
(2016) 08 BOM CK 0112

In the Bombay High Court

Case No : Appeal (L) No. 841 of 2015 In Suit No. 810 of 2013.

**Dr. Mahendra Kumar Modi and Another - Appellants @HASH Gujarat
State Fertilizers and Chemicals Ltd.**

Date of Decision : 24-08-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1

Citation : (2016) 6 AIRBomR 270 : (2017) 1 ALLMR 593 : (2017) 3 MhLJ 114

Hon'ble Judges : A.S. Oka and P.D. Naik, JJ.

Bench : Division Bench

Advocate : Mr. Mayur Khandeparkar a/w Mr. Rushabh Sheth and Ms Pooja Batra i/b M.S. Bodhanwalla and Co, for the Appellants; Mr. Gaurav Joshi, Senior Counsel a/w Ms Snehal Shah, Mr. Gaurav Shah, Ms Jigiisha i/b Negandhi Shah Himayatullah, Advocates, for the Responden

Final Decision : Dismissed

Judgement

A.S. Oka, J. - By this appeal, the appellants who are the original defendants have taken an exception to the Judgment and order dated 1st October 2015 passed by the learned Single Judge on a Notice of Motion taken out by the respondent-plaintiff.

2. With a view to appreciate the submissions made across the bar, it will be necessary to make a brief reference to the facts of the case. For the sake of convenience, we are referring the parties with reference to their status before the learned Single Judge. A suit for recovery was filed by the plaintiff seeking a decree against the first defendant in the sum of Rs. 3,98,02,466/- at the rate of 13.50% p.a on the principal amount of Rs. 2,00,00,000/- from 1st August 2013. The second prayer in the suit is for a declaration that the suit property which is the flat No. 2 (the "suit flat") in Shreyas building, Madam Cama Road, Mumbai 400 020 and the shares issued by the Shreyas Cooperative Housing Society Limited stand validly mortgaged in favour of the plaintiff in respect of the suit claim. The third prayer is for a decree fixing a date for redemption of mortgage. There are other consequential reliefs sought in the plaint. The case made out by the plaintiff is that it was supplying certain raw material required for

manufacturing polyester filaments to the second defendant. Prior to 6th September 2005, the second defendant was enjoying the credit exposure limit of Rs. 11.25 crores with the plaintiff. On 6th September 2005, by addressing a letter to the second defendant, the exposure limit was offered to be enhanced to Rs. 13.25 crores subject to the condition of reducing the exposure to the present level of Rs. 11.25 crores. This was subject to additional condition of the first defendant mortgaging suit property in favour of the plaintiff.

3. According to the plaintiff, on 9th September 2005, a Memorandum was executed by the first defendant recording deposit of title deeds in respect of the suit property with the plaintiff. The memorandum records that the mortgage shall continue as security for the credit exposure granted to the second defendant which could be released only upon reduction of additional credit exposure of Rs. 2,00,00,000/- by 31st March 2006.

4. It is alleged that the second defendant defaulted in its assurance of reducing credit exposure limit from Rs. 13.25 crores to Rs. 11.25 crores by 31st March 2006 and in fact outstanding amount on the said date payable by the second defendant was Rs. 16,79,09,732.62. The second defendant according to the plaintiff admitted that the account remained overdue and large amount was payable to the plaintiff. Reliance is placed on certain letters of the second defendant admitting that the account had remained overdue. A summary suit was filed by the plaintiff against the second defendant for recovery of a sum of Rs. 22,47,83,280/-. The plaintiff continued to be a mortgagee of the suit property to secure repayment of the enhanced credit limit of Rs. 2,00,00,000/- and the interest accrued thereon. According to the case of the plaintiff, one of its Officers Mr. P.A. Francis, Surveyor and valuer visited the suit flat for conducting valuation. He was informed by the manager of the housing society that the first defendant had intimated the society that the defendants had resolved their dispute with the plaintiff by paying the outstanding amount and therefore, a request was made to the society by the first defendant to issue a duplicate Share Certificate. On 27th May 2013, the plaintiff addressed a letter to the said society repudiating the said representation made by the first defendant and called upon the society not to entertain any application made by the first defendant in respect of the transfer of the suit property. Thereafter, the present suit has been filed.

5. In the suit, a Notice of Motion was taken out by the plaintiff for appointment of Receiver of the suit property and for injunction. On application made for grant of urgent ad interim relief, by order dated 2nd September 2013 the learned Single Judge recorded the statement of the first defendant that it will not alienate the suit flat, will not create third party interests therein and will not part with possession thereof. As a preliminary issue of limitation under section 9A was raised by the defendants, the Notice of Motion could not be decided finally. The plaintiff moved for further ad interim relief of appointment of Receiver in respect of the suit flat. As the suit flat which was in prime locality in Mumbai was lying

vacant, a prayer was made for issuing a direction to the Court Receiver to let out the same on usual conditions as to agency and payment of royalty. By the impugned order dated 1st October 2015, further ad interim relief has been granted on the Notice of Motion. The operative part of the impugned order reads thus:

"(i) The Court Receiver, High Court, Bombay, is appointed Court Receiver in respect of the suit Flat viz. Flatt No. 2, Shreyas Building, 180, Madam Cama Road, Mumbai 400 020.

(ii) The Court Receiver shall after taking possession of the Suit Flat let out the same to a third party as agent/s of the Court Receiver, upon payment of security and royalty.

(iii) The initial expenses of inviting offers, etc shall be borne by the plaintiff.

(iv) Before executing the Agency Agreement, the Court Receiver shall submit his report to this Court and obtain confirmation of this Court qua the terms of the agreement."

6. The learned Judge recorded a prima facie finding that there was a mortgage of the suit flat in favour of the plaintiff and considering the amount due and payable to the plaintiff on 31st March 2006, it was entitled to enforce the mortgage. The learned Judge observed that the suit flat was admittedly vacant. The learned Judge observed that by the time the suit is finally heard and disposed of, the claim of the plaintiff would increase by several crores. Therefore, the learned Judge proceeded to pass the impugned order.

7. The present Appeal came up before this Court on 11th December 2015. While granting ad interim relief, though this Court restrained the Court Receiver from taking further steps, he was permitted to take symbolic possession. We must note here that the learned counsel for the appellant tendered a draft amendment to the Memorandum of Appeal for adding additional grounds. We permitted the learned counsel to address us on the added grounds in view of provision of rule 2 of Order 41 of the Code of Civil Procedure, 1908 (for short "the said Code"). His submission is that there is no debt due from the first defendant as he is neither a borrower nor a guarantor in respect of the credit exposure allegedly availed by the second defendant. He submitted that no personal decree can be passed as against the first defendant and that there was no special covenant so as to make the first defendant liable as a borrower or guarantor in respect of the credit exposure availed by the second defendant. He submitted that there is no pleading that any such implied covenant is present in terms of section 68 of the Transfer of Property Act, 1882 (for short "the said Act"). He submitted that the monitory claim in terms of prayer clause (a) was barred. He urged that ad interim order of drastic nature could not have been passed by the learned Single Judge. He urged that the Memorandum of Mortgage was not adequately stamped in accordance with law. He submitted that the learned Single Judge had earlier considered the prayer for grant of ad interim relief and there was no warrant to

grant further ad interim relief. He submitted that the first defendant had been already discharged having regard to the fact that if any time credit exposure was below 11.25 crores, the security offered by the first defendant stood discharged. He submitted that as of 31st March 2006, the credit exposure was reduced to an amount less than Rs. 11.25 crores. He submitted that there are clear discrepancies in the statement of accounts submitted by the plaintiff. He submitted that there was assertion in the plaint that the plaintiff was not claiming any relief against the second defendant. But, findings have been recorded against the said defendant. Reliance was placed on the decision of this Court in the case of Anita Venkatrao v. Surendra Karsonal Dalal and others dated 5th December 2015 in Writ Petition No. 12036 of 2015. The submission is that such drastic ad interim order ought not to have been made by the learned Single Judge especially when the issue of jurisdiction was raised.

8. The learned senior counsel appearing for the plaintiff tendered across the bar photographs of the suit flat showing that the entire furniture and fixtures therein are ready and therefore, if the premises are given on leave and licence, both the first defendant and the plaintiff will be the beneficiaries. He submitted that keeping the premises vacant will not serve any one's purposes. He relied upon the decision of a full Bench of this Court in the case of State Bank of India v. Trade Aid Paper and Allied Products (India) Pvt. Ltd and others, AIR 1995 BOMBAY 268. He urged that the law laid down by the full Bench will squarely apply to the present case. Reliance was also placed by the learned senior counsel for the original plaintiff on a decision of the Division Bench dated 2nd September 2014 in Appeal (L) No. 379 of 2014 (Prem Bhagwandas Harjani v. Naraindas Vensimal Harjani and others). He also relied upon the Judgment and Order dated 17th July 2012 passed by the learned Single Judge of this Court in the case of Freny Kersi Irani and another v. Soona Kali Contractor and others in Notice of Motion No. 748 of 2012 in Suit No. 2761 of 2011. He submitted that the learned Single Judge was justified in granting ad interim relief of appointment of the Court Receiver.

9. We have carefully considered the submissions. It will be necessary to make a reference to the Memorandum dated 9th September 2005 executed by the first defendant in favour of the plaintiff. It is executed on a stamp paper of Rs. 100/. Material portion of the Memorandum reads thus :

"Ref: Additional Credit exposure of Rs. 200 lacs granted by you to M/s. Modipon Fibres Company a division of Modipon Ltd., Modinagar

Dear Sirs,

This is to place on record that in consideration of a sum of Rs. 200 lacs granted as an additional credit exposure from Rs. 11.25 crores to Rs. 13.25 crores by M/s. Gujarat State Fertilizers & Chemicals Ltd. (hereinafter referred as "MFC") towards purchase of Caprolactam, which is to be reduced to Rs. 11.25 crores by 31.3.2006.

I hereby declare that title deeds in respect of flat office premises No. 2 situated on ground floor, the Shreyas Cooperative Housing Society Limited, 180, Madam Cama Road, Mumbai 400 020 containing by measurement built up areas of about 1000 sq ft bet the same a little more less together with proportionate interest in land and all other rights and privileges are being deposited as and by way of equitable mortgage with GFC on 9.9.2005 as security for additional credit exposure of Rs. 200 lacs by GFC which shall be released/returned upon reduction of additional credit exposure of Rs. 200 lacs from Rs. 13.25 crores to Rs. 11.25 crores.

I further declare that the said title deeds are the only document of title in respect of our said immovable property situated on ground floor, Shreyas Cooperative Housing Society Limited, 180, Madam Cama Road, Mumbai 400 020 and I have a clear and marketable title thereon."

10. Thus, the document provides that the security for additional credit exposure shall be released on reduction of additional credit exposure from Rs. 13.25 crores to Rs. 11.25 crores. Prima facie, there is no dispute about the execution of the document. As far as the objection of inadequacy of stamp is concerned, even assuming that there is some merit in the same, by paying deficit stamp duty and penalty in accordance with section 34 of the Maharashtra Stamp Act, the document can always read in evidence. The issue as to legality of the document can be gone into at the time of final hearing. Suffice it to say that prima facie, there is no dispute about the execution and the contents of the document.

11. We must note here that the first defendant is relying upon the letter dated 30th March 2006 addressed to the plaintiff by which the second defendant informed the plaintiff that the credit exposure granted to the said defendant has been reduced and balance as on 30th March 2006 was Rs. 11.06 crores. A statement of account dated 29th August 2013 has been annexed to the said letter. The stand of the plaintiff is that the said letter is a fabricated letter. It was submitted that in any case, the statement of account dated 29th August 2013 could not have been attached to the said letter of 30th March 2006. The contention of the plaintiff was that the said letter was not received by it. As far as this letter is concerned, in paragraph 6 of the impugned order, the learned Single Judge has observed thus:

"6...It is submitted that it is impossible to annex a statement of account dated 29th August 2013 to the alleged letter dated 30th March 2016. It is submitted by the plaintiff that despite agreeing to provide inspection of the said letter along with other documents referred to and relied upon by Defendant No. 2 in its Affidavit-in-Reply, the Defendants failed to provide inspection of the same. This Court therefore called upon the Advocate for the Defendants to produce proof of dispatch and/or acknowledgement by the Plaintiff of any such letter. However, the Advocates for the Defendants on the adjourned date admitted that there was no such proof of dispatch to and/or acknowledgement of the plaintiff for the said letter."

12. Apart from the fact that there is no evidence to show that the letter dated 30th March 2006 was dispatched and served to the plaintiff, the date mentioned on the right hand corner of the first page of the annexure to the said letter is 29th August 2013. We have already quoted the contents of the Memorandum of deposit of title deeds. The memorandum does not provide for automatic cancellation or discharge of the security. Reliance was placed by the first defendant on another letter addressed by the Managing Director of the plaintiff which is dated 8th June 2007 wherein it is mentioned that as of that date, the plaintiff has exposure of approximately 11+ crores. The learned Single Judge rightly observed that the mention of the amount of Rs. 11+ crores does not necessarily suggest that the amount was less than Rs. 11.25 crores.

13. Another interesting feature is noted by the learned Single Judge. He has observed that though it is claimed by the first defendant that the amount due and payable by the second defendant as on 30th March 2006 were only Rs. 11.06 crores, at no stage, any demand was made by the first defendant to the plaintiff for return of documents of title. This aspect is very significant.

14. From paragraph 9 of the impugned order, it appears that the learned Judge permitted the parties to furnish their respective statements of accounts as on 31st March 2006. Accordingly, the accounts were produced by the plaintiff showing that on 31st March 2006, the amount payable by the second defendant was Rs. 16.79 crores. The second defendant produced accounts showing that as on 31st March 2006 his liability was only Rs. 11.06 crores. In paragraph 9 of the impugned order, the discrepancies in the accounts submitted by the second defendant pointed out by the plaintiff have been set out. There are four discrepancies pointed out by the plaintiff in the accounts submitted by the second defendant. The response of the defendants to said discrepancies is in paragraph 15 of the written submissions filed before the learned Single Judge. Paragraph 15 has been quoted in the impugned order which reads thus:

"The Defendant Nos. 1 and 2 submit that a reconciliation of the statement of accounts of the plaintiffs with the statement of the Defendant Nos. 1 and 2 (as on March 30, 2006) and the contention of the Plaintiffs that some invoices of the Plaintiffs do not find place in the Statement of the Defendant Nos. 1 and 2 and/or that some credits/payments in the account claimed by the Defendant Nos. 1 and 2 were never received by the Plaintiffs are matters which with utmost respect cannot be decided by submissions across the bar by submission of compilations and without any evidence being recorded in the matter. The Plaintiffs submitted a compilation of certain invoices and tendered the same across the bar with a contention that these invoices do not find place in the Statement of the Defendant Nos. 1 and 2. There could be a myriad of reasons why that is so, assuming what the Plaintiffs say is true. Likewise, the veracity of the statements of the Plaintiffs whether or do not they received the credits/payments claimed to have been made by the Defendant Nos. 1 and 2 is to be tested in the manner known to law. This can be conveniently done under the umbrella of the framing

of the preliminary issue under Section 9A of the Code of Civil Procedure, 1908."

15. Thus, the contention of the defendants seems to be that evidence is necessary on aspect of accounts.

16. Thus, there were discrepancies pointed out by the plaintiff in the accounts submitted by the second defendant. The main discrepancy pointed out by the plaintiff was that all invoices produced by the plaintiff did not find place in the statement of accounts of the defendants. It was specifically pointed out that the payments of certain amounts reflected in the accounts submitted by the defendants was not received by the plaintiff. The learned Judge is right when he held that the defendants did not specifically respond to the said deficiencies. In fact they avoided to deal with the deficiencies.

17. The documents produced by the plaintiff showed that as of 30th March 2006, the amount of more than Rs. 11.25 crores was due and payable by the second defendant.

18. As stated earlier, the first defendant has never asked for return of the title deeds or discharge of the mortgage till the date of filing of the present suit. The first defendant has not filed any proceedings. Thus, prima facie, it can be said that the mortgage is in subsistence. A preliminary issue of jurisdiction under section 9A has been raised by the defendants. Hearing of the issue will take some time. Till the disposal of the preliminary issue, the Notice of Motion pending before the learned Single Judge cannot be finally decided.

19. The learned Single Judge has noted that in August 2015 when the plaintiff noticed that the suit flat was lying vacant, an application was made for grant of further ad interim reliefs. The plaintiff could have always applied for grant of further ad interim reliefs as the decision on preliminary issue will take considerable time.

20. We do not find any error in the prima facie findings recorded by the learned Single Judge that the suit flat was mortgaged in favour of the plaintiff and an amount of more than Rs. 11.25 crores was due and payable by the second defendant to the plaintiff as on 31st March 2006. The said finding is borne out from the record. The issue of maintainability of the suit in view of bar of Rule 2 Order 2 of the said Code can be decided at appropriate stage.

21. It cannot be disputed that as the suit flat is situated at Madam Cama Road in south Mumbai, it will fetch a very high amount of rent. The suit flat is lying vacant. Therefore, the learned Single Judge has rightly observed that it is not in the interests of the either parties to keep the same vacant. In paragraph 13, the learned Single Judge has observed that by the time the suit is finally heard and disposed of, the claim of the plaintiff would substantially increase and it may not be possible for the plaintiff to recover its dues by the sale of the suit flat. We must note that if the suit flat fetches substantial income pending the suit, even the first defendant-mortgagor will be ultimately benefited as the royalty amount

will remain deposited and invested.

22. We find nothing wrong with the discretionary order passed by the learned Single Judge. The plaintiff has not been permitted to withdraw the royalty amount.

23. In the case of *Wander Ltd and Anr. v. Antox India P. Limited*, 1990 Supp (1) SCC 727, the Apex Court was dealing with the discretionary order passed by the learned Single Judge which was taken in Appeal before a Division Bench of High Court. In paragraph 14, the Apex Court has observed thus:

"14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd. v. Pothan Joseph* [(1960) 3 SCR 713 : AIR 1960 SC 1156] : (SCR 721)

"... These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. v. Jhanaton* [1942 AC 130] "...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case".

The appellate judgment does not seem to defer to this principle."

(emphasis added)

24. We find nothing arbitrary or perverse in the impugned order which is discretionary in nature. The conclusions drawn by the learned Single Judge are based on material on record.

25. Hence, there is no merit in the Appeal and the same is accordingly dismissed.

26. The Court Receiver shall remain in symbolic possession of the suit flat and no further steps shall be taken on the basis of the impugned order for a period of six weeks from today.