

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****NOTICE OF MOTION NO.1916 OF 2015****IN****SUIT NO. 424 OF 2008**

Union Bank of India

...Applicant

In the matter between

Dr.Abdul Razzak Ismail Holy & Anr.

...Plaintiffs

VS.

Ali Haroon Wangre & Ors.

...Defendants

WITH

NOTICE OF MOTION (L) NO. 3338 OF 2015**IN****SUIT NO. 424 OF 2008**

Dr.Abdul Razzak Ismail Holy & Anr.

...Plaintiffs / Applicants

VS.

Ali Haroon Wangre & Ors.

...Defendants

and

Union of India

...Respondent

Ms.Firdaus Moosa i/b. Prakash Mahadik for Plaintiff.

Mr.Murari Madekar i/b. Madekar & Co. for Defendant Nos.1 to 6.

Mr.Dinyar Madon, Senior Advocate with P.N. Mehta, Francisca Phillip i/b.

Kochhar & co. for Defendant Nos.7 to 10.

Mr.Jay Lathigara i/b. Interjuris for Applicant in NMS 1916/2015.

CORAM : S.C. GUPTE, J.**23 DECEMBER 2015****P.C. :**

This notice of motion, namely, Notice of Motion No.1916 of 2015, is taken out by a third party Applicant – Union Bank of India, who was occupying as a lessee Shop Nos.10 and 11, A-Block, Haroon Manzil, admeasuring 700 sq.ft. on ground floor and 600 sq.ft. on the mezzanine floor, for leave to hand over keys and possession thereof together with furnitures and fixtures therein to an officer

of this Court or any other person and for discharge of the Applicant from its obligations of payment of further lease rentals. The shops are hereinafter referred to as "the suit shops", whilst the property in which the shops are situate, namely, the plot and the building, is collectively referred to as "the suit property".

2 The present suit is filed by the Plaintiffs for specific performance of two separate agreements described as (i) an agreement of assignment of lease and (ii) an agreement for assignment of the lessors' interest, both dated 18 May 2007. It is the case of the Plaintiffs that by these agreements, Defendant Nos.1 to 6, who are lessees in respect of the suit property, agreed to assign, transfer or alienate their leasehold rights and also their possessory and other rights in the suit property as also the suit shops separately or for a consideration of Rs.1.57 crores. The suit property consists of Plot Nos.32 and 33 of Sandhurst Road (East), Mumbai, admeasuring 1119 sq.mtrs. together with a building standing thereon by the name of Haroon Manzil comprising of two blocks, namely, Blocks "A" and "B". The building Haroon Manzil *inter alia* contains the suit shops, namely, Shop Nos.10 and 11, with which we are concerned in the present notice of motion. It is the Plaintiffs' case that out of the total consideration of Rs.1.57 crores, the Plaintiffs have duly paid to Defendant Nos.1 to 6 an amount of Rs.56 lakhs as and by way of earnest money on the date of the execution of the agreements. It is the case of the Plaintiffs that Defendant Nos.1 to 6 have also executed in favour of the Plaintiffs two General Powers of Attorney, both dated 18 May 2007, against payment of this earnest money. It is the Plaintiff's grievance that Defendant Nos.1 to 6 failed to complete the assignment in favour of the Plaintiffs in pursuance of the suit agreements. The Plaintiffs, accordingly, have filed the present suit originally only against Defendant Nos.1 to 6, and took out a notice of motion. During the pendency of this suit, the Plaintiffs came to know of a Deed of Assignment dated 18 June 2008 together with a Power of Attorney of the same date executed by Defendants Nos.1 to 6 purporting to transfer the suit property in favour of Defendant Nos.7 to 10. The Plaintiffs thereafter amended the present suit by impleading Defendant Nos.7 to 10 and also seeking reliefs for cancellation of the Deed of Assignment and Power of Attorney dated 18 June 2008. Along with the plaint, the Plaintiffs also amended their notice of motion,

namely, Notice of Motion No.639 of 2008. A learned Single Judge of this Court by his order dated 24 August 2009 made that notice of motion absolute in terms of prayer clause (g) thereof by granting a temporary injunction restraining the Defendants from in any manner disposing of or alienating or encumbering, or creating any third party rights in respect of, the suit property together with the suit shops and / or developing the same or putting up any construction thereon. The learned Single Judge also appointed the Court Receiver, High Court, Bombay, as receiver of the suit property, appointing Defendant Nos.7 to 10 as agents of the Court Receiver. The order of the learned Single Judge was carried in appeal by the Plaintiffs as well as Defendant Nos.7 to 10 before a Division Bench of this court. The Division Bench by its order dated 13 April 2010 set aside the order of the learned Single Judge insofar as it appointed the Court Receiver in respect of the suit property, whilst at the same time maintaining the order of temporary injunction granted by the learned Single Judge. The Division Bench further directed that the injunction would also cover tenancy rights in respect of the premises in the suit building and restrained the Defendants from creating or transferring any tenancy or accepting the surrender thereof, except with the prior permission of the court. The Defendants were directed to maintain a complete account reflecting rent and charges collected from various occupants of premises in the suit property including the suit shops, which were occupied by Union Bank of India. The details of this account together with copies of relevant documents were directed to be forwarded to the Plaintiffs every quarter during the pendency of the suit.

3 The present notice of motion by Union Bank of India is on the footing that due to operational and managerial reasons, the Applicant bank has decided to shift its operations to a new premises and has, accordingly, given a three months' notice to quit and vacate the suit shops in terms of the lease deed to Defendant Nos.1 to 6 and Defendant No.7; but that due to the injunction order passed by the learned Single Judge and confirmed by the appeal court, it was not in a position to surrender possession of the suit shops. It is the case of the Applicant that both the Plaintiffs on the one hand, and Defendant Nos.7 to 10 on the other, are claiming to seek surrender and possession of the suit shops from

the Applicant. It is the submission of the Applicant that since it was no more interested to continue the lease of the suit shops and instead wanted to hand over the possession of the same together with fixtures therein, appropriate directions be passed for handing over such possession to any officer of the court or to any other person / party, as this Court may deem fit and proper. It is submitted that in the premises, the Applicant be discharged from all obligations, including further payment on lease rentals in respect of the suit shops.

4 The companion notice of motion, namely, Notice of Motion (Lodging) No.3338 of 2015, is taken out by the original Plaintiffs for directions to the Respondent Union Bank of India to hand over keys and possession of the suit shops to the Plaintiffs, or in the alternative, for appointment of a Court Receiver in respect of the suit shops with direction to appoint the Plaintiffs as agents of the Court Receiver.

5 The two motions are being heard together, since they involve a common question, namely, who should be the person to whom possession should be handed over by Union Bank of India, whether it is the Plaintiffs or Defendant Nos.7 to 10 or any officer of the Court.

6 At the outset, I must clarify that when the motions reached hearing on the last occasion, i.e. on 18 December 2015, it was pointed out by learned Counsel appearing for Defendant Nos.7 to 10 that a motion for similar reliefs was taken out by the Plaintiffs in their appeal from the original order in Notice of Motion No.639 of 2008. In that motion, namely, Notice of Motion (Lodging) No.2102 of 2014, the Plaintiffs have prayed for modifying the original appellate order dated 13 April 2010 and for appointment of Court Receiver. When this was pointed out, learned Counsel for the Plaintiffs stated before this Court that the Plaintiffs would not press the same relief, namely, appointment of Court Receiver in respect of the suit shops before the Appeal Court in Notice of Motion (Lodging) No.2102 of 2014. This Court accepted the statement and heard these Notices of Motion on that footing. The Motion were fully heard and posted on today's date for orders. Today, when the matter is called out a new advocate appears for the

Plaintiffs. She submits that she does not know what statement was made before the court on the last occasion. She also claims to make further submissions in the matter. Whilst I am not averse to hearing the advocate further in the matter and I proceed to do so, I cannot countenance the approach that the new advocate would not know the statement made by the former advocate earlier (on the basis of which the Motions were fully heard) or would not stand by the same. No advocate can conduct himself or herself in a manner like this. Advocates are expected to conduct themselves as responsible officers of the Court and this approach undermines that expectation. It is not possible for the new advocate to either feign ignorance of the statement of the earlier advocate or not stand by the same. The Plaintiffs shall, accordingly, be held to their advocate's statement as recorded above.

7 Let me now come to the merits of the matter. On the facts recounted above, there is no doubt that the possession of the suit shops needs to be taken over from the Applicant bank. The question only is as to whom, in the facts and circumstances of the case, this possession should be handed over. At the outset, it is important to note that when, in its order of 10 April 2010, the Division Bench of this court was pleased to set aside the order of appointment of Court Receiver passed in the present suit originally by the learned Single Judge, the Division Bench was of the view that an order of injunction against the Defendants, including Defendant Nos.7 to 10 herein, sufficiently protects the interests of the Plaintiffs. It was conscious of the fact that Defendant Nos.7 to 10, as assignees of the original lessees, namely, Defendant Nos.1 to 6, were in possession and control of the suit property and recovered rents from all occupants of premises in the suit property including Union Bank of India for the suit shops. Yet, it chose not to countenance appointment of a Court Receiver or any disturbance of the possession or control of the suit property including the suit shops. Though it was of the view that before transferring tenancies in the suit building (including the suit shops herein) or accepting surrender of tenancies, Defendant Nos.7 to 10 be asked to take an appropriate leave of the Court, evidently, under the dispensation of the arrangement ordered in the suit, the Division Bench did permit Defendant Nos.7 to 10 to retain dominion over the

property, including the suit shops, and receive rent in respect thereof. (It is pertinent to note that even under the original order of the learned Single Judge, it was Defendant Nos.7 to 10, who were appointed as agents of the Court Receiver.) There is no change of circumstances today except that Union Bank now proposes to surrender the suit shops. There is no case for disturbing the arrangement ordered by the Division Bench or for appointing a Court Receiver or the plaintiffs as agents of such receiver. It is equally important to note that the suit shops need not be kept vacant, but should be permitted to be allotted to third parties so that income is generated from out of the suit shops, which then would be available for the benefit of the party, who may ultimately succeed in the suit. Just as in case of other premises in the suit property, there is no reason why the suit shops may not be licenced by Defendant Nos.7 to 10 and Defendant Nos.7 to 10 be permitted to recover rent in respect of the suit shops, subject of course to maintaining accounts in respect of rent receipts as in the case of other premises in the suit building. There is no question of making over of the suit shops to the Plaintiffs or allowing the Plaintiffs to recover compensation in respect of the suit shops at this moment, since admittedly, the transaction as between the Plaintiffs and Defendant Nos.1 to 6 is in the nature of an agreement for sale, which needs to be first ordered to be specifically performed, before the Plaintiffs are allowed to be put in possession of the suit property or allowed to exercise dominion over it or recover rents of it. Today, *prima facie*, Defendant Nos.1 to 6 have transferred their right, title and interest in respect of the suit property, including the suit shops in favour of Defendant Nos.7 to 10 and it is in the interests of justice that Defendant Nos.7 to 10 are permitted to be in possession and control of the same and recover licence fees or compensation in respect of the same, subject to maintenance of accounts, as in the case of other premises in the suit building. The interests of the Plaintiffs would be adequately protected, as held by the appeal court in its order of 13 April 2010, if Defendant Nos.7 to 10 are restrained from creating any further third party rights or licence of the suit shops without leave of the court and are also directed to keep an account.

8 Both notices of motion are, accordingly, disposed of in terms of the following order :

- (i) The Applicant Union Bank of India is allowed to hand over keys and possession of the suit shops, namely, Shop Nos.10 and 11, A-Block, Haroon Manzil at E.R. Marg, Bhendi Bazaar, Mumbai – 400 003, together with furnitures and fixtures therein to Defendant Nos.7 to 10;
- (ii) The Applicant is discharged from all its obligations, including further payment of lease rentals in respect of the two shops;
- (iii) As and when Defendant Nos.7 to 10 propose to enter into any leave and licence agreement with a third party licensee in respect of the suit shops, the Defendants may seek appropriate leave from the Court. The Plaintiffs may also be heard at that time on the quantum of compensation to be recovered for licensing the suit shops and also on the conditions of licence.

9 The Application of learned Counsel for the Plaintiffs for stay of this order is rejected.

(S.C. Gupte, J.)

CERTIFICATE

Certified to be true and correct copy of the original signed
Judgment / Order.