

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

**NOTICE OF MOTION NO.1192 OF 2016**  
**IN**  
**APPEAL NO.320 OF 2016**

|                                         |                          |
|-----------------------------------------|--------------------------|
| <b>Sanyam Realtors Private Limited</b>  | <b>..... Applicant</b>   |
| <b>IN THE MATTER BETWEEN</b>            |                          |
| <b>Sanyam Realtors Private Limited</b>  | <b>..... Appellant</b>   |
| <b>V/s</b>                              |                          |
| <b>Kantilal Khimji Haria &amp; ors.</b> | <b>..... Respondents</b> |

Mr. D.D. Madon, Senior Counsel a/w Mr. Aditya Shiralkar and Mrs. Prachi Mhatre i/b M/s. Shiralkar & Co. for the Appellant/Applicant.  
Mr. Zal Andhyarujina a/w Ms. Shruti and Mr. Umesh Tiwari, Ms. Trisha Yelve i/b M/s. S. Ashwinikumar & Co. for Respondent Nos.1 to 8.  
Mr. Dharmesh S. Jain for Respondent No.9.

**CORAM : A.S. OKA &**  
**A.A. SAYED, JJ.**  
**DATED : 07 JUNE 2016**

**ORDER:**

1 Heard learned Counsel appearing for the Applicant who is the Appellant. The Appellant is the original first Defendant and the first to eight Respondents are the original Plaintiffs. The prayer (a) in the Notice of Motion is for the stay of further proceedings of the Suit.

2 The order impugned in the Appeal is an order by which a preliminary issue framed by the learned Single Judge “Whether the suit is barred under section 69(2) of the Partnership Act, 1932?” has been answered against the Applicant.

3 The learned Senior Counsel appearing for the Applicant contends that in view of plain language used by sub-section 2 of section 9-A of the Code of Civil Procedure, 1908 (for short “CPC”), at highest, pending the decision of preliminary issue framed under sub-section 1 of section 9-A of CPC, the original Plaintiffs could have prayed for grant of ad-interim relief which can continue till the disposal of the preliminary issue. He invited our attention to the orders passed by the learned Single Judge on the Notice of Motion No.1361 of 2013 and in particular the order dated 21 August 2015 passed by the learned Single Judge which specifically records that ad-interim relief has been refused and that the Notice of Motion is adjourned sine die to be heard and decided after the preliminary issue is heard and decided.

4 Learned Senior Counsel appearing for the Applicant, therefore, submits that in view of the refusal of ad-interim relief, now the proceedings of the pending Notice of Motion will have to be stayed as well as the proceedings of the suit as the issue of bar of section 69 (2) of the Partnership Act, 1932 will have to be finally decided in Appeal.

5 The learned Counsel appearing for the original Plaintiffs firstly submits that if the order dated 31<sup>st</sup> October 2012 passed by the learned Single Judge is perused, it is crystal clear that ad-interim relief was not refused on merits and in fact, a liberty was granted to move the Court for ad-interim relief after carrying out amendment. He pointed out that the first sentence of the order dated 21 August 2015 is not consistent with what is recorded in the order dated 31<sup>st</sup> October 2012 of the learned Single Judge as in fact, there is no order by which the prayer for ad-interim relief was refused on merits. He submits that none of the orders passed by the learned Single Judge prior to the order dated 21 August 2015 record that the prayer for ad-interim has been refused on merits.

6 He relies upon a decision of learned Single Judge of this Court dated 17 July 2012 in Notice of Motion No.748 of 2012 along with connected matters. He submits that even assuming that ad-interim relief has been refused on merits, while keeping the Notice of Motion for interim relief pending, the Court is not powerless to grant a limited ad-interim relief till the disposal of the preliminary issue framed under sub-section 1 of section 9-A of the CPC. He invited our attention to the findings recorded by the learned Single Judge and especially the observation that the term ad-interim relief which is commonly used on

the Original Side is only a term which is of convenience to the parties. He submitted that in so many words, the learned Single Judge has held that the prayer for interim relief can be considered by the Court pending the disposal of the preliminary issue of jurisdiction. He also relies upon the language used in sub-section 2 of section 9-A of the CPC which provides for grant of interim relief pending the determination of the preliminary issue.

7 We have considered the submissions. The first sentence of the order dated 21 August 2015 passed by the learned Single Judge reads thus:

“Ad-interim relief has been refused on merits on 31<sup>st</sup> July, 2012. The Notice of Motion is ripe for hearing.”

The last paragraph of the same order reads thus :

“5. Notice of motion is adjourned *sine die* to be heard and decided after the preliminary issue is heard and decided.”

8 Obviously, there is a typographical error as no order has been passed in the suit on 31 July 2012. The reference to the order in the first sentence is to the order dated 31 October 2012 passed by the learned Single Judge. The said order dated 31<sup>st</sup> October 2012 reads thus:

“1. The Plaintiffs have filed the above suit seeking specific performance of the MOU dated 15<sup>th</sup> December 2005 (Exhibit B to the plaint) and the purported supplemental Agreement annexed as Exhibit M to the plaint. The learned Advocate appearing for the Defendant has pointed out that the Agreement has been terminated by their Advocate's letter dated 17<sup>th</sup> January 2012. According to the Plaintiffs themselves, the plinth which was put up by the Plaintiffs on the suit plot was destroyed/ demolished by the Defendant in June 2005. The suit is filed on 23<sup>rd</sup> October 2012 and an application is now made for urgent ad-interim reliefs. The learned Advocate appearing for the Defendants has also pointed out that the Development Agreement is already entered into by the Defendant with M/s. EDMD Infracon Pvt. Ltd. on 27<sup>th</sup> September 2012. The said M/s. EDMD Infracon Pvt. Ltd. will have to be brought on record. In view of the aforesaid facts, no ad-interim relief can be granted. However, the plaintiffs shall be at liberty to move for reliefs, if any, after seeking/carrying out amendments to the plaint. All applications taken out by the Plaintiffs shall be decided on its own merits.

2. Place the Notice of Motion for hearing and final disposal on 27<sup>th</sup> November 2012. ”

9 At this stage, we may make a reference to sub-section 2 of section 9-A of the CPC which reads thus:

*“(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.”*

10 If the order dated 21 August 2015 is read in its entirety, it is apparent that the learned Single Judge declined to grant any relief (whether ad-interim or interim) till the disposal of the preliminary issue. In fact, clause 2 of the said order dated 21 August 2015 frames the preliminary issue of bar under section 69 of the Partnership Act, 1932. Without granting any relief in the Notice of Motion, the learned Single Judge directed that the Motion is adjourned sine die and shall be decided only after the preliminary issue is heard and decided.

11 In the Notice of Motion No.1361 of 2013, the prayer was for grant of interim relief till the disposal of the suit. The power under sub-section 2 of section 9-A of the CPC is to grant interim relief till the determination of the preliminary issue. Therefore, once preliminary issue is framed under sub-section 1 of section 9-A of the CPC, the Court is powerless to grant interim relief which will operate till the disposal of the suit and at highest, interim relief can be granted which can continue only till the disposal of the preliminary issue of jurisdiction.

12 It will be necessary to make a reference to paragraph 8 of the order dated 17 July 2012 in Notice of Motion No.748 of 2012 (Freny Kersi Irani and another v/s. Soona Kali Contractor and others) passed by the learned Single Judge. The paragraph 8 of the said order reads thus:

*“8. It can thus be seen that the term ad-interim which is commonly used on the Original Side is only a term which is of convenience to the parties and the Court. Nodoubt that with the usage of the said term for the decades, the same is being followed almost as a rule. However, merely because the term ad-interim is used as a common practice and has been used by the Division Bench in its judgment in the case of **Royal Palms** (supra), it cannot be said to come in the way of the Court, in exercising its power in considering the appropriate applications for grant of interim reliefs during the pendency of the notice of motion. The only rider is that until the Court decides the preliminary issue regarding the jurisdiction, it cannot finally dispose of the notice of motion for grant of interim injunction during the pendency of the Suit. ....”*

13 In this Appeal, the preliminary issue of jurisdiction will have to be finally decided. So long as the order dated 21 August 2015 continues to operate, the original Plaintiffs cannot be permitted to pray for any ad-interim relief in the Suit in view of the order dated 21 August 2015 passed by the learned Single Judge which as of today has attained finality.

14 Therefore, this is a fit case to grant interim relief in terms of prayer clause (a) of the Notice of Motion. We make it clear that this order will not preclude original Plaintiffs from challenging the order dated 21 August 2015 in accordance with law subject to all the objections which can be raised by the Applicant. If the order dated 21<sup>st</sup> August 2015 is modified or clarified, the Plaintiffs can apply for modification of this order.

15 Subject to all the above observations, the Notice of Motion is made absolute in terms of prayer clause (a).

**(A.A. SAYED, J.)**

**(A.S. OKA, J.)**

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