IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1340 OF 2014
IN
SUIT NO. 823 OF 2014

Nurallah Kamruddin Veljee & Anr. …Plaintiffs / Applicants
vs.
Mr.Vishal Harichand Khanna & Ors. ...Defendants

Mr.Atul Rajadhyaksha, Senior Advocate i/b. Mr.Suresh M. Kamble for Plaintiffs.
Mr.Rajiv Narula with Mr.Udaipuri i/b. M/s.Udaipuri & Co. for Defendant Nos.1, 2 and 4.

CORAM : S.C. GUPTE, J.

24 FEBRUARY 2015

P.C. :

This Notice of Motion is taken out by the Plaintiffs, for appointment of Court Receiver as also for an interim injunction restraining the Defendants from creating third party rights in respect of the suit property.

2 The suit property consists of two flats, being Flat Nos.5 and 6, on the 5^{th} and 6^{th} Floor of a building known as "Madhu Kiran". These two flats have been internally connected and amalgamated into a single duplex unit, admeasuring 1250 sq.ft. Defendant Nos.1 and 2 are the owners of the suit property.

3 The Plaintiffs are estate agents, property consultants and developers. The Plaintiffs claim to be agreement purchasers in respect of the suit property and also mortgagees of the suit property. The short facts of the case may be stated as follows :

(i) Defendant Nos.1 and 2 are owners of the suit property as members of Defendant No.5 society. By two agreements of leave and licence, both dated 18 October 2007, Defendant Nos.1 and 2 created a licence in favour of one UPS SCS (India) Pvt.Ltd. ("UPS") in respect of the suit property for a period of three years on a monthly compensation of Rs.1,75,000/- each (i.e. Rs.3,50,000/- for the entire suit property) and interest free deposit of Rs.21 lakhs each (i.e. Rs.42 lakhs in the aggregate);

(ii) It appears that Defendant Nos.1 and 2 obtained a loan of Rs.75 lakhs from one Jankalyan Sahakari Bank Ltd. against the mortgage of the suit flats. It was one of the terms of the loan agreement that the bank was authorized to recover the compensation payable by UPS directly from UPS as and when it became due;

(iii) On 19 September 2008, UPS addressed a notice to Defendant Nos.1 and 2 terminating the licence in respect of the suit flats and calling upon Defendant Nos.1 and 2 to repay the security deposit of Rs.42 lakhs along with interest thereon at the rate of 18% p.a.;

(iv) As Defendant Nos.1 and 2 did not comply with the requisition of UPS, in 2009, UPS filed two applications before the Competent Authority at Bandra (Application Nos.20 and 21 of 2009), seeking *inter alia* the return of the security deposit of Rs.42 lakhs together with interest;

(v) During the pendency of these applications, since UPS stopped paying the monthly compensation, the bank initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, by issuance of a statutory notice under Section 13(2) of that Act;

(vi) The securitisation notice was challenged by Defendant Nos.1 and 2 by filing Securitisation Applications (Application Nos.49 and 50 of 2009) before the Debt Recovery Tribunal-II;

(vii) During the pendency of these applications, Defendant No.2

approached the Plaintiff for financial accommodation with a view to clear off the bank liability. It is the case of the Plaintiff that Plaintiff No.1, in view of the close relationship between Plaintiff No.1 and Defendant No.2, agreed to give unsecured financial accommodation to Defendant Nos.1 and 2, undertaking to repay the outstanding liability of the bank;

(viii) It appears that on 22 July 2011, consent terms were entered into between Defendant Nos.1 and 2 on the one hand, and the bank on the other, for discharge of the bank liability;

(ix) On 13 September 2011, various documents were executed between Defendant Nos.1 and 2 and the Plaintiffs, presumably as a result of the financial accommodation to be granted by the Plaintiffs to Defendant Nos.1 and 2, as noted above. There was an agreement for sale executed between Defendant Nos.1 and 2 as “vendors” and the Plaintiffs as “purchasers / investors”. It is the Plaintiffs’ case that under this agreement, Defendant Nos.1 and 2 agreed to sell the suit flats to the Plaintiffs at or for a price of Rs.200 lakhs. (The relevant terms of this agreement will be noted later.) The other document was a possession letter addressed by Defendant Nos.1 and 2 to Plaintiff No.1. This letter, also dated 13 September 2011, acknowledges the agreement for sale and the manner of payment thereunder and assures the Plaintiffs that on making full payment to the bank, Defendant Nos.1 and 2 will hand over legal possession of the suit flats to the Plaintiffs. A third document, purported to be an affidavit-cum-declaration, also dated 13 September 2011, was executed by Defendant Nos.1 and 2 confirming *inter alia* that Defendant Nos.1 and 2 had deposited original title documents in respect of the suit flats together with the no due certificate from the bank and no lien certificate from Defendants No.3, with the Plaintiffs. It is the Plaintiffs' case that a lawful mortgage by deposit of title deeds was thereby created by Defendant Nos.1 and 2 in favour of the Plaintiffs;

(x) The Plaintiffs claim to have paid a sum of Rs.1,32,82,582/- to Defendant Nos.1 and 2 towards repayment of the bank dues in accordance with the consent terms and in pursuance of the documents of 13 September 2011;

(xi) In pursuance of orders passed by this Court in a writ petition arising out of the pending proceedings before the Competent Authority at Bandra, possession of the suit flats was handed over by UPS to Defendant Nos.1 and 2, who have since been in possession of the suit flats;

(xii) Subsequent to these events, there was correspondence between the parties, in the course of which there were disputes raised by Defendant Nos.1 and 2 as to the nature of the transaction between the parties. Whereas it was the case of the Plaintiffs that there was indeed an agreement for sale as also mortgage by deposit of title deeds, it was the case of Defendant Nos.1 and 2 that this was a simple loan agreement. There were also disputes between the parties as to the exact amount paid by the Plaintiffs to Defendant Nos.1 and 2. Whereas it was the case of the Plaintiffs that a sum of over Rs.1.32 crores was paid by the Plaintiffs to Defendant Nos.1 and 2, it was the case of the Defendants that a sum of about Rs.85 lacs was actually paid by the Plaintiffs to Defendant Nos.1 and 2;

(xiii) In these facts, the Plaintiffs have filed the present suit praying for specific performance of the purported agreement for sale dated 13 September 2011 as also for enforcement of the purported equitable mortgage over the suit flats. As noticed above, by the present Notice of Motion, the Plaintiffs seek appointment of Court Receiver in respect of the suit flats and also interim injunction restraining the Defendants from creating any third party rights over the suit flats.

4 As may be noticed from the facts narrated above and the documents produced before the Court, the Plaintiffs' case is of an agreement purchaser and also a mortgagee in respect of the suit flats. Let us now examine the *prima facia* merits of these two cases from the point of view of grant of interim

relief. At the outset, it is pertinent to note that all these documents, namely, the purported agreement for sale as well as the possession letter and affidavit-cum-declaration are executed on the same date. The nature of the transaction will, in that case, have to be ascertained on a conjoint reading of these three documents. The agreement for sale *inter alia* records an agreement for sale of the suit flats for a basic price of Rs.2 crores and a share of 50% profits from sale proceeds of the suit flats as and when the suit flats are sold by the purchasers / investors, within a period of four months from 1 September 2014. The purchasers / investors were to pay certain amount totalling a sum of Rs.70,31,582/- by RTGS to the bank account of Defendant No.1, within twenty four hours of receipt whereof by the bank Defendant Nos.1 and 2 were to obtain no dues certificate, release of mortgage and the original purchase agreements of the suit flats from the bank. The purchasers / investors were also to settle the dues of UPS. The balance payable to UPS was stated to be Rs.42 lakhs together with interest payable and the litigation costs, which together with the total amount payable to the bank in terms of the settlement (Rs.1,31,32,582/-) and additional benefit to the vendors and Advocates' fees (Rs.5,50,000/- and Rs.1 lakh, respectively), made up the total consideration of Rs.2 crores payable by the Plaintiffs to Defendant Nos.1 and 2 towards sale of the suit flats. The agreement, thereafter, provides that the purchasers / investors shall be entitled to sell the suit flats and also conclude the deal mutually and in consent with Defendant Nos.1 and 2 and to receive from the sale proceeds a sum of Rs.2 crores and an equal share in the balance amount of the sale proceeds over and above Rs.2 crores. The agreement further provides that if for any reason, the sale was not completed within four months, then in that case, Defendant Nos.1 and 2 shall bear 2% interest on Rs.2 crores from 1.1.2012 onwards, and also continue to reserve their rights on 50% of profit from the sale of the suit flats. The letter of possession executed on same day, as noted above, acknowledges the agreement for sale and the manner of payment of consideration provided therein and assures the Plaintiffs legal possession of the suit flats upon making the full payment to the bank. The affidavit-cum-declaration, on its part, confirms handing over of original title deeds in respect of the suit flats together with original correspondence between the bank and the vendors, the original lease agreement with UPS, consent terms, etc. by Defendant Nos.1 and 2 to the Plaintiffs. It also confirms a total amount to be paid by the Plaintiffs to Defendant Nos.1 and 2 and or the bank. It confirms Defendant Nos.1 and 2 having undertaken to execute an agreement for sale with a prospective buyer provided the terms and conditions of the agreement for sale dated 13 September 2011 are complied with. A conjoint reading of these documents clearly indicates that rather than an agreement for sale in respect of the suits flats, the transaction between the parties was more of a loan transaction, in consideration of which the parties had agreed to recoup the amount of loan and share profits from out of sale of the suit flats. What was envisaged was that the suit flats would be sold at a future date and after recouping the amount of Rs.2 crores to be paid under the purported agreement for sale dated 13 September 2011, the parties were to share the sale proceeds in a ratio of 50 : 50.

5 As regards the payment made by the Plaintiffs under the suit transaction, there are disputes between the parties, which will have to be adjudicated upon at the hearing of the suit. As noticed above, whereas it is the Plaintiffs' case that the amount of over Rs.1.32 crores was paid by the Plaintiffs to Defendant Nos.1 and 2 or to their account, it is the case of the Defendants that only a sum of about Rs.85 lacs was paid by the Plaintiffs to Defendant Nos.1 and 2.

6 By that as it may, it is an admitted position that a large amount of over Rs.85 lacs is owed by Defendant Nos.1 and 2 to the Plaintiffs; that there is an agreement between the parties for disposal of the suit flats and sharing of the proceeds thereof and recouping the financial accommodation given by the Plaintiffs to Defendant Nos.1 and 2 from out of the sale proceeds and sharing the balance amount equally; that towards such transaction, title deeds have been admittedly deposited by Defendant Nos.1 and 2 with the Plaintiffs. On these facts, in a suit for specific performance of the purported agreement for sale and also for enforcement of the purported mortgage, the Plaintiffs are surely entitled to be protected insofar as the suit property is concerned. Pending the hearing and final disposal of the suit, the Defendants certainly cannot be permitted to dispose of

the suit flats or create any third party rights in respect thereof. Indeed, even the Defendants have no serious objection to these reliefs being granted to the Plaintiffs. The real controversy between the parties is whether a Court Receiver ought to be appointed in respect of the suit flats.

7 The principles of appointment of a Court Receiver and in particular, the requirements to be satisfied before an order for appointment of Receiver is made, are noted by the Madras High Court in the case of **T. Krishnaswamy Chetty vs. C. Thangavelu Chetty**[1]**.** This judgment has since been followed and the principles stated therein applied by various courts in India. As noted by the Madras High Court in that case, the appointment of Court Receiver pending a suit is a matter of discretion of the court. The Court appoints a receiver not only on it being shown that the plaintiff has a good case to go to the trial, but upon proof being tendered that *prima facie* the plaintiff has a very excellent chance of succeeding in the suit. Besides, the plaintiff must also show some emergency or danger or loss calling for an immediate action. So also, an order appointing a receiver will not ordinarily be made when it has the effect of depriving the defendant of a de facto possession, since that might cause an irreparable wrong. The Court also looks at the conduct of the party, who makes the application, and if such conduct is not free from blame, it ordinarily refuses to interfere. On the touchstone of these principles, let us now see if the Plaintiffs have made out a case for appointment of Court Receiver. As noted above, the transaction is really of a loan transaction between the parties, in consideration of which a particular manner of recoupment of the loan advanced and thereafter sharing of profits has been agreed to between the parties. In that case, it is nothing but a pure money claim. It is doubtful if such a claim warrants specific performance and whether the suit flats should be made over to the Plaintiffs towards enforcement of the suit transaction. As far as the case of mortgage is concerned, the Plaintiffs are adequately protected if the Defendants are restrained from disposing of or creating any third party rights over the suit flats. Besides, other than a simple case for enforcement of the purported mortgage, the Plaintiffs have not shown any element of emergency, danger or loss calling for an immediate interference

1 **AIR 1955 MADRAS 430 (Vol. 42, C.N. 116)**

with the possession of the Defendants. Neither as an agreement purchaser nor as a mortgagee do the Plaintiffs have the right to the present possession of the suit flats. In other words, the Plaintiffs are not *prima facie* entitled to dispossess the Defendants from the suit flats as of now. It is submitted by Mr.Rajadhaksha, learned Senior Counsel appearing for the Plaintiffs, that the Plaintiffs are not, in fact, seeking to dispossess the Defendants, but an order permitting the Defendants to occupy the suit flats under a Court Receiver and on payment of royalty and security. The order sought by the Plaintiffs, in any event, has the effect of depriving the Defendants of de facto possession since their possession is now expected to be continued conditionally, that is to say, on payment of royalty or security, failure to pay which will entail a necessary dispossession of the Defendants. When the Plaintiffs do not have a present right to dispossess the Defendants and also when they have not made out any case of imminent danger to the suit property or a serious jeopardy to the Plaintiffs' suit claim, if the order of receiver is not granted, the Plaintiffs cannot have a receiver appointed of the suit flats and make the Defendants' continued occupation of the same conditional upon payment of royalty or security

8 In that view of the matter, there is no case made out for appointment of Court Receiver, pending the hearing and final disposal of the suit.

9 The Notice of Motion is, accordingly, made absolute in terms of prayer clause (b) excepting the bracketed portion, namely, the words “dealing with”. The other reliefs are rejected.

(S.C. Gupte, J.)