

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.351 OF 2015
IN
SUIT NO.970 OF 2014**

Anil Budhrani & Anr.	...Applicants
In the matter between	
Anil Budhrani & Anr.	...Plaintiffs
Vs.	
Gulraj Karamchand Rupani alias	
Gul Karamchand Rupani & Ors.	..Defendants

Mr.N.V. Gangal i/b. Ms.Namita Mestry, Advocate for Plaintiffs.
Mr.S.M. Shettigar, Advocate for Defendant No.1.
Mr.Sahil Mahajan with Ms.Chitra Salunke and Mr.Utsav Salunke,
Advocates for Defendant Nos.2 and 3.

**CORAM : K. K. TATED, J.
DATE : SEPTEMBER 12, 2017**

P.C.:

1. Heard learned Counsel for the parties.
2. This Notice of Motion is preferred by the applicants/plaintiffs for directing the defendants to hand over possession of the suit property namely Flat No.5 on the second floor of the building on Plot No.68 together with 1/3rd share in the said Plot No.68 situated at Sindhi Immigrants Co-operative Housing Society Limited, Chembur, Mumbai – 400 071.
3. The learned Counsel Mr.N.V. Gangal for the plaintiffs submits that in the present proceeding, they purchased the suit property by registered Conveyance Deed dated 4th April 2013 from defendant

No.1 for the sum of Rs.60 Lakhs. He submits that the said Conveyance Deed was duly registered in the Office of the Sub-Registrar on 4th April 2013 itself. He further submits that the entire consideration was paid by the plaintiff to defendant No.1. Same is admitted by the defendant No.1 by executing receipts to that effect which are on record along with Conveyance Deed dated 4th April 2013.

4. The learned Counsel for plaintiffs submits that inspite of registered Conveyance Deed dated 4th April 2013, defendant No.1 failed and neglected to hand over peaceful possession of the suit premises to the plaintiffs. Plaintiffs called upon the defendant No.1 to act as per registered Conveyance Deed. At that time, plaintiffs learnt that defendant No.3 is in possession of the suit premises on the basis of Memorandum of Understanding dated 1st October 2007 between defendant nos.1 and 3. He submits that the defendant No.3 claimed that he agreed to purchase the said flat from defendant No.1 for a sum of Rs.70 Lakhs. They advanced a sum of Rs.22 Lakhs to the defendant No.1. He submits that as the defendants failed and neglected to hand over the possession of the suit premises, plaintiffs filed a present suit on 23rd September, 2014 for possession of suit property and the reliefs.

5. The learned Counsel for plaintiffs submits that plaintiffs have apprehension that the defendants may create further third party right, title and interest in the suit premises to defeat plaintiffs' claim and hence, the plaintiffs preferred the present Notice of Motion for an order of possession, to appoint Court Receiver under Order XL Rule 1 of the Code of Civil Procedure, 1908, for an order and injunction restraining the defendants from creating any third party right, title,

interest in the suit premises and to pay a sum of Rs.3,50,000/- towards damages i.e. Rs.35,000/- per month from 1st November 2013 till the date of filing of the suit and further orders. He submits that in the present proceedings, this Court (Coram: R.D. Dhanuka J.) by order dated 17th November 2014, granted ad-interim injunctions in terms of prayer clause (c) excluding the word “dealing with”. He submits that the defendant No.1 filed their reply in Notice of Motion where they categorically stated that the defendant No.1 executed Memorandum of Understanding dated 1st October, 2007 only for taking loan of Rs.22 Lakhs from other defendant. There was no intention to sell or create third party right, title and interest in respect of the suit premises. He further submits that the defendant No.1 specifically stated in reply that the defendant Nos.2 and 3 took key of the suit flat on the pretext that they required the same for some time.

6. The learned Counsel for the applicants/plaintiffs further submits that the defendant Nos.2 and 3 filed their reply in Notice of Motion. He submits that by an Memorandum of Understanding dated 1st October 2007 executed between defendant No.1 on one hand and defendant No.3 on the other hand, it was agreed that the defendant No.1 will hand over the possession of the suit premises to defendant No.3 on payment of entire consideration of Rs.70 Lakhs. In support of his contention, he relies on the clauses (1), (3) and (5) which read thus:

“1. That in pursuance of the purchaser making the payment of the aforesaid consideration of Rs.70,00,000/- (Rupees SEVENTY LAKHS ONLY) being the full and final price or consideration money and the present market value of the said Flat No.5 and 1/3rd share of balance F.S.I. in Plot No.68 (part vacant), along with T.D.R. Rights and future F.S.I. if any, to the Vendor doth hereby agrees to acquit, execute, release and discharge the said Purchaser for ever, he the Vendor doth hereby agrees to grant,

- transfer, convey, assign and assure unto and to the use, occupation and possession and enjoyment of the Purchaser for ever the said Flat No.5 along with 1/3rd share balance F.S.I. on Plot bearing No.68, (Part vacant), C.T.S. No.241, 241/1 & 241/2 as more particularly described in the Schedule hereunder written.
3. The Vendor agree in pursuance to the said MOU of property mentioned within along with the nominal membership of the said Society to hand over vacant and peaceful possession of the said Flat No.5 along with 1/3rd share of Balance F.S.I. on Plot No.68 (part vacant) to the Purchaser after receiving the Payment of Rs.53,00,000/- (Rupees Fifty Three Lakhs only) as full and final settlement to which the Purchaser herein confirm subject to any tenancy rights of any tenant/occupants of Flat No.5, on Second Floor, on the said Plot No.68. It shall be Vendor responsibility to furnish to the Purchaser before the execution of the Deed of Transfer, the document/s confirming the removal of the tenant, surrender of the tenancy rights of any tenant in the flat on the said Flat No.5 on Plot No.68.
5. It is agreed that it shall be the Vendor's responsibility to apply to The Sindhi Immigrants Co-operative Housing Society Limited by his letter for grant of the requisite No Objection as required under the Bye-laws of the Society and for the acceptance of the Purchase as nominee Membership of the said Society in respect of the said Flat No.5, along with 1/3rd share of balance F.S.I. on Plot No.68 (part vacant) of the said Society and also that it shall be the Vendor's responsibility to remove the tenant from the said Flat No.5 on the second floor of the Plot No.68 and further to put the Purchaser in vacant and peaceful possession of the said Flat No.5, and 1/3rd share of balance F.S.I. on Plot No.68 (part vacant) including the nominee membership in the society.”

7. The learned Counsel for plaintiffs submits that admittedly, the defendant No.3 failed to pay the entire consideration as per the Memorandum of Understanding dated 1st October 2007 to the defendant No.1. Hence, there is no question of handing over any possession of the suit premises to the defendant No.3. Hence, as on today, the defendant No.3 is unauthorized occupant of the suit premises.

8. The learned Counsel for the plaintiffs submits that earlier this Court by order dated 14th September 2015 (Coram: S.J. Kathawalla, J.), directed the Assessing Officer, Ward 27(1) (3), Income Tax Department, Mumbai, to produce the returns filed in the last five years by defendant No.3 Hitesh Narendra Rupani having PAN ADWPR9144D and also the returns filed by Mr.Narendra Murlidhar Rupani having PAN ADWPR9146B. Pursuant to the said order, Income Tax authority filed their affidavits dated 1st October 2015 and 15th October 2015 along with compilation of documents. He submits that from bare reading of the affidavits filed by the Income Tax officers as well as the copies of the returns, it is crystal clear that the defendant Nos.2 and 3 failed to disclose the transaction of Memorandum of Understanding dated 1st October 2007 before the Income Tax authority. He further submits that the returns filed by the defendant No.3 for the assessment years i.e. 2011-12, 2012-13, 2013-14, 2014-15 and 2015-16 show that defendant No.3's income was not more than Rs.3,50,000/- per annum. He submits that this itself shows that the statement made by defendant No.3 in his affidavit-in-reply about payment of part consideration to defendant No.1 is not correct.

9. The learned Counsel for plaintiffs submits that as the defendant No.1 failed and neglected to hand over possession of the suit property to the plaintiffs though they paid the entire consideration and as the defendant No.3 is in possession of the suit premises, in the interest of justice, pending the hearing and final disposal of the suit, this Court be pleased to appoint a Court Receiver, High Court, Bombay, with all powers under Order XL Rule 1 of the Code of Civil Procedure, 1908 including the power to take possession of the suit premises and hand

over possession to the plaintiffs. He further submits that the Notice of Motion be made absolute. If such reliefs are not granted, irreparable loss would be caused to the plaintiffs.

10. On the other hand, learned Counsel Mr.Shettigar for defendant No.1 submits that they never entered into an agreement for sale of the suit premises with defendant Nos.2 and 3. He submits that the defendant No.1 was in need of Rs.22 Lakhs, hence, he borrowed the said amount from the defendant Nos.2 and 3 and executed Memorandum of Understanding dated 1st October 2007 as a security. He further submits that the defendant Nos.2 and 3 obtained the keys of the suit premises on the pretext that they required to accommodate guest for a short period. He submits that the defendant No.1 is always ready and willing to hand over possession of the suit premises to the plaintiffs, if it gets from defendant No.3.

11. On the other hand, the learned Counsel Mr.Sahil Mahajan appearing on behalf of the defendant Nos.2 and 3 vehemently opposed the present Notice of Motion. He submits that this Hon'ble Court by order dated 17th November 2014 already restrained the defendants from creating any third party right, title and interest in respect of the suit premises. He submits that in view of the said order, there is no question of passing any further order in the present Notice of Motion for appointment of any Court Receiver and of handing over possession to the plaintiffs. He submits that the defendant No.3 entered into Memorandum of Understanding dated 1st October 2007 with defendant No.1 to purchase the suit premises for consideration of Rs.70 Lakhs and paid a sum of Rs.25,50,000/- as stated in affidavit-in-reply. He submits that defendant No.3 is always ready and willing to comply remaining terms and conditions of the

Memorandum of Understanding dated 1st October 2007. He submits that the defendant No.3 is in possession of the suit premises as a part performance of Memorandum of Understanding dated 1st October 2007. Hence, there is no question of directing defendant No.3 to hand over possession of the suit premises to the plaintiffs and/or to appoint a Court Receiver. The learned Counsel appearing for the defendant No.3 submits that the defendant No.3 has already filed a Suit bearing No.1118 of 2015 in this Court for specific performance of Memorandum of Understanding dated 1st October 2007 and for cancellation of Deed of Conveyance dated 4th April 2013. During the course of arguments, he placed on record a copy of the plaint in Suit No.1118 of 2015. In that suit, defendant No.1 has made following prayers:-

“(a) that the Defendants No.1 be ordered and decreed to specifically perform their obligations under the said Memorandum of Understanding dated 1.10.2007 (being Exhibit-B hereto) by doing all such acts and deeds necessary for effectively transferring the suit property being Flat No.5 on the Second Floor together with 1/3rd share (admeasuring 1000 sq. ft.) of Plot No.68 (part vacant), T.D.R. rights of his proportion and future F.S.I. (if any) and nominal membership of the Sindhi Immigrants Co-op. Hsg. Society Limited, Little Malabar Hill, Survey No.214, 214/1, 214/2 of City Survey Chembur, Taluka Kurla, Mumbai – 400 071, (more particularly described at Exhibit-A hereto) to Plaintiff;

(b) that this Court be pleased to declare that the Agreement/Conveyance Deed dated 04.04.2013 (Exhibit “F”) executed between the Defendant No.1 and Defendant Nos.2 & 3, in respect of the suit said property being Flat No.5 on the Second Floor together with 1/3rd share (admeasuring 1000 sq. ft.) of Plot No.68 (part vacant), T.D.R. rights of his proportion and future F.S.I. (if any) and nominal membership of the Sindhi Immigrants Co-op. Hsg. Society Limited, Little Malabar Hill, Survey No.214, 214/1, 214/2 of City Survey Chembur, Taluka Kurla, Mumbai – 400 071 (more particularly described at Exhibit-A hereto), is void illegal, bad in law and not binding upon the plaintiffs.

(c) that this Court be pleased to declare that the letter dated

27.10.2013 (Exhibits "J") issued by the Defendant No.4 Society to Defendant Nos.2 and 3 admitting them as Nominal members of the Society in respect of the suit property more particularly described at Exhibit-A hereto) is void illegal, bad in law and not binding upon the Plaintiffs.

(d) That in the alternative to prayers hereinabove, the Defendant Nos.1 ordered and decreed to pay to Plaintiff a sum of Rs.2,36,35,200/- (Rupees two crores thirty six lakhs thirty five thousand two hundred only) as and by way of damages as per particulars of claim, hereto annexed and marked as Exhibit-L.

(e) that pending the hearing and final disposal of the suit, the Defendants by themselves or through their agents be restrained by an order and injunction of this Hon'ble Court from dealing with and/or disposing off and/or selling and/or transferring and/or alienating and/or encumbering and/or creating any rights, title or interest in, to, or upon or in respect of the suit property being Flat No.5 on the Second Floor together with 1/3rd share (admeasuring 1000 sq. ft.) of Plot No.68 (part vacant), T.D.R. rights of his proportion and future F.S.I. (if any) and nominal membership of the Sindhi Immigrants Co-op. Hsg. Society Limited, Little Malabar Hill, Survey No.214, 214/1, 214/2 of City Survey Chembur, Taluka Kurla, Mumbai – 400 071, (more particularly described at Exhibit-A hereto) or any part thereof or parting with possession thereof to any person or party other than the Plaintiffs.

(f) That ad-interim and/or interim orders in terms of prayers (e) be passed;

(g) That costs of this Suit be provided for;

(h) That such further and other orders be made and the reliefs granted to the Plaintiffs as the nature and the circumstances of the case may deem it just and necessary."

12. The learned Counsel for the defendant No.3 submits that in view of pendency of the suit filed by defendant No.3 for specific performance of Memorandum of Understanding dated 1st October 2007 and for cancellation of Deed of Conveyance dated 4th April 2013, there is no question of granting any further prayers in the present Notice of Motion. He submits that the defendant No.3 is in lawful possession of the suit premises on the basis of Memorandum of

Understanding dated 1st October 2007. He submits that as there is no substance in the present Notice of Motion, the same is required to be dismissed with costs.

13. I have heard both the sides at length. It is to be noted that the issue involved in the present Notice of Motion is “how to protect the suit premises till the hearing and final disposal of the suit”. In the present matter, the plaintiffs purchased the suit premises by executing registered Conveyance Deed dated 4th April 2013 and paid the entire consideration of Rs.60 Lakhs to the defendant No.1. As the defendant No.1 failed and neglected to hand over the possession of the suit premises to the plaintiffs, plaintiffs made enquiry and learnt that defendant No.3 is in possession of the suit premises on the basis of unregistered Memorandum of Understanding dated 1st October 2007. Though it is stated in Memorandum of Understanding that the defendant No.3 paid a sum of Rs.22 Lakhs to the defendant No.1, but considering the affidavit filed by the income tax authorities and the documents i.e. assessment orders, it is difficult to accept the case of defendant No.3 that he was in a position to pay a sum of Rs.22 Lakhs to defendant No.1. There is no disclosure of the said transaction in defendant No.3's income tax returns. But in any case as on today, defendant No.3 is in possession of the suit premises since 2007. Considering these facts and as the present Notice of Motion is for possession of the suit premises, I am of the opinion that in the interest of justice, to protect the suit premises, it is necessary to appoint the Court Receiver as per prayer clause (b) of the Notice of Motion with direction to the Court Receiver to appoint defendant No.3 if he is willing to occupy the same as agent of Court Receiver on executing documents to that effect and payment of royalty per month from 1st November 2013.

14. Hence, the following order:-

(A) The Notice of Motion is made absolute in terms of prayer clauses (b) and (c) which read thus:-

“(b) That in the alternative of prayer clause (a) above, pending the hearing and final disposal of the suit, the Court Receiver, High Court, Bombay or any other fit and proper person be appointed as Receiver of the suit property described in prayer (a) above with all powers under Order XL Rule 1 of the Code of Civil Procedure, 1908 including the power to take possession of the suit property with police help, if necessary;

(c) That pending the hearing and final disposal of the suit, the Defendants their servants and agents and anyone else claiming by, through or under them be restrained by an Order and Injunction of the Hon'ble Court from dealing with, disposing of, parting with possession of and/or otherwise alienating in any manner whatsoever the suit property described in prayer (a) above or any part thereof.”

(B) The Court Receiver to take formal possession of the suit Flat from defendant No.3 or whosoever is in possession;

(C) The Court Receiver to offer the defendant No.3 to act as an agent of Court Receiver on usual terms and conditions and on payment of royalty;

(D) If defendant No.3 accepts the terms and conditions of the Court Receiver and agrees to pay royalty from 1st November 2013 within two months from the date of communication of this order by the Court Receiver, the Court Receiver to execute documents appointing defendant No.3 as agent of Court Receiver for suit flat.

(E) If the defendant No.3 is failed and neglected to accept the terms and conditions of the Court Receiver within two months, the Court Receiver may appoint the plaintiffs as agents of the Court Receiver on usual terms and conditions;

(F) If the plaintiffs are appointed as agents of the Court Receiver, royalty is to be fixed by considering the fact that the plaintiffs have already paid a sum of Rs.60 Lakhs to the defendant No.1;

(G) Notice of Motion stands disposed of accordingly.

(H) No order as to costs.

At this stage, Mr.Sahil Mahajan appearing on behalf of the defendant No.3 seeks stay to this order for two weeks.

Considering the fact that the defendant No.3 is in possession of the suit premises on the basis of the unregistered Memorandum of Understanding, I do not find any substance to stay this order. Hence, oral prayer is rejected.

(K.K.TATED, J.)