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

**APPEAL FROM ORDER NO. 880 OF 2022
WITH
INTERIM APPLICATION NO. 2395 OF 2019**

Rajesh Shivshankar Gupta ..Appellant
vs.
Ganesh Narayan Nadar ..Respondent

Mr. Amogh Singh i/b Mr. D.P. Singh, for Appellant.
Mr. R.P. Ojha, for Respondent.

CORAM : M. S. KARNIK, J.

DATE : SEPTEMBER 14, 2022.

P.C. :

1. Learned counsel for the respondent at the outset raised the preliminary objection to the maintainability of the appeal from order. My attention is invited to the consent terms which are at page 105. According to the respondent, the consent terms needed to be set aside as the same are obtained by practicing fraud. The trial Court while disposing of the notice of motion filed by the respondent for recalling the consent terms observed that there was a mistake in entering into the consent terms and therefore by the

impugned order allowed the notice of motion and the order passed by the trial Court with reference to the consent terms dated 30/06/2014 was recalled as an outcome of mistake of fact.

2. Mr. Singh, learned counsel appearing on behalf of the appellant submitted that the appeal from order is maintainable as the impugned order passed by the trial Court is one under Order XXXIX Rule 4 of the Code of Civil Procedure, 1908 (for short 'CPC')

3. No doubt, Order XXXIX Rule 4 of the CPC empowers the trial Court to discharge, vary or set aside an order of injunction, but the power can be so exercised when an order to be discharged, varied or set aside is an order of injunction. Reading of the consent terms clearly demonstrates that the same cannot be construed to be an order of injunction.

4. The consent terms reads thus :

"1. The defendant abovenamed do hereby admit and confirm that the plaintiff is the absolute owner in respect of the plot of land bearing CTS No. 31 admeasuring 1290 square meters situate at Village Mohili, Taluka Kurla, MSD together with the structure standing thereon.

2. The defendant hereby also agrees, undertakes and declares not to claim, any right, title or interest in respect of the aforesaid plot of land and the structures standing thereon in any manner whatsoever.

3. The defendant hereby further agrees and declares that the defendant and plaintiff are the joint owners having equal rights only in respect of the land bearing CTS Nos. 20(pt), 24(pt), 29(pt), 30(pt), 32(pt) and 33(pt) aggregately admeasuring about 8185 square meters together with the structures standing thereon and known as Kailash Puram situate at Village Mohili, Taluka Kurla MSD adjoining to the said land bearing CTS No. 31.

4. The plaintiff and defendant do hereby agree to get the boundaries of the aforesaid land bearing CTS No. 31 and CTS Nos. 20(pt), 24(pt), 29(pt), 30(pt), 32(pt) and 33(pt) surveyed and demarcated within a period of one month or as early as possible. The costs and charges of the survey and demarcation of the boundaries shall be paid by the parties equally.

5. The defendant hereby further agrees and undertakes that until the boundaries as aforesaid are surveyed and demarcated, the defendant shall not carry on any further work of construction on either CTS No. 31 or CTS Nos. 20(pt), 24(pt), 29(pt), 30(pt), 32(pt) and 33(pt), situate at Village Mohili, Taluka Kurla, MSD. The defendant states that he has maintained the status-quo as on 6.5.2014 as per the order passed by the Hon'ble Court and shall continue till compliance of these terms.

6. The defendant agrees and undertakes that after demarcation of the boundaries by the Revenue Authorities if it is found that the suit structure under construction or any part thereof is found on plot of land bearing CTS No. 31, the plaintiff shall pay the costs and expenses thereof to the defendant which will be agreed and decided by the parties mutually or on failure fixed and determined by person authorised and appointed by the plaintiff and on such payment, the defendant shall have no right, title and claim of whatsoever nature in respect of the suit structure falling on land and bearing CTS No. 31 and the same shall be separated by constructing partition wall.

7. It is further hereby clearly agreed between the parties that the defendant shall not claim any right, title and

interest of whatsoever nature in any manner whatsoever in respect of the land bearing CTS No. 31 admeasuring 1290 square meters or any part thereof and also in respect of all the structures standing thereon. The defendant hereby further agrees and declares that in the event any record/document in respect of the land bearing CTS No. 31 or the structures standing thereon is found existing in the name of the defendant, the same shall and be deemed to have been revoked and cancelled and the defendant shall not claim any right, title and interest on the basis of any such records/documents.

8. The defendant hereby also agrees and undertakes to furnish the details of the licensees in whose favour the defendant has executed the Leave and License Agreements in respect of the structures standing on the land bearing CTS No. 31.

9. The defendant hereby also declares that he has not created any third party right, title or interest of whatsoever nature in any manner whatsoever in respect of the suit structure under construction and also the other structures standing on the land bearing CTS No. 31 save and except the licenses in respect of other structures. The defendant hereby further agrees and undertakes not to create any third party right of whatsoever nature in any manner in respect of land bearing CTS No. 31 admeasuring 1290 square meters situate at Village Mohili, Taluka Kurla, MSD or any part thereof and also the suit structures and other structures on the land bearing CTS No. 31. The defendant hereby agrees and undertakes not to part with possession of the suit structures to any third party except the plaintiff on compliance of these terms."

5. I do not wish to burden this order with the detailed consideration of the terms of the consent terms to form an opinion that the same cannot be construed as an order of injunction. A reference to a few clauses is sufficient to arrive at this conclusion.

6. Clause 1 of the consent terms is an admission and confirmation by the defendant about the plaintiff being an absolute owner of the land mentioned therein. In clause 2 defendant agreed and declared not to claim any right, title or interest in the aforesaid plot of land and structure standing thereon in any manner. Then in clause 3 the defendant agreed and declared that the defendant and plaintiff are the joint owners having equal rights in respect of the portion of the property mentioned in clause 3. Clause 4 is about getting the boundaries surveyed and demarcated.

7. True it is that clause 5 is in the nature of an injunction. However, this appeal from order is not restricted to clause 5. The recall of the consent terms seeks to cover the entire consent terms and not a part thereof. Suffice it to observe that the impugned order passed by the trial Court is not under Order XXXIX Rule 4 of CPC and hence, I do not find substance in the contention of learned counsel for the appellant that the appeal from order is maintainable.

8. This appeal from order under Order XLIII of CPC is

therefore held to be not maintainable. This will however not preclude the appellant from challenging the impugned order of the trial Court by resorting to the appropriate remedy provided by law.

9. Needless to observe that I have only dealt with the aspect of maintainability and all contentions on merits are kept open.

10. Learned counsel for the respondent submitted that in the event the appellant takes resort to the appropriate remedy in challenging the impugned order, the respondent will not raise any objection to the maintainability of such proceeding on the ground that remedy of appeal from order is available.

11. The appeal from order is disposed of. In view of disposal of the appeal from order, interim application also stands disposed of.

(M. S. KARNIK, J.)