

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

**NOTICE OF MOTION NO.2504 OF 2016
IN
SUIT NO.586 OF 2015**

Madhavlal Narayanlal Pittie ... Applicant

In the matter between :

M/s Manas Shelters Pvt. Ltd. ... Plaintiff

Versus

Madhavlal Narayanlal Pittie

And Others ... Respondents

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Mr. Zal Andhyarujina a/w Harsh Meghani, B.N. Shukla, Ms. Dhun A. Chhapgar And Mr. R.S. Tiwari i/b D.J. Kamdin & Co., for the Applicant (original Defendant No.1.)

Mr. Rajendra Pai a/w A.R. Pai and Ms. Apurva Bhat i/b Ms. Bina Pai for the Plaintiff.

Mr. Prashant Chavan a/w Ms. Reshmarani Nathani i/b Ms. Neuty Thakkar for Defendant No.4.

Mr. P.M. Jadhav for Defendant No.5.

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CORAM : S.C.GUPTE, J.

DATE : 14 MARCH 2017

P.C. :

. Heard learned Counsel for the parties.

2 This notice of motion is taken out under Order 39 Rule 4 of the Code of Civil Procedure, 1908 ("Code") for various reliefs, including the relief in prayer-(a), namely, for recall, discharge or modification of the order passed by this Court on 15 June 2015 in Notice of Motion (L) No.2370 of 2014 in

Suit (L) No.994 of 2014 taken out by the Plaintiff. Learned Counsel for the Appellant (original Defendant No.1) presses only prayer-(a).

3 The prayer is on the footing, firstly, that there were some documents suppressed by the Plaintiff when he applied for interlocutory reliefs under Notice of Motion (L) No.2370 of 2014. Learned Counsel for Defendant No.1 referred to the supplementary agreement dated 16 December 2003. This supplementary agreement purportedly deals with the question of additional consideration of Rs.21,00,000/- payable by the Plaintiff to Defendant No.1. The agreement provides a rationale for payment of Rs.21,00,000/- in addition to the original consideration of Rs.88,00,000/- fixed under the development agreement. It is submitted that this additional consideration was purportedly provided for in pursuance of clause-22 of the development agreement which cast the liability to discharge all taxes, assessment etc. raised by any authority in connection with the development agreement between the parties on the Plaintiff. This agreement is suppressed by the Plaintiff, according to learned Counsel for Defendant No.1. It is submitted that the Plaintiff, by suppressing this document, had contended before the Court that the additional consideration of Rs.21,00,000/- was towards Defendant No.1 undertaking certain obligations to MHADA, which were of the Plaintiff under the original development agreement.

4 Whilst it is true that the supplementary agreement of 16 December 2003, referred to by Defendant No.1, was not produced by the Plaintiff before the Court, though other two agreements of the same date, namely, 16 December 2003, were produced, the document, purportedly suppressed,

cannot be termed as a material document, which either goes to the root of the matter or in any way dis-entitles the Plaintiff to specific performance. The alleged supplementary agreement of 16 December 2003 is not in any way determinative of the rationale for agreeing to the additional consideration of Rs.21,00,000/-. This matter really will have to be decided in the course of the trial. As of now, what is material is to note that this amount of Rs.21,00,000/-was admittedly paid by the Plaintiff to Defendant No.1, though, according to Defendant No.1, it was paid with a certain amount of delay. The payment was accepted by Defendant No.1 and no grievance is made in this behalf. Though it is open to debate whether the rationale for this payment was as suggested by the Plaintiff or as claimed by Defendant No.1 relying upon the document of 16 December 2003, it cannot be said that material particulars bearing on the merits of the case were deliberately kept from the Court by the Plaintiff whilst seeking reliefs in the notice of motion, or that had these particulars been brought before the Court, then the decision of the Court would have been otherwise.

5 Secondly, it is alleged that Defendant No.1 has subsequently come across plans filed by the Plaintiff with the Municipal Corporation of Greater Mumbai ("MCGM"), which reflect a deliberate attempt on his part to project himself as the owner of the suit property. It is submitted that whilst the development agreement between the parties required the Plaintiff to file plans with MCGM as a Constituted Attorney for and on behalf of the owner, namely, Defendant No.1, the plans, which have subsequently come to light, disclose that the Plaintiff actually proceeded to file them allegedly in his capacity as the owner of the suit property. It cannot be said that this purported lapse on the part of the Plaintiff is a material particular, which

could have affected the eventual order that came to be passed in the Plaintiff's notice of motion. As a constituted attorney, the Plaintiff could have filed the plans in the name of the owner or in his own name, as a constituted attorney of the owner. That he did not endorse his capacity as that of the constituted attorney in the plans actually submitted to MCGM, does not reflect on his readiness or willingness to abide by the terms of the development agreement or suggest any breach on his part of the development agreement. This, of course, is a *prima facie* view of the matter, which may have to be deliberated in greater details at the trial of the suit.

6 Thirdly, it is submitted that the Plaintiff approached the Court with a specific averment that under the development agreement read with the supplementary agreements, Defendant No.1 had undertaken to get the occupants/tenants occupying the suit building vacated/shifted to the temporary transit accommodation to be provided at the cost of the Plaintiff. Learned Counsel took me through the agreements, which, according to him, makes a case for this being in fact the obligation of the Plaintiff. This matter really pertains to the merits of the controversy and was certainly the subject matter of the arguments when the original notice of motion was argued before this Court. It really bears on the veracity of the reason assigned by the Plaintiff as to why the transit accommodations could not be constructed earlier. This aspect of the case has been dealt with by this Court in its original order on the Plaintiff's Notice of Motion in paragraphs 2 and 9 of the order.

7 Anyway, these are not the matters which can really be urged at the

hearing of an application under Order 39 Rule 4 of the Code. As held by Madras High Court in the case of **Govinda Ramanuja Das Goswami Vs. Vijiaramaraju**¹, Order 39 Rule 4 is intended to cover two classes of cases, namely, (1) when an urgent order has been passed ex parte under Rule 3, and the party against whom it has been passed applies to have it discharged or varied or set aside and (2) when an injunction order already in force has, owing to fresh circumstances, become unduly harsh or unnecessary or unworkable. In the latter case, it would be open to either party to apply under Rule 4 to discharge, vary or set it aside. In a case where each side has had an opportunity of being heard but a party omitted to put his case forward, Rule 4 does not give jurisdiction to the Court to interfere with an injunction already passed after hearing the parties. In other words, as held by Madras High Court, rule 4 is not intended to set at nought the ordinary *cursus curiae* that, once a Court has decided a matter after giving each side an opportunity of being heard, its order is final and binding on itself as much as on the parties, and cannot be re-opened except on the presentation of some new matter not available when the original order was passed. Needless to add, this new matter must have such material bearing on the order passed earlier that it was possible that the Court would have decided the matter otherwise had the material been pointed out to it earlier.

8 This principle was further affirmed by the Full Bench of Madhya Pradesh High Court in the case of **Ravishankar Vs. VII th Additional District Judge**². The following observations of the Madhya Pradesh High Court may be noted :

1 AIR 1929 Mad 803

2 1994(2) MPJR 200

“Whenever a prayer is made under Order 39, Rule 4, Civil Procedure Code, the Court has to pose itself with a question – whether there is a change in the circumstances or whether the order of the Court is causing undue hardship to a party ? The later part of the question, needless to say, would involve consideration of only such factors causing undue hardship as have come in existence after passing of the order of the Court or which factors would be a consequence of the order of the Court itself. So is the case with the change in the circumstances. Exercising its jurisdiction under Rule 4 abovesaid, the Court may with advantage draw upon the principles revolving around Explanation IV to Section 11 of the Civil Procedure Code and ask itself whether the pleas raised in the application under Rule 4 might and ought to have been raised prior to the passing of the order ? If the answer be 'yes', the Court may reject the application. If the answer be in the negative, the Court may very well entertain the application and dispose of the same on merits.”

9 Applying these principles to the case in hand, it is, to my mind, quite clear that the Applicant (Defendant No.1) has failed to make out a case under Order 39 Rule 4 of the Code.

10 The Notice of Motion is, accordingly, dismissed. Costs to be costs in the cause.

(S.C. GUPTE, J.)