

## IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## ORDINARY ORIGINAL CIVIL JURISDICTION

**Notice of Motion (L) No 807 of 2014****in****SUIT (L) NO 328 OF 2014**

National Spot Exchange Limited

... Plaintiff

v/s

P D. Agro Processors Pvt. Ltd. &amp; Ors.

.... Defendants

Mr. Virag Tulzapurkar, Senior Advocate, alongwith Mr. Birendra Saraf, Mr. Ameet Naik, Ms. Anuja Jhunjhunwala and Mr. Abhishek Kale, instructed by M/s. Naik Naik & Company for the Plaintiff.

Mr. Vinay Bhanushali, instructed by M/s. Singh and Associates for Defendant Nos. 1 to 5, 9 and 11.

Mr Kane for Defendant No. 14.

Mr. Arun Siwach for Defendant No. 15.

**CORAM: S.J. KATHAWALLA, J.****DATE: 11th April 2014****PC.**

1. The Learned Senior Advocate appearing for the Plaintiff states that service of Notice of this Application was attempted on all Defendants. While some of the Defendants have been served with the notice, on a majority of them service was not possible as their premises were found closed or there was no one to accept the service. An Affidavit of Service dated 11th April 2014, has been filed in respect of service being attempted/made.
2. Defendant No 1 to 5 and 9 and 11 have appeared through counsel and requested for time to file reply. Defendant Nos. 14 and 15 have also appeared through counsel and stated that Defendant Nos. 14 and 15 are only nominee

directors on the board of Defendant No. 1.

3. I have heard the Learned Senior Advocate for the Plaintiff on the application of the ad-interim relief which is presently restricted to prayers (e), (f), (g) and (h) of the Notice of Motion and also a relief to direct the Defendant No. 20 to deposit in this Court to the credit of this suit a sum of Rs. 29.20 crores in the circumstances stated in the Plaint and the documents annexed thereto.
4. The Suit is for recovery of Rs. 680.23 crores from Defendant Nos. 1 to 16 and a sum of Rs. 29.20 crores from Defendant No. 20. The Plaintiff's claim arises out of the transactions done by the Defendant No. 1 on the Plaintiff's trading platform, viz. the commodity exchange. The Plaint sets out that transactions were entered into by Defendant No. 1 as a Trading cum Clearing Member of the Plaintiff Exchange for itself and its Clients, i.e. Defendants No. 2 to 4. Defendants No. 2 to 4 are entities which are related to and controlled by the management of Defendant No. 1. The Plaint sets out in detail, transactions entered into by Defendant No. 1 and material is produced in the Plaint to show the ledger accounts of Defendant No. 1 maintained by the Plaintiff in the normal course of business. Defendant No. 1 has defaulted in performing its obligations arising out of the trades carried out by Defendant No. 1 on the Plaintiff's Exchange, by reason of which Defendant No. 1 has been declared a defaulter by the Plaintiff and large amounts have become payable by Defendant No 1 to the Plaintiff. The Documents in the Plaint, *inter alia*, show that Defendant No. 1 has unconditionally admitted its liability of Rs 693 crores, which it has agreed to pay.
5. As regards Defendant No 20, it has admitted to have received an aggregate sum of Rs 42.77 crores from three parties, one of whom is Defendant No 1, and which Defendant 20 has agreed to pay to the Plaintiff. The amount to be paid on account of Defendant No. 1, is stated in the Plaint to be 31.10 crores,

out of which a sum of Rs 1.90 crores has been paid to Plaintiff leaving a balance of Rs 29.20 crores. which is payable to the Plaintiff.

6. The Plaintiff seeks ad-interim relief at this stage in terms of the prayers mentioned for as protecting its claim.
7. I have heard the Counsel who have appeared today for the respective parties. I have gone through the Plaint and the documents and material produced therewith. Prima facie, I find that Defendant No. 1 has defaulted in performing its obligations in respect of its trading on the Plaintiff Exchange. Detailed material has been produced with the Plaint, inter alia: Ledger accounts and Clearing Bank Statement of Defendant No. 1, wherein the transactions are reflected.
8. The 1st Defendant has clearly admitted its liability to the Plaintiff for a sum of Rs 693 crores by its letter dated 1st August 2013 at Exhibit Y to the Plaint, and also agreed unconditionally to make payment by installments in 20 weeks. Some amounts were paid, but in view of subsequent defaults the Plaintiff addressed a notice dated 28th August 2013 at Ex "Z" to the Plaint, declaring Defendant No. 1 as a defaulter.
9. As regards Defendant No. 20, the agreement dated 10th December 2013 at Exhibit "EE" ("**Agreement**") to the Plaint, admits liability and assures payment to the Plaintiff of an amount which, so far it relates to Defendant No 1, is now crystallized at Rs 29.20 crores. Though the said Agreement sets out a schedule of payment, Defendant No 20 has defaulted in complying with the schedule. There is no reason why Defendant No 20 should be allowed to retain and utilize these amounts which it is obliged to pay on account of Defendant No 1 to the Plaintiff.
10. The Plaint and the documents produced therewith show that criminal

proceedings have been initiated against Defendant 1 and some of its directors. The EOW and ED have both initiated action in the course of which some arrests have also been made. Exhibits "BB" and "CC" are press reports which mention that the ED has attached properties of Defendant 1 and investigation has revealed that large amounts were siphoned off to invest in the real estate project of Defendant No 20.

11. The 1st Defendant and some of its directors owe huge amounts arising of their role in the NSEL scam which is being investigated by the authorities.
12. In my view, prima facie, the Plaintiff has made out a strong case for being entitled at this stage to limited ad-interim relief, *inter alia*, in view of the averments made in the Plaint including the statements in paragraph 9,10, 18 to 21 thereof, and material placed on the record.
13. It is necessary to grant such protective relief to the Plaintiff. Balance of convenience is in favour of grant of relief, and unless such relief is granted, the Plaintiff's rights are likely to be gravely prejudiced.
14. Counsel for Defendant 1 to 5, 9 & 11 has contended that there is an arbitration agreement between the Plaintiff and Defendant No 1 and, therefore, the maintainability of the Suit has to be considered. To this, the Plaintiff has submitted that paragraph 23 of the Plaint gives reasons why this Suit is maintainable and why the subject matter thereof and the parties thereto should not be referred to Arbitration. This is because apart from Defendant No. 1 who alone is a party to the arbitration agreement, there are other Defendants who are necessary parties to the suit against whom the reliefs have been claimed. Therefore, the Plaintiff contends that in view of the judgment in *Sukanya Holdings Pvt. Ltd. Vs. Jayesh Pandya & Anr.* (2003 (5) SCC 531), this suit cannot be referred to Arbitration. It is not necessary to consider this question at this ad interim stage. As and when any application

under section 8 of the Arbitration & Conciliation Act, 1996 is made by any party the same will be considered on its own merits. All contentions in that behalf are kept open.

15. In the circumstances, I pass the following order:

(i) Ad-interim relief is granted in terms of prayers (e) , (f), (g) and (h) of the Notice of Motion. However prayer (g) is granted only against Defendant Nos. 1 to 13 and 16 and not against Defendant Nos. 14 and 15 at this stage. The aforesaid prayers are reproduced below:

*"e. that pending the hearing and final disposal of the Suit, the Defendant No. 1 be directed and/ or injuncted from disposing of, alienating, encumbering, parting with possession of and / or otherwise creating third party rights in respect of its immovable properties and assets including those described and contained in Exhibit "AA" to the Plaint as known to the Plaintiffs.*

*f. that pending the hearing and final disposal of the Suit, the Defendant No. 4 be directed and/ or injuncted from disposing of, alienating, encumbering, parting with possession of and / or otherwise creating third party rights in respect of its movable/immovable properties/assets including those described and contained in Exhibit "DD" to the Plaint, as known to the Plaintiffs.*

*g. Pending hearing and final disposal of the suit, this Hon'ble Court be pleased to order and direct the Defendant Nos. 1 to 16 to disclose, on affidavit and within such time as this Hon'ble Court may deem fit and proper, all their movable and immovable assets, properties and assets including bank accounts with all details of funds debited and credited, for a minimum period of last 3 years;*

*h. Pending hearing and final disposal of the suit, this Hon'ble Court*

*be pleased to order and direct the Defendant No. 20 to disclose, on affidavit and within such time as this Hon'ble Court may deem fit and proper, all their movable and immovable assets"*

- (ii) It is clarified that the order in terms of prayer "f" of the Notice of Motion will not affect any prior rights which exist in favour of Banks in whose favour security has been created in respect of stocks, goods and book debts referred to Exhibit DD to the plaint and, in particular, in the schedule to the deed of hypothecation ( at page 547of the Plaint.)
- (iii) Defendant No. 20 is hereby directed to deposit in this Court a sum of Rs 29.20 crores on or before 21st April 2014.
- (iv) The affidavit of disclosure shall be filed by Defendant Nos. 1 to 13, 16 and 20 on or before 21st April 2014.

S.O. to 21st April 2014 for consideration of further ad-interim relief/s.

**(S.J.KATHAWALLA, J.)**