

(2012) 09 BOM CK 0167

In the Bombay High Court

Case No : Chamber Summons No. 866 of 2012 in Execution Application (L.) No. 1207 of 2012

Yash Tejpal Shah and Others

APPELLANT

Vs

M/s. Shree Ashtavinayak Cine Vision Ltd. and Others

RESPONDENT

Date of Decision : 18-09-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 41(2)

Citation : (2013) 1 BomCR 803

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : Aspi Chinoy, assisted with Mr. Rajiv Narula, Mr. A. Dasgupta instructed by J. Narula and Associates, for the Appellant; D.D. Madon a/w. Mr. I.S. Nankani, H.S. Khokawala instructed by . Nankani and Associates for Respondent Nos.1 and 2, Ms. Rajani Iyer a/w. Mr. S.V. Kadam, Monish Choudhary, Ms. Apeksha Sharma instructed by . Kadam and Co. for Respondent No. 4 and Mr. Virag Tulzapurkar a/w. Mr. Ashish Kamath instructed by . Naik Naik and Co., for the Respondent

Judgement

Mrs. Roshan Dalvi, J.—The applicants are the Judgment Creditors under a Consent Award dated 29th October, 2011 executed by and between the applicant and respondent No. 1 as the Judgment Debtor under which Rs. 41 crores was to be paid by Respondent Nos. 1 and 2 with interest thereon @ 27% p.a. from 1st October, 2011 until payment The Consent Award constitutes a money decree. A paramount lien is created in favour of the Applicants under clause 2 of the Award on the income of the respondent No. 1 from various films which he would produce. The payment of installments as agreed by and between the parties came to be set out in the Award. It was specifically provided that upon committing default of any one installment on those dues dates the entire outstanding amount would become due and payable and the award would become executable. First three installments were paid. Thereafter there was defaults. Further time was asked for and granted under letters of the parties which correspondence is admitted. Rs. 36.26 crores remained due and payable.

Under the specific agreement between the parties the amount was to be paid on or before 30th June, 2012 or in the alternative respondent No. 1 was to show the petitioner 30% of the work completed by respondent No. 1 in another production and be entitled to deferred dates of payment by issue of fresh cheques dated 30th June, 2012, 31st July, 2012 and 30th September, 2012. This had to be shown by a certificate of laboratory which held the negatives of the suit film. Respondent No. 1 by certain letters executed in June, 2012 agreed to obtain the certificate and in fact obtained the certificate of Respondent No. 3 dated 11th June, 2012. Pursuant to respondent No. 1 showing that it had rights and entitlement in such other film, the dates of payment were deferred and fresh cheques were issued. In the meantime before those deferred dates of payment the another film "Sher" was sought to be released by Respondent Nos. 1 and 2. The applicant preferred to proceed in execution against the rights, title and interest of Respondent Nos. 1 and 2 in such other film. The 4th installment of Rs. 36.26 crores was to be paid on 30th June, 2012 or before the release of the suit film of defendant Nos. 1 and 2 which was not paid. If this was not paid the parties agreed that Respondent Nos. 1 and 2 would produce a certificate from Respondent No. 3, the relevant laboratory, certifying that their next film is complete to the extent of 30% and issue fresh cheques for that installment. These cheques were to be honoured on those dates.

2. The first cheque itself has been dishonored. The other film, which was stated to be more than 30% completed was infact stated to be soon released and hence the execution proceedings were commenced.

3. In such execution the claimants want receiver in execution to be appointed with regard to the release of prints and negatives of the other film, injunction against Respondent Nos. 1 and 2 against release of that other film and against Respondent No. 3 against releasing prints of that film, further injunction against Respondent Nos. 1 and 2 in respect of certain shares standing in their names in another company, depositing the income to be received by Respondent Nos. 1 and 2 from third parties and disclosing on oath their properties and orally examining them in respect thereof.

4. Before the due date of the 4th installment of Rs. 36.26 crores the claimants issued the notice upon Respondent Nos. 1 and 2 in respect of the alternative obligations of Respondent Nos. 1 and 2 under the Consent Terms of either making payment of last installment on deferred dates obtaining the certificate of completion of another film, by their notice dated 22nd May, 2012. This was because the 4th installment was due and payable on 30th June, 2012 and respondent Nos. 1 and 2 were announced the release of the other film on 6th July, 2012 for which the deliveries of prints would take place by 25th June, 2012. The notice dated 22nd May, 2012 has been received by Managing Director of Respondent No. 1 on 28th May, 2012.

5. On 4th June, 2012 respondent No. 1 through the said Managing Direction replied to the notice. The reply shows the receipt of the notice but the allegations

were not disputed. In fact the reply only contains an explanation of the alternative obligations under the Consent Terms which could not even be denied since the execution of Consent Terms is admitted. The Respondent No. 1 clarified that their next film "Sher" will be more than 30% completed by the due date as per the Consent Terms and the certificate of the laboratory would be made available to the claimants on or before 20th June, 2012. It was specifically stated that the amount under the 4th installment would not be made payable immediately. Respondent Nos. 1 and 2 forwarded further 8 cheques of diverse amounts as per their obligations under the Consent Terms. They further confirmed that they would not release the suit film without honouring the Consent Terms. Applicant No. 1 received the letter and confirmed what was stated therein.

6. It is now alleged that the letter was executed under certain coercive representation and under threat that the claimants would inform the distributors of the film. Defendant Nos. 1 and 2 did not want such information to be given out and hence they executed the letter dated 4th June, 2012. Upon certain arrangements between the parties that letter was kept in a sealed cover each, by both of them. The purpose of the sealed cover has not been understood. The assurance under the letter that they would give the certificate of the distributors agreed under the Consent Terms was infact carried out. The certificate dated 11th June, 2012 has been given a week after the letter was written and confirmed. The cheques mentioned in the letter have been issued. Defendant No. 1, therefore, acted upon the said letter. The certificate dated 11th June, 2012 has been sent along with another letter dated 11th June, 2012 itself signed by another Director of respondent No. 1 mentioning about the part production of the other film and enclosure of the footage certificate. Infact after execution of the letter kept sealed and before complying with the assurance made in that letter by getting the certificate issued, Respondent No. 1 requested the claimants not to deposit the cheques until 14th June, 2012. Another such letter was given after the certificate was issued also on 14th June, 2012 not to deposit the cheques till 23rd June, 2012. The entire exercise of sealing the letter, a copy of which was given to the claimants, only comes out as a drama without absolutely no meaning. It is best ignored. Besides, the sealed envelope relied upon by Respondent Nos. 1 and 2 was not offered for inspection when demanded, but has yet been seen opened and returned by the Court after reading its contents of the letter it contains.

7. The applicants did not agree to keep holding the cheques. They issued their notice dated 18th June, 2012 that they would deposit the cheques issued by defendant Nos. 1 and 2 and takes steps if they were dishonoured. The cheques have indeed been dishonoured. In fact on 21st June, 2012 the Managing Director of defendant No. 1 wrote to the applicants that the production of other film was 30% completed and hence they were not in default of 4th installment of Rs. 36.25 crores and hence were not liable to pay the applicants that amount. This is a rather astounding contention. The Consent Terms do not show that if another

film is 30% complete, the remaining amount which was due and payable was not to be paid. The only leeway given in the Consent Terms is that if the other film is certified to be 30% completed, fresh cheques would be issued of later dates to give them a breather in the payment of 4th installment which cheques are always expected to be honoured. In fact the defaults calls in proviso to clause 11 of the Consent Terms.

8. It is also argued on behalf of the Respondent Nos. 1 and 2 by Mr. Nankani that the claim under Consent Terms has been satisfied. No receipts in that behalf are produced. The ledger account of one of the claimants for the period from 1st April, 2009 to 9th July, 2012 is relied upon to show the amounts paid through bank. The reliance is as dishonest as its amusing. For the award passed on 29th October, 2011 in terms of the Consent Terms dated 28th October, 2011, the entire account, except the last 4 entries, is of the dates prior to the date of the award. The payments could never have been made in respect of the award which is sought to be executed. Mr. Narula on behalf of the claimants drew my attention to three agreements entered into by and between respondent No. 1 and one of the claimants which are precisely for the amounts stated in the account being Rs. 45 lacs, Rs. 60 lacs and Rs. 1.90 crores being the three agreements marked Exh. 3, 4 & 5 to the additional affidavit of the claimants showing three other different transactions. Only the last portion of the account consisting of four transactions are after the date of the award. These are of 23rd June, 2012, 30th June, 2012 and 3rd September, 2012 for Rs. 45.69 lacs and Rs. 15.23 crores. The earlier correspondence would show how on 4th June, 2012 the letter came to be issued by Respondent No. 1 assuring that Respondent Nos. 1 and 2 were giving the required certificate the completion of their next feature film to the extent of 30% by 20th June, 2012 and issuing fresh cheques. The Respondent No. 1 has refuted that any amount is due and payable in its letter dated 21st June, 2012. Why would respondent No. 1 then pay Rs. 45.69 lacs on 23rd June, 2012 and Rs. 3.5 crores on 30th June, 2012? It is not even the case of the Respondent Nos. 1 and 2 in their affidavit in reply that such payments have been made and no receipts in respect thereof are produced. Besides the fresh cheques which were to be given under the Consent Terms along with the certificate of the laboratory granted respondent Nos. 1 and 2 a breather in the payment of the 4th installment which was to the tune of Rs. 15.23 crores to be paid on or before 30th June, 2012. There would be no reason for respondent Nos. 1 and 2 to pay the paltry amount of Rs. 45.69 lacs on 23rd June, 2012 from the sum of Rs. 15.23 crores payable. The similar would go for the next installment. The amounts which are paid are seen to be for some other transactions. The parties indeed have had various other transactions.

9. Respondent No. 1 sought to produce a huge compilation of copies of documents. Inspection demanded was not offered. The court must refuse to go into those documents. Nevertheless in view of the aforesaid wondrous defence taken up at the stage of arguments the court called upon Mr. Nankani, the advocate of Respondent No. 1 to produce the original receipts. Four documents

which are claimed to be such receipts are produced. The first receipt is in respect of the film negatives of the film "Mastermind". Three letters are produced in respect of another film "Jack and Jhol". The contents need not be even gone into. It is a mere attempt to digress on the part of the advocate of defendant No. 1. Certain confirmation of accounts are produced. These are stated to show that only Rs. 21 crores was due and payable on 1st April, 2012 to the claimants. A specific defence in that behalf is not taken. The original documents are not given for inspection. The documents cannot be relied upon even if such amount is due and payable in respect of the suit award dated 29th October, 2011. It is for Respondent Nos. 1 and 2 to pay of that amount and then apply for marking the award fully satisfied. Admittedly that amount as also not paid and the claim of respondent Nos. 1 and 2 that such amount is alone due and payable cannot be accepted.

10. It is argued that the award is not stamped as required under the Bombay Stamp Act and therefore, cannot be executed until it is impounded and sent for stamping and adequately stamped. The award is specifically covered under Article 12 of the schedule 1 to the Bombay Stamp Act. Under Article 12 (a) an award relating to property would be stamped as a conveyance. Under Article 12(b), which relates to an award in any other case it requires to be an stamp paper of Rs. 100/-. That is so in this case. The award is adequately stamped.

11. The respondent No. 3 has been served and has not filed any affidavit in reply. Consequently the case for appointing a receiver in execution of the aforesaid award dated 29th October, 2011, in respect of the relevant prints and negatives of the other film of Respondent No. 1 "Sher" in respect of Respondent No. 3 made out.

12. Respondent No. 4 is the owner of satellite rights of the other film "Sher". Respondent No. 4 is stated to have paid Respondent Nos. 1 and 2 in respect of the satellite rights of the said film under certain agreement executed by and between respondent No. 4 earlier. Mrs. Rajni Iyer, Sr. advocate on behalf of the Respondent No. 4 stated that Respondent No. 4 would be as much a victim as the claimant in as much as its satellite rights were jeopardized in view of the defaults committed by Respondent Nos. 1 and 2 which has resulted in the above execution.

13. Respondent Nos. 4 and 5 are two parties who have entered into two separate agreements with Respondent No. 1.

14. The agreement with respondent No. 4 is shown to be dated 5th June, 2012 in respect of certain satellite rights of the other films, the receivables of which the applicant seeks to claim.

15. The agreement with respondent No. 5 is shown to be dated 22nd February, 2012 in respect of the entire production rights of the other film.

16. Both respondent Nos. 4 and 5 have produced certain earlier agreements

claiming rights thereunder. The main agreement with respondent No. 4 is dated 21st June, 2011 which is shown to be stamped on that date and on which the stamp duty of Rs. 6.4 lacs has been paid.

17. The agreement dated 22nd February, 2012 of Respondent No. 5 is similarly stamped on 21st February, 2012 and on which Rs. 3.50 lacs is paid as stamp duty. The earlier agreement between respondent Nos. 1 and 5 shown as a time sheet is stated to be executed on 5th December, 2011 which is neither registered nor stamped.

18. It is contended by the applicant that both these agreements, more specially the agreement with respondent No. 5 is a colourable document fabricated only to defeat the rights of creditors such as the applicant.

19. To the agreement dated 22nd February, 2012 two letters required to be addressed by respondent No. 1 to respondent No. 3, the distributors who had the right to the negatives to the said other film, were annexed. Those letters are shown to be dated 22nd February, 2012, the date of the agreement itself and 5th July, 2012, the date of the last payment required to be made under the agreement. The letter dated 22nd February, 2012 was in respect of only the lien which respondent No. 3 as distributor would be entitled upon the negatives and the rights of respondent No. 1 in claiming those negatives for the purpose of the actual production of the film. The letter dated 5th July, 2012 was the letter in respect of transfer of the negatives to respondent No. 5, subject, of course, to the rights of respondent No. 3.

20. Whereas it is claimed by the applicants that the correspondence entered into by respondent No. 1 in June, 2012 shows his rights and entitlement in that other film even in June, 2012, despite the agreement purportedly entered into in February, 2012 and that letter relating to transfer of negatives was given only after the execution application was taken out and the initial order was passed in the Chamber Summons taken out by the applicant, it is claimed by respondent No. 5 that the agreement was entered into when respondent No. 5 had no knowledge of the rights claimed by the applicants as the Judgment Creditors under the Award dated 29th October, 2011 and was well prior to the execution application having been taken out and the letters issued by respondent No. 1 to the applicants.

21. It will be material to consider the agreement itself, to understand its terms and import.

22. It is contended on behalf of respondent No. 5 by Mr. Tulzapurkar that respondent No. 5 is only concerned with the said other film. He is not a Judgment Debtor but a third party to the litigation. The rights of the other film cannot be claimed by the applicants unless applicants prove that the other film belonged to the Judgment Debtor. He would argue that the applicants have not proved that the other film belonged to respondent No. 1 except to challenge the agreement between respondent Nos. 1 and 5 as a fraudulently executed

document. It is claimed by respondent No. 5 that the agreement dated 22nd February, 2012 stamped on 21st February, 2012 succeeded the term sheet entered into by and between the parties as early as on 5th December, 2012. Both the documents, however, contain the same terms.

23. It is contended on behalf of the applicants by Mr. Chinoy that Rs. 36.26 lacs with interest thereon at the agreed rate was the balance payable when defendant No. 1 confirmed that the other film was his film and obtained the certificate as agreed by the parties from the distributor Respondent No. 3 after which he reconfirmed that it was his film.

24. To contend that the agreement is sham and did not relate to the entire film for which it was sought to be made, the applicants have relied upon the consideration that was stated to pass thereunder. The film was a regular commercial feature film. It is not a low budget documentary. For all the rights in the film the total consideration is shown to be Rs. 17.5 crores only. It is argued that this could never be adequate consideration or even a reasonable consideration for taking over the entire rights or for showing one's entire rights in such film.

25. Mr. Narula argued that respondent No. 5 could only finance the residuary schedule which was the last part of the film that remained to be produced after February, 2012 and the fact that before 22nd February, 2012 some material containing the negatives of the film was lying with respondent No. 3 would be apparent from the fact that respondent No. 1 was required to write two letters to respondent No. 3. The first was in respect of their lien over the negatives dated 22nd February, 2012 and the second for transfer of the rights to respondent No. 1 dated 5th July, 2012.

26. Mr. Narula drew my attention to the balance sheet of respondent No. 5 as on 31st March, 2011 which showed inter-alia the work-in-progress including capital advances of Rs. 431 crores. He drew my attention to the agreement with another party entered into by respondent No. 1 (which is the subject matter of the another Chamber Summons before this Court) which shows that the film for which the amount was initially credited was itself worth Rs. 76 crores and stated that in another litigation a third film shown to be produced by respondent No. 5 was of Rs. 100 crores. He, therefore, argued that arithmetically it could not stand to reason that the other film, for which the applicant claimed the entitlement to receivables, would be acquired for only Rs. 17.5 crores when a provision is made by respondent No. 5 for additional more than Rs. 200 crores in the balance sheet. He also drew my attention to the statement of respondent No. 5 that it was not producing any film other than those two films.

27. Mr. Narula took me through the agreement dated 22nd February, 2012 between Respondent No. 1 and Respondent No. 5 meticulously. It shows that Respondent No. 5 is in the business of financing production and distribution of films and has approached Respondent No. 1 for line production of the film for Rs.

17.5 crores out of which Rs. 17 crores would be the expenses of line production and Rs. 50 lacs would be the fees of Respondent No. 1. The agreement shows the line production would include pre production casting film editing, post production and delivery. It would, therefore, exclude nothing from the pre production to post production stage. Respondent No. 1 was supposed to supervise all the above for full length feature film with a renowned cast of actors for which respondent No. 5 had the rights specified in clause 1.10 of the agreement being derivative rights, exploitation rights, intellectual property rights, (including copyright) audio visual format, musical rights, theater rights, television rights, broadcasting rights, webcasting rights, radio and internet rights, broadband rights, and all incidental and ancillary rights worldwide i.e. all the rights.

28. It is argued on behalf of the claimants, and it stands to reason, that all the negatives and the rush prints as also the positive prints of the film were to be in terms of Annexure 4 to the agreement. In fact the annexure itself makes interesting reading. Annexure 4 is the confirmation of the letter agreed upon by both the parties. It was to be issued not by the owner of the film respondent No. 5, but the line producer Respondent No. 1. The letter shows transfer of the negatives of the film to Respondent No. 5. It specifically mentions about financial agreement entered into by Respondent No. 1 to Respondent No. 5 to complete "our" film. It mentions about the first lien and charge created in favour of Respondent No. 5 by Respondent No. 1 but under the financial agreement. It further mentions that the Respondent No. 5 has been authorised to handle the negatives etc., and therefore, calls upon Respondent No. 3 laboratory to transfer negatives to respondent No. 5. The letter dated 5th July, 2012 is also shown to be written by Respondent No. 1 authorising transfer of the picture and its negatives to Respondent No. 5 who will be authorised to handle the negatives in the premises of the Respondent No. 3. That letter informed the respondent No. 3 not to release any prints to any party other than Respondent No. 5. Annexure 4 leaves no doubt that the agreement was admittedly a finance agreement alone.

29. It is contended on behalf of the Respondent No. 5 that this arrangement had to be made because Respondent No. 1 as the line producer would be requiring to deal with the laboratory on day to day basis. However, if that was so, the owner of the film would itself give such a letter to the laboratory to allow its agent access to those materials required for production of the films. There was no reason for the agent, the line producer, to address such a letter. Such letter could have only been addressed if until then the line producer was the owner until then. This would show that until the date of the letter respondent No. 1 was indeed the producer and accordingly the owner of that film.

30. Under the said clause 2.5 itself the parties contemplated the transfer of ownership in July, 2012. This letter of transfer of ownership was dated 5th July, 2012, a draft of which was agreed by and between the parties and annexed as annexure 5 to the agreement itself. This letter would show that until 5th July,

2012 the transfer of ownership was not even contemplated. The film itself would be completed by then. Infact in the first letter denying liability by Respondent Nos. 1 and 2 to the claimants on 21st June, 2012, the Respondent No. 1 had mentioned that the film was 60% completed. This is compatible with the intention to transfer the ownership on 5th July, 2012.

31. The assurance of respondent No. 1 in clause 6 by which it acknowledges that it shall not be entitled to the monies generated from and out of the exploitation of the film itself shows the collusion to defeat the claims of the creditors of Respondent No. 1 and 2 such as the claimants. Hence the argument of Mr. Narula that if indeed respondent No. 5 was the complete owner of the said other film, it would be respondent No. 5 who would be writing letters such as letters dated 22nd February, 2012, and 5th July, 2012 to respondent No. 3 informing respondent No. 3 that respondent No. 1, as the agent of respondent No. 3 or as the contracting party, would deal with the negatives during the actual line production stands to reason.

32. The argument of Respondent No. 5 exalting the Court that the agreement stands to scrutiny of the Court is on the premise that it shows payment of stamp duty of Rs. 3.5 lacs on 21st February, 2012 a date prior to the execution to suggest that the agreement was indeed executed on that day. An agreement could be executed by a party with another to defraud another party in future or to make provision for evasion of future liability known to such party. The award had been passed since 29th October, 2011. Respondent Nos. 1 and 2 know their liability from that date itself. Respondent No. 1 discharged only a part of its liability of minor amounts aggregating to Rs. 5.3 crores only from amount of 41 crores with interest. The chunk of the liability was to arise in June, 2012. If respondent Nos. 1 and 2 had not the intention to discharge that liability but only the intention to defraud their creditors after causing them to sign the Consent Terms, Respondent Nos. 1 and 2 may enter into such an agreement in February, 2012. It matters not that some of the installments had not become due and payable until then and were defaulted thereafter and the execution application was taken out still thereafter. The malafide intention of Respondent Nos. 1 and 2 could have been present to their minds even in February, 2012 unknown to all others including the claimants. Hence merely because the agreement was executed prior to the execution application would not impute bonafides.

33. The court must see the agreement vis a vis the rights of the parties and their obligations in consonance with the consideration that flows for such obligations and rights. This is not an instance where the parties would contract for any consideration less than the market value demands. The court must, therefore, take judicial notice of such value and the minds of the parties that accompanied it. It would be impossible for the court to accept an agreement of the kind as bonafide executed. The rights claimed by respondent No. 5 are seen to be in collusion or for some other consideration hitherto not shown in the agreement and which must be disregarded by the Court.

34. Hence the following order :

1. Court Receiver is appointed Receiver in execution of the above award dated 29th October, 2011 in respect of all the prints and negatives of the other film "Sher" of Respondent Nos. 1 and 2. The Court Receiver shall take charge of the prints and negatives of the said film "Sher" from Respondent No. 3 or any other party and keep the same in his custody pending the execution of the aforesaid award.

2. Consequently respondent No. 3 is directed not to part with the release of prints or the negatives of the film "Sher" and instead hand them over to the Court Receiver, High Court, Bombay.

3. Respondent Nos. 1 & 2 as Judgment Debtors shall disclose on affidavit the particulars of their assets and properties under the provisions of Order 21 Rule 41(2) of the CPC within two weeks from today.

4. The Respondent Nos. 1 and 2 own certain shares in their names in a Limited Company Shree Ashtivinaya LFS Infrastructure Ltd. The respondent Nos. 1 and 2 have been restrained from encumbering, selling or creating third party rights in the said shares by way of ad-interim order in this Chamber Summons. Respondent Nos. 1 and 2 shall not sell the shares standing in their names of Ashtivinayak LFS infrastructure Ltd. until the award dated 29th October, 2011 is satisfied.

5. At present no order against Respondent No. 4 is passed for the execution of the award dated 29th October, 2011.

The Chamber Summons is disposed off accordingly. The original irrelevant documents being two sheets of confirmation of accounts and two sheets of receipts with letters dated 11th April, 2012 and 19th April, 2012 are returned to the advocate of Respondent No. 1 along with the original letter dated 4th June, 2012 purportedly kept in sealed envelope which has been opened by Court.