
(2012) 02 BOM CK 0028

In the Bombay High Court

Case No : Appeal No. 546 of 2011 in Notice of Motion No. 726 of 2011 in Suit No. 536 of 2011

Swan Mills Ltd.

APPELLANT

Vs

Dhirajlal @ Dhirubhai Babaria and others

RESPONDENT

Date of Decision : 02-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, 13

Citation : (2012) 4 ALLMR 51 : (2012) 2 BomCR 20 : (2012) 114 BOMLR 1242 : (2012) 4 MhLj 937

Hon'ble Judges : D.K. Deshmukh, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : Virag Tulzapurkar, with Mr. Zubin Bheramkamdin, Vivek Vashi and Ms. Shouger Merchant instructed by M/s. Bharucha Partners, for the Appellant; Pravin Samdani with Sunil Purohit and Swati Deshpande and Prakash Shinde instructed by . M/s. MOP and Partners, for the Respondent

Final Decision : Allowed

Judgement

1. The appeals are directed against the same order passed by the learned Single Judge. Appeal no.546/11 is filed by original defendant no.2 in Suit no.536/11 and Appeal no.547/11 is filed by defendant no.1 in the same suit, and therefore, both the appeals can be conveniently disposed of by common order.

2. Both these appeals are directed against order dated 14.6.2011 passed by the learned Single Judge of this Court in Notice of motion no.726 of 2011 which was taken out in Suit no.536 of 2011 by the plaintiffs. By that order, the learned Single Judge of this Court has granted that notice of motion in terms of prayer clause (a). Prayer clause (a) of that notice of motion reads as under:-

(a) That pending the hearing and final disposal of this suit, Defendants be restrained by an order and injunction of this Hon''ble Court from selling and/or alienating and/or encumbering and/or creating Third Party rights of any nature whatsoever in respect of the immovable and movable assets/properties of the

Defendants where ever be located in India and overseas and also more particularly described in the List Exhibit "I" to the Plaint.

3. The facts which are material and relevant for deciding these appeals are that the respondents have filed suit for an order that a foreign judgment dated 21st September,2010, passed by the District Court, 14th Judicial District, Dallas County, Texas, United States of America, be deemed to be a decree of this Court and for a direction to enforce and execute the said judgment as a decree in favour of the respondents and against the appellants.

4. The respondents filed proceedings before the District Court to recover a sum of US \$5,500,000/- together with interest thereon at 10% from April,2009 till payment and for costs. The case of the respondents is that the parties entered into a series of transactions commencing from 1989 in Dallas County, Texas. The transactions were referred to as the "Oil Rig of Peerless Drive Limited". The appellant in Appeal no.547/11, acting individually and as the Chairman of the Board of Appellant in Appeal no.546/11-Swan Mills Ltd., requested the respondents to secure a loan of approximately US \$ 1 million for which the respondents furnished personal guarantees. Further transactions of this nature were also entered into. The respondents agreed to furnish guarantees in Dallas County. The respondents made various payments under the said guarantee. Pursuant to negotiations between the parties, a settlement agreement dated 9th May, 2005, was executed by appellant in Appeal no. 547/11 in his personal capacity and as Chairman on behalf of Appellant in Appeal no.546/11. The document reads as under:-

This has reference to the last discussion we have had jointly in the presence of Shri.Dineshbhai Gandhi and Shri Dhirubhai Shah, in connection with the dealing in respect of the Oil Rig of Peerless Drive Ltd.

It has been mutually and finally settled that an area of approximately 10,000 sq.ft (built up) will be handed over to you, as compensation and in full settlement for the above purpose by us along with the others, as and when the premises is available for possession, from property

Being developed by us adjoining Bandra-Kurla Complex.

It was also mutually agreed that the above arrangement would supersede all the previous discussions, or writings, understandings etc. and the matter sets closed.

The plaintiffs/respondents endorsed their acceptance at the foot of the document. The document has been witnessed by two witnesses. It is also averred in the petition that the appellants can be served pursuant to section 17.044 of the Texas Practice & Remedies Code and Rule 108 of the Texas Rules of Civil Procedure, and that the Secretary of the State of Texas is an agent for service of the process on the appellants because they "engage in business in this State, but do not maintain a regular place of business in this State or a designated agent for service of process in this State in a matter that arises out of

business done in the State of Texas and to which the appellants are a party." It is also averred that the cause of action arose in whole or in part in Dallas County, Texas.

5. Under cover of a letter dated 18th December, 2009, appellant in appeal no. 547/11 forwarded to the clerk of the said Court, a written answer. The appellant in Appeal no. 547/11 contended that the Court had no jurisdiction, inter-alia, as no part of the cause of action had arisen in the United States. It is averred that the respondents had not exhibited any documents with regard to business dealings of the appellants in Dallas, Texas. It is averred that appellant in appeal no. 547/11 "does not carry on any business activity in Texas or anywhere in the United States and that the respondents had not submitted any evidence to show that the appellants in both the appeals engage in business in Texas. This averment is in respect of the respondents' assertion in the petition that the Secretary of the State of Texas is an agent for service of process on the appellants because they engage in business in the State of Texas, but do not maintain a regular place of business therein. The appellant in appeal no. 547/11 also denied the respondents' case on merits.

6. The appellant in appeal no. 546/11, under cover of a letter dated 22nd February, 2010, addressed to the clerk of the District Court, forwarded its written answer to the respondents' original petition. The appellant in appeal no. 546/11 contended that the District Court at Dallas County, Texas had no jurisdiction to entertain the petition, inter-alia, on the ground that the settlement agreement dated 9th May, 2005, was entered into in India and that no part of the cause of action had arisen in Texas, and it denied all the allegations made by the respondents. It contended that settlement agreement was not signed by the appellant in appeal no. 547/11 in his capacity as Chairman of Appellant in appeal no. 546/11 and that the appellant in appeal no. 546/11 has no connection therewith. The appellant in appeal no. 546/11 adopted the written answer filed by Navinbhai C. Dave who is the appellant in appeal no. 547/11.

7. The respondents filed a motion to abate and to strike the answer of Swan Mills Limited. The motion was directed only against appellant in appeal no. 546/11 and not the appellant in appeal no. 547/11. The respondents contended that if appellant in appeal no. 546/11 failed to obtain counsel authorized to practice law in the State of Texas within the time provided by the Court, its answer should be stricken and a default judgment entered. The respondents' contention was that under the Rules of Civil Procedure of Texas, parties are allowed to appear either in person or by an attorney, but that this had been held to apply only to individuals and not to corporations. By an order dated 23.4.2010, the District Court ordered as under:-

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that this case be and is hereby ABATED for a period of Sixty (60) days from the date of this Order for the purpose of allowing Defendant Swan Mills Ltd. to obtain counsel for representation in this action.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that should Defendant Swan Mills Ltd. not obtain counsel within sixty (60) days from the date of this order, the Answer filed herein by said Defendant may be stricken and a post judgment default entered pending evidence of the Plaintiffs' damages.

Appellant-Swan Mills Ltd. failed to appoint an attorney or counsel to represent it in the action.

8. The respondents thereafter filed a motion for summary judgment. The motion reiterated some of the averments in the petition. The respondents contended that the value of the property was US \$750 per square foot i.e. an aggregate of US \$7,500,000/- for the ten thousand square feet agreed to be transferred. The respondents averred that in the light of the summary judgment proof attached to the Motion through the affidavit of the respondent no.1 as well as the failure of the appellants to deny the validity of the settlement agreement, they were entitled to move for a summary judgment for an award of the value of the property or, in the alternative, for an order of specific performance to order the appellants to convey the property plus attorney's fees. It is in that motion for summary judgment that the said judgment dated 21.9.2010, was passed and of which the respondents seek enforcement of.

9. Suit no.536/11 was filed, as observed above, for enforcement of judgment dated 21.9.2010. In that suit, Notice of Motion no. 726/11 was taken out seeking interim orders against the defendants. As observed above by the order impugned in the appeals the learned Single Judge has granted interim order in terms of prayer clause (a) of that Notice of Motion. The learned Counsel appearing for appellants submits that it is now settled law that no Court can make an order granting temporary injunction in favour of the plaintiff without recording clear finding on three aspects viz. (i) existence of strong prima facie case in favour of the plaintiff; (ii) balance of convenience is in favour of grant of interim injunction; and (iii) that if order of temporary injunction is not made the plaintiff is likely to suffer irreparable loss. The learned Counsel submitted that in the order impugned not only that the learned Single Judge has not recorded finding on any of these three aspects and has granted temporary injunction against the appellants and in favour of the plaintiffs-respondents, but also the findings recorded by the learned Single Judge himself on the aspect of existence of prima facie case in favour of the plaintiffs will show that, even according to the learned Single Judge, plaintiffs do not have a strong prima facie case. The learned Counsel also took us through the provisions of Section 13 of the CPC and the judgment of the Supreme Court in the case M/s. International Woolen Mills Vs. M/s. Standard Wool (U.K.) Ltd., .

10. We have heard the learned Counsel appearing for respondents/plaintiffs. According to the learned Counsel though in the order the learned Single Judge has not recorded specific finding that the plaintiffs have made out a strong prima facie case, the observations made by the learned Single Judge and the findings recorded by him show that the learned Single Judge has come to the conclusion

that there is a strong prima facie case in favour of the plaintiffs. The learned Counsel also submits that same is the case with the other two aspects.

11. We have examined the record and we have gone through carefully through the judgment of the learned Single Judge. Perusal of the judgment of the learned Single Judge shows that the learned Single Judge has in order to find out "whether the plaintiffs have strong prima facie case in favour of the plaintiffs", has examined three questions. The first question examined by the learned Single Judge is "whether the foreign Court which passed the decree had jurisdiction or not?". In paragraph 15, the learned Single Judge has observed thus:-

The question of jurisdiction was thus considered. Whether the extent of consideration was adequate to meet the test of section 13 or not is undoubtedly an important point. I would, however, leave the issue to be decided at the final hearing of the suit. I am not inclined, at this stage, to brush aside the judgment on the ground of non-application of mind or even non-consideration of the issues.

These observations are on the question argued on behalf of the appellant before the learned Single Judge that the Foreign Court did not have jurisdiction to entertain the suit, because the writing on the basis of which that suit was filed was, even according to the plaintiffs, signed by defendant no.1 in Bombay. It is clear from the observations of the learned Single Judge that the learned Single Judge has not examined that issue and has not recorded finding that prima facie the Foreign Court had jurisdiction to pass the decree. On the question of jurisdiction, it was also argued before the learned Single Judge that for the purpose of effecting service on defendant no.2-Company through the Secretary of State, it was stated in the plaint that defendant no.2 carried out business in the State of Texas. This was absolutely false. In any case, there was no material before the Court to substantiate this averments, and therefore, the mode of service that was adopted for effecting service on the second defendant was not proper. While considering this aspect in paragraph 18 the learned Single Judge has observed thus:-

The learned Judge, however, held that the defendants had not complied with the rules and obviously, therefore, held that they had filed a general appearance. Whether his construction of the order is correct or not is another matter. Even if I am entitled to question the correctness of the decision, I am not inclined at this stage to, in effect, set it aside.

It is, thus, clear that the learned Single Judge has declined to examine the question raised by the defendants that mode of service adopted by the plaintiffs and the order of the Foreign Court proceeding to pass summary judgment against the defendants was erroneous. In our opinion, examination of this aspect of the matter in detail by the learned Single Judge and recording of prima facie finding, was absolutely necessary. In any case, it is clear to our mind that on the first question examined by the learned Single Judge as to the jurisdiction of the Foreign Court to pass the decree, there is no finding recorded by the learned

Single Judge that the plaintiffs have made out a strong prima facie case.

12. The second question which has been examined by the learned Single Judge was "the liability of the defendants under the settlement agreement dated 9.5.2005." The settlement agreement dated 9.5.2005, even according to the plaintiffs, was signed only by defendant no.1. The defendant no.1 in the settlement does not say that he is signing this agreement in his capacity as Chairman of defendant no.2-Company. It is the case of the appellants that if the writing dated 9.5.2005 is signed by defendant no.1 in his capacity as Chairman of defendant no.2 promising to give property belonging to defendant no.2 to the plaintiffs, then by the document dated 9.5.2005 no liability is cast on defendant no.1, and therefore, there can be no decree passed against defendant no.1 on the writing dated 9.5.2005. So far as defendant no.2's liability on the basis of that document is concerned, it was contended that there is no material on record to show that defendant no.1 was authorised by the body corporate viz. the second defendant to fasten liability on defendant no.2. It was contended before the learned Single Judge on behalf of the appellants that the Foreign Court has not considered this aspect of the matter, and therefore, the judgment of the Foreign Court cannot be said to be a judgment on merit in terms of Section 13 of the Code of Civil Procedure. While considering this aspect of the matter, the learned Single Judge in paragraph 21 of his order has observed thus:-

I would leave for consideration at the final hearing of the suit, the question as to the adequacy of reasons furnished by a foreign Court to meet the test u/s 13 of the Code of Civil Procedure. It is true that the judgment itself is not elaborate on this point.

It is, thus, clear that the learned Single Judge has not recorded a clear finding that in his opinion whether prima facie the foreign Court's judgment is on merit or not.

13. The third question that was considered by the learned Single Judge was "the market value of the property." It was claimed that the document dated 9.5.2005 promises to hand over to the plaintiffs approximately 10,000 square fts. built up area. The claim in the plaint filed in the Foreign Court was not for any built up area. The claim was for a money decree in the sum of US \$5,500,000/-. It was contended on behalf of the defendants that there is nothing on record placed as to how the plaintiffs came to the conclusion that valuation of 10,000 sq.ft. built up area at Bandra-Kurla Complex is US \$5,500,000/-. While examining this aspect, the learned Single Judge in paragraph 26 has observed thus:-

I must clarify that I do not for a moment suggest that the matter is free from doubt. Indeed, there is much to be said in favour of the defendants. The matter certainly requires deeper consideration at the final hearing. I am, however, unable at this stage of the proceedings to come to the conclusion that the judgment is absurd and does not satisfy the test of section 13.

In our opinion, once having recorded the finding that the matter is not free from

doubt, it was not open to the learned Single Judge to grant temporary injunction. The order of temporary injunction can be made only on the Court recording a clear finding of existence of strong prima facie case. It is, thus, clear that on all the three questions that have been examined by the learned Single Judge, the learned Single Judge has not recorded a finding of existence of strong prima facie case in favour of the plaintiffs. On the contrary, the observations of the learned Single Judge show that the learned Single Judge himself had doubts about the existence of strong prima facie case in favour of the plaintiffs. What is further to be noted is that in the plaint filed in the Foreign Court, a decree in the sum of US \$5,500,000/- was claimed. However, a decree in the amount of US \$7,500,000/- has been made. It was argued before the learned Single Judge that a decree in larger sum than the one which is mentioned in the plaint as the decretal amount could not have been made without carrying out amendment in the plaint. It was claimed that one of the requirements of Section 13 of the CPC is that the claim in the foreign decree should not be founded on a breach of law in force in India. It was claimed that the law in force in India is that Civil Court cannot grant decree in a sum larger than the one which is mentioned in the plaint without the plaintiff first amending the plaint. Therefore, the decree passed by the Foreign Court was based on a law which is in breach of law in force in India. The learned Single Judge, however, while examining this aspect of the matter observed in paragraph 27 as under:-

Whether under the laws of the State of Texas, an amount in excess of that claimed in the plaint can be granted in this manner can be decided at the final hearing of the suit. There is insufficient material to decide the same at this stage.

It is to be seen that the learned Single Judge has really not examined the contention that was urged before him viz. that the decree passed in a sum larger than the sum of which the decree is claimed in the plaint, is in breach of law in force in India.

14. In paragraph 30 the learned Single Judge has observed thus:-

I do not intend passing an order of attachment before judgement

However, he has passed an order of temporary injunction restraining the defendants from transferring their movable and immovable properties. It was, therefore, contended that the order of the learned Single Judge declining to pass an order of attachment before judgment shows that the learned Single Judge has declined to make that order because, according to the learned Single Judge, the plaintiffs were not able to establish that the defendants are likely to transfer their properties during the pendency of the suit with an intention to defeat the decree that may be passed in the suit. It was contended that if that is so then there was no justification for making an order of temporary injunction. If there is no possibility of the defendants transferring their properties during the pendency of the suit so as to defeat the decree that may be passed in the suit then there is no question of the plaintiffs suffering irreparable loss in case temporary

injunction restraining the defendants from transferring the properties is not granted. We find considerable substance in this submission. As observed above, the learned Single Judge has held that the plaintiffs have not made out a case for making an order of attachment before judgment. That part of the order has been accepted by the plaintiffs as there is no appeal filed by the plaintiffs against the rejection of the prayer for an order of attachment before judgment. Perusal of Order 38 Rule 5 of the CPC shows that an order for directing the defendant to furnish security can be made if the Court is satisfied that the defendant is about to dispose of whole or any part of his property with intent to obstruct or delay the execution of any decree that may be passed against him, and it is only on failure of the defendant to furnish security or show cause to the satisfaction of the Court, that an order of attachment before judgment is made. The result of an order of attachment before judgment is substantially the same as an order of temporary injunction restraining the defendants from transferring, alienating, parting with possession of the property. Thus, on Court being satisfied that the defendant is likely to transfer his property to delay the execution of decree that may be passed in the suit, in the first instance an order for furnishing security is made against the defendant and in the second instant on failure of the defendant to show cause or to furnish security that an order for attachment before judgment is made. In the instant case, however, the learned Single Judge, after recording a finding that there is no case made out for order of attachment before judgment which implies that the plaintiffs have not been able to satisfy the Court that the defendants are likely to dispose of the property with intent to defeat the execution of decree that may be passed in favour of the plaintiffs, has made an order granting injunction which as observed above has substantially the same effect as an order of attachment before judgment. In our opinion, after having recorded the finding that the plaintiffs have not made out a case for attachment before judgment, the learned Single Judge could not have granted temporary injunction against the defendants in the terms in which it has been granted by the learned Single Judge. In any case, we do not find that the learned Single Judge has considered the aspect of balance of convenience and irreparable loss before making the order of temporary injunction. The suit is for enforcement of a money decree. A temporary injunction is sought restraining the defendants from transferring movable and immovable property. In a suit for money decree, normally, an order of temporary injunction is not passed because there is no possibility of plaintiff suffering any irreparable injury. In case the defendant transfer his property during the pendency of the suit, unless it is shown that he is transferring the property with the intention to defeat the money decree that may be passed in favour of the plaintiff or if the defendant is permitted to transfer the immovable property it would not be possible for the plaintiff to execute his money decree. If, according to the plaintiff, the defendant is likely to transfer his property with an intention to defeat the decree that may be passed in favour of the plaintiff, then the remedy of the plaintiff is to apply for attachment before judgment. It is hard to imagine that the plaintiff who cannot make out a case for an order of attachment before judgment can be successful in

getting an order of temporary injunction which has practically the same effect that is restraining the defendant from transferring his property. We also do not find any material placed by the respondents on record to show that in case the defendants are not prevented from transferring their property, the plaintiffs would not be able to execute the money decree that they may get at the final disposal of the suit or that the defendants are transferring the property with an intention to defeat the money decree that may be passed in favour of the plaintiffs. Looking at the matter from any point of view, in our opinion, the learned Single Judge was not at all justified in making the order of temporary injunction against the defendants.

15. In the result, therefore, the appeals succeed and are allowed. The order impugned in the appeals is set aside. Notice of Motion no.726 of 2011 taken out by the plaintiffs in Suit no. 536 of 2011 is dismissed. Both the appeals are disposed of.

At the request of the learned Counsel appearing for respondents, it is directed that despite our order dismissing Notice of Motion no. 726/11, the interim order passed by the learned Single Judge which was impugned in this appeal, shall continue to operate for a period of four weeks from today.