

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

**APPEAL NO. 330 OF 2017
IN
NOTICE OF MOTION (SUIT) NO. 224 OF 2011
WITH
NOTICE OF MOTION NO. 1939 OF 2017
IN
APPEAL NO. 330 OF 2017**

Suresh Harikishan Mirchandani Petitioner

Vs.

Deepak Harikishan Mirchandani Respondents
and 4 others

Mr. Sanjay Kothari a/w Mr. D. K. Pradhan i/b Avinash V. Joshi for the appellant.

Mr. Surya Das i/b Ramanand R. Sharma for the respondent no. 1

Mr. Kunal Bhanage a/w Mr. Akshay Pawar for respondent nos. 3 & 4.

**CORAM : SMT. VASANTI A. NAIK,
SARANG V. KOTWAL, JJ.**

DATE : DECEMBER 11, 2017.

P.C.

By this intra court appeal, the appellant-original defendant no. 3 has challenged the order dated 06/04/2017 passed by the learned Single Judge in notice of motion no. 224 of 2011 in suit no. 126 of 2011.

The appellant is the original defendant no. 3. The respondent no. 1 had filed a suit bearing suit no. 126 of 2011 for a declaration that he has 3/5th share in suit property which comprises of 2 flats at Bandra, bearing flat nos. 401 &

402. According to the respondent no.1-original plaintiff, the flats initially belonged to the mother of the parties namely Roopmati and on her death, the respondent no. 1-plaintiff was entitled to the $\frac{3}{5}$ th share in the two flats. The claim of the respondent no. 1 was denied by the defendants including the appellant-defendant no. 3. In the said proceedings, a notice of motion was moved by the respondent no. 1-plaintiff for an injunction restraining the appellant-defendant no. 3 from alienating the suit property or creating third party interest therein. In the said notice of motion, the prayer for grant of ad-interim relief was rejected and it was directed that the notice of motion would come up for hearing in the normal course. During the pendency of the said notice of motion, the appellant-defendant no. 3 entered into an agreement to sell flat no. 402 to Mr. Javed Zaveri for total consideration of Rs. 2 Crores & 50 Lacs. Since the appellant-defendant no. 3 had entered into an agreement for alienating and transferring the said property viz. flat no. 402, the plaintiff sought a direction restraining the appellant-defendant no. 3 from alienating the suit property or creating third party interest therein. Certain other ancillary prayers were also made. The learned Single Judge by an order dated 06/04/2017 had granted a temporary injunction in favour of the plaintiff, restraining the defendant no. 3-appellant from creating any third party rights in flat nos. 401 & 402. Since the learned Single Judge found that flat nos. 401 & 402 were not interconnected and the wall between two was removed, the learned Single Judge directed that the wall between flat nos. 401 & 402 be erected and the expenses for the construction of the same should be borne by the appellant-defendant no. 3. The said order of the learned Single Judge is appealed against.

On hearing the learned counsel for the parties and on a perusal of the order appealed against, it appears that there is no scope for interference with the order dated 06/04/2017 except to the limited extent that the expenses for erecting the wall should be equally borne by the original plaintiff and the

appellant-defendant no. 3. No doubt, when the appellant had filed the notice of motion (L) no. 2624 of 2016 for seeking a temporary injunction against the appellant-defendant no. 3, thereby restraining her from alienating the suit property or creating third party interest therein the learned Single Judge had declined to grant any ad-interim relief in the said notice of motion, however, we find that at the relevant time, the defendant no. 3-appellant had not entered into an agreement of with Javed Zaveri as the order rejecting the ad-interim relief was passed on 19/10/2016 and the appellant-defendant no. 3 had entered into an agreement of sale with Javed Zaveri on 03/02/2017. The provisions of Order 39 Rule 1 of the Civil Procedure Code could have been invoked after the execution of agreement of sale between the defendant no. 3 and Javed Zaveri on 03/02/2017. When a property that is the subject matter of the suit is sought to be alienated during the pendency of the suit thereby causing loss or affecting the rights of the parties, the Court would be justified in passing an order of temporary injunction restraining the defendant that seeks to transfer the said property during the pendency of the suit. It is not disputed by the appellant-defendant no. 3 that she had entered into an agreement of sale with Javed Zaveri on 03/02/2017. If that is so, the learned Single Judge was justified in restraining the defendant no. 3-appellant from creating any third party interest in the suit property during the pendency of the suit. In the circumstances of the case, the judgments reported in **1956 S.C. 593** and **(2005) 3 ALT 17** cannot be made applicable to the case in hand. In the case before the Hon'ble Supreme Court, it was contended on behalf of the concerned party that the purchase in execution of the decree was void and conferred no title on the other side because the Official Receiver to whom the estate of the mortgagor had vested was declared as insolvent and had not been made party to the proceeding. In the aforesaid set of facts, the Hon'ble Supreme Court had held that the sale was no doubt pendente lite but the effect of section 52 was not wiped out altogether. The judgment of the Hon'ble Supreme Court would not apply to the case in hand by

any stretch of imagination. So also, the other judgment on which the appellant has relied would rather be helpful to the plaintiff-respondent no. 1 than the appellant-defendant no. 3 in this case.

The learned Single Judge had found that though flat nos. 401 & 402 were distinct and separate, the wall between two was removed. Hence, the learned Single Judge directed the defendant no. 3-appellant to construct the wall between flat nos. 401 & 402. The learned Single Judge directed the society to take steps to ensure that the wall is erected if there were no sanction to the municipal plans for connecting the two flats. The learned Single Judge had taken due care and caution while issuing the said direction against the society and the society was directed only to ensure that the wall is erected if the municipal corporation had not granted any permission for the connecting two flats. We find that the order of the learned Single Judge is just and proper except that it directs the defendant no. 3-appellant to bear the expenses for the construction of the wall between flat nos. 401 & 402 without recording a finding that defendant no. 3-appellant was guilty of removing the wall between the 2 flats.

Hence, by modifying the order to the aforesaid extent that the expenses for the construction of the wall would be borne by the defendant no. 3-appellant and the respondent no. 1-plaintiff, we dispose of the appeal by confirming the reset of the order passed by the learned Single Judge.

With the disposal of the appeal, the two notice of motion stand disposed of.

[SARANG V. KOTWAL, J.]

[SMT. VASANTI A. NAIK, J.]