

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

WRIT PETITION NO. 13410 OF 2016

Jani Niwas Co-operative Housing
Society Ltd

..Petitioner.

Vs

Shri Pramod Vithoba Patil and
Ors

.. Respondents

Mr. Sandeep Mishra, Advocate for Petitioner.

CORAM : R.G.KETKAR,J.
DATE : 15/12/2016

PC:

1. Heard Mr.Sandeep Mishra, learned counsel for the petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'plaintiff', has challenged the Judgment and order dated 27.10.2016 passed by the learned Jt. Civil Judge, Sr. Dn., Thane below Exhibit-56 in Spl. Civil Suit No.357 of 2016. By that order, the learned trial Judge rejected the application filed by the plaintiff under section 9A(2) of C.P.C. for grant of interim relief till the decision on preliminary issue of limitation framed on the basis of the contentions raised by defendants no.12 and 13 by filing application Exh.29.

3. Mr. Mishra submitted that defendants no. 12 and 13 filed application Exhibit 29 for framing preliminary issue of limitation. In view thereof, the plaintiff filed application Exhibit 56 under

section 9A(2) of C.P.C. praying, inter alia, for injunction restraining defendants no.12 and 13 from carrying out any type of construction activities on the suit properties in respect of undivided proportionate share of the plaintiff on the basis of the Deed of Conveyances and Agreement for redevelopment dated 8.11.2012 during the pendency and determination of application under section 9A read with Section 151 of C.P.C.

4. Mr. Mishra submitted that the impugned order is not covered by Order 43, in the sense, that Order 43 does not include any order passed in an application filed under section 9A(2) of C.P.C. He, therefore, submitted that the petition is maintainable and the plaintiff cannot file Misc.Civil Appeal/Appeal from Order under Order 43, Rule 1(r) thereof.

5. As noted earlier, the plaintiff has filed application under section 9A(2). Prayer (a) reads thus:

(a) The Hon'ble Court may be pleased to grant interim relief restraining the defendant no.12 and 13 and its persons, agents contractors and/or any person claiming on their behalf from carrying out any type of construction activities on the suit properties in respect of undivided proportionate share of plaintiff on the basis of said Deed of Conveyances and Agreement for Development dated 8.11.2012 during the pendency and determination of application under section 9A r/w section 151 of C.P.C and defendants no.12 and 13 be restrained from creating third party interest or executing any document in favour of any person in respect of suit properties of any nature whatsoever. “

6. Perusal of prayer (a) clearly shows that it squarely falls under Order 39, Rule 1. It is no doubt true that the plaintiff has filed application under section 9A(2) of C.P.C. Section 9A reads

thus;-

“9A. Where at the hearing of application relating to interim relief in a suit, objection to jurisdiction is taken such issue to be decided by the court as a preliminary issue:-

(1) Notwithstanding anything contained in this code or any other law for the time being in force, if at the hearing of any application for granting or setting aside an order granting any interim relief, whether by way of stay, injunction, appointment of a receiver or otherwise, made in any suit, on objection to jurisdiction of the court to entertain such suit is taken by any of the parties to the suit the court shall proceed to determine at the hearing of such application the issue as to the jurisdiction as a preliminary issue before granting for setting aside the order granting the interim relief. Any such application shall be heard and disposed of by the court as expeditiously as possible and shall not in any case be adjourned to the hearing of the suit.

(2) Notwithstanding anything contained in sub-section (1), at the hearing of any such application the court may grant such interim relief as it may consider necessary, pending determination by it of the preliminary issue as to the jurisdiction”.

Perusal of Section 9A(1) shows that if at the hearing of any application for granting or setting aside **an order granting any interim relief, whether by way of stay, injunction, appointment of a receiver or otherwise**, made in any suit, on objection to jurisdiction of Court to entertain such suit is taken by any of the parties to the suit, the Court shall proceed to determine at the hearing of such application issue as to the jurisdiction as a preliminary issue before granting for setting aside the order granting the interim relief. Sub section (2) thereof lays down that notwithstanding anything contained in sub-section (1), at the hearing of any such application, the Court

may grant such interim relief as it may consider necessary, pending determination by it of the preliminary issue as to the jurisdiction.

7. Consistent with the provisions of Section 9A(2) of C.P.C., the plaintiff has filed application praying for injunction. Perusal of prayer (a), extracted herein above, shows that it is squarely referable to Order 39, Rule 1 and 2. Order 43(1)(r) provides for an appeal against order under Rule 1, Rule 2, Rule 4, Rule 10 or Rule 11 of Order 39. Thus, the petitioner has an equally efficacious alternate statutory remedy of filing Appeal from order/Misc.Civil Appeal under order 43 (1)(r). Hence, Petition is not maintainable and as such liable to be dismissed reserving liberty to the plaintiff to file Appeal from Order/Misc. Civil Appeal. If such Appeal is filed, learned District Judge will dispose it expeditiously. It is made clear that I have not examined merits of the case. Order accordingly.

(R.G.KETKAR, J.)