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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION(L) NO.3003 OF 2015

IN

SUIT(L) NO. 882 OF 2015

Sagar Harisha Sharma

Vishal Harisha Sharma

..Plaintiffs

Versus

Smt. Sushma Harish Sharma

Gagan Harish Sharma

..Defendants

.....

Mr. Paritosh Jaiswal a/w Rubin Vakil and Ms. Nikita Lamba i/b. Daya Gupta for the Plaintiffs.

Mr. Samsher Garud and Joy Pereira i/b. M/s. Jayakar & Partners for Defendant No.1.

Mr. Rohan Kadam i/b. Ms. Prachi Tatake for Defendant no.2.

Mrs. R. S. Gulekar, Section Officer, Court Receiver.

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CORAM: A.K.MENON, J.

DATE OF RESERVING THE ORDER: 26th NOVEMBER, 2015

DATE OF PRONOUNCING THE ORDER: 15th DECEMBER, 2015

P. C.

1] By this Notice of Motion the plaintiff seeks modification of paragraph 5(b) of an order dated 20th October, 2015 passed in Notice of Motion(L)No.2359 of 2015 by replacing the words "*plaintiffs will make arrangement to create a kitchen in flat no.14A*" with "*plaintiffs will make*

arrangement to create a kitchen in flat no.14B at their own expense”, Alternatively for recall of the order dated 20th October, 2015 and pending the hearing and final disposal of the notice of motion to stay the operation of the order dated 20th October, 2015. The plaintiffs have filed a supplementary affidavit dated 28th October, 2015 on behalf of defendant no.1 reply is filed on 4th November, 2014 and affidavit in rejoinder is also filed by the plaintiffs dated 20th November, 2015.

2] By consent the motion is taken up for final disposal. Accordingly, the only prayers to be considered is whether the order dated 20th October, 2015 is to be modified or whether the same is to be recalled. The subject matter of the motion is a consent order. The plaintiffs and defendant nos.1 and 2 were represented as set out in the order dated 20th October, 2015. The defendant no.1 is the mother of the plaintiffs and defendant no.2. The matter has a checkered history, initially as a result of the acrimonious relationship the Court Receiver came to be appointed vide order dated 27th August, 2015 by consent of parties. The Receiver was to take vacant possession from the parties by 5.00 p.m. on Monday, 31st August, 2015 and was to make a report thereafter. It appears that the parties' belongings had not been removed. Even as on 16th September, 2015 some belongings of the parties had not been removed and further

time was sought. The Court made it clear that all belongings must positively be removed from the suit flats and four garages by 5.00 p.m. Saturday 3rd October, 2015. However, petty differences continued even during the process of removal of their belongings as recorded by the Court Receiver. Once again time was granted upto 15th October, 2015 to sort out personal belongings and it was clarified that the Court Receiver will not assist the parties in complying with the Order.

3] On 16th October, 2015 an order came to be passed recording that both the parties have removed their belongings except for certain minor items that have been placed in a store room in one of the terraces and the matter came to be adjourned to Tuesday, 20th October, 2015. By 20th October, 2015 further developments surfaced and contrary to the earlier order to let out the premises on leave and license, the parties contended that they would like to come back into the flat and a temporary ad-hoc arrangement was arrived at that seeks to preserve the status quo and at the same time make some provision for a clear separation of areas to be used so as to ensure there is no further acrimony.

4] The flats appear to have been initially, separate but were combined by/at the instance of the parties. Flat no.14A was a three

bedroom flat and the plaintiffs came to be entitled to it. Flat no.14B has two bedrooms. However, between the two flats there is only one kitchen which is attached to flat no.14A. In the course of the temporary ad-hoc arrangement arrived at, the learned counsel appearing on behalf of and on instructions of both the plaintiffs who were present personally in Court stated that the plaintiffs would make necessary arrangements to make available to the 1st defendant the existing kitchen separated in flat no.14A and that the plaintiffs will not access that kitchen from flat no.14A. In other words the 1st defendant was to have exclusive access to the kitchen situated at flat no.14A. The plaintiffs also agreed to create separate kitchen for themselves at flat no.14A on their own expense.

5] The plaintiffs however, had agreed to this arrangement by order of the Court and it was clarified that the 2nd defendant could not be permitted to reside in flat no.14B although he met the deceased the defendant no.1 to Court for her should she be unwell. Mr. Jaiswal, the learned counsel appearing for the plaintiffs submits that the plaintiffs now see modification of the order since according to him it is not possible to construct another kitchen in flat no.14A as initially contemplated. In the affidavit in support of this Notice of Motion the plaintiff no.2 has repeated and reiterated various statements made by him in the earlier notice of

motion. In the affidavits in support of the earlier notice of motion, the Notice of Motion (L)No.2359 of 2015 an affidavit discloses that plaintiffs made an application for speaking to the minutes to the order dated 20th October, 2015. According to them the plaintiffs were seeking modification of the order dated 20th October, 2015 seeking permission to make a kitchen in flat no.14B at the expense of the plaintiffs. The application for speaking to the minutes was rejected by the learned Single Judge by an order dated 23rd October, 2015 by observing that there is no error in the order and permitting them to make a fresh application for modification of the order. In the circumstances, the present motion is being urged.

6] Mr. Jaiswal submitted that flat no.14B is a two bedroom flat admeasuring 1000 sq. ft. It consists of two independent bedrooms, one living room, two bathrooms and had included a kitchen which was subsequently converted into a study by defendant no.1. He submitted that the flat no.14A which the plaintiffs are entitled to use admeasures about 1200 sq. ft. consisting of three bedrooms, one living room, three bathrooms and a kitchen. He further submitted that even in accordance with the original plan, copy of which is annexed at Exhibit J to the present notice of motion will reveal that in the agreement in which the suit premises was purchased four flats are shown separately divided by a

common lobby and the flat from the right side is flat no.14B which clearly evidences the existence of kitchen admeasuring 10.6" X 8.3". The defendant has since been using this as study and the kitchen is not functional in this area. He submits that the plaintiff is willing to construct a kitchen in this area in accordance with the original plan so as to enable the 1st defendant to utilize the same flat no.14A.

7] Mr. Jaiswal further contended that in earlier proceedings namely in Trust Petition No.1 of 2008 the defendant no.1 herein had taken out the notice of motion no.1859 of 2008 seeking extension of time to handover the possession of the flat no.14A to the plaintiffs. In that notice of motion in the affidavit in support dated 27th May, 2008 the defendant no.1 had contended that she had started construction of a new kitchen in flat no.14B. The plaintiffs are claiming, inter alia, 2/3rd right, title and interest in the suit flats no.14A and 14B in all admeasuring 2200 sq. ft. and according to them they would be entitled to 266 sq.ft. from flat no.14B in addition to flat no.14A. The order dated 20th October, 2015 requires them to give away their kitchen and construct a new kitchen in the balance portion of flat no.14A. According to the plaintiffs if the said new kitchen is to be constructed it would require the conversion of one of the three bedrooms into a kitchen and that will lead to great hardship and

inconvenience to the plaintiffs since there are five persons consisting of two families who have to reside in flat no.14A excluding the domestic help and therefore, it is inequitable and unjust. As per order dated 20th October, 2010 only defendant no.1 has been appointed as an agent of the Court Receiver and has been permitted to reside in flat no.14B. Since flat no.14B consists of two bedrooms, two bathrooms and the living room and the kitchen converted into a study this conversion could be reversed and the study of once again may converted a kitchen which will be much enough to meet the needs of the 1st defendant who stay alone specially the 2nd defendant who is not permitted to reside there. In view of what is already been stated in her affidavit dated 27th May, 2008 Mr. Jaiswal submits that there is no reason why the 1st defendant should be permitted to use kitchen in flat no.14A. Furthermore, it is contended that access of kitchen in flat no.14A is through the common lobby outside flat no.14A and therefore constructing a new kitchen in flat no.14B would be more convenient to avoid dispute between the parties. Thus modification of the consent order is now sought.

8] On the other hand, on behalf of the defendants the application has opposed by contending that the order passed is a consent order and there is no case made out for varying the same. According to

defendant no.1 she is entitled to use the kitchen of flat no.14A which is operational. She is accustomed to residing in the flat for a long time and is not desirous of moving out or having a kitchen in flat 14B. It is contended that the plaintiffs are not residing in the suit flat no.14A but are residing elsewhere and no hardship whatsoever would be caused to the plaintiffs if the kitchen in flat no.14A is used by defendant no.1. Defendant no.1 on the other hand is staying alone and has personally looked after by defendant no.2. It is not possible to have further kitchen constructed within the flat which will cause further inconvenience to her and considering the fact that she is an aged person.

9] The learned counsel for the 1st defendant further submits that the motion is an abuse of process of Court and that the arrangement was arrived at by consent. Since defendant no.2 is recently married and he is compelled to leave the flat and stay with the defendant's sister in Chembur. Defendant no.1 has contended that she has lived in the flat for about 38 years and her entire life was revolves around it. She had been depressed about the fact that she is being forced to live outside her own home far away from her friends. She has further contended that the plaintiffs have voluntarily suggested and stated that they would grant exclusive use of the kitchen through the common lobby and further

voluntarily made a statement and undertook an obligation to build a kitchen for themselves in flat no.14A as recorded in the order. The order in this behalf was passed by the learned Judge on the basis of the offer made by the plaintiffs themselves and it was not an error. They are now dishonestly contending that the order is liable to be recalled. According to the 1st defendant by varying the order dated 20th October, 2015 she is likely to suffer great hardship and inconvenience.

10] Mr. Jaiswal, the learned counsel appearing for the plaintiffs also submitted that modification of the order is not unheard circumstances that justify. He relied upon the decision of the Hon'ble Supreme Court in ***Smt. Periyakkal and others V/s. Smt. Dakshyani (1983) 2 Supreme Court Cases 127*** and relied upon the observations in paragraph 4 and submitted that the parties have entered into a compromise and invited the Court to make an order in terms of the compromise. The Court passing the order and fix the time and in view of the same extension of time can always be granted to prevent manifest injustice. Relying on this observation Mr. Jaiswal submits that it is always within the power of this Court to modify the order. I do not see how the judgment in Periyakkal is of any assistance to the plaintiffs in view of the fact that what is being sought is modification of an order which merely records a consensual

arrangement proposed by the plaintiffs and accepted by the defendants. In the circumstances, I am of the view that there is no scope of modification of the order based on the ratio to Periyakkal. Mr. Jaiswal relied upon the fact that the judgment in Periyakkal was followed by this Court in *Arvinder Kaur Kohli V/s. Sister Ita Fernandes and others* 1996(3) Bom.C.R. 1.

11] Mr. Garud on behalf of defendant no.1 has relied upon the judgment in the case of Yusuf Ismailbhai Abdullabhai Lalji V/s. Abdullabhai Lalji and others and relied upon the observation and that an consent order cannot be valid or set aside merely on the ground of greater benefit or convenience arising from its variation or from setting it aside except by the consent of the parties. In view of the above, he submitted that there was no occasion for variation of modification of the order.

12] Having heard the learned counsel for the parties and having perused the facts, I am of the view that there is no justification in seeking modification of the order. The contention that it is not possible to build the kitchen within flat no.14A have to be converted and will cause inconvenience to the parties is not a submission that deserves to be considered at this stage since these were facts well within the knowledge

of the plaintiffs when they submitted they voluntarily conceded to this position and offered to provide exclusive use of a kitchen to the defendant no.1, secondly, the reason that the construction of a kitchen in flat no.14A is not possible going to structural constraints something that has been argued across the bar without even making any effort to ascertain such a kitchen could be constructed in that flat after obtaining necessary permission from the society and the Municipal Corporation. It is thus clear that the learned Single Judge was justifiably of the view that that the suggestion of parties was brimming optimism, nevertheless it was made and it is accepted by the Court without any persuasion. As stated above I am not satisfied that the order dated 20th October, 2015 was made by the Court of its own and therefore empowering the court to modify the same under 148 and 151 of the Code of Civil Procedure. In my view the plaintiffs are now seeking modification of the order by seeking to avoid aspects which may be inconvenient for them even though the consent arrange is an interim arrangement pending disposal of the main motion. In view of the pendency of the motion it is not desirable now to modify the order.

13] In these circumstances, I am of the view that no case whatsoever is made out for modification of the order dated 20th October,

2015 or its recall. The Notice of Motion therefore must fail. Accordingly

I pass the following order:-

- i) The Notice of Motion is dismissed.
- ii) The plaintiffs shall pay costs of the Notice of Motion fixed at Rs.10,000/-.

(A. K. MENON, J.)

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