

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

**APPEAL FROM ORDER NO.106 OF 2023
WITH
INTERIM APPLICATION NO.1357 OF 2023**

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SUBHASH
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VISHAL SUBHASH
PAREKAR
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Harold Francis Alberquerque

...Appellant

VS.

Nandan Bulidcon and Others

...Respondents

Mr. Atul Damle, Senior Advocate a/w. Ms. Surbhi Agrawal i/b. Yende
Legal Associates, for the Appellant.

None for the Respondents.

CORAM : N. J. JAMADAR, J.

DATE : APRIL 12, 2023

P.C.:

1. This appeal is directed against an order dated 3rd November, 2022 passed by learned Judge, City Civil Court in Notice of Motion No. 1853 of 2021 in Commercial Suit No. 1160 of 2021 whereby the Notice of Motion taken out by the appellant/ plaintiff to direct the defendants to give security to the extent of the claim of the plaintiff or in the alternative to deposit an amount of Rs. 80,00,000/- with the Court and restrain the defendants from creating third party rights in or parting with the possession of the property belonging to the defendants came to be rejected.

2. The defendant No. 1 is a partnership firm. The plaintiff and defendant No. 2 were the partners of the defendant No. 1 firm. It

was engaged in the business of real estate development. On 3rd November, 2020 a Partnership Admission cum Retirement Deed came to be executed. Under the terms thereof the plaintiff retired from the firm. Defendant No. 3, the wife of defendant No. 1, joined the partnership. Under the said deed of Retirement, the defendants agreed to pay a sum of Rs. 40 lakhs to the plaintiff vide cheques No. 20th May, 2021 and 30th May, 2021 towards the capital and profit of the plaintiff in the said firm. Simultaneously, the defendant No. 3 acquired 22.5 R area out of Gut No. 109, admeasuring 00 H 45 R , mouje Karla, Maval, Dist. Pune, belonging to the plaintiff under a Sale Deed. In the said Sale Deed, the consideration was shown at Rs. 40 lakhs and the very same cheques, which were delivered towards the payment of capital and share in the profits of the plaintiff under the Deed of retirement, were shown to represent the amount of consideration for the sale. Those cheques were dishonored on presentment.

3. The plaintiff approached the Court with a case that in fact it was agreed between the parties that the plaintiff would be paid Rs. 80 lakhs towards his share of capital and profits in the defendant No. 1 firm. The plaintiff had agreed to accept Rs. 40 lakhs as and by way of down payment. The agreement to accept Rs. 40 lakhs was

conditional one. Since the cheques drawn for Rs. 40 lakhs were dishonored, the plaintiff is entitled to a sum of Rs. 80 lakhs.

4. Hence, the suit for direction to the defendants to render the accounts of the firm and, in the alternative, to pay a sum of Rs. 80 lakhs. In the said suit, the plaintiff took out a Notice of Motion seeking direction to provide security or deposit the amount and in the alternative restrain the defendants from creating third party rights in their properties.

5. By the impugned order, the learned Judge, City Civil Court was persuaded to reject the application opining, inter alia, that the plaint does not disclose as to how the plaintiff is entitled to claim a sum of Rs. 80 lakhs in the face of the documents which indicate that the plaintiff had agreed to accept a sum of Rs. 40 lakhs. The prayers for direction to furnish the security or deposit the amount of Rs. 80 lakhs were found prima facie untenable. The pleadings as regards the prayer to restrain the defendants from creating third party interest in their property were found to be vague and inadequate.

6. Being aggrieved, the plaintiff is in appeal.

7. I have heard Mr. Atul Damle, learned senior counsel for the appellant. Perused the pleadings and the material on record including the impugned order.

8. Mr. Damle, would submit that the learned Judge, City Civil Court misconstrued the case of the plaintiff. The fact that the very same cheques were shown as consideration for the retirement of the plaintiff from the partnership and acquisition of the plaintiff's one half share in the property bearing Gut No. 109, was completely lost sight of. Mr. Damle would urge that the defendant No. 3 was admitted into the partnership and simultaneously defendant No. 3 purchased the share of the plaintiff in the said land, in the capacity of the partner of the defendant No. 1 firm. Eventually, the cheques were dishonored on presentment. Thus, the plaintiff did not receive any consideration. In these circumstance, the trial Court ought to have adequately protected the interest of the plaintiff during the pendency of the suit. Mr. Damle was, however, fair enough to submit that the prayers in the Notice of Motion have not been happily worded. Nonetheless, the trial Court could have moulded the relief in exercise of equitable jurisdiction, urged Mr. Damle.

9. I find it difficult to accede to the submission on behalf of the

appellant. First and foremost, the case set up by the appellant that the agreed consideration for the retirement from partnership was Rs. 80 lakhs and not Rs. 40 lakhs is against the weight of the material on record. The Admission cum Retirement Deed clearly records that the plaintiff had agreed to retire from the partnership upon payment of a sum of Rs. 40 lakhs. The trial Court was thus justified in observing that the plaintiff could not satisfactorily explain as to how the plaintiff was entitled to receive Rs. 80 lakhs.

10. Secondly, the case now sought to be urged by Mr. Damle that the consideration of Rs. 40 lakhs each for retirement from partnership and for the sale of the property was to be distinctly paid is also not borne out by the record. Clause 2 of the Admission cum Retirement Deed clearly records that the sum of Rs. 40 lakhs was agreed to be accepted by the plaintiff towards both the proprietary title in one half share in the land bearing Gut No. 109 and the account settled between the partners in respect of the partnership business. It further records that the accounts between the partners were settled upto the date of execution of the Admission cum Retirement Deed.

11. In any event, by the Notice of Motion, what the plaintiff

essentially sought was an order of attachment before judgment. The learned Judge, City Civil Court was within his rights in recording that the plaintiff failed to establish the pre-requisites for an order for attachment before judgment. Neither strong prima facie case was made out nor the plaintiff could demonstrate that the defendants were, in order to delay or defeat the decree that may be eventually passed against them, disposing of their assets. The prayer for restraining the defendants from creating third party interest in their properties was also rightly found to be based on vague and inadequate pleadings.

12. In the totality of the circumstances, the trial Court can not be said to have committed any error in declining to exercise the discretion in favour of the plaintiff. Resultantly, no interference is warranted in the discretionary order.

Hence, the following order.

ORDER

1] The appeal stands dismissed.

2] In view of the dismissal of the appeal, the Interim Application also stands disposed.

(N. J. JAMADAR, J.)