

vai

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION (STAMP) NO.26883 OF 2018
IN
ORDER BELOW EXHIBIT – 25
IN
S.C. SUIT NO.3220 OF 2013

WITH
CIVIL APPLICATION (STAMP) NO.26894 OF 2018
IN
CIVIL REVISION APPLICATION (STAMP) NO.26883 OF 2018

Mohd.Rafique Mohd. Hussain Tinwala	)	
Age 47 years, Occupation Business,	)	
R/o 107/4, Lily View, Sharma Estate,	)	
S.V. Road, Jogeshwari (West)	)	
Mumbai – 400 102.	)	...Applicant

....Versus....

- | | |
|--------------------------------------|---|
| 1). M/s.S.S. Enterprises |) |
| A Partnership Firm, having address |) |
| At 9, Lily Tower CHS, Building No.5, |) |
| Bhd. Comfort Inn Hotel, S.V. Road |) |
| Jogeshwari (West),Mumbai – 400 102.) |) |
| 2). Mohd. Shafi Bhati |) |
| Age : 49 years, Occupation Business |) |
| 3). Shri Sanan Jabbar Shaikh |) |
| Age : 40 years, Occupation Business |) |
| 4). Nadeem Rehman Bhati |) |
| Age : 29 years, Occupation Business |) |
| 5). Ayyaz Sanan Shaikh, |) |
| Age : 16, Occupation Business, |) |

- Respondent No.1 to all having)
address at Office No.3, Lily Annex)
CHS Behind Nina Hotel, Jogeshwari)
(West),Mumbai – 400 102.)
)
6). Yasodhan Co-operative Society Ltd.)
Survey No.40, Hissa No.2, CTS)
No.41, 41/1 to 7, 42, 42/1 to 14 of)
Village Vile Parle, Andheri (East))
Mumbai – 400 051.)
)
7). Slum Rehabilitation Authority,)
Administrative Building, Anant)
Kanekar Marg, Bandra (East),)
Mumbai – 400 051.)
- ...Respondents

Mr.S.M. Gorwadkar, Senior Counsel I/b Mr.Khan Altaf for the Applicant.

Mr.A.Y. Sakhare, Senior Counsel with Mr.Pankaj Dwivedi, Mr.Rohan Hirpur and Mr.Diwakar Dwivedi for the Respondents.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 6TH OCTOBER, 2018
PRONOUNCED ON : 23RD OCTOBER, 2018

JUDGMENT :-

1. By this civil revision application filed under section 115 of the Code of Civil Procedure, 1908 (for short “CPC”), the applicant (original defendant) has impugned the order dated 21st August, 2018 passed by the learned *Ad-hoc* Judge, City Civil Court , Borivali, Dindoshi, Mumbai below Exhibit 25 in S.C. suit No.3220 of 2013 granting liberty to the respondents (original plaintiffs) to file the arbitration proceedings after withdrawal of the said suit. By consent of parties, matter is heard finally at the admission stage. Some of the

relevant facts for the purpose of deciding this application are as under :

2. The parties in this judgment are described as per their original status in the proceedings before the learned Trial Judge. On 2nd November, 2013, the plaintiffs filed a suit against the defendant *inter-alia* praying for a mandatory order and decree and for a declaration that the Memorandum of Understanding dated 25th July, 2012 and the Partnership Agreement of single venture dated 26th December, 2012 are binding upon the defendant. It is prayed that the plaintiffs have all right, title and interest including the development right to develop the suit property in accordance with the sanction and approval granted by the Slum Rehabilitation Authority and for various other reliefs. In the said suit, the plaintiffs had filed a notice of motion *inter-alia* praying for interim reliefs. On 4th December, 2013, the learned Trial Judge granted an ad-interim relief in favour of the plaintiffs. The defendant had filed an application under section 9-A of the Code of Civil Procedure, 1908, *inter-alia* raising an issue of jurisdiction to entertain, try and adjudicate upon the said suit in view of their being arbitration agreement recorded in the said Memorandum of Understanding and the Partnership Agreement. The said application was vehemently opposed by the plaintiffs.

3. Learned Trial Judge framed two preliminary issues on 28th

November, 2013 :-

- i). Whether the suit is barred by the provisions of the Arbitration & Conciliation Act, 1996 ?, and
- ii). Whether this Court has no pecuniary jurisdiction to entertain and try the suit.

4. By an order dated 21st December, 2015, the learned Trial Judge held that it had jurisdiction to try and entertain the said suit and all the preliminary issues framed at Exhibit – 9. Insofar as the existence of the arbitration agreement is concerned, it is held by the learned Trial Judge that the plaintiffs did not challenge or raise any issue on the terms incorporated in the agreement and thus though there was an arbitration clause, learned advocate for the plaintiffs had not come up with a case that the plaintiffs did not dispute the terms incorporated in the agreement and the Memorandum of Understanding and as such there being no issue on that count, there was no need to go to arbitration.

5. Though the said order passed by the learned Trial Judge shows perversity, the defendant did not challenge the said order. Learned Trial Judge thereafter passed an order on 22nd February, 2016 dismissing the said Notice of Motion No.2619 of 2013 *inter-alia* praying for interim reliefs in the said suit. The plaintiffs filed an appeal from order against the said order dated 22nd February, 2016 passed

by the learned Trial Judge. The said appeal from order filed before this Court came to be withdrawn by the plaintiffs by an order dated 24th July, 2018.

6. The plaintiffs thereafter filed an arbitration petition under section 9 of the Arbitration & Conciliation Act, 1996 (for short “the said Arbitration Act”) on 9th August, 2018 before this Court *inter-alia* praying for interim measures. On 9th August, 2018, this Court passed an order in the said arbitration petition recording the statement made by the plaintiffs' advocate that his clients were not pressing for any ad-interim reliefs. This Court accordingly directed the office to place the said arbitration petition for hearing and final disposal in due course.

7. The plaintiffs thereafter filed an application for seeking withdrawal of the said S.C. Suit No.3220 of 2013. After few days, the plaintiffs filed another application on 8th August, 2018 *inter-alia* praying for withdrawal of the said suit unconditionally. The plaintiffs thereafter on 13th August, 2018 filed another application for seeking withdrawal of the said suit. The plaintiffs thereafter filed a third application on 16th August, 2018 seeking withdrawal of the suit before the Bombay City Civil Court with liberty to file the arbitration proceedings before this Court. The defendant no.1 filed affidavit in reply to the said application for withdrawal of the said suit filed by the

plaintiffs. By an order dated 21st August, 2018, learned Trial Court allowed the plaintiffs to withdraw the said S.C. Suit No.3220 of 2013 and granted leave to institute the arbitration proceedings exercising powers under Order XXIII Rule 1 (3) (a) and (b) of the CPC. The defendants have impugned the said order dated 21st August, 2018 passed by the learned Trial Judge granting such leave purportedly exercising powers under Order XXIII Rule 1 (3) (a) and (b) of the CPC.

8. Mr.Gorwadkar, learned senior counsel for the applicant invited my attention to the pleadings and the documents annexed to this application and would submit that the defendant had filed an application under section 9-A of the CPC inviting the attention of the learned Trial Judge to the arbitration clause in the documents executed between the parties and had raised an issue of jurisdiction. The plaintiffs had vehemently opposed the said application filed by the defendants. Learned Trial Judge had accepted the plea of the plaintiffs raising an objection to the application filed by the defendants and held that the City Civil Court, Bombay had jurisdiction to entertain, try and adjudicate upon the said suit filed by the plaintiffs though there was an arbitration agreement between the parties.

9. Learned senior counsel invited my attention to the order passed by the learned Trial Judge dismissing the notice of motion

filed by the plaintiffs *inter-alia* praying for interim reliefs. He also placed reliance on the order passed by this Court allowing the plaintiffs to withdraw the appeal from order arising out of the said order passed by the learned Trial Court. He submits that during the pendency of the said suit filed by the plaintiffs before the Bombay City Civil Court, they filed a petition under section 9 of the Arbitration Act before this Court, *inter-alia* praying for interim measures. During the pendency of the said arbitration petition, the plaintiffs filed three applications before the learned Trial Judge. The first two applications were filed for seeking liberty to withdraw the said suit unconditionally, whereas the third application was filed for seeking liberty to withdraw the said suit with liberty to file the arbitration proceedings before this Court. The said application was vehemently opposed by the defendants. Learned Trial Judge however, passed a perverse order and granted leave to the plaintiffs to file arbitration application.

10. It is submitted that the learned Trial Judge purportedly exercised powers under Order XXIII Rule 1 (3) (a) and (b) of the CPC. He submits that under Order XXIII Rule 1 (3) (a) and (b) of the CPC, the learned Trial Judge had no power to grant liberty to withdraw the said civil suit with liberty to file the arbitration proceedings. He submits that the arbitration proceedings cannot be considered as the suit. The impugned order passed by the learned

Trial Judge is *ex-facie* illegal and contrary to the Order XXIII Rule 1 (3) (b) of the CPC. He placed reliance on the judgment of this Court in case of **Anil Dinmani Shankar Joshi & Anr. vs. Chief Officer, Panvel Municipal Council, Panvel & Anr., AIR 2003 Bombay 238.**

He submits that out of those three applications filed by the plaintiffs, the first two applications were filed for seeking permission to withdraw the said suit unconditionally. For withdrawal of the said suit unconditionally, no leave of the Court is required. He submits that once the plaintiffs had filed the application for withdrawal of the said suit, the said suit stood withdrawn on the date of filing of the said application and thus the third application for seeking liberty to file the arbitration proceedings was not maintainable. The impugned order was thus without jurisdiction.

11. Learned senior counsel placed reliance on the judgment of this Court in case of **Mrs. Anges Miranda & Ors. vs. Howard Miranda & Ors. (2017) 4 Bom CR 484** and in particular paragraph 52 in support of the submission that inherent powers of the Court under section 151 of the Code of Civil Procedure, 1908 (for short "CPC") have to be used with circumspection and care and can be exercised only where it is absolutely necessary and when there is no provision in CPC governing the matter, when the *bonafides* of the applicant cannot be doubted, when such exercise is to meet the ends

of justice and to prevent abuse of process of Court.

12. Learned senior counsel for the defendant placed reliance on the judgment of this Court in case of **Jayprakash Sitaram Goel vs. Sarubai Narayan Muli, since deceased & Ors., 2018 (2) Mh.L.J. 509** and in particular paragraph 22 in support of the submission that inherent powers under section 151 of the CPC cannot be exercised so as to nullify the provisions of CPC. Where the CPC deals expressly with a particular matter, the provisions should normally be regarded as exhaustive.

13. Learned senior counsel for the defendant submits that even otherwise the learned Trial Judge could not have permitted the plaintiffs to withdraw the said suit with liberty to file the arbitration proceedings since the interim reliefs prayed by the plaintiffs before the Bombay City Civil Court in that said suit were already rejected. The appeal from order filed by the plaintiffs against the said order came to be withdrawn unconditionally. The plaintiffs thus could not have been granted liberty to file any arbitration proceedings including the application under section 9 of the Arbitration Act *inter-alia* praying for interim reliefs which reliefs were already rejected by the Civil Court. He submits that in view of the dismissal of the said notice of motion and also withdrawal of the appeal from order filed by the plaintiffs, various rights had been accrued in favour of the defendant

which could not be taken away by the plaintiffs.

14. Learned senior counsel invited my attention to the impugned order dated 21st August, 2018 passed by the learned Trial Judge and would submit that the plaintiffs had abandoned the said arbitration clause recorded in the agreement entered into between the parties and had chosen to file a civil suit. The plaintiffs had also vehemently opposed the application filed by the defendant raising an issue of jurisdiction of the Civil Court on the ground that the arbitration agreement exists between the parties. The plaintiffs thus having abandoned the arbitration agreement, were estopped from filing an application for seeking liberty to withdraw the said suit with liberty to file arbitration proceedings under the same arbitration agreement. Learned Trial Judge however, totally failed to appreciate this crucial aspect in the matter and allowed the plaintiffs to withdraw the said suit with liberty to file the arbitration proceedings contrary to law. The defendant had not filed any application under section 8 of the Arbitration Act.

15. Mr.Sakhare, learned senior counsel for the plaintiffs on the other hand invited my attention to the issue of jurisdiction raised by the defendant on the ground that there exists an arbitration agreement recorded in the documents entered into between the parties. He submits that though the plaintiffs at that stage opposed

the said application as per the advice given to the plaintiffs by their advocate, the plaintiffs were subsequently given advice that they will have to invoke the said arbitration agreement and to apply for withdrawal of the said suit with liberty to file arbitration proceedings. He submits that the defendant having filed an application raising an issue of jurisdiction of the Civil Court on the ground that there exists an arbitration agreement, such party cannot be allowed to now raise a plea that the plaintiffs could not have been permitted to apply for liberty to withdraw the said suit with liberty to invoke the arbitration agreement and file the arbitration proceedings before this Court.

16. Learned senior counsel for the plaintiffs submits that the applications filed by the plaintiffs before the learned Trial Judge in the said suit were not under Order XXIII Rule 1 (3) (a) and (b) of the CPC but were filed under section 151 of the CPC. He submits that the Civil Court has inherent powers under section 151 of CPC to pass such order if ends of justice warranted and to prevent any abuse of process of Court. In support of this submission, learned senior counsel placed reliance on the following judgments of the Hon'ble Supreme Court :-

- i). **Manohar Lal Chopra vs. Rai Bahadur Roa Raja Seth Hiralal, AIR 1962 SC 527** (Paragraphs 17 to 19),
- ii). **Vikas Aggarwal vs. Anubha, (2002) 4 SCC 468**

(Paragraphs 3, 4 and 11), and

iii). **Shipping Corporation of India Limited vs. Machado Brothers & Ors., (2004) 11 SCC 168** (Paragraph 19).

17. It is submitted by the learned senior counsel that though the plaintiffs had filed the arbitration petition under section 9 of the Arbitration Act before this Court, the plaintiffs have not pressed any ad-interim reliefs in the said arbitration petition and the said petition is still pending. He submits that there is no contrary provision in the Code of Civil Procedure, 1908 providing as to when inherent powers under section 151 of the CPC cannot be invoked. He submits that Order XXIII Rule 1 (3) (a) and (b) of the CPC and inherent powers of the Court under section 151 of the CPC are not in conflict with each other. He submits that the provisions of Order XXIII Rule 1 (3) (a) and (b) of the CPC will not come in the way of the Civil Court in exercising inherent powers under section 151 of the CPC. Learned Trial Judge had exercised such powers under section 151 of the CPC in the interest of justice. The appeal from order filed by the defendant against the order passed by the learned Trial Judge rejecting the plea of jurisdiction raised under section 9-A of the CPC is still pending before this Court.

18. Mr.Gorwadkar, learned senior counsel for the plaintiffs in rejoinder submits that inherent powers under section 151 of the CPC

cannot be exercised to take away the rights accrued in favour of his clients. He invited my attention to paragraph 6 of the impugned order passed by the learned Trial Judge and would submit that neither the plaintiffs had applied for exercising inherent powers of the learned Trial Judge under section 151 of the CPC nor the said powers are exercised by the learned Trial Judge while allowing the said application below Exhibit – 25. He submits that paragraph 6 of the impugned order clearly indicates that the learned Judge has purported to have exercised powers under Order XXIII Rule 1 (3) (a) and (b) of the CPC. The judgments thus relied upon by the learned senior counsel for the original plaintiffs are clearly distinguishable in the facts of this case and would not assist the case of the plaintiffs.

19. Insofar as the submission of the learned senior counsel for the plaintiffs that no prejudice would be caused to the applicant if the plaintiffs are allowed to pursue the proceedings under the provisions of the Arbitration Act after obtaining such permission from the learned Trial Court is concerned, learned senior counsel for the applicant submits that the arguments of the defendant raising an issue of jurisdiction of the Trial Court in view of the arbitration agreement were opposed by the plaintiffs and such objection of the plaintiffs were upheld by the learned Trial Judge. The notice of motion filed by the plaintiffs also came to be rejected in the year

2016. The appeal from order filed by the plaintiffs also came to be withdrawn. There is no interim relief granted in favour of the plaintiffs till date. He submits that if the impugned order passed by the learned Trial Judge is not interfered with by this Court, substantial prejudice would be caused to his clients.

20. It is submitted by the learned senior counsel that inspite of the arbitration agreement recorded in the documents executed by and between the parties, the plaintiffs had filed a civil suit and even at that stage had abandoned and waived the arbitration agreement by filing a civil suit. The arbitration agreement had not been invoked by the plaintiffs for a period of five years. In view of such conduct on the part of the plaintiffs itself, learned Trial Judge even otherwise could not have granted such liberty to withdraw the said civil suit with liberty to file arbitration proceedings contrary to this own order holding that the learned Trial Judge had jurisdiction to entertain the said suit inspite of the arbitration agreement. He submits that the first two applications were filed by the plaintiffs under Order XXIII Rule 1 of the CPC, whereas the third application was filed under Order XXIII Rule 1 (3) (a) and (b) of the CPC.

21. It is submitted that the arbitration proceedings cannot be considered as suit and thus the learned Trial Judge granting permission to withdraw the said suit with liberty to file the arbitration

proceedings purportedly under Order XXIII Rule 1 (3) (a) and (b) of the CPC itself was totally without jurisdiction. Order XXIII Rule 1 (3) (b) of the CPC does not confer powers on the Civil Court to relegate the parties to different statutory forum. At the most, the Court has power to relegate parties to different Courts having jurisdiction and not different statutory forum.

22. Insofar as the judgment relied by Mr.Sakhare, learned senior counsel for the plaintiffs are concerned, learned senior counsel for the defendant submits that there is no dispute about the proposition of law laid down by the Hon'ble Supreme Court in those judgments. He however, submits that the facts before the Hon'ble Supreme Court in all the said judgments were totally different. There was no permission granted by the learned Trial Judge to withdraw the suit with liberty to file the arbitration proceedings in any of those judgments.

23. Mr.Sakhare, learned senior counsel for the original plaintiffs in sur-rejoinder submits that merely because the plaintiffs had quoted the wrong provision in the application filed by them, the impugned order passed by the learned Trial Judge cannot be vitiated on that ground. He submits that the application filed by the plaintiffs under section 9 of the Arbitration Act is still pending in this Court. His clients have not pressed for any *ad-interim* relief in the said matter.

He submits that the Order XXIII of the CPC does not prohibit from granting any permission to file the arbitration proceedings before different forum.

REASONS AND CONCLUSIONS :

24. The short questions that arise for consideration of this Court are :-

a). Whether the learned Trial Judge could have permitted the plaintiffs to withdraw the civil suit by exercising powers under Order XXIII Rule 1 (3)(b) of the Code of Civil Procedure, 1908 with liberty to file the arbitration proceedings or not, and

b). Whether the learned Trial Judge could have exercised powers under section 151 of the Code of Civil Procedure, 1908 and could grant leave to withdraw the civil suit with liberty to file the arbitration proceedings inspite of the provisions of Order XXIII Rule 1 (3)(b) of the Code of Civil Procedure, 1908.

25. There is no dispute that in the documents entered into between the parties, an arbitration agreement was recored. The plaintiffs however filed a civil suit *inter-alia* praying for mandatory order and decree and for a declaration that the Memorandum of Understanding dated 25th July, 2012 and the Partnership Agreement of Single Venture dated 26th December, 2012 are binding upon the defendant and the plaintiffs have no right, title or interest including

the development right to develop the suit property in accordance with the sanction and approval granted by the Slum Rehabilitation Authority and for other reliefs. It is not in dispute that in reply to the notice of motion filed by the plaintiffs for interim reliefs, the defendant had raised an issue of maintainability of the suit in view of there being an arbitration agreement between the parties. Learned Trial Judge had framed two preliminary issues on 28th November, 2013 i.e. :

- i). Whether the suit is barred by the provisions of the Arbitration & Conciliation Act, 1996 ? and
- ii). Whether this Court has no pecuniary jurisdiction to entertain and try the suit ?

26. No application was filed by the defendant under section 8 of the Arbitration Act. Learned Trial Judge passed an order on those two preliminary issues on 21st December, 2014 holding that the City Civil Court, Bombay had jurisdiction to try and entertain the said suit and that the learned Trial Court had pecuniary jurisdiction to entertain and try the said suit. The writ petition filed by the defendant against the said order dated 21st December, 2015 is pending in this Court.

27. It is not in dispute that the learned Trial Judge dismissed the said notice of motion filed by the plaintiffs *inter-alia* praying for interim reliefs by an order dated 22nd February, 2016. The appeal from

order filed against the said order dated 22nd February, 2016 by the plaintiffs has been withdrawn on 21st July, 2018.

28. During the pendency of the said civil suit before the learned Trial Court, the plaintiffs filed an application under section 9 of the Arbitration Act before this Court *inter-alia* praying for interim measures on 9th August, 2018. In the said arbitration petition, the plaintiffs made a statement that they were not pressing for any *ad-interim* reliefs. The said arbitration petition is still pending.

29. It is not in dispute that during the pendency of the said arbitration petition, the plaintiffs filed two applications *inter-alia* praying for liberty to withdraw the said suit before the City Civil Court. The third application filed by the plaintiffs was for seeking liberty to withdraw the said suit with liberty to file the arbitration proceedings. The said application was made under Order XXIII Rule 1 (3)(a) and (b) of the CPC. The plaintiffs had opposed the application filed by the defendant raising a preliminary issue that in view of there being an arbitration agreement, the said suit filed by the plaintiffs was not maintainable. Learned Trial Judge accepted the said plea raised by the plaintiffs.

30. The plaintiffs though had raised an issue that the said civil suit was maintainable inspite of there being an arbitration agreement, filed an arbitration petition under section 9 of the Arbitration act in this

Court on the ground that there was an arbitration agreement existing in the agreement entered into between the parties. Similar plea was also raised by the plaintiffs in the third application filed by the plaintiffs before the City Civil court seeking liberty to withdraw the said civil suit with liberty to file arbitration proceedings contrary to the stand taken by the plaintiffs while opposing the application made by the defendant raising an issue of jurisdiction on the ground that there was an arbitration agreement existing between the parties. The arbitration petition under section 9 of the Arbitration Act was already filed by the plaintiffs even before seeking any such leave purportedly under Order XXIII Rule 1 (3)(a) and (b) of the CPC.

31. A perusal of the impugned order passed by the learned Trial Judge indicates that the learned Trial Judge invoked the provisions of Order XXIII Rule 1 (3)(b) of the CPC while opposing the impugned order and held that when the plaintiffs had filed the said suit for declaration and injunction, there existed an arbitration agreement. The defendant had raised an objection about lack of jurisdiction of the City Civil Court. The City Civil Court however had held that it had jurisdiction. It is held that the plaintiffs now wished to invoke arbitration clause, the Court found that the said suit will fail by reason of formal defect and thus there were sufficient grounds which warranted the Court to grant permission to withdraw the said suit with

liberty to file the arbitration proceedings. It is not in dispute that there was no application made by the plaintiffs to seek review of the impugned order passed by the learned Trial Judge on 21st December, 2015. There is inconsistency in the order dated 21st December, 2015 and in the order dated 21st August, 2018 passed by the learned Trial Judge.

32. Under section 9 of the CPC, the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. In my view, though there was arbitration agreement between the parties recorded in the documents relied upon by the plaintiffs, the jurisdiction of the Civil Court is not barred to entertain, try and adjudicate upon such suit however, the same is subject to an application, if any, made by the defendant under section 8 of the Arbitration Act and if all the conditions prescribed in that provisions are complied with. Admittedly, in this case no such application under section 8 of the Arbitration Act was filed by the defendant. In my view, since there was no application filed by the defendant under section 8 of the Arbitration Act within the time prescribed under the said provision or otherwise, the City Civil Court had jurisdiction to entertain, try and adjudicate upon the said suit filed by the plaintiffs. The plaintiffs had abandoned the arbitration agreement and had filed a civil suit and

thus could not be allowed to file an application for withdrawal of suit with liberty to file arbitration proceedings and that also after five years of filing of suit.

33. Insofar as the application filed by the defendant raising a preliminary issue of jurisdiction on the ground that there was an arbitration agreement entered into between the parties, the said application was vehemently opposed by the plaintiffs. The objection raised by the plaintiffs to the said application was accepted by the City Civil Court. In my view, learned Trial Judge thus could not have taken a different view without there being any review application filed by the plaintiffs and could not have granted any leave under Order XXIII Rule 1 (3) (b) of the CPC.

34. A perusal of the Order XXIII Rule 1 (3)(b) of the CPC clearly indicates that the said power could be exercised only if liberty is prayed to institute a fresh suit in respect of the subject matter of such suit or part of claim and not the arbitration proceedings. In my view, the arbitration proceedings cannot be considered as a suit for the purpose of granting liberty under Order XXIII Rule 1 (3)(b) of the CPC or otherwise. The learned Trial Judge has thus acted totally without jurisdiction in granting leave to withdraw the said suit with liberty to file the arbitration proceedings. The impugned order is thus *ex-facie* in violation of Order XXIII Rule 1 (3)(b) of the CPC.

35. A perusal of the impugned order passed by the learned Trial Judge clearly indicates that one of the reason recorded by the learned Trial Judge while granting such liberty to file such arbitration proceedings was that there was a formal defect in the suit in view of the fact that the said suit was filed inspite of there being an arbitration agreement between the parties. Learned Trial Judge applied Order XXIII Rule 1 (3)(a) of the CPC while granting such leave under Order XXIII Rule 1 (3)(b) of the CPC. In my view, even if there is an arbitration agreement, if a civil suit is filed in respect of the dispute arising between the parties which was capable of being adjudicated upon in the arbitral proceedings, the civil suit filed by the plaintiffs cannot be considered having any formal defect. If the defendant does not file any application under section 8 of the Arbitration Act within the time prescribed and subject to compliance of other conditions prescribed therein, the Civil Court will continue to have jurisdiction to entertain, try and adjudicate upon such suit. In my view, the impugned order passed by the learned Trial Judge granting liberty to withdraw the said civil suit with liberty to file the arbitral proceedings on the ground that there was some formal defect in the suit is *ex-facie* perverse and contrary to Order XXIII Rule 1 (3)(a).

36. The question now that arises for the consideration of this Court is whether the learned Trial Court could have exercised any

powers under section 151 of the CPC while granting such liberty to withdraw the said civil suit with liberty to file the arbitration proceedings or not and if such powers could be exercised under section 151 of the CPC, whether in the facts of this case, the learned Trial Judge had exercised such powers under section 151 of the CPC or not. This Court will also decide whether the plaintiffs had made out a case for invoking inherent powers under section 151 of the CPC or not.

37. Section 151 of the CPC provides that nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court. Learned senior counsel for the plaintiffs does not dispute that Order XXIII Rule 1 of the CPC provides for withdrawal of the suit. Order XXIII Rule 1 (3) (a) of the CPC provides that if the Court is satisfied that a suit must fail by reason of some 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, Court can grant permission to withdraw such suit or part of claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.

38. In my view, even if for the sake of argument, the

submission of the learned senior counsel for the plaintiffs is accepted that the Trial Court could have exercised such powers under Order XXIII Rule 1 (3) (b) of the CPC, in my view since there is a specific provision under the Code of Civil Procedure, 1908, and conditions prescribed under such provisions are not satisfied by the plaintiffs, the inherent powers of Court under section 151 of the CPC cannot be exercised. This Court in case of **Mrs.Anges Miranda & Ors.** (supra) has adverted to the judgment of the Hon'ble Supreme Court in case of **K.K. Velusamy vs. N. Palanisamy (2011) 11 SCC 275** in which Hon'ble Supreme Court had laid down the principles and guidelines as to when inherent powers can be exercised by a Court under section 151 of the Code of Civil Procedure, 1908.

39. It is held by the Hon'ble Supreme Court that the powers under section 151 of the CPC will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in CPC governing the matter, when the *bonafides* of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of Court. In this case, admittedly the notice of motion filed by the plaintiffs *inter-alia* praying for interim relief in the said suit had been dismissed by the learned Trial Judge. The appeal from order filed by the plaintiffs against the said order has been admittedly withdrawn. The

vested rights are thus accrued in favour of the defendant by virtue of the said order passed by the learned Trial Judge dismissing the notice of motion for interim reliefs and the order passed by this Court granting liberty to the plaintiffs to withdraw the said appeal from order.

40. A perusal of the record clearly indicates that even otherwise the plaintiffs had not filed any of the three applications invoking such section 151 of the CPC while seeking liberty to withdraw the said suit with liberty to file the arbitration proceedings in the third application. A perusal of the impugned order clearly indicates that the learned Trial Judge has purportedly invoked the provisions of Order XXIII Rule 1 (3)(a) and (b) of the CPC while granting such liberty to the plaintiffs. I am thus not inclined to accept the submissions of Mr.Sakhare, learned senior counsel for the plaintiffs that the learned Trial Court had exercised inherent powers under section 151 of the CPC while granting liberty to the plaintiffs to withdraw the said suit with liberty to file the arbitration proceedings in the impugned order.

41. In these circumstances, in my view, even otherwise no case is made out by the plaintiffs for invoking powers under section 151 of the CPC, in the facts and circumstances of this case. In my view filing of such application itself was a gross abuse of process of

law and thus the order passed by the Trial Court would not meet the ends of justice or to prevent abuse of process of the Court. The impugned order thus passed by the learned Trial Judge is contrary to the provisions laid down by the Hon'ble Supreme Court in case of **K.K. Velusamy** (supra) and in case of **Mrs.Anges Miranda & Ors.** (supra) delivered by this Court.

42. This Court in case of **Jayprakash Sitaram Goel** (supra) has held that inherent powers of the Court under section 151 of the CPC cannot be exercised so as to nullify the provisions of the Code of Civil Procedure, 1908. Where the CPC deals with expressly to a particular matter, the provisions would naturally be regarded as exhaustive. This Court adverted to the judgment of the Hon'ble Supreme Court in case of **Manohar Lal Chopra vs. Raj Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527** and the said judgment in case of **Jayprakash Sitaram Goel** (supra). In my view, the principles laid down by the Hon'ble Supreme Court in case of **Manohar Lal Chopra** and the judgment of this Court in case of **Jayprakash Sitaram Goel** (supra) would apply to the facts of this case and would assist the case of the defendant. I am respectfully bound by the said judgments.

43. This Court in case of **Anil Dinmani Shankar Joshi & Anr.** (supra) has held that once an application for withdrawal was filed

under Order XXIII Rule 1 of the CPC, abandonment of the suit is complete as soon as the plaintiff informs the Court. No order of the Court is necessary though the Court often passes formal order recording the abandonment. It was vehemently urged by the learned senior counsel for the defendant that since the plaintiffs had already filed two applications under Order XXIII Rule 1 of the CPC for withdrawal of the said suit, abandonment of the suit at the instance of the plaintiffs was complete and thus the learned Trial Judge could not have entertained the third application *inter-alia* praying for withdrawal of the suit with liberty to file the arbitration proceedings. I do not propose to decide this issue in view of the fact that when the third application was filed by the plaintiffs with liberty to withdraw the said suit with liberty to file the arbitration proceedings, no such objection was raised by the defendant and also on the ground that this Court has already taken a view in this judgment that the third application even otherwise could not have been entertained by the learned Trial Judge for granting liberty to withdraw the said suit with liberty to file the arbitration proceedings by purportedly invoking powers under Order XXIII Rule 1 (3) (b) of the CPC.

44. Insofar as the judgment of the Hon'ble Supreme Court in case of **Manohar Lal Chopra** (supra) relied upon by the learned senior counsel for the plaintiffs is concerned, the said judgment has

been interpreted subsequently. The Hon'ble Supreme Court in the said judgment has also held that inherent jurisdiction of the Court cannot be exercised so as to nullify the provisions of CPC. Where the CPC deals with expressly to a particular matter, the provisions would naturally be regarded as exhaustive. In my view the said judgment of the Hon'ble Supreme Court would assist the case of the defendant and not the case of the plaintiffs.

45. Insofar as the judgment of the Hon'ble Supreme Court in case of **Shipping Corporation Of India Limited** (supra) relied upon by Mr.Sakhare, learned senior counsel for the plaintiffs is concerned, it is held in the said judgment that if there is no specific provision, which prohibits the grant of relief sought in an application filed under section 151 of the CPC, the Courts have all the necessary powers under section 151 of the CPC to make a suitable order to prevent the abuse of the process of Court. It is held in the facts of that case that, during the pendency of the first suit, certain subsequent events had taken place which had made the first suit infructuous and in law the said suit could not be kept pending and continued solely for the purpose of continuing an interim order made in the said suit. The Hon'ble Supreme Court in such facts and circumstances held that by subsequent events, if the original proceeding had become infructuous, it would be the duty of the Court to take such action as is

necessary in the interest of justice which includes disposing of infructuous litigation.

46. It is not the case of the plaintiffs in this case that by virtue of dismissing the notice of motion filed by the plaintiffs or in view of the arbitration agreement between the parties, the said suit had become infructuous. The arbitration agreement was not arrived at during the pendency of the said suit but was already arrived at much prior to the filing of the suit. The said judgment of the Hon'ble Supreme Court in case of **Shipping Corporation Of India Limited** (supra) is distinguishable in the facts of this case and would not assist the case of the plaintiffs.

47. Insofar as the judgment of the Hon'ble Supreme Court in case of **Vikas Aggarwal** (supra) is concerned, in this case the plaintiffs have not made out a case that the said application was made for the purpose of exercising inherent powers under section 151 of the CPC to advance interests of justice and the technicalities. In this case, the notice of motion filed by the plaintiffs was already rejected and the appeal from order against the said order was already withdrawn by the plaintiffs. The defendant was thus justified in opposing the said application on the ground that certain rights had been accrued in favour of the defendant and thus no such leave could have been granted by the learned Trial Judge. The said

judgment of the Hon'ble Supreme Court in case of **Vikas Aggarwal** (supra) would not assist the case of the plaintiffs and is clearly distinguishable in the facts of the case.

48. In my view, the impugned order passed by the learned Trial Judge is *ex-facie* contrary to the principles of law laid down by the Hon'ble Supreme Court in the aforesaid judgments and also *ex-facie* in violation of Order XXIII Rule 1 (3) (a) and (b) of the CPC and thus deserves to be quashed and set aside.

49. I therefore, pass the following order :-

a). Impugned order dated 21st August, 2018 passed by the learned *Ad-hoc* Judge, City Civil Court, Borivali, Dindoshi, Mumbai below Exhibit – 25 in S.C. Suit No.3220 of 2013 is set aside. Application (Exhibit – 25) filed by the plaintiffs is dismissed. The Civil Revision Application (Stamp) No.26883 of 2018 is allowed in aforesaid terms.

b). There shall be no order as to costs.

c). In view of disposal of the Civil Revision Application, the Civil Application (Stamp) No.26894 of 2018 does not survive and is accordingly disposed off.

(R.D. DHANUKA, J.)