Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION (L) NO. 608 OF 2018

IN

SUIT NO. 2546 OF 2012

Ashutosh Y Maneklal
Resigding at 17(B-2), Woodland Apartments,
Peddear Road, Mumbai 400 026

… **Plaintiff**

~ versus ~

1. **Lina Y Maneklal,**
Residing at 17(B-1), Woodland Apartments, Peddar Road, Mumbai 400 026

2. **Madhav Maneklal,**
Residing at : Shyam Niwas, SB-63, 51, Bhulabhai Desai Road, Breach Candy, Mumbai 400 026

3. **Kunti Maneklal**
Residing at 552 Tobin Drive, Apartment 3310, Inkster MI 48141 (U.S.A.)

4. **Maneklal Enterprises Private Limited**
a Private Limited Company having its Registered Office at Manek Mahal, 7th Floor 990, Veer Nariman Road, Mumbai 400 020

5. **Mamta Share Investment &**

Trading Company Private Limited,
a Private Limited Company having its registered office at Manek Mahal, 7th Floor, 90, Veer Nariman Road, Mumbai 400 020

6. **Ashu Engineers & Plastics Private Limited**, a Private Limited Company having its registered office at Manek Mahal, 7th Floor, 90, Veer Nariman Road, Mumbai 400 020

7. Scorpio Properties Private Limited, a Private Limited Company having its registered office at Manek Mahal, 7th Floor, 90, Veer Nariman Road, Mumbai 400 020

8. **Anag Maneklal Engineers Private Limited**, a Private Limited Company having its registered office at 9901, Vraj Apartments, Opposite Judges Bungalow Road, Bodakdev, Ahmedabad 380 054 (Gujarat)

9. **Emesar Vaigyanik Annusandhan Kendra Pvt Ltd**, a Private Limited Company having its registered office at Manek Mahal, 7th Floor 90, Veer Nariman Road, Churchgate, Mumbai 400 020

10. **TMVT Industries Pvt Ltd,** a Private Limited Company having its registered office at Plot No. 84/A, "F" Road, Phase I, GIDC Vatva, Ahmedabad 382 445 (Gujarat)

11. **Municipal Corporation of**

Greater Mumbai, having its office at Ast Law Officer, Legal Department , MCGM Head Office, 3rd Floor, Main Building, Fort Mubmai 400 001. Through Assessment & Collection Department, MCGM having his office at A-Ward, Municipal Office, Shahid Bhagat Singh Road, Near Reserve Bank, Fort, Mumbai 400 001

... **Defendants**

Appearances

FOR THE PLAINTIFF	**Mr Rohit Kapadia, Senior Advocate**, *with Farhan Dubash, Anosh Sequiera, Jesse Cornelious, & Aarohee Gursale, i/b Dhaval Vussonji & Associates.*
FOR DEFENDANT NO. 1	**Mr DD Madon, Senior Advocate**, *with Pratik Seksaria, & Gauraj Shah i/b Vina Advani.*
FOR DEFENDANT NO. 2	**Mr Manish Doshi**, *with Ashwin Poojari, i/b Vimadalal & Co.*

CORAM : G.S.Patel, J.

DATED : 18th/19th April 2018

ORAL JUDGMENT:

1. I have heard this Notice of Motion for several hours today. It has been listed before me earlier. Affidavits have gone to the stage of a Rejoinder of some 220 pages and there is a substantial compilation as well. I have with the assistance of Mr Seksaria for the Applicant, the 1st Defendant, gone through the relevant portions of the record. I have heard Mr Kapadia, learned Senior Advocate appearing on behalf of the Plaintiff in opposition.

2. In my view, the entire Notice of Motion is, first, thoroughly misconceived. Second, it proceeds on a premise that is untenable both on facts and in law. Third, I am constrained to observe that the Affidavit in Support and the Affidavit in Rejoinder are very like an official statistic: what they show is merely interesting; what they conceal is vital.

3. The Plaintiff is the son of the 1st Defendant, who is his mother, and the brother of the 2nd Defendant. The Suit itself seeks reliefs related to the estate of the father of the Plaintiff and the 2nd Defendant, one Yogesh Maneklal. Defendant No. 3 is a sister of the Plaintiff and the 2nd Defendant. The Suit is for administration of Maneklal's estate. One of the principal properties in this estate is a building called Manek Mahal at Veer Nariman Road, Mumbai 400 020 in the Churchgate area. There are several tenants in the building including some family members.

4. The present Notice of Motion is by the 1st Defendant, Lina Maneklal, the Plaintiff's mother, and it seeks an order that a fixed deposit of Rs.1,80,77,001/- held by the 4th Defendant, a company, in the Bank of Baroda, Altamont Road Branch, be permitted to be used by the 4th Defendant to pay certain amounts due to Municipal Corporation of Greater Mumbai ("**MCGM**") towards property taxes and repair cess in respect of the Manek Mahal property.

Defendant No. 4 is a private limited company. The Plaintiff's case is that he was managing the affairs of the company till 2013 when, by a series of acts that he has challenged in different proceedings in the City Civil Court and before the National Company Law Tribunal, he was entirely ousted from the management of that company, apparently on the ground that he did not have the necessary qualification shareholding to be a director of the 4th Defendant. Since that time Defendant No. 1 has been in control and conduct of Defendant No. 4.

5. Mr Seksaria says that such an order as sought in this Notice of Motion is necessary because the 4th Defendant company does not have ready funds or the liquidity to make payment of the MCGM's dues. If these are not paid, there is every likelihood that the property will be attached, auctioned and sold. He says that notices have been received from the MCGM making demand for payment.

6. Shortly stated, Mr Kapadia's response is this. First, that there is a previous order of a learned Single Judge of this Court that specifically prohibits the encashment of the 4th Defendant's fixed deposits. That order has not been set aside in appeal. He accepts, as must I, that since that order was an ad-interim order, it cannot strictly be said to have attained 'finality', and while this means that an application for variation or modification is always possible, any such application must be supported by a cogent statement that circumstances have changed justifying such a modification or variation. He says that just such a modification was attempted and was not granted. It is also his case that in fact there is no change in circumstances justifying such an order. According to him, the 4th

Defendant demonstrably and on its own records has more than enough funds to meet this claim. At the time when the Plaintiff was in charge of the affairs of the 4th Defendant there was no such issue. He also says that if the funds of the 4th Defendant have been debilitated, the 1st Defendant must answer for this. He submits that he is in a position to demonstrate that ready funds of the 4th Defendant have been used unwisely and even to sustain the various litigations on behalf of the 1st Defendant. He points out that there is a contest in parallel for control of the 4th Defendant, and should the present application be allowed, and if — in his submission the appropriate word is *when*, not *if* — the Plaintiff succeeds and is reinstated in control and charge of the 4th Defendant, he will then find himself left with nothing but an utterly denuded shell of a company.

7. Before I turn to the factual background and to the material on record, I will note Mr Seksaria's submission that the undeniable fact of a previous ad-interim order does not and cannot operate as *res judicata* and that it is always open to a party to make an application, or, indeed, repeated applications, for variation of that order. Mr Seksaria fairly accepts that to support such an application a change in circumstances must be demonstrated. This proposition is correct and requires no authority. The question before me today is not whether such an order can be made, but whether it should be; not whether such an application lies, but whether it should be allowed.

8. The essence of Mr Seksaria's application is that correspondence of 2013, including in particular a letter signed by the Plaintiff on behalf of the 4th Defendant at pages 19-21 to the

Affidavit in Support of the Notice of Motion shows that the Plaintiff himself accepted that there are several expenses required for maintenance of the building and more importantly that there was a requirement to spend money. He uses this letter to argue that the building requires several expenses in quite significant amounts. He then turns to an earlier letter dated 12th September 2012 which notes several points for discussion. Among these is a statement that there are funds locked in a fixed deposit and that this will need to be broken to pay for these expenses. There is then a letter at pages 26 and 27 of the Affidavit in Support from the Plaintiff's previous attorneys which specifically notes that the fixed deposit would have to be broken to make payment of the shortfall in arrears of property tax. This is a letter of 26th March 2013; and it was followed by a second letter of two days later of 28th March 2013 which speaks specifically of breaking the fixed deposit in the name of the 4th Defendant in the Bank of Baroda for payment of property taxes.

9. In the present Suit, a learned Single Judge of this Court made an order on 16th October 2012 at an ad-interim stage. There was an injunction against both sides from dealing with the estate. Parties were referred to mediation and in the meantime, the learned Single Judge said that the parties would be entitled to carry on their business and incurred expenses in the normal course.

10. Had matters remained at this, perhaps the present Motion was entirely unnecessary. There is, however, is a subsequent order of 20th December 2013 of another learned Single Judge of this Court (Anoop V Mohta J) but this was in an Appeal from Order coming up from an order of 3rd December 2013 passed by the City

Civil Court in a Motion filed by the present Plaintiff. In this Suit, it seems, the resolutions by which the Plaintiff was ousted from the 4th Defendant Company were in issue. The meetings at which the impugned resolutions were passed were brought into question. Paragraphs 4 and 5 of that order (pages 38-39) reads as follows:

> "4. The apprehension now based upon the impugned resolution of 27 September 2013 is that Defendants 1 and 2, will transfer and/or create and/or alter the shareholding, apart from alteration of the fixed deposits and the investments.
>
> 5. The action of disqualification of two Directors on a foundation that they have no qualifying shares, therefore, in my view, for above reason, need to be tested and so also the consequential effect of the same. The appointment of additional Director and disqualification of these two Directors including the Plaintiff will certain change the scenario of the management of the company/Defendant No. 4. Even if the subsequent resolutions whereby Defendants ½, have been authorized to do the needful which may include even the apprehension so expressed, therefore, in my view, at this stage, till the trial Court hears the Notice of Motion finally, there will be an ad-interim order in terms of prayers f(i) of Civil Application No. 1638/2013 and instead of (f)(ii), I am inclined to direct the Defendants not to alter the fixed deposits/investments of the Company."

11. The Appeal from Order was disposed of in these terms. Clause (f)(ii) of the Civil Application in Appeal from Order sought a restraint against the present Defendants Nos. 1 and 2 from signing any cheques or authorising any withdrawals on behalf of the 4th

Defendant without a joint signature of the Plaintiff. That relief was not granted but the Defendants were directed not to alter the fixed deposits or investments of the 4th Defendant Company. Therefore, this application.

12. On 24th March 2017, the Plaintiff's Notice of Motion for ad-interim reliefs in the Suit was mentioned before me. The question of payment of this very claim of property tax (although of a much lower amount) was made on behalf of the 1st Defendant. That application was opposed by the Plaintiff. I said that the property taxes would have to be paid and allowed the company to pay the property taxes out of thee funds or liquidating to the extent necessary any investment it held.

13. I do not recall Justice Mohta's order of 20th December 2013 being shown to me; had it been, I would have most certainly have noted it. It appears that the company took the matter in Appeal. On 31st March 2017, the Appellate Court noted a statement made on behalf of the present 1st Defendant that she would seek a clarification from Justice Mohta in regard to his 20th December 2013 order. A copy of that order is at pages 141 to 142 of the paper-book.

14. An application for clarification was made by way of Civil Application No. 278 of 2017 before Justice Mohta. An order was passed on 11th April 2017 (pages 143-144). The learned Single Judge was of the view that no case was made out for any clarification of his order of 20th December 2013 "based upon the subsequent events".

However, liberty was granted to the parties to take out an appropriate application if so advised.

15. On this clarification, the parties went back to the Appeal Court in the appeal against my order. That order was set aside and the matter was remitted for deciding the Plaintiff's application afresh. It is in this factual background that the present application comes to be made.

16. On the question of finances, Mr Seksaria says that the company has no more than about Rs.20,000/- in its bank account. It does not have the funds required to make payment to the MCGM. To show this, are, he says annexures to the Affidavit in Rejoinder. He says that the building his old and it has required significant amounts to be spent for repairs for the lift, maintenance etc. The income is negligible. There are arrears of contributions towards maintenance from the tenants. Many of the tenants are in arrears of rent, which is in an any case paltry. One of the principal source of income was the premium being taken on transfers of tenancies; even that is stopped. This is the situation as it obtains in 2017-18, he says, and since 2013 the financial position of the company has steadily worsened.

17. What is there to show this? I must, first, address the question of what material the 1st Defendant has produced to show this, and whether that is demonstrated to be accurate and whether it substantiates these statements are made by the 1st Defendant as to the 4th Defendant's financial position. Annexed to the Affidavit in

Rejoinder is a cash book statement taken from an accounting software of the 4th Defendant's account with the HDFC Bank, Tulsiani Chambers (pages 198-212) and of the Bank of Baroda account (pages 213 to 214). These statements are unsigned and unverified. What is not produced, for reasons I am wholly unable to understand, are actual print outs or copies of the 4th Defendant's bank statements as issued by either of these two banks. Moreover these statements are for a period that is, in my view, wholly irrelevant: only for some part of 2013, a good five years ago. This does not, therefore, reflect the current position of the Company. There then follow copies of the profit and loss accounts of the 4th Defendant Company from the years ending 31st March 2011 to 31st March 2017 (pages 215 to 221). Again these disclosures are incomplete. They are also misdirected. I say they are incomplete because the full financial returns are not produced by the 1st Defendant. The notes to the financial accounts showing the break-ups of the income and expenditure are not shown. The auditors' notes are not shown. In any case, working backwards from the profit and loss accounts of 2017 it is not at all apparent that these profit and loss statements bear out the 1st Defendant's case. For instance, the statement of profit and loss for the 4th Defendant for the year ending 31st March 2017 shows a total revenue or income of over Rs.50 lakhs in that year and over Rs.48 lakhs in the previous year. For the year ending 31st March 2014 the income was more than Rs.53 lakhs. For the year ending 31st March 2015 it was over Rs.46 lakhs. There is a discrepancy between Exhibit "M" and Exhibit "N" which is unexplained. Exhibit "M" shows the revenue for the year ending 31st March 2014 as Rs 55 lakhs. Exhibit "N" notes the previous year's, i.e. for the year ending 31st March 2014 total revenue as Rs.53 lakhs. Throughout, from 2013 onwards the annual income seems to have been in excess of at least Rs.45,00,000/-.

18. Mr Seksaria also says that it is the Plaintiff who misstated various issues relating to the finances. He claimed that there was large amount as cash in hand but that this was notional or theoretical and this amount of cash was never on hand.

19. Mr Kapadia has put together a substantial compilation. This includes copies of the complete returns of the 4th Defendant company as filed before the statutory authorities. The same profit and loss statements are also to be found here but in addition we see critical details. For the year ending 31st March 2015 there are details of the income received from various sources. Page 85 of this compilation, *prima facie,* shows that the claim that virtually nothing was received towards maintenance charges is incorrect. An amount of Rs.17,84,076/- is shown as income only under this head for that year. For subsequent years also, the details indicate significant inflows. I do not think it is necessary to go through each year. It is enough to note that at page 119 of the compilation the total income from operations for the year ending 31st March 2016 is shown as Rs.36,23,820/-. In addition, there is other income from interest etc. of Rs.12,75,301/-. For the previous year 31st March 2015 the figures were not much lower. For the year ending 31st March 2017, the one closest for our purposes, the income from operations is shown at over Rs. 35 or 36 lakhs and the income from other sources is over Rs.11,00,000/-.

20. But that is not all. The allegation that the cash on hand that the Plaintiff says was with the company and which Mr Seksaria is instructed to say is hypothetical is also disproved by what is shown in this compilation. Here we find the notes appended to these financial statements. There are auditor's notes annexed and these show (for example page 162) that even post demonetisation when specified bank notes were required to be particularly accounted (and physically counted) an amount of Rs.14,46,051/- was in hand for the period 8th November 2016 to 30th December 2016.

21. There is also substance to Mr Kapadia's allegations that large amounts have been paid towards under the head "professional fees". For the year ending 31st March 2017 an amount of over Rs.13,00,000/- was paid out under this head (page 159) and a slightly higher amount in the previous year. For the year ending 31st March 2015 the figure was lower but not itself insignificant, an amount of Rs.4,92,292/-. Mr Seksaria says that these are expenses in relation to litigation against "tenants". I do not know. I cannot tell. There are no details. Mr Kapadia says that there are only one pending litigation in the Court of Small Causes. Mr Seksaria's answer that notices had to be sent to other tenants inspires no confidence.

22. Do these factors in themselves constitute a sufficient demonstration of changed circumstances to warrant a variation or modification of the 20th December 2013 order of Mohta J? I am not even remotely persuaded to accept the submission. The cash in hand being nil or negligible (averred in paragraph 13 at page 82 by the 1st Defendant) and the assertion that the Company has insufficient funds (paragraphs 17 and 18 at pages 85 and 86) are not statements that are now demonstrated by the record. It is one thing to suggest that Justice Mohta's order can, given sufficient reason, be varied or modified. It is quite another to suggest that this should be done even when the record as finally set before the Court not only does not support the Applicant/1st Defendant's case, but actually runs counter to it. For instance, there is no explanation why the 4th Defendant's bank accounts from 2014 till date were not shown. There is no explanation why there was only a partial disclosure and that too in the Rejoinder of the 4th Defendant's financial returns, and remained a disclosure limited to statements of profit and loss and nothing else. The notes falling part of the accounts and the schedules that are statutorily required to be drawn up and filed were not shown. There is no explanation why the ledger statement that is produced is only for the year 2013 but not for a day beyond.

23. The 1st Defendant has had more than enough opportunity and, in my view, more than capable legal representation to place in the first instance material to show that the company was in the financial doldrums. It is self-evident that this could not be established merely on the 1st Defendant's say-so but had to be demonstrated from the 4th Defendant's statutory and official financial records and bank statements. The 1st Defendant had not one but two opportunities to do this and both were unrestricted. She could have done so in her Affidavit in Support. She could also have done so in her Affidavit in Rejoinder to meet the case of the Plaintiff that the 4th Defendant had enough funds. The 1st Defendant did neither. The reason for that non-disclosure suggests itself, for the full financials have been shown by the Plaintiff in the compilation and these do not even remotely support the 1st Defendant's case of there being any change of circumstances whatsoever to justify a variation or modification of Mohta J's injunction.

24. There is no substance in this Notice of Motion. It is dismissed with costs.

25. As regards prayer clause (b), there is a bond of the National Highways Authority of India, that matured in 2013. Since the instrument has not been surrendered by the Plaintiff, the amount has not been realized with accrued dividend or interest. The Plaintiff will deliver the physical instrument to Mr Ketan Trivedi, Commissioner for Taking Accounts, who will on the strength of this order, submit the bond to the NHAI at the office concerned. The NHAI will make repayment of the amount of the bond with all accrued interest in favour of the Prothonotary and Senior Master of this Court. The amount of the bond with interest will be held by the Prothonotary and Senior Master and be invested in a fixed deposit with any nationalized bank at the best possible rates of interest initially for a period of one year and thereafter renewed for like periods until further orders.

26. All concerned will act on an authenticated copy of this order.

27. As regards the claim of the Corporation, I had only requested it to give sufficient notice to the parties before taking any coercive action. That order of three weeks' notice will continue.

28. It is clarified that there is no injunction of any kind against the MCGM.

(G.S. PATEL, J.)