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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.69 OF 2013
IN
SUIT NO.1364 OF 2012

Pratima Enterprises & Anr.

..Plaintiffs.

V/s.

Nalin Pravinchandra Shah & Ors.

..Defendants.

Mr.Shreepad Murthy with Mr.Abhishek Patil i/b. M/s.Anshutosh A. Singh for the Plaintiffs.

Ms.Trupti Shetty and Umang Mehta i/b. M/s. Dhruve Liladhar & Co. for Defendant Nos.1 to 5.

CORAM : A.K. MENON, J.

DATED : 17TH JULY, 2015

P.C. :-

1. This Notice of Motion is taken out by the defendants seeking stay of the proceedings in the above suit under the provisions of Section 10 of the Code of Civil Procedure, 1908.

2. Ms.Shetty, learned counsel appearing for defendant No.1 / applicant submitted that it is the defendants' case that they have filed a Suit No.146 of 2010 in this Court against one M/s. Pratima Enterprises, Plaintiff No.1 in the present suit, one Shivery Realty and others some of whom are partners of plaintiff No.1. Some other persons such as Navnit Mohanlal Ruparelia, Samir Pratap Ruparelia and Rajan Laxman Salvi have

been joined as party defendants by way of an amendment.

3. Ms.Shetty submits that suit No.146 of 2010 was filed in this Court on 8th January, 2010 seeking the following reliefs (a) declaration that an Agreement for Sale dated 26th November, 2002 between the plaintiffs and defendant No.1 is not valid, subsisting and / or binding upon the plaintiffs, to cancel the same, (b) the power of attorney (Exhibit-G) be also terminated, and (c) for other reliefs of declaration and injunction to the effect that the defendants are not entitled to act upon the Agreement for Sale dated 26th November, 2002 and the power of attorney. The defendants also seek appointment of a Court Receiver of the property described in Exhibit-A to that plaint. The aforesaid suit filed by defendant No.1 stands transferred to the City Civil Court, Bombay in view of the suit valuation clause paragraph 30 of the plaint disclosing the value at Rs.18,75,000/-.

4. Ms.Shetty, learned counsel for the defendants has strongly contended state that since the defendants' suit is prior in point of time and since this suit is not transferred to the City Civil Court, the subsequent suit is between the same parties and the matter in issue being directly substantial in issue in the defendants' previously instituted suit which is between the same parties and they are litigating under the same title, the present suit is liable to be stayed.

5. Mr.Murthy, learned counsel appearing for the Plaintiff submits that the Motion is misconceived inasmuch as, the parties are

obviously not the same and the matter in the present suit filed by the Plaintiffs are not disputed in the suit filed by the Defendants. In any event, the Defendants in the present suit as follows:-

- (i) Nalin Pravinchandra Shah
- (ii) Jagat Pravinchandra Shah
- (iii) Nirmala Shashikant Zaveri - Deleted
- (iv) Dilip Shashikant Zaveri
- (v) Pankaj Shashikant Zaveri
- (vi) Mukesh Shashikant Zaveri
- (vii) Navnit Mohanlal Ruparelia
- (viii) Suresh Kameshwar Joshi

Plaintiff No.1 is a partnership firm consisting of plaintiff No.2 and defendant Nos.7 & 8 as its partners. There being disputes between the partners, the plaint has been filed only by the firm and one of the partners Samir Pratap Ruparelia. Navnit Mohanlal Ruparelia and Suresh Kameshwar Joshi are joined as party Defendants on account of some dispute. Defendant No.2 in the defendants' Suit No.146 of 2010 is one Shivery Realty. Defendant No.3 in the plaintiffs' suit is the partner of Shivery Realty whereas the present suit does not make any reference to the firm Shivery Realty nor does it describe the status of defendant No.8 in the suit. Suresh Kameshwar Joshi, who is also defendant No.3 in Suit No.146 of 2012 has been sued in his personal capacity and not as partner of Pratima Enterprises or a partner of Shivery Realty. To the extent described above, the two suits are not between the same parties.

6. The present suit is filed for declaration that the agreement for sale dated 26th November, 2002 and the power of attorney of the same date are valid, subsisting and binding upon defendant Nos.1 to 6 and they be directed to perform their obligations under the said agreement by executing a Deed of Conveyance by transferring all rights, titles and interest in the suit property and declaring the purported termination as illegal and claimed for damages of Rs.5 crores. In the alternative, the plaintiffs hereby claim damages of Rs.25 crores with interest thereon at 18% p.a. from the date of filing the suit till realization.

7. Pending hearing of the suit, the plaintiffs seek an order restraining Defendant Nos.1 to 6 from creating any third party rights in the suit property. The plaintiff in this suit has admitted that Shivery Realty is the current beneficiary of the agreement for sale dated 26th November, 2002 executed by plaintiff No.1 firm in favour of Shivery Realty. It is said to be a registered agreement for development dated 27th November, 2006 and in furtherance of the agreement dated 27th November, 2006, the plaintiffs permitted them to do various acts and are stated to be in possession of the suit property. The said Shivery Realty is stated to have spent huge sums of money for surveying, levelling and compounding the suit property and is presently in possession of 5977 Sq. mtrs. of plot being CTS No.39 which has been duly bounded by compound wall.

8. Mr.Murthy, learned counsel appearing for the Plaintiffs submits that the Defendants are not entitled for any relief in the present

motion. Both the Courts are not of concurrent jurisdiction and the City Civil Court, Mumbai does not have jurisdiction to grant relief claimed by the Plaintiffs in this Court. Mr.Murthy submits that it is not merely nature of the subject matter but nature of the controversy that should be the same. The plaintiffs in this suit seek a decree for specific performance against defendant Nos.4 to 6 who have not terminated the agreement and hence there is no question of seeking any declaration in suit No.146 of 2010 of the validity of termination of the Agreement for Sale against defendant Nos.4 to 6. These defendants are stated to have been negotiating with the plaintiffs herein, hence it is not a substantial issue in Suit No.146 of 2010. Only some of the issues are common. Mr.Murthy relied upon the judgment of this Court in ¹**Minocher Behramji Damania V/s. Hema N. Dadachanji and Ors.** and submitted that mere identity of subject matter of the suit is not enough, the Court in earlier suit should also have jurisdiction to grant reliefs claimed in the subsequent suit.

9. Mr.Murthy then relied upon the judgment of the Single Judge of this Court in the case of ²**Sanjay Sales Corporation V/s. Smt. Sunderbai & Ors.** in which the learned Single Judge has held that the field of controversy in the two suits should be directly and substantially the same and not merely the subject matter. In that case, the field of controversy in the subsequent suit related to the issue regarding the right of the applicant as lessee to continue in occupation of a portion of land after acquisition of part of the leased premises. On the other hand, in the earlier suit the issue relates to alleged harassment by the non applicant

1 AIR 1982 Bombay 151

2 1998 A.I.H.C. 1045

with intention to compel the applicant to vacate the lease premises and since the controversy was different, the Court declined to grant any relief.

10. Mr.Murthy then relied upon the decision of the Supreme Court in the case of ³**Pukhraj D. Jain & Ors. V/s. G. Gopalkrishna**, the Hon'ble Supreme Court held that mere filing of an application under Section 10 does not put an embargo on power of Court to examine the merits of matter. The object of the section was to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter.

11. Having heard learned counsel for the parties, I have proceeded to first examine the nature of the suit filed by defendants. The subject matter of the suit is termination of Agreement for sale dated 26th November, 2002 and Power of Attorney of the same date. The suit relates to the land bearing (i) Survey No.309, Hissa No.5 and CTS No.35 admeasuring 477.40 sq. mtrs. (ii) Survey No.309, Hissa No.8 and CTS No.39 admeasuring 5977.00 sq. mtrs. and (iii) Survey No.302, Hissa No.2 and CTS No.7 (part) admeasuring 1863.70 sq. mtrs., situate at Village Dahisar, Taluka Borivali, Dist. Mumbai Suburban. Admittedly, the suit property has been under reservation and defendant No.1 M/s.Pratima Enterprises through its partners and other co-owners defendant Nos.4 to 6 acquired the development rights of the suit property. Defendant No.1 paid to each of the plaintiffs an amount of Rs.17,000/- and on 26th November, 2002 an Agreement for sale was entered into between the plaintiffs and original Defendant Nos.4 to 6 and Defendant No.1. A Power

³ (2004) 7 Supreme Court Cases 251

of Attorney also came to be executed by Defendant Nos.4 to 6 in favour of Defendant No.3.

12. Under the said Agreement, Defendant No.1 granted a licence to the Plaintiffs to enter in the suit property. Defendant No.1 deliberately failed and neglected to implement the suit agreement. It is the case of defendant No.1 that they merely granted a licence to enter the suit property to the plaintiffs and the licence did not constitute handing over of possession. The defendants received certain payments but failed to comply with the terms of the agreement. The plaintiffs allegedly committed breach of the agreement and the suit agreement stood frustrated and the rights and obligations of the parties had come to an end and the parties had treated the same as having come to an end.

13. According to the defendants, the plaintiffs had dishonestly and belatedly attempted to revive the suit agreement. It is the defendants' case that the plaintiffs deliberately failed and neglected to comply and perform the agreement, failed and neglected to pay the balance amount and abandoned the suit agreement and the plaintiffs were not entitled to revive the same and duly cancelled and terminated the suit agreement. The plaintiffs are alleged to have caused irreparable loss to defendant No.1, therefore, defendant No.1 had claimed declaration that the Agreement for Sale dated 26th November, 2002 is not subsisting and binding upon the plaintiffs and that the same be duly cancelled. The defendants further seek a declaration that the agreement has been validly terminated and pray to issue an order of permanent injunction

restraining the plaintiffs from disturbing the possession of defendant Nos.1 & 2. Thus, the first and the second defendants are the plaintiffs in that suit.

14. As far as the present suit is concerned, the same is filed by M/s.Pratima Enterprises and Samir Pratap Ruparelia, a partner, who are defendant No.1 and he is arrayed as defendant No.8 in Suit No.146 of 2010. In addition to defendant Nos.1 & 2, there are five others namely, Dilip Shashikant Zaveri (father of defendant Nos.4, 5 & 6), Pankaj Shashikant Zaveri, Mukesh Shashikant Zaveri, Navnit Mohanal Ruparelia and Suresh Kameshwar Joshi are said to be entitled to undivided share in the aforesaid suit property mentioned in paragraph 9 above. It is the case of the plaintiffs that under a Deed of Conveyance dated 19th November, 1973 the suit property was purchased by 11 persons holding the property in different shares. The plaintiffs state that before the said agreement, the plaintiff firm paid to the defendants an amount of Rs.17,000/- to each of the defendants. Thereafter, the plaintiffs made further payment to the defendants amounting to Rs.11,75,000/-. It is stated by the plaintiff that defendant Nos.1 & 2 received the said cheques but they did not deposit the cheques. It is the plaintiffs' case that plaintiff No.1 firm was entitled to the property under the said Agreement for Sale dated 26th November, 2002 and third party rights have been created in favour of Shivery Realty under a registered Agreement for Development dated 27th November, 2006. Shivery Realty is stated to have spent huge amounts for surveying, levelling and putting up a compound wall around the suit property.

15. The defendants caused a notice to be issued to the plaintiffs on 16th June, 2009 purporting to terminate the agreement dated 26th November, 2002. Meanwhile, defendant Nos.1 & 2 filed a suit No.146 of 2010 for declaration as aforesaid and in the Notice of Motion bearing No.199 of 2010 taken out in the suit, defendant Nos.1 & 2 obtained ex-parte ad-interim order. Upon receipt of the order, the plaintiffs and defendant Nos. 7 & 8 had filed their affidavits stating therein as to how defendant Nos.1 & 2 have practised a fraud upon the parties. Meanwhile, the plaint came to be amended and defendant Nos.3 to 6 were added as parties.

16. Defendant Nos.7 & 8 have strongly disputed the claim of defendant Nos.1 & 2 in Suit No.146 of 2010. The second suit is filed in 2012. Subsequently, it appears that during the hearing of Notice of Motion 199 of 2010 the dispute between the parties came to be referred to an Arbitrator, however, the learned Arbitrator withdrew from the arbitration and the proceedings came to be terminated. The plaintiffs counterclaim could not be pursued in view of the termination of the said arbitration proceedings and, therefore, the filed the present suit for a declaration that the Agreement for Sale dated 26th November, 2002 and the power of attorney of the same date are valid, subsisting and binding upon defendant Nos.1 to 6 and they be directed to perform their obligations under the aforesaid agreement by executing a Deed of Conveyance by transferring all right, title and interest in the suit property.

17. According to the Plaintiffs, they have performed their obligations by paying all monetary considerations as agreed and are entitled to remain in possession and create third party rights in respect of the suit property. Some of the defendants, namely defendant Nos.3 to 6 who are also defendant Nos.4 (d), 5 & 6 in Suit No.146 of 2010 have not terminated the agreement and they have decided to convey the right, title and interest in favour of the plaintiffs. In these circumstances, the claim in the present suit is for specific performance of agreement dated 26th November, 2002 and in the alternative for damages. The notice for termination is issued on 16th June, 2002 and the suit is filed within a period of three years on or about 18th May, 2012. The notice of purported termination is 16th June, 2009 and filed Suit No.146 of 2010 on 9th January, 2010 whereas the present suit is filed on 18th May, 2010.

18. As seen from the above narration, apart from the fact that some of the parties to the suit are different, the first suit is filed for declaration purporting termination of the Agreement for Sale and the Power of Attorney and for cancellation and to protect, possession of their property. The second suit seeks a decree of specific performance and for restraining the defendants from disturbing the Plaintiffs' possession. Defendant Nos.1 to 5 have also contested the factual position of possession as to the property.

19. The only common factor is that the suit property is common in both the suits, however, the nature of controversy is different. In the first suit, that the termination is valid and proper and for consequential

relief. Whereas the suit second is for declaration that the agreement is valid subsisting and binding and for specific performance and in the alternative for damages. It appears that the first suit is filed as a pre-emptive move and in anticipation of the plaintiffs' suit. In my view, Mr. Murthy's submissions deserve to be accepted it is not merely identical subject matter of the controversy that has to be looked at, I am in agreement with the decision of our Court in Sanjay Sales Corporation (supra) wherein it has been held that field of controversy in the two suits should be directly and substantially and not merely the subject matter. For invoking section 10 in the facts of the present case, the whole of the subject matter in both the proceedings and the field of controversy should be identical. Merely because the disputes are arising from the same transaction does not mean that the matters in issue in both the matters is directly and substantially the same. It is however clarified that the pendency of this Suit No.1364 of 2012 will not affect the progress of Suit No.146 of 2010 pending in the City Civil Court. In the circumstances, I am of the view that the defendants are not entitled to any relief in the present Notice of Motion and the Notice of Motion must fail. In the circumstances, the following order is passed:-

- a) Notice of Motion is dismissed.
- b) There will be no order as to costs.

(A.K.MENON, J.)