

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

**NOTICE OF MOTION NO.524 OF 2012
WITH
NOTICE OF MOTION NO.2293 OF 2016
IN
SUIT NO.259 OF 2011**

Chandrika Chunilal Shah

....Plaintiff

Vs.

Orbit Finance Pvt. Ltd. & Ors.

....Defendants

Ms. Ambreen Saheed i/b. MDP and Partners for plaintiff.

Mr. Aspi Chinoy, senior advocate i/b. Chandana Salgaocar for defendant nos.2 and 3.

CORAM : K.R.SHRIRAM, J.

DATE : 31st AUGUST, 2017

PC.:

NOTICE OF MOTION NO.2293 OF 2016

1 Plaintiff has taken out this notice of motion for appointment of Court Receiver as Receiver of the suit premises being Unit No.401, 4th Floor, Industrial Building (now known as Orbit Plaza), Chaitanya Tower Complex, Prabhadevi, Mumbai - 400 025 admeasuring 2680 sq. ft. (BUA) (the suit premises).

2 At the outset, it should be noted that a similar relief was sought by plaintiff in their earlier notice of motion being notice of motion no.309 of 2011, which relief was refused. In the notice of motion no.309 of 2011, the Single Judge of this Court (Dr. D.Y. Chandrachud, J.) was pleased to grant interim protective order as mentioned in paragraphs 11 and 12 of

the said order which read as under :

"11. In the circumstances, the grant of an interim protective order is warranted. This is not a fit and proper case for the appointment of a Receiver at the present stage. However, an order of injunction in terms of prayer clause (b) would be warranted. Prayer clause (b) reads as follows :

(b) Pending the hearing and final disposal “ of the suit for an interim and ad interim order and injunction of this Hon’ble Court restraining the Defendants their servants, agents and anyone claiming through or under them from creating third party rights any manner howsoever in respect of the said Suit Premises described in prayer (a) above and /or from parting with possession of the same or any part or portion thereof in any manner howsoever.”

12. There shall be an order in these terms. However, Counsel appearing on behalf of the Second and Third Defendants has submitted that the aforesaid Defendants should be permitted to create a licence in respect of the area which has been agreed to be sold to them which is inclusive of the area admeasuring 2680 sq. ft. which forms the subject matter of the agreement with the Plaintiff. Counsel appearing on behalf of the Plaintiff has objected to the creation of third party interests. Since the Second and Third Defendants have invested an amount of Rs.11.5 Crores and having regard to all the circumstances of the case, no injustice would result if it is clarified that the order of injunction that has been passed by the Court shall not preclude the Second and Third Defendants from granting the premises on leave and licence basis for a period not exceeding eleven months each subject to the condition that the licensee shall be placed on notice of the pendency of this suit and that no interest shall be created in the premises in favour of the licensee. A bare license does not create an interest in immovable property. No tenancy or any other interest in the property shall be created. The injunction which has been granted by the Court shall operate only in respect of a built up area on the fourth floor admeasuring 2680 sq. ft. which forms the subject matter of the agreement dated 2 March 2000 between the First Defendant and the Plaintiff. In order to facilitate the identification of the area which forms the subject matter of the injunction, Counsel appearing on behalf of the Plaintiff as well as counsel appearing on behalf of the Second and Third Defendants have requested the Court to issue a direction by which an architect may be appointed to identify the built up area of 2680 sq. ft. that forms the subject matter of injunction. Accordingly, the Prothonotary and Senior Master is directed to appoint an architect from the panel of the Court. The architect shall be furnished with a copy of the sanctioned building plan by the First Defendant. The architect shall upon inspecting the premises after due notice to the parties demarcate a built up area of 2680 sq. ft. on the plan. The area shall be demarcated, as far as possible in one of the four corners of the entire fourth floor. The architect shall transmit a copy of the report to the Prothonotary and Senior Master, which shall form part of the record of these proceedings.

The Motion is accordingly disposed of.

Counsel appearing on behalf of the Plaintiff seeks a stay of the direction permitting the Second and Third Defendants to grant a licence in respect of the portion admeasuring 2680 sq. ft. Stay refused.

3 Against this order, plaintiff filed an appeal, which appeal was disposed by an order dated 27th April, 2011. The order of the learned Single Judge was modified only to the extent that the leave and licence fees received for 2680 sq. ft. area be earmarked by the Architect and that amount be deposited with the Prothonotary and Senior Master, High Court, Bombay. Paragraphs 13 and 14 of the said order read as under :

“13. In the peculiar facts and circumstances, we are of the view that interests of justice will be served if, while upholding the order of the learned trial Judge permitting the second and third defendants to grant suit premises on leave and licence basis for a period not exceeding 11 months at a time and subject to the condition that the licensee shall be placed on notice of the pendency of the suit and that no interest shall be created in the premises in favour of the licensee, it is directed that the licence fees to be received from the licensee shall be deposited with the Prothonotary & Senior Master of this Court with respect to the built up area of 2680 sq.ft. of the fourth floor which shall be earmarked by the Architect as already directed by the learned trial Judge.

It is directed accordingly.

14. After the first payment by the licensee is deposited with the Prothonotary and Senior Master of this Court, the Prothonotary and Senior Master shall deposit the amount in a recurring deposit with a Nationalised Bank and the subsequent payments to be made by the licensee shall be deposited directly in the said account under intimation to both the parties as well as to the Prothonotary and Senior Master of this Court. In case of any default, it would be open to the parties to move this Court for further directions.”

4 Against this order, plaintiff approached the Apex Court and the Apex Court disposed the civil appeal of plaintiff. Paragraph 8 of the said

order reads as under :

“8. In view of the above, the facts and circumstances of the case do not warrant interference by this Court. The appeal lacks merits and is, accordingly, dismissed. However, as the suit had originally been instituted in the year 2007, we request the learned Trial Judge to conclude the trial expeditiously preferably within a period of one year. We further clarify that the appellant shall be at liberty to raise all his grievances before the appropriate forum at an appropriate stage as this order is being passed only on an application for interim relief. No order as to costs.”

5 This order has been continuing. It should also be noted that the suit premises still does not have an Occupation Certificate. Plaintiff has now given the entire premises, which includes the suit premises, by two separate leave and licence agreements for 11 months at a time, whereby for the suit premises, plaintiff has agreed for licence fee/compensation of Rs.1 lakh per month. This amount is being deposited in this Court. In the affidavit in support, there is no allegation of any fraud by plaintiff. It is only stated that defendant nos.2 and 3 are giving the suit premises on leave and licence for a period exceeding 11 months and therefore, in breach of the orders passed. Defendant nos.2 and 3 have annexed copies of the leave and licence agreements to the affidavit in reply from which it is obvious that (a) they are registered agreements and (b) licence is only for 11 months at a time.

6 Across the bar, Ms. Saheed, counsel for plaintiff submitted that the market rate for the suit premises will be much more and plaintiff has

raised this in her rejoinder. To determine what is the market rate, evidence will have to be led and in such a situation, the question of appointing Receiver, as prayed for by plaintiff, does not arise. In any event, plaintiff's application for appointment of Receiver has been rejected earlier. Therefore, the relief as sought in this notice of motion cannot be granted.

7 Notice of motion accordingly stands dismissed.

NOTICE OF MOTION NO.524 OF 2012

1 This notice of motion is taken out by plaintiff to challenge the report dated 10th June, 2011 of Architect - AT and TS Associates appointed pursuant to order dated 21st March, 2011.

2 This Court by an order dated 21st March, 2011 had directed the Prothonotary and Senior Master to appoint an Architect from the panel of the Court to facilitate the identification of the area which forms the subject matter of the injunction. The Architect was to identify the built up area of 2680 sq. ft. that forms the subject matter of the injunction. The Architect was directed to demarcate the built up area of 2680 sq. ft. and as far as possible, in one of the four corners of the entire fourth floor.

3 Pursuant to this order, the Prothonotary and Senior Master appointed AT and TS Associates as Architect. The Architect has in paragraph 4 of his report observed that defendant no.1 has obtained

the sanction of BMC by preparing a plan that complies to Development Control Rules (specifically Rule 30 and Rule 35 for calculation of built up areas (BUA) but has not complied to the same with regard to niche and treatment of elevation elements while carrying out the construction. The Architect has also noted that the BUA of as built property is different to the extent of more than 20% from what is theoretically shown on the sanctioned plan as furnished by defendant no.1. The Architect has also noted that the building is without proper OC (Occupation Certificate) and for demarcating the built up area of the property as it exists, it becomes necessary to prepare a fresh plan of the floor under the applicable Development Control Rules, 1991.

4 It is the case of plaintiff that the Architect, in the report has concluded that the area under the niche would fall within the built up area which according to plaintiff is not correct. According to plaintiff, this would result in a three feet shift of the boundary and that would effectively reduce plaintiff's area by about 30 sq. ft.

As noted by the Architect, there are defects in the plans. Therefore, it will be, at this stage, very difficult to discard or disregard the report filed by the Architect. At the same time, defendant nos.2 and 3 have given the suit area on leave and licence basis and the area given is 2680 sq. ft. built up and an amount of Rs.1 lakh being licence fee is being deposited

by defendant nos.2 and 3 with the Prothonotary and Senior Master of this Court.

5 Therefore, in my view, no prejudice is also being caused to plaintiff. As stated above, it is impossible to find fault with the Architect's report since the building plan itself submitted by defendant no.1 is not strictly in accordance with the Development Control Rules.

6 In the circumstances, I am inclined to reject the prayer as sought by plaintiff. The notice of motion accordingly stands dismissed.

(K.R. SHRIRAM, J.)