

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION***

WRIT PETITION NO.6408 OF 2021

J & J Associates ...Petitioner
Vs
Leena Chaban Tonde and Ors. ...Respondents
...

Mr. Girish Godbole, Senior Advocate with Mr. Parag Tilak with
Ms. Shivani Samel for Petitioner for the Petitioner.

Mr. Prasad Dani, Senior Advocate i/by V.P.Vyas for respondent.

Mr. Vishal Kanade i/by Mr. Makarand Savant for Respondent
Nos.8 and 10.

CORAM : SANDEEP K. SHINDE J.
RESERVED ON : FEBRUARY 15, 2022.
PRONOUNCED ON: FEBRUARY 22, 2022.

P.C. :

Heard Mr. Godbole, learned Senior Counsel for the
petitioner and Mr. Dani, learned Senior Counsel for respondent no.1.

2 Petitioner, is Defendant No.12 in the Special Civil Suit
No.1387 of 2012, instituted by Ms. Leena Chaban Tonde-respondent
no.1-plaintiff, for partition, declaration, permanent injunction and
other ancillary reliefs. Suit was instituted in September, 2012.

Plaintiff moved an application below Exhibit 5 for temporary injunction under Order 39 Rule 1 / 2 of the Code of Civil Procedure, 1908 ('CPC' for short). At a time, defendant no.7 raised the issue of limitation, in respect of reliefs of declaration. The trial Court thus, framed a preliminary issue under Section 9A of the CPC. The preliminary issue was answered in negative vide order dated 14th November, 2016. That order was challenged in Civil Revision Application No.117 of 2017 before this Court. Revision was disposed of by this Court on 21st January, 2019. As a result, application below Exhibit 5 filed by the plaintiff remained to be unheard. In the interregnum, on 16th November, 2017, the trial Court passed the following order below Exhibit 5;

“Learned advocate for Plaintiff and Defendant Nos.10 to 12 present. No arguments advanced stating pending of Appeal From Order before the Hon’ble High Court. If parties fail to argue on 15th December, 2017, Exhibit 5 shall proceed along with suit.”

3 Be that as it may, after Civil Revision Application was disposed of on 21st January, 2019, plaintiff moved another application, Exhibit 184 under Order 39 Rule 1 / 2 of the CPC on 4th September, 2019

against defendant nos.1 to 11.

4 Petitioner (Original Defendant No.12) along with Defendant Nos.10 and 11 objected to maintainability of the second application (Exhibit 184) and sought its' rejection. The learned Judge vide order dated 3rd November, 2020 disallowed the objection. This petition under Article 227 of the Constitution of India challenges the order dated 3rd November, 2020.

5 The objection sought to be raised as to maintainability of the second application for temporary injunction, (Exhibit 184) was that, since plaintiff failed to argue application Exhibit 5, despite, the order dated 16th November, 2017 and since thereafter, suit was posted for framing the issues, second application was not maintainable. In my view, this cannot be a valid ground for objecting the maintainability of the application (Exhibit 184). One of the grounds taken up in Petition to challenge the maintainability of the second application, is that in absence of change in the circumstances, second application could not have been entertained in terms of Order 39 Rule 4 of the CPC. It may be stated that application below Exhibit 5 for temporary injunction moved by the plaintiff in the year 2012 was not heard on merits at all. Reason being at the

material time, preliminary issue under Section 9A of the CPC was pending for consideration in Civil Revision Application before this Court.

6 Thus, in consideration of the facts of the case, the learned Trial Judge has correctly disallowed the objection raised by the petitioner/defendant no.2.

7 For all that reasons, no interference is called for in the impugned order in the supervisory jurisdiction of this Court.

8 Petition is dismissed.

(SANDEEP K. SHINDE, J.)