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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION STAMP NO. 34488 OF 2015

Waman Arjun Gawade and others .. Petitioners

Vs.

Municipal Corporation of Greater Mumbai .. Respondent

Mr.Vikram V. Pai, Advocate for the Petitioners.

Ms.Geeta Joglekar, Advocate for Respondent – B.M.C.

CORAM : R.G.KETKAR, J.
DATED : 17^h DECEMBER, 2015

P.C. :

. Not on board. At the request of Mr.Pai, taken up for admission.

2. Heard Mr.Vikram V. Pai, learned Counsel for the petitioners and Ms.Geeta Joglekar, learned Counsel for respondent.

3. Mr.Pai submitted that petitioners instituted Suit No. 244 of 2009 on the Original Side of this Court. Pending the Suit, they took out Notice of Motion No. 410 of 2010 in this Court. By order dated 16/09/2010, Motion was allowed in terms of prayer clauses (c) & (d) and the undertakings given by the petitioners were accepted. The Suit was transferred to City Civil Court. He submitted that on 15/04/2013, Suit was dismissed in default. The plaintiffs, therefore, took out Motion for setting aside order of the dismissal

under Order 9 Rule 8 of Code of Civil Procedure, 1908, (for short 'C.P.C.') and for restoration of the Suit by condoning the delay in filing the Motion and pending the hearing and final disposal of the Motion, for continuing ad-interim order passed in Suit. He submitted that the learned trial Judge has not passed any order thereon.

4. Ms.Joglekar submitted that the Suit was dismissed on 15/04/2013 and present Motion is taken out on 11/12/2015. She is not in a position to make a positive statement as to whether offending structure is demolished or not. Mr.Pai submitted that Narayan Waman Gawade, son and constituted attorney of petitioner No.1 is present in the Court. Upon taking instructions from him, he states that respondent has not demolished the offending structure.

5. Having regard to the fact that the learned trial Judge has not passed any order, it amounts to refusal of ad-interim order. In view thereof, petitioners have an equally efficacious alternate statutory remedy by way of filing Appeal From Order under Order 43 Rule 1(r) of C.P.C. In view thereof, Mr.Pai seeks permission to withdraw this Petition with liberty to file Appeal from Order. He submitted that for a period of one week, ad-interim order in terms of prayer clause (c) of the Motion may be granted.

6. In view thereof, the petitioners are permitted to withdraw this Petition with liberty to file Appeal From Order and are

further at liberty to take out appropriate application for grant of ad-interim order. Notwithstanding withdrawal of the Petition, there shall be ad-interim order in terms of prayer (c) of the Notice of Motion No. 4745 of 2015 for a period upto and inclusive of 24/12/2015. It is made clear that grant of ad-interim order by this Court does not amount to expression on merits either way.

(R.G.KETKAR, J.)