

vai

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2034 OF 2018
IN
SUIT NO.528 OF 2016

Sadanand K. Chiplunkar ...Applicant

IN THE MATTER BETWEEN :

Sadanand K. Chiplunkar ...Plaintiff
V/s.
M/s.Shubh Enterprises & Ors. ...Defendants

Ms.Sonal F. with Mr.Abbas Zaidy I/b Zohair & Co. for the Plaintiff.
Mr.S.C. Naidu I/b Mr.Amol Joshi for the Applicant in the Notice of Motion.
Mr.Ranjit Dharmadhikari I/b Mr.A.L. Naik for the Defendant No.4.

CORAM : R.D. DHANUKA, J.
DATE : 9TH JANUARY, 2019.

P.C. :-

1. By this notice of motion, the applicant (original plaintiff) seeks an action against the defendant no.5 and all other persons claiming through or under them, under the provisions of Order XXXIX Rule 2-A and Rule 11 read with section 151 of the Code of Civil Procedure, 1908 alleging disobedience of the order of injunction passed by this Court on 4th November, 2016.

2. Learned counsel appearing for the applicant invited my attention to the order dated 4th November, 2016 passed by this Court

in the draft chamber summons filed by the applicant *inter-alia* praying for impleadment of the defendant no.5 as a party defendant and for various reliefs in the Notice of Motion No.2034 of 2016 and Notice of Motion No.2001 of 2016 in Suit No.528 of 2016.

3. The applicant has filed a suit for specific performance against the defendant nos.1 to 4. It was the case of the applicant that the defendant no.4 has entered into a development agreement with the defendant no.5 who proposed to demolish the building partly constructed which would affect the interest of the applicant, who was one of the co-purchaser of a flat in the said building under an agreement entered into between the applicant and the defendant no.1.

4. Learned counsel for the applicant submits that though an order of *status-quo* was passed by this Court on 4th November, 2016, the defendant no.5 made an attempt to demolish the said building. Learned counsel invited my attention to an order dated 17th November, 2016 passed by this Court in the said Chamber Summons No.1722 of 2016 and would submit that though by the said order the said chamber summons came to be disposed by this Court, since the order dated 4th November, 2016 granting an order of *status-quo* was passed not only in the chamber summons but also in the Notice of Motion No.2034 of 2016 and Notice of Motion No.2001

of 2016 in Suit No.528 of 2016, the defendant no.5 committed willful disobedience of the said order dated 4th November, 2016 and thus shall be punished for the same.

5. Learned counsel appearing for the applicant invited my attention to various further orders passed by this Court from time to time in support of the submission that inspite of the order of *status-quo* and also inspite of the stop work notice issued by the Municipal Corporation in respect of the building in question, the defendant no.5 made an attempt to demolish the building in question. She also pointed out the orders dated 11th December, 2017, 19th December, 2017 and 30th January, 2018 passed by S.J. Kathawalla, J. and would submit that this Court has made various observations about the sharp practice played by the defendant no.5 in the matter. She submits that demolition of the building is admittedly stayed by the order passed by this Court. However, since the defendant no.5 made an attempt to demolish the building in question inspite of the order of status-quo passed by this Court, the defendant no.5 shall be dealt with under the provisions of Order XXXIV Rule 2-A read with section 151 of the Code of Civil Procedure, 1908.

6. Mr.Naidu, learned counsel appearing for the defendant no.5 on the other hand invited my attention to the order dated 4th November, 2016 passed by this Court and also an order dated 17th

November, 2016 and would submit that when the order of status-quo was passed by this Court, the said status-quo order was passed in the draft chamber summons and not in the notice of motions. He submits that on 17th November, 2016 when the said chamber summons was disposed of by this Court, ad-interim status-quo which was passed on 4th November, 2016 automatically came to an end. He submits that there is no order passed by this Court on 17th November, 2016 directing the status-quo order passed by this Court earlier to continue in any of the pending notices of motion filed by the applicant.

7. Learned counsel led emphasis on the words “in the meantime” in the order dated 4th November, 2016 and placed reliance on the judgment of this Court in case of **Govinda Bhagoji Kamble & Ors. vs. Sadu Bapu Kamble & Ors., 2005(1) Mh.L.J. 651** and in particular paragraphs 11 to 13 thereof. He submits that even if the said order dated 4th November, 2016 was to be considered as in force till 15th November, 2016, since the chamber summons was not heard prior to the date, the said ad-interim automatically came to an end when the chamber summons was ultimately disposed on 17th November, 2016 i.e. subsequent to the returnable date.

8. Insofar as the contention raised by the learned counsel for

the applicant that the ad-interim order was passed in the Notice of Motion No.2034 of 2016 and Notice of Motion No.2001 of 2016 also and not only in the draft chamber summons on 4th November, 2016 is concerned, Mr.Naidu, learned counsel for the defendant no.5 would submit that admittedly the defendant no.5 was not even a party to the said two notices of motion. There was no issue of demolition raised by the applicant in those two notices of motion. Insofar as the Notice of Motion No.2034 of 2016 is concerned, the said notice of motion was directed only against the defendant no.1. Insofar as the Notice of Motion No.2001 of 2016 is concerned, there was no averment in respect of demolition in that notice of motion also. There were other reliefs prayed against the other defendants and not against the defendant no.5.

9. Insofar as the prayers in the said chamber summons which was moved on 4th November, 2016 is concerned, it is submitted that though in the said chamber summons, there was a prayer for appointment of a Court Receiver and for further reliefs, this Court while disposing of the said chamber summons on 17th November, 2016 had simplicitor allowed the impleadment of the defendant no.5 as a party to the suit and disposed of the said chamber summons. He once again invited my attention to the order dated 4th November, 2016 making it clear that the other prayers in the

chamber summons which was yet to be lodged on the date of passing of the said order were not granted. The parties were granted opportunities to raise those contentions before this Court when the Notice of Motion No.2034 of 2016 and Notice of Motion No.2001 of 2016 were directed to be heard on 15th November, 2016. He submits that the contentions of the applicant that the said order dated 4th November, 2016 was passed not only in the chamber summons but also in the notices of motion thus cannot be accepted by this Court.

10. Learned counsel for the applicant in her rejoinder argument also sought to place reliance on the judgment of this Court in case of **Govinda Bhagoji Kamble & Ors.** (supra) and would submit that the said ad-interim order was through out continued till the disposal of the notice of motions. She submits that considering the subsequent conduct of the defendant no.5, this Court shall take appropriate action against the defendant no.5 in the present notice of motion.

11. A perusal of the order dated 4th November, 2016 passed by this Court in the chamber summons moved by the applicant clearly indicates that the said chamber summons was for impleadment of the defendant no.5 and for various other interim reliefs. At that stage, there was no question of the defendant no.5

making any attempt to demolish the building in question. By the said order dated 4th November, 2016, this Court directed that the proposed defendant no.5 be allowed to be impleaded as party defendant no.5. This Court directed that insofar as other prayers in the chamber summons were concerned, those issues can be raised by the parties before this Court when the Notice of Motion No.2034 of 2016 and Notice of Motion No.2001 of 2016 shall be heard on 15th November, 2016. In the meantime this Court directed the parties to maintain *status-quo*.

12. Admittedly the notices of motion could not be heard by this Court on 15th November, 2016. On 17th November, 2016 the said chamber summons filed by the applicant inter-alia praying for impleadment of the defendant no.5 as also for other reliefs appeared before the same Judge i.e. S.J. Kathawalla, J. The chamber summons came to be allowed by the said order dated 17th November, 2016. A perusal of the said order clearly indicates that neither the applicant applied for continuation of the ad-interim status-quo order passed by this Court on 4th November, 2016 till hearing of Notice of Motion No.2034 of 2016 and Notice of Motion No.2001 of 2016 nor the said order came to be passed by this Court. In my view, in view of the disposal of the Chamber Summons No.1722 of 2016 passed by this Court, ad-interim order passed by this Court on 4th

November, 2016 automatically came to an end.

13. Insofar as the contention of the learned counsel for the applicant that the said order dated 4th November, 2016 shall be read as the order also in the Notice of Motion No.2034 of 2016 and Notice of Motion No.2001 of 2016 is concerned, learned counsel for the applicant does not dispute that the defendant no.5 was admittedly not a party to both the notices of motion. There was no averment in respect of demolition of the suit structure at all. The reliefs which were subject matter of those two notices of motion were against the other defendants. There was no prayer for any injunction restraining those defendants from demolishing the suit structure. I am thus not inclined to accept the submission of the learned counsel for the applicant that the order which was passed by this Court on 4th November, 2016 shall be considered as an order also in the Notice of Motion No.2034 of 2016 and Notice of Motion No.2001 of 2016. A perusal of the order clearly indicates that the said order was passed in the draft chamber summons which was filed by in the Notice of Motion No.2034 of 2016 and Notice of Motion No.2001 of 2016.

14. Since the order dated 4th November, 2016 came to an end automatically on 17th November, 2016 and since it is the case of the applicant in paragraph 5 of the affidavit in support of the notice of motion that there was no development on the suit property till at least

a year from the date of the ad-interim status-quo order passed by this Court, I am not inclined to accept the submission of the learned counsel for the applicant that the defendant no.5 has committed any violation of ad-interim status-quo order dated 4th November, 2016 passed by this Court.

15. Insofar as the submission of the learned counsel for the applicant that this Court has deprecated the misconduct on the part of the defendant no.5 in the subsequent order passed by this Court and that also shall taken into consideration by this Court for initiation of action against the defendant no.5 is concerned, in my view, the subsequent alleged misconduct of the defendant no.5 not relating to violation of the ad-interim order, cannot be considered for the purpose of taking any action against the defendant no.5 for alleged violation of ad-interim order passed by this Court on 4th November, 2016. Even according to the applicant, there was no demolition for a period of one year which period was admittedly subsequent to the date of the order dated 17th November, 2016. In my view, there is thus no merit in this submission made by the applicant in this notice of motion. The notice of motion is accordingly dismissed insofar as prayer clauses (a) and (b) are concerned.

16. Insofar as prayer clauses (c) to (e) are concerned, the applicant is at liberty to press these reliefs along with other two

pending notices of motion. It is made clear that this Court has not expressed any views on the merit insofar as prayer clauses (c) to (e) are concerned and are kept open.

17. At this stage, learned counsel for the applicant invited my attention to the order dated 30th January, 2018 passed by S.J. Kathawalla, J. in Notice of Motion (Lodging) No.2512 of 2017 now renumbered as Notice of Motion No.2034 of 2016, Notice of Motion (Lodging) No.2710 of 2017 and Notice of Motion No.561 of 2017 and submits that the defendants have not filed affidavit in reply at least in the Notice of Motion (Lodging) No.2710 of 2017 and Notice of Motion No.561 of 2017. She submits that by the said order, this Court had directed that there shall be no demolition in the meantime.

18. Admittedly, since the Notice of Motion (Lodging) No.2710 of 2017 and Notice of Motion No.561 of 2017 are not disposed of till date and only the Notice of Motion (Lodging) No.2715 of 2017, which is now numbered as Notice of Motion No.2034 of 2018 is disposed of by an order dated 30th January, 2018 which was common order in all three notices of motion, the said ad-interim would continue in Notice of Motion (Lodging) No.2710 of 2017 and Notice of Motion No.561 of 2017 during the pendency of those two notices of motion.

19. The time to carry out amendment in the pending notices of motion is extended by one week from today. The amended copy of

the notices of motion shall be served by the learned advocate for the applicant upon the defendants' advocates. Affidavit in reply shall be filed by the defendants within two weeks from the date of the service of the amended copy of the notices of motion with a copy to be served upon the applicant's advocate simultaneously. Rejoinder, if any, shall be filed within two weeks from the date of service of the affidavit in reply with a copy to be served upon the defendants' advocate simultaneously.

20. Since the said common order was passed by this Court in two different suits, out of which one notice of motion is assigned to this Court and another notice of motion is assigned to another Court, the parties are at liberty to apply for appropriate direction for clubbing both the suits before the Hon'ble Chief Justice. If any other suit is pending in respect of the subject matter of the same property, the parties are at liberty for clubbing of that suit also along with this suit before the Hon'ble Chief Justice.

21. Place the Notice of Motion No.2034 of 2016 and Notice of Motion No.2001 of 2016 along with Chamber Summons No.142 of 2017 and Notice of Motion (Lodging) No.2710 of 2017 for hearing and final disposal after six weeks.

(R.D. DHANUKA, J.)