

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

**FIRST APPEAL NO.362 OF 2016
IN
S.C. Suit NO. 2446 OF 2012**

M/s Mulla Akbarali Tayebali Appellant

Vs.

Moiz T. Rangwalla Respondent

Mr. N.J. Devashraye alongwith Mr. Rahul Raut i/by M/s N.N. Vaishnawa & Co., Advocate for the Appellant.

Coram : **Smt. R.P. SondurBaldota, J.**

Date : 29th March, 2016

P.C.

1 This First Appeal arises out of the judgment and order dtd. 31st November, 2015, by which the Bombay City Civil Court dismissed the appellant's suit for injunction i.e. to restrain the respondent from “obstructing the plaintiffs, their agents, servants from using the said wall shown by yellow coloured boundary line to the sketch being Exhibit 'B' and also shown by red coloured boundary line being in the photograph Exhibit 'C-2' to the plaint and/or from putting iron grill or collapsible gate on the said wall being situate at 186/188, Bapu Khote Street, Mumbai – 400 003, in any manner whatsoever.” The other injunctions sought by the appellant are to restrain respondent from extending the wooden box fixed outside his shop to the “wall of the plaintiffs” and keeping any material at the bottom of the wall described in the earlier prayer. The wall in question is an outer wall and the appellant claims

that it is abutting its shop. The appellant is the tenant in respect of the shop.

2 The respondent contested the suit contending that the wall in question has always been used by him for resting the door of his shop whenever he opens the shop. That is the only way his shop can be opened. If the appellant is permitted to construct a grill on the wall, he would not be in a position to open door of his shop. It has been alleged in the written statement that by asking the injunction as sought, the appellant in effect is seeking seeking back-door entry for making illegal construction of encroachment on the outer wall of the building.

3 The trial court framed three issues on the pleadings between the parties. The first issue was whether the appellant proves that the wall abutting the corner of the building and located between the premises of the appellant and the respondent, forms part of the tenanted premises of the appellant and answered the same in the negative. The second issue framed was whether the appellant proves that it is entitled to use the outer portion of the wall by fixing grills thereon and answered it in the negative. The third issue was whether the appellant is entitled to the injunction as sought by it. This was obviously answered in the negative.

4 The only evidence led in the proceedings was the evidence on behalf of the appellant. The respondent did not lead any evidence. On appreciation of the evidence, the Bombay City Civil Court held that the only fact established by the evidence produced by the appellant is that it is the tenant of shop no.14 and there is nothing to suggest that

outer wall is a part of the demised premises. It has further observed that in fact the said wall is a common which is a support column to the building and as such cannot be considered a part of tenanted premises of the appellant.

5 Mr. Devashraye, the learned advocate for the appellant submits that the respondent himself has extended his bill-board over the common wall unauthorisedly and therefore, he cannot be permitted to prevent the appellant from extending the grill for fixing up it's air conditioning unit. Even if it is accepted for the sake of argument that the respondent has unauthorisedly extended his bill-board, the question is whether the act would entitle the appellant to make exclusive use of the common wall between the two shops. The answer to the question must obviously be in the negative.

6 The next argument of Mr. Devashraye is that the entire approach of the trial Court in appreciating the case of the appellant is incorrect. According to him the trial Court has treated the suit for injunction like an application for interim injunction. He submits that the trial court could not have considered the "balance of convenience" while passing the impugned order. According to him this consideration is restricted to the order of interim injunction. The submission though appearing attractive in the first flush of things, is without merit in my considered opinion. As already noted earlier the appellant's suit was for simplicitor injunctions. The origin of the relief of injunction lies in the principles of equity. Etymologically the term equity is a derivation of the Latin term "aquitas", which means equalisation or levelling. Equity is therefore that which levels down any arbitrary action or preference or

denial of justice. Traditionally it is founded upon three assumptions (i) that equity was a matter of grace, (ii) that equity is a matter of conscience and (iii) equity was enforceable by a process of contempt. Equitable relief is distinct from the legal relief. Equitable relief is always within the discretion of the court whereas the legal relief is a matter of right. With the enactment of the Specific Relief Act granting of injunctions got regulated by the relevant provisions of that Act. However, the principles underlying the relief of injunction have not been obliterated. They still hold good. Granting of injunction today is regulated Chapter VIII of the Specific Relief Act which covers Section 38 to Section 42 thereof. Section 38(1) of the Act reads as under :

“38 (1) Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction maybe granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.”

That, the relief of injunction is a discretionary relief is confirmed by use of the term “may” in the provision instead of “shall”. Undoubtedly none of the sections between Section 38 to Section 42 take note of the concept of “balance of convenience” which is adopted as a consideration for grant or refusal of relief of interim injunction. But that does not mean that the court should not take that into consideration while exercising it's discretion which is expected to be a judicious discretion. Therefore, consideration of balance of convenience cannot be said to be fatal. Thus, there is no merit in the appeal. Hence, the First Appeal is dismissed.

(Smt. R.P. SondurBaldota, J)