

Arun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 96 OF 2017

IN

SUIT NO. 4472 OF 1997

Meenakshi Komera	...Plaintiff
<i>Versus</i>	
Madhu Hotchand Jaisinghani & Anr	...Defendants
<i>And</i>	
Ama Pvt Ptd	...Third Party

Mr AR Pai, *with Ms Apurva M Bhat, i/b Mrs Bina R Pai, for the Plaintiff.*

Mr Mayur Khandeparkar, *i/b Tanvir Shaikh, for Defendants Nos. 1a to 1c and 12.*

Ms Neuty N Thakkar, *for Defendant Nos. 3 to 5 (C).*

Mr SA Jabbar, *i/b GM Joshi, for Third Party.*

CORAM: G.S. PATEL, J

DATED: 10th September 2018

PC:-

1. Although the matter is listed for ad-interim reliefs, by consent, the Notice of Motion is taken up for hearing and final disposal.

2. In a Partition Suit, this is the Plaintiff's application under Order 39 Rule 2A of the Code of Civil Procedure, 1908 ("CPC") combined with reliefs under Order 39 Rule 11 of the CPC.

3. There is no quarrel with Mr Pai's general submission, and none in any case that needs the weight of any authority, that if there is found to be a breach of any order of a Court, the party in breach is liable to suffer, in the discretion of the Court, all the consequences set out in Order 39 including having a pleading struck off and suffering a sentence of imprisonment. The slightest breach can invite all or any of these consequences. A third party who participates in such a breach is not immune from these actions either. It is most certainly not an answer for any third party purchaser of property to say that his vendor did not tell him that he, the vendor, by transacting with the third party purchaser was acting in breach of an order of a court. To the purchaser the risk: he must bear the consequences of not adequately protecting himself with sufficient investigation and enquiry, and if there is in fact found to be such a breach he will also suffer additionally the consequence of having acquired insufficient title.

4. Seeking partition, the Plaintiff sought the following interim relief as prayer clause (e) of the Notice of Motion in respect of two Galas Nos. 125 and 126 in which admittedly has only a one-sixth share:

"(e) Pending the hearing and final disposal of the suit and the Notice of Motion the defendants, their agents, servants or any today claiming through them be restrained by an order of injunction of this Hon'ble Court from disposing off and/or selling, transferring, or creating any third party interest and/or inducting any third party or assigning in favour of the third party so as to deprive the

plaintiff to the extent of her share in respect of the properties described in para 1 of the plaint."

There were other prayers, of course, but this is the relief that is the subject matter of present application.

5. Part of this was modified at the ad-interim stage on 12th January 1998. There was an ad-interim Order in terms of this prayer but said to be excluding "a bracketed portion". Neither in the original plaint nor in the original Notice of Motion is any portion bracketed. However, according to the Plaintiff, the words "inducting any party" have been removed. These are the words that appear in the original Notice of Motion but have been omitted by the Plaintiff while extracting the operative order or relief at page 9 of the present Notice of Motion.

6. In any case, this exclusion is largely irrelevant. There is no doubt that this Order was in operation. The Plaintiff's Notice of Motion was then taken up for hearing and final disposal. That Order was of 22nd November 2000. I will set out a limited portion of this Order which appears at pages 51 and 52 of the paper-book. In paragraph 4, FI Rebello J, while finally disposing of the Notice of Motion, ruled:

"4.... As pointed out earlier no documentary evidence has been placed on record in support of the contention of the Defendant No. 1(a) that the properties were self acquired properties of late Tharumal, late Hotchand and late Jhamandas. The Plaintiff today is in a dire position. Her marriage has fallen apart. Apart from that her children are with the Plaintiff. In the facts and circumstances it would

be just and proper to permit the Plaintiff to occupy the 3rd floor premises, which according to the Defendant No. 1(b) he is presently occupying by appointing a Receiver for the said flat. Defendant No. 1(b) is one of the heirs of original Defendant. They are in possession and occupation of the flat on the 1st floor. **In so far as the other properties are concerned, there is an interim relief preventing the Defendants from alienating, transferring or creating third party rights. In my opinion that will be sufficient pending the hearing and final disposal of the suit as ultimately if the Plaintiff succeeds the Defendants will be bound to give accounts in respect of the suit properties.** In the light of that the following Order:-

(i) There will be a Receiver in so far as the flat on the 3rd floor presently occupied by the Defendant No. 1(b) and his family. Receiver to take possession and induct the Plaintiff as agent of the Receiver without royalty and security subject to the final decision of the suit.

(ii) Defendant No. 1(a) to show cause why Defendant No. 1(a) should not be punished for contempt of this Court for filing a false affidavit and misleading the Court. Notice made returnable on 5th December, 2000."

(Emphasis added)

7. The matter was carried in Appeal. The Appeal was admitted on 14th December 2000 and partly allowed in the following terms:

"2. After hearing the appeal for sometime, **the learned Counsel for the Respondents submits that the directions (i) and (ii) in para 4 of the impugned Order**

may be set aside, but that the Receiver may be continued, though without royalty and security.

4. We set aside the two directions (i) and (ii) in para 4 of the Order of the learned Single Judge. We modify the Order of the learned Single Judge as under:-

(i) **The directions contained in subparagraphs (i) and (ii) of para 4 of the impugned Order are set aside;**

(ii) Receiver stands appointed in respect of the 3rd floor suit flat. Defendant 1(b) is allowed to occupy the said premises as agent of Court Receiver without payment of royalty or giving security;

(iii) Liberty to the 1st Respondent to move the Court for appropriate relief, in case the conditions contemplated by the proviso to Section 23 of the said Act arise in future. Liberty to the Appellants to contest such application, if made."

(Emphasis added)

8. I have set these out because Mr Khandeparkar for the contesting Defendants submits first that the previous ad-interim order of 12th January 1998 no longer survives. It was continued by FI Rebello J, but his order merged with the Appellate Court order, one that did not expressly provide for the continuance of that order in respect of the two galas Nos 125 and 126. The order of FI Rebello J was modified in regard to the flat, but the Appellate Order said nothing at all in regard to the two galas. It cannot, he submits, and I think with some justification, be assumed that despite a

comprehensive appeal, some portion of an ad-interim or an interim order must be deemed to have been continued even if the Appellate order not only admitted the Appeal but partly allowed it, and in doing so made specific directions for other properties but none at all for these two galas.

9. That is the first difficulty in Mr Pai's way and it is a very real difficulty when seeking a discretionary relief invoking an order of the severity of Order 39. The Plaintiff was a respondent to the appeal, represented by Mr Pai (the elder). He argued, as the Appellate Court order says, that the directions in paragraphs 4(i) and 4(ii) could be set aside but the Receiver should be continued without the payment of royalty or security. This was a submission by the present Plaintiff before the Appeal Court. It was, therefore, for the Plaintiff to make the distinction before the Appeal Court that the other ad-interim/interim order in regard to the galas should be continued. That was not done, nor was any later clarification sought. I do not think that it is possible for a Court confronted with an Order 39 application to read into an appeal court order something it does not say, on the basis that the lower court said it, but the appeal court said nothing about it. The doctrine of merger does not permit this approach.

10. There is no dispute that the contesting Respondents did engage with the third party purchaser (before me today) and entered into agreements for both these galas nos. 125 and 126. The first agreement is of 3rd April 2003 for Gala No 125. It makes no mention at all of any restraint order and says there is no litigation pending for the gala. The second agreement is at page 165 and this is in respect

of the other gala. It is of 26th October 2005 and again there is no mention of any pending litigation.

11. Had this been totally in the absence of any Appellate Order and completely without the knowledge of the Plaintiff, things might have been slightly different. I find however that in the meantime the Suit proceeded to trial. The Plaintiff filed her Evidence Affidavit. In cross-examination at a later date, she was specifically asked question 187 as to when she learnt that the contesting Defendants had sold Galas Nos. 125 and 126. She answered that she learnt of this in December 2009 (page 123). This is important because the two transactions are of the year 2003.

12. Mr Pai attempts an argument that the time between December 2009 and 2016 was a period when the Plaintiff remained without sufficient information. Although the Plaintiff wrote to the Society in December 2009, there was no response. The only response received was much later on 9th August 2016, pursuant to an order of this Court, when certain documents were forwarded. Hence, the present application, including for a Receiver. I do not think this is a tenable response especially in light of the relief that is now being sought. The legal position in regard to the interim order and the appellate order is not one that can be altogether ignored either. If, on her own showing, the Plaintiff knew *since December 2009* of the transfer, and that was the specific question put to her in the cross-examination, then she must be held to that. She ought to have acted and moved court. She cannot take advantage of her own inaction or indolence.

13. The other aspect of the matter, as Mr Khandeparkar points out, is that the ad interim relief sought was not an omnibus restraint, but only to the extent of the Plaintiff's share in the galas. There appears to be no dispute that the Plaintiff has a one-sixth share in these galas. This is also reason to reject the prayer for a Receiver. If the Plaintiff's share in the two galas is undisputed, and now with the advantage of the transaction in hand, a basis is available for the valuation of those two galas, then ascertaining the Plaintiff's one-sixth share in monetary terms is perhaps simplified. This amount can always be secured to her. As an equitable consideration, therefore, it is difficult to say that the Plaintiff has a one-sixth interest in the two immovable properties *in specie*.

14. Having regard to all of these factors, I do not believe this Notice of Motion warrants the grant of relief. The Notice of Motion is dismissed.

15. All interim orders stand vacated.

16. The third party was under an ad-interim restraint from creating further third party rights since 18th August 2017. I do not think it is necessary to continue that order. The third party is put to notice that if he further transacts with Galas Nos. 125 and 126 he will do so at his own risk. He is, therefore, well advised to give notice to any transferee of the present Order and of these proceedings.

(G. S. PATEL, J)