

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

**NOTICE OF MOTION NO.1799 OF 2018
WITH
NOTICE OF MOTION NO.628 OF 2019
IN
SUIT NO.966 OF 2011**

Deven Hemant ShahPlaintiff

Vs.

Atul Arvind KamdarDefendant

Mr. Ruchir Tolat i/b. L.C. Tolat for applicant/plaintiff.

Mr. Kalpesh Joshi a/w. Ms. Nisha Shah i/b. Kalpesh Joshi Associates
for defendant.

CORAM : K.R.SHRIRAM, J.

DATE : 22nd MARCH 2019

P.C.:

NOTICE OF MOTION NO.628 OF 2019

1 By this notice of motion, plaintiff is seeking a consent decree in terms of the compromise/settlement recorded in consent terms signed and executed by plaintiff and defendant on 31st October 2018 and taken on record and marked "X" for identification. Plaintiff is also seeking appointment of Court Receiver of a flat being Flat No.55/56 on the 5th floor, Shivsagar CHS Limited, Walkeshwar Road, Malabar Hill, Mumbai – 400 006 with all powers under Order 40 Rule 1 of the Code of Civil Procedure, 1908.

2 Defendant has ofcourse filed an affidavit in reply opposing this notice of motion and there are two main grounds which are taken, viz., (a) defendant was pressurized to sign the consent terms and (b) defendant to the said flat is only as a nominee of the original owner late Mrs. Sunita Bipinchandra Kamdar who expired intestate in the year 2006. Defendant has also stated that he was only a nominee and rights of the third parties may get affected if Court Receiver is appointed.

3 The reason why plaintiff has taken out this notice of motion can be found in the order dated 18th December 2018 passed by this Court. For ease of reference, the order dated 18th December 2018 is reproduced below :

Today, the application is moved on behalf of the plaintiffs that the Court should take on record the consent terms arrived between the parties plaintiffs and defendants and proceed to dispose of the Suit in terms of the consent terms.

2. The learned counsel for the defendants on the other hand does not dispute that the parties have arrived at the consent terms, however, he submits that now although the consent terms are signed between the parties, his client has reservations to the time period to make payment as set out in clause nos.4 & 8 of the consent terms namely the date of 30/12/2018, and thus, the consent terms ought not to be taken as a complete settlement of the disputes between the parties. It is submitted that the defendants would require further time to make payment of the said amount as they are in financial difficulties and the time by which the defendant propose to make the said payment by 15/01/2019.

3. *The learned counsel for the plaintiff states that this is a second occasion on which the defendant has deviated from his commitment. Earlier, defendant has agreed to make payment by 15/12/2018 and thereafter again the consent terms were modified and time to make payment was extended to 30/12/2018. It is submitted that in view of this clear understanding and acceptance of the terms and conditions of the consent terms, this Court should record settlement and Decree the Suit in terms of the consent terms. The learned counsel for the plaintiffs has placed on record the consent terms duly signed between plaintiffs and defendants as also signed by the respective Advocates. They are marked as 'X' for identification.*

4. *The situation before the Court is quite peculiar. The defendant has agreed to make the payment as per clause 4 & 8 of the consent terms, to make the payment on or before 30/12/2018, however, orally a statement is being made that this date be modified to 15/01/2019 which is not agreeable to the plaintiff. There is no consensus in this regard. Thus, in this situation it would be difficult for the Court to proceed and record a settlement of the disputes between the parties in terms of the consent terms.*

5. *In the above premises, no further order required to be passed today and it is open for the parties to resort to appropriate course of action. Accordingly the matter be listed before the regular Court after four weeks.*

4 From the order it is quite clear that the only reason why defendant did not come to the Court and confirm the consent terms was because defendant wanted extension of time to make the payment from 30th December 2018 to 15th January 2019, a mere 15 days. It was not defendant's case before this Court on 18th December 2018 that defendant was coerced or pressurized in signing the consent terms. If one considers the consent terms, defendant has admitted his liability to plaintiff.

5 It will be useful to scan and reproduce the consent terms at this stage :

Coram :- G. S. Kulkarni, J.
Date :- 18/12/18

Marked "X"

Del
18/12/18

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 966 OF 2011

DEVEN HEMANT SHAH.....PLAINTIFF

V/S

ATUL ARVIND KAMDAR.....DEFENDANT

CONSENT TERMS BETWEEN THE PLAINTIFF AND DEFENDANT

1. The present suit has been filed against the Defendant inter-alia for recovery of Rs.11,93,12,328/- (Rupees Eleven Crores Ninety-Three Lacs Twelve Thousand Three Hundred Twenty Eight Only) and also for a declaration and realization of the security created by the Defendant in respect of the flat No. 55/56 on the fifth Floor, Shivsagar CHS Ltd, Walkeshwar Road, Malabar Hill, Mumbai-40006 (said flat).
2. The Plaintiff and Defendant have mutually agreed to settle all their disputes and differences in the present suit amicably as more particularly set out herein.
3. The Plaintiff has agreed to accept, and the Defendant undertakes to pay a lump sum consideration of Rs.1,50,00,000/- (Rupees One Crore Fifty Lakhs Only) in full and final settlement of all the claims of the Plaintiff.

DHS *W*

4. The Defendant undertakes to make the aforesaid payment of Rs.1,50,00,000/- (Rupees One Crore Fifty Lakhs Only) on or before ³⁰th December, 2018 by Demand Draft or RTGS.

5. The Plaintiff is in possession of the following original documents of the Defendant.

(i) Original Agreement dated 7th March, 1957 executed between Associated Construction and Bipinchandra Gunvantrai Kamdar in respect of Flat No. 55/56, situated on the 5th floor, Shivsagar CHS Ltd. Walkeshwar Malabar Hill, Mumbai-40006 admeasuring about 872 carpet area (said flat).

(ii) Duplicate Share Certificate No. 26 issued by Shivsagar CHS Ltd being 5 (five) fully paid share of Rs. 50/- each aggregating to Rs. 250/- bearing distinctive Nos. 126 to 160 (both inclusive) issued in the name of Bipinchandra Gunvantrai Kamdar dated 1st July, 1961.

6. Upon receipt of the entire consideration of Rs. 1,50,00,000/- (Rupees One Crore Fifty Lakhs Only) by the Plaintiff, the Plaintiff undertakes to handover the original documents as mentioned in para 5 (i) & (ii) above to the Defendant forthwith and also write letter to society and publish the same in Free Press Journal newspaper

20/12/18

Intimating that all disputes and differences between the Plaintiff and the Defendant have been settled and the Plaintiff has no right, title claim and interest whatsoever nature in the said flat.

7. Upon receipt of the entire amount of Rs.1,50,00,000/- (Rupees One Crore Fifty Lac Only) payable by the Defendant to the Plaintiff towards full and final settlement of all the claims of the Plaintiff, the injunction granted restraining the Defendant from disposing of, alienating, encumbering the said flat granted pursuant to an order dated 21st November, 2011 passed by the Hon'ble Justice Shri. S.J.Vazifdar Judge in Notice of Motion No. 1323 of 2011 in the present suit will stand vacated and the Defendant is at liberty to deal with the said flat in the manner he may deem fit without any interference from the Plaintiff.
8. It is hereby agreed between Plaintiff and the Defendant that in the event if the Defendant fails to clear the consideration amount of Rs. 1,50,00,000/- (Rupees One Crore Fifty Lakhs Only) as undertaken by the Defendant on or before ³⁰^{KHS} -th December 2018, then in such event the Plaintiff is entitled to recover the amount of Rs.2,11,20,000/- (Rupees Two Crores Eleven Lac Twenty Thousand Only) as more particularly mentioned in the Notice of Motion No. 1799 of 2018 from the Defendant.

[Handwritten signatures]

The Plaintiff will be entitled to dispose of the said flat in which the Defendant and his family members presently reside to recover the sum of 2,11,20,000/- (Rupees Two Crores Eleven Lac Twenty Thousand Only). The Defendant agrees and undertakes to render his full assistance and co-operation to the Plaintiff in disposing of the said flat including execution and registration of all necessary documents without causing any hindrance /interference in respect of the sale of the flat. The entire sale transaction in respect of the said flat shall be conducted exclusively by the Plaintiff.

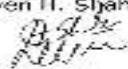
9. Out of the sale proceeds that may be received, the Plaintiff shall after adjusting the amounts of Rs.2,11,20,000/- (Rupees Two Crores Eleven Lakhs Twenty Thousand Only), payable by the Defendant to the Plaintiff, the balance amount of the sale proceeds, if any, shall be paid to the Defendant.
10. The Plaintiff has filed a Criminal Complaint being CC No.1820/SS/2011 in the Metropolitan Magistrate 23rd Court Esplanade against the Defendant on the basis of the two cheques of Rs.5,00,00,000/- (Rupees Five Crores Only) each Issued by the Defendant in favour of the Plaintiff. Upon receipt of the entire consideration of Rs. 1,50,00,000/- (Rupees One Crore Fifty Lacs Only) or Rs.2,11,20,000/- (Rupees Two Crores Eleven Lakhs



Twenty Thousand Only) as the case may be, payable by the Defendant to the Plaintiff, the Plaintiff undertakes to withdraw the Criminal Complaint within one week thereof.

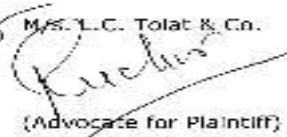
11. The above the suit stand disposed of in terms of the present Consent Terms.
12. Upon filing the present consent terms the Notice of Motion No. 1799 of 2018 shall stand disposed off.

Dated this 21st day of October, 2018

Deven H. Shah

 Plaintiff

Atul A. Kamdar

 Defendant

F20 M/s. L.C. Tolat & Co.

 (Advocate for Plaintiff)
 RUCHIK TOLAT

M/s. T.N. Tripathi & Co.

 (Advocate for Defendant)

6 In the circumstances, plaintiff is certainly entitled to a decree against defendant.

7 The suit stands decreed accordingly. Drawn up decree dispensed with.

8 Admittedly, the share certificates for the said flat are in the name of defendant. The share certificates are in the possession of plaintiff. Therefore, it will be only appropriate if the Court Receiver of this Court is appointed as Receiver of the said flat with all powers under Order 40 Rule 1 of the Code of Civil Procedure, 1908. The Court Receiver to take physical possession of the said flat and if there is any obstruction, may approach the concerned police station for assistance, who shall depute such number of personnel as required.

9 This notice of motion accordingly stands disposed.

10 In view of the above, notice of motion no.1799 of 2018 also stands disposed. Suit also stands disposed. Refund, if any, of court fees in accordance with rules.

11 All to act on authenticated copy of this order.

(K.R. SHRIRAM, J.)