

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.78 OF 2016

IN

SUIT NO.3394 OF 2008

Mrs. Lajwanti G. Godhwani & Anr.Applicants/Plaintiffs
Vs.
Shyam Godhwani & Ors.Defendants

Mr. Ajay Panicker, i/b. Ajay Law Associates, for the Plaintiffs/Applicant.

Mr. Madhusudan Nair, for Defendant No.1.

Mr. Gauraj Shah, i/b. M/s. Kanga and Co., for Defendant Nos.2 and 3.

Mr. Karl Shroff, a/w. Ms Khyati Pandi, i/b.Dhru and Co., for Defendant No.4.

CORAM : K.K. TATED, J.

DATE : 15th November, 2017

P.C. :

1. Heard the learned Counsel for the parties.
2. This Notice of Motion is preferred by the plaintiffs for appointment of Court Receiver in respect of the suit property i.e. Flat No.194-D, 19th Floor, in Tanhee Heights, Napeansea Road, Mumbai – 400 006 and parking spaces bearing Nos.F1 and F2 and directing the Court Receiver to sell the said Suit Flat and parking spaces by adopting the normal course of Public Auction and by

fixing the reserve price as per the present prevailing market rate. The plaintiffs further seeks to relief by this notice of motion that Court Receiver be directed to clear the Defendant No.4's liability as per Suit No.3980 of 2002 pending before this Court.

3. The learned Counsel for the plaintiffs submits that in the present proceedings, K.D. Lakhani and V.D. Lakhani have 25% shar in the suit flat respectively and Defendant No.2 Godhwani Brothers India Private Limited have 50% share. He submits that because of dispute between the family members of Godhwani, they appointed Arbitrator. He submits that the Arbitrator filed Award dated 30.03.2001 holding that Defendant No.1 Shyam Godhwani have no right, title and interest in respect of suit flat. In support of this contention, he relies on paragraph 38(c) of the said Award, which reads thus....

It is declared that the interest to the extent of half share in the Flat No.194 on the 19th Floor of the building Tanhee Heights Napean Sea Road and Parking Spaces belong to Godhwani Brothers (India) Private Limited and not to Shyam Rochiram Godhwani in his personal capacity.”

4. The learned Counsel for plaintiffs submits that the said order dated 30.03.2001 was challenged by Defendant No.1 alongwith his father by preferring Arbitration Petition No.413 of 2001 before this Court. He submits that the said petition stands dismissed by order dated 19.12.2001. He submits that thereafter Defendant No.1 and his father preferred Appeal No.647 of 2002 before the Division Bench of this Court. He submits that the said appeal also stands rejected by order dated 14.08.2002. He submits that thereafter Defendant No.1 and his father carried the

matter to the Apex Court by Civil Application No.614 of 2015. He submits that the Apex Court also dismissed the matter by order dated 07.09.2006. He submits that in this way the Award passed by learned Arbitrator on 30.03.2001 become final.

5. The learned Counsel for the plaintiffs submits that leave and licence agreement dated 05.07.1999 executed with Defendant No.4 by Shyam Godhwani, K.D. Lakhani and V.D. Lakhani. At the time of executing this leave and licence agreement, Defendant No.4 deposited sum of Rs.2.50 Crores. He submits that out of 2.50 Crores, plaintiffs and Defendant No.3 received 25% each i.e.62.50 Lakhs and Defendant No.1 received Rs.1.25 Crores. He submits that after expiry of the period of leave and license agreement, both have decided to terminate the same. Hence, they decided to returned Defendant No.4's deposit amount. At that time, plaintiffs and Defendant No.3 returned a sum of Rs.62.50 Lakhs each to Defendant No.4. He submits that Defendant No.1 failed and neglected to return his share of Rs.1.25 Crores to Defendant No.4. Hence, Defendant No.4 refused to hand over the vacant possession of the suit flat.

6. The learned Counsel for the plaintiffs submit that inspite of several requests and letters, Defendant No.1 failed and neglected to return his share of deposit to Defendant No.4. Hence, it constrained the plaintiffs to file the present Suit No.3394 of 2008 for damages against Defendant No.1. He submits that in the present suit, they claimed the following reliefs against Defendant No.1 and other defendants :-

“(a) That the Defendant No.1 be ordered and decreed to pay to the plaintiff a sum of Rs.2,56,69,689/- (Rupees Two Crores Fifty Six Lakhs Sixty Nine Thousand Six Hundred Eighty Nine Only) as more particularly stated in the particulars of claim being Exhibit-K hereto plus further interest on the said sum at the rate of 20% per annum or such other rate as this Hon'ble Court may deem fit and proper from date of suit till payment of realization thereof;

(b) That the Defendant No.1 be ordered and decreed to pay mense profit of Rs.5,00,000/- per month with yearly increase of the same by 20% with interest thereon at the rate of 20% p.a., or such market rate of compensation then prevailing at the time of decreeing the suit, from the date of suit till date of getting the suit flat no.194-D, 19th Floor, in Tanhee Heights, Napean Sea Road, Mumbai, admeasuring about 3300 sq.ft. built up area vacated and released from the occupation of any third party, free from any liability, encumbrances, charges etc.

(c) In the above alternative to prayer (b) above, in the event it is found that further inquiry is required for ascertaining the mense profits, this hon'ble court may be pleased to order a separate inquiry under Order 20 Rule 12 of C.P.C. 1908 for determination of the mense profits in respect of the suit premises being flat no. 194-D, 19th floor, in Tanhee Heights, Napean Sea Road, Mumbai, admeasuring about 3300 sq. ft. built up area, receivable and recoverable from the defendants.

(d) That the defendant no.1 be ordered and directed to return the amount of security deposit received from the defendant no. 4 against the suit flat no. 194-D, 19th floor, in Tanhee Heights, Napean Sea Road, Mumbai, admeasuring about 3300 sq. ft. with all interest, charges and penalty, if any, and get the suit flat, vacated from the defendant no. 4 or its agents and successors, free from any liability, encumbrances and charges;

(e) That the defendant no. 4 be ordered and directed to hand over the vacant and peaceful occupation of the suit flat no. 194-D, 19th floor, in Tanhee Heights, Napean Sea Road, Mumbai, admeasuring about 3300 sq. ft. to the plaintiffs, without prejudice to the right of the defendant no.4 to recover the security deposit and other interest, charges & compensation legally entitled to,

from the defendant no. 1.

(f) That pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to restrain the defendant no. 1 his agents and servants from dealing with, letting out, disposing or transferring of flat no. 194-D, 19th floor, in Tanhee Heights, Napean Sea Road, Mumbai, admeasuring about 3300 sq.ft. Built up area.

(g) That pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to appoint the Court Receiver High Court, as Receiver in respect of the said flat no. 194-D, 19th floor, in Tanhee Heights, Napean Sea Road, Mumbai, admeasuring about 3300 sq.ft. built up area with all powers except the power to sell;

(h) That pending the hearing and final disposal of the suit, the defendant no.1 be ordered and directed to return the amount of security deposit received from the defendant no. 3 against the suit flat no. 194-D, 19th floor, in Tanhee Heights, Napean Sea Road, Mumbai, admeasuring about 3300 sq.ft., with all interest, charges and penalty, if any, and get the suit flat vacated from the defendant no. 3 or its agents and successors, free from any liability, encumbrances and charges;

(i) That pending the hearing and final disposal of the suit, the defendant no. 4 be ordered and directed to hand over the vacant and peaceful occupation of the suit flat no. 194-D, 19th floor, in Tanhee Heights, Napean Sea Road, Mumbai, admeasuring about 3300 sq.ft. to the Plaintiff, without prejudice to the right of the defendant no. 4 to recover the security deposit and other interest, charges & compensation legally entitled to, from the defendant nos. 1 and 2 jointly or severally.

(j) That pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to pass an attachment order before Judgment under order 38 rule 5 of the Code of Civil Procedure, 1908 by attaching the other personal assets of defendant no.1;

(k) That pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to order and direct the defendant to furnish the securities for securing the liabilities till date, to the

satisfaction of this Hon'ble Court.

(l) For ad-interim and interim reliefs in terms of prayer (f) to (k) above;

(m) For costs of this suit;

(n) For such and other reliefs as the nature and circumstances of the case may require.”

7. The learned Counsel for the plaintiffs submits that for last 16 years, Defendant No.4 is in possession of the suit flat without paying any compensation and/or licence fees in view of the terms and conditions of the leave and licence agreement dated 05.07.1999. He submits that without any income from the said flat, they have to pay maintenance charges to the concerned society also. He submits that the present suit may take its own time and hence, they preferred the present Notice of Motion for various reliefs.

8. The learned Counsel for the applicants/plaintiffs submits that Defendant No.1 in order to delay the refund of the security deposit and delay the hearing in the present suit and also in the suit filed by Defendant No.4 M/s. Castrol India Ltd., has made statement before this Court for settlement of the disputes by refunding the entire security deposit with nominal rate of interest, and it appears that in order to keep candle burning, some meetings were held with the representatives of Defendant No.4. He submits that when plaintiffs' advocate in this regard had written letter dated 03.09.2014 to the advocate for Defendant No.1 and Defendant No.4 requesting them to furnish copy of the

correspondence exchanged between them regarding settlement of the disputes, copy of the two letters both dated 03.09.2014 to Defendant Nos.1 and 4, Defendant No.1 failed and neglected to supply the same. He submits that the advocate for Defendant No.1 has not responded to the said letter, but the advocate for Defendant No.4 in response to the said letter under the cover of the letter dated 05.09.2014 furnished copies of their three letters i.e. dated 13.08.2014, 16.08.2014 and 20.08.2014 addressed to the advocate for Defendant No.1. From the said letters, it is crystal clear that only appointments for the meetings for discussion of settlement were fixed and what transpired in the meetings, if any, held was not disclosed. Therefore, the plaintiffs constrained to prefer the present Notice of Motion.

9. The learned Counsel for the plaintiffs submits that in view of the conduct of Defendant No.1 in non-refunding the security deposit of Rs.1.25 Crores collected by him from Defendant No.4 company, plaintiffs are lossing 25% income which they have been received from the letting out of the said flat. He further submits that plaintiffs and Defendant No.3 is suffering the financial losses on daily basis from 01.11.2002. He submits that the said flat is kept under lock. The said flat is getting damaged and all the fixtures and fittings are getting rusted and damaged. He submits that at the same time M/s. Castrol India Ltd. i.e. Defendant No.4 in addition to holding on the suit flat claiming huge interest @ 21% per annum on the said security deposit on Rs.1.25 Crores and have sought sale of the said flat for the recovery of the security deposit and interest. He submits that in view of this situation, it is just and

necessary that this Hon'ble Court be pleased to appoint the Court Receiver High Court, Bombay and the Court Receiver be directed to sell the said suit flat and parking spaces by adopting the normal course of Public Auction, by fixing the reserve price as per the present prevailing market rate.

10. The learned Counsel for the plaintiffs submits that in the interest of justice, this Hon'ble Court be pleased to allow the Notice of Motion directing the Court Receiver to take possession of the suit flat and sell the same as per market value and clear Defendant No.4's liability. He submits that if present Notice of Motion is allowed, the plaintiffs will suffer irreparable loss.

11. The learned Counsel appearing on behalf of Defendant Nos.2 and 3 after taking instructions from advocate on record makes a statement that they have no objection if notice of motion is made absolute in prayer clause (a) and (b).

12. The learned Counsel appearing on behalf of Defendant No.4 submits that they also preferred Suit No.3980 of 2002 for recovery of their dues to the extent of Rs.1,92,92,465/- with interest on Rs.1,87,50,000/- @ 24% from the date of the suit. He submits that they have no objection to hand over the formal possession of the property to the owners subject to refund of their deposits. He submits that in their Suit No.3980 of 2002 they claimed the following reliefs :-

“(a) the Defendant Nos.2 and 3(A) and (B) or Defendant Nos.3(A) and 3(B) and 4 be ordered and decreed to pay to the Plaintiff a sum of Rs.1,92,92,465/- as per Exhibit 'EE' with

further interest on Rs.1,87,50,000/- at the rate of 24% p.a. from the date of the suit till payment.

(b) that this Hon'ble Court be pleased to declare that the Plaintiff are entitled to the use, occupation and possession of the said Flat without payment of any Licence Fee or compensation till refund of the dues mentioned in prayer (a) is made by the Defendant Nos.3 and 3(A) and 3(B) or Defendant Nos.3(A), (B) and 4 to the Plaintiff.

(c) that this Hon'ble Court be pleased to declare that the Defendants are not entitled to interfere with the Plaintiff's use, occupants and possession of the said Flat without payment of Licence Fee or compensation till the balance Security Deposit of Rs.1,87,50,000/- with interest thereon @ 24% per annum from 2nd November 2002, is refunded by the Defendants to the Plaintiff.

(d) that the Defendants by themselves their servants and agents be restrained by a perceptual order and injunction of this Hon'ble Court from in any manner interfering with or disturbing the Plaintiff's possession, use and occupation of the said flat or any part thereof.

(e) that pending the hearing and final disposal of the suit, the Defendants by themselves, their servants and/or agents be restrained by an order and injunction of this Hon'ble Court from interfering with the use, occupation and possession of the said Flat by the Plaintiff.

(f) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to appoint the Court Receiver or some other fit and proper person as Receiver of the said Flat with all powers under Order 40 Rule 1 of C.P.C.1908 including power to give the suit flat on Agency basis to third parties on such terms as the Receiver may deem fit.

(g) for ad-interim reliefs in terms of prayers (e) to (f) above;

(h) for the costs of the suit;

(i) for such further and other reliefs as this Hon'ble Court may deem fit."

13. The learned Counsel for Defendant No.4 submits that though they claimed more than Rs.1.92 Crores in their suit, he received instructions from his client to restrict their claim in view of subsequent development to the tune of Rs.1.25 Crores with 24% interest per annum from 02.11.2002. He further submits that they received instructions from their client that they have no objection to allow the present notice of motion. He submits that the Court Receiver may be directed to sell the said property by taking formal possession only. He submits that they are opposing to take physical possession. To that effect, advocate on record given in writing dated 15.11.2017. Same is taken on record and marked 'X' for identification. He further submits that Defendant No.4 have no objection if the owners want to carry out some tenantable repairs to get better price in market. He submits that Defendant No.4 will always cooperate with owners through the Court Receiver to carry out tenantable repairs.

14. The learned Counsel appearing on behalf of Defendant No.1 vehemently opposed the present notice of motion. He submits that Defendant No.1 have 50% share in the suit property. He submits that if the suit property is disposed of by appointing Court Receiver, then irreparable loss will be caused to him. He submits that plaintiffs and Defendant Nos.2 and 3 are disputing Defendant No.1's share in suit property to the extent of 50%. He submits that it is crystal clear from the fact that Defendant No.1 received 50% of deposited amount from Defendant No.4 at the time of executing

the leave and licence agreement dated 05.07.1999. He further submits that being a owners of the 50% of the suit flat, he filed Application No.3 of 2016 before the Court of Competent Authority (Rent Act) Konkan Division, Mumbai on 03.01.2016 for possession of suit property alongwith two co-owners. He submits that they claimed the following reliefs before the Competent Authority:-

“(a) that the Respondent No.1 be ordered and directed to forthwith remove themselves together with their servants and agents and their belongings from the Application premises and to hand over vacant and peaceful possession forthwith of the said Flat No.194, on the 19th Floor in Tahnee Heights, Petit Hall, 66, Nepean Sea Road, Mumbai – 400 006 alongwith two car parking spaces as enumerated under the leave and license agreement to the Applicant alongwith two co-owners;

(b) the Respondent No.1 be ordered and decree to pay to the Applicant a sum of Rs.81,00,000/- (Rupees Eighty one lakhs only) ans and by way of accumulated arrears of compensation/damages effective from 16.07.2002 to 15.01.2016 and from 15.01.2016/from the date of filing of the Application till the date of payment @ double the amount of the monthly compensation as per the particulars of claim annexed hereto;

(c) Cost of the application provided for;

(d) that such other and further reliefs as per the law to this Ld. Competent Authority deemed fit and proper in the circumstances of the case may be granted.”

15. The learned Counsel for Defendant No.1 submits that their application before the competent authority is pending for hearing and final disposal also on merits. He submits that if any order is passed in the present notice of motion, same is going to affect their right, title and interest in the pending proceeding being Application No.3 of 2016.

16. The learned Counsel for Defendant No.1 submits that before the Competent Authority in Application No.3 of 2016, Defendant No.2 filed application for joining them as a party. The said application was rejected by the Competent Authority. He submits that the same was challenged by Defendant No.2 before this Court in Writ Petition No.14413 of 2016. He submits that the said writ petition stands dismissed with following observations :-

“Be that as it may, if a stand is taken by Respondent No.1 that the security deposit will be refunded to Respondent No.2 to facilitate recovery of possession, then the application expressed by the Petitioner does not survive. The statement made by the learned counsel for Respondent No.1 is accepted. It is always open to the Petitioner to institute a substantive proceedings for claiming share and possession pursuant to the application in the suit property after possession is so obtained by Respondent No.1. Needless to state that such proceedings will be decided on their own merits. Therefore, the possession received by Respondent No.1 alongwith other co-owners, as claimed in the application will be subject to the substantive proceedings that the Petitioner proposes to institute. The writ petition is accordingly disposed of.”

17. The learned Counsel for Defendant No.1 submits that these facts clearly show that as on today Defendant No.1 is holding 50% share in the suit property. Therefore, there is no question of allowing the present Notice of Motion for appointing of Court Receiver and disposal of the suit property.

18. I have heard both the sides at length.

19. When Court asked Defendant No.1's Counsel that, whether his client is ready and willing to pay the entire liability of

Defendant No.4 i.e. Rs.1.25 Crore with interest, he showed his inability for want of instruction.

20. It is to be noted that whether Defendant No.1 is holding 50% share in the suit property or not, that issue cannot be decided either in the present notice of motion or in the suit. It is to be noted that because of family disputes in Godhwani's family, they appointed Arbitrator. Arbitrator passed Award dated 30.03.2001 and given findings in respect of ownership of the suit property. That Award was challenged by Defendant No.1 alongwith his father upto the Apex Court unsuccessfully.

21. It is to be noted that as on today the suit flat is in possession of Defendant No.4 without any payment of compensation and/or licence fees because of terms and conditions of leave and licence agreement dated 05.07.1999. The plaintiffs and Defendant No.3 already returned a sum of Rs.62.50 Lakhs each to Defendant No.4, but because of Defendant No.1's attitude not to refund the deposit of Defendant No.4, the suit flat is in possession of Defendant No.4 without payment of any compensation. In any case, suit may take its own time. During the pendency of the suit, owners have to maintain and pay the maintenance charges of the suit property to their Co-operative Housing Society.

22. Considering these facts, I am of the opinion what is a share of plaintiffs and Defendant Nos.1 to 3 in suit flat that can be decided at the time of hearing of proper proceedings. Hence,

Court Receiver can be appointed in the present proceedings to dispose of the suit property as per the present market rate and clear the Defendant No.4's liability and in respect of remaining amount, liberty can be granted to the parties to make appropriate application before this Court and that can be decided on its own merits.

23. Hence, Notice of Motion is made absolute in prayer clause (a) and (b), which reads thus:-

(A) (a) Pending the hearing and final disposal of the present suit, this Hon'ble Court be pleased to appoint the Court Receiver High Court Bombay as the Receiver of the Suit Flat No.194-D, 19th Floor, Tahnee Heights, Napean Sea Road, Mumbai – 400 006 and parking spaces – bearing Nos.F1 and F2 and the Court Receiver be directed to sell the said Suit Flat and parking spaces by adopting the normal course of Public Auction and by fixing the reserve price as per the present prevailing market rate.

(b) After the sale is effected and confirmed by this Hon'ble Court, the Court Receiver be directed to hand over vacant possession of the Suit Flat and parking spaces bearing Nos.F1 and F2 to the successful highest bidder, after paying the amount of security deposit and interest thereon till the date of payment to Defendant No.4 as claimed in Suit No.3980 of 2002 pending to this Hon'ble Court from the amount of purchase price coming to the share of and payable to the defendant No.2 company herein.

(B) Court Receiver is directed to invest the remaining amount i.e. after clearing the liability of Defendant No.4, in fixed deposit in any Nationalized Bank initially for a period of one year and same to be continued thereafter.

(C) Liberty is granted to the plaintiffs and Defendant Nos.1 to 3

if they so desire to make appropriate application to this Court for withdrawal of the money, if any, and that application will be decided after hearing of other parties.

(D) Initially the expenses of Court Receiver shall bear by plaintiffs, Defendant Nos.2 and 3 equally subject to the outcome of the suit.

(E) Liberty is granted to the plaintiffs and Defendant Nos.2 and 3 to carry out tenantable repairs in the suit premises through the Court Receiver at their own costs, if necessary for sale.

(F) Defendant No.4 is directed to permit the Court Receiver or owners through the Court Receiver to carry out tenantable repairs in the suit premises at their own costs as and when required by them.

(G) The plaintiffs to lodge this order in the office of Court Receiver within four weeks from the date of unloading.

(H) No order as to costs.

(K.K. TATED, J.)

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