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

NOTICE OF MOTION NO.750 OF 2015
IN
SUIT NO.342 OF 2013

Rajendra Saxena & Anr.	…	Applicants / Plaintiffs
Vs.		
Ms. Sharda Ratnam	…	Defendant

M M Vashi, Sr. Adv., a/w. Prachi Khandge, Adv. i/b. M/s. M P Vashi & Associates for applicants / plaintiffs.
S K Chaurasia, Adv. i/b. S K C Legal for defendant.
Mr. O A Das, Adv. for Bank of India.

CORAM : MRS. ROSHAN DALVI, J.
DATE : 2nd September, 2015.

P.C. :

1. The plaintiffs have taken out the Notice of Motion for appointment of the Court Receiver, High Court, Bombay in respect of the suit Flat No. 1002, 10th Floor, Versova Dhanlaxmi CHS, Plot No.10 RDP – II, MHADA layout S V P Nagar Versova Andheri (W), Mumbai 400 053 and for a direction to put the plaintiffs in physical possession of the suit flat without payment of any compensation or security. The source of reason for taking out this Notice of Motion emanates from the original cause of action and the consequent interim / ad interim order.

2. The parties entered into an MOU on 11th March, 2011 for sale of the suit flat, which was then owned by the defendant, to the plaintiff. The total consideration agreed by the parties was Rs.1.20

Crores. The plaintiffs paid the initial earnest amount of Rs.20 lacs upon executing the MOU. The plaintiffs had to make payments of the balance Rs.1 Crore as per clause 9 of the agreement. Strangely Rs.25 lacs were payable in cash as seen from the clause 9 of the MOU. The plaintiffs have made payment of a total sum of Rs.1,06,50,000/- to the defendant. The balance amount is Rs.13.50 lacs.

3. The plaintiffs required “no objection” certificate of the society for transferring the flat to the names of the plaintiffs and for admitting the plaintiffs as members of the society. The defendant was found to have had disputes with the society. She was a defaulter for the payment of compensation and for society's dues. Hence the plaintiffs could not obtain the required NOC and could not make payment of the balance consideration of Rs.13.50 lacs.

4. The plaintiffs sued for specific performance and defendant terminated the agreement on the ground that the payment was not made as per the MOU. The payment was not made, as shown by the plaintiff upon the aforesaid reason.

5. Upon the filing of the suit the status quo order came to be passed initially on 11th May, 2012. It has been continued thereafter on 20th June, 2012 until further orders.

6. In between the suit came to be dismissed for default. It has been restored under the order dated 26th June, 2013 and the status quo order initially granted came to be continued thereafter. The status quo order continues until today.

7. The defendant has breached the status quo order. The defendant has created a mortgage of the suit flat in favour of Bank of India (BOI) to obtain a loan from BOI. The defendant has admitted the breach. The defendant has justified the breach on the ground that she did not have financial means and hence required to sell the suit flat.

8. Upon the above Notice of Motion being taken out the defendant sought to clear the loan. The defendant has paid off BOI. The defendant has been handed over the original documents of title which were given by the defendant to the plaintiffs. The defendant was given an opportunity to purge the contempt and to produce the documents before the Court after this Notice of Motion came to be taken out and came to appear on board almost from day to day in the last week. The defendant appeared before the Court. The defendant assured the Court that she would obtain the original documents. The defendant failed to do so. The Notice of Motion came to be adjourned almost from day to day on the request of the defendant's advocate on the ground that the original documents were to be procured from BOI.

9. The plaintiffs justifiably apprehended that the defendant would create third party rights and sell the suit flat in favour of another third party. Hence the plaintiffs insist upon appointment of Court Receiver and placing plaintiffs in possession of the suit flat.'

10. Incidentally it so transpired that on 28th August, 2015 counsel on behalf of the defendant stated to Court that the defendant was in the locality and would obtain the original documents to Court.

The matter was kept back for the defendant to appear with the documents of title. The defendant filed the affidavit in reply through her counsel who appeared on her behalf to have the matter kept back and thereafter adjourned. However, whilst adjourning the matter the Court summoned the BOI Branch Manager, Mumbai Main Branch, from where the loan was taken, to appear along with all the original documents of title in Court as it was informed to Court that the documents were not handed over by the BOI despite the fact that the defendant had cleared the loan.

11. In the affidavit in reply the defendant has justified her breach and contempt. She has stated that in May / April, 2015 she was in need of finance for her business purpose and survival and she believed that obtaining loan would not tantamount to breach of the status quo order. Hence it is her case that due to her alleged financial constraints she mortgaged her flat to take the loan from BOI.

12. The defendant did not produce the original documents as was stated by her counsel. The Notice of Motion came to be adjourned yesterday 1st September, 2015.

13. Mr. O A Das appeared on behalf of BOI consequent upon the summons issued. He tenders an affidavit in reply of the Chief Manager of BOI with regard to the documents of the defendant. It is seen that the documents of the defendant have been returned to her on 25th August, 2015. The defendant, therefore, made a false statement to Court thereafter that she would obtain the documents and sought time from time to time to produce the documents.

14. Yesterday when the matter was in court the defendant failed to appear. It was mentioned to Court that the defendant is ill without any documentary evidence. The Court once again indulged to adjourn the matter till today. Even today the defendant has not appeared. She has not produced the original documents. It is seen that BOI has already returned the documents to her.

15. The defendant who sought to purge her contempt by paying off the loan to the bank has in fact continued with the contemptuous behaviour. Despite paying off the loan of the bank she has not produced the original title deeds and hence her contempt / breach has not been purged. The title deeds are at large. The dispute between the parties has to be adjudicated in Court. The defendant is not present. Counsel on her behalf again applies for time till Friday for the appearance of the defendant and for production of the documents. The plaintiffs justifiably apprehend creation of third party rights. This is precisely what has to be prevented by interim order of the Court pending a suit in which the plaintiffs make out a prima facie case.

16. The plaintiffs prima facie case is seen to be made from the defendant's contempt. A large part of the consideration to the extent of Rs.1,06,50,000/- has been paid. The remainder of the consideration has not been paid because the NOC of the society was not obtained. The plaintiffs would deserve and require the clear title and consequently the NOC of the society. The plaintiffs would also require to be handed over the title documents.

17. The plaintiffs must of course, be ready and willing to

perform their part of the contract. The only application of the plaintiffs as the purchasers would be the payment of consideration. The plaintiffs were directed to make arrangements for the payment of the balance amount. The plaintiffs have tendered in Court two demand drafts of Rs.5.50 lacs and Rs.8 lacs constitute the entire balance payment. The plaintiffs deserve to be handed over possession of the suit flat.

18. The application of the plaintiffs for appointment of Court Receiver is wholly justified. In fact the defence of the defendant requires to be struck off under Order 39 Rule 11 of the CPC.

19. Nevertheless counsel on behalf of the defendant argued that the plaintiffs delayed the payment of the balance consideration and hence the defendant terminated the contract. This case on merits would have been considered but for the continuous breach of the order of status quo. Even upon considering this defence it may be stated that the delay on the part of the plaintiffs is seen to have been caused by the default of the defendant in paying off the society's dues so that the plaintiffs would not get clear title and would not be bound to perform the contract.

20. Even when the defence of the defendant the Court would see that upon a large part of the consideration has been paid to the defendant. The Court has also seen the readiness and willingness together with the actual payment of the plaintiffs. Hence the reliefs prayed for are required to be granted. Upon seeing breach of the defendant the Court has no option but to pass the precisely the following order.

21. Hence the following order :

1. The Notice of Motion is made absolute as prayed.
2. The Court Receiver, High Court, Bombay is appointed receiver in respect of the Flat No. 1002, 10th Floor, Versova Dhanlaxmi CHS, Plot No.10 RDP – II, MHADA layout S V P Nagar Versova Andheri (W), Mumbai 400 053.
3. The Court Receiver shall <u>forthwith take</u> physical possession of the suit flat and put the plaintiffs in possession as the receiver's agent without payment of compensation and security from the plaintiffs.
4. The defendant shall pay costs of this Notice of Motion fixed at Rs.1 lac.
5. Stay applied by counsel on behalf of defendant is refused.
6. The Chief Manager of BOI who has appeared pursuant to summons is discharged. The affidavit in reply of the Chief Manager, BOI is taken on record.
7. Two demand drafts made out by plaintiffs in the name of the Prothonotary and Senior Master of this Court shall be deposited to the credit of the suit and invested pending the decree.
8. All the parties to act upon the copy of this order uploaded on the Internet.
9. The Notice of Motion is disposed of accordingly.

10. The suit is adjourned to 28th September, 2015 for *ex-parte* decree.

(ROSHAN DALVI, J.)

C E R T I F I C A T E

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