

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO.732 OF 2015
IN
SECOND APPEAL NO.136 OF 2007**

Shri Rajendra Jagannath Karne .. Applicant

In the matter between parties:

Mr.Maheshkumar Jagannath Karne and Ors. .. Appellants

vs.

Shri Rajendra Jagannath Karne .. Respondent

Mr.Dilip Bodke for the applicant

Mr.Dhananjay Ranaware i/b Mr.S.P.Thorat for the respondent

CORAM : K.K.TATED, J.

DATED : 02/09/2015

PC:

1 Heard the learned counsel for the parties.

2 This application is preferred by the plaintiff for vacating and / or modifying the order dated 5.10.2007 passed by this court in Civil Application No.327 of 2007 in Second Appeal No.136 of 2007 for non-compliance of statement made by the Appellant.

3 The learned counsel for the applicant submits that in Civil

Application No.327 of 2007, this court passed order on 5.10.2007 which reads thus:

“1. Heard. There shall be interim stay of execution, pending Second Appeal. Shri Thorat, the learned counsel appearing for the appellants, states that the appellants will furnish private paper book at the earliest.”

4 The learned counsel for the applicant submits that this court granted interim stay of execution pending the Second Appeal only on the assurance given by the advocate for the appellant that they will furnish private paper book at the earliest. He submits that the said order was passed in 2007 but till today the appellant has not filed private paper book in this court. He submits that the applicant by letter dated 18.3.2014 called upon the advocate for appellant to comply the order dated 5.10.2007 and provide copy of paper book. He submits that there is no reply from the appellant's advocate. Hence, the appellant preferred present Civil Application on 24.3.2015 with following reliefs:

“(a) This Hon'ble Court be pleased to vacate and/or modify the order dated 05.10.2007 passed by this Hon'ble Court (Coram: S.A.Bobade, J.) in Civil Application No.327 of 2007 in Second Appeal No.136 of 2007;

(b) Pending the hearing and final disposal of the

present Civil Application, this Hon'ble Court be pleased to vacate and/or modify the order dated 05.10.2007 passed by this Hon'ble Court (Coram: S.A.Bobade, J.) in Civil Application No.327 of 2007 in Second Appeal No.136 of 2007;

(c) Interim/ ad-interim relief in terms of prayer clause (b) above be granted;

(d) Such other orders and reliefs be granted in favour of the Applicant.”

5 The learned counsel for the applicant submits that in view of Order 41 Rule 5 of the Civil Procedure Code, 1908 and particularly sub-rule 3(a) and (c), the applicant filed the present Civil Application for vacating and / or for modifying the order passed by this court on 5.10.2007. He further submits that the applicant with bad intention and ill-will delayed in complying the order dated 5.10.2007 i.e. filing of private paper book. He further submits that for want of private paper book, it is not possible for the applicant to take out appropriate application for early hearing of Second Appeal. Hence, in the interest of justice this Hon'ble Court be pleased to allow the present Civil Application either by vacating and / or modifying the order dated 5.10.2007 in Civil Application No.327 of 2007.

6 On the other hand, the learned counsel for the appellant vehemently opposed the present Civil Application. He submits that as per the order passed by this court on 5.10.2007 they already filed

paper book in the Registry on 18.6.2015. He further submits that provisions of Order 41 Rule 5 are not applicable in the facts and circumstances of the present case. Hence, there is no substance in the present Civil Application and same be dismissed with costs.

7 I have heard both the counsel at length. Before considering the Civil Application it is better to refer to the averments made by the applicant in Civil Application in paragraph 7 and 8 as under:

“7. It is pertinent to note that at the time of granting stay on behalf of the Appellants it was stated that they will furnish the private paper book at the earliest and accepting the said statement this Hon'ble Court was pleased to grant the interim stay of execution pending the Second Appeal.....”

“8. The Applicant states and submits that as stated herein above the Appellants undertakes to this Hon'ble Court on 05.10.2007 that they will file the paper book in the above said matter and on accepting the said statement this Hon'ble Court has granted the ad-interim relief, however till date even after the lapse of 7 years and 5 months the Appellants have not filed the paper book with a view to the Appeal should not become ready for final hearing.....”

8 Bare reading of the averments made by the applicant in paragraph 7 and 8 shows that just because of the statement made by the advocate for the appellant that they are ready to file private paper book, this court granted stay in favour of the appellant. Advocate for the applicant has made a statement before this court on 5.10.2007. Applicant interpreted the same as undertaking as stated in paragraph 8 of the Civil Application which is contrary to facts of case. Apart from that, the provisions of Order 41 Rule 5 (3) and (5) are not applicable in the facts and circumstances of the present case at all. Same reads as under:

“3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(C) that security has been given by the applicant for the due performance of such decree of or as may ultimately be binding upon him.

(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of rule 1, the court shall not make an order staying the execution of the decree.”

9 It is to be noted that Order 41 Rule 5 (3) and (5) stated that no order for stay of execution shall be made under sub rule 1 or 2 unless the court satisfied the three conditions.

10 In the case in hand, advocate for the appellant on its own made a statement before the court that they will file private paper book as early as possible. Without considering the provisions of Order 41 Rule 5 applicant has preferred present Civil Application and made averments to that effect in paragraph 10 of the Civil Application. Apart from that, record shows that advocate for appellant has filed private paper book in the Registry.

11 Considering these facts, I am of the opinion that applicant failed to make out any case for allowing Civil Application. Hence, following order is passed:

- a) Civil Application stands dismissed with cost of Rs.1000/-.
- b) Cost to be paid to the appellant or to deposit in the Registry within four weeks from today.

(K.K.TATED, J.)