

ingale

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5541 OF 2015

Kishore Ramchandra Padwal .. Petitioner

Vs.

Rameshwar Vishwakarma .. Respondent

Mr.Rahul Singh i/b Mr.M.S.Singh, Advocate for the Petitioner.
Mr.O.P.Singh, Advocate for the Respondent.

CORAM : R. G. KETKAR, J.
DATE : 08th JULY, 2015

P.C. :

. Heard Mr.Rahul Singh, learned Counsel for the petitioner and Mr.O.P.Singh, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, original defendant has challenged the judgment and order dated 06/02/2015 passed by the learned Judge, City Civil Court at Greater Bombay in Unregistered Notice of Motion in Decided Notice of Motion No. 4712 of 2014 in Execution Application No. 510 of 2010 in S.C. Suit No. 5775 of 2003. By that order, the learned trial Judge rejected Unregistered Notice of Motion of judgment-debtor/defendant in decided Notice of Motion No. 4712 of 2014 in pending Execution Application No. 510 of 2010 in decided Suit No.

5775 of 2003 and refused to grant leave for registration of Notice of Motion.

3. In support of this Petition, Mr. Rahul Singh submitted that petitioner had instituted Writ Petition Stamp No. 32327 of 2014 in this Court challenging the judgment and order dated 28/11/2014 passed by the learned trial Judge in unregistered Notice of Motion filed in execution application. By that order, the learned trial Judge dismissed the Unregistered Notice of Motion of defendant. This Court disposed of Writ Petition by issuing following directions.

(1) The petitioner to file an application for setting aside the said order dated 28/11/2014 within one week from date, the copy of the same to be served on the other side immediately on its filing.

(2) The trial Court to hear and decide the said application within the outer limit of 4 weeks from the filing of the said application.

(3) Needless to state that the grounds which are sought to be urged by the Petitioner have not been dealt with by this Court and it is for the trial Court to consider the said grounds and decide the application that would be filed on merits and in accordance with law.

(4) Till the application is decided the directions as contained in the impugned order dated 28/11/2014 would lie suspended and the suspension would be contingent upon the decision that would be rendered in the application.

(5) The contentions of the parties on merits are kept open for being urged before the Trial Court.

4. Mr. Rahul Singh submitted that this Court permitted the petitioner to file application for setting aside order dated 28/11/2014 within one week from 10/12/2014. The period of one week expired on 17/12/2014. The petitioner filed Motion on 18/12/2014 i.e. to say one day after the time stipulated in the order

dated 10/12/2014. He submitted that on 18/12/2014, advocate representing petitioner in that Motion was arrested. On 18/12/2014, Advocate Sudhir Kumar for defendant was present. None was present for the Decree Holder. In the Roznama dated 18/12/2014, it was recorded that defendant-judgment debtor submitted unregistered Motion. He was permitted to register the Motion and to serve the Notice as well as documents annexed with the Motion to the plaintiff-Decree Holder. The matter was adjourned to 09/01/2015.

5. On 09/01/2015 none appeared for the Decree Holder. Advocate Ms. Manasi Vilas for judgment-debtor was present. In the roznama dated 09/01/2015, it was recorded that unregistered Notice of Motion of judgment-debtor being not tendered to the Court, so dismissed for default. Mr. Rahul Singh submitted that in paragraph 4 of the impugned order, the learned trial Judge referred to the roznama of 18/12/2014 and 09/01/2015. It was observed that on 09/01/2015, defendant did not tender unregistered Notice of Motion nor informed that Motion was registered or not. Consequently, on 09/01/2015, the Court dismissed the said Motion for defendant's default in prosecution. Mr. Rahul Singh submitted that if unregistered Motion itself was not tendered to the Court, it could not have been dismissed in default. He submitted that the learned trial Judge instead of dismissing the Motion on technical

ground, rather should have decided the same on merits. He, therefore, submitted that the impugned order deserves to be set aside and unregistered Motion may be restored to the file of the trial Court. He states that the petitioner will obtain leave of the trial Court for registration of the Motion.

6. On the other hand, Mr.O.P.Singh supported the impugned order. He submitted that in fact perusal of the Notice of Motion No. 4712 of 2014 shows that the Court fee stamp of 18/12/2014 was affixed and the affidavit was verified on 15/12/2014. He submitted that there is forgery in the Motion. The Motion is also antedated. He submitted that if the Court is inclined to restore the Motion, the respondent will file reply within 2 raising this contention as well.

7. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, by order dated 10/12/2014 passed by this Court, petitioner was give liberty to file application for setting aside order dated 28/11/2014 within one week. The period of one week admittedly expired on 17/12/2014. Perusal of roznama dated 18/12/2014 shows that petitioner submitted unregistered Notice of Motion. The learned trial Judge permitted registration of Motion and directed to serve the notice as well as documents annexed with the Motion to the plaintiff-Decree Holder. The

impugned order records that till 06/02/2015, plaintiff did not comply that order. It is not in dispute that plaintiff has received copy of Motion as also documents annexed with the Motion.

8. Perusal of the roznama dated 09/01/2015 shows that none appeared for the plaintiff-Decree Holder. On behalf of the judgment-debtor advocate Ms.Manasi Vilas was present. Mr. Rahul Singh submitted that on 18/12/2014, advocate representing the defendant was arrested and therefore, he could not conduct the Motion. Perusal of the roznama dated 09/01/2015 further shows that unregistered Notice of Motion of judgment-debtor was not tendered to the Court and so it was dismissed for default. Paragraph 4 of the impugned order records this fact. Perusal of the paragraphs 5 & 6 of the impugned order records that the learned trial Judge observed that since the defendant did not comply order dated 10/12/2014 passed by this Court, the Motion dated 06/02/2015 cannot be considered. The learned trial Judge further observed that it was necessary for the defendant to request the High Court for extension of time limit.

9. In my opinion, the learned trial Judge was justified in observing that defendant should have approached this Court for extension of time as stipulated in the order dated 10/12/2014. Nonetheless, the fact remains that on 18/12/2014, defendant-judgment debtor submitted unregistered Notice of Motion. On that

day, none appeared on behalf of Decree Holder. Even on the subsequent date, on 09/01/2015, none appeared on behalf of the plaintiff-Decree Holder. Mr.O.P.Singh was not in a position to justify order dated 09/01/2015 dismissing the Motion for default though not tendered in the Court. In view thereof, the impugned order deserves to be set aside and the unregistered Notice of Motion deserves to be restored to the file of the trial Court. Hence, following order.

i) The impugned order dated 06/02/2015 is quashed and set aside.

ii) The Unregistered Notice of Motion filed by the defendant is restored to the file of the trial Court.

iii) The defendant shall obtain leave of the trial Court on or before 17/07/2015.

iv) The respondent-plaintiff shall file reply on or before 31/07/2015.

v) The learned trial Judge will consider the Motion on its own merits and in accordance with law on the basis of the material on record. While deciding the Motion, the learned trial Judge will also consider and deal with the contention of the plaintiff that the Motion No. 4712 of 2014 is fabricated and antedated.

vi) The time stipulated in the order dated 10/12/2014 in Writ Petition Stamp No. 32327 of 2014 is extended till 17/07/2015.

vii) Till the restored Motion is decided, the directions contained in the order dated 28/11/2014 is suspended and the same shall be subject to the outcome of Notice of Motion.

viii) The learned trial Judge is requested to decide the Motion on or before 31/08/2015. It is made clear that I have not examined the merits of the Motion. All the contentions in that regard are expressly kept open.

10. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)