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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

APPEAL NO.335 OF 2015

IN

NOTICE OF MOTION NO.4116 OF 2009

IN

SUIT NO.234 OF 1998

Subhash Amolakchand Gandhi

... Appellant

Versus

Pashmina Co-operative Housing Society and Ors.

... Respondents

Mr. Kishore Jain a/w Ms. Shweta Jain & Mr. Navin i/by Mrs. Divya Jain & Ms. Minal Lodaya for the Appellant.

Mr. Darius Khambatta, Senior Counsel a/w Mr. Gautam Ankhad & Ms. Hiral Thakkar i/by M/s. Federal & Rashmikant for the Respondent No.1.

**CORAM : A.S. OKA &
P. D. NAIK, JJ.**

DATE : 26th APRIL, 2016

P.C.

1 The learned counsel appearing for the Appellant, on instructions of the Appellant, seeks permission to withdraw this Appeal with liberty to adopt substantive proceedings and with liberty to claim interim relief therein which was claimed by way of Notice of Motion No.4116 of 2009. He states that he is making this prayer as the Notice of Motion in the suit filed by the first Respondent was not maintainable. The learned Senior Counsel appearing for the first Respondent states that all contentions of the first Respondent in the proceedings which may be filed by the Appellant are kept open.

2 We find that what was invoked by the Appellant was Rule 1 of Order XXXIX of the Code of Civil Procedure, 1908. In our view, considering the prayer made in the Notice of Motion, the Appellant being the defendant was not entitled to seek injunction against the plaintiff.

3 Therefore, prayer made by the learned counsel appearing for the Appellant deserves to be accepted.

4 Accordingly, the Appeal is disposed of as withdrawn with liberty as prayed. We make it clear that the proceeding which may be filed by the Appellant will be decided on its own merits without being influenced by prima facie observations made by the learned Single Judge in paragraph 9 of the impugned order. However, in the proceedings which may be filed by the Appellant, it will be open for the first Respondent to raise all permissible contentions including the contentions which are raised before the learned Single Judge. The pending Notice of Motion No.835 of 2015 does not survive and the same is disposed of.

(P. D. NAIK, J)

(A.S. OKA, J)