

RAZIA AMIRALI SHROFF v. M/S NISHUVI
CORPORATION

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CIVILAPPELLATE JURISDICTION : I.A. Nos. 6 of 2012 A
and 7 of 2014 in Civil Appeal No. 5514 of 2012

From the Judgment and Order dated 15.03.2012 of the
High Court of Judicature at Bombay in Appeal (Lodging) No.
662 of 2011 in Notice of Motion No. 3616 of 2010 in Suit No. B
2901 of 2010

WITH

R. P. (C) No. 2246/2015 in C. A. No. 5514/2012

Shekhar Naphde, Pravin H. Parekh, Sr. Advs., Sameer C.
Parekh, Ms. Shubangi Tuli, Amr Dave, Ms. Rukhmini Bobde,
Vishal Prasad (For M/s. Parekh & Co.), Advs. with them, for
the Appellants.

C. A. Sundaram, Harin P. Rawal, R. Venkataramani, Sr. D
Advs., Prashant G. Karande, P. M. Palshikar, Anish R. Shah,
Shivaji M. Jadhav, Yashraj Bundela, Anando Mukherjee, Advs.
with them, for the Respondents.

The following order of the Court was delivered: E

ORDER

M. Y. EQBAL, J. 1. Delay in filing the review petition is
condoned.

2. By this review petition, the petitioners are seeking F
limited review of the judgment dated 8th April, 2015 passed by
this Court in Civil Appeal No.5514 of 2012 and other connected
matters (reported in (2015) 6 SCC 412) to the extent that the
said judgment has not considered or decided the issue raised G
in the petitioners' C.A.No.5514 of 2012 regarding the
petitioners' entitlement to ad-interim relief under Section 9A(2)
of the Code of Civil Procedure (Maharashtra Amendment)
during the consideration of preliminary issue under Section
9A(1) of the Code. H

A 3. A separate interlocutory application being I.A. No.6 of
2012 had been filed praying therein that pending the appeal
this Court may pass appropriate order to restrain the
respondents, their agents, servants or representatives from
carrying out any development or any construction or creating
B any rights, title or interest in favour of any third party.

 4. Mr. Shekhar Naphade, learned senior counsel
appearing for the petitioners, drew our attention to paragraph
7 of the review petition and submitted that review petitioners
C have categorically stated in the petition that they are not seeking
review of the judgment insofar as it interprets Section 9A(1),
CPC (Maharashtra Amendment) but are seeking review only
to the limited extent of non-grant of ad-interim relief under
Section 9A(2) of CPC (Maharashtra Amendment). Mr.
D Naphade, learned senior counsel, further submitted that the
main grievance of the petitioners is that their prayer for ad-
interim injunction was not considered and decided by this
Court.

E 5. On the other hand, Mr. C.A. Sundaram, learned senior
counsel appearing for the respondents, drew our attention to
several orders passed by the High Court and this Court had
submitted that as a matter of fact Notice of Motion pressed by
the petitioners was not granted by the High Court and the Notice
F of Motion is still pending for consideration. The petitioners
have come only for the ad-interim relief before this Court, which
cannot be interfered with at this stage.

 6. We have considered the submissions made by the
G learned counsel appearing for the parties and have also gone
through the orders passed by the High Court and of this Court.
From perusal of the record, it reveals that when the Notice of
Motion (being 3616 of 2010) was moved, the learned Single
Judge of the Bombay High Court passed the following order:

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"The Defendants shall file their Affidavit-in-Reply within two weeks from today. Rejoinder, if any, within two weeks thereafter. A

2. Place the Notice of Motion for hearing and final disposal on 28th February, 2011." B

7. The said order of learned Single Judge dated 24.1.2011 was challenged before the Division Bench of the High Court being Appeal (Lodging) No.662 of 2011 in Notice of Motion No.3616 of 2010. The Division Bench disposed of the appeal holding that the Notice of Motion is pending and, therefore, the learned Single Judge was perfectly justified in declining to make any interim order in favour of the plaintiffs. C
The order dated 15th March, 2012 passed by the Division Bench is quoted hereinbelow: D

"Delay in filing the appeal is condoned.

2. By this appeal, the original plaintiffs make a grievance against the order dated 24th January, 2011 passed by the learned Single Judge of this Court in Notice of Motion No.3616/2010, in Suit No.2901/2010. That Notice of Motion was taken out by the plaintiffs seeking certain interim reliefs to operate during the pendency of the suit. The learned Single Judge by that order has directed the defendants to file reply to the affidavit in support of Notice of Motion and has directed that the of Notice of Motion to be placed for final hearing. E F

3. Grievance of the appellants is that by this order, the learned Single Judge has declined to pass any ad-interim order in favour of the appellants-plaintiffs without giving any reason for doing so. G

4. In order to find out whether the plaintiff would be entitled to any ad-interim order to operate during the hearing of the motion, we heard the learned counsel for H

A the appellants. It is clear from the record that the
defendant has raised objection to the maintainability of
the suit itself and a preliminary issue as to the
maintainability of the suit is also on the question whether
B the suit is filed within the period of limitation, has been
framed. We find that the plaintiffs had admittedly filed a
suit in the year 2007 claiming the same reliefs. During
the pendency of that suit, the present suit was filed.
Thereafter, the 2007 suit was withdrawn but the Court
has not granted any liberty to the plaintiff to file a suit on
C the same cause of action.

5. It was contended on behalf of the plaintiffs relying on
the judgment of the Supreme Court in the case of
D ***Vimlesh Kumari Kulshrestha vs. Sambhajirao and
another*** [(2008) 5 Supreme Court Cases 58] that when
a suit on the same cause of action is filed during the
pendency of the suit, no liberty of the Court is to be
secured while withdrawing the earlier instated suit.

E 6. Our attention on behalf of the defendants was invited
to the provisions of Section 12 of the CPC which lays
down:-

F “Where a plaintiff is precluded by rules from instituting
a further suit in respect of any particular cause of
action, he shall not be entitled to institute a suit in
respect of such cause of action in any Court to which
this Code applies.”

Our attention was also invited to the provisions of Rule 1
of Order II lays down:-

G “Every suit shall as far as practicable be framed so as
to afford ground for final decision upon the subjects in
dispute and to prevent further litigation concerning
them.”

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Our attention was also invited to the provisions of Rule 1 A
Order XXIII which lays down:-

“At any time after the institution of a suit, the plaintiff
may as against all or any of the defendants abandon
his suit or abandon a part of his claim.”

It was contended that when at a point of time there are B
two suits pending based on the same cause of action,
withdrawal of any of the suits without securing liberty from
the Court to institute a fresh suit will result in the plaintiffs
abandoning his claim against the defendants. Therefore, C
if the first suit is withdrawn, the second, the second suit
would not be maintainable. It was also pointed out to us
that even according to the averments in the plaint and
plaintiffs became aware of the Consent Terms in the year D
2000 whereas the suit has been instituted in the 2010.
Therefore, the issue whether the suit is filed within the
period of limitation has been raised. Our attention is
also invited to the portion of the paragraph 12 of affidavit
of the Power of Attorney Holder of the plaintiffs dated E
15th September, 2011 wherein it has been stated that a
revalidated I.O.D. was issued on 19th December, 2007
and defendant has been granted plinth Commencement
Certificate. It was pointed out that the work has
commenced from 2007 and in the earlier instituted suit F
also, there was a Notice of Motion taken out seeking
interim reliefs but during the pendency of that suit, no
interim relief or ad-interim relief was ever granted.

7. As the Notice of Motion is still pending in our opinion,
it will not be appropriate to express any opinion either G
way. Suffice to say that the objection raised on behalf of
the defendant to which we have referred above, has some
substance. It also appears that the commencement
certificate for plinth was granted in December 2007 and

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A neither in the 2007's suit nor in this suit there is any order made in relation to construction. In our opinion, therefore, the learned Single Judge was perfectly justified in declining to make any ad-interim order in favour of the plaintiffs.

B 8. The appeal is, therefore, disposed of."

8. In the facts and circumstances of the case, we do not find any reason to pass an ad-interim order as prayed for by the petitioners/applicants, which has already been declined
C by the High Court. However, we give liberty to the petitioners to move their Notice of Motion No.3616 of 2010, which is pending consideration by the High Court. Needless to say that if the aforesaid Notice of Motion is pressed by the
D petitioners, the same shall be heard while deciding the preliminary issue as contemplated under Section 9A of the Civil Procedure Code (Maharashtra Amendment).

9. With the aforesaid direction, this review petition and the interlocutory application stand disposed of.

E 10. I. A.No.7 of 2014

We have perused the application and also the prayer made therein for initiating proceedings under the provisions of Section 195 and 340 of the Code of Criminal Procedure.
F Considering the entire facts of the case and the order passed today, we do not find any merit in this application. Hence, the same is dismissed.

G Nidhi Jain

Review Petition and I.A. disposed of.