

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

**APPEAL NO.289 OF 2017
IN
NOTICE OF MOTION (L) NO.2370 OF 2014
IN
SUIT (L) NO.994 OF 2014**

WITH

**NOTICE OF MOTION NO.1337 OF 2017
IN
APPEAL NO.289 OF 2017**

Madhavlal Naraynlal Pittie

.... Appellant

versus

M/s Manas Shelters Pvt. Ltd. & Ors.

... Respondents

.....

- Mr.H. Devrajan a/w Mr.R.S. Tiwari, Ms. B.N. Shukla i/b. B.N. Shukla & Co., Advocate for the Appellant.
- Mr.Rajendra V. Pai a/w Mr.A.R. Pai i/b. Bina R. Pai, Advocate for the Respondent No.1.
- Mr.V.P. Sawant a/w Mr.Nikhil Patil, Mr.Prabhakar jadhav, Advocate for Respondent No.5.
- Mr.Prashant Chavan a/w Ms. Nenty N. Thakkar, Advocate for Respondent No.4.

**CORAM : SMT. VASANTI A. NAIK &
SARANG V. KOTWAL, JJ.**

DATE : 12th DECEMBER, 2017.

P.C. :

By this appeal, the order of the learned Single Judge dated 15/06/2015 granting an order of temporary injunction in favour of the

respondent no.1 and restraining the appellant from acting upon the termination notice dated 16/07/2013 is appealed against.

The suit property is a plot of land and the building structure standing thereon. The said property is one of the several properties belonging to the joint family of late Mr.Narayanlal Bansilal. The suit property was also the subject matter of the suit filed by Mr.Madhdusudanlal Narayanlal Pittie against Mr.Narayanlal Bansilal in the High Court being Suit No.224 of 1961. The appellant was appointed as a private receiver of the suit property. Incidentally, the appellant is also one of the co-owners of the property. In pursuance of the NOC granted by MHADA for redevelopment of the property, the respondent No.1-M/s Manas Shelters Pvt. Ltd. entered into a development agreement with the appellant in its capacity as a receiver, whereunder the developer acquired the development rights, in respect of property. After securing the necessary permissions from the corporation, as also MHADA, the construction of the rehabilitation building had commenced. The appellant had terminated the redevelopment agreement by the termination notice dated 16/07/2013. The said termination notice was challenged by the respondent no.1 in suit (L) No.994/14. In the said suit filed by the developer for specific performance of the development agreement, a notice of motion for seeking an injunction, interalia, restraining the appellant/original defendant no.1 from acting upon the termination notice dated 16/07/2013 was lodged. The said notice of motion was heard by the learned Single Judge and by the order dated 15/06/2015, the same was allowed after making it absolute in terms of prayer clause (a) and (c).

Being aggrieved by the said order of the learned Single Judge, the appellant filed an appeal against the said order bearing Appeal (L) No.556/15. On 07/04/2016, the counsel for the appellant on instructions sought permission to withdraw the appeal with liberty to file an application under Order 39 Rule 4 of the Civil Procedure Code before the learned Single Judge. A request was made by the learned counsel that in the event the injunction order is not vacated, liberty may be reserved to the appellant to prefer a fresh appeal for challenging the order, dated 15/06/2015. By the order dated 07/04/2016 this Court disposed of the appeal as 'withdrawn' with liberty to the appellant to apply under order 39 rule 4 of the Code for vacating/modifying the order dated 15/06/2015. It was observed by the Court that in the event the application made by the appellant is rejected, it would be open for the appellant to file a fresh appeal for challenging the impugned order, dated 15/06/2015, if permissible in law. In pursuance of the liberty granted by this Court, the appellant filed the application before the learned Single Judge under order 39 rule 4 of the Code. The said application was dismissed by the order dated 14/03/2017. The appellant has filed a separate appeal against the order dated 14/03/2017. The present appeal is filed against the order dated 15/06/2016.

The learned counsel for the Respondent No.1 has raised a preliminary objection to the tenability of the appeal. It is submitted that in the appeal filed by the appellant against the order dated 15/06/2016 bearing Appeal (L) No.556/15, this Court had not granted liberty to the appellant to challenge the order, dated 15/06/2016. It is submitted that

the Court had clearly observed in the order dated 07/04/2016 in Appeal (L) No.556/15 that it would be open to the appellant to prefer a fresh appeal for challenging the order dated 15/06/2015, if permissible in law. It is submitted that the law would not permit the appellant to prefer an appeal against the order dated 15/06/2015 when the appeal filed by the appellant against the said order was withdrawn with a view to apply under the provisions of Order 39 Rule 4 of the Code and liberty was not granted to the appellant to again prefer an appeal against the order, dated 15/06/2016.

The learned counsel for the petitioner has submitted that the appeal would be tenable as this Court had, in Appeal (L) No.556/15 permitted the appellant to prefer an appeal against the order, dated 15/06/2015 if permissible in law. It is submitted by placing reliance on the judgment of the hon'ble Supreme Court in the case of ***Shah Babulal Khimji Vs. Jayaben D. Kania & Anr., reported in AIR 1981 SC 1786*** and specially paragraph 14 thereof that the provisions of the Code of Civil Procedure would not apply to a Letters Patent Appeal. It is submitted that the plaintiff had not approached the learned Single Judge with clean hands and two development agreements, dated 16/12/2003 and a couple of letters were suppressed by the plaintiff/respondent No.1 while seeking the order of temporary injunction. It is submitted that the order dated 15/06/2016 is obtained by the plaintiff- respondent No.1 by pleading falsehood. It is stated that in the circumstances, the preliminary objection is liable to be overruled.

While considering the tenability of the objection raised on

behalf of the respondent no.1 it would be necessary to refer to the provisions of order 23 rule 1 of the Code. The provision of order 23 Rule 1 of the Code read thus;

1. *withdrawal of suit or abandonment of part of claim -*

(1) At any time after, the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the palintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandon without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied, -

(a) that a suit must fail by reason of so formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim

(4) Where the plaintiff -

(a) abandons any suit or part of claim under sub-rule (1)

or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of the several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.

It is apparent from a reading of the said provision that the plaintiff or an appellant as the case may be would be entitled to abandon his claim in a suit or an appeal or abandon a part of his claim and if the Court is satisfied that there are sufficient grounds for allowing the plaintiff to file a fresh suit for the subject matter of the suit or a part of the claim, the court may grant liberty to file a fresh suit in respect of the subject-matter of such suit or such part of the claim.

It is clear from a reading of the provision of sub-rule 3 of rule 1 of order 23 that liberty could be granted by the Court to institute a fresh suit or appeal in respect of the subject-matter of such suit or any part of the claim, only if the Court is satisfied that the suit would fail by reason of some formal defect or there is the sufficient ground for

allowing the plaintiff to institute a fresh suit for the subject-matter of the suit or a part of the claim. We do not find anything in the order dated 07/04/2016 in Appeal (L) No.556/15 that would show that the said appeal would have failed by reason of some formal defect or that there were sufficient grounds for allowing the appellant to institute a fresh appeal for the subject-matter of the appeal or a part of the claim. As per sub-rule 4 of rule 1 of order 23, the plaintiff would be precluded from instituting a fresh suit in respect of the subject-matter of the suit or such part of the claim, where he has abandoned the suit or the part of the claim or has withdrawn the suit or the part of the claim without liberty, as provided in sub-rule 3 of rule 1 of order 23 of the Code. We find from the order dated 07/04/2016 that though the learned counsel for the appellant had prayed that in the event the injunction order is not vacated, liberty may be reserved to the appellant to prefer a fresh appeal for challenging the order dated 15/06/2015, the Court had granted the liberty to file an application under Order 39 Rule 4 of the Code and had observed that it would be open to the appellants to file an appeal if permissible in law. Since by the order dated 07/04/2016 in Appeal (L) No.556/15 this Court had observed that it would be open for the appellant to prefer an appeal against the order dated 15/06/2015, if permissible in law and since the law viz. the provisions of order 23 rule 1 of the Code do not permit the appellant to file an appeal against the order dated 15/06/2015, it would be necessary to uphold the preliminary objection raised on behalf of the respondent No.1 and dismiss the appeal filed by the appellant.

Hence, we decline to entertain the appeal filed by the

appellant as the same is not maintainable. The appeal stands dismissed with no order as to costs.

With the disposal of the appeal, notice of motion No.1337/17 stands disposed of.

(SARANG V. KOTWAL, J.)

(SMT. VASANTI A. NAIK, J.)