

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL APPEAL (L) NO. 523 OF 2018
IN
CHAMBER SUMMONS CD NO. 1362 OF 2018
IN
COMMERCIAL EXECUTION APPLICATION (L) NO. 2708 OF 2018
WITH
COMM.NOTICE OF MOTION (L) NO. 1246 OF 2018

Shiv-sneha Associates and Ors.

... Petitioners

Versus

Ravindranath R. Shetty

... Respondents

Mr. Subhash Jha a/w Ms. Sanjana Pardeshi I/by R.J. Ghag for petitioners.

Mr. S.G. Aney, Sr. Advocate a/w Mr. Sanjay Jain, Mr. Ishwar Nankani, Mr. Huzefa Khokhawala, Ms. Janaki Garbe I/by M/s. Nankani & Associates for the respondents.

CORAM : B.P. DHARMADHIKAKRI &
SARANG V. KOTWAL, JJ.
DATE : DECEMBER 21, 2018

P.C.:

The appeal filed by original defendants challenging the order dated 30/10/2018 passed by Single Judge in Chamber Summons (L) No. 1618/2018 in Commercial Execution Application (L) No. 2708 of 2018. By that order learned Judge of this court has passed interim order which is to continue till the separate application

moved by the defendants for recall of the order dated 19/06/2018 is disposed of. Learned Single Judge has directed to place on record few details and has restrained the defendants from dealing with or encumbering the immovable property including the building known as “Daulat Classic”.

2. By notice of motion, the petitioner seeks suitable orders on appeal as also interim order staying the above mentioned order dated 30/10/2018.

3. We have heard Advocate Jha for the defendants and senior Advocate Mr.Aney with Mr. Sanjay Jain for the plaintiffs.

4. Perusal of the impugned order dated 30/10/2018 in opening para itself shows the observations of the learned Single Judge declining to hear defendants of execution at that juncture. It appears to be misconduct of defendants of violation of the commitments made to the court on more than one occasion and then to take a stance contrary to it. Learned Single Judge has also noted the fact that the party must satisfy the court that it has come to the court with clean hands and has not attempted to mislead it and has not defaulted in solemn undertakings given to it. If there is no such intention, right to be heard is forfeited. This finding is in the backdrop of the contention that the

commitments made initially on 19/6/2018 and thereafter on 01/08/2018 and 16/08/2018 have not been honoured and was attempted to be disputed by filing an application for recall.

5. Though appellant has contended that the impugned order is passed without hearing his advocates, the learned Single Judge has expressly recorded that the order being passed is interim in nature and to last till that application for recall is disposed of. This observation is reiterated against in paragraph 8 of the same order. It therefore, uses discretion available to court to balance equities till the main issue of recall is decided.

6. Various contentions are raised by Advocate Mr. Jha on behalf of the appellant. The contentions in effect also attempt to urge that the recording of undertaking on 19/06/2018 and consequential orders thereafter in its furtherance are unwarranted and should not have been passed. This contention and controversy definitely forms part of the application for recall moved on 04/09/2018 and still pending. The order impugned before us therefore, qualifies its operation till adjudication of this request to recall.

7. The other contentions : The order of which execution is sought cannot be construed as operative order and is not therefore executable. Inviting our attention to section 36 of Code of Civil

Procedure, it is submitted that the said section needs to be understood and interpreted in the light of section 2(2) of the Code which defines the decree. Hence, the order which is of final nature can only be subjected to execution. Such an order which has final tendency needs to be passed after adjudication i.e. after hearing of all aggrieved persons. When the parties are not heard and there is no adjudication of dispute, any order which is passed cannot become executable.

8. To drive home these contentions, our attention is invited to judgment in S. Satnam Singh and Ors. Vs. Surender Kaur and anr.¹ [Paragraphs 14 and 15], Surender Nath Kapoor Vs. Union of India and Ors.² [Paragraphs 17 and 19] and judgment of Full Bench of Nagpur High Court in Baliram Ganpatroa Bhjoot Vs. Manohar Damodhar Bhoot³.

9. Advocate Aney has given us relevant list of dates and then submits that after a long rope to appellant/defendant, commercial execution has been taken out. He submits that when contempt is prima facie seen, contemnor need not be heard. He argues that the orders passed by the learned Single Judge extending time to comply with the undertaking, order noticing that amount as

1 AIR 2009 SUPREME COURT 1089

2 AIR 1988 SUPREME COURT 1777

3 AIR (30) 1943 Nagpur 204

accepted and agreed, was not deposited by defendant, are not informal orders but passed after due consideration of controversy and to advance the cause of justice. These orders therefore, are executable. He relies upon the judgment of the learned Single Judge of this court dated 08/02/2010 in Satyapal s/o. Vaidyaram Katariya Vs. Sanjay Jagannath Kanjune and Ors. in W.P. No. 735 of 2010 at Aurangabad particularly paragraphs, 7, 8 and 15.

10. He also relies upon the judgment of Hon'ble Apex Court in Tayabbhai H. Bagasarwalla and anr. Vs. Hind Rubber Industries Pvt.Ltd. And Ors.⁴ [pags 454 and 457] to submit that the appellant defendant cannot continue to disobey the orders claiming that his recall application is pending.

11. We find that the learned Single Judge has in the impugned order dated 13/10/2018 looked into all relevant aspects and then proceeded to pass the order which in effect is interim in nature. The relevant dates and developments are taken note of in paragraphs 3 and 4 of the order. Conduct of defendant thereafter forms part of paragraph 5 and 6. We therefore, do not see any merit in this appeal. The commercial execution is still pending and interim arrangement therein has only been made to safeguard the interest of the plaintiff i.e. present respondent. It protects the

4 (1997) 3 Supreme Court Cases 443

interests of plaintiff (respondent before us) and also preserves the property to answer the execution till grievance of defendant about undertaking and consequential orders is discarded. We do not see any jurisdictional error or perversity in the approach of the learned Single Judge.

12. As such, we are not inclined to admit his appeal, which is accordingly rejected. Notice of motion is also disposed of.

(SARANG V. KOTWAL, J.) (B.P. DHARMADHIKARI, J.)