

A AVENUE SUPERMARTS PVT. LTD.

v.

MRS. NISCHINT BHALLA & ORS.

(Civil Appeal No.8397 of 2015)

B OCTOBER 08, 2015

**[RANJAN GOGOI AND R.K. AGRAWAL, JJ.]**

*Suit – Administration of estate of deceased – Notice of motion in suit – On facts, Notice of motion taken by defendants nos. 4A, 4B and 5 in the suit for enforcement and implementation of certain orders passed by the Court on consent of the parties to the suit – Order passed by High Court giving directions for confirmation of the sale and execution of the conveyance deed etc., of the immovable property in favour of the present appellant – However, before the Division Bench, the Defendant Nos. 4A, 4B and 5 sought withdrawal of the Notice of Motion filed by them in the suit – Division Bench permitted withdrawal of the Notice of Motion at the instance of the said defendants and held that the order of the Single Judge does not survive for consideration rendering the appeal infructuous – On appeal, held: In the Order, the Single Judge while allowing the Notice of Motion had held that the highest offer made by the appellant stood accepted by all the parties to the suit and thereafter passed certain directions – Thus, a vested right was created in favour of the appellant and that cannot be set at naught simply by permitting the defendants to withdraw the Notice of Motion filed by them – Division Bench was to decide the appeal on merits instead of permitting the withdrawal of the Notice of Motion and observing that the order of the Single Judge passed on that Motion does not survive for consideration – Order passed by the High Court not sustainable and is set aside.*

*R. Rathinavel Chettiar and Another vs. V. Sivaraman and Others* 1999 (2) SCR 313: (1999) 4 SCC 89; *Sneh Gupta vs. Devi Sarup and Others* 2009 (2) SCR 553:(2009) 6 SCC 194; *Janatha Textiles and Others vs. Tax Recovery Officer and Another* 2008 (8) SCR 1148 : (2008) 12 SCC 582 – referred to. A  
B

Case Law Reference

1999 (2) SCR 313	referred to.	Para 8	
2009 (2) SCR 553	referred to.	Para 8	C
2008 (8) SCR 1148	referred to.	Para 8	

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 8397 of 2015 D

From the Judgment and Order dated 01.03.2012 of the High Court of Judicature at Bombay in Appeal No. 271 of 2009 in Notice of Motion No. 21 of 2006 in Suit No. 3706 of 1995

C. A. Sundaram, Ramji Srinivasan, Pratyush Panjwani, Mahesh Agarwal, Shashank Manish, Vivek Jain, E. C. Agarwala for the Appellant. E

Vijay Hansaria, Aslam Ahmed, Puneet Singh Bindra, Dhiraj Mehta, Gagan Gupta, Vikas Mehta, Rajat Sehgal for the Respondents. F

The Judgment of the Court was delivered by

**R.K. AGRAWAL, J.** 1. Leave granted. G

2. The present appeal has been filed against the judgment and order dated 01.03.2012 passed by the Division Bench of the High Court of Bombay in Appeal No. 271 of 2009 in Notice of Motion No. 21 of 2006 in Suit No. 3706 of 1995. H

- A Before the High Court, an appeal was filed against the order dated 10.02.2009 passed by the learned single Judge of the High Court on a Notice of Motion taken by Defendant Nos. 4A, 4B and 5 respectively in the aforementioned suit for enforcement and implementation of certain orders passed by
- B the Court on consent of the parties to the suit.

3. However, before the Division Bench, the original Defendant Nos. 4A, 4B and 5 sought withdrawal of the Notice of Motion No. 21 of 2006 filed by them in the Suit No. 3706 of
- C 1995. The Division Bench of the High Court opined that as the Notice of Motion taken out by Defendant Nos. 4A, 4B and 5 seeking interim reliefs and now they seek withdrawal of that motion, they cannot be prevented from withdrawing the same with the liberty to seek appropriate relief to which they may be
- D entitled in the changed circumstances. It had further held that as a result of the withdrawal of the motion, the order of the learned single Judge passed on the motion dated 10.02.2009 does not survive for consideration rendering this appeal
- E infructuous.

#### 4. Brief facts:

- (a) One Smt Durga Devi Hitkari was owner of various properties at Mumbai. She died in the year 1991. It
- F appears that there was some dispute between her heirs regarding the estate left by her. The plaintiffs therein filed the present suit for administration of estate of the deceased. The Notice of Motion being No. 3441 of 1995 in the suit was taken by the plaintiffs therein praying for
- G appointment of a receiver on the properties left by Late Smt Durga Devi and for temporary injunction restraining the defendants therein from disposing or selling or creating any third party rights or interest in the property.
- H (b) A learned single Judge of the High Court, vide order

dated 04.08.1998 disposed of the Notice of Motion by A  
restraining the defendants, their agents and servants from  
creating any third party interest in or encumbering or  
selling or transferring or alienating in any manner  
whatsoever the immovable properties bearing Survey No. B  
97 of Mandavi Division, admeasuring 202 sq. yards, Plot  
No. 66 at Chembur, Ghatkopar, Mahul Road,  
admeasuring 502 sq. yards and ground 1st, 6<sup>th</sup> and 7<sup>th</sup>  
floor of Sky Lark Building known as Hitkari House along  
with certain other directions.

(c) On 01.12.1999, the said Award was made rule of the C  
court by the High Court and a decree in terms of the said  
Award was passed in Arbitration Petition No. 148 of  
1997.

(d) Being aggrieved, defendants therein moved this Court D  
by filing special leave petition being No. 9168 of 2000.  
Before this Court, learned counsel for the parties filed  
consent terms of compromise duly signed by the parties.  
Vide order dated 11.12.2000, the special leave petition E  
got disposed of in terms of the consent terms dated  
11.12.2000. However, the said order was passed  
without prejudice to the parties to move the High Court  
of Bombay for probate proceedings. The High Court,  
vide order dated 15.04.2004, disposed of the Notice of F  
Motion No. 2998 of 2001 filed in Suit No. 3706 of 1995  
in terms of the minutes of the order.

(e) In the minutes, the earlier order of the learned single G  
Judge dated 04.08.1998 restraining the defendants from  
transferring immovable property situated at Chembur  
was modified and Defendant Nos. 1, 4 and 6 were  
permitted to take all necessary steps to sell the said  
property on the terms and conditions mentioned in the  
minutes. H

A (f) Bids were invited for the sale of the property at  
Chembur and the appellant herein gave bid of Rs.  
20,15,00,000/- which was found to be highest and  
accepted by the parties also. No challenge was made  
B to the sale contemplated under the provisions of the  
Code of Civil Procedure, 1908 (in short 'the Code'). As  
there was delay in execution of the agreement, Defendant  
Nos. 4A, 4B and 5 made an application by way of Notice  
of Motion being No. 21 of 2006 to the court for completion  
and confirmation of the sale process. The learned single  
C Judge of the High Court, vide order dated 10.02.2009  
confirmed the sale process and directed execution of  
the documents in favour of the appellant.

D (g) The original Defendant Nos. 2, 6 and 7 challenged  
the order dated 10.02.2009 by way of Letters Patent  
Appeal being No. 271 of 2009 before the Division Bench  
of the High Court. The original Defendant Nos. 4A, 4B  
and 5 did not challenge the order dated 10.02.2009.

E (h) At the appellate stage, original Defendant Nos. 4A,  
4B and 5 made an oral application for withdrawal of the  
notice of motion filed by them. The Division Bench of  
the High Court, vide order dated 01.03.2012, allowed  
the withdrawal of the Motion while holding that the order  
F of the learned single Judge dated 10.02.2009 does not  
survive for consideration rendering the appeal  
infructuous. Against the said order, the appellant has  
preferred this appeal by way of special leave.

G 5. Heard learned senior counsel for the parties.

**Rival submissions:**

H 6. Learned senior counsel for the appellant submitted  
that when the rights of the parties had been crystallized and

findings have been rendered in favour of the appellant herein and against the respondents and the same have been confirmed, the Division Bench of the High Court, without considering the effect thereon on the rights already accrued to the parties, could not have permitted withdrawal of the Notice of Motion at the instance of the original Defendant Nos. 4A, 4B and 5. In the alternative, it is submitted that even if the Division Bench could have allowed withdrawal of the original application, it had no occasion or cause to observe that on withdrawal of the original application, the order of the learned single Judge dated 10.02.2009 could not survive for consideration which in effect amounts to allowing the appeal without making any comments on the merits or otherwise on the order dated 10.02.2009.

7. He further submitted that the Division Bench was not justified in granting liberty to the parties to the suit to apply for appointment of receiver in respect of subject property for sale thereon as the sale in favour of the appellant herein had been in execution of the First and the Second decree which can only be set aside on an appropriate application being made in accordance with the provisions of Order XXI of the Code and not otherwise. Even if the suit was to be withdrawn that would not lead to setting aside of the sale in favour of the appellant herein unless recourse to appropriate proceedings in accordance with the provisions of Order XXI of the Code is made.

8. Learned senior counsel for the appellant relied upon the following decisions in support of his contention viz., *R. Rathinavel Chettiar and Another vs. V. Sivaraman and Others* (1999) 4 SCC 89, *Sneh Gupta vs. Devi Sarup and Others* (2009) 6 SCC 194 and *Janatha Textiles and Others vs. Tax Recovery Officer and Another* (2008) 12 SCC 582.

9. Learned senior counsel for the respondents, however,

- A submitted that as the order dated 10.02.2009 passed by the learned single Judge was on a Notice of Motion filed by Defendant Nos. 4A, 4B and 5, it was always open for the said defendants to withdraw the Notice of Motion in the appeal itself and once the court has permitted the withdrawal of Notice of
- B Motion, the order, if any, passed on the said Notice of Motion, does not survive.

**Discussion:**

- C 10. We have given our anxious consideration to the various pleas raised by learned senior counsel for the parties. It is not in dispute that vide order dated 04.08.1998 in Administration Suit No. 3706 of 1995, the learned single Judge had restrained the defendants, their agents and servants therein
- D from creating any third party interest in or encumbering or selling or transferring or alienating in any manner whatsoever amongst other properties the immovable property situated at Chembur, Ghatkoper, Mahul Road bearing Plot No. 66 admeasuring 502
- E sq. yards also. When the matter was taken up by way of special leave petition being No. 9168 of 2000 before this Court, the parties had signed the consent terms and vide order dated 11.12.2000, this Court had disposed of the special leave
- F petition in terms of the consent terms dated 11.12.2000. However, the said order was passed without prejudice to the parties to move the High Court for probate proceedings.

11. The learned single Judge of the High Court, vide order dated 15.04.2004, had taken on record the minutes of the order and the Notice of Motion was disposed of in terms of
- G the minutes of the order. In the minutes of the order, the order of injunction in respect of immovable property at Chembur was varied to the limited extent so as to enable Defendant Nos. 1, 4 and 6 to take all necessary steps to sell the said property on the terms and conditions mentioned in the minutes. It is not
- H necessary to reproduce the minutes of the order. Suffice it to

mention that in terms of the minutes, the appellant herein submitted its bid of Rs. 20,15,00,000/- which was found to be the highest and was accepted by the parties. In the Notice of Motion being No. 21 of 2006 filed by Defendant Nos. 4A, 4B and 5, the learned single Judge, vide order dated 10.02.2009, had held that the offer made by the respondent therein who is the appellant before us stood accepted by all the parties to the suit. While allowing the Notice of Motion, the learned single Judge gave certain directions in the operative part of the order dated 10.02.2009. For ready reference, the directions given in the order dated 10.02.2009 passed by the learned single Judge are reproduced below:-

"Order

(1) The respondents shall deposit a sum of Rs. 2,28,15,000/- with the Prothonotary & Senior Master, High Court, Bombay within one week from the date of signature on the detail order, who should forthwith invest the said amount in any nationalized Bank as fixed deposit.

(2) The Advocate for the defendant Nos. 4A, 4B and 5 shall return the Pay Order dated 5-8-2005 for the amount of R.2,28,15,000/- back to the respondents against the aforesaid deposit to be made by the respondents for cancellation of the same.

(3) Within one week therefrom, the defendant Nos. 2, 4A, 4B, 5 and 6 shall handover the original title deeds of the Chembur property to the Prothonotary and Senior Master, who shall keep the same in safe custody. Within one week therefrom, the Court Receiver shall take formal possession of the Chembur property and get it vacated from the defendants and any party claiming through them. The Receiver shall then intimate to the respondents about the vacant possession being available and within one

A week therefrom the respondents shall deposit the remaining consideration of Rs. 17,86,85,000/- with the court receiver High Court, Bombay. In case the amount is not deposited within one week as directed, then the deposit amount of Rs. 2,28,15,000/- shall stand forfeited and shall be handed over to the credit of the suit.

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(4) In case the amount is deposited as directed above, the defendant Nos. 2, 4A, 4B, 5 and 6 and Shri Sanjay Sawhney (the heir of the defendant No. 8) shall execute register and duly admit the execution before the Sub-Registrar of an irrevocable Power of Attorney in the format annexed at Exhibit-12 to the affidavit in reply of the respondents dated 18-10-2007, at the cost and expenses of the respondents. The Court Receiver shall then handover the possession of the Chembur property to the respondents and shall also handover the original title deeds and thereafter the Prothonotary & Senior Master shall handover the original title deeds to the respondents.

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E  
(5) In case the defendants above-mentioned fail to execute the Power of Attorney, as aforesaid, then the Court Receiver shall execute the same and register it at the costs and expenses of the respondents and further if the respondents want, they shall also execute the deed of conveyance at the costs of the respondents.

G  
F  
(6) The respondents to indemnify and keep indemnified the defendants against all actions, demands, claims, costs, charges and expenses by reason of any claim on account of any act or omission of the Attorneys under the Power of Attorney to be executed in their favour.

H  
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(7) After the completion of the aforesaid sale in favour of the respondents, the parties shall be entitled to

distribution of the amount and any one of them may apply to the Court for distribution of the same in terms of the order of the Supreme Court dated 11-12-2000 and the order of this Court dated 15-4-2004. A

(8) The respondents shall pay to the Court Receiver the costs, charges and expenses of the Receiver to be worked out on the basis of actuals incurred and estimated by the Court Receiver and not on the basis of commission and the Court Receiver shall stand discharged without any further order of this Court. B C

(9) In case of any difficulty, liberty to the party to approach the Court. At this stage, the learned senior counsel appearing for the defendant Nos. 6 and 7 makes oral request for stay of operation of this order for a period of six weeks. Request granted. The effect and operation of this order is stayed for a period of six weeks from the date of signature on the detail order". D

12. From a reading of the directions given by the learned single Judge in the operative portion of the order dated 10.02.2009 reproduced above, we find that the learned single Judge had directed the appellant herein who was the respondent before learned single Judge to deposit a sum of Rs. 2,28,15,000/- with the Prothonotary & Senior Master, High Court of Bombay within one week and the advocate for the Defendant Nos. 4A, 4B and 5 was directed to return the pay order dated 05.08.2005 for the amount of Rs. 2,28,15,000/- back to the respondents therein against the aforesaid deposit. The Defendant Nos. 2, 4A, 4B, 5 and 6 were further directed to handover the original title deeds of Chembur property to the Prothonotary & Senior Master, High Court of Bombay to be kept in safe custody and the court receiver to take formal possession of the Chembur property within one week and get it vacated from the defendants therein and any party claiming E F G H

A through them. After intimation to the respondents about the  
vacant possession being available, the respondent (appellant  
herein), was required to deposit the remaining consideration  
of Rs. 17,86,85,000/- with the court receiver. In case the  
amount is not deposited within one week as directed, the  
B deposit of Rs. 2,28,15,000/- would stand forfeited and was to  
be handed over to the credit of the suit. It was further directed  
that in case the amount is deposited as directed, the Defendant  
Nos. 2, 4A, 4B, 5 and 6 and heir of Defendant No. 8 shall allow  
the execution of an irrevocable Power of Attorney in the  
C prescribed format before the sub-Registrar. The court receiver  
was then directed to hand over the possession of the Chembur  
property to the respondent and was also directed to handover  
the original title deeds to the respondent. The conveyance  
deed was also directed to be executed at the cost of the  
D respondent.

13. The order dated 10.02.2009, in fact, gave certain  
directions regarding the sale of the immovable property at  
Chembur in favour of the respondent therein who is the  
E appellant before us. The order dated 10.02.2009 was brought  
up in appeal by some of the defendants. Those defendants,  
who were appellants in Appeal No. 271 of 2009, had not sought  
for any withdrawal of appeal. The question is as to whether  
F Defendant Nos. 4A, 4B and 5, on whose Notice of Motion No.  
21 of 2006, the order dated 10.02.2009 has been passed  
giving directions for confirmation of the sale and execution of  
the conveyance deed etc., of the immovable property at  
Chembur in favour of the present appellant, can be permitted  
G to withdraw and the order dated 10.02.2009 can be said to be  
not surviving for consideration.

14. In the case of *R. Rathnival (supra)*, this Court has  
considered the question as to whether at a stage where the  
rights of the parties are crystallized can be divested of the rights  
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under the decree simply because of withdrawal of the suit at the appellate stage or not. This Court has held as follows:- A

“12. What is essential is that the matter must have been finally decided so that it becomes conclusive as between the parties to the suit in respect of the subject-matter of the suit with reference to which relief is sought. It is at this stage that the rights of the parties are crystallised and unless the decree is reversed, recalled, modified or set aside, the parties cannot be divested of their rights under the decree. Now, the decree can be recalled, reversed or set aside either by the court which had passed it as in review, or by the appellate or revisional court. Since withdrawal of suit at the appellate stage, if allowed, would have the effect of destroying or nullifying the decree affecting thereby rights of the parties which came to be vested under the decree, it cannot be allowed as a matter of course but has to be allowed rarely only when a strong case is made out. It is for this reason that the proceedings either in appeal or in revision have to be allowed to have a full trial on merits.” B C D E

This Court after referring to the various decisions of the High Courts have come to the conclusion that where a decree passed by the trial Court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. In para 22, this court held as under:- F

“22. In view of the above discussion, it comes out that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in the parties to the suit under the decree cannot be taken away by withdrawal of the suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice H

A anybody's vested rights. The impugned judgment of the High Court in which a contrary view has been expressed cannot be sustained."

B 15. In *Janatha Textiles (supra)*, this Court has held that it is an established principle of law that in a third party auction-purchaser's interest in the auctioned property continues to be protected notwithstanding that the underlying decree is subsequently set aside or otherwise.

C 16. In *Sneh Gupta (supra)*, this Court has held that a right to withdraw a suit in the suitor would be unqualified, if no right has been vested in any other party.

**Conclusion:**

D 17. Applying the principles given in the aforementioned decisions to the facts of the present case, we find that in the order dated 10.02.2009, the learned single Judge while allowing the Notice of Motion No. 21 of 2006 had held that the highest offer made by the respondent therein (appellant before us) stood accepted by all the parties to the suit and thereafter passed certain directions to deposit the bid amount, execution of the conveyance deed etc. Thus a vested right has been created in favour of the respondent therein, that is, the present  
E appellant and that cannot be set at naught simply by permitting the Defendant Nos. 4A, 4B and 5 to withdraw the Notice of  
F Motion filed by them. It was for the Division Bench to decide the appeal on merits instead of permitting the withdrawal of the Notice of Motion and observing that the order of the learned  
G single Judge passed on that Motion dated 10.02.2009 does not survive for consideration..

H 18. In view of the foregoing discussion, the order dated 01.03.2012 passed by the High Court of Bombay under appeal cannot be sustained and is hereby set aside. The High Court

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is directed to decide the appeal afresh on merits in A  
accordance with law. The appeal is hereby allowed.

Nidhi Jain

Appeal allowed.