

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2828 OF 2015**

1 Smt. Bhamabai Mukundrao Nadhe)
Age 59 yrs. Occ: Household)
R/at, Near Bhairavnath Temple,)
Rahatani, Taluka – Haveli,)
Pune 411 017)

2 Smt. Lakshmi Shankar Tope)
Age 57 yrs. Occ: Household)
R/at Phugewadi, Tal Haveli)
District Pune,)
(Plaintiff No.1 and 2 through their)
Power of Attorney holder))

M/s. Aswani Associates)
A registered partnership firm,)
Through its partner,)
Shri Shreechand Shamandas Aswani)
Age 35 yrs., Occ: Business)
O/at S. P. Heights Near Hotel)
Shere Punjab, Kasarwadi,)
Pune 411 034)

..Petitioners

Vs.

1 Kishna Maruti Kate)
(deceased hence through legal heirs))

1A Smt. Manisha Krishna Kate)
Age 40 yrs., Occ Housewife)

1B Kumari Medha Krishna Kate)
Age 26 Yrs. Occ Housewife)

1C Kumari Nilam Krishna Kate)
Age 24 yrs. Occ Housewife)

1D Kumar Kaustubh Krishna Kate)
Age 19 yrs Occ: Student)

1E Kumar Madhududan Krishna Kate	)	
Age 14 yrs. Occ Student	)	
(through natural guardian	)	
Respondent No.1A being mother)	)	
All R/at House No.1,	)	
Pimple Saudagar, Pune-411 027	)	
2 M/s Mangalmurti Developers	)	
(A registered Partnership firm)	)	
through its partner,	)	
Mr. Naresh Tahkurdas Wadhwani	)	
Age Adult, Occ: Business,	)	
R/at, 9 Umed Bhavan,	)	
Canara Bank Building,	)	
Station Road, Pimpri	)	
Pune 411 018	)	..Respondents

Mr. Sachin Dhakephalkar a/w Mr. Nilesh Kadam for the Petitioners

Mr. Samrat Shinde for the Respondent Nos.1A to 1E

Mr. T. D. Deshmukh for the Respondent No.2

CORAM : R. M. SAVANT, J.
DATE : 9th SEPTEMBER, 2015

ORAL JUDGMENT

1 Rule. With the consent of the Learned Counsel for the parties made returnable forthwith and heard.

2 The Writ Jurisdiction of this Court is invoked against the order dated 30-9-2014 and the order dated 22-1-2015 passed by the Learned 22nd Joint Civil Judge Junior Division, Pune, by which orders the application Exhibit

123 and the application Exhibit 137 filed by the Petitioners came to be rejected.

3 By order dated 30-9-2014, the application Exhibit 123 invoking Order XXXIX Rule 2A and Order XXXIX Rule 11 came to be rejected and the rejection is on the ground that the application filed is not in proper form. By the second order dated 22-1-2015 the application Exhibit 137 for review of the said order dated 30-9-2014 came to be rejected.

4 It is not necessary to burden this order with unnecessary details having regard to the directions that are required to be issued. In so far as the application Exhibit 123 is concerned, the Trial Court has observed that the application was not tenable in the form in which it was filed as it was of the view that a separate Misc Application would have to be filed invoking Order XXXIX Rule 2A and cannot be clubbed with an application under Order XXXIX Rule 11, the Trial Court was further of the view that only if the Plaintiffs prove that the Defendants have violated the order of injunction can the application under Order XXXIX Rule 11 would lie. The application for review Exhibit 137 filed by the Petitioners / Plaintiffs has been rejected on the ground that no case for review is made out in the light of the observations made in the order dated 30-9-2014.

5 The Learned Counsel appearing on behalf of the Petitioners Mr. Dhakephalkar points out that now a separate application has been filed invoking Order XXXIX Rule 2A of the Civil Procedure Code which is pending. There can be no dispute of the fact that the application under Order XXXIX Rule 2A is required to be treated as an independent proceeding and has to be tried separately as the parties are entitled to even lead evidence in support of their assertions. However, in so far as Order XXXIX Rule 11 is concerned, which is for striking of the defence of the Defendants. The said application has to be tried independently and the proponent of the application has to make out a case for striking of the defence in terms of the parameters which are laid down by this Court well as the Apex Court. The Learned Counsel appearing on behalf of the Petitioners states that a separate application under Order XXXIX Rule 11 would be filed by the Petitioners within two weeks from date and therefore prays that the said application may be directed to be disposed of within a particular time frame.

6 In so far as the observations of the Trial Court that it is only after the breach and violation is proved in a proceeding under Order XXXIX Rule 2A that an application under Order XXXIX Rule 11 can be filed, is mis-founded as the same does not have any basis either in the Civil Procedure Code or in the law laid down by this Court or the Apex Court, that is only after the application under Order XXXIX Rule 2A is finally decided that an application under Order

XXXIX Rule 11 can be invoked. It is required to be noted that the consequences of the two provisions are also different. The Trial Court therefore would be required to decide the said application filed under Order XXXIX Rule 11 independently. Hence the following directions :

(i) On the application under Order XXXIX Rule 11 being filed by the Petitioners within two weeks from date, the Trial Court is directed to decide the said application and thereafter proceed with the Suit in question.

(ii) However, in so far as the application filed under Order XXXIX Rule 2A is concerned, the same may be tried by the Trial Court independently and there is no necessity of connecting the said two applications.

(iii) The application filed under Order XXXIX Rule 11 to be tried by the Trial Court by giving proper opportunity to the parties and latest by 30-10-2015. Needless to state that the said application be tried on its own merits and in accordance with law. The contentions of the parties are explicitly kept open for being urged before the Trial Court.

(iv) The Learned Counsel for the parties are ad-idem that the evidence has already been led in the Suit and therefore contingent upon the decision that would be rendered in the application filed under Order XXXIX Rule 11, the

Suit to be decided within a period of 3 months of the decision on the application under Order XXXIX Rule 11.

7 With the aforesaid directions, the Writ Petition is disposed of.

[R.M.SAVANT, J]

Certified to be true and correct copy of the original signed order