

Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 1591 OF 2015
IN
SUIT NO. 1927 OF 1984
AND
CHAMBER SUMMONS NO. 1403 OF 2015
WITH
CHAMBER SUMMONS NO. 1060 OF 2015

Manish Commercial Premises Coop Soc Ltd	...Plaintiff
<i>Versus</i>	
Manish Estates Pvt Ltd	...Defendant

Mr Mihir Desai, Senior Advocate, i/b Mihir Joshi, for the
Plaintiff/Applicant.

Mr Naushad Engineer, with Lalit Katariya & Benedicta Lobo, i/b
Katariya & Associates, for Defendant No. 1.

Mr DD Madon, Senior Advocate, with Sunil Tilokchandani &
Subhasree Chatterjee, i/b Manilal Kher Ambalal & Co., for
Defendants Nos. 2 & 3.

CORAM: G.S. PATEL, J
DATED: 1st August 2018

PC:-

1. The Notice of Motion is by the original Plaintiff to the Suit. It seeks, first, that a delay of 561 days in filing the Notice of Motion be

condoned. That, as we will see, is a wholly and egregiously misstatement in itself. The delay is rather more; far more, in fact. The second prayer is that the Consent Terms and the Consent Decree dated 17th December 1984 be declared to be null, void, *non est* and not binding on the Plaintiff. Prayers (c) and (d) are for recall of the order dated 17th December 1984 and an order that the Suit be resurrected and restored to file.

2. The Plaintiff-society brought suit in June 1984 against the Defendant, a private limited company, for a decree in specific performance of an agreement to sell some property at Prabhadevi. Consent Terms were drawn in December 1984. Both sides were separately represented by their respective Advocates. The Consent Terms resulted in a decree (of Pendse J, as he then was) and required the Defendants to execute a sub-lease for 99 years in respect of a portion of land admeasuring 1,400 sq mtrs, which forms part of a larger property CS No. 5/1629 of the Lower Parel Division. Clause 4 contained a decree that the Defendant was to convey to the Plaintiff the building known as Manish Commercial Centre that the Defendant constructed on the demised land. Clause 5 said that the decree would operate as a sub-lease. Clause 6 provide for a renewal for a further period of 99 years. Clause 7 said that the decree would operate as a conveyance from the Defendant to the Plaintiff in respect of Manish Commercial Centre premises.

3. The entire case today is mounted on the basis that one Chittaranjan Damodardas Shah was not only in control of the Plaintiff, because he held several units in the society, but was also the principal person driving the Defendant company. The plaint was

verified by CD Shah. He signed the Consent Terms for the Plaintiff. Another gentleman signed on behalf of the Defendants.

4. The entire application seems to be on the basis that the Plaintiff is entitled to greater FSI or buildable rights than the Consent Terms and the Consent Decree allow. The Affidavit in Support in paragraphs 11 to 17 targets CD Shah and his actions on behalf of the Plaintiff in 1984. In paragraph 14, the deponent of this Affidavit on behalf of the Plaintiff, one Sushil Gupta, says that the suit was collusive and it was disposed of in a “hurried and surreptitious” manner by filing “unauthorized, unlawful, illegal, collusive and fraudulent Consent Terms”. These are only adjectives, not proof. The same set of adjectives are used again in paragraph 15. Repetition is not proof either.

5. Paragraphs 16 and 17 of this Affidavit in Support, however, are important and this is how they read:

“17. The issue regarding the consent terms were discussed but either the details were not available or said CD Shah avoided discussion stating that the consent decree had not been stamped, registered or acted upon and the same are not valid, binding or subsisting anymore and Plaintiff. In one of the General Body meeting in 2011 when said CD Shah was asked about conveyance, he said all the files were taken by the income tax department in a raid a few years back. **However the contents of consent decree came to light only when a copy thereof was enclosed with the affidavit dated 14th December 2011 filed by Shri Nitin Mathuria of M/s. Hindalco Ltd in Writ Petition (L) No. 2498 of 2011 before this Hon’ble Court.**”

18. The said consent terms were discussed in General Body of the Plaintiff held on 20th July 2012 and by a resolution passed at the said meeting a legal committee was constituted to look into the matter relating to the said consent terms and take appropriate professional advice. Accordingly the legal committee consulted lawyers and obtained report/opinion of architects on or about 25th July 2013 and 7th December 2013. Upon on going through the said reports, it was realised that though FSI of an area admeasuring 4006.20 sq mts has been used from the said land for construction of the said building, the Defendant has defrauded them and managed to file the consent decree purportedly giving sub-lease of an area admeasuring about 1,400 sq mtrs from the said land. The same is unlawful, illegal and contrary to the said agreements and provisions of MOFA. I crave leave to refer to and rely upon the reports of the architects when produced."

(Emphasis added)

6. In paragraph 17 there is an unambiguous statement that the Plaintiff *did not know* of the Consent Terms and that these "*came to light*" only when a copy was enclosed to an Affidavit of 14thDecember 2011 filed by one Nitin Mathuria on behalf of Hindalco Ltd in Writ Petition (L) No. 2498 of 2011.

7. That statement has been demonstrated today to be utterly false.

8. The Plaintiff filed Writ Petition No. 317 of 2002, a good nine years before Hindalco Ltd's writ petition of 2011. In paragraph 7 of

its Writ Petition, affirmed on 29th January 2002, there is a reference by the Plaintiff, or on its behalf, to these very Consent Terms. Indeed, a typed copy of the Consent Decree is annexed at Exhibit “B” at page 25. This Writ Petition by the Plaintiff was affirmed by one Devindar Pal Malhotra. That, as we shall immediately see, is not without consequence.

9. There is, therefore, no question of Sushil Gupta today saying with any acceptable degree of honesty or truth that the Consent Decree or Consent Terms “*came to light*” only in December 2011.

10. The present Affidavit in Support met a comprehensive Affidavit in Reply. At page 296 of the paper-book, the Defendant said specifically this in sub-paragraph (xx):

“(xx) I say that certain disputes had arisen between Mr CD Shah and the Plaintiff-society. **I say that Mr CD Shah had, vide his letter dated 23rd November 2002, handed over all the registers, files, books and papers of the Society that were in his possession to the Chairman and Secretary of the Plaintiff-Society Mr DP Malhotra and Mr Kishor Shah. The said Chairman and Secretary have acknowledged the receipt of all the documents that were in the possession of Mr CD Shah. It is expressly stated in the list of documents that were handed over that the consent decree conveying the property was handed over on 23rd November 2002.** A copy of the said letter dated 23rd November 2002 is hereto annexed and marked as **Exhibit-N**. In fact, on 26th November 2002, the Plaintiffs addressed a letter to Mr CD Shah, thanking Mr CD Shah for handing over the records and requested for certain further records from Mr CD

Shah. A copy of the said letter is hereto annexed and marked as **Exhibit-O**."

(Emphasis added)

11. This is, therefore, a clear statement that CD Shah, in November 2002, delivered all documents to DP Malhotra — the very person who affirmed the Writ Petition — and to Kishore Shah, both representatives of the Plaintiff. This appears to be, as Mr Madon for the Defendants points out, a *second* handing over, because the Writ Petition is of January 2002 and this paragraph speaks of events of late-November 2002. Therefore, even at the dawn of that year, 2002, the Plaintiff had the documents in question. The reply also says that the Chairman and the Secretary of the Plaintiff society acknowledged receipt of these documents. Copies of the correspondence are at Exhibits "N" and "O" to this Affidavit in Reply at pages 373 and 374. The letter at page 373 contains a typed endorsement that the documents were received from CD Shah. The endorsement is of 23rd November 2002 by DP Malhotra and Kishore Shah. There is a list annexed to this. Item 1 is the registration file that specifically speaks of a copy of the Consent Decree conveying the property. Exhibit "O" at page 376 is a letter from the society itself to CD Shah expressing gratitude for his cooperation. Annexed to this, apparently, was a list of documents that were also required. These included certain bank documents, salary documents, utility files and so on, but the list has no mention of the Consent Decree or registration documents being missing.

12. Then comes a Rejoinder in the present Motion. This is filed by one Dharendra Kumar Surana on behalf of the Plaintiff society. I

note this because curiously the same gentleman, Sushil Gupta, who was so very emphatic in his statements on behalf of the society in the Affidavit in Reply does not file a Rejoinder. At page 435-436 of the paper-book in paragraph 9, this is what Surana says in response to the Defendant's claim to have delivered all documents, including the Consent Terms and Consent Decree, in 2002:

"9. With further reference to the remaining paragraphs of paragraph 4 and purported minutes of the Managing Committee meetings referred to therein, it is stated that the purported decisions taken by the Managing Committee headed by the said CD Shah travel much beyond its powers and contrary to the legal provisions cannot be made binding on the Plaintiff society. The Defendant cannot escape its statutory liability in the guise of decisions of managing committee or by alleging knowledge of consent decree to members of managing committee. **The consent decree may have been referred to or discussed but its actual contents, implications and fraudulent nature were realized much later as stated earlier. Thus so called delivery of consent terms by said CD Shah to the society does not make them legal and binding on the Plaintiff, if it is null, void ab initio, non est, fraudulent, illegal and not binding upon the Plaintiff.**"

(Emphasis added)

13. Now saying that the "contents, implications and fraudulent nature" — more adjectives — were realized later is a very different thing from saying that the Consent Decree was never given at all until 2011.

14. Mr Madon may be right in saying that Sushil Gupta has rendered himself liable to proceedings in perjury. I will leave that aside for the time being, and address instead the question of delay. The only explanation seems to be this very paragraph claiming knowledge only as of 2011; a statement that, as I have noted, is demonstrably and entirely false. In my view, this entire application is nothing but a latter-day epiphany and an attempted cleverness on the part of some members of the Plaintiff's legal committee, who seem to have set about trying to find some way to gain advantage for themselves, possibly on account of enlarged development potential. This is evident from paragraph 18 of Sushil Gupta's Affidavit in Support, extracted earlier.

15. None of this is even remotely persuasive. It is singularly underwhelming and uninspiring. There is no explanation for anything that happened with the society and its members from 1984 and 2002. There is no explanation for the nine years between 2002 to 2011. There is only a material misstatement — indeed a patent untruth — on Affidavit.

16. I do not think that there is any branch of law that will even permit me to exercise any discretion in favour of a party who comes to a Court with false statements in this fashion.

17. There is no question of this Plaintiff being able to impugn or impeach the Consent Decree or the Consent Terms on the ground of fraud or concealing. There is no case made out whatsoever.

18. The Notice of Motion is dismissed.

19. Resisting all temptation and my own predilections in such cases, and only because the Plaintiff is a society with several individual members, there will be no order as to costs.

(G. S. PATEL, J)