

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

**APPEAL NO.204 OF 2017
IN
NOTICE OF MOTION NO.138 OF 2016
IN
SUIT NO.424 OF 2008
ALONG WITH
NOTICE OF MOTION LODGING NO.769 OF 2016
IN
APPEAL NO.204 OF 2017**

**Dr. Abdur Razak Ismail Holy and anr. : Appellants/Org.Plaintiffs
versus
Ali Haroon Wangre and ors. : Respondents/Org.Defendants.
And
Union Bank of India : Respondent.**

**APPEAL NO.207 OF 2017
IN
NOTICE OF MOTION NO.1916 OF 2015
IN
SUIT NO.424 OF 2008**

**Dr. Abdur Razak Ismail Holy and anr. : Appellants/Org.Plaintiffs
versus
Ali Haroon Wangre and ors. : Respondents/Org.Defendants.
And
Union Bank of India : Respondent.**

**Mr. Anand Grover, Senior Advocate a/w Ms. Moosa and Mr. Prakash Mahadik for the Appellants.
Mr. D D Madon, Senior Advocate a/w Mr. F. Dubash, Mr. S Sathantary and Mr. P N Mehta i/ny PNM Legal for the Respondent Nos. 7 to 10.
Mr. Murari Madekar i/by Madekar & Co. for the Respondent Nos.1, 3 to 6.
Mr. Jaylathigara i/by Interjuris for the Union Bank of India.**

**CORAM : R. M. SAVANT &
SARANG V KOTWAL, JJ.
DATE : 28th November 2017**

P.C.

1 The above Appeals have been filed challenging the Order dated 23/12/2015 passed by a learned Single Judge of this Court (S.C.Gupte, J). By the said order the Notice of Motion No.1916 of 2015 (subject matter of Appeal No.207 of 2017) and the Notice of Motion (L) No.3338 of 2015 (Now Notice of Motion No.138 of 2016) (Subject matter of Appeal No.204 of 2017) came to be disposed of.

2 In so far as the Notice of Motion No.1916 of 2015 filed by the Union Bank of India is concerned, the same came to be allowed the Applicant Union Bank of India was allowed to hand over keys and possession of the suit shops to the Defendant Nos.7 to 10. In so far as the Notice of Motion (L) No.3338 of 2015 filed by the original Plaintiffs is concerned, the same came to be dismissed.

3 The subject matter of the aforesaid Notices of Motion were two shops bearing Nos.10 and 11 and the issue was as to whom they were to be handed over possession of the said two shops as the Applicant Bank was desirous of surrendering the said two shops. In the context of the reliefs sought in the above Appeals, it is required to be noted that the Appellants/Original Plaintiffs have filed the suit in question 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 18/05/2007. By the said agreements the 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 for a consideration of Rs.1.57 crores. The larger 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 which building inter-alia contains the suit shops. The cause for filing the suit by the Plaintiffs was the reluctance of the Defendant Nos.1 to 6 to complete the assignment in favour of the Plaintiffs in pursuance of the suit agreements. Since during pendency of the suit, the Plaintiffs acquired knowledge of the Deed of Assignment dated 18/06/2008 together with a Power of Attorney of the same date executed by the Defendant Nos.1 to 6 purporting to transfer the suit property in favour of the Defendant Nos.7 to 10, the Plaintiffs amended the suit and have also now sought the relief of cancellation of the Deed of Assignment and Power of Attorney dated 18/06/2008 executed in favour of the Defendant Nos.7 to 10.

4 In the said suit, the Plaintiffs had filed Notice of Motion No.639 of 2008. The learned Single Judge of this Court by order dated 24/08/2009 had allowed the said Notice of Motion in terms of prayer clause (g) thereby 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 the Receiver of the suit property, and appointed the Defendant Nos.7 to 10 as agents of the Court Receiver.

5 The matter was carried in Appeal. The Appellate Court i.e. the Division Bench of this Court by order dated 13/04/2010 set aside the order of the learned Single Judge appointing the Court Receiver in respect of the suit property but maintained the order of temporary injunction granted by the learned Single Judge. The Appellate Court i.e. the Division Bench further clarified 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 also directed to maintain a complete account of the rent and charges collected from various occupants of premises in the suit property including the suit shops which were occupied by the Union Bank of India.

6 As indicated above, the Union Bank of India i.e. the Applicant on account of operational and managerial reasons had decided to shift its

operations to a new premises and accordingly had given three months' notice to quit and vacate the suit shops in terms of the Lease Deed which notice was given to the Defendant Nos.1 to 6 and Defendant No.7. On account of the injunction order passed by the learned Single Judge as confirmed by the Appellate Court it was not in a position to surrender the possession of the suit shops. In view of the fact that both the Plaintiffs and the Defendant Nos.7 to 10 were seeking possession from the Bank, that the Bank was constrained to file the above Notice of Motion for being permitted to surrender the suit shops together with fixtures therein seeking appropriate directions for handing over possession of the suit shops.

7 On the other hand the Plaintiffs have filed the above Notice of Motion No.138 of 2016 (Notice of Motion (L) No.3338 of 2015) for directions to the Union Bank of India to hand over keys and possession of the suit shops to the Plaintiffs. Since the adjudication of the Notices of Motion involved a common question, the learned Single Judge deemed it appropriate to hear the said Notices of Motion together.

8 The learned Single Judge in the context of the fact that the injunction granted against the Defendant Nos.7 to 10 sufficiently protects the interest of the Plaintiffs did not countenance the appointment of a Court Receiver or any disturbance of the possession of the possession or control of

the suit property including the suit shops. The learned Single Judge has however directed that before transferring tenancies in the suit building (including the suit shops therein) or accepting surrender of tenancies, the Defendant Nos. 7 to 10 were asked to take appropriate leave of the Court. The learned Single Judge was of the view that the Division Bench therefore permitted dominion of the Respondent Nos.7 to 10 over the suit shops and receive rent in respect thereof. The learned Single Judge was of the view that on account of the surrender which the Applicant Bank was proposing to do, there is no change in circumstances and therefore there was no warrant to interfere with the arrangement made by the Division Bench by the order passed in the Appeal. The learned Single Judge therefore directed the Applicant Bank to hand over the possession of the suit shops to the Defendant Nos.7 to 10 and resultantly discharged the Bank from all its obligations including further payment of lease rentals in respect of the two shops. The learned Single Judge also directed the Defendant Nos.7 to 10 that if they propose to enter into any leave and license agreement with a third party licensee in respect of the suit shops, they would seek appropriate leave from the Court and that the Plaintiffs would also be heard at that time on the quantum of compensation to be recovered.

9 The learned Senior Counsel Mr. Anand Grover appearing on behalf of the Appellants would contend that since the Plaintiffs have the assignment

of the said two shops by a separate Agreement for Assignment dated 18/05/2007, the learned Single Judge ought not to have directed the Applicant – Bank to hand over possession to the Defendant Nos.7 to 10. The learned Senior Counsel would also seek to make submissions which were revolving around the Agreement executed by the Defendant Nos.1 to 6 in favour of the Defendant Nos. 7 to 10. The learned Senior Counsel would contend that having regard to the consideration mentioned in the said Agreement executed in favour of the Defendant Nos. 7 to 10, the said fact impinges upon the legality and validity of the said Agreement. The learned Senior Counsel would lastly contend that the observations made in paragraph 6 of the impugned order against the learned Advocate appearing for the Appellants before the learned Single Judge be expunged as the learned Advocate was only espousing the cause of the Plaintiffs before the learned Single Judge.

10 In our view it is not possible to accept the contentions urged on behalf of the Appellants by the learned Senior Counsel. It is required to be noted that the said relief has been rejected by the learned Single Judge having prima facie found that the Defendant Nos.1 to 6 have transferred their right, title and interest in respect of the suit property which included the said shops in favour of the Defendant Nos. 7 to 10. The learned Single Judge therefore found that it would be in the interest of justice that the 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 said two shops, subject to maintaining accounts. as in the case of other premises in the suit building. The learned Single Judge has also observed that the transaction between the Plaintiffs and the Defendant Nos.1 to 6 is in the nature of Agreement for Sale of which specific performance is sought by the Plaintiffs by way of the above Suit. Hence the learned Single Judge has observed that unless the Plaintiffs succeed in the suit, they cannot be put in possession of the suit property or allowed to exercise dominion over it or recover rents of it. The learned Single Judge as indicated above has accordingly balanced the equities by protecting the Plaintiffs by restraining the Defendant Nos.7 to 10 from creating any third party rights or licence in respect of the said two shops without leave of the Court and are directed to keep an account.

11 In our view having regard to the fact that the rights of the Plaintiffs are still inchoate which would be subject to the result of the suit for specific performance filed by them, the order passed by the learned Single Judge directing the said two shops being handed over to the Defendant Nos.7 to 10 cannot be faulted with.

12 In so far as expunction of remarks are concerned, in our view, it would not be appropriate for us to expunge the remarks as the said remarks have been made in the context of what had transpired during the hearing of

the Notices of Motion before the learned Single Judge. If the learned Advocate who appeared for the Plaintiffs before the learned Single Judge is aggrieved by the remarks made against her, which are appearing in paragraph 6 of the impugned order, it would be open for the learned Advocate to file an appropriate application before the learned Single Judge seeking expunction of the said remarks. We do not express any opinion in that regard.

13 In that view of the matter, there is no merit in the above Appeals. The same are accordingly dismissed.

14 In view of the dismissal of the above Appeals, the Notice of Motion (Lodging) No.769 of 2016 filed by the Appellants for the stay of the impugned order, does not survive and the same to accordingly stand disposed of as such.

[SARANG V KOTWAL, J]

[R.M.SAVANT, J]