

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.4186 OF 2016

1.Smt. Nalini Himatlal Kantilal
and Ors

Petitioners

Vs

1. Brahma Jeet and Ors

.. Respondents

Mr. R.S.Kachare i/b Mr. Ameet A. Palkar, Advocate for Petitioners.
Mr. A.S.Rao, Advocate for Respondents.

CORAM : R.G.KETKAR,J.
DATE : 07/04/2016

PC:

1. Heard Mr. R.S.Kachare, learned counsel for the petitioners and Mr.A.S.Rao, learned counsel for the respondents at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 8.3.2016 passed by the learned Civil Judge, Jr. Dn., Wada below Exhibit 105 in Regular Civil Suit No. 55 of 2013. By that order, the learned trial Judge allowed the application made by the respondents, hereinafter referred to as 'defendants, under section 151 of C.P.C and directed the petitioners, hereinafter referred to as 'plaintiffs', to remove banners, boards, notices etc. displayed on the suit property forthwith.

3. Mr.Kachare invited my attention to Application Exhibit-63 filed by the defendants on 7.10.2015 and the prayers made therein as also order dated 7.10.2015 passed by the learned trial Judge. He invited my attention to the application Exh.105 filed by

the defendants on 25.1.2016. The said application is filed under section 151 of C.P.C. The defendants have, inter-alia, prayed for injunction directing the plaintiffs to remove the advertisements/banners/boards/ notices etc. put up and pasted on various parts of the suit property described in paragraph 1 of Plaint, among other prayers. He submitted that having regard to the prayers made in the application, it is essentially under Order 39, Rule 1 and 2 of C.P.C. The defendants, therefore, cannot style and treat application Exhibit-105 as one under section 151 of C.P.C. He submitted that the defendants cannot invoke Section 151 when there is other specific provision. He relied upon the decision of the Apex Court in Nain Singh Vs. Koonwarjee, 1970 (1) Supreme Court Cases 732. In this case, the Apex Court has held that inherent jurisdiction of the Court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be involved. In other words, the Court cannot make use of the special provisions of Section 151 of Code where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same.

4. Mr. Rao submitted that though the application is styled under section 151, essentially the relief of injunction is sought against the plaintiffs and the same may be treated as one under

Order 39, Rule 1 and 2 of C.P.C. It is settled position in law that mere wrong mentioning of the provision will not vitiate the proceedings if otherwise the proceedings are referable to other provisions. After considering the application at Exhibit 105 as also the prayers made therein, I am satisfied that it is essentially under Order 39, Rule 1 and 2. In view thereof, it has to be held that by the impugned order the learned trial Judge issued mandatory injunction directing the plaintiffs to remove the banners, boards, notices etc. displayed on the suit property. The petitioners, therefore, have an equally efficacious statutory alternate remedy of filing Appeal from Order under Order 43, Rule 1(r) of C.P.C.

5. In view thereof, Mr. Kachare seeks permission to withdraw this Petition with liberty to challenged the impugned order by filing Appeal from order under Order 43 rule 1(r) of C.P.C, He submits that in case there is delay in filing the Appeal, the learned District Judge may be directed to exclude the time spent by the petitioners in prosecuting this petition. The impugned order is passed on 8.3.2016 and the Petition is instituted on 30.3.2016 and is disposed of today. In view thereof, the time spent by the petitioner from 30.3.2016 to 7.4.2016 shall be excluded while considering the delay.

6. On the motion made by Mr. Kachare, Petition is allowed to be withdrawn with liberty as prayed for. It is made clear that I

have not examined merits of the case. All contentions of the parties on merits are expressly kept open. Order accordingly.

(R.G.KETKAR, J.)