Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 229 OF 2016
IN
SUIT NO. 71 OF 2016

Uday Krishnarao Parab & Anr …Plaintiffs
Versus
Pawan Kumar Mittal & Ors …Defendants

Mr CG Gavnekar*, with Rakesh Bhatkar, Atmaram Patad, Mohan Devkule, i/b Sangeeta Salvi, for the Plaintiffs.*
Mr Arshil Shah*, with Sneha Vani-Marjadi, i/b Chaitanyaa Bhandarkar, for Defendants Nos. 1 & 2.*

CORAM: G.S. PATEL, J
DATED: 12th December 2018

PC:-

1. Heard.

2. The Motion seeks an injunction against Defendants Nos. 1 and 2 for the following reliefs: first, from dispossessing the Plaintiffs from Flat No. 504, 5th Floor, Building No. 5, Raheja Classique 5, off Link Road, Andheri, Mumbai 400 053, (**"the suit flat"**); second, for an injunction restraining Defendants Nos. 1 and 2 from selling or creating any third party rights in respect of that flat; and third, restraining the 3rd Defendant, the society in question, from issuing any no objection certificate to any such sale or transfer.

3. There is a comprehensive reply to the Motion dated 15th December 2015 and this was followed by an Affidavit in Rejoinder of 1st February 2016. In the Notice of Motion there are two sets of Affidavits in Reply, one having been filed at an ad-interim stage and a more substantial reply filed thereafter. I will refer to the page numbers as corrected.

4. Mr Gavnekar for the Plaintiffs points out that there is an order of status quo of SJ Kathawalla J of 15th December 2015. His first submission is that given the passage of almost exactly three years, there is no reason why that order should not continue while the suit can be expeditiously taken to trial. I am not persuaded that this is a sound approach in every matter. Whether the 15th December 2015 order says so or not, that was clearly an ad-interim order when the Notice of Motion was still on a lodging number. Indeed the suit itself was on a lodging number. That order was made to place the parties in what I may describe as a holding pattern until the Notice of Motion was finally heard. The fact that a Court did not hear the Notice of Motion soon thereafter is not something that can be held against the Defendants (or, in a given case, against a plaintiff). These delays in the legal system furnish neither answer nor solution to an application for interim relief. Certainly the continuance of an ad-interim order for a long period of time only because a court, due to the pressures on its docket, has not been able to take it up is no reason to grant or refuse interim relief. There is another reason in this context that militates against an acceptance of Mr Gavnekar's submission, but I will turn to that in sequence.

5. For now, what I must consider is the case that the Plaintiffs have put before the Court. A primary objection by Mr Purohit for Defendants Nos. 1 and 2 is that the Plaintiffs are guilty of suppression of vital material that, though demonstrably to their knowledge and prior to the date of the suit, was without sufficient explanation wholly elided from the plaint as originally filed (and on which the Plaintiffs obtained the ad interim *status quo* order). The suppression in this case, he submits, is evident in the two manifestations of the plaint, as it originally stood, and after it was amended. He submits that it is a principle so firmly established as to be very nearly sacrosanct, that where a party is shown not to have conducted itself with complete candour, it is automatically disentitled to any equitable discretionary remedy. No party can, he submit, come to Court with half-truths and yet seek judicial protection. There are simply no exceptions to this. Of course Mr Purohit is correct, and there are indeed no exceptions. But what I must see is whether there is in fact the kind of suppression that he describes.

6. To do this, a very brief narrative of the background facts is necessary. It runs thus, in the plaint as it stood when the suit was instituted. According to the Plaintiffs, the 1st and 2nd Defendants acquired the suit flat under an agreement dated 13th November 2009. The Plaintiffs say that the 1st and 2nd Defendants offered to sell the flat to the Plaintiffs in March 2011 for a total consideration of Rs. 3.15 crores. They again say that there was an agreement of sale of 8th March 2011 in respect of this flat. The Plaintiffs claim they were in possession on 15th May 2011 in view of this agreement. They say they paid Rs. 20 lakhs by cheque as part consideration on 20th May 2011. Then there is what I can only describe as something of a leap of faith in the plaint as initially filed, for the Plaintiffs say that the parties then entered into a leave and license agreement for a 24-month period from 15th May 2011 to 14th May 2013. Then there are averments that amounts of Rs. 50 lakhs and 11 lakhs were paid in cash in November 2013 and a further amount of Rs. 14 lakhs paid on 16th November 2013. Finally the Plaintiffs say that there was another leave and license agreement, this time for 12 months from 15th May 2013 to 14th May 2015, and that this was executed on 8th October 2014.

7. The plaint was amended on the application of the Plaintiffs on 15th December 2017. The Plaintiffs added a number of paragraphs, the most important of which perhaps is paragraph 16a at page 17A. This is how that paragraph reads:

> "16a) The Plaintiff states that it became clear that the sale agreement dated 8th March 2011 cannot be registered in view of restriction on sale of suit flat for two years. The Plaintiffs paid Rs.20,00,000/- by cheque no. 624081 drawn on HDFC dated 20th May 2011 to the Defendants. The Plaintiffs and the Defendants entered into agreement on 22nd May 2011, which was executed on franking stamp duty of Rs.100/- for modifying the terms and condition of Sale deed dated 8th March 2011. Vide the said agreement dated 22nd May 2011, the Plaintiffs and Defendant came to agreement, that as a Builder Unique Estate Development Company Ltd is not permitting sale of suit premises

immediately, hence the terms of sale deed date d8th March be modified and altered. The Defendants and Plaintiffs reduced to writing their understanding vide agreement dated 22nd May 2011 *inter alia* stating that Defendant agreed to reduce the sale consideration fro suit premises from Rs.3,15,00,000/- to Rs.2,95,00,000/- out of which Rs.1,05,00,000/- is already received by the Defendants and the Defendant agreed to purchase a residential flat from Plaintiff no. 1 in his building project at Vile Parle, for balance consideration of Rs.1,90,00,000/- from Plaintiffs with interest at the rate of 18% per annum from date of agreement dated 22nd May 2011 till full payment. The agreement dated 22nd May 2011, specifically provides that the leave and License agreement is a facility to allow the Plaintiff no. 1 and his family to reside in the flat, pending completion of the sale transaction herein. This agreement further provided that one Advocate Mr Viral Vora will be Arbitrator and that none of the parties will have copy of the agreement dated 22nd May 2011 and same will remain in escrow with said Advocate Mr Viral Vora. This agreement dated 22nd May 2011 was notarised. This agreement was deliberately suppressed by the Defendants in proceedings before the Ld. Competent Authority. As this agreement was kept in escrow, the Plaintiffs did not have copy of the same when the suit was filed."

8. Indeed this is the heart of Mr Purohit's submission that there has been complete suppression; for, in this paragraph, for the first time after the amendment, two years after the suit was filed and an ad interim *status quo* order taken, the Plaintiffs now say that there was *another* intervening agreement between the sale agreement and the leave and license agreement dated 22nd May 2011. They say, of course, that this was only for reducing the sale consideration from

Rs. 3.15 crores to 2.95 lakhs. Is this correct? For this, I turn to the later-referenced interspersed agreement of 22nd May 2011. In the later Affidavit in Reply at corrected page 44 is a copy of the agreement dated 22nd May 2011. Confronted with this document, Mr Gavnekar strives long and hard to make something of a case of it. He submits that this agreement was largely irrelevant and was a minor modification or substitution of the agreement of 8th March 2011. Leaving aside all other questions of whether this document required to be stamped or registered and whether it can even be looked at, the submission by Mr Gavnekar is plainly incorrect. At page 48 we find clause (2) and this says that the parties to the agreement agreed that the agreement of sale dated 8th March 2011 '*stands cancelled and revoked*' by the parties. The parties are none other than the two Plaintiffs and the first two Defendants. The agreement then goes on to say that parties have agreed to enter into an arrangement of leave and license pending the execution of further writings and pending the completion of other transactions. By no stretch of the imagination is this agreement of 22nd May 2011 merely a modification. It says otherwise, and it says so in the plainest possible language.

9. The suit sought specific performance of the agreement dated 8th March 2011. Here lies Mr Gavnekar's single greatest difficulty. That prayer was amended to say that the Plaintiffs now sought specific performance of the 8th March 2011 agreement "*as modified by the subsequent agreement dated 22nd May 2011*". But if the 22nd May 2011 agreement was not in fact, on the face of it, in modification but recorded an agreement cancelling the agreement of 8th March 2011, prayer (a) of the suit cannot possibly be granted.

10. The other difficulty is that it is not either the 8th March 2011 agreement (for obvious reasons) or the 22nd May 2011 that governed the subsequent conduct of the parties. The 22nd May 2011 agreement is, *prima facie*, perhaps an agreement to enter into an agreement, and is on the face of it thus unenforceable. What the parties did do was to enter into a leave and license agreement initially for a period of 24 months and then for an extension of 12 months. There is no dispute that that license period has ended. There is also no dispute that Defendants Nos. 1 and 2 initiated possession recovery proceedings before the competent authority and obtained an order to recover possession. That is in appeal or revision. The result is that the Plaintiffs are unable to show that they have an agreement capable of specific performance; in the plaint as filed they omitted all mention of what they now describe as a modification of 22nd May 2011 but which is actually on a plain reading a cancellation of the earlier agreement; they then had two agreements for leave and license, both of which have ended; and that is about the whole of it. There is not a single other claim that the Plaintiffs can make at this *prima facie* stage.

11. Therefore, even if one moves beyond Mr Purohit's initial submission of suppression (of the 22nd May 2011 agreement) to the merits, the inescapable result is that today the Plaintiffs have not a single legally tenable document on which they can be said to have made out a *prima facie* case for the grant of these reliefs. Whether or not the Plaintiffs are entitled to specific performance and what the contours of these agreements are will of course be decided at a later stage in the suit. There is no question also of my granting any injunction in exercise of my powers on the Original Side of this

Court in regard to any recovery order or decree that Defendants Nos. 1 and 2 have obtained from the competent authority.

12. I am constrained, therefore, to observe that the Notice of Motion is without merits. No *prima facie* case is made out. There is no balance of convenience that can be said to weigh in favour of the Plaintiffs.

13. The Notice of Motion is dismissed with no order as to costs.

14. At the request of Mr Gavnekar the ad-interim *status quo* order will continue for a brief period until 14th January 2019.

(G. S. PATEL, J)