

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****APPEAL FROM ORDER NO. 898 OF 2014****ALONGWITH****CIVIL APPLICATION NO. 1075 OF 2014****IN****APPEAL FROM ORDER NO. 898 OF 2014****Tiwari & Sons. & Anr.****..... Appellants****VERSUS****State Bank of Patiala & Ors.****..... Respondents****ALONGWITH****APPEAL FROM ORDER NO. 948 OF 2014****ALONGWITH****CIVIL APPLICATION NO. 1153 OF 2014****IN****APPEAL FROM ORDER NO. 948 OF 2014****State Bank of Patiala****..... Appellants****VERSUS****Tiwari & Sons. & Ors.****..... Respondents**

Mr.Surel Shah, i/b. Mr.Ashish Mishra for the Appellant in Appeal from Order No.898 of 2014 and for the Respondents in Appeal from Order No.948 of 2014.

Mr.Pravin Patel for the Appellant in Appeal from Order No.948 of 2014 and for the Respondent in Appeal from Order No.898 of 2014.

CORAM : R.D. DHANUKA, J.**DATED : 15th DECEMBER, 2015****P.C.**

Both these appeals arises from a common order passed by the learned trial judge in the notice of motion filed by the appellant in Appeal from Order No.898 of 2014 (original plaintiff) inter alia praying for action against the respondents under Order 39 Rule 2(a) of the Code of Civil Procedure.

2. It is the case of the appellant (original plaintiff) that both the parties had filed minutes of the order before the learned trial judge which was accepted by the learned trial judge on 10th February, 2014 and Notice of Motion No.1875 of 2013 came to be disposed of. Under the said minutes of the order, the original plaintiff agreed to hand over various cheques to the respondent bank in full and final payment towards the loan Account Nos.65033653710 and 65033653721. The defendant bank agreed to issue the notice to the plaintiff within three working days and/or execute any documents required to delete the hypothecation endorsement on registration certificate of the said vehicles upon those cheques issued by the plaintiff.

3. The grievance of the original plaintiff was that inspite of the said fact that the plaintiff complied with the said order by issuing those cheques which were honoured in the account of the respondent no.1 bank, the respondent no.1 (defendant no.1) did not issue 'no due certificate' to the plaintiff and did not comply with the said order. The matter thereafter again appeared before the court on 10th February, 2014. The matter again appeared before the court when the respondent no.1 through their advocate was present in court.

4. Since the respondent no.1 did not comply with the order dated 10th February, 2014 passed by the learned trial court, the plaintiff filed a notice of motion invoking Order 39 Rule 2(a) of the Code of Civil Procedure and prayed for action of contempt against respondent no.1 and also applied for an order and directions against respondent no.1 to forthwith act on the order dated 10th February, 2014 passed by the learned trial judge and the minutes of order dated 10th February, 2014. The said notice of motion was resisted by the respondent no.1 by filing affidavit-in-reply.

5. The learned trial judge has disposed of the said notice of motion by passing an order on 17th July, 2014. Insofar as prayer (a) of the notice of motion is concerned, the trial judge did not think it necessary to grant the said prayer which was for initiating action of contempt against respondent no.1. Learned trial judge however did not grant prayer (b) without recording any reasons and dismissed the said notice of motion.

6. The learned trial judge however has passed an order thereby striking off the defence filed by the defendant no.1. Both the parties are aggrieved by this order and have filed two separate appeals from order. The respondent no.1 bank has filed appeal from Order No.948 of 2014 whereas the original plaintiff has filed Appeal from Order No.898 of 2014.

7. Learned counsel appearing for the original plaintiff invited my attention to the affidavit-in-reply filed by the respondent no.1 bank in the notice of motion filed by the appellant (original plaintiff) and various orders passed by the learned trial judge. He submits that the appellant has already complied with their part of the obligation under the said minutes of the order and made payment by cheques which are honoured. He submits that though the learned trial judge did not think it proper to initiate any contempt proceedings against respondent no.1 and though the learned trial judge held that there was no compliance of the order by the respondent no.1, the learned trial judge has refused to grant prayer (b) without recording any reasons.

8. Learned counsel appearing on behalf of the appellant in Appeal from Order No.948 of 2014 (original defendant no.1) on the other hand invited my attention to the correspondence exchanged between the earlier advocate Mr.P.S.Jhedu and the

advocate representing the appellant in Appeal from Order No.898 of 2014 and also the correspondence exchanged between the bank and the said advocate. It is the case of the bank that the said Mr.Jhedu who was on the panel of the bank was absent when the matter was called out on 10th February, 2014. The officer of the bank could not remain present when the said matter was heard. He submits that junior advocate of Mr.Jhedu advocate who filed the said minutes of the order before the learned trial judge had no such authority on behalf of the bank to agree to any such terms. He submits that the bank was given an impression by the said advocate that the cheques issued by the plaintiff would be on account and not as and by way of full and final settlement of the matter. He submits that the learned trial judge could not have struck off the defence.

9. A perusal of the record indicates that when the order was passed by the learned trial judge on the minutes of the order, the advocates representing both parties were present. It is not in dispute that pursuant to the said minutes of the order passed by the learned trial judge, the plaintiff had issued various cheques which are already honoured and the amounts are credited to the account of the bank. Since respondent no.1 did not comply with the said order passed by the learned trial judge, the appellant had issued a notice for compliance of the said order and had threatened the respondent no.1 bank of contempt proceedings. Only at that stage the respondent no.1 alleged for the first time in the month of July 2014 that the junior of Mr.Jhedu was not authorized to agree to any minutes of the order. The respondent no.1 thereafter engaged a new advocate.

10. A perusal of the affidavit in reply filed by the bank to the notice of motion filed by the original plaintiff clearly indicates that no such plea has been raised by the respondent no.1 in the said affidavit.

11. It is not in dispute that the said order passed by the learned trial judge on 10th February, 2014 passing an order in terms of the minutes of order tendered by the parties through their advocates has not been challenged by the respondent no.1 bank till date. Since the said order was in force, both the parties were under obligation to comply with the said order passed by the learned trial judge. Though the plaintiff has complied with their part of the obligation under the said order, the defendant no.1 did not comply with the said order. In these circumstances the said order dated 10th February, 2014 having attained finality, the Respondent no.1 not having complied with the said order, the learned trial judge was justified in striking off the defence filed by the defendant no.1.

12. Insofar as submission of the learned counsel for the bank that Mr.Jhedu, advocate was on the Panel of the bank and his junior was not authorized to agree to any such minutes of order tendered across the bar before the learned trial judge is concerned, no such plea was raised in the affidavit-in-reply filed in the notice of motion taken out by the plaintiff. Be that as it may, the respondent no.1 bank did not apply for vacating the said order dated 10th February, 2014 or did not challenge the said order before this court. I am thus not inclined to accept this submission on this part of the respondent no.1 bank.

13. Insofar as Appeal No.898 of 2014 is concerned, in my view the learned trial judge though held that the respondent no.1 had not complied with the order passed by the learned trial judge on 10th February, 2014 could not have rejected prayer clause (b) of the notice of motion which was for seeking compliance with the order passed by the learned trial judge. A perusal of the said order indicates that the learned trial judge has not even recorded the reasons while rejecting the prayer

clause (b) of the notice of motion. In my view, the appellant has made out a case for grant of prayer clause (b) which ought to have been granted by the learned trial judge.

13. I, therefore, pass the following order :-

- (a) Appeal from Order No.898 of 2014 is allowed.
- (b) Contempt Notice No. 2239 of 2014 is allowed in terms of prayer clause (b).
- (c) Appeal from Order No.948 of 2014 filed by the appellant (original defendant) is dismissed.
- (d) In view of the dismissal of Appeal from Order No.948 of 2014, civil application filed by the appellant in that appeal does not survive and is accordingly disposed of.
- (e) In view of the disposal of the Appeal from Order No.898 of 2014, Civil Application No.1075 of 2014 filed by the appellant in the said Appeal from Order does not survive and is accordingly disposed of. No order as to costs.

[R.D. DHANUKA, J.]