

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 45 OF 2015

WITH

NOTICE OF MOTION NO. 641 OF 2014

IN

SUIT NO. 3526 OF 1999

M/s. G.E. Money Financial Services Ltd.

...Plaintiff

Versus

K.C. Sheth & Ors.

...Defendants

Mr. Sameer Pandit, a/w Mr. Abhijeet Sodikale, i/b Wadia Ghandy & CO., for the Plaintiff.

Mr. S.M. Sharma, i/b M/s. M.P. Vashi & Asso., for the Applicants in NMS/45/2014.

Mr. Nitesh Shirke, a/w Mr. A. Shirke, for the Applicant in NMS/641/2014.

CORAM : S.C. GUPTE, J.

DATE : 26th February 2016

P.C. :

1 . These two Notices of Motion have been taken out by the respective Applicants for setting aside a final Judgment and decree dated 9th December 2013 passed by a learned Single Judge in the

present Suit. The Motions contain more or less identical facts. Notice of Motion No. 641 of 2014 is treated as a representative case for considering the Motions.

2. The present Suit is filed by the Plaintiff as a Suit on mortgage seeking a decree of Rs. 1,29,64,666/- together with interest and for sale of the mortgaged property and application of the sale proceeds towards the Plaintiff's decretal dues. The mortgage property consists of a flat, namely, Flat No. 15 in the building known as 'Sun Flower', Cuffe Parade, Mumbai together with the shares relating to the said flat in Cuffe Parade Ravi Kiran Co-operative Housing Society. The Plaintiff was put in possession and occupation of the suit flat by Defendants No. 2 and 3 under a leave and licence agreement for 36 months on payment of licence fees. (Defendants No. 2 and 3 are coparceners in Defendant No. 1 HUF, who owned the suit flat.) Towards this leave and license agreement, the Plaintiff was required to deposit a total sum of Rs. 1,00,00,000/- with the Defendants, i.e., 68,50,000/- bearing interest at the rate of 16 per cent per annum and another deposit of Rs. 31,50,000/- with no interest. Subsequent to this leave and licence agreement, on 14th July 1994, Defendants No. 1 to 4 created an equitable mortgage in respect of the suit flat in

favour of the Plaintiff by depositing the title deeds by way of security. The Defendants also executed general Power of Attorney in respect of the flat in favour of the Plaintiff. By its letter dated 25th April 1997, the Plaintiff expressed its intention to vacate the suit flat on expiry of the licence period. The Plaintiff also requested Defendants No. 1 to 4 to refund the amount of deposit and offered to surrender the possession of the flat. Despite this request and several reminders, which followed it, Defendants No. 1 to 4 did not refund the amount of deposit. They instead informed the Plaintiff that they were unable to return the deposit, and suggested that the Plaintiff might continue to occupy the suit flat as a licensee. The Plaintiff, however, insisted on refund of the deposit. The Defendant, however, failed to refund the deposit. The Plaintiff, in the premises, filed the present Suit for enforcement of the mortgage by an order of sale of the mortgaged property.

3. In a Notice of Motion taken out by the Plaintiff in the present Suit, namely, Notice of Motion No. 2040 of 1999, consent terms were arrived at between the parties. Under these consent terms, the Defendant agreed to sell, transfer and assign the suit flat to the Plaintiff or its nominees in accordance with the Memorandum

of Compromise dated 20th March 2003. The Memorandum of Compromise was placed on record along with consent terms by this Court and the Motion was disposed of in terms of consent terms. After dismissal of the Motion, and despite passage of about 10 years after filing of the consent terms, parties have not taken any steps for sale of the flat. When the Suit came up for final hearing before this Court, none of the Defendants appeared in the Suit. No Written Statement was filed and in the premises, the Suit was transferred to the category of undefended Suits. A learned Single Judge of this Court by an order and decree dated 9th December 2013 accepted the Plaintiff's Affidavit in lieu of examination-in-chief and admitted the documents placed by the Plaintiff in evidence and decreed the Suit in terms of prayer clauses (a), (b) and (c). Prayer clause (a) related to the money decree, as noted above, whereas prayer clauses (b) and (c), respectively, referred to the order of sale and declaration in connection with the mortgage.

4 . The Applicants in the present Notices of Motion claim to be coparceners of Defendants No. 2 to 4 in Defendant No. 1 HUF. It is the case of the Applicants that the Applicants were not aware of the transaction between the Plaintiff and Defendants No. 1 to 4. It is

submitted that Defendant No. 2, who was a Karta of Defendant No. 1 HUF, along with Defendants No. 3 and 4 was managing the affairs of the HUF and particularly, the business transactions between the Plaintiff and the Defendants. It is submitted that originally the father of the parties was a Karta, but after his death, disputes arose between coparceners, as a result of which a partition Suit came to be filed between the coparceners Defendants No. 2 to 4 and the Applicants wherein are parties to the Suit. That Suit was filed in Madras High Court and claimed partition of the family business and assets. It is submitted that the suit flat is shown as one of the properties in the schedule of joint family properties produced in this Suit. It is submitted that Defendants No. 2 to 4 chose not to file any Written Statement on account of a collusion between the Plaintiff and Defendants No. 2 to 4. It is submitted that the alleged Memorandum of Understanding or Compromise of 20th March 2003 was not signed by the Karta of the HUF, but it was signed only by one coparcener, who had no right to execute, transact or sign on behalf of the HUF. The Notices of Motion are said to be taken out under the provisions of Order IX Rule 13 of the Code of Civil Procedure, 1908.

5. At the hearing of the Notices of Motion, Mr. Vashi,

learned Counsel appearing for the Applicants submitted that the Motions may be considered, alternatively, under Order XXIII Rule 3A or Section 47 of the Code of Civil Procedure, 1908. He submitted that the Suit was in effect a compromise between the parties by entering into consent terms and that since his clients, who were also coparceners along with Defendants No. 2 to 4 in Defendant No. 1 HUF, were not consulted whilst compromising the Suit, the only remedy they have is to move this Court a Notice of Motion by virtue of Order XXIII Rule 3A of the Code of Civil Procedure, 1908. Alternatively, he submitted that the Notices of Motion may be treated as applications for determining questions between parties arising in connection with the Suit after the decree was passed or their representatives and which concerned execution, discharge or satisfaction of the decree, under Section 47 of the Code of Civil Procedure, 1908. Curiously enough, he did not argue the case of Order IX Rule 13 of the Code of Civil Procedure, 1908, which appeared to be the original provision under which the Motions seem to have been moved.

6. Be that as it may, at the outset, it must be noted that a Motion, such as the present, does not lie at the instance of a third

party for setting aside a decree passed in the Suit, under Order IX Rule 13 of the Code of Civil Procedure, 1908. As held by the Supreme Court in **Ram Prakash Agarwal & Anr. Vs. Gopi Krishan (dead through LRs.) & Ors.**¹, an application for setting aside the decree does not lie at the instance of a party, who was not a party to the Suit. Such Application is not even maintainable under Section 151 of the Code of Civil Procedure, 1908. The statutory provision under Order IX Rule 13 of the Code of Civil Procedure, 1908 refers to the Defendant in an action, who alone can move an application under Order IX Rule 13 of the Code of Civil Procedure, 1908. A person, who was not a party, despite the fact that he may be interested in the Suit, is not entitled to move an application under this Rule and such order cannot be passed at his instance even under Section 151 of the Code of Civil Procedure, 1908.

7. Secondly, it must be noted that the decree is passed not under Order IX of the Code of Civil Procedure, 1908 in the absence of the Defendants. The Defendants did not file any Written Statement to the Suit. Since there was no Written Statement, the Suit was set down for hearing as an undefended Suit. The Judgment and Decree pronounced in the Suit is, accordingly, as a decree passed under

¹ (2013)11 SCC 296

Order VIII Rule 10 of the Code of Civil Procedure, 1908 and not an ex parte decree under Order IX Rule 6 of the Code of Civil Procedure, 1908. As held by the Division Bench of our Court in the case of **Dhanwantraï R. Joshi & Ors. Vs. Satish J. Dave & Ors.**², the remedy in such case is not to file an application for setting aside the decree, but to file an appeal against such decree.

8. The decree passed by this Court on 9th December 2013 cannot be said to be a decree passed on compromise between the parties. The original compromise was contained in Consent Terms dated 24th March 2003, which were filed in the Notice of Motion and which required sale of the suit flat to the Plaintiff. That agreement, however, appears to have been given a go by, as noted by this Court in the decree passed on 9th December 2013. This Court passed a decree in the mortgage Suit under Order VIII Rule 10 of the Code of Civil Procedure, 1908, as I have noted above. Therefore, there is no question of setting aside that decree under the provisions of Order XXIII Rule 3A of the Code of Civil Procedure, 1908.

9. Learned Counsel for the Applicants alternatively submitted that the present Notice of Motion may be considered as an application of Section 47 of the Code of Civil Procedure, 1908. He

² 1999(1) Bom.C.R. 97

submitted that as held by the Supreme Court in case of **Sushila Devi Vs. Ran Veer Singh & Anr.**³, it was not necessary for the Applicants to wait until the decree in the Suit is, in fact, sought to be put into execution against them. He submitted that since the application requires the Court to determine questions as between the parties arising out of a decree passed by this Court and which would anyway concern the execution of the decree, the Applicants are within their rights to make the present application under Section 47 of the Code of Civil Procedure, 1908. The present Application is to set aside a decree passed by this Court. Such application could obviously not be made before the executing Court. The application also could not be made before a Court exercising co-ordinate jurisdiction by treating the decree as a nullity or non est. Here is a case where the Applicants at best could be said to be aggrieved by a decree passed in the Suit. The decree is obviously passed under Order VIII Rule 10 of the Code of Civil Procedure, 1908. If it is their case that the HUF was not properly represented before the Court and as members of the HUF, they have a grievance against the decree, their only remedy is to go in appeal challenging the decree. They cannot come before a Court of co-ordinate jurisdiction or executing Court and seek an order of that

³ (2009)16 SCC 244

Court on the basis that the decree is a nullity or non-est.

10. Learned Counsel for the Applicants submitted that the decree passed in the present Suit in a final decree passed without a preliminary decree. Again if the Applicants have any grievance on this score, that is a matter of an appeal. The decree cannot be described as a nullity or non-est on that ground.

11. Viewed from any point of view, the applications are clearly not maintainable. Even otherwise, the Applicants' case lacks any bona fides. The entire case of the Applicants is premised on averments that they were not aware of the transaction between the Plaintiff and Defendants No. 1 to 4, based on which the present Suit was filed. The documents on record clearly indicate that the Applicant before the Court in Notice of Motion No. 641 of 2014 not only knew about the transaction, but was himself a signatory as a witness to the documents drawn between the parties, namely, the leave and licence agreement, the deposit agreement and the memorandum of equitable mortgage.

12. It is also pertinent to note that the Applicants have never raised any dispute in the correspondence or otherwise with respect to the suit transaction. Even in the partition suit, which is

pending before the Madras High Court, there is no pleading on the part of the Applicants challenging the Suit transaction either on the ground that the coparceners, who entered into the transaction, did not have the requisite authority or that the transfer was not for the benefit of the HUF. In the premises, even on merits, there is hardly any case for the Applicants.

13 . In the premises, there is no merit in the Notices of Motion. The same are dismissed, with costs.

14 . At one stage, during the course of hearing, it was suggested by learned Counsel for the Applicants that there was a restraint order passed by the Madras High Court in respect of the suit property. Perusal of the order of the Madras High Court indicates that the suit property, which admittedly is a mortgage property, has been carved out of the injunction order. (In fact, all mortgage properties belonging to Defendant No. 1 HUF have been carved out so.) The Plaintiff/decree-holder may, accordingly, deal with the suit flat in accordance with law.

[S.C. GUPTE, J.]