
(2015) 03 BOM CK 0086

In the Bombay High Court

Case No : Suit No. 3254 of 1991 and Notice of Motion (L) No. 2680 of 2014

Dileep Nevatia

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 12-03-2015

Acts Referred:

Citation : (2015) 03 BOM CK 0086

Hon'ble Judges : G.S. Patel, J.

Bench : Single Bench

Judgement

G.S. Patel, J.—Of the four principal reliefs sought in this suit, only the third survives today. This is a prayer, originally cast in the alternative to the preceding two, for a decree in damages in the amount of Rs.160.38 lakhs against the Defendant with interest at 21% per annum.

2. The original Defendant was the State Bank of Indore. It has subsequently been taken over by the State Bank of India. The plaint was amended to reflect this.

3. The Plaintiff, Mr. Dileep Nevatia, is the Sole Proprietor of a firm called M/s. Sundeep Industries. Mr. Nevatia appears in person. The firm used to carry on business in Mumbai. The Plaintiff's case is that his firm started business in 1975. From 1978 onwards, the Plaintiff sought and was granted various banking and credit facilities by the Defendant (then the State Bank of Indore). Initially, the Plaintiff achieved a handsome turnover and profitability for the 10-year period from 1978 to 1988. The Plaintiff contends that it is on account of the wrongful acts and misconduct of the Defendant that the Plaintiff's firm went into losses. The Plaintiff manufactured and marketed plastic goods and plastic products for the automobile and scooter industries. The Plaintiff set up a manufacturing plant at 2 of 16 Nagpur. The Plaintiff availed various facilities and schemes directed towards the growth of Small Scale Industries. From 1978 to 1988, the Plaintiff's account with the Defendant Bank was in good order. By the year 1987, the Plaintiff had two or three distinct types of credit facilities with the Defendant.

4. Briefly stated, the case of the Plaintiff is that in respect of these facilities the Plaintiff executed various security documents in favour of the Defendant. The Plaintiff claims that in July 1988, there was a fraud on the part of two companies with whom the Plaintiff dealt, i.e., S.N. Home Appliances Private Limited ("SN Home") and Bharat Electrical Industries Limited ("BHEL"). The Plaintiff claims that these companies acted in collusion with the Branch Manager of the then State Bank of Indore. The Plaintiff also claims that the Defendant was negligent and a sum of Rs. 7.87 lakhs remained unpaid to the Plaintiff under dishonoured Bills of Exchange drawn by the Plaintiff on these two companies. The dishonour of these Bills of Exchange and overdue interest were debited to the Cash Credit Account of the Plaintiff which thus became irregular, resulting in a stoppage of operations of that account. This in turn, Mr. Nevatia says, brought the Plaintiff's business operations to a complete standstill. Mr. Nevatia claims that he made representations and had meetings with representatives and officers of the Defendant, and that there was some sort of agreement arrived at with the Defendant for regularization of his delinquent account. The Plaintiff claims to have implemented the terms of this alleged agreement. In the plaint, a considerable amount of correspondence is referred to, and it is sought to be contended that the Defendant was obliged to rehabilitate the Plaintiff's Indore 3 of 16 Unit in terms of an alleged agreement dated 18th June 1990. It is also alleged that the Defendant had agreed not to recall the facilities extended to the Plaintiff. This is the subject matter of prayers (a) and (b) to the plaint. Mr. Nevatia fairly agrees that these reliefs do not survive. The only surviving relief is the prayer for damages, i.e., prayer (c), which reads thus:

"(c) In the event the Hon'ble Court is not inclined to grant relief in terms of prayer (a) and (b) herein above the Defendants be ordered and decreed to pay to the Plaintiffs a sum of Rs. 160.38 lacs towards losses and damages suffered by the Plaintiffs as per particulars of claim Ex. hereto with further interest at 21% p.a. on Rs. 160.38 lacs from the date of the suit till payment of realization;" (In the original there is no cross-reference to any exhibit with particulars of claim; no such particulars are annexed to the plaint.)

5. As we shall see, although it would ordinarily have been necessary to consider in some detail the case placed by the Plaintiff on the question of loss and damage suffered, this has been rendered unnecessary on account of the evidence (or more properly, the lack thereof) after the suit was taken to trial.

6. The Defendant filed a written statement. All the allegations of the Plaintiff were denied. It was denied that there was any such agreement as alleged. The Defendant denied that it was in any way negligent. It is stated that the Bills of Exchange were dishonoured after they were discounted by the Defendant and that the Defendant is, therefore, the holder in due course of those Bills of Exchange. 4 of 16 Once the Bills of Exchange were dishonoured, the Defendant having discounted them, the Plaintiff was liable to the Defendant in the amounts of those instruments. All allegations of negligence are specifically denied.

7. On these pleadings the following issues were framed on 27th January 2014.

8. The Plaintiff thereafter filed his affidavit in lieu of examination-in-chief, an affidavit of documents and a compilation of documents. Some of the Plaintiff's documents were marked. The Plaintiff was then cross-examined by Ms. Priyanka Kothari, learned Advocate for the Defendant. Thereafter, the Defendant filed as many as five affidavits in lieu of examination-in-chief. This was necessary in order to prove the documents produced by the Defendant in a compilation. It seems that many of these documents were all photocopies and not originals on account of the takeover of 5 of 16 the State Bank of Indore by the State Bank of India. It was with a great deal of difficulty that some of those documents of the Defendant were finally marked in evidence.

9. In paragraph 63 of his evidence affidavit, the Plaintiff says:

"63. I say that the conduct of the Defendant has resulted to me a loss of profit and damages in the sum of Rs. 160.38 lacs as more particularly set out herein below:

I am therefore also entitled to an order and decree in the sum of Rs. 160.38 lacs in my favour against the Defendant along with further interest at the rate of 21% per annum on the aforesaid amount from the date of the suit till payment or realization."

10. This must be read with paragraph 60 of the same affidavit, which reads thus:

"60. I say that even since 1978 until 1988 my Unit was a profit making Unit. The failure on the part of the Defendant to assist me and instead stopping the 6 of 16 operation of my accounts with the Defendant and the freezing of facilities granted to me has resulted in losses to my Unit in the sum of Rs. 23,77,925/- for the year 1988-89. I say that the sales effect and the labour charges received for the year 1987-88 was Rs. 102.46 Lacs and the net profit during the year was Rs. 4.94 Lacs. The corresponding figures for the year 1988-89 i.e. after the stoppage of the facilities were sales Rs. 39.98 Lacs and net loss Rs. 23.78 Lacs. The said figures are also confirmed by the Defendant by its letter dated 6.3.1990. I am producing and tendering in evidence the said letter dated 6.3.1990 issued by the Defendant to M/s. Sundeep Industries, which is at Page Nos. 78 and 79 of the Plaintiff's documents. The said letter bears the signature of the Defendant's Worli Branch Manager, who has issued the same in normal course of its official duties and the same be exhibited and marked as Exhibit No. ."

(emphasis supplied)

11. I must note that the emphasised portion is entirely beyond the pleadings and not part of the claim. But let me return to paragraph 63. This is the basis of prayer (c) to the plaint. What the Plaintiff has stated in paragraph 63 is wholly without substantiation or proof. There is absolutely nothing on record to indicate that the Plaintiff suffered the cash losses or loss of profit claimed. There is nothing to establish the value of permanent loss of business. The claim for

mental torture and anguish is not sustainable. This is, after all a claim brought by a business concern. It is not a claim strictly speaking by an individual. There is also nothing to show that any of 7 of 16 these losses, even if proved, are attributable to the Defendant in any way.

12. The Plaintiff was extensively cross-examined by Ms. Kothari. She specifically put to the Plaintiff whether there was any document on record by which the Defendant had agreed to rehabilitate the Plaintiff's Unit. The Defendant agreed that there was no such document.¹

13. In paragraph 32 of his cross-examination, a suggestion was put to the Plaintiff that there was no document to establish the cash loss. The Plaintiff denied this. He referred to the Defendant's letter at page 78, part of Exhibit "P1". That document is only a document by which the Defendant sought particulars and details of a claim of loss made by the Plaintiff. This is no evidence of actual loss. This is further established by the next answer in cross-examination where the Plaintiff agrees that there was no document adduced by him to show that had the Bank accepted his proposal, the Plaintiff would have made a total profit of Rs. 54.87 lakhs for the period 1st April 1988 to 15th July 1991.

14. In further cross-examination, the Plaintiff admits that he filed a civil suit against S N Home and BHEL for recovery of the amount under the two Bills of Exchange. He also admits that these Bills of Exchange were discounted by the Defendant. The Plaintiff's allegation of collusion fails because in the civil suit filed against the two parties, the Defendant was not impleaded. He also claims in 8 of 16 paragraph 24 of his cross-examination that his account was irregular only on account of the unpaid bills. Evidently, this does not appear to be so. In effect, Mr. Nevatia's claim is that the unpaid amounts of these two Bills of Exchange, of a few lakhs, were the proximate, direct and foreseeable cause of his firm's losses of nearly a crore.

15. What is the negligence of which the Plaintiff complains? It is simply this: that according to the Plaintiff the original Defendant "failed and neglected to follow up the receipt of money and the receipt of document from SBI, Delhi" in relation to the two Bills of Exchange that were dishonoured by S.N. Home and BHEL. It is difficult to understand what this is supposed to mean. It is only the most generalized statement devoid of all particulars. It is not in dispute that these two Bills of Exchange were discounted by the Defendant Bank and that they were dishonoured by the two parties on whom they were drawn. This can hardly be termed as negligence. There could not have been dishonour with presentment, and presentment is precisely the "follow up" that Mr. Nevatia accuses the Defendant of failing to do. Negligence, as a tort, must be properly pleaded and proved. There is no proof of negligence.

16. The Plaintiff also cross-examined the Defendant's witness, one Prakash Narvekar. Nothing in that cross-examination in any way assists the Plaintiff in

establishing his case, which, we have seen is limited to prayer (c) of Rs. 160.38 lakhs.

17. During final arguments, when I indicated that there was no evidence in support of the claim for damages, Mr. Nevatia sought leave to lead additional evidence. He even filed a Notice of Motion 9 of 16 for this. I adjourned that Notice of Motion to the hearing of this suit, and I will turn to that Notice of Motion a little later in this judgment.

18. A claim for damages must be both pleaded and proved. I will assume for a moment that there is an adequate pleading although, in my view, there is not. In itself, this is insufficient to support a decree. The Plaintiff must necessarily prove his claim. Evidence must be led on damages, including loss of profit and actual losses suffered. This might have been done by leading the evidence of an accountant, producing the necessary financial documents and demonstrating that these losses were the direct, proximate and foreseeable result of some action (or inaction) on the part of the Defendant, and not influenced by other mitigating factors and circumstances and, too, not so remote as to defeat causality. Not only would the Plaintiff have to prove the so-called action or inaction on the part of the Defendant, but he would also have to prove causality between any such action or inaction and the losses suffered by the Plaintiff, and which would also have had to be separately proved.

19. None of this has been done. All that the Plaintiff has done is to say in his examination-in-chief that these are the losses, in his estimation, suffered by the Plaintiff. This is no evidence at all.

20. In these circumstances, it is not possible to grant the Plaintiff any relief. All issues must be answered against the Plaintiff. 10 of 16

21. I must now consider the Notice of Motion (L) No. 2680 of 2014 filed by the Plaintiff. The Motion, as I have earlier noted, was filed very late in the day after I had indicated to Mr. Nevatia during the final arguments that no decree could be passed for want of essential evidence. Prayer (a) of the Motion seeks that the Plaintiff's evidence be reopened and the Plaintiff be allowed to lead further evidence to establish his claim. The submission is that it can always be done and is within the powers of the Court in exercise of its discretion to meet the ends of justice. He relies on the decision of the Supreme Court in K.K. Velusamy Vs. N. Palanisamy, This is not an authority for a proposition as wide as Mr. Nevatia canvasses, viz., that a Court must accept every such application. Of course a Court has an inherent power to do so, but it must be for bona fide cause and for compelling reasons. Of these, there are none.

22. In the Affidavit in Support, the Plaintiff admits that he has been unable to produce records to substantiate the loss and damage claimed for the period 1988 to 1991. He claims that his accounts for this period were subjected to substantial scrutiny by the Income Tax Department and that these records lay with his Chartered Accountant who was handling with the matter. Other than stating the

broad period of this hiatus, no specific dates are given. The Plaintiff then says that after the records were returned by the Chartered Accountant, they were stored in his bungalow at Worli Sea Face. He then alleged that "some years later" these records were shifted without his knowledge to his family's office-cum-godown at Udyog Bhavan at Worli. How and in what circumstances this happened and precisely when is not stated. The Plaintiff then 11 of 16 goes on to say that his suit was listed after a gap of about 20 years on 17th January 2014 and that within a month, he was asked to file his evidence affidavit and documents. He claims that he made efforts to find the documents, could not find them and the matter proceeded to trial without these additional documents that he now says are critical.

23. What follows in the Affidavit in Support is more peculiar. In paragraph 5, the Plaintiff says that "around a couple of months back" while once again searching for the documents at home, he also considered searching his office or godown and asked his staff to do so. In the following paragraph, he says that it was only during the week of 26th November 2014 that these affidavits were found at Udyog Bhavan (the office-cum-godown) and brought to his home. He claims that it is only after this that he has been able to collate these documents, including the statements signed by him, assessment orders and letters from his Chartered Accountant. He, therefore, claims that he was unable to lay his hands on the documents at an earlier stage, and that the omission was not deliberate.

24. This affidavit is most regrettable. The final hearing of the suit began before me on 24th November 2014. This was after the Plaintiff filed a considerable affidavit of evidence, produced several documents, and was himself cross-examined, after which he objected to the Defendant's documents (forcing them to file one affidavit evidence after the other). At the final hearing, I pointed out to the Plaintiff that necessary evidence had not been brought on record. It was only then that the Plaintiff sought an adjournment and 12 of 16 three days later, i.e., after having been put to notice of the fatal absence of evidence, that this Notice of Motion was filed on 27th November 2014 citing a date of 26th November 2014 when the mystery documents were miraculously found. The so-called unearthing of these documents is thus not attributable to any great diligence on the part of the Plaintiff. It is an assertion wholly unworthy of credence. The dates themselves show that it was not until the Plaintiff was put to notice of a fatal lacuna in his evidence that he came up with this excuse (there is simply no other way to describe it). The assertion that the Plaintiff's staff located the necessary documents only on 26th November 2014 is not in the least credible. This is evident from the affidavit itself, for the Plaintiff states that the hunt for these documents began only a couple of months ago. It is too curious a coincidence to be true that the Plaintiff's staff serendipitously discovered these documents a mere two days after the Plaintiff was put to notice in Court of the lack of necessary evidence in his suit.

25. Mr. Nevatia's troubles do not begin and end in the evidence affidavit. They

start in the plaint itself. There we find no particulars of the damages claimed; none at all. These are introduced only in the evidence affidavit in paragraph 63. Prayer (c) of the Plaint is not cast in generalities. It makes a reference to a very specific amount. The break down of this amount is given in paragraph 63 of Mr. Nevatia's evidence affidavit. It is not possible that either in the Plaint or in the evidence affidavit, one that it is dated 10th February 2014, Mr. Nevatia could have arrived at figures of such precision as Rs.4.86 lakhs, Rs.3.66 lakhs and Rs.57.85 lakhs with an exactly specified period of 1st April 1991 to 15th July 1991 without having at 13 of 16 hand or at least to his knowledge the relevant material. If the Plaintiff has failed to produce this material the Defendant certainly cannot be disadvantaged by that fact since the Defendant has done nothing to obstruct the Plaintiff in the production of that material. Indeed I may note that it is the Plaintiff who has almost always objected to the production of copies by the Defendant.

26. In any case, the very least the Plaintiff ought to have done was to show in his Affidavit in Support of the Notice of Motion how the material he sought to adduce would advance his cause. This is not ordinarily required in a routine interlocutory application, but I believe it is essential to satisfy the tests of bona fides and good cause in so extraordinary an application at so late a stage. Instead, as I have noted, all that the Affidavit in Support of the Notice of Motion contains is the broadest generalities. It cannot be that a plaintiff, simply because he appears pro se, is afforded liberties not available to those who choose legal representation and a defendant, especially a public sector corporation, is forced to defend itself against a constantly evolving and reinvented case.

27. It is not possible at this stage to allow the Plaintiff to lead any additional evidence. No sufficient ground has been made out for this.

28. Mr. Nevatia has, after judgment was reserved, submitted a compilation of judgments and notes of arguments. These are all irrelevant to the issue at hand. Nothing in these notes or in the decisions cited by Mr. Nevatia persuades me to hold that I should take so extreme step as to re-open the evidence now long closed. 14 of 16 The entire trial in this matter has been conducted before me. Mr. Nevatia has left no stone unturned and has raised every possible objection to the introduction of documents by the Defendant. He has in fact even denied some letters between him and the Bank that form part of a chain of correspondence. All of this is a matter of record and of previous orders. It simply cannot be that when it comes to the Defendant every technical objection that is available is taken but when it comes to a fundamental issue of the lack of evidence, Mr. Nevatia falls back on, inevitably, Section 151 of the Code of Civil Procedure, 1908. Nothing in that Section expressly requires the order that Mr. Nevatia demands. That Section empowers a Court to balance competing demands and to act in the interest of justice. I do not see how, on these facts, the Plaintiff can be said to have been disadvantaged in any way. He had every opportunity to lead his best evidence. He chose not to do so till it was pointed out as late as on 24th

November 2014 that there was a serious infirmity in his case. Till then he made not the slightest attempt to bring forward the documents that he now says are crucial.

29. Mr. Nevatia's written arguments also spread over a much wider canvass that he ever argued. In these, he has sought to introduce new evidence. This is impermissible. He has also contended that he was not cross-examined on his claim for damages as set out in his affidavit in lieu of examination-in-chief. The submission is, therefore, that the entire claim must be deemed to be admitted. This submission only needs to be stated to be rejected. It was for the Plaintiff to discharge the burden of proof of establishing by appropriate and cogent evidence his claim for damages. Indeed, 15 of 16 this submission is defeated by the Plaintiff in his own Notice of Motion, where he categorically pleads for leave to lead additional evidence in support of this very claim. It is true that the Defendant has put forward an affirmative case in its written statement. However, no counter-claim was ever filed. It is first for the Plaintiff to establish his claim and it is only if he has discharged his burden that the Defendant can be required to prove its case. The Defendant claimed that there was fraud and collusion on the part of the Plaintiff. It is wholly immaterial to the Plaintiff's case on damages whether the Defendant proves this case on fraud or not.

30. The Suit and the Notice of Motion are both dismissed. There will be no order as to costs.

31. A final word. Mr. Nevatia is a party in a great many cases. He conducts them himself and he does so, if I may say so, with admirable poise, preparation and good humour. My comments are not a reflection on his abilities, perseverance or endurance. Equally, I must thank Ms. Kothari for her assistance and commend her for the manner in which she has conducted her case; for she has done so with a rare calmness, fixity of purpose and dignity.

1 Paragraph 31 of the cross-examination.