

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY AND ORIGINAL CIVIL JURISDICTION**

NOTICE OF MOTION NO.547 OF 2018

IN

SUIT NO.329 OF 2018

Prasan Kapoor and Ors.Plaintiffs

Vs.

Jaycee Homes Pvt. Ltd. & Ors.Defendants

WITH

NOTICE OF MOTION NO.1666 OF 2018

IN

SUIT NO.403 OF 2018

WITH

NOTICE OF MOTION NO.1796 OF 2018

IN

SUIT NO.1082 OF 2018

Mr. Anoshak Daver a/w. Mr. Suushant Arora and Ms. Rashmi Salian i/b. Vigil Juris for plaintiffs in S/329/2018.

Mr. Ankit Lohia a/w. Ms. Anagha Mhatre and Ms. Chaitrika Patki i/b. Anand and Anand and Khimani for plaintiff in S/1082/2018.

Mr. Sahil Mahajan for defendant nos.2,3,4 and 5 in S/329/2018 and for defendant no.1 in S/1082/2018.

Mr. Karl Tamboly a/w. Mr. Hrushi Narvekar and Ms. Aditi Bhansali i/b. Vashi and Vashi for defendant no.6 in S/329/2018.

Dr. Birendra Saraf a/w. Mr. Devangshu Nath and Ms. Jyoti Sinha i/b. Khaitan and Company for defendant no.7 in S/329/2018 and for defendant no.2 in S/1082/2018.

Mr. N.A. Bandodkar, Second Assistant to Court Receiver present.

CORAM : K.R.SHRIRAM, J.

DATE : 18th APRIL 2019

P.C.:

NOTICE OF MOTION NO.547 OF 2018

WITH

NOTICE OF MOTON NO.1796 OF 2018

1 On 10.05.2018 an ad-interim order came to be passed in these two notices of motion and paragraph 7 of the said order reads as under :

7. In the above circumstances, at this stage, keeping in mind the interest

of one and all, the following Order is passed :

i. The Court Receiver, High Court, Bombay is appointed as Receiver in respect of the Suit projects including the land as well as structure standing thereon.

ii. The parties shall not disturb the status quo as of today in respect of the Suit project without seeking prior permission of this Court.

iii. Order dated 23rd April, 2018 as well as 25th April, 2018 shall be complied with by Mr. Mukesh Bhagtani, Mr. Laxman Bhagtani and Mr. Dipesh Bhagtani.

iv. The learned Advocate appearing for the Plaintiffs in Suit (L) No. 213 of 2018 states that his client wants to carry out some installation / repair / regularization works in the Suit building at their own costs. The same is allowed. However, if any work is done by them at their costs, they shall not claim any equities in future.

v. All contentions of the parties are kept open

vi. Stand over to 12th June, 2018.

2 As these notices of motion were pending for a long time, an application was made on behalf of defendant no.2 in suit no.1082 of 2018, who is defendant no.7 in suit no.329 of 2018 (the said defendant) to vacate the ad-interim order of status quo since the said defendant was suffering prejudice as it was not able to implement an order passed in its favour by the Chief Metropolitan Magistrate under SARFAESI proceedings. The said defendant claims to be the mortgagee of certain land, building and unsold flats pursuant to an Indenture of Primary Mortgage dated 19.06.2015. The mortgagor was Jaycee Homes Pvt. Ltd. (Jaycee Homes). According to the said defendant, they had agreed to finance upto Rs.40 Crores and disbursed actually Rs.16 Crores to Jaycee Homes and therefore, are secured creditors. Plaintiffs in these suits are flat purchasers to whom defendant nos.1 to 4,

which included Jaycee Homes, had sold flats and they have filed these suits for specific performance.

3 Mr. Daver and Mr. Lohia, who appeared for plaintiffs in these two suits and Mr. Tamboly, who appeared for defendant no.6 in suit no.329 of 2018 submitted that the ad-interim order be confirmed as order in the notices of motion and the suit be proceeded with for trial. The counsel submitted that the balance of convenience also is to confirm the ad-interim order because if the order of status quo is vacated, the said defendant will go ahead and take possession of plaintiffs' flats, dispose off the said flats and render the entire suit infructuous.

4 It is brought to the notice of the Court that pursuant to the Mortgage Agreement with Jaycee Homes, the said defendant had issued a public notice, copy whereof is at page 234 of the plaint in suit no.1082 of 2018. In response to the said notice, Anand and Anand and Khimani, advocates, representing plaintiffs addressed a communication dated 11.12.2017 to the said defendant informing them that they are the rightful owners and lawful purchasers of the flat, some of which have been mentioned in the said public notice and called upon the said defendant to confirm that they do not have any charge or security interest on those flats. Such a notice was also sent by plaintiffs in suit no.329 of 2018. In response to the said notice, the said defendant called upon plaintiffs to meet them to

understand their concerns and discuss their position in this regard. Therefore, the said defendant was aware that plaintiffs also have interest in those flats. These public notices were dated 10.11.2017 and 02.12.2017 published in the Economic Times. After these public notices were given, the said defendant filed an application under Section 14 of the SARFAESI Act in the Court of Chief Metropolitan Magistrate, Esplanade, Mumbai. From the copies of the Roznama annexed to the plaint, it appears that the matter was heard on various dates, first of which was 28.12.2017 and the last was 15.01.2018. These dates are important because in the meanwhile plaintiffs have addressed a communication dated 11.12.2017 through their advocates to the said defendant. On the application filed by the said defendant, the Metropolitan Magistrate has passed an order dated 15.01.2018 permitting the said defendant to take possession of the "secured assets" and also if necessary, to use such force and break open the lock by taking police assistance. Admittedly, the fact that plaintiffs had an interest in some of the flats, which the said defendant claims to have been mortgaged to it, has not been brought to the notice of the Magistrate at all. The mortgage has been created by Jaycee Homes in favour of the said defendant on all units in the project "Bhagtani Krishaang" as given in the application and reproduced in the notice as well as in the order, after having excluded all the sold units in the said project wherein 100% sale proceeds have been received by Jaycee

Homes Pvt. Ltd. Therefore, what has been excluded are those units where 100% sale proceeds have been received. Plaintiffs are flat purchasers who have not paid 100% because the time to pay the 100% is yet to come but plaintiffs have paid substantial amounts of money to Jaycee Homes. I am told that some plaintiffs have also paid 100% consideration but still their flats are included in the list of mortgaged flats. Therefore, it is a mystery as to how these flats also have been mortgaged to the said defendant and how the said defendant lent money to Jaycee Homes on the security of these flats on which rights have already been created in favour of plaintiffs. If only these facts had been brought to the notice of the Magistrate, perhaps the order might have been different.

5 Mr. Tamboly, counsel for defendant no.6 in suit no.329 of 2018 submitted that his clients were the owners of the land on which the "Bhagtani Krishaang" project was coming up. Mr. Tamboly states that the mortgage document shows the mortgage has been created on 19.06.2015 whereas his clients had terminated the Development Agreement as well as all Powers of Attorney much before 19.06.2015. Mr. Tamboly submitted that his client had also filed a suit being suit (lodging) no.5 of 2015 and one of the orders passed was on 03.03.2015 more than three months before the Mortgage Deed. Mr. Tamboly also submitted that his client had even filed *lis pendence* on 20.06.2015 and the Mortgage Deed, though signed on

19.06.2005, was registered on 22.06.2015. Mr. Tamboly of course submitted that the suit property in suit (lodging) no.5 of 2015 was a part of the larger property and not the entire property. It makes no difference as even that suit property forms part of the mortgage.

6 The counsel for the said defendant submitted that there were specific three powers of attorney in favour of Jaycee Homes Pvt. Ltd. and relied upon powers of attorney dated 28.06.1996, 07.09.2000 and 26.09.2000. Mr. Tamboly submitted that the power of attorney had already been terminated and if only the said defendant had done due diligence, they would have come to know about it. Mr. Tamboly also submitted that the Mortgage Deed has been signed by one Laxman Bhagtani relying on a power of attorney which has been terminated.

7 The counsel for the said defendant also submitted that the development rights given under the Development Agreement provided very vast powers, including the right *"... To prepare a lay-out and/or a sub-division plan for the said property as also building plans for construction of residential and other structures on the said property"* and further granted the right to *"... develop the said property for such purpose or purposes as may be permissible under the law, either personally or through any nominee as the Developer may desire, and subject to the provisions of this Agreement, to enter into any Agreement; arrangement; writing or contract, and to receive the*

consideration and to appropriate the same without being liable to the account for the same in any manner whatsoever" and therefore, it include even power to mortgage and give power to Jaycee Homes Pvt. Ltd. to do anything and everything in the name of development. The counsel submitted that there was nothing wrong in the mortgage which the said defendant did.

8 Mr. Mahajan has not made any submissions and stated that he will submit to the orders of this Court.

9 Having heard the counsel, in my view, this is a matter which requires to be considered at the time of trial. What is the extent the power that the Jaycee Homes or Jaycee Developers had to mortgage the land, building and flats, needs to be considered. The land owner states that the powers of attorney had been revoked and the development agreement had been terminated and suit filed even before the Mortgage Deed was executed. Lis pendence had been issued before the Mortgage Deed was registered. The said defendant were informed by flat purchasers of their interest in the flats despite which the said defendant did not disclose it to the Chief Metropolitan Magistrate and obtained an order to take possession and break the locks with police assistance even of those flats. Whether the mortgage was rightly created has to be considered and whether such a mortgage gives a higher right to the said defendant as compared to plaintiffs has to be considered. Against that, if the status quo is recalled and the said

defendant is allowed to take possession and even dispose of the suit flats/projects/land, grave prejudice will be caused to plaintiffs in these suits and also the land owner. In my view, the interest of justice requires the order as passed on 10.05.2018 requires to be continued until the hearing and final disposal of the suit. The balance of convenience also tilts in favour of plaintiffs.

10 The order dated 10.05.2018, therefore, is confirmed as order in these notices of motion and notices of motion accordingly disposed. All rights and contentions of the parties including jurisdiction are kept open. Liberty to plaintiffs to approach for further orders granted.

11 All defendants to file written statement and serve a copy thereof on or before 20.06.2019.

12 Suits be listed for directions on 28.06.2019.

NOTICE OF MOTION NO.1666 OF 2018

None for plaintiffs.

Notice of motion to be listed for hearing in due course.

(K.R. SHRIRAM, J.)