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**(2008) 07 BOM CK 0126**

**In the Bombay High Court**

**Case No :** Civil Application No. 4346 of 2008 in Appeal against Order No. 34 of 2006

Bholeshankar Awas Gruha Nirman Sahakari Sanstha Maryadit APPELLANT  
Vs

Omprakash Malviya and Others RESPONDENT

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**Date of Decision :** 07-07-2008

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 10, Order 39 Rule 2, Order 39 Rule 2A, Order 39 Rule 4  
Constitution of India, 1950 — Article 227

**Citation :** (2008) 5 ALLMR 584 : (2008) 5 MhLj 952

**Hon'ble Judges :** A.B. Chaudhari, J

**Bench :** Single Bench

**Advocate :** R.R. Shrivastava, for the Appellant; A.S. Kilor and M. Shareef, for the Respondent

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**Judgement**

A.B. Chaudhari, J.—Rule returnable forthwith. Heard finally by consent of the parties.

2. When this appeal was taken up for final hearing, learned Counsel for the respondents raised preliminary issue about the maintainability of the appeal and since the issue was contested, the following question of law is framed:

Whether appeal under Order 43, Rule 1(r) against an order rejecting an application under Order 39, Rule 2-A of the CPC is maintainable additionally with the help of Section 104(1)(h) of the Code of Civil Procedure?

3. Learned Counsel for the respondents argued that such appeal was maintainable prior to the coming into force of Bombay High Court Amendment effective from 5-9-1983 but after the said amendment specifically appeal against order under Order 39, Rule 2-A of the CPC has been deleted and therefore appeal is not maintainable. Referring to Section 104(1)(h) of the Code of Civil Procedure, he argued that the same would also not apply as that appeal is against only orders of detention and in the instant case there was no order of

detention but there was rejection of the application itself under Order 39, Rule 2-A of the Code of Civil Procedure.

4. Per contra, Advocate Shri Shrivastava for the applicant vehemently opposed the submission made by Counsel for respondents. He relied on the following decisions:

1. 1992 Mh.L.J. 1503 , Dry Chillies Brokers Association v. Dnyaneshwar Chamat and Ors. 2. Harivilas Madhavprasad Ruia Vs. Viraf Ardeshir Udwadia and Others, 3. Vitthal Shriram Kharbadkar Vs. Pandurang Irbhanji Kadu, , 4. Sopan Bhakre Vs. Uttamrao Bhakre, .

5. He also relied on the provision of Section 104(1)(h) of the CPC and argued that when the appeal is provided u/s 104(1)(h) of the CPC against an order of arrest and detention upon adjudication of breach of injunction, there is no reason why it should be interpreted that there is no appeal against the order, rejecting such application under Order 39, Rule 2-A of the Code of Civil Procedure. According to him, such narrow interpretation put forward by the Counsel for the respondents would not advance the cause of justice and the interpretations which do not advance the cause of justice are required to be discouraged.

6. Having heard Counsel for the rival parties on the above questions of law, in the first place, dealing with the judgments cited by the Counsel for the applicant, I must say that those judgments have absolutely no application in respect of the question involved in the present matter. Hence, I do not find any need to refer to them.

7. Now coming to the relevant provisions, it is seen that the Code of Civil Procedure, 1908 came to be amended by the Central Act 104 of 1976 and Clause "r" of Rule 1 of Order XLIII came to be amended by inserting "Rule 2A" whereby the order passed under Rule 2A of Order XXXIX became appealable. Subsequent thereto, insofar as State of Maharashtra is concerned, Clause "r" came to be substituted by Bombay High Court Notification dated 5-9-1983, as under:

An order under Rule 1, Rule 2, Rule 4, Rule 10 or Rule 11 of Order XXXIX.

It is apparent that in this substituted Clause "r", Rule 2A of Order XXXIX is not mentioned, though it was so inserted in Clause "r" by Amending Act 104 of 1976, making thereby the order passed under Rule 2A of Order XXXIX appealable.

The substantive provision which deals with appeals from orders is contained in Section 104 of Civil Procedure Code. Section 104(1)(h) reads thus:

Orders from which appeal lies:

(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:

(ff) ...

(ffa) ...

(g) ...

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;

(i) ...

Provided that no appeal shall lie against any order specified in Clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

8. Now the effect of the amendment made by Bombay High Court notification dated 5-9-1983 is that provision of appeal against order under Rule 2-A of Order 39 has been deleted and, therefore, no appeal shall lie under Order 43, Rule 1(r) of the CPC against any order made under Rule 2-A of Order 39. But then Section 104(1)(h) of the CPC clearly provides for appeal against order imposing fine or directing arrest or detention in civil prison under any of the provisions of the Code. Now under Rule 2-A of Order 39 an order imposing fine or arrest or detention in the civil prison of a person can be made and, therefore, appeal against order under Rule 2-A of Order 39 will lie only if there is an imposition of fine or direction to arrest or detain in civil prison is made. Section 104(1)(h) of the Code Civil Procedure does not at all provide any appeal rejecting application under Rule 2-A of Order 39 nor there is any other provision providing for such an appeal against order rejecting application under Rule 2-A of Order 39. There is thus clear cut deletion of the provision for appeal against order under Rule 2-A of Order 39 and, therefore, there is no justification for interpreting that appeal should be read to have been provided even against an order of rejection of application under Rule 2-A of Order 39. It is rightly said "Judges not only listen to voices of Legislature but listen to what Legislation does not say".

9. For the above reasons, therefore, I answer the above question in the negative and hold that the appeal against rejection of application under Rule 2-A of Order 39 of the CPC is not maintainable.

10. The learned Counsel for the applicant has filed the Civil Application No. 4346/2008 praying for conversion of this appeal into writ petition and he has also relied on the decision of the Supreme Court in the case of Col. Anil Kak (Retd.) v. Municipal Corporation, Indore and Ors. reported in 2005(7) Scale. The following paragraph from the said decision is relevant:

All that the High Court has done is to treat the petition filed before it u/s 115 of the Code as a proceeding initiated under Article 227 of the Constitution of India. The respondents had filed the revision originally and during the pendency of that revision the High Court appears to have taken a view that an order in an appeal

arising from a proceeding under Order 39, Rules 1 and 2 of the Code, could not be challenged u/s 115 of the Code since the order was in the nature of an interlocutory order. In such a situation, in our view, the High Court rightly decided to permit the revision petitioners before it, to convert the same a proceeding under Article 227 of the Constitution of India.

11. In view of the above decision and in the light of the fact that sufficient time has elapsed after admission of appeal, I allow this application and permit the applicant to convert this appeal into writ petition.

12. Applicant to carry out necessary amendment within a period of two weeks from today. Civil Application stands disposed of. Rule is made absolute in the above terms. No order as to costs.