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

NOTICE OF MOTION NO.3735 OF 2011
IN
SUIT NO.2992 OF 2011

Orbit Corporation LimitedPlaintiff
V/s.	
Vikram Devendra AhujaDefendant

Mr.Mahesh Jethmalani, Senior Counsel with Ms.Fereshte Sethna, Mr.Ram Kakkar, Mr.Aagam Doshi, Mr. Pradeep A.R. and Ms.Gunjan Mangela i/b M/s.Duttmenon Dunmorrsett for the Plaintiff.

Mr.J.P. Sen with Mr.Kartik Desai and Mr,Onkar Chandurkar i/b Ms.Kartikeya & Associates for the Defendant.

CORAM : S.J. VAZIFDAR, J.
DATE : 31ST MARCH, 2012.

P.C. :-

1. The plaintiff seeks an injunction restraining the defendant from directly and/or indirectly making / publishing / repeating / circulating and/or causing to be published or circulated any statements maligning it, an order directing the defendant to publish an apology for and a retraction of the defamatory statements and complaints made against the plaintiff and for damages.
2. Mr.Jethmalani, the learned senior counsel appearing on behalf of the plaintiff stated that the defendant had made various

defamatory statements in a letter dated 11.5.2011 to the Axis Bank Limited, which had granted certain credit facilities to the plaintiff. Mr.Jethmalani submitted that the letter read as a whole is clearly libellous. He submitted that there were at least six independent libellous statements in the letter. I will deal with each of them separately. It is however, necessary to reproduce the entire letter for it was submitted that the letter read as a whole established the plaintiff's case. The letter dated 11.5.2011 addressed by the defendant to the Axis Bank Limited reads as under :-

1. I write to you with reference to a cash credit facility your esteemed bank has extended to M/s ORBIT CORPORATION LTD on 1st October 2010 for a sum of 100 crores.
2. Your bank has a registered mortgage of the proposed building pertaining to unsold area of 46,600 sq feet on land bearing CTS No 12/593 and of land bearing CTS No 11/593.
3. The company M/s ORBIT CORPORATION LTD has availed of this cash credit facility to utilise it as part funding of residential apartment Villa Orb annexe project at Napean Sea Road.
4. I would like to bring to your notice how the company has misled your bank and your cash credit facility has been extended on unsold FSI of a building that has various violations as stated below:
5. There are series of stop work orders issued by the MCGM under section 354-A to the company for illegal construction in building bearing CST No 12/593 and other

projects bearing CST NO 8/593 as recent as Dec 2010 after your bank has sanctioned facilities to them. Copies of various stop work Notices are attached.

6. On March 12th an article was published in the Asian Age newspaper on the above stop work notices with a quote from the Chairman Mr Ravi Kiran aggarwal. The copy of article has been attached.

7. M/s ORBIT CORP LTD have misrepresented facts to MCGM by showing entire cost of project being below 5 crs to bypass getting CRZ clearance from Union Ministry of Environment and Forests as according to CRZ norms, if a project is under Rs 5 crs it will only require state coastal authority clearances. Copy of surveyor report submitted to MCGM attached.

8. Few weeks ago the Hon'ble Union Minister Shri Jairam Ramesh held a press conference in Mumbai and has clearly stated that any illegal buildings that have floated this clearance will be severely dealt with and the Occupation Certificate won't be granted and water and electricity connections to such buildings would be cut off. He also stated that 25 complaints for illegal buildings have been received and his ministry is looking into it. M/s ORBIT CORPORATION's two buildings are part of those complaints including the one your bank has lent to mainly CST NO 12/593.

9. I'm sure you will understand if the company shows the project under Rs 5 crs it contradicts with your bank lending of Rs 100 crores for part funding the construction of residential building on CST No 12/593 and CST No 11/593. I'm sure the company has misled your bank and hidden these serious violations while applying for the facilities.

10. All these huge benefits were taken by the

company when Shri Ashok Chavan was the chief Minister due to their close proximity to him and the tainted minister has received two flats in ORBIT CORPORATION's building in lieu of various benefits which are held in benami companies names. The modus operandi being the same that happened in ADARSH BUILDING IN MUMBAI.

11. I have also learnt that the senior authorities at MCGM have sent all ORBIT CORPORATION's files for scrutiny and no sanctions or amendments in any of their projects are to be allowed without the signature of the Municipal Commissioner.

12. Further I would like to inform you that I have informed and provided the MOEF details of violations by ORBIT CORP and various other departments. Shortly a PIL will be filed on the building bearing CST No 8/593, 11/593, 12/593 in the Hon'ble High Court exposing a series of violations which will result in the Hon'ble court initiating an investigation into them and issuing a stay order on the illegal building.

13. In view of the above actions taken place your cash credit of Rs 100 crores will be at risk and sincerely urge you to call back your funds and avoid a huge NPA in the making. AXIS BANK LTD is a publically listed bank with impeccable credibility and clean practices so I'm sure you would look into this matter at the earliest and take strict actions and also take care of the shareholders interests in your bank.

14. I hope the management of your bank will address this matter with seriousness failing which if I don't hear from your esteemed bank on the above matter and the necessary action that has been taken to call back the loan I will be left with no option but to proceed and file the necessary criminal and civil suits in court against your bank."

The letter does not contain paragraph numbers. I have furnished the same for convenience. I will deal with the six alleged libellous statements in the letter in the order in which they were referred to by Mr.Jethmalani. The six libellous statements are contained in paragraphs 8, 10, 11, 4, 5, and 7, which is the order in which they were dealt with by Mr.Jethmalani.

3. I will deal with the matter on the basis that I am bound by the various judgments of this Court, which are referred to in the judgment of the learned single Judge of this Court in *Maheshwar Hydel Power Corporation Ltd. v. Chitroopa Palit*, AIR 2004 Bombay, 143. After referring to these judgments, the learned Judge held as under :-

“49. After having heard the learned Counsel for both the parties at length and after perusal of the impugned judgment and order and also the various judgments cited by both the parties, it is clear that in any event, the principles of law in England and in India with regard to grant of interlocutory reliefs in a civil action for Libel are different. In England, the principle of law is that in case of an action for defamation, once the defendants raise the plea of justification at the interim stage, the plaintiff will not be entitled to an interlocutory injunction. To put in other words, in England, a mere plea of justification by the defendant would be sufficient to deny the plaintiff any interim relief. As far as India is concerned, as has been clearly held by this Court in the judgments referred to hereinabove, specially the judgment of this Court in the case of *Dr. Yashwant Trivedi v. Indian Express Newspapers (Bombay) Private Ltd.* dated 21st March, 1989 and the judgment of appellate Bench dated 29th June, 1989 with regard to the same matter in appeal,

the judgment of this Court in Purshottam Odhnvji Solanki v. Sheela Bhatta dated 3rd December, 1990, judgment of this Court in the case of Mrs. Betty Kapadia v. Magna Publishing Co. Ltd. dated 22nd July, 1991, and the judgment in the case of Indian Express Newspapers (Bombay) Ltd. v. M/s. Magna Publishing Co. Ltd., dated 21st July, 1995, it is clear that in India, a mere plea of justification would not be sufficient for denial of interim relief. The defendants, apart from taking a plea of justification will have to show that the statements were made bona fide and were in public interest, and that the defendants had taken reasonable precaution to ascertain the truth, and that the statements were based on sufficient material which could be tested for its veracity. Therefore, in India, the Court is very much entitled to scrutinise the material tendered by the defendants so as to test its veracity and to find out whether the said statements were made bona fide and that whether they were in public interest. Therefore, in India, even at the interlocutory stage, the Court is very much entitled to look into the material produced by the defendants for the plea of justification, so as to test its veracity with regard to the allegations, alleged to be defamatory.”

4. Mr.Sen, the learned counsel appearing on behalf of the defendant stated that the defendant, without prejudice to his rights and contentions, is willing to make a statement that he will not re-publish in any manner or form whatsoever the second and third libellous statements contained in paragraphs 10 and 11 of the above letter. The statements are accepted and it is so ordered. In view thereof, it is not necessary to consider the same.

5. The first alleged libel is contained in paragraph 8 of the letter. I agree with Mr.Jethmalani that the paragraph read as a whole

suggests that the Union Minister's reference to the twenty five buildings in respect of which complaints were received included two of the plaintiff's buildings. Mr.Sen however, submitted that there is material to establish the fact that complaints were made in respect of two of the plaintiff's buildings.

6. To put the defendant's case at his lowest, it must be said that it is not possible to come to a conclusion that the statement was made without any basis or material whatsoever. Mr.Sen relied upon the three show cause notices, all dated 28.6.2011, issued by the Maharashtra Coastal Zone Management Authority (MCZMA) , two of which are at Exhibits "F" and "G" to the plaint. The show cause notices state that the office of the MCZMA was in receipt of complaints that the plaintiff had violated the CRZ norms in certain respects relating to the construction on a plot bearing No.CS.No.-12/593 and that the complaint also alleges a false valuation having been submitted by the plaintiff. The plaintiff was called upon to show cause why its activities should not be stopped on account thereof and why the MCZMA should not initiate action against it under the provisions of the Environment (Protection) Act, 1986.

7. For the purpose of this suit, it is immaterial whether the show cause notices were issued validly or not. It is sufficient to note that they were issued as the same indicates at least a possibility that

the complaints referred to by the Union Minister at the press conference included those in respect of the plaintiff's buildings on CST 12/593.

8. The press conference was held on 25.4.2011. The same is annexed at Exhibit-1 to the affidavit in rejoinder dated 23.2.2012 filed on behalf of the plaintiff. The fact that the show cause notices were issued subsequently on 28.6.2011, makes no difference. This does not suggest that the twenty five complaints referred to by the Union Minister did not include the complaints against the two buildings constructed by the plaintiff. In fact it suggests the contrary. It obviously indicates that the show cause notices were issued pursuant to the complaints.

9. I mentioned earlier that it is not necessary to consider the second and third libellous statements, as the defendant has agreed not to republish the same in any manner.

10. The fourth and fifth libellous are in paragraphs 4 and 5 of the letter. Mr.Sen was indeed unable to establish that the stop work orders/notices issued by the BMC under section 354-A of the BMC Act in respect of the buildings at CST Nos.12/593 and 8/593 would affect the plaintiff's ability to repay the banks dues under the cash credit facilities granted on 1.10.2010. Mr.Jethmalani submitted that each of these show cause notices was in respect of violations which

were capable of being remedied or regularized by payment of penalty. Indeed Mr.Jethmalani submitted, and I will assume for the purpose of this order correctly, that the show cause notices were withdrawn by the BMC on payment of penalty. In an action for libel, it is not necessary for the defendant, especially at the the interlocutory stage, to establish that as a result of the illegalities the repayment of the banks dues were in jeopardy. The defendant has merely pointed out the fact that the stop work notices were issued. The plaintiff itself does not deny the fact that the stop work notices were issued. Any illegality would be a relevant factor to be considered by a lender. It is for the lender / creditor to assess whether the show cause notices had any substance and if so, the effect thereof upon the debtor's ability to repay the loan.

11. The fact that the loan was granted against the mortgage of the property bearing CST No.12/593 alone, makes no difference. An illegality which affects the recovery of the creditor's dues even relating to the property which is not secured in favour of the creditor, is relevant. If the creditor is unable to recover its dues entirely or even partly from the assets secured in its favour, it can always look to the other properties of the debtor for the balance. Thus the reference to the show cause notice in respect of the plot bearing CST No.8/593 cannot be said to be irrelevant merely because the dues of

the Axis Bank Limited are secured by a charge/mortgage only in respect of the property bearing CST No.12/593.

12. A party is not entitled to an injunction restraining another from making a statement about the notices issued by the statutory authorities without expanding upon the gravity of the charges contained therein and specifying the consequences of the noticee being able to remedy / rectify its actions which are complained of therein.

13. Mr.Jethmalani submitted that the statement in paragraph 4 of the letter that the plaintiff has misled the bank is ex-facie false because the stop work orders were issued after the cash credit facilities had been sanctioned and extended by the bank. He submitted that there could therefore, be no question of the plaintiff having misled the bank when it applied for and obtained the facility.

14. Indeed the cash credit facility was granted on 1.10.2010, whereas the three stop work notices in respect of CST No.8/593 and one in respect of CST No.12/593 were issued thereafter in December, 2010. That the notices were issued after the bank had advanced the cash credit facility is irrelevant. The defendant's contention was that the plaintiff's construction was illegal in certain respects and that the plaintiff misled the bank by not disclosing the same to it while applying for and obtaining the cash credit facilities.

The paragraphs that follow including paragraph 5 is evidence or material that the defendant has referred to and relied upon to substantiate his allegation.

15. This brings me to the sixth and last libel, which is alleged to be in paragraph 7 of the letter. Mr.Jethmalani submitted that the statement that the plaintiff had misled to the BMC by showing that the “entire cost” of the project was below Rs.5.00 crores is ex-facie false. He submitted that the plaintiff had only stated that the cost of construction was less than Rs.5.00 crores. In other words, the plaintiff had not stated to the BMC that the entire cost of the project which would include the price of land was below Rs.5.00 crores. Mr.Sen on the other hand, submitted that even the cost of the construction could be more than Rs.5.00 crores.

16. The defendant relied upon a survey report submitted to the BMC. Mr.Jethmalani submitted that the report was prepared by the surveyor appointed by the defendant and therefore, cannot be relied upon. In an action of defamation that is immaterial. The defendant is entitled to rely upon the material unless it can be established beyond reasonable doubt at the interlocutory stage, that the material itself is obtained mala-fide.

17. The defendant has relied upon the plaintiff's brochure for the project which refers to : “7 Star suites for homes, breath taking

ocean views and the panoramic view of the surroundings and world class facilities". The project involves construction of premium residential towers in one of the most exclusive localities in Mumbai with 20 floors and each flat admeasures 7700 sq. ft. Mr.Sen submitted that even if only the cost of construction is considered, according to the plaintiff, the costs of the construction per sq. ft. would be about Rs.330/-. He submitted that judicial notice can be taken of the fact that this is absolutely impossible.

18. Mr.Jethmalani on the other hand, submitted that this calculation is incorrect. He sought to rely upon circulars and the other provision of law to substantiate the plaintiff's stand in this regard. In fairness to him, I must mention that I did not permit him to do so. I am not concerned here with the correctness or otherwise of the rival contentions. That would be an issue in appropriate proceedings such as in reply to the show cause notices or in any other independent proceedings that the parties may adopt in this regard. It is sufficient for the purpose of this notice of motion to note that the defendant's assertion in this regard cannot be said to have been without any material. Indeed the appropriate authority would have to consider firstly whether the provisions of law required the plaintiff to consider the value of the entire project including the cost of land. Even if the cost of construction is to be considered, the

appropriate authorities would have to consider the factors to be taken into consideration while calculating the same.

19. Mr.Jethmalani had strongly contended that the letter and the complaints were motivated in view of the disputes between the defendant and the plaintiff's Chairman and the Managing Director. The disputes arose in respect of the assets of the defendant's father. The Managing Director is the executor of the Will of the defendant's father. The defendant appears to have been disinherited. The entire estate was bequeathed to the defendant's sister one Tania Goel.

20. The record does indicate enormous disputes and animosity between the defendant and the plaintiff's Chairman and the Managing Director. There are various allegations made by each of them against the other. Mr.Jethmalani submitted with considerable force that the defendant has addressed the letter only to harm the plaintiff on account of the said dispute and animosity. That appears to be quite obvious. The defendant's motive prima-facie does not appear to be out of any concern for the public at large on account of the alleged illegal construction by the plaintiff. This is evident from the fact that the defendant has not even filed any proceedings against the plaintiff. Nor has the defendant taken such steps against the other constructions companies / developers. Mr.Sen did not even suggest that it was mere a co-incidence that the defendant

addressed the communications against the plaintiff.

21. It must be mentioned however, that often facts are disclosed to the benefit of the public on account of the animosity between persons. If the animosity discloses facts which are in public interest so be it.

22. It is also pertinent to note that there are various articles in more than just one newspaper with regard to the plaintiff's construction activities. The plaintiff has not filed any proceedings in respect thereof.

23. I hasten to add and indeed it ought to be clear that I have not expressed any view whatsoever regarding the correctness or otherwise of the allegations made by the defendant. The defendant has pleaded justification. Suffice it to state that I do not find that there is no material whatsoever on the basis of which the allegations have been made. Whether the material establishes the allegations or not is a matter which must await the trial.

24. In the circumstances, the notice of motion is dismissed except to the extent of the two alleged libellous statements in paragraphs 10 and 11 of the letter dated 11.5.2011, in respect whereof the defendant has undertaken not to republish the same in any manner and which undertaking is hereby accepted. It is also accordingly so ordered. There shall be no order as to costs.