and Ms. Anuja Jhunjhunwala i/by. Naik Naik and Co. for Applicant.
Mr. Akshay Patil with Ms. Pooja Kothari and Ms. Hiral Thakkar i/by. M/s. Federal and Rashmikant for Plaintiffs.
Mr. Mukesh Vashi with Mr. Utkarsh Tewari, Mr. Vikas Chaudhary and Mr. Sunil Patel i/by. M/s. Sunil and Co. for Third Party Noticee No.1
Mr. K.A. Setalwad with Mr. Sumit Patni and Mr. K. Khurana i/by Mr. G.B. Solanke for Third Party Noticee Nos. 4 and 5.
....

**CORAM : S.C. GUPTE, J.
DATED : 10th OCTOBER, 2014**

P.C.:

1. This Notice of Motion is taken out in a third party notice by original Defendant no.2. Defendant No.2 carries on business as a spot exchange providing for an electronic platform for spot contracts in commodities on a compulsory delivery basis. Third Party Noticee No.1 is a trading-cum-clearing member of the exchange of Defendant no.2. According to Defendant no.2, Third Party Noticee No.1 has traded on the exchange in various commodities for itself and on behalf of Third

Party Noticee Nos. 2 to 6, who are its clients and on whose behalf it has executed various trades on the exchange of defendant no.2.

2. The case of Defendant No.2 in support of the present application, which is in the nature of an application for attachment before judgment under Order 38 Rule 5 of the Code of Civil Procedure and also under Section 151 of the Code of Civil Procedure, is that Third Party Noticee No.1 in collusion with Third Party Noticee Nos. 2 to 6 has not only defaulted on the payment obligations towards the exchange but also committed fraudulent acts by not depositing or fraudulently removing the commodities which were required to be deposited by them in accordance with the rules of the exchange towards their respective trades effected on the exchange. It is submitted by Defendant no.2 that post suspension of trading in view of the notification issued by the Ministry of Consumer Affairs, Defendant no.2 appointed an independent agency, namely, SGS India Pvt. Ltd. ("SGS"), to conduct surveys at various warehouses including the warehouses/properties in control of Third Party Noticee No.1 with the object of verifying the quantum of goods deposited by each member. It is submitted that when the team of SGS went to the warehouse in control and possession of Third Party Noticee no.1, representatives of Third Party Noticee No.1, present at site, obstructed the audit process by not allowing the representatives of SGS to enter the warehouse/property for conducting the audit. It is submitted that even the representatives of the Court Receiver, who is appointed in Suit No. 221/2014 by this Court, were not permitted entry into the warehouse of Third Party Noticee No.1. It is submitted that there is a concrete apprehension of a substantial shortage or insufficient quantum of goods in the warehouse/property against the goods required to be earmarked and retained by Third Party Noticee No.1.

3. It is submitted by Defendant no.2 that Third Party Noticee No.1 has traded on the exchange not only on its own behalf but also on behalf of Third Party Noticee Nos. 2 to 6 and that these parties in connivance with each other have siphoned off amounts received by them from Defendant no.2 on account of the trades on the exchange. It is also submitted that Third Party Noticee Nos. 2 to 6 and particularly, Third Party Noticee Nos. 4 and 5, are controlled by the same group of directors representing what is referred to as the 'White Water Group' and of which Third Party Noticee No.1 was a part. It is submitted that Third Party Noticee Nos. 2 to 6 have utilized Third Party Noticee No.1 for their own personal gain and are the real beneficiaries of the defaults that have occurred on the exchange platform. In this premises, the present application is made by Defendant no.2. It is submitted by Defendant no.2 in the affidavit in support of the Notice of Motion that the entire group has not only acted in a dishonest and fraudulent manner while conducting the various trades on the exchange but has disposed of the commodities and assets which form the basis of these trades. It is submitted that all these entities of the group, with a view to defeat the claim of Defendant no.1 and the decree that may be passed ultimately in the third party notice, are likely to dispose of their assets in a similar surreptitious manner as in the case of the commodities and that in the premises, it is necessary to secure the claim of Defendant no.2 by attachment of all assets of the White Water Group.

4. The learned Counsel for Defendant no.2, at this ad-interim stage, has prayed for an ad-interim injunction in respect of undisputed assets of Third Party Noticee No.1, namely, three pieces of land ad-measuring 17 Bigha 0 Biswas, 19-9 Bigha and 3 Bigha 13 Biswas

respectively at village Payal, Ludhiana, Punjab referred to in Exhibit 'D' to the affidavit in support of the Notice of Motion. The learned Counsel for Defendant no.2 also prays for an ad-interim order of disclosure of assets on the part of all third party noticees in terms of prayer clause (e) of the Notice of Motion.

5. The learned Senior Counsel appearing for Third Party Noticee No.1 submits that his clients have already created mortgage in respect of these particular assets and that subject to that mortgage his clients shall not deal with or dispose off or create third party rights in respect of these three assets.

6. The learned Senior Counsel appearing for Third Party Noticee Nos. 4 and 5 submits that there is no case made out for any order of attachment before judgment against his clients. He submits that his clients together with Third Party Noticee No.1 do not form any group as alleged by Defendant no.2. He submits that, even if one were to go by the averments made in the affidavit in support of the Notice of Motion, no case is made out either that these third party noticees owe any amounts to defendant no.2 or that these third party noticees are likely to dispose of their assets with a view to defeat any decree that may be passed against them in the Third Party Notice. The learned Counsel relies upon the judgments of the Supreme Court in case of **Raman Tech. & Process Engg. Co. & Anr. Vs. Solanki Traders¹** as also the decisions of our Court in the cases of **Saraswat Co-operative Bank Ltd., Mumbai Vs. Chandrakant Maganlal Shah & Ors.²** and **SJJ Marine Pte. Ltd. Vs. Pisces Exim (India) Pvt. Ltd. & Anr.³** Relying on

1 (2008) 2 Supreme Court Cases 302

2 2002 Vol.104(2) Bom. L.R.177

3 NM(L) 2924/2012 in SS(L) 2558/2012 dt. 10.1.2013

these judgments, it is submitted by the learned Counsel that the powers under Rule 5 of Order 38 are drastic and extraordinary; that such powers should not be exercised mechanically; that before such powers are exercised, the Court should be satisfied that there is a reasonable chance of a decree being passed in the suit (i.e. the Third Party Notice) against the defendant (i.e. the third party noticee); and that after establishing a *prima facie* case on merits, the Plaintiff (Defendant no.2 in our case) has further to establish that the Defendant (third party noticee in the present case) is attempting to remove or dispose of the asset in question with an intention of defeating a decree that could be passed. The learned Counsel therefore submits that these requirements are not satisfied in the present case and that even an order of disclosure ought not to be made at this stage.

7. No doubt, these questions do arise in any interlocutory application in the nature of an application for attachment before judgment. These questions have to be decided by this Court at the hearing of the Notice of Motion after the parties are allowed to state their respective cases on affidavits. At the ad-interim stage what the Court has to see is whether there is a case which needs to be decided *prima facie* at the hearing of the Notice of Motion and whether there is a possibility of any final order of attachment before judgment or any interlocutory restraint order being passed, at the hearing of the Notice of Motion. At this stage, it simply needs to be noted that there is an admission of Third Party Noticee No.1, which is on record, that a sum of Rs.72 Crores is due and payable by Third Party Noticee No.1 to Defendant no.2 in respect of the trades conducted on the exchange. No issues have been joined on oath as of this date with the various statements of Defendant no.2 in the affidavit in support of the Notice of

Motion that trades were conducted on the exchange on behalf of Third Party Noticee Nos. 2 to 6 and these third party noticees were the real beneficiaries of the amounts in respect of these transactions. So also, issues have not been joined even as regards the allegations that these parties have acted in collusion and connivance with each other and have defrauded Defendant no.2 while conducting these trades or the allegations that all these entities acted as one group and owed monies to Defendant no.2 as a result of the fraud alleged in the affidavit in support of the Notice of Motion. As of this date, the allegations together with the documents placed on record by Defendant no.2 in support thereof clearly make out a *prima facie* case that some prohibitory order may have to be granted against all the third party noticees for protecting the dues owed to Defendant no.2. It is therefore necessary that before the matter is heard any further, third party noticees are required to disclose all their assets so that, after considering the relative merits of their cases, necessary orders can be passed.

8. In the premises, all the third party noticees are directed to disclose their assets in terms of prayer clause (e) of the Notice of Motion excluding the words (for itself and on behalf of any related entity). Such disclosure should be made within a period of six weeks from today.

Defendant No.2 will be at liberty to renew its application for further ad-interim reliefs against the third party noticees after such disclosures have been made.

9. Replies to the Notice of Motion should be filed within a period of eight weeks from today. Rejoinder, if any, should be filed within two weeks thereafter. Place this Motion for hearing on 22nd December 2014.

This Order is modified/corrected by Speaking to Minutes Order

7

nmsl.2245.sxw

[S.C. GUPTE, J.]

Bombay High Court

7 / 7