

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****NOTICE OF MOTION NO.1521 OF 2013****IN****SUIT NO.788 OF 2013****WITH****SUIT NO.788 OF 2013**

Megha Rasik Desai ... Plaintiff
Versus
Jayawant D. Bhatte And Ors. ... Defendants

WITH**SUIT NO.360 OF 2014****WITH****NOTICE OF MOTION NO.128 OF 2015****IN****SUIT NO.360 OF 2014**

Jayawant D. Bhatte And Ors. ... Plaintiffs
Versus
Megha Rasik Desai ... Defendant

WITH**SUIT NO.362 OF 2014****WITH****NOTICE OF MOTION NO.147 OF 2015****IN****SUIT NO.362 OF 2014**

Jayawant D. Bhatte And Ors. ... Plaintiffs
Versus
Megha Rasik Desai & Anr. ... Defendants

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Mr. Gaurav Mehta, a/w. Mr. Bimal Bhabhda, i/b. Apte & Co., for the Plaintiff in S/788/2013, for the Defendant in S/360/14 and Defendant No.1 in S/362/14 and for the Applicant in NMS/1521/13.

Mr. Mahendra Ghelani, a/w. Ms. Armin Wandrawela, i/b. Ms. Sutapa Saha, for Defendant Nos. 1 to 6 in S/788/13 and for the Plaintiff in S/360/14 and S/362/14 and for Applicants in NMS/128/15 and NMS/147/15.

Mr. Shubro Dey, for Defendant No.7 in Suit No.788/13.

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CORAM : S.C.GUPTE, J.
DATED : 10 OCTOBER 2018

P.C.:

. Heard learned Counsel for the parties. Defendant Nos. 1 to 6 and 7 tender their written statement in Suit No.788 of 2013.

2. These miscellaneous applications are made in three different suits. The suits are between family members, each group claiming a particular share in the property. The suit property consists of a plot of land together with a structure as described in Exhibit 'A' to the plaint in Suit No.788 of 2013. The Plaintiff in that suit claims to be 3/7th owner of an undivided share, right, title and interest in the suit property. This share of the Plaintiff is not contested by Defendant Nos. 1 to 6, who, in turn, claim 4/7th undivided share, right, title and interest in the suit property. Each of these two groups has entered into an agreement with a third party. The Plaintiff has entered into a deed of lease with Defendant No.8, whilst Defendant Nos. 1 to 6 have entered into an agreement for sale with Defendant No.7. Defendant Nos. 1 to 6 have filed their own suits, Suit No.362 of 2014 challenging the lease deed executed by the Plaintiff in favour of Defendant No.8 and Suit No.360 of 2014 seeking partition of the suit property on the basis of the admitted share of the parties. By these notices of motion taken out by the parties in their respective suits what is claimed is as follows. The Plaintiff in Suit No.788 of 2013 prays for an injunction not only in respect of her 3/7th share in the suit property, but also in respect of the balance 4/7th share, admittedly owned by Defendant Nos. 1 to 6. This prayer is purportedly on the basis of a right of pre-

emption allegedly claimed by the Plaintiff under an oral agreement between the parties. On the basis of this oral agreement, the Plaintiff seeks to restrain Defendant Nos. 1 to 6 from creating any third party right in respect of their portion of the suit property, namely, the 4/7th undivided share, right, title and interest in the suit property. As far as the Defendants, i.e. Defendant Nos. 1 to 6, are concerned, they not only seek an interim injunction in respect of their undivided 4/7th share in the suit property, but also in respect of the lease deed purportedly executed by the Plaintiff in favour of Defendant No.8 identifying 3/7th share of the Plaintiff in the suit property with the help of a map. These reliefs are claimed on two footings. Firstly, it is submitted that Defendant Nos. 1 to 6 have a right of pre-emption in respect of the Plaintiff's 4/7th share in the suit property and, secondly, and at any rate, it is submitted that since there is no partition as between the parties as of now, shares belonging to the parties cannot be identified, and, in the premises, the Plaintiff cannot create any third party right in respect of any identified portion of the suit property.

3. Both parties have ad-interim orders in their favour in their respective notices of motion. The Plaintiff has an ad-interim protection as regards her 3/7th share, restraining Defendant Nos. 1 to 6 from creating any third party right in respect of that share. Defendant Nos. 1 to 6, on the other hand, have an ad-interim injunction in respect of their 4/7th share in the suit property.

4. At the hearing of the notices of motion, the Plaintiff prays for further relief in respect of the 4/7th share of Defendant Nos. 1 to 6 in the

suit property. This, as we have noted above, is on the basis of a purported oral agreement creating a right of pre-emption in favour of the Plaintiff. Prima facie there is nothing on record to suggest that there is any oral agreement between the parties creating such right of pre-emption. Learned Counsel for the Plaintiff relies on the Defendants' averments and prayers in their own suit. Learned Counsel submits that the Defendants themselves have claimed a right of pre-emption existing in the suit property and, on that basis, have even prayed for final reliefs in their suit. That may be so. That still does not make out any case of the Plaintiff having any right of pre-emption. Besides these averments, there is absolutely nothing on record to show any such right in the Plaintiff. In the premises, it is not possible to grant any further relief to the Plaintiff in respect of the 4/7th share of Defendant Nos. 1 to 6 in the suit property.

5. Insofar as the Defendants are concerned, learned Counsel for Defendant Nos.1 to 6 is right in his submission that though the Plaintiff has 3/7th undivided share, for which the Defendants are even prepared to submit to a decree of admission in favour of the Plaintiff, the Plaintiff cannot claim to assert any right in any identified portion of the suit property in lieu of her 3/7th share.

6. On these facts, in my view, in the interest of justice, the notices of motion can be disposed of in terms of the following order and it is, accordingly, ordered as follows :-

(i) There will be a preliminary decree in favour of the Plaintiff declaring her ownership of 3/7th undivided share, right, title and interest

in the suit property described in Exhibit 'A' to the plaint.

(ii) A preliminary decree of partition in favour of Defendant Nos. 1 to 6 (Plaintiffs in Suit No.360 of 2014) declaring inter alia their 4/7th undivided share, right, title and interest in the suit property.

(iii) Mr. Prakash Dharia and Mr. Ankit P. Dharia, Architects, are appointed as Commissioners for reporting to the Court on the possibility of a partition of the property by metes and bounds. The Court Commissioners' report shall be presented to the Court within six weeks from today.

(iv) Pending the hearing and final disposal of the suit and till a final decree is passed in the suit, Defendant Nos. 1 to 6 are restrained from creating any third party right in respect of the 3/7th undivided share, right, title and interest of the Plaintiff in the suit property, which is decreed in her favour as above.

(v) Pending the hearing and final disposal of these suits and till a final decree is passed in the suits, the Plaintiff and Defendant No.8 (Defendants in Suit Nos. 360 of 2014 and 362 of 2014) are restrained from creating any third party right in respect of the identified property indicated in the plan annexed to the lease deed, being Exhibit 'B-2' to the plaint in Suit No.788 of 2013 or to make any changes including additions or alterations in the property described in Exhibit 'B-2'. It is clarified that this, however, does not prevent the Plaintiff and Defendant No.8 from creating any third party right in respect of 3/7th undivided share, right, title and

interest of the Plaintiff in the suit property.

(vi) As part of the final decree to be passed in Suit No.360 of 2014, the Plaintiff and Defendant No.8 will have to account for the rents and outgoings recovered by them in respect of the portion of the property described in the lease deed, being Exhibit 'B-2' to the plaint. The Plaintiff and Defendant No.8 shall accordingly keep an account of the income and outgoings recovered by them.

(vii) All notices of motion are disposed of in the above terms.

Smita Johnson
Gonsalves

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Johnson Gonsalves
Date: 2018.10.12
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(S.C.GUPTE, J.)