

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO. 682 OF 2017
WITH
CIVIL APPLICATION NO. 891 OF 2017
IN
APPEAL FROM ORDER NO. 682 OF 2017**

Hazal Louis Gonsalves & Ors. ...Appellants

Versus

Impact Construction Company & Ors. ...Respondents

**WITH
APPEAL FROM ORDER NO. 683 OF 2017
WITH
CIVIL APPLICATION NO. 892 OF 2017
IN
APPEAL FROM ORDER NO. 683 OF 2017**

Hazal Louis Gonsalves & Ors. ...Appellants

Versus

Impact Construction Company & Ors. ...Respondents

**WITH
APPEAL FROM ORDER (ST.) NO. 26554 OF 2017
WITH
CIVIL APPLICATION (ST.) NO. 26556 OF 2017
IN
APPEAL FROM ORDER (ST.) NO. 26554 OF 2017**

Impact Construction Company

...Appellant

Versus

Hazal Louis Gonsalves & Ors.

...Respondents

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Mr.Jitendra Kumar G. Damani for the Appellants in AO Nos. 682 of 2017 and 683 of 2017.

Mr.Uday P. Warunjikar i/b. Mr.Ashish Dubey for the Appellant in AOST No. 26554 of 2017 and for Respondent No.1 in AO Nos. 682 of 2017 and 683 of 2017.

Mr.Yogesh Dabke,AGP for the State/Respondent No.2 in AO Nos. 682 of 2017 and 683 of 2017.

Mrs.Madhuri More for Respondent Nos. 3 to 5/ Municipal Corporation.

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CORAM: MRS.MRIDULA BHATKAR, J.
DATED: DECEMBER 18, 2017

P.C. :

1. There are cross Appeals filed against the same parties. It appears that the issue involved in all these Appeals from Order is one and the same, all these Appeals are disposed of by a common order.

2. Appeal from Order No. 682 of 2017 is directed against the order dated 23rd June, 2017 passed by the learned Judge, City Civil Court, (Borivali Division), Dindoshi in Notice of Motion No.

1560 of 2013 in Notice of Motion No. 566 of 2014 in S.C.Suit No. 1743 of 2013 thereby partly allowing Notice of Motion No. 1560 of 2013 and dismissing Notice of Motion No. 566 of 2014.

3. Appeal from Order No. 683 of 2017 is directed against the order dated 23rd June, 2017 passed by the learned Judge, City Civil Court, (Borivali Division), Dindoshi thereby dismissing Notice of Motion No. 3024 of 2015.

4. The appellants/plaintiffs in Appeal from Order Nos. 682 of 2017 and 683 of 2017 have filed the two suits. One suit is for injunction and declaration and other suit is filed for injunction, declaration and cancellation of the sale deed, which was executed between defendant no.1 and defendant nos.3 to 13 in respect of the suit plots bearing C.T.S. No. 359, Survey No. 76, Hissa No. 8, C.T.S. No. 360 in village Malvani, Tal. Borivali, Mumbai.

5. It is the case of the appellants/plaintiffs that one Gracious family was the owner of Survey No. 76, Hissa No. 8 and from that family one Pascal Thomas Gracias and John Joseph Gracias, who are the legal heirs of original person, sold the land in the year 1954

to the forefather of the appellants/plaintiffs. The names of the plaintiffs are appearing in Survey No. 76, Hissa No. 8 of the said land. However, on the property registered card, the name of one Tereza Santya was shown as the holder of the land bearing C.T.S. No. 360. It is the case of the appellants/plaintiffs that Santya Tereza died on 12th April, 1945 and thus, her name was fraudulently shown. After the death of the original vendors Pascol Thomas Gracias, who died in the year 1963 and John Joseph Gracias, who died in the year 1966, the question of Gracias being in possession in the year 1974 could not arise and the names of their legal heirs cannot be mutated as they have no right to challenge the conveyance. The present defendants are not bona fide purchasers and they have no right and title in the suit property, as the present appellants/plaintiffs are the owners of the suit property.

6. According to the defendants, they have entered into Development Agreement on 2nd March, 2005 in respect of the suit land and thereafter, they have executed Deed of Conveyance in the year 2011. It is the case of the defendants that they are not aware about the family tree and history of the plaintiffs, but they

are bona fide purchaser and getting suit plot amalgamated in other plots. They have submitted the layout to the Municipal Corporation and the Municipal Corporation has approved the layout so also approved the plan of the construction of the buildings on the total amalgamated area.

7. Learned counsel for the appellants/plaintiffs has submitted that C.T.S.No. 360 is amalgamated and not C.T.S. No. 359. He has further submitted that Survey No.76, Hissa No. 8 was never subdivided by the order of the Collector and, therefore, the appellants have challenged the construction of defendant no.1 so also have challenged the Development Agreement and Deed of Conveyance, which have taken place between the present defendants and their predecessor in the title. He has further submitted that the plaintiffs have filed the Appeal before D.I.L.R., Mumbai against the City Survey Officer and one Smt. Clara Volter D'silva, who is the grant daughter of Tereza Santya. The said Appeal was allowed by the D.I.L.R., Mumbai vide order dated 28th September 2017 and directed the City Survey Officer, Mumbai to enquire into the issue of subdivision and also about the entry made in respect of C.T.S. Nos. 359 and 360. The City Survey

Officer, Mumbai has partly allowed the appeal by order dated 31st November, 2017 and cancelled the entry of the name of Survey Nos. 359 and 360 in the revenue record. He has further submitted that in view of this order, now the entry of Tereza Santya is cancelled and hence, the defendants have no right and title in the suit plots.

8. Per contra, Mr. Warunjikar, learned counsel for the appellant in AOST No. 26554 of 2017 and for respondent No.1 in AO Nos. 682 of 2017 and 683 of 2017, who is original defendant no.1 in the Suit, has submitted that he has also filed an appeal against the order dated 23rd June, 2017 thereby restraining defendant no.1 from creating third party right in respect of the suit property and directing to maintain status quo. He has further submitted that the appellant/respondent no.1 has acquired the suit plot bearing CTS No. 360 by registered Development Agreement of the year 2005 and thereafter, has executed Deed of Conveyance in the year 2011 and thus, he is a bona fide purchaser of the suit plot. He has further submitted that the appellants/plaintiffs have deliberately filed the Suits at very late stage. Defendant no.1 had already constructed four buildings, comprising of A and B Wings upon the

suit plot and the Municipal Corporation has approved the amalgamation of C.T.S. No. 360 in other adjacent plot and, therefore, the construction of the buildings is as per sanctioned plan. He has further submitted that many flats were constructed in these 11 to 12 storied buildings and the flats were sold out to the respective purchasers and, therefore, third party interest and right is already created in favour of the flats purchasers. He has further submitted that defendant no.1 has spent lot of money in constructing the buildings and, therefore, at this stage, such order of restraining defendant no.1 from creating third party interest in those flats will cause irreparable loss and hardship to defendant no.1. He has further submitted that the appellants/plaintiffs have filed two suits against the same defendants in respect of the same land and considering the reliefs claimed in those suits, later suit is not maintainable. He has further submitted that the plaintiffs have not obtained permission of the Court under Order 2 Rule 2 of the Code of Civil Procedure for filing the second suit. He has further submitted that the order of dismissal of Notice of Motion No. 3024 of 2015 in later suit i.e. S.C.Suit No. 2272 of 2015 is correct and not to be disturbed.

9. Heard submissions. Perused the pleadings of both the parties and the orders passed by the City Survey Officer, Mumbai and D.I.L.R., Mumbai in respect of subdivision of original survey no. 76, Hissa No. 8. In view of the order passed by the City Survey Officer, Mumbai the entry of Tereza Santya is cancelled i.e. the first original entry where the plot is shown subdivided and the name of Tereza Santya is shown as an owner of the plot bearing C.T.S. No. 360. However, the plaintiffs have purchased the original plot in the year 1954. It appears that there was no question of subdivision in the absence of the order from the office of the Collector. It is the case of the plaintiffs that the plot was never subdivided, but entry of Tereza Santya on the plot bearing C.T.S. No. 360 was incorrect. If the original entry is held as illegal, then further transactions which started from Tereza Santya or her legal heirs are without appropriate title and are hollow.

10. Learned counsel for defendant no.1 has further submitted that defendant no. 1 should have been heard by the City Survey Officer or D.I.L.R. before passing such orders. However, defendant no.1 may still challenge or ask for audience before the appropriate authority.

11. Be that as it may, defendant no.1 himself has spent huge money in constructing the buildings and also construction of 17 to 18 more buildings work are complete in a short period of time. However, the plaintiffs did not bother to approach the Court for stay well in time. Thus, on the ground of laches, the order of not creating third party right in the suit property will go against the flats purchasers, who have invested money in the property. Therefore, the order of status quo needs to be modified and the following common order is passed in Appeal No. 682 of 2017 and Appeal from Order (St.) No. 26554 of 2017:

- (i) Defendant no. 1 to maintain status quo in respect of the open plot bearing C.T.S.No. 360.
- (ii) Defendant no.1 not to create any third party right in the open plot bearing C.T.S.No. 360 and not to develop the said portion so also not to sell or transfer or alienate in any manner the said open plot in favour of any third party till the hearing of the Suits. If defendant no.1 wants to create third party

right in the said plot, then it is to be created only with the permission of the Court.

12. With this, Appeals from Order are disposed of. Civil Applications are also accordingly disposed of.

(MRIDULA BHATKAR, J.)