

**(2011) 08 BOM CK 0211**

**In the Bombay High Court**

**Case No :** Appeal From Order No. 688 of 2011 with Civil Application No. 928 of 2011

Suresh Kakdya Nankar

APPELLANT

Vs

Nahalchand Laloochand Pvt. Ltd. and Others

RESPONDENT

---

**Date of Decision :** 12-08-2011

**Acts Referred:**

**Citation :** (2012) 2 BomCR 463

**Hon'ble Judges :** Bhatia J.H., J

**Bench :** Single Bench

**Advocate :** P.K. Dhakephalkar instructed by H.V. Kode, for the Appellant; R.N. Kachare, for the Respondent

---

## **Judgement**

Bhatia J.H., J.—Rule. Rule returnable forthwith. Heard learned Counsel for the parties.

2. The plaintiff-respondents filed Suit No. 211 of 2011 seeking perpetual injunction restraining the defendants-appellant from committing trespass on the suit property. The plaintiff also took out Notice of motion for temporary injunction of the same on 2nd February, 2011 learned Judge of the City Civil Court, Dindoshi Mumbai granted ex parte ad interim relief in terms of prayer Clauses (a) and (b) with Notice of motion to the defendant-appellant. The notice was made returnable on 4th March, 2011. On 4th March, 2011 none appeared for the defendants inspite of service of notice. Thereafter ad interim relief was made absolute and was directed to continue till disposal of the suit. The defendants thereafter took out Notice of Motion No. 780.11 for setting aside order dated 4th March, 2011 making the ex parte ad interim order absolute and praying for hearing of the Notice of motion of the plaintiff on merits after expediting reply of the defendants. That Notice of motion taken out by the defendants was rejected by an order dated 22nd June, 2011. That order is challenged in the present appeal.

3. The learned Senior Counsel for the defendant-appellant pointed out that as

advised by the Advocate, defendants had preferred Appeal from Order No. 249 of 2011 challenging the ad interim order but, that appeal form order was disposed of on 29th March, 2011 when it was disclosed that ad interim order was already made absolute by order dated 4th March, 2011. According to the learned Counsel defendants acted as per advise given by the lawyer and could not appear on 4th March, 2011 when the original Notice of motion was fixed for hearing before the trial Court. Learned Counsel for the plaintiff-respondents pointed out that on the very next day after the ad interim order was passed the defendants had served caveat and the plaintiff had served copy of Notice of motion with ad interim order to the defendants on 7th February, 2011 and thus the defendants was fully aware that next date in the Notice of Motion was 4th March, 2011. In spite of that the defendants and their Advocate did not appear and therefore defendants was at fault.

4. Factually, learned Counsel for both the parties are correct. But at the same time it has to be borne in mind that many a times parties act as per advise given to them by their lawyers. It appears that defendants was interested in protecting his right and interest since beginning and therefore, he had also filed a caveat. But instead of appearing before the trial Court, as advised by the Advocate, he was made to prefer an appeal before the High Court. In fact, that could have been avoided and defendants could appear before the trial Court. But the fact remains that the appeal against ex parte order could not be heard on merits because ex parte order was already made absolute and the appeal had become infructuous. He also did not get opportunity to contest the Notice of motion for the interim order in view of the circumstances. Possibility of this leading to causing injustice to him cannot be ruled out. Therefore, in my opinion it would be in the interest of justice to allow the defendants to file a reply and contest the Notice of motion taken out by the plaintiff for interim relief instead of shutting the doors at the threshold. Therefore, in the interest of justice appeal is allowed. The impugned order is hereby set aside. The appellant-defendant is permitted to file reply to the Notice of motion taken out by the plaintiff's for interim reliefs within two weeks from this date and the trial Court shall hear and dispose of the Notice of motion afresh on its own merits within four weeks thereafter. Ad interim relief granted by the trial Court shall continue to operate till decision on the Notice of motion.

Rule made absolute accordingly.

As the appeal itself is disposed of, Civil Application No. 928 of 2011 does not survive and stands disposed of accordingly.