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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.691 OF 2016

WITH
CIVIL APPLICATION NO.383 OF 2018
IN
WRIT PETITION NO.691 OF 2016

Rajesh O. Bhagwat	...Petitioner
V/s.	
Arvindkumar R. Giri & Anr.	...Respondents

Mr.Kishor Malpathak for the Petitioner.

Ms.Poonam Shrivastav I/b M/s.Shrivastav & Co. for the Respondent No.2.

CORAM : R.D. DHANUKA, J.
DATE : 4TH SEPTEMBER, 2018.

P.C. :-

1. By this petition filed under Article 227 of the Constitution of India, the petitioner has impugned the order dated 4th September, 2015 passed by the learned Trial Judge rejecting the Application (Exhibit – 21) filed by the petitioner (original plaintiff) *inter-alia* praying for amendment to the plaint.
2. The original prayers in the suit was for declaration, cancellation of the suit agreement with the original defendant no.1 and for perpetual injunction.
3. It is the case of the petitioner that the petitioner had sold

the suit flat in question to the respondent no.1. The respondent no.1 had borrowed certain amount from the respondent no.2. It is the case of the petitioner that the respondent no.1 opened the account in the name of the petitioner. The respondent no.2 has given a loan amount to the respondent no.1 instead of making that payment to the petitioner. It is the case of the petitioner that the said amount was deposited by the respondent no.1 in the account fraudulently opened in the name of the petitioner. There are allegations of collusion between the defendant no.1 and the defendant no.2 by the petitioner.

4. The petitioner was issued the notices by the respondent no.2 on 20th January, 2013 and 25th September, 2013. By the notice dated 25th September, 2013, the petitioner was called upon to vacate the suit flat. The petitioner accordingly made an application for amendment to the plaint and sought to impugn the notices issued by the respondent no.2 and also for a declaration that the respondent no.2 has no right to attach the suit flat and to sell / dispose of the same to any third parties. The said application came to be rejected by the impugned order dated 4th September, 2015.

5. Learned counsel appearing for the petitioner invited my attention to the submissions and the prayers in the plaint and also the averments made in the application for amendment to the plaint. He also invited my attention to the notices dated 20th January, 2013 and

25th September, 2013. He submits that the petitioner being a third party, the respondent no.2 could not have called upon the petitioner to hand over vacant possession and such action was not an action under section 13(2) of Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (for short "the said Act"). The petitioner was thus entitled to seek amendment by seeking impleadment of the respondent no.2 as a party defendant no.2 and also to challenge the action of the respondent no.2.

6. A perusal of the order passed by the learned Trial Judge indicates that the learned Trial Judge has rejected the said application only on the premise that under section 34 of the said Act, civil suit was not maintainable. Admittedly, the petitioner was not the borrower of the respondent no.2 and the action initiated by the respondent no.2 was not under section 13(2) of the said Act against the petitioner and thus the petitioner having alleged collusion between the defendant no.1 and the defendant no.2, was entitled to seek amendment of the plaint and to impugn the notices as well as for declaration.

7. In my view, the impugned order passed by the learned Trial Judge on 4th September, 2015 thus deserves to be set aside. It is ordered accordingly.

8. I therefore, pass the following order :-

a). The impugned order dated 4th September, 2015 passed by

the learned Trial Judge is quashed and set aside. The Application (Exhibit – 21) filed by the petitioner for seeking amendment is allowed.

b). The amendment to be carried out within four weeks from today. The amended copy of the plaint shall be served upon the defendants' advocate simultaneously.

c). The writ petition is allowed in aforesaid terms. There shall be no order as to costs.

d). During the pendency of this petition, this Court had granted interim protection to the petitioner by an order dated 5th October, 2017. The said interim order passed by this Court to continue for a period of eight weeks from today to enable the petitioner to seek continuation of the interim protection before the learned Trial Court.

9. In view of disposal of the writ petition, the Civil Application No.383 of 2018 does not survive and is accordingly disposed of. There shall be no order as to costs.

Vasant
Anandrao
Idhol

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Vasant Anandrao
Idhol
Date: 2018.09.07
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(R.D. DHANUKA, J.)