

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

NOTICE OF MOTION NO.851 OF 2017

IN
SUIT NO.147 OF 2017
WITH
SUIT NO.147 OF 2017

Mrs. Lourdes Veronica Baptista ... Applicant

In the matter between :

Mrs. Lourdes Veronica Baptista ... Plaintiff

Versus

M/s Crescent Builders And Developers

And Others ... Defendants

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Mr. Shanay Shah i/b Ms Dione C. Baptista for the Plaintiff.

Dr. Birendra Saraf a/w Ms. Apurva Thipsay i/b Shreyas Vyas for Defendant Nos.1 and 2.

Mr. Suraj Iyer i/b Ganesh & Co. for Defendant Nos.3 to 5.

Ms. Arya Bile a/w Ms. Soniya Putta i/b Solomon & Co. for Defendant No.8.

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CORAM : S.C.GUPTE, J.

DATE : 4 AUGUST 2017

P.C. :

Heard learned Counsel for the parties.

2 This Notice of Motion is taken out by the original Plaintiff. The suit is on the basis that the Plaintiff is one of the co-owners of the suit property, in which Defendant Nos.1 to 5 are trespassers and where Defendant Nos.1 and 2 have made illegal construction of a multi storied building, violating, and interfering with, the rights of the Plaintiff as such co-owner. The Plaintiff, accordingly, prays for a declaration of her co-ownership and a perpetual injunction against Defendant Nos.1 to 5 from claiming any right,

title or interest in or over the suit property and for a mandatory order against Defendant Nos.1 to 5 to hand over vacant and peaceful possession of the suit property to the Plaintiff. The Plaintiff also seeks cancellation of various documents executed between the Defendants in relation to the suit property. The Notice of Motion seeks a temporary injunction restraining the Defendants from acting upon various documents referred to above, or developing, or creating any third party right in or parting with possession of, any part of the suit properties/buildings/structures constructed thereon.

3 It is the Plaintiff's case that the suit properties are undivided ancestral properties of the Plaintiff and Defendant Nos.6 to 8, which consist of (i) undivided ancestral family dwelling having ten rooms, outhouses and five shops ('Suit Properties A') and (ii) the properties bearing CTS Nos.866, 866/1-7, situated in Marol Village, Andheri (East), Mumbai-400 059 ('Suit Properties B'). According to the Plaintiff, these properties are inherited by the Plaintiff through her late parents Joseph Anthony Thomas Misquitta ("Joseph") and Rena Clara Misquitta ("Rena"). The Plaintiff has relied on a family tree at Exhibit 'A' to the plaint. This family tree indicates that the suit properties 'A' and 'B' were owned by the Plaintiff's late grandparents Thomas M. Misquitta ("Thomas") and Louiza V. Misquitta ("Louiza"). The grandparents had five sons and four daughters. It is the Plaintiff's case that two sons died issueless and without any heirs and whereas two other sons were survived by legal heirs, one by the Plaintiff and the other by Defendant Nos.6 to 8. It is the Plaintiff's case that four daughters of Thomas and Louiza had executed a registered release deed in the year 1961, releasing their rights in favour of their five brothers. The Plaintiff, accordingly, claims to have 1/3rd share in the suit properties 'A' and 'B'. The grievance of the Plaintiff is that in May 1985, father of Defendant Nos.6 to 8 (one of the five sons of Thomas and Louiza) obtained a purported release deed from other legal heirs of Thomas and Louiza, including the Plaintiff and her mother. Sometime in September

1985, the Plaintiff claims to have obtained a copy of the release deed which at that time appeared to be unregistered. The Plaintiff continued to hold a *bona fide* belief that the release deed was never registered. Sometime in October 1985, when the deed was sought to be registered, the Plaintiff's mother refused to acknowledge her signature before the registering authorities. It is the grievance of the Plaintiff that in the year 2014, she noticed an ongoing construction on suit properties 'A'. The undivided ancestral family dwelling contained therein had been demolished. The Plaintiff claims to have made RTI applications between 25 February 2014 and 12 April 2016, whereupon she received some documents from the Sub-Registrar of Assurances. After considering these documents, it is the Plaintiff's case, various illegal and criminal acts committed by Defendant Nos.6 to 8 in connivance with Defendant Nos.3 to 5 and Defendant No.9 were noticed by the Plaintiff. By these acts, the Defendants purported to deal with the suit properties defeating the Plaintiff's legitimate rights. It is claimed by the Plaintiff that Defendant No.6 to 8 purported to execute several documents in December 2005, based on which mutation entries were made in December 2006 and January 2007, and original property cards of the suit properties were altered. It is the case of the Plaintiff that pursuant to this alteration, in or about July 2010, Defendant Nos.3 to 8, in connivance with Defendant Nos.1 and 2, entered into a tripartite development agreement. Suit properties 'A' were developed under this purported development agreement and a multi storied building was erected thereon. The Plaintiff, in the premises, has approached this Court with this declaratory suit, praying *inter alia* for cancellation of documents and perpetual injunction, as noted above.

4 On 7 February 2017, this Court granted time to the Defendants to file their affidavit in reply and in the meantime, ordered *status quo* in respect of the suit properties. The Court, however, allowed Defendant

Nos.1 and 2 to take steps for obtaining OC, though such steps were to be subject to further orders that may be passed by the Court. In the event of Defendant Nos.1 and 2 proposing to hand over the flats for fit outs or towards possession to third parties after receipt of OC, the Defendants were to take prior permission of the Court. So also, registration of further agreements, if any, was to be subject to further orders that may be passed by the Court.

5 Defendant Nos. 1 and 2, thereafter, appear to have pursued their application for OC and are now in possession of OC for the suit building. Defendant Nos.1 and 2 are now desirous of handing over possession of the flats/shops in the building to the parties entitled thereto. These parties include (i) twenty six flat purchasers and five shop-owners, (ii) one Sybil Dias, who is a tenant of an adjacent building to whom a flat has to be given in lieu of his tenanted premises in the suit building, (iii) Defendant No.8, one of the co-owners who is entitled to receive one flat in addition to the monetary consideration under the tripartite development agreement, and (iv) Defendant Nos.3 to 5, who are entitled to receive six flats under the development agreement.

6 The Court would have, in these facts, ideally taken up and disposed of the Plaintiff's Notice of Motion itself rather than considering the Defendants' application for variation of the ad-interim order. Since, however, there is a preliminary objection raised by the Defendants to the jurisdiction of this Court on the ground of bar of limitation, and any preliminary issue framed in that behalf would require evidence to be led thereon, the Motion itself cannot be taken up for final hearing. In the premises, I have thought it fit to consider the application for variation of ad-interim order at this stage.

7 The Defendants' application for variation involves two aspects, namely, (i) the rights of the Plaintiff as a co-owner vis-a-vis suit properties 'A' and 'B' and protection, if any, required by her towards such rights pending adjudication of the suit and (ii) the position of Defendant Nos.1 and 2 vis-a-vis suit properties "A", where they have constructed a tower as developers.

8 As for the Plaintiff's rights as a co-owner, it cannot be seriously disputed that she has already executed a registered release deed in favour of the predecessor of Defendant No.8. The plaintiff's contention that she signed the deed without knowing its contents, does not *prima facie* merit much countenance. She is, at the same time, a legal heir of her deceased mother and her right to claim through the mother cannot *prima facie* be seriously disputed. It is not disputed that her mother, Rena, did not acknowledge execution of the release deed before the Sub-Registrar of Assurances and as against her, the release deed is an unregistered document, incapable of bringing into effect relinquishment of her interest in suit properties 'A' and 'B'. She continues to be a co-owner of the properties and can *prima facie* pass on such co-ownership to her legal heir, i.e. the Plaintiff.

9. Having noted *prima facie* the plaintiff's right to the suit properties as a co-owner, we need to consider what would be an adequate protection to the plaintiff pending the hearing and final disposal of the suit. The plaintiff's claim at the highest is 1/3 share in the properties and that after presupposing many things. Firstly, it presupposes that the plaintiff is entitled to represent the entire share of her father Joseph (son of Thomas), which originally devolved on her mother and herself. As I have noted above, there is no *prima facie* case that her own share was retained by her; *prima facie* she released her share unto the predecessor of defendant No.8. She has claim only to her mother's share which devolved on her after her

mother's death. That makes her share 1/6. Secondly, it presupposes that the shares of the four daughters of Thomas (sisters of Joseph and four others) were released only in favour of the three surviving sons (Joseph, and his two brothers). The daughters released their shares in 1961 in favour of the sons. At that date, all five sons were alive. The legal heirs of at least two sons (Dominic and Wilfred) have executed release deeds in favour of the predecessor of defendant No.8. That brings the plaintiff's share (claimed by her through her mother) in the region of about 1/8. Considering the fact that there is no case whatsoever for protecting the balance share of the family of Thomas in the suit properties, which has been duly conveyed to the predecessor of defendant No.8 and dealt with by him in favour of defendant Nos.1 and 2. The latter have also fully developed suit properties 'A' and created third party rights therein. The protection, if any, to be granted to the plaintiff must, in the premises, relate to only a part of the built up area in the new building, subject of course to the rights of others, which are discussed below.

10. Having considered the extent of the plaintiff's share and the kind of protection needed to protect the same during the pendency of the suit, we may now turn to the position of each of the defendants vis-a-vis the suit properties. Is defendant No.8, as one of the co-owners having dealt with the suit properties, entitled to the allotment of his flat which is part of his consideration under the tripartite development agreement? Can defendant Nos. 3 to 5 as bona fide transferees for value and without notice claim their six flats coming to them as part of their consideration under the development agreement? And what is the position of defendant Nos. 1 and 2 as such purchasers? As far as defendant No.8 is concerned, he has clearly dealt with suit properties 'A' and 'B' with knowledge of his defective title, that is to say, with knowledge of the plaintiff's undivided share in the properties which he could not have dealt with. If as a result of the protection needed for the plaintiff to the extent of part of the built up area

in suit properties "A" some built up area needs to be preserved, such area, in the first place, must come from him. Though, of course, equities could be further balanced, by protecting and preserving suit properties "B" which are as yet not finally dealt with in favour of any third party, the flat coming to the share of defendant No.8 in the tower constructed in suit properties "A" will have to be protected.

11. Coming now to defendant Nos. 3 to 5, they can hardly be described as bona fide purchasers for value without notice. They may be bonafide purchasers and may have even paid a competent price, but they certainly cannot be said to have had no notice of the plaintiff's rights to the suit properties. The documents on record clearly indicate that they very well knew that the deed of release executed by the legal heirs of Thomas and Louiza was unregistered as far as the plaintiff's deceased mother Rena was concerned. They nevertheless went ahead and dealt with the suit properties. They have no answer to the plaintiff's claim, save and except to the extent of the flats actually dealt with by them in favour of third parties. No flat purchaser, whether claiming under defendant Nos. 1 and 2 or under defendant Nos. 3 to 5, can be said to be but a bonafide purchaser for value and without notice. There is a release deed executed by legal heirs of the deceased Thomas and Louiza in favour of the predecessor of defendant No.8. Then, there is an agreement between defendant No.8 and defendant Nos. 3 to 5, followed by a tripartite development agreement between defendant No.8, defendant Nos. 3 to 5 and defendant Nos. 1 and 2. And finally there is a detailed title certificate issued by Advocates in favour of defendant Nos. 1 and 2. There is no way the flat purchasers could be said to be having any notice, at least *prima-facie*, of the defect in the title or authority of defendant Nos. 1 and 2 to deal with the flats. Each of the flat purchaser has agreed to pay a competent price. It is nobody's case that they didn't. A substantial part of the payment has already been made. If and to the extent defendant Nos. 3 to 5 have dealt with the flats

coming to their share, there is no case to prohibit any third party from receiving the flats in performance of their respective agreements. It is pointed out by defendant Nos. 3 to 5 that they have entered into registered agreements for sale in favour of third parties for two out of their six flats. If these third parties come before the Court and satisfy the Court that they have indeed paid value without notice as bona fide purchasers, there is no reason to restrain defendant Nos. 1 and 2 from handing over possession of these flats to them.

12. That brings us to consider the position of defendant Nos. 1 and 2 vis-a-vis the suit properties. Nothing could be pointed out by the plaintiff's counsel, which would indicate that they actually had notice of the defect in the title of defendant No.8. What was produced before them by their predecessors, namely, defendant No.8 and defendant Nos. 3 to 5, was a deed of release which showed execution and registration and they were clearly entitled to rely on the title certificate issued by their advocates, who purported to meticulously trace the title and certify it to be clear. The advocates, of course, appear to have missed the fact of non-registration of the release deed as against Rena-mother of the plaintiff, but there is nothing to indicate that it was anything but a bona fide error. Learned counsel for the plaintiff submits that even if the advocates had been negligent in certifying the title, the defendants, as the principals who engaged the advocates, must be held accountable. That is not quite correct. First of all, there is nothing to show any culpable negligence and secondly, the advocates are not exactly the agents of defendant Nos. 1 and 2. They are independent professionals engaged by the latter on a principal to principal basis. If they bona fide relied on the certificate of title issued by their advocates, they cannot be held accountable for the advocates' act under a vicarious liability through an agent. For these reasons, defendant Nos. 1 and 2 can be seen *prima-facie* as bonafide purchasers for value and without notice and their dealings with third parties on that basis would

have to pass muster. Besides, as I have pointed out below, all through the relevant period, when defendant Nos. 1 and 2 went ahead with the development of suit properties "A" and not only pulled down the ancestral dwelling but constructed one whole tower of more than 34 flats, the plaintiff stood by and even allowed defendant Nos. 1 and 2 to enter into third party agreements. There is no reason to now restrain defendant Nos. 1 and 2 from performing their respective third party agreements and delivering possession of flat/ shops in the tower to third party purchasers.

13. It is the plaintiff's own case that the relevant documents for dealing with the suit properties were executed by defendant No.8 and defendant Nos.3 to 5 in December, 2005; that based on these documents mutation entries were made in December, 2006 and January, 2007; and that based on these, a tripartite development agreement was executed in July, 2010, and thereafter the ancestral dwelling was demolished and the construction work commenced. The plaintiff herself claimed to have noticed the on-going construction in 2014. She claims to have made RTI applications thereafter between February, 2014 and April, 2016. And she has filed the present suit in 2017, by which time the construction has been more or less complete and the parties are awaiting an OC, all third party agreements are in place and substantial monies are parted with thereunder by scores of innocent purchasers. Does such plaintiff deserve any equitable relief against third party bona fide purchasers? The answer seems to me to be a resounding 'no'.

14. Besides all these considerations, I am also conscious of the fact that since anyway, full protective relief is being granted in respect of suit properties "B", any balancing of equities as between the plaintiff and other co-owners, including defendant No.8, can always be achieved later at the trial and the sales by defendant Nos. 1 and 2 need not be held up with a view to protect about 1/8 share of the plaintiff.

15. For the reasons stated above, the following order is passed :
- (i) The following issue is framed as a preliminary issue in the suit :

“Whether the Suit is barred by the law of limitation ?”
 - (ii) The parties to file their respective affidavits and compilations of documents in respect of the preliminary issue framed as above, within four weeks from today. The Plaintiff to also file her affidavit of evidence in lieu of examination in chief on the preliminary issue, within a period of two weeks thereafter.
 - (iii) Permission is hereby granted to Defendant Nos.1 and 2 for registering the remaining agreements for sale and also for parting with possession of all twenty six flats agreed to be sold to third party purchasers in the building “**Crescent Exotica**”, in favour of the respective flat/premises purchasers/allottees, whose names are listed in Exhibits 3 and 4 to the Affidavit dated 20 July 2017.
 - (iv) Five shops which have already been given to the existing tenants for fit out purposes and which are in lieu of their original premises in the old building, may also be handed over finally to, and possessed by, the respective shop owners.
 - (v) Defendant Nos.1 and 2 shall also be entitled to hand over possession of Flat No.704 to Sybil Dias, who is the tenant of the adjacent building and who is to be accommodated in the new building in accordance with the agreement between the parties, and Flat No.402 to Defendant No.8.

(vi) As far as Defendant No.8 is concerned, he shall, however, be entitled to use Flat No.402 along with its car parking space, in terms of the letter of allotment dated 20 March 2015 issued by Defendant Nos.1 and 2 to him, only by himself and shall not create any third party right or interest therein or part with possession thereof in favour of any third party. In case, however, Defendant No.8 intends to give the flat to any licensee, he will be at liberty to apply to this Court, whereupon, the Court may grant permission upon such terms, including execution of a suitable undertaking on the part of the proposed licensee, as the case may be, for such licence as may be deemed fit.

(vii) Defendant Nos.1 and 2 are restrained from handing over possession of any of the six flats coming to the share of Defendant Nos.3 to 5 to these Defendants or their nominees.

(viii) Defendant Nos.3 to 5 in their Affidavit dated 9 February 2017 claim to have already entered into registered agreements for sale in respect of two flats out of these six, namely, Flat Nos.701 and 702, in favour of third parties. The third parties, in whose favour these agreements have been entered into, shall be at liberty to apply for their impleadment either by themselves or through Defendant Nos.3 to 5 and also seek an appropriate variation of this order to enable them to be put in possession of the two flats. If these two flat purchasers make out a case that they are *bona fide* purchasers for value without notice, possession shall be ordered in their favour without reference to any other point in controversy between the parties.

(ix) The ad-interim injunction granted earlier in this Notice of Motion concerning the property designated as Suit Properties 'B' in the plaint shall continue to operate.

16. This order shall operate pending the hearing of the preliminary issue and final disposal of the Notice of Motion.

17. At the request of learned Counsel for the Plaintiff, this order shall come into effect after two weeks.

18. The Suit to appear on board for directions after six weeks.

(S.C. GUPTE, J.)