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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1070 OF 2014
IN
SUIT NO.569 OF 2014

Trinity Property Ventures (India) Pvt. Ltd. ...Applicant/Plaintiff
vs
Abhimanyu Dattatraya Wandrekar @
Abhimanyu Dattatraya Bharadwaj ...Defendant

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Mr. Milind Sathe, Senior Advocate along with Mr. Naushad Engineer and Mr. Srinivasan Mudaliar, i/b. Federal & Rashmikant, for the Plaintiff.

Mr. P.R. Arjunwadkar, i/b. Prabha Badadare, for the Defendant.

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CORAM : S.C. GUPTE, J.

DATED : MARCH 5, 2015

P.C. :

. This Notice of Motion is taken out by the Plaintiff in a specific performance suit, praying for an injunction restraining the Defendant from creating any third party rights in respect of the suit property or interfering with the possession of the Plaintiff of the suit property. Besides these two reliefs, the Plaintiff also prays for restraining the Defendant from in any manner interfering with the demolition of the existing structure on the suit property and construction to be commenced by the Plaintiff on the property.

2. The Plaintiff is a Private Limited Company incorporated by the

promoters with the intention of acquiring a property in the vicinity of Bandra-Khar in order to construct a family house for the personal residence of the promoters of the Plaintiff. One Wilfred Jose Anthony Pereira and his family members are the promoters of the Plaintiff. The suit property is the only immovable asset of the company and it carries on no other business. The suit property was owned by members of the Wandrekar family. There were in all 13 shares of various members of the Wandrekar family in the suit property, one of which belongs to the Defendant. There is a building standing on the suit property, which was in the occupation of three particular members of the Wandrekar family, though, as noted above, 13 members of the family had shares in the property. It is the case of the Plaintiff that pursuant to the negotiations between the parties, namely, the said Wilfred Pereira and 13 members of the Wandrekar family, which negotiations concluded by May 2012, it was agreed between the Plaintiff and each of the 13 members of Wandrekar family, including the Defendant, that they would sell their respective right, title and interest in the suit property to the Plaintiff. The essential terms and conditions of the concluded oral contract between the parties *inter alia* envisaged that the Plaintiff would first settle the matter with one Ladho Wadhwa, with whom the members of Wandrekar family, including the Defendant herein, had entered into an agreement in respect of the property and for the specific performance of which the said Wadhwa had filed a suit in this Court (Suit No.2288 of 2010); that the Plaintiff would pay various sums mentioned in clauses (b) and (c) of para 16 of the plaint to the particular members of Wandrekar family mentioned therein at the time of execution and registration of individual conveyances by the members of the family in favour of the Plaintiff; and that each member of the family, including the Defendant, would execute a deed of conveyance, a power of attorney, a declaration cum indemnity and a possession letter, all in favour of the Plaintiff. On these facts, it is claimed by the Plaintiff that there was a valid, legal and binding concluded agreement between the Plaintiff on the one hand and the members of the Wandrekar family, including the Defendant, on the other, for sale of the suit property by the latter to the Plaintiff. The Plaintiff, thereafter, proceeded to pay a sum of Rs.1 crores to Ladho Wadhwa, against which payment the said Wadhwa agreed to withdraw Suit No.2288 of 2010 filed by him against the Wandrekars. The order passed by this Court in Wadhwa's suit on 12 June 2012 is placed by the Plaintiff before this Court, which shows that the suit filed by Wadhwa was withdrawn on 12 June 2012. Wadhwa has also executed declarations affirming that Wandrekars along with the Plaintiff had approached Wadhwa on the basis of negotiations to sell the undivided right, title and interest of Wandrekars in the suit property to the Plaintiff, for settlement of Wadhwa's suit against Wandrekars and that in pursuance of the negotiations, Wadhwa had agreed to accept a sum of Rs. 1 crore and offered to withdraw unconditionally the suit filed against Wandrekars. All members of the Wandrekar family save and except the Defendant have, thereafter, proceeded to execute conveyance of their respective undivided shares in the property in favour of the Plaintiff against payment of considerations mentioned in clauses (b) and (c) of paragraph 16 of the plaint. There are in all 8 conveyances in respect of 91.67% undivided share of 12 members of Wandrekar family in the suit property in favour of the Plaintiff. In pursuance of these conveyances, the Plaintiff has been put in possession of the suit property by the occupant members of Wandrekar family. The Plaintiff's name has, accordingly, been entered in the property card on 21 August 2013. The Plaintiff has since been in possession of the suit property paying all outgoings, including municipal taxes, electricity charges, etc. in respect of the suit property. It is the case of the Plaintiff that on 18 March 2013, there was a notice issued by the Municipal Corporation of Greater Mumbai under Section 354 of the Mumbai Municipal Corporation Act, 1888 requiring the Plaintiff to demolish the structure standing on the suit property on the ground that the structure was in a ruinous condition and likely to fall and was dangerous to persons occupying or passing by the property. The Plaintiff now proposes to demolish the structure on the suit property and construct a new structure in its place to be used as a family house for the Pereira's. Before doing so, the Plaintiff claims to have approached the Defendant to execute a conveyance in respect of his 8.33% undivided share of the suit property in pursuance of the oral agreement between the parties, offering to pay the entire consideration of Rs.1.75 crores to the Defendant. It is the case of the Plaintiff that the Defendant has refused to comply with the Plaintiff's requisition and, in the premises, the Plaintiff has filed the present suit for specific performance. It is the case of the Plaintiff that though as a matter of law, the Plaintiff being in possession of the suit property and the structure thereon and already being 91.67% owner of the suit property on the basis of the conveyances executed by members of the Wandrekar family, is not bound to approach this Court for a permission to demolish the suit property, being required to do so by virtue of Section 354 of the Mumbai Municipal Corporation Act, 1888. The Plaintiff has nevertheless approached this Court by the present Notice of Motion by way of abundant caution and also so that the Defendant does not interfere with the proposed demolition of the structure in the suit property by the Plaintiff and construction of a new building thereon.

3. The Motion is opposed by the Defendant on various grounds.

Firstly, it is submitted that there is no agreement between the Plaintiff and the Defendant, oral or otherwise. It is submitted that any oral agreement for sale of an immovable property in a City like Mumbai is inherently improbable. Besides, it is submitted that there is no documentary proof or material tendered by the Plaintiff in support of its case of an oral agreement. Secondly, it is submitted that there is admittedly no payment made by the Plaintiff to the Defendant of any amount whatsoever towards the purported sale of 8.33% undivided share of the Defendant. Thirdly, it is submitted that the suit property being a dwelling house belonging to a joint family, and the transferee, i.e. the Plaintiff, not being a member of the family, is not entitled to even possession of the property, let alone being entitled to demolish the same. It is lastly submitted that even if this Court were to come to a conclusion that there was indeed an oral agreement for sale between the Plaintiff and the Defendant, the question of grant of specific relief in respect of such agreement is a matter of discretion to be exercised by the Court at the end of the trial. In the premises, it is submitted that a relief as drastic as permitting the Plaintiff to demolish the structure standing in the property and construct a new building thereon, ought not to be permitted.

4. The Plaintiff relies upon several circumstances, which go to show that there was indeed an oral agreement for sale of 8.33% undivided share of the Defendant in the suit property. The very first circumstance is that admittedly there was a transaction between the Wandrekars and Wadhwa in relation to the property, though whether the transaction was an agreement for sale or an agreement for development is a matter of debate between the parties. The Plaintiff actually proceeded to clear the encumbrance of Wadhwa and seek a withdrawal of the suit filed by

Wadhwa. The oral agreement pleaded between the Plaintiff and Wandrekars appears to be a reasonably probable basis for the Plaintiff proceeding to discharge the encumbrance of Wadhwa. The second important circumstance is the fact that all members of Wandrekar family, save and except the Defendant, have actually proceeded to execute conveyance of 91.67% undivided share of the vendors in the suit property in favour of the Plaintiff. This obviously shows that the oral agreement between the family members and the Plaintiff was duly acted upon between the family and the Plaintiff. This is certainly an important piece of evidence, which goes to show that the agreement pleaded by the Plaintiff was actually entered into between the members of Wandrekar family and the Plaintiff. The third important circumstance is that the Plaintiff is admittedly in possession of the suit property, including the structure standing thereon. The Plaintiff has submitted proof of its having been put in such possession and exercised all rights of an owner and occupier of the suit property since June 2013. It is also pertinent to note that after the Plaintiff obtained the last conveyance from the 12th member of Wandrekar family on or about 10 July 2013, the Plaintiff not only sent a draft deed of conveyance to be executed by the Defendant in favour of the Plaintiff, but addressed as many as three communications to the Defendant calling upon him to fulfill the oral agreement between the parties and execute a conveyance in favour of the Plaintiff. Admittedly, though these communications were duly received by the Defendant, there is no reply by the Defendant to these communications. Non-furnishing of a reply to these communications, no doubt, does not imply that the Plaintiff's case of oral agreement stands admitted by the Defendant but it is a circumstance, which, together with the other circumstances noted above, goes to show that the Plaintiff's case, as pleaded in the plaint, is highly probable.

5. A cumulative effect of all these circumstances, staring as they are in the face of the Defendant, is that the Plaintiff has made out a prima facie case of their being an oral agreement for sale of 8.33% undivided share of the Defendant in the suit property to the Plaintiff. The question now is whether the interim relief prayed for by the Plaintiff, and in the terms in which such relief is prayed, ought to be granted, considering the nature and circumstances of the case as also the balance of convenience as between the parties. It is an admitted position that as far back as in March 2013, there is a demolition notice issued by the Municipal Corporation to the Plaintiff for demolition of the structure standing in the suit property. The basis of a notice under Section 354 is that the structure is in such ruinous condition or is so dangerous to persons occupying, resorting to or passing by the structure or other structures in the neighbourhood, that the Corporation requires the owner or occupier of the structure to pull down the structure so as to prevent all cause of danger. The notice itself is not contested by the Defendant. Though learned Counsel for the Defendant submitted at the bar that the Defendant did not accept the fact that conditions stipulated under Section 354 actually obtain at the site and might still pursue his remedy in respect of the notice, the fact of the matter is that for the last about one year he has not chosen to do so. The Municipal Corporation's notice, uncontested as it is, clearly implies that the structure is in a ruinous and dangerous condition. Besides the Plaintiff has annexed to the affidavit in support of the Notice of Motion photographs of the structure, which again are not contested by the Defendant, which show that the structure is indeed in a dilapidated condition and urgently requires to be pulled down. If that is so, and the Plaintiff is legally bound to do so, there is no way that the Defendant, even though he contests the oral

agreement purportedly entered into by him with the Plaintiff for sale of his undivided share of the suit property, can prevent the Plaintiff from pulling down the structure. As I have noted above, there is already an overwhelming *prima facie* case in favour of the Plaintiff that there was an oral agreement between the parties but even in the absence of such agreement, the Plaintiff's demolition of the suit property cannot be interfered with by the Defendant.

6. The Defendant's contention that the suit property is a dwelling house belonging to an undivided family has no substance whatsoever. In the first place, there is absolutely nothing to show that members of Wandrekar family constituted a joint and undivided family or that the suit property was used as a dwelling house of such undivided family. By all account, the undivided shares of the members of family were held as tenants in common. Even the suit property was occupied by only three individuals, namely, Sumant, Gajanan and Narendra Wanderkar, each of whom has executed a registered conveyance in favour of the Plaintiff and transferred possession to it. The Defendant was admittedly not in occupation of the suit property. Since June 2013, the Plaintiff is in exclusive possession of the suit property. There is no question of application of the provisions of either Section 44 of the Transfer of Property Act or Section 4 of the Partition Act, which concern transfer of share of a dwelling house belonging to an undivided family, to the facts of the present case.

7. As for the balance of convenience, it is very clear that even if one were to disregard the agreement for sale purportedly entered into by the Defendant in respect of his 8.33% undivided share in the suit property,

the Plaintiff admittedly owns 91.67% of undivided share in the suit property. As owner of the suit property, if the Plaintiff were to assert its rights in respect of the suit property and even if there were to be a partition as between the Plaintiff and the Defendant, all that the Defendant might expect the Court to do is to permit the Plaintiff to buy out the Defendant. The Defendant being 8.33% co-sharer of the suit property, as against the Plaintiff's 91.67% share, it is but reasonable to expect the Court to allow the Plaintiff to purchase the moiety of the Defendant in the suit property. The only question in that case would be to determine the reasonable compensation that the Defendant ought to get. The price determined by the Wandrekars to be payable to each of the family members under the oral agreement, which has, as noted above, since been acted upon by execution of conveyance, can be treated as a proper and reasonable price of the Defendant's share, at least for the purposes of the present interim application. In that view of the matter, if the Defendant's share in the suit property is secured to the extent of its entire value, there is no reason why this Court ought to permit the Defendant to interfere with the demolition of the dangerous structure in the suit property and construction of a new structure in its place by the Plaintiff.

8. In that view of the matter, the Plaintiff has made out not only a strong *prima facie* case but a clear balance of convenience in its favour for grant of the interim relief claimed, on deposit of the value of the Defendant's share in the property in Court. Accordingly, the Notice of Motion is made absolute in terms of prayer clauses (a), (b) and (c) subject to the Plaintiff depositing a sum of Rs.1.75 crores in this Court within a period of four weeks from today.. There shall be no order as to costs.

9. Learned Counsel for the Defendant applies for stay of this order. Since this order is in the nature of grant of preventive reliefs, there is no question of granting any stay. Mr. Sathe, learned Senior Counsel appearing for the Plaintiff, however, makes a statement that the Plaintiff does not propose to demolish the structure in the suit property for four weeks from today. This statement, which is accepted by this Court, should adequately protect the Defendant for the time being.

(S.C. GUPTE, J.)