

M/S. New Era Fabrics Ltd. vs Bhanumati Keshrichand Jhaveri on 3 March, 2020

Equivalent citations: AIRONLINE 2020 SC 339

Author: Mohan M. Shantanagoudar

Bench: R. Subhash Reddy, Mohan M. Shantanagoudar

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

INTERLOCUTORY APPLICATION NO. 61907 OF 2018

IN

MISCELLANEOUS APPLICATION NO. 1301 OF 2018

IN

SPECIAL LEAVE PETITION (CIVIL) NO. 3309 OF 2018

M/s New Era Fabrics Ltd.

...Petitioner

Versus

Bhanumati Keshrichand Jhaveri & Ors.

...

Respondents

IN THE MATTER OF

Nikhilesh Keshrichand Jhaveri

...Applicant/
Respondent No. 4

J U D G M E N T

MOHAN M. SHANTANAGAUDAR, J. :

1. This application has been filed under Section 340 read with Section 195(1)(b) of the Criminal Procedure Code, 1973 ('CrPC') seeking institution of criminal proceedings

against the Petitioner in SLP (Civil) No. 3309/2018 for giving false evidence before this Court.

2. The facts giving rise to this application are as follows:

The Respondents/plaintiffs claim to be the lessors of suit premises being C.S. No. 560 and 561, final Plot No. 268, T.P.S. III of Mahim Division, Ward No. 6/North 5546 (1-1A) situated at Mogul Lane, Tulsi Pipe Road, known as Senapati Bapat Marg, Mahim, Mumbai- 400 016. The Petitioner/defendant Company was a monthly tenant of the suit premises. The Respondents terminated the tenancy by notice to quit dated 11.02.2009 and subsequently filed Suit No. 48/62/2009 before the Court of Small Causes, Mumbai ('Trial Court') for possession and injunction against the Petitioner. The Respondents averred in their suit that the Petitioner is a public limited company having a paid-up share capital of more than Rs. 1 crore; hence it would not be protected under the Maharashtra Rent Control Act, 1999. 1 The Petitioner claimed in its written statement that as of 31.02.2007, it had a paid up share capital of Rs. 1,03,64,000;

however, by resolution dated 01.03.2007, it had reduced its share capital to Rs. 93,74,000. Hence it raised a preliminary objection to the jurisdiction of the Trial Court to try the suit. 2.1 Consequently, the matter was directed to be heard on the preliminary issue of whether the Trial Court had jurisdiction to entertain, try and decide the suit. The Respondent relied on the income tax return filed by the Petitioner Company for the assessment year 2008-2009 (i.e. pertaining to the financial year 2007-2008), which showed that the paid-up share capital of the company as on the date of termination of the tenancy was Rs. 1,03,64,000. A revised return showing the share capital to be Rs.93,74,000/- was filed only on 4.04.2009, which was subsequent to the notice for termination of the tenancy.

Section 3(1)(b) of the Maharashtra Rent Control Act, 1999 provides that the Act shall not apply to any premises let or sub-let to private limited and public limited companies having a paid up-share capital of more than one crore rupees.

2.2 Per contra, the Petitioner argued before the Trial Court that the share capital had been reduced by way of 'buy-back' of shares on 1.03.2007, and hence the paid-up share capital for the financial year 2007-2008, ending on 31.03.2008, was Rs. 93,74,000. Mr. R.K. Agarwal, who is the Director of the Petitioner Company, was examined as D.W. 1 in this regard. He deposed that the Registrar of Companies had been informed of the aforesaid reduction in share capital; that the assistant of the Company's internal auditing firm had inadvertently entered the share capital of the Company as Rs. 1,03,64,000/- while preparing the income tax return for the assessment year 2008-2009; and upon discovery of the error, the revised return dated 4.04.2009 (supra) was filed. That the audit report and the balance sheet for the year 2007-2008 showed that the share capital had been reduced, and the same had been submitted to the Central Excise and Sales Tax Departments. The audit report and the balance sheet dated 19.9.2008, as prepared for the financial year 2007- 2008, and as produced in the evidence of D.W. 1, were marked as Exhibits 81 and 82 respectively.

Additionally, D.W. 3 Mr. Gautam Nemani, who was stated to be a shareholder of the Company, deposed that he had surrendered 18,000 shares at the rate of Rs. 10 per share, though he admitted that the book value of a single share was Rs. 73.46. D.W. 5, the internal auditor of the Company deposed that the Company had bought back 99,000 shares of face value of Rs. 10 each, and therefore the Petitioner's share capital for the year 2007-2008 was Rs. 93,74,000/-.

D.W. 6, the statutory auditor of the Company, similarly deposed that he had prepared the balance sheet dated 19.09.2008, for the financial year 2007-2008 (as mentioned supra) showing the reduced share capital as Rs. 93,74,000/-. He also certified that the figure stated in Column 12 of the balance sheet, showing the basic and diluted earning per share (hereinafter 'EPS') as Rs. 15.91 per share, was correct. 2.3 However, the Trial Court rejected the Petitioner's contentions, finding that there were material discrepancies in the evidence of their witnesses, which made their case regarding 'buy-back' of shares improbable. That there was no record of the letters dated 09.03.2007 and 25.03.2007 which the Petitioner contended it had filed before the Registrar of Companies as returns relating to the buy-back, and electronic return was filed only on 05.09.2009, though filing of electronic returns has been made mandatory from 16.09.2006 onwards. Hence the Petitioner had not complied with the procedure for buy-back of shares as prescribed under Sections 77A, 77B and 159 of the Companies Act, 1956.

Importantly, it was pointed out that there was a significant discrepancy in the audit report and the balance sheet dated 19.09.2008, inasmuch as the weighted average number of shares for the financial year 2007-2008 in Column 12 of the balance sheet was stated to be the same as that for the year 2006-2007, i.e., 10,36,400, even though the share capital of the Petitioner Company had been reduced.² Therefore it was evident that the revised income tax return filed by the Petitioner was a subsequent act, post notice of termination of tenancy served by The Trial Court had erroneously stated that the 'EPS' was 10,36,400, perhaps because the heading of Column 12 states 'EPS', however the same does not have any bearing on the merits of the case. the Respondent, and that the actual paid-up share capital of the Petitioner Company as on the date of termination of the tenancy was Rs. 1,03,64,000/-. Hence the Trial Court would have jurisdiction to try the Respondent's suit.

2.4 The Trial Court's findings were affirmed by the Court of Small Causes (Appellate Bench). The High Court dismissed the revisional application filed by the Petitioner. Subsequently, on 09.04.2018, a three-Judge Bench comprising one of us dismissed SLP (Civil) No. 3309/2018 filed by the Petitioner before this Court, out of which the present application arises. Therefore it is not disputed that the finding on the preliminary issue of jurisdiction has attained finality, and the trial of the suit on merits is presently pending before the Trial Court.

2.5 However it is the case of Respondent No. 4 in the aforesaid SLP (Civil) No. 3309/2018 (hereinafter 'Applicant') that the Petitioner in the aforesaid SLP deliberately made false interpolations in the auditor's report and the balance sheet dated 19.9.2008, while submitting these documents before this Court. The Applicant's contention is that these documents have been revised/interpolated for the first time in the course of the SLP proceedings, for the purpose of misleading this Court. Hence the present application has been moved on 24.04.2018, soon after the dismissal of the SLP, seeking institution of criminal proceedings against the Petitioner for the

offence of perjury.

3. Learned Senior Counsel Mr. Amit Sibal, arguing on behalf of the Applicant, submitted that the Petitioner/defendant, in its reply to the application for interim injunction filed by the Applicant before the Trial Court, had annexed the audited balance sheet dated 19.09.2008 for the financial year 2007-2008 (supra). In the version filed before the Trial Court, the paid-up share capital of the Petitioner/defendant was shown as Rs. 1,03,64,000/- as on 31.03.2007, and Rs. 93,74,000/- as on 31.03.2008.

Therefore as per the Petitioner's stand, the buy-back process was completed in April 2007. If that was the case, the number of Weighted Average shares and the EPS for the financial year 2007- 2008 ought to have been computed accordingly. However, Mr. Sibal pointed out that the number of Weighted Average shares in the balance sheet was stated to be 10,36,400 for both financial years 2006-2007 and 2007-2008, even though it should have changed to 9,37,400 for the year 2007-2008. Further, the EPS was also calculated on the basis of the original share capital of Rs. 1,03,64,000, and not the reduced share capital as claimed by the Petitioner.

Mr. Sibal argued that it was on account of this failure to manipulate the balance sheet that the Trial Court declined to rely on the document, and held that the Petitioner had failed to establish that its share capital had been reduced. Hence, in order to overcome this omission at the stage of hearing of the SLP, the Petitioner for the first time made a handwritten interpolation in Column 12 of the balance sheet, by which the words 'Weighted Average' were crossed out, and the document was manipulated (by interpolation) to show that the number of equity shares 'as on 1/4/07' was 10,36,400.

Mr. Sibal also pointed out that there were four instances in the Trial Court record wherein D.W. 1 Mr. R.K. Aggarwal had referred to the original balance sheet dated 19.09.2008, which did not contain any handwritten interpolation. Therefore the first time that the Petitioner sought to place reliance on the contents of the manipulated balance sheet was before this Court, which clearly showed that the document was forged specifically to mislead this Court. Had the interpolated document been authentic, the Petitioner would have naturally placed reliance on the same before the Courts below.

3.1 Per contra, learned senior counsel for the Petitioner/Non-Applicant, Mr. Basava Prabhu Patil submitted that the auditor's report and balance sheet dated 19.09.2008 were exhibited multiple times as part of the evidence of different parties. In the Petitioner's reply to the application of the Respondent/Applicant for interim injunction, the auditor's report together with the balance sheet had been marked as Exhibit 13. Mr. Patil highlighted that the advocate appearing for the Petitioner before the trial Court had obtained a certified copy of the aforesaid Exhibit 13. In the certified copy of Exhibit 13, Column 12 of the balance sheet states that the 'number of Equity Shares as on 1/4/07' is 10,36,400 shares. It can be seen that the words 'Weighted average' have been crossed out, and 'as on 1/4/07' has been added, by hand.

Mr. Patil also placed on record a certified copy of Exhibit 82, which is the balance sheet dated 19.9.2008, as marked in the evidence of D.W. 1. Column 12 of the certified copy of Exhibit 82 contains the same handwritten interpolation. Therefore it was strenuously contended that the handwritten corrections in the balance sheet were present since the beginning of the trial. The Applicant ought to have raised any grievance regarding forgery in the document at the stage of trial itself. However, no cross- examination of the Petitioner's witnesses was conducted on this aspect before the Trial Court, and the perjury application was moved only after the SLP had been dismissed.

It was further contended that the Petitioner's advocate had not relied upon Column 12 of the balance sheet while arguing the SLP before this Court, and as such the contents of Column 12 had no bearing on the dismissal of the SLP. Hence it was submitted that there was no merit in the Applicant's contention that the Petitioner had committed perjury.

4. Be that as it may, having perused the original copies of the Trial Court record, we find prima facie merit in the Applicant's case that the Petitioner has committed perjury. We have compared the original copies of the auditor's report and the balance sheet, as exhibited before the Trial Court, with the copies filed before this Court in SLP (Civil) No. 3309/2018. We find that in the Trial Court record, Column 12 of the balance sheet dated 19.09.2008, marked as Exhibit 82, has tabulated the EPS as follows:

	2007-08	2006-07
a) Net profit available for Equity	1648667	13577864
b) Weighted average number of Equity Shares	1036400	1036400
c) Basic and Diluted earning per share of Rs. 10 each	15.91	13.10

Whereas in the copy of the balance sheet submitted before this Court, the words 'Weighted average' have been struck out, and 'as on 1/4/07' has been added after 'Equity Shares', as shown below:

	2007-08	2006-07
a) Net profit available for Equity	1648667	13577864
b) Weighted average number of Equity Shares as on 1/4/07	1036400	1036400
c) Basic and Diluted earning per share of Rs. 10 each	15.91	13.10

(emphasis supplied)

4.1 We further find that wherever the auditor's report and

the balance sheet have been marked as evidence before the trial Court, no such handwritten interpolation is present. Exhibit 13, which is the Petitioner's reply to the application for interim

injunction, Exhibit 92, which is the audited copy of the balance sheet as filed with the Superintendent of Central Excise, and Exhibit 93, which is the audited copy of the balance sheet as filed with the Assistant Commissioner of Sales Tax, do not contain the handwritten modifications as present in the documents filed before this Court. Hence we find no merit in the Petitioner's submission that the handwritten interpolations were present right from the stage when the documents were exhibited before the Trial Court, and the certified copies produced by it in this regard are patently unreliable. It is apparent from a comparison with the original copies in the Trial Court record that the handwritten modifications to Column 12 appear for the first time in the documents filed before this Court.

5. We find it useful to briefly delve into the terms 'Weighted Average' and 'EPS' for understanding why the aforesaid interpolation in the balance sheet, is a significant deviation from the original document submitted before the Trial Court. 'EPS' is used as a common tool for gauging the profitability of a company. It indicates the benefit reaped per individual shareholding of a company. The auditor's report provides the formula for calculating EPS as follows:

Basic and diluted earnings per share=Net Profit for the Financial Year/Weighted Average Number of Shares The term 'Weighted Average' of shares in commercial parlance refers to the number of shares in a company calculated after adjusting for any change in shareholding over a given financial reporting period. This is as opposed to the 'outstanding' number of shares, which merely shows the number of shares as existing with a company on a given date. Therefore, if the company has increased its share capital by purchasing new shares, or reduced its share capital through buy-back or other means, the 'Weighted Average' would change accordingly.

5.1 As mentioned supra, it was noticed by the Trial Court that even though Column 7 of the balance sheet dated 19.09.2008 stated that the Petitioner Company had bought back 99,000 equity shares in the financial year 2007-2008, Column 12 showed that the 'Weighted Average' number of shares continued to be the same, i.e., 10,36,400, for the financial years 2006-2007 and 2007-2008. Hence the Trial Court found that the auditor's report was unreliable as evidence to conclude that the Petitioner Company had reduced its share capital.

It can be further noticed, as pointed out by the learned senior counsel for the Applicant, that if the EPS had been calculated on the basis of the reduced share capital, i.e. 9,37,400 shares it would have been 17.59. However, the EPS has been calculated as 15.91 on the basis of the same Weighted Average number of shares as was held in the Petitioner Company in 2006- 2007, i.e. 10,36,400 shares.

5.2 It is pertinent to note that the Petitioner, for the first time in the SLP, raised a ground that since the buy-back process was not complete as on 01.04.2007, the EPS as shown in Column 12 of the auditor's report was calculated on basis of the original share capital of Rs 1,03,64,000/-. Therefore it appears that the Petitioner, in order to overcome the discrepancy between Column 7 and Column 12 of the Auditor's Report at the stage of SLP proceedings before this Court, changed the words 'Weighted average number of Equity Shares' to 'number of Equity Shares as on 1/4/07' by hand.

This would indicate that the number of outstanding equity shares held in the Petitioner Company continued to be the same as of 1.04.2007, and the revised 'Weighted Average' and EPS were not calculated as the buy-back process had not yet been completed by that date. 5.3 We do not wish to comment in detail upon the intention behind making the aforesaid interpolations. At this juncture, all that is required to be assessed is whether a prima facie case is made out that there is a reasonable likelihood that the offence specified in Section 340 read with Section 195(1)(b) of the CrPC has been committed, and it is expedient in the interest of justice to take action. From the above discussion, it is evident that the handwritten modification made by the Petitioner in Column 12 of the balance sheet dated 19.09.2008 is a significant alteration from the terms as used in the original document. Hence we find that a prima facie case is made out that the Petitioner has fabricated evidence for the purpose of the SLP proceedings before this Court.

We further find that prima facie case is also made out against Mr. R.K. Agarwal, for having sworn in his affidavit before this Court as to the veracity of the facts stated and documents filed in SLP (Civil) No. 3309/2018, even though he had relied upon the original auditor's report, which did not contain any handwritten interpolation, in his evidence before the Trial Court.

6. In similar circumstances, a three-Judge Bench of this Court in In Re: Suo Motu Proceedings against R. Karuppan, Advocate, (2001) 5 SCC 289 had authorized the Registrar General of this Court to depute an officer to file a complaint for perjury against the respondent therein. Accordingly, we direct the Secretary General of this Court to depute an officer of the rank of Deputy Registrar or above of the Court to file a complaint under Sections 193 and 199 of the Indian Penal Code, 1872 against the Petitioner Company in SLP (Civil) No. 3309/2018 and Mr. R.K. Agarwal, before a Magistrate of competent jurisdiction at Delhi. The officer so deputed is directed to file the aforesaid complaints and ensure that requisite action is taken for prosecuting the complaints.

7. Thus, the present application is allowed in the above terms.

... .. J . [M O H A N M . S H A N T A N A G O U D A R]
.....J. [R. SUBHASH REDDY] NEW DELHI;

MARCH 03, 2020