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

CHAMBER SUMMONS (LODGING) NO.1325 OF 2017
IN
SUIT (LODGING) NO.562 OF 2017

WITH
NOTICE OF MOTION (LODGING) NO.2181 OF 2017
IN
SUIT (LODGING) NO.562 OF 2017

Palak A. Shah ...Applicant

IN THE MATTER BETWEEN :

Jal R. Aria ...Plaintiff
V/s.
Devang N. Goradia & Ors. ...Defendants

Mr.Shiraz Rustomjee, Senior Counsel with Ms.Ankita Singhania, and
Mr.Yuvraj K. Singh i/b Desai & Diwanji for the Plaintiff.

Mr.Yusuf Iqbal Yusuf with Mr.Neville Majra with Ms.Nikita Bangera i/b
Y.A. Legal for the Applicant in Chamber Summons (Ldg.) No.1325 of
2017 and Notice of Motion (Ldg.) No.2181 of 2017.

Mr.Devang Goradia – Defendant No.1 present in person.

CORAM : R.D. DHANUKA, J.
DATE : 5TH DECEMBER, 2017.

P.C. :-

1. The applicant - Mr.Palak A. Shah has filed this chamber
summons as well as the notice of motion for various reliefs in the Suit
(Lodging) No.562 of 2017. The chamber summons is filed *inter-alia*

praying for impleadment of the applicant as a party defendant. The Notice of Motion (Lodging) No.2181 of 2017 is filed *inter-alia* praying for clarification that the order dated 10th October, 2017 passed by this Court in the Notice of Motion (Lodging) No.2122 of 2017 filed by the plaintiff is not enforceable or implementable *qua* the present applicant or the suit premises which are currently in possession of the applicant and for other reliefs.

2. It is the case of the applicant that the plaintiff has prayed for various reliefs in the suit such as an order of permanent injunction restraining the defendant nos.1 and 2 from carrying out any illegal or unauthorized construction, from carrying out any addition, alteration etc. and other reliefs which premises are in possession of the applicant. He submits that if any relief as prayed by the plaintiff in respect of the suit premises which is in possession of the applicant under a registered Leave and License Agreement is granted, his rights would be seriously prejudiced.

3. Mr.Rustomjee, learned senior counsel for the plaintiff has no objection if the chamber summons insofar as the prayer for impleadment of the applicant in the chamber summons is concerned, is allowed without prejudice to the rights and contentions of the plaintiff and keeping all the contentions open. The statement made by the learned senior counsel is accepted.

4. Insofar as prayer for impleadment of the applicant to the suit is concerned, the same is allowed without prejudice to the rights and contentions of the plaintiff and keeping all the contentions raised by the plaintiff about the alleged rights of the applicant in the suit premises open. It is made clear that this Court has not expressed any views on the alleged interest claimed by the applicant in respect of the suit premises in these proceedings.

5. The chamber summons is disposed of in aforesaid terms. It is made clear that in view of the applicant having been impleaded in the suit, the plaintiff shall be at liberty to amend the Notice of Motion (Lodging) No.2122 of 2017 for seeking appropriate reliefs, if any, against the applicant. The amendment to be carried out within one week from today. The amendment to the notice of motion also shall be carried out within one week from today. The amended copy of the plaint as well as the Notice of Motion (Lodging) No.2122 of 2017 shall be served upon the defendants' as well as the applicant's advocates simultaneously.

6. Insofar as the Notice of Motion (Lodging) No.2181 of 2017 filed by the applicant is concerned, learned counsel for the applicant invited my attention to the alleged Writing at page 14 of the notice of motion dated 31st May, 1994 between the defendant nos.1 and 2 and the owners and the landlords of Sunama House in which the suit

property is situated. He placed reliance on clauses 3, 5, 6 and 7 of the said agreement. He also placed reliance on the Leave and License Agreement entered into between the defendant nos.1 and 2 and his client and would submit that under the said Leave and License Agreement, his client has been placed in possession of the suit property and that his client has been carrying out requisite repairs in the suit property. He submits that substantial part of repairs is already completed except the minor activities are yet to be completed. He submits that from the date of taking possession of the suit premises under the said Leave and License Agreement, the applicant has already spent more than Rs.1 crore on carrying out repairs in the suit property. He submits that in view of the *ad-interim* relief granted by this Court on 31st October, 2017 in the Notice of Motion (Lodging) No.2122 of 2017, the rights of the applicant are seriously affected and thus the said order passed by this Court shall be modified by issuing a clarification that the said order does not affect the right, title and interest of the applicant and would not apply to the premises in question.

7. It is submitted by the learned counsel that under the said Writing dated 31st May, 1994, the defendant nos.1 and 2 were entitled to carry out requisite repairs and renovation at their own costs and also to change the user of the suit premises from residence to any

other use. He submits that since the applicant is claiming rights under the said Leave and License Agreement through the defendant nos.1 and 2, the applicant is also entitled to use the said premises for commercial use and also to carry out repairs in the suit premises.

8. Mr.Rustomjee, learned senior counsel for the plaintiff on the other hand strongly opposes this notice of motion on various grounds. He invited my attention to the Deed of Indenture dated 27th December, 2000 entered into between the original owners and his client annexed at Exhibit "A" to the plaint and more particularly clauses (iii), (iv) and (vii) at pages 37 and 38 of the plaint. He submits that the plaintiff is senior citizen and has been occupying the premises on the second floor of the building. He submits that under the said provisions, the plaintiff has been exclusively entitled to organize, carry out and control the management, maintenance, repair, upkeep, beautification etc. of the entire building, including the suit premises which is claimed to be occupied by the applicant. He submits that under the said Deed of Indenture, it is made clear that the original owners shall not carry out any repairs of any nature whatsoever without seeking prior consent of the plaintiff. He submits that the said provisions also clearly indicate that the original owners will not change the original use of the residence to any other user without the consent of the plaintiff.

9. Leaned senior counsel for the plaintiff invited my attention to various notices and more particularly stop work notices issued by the Municipal Corporation to the defendant nos.1 and 2. He submits that before the Metropolitan Magistrate, 42th Court, Shindewadi, Dadar, the defendant nos.1 and 2 pleaded guilty to the charges that the defendant nos.1 and 2 had changed the user from residential to commercial. He also invited my attention to various photographs annexed to the plaint to demonstrate that by virtue of substantial repairs of structural nature carried out by the defendant nos.1 and 2, the entire building may be in dangerous condition. He submits that various repairs are carried out by the defendant nos.1 and 2 in violation of the said Deed of Indenture and also contrary to the provisions of the Mumbai Municipal Corporation Act. He also invited my attention particularly to the notice dated 4th August, 2017 issued by the Municipal Corporation to the defendant nos.1 and 2 under section 351(1) of the Mumbai Municipal Corporation Act, 1888 clearly stating that the defendant nos.1 and 2 had unlawfully commenced or has been unlawfully carrying on, erection of building / erection of work more particularly set out in the said notice.

10. Learned senior counsel also invited my attention to the correspondence exchanged between the advocates of the plaintiff and the defendant nos.1 and 2. He submits that the defendant nos.1

and 2 in the reply dated 17th August, 2017 has alleged that the defendant nos.1 and 2 were authorized by the landlords to carry out the repairs and renovation in the said building and also to give the premises to any party of his choice. In paragraph 4, the defendant nos.1 and 2 have alleged that the suit premises needed heavy repairs and they had only started repairs in the premises.

11. The defendant no.1, who is present in Court, states that in view of the condition of the suit property being dangerous and was seriously affected by termites, defendant no.1 had started carrying out repairs. He submits that substantial repairs are already carried out by the applicant and not by the defendant no.1. He however, does not dispute that no permission from the Municipal Corporation was taken by the defendant no.1 before the change of user from residential to commercial and before carrying out any repairs of such nature.

12. In rejoinder, the learned counsel for the applicant submits that the original owners had already permitted the defendant nos.1 and 2 to change the user from residential to commercial and to carry out repairs. Since the applicant is claiming through the defendant nos.1 and 2, all rights and obligations of the defendant nos.1 and 2 are transferred to the applicant and thus the applicant is entitled to use the premises for commercial purpose and to carry out requisite

repairs.

13. I shall first deal with the provisions of the Writing entered into between the defendant nos.1 and 2 and the original owner dated 31st May, 1994. A perusal of clause (3) clearly indicates that the dominant user of the said premises will be for the residence of the defendant nos.1 and 2 and their family members. Clause (5) provides that the defendant nos.1 and 2 will carry out repairs and renovation at their own costs without affecting the F.S.I. of the property and / or the premises. Clause (6) provides that in the event if lawful change of user is permitted by the authority, they would bear and pay their proportionate share or additional municipal taxes and repair cesses as may be required on account of change of the user. Clause (7) provides that the defendant nos.1 and 2 confirm that they would not make any change of user of the suit premises without first obtaining the permission from the concerned authority.

14. A conjoint reading of the aforesaid clauses would clearly indicate that the dominant user of the suit premises was for residence of the defendant nos.1 and 2. Even if any change of user was permissible, the same could be done only by obtaining permission of the concerned authority and the plaintiff. It is not in dispute that neither the defendant nos.1 and 2 nor the applicant sought any permission from the authority for seeking conversion of the premises

from residential purpose to commercial or for carrying out any repairs being carried out by the applicant. In my view, since the defendant nos.1 and 2 were not allowed to change the user from residential to commercial without the permission of the concerned authority, not to carry out repairs without the permission of the authority, the applicant, who claims rights through the said defendant nos.1 and 2 cannot get any rights higher than the rights of the defendant nos.1 and 2 and would be bound by the terms and conditions which were binding on the defendant nos.1 and 2 under the said Writing dated 31st May, 1994. Even today before this Court, the applicant or the defendant no.1 are unable to produce any such prior permission from the authority for change of user or for carrying out repairs.

15. A perusal of the Deed of Indenture annexed to the plaint and more particularly clauses (iii), (vi) and (vii) clearly indicates that though the plaintiff had purchased part of the premises described in Schedule – V of the said Agreement and is the co-owner in respect of the areas in Schedule – VI, the plaintiff has been permitted to carry out and control the management, maintenance, repair etc. of the entire building. The said clause clearly provides that without any prior permission of the plaintiff, the assignors shall not carry out any change of user or repairs in the entire building. It is not in dispute that no such prior permission of the plaintiff had been obtained by the

defendant nos.1 and 2 for change of user or for carrying out repairs.

16. A perusal of the record further indicates that several stop work notices have been issued by the Municipal Corporation upon the defendant nos.1 and 2 alleging for illegal change of user from residential to commercial. The defendant nos.1 and 2 have also pleaded guilty before the Criminal Court which is recorded by the learned Metropolitan Magistrate.

17. A perusal of the correspondence exchanged between the plaintiff's advocate and the advocates of the defendant nos.1 and 2 clearly indicates that even in the month of August, 2017, it was the case of the defendant nos.1 and 2 that they were carrying out requisite repairs in the suit premises and not anybody else, including the applicant.

18. It is not in dispute that the order dated 13th October, 2017 passed by this Court in the Notice of Motion (Lodging) No.2122 of 2017 granting *ad-interim* relief in terms of prayer clause (a) of the notice of motion is in force. In my view since the defendant nos.1 and 2 are restrained from carrying out any repairs in terms of prayer clause (a) of the notice of motion, the applicant, who claims through the defendant nos.1 and 2 also cannot be allowed to carry out repairs in the suit premises. I am not inclined to accept the submission made by the learned counsel for the applicant that the applicant was not

aware of the notices issued by the Municipal Corporation or the defendant nos.1 and 2 had not taken prior permission of the Municipal Corporation or of the plaintiff before any change of user. I am also not inclined to modify the order passed by this Court dated 13th October, 2017 on the ground that the applicant has already alleged to have spent about one crore of rupees on carrying out repairs in the suit premises.

19. A perusal of the photographs annexed to the plaint and on perusal of various notices issued by the Municipal Corporation, it is clear that the repairs being carried out by the defendant nos.1 and 2 are of substantial nature and without seeking permission of the Municipal Corporation or of the plaintiff. In my *prima-facie* view, the change of user by the defendant nos.1 and 2 from residential to commercial is also in violation of the provisions of the Mumbai Municipal Corporation Act and also in violation of the Deed of Indenture at Exhibit "A" to the plaint. I am thus not inclined to grant any relief in favour of the applicant in the notice of motion.

20. I therefore, pass the following order :-

a). The Notice of Motion (Lodging) No.2181 of 2017 is dismissed. No order as to costs.

(R.D. DHANUKA, J.)