

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

**NOTICE OF MOTION 804 OF 2013
IN
SUIT NO. 370 OF 2013**

Leila Trading Company ..Applicant

In the matter between

Leila Trading Company ..Plaintiff
versus

Pawan Chandulal Khemani & Ors. ..Defendants

Mr. Pery Modi, Counsel with Ms. Kalpana a/w. Mr. Pratik Divkar i/b.
Little & Co. for the Plaintiff.

Mr. Vachan Bodke a/w. Adv. Pinky Sharma, Adv. Bhagyashri Ranade
i/b. V.M.Legal for the Defendant Nos.1 and 2.

Mr. Rakesh Agarwal a/w. Adv. Chandan Sharma for the Defendant
Nos.3 and 4.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED: 3rd MAY, 2019.**

P.C.:-

1. The Plaintiff has taken out this notice of motion for :
 - (i) appointment of Court Receiver,(ii) to restrain the defendant nos.1 and 2 from changing the locks on the suit property, (iii) to restrain the Defendant Nos.1 and 2 from entering into, remaining in the Dolphin bungalow or alienating, encumbering, parting with or creating third

party right in any manner in respect of the said Dolphin bungalow.

2. The dispute is in respect of a bungalow named Dolphin cottage or Dolphin Bungalow, admeasuring 2200 sq. meters constructed on leasehold land admeasuring 956 sq. meters of Survey No.20, Hissa No.7, CTS No.31 (part) Village-Erangal, Malad (West), Mumbai. The said bungalow shall be herein referred to as 'the suit bungalow'.

3. The suit bungalow was constructed by the original lessees of the land. As per the settlement arrived between lessees, Teckchand Arora became the exclusive owner of the suit bungalow. Upon the death of Teckchand, the suit bungalow devolved upon his son and granddaughter i.e. Defendant Nos.3 and 4. The Plaintiff claims that since the death of Teckchand, the Defendant No.3 was in exclusive possession of the suit bungalow, which was used as a holiday home.

4. The Plaintiff claims that the Defendant No.3 had informed it that he was interested in selling the suit bungalow. The Defendant No.3 had disclosed that he had earlier entered into an agreement for sale with the Defendant Nos.1 and 2 and had received part consideration in respect of the suit bungalow. The Defendant No.3 further represented

to the Plaintiff that the Defendant Nos.1 and 2 had not discharged their obligation resulting in termination of agreement. The Plaintiff inspected the bungalow and having confirmed that the Defendant No.3 was in possession of the suit bungalow and that there were no encumbrances, agreed to purchase the suit bungalow for a total consideration of Rs.95,00,000/-. Accordingly, the Defendant No.3 and 4 executed the Assignment of Lease dated 29th January, 2013 in favour of the Plaintiff.

5. The Plaintiff paid the entire sale consideration and after adjudication and payment of registration charges, the Transfer Deed came to be registered with the Office of the Sub-Registrar of Assurance. The Plaintiff claims that pursuant to the execution of the said Deed, the Defendant Nos.3 and 4 put it in possession of the suit bungalow, and handed over to it a set of keys. Mr. Vakil Singh, Caretaker of the bungalow handed over to the Plaintiff a file containing electricity bills.

6. The grievance of the Plaintiff is that on 31st January, 2013, the Defendants changed the locks and took forcible possession of the suit bungalow. The Plaintiff contends that the Defendant nos.1 and 2 have

no right to remain in possession or occupation of the suit bungalow. The Plaintiffs have therefore filed a suit for eviction, permanent injunction and mesne profit. During the pendency of the suit, the Plaintiff has sought the interim relief as stated above.

7. The Defendant nos.1 and 2 have contested the claim of the Plaintiff on the ground that the Defendant no.3 had agreed to sell the suit bungalow for consideration of Rs.65,00,000/-. These Defendants claim that they have paid the entire sale consideration and that they have been put in possession of the suit premises. They claim that despite repeated requests, the Defendant no.3 evaded to execute the Sale Deed.

8. The Defendant no. 3 disputes that the Defendant Nos.1 and 2 had paid the entire sale consideration and claims that the Defendant nos. 1 and 2 had paid only part consideration of Rs. 40,00,000/-. They failed and neglected to pay the balance consideration resulting in termination of agreement. This Defendant has denied that he had put the Defendant nos. 1 and 2 in possession of the suit bungalow. He has stated that the suit bungalow has been sold to the Plaintiff for total consideration of Rs.95,00,000/- and that the Plaintiff has been put in

possession of the suit premises.

9. Mr.Modi, the learned Counsel for the Plaintiff contends that the Plaintiff has admittedly purchased the suit property by a registered Deed and that he was in possession of the same. The learned Counsel for the Plaintiff claims that the Defendant nos.1 and 2 are trespassers and have no right to continue to be in possession of the suit bungalow. He submits that the Defendants are in illegal possession of the said bungalow and hence this is a fit case to appoint a Court Receiver.

10. Mr. Bodke, the learned Counsel for the Defendant Nos.1 and 2 submits that the property on which the suit bungalow is constructed is itself a leasehold property and that the lease in respect of the suit property has already expired. He further contends that the material on record prima facie indicates that the Defendant Nos.1 and 2 have paid the entire sale consideration upon which they were put in possession of the suit bungalow.

11. I have perused the records and considered the submissions advanced by the learned Counsel for the respective parties. It is not in dispute that the Defendant Nos.3 and 4 have sold the suit bungalow to

the Plaintiff by a registered Deed dated 29th January, 2013 for total consideration of Rs. 95,00,000/-. It is also not in dispute that prior to the said sale transaction, the Defendant nos. 3 and 4 had agreed to sell the suit bungalow to the Defendant Nos.1 and 2 for a total consideration of Rs.60,00,000/-. The defendant nos. 1 and 2 had paid Rs. 15,00,000/- prior to execution of the said agreement. The balance sale consideration was to be paid in monthly installment of Rs.5,00,000/- each commencing from 10th May 2011 till 10th January 2012. Defendant nos.1 and 2 claim that they have paid the entire sale consideration. The Defendant no.3 admits having received sale consideration of Rs. 40,00,000/- but denies receipt of the balance sale consideration of Rs 20,00,000/-.

12. It is pertinent to note that the Defendants Nos. 1 and 2 have relied upon the receipts dated 10th May, 2011, 11th June, 2011 and two receipts dated 19th August, 2011 issued by the Defendant no. 3, acknowledging payment of Rs.45,00,000/- which was payable under the Memorandum Of Understanding. In one of the receipts dated 19th August, 2011, the Defendant No.3 has confirmed that he has received the total sale consideration of Rs.60,00,000/-. These receipts are purportedly signed by the Defendant No.3 in presence of two

witnesses. These receipts prima facie indicate that the Defendants nos.1 and 2 have paid the sale consideration within the period stipulated in the agreement. The Defendant no.3 has disputed having issued these receipts. Suffice it to say that the genuineness of the defence cannot be considered at this stage and would require adjudication on merits.

13. The Defendants no. 1 and 2 have also relied upon a possession receipt dated 7th April, 2011 issued by the Defendant no.3. The said receipt which is duly signed by the Defendant No.3 confirms that pursuant to the agreement, the entire set of keys of the suit bungalow was handed over to the Defendant nos. 1 and 2 and they were put in vacant and peaceful possession of the suit bungalow. Thus the possession receipt prima facie negates the plea that the Defendant nos.1 and 2 have trespassed into the suit property and /or their possession is that of trespassers.

14. The Defendants no. 1 and 2 have also placed on record several letters addressed to M/s. Chitnis Vaithy & Co., the Solicitor of the Defendant no. 3, informing about payment of the entire sale consideration and calling upon them to furnish a draft conveyance and

to complete the execution of the final Agreement for Assignment cum Sale. The said letters were replied by M/s. Chitnis Vaithy & Co. stating that requisite documents from the Defendant no. 3 were awaited. By letter dated 14th December 2011, M/s. Chitnis Vaithy & Co. had informed the Defendant nos. 1 and 2 that they would instruct the Defendant No.3 to complete the sale transaction. These documents also prima facie fortify the case of the Defendant nos.1 and 2 that they had paid the entire sale consideration and were put in possession of the suit bungalow.

15. The records prima facie indicate that the Defendants nos.1 and 2 have performed their part of the agreement and nothing remained to be performed on their part. They had made repeated requests to the Defendant No. 3 to execute the sale deed, which fact prima facie indicates that they were ready and willing to get the Sale Deed executed and registered. The Defendant No.3 had evaded executing the Sale Deed despite repeated requests by the Defendant Nos.1 and 2.

16. It is true that the Defendant Nos.1 and 2 have not sought specific performance of the agreement and that a mere agreement for sale would not create in their favour right or title in respect of the suit

premises. Nevertheless, the Defendant Nos.1 and 2 having paid the sale consideration, and having been put in possession of the suit bungalow are prima facie entitled to remain in possession.

17. Under the circumstances, this is not a fit case for appointment of a Court Receiver. The Plaintiff who has purchased the suit bungalow for consideration claims to be a bonafide purchaser. The Defendants Nos. 1 and 2 have no title to the suit bungalow and are not competent to transfer or alienate the suit bungalow. Suffice it to say that transfer, alienation or creation of encumbrances on the suit bungalow during the pendency of the suit can finally affect the rights of the Plaintiff.

18. Hence, the Notice of Motion is made absolute in terms of prayer clause (iii). The Defendant Nos.1 and 2 are restrained from alienating, transferring, or creating third party rights or encumbrances in respect of the suit bungalow till the disposal of the suit.

. Notice of Motion stands disposed of accordingly.

(SMT. ANUJA PRABHUDESSAI, J.)