

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

**NOTICE OF MOTION NO.36 OF 2017
IN
NOTICE OF MOTION NO.1489 OF 2016
IN
SUIT NO.347 OF 2016**

Mrs Caroline Bocarro ... Applicant
and
Mrs Caroline Bocarro and anr.
v/s
Menlyn Transport Pvt.Ltd. and others ... Defendants

Mr Rohan Cama i/b Mr Bipin J. Joshi for Applicant.
Mr Jaydeep J. Thakkar for Defendant No.1.
Mr Madhav J. Jamdar for Defendant Nos.2 to 4.
Mr Kapi N. Gor for Defendant No.5.

CORAM : B.P. COLABAWALLA, J.

DATE : JUNE 22, 2017

P.C.:

1. The present Suit has been filed by the Plaintiffs for a declaration that the deceased Dale Bocarro, who expired on 22nd June 2015, was the 20 % shareholder in Defendant No.1 Company and entitled to 33 % share in the business of Defendant No.2. Thereafter, the Suit seeks a partition of the properties by meets and bounds and seeking possession of their respective shares, failing which the

properties of the deceased be sold and the Plaintiffs be handed over their respective shares from the sale proceeds.

2. The present Notice of Motion has been filed seeking leave of this Court to give Flat No.601/601A, Josephine Apartments, St. Andrew's Road, Bandra (West), Mumbai 400 050 on leave and license basis. In this Suit, the Plaintiffs had filed Notice of Motion No.1489 of 2016 seeking certain ad-interim reliefs. In this Notice of Motion, at the time when it was heard for ad-interim reliefs, the parties were sent for mediation and a statement was recorded on behalf of the Plaintiffs that they have not created any encumbrances on Flat No.601/601A, Josephine Apartments, St. Andrew's Road, Bandra (West), Mumbai 400 050 and shall not create any third party rights or deal with the said premises without the leave of the Court. It now transpires that the mediation has failed. It is in these circumstances that the present Notice of Motion has been filed seeking leave of this Court to give the said premises on leave and license basis. It is the case of the Plaintiffs that the Plaintiff No.1 is the wife of the Deceased Dale Bocarro and Plaintiff No.2 is the minor daughter of the deceased. It is pleaded in the affidavit in support of the Notice of

Motion that the Plaintiffs are in desperate need of funds as the late Dale Bocarro (deceased husband) was the sole bread winner of the family. It is not in dispute that the said premises (Flat No.601/601A, Josephine Apartments, St. Andrew's Road, Bandra (West), Mumbai 400 050) is in possession of Plaintiff No.1. The reason for letting these premises on leave and license basis is that it would earn regular compensation which would go a long way in Plaintiff No.1 to provide for her minor daughter's education and other expenses. It is in these circumstances that the present Notice of Motion has been filed. This Notice of Motion was opposed by Defendant Nos.3, 4 and 5 by filing their affidavits dated 6th February 2017. Mr Cama states that his client has not filed any affidavit in rejoinder and is proceeding on the basis of denials.

3. Mr Cama, learned counsel appearing on behalf of the Plaintiffs, submitted that admittedly the subject premises are in the possession of the Plaintiffs. Since they are in need of funds, they want to give these premises on leave and license basis so that they can earn compensation from subject premises. On taking instructions, Mr Cama stated that the proposed leave and license will be executed for

a maximum period of three years and once entered into and registered, a copy of the same would be furnished to the learned counsel for the Defendants. Mr Cama further stated that to safeguard the interest of the Defendants, Plaintiff No.1 would execute an undertaking that barring the execution of this leave and license agreement, the Plaintiff No.1 would not create any third party rights, encumbrances and/or interest in the subject premises and that if so ordered by the Court to bring back such amount as this Court may order out of the proceeds that Plaintiff No.1 may receive pursuant to this leave and license agreement. He further stated that with the proposed licensee, the pendency of the present Suit will also be disclosed. He therefore submitted that all these are adequate safeguards to ensure that the property is made available in the event this property also forms the subject matter of the Suit as contended by the Defendants. Looking to all this, he submitted that leave be granted to the Plaintiffs to enter into a leave and license agreement for the subject premises.

4. On the other hand, Mr Jamdar, learned counsel appearing on behalf of Defendant Nos.2 to 4, submitted that no such permission

ought to be given in the facts and circumstances of the present case. He submitted that though it is true that the subject premises stands solely in the name of deceased Dale Bocarro, it was transferred to his name pursuant to an oral family arrangement entered into in the year 1997. The Plaintiffs cannot be allowed to claim this flat exclusively on one hand and their recital in the family arrangement entered into in the year 1997, according to Mr Jamdar, the subject premises went to deceased Dale Bocarro on the understanding that no further claim would be made by him on any other premises. He submitted that now it is clear that the Plaintiffs are resiling from this family arrangement and are taking a claim from all the premises and yet claiming the subject premises as exclusively owned by the deceased Dale Bocarro. For all the aforesaid reasons, Mr Jamdar stated that no relief ought to be granted in this Notice of Motion. In the alternative, it was the submission of Mr Jamdar that if this Court is inclined to grant such leave, then the compensation received by entering into the leave and License agreement ought to be deposited in this Court and the Plaintiffs be allowed to withdraw only to the extent of her share. Mr Gor, learned counsel appearing on behalf of the Defendant No.5 reiterated the documents the arguments of Mr Jamdar and supported

him in his contention.

5. I have heard the parties at length and perused the papers and proceedings in the Suit as well as in the Notice of Motion. It is not in dispute that the subject premises are exclusively in the possession of the Plaintiffs. The Plaintiffs have also agreed to give an undertaking that barring creation of this leave and license agreement, they shall not create any encumbrances and/or third party rights and / or interests in the subject premises without the leave of the Court. This being the case, I think that the interest of the Plaintiffs quays the subject premises are identically protected. I do not think that any useful purpose will be served that the subject premises are kept locked and it does not earn any compensation for any of the parties. It is in this light that I am inclined to grant leave but subject to certain terms and conditions. Accordingly, the following order is passed :-

- “A) Leave is granted to the Plaintiffs to give Flat No.601/601A, Josephine Apartments, St. Andrew's Road, Bandra (West), Mumbai 400 050 on Leave and License basis;
- B) This proposed Leave and License Agreement shall not be for a period of exceeding three years;

- C) Once this Leave and License Agreement is executed and registered, a copy of the same shall be served on the learned counsel for Defendant Nos.2 to 4 and Defendant No.5 within a period of two weeks from the execution and registration of the Leave and License Agreement;
- D) Within a period of one week from today, the Plaintiff shall file a written undertaking in this Court stating that she shall not create any encumbrances and/or third party rights and/or interest in the subject premises except for entering into this Leave and Licence Agreement. If Plaintiff No.1 wants to be relieved of this undertaking, they shall have to obtain prior permission of this Court which shall be decided on its own merits and in accordance with law;
- E) This undertaking will also be subject to the final outcome of Notice of Motion No.1489 of 2016 which is pending in this Court;
- F) To bring back to this Court such amount as may be directed by it, that is received by the Plaintiff No.1 as compensation from the Leave and License Agreement that may be executed pursuant to the leave granted by me today.
- G) To disclose the pending Suit in the Leave and License Agreement.”

6. It is further ordered that the Defendants shall not in any manner interfere with or thwart the execution and performance of the Leave and License Agreement excluding but not limited to the writing to the Licensee or the Society or such other person in this regard.

7. This order is passed without prejudice to all the rights and contentions of all the parties not only in Notice of Motion No.1489 of 2016 but also in the Suit and the counter claim filed by Defendant Nos.3 and 4. As far as Notice of Motion No.1489 of 2016 is concerned, Mr Cama states that he will file his affidavit in rejoinder within a period of four weeks from today. By consent of parties, list the Notice of Motion No.1489 of 2016 for hearing and final disposal on 24th August 2017.

8. I must also mention that the parties are at ad-idem before me that even though the ad-interim order refers to Flat No.601/601A, the actual Flat Nos.601A/601B. Notice of Motion is disposed of in the aforesaid terms. Parties to act on the authenticated copy of this order duly authenticated by the Associate.

(B.P. COLABAWALLA, J.)