

Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 2980 OF 2020

IN

FIRST APPEAL NO. 1369 OF 2019

Vijay Vasantrai Gohil

...Applicant (Org.
Plaintiff No. 2 & Res.
2 in above Appeal)

In the matter between

M/s. IRB Infrastructure Developers
Ltd. & Ors.

...Respondent No. 1-9
(Org. Defendant No.1,
2,4 to 10 Appellants
herein)

Versus

Vasantrai Harilal Gohil & Ors.

...Respondents (Org.
Plaintiffs & Org.Def.
No. 11-17)

Mr. Abhishek Tripathi for the Applicant.

Ms. Gulnar Mistry a/w Teresa Daulat, Mohanish Patkar,
Shreyas Maheshwari, Nikita Agarwal for the Respondent Nos.
1 to 9 in IA/2980/20 and Appellants in FA/1369/19.

CORAM : K.K. TATED &
R.I. CHAGLA, JJ.

DATE : 6 April 2021

ORDER :

1. Heard the learned Counsel for parties.
2. For the sake of convenience, the nomenclature of the parties will be referred to as stated in Special Civil Suit No. 48 of 2012.
3. By this Application, the Applicant-Plaintiff No. 2 is seeking permission to withdraw the amount deposited by the Defendant in the Registry of this Court as per order date 21st November 2019 passed by this Court in Civil Application (ST) No. 24662 of 2019. This Court by order dated 21st November 2019 in Civil Application (ST) No. 24662 of 2019 granted liberty to the Plaintiffs to prefer an Application for withdrawal of the amount, if they so desire, and that be decided on its own merits. Hence, the present Interim Application.
4. Learned Counsel Mr. Tripathi appearing on behalf of the Plaintiff No. 2 submits that he filed the present Interim Application on 28th February 2020 on the ground that he required the amount for his business purpose as well as to take

medical treatment for himself as well as for his father.

5. Learned Counsel for the Plaintiff No. 2 submits that in the present proceedings, because of assault by the Defendants, they file the Special Civil Suit No. 48 of 2012 before the Civil Judge Senior Division, Vasai for compensation of Rs. 5,05,00,000/- (Rupees Five Crores and Five Lakhs only) and interest at the rate of 24% per annum from the date of incident i.e. from 5th January 2011 till the date of filing of the Suit and further interest, if the amount is awarded. It is the case of Plaintiffs that on 5th January 2011 at about 3.30 p.m. the Plaintiffs along with their family members travelling from Mumbai to Silvassa in their car registration No. DN-09-F-1462. At that time, at Vasai Toll Naka, the Plaintiffs handed over Rs. 100/- for paying toll of Rs. 47/-. However, the concerned clerk/employee refused to give back the change. He insisted for the change and because of that, some of the Defendants assaulted the Plaintiffs. He submits that this facts are stated by the Plaintiffs in paragraph 6 and 9 of the Plaint, which read thus:-

“6) It is submitted that on 5.1.2011 at about 3.30 p.m. the

Plaintiffs along with their family were traveling from Malad-Mumbai towards Silvassa in their Chevrolet Beat Car bearing Registration No. DN 09 R 1462. The Plaintiff No. 2 was driving the Car. When the Plaintiffs reached at Toll Plaza at Khanivade, Taluka Vasai, which is run by the Defendants No. 1 to 10, their vehicle was halted for paying toll. The Plaintiff No. 1 handed over Rs. 100/- for paying the toll of Rs. 47/-. However, the concerned clerk/employee refused to give back change of Rs.3/- and returned back Rs. 50/-. The Plaintiffs asked the explanation about the said cheating. However, the Plaintiffs realized that the Defendants No. 11 to 16 at Toll Plaza were not interested to pay the change purposely, so the Plaintiffs asked for their money back saying they would pay the exact fees and they then refused to pay the toll unless change is provided by the Defendants No. 11 to 16.

At that time the Defendants No.11 to 16 at the Toll Plaza became violent and started hitting the car and forcefully asking for money. However, the Plaintiffs afraid of violent reaction by the Defendants No.11 to 16 at Toll Plaza and succeeded to escape from the spot. But the Defendatns No.11 to 16 followed quietly Plaintiff's car in their vehicle MH04 G 6821 and intercepted them about 5-6 kilometers away from Toll Plaza. The Defendants No.11 to 16 got down the said vehicle with iron roads. The Defendants No.11 to 16

started thumping the Car windows and threatened the Plaintiff's to get down from their car, the Defendants No.11 to 16 pulled him out and started beating him with feast blows on his face without any arguments causing him serious injury to his right Eye. At that time when the Plaintiff No.1 Mr. Vasantrai Gohil tried to rescue the Plaintiff No.2 from the hands of Defendants No.11 to 16, the Defendants No.11 to 16 beat him on his face with feast blows and pushed him forcefully on the road and therefore, he sustained injury on his hipbone. The Defendants No.11 to 16 also assaulted daughter and daughter-in-law of the Plaintiff No.1 who were trying to help the Plaintiffs and injured them too. The Plaintiffs called the Police by dialing the Police Helpline No.100. Thereafter the Defendants No.11 to 16 ran away from the spot. The Plaintiffs lodged the police complaint with preliminary medical examination at parcle Government Hospital at Vasai. The Defendants No.11 to 16 were arrested, and at present Criminal Prosecution Under Section 143, 147, 148, 149, 325 and 323 of Indian Penal Code against the Defendants No.11 to 16 is pending in the Court of Judicial Magistrate (First Class) at Vasai."

And

- "9. It is further submitted that also as a result of assault and grievous hurts, caused by the Defendants No.11 to 16 the Plaintiff No.2 too suffered right eye injury of retinal tear and detachment. His right eyesight has*

been partially impaired permanently. He has taken treatment initially at SHAH EYE CLINIC & MICROSURGERY CENTRE as well as at Aditya Jyot Eye Hospital Pvt. Ltd. at Wadala Mumbai. He was operated in the said Hospital for his right EYE injury with surgery called Vitrectomy Suture less surgery. He has become liable to pay expenses for medical treatment and attendance for nursing and for medicines to the tune of Rs.1,00,000/- (Rupees One lac only). Now the Plaintiff No.2 is permanently unfit for doing the work on computers as well as working continuously on electronic instruments. The Plaintiff No.2 is only 27 years old and he was quite healthy and he was suffering from no illness till 5.1.2011. He is an Engineer by profession doing the business of Electronic Industrial Instrumentation. How, he is not able to work either on computers or on electronic devices continuously i.e. for more than 15 minutes. This has resulted into unexpected permanent business loss to the Plaintiffs. He is still in his starting career and excellently developed his business and had an excellence knowledge to become a successful industrialist now due to this incident he has only one eye vision to carry out his work, which will force him for early retirement at age of 40-45 if his left eye stops working at that age due to too much pressure and strain in his one eye. Currently whole responsibility for his family is depending on him and even plaintiff has divorced sister and sister's minor daughter of age

9 years is his responsibility. The Plaintiff No.1's age is 60 years. He is now crippled and incapacitated due to the assault and grievous hurts caused by the Defendants No.11 to 16. He was a major backbone for Plaintiff No.2 as consultant and due to such seriously handicapped, he can no longer move and sit for longer times and not efficient as earlier further affecting plaintiff no.2 business. The Defendants No.1 to 16 are jointly liable for the above said vicious effects on the physical and mental health of the Plaintiffs. As the Plaintiffs have suffered severe mental and physical trauma, they are unable to carry on their routine work efficiently. This has resulted in loss of their income to an every great extent. Due to the injuries caused by the Defendants, their ability to work normally is severely impaired permanently."

6. Learned Counsel for the Plaintiff No. 2 submits that after considering the evidence on record, the Trial Court by its judgment and decree dated 9th July 2019 held that the Defendants jointly and severely are liable to pay compensation of Rs. 50,00,000/- (Rupees Fifty Lakhs only) with interest at the rate of 9% per annum to the Plaintiffs within one month from the date of passing the order. He submits that even the Trial Court in paragraph 25 of the judgment specifically recorded that the Plaintiffs suffered 30% disability, because of

their assault by some of the Defendants. The Trial Court at the time of awarding compensation, considered the Plaintiff Nos. 2's income. In support of his contention, the learned Counsel for Plaintiff No. 2 relied upon paragraphs 25 and 37 of the judgment and decree passed by the Trial Court which read thus:-

"25] So far as injury caused to P.W.2 Vijay is concerned, P.W.6 Dr. Natrajan deposed that he made surgery on the right eye of P.W.2 Vijay. He deposed that after the surgery the vision of P.W.2 Vijay stands 6/60. He deposed that 30% disability caused to P.W.2 Vijay. He deposed that he issued case summary of P.W.2 Vijay Exh.90. During the cross examination, the testimony of P.W.6 was not at all shattered. There is absolutely no reason to disbelieve the testimony of P.W. 6 Dr. Natrajan. As per the testimony of P.W.6 in the first year there are chances of improvement in vision but thereafter it is not possible. P.W.2 Vijay also deposed that due to the incident he cannot see from his right eye. Hence, from the testimony of above witness it is clear that P.W.2 Vijay cannot see by his right eye. It means he has lost the vision of his right eye."

And

"37. As per testimony of P.W.2 Vijay he is running business

of Electronic Industrial Instrumentation. As per his testimony every year he pays income tax upto Rs.60,000/-. The plaintiffs have filed the copies of income tax returns on record. At the time of incident the age of P.W.2 Vijay was only 27 years. Even the income of P.W.2 Vijay is considered as Rs.50,000/- per month then he could easily earn Rs.6,00,000/- per year. If he could work upto age of 60 years with his both eyes then he could earn huge income in his life i.e. more than Rs.3,00,000/- Crores by adding future prospects of 40%. The eye is vital organ in his body. Due to the loss of eye P.W.2 Vijay caused 30% disability to his body. Due to the loss of eye his working efficiency will be naturally reduced. P.W.2 spent Rs.1,00,000/- on surgery of his right eye. Thereafter, also he continuously takes the follow up in the hospital. Hence, considering the pecuniary damages i.e. expenses relating to the treatment, hospitalization, medicine, loss of earnings which the injured could have made had he not been injured, loss of earning during the period of treatment, loss of future earnings on account of permanent disability, loss of future medical expenses and non-pecuniary damages i.e. damages for pain, suffering and trauma is the consequences of the injuries, loss of amenities, the compensation and damages of Rs.50,00,000/- with interest of 9% from the date of filing of the suit would be just and proper to meet the ends of justice."

7. The learned Counsel for the Plaintiff No. 2 submits that at present the Plaintiff No. 2's father i.e. Plaintiff No. 1 is suffering Covid 19 virus and is admitted in Kokilaben Dhirubhai Ambani Hospital and Medical Research Institute. He submits that till today, Plaintiff No. 2 has already paid more than Rs. 9,00,000/- (Rupees Nine Lakhs only) amount towards his father's treatment. To that effect, he has placed on record certain documents. He submits that this is one of the grounds for allowing the present Application. He submits that in any case, there is a money decree against the Defendants and they already deposited the entire amount in the Registry of this Court. Therefore, this Hon'ble Court be pleased to allow Plaintiff No. 2 to withdraw the entire amount deposited by the Defendants in the Registry as per order dated 6th September 2019 and 21st November 2019 in Civil Application (ST) No. 24662 of 2019.

8. Learned Counsel for the Plaintiff No. 2 submits that if the present Interim Application is not allowed, irreparable loss and injury will be caused to him. He submits that in any case final hearing of First Appeal will take its own time.

9. On the other hand, learned Counsel Ms. Mistry appearing on behalf of Defendant Nos. 1, 2 and 4 to 10 vehemently opposed the present Interim Application. She filed their Affidavit in Reply dated 5th April 2021. Learned Counsel for the Defendants submits that there is no substance in the present Interim Application and the same be dismissed with costs. She submits that in the present proceedings, whether the Plaintiff No. 2 proves the relationship of employer – employee between the Defendants is also required to be decide on its own merits. She further submits that if the entire amount is withdrawn by Plaintiff No.2 then nothing will survive in the present First Appeal. She submits that if the Defendants succeed in the present First Appeal, then it will be very difficult for them to recover the amount, if this Court permits the Plaintiff No. 2 to withdraw the entire amount without furnishing any security.

10. Learned Counsel for the Defendants submits that even bare reading of the judgment of the Trial Court shows that the Trial Court failed to consider the relevant facts placed on record by them. She submits that the Plaintiffs failed to prove injury sustained by them. Not only that the Trial Court

failed to consider the fact about vicarious liabilities of the Defendants. She submits that even the Apex Court in the matter of *P.S.L. Ramanathan Chettiar & Ors. Vs. O.R.M.P.R.M. Ramanathan Chettiar*¹ not allowed the Decree-holder to withdraw the entire amount without furnishing any securities. To that effect, learned Counsel for the Defendants relies on paragraphs 12 and 13 of the said judgment, which read thus:-

“12 On principle, it appears to us that the facts of a judgment- debtor's depositing a sum in court to purchase peace by way of stay of execution of the decree on terms that the decree- holder can draw it out on furnishing security, does not pass title to the money to the decree-holder. He can if he likes take the money out in terms of the order; but so long as he does not do it, there is nothing to prevent the judgment-debtor from taking it out by furnishing other security, say, of immovable property,' if the court allows him to do so and on his losing the appeal putting the decretal amount in court in terms of Order 21 rule 1 C.P.C. in satisfaction of the decree.

13. The real effect of deposit of money in court as was done in this case is to put the money beyond the reach of the parties pending the disposal of the appeal. The decree- holder could only take it out on furnishing

¹ AIR 1968 SC 1047

security which means that the payment was not in satisfaction of the decree and the security could be proceeded against by the judgment debtor in case of his success in the appeal. Pending the determination of the same, it was beyond the reach of the judgment-debtor.”

11. Learned Counsel for the Defendants also relies on the judgment in the matter ***Manibhai & Brothers Vs. Birla Cellulosic***². She submits that in this judgment also the Gujarat High Court specifically held that there is no question of allowing the Decree-holder to withdraw the entire amount without furnishing any security. In support of his contention, he relies upon paragraphs 25 and 31 of the said judgment, which read thus:-

“25. As noticed hereinabove, Order XLI rule 5 of the Code does not make any express provision for withdrawal of the amount by the decree-holder. Since withdrawal of the amount deposited by the judgment-debtor can be allowed only provided the decree-holder furnishes sufficient security, it need not be stated that such order can be passed only on a request made by the decree-holder. Such request or application for

2 2016 SCC OnLine Guj 1084

withdrawal, therefore, would not be one under rule 5 of Order XLI of the Code, inasmuch as, the said rule provides for stay by the appellate court and lays down the circumstances and the manner in which the execution of a decree could be stayed. Sub-rule (3) of rule 5 provides for the factors in respect of which the court should be satisfied for the purpose of staying the execution of the decree, one of which is that the security has been given by the applicant for due performance of such decree or order as may ultimately be binding upon him. There is no express provision in rule 5 of Order XLI of the Code which permits the decree-holder to apply for withdrawal of the amount that may be directed to be deposited as a pre-condition for stay of execution of the decree.”

And

“31. In the opinion of this court, permitting withdrawal of the amount would also not amount to modifying the stay order as by virtue of this order the respondent has not been asked to pay any Additional sum nor are the terms of stay order granted by the court in any manner being modified. All that is being done is that in view of a long settled practice, the applicant is being permitted to withdraw the amount deposited by the respondent in compliance with the stay order subject to the applicant furnishing security as directed by the court. by adopting this course of action, the respondent judgment-debtor is not in any

manner prejudiced inasmuch as against withdrawal of the amount the applicant would be required to furnish such security as the court deems fit. The only consequence is that instead of money lying in the deposit with the bank, the decree-holder gets to enjoy the same, subject of course, to furnishing security for withdrawal of the amount."

12. On the basis of these facts and authorities, learned Counsel for the Defendants submits that there is no substance in the present Interim Application and the same be required to be dismissed, with costs.

13. We heard both the side at length.

14. It is to be noted that in the present proceedings, the Plaintiffs filed Special Civil Suit No. 48 of 2012 before the Civil Judge Senior Division, Vasai, at Vasai for damages and compensation. The Trial Court after considering the facts on record, held that the Defendants jointly and severally are liable to pay compensation of Rs. 50,00,000/- (Rupees Fifty Lakhs only) with interest at the rate of 9% per annum. Bare reading of paragraphs 25 and 37 of the judgment

dated 9th July 2019, *prima facie* shows that because of the assault by the Defendants, the Plaintiffs suffered the injury, not only that Plaintiff No. 2 suffered 30% disability. Apart from that the Plaintiff No. 2 specifically made averments in the Interim Application that he requires said amount for his business purpose. Not only that he disposed of some of the properties for survival of his business. Not only that during pendency of the present Interim Application, the Plaintiff Nos. 2's father i.e. Plaintiff No. 1 has suffered Covid 19 virus and he is admitted in Kokilaben Dhirubhai Ambani Hospital and Medical Research Institute. The documents placed on record by the Plaintiffs during the course of arguments show that Plaintiff No.2 already paid more than Rs. 9,00,000/- (Rupees Nine Lakhs only) towards his father's treatment, who is still in hospital. How much amount he is required to pay in future, one cannot say.

15. Apart from all these facts, it is to be noted that there is a money decree against the Defendants. Not only that the Plaintiff No. 2 suffered 30% disability as recorded by the Trial Court on the basis of the evidence on record. Considering these facts, the Plaintiff No. 2 is entitled to

withdraw some amount during the pendency of the present First Appeal, because First Appeal will take its own time.

16. Authorities cited by the Defendants in the matter of *P.S.L. Ramanathan Chettiar & Ors. Vs. O.R.M.P.R.M. Ramanathan Chettiar* (supra) and *Manibhai & Brothers Vs. Birla Cellulosic* (supra) are not applicable in the facts and circumstances of the present case. The Trial Court specifically recorded that the Plaintiff No. 2 suffered 30% disability. Not only that the Trial Court at the time of calculating the compensation of Rs. 50,00,000/- (Rupees Fifty Lakhs only) recorded in paragraph 37 of the judgment, the income of the Plaintiff No 2. Apart from that the Apex Court in the matter *Baburao s/o Govindrao Gaikwad & Anr. Vs. State of Maharashtra & Ors.*³, held that 50% compensation can be granted without furnishing any securities and balance 50% on furnishing security which is mentioned in paragraph 3 of the said judgment, which reads thus:-

“3. Having heard the learned counsel for the parties to the lis, we are of the opinion that the prayer made by

3 (2017) 11 SCC 333

the appellants requires to be accepted and granted. Accordingly, we pass the following order:

“We direct that 50% of the enhanced compensation granted to the appellants shall be released without security whereas balance of 50% shall be released to them on furnishing security to the satisfaction of the Collector.”

17. Considering this fact and law declared by the Apex Court, we are of the opinion that the Applicant has made out a case to allow the Application. Hence, we pass the following order:-

- (i) Applicant-Original Plaintiff No. 2 is permitted to withdraw the 50% amount deposited by the Defendants with accrued interest, if any, without furnishing any security, but subject to outcome of the present First Appeal.
- (ii) Remaining 50% amount can be withdrawn by the Plaintiff No. 2 by furnishing solvent security to the satisfaction of the Registrar of this Court within a period of three months from today.

(iii) If the amount is not withdrawn within a period of three months from today, the Registry is directed to invest the entire and/or balance amount in Fixed Deposit in any Nationalised Bank, initially for a period of one year and the same to be renewed time to time till hearing and final disposal of the First Appeal.

(iv) Interim Application stands disposed of accordingly.

(v) No order as to costs.

18. At this stage, learned Counsel for the Defendants orally made application for stay of this order.

19. Considering the present case and as the Plaintiff No. 2's father is in hospital for taking treatment of Covid 19 virus and he has already paid a sum of Rs. 9,00,000/- (Rupees Nine Lakhs only) in the hospital, we do not find any reason to stay this order. Hence, the oral application is rejected.

[R.I. CHAGLA J.]

[K.K. TATED, J.]