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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7278 OF 2015

Gulshan Kishanchand Lamba ... Petitioner

Vs.

Municipal Corporation for Greater
Bombay and others ... Respondents

Mr.Kishor Tembe, Advocate for Petitioner.

Ms.Pallavi Thakar, Advocate for Respondent No.1-M.M.C.

Mr.G.S.Godbole Senior Advocate a/w Mr.Y.V.Divekar, Advocate for
Respondents No. 2 to 4.

Mr.Arvind Pinto, Advocate for Respondent No.5.

CORAM : R. G. KETKAR, J.

DATE : 29th JULY, 2015

P.C. :

. Heard Mr.Kishor Tembe, learned Counsel for the
petitioner, Ms.Pallavi Thakar, learned Counsel for respondent No.1-
M.M.C., Mr.G.S.Godbole, learned Senior Counsel for respondents No.
2 to 4 and Mr.Arvind Pinto, learned Counsel for respondent No.5 at
length.

2. By this Petition under Article 227 of the Constitution of
India, original plaintiff has challenged the order dated 27/05/2015
passed by the learned Judge, City Civil Court, Mumbai in L.C.Suit
No. 1949 of 2008. By that order, the learned trial Judge has refused
ad-interim relief as prayed for by the plaintiff.

3. The petitioner, hereinafter referred to as plaintiff has

instituted Suit interalia for declaration that I.O.D. No. CE.6136/BPES/AM dated 25/04/2007 issued by Executive Engineer Building Premises of defendant No.1 has lapsed and cannot be given effect to by the defendants; for perpetual injunction restraining defendant No.1 from granting any permission for redevelopment, repairs and/or issuing commencement certificate in pursuance of I.O.D. No. CE.6136/BPES/AM dated 25/04/2007 in favour of the defendant No.4 or any other permission for purpose of construction and redevelopment by demolishing the said building or any part thereof including Unit No. 1, 2, 3 on the Plot No. 458 admeasuring about 534 sq.meters bearing C.T.S. No. 1387, 14th Road, Chembur, Mumbai 400 071 (for short 'suit property') or part thereof.

4. During the pendency of the Suit, the plaintiff took out Notice of Motion – Exhibit 5 for temporary injunction restraining defendant No.5 from granting permission for redevelopment, repairs and/or issuing commencement certificate in favour of defendant No.4 or for permission for the purpose of construction and development by demolishing the building or any part thereof including unit Nos. 1, 2 and 3 on the suit property. By judgment and order dated 11/11/2013, Motion was made absolute. It is not in dispute that the said order was not challenged. It appears that on 22/07/2014, the Suit was dismissed for non-prosecution. The plaintiff, therefore, took out present Notice of Motion No. 1996 of

2015 interalia praying for condoning the delay of 307 days in taking out the Motion; for setting aside the order dated 22/07/2014 dismissing the Suit for want of prosecution; for restoration and revival of interim order dated 11/11/2013 passed by the trial Court in Notice of Motion Exhibit 5 of 2008. Pending hearing and final disposal of the Motion (wrongly typed as Suit), plaintiff has sought injunction restraining defendant No.1 from granting any permission for redevelopment, repairs and /or issuing commencement certificate in favour of defendant in favour of defendant No.4 or for permission for the purpose of construction and development by demolishing the said building or any part thereof including unit Nos. 1, 2 and 3 on the suit property. By the impugned order, the learned trial Judge has declined to grant ad-interim relief.

5. Mr.Tembe submitted that aggrieved by that order, the plaintiff preferred Appeal From Order No. 741 of 2015. The Appeal was withdrawn on 23/07/2015. In paragraph 2, submission made on behalf of defendants No. 2 to 4 that Suit itself stood dismissed on 22/07/2014 and that till date, the same is not restored and in view of the subsequent development, nothing survived in the present Appeal From Order was considered. In paragraph 3, the Court recorded that the plaintiff sought permission to withdraw the present Appeal From Order with liberty to file appropriate proceedings. The same was granted.

6. Mr.Tembe submitted that accordingly, plaintiff has instituted present Petition challenging refusal of ad-interim order dated 27/05/2015. Mr.Godbole raised preliminary objection as regards maintainability of this Petition on the ground that plaintiff is challenging refusal of the ad-interim order. The petitioner has an equally efficacious alternate remedy by filing Appeal From Order under Order 43 Rule 1(r) of the Code of Civil Procedure, 1908 (for short 'C.P.C.'). He submitted that the plaintiff has filed Notice of Motion No. 1996 of 2015 under Order 9 Rule 9 of C.P.C. By prayer clause (a), he has sought condonation of delay of 307 days in taking out the Motion. By clause (b), he has prayed for setting aside order dated 22/07/2014 dismissing the Suit for non-prosecution. By prayer clauses (c) & (d), plaintiff has prayed for injunction. In other words, he submitted that Motion taken out by the plaintiff is under Order 9 Rule 9 of C.P.C. As far as refusal of prayer of ad-interim relief of injunction is concerned, it is clearly referable to provisions of Order 39 of C.P.C. and consequently, Appeal From Order challenging such refusal is maintainable. He, therefore, submitted that Writ Petition is not maintainable and on this ground alone, is liable to be dismissed.

7. Mr.Tembe on the other hand submitted that relief of temporary injunction can be granted under Order 39 Rules 1&2 of C.P.C. only when the suit is pending. If no Suit is pending, question

of taking recourse to Order 39 Rules 1 & 2 does not arise. The prayer for grant of temporary injunction is referable to Section 151 of C.P.C. and therefore, refusal to grant ad-interim order can be challenged by instituting Writ petition. He submitted that undoubtedly proceedings under Order 9 are within the meaning of the proceedings under Section 141. He relied upon the decision of the Apex Court in the case of **Vareed Jacob Vs. Sosamma Geevarghese, AIR 2004 SC 3992**. He submitted that C.P.C. is divided into two parts. The main body of the Code consists of sections which create jurisdiction while the rules indicate the manner in which the jurisdiction has to be exercised. He also relied upon the decision of the Apex Court in the case of **Nawab Usmanali Khan Vs. Sagarmal, AIR 1965 SC 1798** and in particular, paragraph 10 thereof where Apex Court has observed thus:

“Section 141 makes applicable to other proceedings only those provisions of the Code which deal with procedure and not those which deal with substantive rights.”

8. Mr.Tembe submitted that Section 94(c) invests the Civil Court with power to grant temporary injunction and how that power is to be exercised is provided under Order 39 Rules 1 & 2 of C.P.C. Section 94(c) is not applicable to proceedings under Order 9 Rule 9. He relied upon the decision of the Apex Court in the case of **Manoharlal Chopra Vs. Rai Bahadur, AIR 1962 SC 527** to contend

that Courts have inherent jurisdiction to issue temporary injunctions in circumstances which are not covered by the provisions of Order, 39 Rules 1 & 2 C.P.C. and the powers are recognized by Section 151. He submitted that “to a proceeding” conceived by Section 141, substantive part of the Code is not applicable, but only the procedural part is applicable as Section 94(c) is not being available, Order 39 Rules 1 & 2 will not apply. The injunction can be granted by taking recourse to Section 151. In support of his submission, he relied upon the decision of the Apex Court in the case of ***Keshardeo Chamria Vs. Radha Kissen Chamria***, AIR 1953 SC 23 and in particular paragraph 20 thereof. In paragraph 20, it is held that certain specific orders mentioned in Section 104 read with Order 43, Rule 1 only are appealable and no appeal lies from any other orders. An order made under Section 151 is not included in the category of appealable orders and consequently, the Petition instituted by the plaintiff is perfectly maintainable.

9. 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, the Suit instituted by the plaintiff was dismissed in default on 22/07/2014. It is not in dispute that plaintiff has taken out Notice of Motion No 1996 of 2015 for setting aside order dated 22/07/2014. The said Motion is clearly under Order 9 Rule 9 of C.P.C. Mr.Tembe also did not dispute this

position. Perusal of prayers and in particular, prayer clauses (c) and (d) shows that by prayer clause (c), plaintiff has sought restoration and revival of order dated 11/11/2013 by which the Notice of Motion Exhibit 5 was allowed by the trial Court and injunction was issued against the defendants. Prayer clause (d) of the Motion reads as under :

“(d) That pending the hearing and final disposal of the Suit this Hon'ble Court may be pleased to restrain the Defendant No.1 their servants, agents, officers by an order and injunction of this Hon'ble Court from granting any permission for redevelopment, repairs and/or issuing commencement certificate in pursuance of I.O.D. No. CE.6136/BPES/AM dated 25th April 2007 (including its revalidation) in favour of the defendant No.4 or any other permission for purpose of construction and redevelopment by demolishing the said building or any part thereof including Unit No. 1, 2, 3 on the suit property i.e. Plot of land bearing Plot No. 458 admeasuring about 534 sq.meters bearing C.T.S. No. 1387, 14th Road, Chembur, Mumbai 400 071 or part thereof.”

10. Perusal of prayer (d) also shows that plaintiff has sought injunction against defendant No.1 from granting any permission for redevelopment, repairs and/or issuing commencement certificate in pursuance of I.O.D. dated 25th April 2007 in favour of the defendant No.4 or any other permission for purpose of construction and redevelopment by demolishing the said building or any part thereof including Unit No. 1, 2, 3 on the suit property. In other words, the plaintiff pending hearing and final disposal of the Motion, plaintiff has sought injunction against defendant No.1. Section 141 of C.P.C. reads as under :

“141. Miscellaneous proceedings.- The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

Explanation: In this section, the expression “proceedings” includes proceedings under Order IX, but does not include any proceeding under article 226 of the Constitution.”

11. Perusal of explanation clearly shows that the expression “proceedings” includes proceedings under Order 9 but does not include proceedings under Article 226 of the Constitution of India. Thus, in view of Section 141, procedure provided in C.P.C. in regard to the Suits has to be followed, as far as it can be made applicable, in all the proceedings in any Court of Civil jurisdiction. It is nobody's case that the Motion taken out by the plaintiff is not of a civil proceedings. Thus, provisions of Section 141 clearly lays down that the procedure as regards the suit has to be followed in all the proceedings which will also include proceedings under Order 9 of C.P.C. The plaintiff has taken out Motion under Order 9 Rule 9 OF C.P.C. for restoration of the Suit which was dismissed in default. During the pendency of that Motion, plaintiff has sought injunction. By the impugned order, the learned trial Judge has declined to grant ad-interim order. In my opinion, the order is clearly referable to Order 39 Rules 1&2 and the petitioner has to an equally efficacious alternate remedy under Order 43 rule 1(r) of C.P.C.

12. The reliance placed by Mr.Tembe on the decision of the Apex Court in the case of **Nawab Usmanali Khan** (*supra*) does

not advance the case of the plaintiff. In that case, the appellant was the Ruler of the former Indian State of Jaora. The dispute arose between the parties and they agreed to refer their disputes regarding money dealings to the arbitration of Lala Durgashankar. On the same day, the arbitrator made an award. The arbitrator filed the award in the Court of District Judge Ratlam. On 19/06/1957, the Court recorded the compromise and passed a decree in terms of award as modified by the compromise. The appellant filed appeal in the Madhya Pradesh High Court under Section 39 of the Indian Arbitration Act, 1940 against order dated 19/06/1957 treating it as an order refusing to set aside the award. The appellant also filed appeal under Order 43 Rule 1 (m) of C.P.C. against the order recording compromise.

13. In paragraph 10, it was observed that proceedings under Section 14 read with Section 17 of the Indian Arbitration Act, 1940 for the passing of a judgment and decree on an award does not commence with a plaint or a petition in the nature of a plaint and cannot be regarded as a suit and the parties to whom notice of the filing of the award is given under section 14(2) cannot be regarded as “sued in any Court otherwise competent to try the suit” within the meaning of section 86(1) read with section 87B, Code of Civil Procedure. It was held that the institution of this proceeding against the Ruler of a former Indian State is not barred by section 86(1) read with section 87B. It is in that context, the Apex Court observed that

Section 141, Code of Civil Procedure does not attract the provisions of section 86(1) read with section 87B to the proceedings under section 14 of the Indian Arbitration Act. Section 86(1) read with section 87B confers upon the Rulers of former Indian States substantive rights of immunity from suits. The Apex Court observed that Section 141 makes applicable to other proceedings only those provisions of the Code which deal with procedure and not those which deal with substantive rights. The Court was considering immunity claimed by the former Rulers based on Section 86(1) read with Section 87B of the Act. In my opinion, the said decision does not assist the plaintiff's case.

14. I have already held that the impugned order is referable to Order 39 Rules 1 & 2 and is appealable under Order 43 Rule 1(r). In view thereof, the decisions relied by Mr. Tembe viz. ***Manoharlal Chopra (supra) & Keshardeo Chamria (supra)*** do not advance the case of the plaintiff.

15. Hence, Petition is dismissed on the ground of maintainability. The petitioner has equally efficacious remedy of filing an Appeal under Order 43 Rule 1(r) of C.P.C. It is made clear that I have not examined merits of the case. All the contentions of the parties in that regard are expressly kept open.

16. At this stage, Mr. Tembe orally applies for continuation of ad-interim order granted on 24/07/2015 till 10/08/2015. He

assures that he will not apply for further extension of time. In view of assurance, notwithstanding dismissal of the Petition, ad-interim order dated 24/07/2015 shall remain in force upto and inclusive of 10/08/2015 with specific understanding that no further application for extension of this order will be entertained. Order accordingly.

(R. G. KETKAR, J.)