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

APPEAL NO.250 OF 2017
IN
NOTICE OF MOTION NO.2504 OF 2016
IN
SUIT (L) NO.994 OF 2014

WITH

NOTICE OF MOTION NO.1300 OF 2017
IN
APPEAL NO.250 OF 2017

Madhavlal Naraynlal Pittie .... Appellant

versus

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

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- 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

14/03/2017, rejecting the application filed by the appellant under Order 39 Rule 4 of the Code of Civil Procedure for varying or setting aside the order of temporary injunction, dated 15/06/2015, 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.Madhusudanlal Narayanlal Pittie against Mr.Narayanlal Bansilal in the High Court being Suit No.224 of 1961. The appellant herein 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. 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 however dismissed by the order dated 14/03/2017. The appellant has filed this appeal against the order of the learned Single Judge, dated 14/03/2017.

The learned counsel for the appellant submitted that the learned Single Judge has committed a serious error in rejecting the

application under order 39 rule 4 of the Civil Procedure Code. It is submitted that in the suit filed by the respondent No.1 for specific performance of the development agreement, the respondent No.1 (plaintiff) had prayed for damages and when a claim for damages is made in the suit for specific performance of the contract, the court will be loath in granting an order of temporary injunction in favour of the plaintiff. It is submitted that the plaintiff had not approached the Court with clean hands, inasmuch as though three agreements were executed between the appellant-defendant No.1 and the respondent No.1-plaintiff, two of the said agreements were not produced by the plaintiff in the trial Court. It is submitted that false statements were made by the plaintiff in the plaint that a duty was cast upon the appellant-defendant No.1 to settle the tenants as per the agreement though the duty was cast on the plaintiff to settle them. It is submitted that while suppressing the two documents dated 16/12/2003, the plaintiff had also suppressed a couple of relevant communications exchanged between the parties. It is submitted that the documents produced by the appellant before the learned Single Judge in the application under order 39 rule 4 of the Civil Procedure Code, were not considered by the learned Single Judge, though the said documents would clearly point out that the plaintiff had practiced fraud on the Court while seeking the discretionary relief of injunction. It is submitted that every Court has inherent jurisdiction to recall the order obtained by a party by practicing fraud and hence this Court may recall the order passed by the learned Single Judge on 14/03/2017 as the original order, dated 15/06/2015 granting temporary injunction in favour of the plaintiff was secured by the plaintiff by practicing fraud.

On hearing the learned counsel for the parties and on a perusal of the provisions of order 39 rule 4 of the Code, we find that the scope of jurisdiction of the Court while considering an application under order 39 rule 4 of the Code is limited. Under the said provision, any order of injunction could be discharged, varied or set aside by the Court, on an application made by any party dissatisfied with such order. The said power could be invoked only in two circumstances. According to the first circumstance, when a false or misleading statement in relation to a material particular is made by a party knowingly and the injunction is granted without giving notice to the opposite party, the Court shall vacate the injunction order unless it considers that it is not necessary to do so, in the interest of justice. The first proviso to rule 4 of order 39 would not apply to the case in hand. Admittedly, in this case, the appellant/defendant no.1 was duly served in the matter and the order dated 14/03/2017 was not passed without giving notice to the appellant. Not only was a notice served on the appellant before the order dated 14/03/2017 was passed, but the appellant was duly heard by the learned Single Judge and after hearing the parties at length and after recording cogent reasons for granting the temporary injunction, the learned Single Judge had granted the same in favour of the respondent no.1-plaintiff.

Let us now consider whether the second proviso under which the power under Order 39 Rule 4 could be exercised by the Court, is applicable to the case in hand. In terms of the second proviso, where an order of injunction is passed after giving the party an

opportunity of being heard, the order cannot be discharged, varied or set aside on the application of that party except where such discharge, variation, etc. has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party. The second proviso would also not apply to the case in hand. The appellant had not pointed out any change in the circumstance for the exercise of the power under Order 39, Rule 4 of the Code. It was also not the appellant's case that order dated 15/06/2015 had caused undue hardship to the appellant-defendant No.1. Since the jurisdiction under order 39 rule 4 could have been exercised only in two set of circumstances and since the circumstances necessitating the exercise of jurisdiction under order 39 rule 4 of Code did not arise in this case, the learned Single Judge has rightly rejected the application made by the appellant under Order 39 rule 4 of the Code. Though it was not necessary for the learned Single Judge to deal with each and every submission made before the learned Single Judge by the learned counsel, the learned Single Judge has dealt with every submission and has recorded a finding that on the basis of the same, a case under order 39 rule 4 of the Code cannot be made out. The learned Single Judge has rightly held that the first proviso of Order 39 rule 4 does not apply to the circumstances of the case and the second proviso would also not apply as the appellant had failed to prove that there was a change in the circumstances or that the order was so harsh that it became unworkable. In the instant case the appellant could not have invoked the provisions under section 151 of the Code, when specific provisions under order 39 rule 4 empower the Court to discharge, vary or set aside the order. The learned Single Judge did not find that the

respondent No.1-plaintiff had practiced fraud on the learned Single Judge while securing the order dated 14/07/2017.

In the result, we dismiss the appeal with no order as to costs.

With the disposal of the appeal, notice of motion No.1300/17 stands disposed of.

(SARANG V. KOTWAL, J.) **(SMT. VASANTI A. NAIK, J.)**