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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.454 OF 2017

Horace K. Gonsalves & Anr. V/s. Miss Prabha G. Borkar & Ors.	...Applicants ...Respondents
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Ms.Archana Khan for the Applicants.

Mr.Khan Altaf for the Respondent No.1.

Mr.Rahul Motkari for the Respondent No.2.

Mr.A.R. Patil, A.G.P. for the State – Respondent No.4.

CORAM : R.D. DHANUKA, J.
DATE : 18TH SEPTEMBER, 2018

P.C. :-

1. By this civil revision application filed under section 115 of the Code of Civil Procedure, 1908, the applicants (original defendant nos.3 and 4) have impugned the order dated 13th July, 2017 passed by the learned Trial Judge in Notice of Motion No.3187 of 2016 *inter-alia* praying for dismissal of the Suit No.2363 of 2013.

2. The respondent no.1 herein (original plaintiff) had filed a Suit bearing S.C. Suit No.1835 of 2012 against M/s. Drego Enterprises *inter-alia* praying for permanent injunction in respect of the flat admeasuring 1980 sq. ft. situated at Flusheel Apartments, Plot

Nos.591/A-1/A-2, C.S.T. No.F/4-F/5, at 21st Road, Bandra Mumbai – 400 050 as also the closed garage more particularly described in schedule annexed at Exhibit – A to the said plot and for interim reliefs.

3. During the pendency of the said S.C. Suit No.1835 of 2012, the respondent no.1 (original plaintiff) filed S.C. Suit No.2363 of 2013 against Mr.Venkatraman Iyer, Mr.Arif Anwar Shaikh, Mrs.Jessica Ferriara @ Drego, Mr.Horrace Kavin Gonsalves and Mr.Sharon Lilian Gonsalves inter-alia praying for a declaration that the agreement dated 16th November, 2006 were sham, bogus, colourful, illegal and bad in law and the same be cancelled and revoked. The plaintiff also applied for a declaration that the defendants to the said suit had no right, title or interest in the suit premises and the defendants did not have any right to disturb and interfere with the plaintiff's peaceful possession. The plaintiff also prayed for various temporary and permanent injunction in the said suit against the defendants in respect of the suit flat.

4. On 13th February, 2014, the plaintiff filed a Pursis in the said S.C. Suit No.2363 of 2013 *inter-alia* praying for withdrawal of the said suit stating that the said suit was for the perpetual and temporary injunction. The plaintiff had sold the suit flat and have created third party rights and interest in the suit flat in the end of December, 2013 and thus the plaintiff was no way concerned with the suit premises.

The cause of action to continue the suit did not survive. The said Pursis was opposed by the contesting defendants. By an order dated 27th February, 2014, the learned Trial Judge allowed the plaintiff to withdraw the said S.C. Suit No.2363 of 2013 unconditionally.

5. In view of the withdrawal of the said substantive suit, the applicants herein applied for dismissal of the S.C. Suit No.1835 of 2012 on the ground that the suit did not survive in view of the withdrawal of the substantive suit filed by the plaintiff. By an order dated 13th July, 2017, the Civil Judge has dismissed the said notice of motion filed by the applicants.

6. With the assistance of the learned counsel for the applicants and the contesting respondents, I have perused the prayers in the said Suit No.1835 of 2012 and also in the S.C. Suit No.2363 of 2013 . A perusal of the prayers in the S.C. Suit No.2363 of 2013 to which the applicants were one of the parties clearly indicates that the said suit was for seeking a declaration that the agreements dated 16th November, 2016 in favour of the applicants were sham, bogus, colourful, illegal and bad in law and that the defendants have no right, title and/or interest whatsoever in the suit premises. The plaintiff had also prayed for injunction against the defendants in respect of the said suit flat. A perusal of the Pursis filed by the plaintiff on 13th February, 2014 seeking withdrawal of the said S.C. Suit

No.2363 of 2013 clearly indicates that it was the case of the plaintiff that the plaintiff had sold the suit flat and had created third party rights in the end of December, 2013 and was not at all concerned with the suit flat. It was also the case of the applicant that the cause of action to continue in view of the fact that the plaintiff having already created third party rights did not survive. Learned trial Judge accepted the said application and the case of the plaintiff and allowed the plaintiff to withdraw the said substantive suit *inter-alia* praying for declaration and injunction in respect of the suit property.

7. Insofar as the Suit No.1835 of 2012 is concerned, in the said suit also, the plaintiff had prayed for permanent and temporary injunction against the defendants in respect of the same suit flat.

8. In my view, in view of the case of the plaintiff that the plaintiff has already created third party rights in respect of the suit flat and did not have any interest in the suit property and has already withdrawn the said substantive suit on that ground, the plaintiff did not have right to pursue the suit simplicitor for an injunction in respect of the same property. The contesting defendants were justified in filing the notice of motion for dismissal of the second suit simplicitor for an injunction in respect of the same property.

9. In my view, the learned Trial Judge thus could not have dismissed the said Notice of Motion by an order dated 13th July, 2017

filed by the applicants on erroneous premise that the present suit was only for protection of possession. If the plaintiff had lost interest in the suit premises and have created third party rights and having withdrawn the substantive suit, learned Trial Judge ought to have dismissed the said Suit No.1835 of 2012.

10. Learned counsel appearing for the respondent no.1 states that as far as those third parties are concerned, the said deal has not been materialized. A perusal of the Pursis however, filed by the respondent no.1 clearly indicates that the respondent no.1 had sold the said premises to some third party and on that ground had made a solemn statement before the City Civil Court that the respondent no.1 (original plaintiff) did not have any right in the suit premises and had prayed for withdrawal of the said suit which prayer is granted by the City Civil Court.

11. Insofar as the Notice of Motion No.3186 of 2016 filed by the applicants in the Civil Revision Application is concerned, the said notice of motion shall be heard by the learned Trial Judge on its own merit after considering the objection about the maintainability of the said notice of motion by the original plaintiff.

12. I therefore, pass the following order :-

a). The impugned order dated 13th July, 2017 passed by the learned Trial Court dismissing the Notice of Motion No.3187 of 2016

filed by the applicants is quashed and set aside. The Notice of Motion No.3187 of 2016 filed by the applicants is allowed.

b). The Civil Revision Application No.454 of 2017 is allowed in aforesaid terms. There shall be no order as to costs.

Vasant
Anandrao
Idhol

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Vasant Anandrao Idhol
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(R.D. DHANUKA, J.)