
(1999) 06 BOM CK 0091

In the Bombay High Court

Case No : Notice of Motion No. 2023 with 2167 of 1997 in Suit No. 443 of 1995

Vijaykumar B. Agarwal

APPELLANT

Vs

Govindbhai Dayal Mange and another

RESPONDENT

Date of Decision : 22-06-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, Order 9 Rule 13
Criminal Procedure Code, 1973 (CrPC) — Section 357(1)
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (1999) 4 BomCR 251 : (1999) 4 CivCC 367 : (1999) 3 MhLj 81

Hon'ble Judges : S.S. Nijjar, J

Bench : Single Bench

Advocate : Smt. Rajani Iyer, instructed by H.H. Chande, for the Appellant; Ms. K.C. Nichani, for the Respondent

Judgement

S.S. Nijjar, J.—This order will dispose of Notice of Motion Nos. 2023/97 and 2167 of 1997.

These two Notices of Motion have been taken out for setting aside the ex parte decrees dated 20th July, 1995 against defendant No. 1 and 18th October, 1995 against defendant No. 2. The plaintiff is carrying on business in the name and style of "Oriental Finance Company". On 23rd August, 1991 the plaintiff had advanced a sum of Rs. 1,00,000/- to the firm of Dayal Dosabhai & Co. The firm had given post dated cheques in favour of the plaintiff dated 25th November, 1991. The firm also handed over three other post dated cheques for interest for Rs. 1500/- Rs. 1500/- and Rs. 1700/- which covered the interest for the period upto 25th November, 1991. Defendant Nos. 1 and 2 guaranteed the repayment of the amount. Two guarantees were given in writing by defendant Nos. 1 and 2 dated 23rd August, 1991. On presentation of the post dated cheques by the plaintiff to the bank, it was dishonoured with the remarks "insufficient funds". Plaintiff gave advocate's notice dated 17th December, 1991 recording the fact of dishonour of the cheques and calling upon the firm to make the payment. This notice was served at the address of defendant No. 1. The letter addressed to the

firm was, however, returned by the postal authorities with the remarks: intimation issued, not claimed". After the issuance of the notice a part payment of Rs. 10,000/- has been made by the firm to the plaintiff on 24th December, 1991. No further amounts have been paid. Thus the suit was filed suing defendant No. 1 in his personal capacity as also the legal representative of the deceased Dayal Dosabhai who represented himself to be the Proprietor of Dayal Dosabhai & Co. Defendant No. 2 is sued in his capacity as guarantor. The claim made in the plaint is for a principal sum of Rs. 90,000/- together with 18 per cent interest.

2. From the various pleadings the following facts have emerged. That the loan was given on 23rd August, 1991. The post dated cheque was dated 25 November, 1991. It was dishonoured on 4th December, 1991. Notice of dishonour was given on 17th December, 1991. The suit is filed on 23rd December, 1991. Part payment in the amount of Rs. 10,000/- is made by the firm on 24th December, 1991. Around the same time the plaintiff also filed a complaint in the Court of Additional Chief Metropolitan Magistrate u/s 138 of the Negotiable Instruments Act. The hearings in the aforesaid complaint commenced in January, 1992 and culminated in the conviction of defendant No. 1 on 16th May, 1995. Appeal was filed against the order of conviction by defendant No. 1 which has been partly allowed on 31st July, 1995. Ex parte decree against defendant No. 1 was passed on 20th July, 1995. Decree against defendant No. 2 was passed on 18th October, 1995. The plaintiff made an application for payment of the compensation awarded by the Magistrate dated 31st August, 1995. The application was allowed on the same date. The voucher for payment was issued in August, 1996. Both the Notices of Motion have been taken out on the two grounds that there is suppression of material facts by the plaintiff and that the defendants did not attend to the proceedings in the Civil Court as the plaintiff had deliberately misled them by stating that in view of the criminal proceedings he would not proceed with the civil suit. It is, therefore, stated that the ex parte decrees ought to be set aside.

3. In support of the Notice of Motion, Ms. Nichani has submitted that defendant No. 1 was convicted on 16th May, 1995 and the Magistrate has ordered defendant No. 1 to undergo rigorous imprisonment for three years and to pay a fine of Rs. One lakh. Defendant No. 2 was, however, acquitted. It was further ordered that if amount of fine is paid or recovered, Rs. 90,000/- be given to the complainant towards compensation after period of appeal is over. The appeal was partly allowed. The sentence of imprisonment was reduced to one day's simple imprisonment and the fine was increased to Rs. 1,15,000/-. It was also ordered that a sum of Rs. 90,000/- be paid to the complainant i.e. the plaintiff. Defendant No. 1 had in fact deposited a sum of Rs. One lakh before filing the appeal. In spite of having received the money the plaintiff has not brought the aforesaid facts to the notice of this Court. She submits that the compensation had been granted to the plaintiff by the Criminal Court u/s 357 of the Criminal Procedure Code. Therefore, the aforesaid compensation would have been taken

into account by this Court while passing a decree in favour of the plaintiffs. In support of her submission, the learned Counsel has relied a judgment of the Supreme Court in the case of Ishwar Singh Bagga and Others Vs. State of Rajasthan, . She has relied in particular on the following passage:

"Before leaving this case we have to observe that in some of the orders passed by certain Magistrates in respect of persons accused of running motor vehicles unauthorisedly on the notified routes it is seen that the fines levied thereunder have been ordered to be paid over to the Corporation. We are told that the Corporation has realised several lakhs of rupees under such orders. Section 357 of the Code of Criminal Procedure, 1973 provides for payment of compensation out of the fine to certain persons. The orders directing payment of compensation to the Corporation may have been passed under Clause (b) of that section which provides that the fine recovered may be applied in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court. Prima facie we feel that the Corporation is not entitled to be paid any compensation u/s 357 of the Code of Criminal Procedure, 1973. It can be paid such compensation only when it is open to the Corporation to file a suit and recover damages in law for such unauthorised operation of stage carriages. The question whether such unauthorised running will give rise to a claim for damages in a Civil Court is not free from doubt. We do not, however, express our opinion on the above question. This is a matter in which the State is also interested. We hope that the Magistrates before whom such cases are filed hereafter will, before passing an order u/s 357 of the Code of Criminal Procedure, 1973 in favour of the Corporation, examine and decide the question in accordance with law."

She further submitted that having received the entire principal amount the plaintiff is now unnecessarily persecuting defendant No. 2 who was merely a guarantor. She submits that by separate proceedings the residential flat belonging to the wife of defendant No. 2 has been attached. Although the decree is for a very small amount, yet the flat which is worth for Rs. 30 lakhs has been ordered to be attached. Above all, she submits that the decree deserves to be set aside as the plaintiff has deceived the defendants into believing that the civil proceedings are a mistake and will not be continued. She submits that taking out Notice of Motion is also delayed only on account of non-availability of the certified copy of the order of payment to the plaintiff. She further submits that even if there was justification for not disclosing the payment of compensation when the decree was passed against defendant No. 1, there is no such justification for not informing the Court when the decree was passed against defendant No. 2 which was passed on 18th October, 1995. The order of conviction having been passed on 16th May, 1995 it was the bounding duty of the plaintiff to bring the aforesaid facts before the Court. By the aforesaid method of receiving compensation in the Criminal Court, enforcing the decree against defendant Nos. 1 and 2, the plaintiff is recovering three times the entire amount he is legally entitled to.

4. Ms. Iyer, however, submits that there is undoubtedly a suppression of the complaint filed in the Criminal Court. She submits that this was a genuine oversight. In any event nothing precluded the defendants from bringing the complaint to the notice of this Court. Defendant No. 1 had been appearing in the Criminal Court and was convicted after 38 adjourned hearings. Similarly she submits that there is no suppression of the order dated 16th May, 1995 as the appeal had been filed. In any event the suit had been filed prior to the conviction. Therefore, no relief whatsoever can be given to the defendant. She submits that it was wholly unnecessary to mention the filing of the criminal complaint as the criminal proceedings are not a part of the claim made in the Civil Court. The amount of compensation awarded u/s 357 of the Criminal Procedure Code is not on account of any damages that may have been suffered by the plaintiff. The amount is paid in lieu of the expenses incurred by the plaintiff in successfully prosecuting defendant No. 1. The ex parte decree having been passed on 20th July, 1995, it was not possible to inform the Civil Court about the payment of compensation which were received by the plaintiff in August, 1966. She submits that no special circumstances have been made out for setting aside the ex parte decree.

5. I have considered the submissions made by the learned Counsel. From the narration of the facts above it is apparent that the civil suit was filed on 23rd December, 1994. The criminal complaint was filled in 1992. In my view, the aforesaid fact with regard to the filing of the criminal complaint on the same cause of action ought to have been succinctly mentioned in the civil suit. However, having considered the matter, I am not at all impressed by the submissions made by Ms. Nichani. A bare perusal of section 357 would show that the compensation can be awarded by the Criminal Court if the accused is convicted and fined. The aforesaid compensation can be granted for a number of reasons. u/s 357(1)(a) Compensation is granted in lieu of the expenses incurred for the prosecution. Under sub-section (b) compensation can be awarded for any loss or injury caused by the offence. But this can only be awarded when the Court is of the opinion that the compensation would be recoverable by the said person in a Civil Court. The observations made by the Supreme Court in the case of Ishwar Singh (supra) make it abundantly clear that the compensation can only be awarded when it is open to the person to file a suit and recover damages in law for any loss or injury caused. In my view, the suit filed by the plaintiff is not a suit for damages. It was a suit filed for recovery of the amount of loan advanced to the Proprietary firm of the deceased father of defendant No. 1. It was also not a suit within the scope and ambit of section 357(5) of the Criminal Procedure Code. The aforesaid section provides that compensation awarded in a criminal case shall be taken into account by the Civil Court in any subsequent suit relating to the same manner. In my view, apart from the fact that the loss or injury has to be in the nature of tort the suit would have to be filed after the conviction to claim damages for the loss or injury caused by the commission of the crime which also happens to be a tort. A suit filed under Order XXXVII of the

CPC for recovery of the amounts due on a bill of exchange cannot be said to be suit for claiming compensation. It is a pure and simple suit for recovery of money. Thus the submissions made by Ms. Nichani on the basis of section 357 of the Criminal Procedure Code would have to be rejected. Coming now to the ground of suppression of material facts, I am of the considered opinion that the plaintiff was duty bound to disclose in the plaint the factum of filing of the criminal plaint. Ms. Iyer has fairly stated that there is hardly any justification for the same. However, this would not be sufficient to set aside the ex parte decrees. The suppression of the material facts has to be such which would materially affect the decision of the case. The pendency of the criminal complaint could have had no bearing on the merits of the claim of the plaintiff in the summary suit. The suit had to be decreed as the defendants remained absent. The law permits the plaintiff to take out both civil and criminal proceedings. Both proceedings can be continued simultaneously. Both remedies are independent of each other. Thus passing of a decree will not affect the outcome of the criminal trial. Similarly the conviction and grant of compensation will not prevent the Civil Court from passing decree in favour of the plaintiff. Having held that the conviction of defendant No. 1 and compensation paid to the plaintiff would not be a relevant consideration for the decision in the suit the lapse on the part of the plaintiff has to be excused. The plaintiff was remiss in not mentioning the filing of the criminal complaint. However, this cannot have the effect of nullifying the ex parte decree which has been passed against the defendants after following the due procedure of law. The next submission of Ms. Nichani with regard to the non-appearance in the Civil Court by the defendant has to be stated only to be rejected. She claims that the defendant was hoodwinked into believing that the plaintiff will not pursue the civil suit. I find it difficult to believe that the defendant would have taken the word of plaintiff at its face value. At that moment of time the plaintiff was prosecuting the defendants with an object of sending them to jail. In such circumstances it would have been wholly unnatural for the defendant to attach any credence to the word of the plaintiff. Therefore, I do not find that the defendants have made out any special circumstances for the grant of any relief in the Notices of Motion. In view of the above, both the Notices of Motion are dismissed with no order as to costs.

6. Certified copy expedited.

7. Notice of Motion dismissed.