

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

**NOTICE OF MOTION NO.2250 OF 2012  
IN  
SUIT NO.2335 OF 2012  
WITH  
SUIT NO.2335 OF 2012**

Darryl D'Monte And Others ... Plaintiffs

Versus

Saint Peter's Church

And Others ... Defendants

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Mr. Vishal Kanade a/w Ms. Mallika Taly I/b S. Mahomedbhai And Co. for the Plaintiffs.

Mr. U.J. Makhija a/w Austin Fernandes I/b Mr. Denzil D'Mello for Defendant Nos.1 and 2.

Mr. Zal Andhyarujina I/b Mr. P.M. Havnur for Defendant No.3.

Mr. Kevic Setalvad, Senior Advocate I/b Ms. Vanita Kakar for Defendant No.7.

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**CORAM : S.C.GUPTE, J.**

**DATE : 23 OCTOBER 2018**

**P.C. :**

. Heard learned Counsel for the parties.

2 This Notice of Motion seeks protective reliefs in respect of a property, which is the subject matter of the suit. The suit is filed by the Plaintiff, who claims to be the owner of the suit property. The suit property consists of land measuring 1774.25 sq.mtrs. or thereabouts situate at Saint John Baptist Road, Bandra (West), Mumbai-400 050. This property was originally claimed by Defendant Nos. 1 and 2, who represent Saint Peter's

Church, Bandra, as property acquired by them by adverse possession. The Suit filed by them for declaration of such title was decreed by the City Civil Court at Bombay. It is the Plaintiffs' case that the decree passed in that suit was fraudulently obtained by Defendant Nos.1 and 2. Defendant Nos.1 and 2 have entered into conveyance of the suit property in favour of Defendant Nos.4 and 5, who in turn, have executed a registered deed of conveyance in favour of Defendant No.7. The present suit seeks a declaration of the Plaintiffs' right, title and interest in the suit property and a declaration that the decree obtained by Defendant Nos.1 and 2 against the predecessor in title of the Plaintiffs was null and void and delivery up and cancellation of various documents of title purportedly created by the Defendants in pursuance of the said decree.

3 The predecessor in title of the Plaintiffs, one Dr. Cecil Joseph D'Monte ("Dr. D'Monte") was admittedly the owner of the suit property. Defendant Nos. 1 and 2 were admittedly lessees of Dr. D'Monte. The last of the lease documents executed by Dr. D'Monte in favour of Defendant Nos.1 and 2 was a lease for 20 years, which expired on 30 June 1963. Defendant Nos.1 and 2, however, continued to be in possession of the property as lessees/tenants at sufferance. Apparently, a suit was filed by Defendant Nos.1 and 2 in the City Civil Court at Bombay claiming ownership by adverse possession of the suit property (purportedly after addressing a notice to Dr. D'Monte on 13 July 1987 asserting such adverse possession). Defendant No.3 herein appeared as an Advocate of Dr. D'Monte in that suit and waived service of the writ of summons and also submitted to a decree in favour of the plaintiffs, i.e. Defendant Nos.1 and 2 herein. It is the Plaintiffs' case in the present suit that Defendant No.3 had

no authority of Dr. D'Monte to do so, and the decree was a fraud practiced upon the court. Dr. D'Monte died in the year 1998. There is nothing on record to show either that Dr. D'Monte or the Plaintiffs as his legal heirs were aware of either the suit or the decree passed therein at any time before 2012. The Plaintiffs herein claim to have got the knowledge of the decree and the fraud played upon the court by the Defendants upon inspection of records and proceedings in the City Civil Court at Bombay and after receipt of documents from the Office of the Charity Commissioner. The Plaintiffs claim to have thereupon filed the present suit.

4 The chief controversy, which we are concerned with in the present suit, is about validity of the decree dated 29 June 1988 passed in Suit No.239 of 1988 by the City Civil Court at Bombay. As I have noted above, the writ of summons was admittedly not served on Dr. D'Monte, who was the defendant in that suit. The decree was passed simply on the basis of representation by Defendant No.3 herein, purportedly as an advocate of Dr. D'Monte, when he waived service of the writ of summons and submitted to a decree within a few months of the filing of the suit. There is, admittedly, no vakaltnama by Dr. D'Monte in favour of Defendant No.3 to be found in the record and proceedings of Suit No.239 of 1988. There is also no record to show registration of any such vakalatnama in the register maintained by the City Civil Court at Bombay. Apparently, the register has been missing and the vakalatnama lost. On these facts, the case of the Plaintiffs that the decree passed in the City Civil court at Bombay was a nullity *prima facie* merits consideration. The fact that the decree was passed without service of writ of summons and through submission to a

decree by a person, who *prima facie* appears to be lacking any authority to represent the defendant (i.e. predecessor of the Plaintiffs) stares one in the face, and also goes a long way to *prima facie* support the Plaintiffs' case of want of knowledge on their part till the time they claim to have got to know of the suit and the decree passed therein in the year 2012.

5 On these facts, the Plaintiffs clearly have an imminently arguable case on nullity of the decree and for cancellation of all subsequent documents of title executed between the Defendants on the strength of such decree and pending such trial, *status quo* clearly needs to be preserved in respect of the suit property.

6 Learned Counsel for Defendant Nos.1 and 2 as also Defendant No.3 and Defendant No.7 submit that the Plaintiffs herein must be imputed with the knowledge of assertion of a rival title by Defendant Nos.1 and 2. Learned Counsel refer to the letter dated 13 July 1987 purportedly addressed by O.S. Pereira, Advocate, on behalf of Defendant No.1 to Dr. D'Monte claiming adverse possession of the property. There is a serious controversy between the parties as to whether this letter was in fact served on, or received by, Dr. D'Monte or any of the Plaintiffs. The case of the Plaintiffs is that a copy of this letter was obtained by the Plaintiffs from the Office of the Charity Commissioner in the year 2012. Besides, the knowledge of assertion of an adverse title by Defendant Nos.1 and 2 does not suggest that the Plaintiffs or their predecessor Dr. D'Monte had knowledge either of the suit or of the decree passed therein. Learned Counsel for Defendant No.7 submits that there is nothing in the plaint to suggest that there was any infirmity or suspicion about the conduct of

Defendant No.7, who claims to be the transferee of Defendant No.4. The case of bona fide transferee with value and without notice is *prima facie* a non-starter in a case, where there is want of title on the part of the vendor. Learned Counsel also submits that since evidence has been led in this suit on a preliminary issue of limitation framed under Section 9A of the Code of Civil Procedure, 1908, we must have regard to that evidence to assess the *prima facie* merits of the rival cases of the parties. Even such *prima facie* assessment does not in any event rule out the Plaintiffs' case at the trial, on which further evidence is to be tendered by the Plaintiffs. There is a *prima facie* case of want of authority of the Plaintiffs' predecessor to Defendant No.3 to represent him and accordingly, nullity of the decree passed by the City Civil Court at Bombay declaring the title of the predecessor/vendor of Defendant No.7 by adverse possession.

6 In the premises, pending the trial, the property needs to be protected and its status preserved.

7 Accordingly, the Notice of Motion is made absolute in terms of prayer clauses (a)(i) and (ii). Costs to be costs in the cause.

**(S.C. GUPTE, J.)**