

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**BENCH AT AURANGABAD**

**WRIT PETITION NO.9837 OF 2023**

Ganesh Jagdishlal Manocha  
 and another

.... Petitioners

Versus

Chandramohan Jagdishlal Manocha

.... Respondent

.....

Mr. N.C. Garud, Advocate for the Petitioners

Mr. S.V. Natu, Advocate for the Respondent

.....

**[CORAM : NITIN B. SURYAWANSHI, J.]**

**DATE : 08<sup>th</sup> AUGUST, 2023**

**ORDER :**

1. Petitioners/plaintiffs have filed Regular Civil Suit No.222 of 2021 against the respondent and other defendants for partition and possession. Along with plaint, application Exhibit-5 is filed, which is pending. Since according to the petitioner the respondent/defendant started construction over the suit property, the application exhibit-45 is filed seeking injunction against the respondent/defendant from making construction in the suit property on the ground that the suit property is joint family property. The said application is resisted by the respondent/defendant. The Trial Court has allowed it by order dated 08/05/2023 and restrained the

respondent from making construction in the suit property till disposal of the suit.

2. Being aggrieved by the Trial Court's order, passed below exhibit-45, respondent/defendant has filed Misc. Civil Appeal No.46 of 2023 in the District Court. Petitioners/plaintiffs have raised objection as to the maintainability of the appeal by filing application Exhibit-14. The said application is rejected by the Appellate Court. This order is impugned in the present petition.

3. Heard the learned advocate for the petitioners and the learned advocate for the respondent. Perused the writ petition memo, annexures thereto, impugned order and the citations relied upon by the learned advocates for the petitioners and respondent.

4. The learned advocate for the petitioners submits that the said application cannot be treated to be an application under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure and interlocutory order is passed by the Trial Court, which is not appealable. The appellate Court has committed an error in entertaining the appeal. The impugned order is therefore liable to be quashed and set aside, and it needs to be held that the

Misc. Civil Appeal filed by the respondent/defendant is not maintainable. In support of his submission, he relied on ***Shobha Dinesh Supare and another Vs. Dinesh Mandeorao Supare, 1993 (1) Mh.L.J. 910.***

5. Per contra, learned advocate for the respondent supported the impugned order. He submits that merely because in the application filed by the petitioners/plaintiffs the provisions are not quoted that itself is not sufficient to hold that it is an interlocutory order and Misc. Civil Appeal is not maintainable against him. In support of his submission, he relied on ***Tilaksingh S/o Ramsingh Aulan and another Vs. Pyarrokhan @ Mohd. Inamussuddinkhan S/o. Saifuddinkhan and others, 1996 (2) Bom. C.R. 441.***

6. Admittedly, application Exhibit-45 is filed during the pendency of application Exhibit-5, wherein similar prayer of injunction is made. Perusal of the order passed below Exhibit-45 shows that the respondent is restrained from making construction in the suit property No.1(D) till the disposal of the suit. This order has to be treated as order passed under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, and it cannot be termed as interlocutory order. The appellate Court has rightly held that the order is passed by the Trial Court by

invoking the provisions of Order XXXIX Rule 2 of the Code of Civil Procedure. So far as the maintainability of Misc. Civil Appeal is concerned, it is held by the Appellate Court that Order XLIII Rule 1(r) provides that the appeal shall lie under Rule 1, Rule 2 (Rule 2-A), Rule 4 or Rule 10 of Order XXXIX of the Code of Civil Procedure. It is held that the appeal is governed by Order XLIII of the Code of Civil Procedure, hence, the District Court has jurisdiction to entertain the appeal. The learned District Judge has rightly interpreted the provisions of the Act and has correctly applied the same to the facts of the case.

7. In *Shobha Dinesh Supare and another* (supra), an interlocutory order granting temporary injunction passed in Miscellaneous Appeal preferred under Order XLIII Rule 1(r) was held to be not appealable in view of the provisions of Section 104(2) of the Code of Civil Procedure. This decision is rendered in different facts, and is of no assistance to the case of the petitioners.

8. In *Tilaksingh S/o Ramsingh Aulan and another* (supra), learned Single Judge of this Court has held that, the order granting adjournment on injunction application amounts to refusal of the application, and the appeal is maintainable.

Hence, the same is appealable under the provisions of Order XLIII Rule 1(r) of the Code of Civil Procedure. This decision is squarely applicable to the facts of the present case.

9. There is no illegality or perversity in the order impugned in the present petition. No case is made out by the petitioners to interfere in the impugned order in extraordinary writ jurisdiction. The writ petition being devoid of merit is dismissed.

**[ NITIN B. SURYAWANSHI ]**  
**JUDGE**

S.P. Rane