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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 864 OF 2015
IN
SUIT NO. 2866 OF 2009

Benito Anthony D'Souza & Ors.	...Applicants
<i>In the matter between</i>	
Monica Mary Mendonca & 7 Ors.	...Plaintiffs
<i>Versus</i>	
Anthony J. D'Souza & 4 Ors.	...Defendants

Mr. H.S.S. Murthy, *with A.P. Steenson, for the Plaintiffs.*
Mr. M.S. Menon, *with Mr. A.A. Siddique, i/b M/s. A.A. Siddique & Associates, for the Defendants.*
Mr. Karl Tamboly, *with Mr. Jayesh Rathod, i/b Dhiren Shah, for Respondents Nos. 1 and 2.*

CORAM: G.S. PATEL, J
DATED: 3rd July 2015

PC:-

1. Heard. This matter has unfolded in the most unusual manner. This is a Notice of Motion filed by the Defendants seeking reliefs against the Plaintiffs in a partition Suit. At the very beginning, I must note that other than this Notice of Motion, the

Defendants' themselves have filed no Suit, either for partition or to impeach the documents in question.

2. Prayer clause (b) of the present Notice of Motion reads thus:

“(b) That the Hon’ble Court be pleased to pass an Order directing each of the Plaintiffs and Respondent Nos. 1 to 4 to deposit the total consideration amount of Rs. 75,00,000/- (Repees Seventy Five Lakhs) as received by each one of them towards the sale of the Suit properties to Respondent Nos. 1 to 4 under the various Deeds of Conveyance dated (1) 31.12.2010, (2) 27.10.2010, (3) 30.04.2011 and the Agreements dated 02.04.2012 and 22.04.2012.”

3. It is clear that the Defendants seek to assail three registered conveyance deeds of the years 2010 and 2011 and two agreements, both of the year 2012. The present Notice of Motion is filed on 15th June 2015. It is directed *inter alia* against four Respondents, all parties to one or more of the conveyances and the agreements that are the subject matter of prayer (b) of this Notice of Motion. In the Affidavit in Support of the Notice of Motion, there is not a single mention or explanation as to this delay, silence and inaction on the part of the Defendants in filing this Notice of Motion.

4. To a query from the Court as to whether the Plaintiffs or the Respondents to the Notice of Motion were in breach of any order of injunction of any Court when entering into or executing these three conveyances and two agreements, learned Advocate for the

Defendants drew my attention to Exhibit “B” to the Affidavit in Support of the Notice of Motion. This is an order dated 25th April 2012 in an Appeal filed in another Notice of Motion in this very Suit. That Notice of Motion was filed by the Plaintiffs. It seems that an order was passed by the learned Single Judge on the Notice of Motion, one filed by the Plaintiffs. In Appeal, the impugned order was set aside and the Appeal Court directed as follows:

“3. Considering the same, this appeal is disposed of by passing the following order:

- (a) The impugned order dated 07.05.2010 passed in the Notice of Motion No. 1496 of 2009 is set aside. The learned Single Judge shall decide the said Notice of Motion *de novo* after hearing both the sides.
- (b) Till the learned Single Judge decides the said Notice of Motion, there shall be ad-interim injunction restraining the Appellants and Respondents to create third party interest in any manner as in a partition suit, the status of both the sides is in the nature of Plaintiffs. The learned Single Judge may decide the Notice of Motion after hearing both the sides regarding the prayers made in the Notice of Motion. It will be open to the Plaintiffs to request the learned Single Judge by way of appropriate application to pass a preliminary decree, if required, as it is a suit for partition.”

5. This order is dated 25th April 2012. From a bare reading of this order, it is clear that the injunction directed is prospective and cannot possibly apply to any acts done or completed prior to that date. Every one of the documents referred to in prayer clause (b) of

the present Notice of Motion is prior to the date of the order of the Appeal Court. Therefore, it is entirely incorrect to say or even suggest that the Plaintiffs and the Respondents were in breach of this injunction when they executed any of the documents.

6. As I have noted earlier, the Defendants themselves have filed no Suit. It is true that in a Suit for partition every party is a Plaintiff and every party is a Defendant, but this does not mean and is not to be construed to mean that the Defendants have a licence to move in a belated fashion or that they have no obligation to be diligent in the protection of their rights.

7. This Notice of Motion was one of several interim proceedings that was listed today under the caption “directions”. An Affidavit in Reply was tendered by Mr. Murthy, learned Advocate for the Plaintiffs. Mr. Tamboly, learned Advocate for the Respondents, states that his Attorneys were given notice only yesterday that this Notice of Motion was being mentioned today. It is for this reason he has not been able to file an Affidavit in Reply. Copies of the Notice of Motion and the Affidavit in Support were served on them a few days ago.

8. No request is made for time to file an Affidavit in Rejoinder. Rather, learned Advocate for the Defendants insisted that the present Notice of Motion be taken up and that an order be passed on it, citing grave urgency. To a query from the Court as to why there was no explanation in the Affidavit in Support for the delay in filing the present Notice of Motion, the response was that the query was ‘unexpected’. This is no answer at all.

9. There is no question of appointing a Receiver on the case made out by the Defendants in the Notice of Motion, nor of granting relief in terms of prayer clause (b). As regards prayer clause (c), this is a prayer for a direction regarding rent/compensation recovered from the tenants and occupants of the suit property. I do not see what bearing it has on the documents that are subject matter of prayer clause (b). In any case, in a partition Suit necessary directions in regard to taking of accounts will necessarily have to be passed at some stage in these proceedings. It is not necessary, in my view, to pass these directions at this stage. It is made clear that the Defendants' contentions in regard to the details of rent/compensation are not rejected by virtue of this order and that all contentions in that behalf are kept open.

10. Prayer clause (d) demands an enquiry into the conduct of the Plaintiffs; and prayer clause (e) is in the nature of a decree for delivering up the registered deeds of conveyance dated (1) 31.12.2010, (2) 27.10.2010, (3) 30.04.2011 for cancellation. Obviously, prayer clauses (d) and (e) cannot be granted.

11. The Notice of Motion is without merit. It is dismissed with no order as to costs.

(G. S. PATEL, J.)