

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

NOTICE OF MOTION NO. 2968 OF 2011
IN
SUIT NO. 968 OF 2011

Mr. Nitin Baburao Shivalkar. .. Applicants
Vs.
Mr. Anthony Xavier Serrao & Anr. .. Respondents
...
Mr. Girish Kedia, for Applicants.
Mr. O. P. Singh, for Defendant No. 2
Mr. Vimlesh Singh, for Defendant No. 1.

CORAM : A. K. MENON, J.
DATE : AUGUST 28, 2015.

P.C.:

This notice of motion is taken out in a suit filed for specific performance of an Agreement for sale of the suit property being No. Survey No. 181, Hissa No. 12 (Pt). In the motion vide an ad-interim order dated 15th June 2011, the defendant was restrained by an order of injunction in terms of prayer clause (a) of the present notice of motion. The record indicates that the ad-interim order of 15th June 2011, was challenged in Appeal No. 483/2011. An order came to be passed on 25th August 2011, finally disposing of the appeal. By the said order the impugned order of 15th June 2011, was set aside by consent of parties. Notice

of Motion No. 1326/2011, being the first motion was disposed a with liberty to take out of second notice of motion. The present motion is this second notice of motion. The Appellate Court, however continue the ad-interim order passed in the first Notice of Motion for a period of 2 weeks.

2. This order came to be continued by the single Judge by an order dated 6th September, 2011, passed in Chamber Summons No. 1447/2011, taken out by the plaintiff for amendment of this plaint. The amendment was necessitated on account of termination of the suit MOU by defendant No. 1 after the suit was filed on 25th April 2011. As a result, the plaintiff challenged the termination by way of the amendment.

3. While permitting the amendment the ad-interim injunction was continued for a period of 4 weeks and thereafter further continued vide an order 28th September, 2011. The order dated 28th September 2011, continuing the ad-interim relief was challenged in Appeal no. 112/2012, vide an order dated 3rd August 2012, the aforesaid ad-interim relief was confirmed and the Appeal was dismissed. The motion has now being listed for hearing an affidavit in reply has been filed by the both the defendants. The

defendant no. 1 has filed an affidavit dated 8th November 2011, in which the main contention taken up by the first defendant is that under the suit MOU a total sum of Rs. 1,42,00,000/- was payable. The defendant no. 1 admits that a sum of Rs. 42,00,000/- was paid as per the MOU, but the sum of Rs. 1,00,00,000/- remains payable. This balance was due within 40 days of publication of a public notice inviting claims. The public notice was admittedly published on 18th August 2010, and according to the defendant No.1 the sum of Rs. 1,00,00,000/- fell due on or about 28th September 2010. There was also a grace period in clause 7 of the MOU which grace period expired on 10.10.10. The defendant no. 1 has also contended that the agreement has not been stamped and registered and therefore the same is inadmissible in evidence.

4. As far as the merits of the case is concerned, there are disputes between the plaintiff and defendant no. 2 inter se as a result of which it has not been possible to complete the suit transaction and the defendant no. 2 was not willing to tender his share of the balance amounts due under the suit MOU. The defendant no. 1 has also contended that the suit is MOU has been terminated on 11th June, 2011. This termination however has been

challenged in the suit.

5. As far as the defendant no. 2 is concerned in his affidavit in reply he has inter alia contended that he has already invested a sum of Rs. 21,00,000/-, in the project in addition to Rs. 42,00,000/- paid by the plaintiff in terms of the MOU. In paragraph No. 5 of the affidavit he states that he is willing to pay the amount due as his share as per the MOU. Thus the defendant no. 2 is seen to support the case of the plaintiff, subject of adjustment of money claimed to be invested by him.

6. Mr. Kedia learned counsel for the applicants took me through the various provisions of the agreement and the sequence of events and submitted that the plaintiffs are always ready and willing to comply with his part of the bargain and that the ad-interim relief granted to him should be continued, pending the hearing and final disposal of the suit. He also submitted that the defendant No. 2 is also supporting the plaintiff and will comply with his obligations and therefore collectively the plaintiff and defendant No. 2 will abide by the contract. On behalf of the defendant no. 1 Mr. Singh learned advocate contended that the agreement was not stamped or registered. He further submitted

that the plaintiffs and defendant no. 2 failed to comply with the suit MOU and failed to pay the balance amount of Rs. 1,00,00,000/-. He further submitted that the plaintiffs are in breach of the MOU and plaintiff is not entitled to any relief.

7. Having considered the facts and having heard the learned counsel for the parties, I find that it is not in dispute that the termination of the suit took place after the filing of the suit and before passing of ad-interim order. The ad-interim order came to be passed despite such termination and thereafter the same was carried in appeal only to be confirmed. Thus the ad-interim protection was continued and the same has been confirmed by virtue of the dismissal of Appeal No. 112/2012, vide order dated 3rd August 2012.

8. The learned counsel for the plaintiffs submits that he is only pressing prayer clause (a) as on date. Having considered the pleading and conduct of parties it is not in doubt that both plaintiff and defendant no. 2 have expressed their readiness and willingness to complete the agreement. I have no doubt in my mind that their expression of willingness is bonafide that even today both the counsel have offered to pay the money due under the MOU to the

defendant No. 1 a query from this court, learned counsel for defendant No. 1 states that he is no instruction on that aspect is the facts of the case and in the interests of justice the ad-interim order passed on and operating from, 15th June 2011, in term of prayer clause (a) is confirmed. Notice of Motion is made absolute in term of prayer clause (a) there will be no order as to costs.

(A. K. MENON, J.)