IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL NOTICE OF MOTION (L) NO.1031 OF 2019
IN
COMMERCIAL SUIT (L) NO.339 OF 2019

Sunil Krishnan Anand and Anr. ....Plaintiffs

Vs.

Siroya FM Construction Pvt. Ltd. and Ors. ....Defendants

Mr. Gauraj Shah I/b. Mr. Omar Khaiyam Shaikh for applicants/plaintiffs.
Mr. Sarosh Bharucha I/b. M/s. Kaushik and Company for defendant no.1.
Ms. Gunjan Mangla for defendant no.2.
Mr. Karl Tamboly a/w. Mr. Anuj Desai I/b. Mr. Vikas B. Pandey for defendant no.3.
Mr. Rohan Siroya, nephew of defendant no.3 present in person.

CORAM : K.R.SHRIRAM, J.
DATE : 8th JULY 2019

P.C.:

1 It is plaintiffs' case that plaintiff no.1 had paid a sum of Rs.4,25,00,000/- to defendant no.1 towards the sale price of Flat No.501 in building known as Orchid, situated in Vile Parle (West), Juhu, Mumbai - 400 049. A copy of the receipt confirming receiving this amount issued by defendant no.1 is at Exhibit A to the plaint. It is plaintiffs' case that defendants have not given possession of the Flat No.501 despite receiving the entire consideration and therefore, plaintiff is seeking return of the amount together with interest and are also claiming about Rs.12 Crores as damages.

2 Plaintiff has taken out this notice of motion to direct defendants, pending the hearing and final disposal of the suit, to deposit the amount of Rs.22,66,86,579.52 with the Prothonotary and Senior Master, High Court, Bombay to secure plaintiff's claim in the suit, direct defendants to disclose all their assets including movables, immovables, tangible, etc., give list of all their ongoing project and unsold flats, appoint Receiver for all properties owned by defendant nos.2 and 3 etc. In effect, what plaintiff is seeking is an attachment before judgment.

3 At first blush, it looks like a regular recovery suit and normally Courts will not grant any relief unless a case is made out that defendants, if the relief as prayed for is not granted, will do everything to defeat plaintiff's claim in the suit. Mr. Shah also in fairness submitted that he is restricting his security claim in the notice of motion at Rs.4,25,00,000/- which is admittedly the amount paid to defendants. Should the Court grant the relief at the ad-interim stage? My answer is yes.

4 Admittedly, defendant nos.2 and 3 are directors of defendant no.1 and both are behind bars. Whether defendant nos.2 and 3 as directors be held personally liable for the liabilities of defendant no.1. Normally no but in this case, yes.

5 On a criminal complaint filed by plaintiff, defendant nos.2 and 3 had filed an application for anticipatory bail before the City Sessions Court, Mumbai. There is an order dated 15.11.2016 passed by the Sessions Court on the application made by defendant no.2. Mr. Shah, counsel for plaintiffs states that there is almost identical order passed in the anticipatory bail application filed by defendant no.3 as well and he shall file a copy thereof in the proceedings within two weeks from today. In the said order, the Court had recorded the investigation officer's submissions that defendant no.2 despite summons was not keeping his presence. On 21.11.2016 the City Sessions Court passed the following order :

> *Adv. Mr. Mishra for applicant/accused present. APP Ms. Sanjana Sharma for State present. Advocate Mr. Mishra for applicant seeks adjournment. Adv. Mr. Kotian for intervener present. He objects for adjournment with submission that the present applicant after getting interim protection he is prolonging the matter and they are intending to flee away from India. They be restrained from going abroad in the event of adjournment. Adv. Mr. Mishra further stated that he is ready to pay entire amount but in view of present market situation he is unable to pay entire amount in one stroke. Further he made statement across the bar that the applicant will not go abroad without permission of the Court. IO is not present. Adjournment granted with directions to the applicant to observe conditions vide order dated 20.07.2016 and 15.11.2016. Adjd. to 01.12.2016 for hearing.*

Again Mr. Shah states that identical undertaking was given on behalf of defendant no.3 and a copy of the said order will also be produced within two weeks from today.

6 As recorded in the said order, defendant no.2, and I would proceed on the basis of statement made by Mr. Shah, and defendant no.3, have given an undertaking that they are ready to pay the entire amount to

plaintiff. The anticipatory bail application came to be dismissed on 03.12.2016 and interim protection granted was also revoked. Defendant nos.2 and 3 then filed anticipatory bail applications in the criminal appellate jurisdiction of this Court. In its order dated 22.06.2017, this Court was pleased to record the undertaking of defendant nos.2 and 3 that they are personally ready to return the entire sum of Rs.4,25,00,000/- to plaintiff or ready to handover Flat No.601 (not Flat No.501 which was sold to plaintiff) in the very same building provided plaintiff pays the balance amount of Rs.2,24,00,000/-. Defendant nos.2 and 3 were also ready to file an undertaking on the next date. The order dated 22.06.2017 reads as under :

> *1. Learned Counsel for both the Applicants state that the applicants are ready to return the entire sum of Rs.4,25,00,000/- to the complainant or are ready to handover Flat No.601 in the very same building, provided the complainant pays the balance amount of Rs.2,24,00,000/-. They state that the applicants are ready to file an undertaking on the next date.*
>
> *2. Stand over to 30th June, 2017.*
>
> *3. Interim order granted earlier to continue till then.*

7 These two anticipatory bail applications were thereafter not persuaded diligently by defendant nos.2 and 3 and came to be dismissed. To what level defendant nos.2 and 3 could go to use their influence to thwart even the investigation against them can be found in the order dated 30.04.2019 passed by this Court. This Court has also noted that despite the anticipatory bail applications being dismissed and interim

protections vacated, defendant nos.2 and 3 had used their influence with the police to stay out. This is the background of defendant nos.2 and 3. Though the order dated 30.04.2019 is rather long, for ease of reference and for it's usefulness, I would reproduce the same hereinbelow :

> *1] Heard the learned counsel for the applicants, Mr. Anil Shah, Constituted Attorney of the first informant Shri Sunil Krishnan Anand and the learned APP. The Investigating Officer is absent despite specific oral directions issued by this Court on earlier occasion and therefore the record of investigation is not produced before this Court.*
>
> *2] By Orders dated 7th December 2016 and 9th December 2016 the applicants herein respectively were granted interim relief. At the outset it is to be noted here that, by an Order dated 4th July 2018 both the anticipatory bail applications were dismissed for non prosecution. The applications were restored by an Order dated 27th March 2019, however, interim relief granted by Orders dated 7th December 2016 and 9th December 2016 was not continued. The said fact is clearly mentioned in Order dated 27th March 2019. On 27th March 2019, it is specifically observed that, this Court has not restored the interim relief. Despite the said fact, the Investigating Officer has not arrested the applicants herein till date. The aforesaid fact narrated hereinabove indicates sorry state of affairs in the investigation of present crime, which according to this Court requires attention of the Directorate General of Police, State of Maharashtra, for adopting appropriate remedial measures in that behalf, as per law.*
>
> *3] The first information report dated 17th June 2016 is filed by Shri Anil Shah, Constituted Attorney of Shri Sunil Krishnan Anand. The prosecution case in nutshell is that, the applicants being the owners/ Directors of M/s Siroya FM Constructions Pvt. Ltd. agreed to sell flat No.501 in 'Orchid' building situated at Vile Parle (West), Juhu, Mumbai 400 049 and the first informant agreed to purchase it at a consideration of Rs.4,25,00,000/- (Rupees Four Crores Twenty Five Lakhs Only). Accordingly, the first informant paid an amount of Rs.4,25,00,000/- towards purchase of the said flat to the applicants and/or to their firm by way of bank transfers from 11.6.2008 to 2.8.2011. Despite making payment, till mid of 2015 the said building was not completed by the applicants. The applicants neither gave possession of the said flat nor returned the agreed amount to the first informant and in the premise the present crime is registered.*
>
> *4] The learned counsel for the respective applicants submitted that, the applicants were and are ready to settle the matter with the first informant and are ready to give possession of Flat No.501 in the said building to the informant. The learned counsel for the applicants submitted that, in a suit filed by Ashok Shah & Anr. Vs. Siroya FM Constructions Pvt. Ltd bearing Commercial Arbitration (L) No.60 of 2016, the Coordinate Bench (Shri S.J. Kathawalla, J.) by its Order dated 21st July 2016 has appointed Court*

Receiver, High Court, Bombay in respect of unsold property of the respondents i.e. Siroya FM Constructions Pvt. Ltd, the firm of the applicants herein. That the investigation of the present crime pertains to documents and therefore the custodial interrogation of the applicants is not necessary. The learned counsel for the applicants however fairly conceded to the letter dated 12th September 2014 addressed by the applicants admitting the receipt of entire consideration towards sale of Flat No.501 in 'Orchid' building. The learned counsel for the respective applicants prayed that, the applicants may be granted pre-arrrest bail by allowing both the applications.

5] The first information report is self0eloquent. The fact i.e. the first informant has paid Rs.4,25,00,000/- (Rupees Four Crores Twenty Five Lakhs Only) to the applicants has been further reinforced by the receipts executed by the applicants and in particular a receipt/letter dated 12th September 2014 addressed by the applicants firm. The informant has paid huge amount to the applicants through bank transfers, details of which is mentioned in the first information report (Page No.47 of the application).

6] The applicants despite accepting the aforesaid huge amount from the informant have failed to give possession of the said flat No.501 to the informant to return the amount accepted by them. Today Mr. Anil Shah, the Constituted Attorney of first informant submitted that, the said property i.e. Flat No.501 in Orchid building has already been sold to a third person namely Mr. B.Y. Chandak by the applicants. In support of his contention, he places on record the document pertaining to the sale of property to the said third person i.e. Mr. Chandak. Thus it is clear that, the applicants with dishonest intention induced the informant to part with the said huge amount and caused him wrongful loss. The applicants thereafter defalcated the said amount and have also sold the flat in question to third party which further aggravates the crime.

7] There is another facet to the present case. The record indicates that on 22nd June 2017, the learned counsel for both the applicants on instructions made a statement before this Court that, the applicants herein are ready to return the entire sum of Rs.4,25,00,000/- to the complainant or are ready to hand over Flat No.601 in the very same building, provided the complainant pays the balance amount towards its consideration. That the applicants are ready to file an undertaking on the next date. It is to be noted here that, in last about two years the said statement is not adhered to by the applicants. The statement made on 22nd June 2017 on behalf of the applicants was made by senior Advocates of this Court and undoubtedly their statements carry more weightage. The record indicates that, the said statements were not honoured by the applicants and subsequently, by Order dated 4th July 2018 both the applications were dismissed for non prosecution.

8] As noted earlier, on 27th March 2019 it was categorically clarified that, interim relief granted in favour of the applicants was not restored by this Court. Despite the said fact, that since 4th July 2018 no interim relief was restored, the Investigating officer has not taken any pains to arrerst the applicants herein. It prima facie appears that, the applicants are well connected and highly influential persons. It further appears that, the concerned Investigating Officer is conducting the investigation in a loath and

> *lackadaisical manner, particularly after 4th July 2018 which requires the attention of the Directorate General of Police, State of Maharashtra in that behalf. In view of the above, the Directorate General of Police, State of Maharashtra is hereby directed to look into the matter personally and take appropriate remedial measures in that behalf as noted in para No.2 hereinabove.*
>
> *9] As noted earlier, the applicants despite accepting such huge amount from the first informant, neither gave possession of the agreed flat nor returned the accepted amount to the informant and has further sold the flat in question to third person which has aggravated the nature of present offence. The applicants have also shown scant respect to their own solemn statements made on 22nd June 2017. Perusal of the entire record would indicate that, the applicants since inception were having intention to cheat the first informant and induced him to part with the said huge amount and after its receipt, have defalcated it.*
>
> *10] In view of the above and after taking into consideration the gravity of offence and the serious allegations against them, this Court is of the opinion that, the applicants do not deserve to be protected by pre-arrest bail. Both the applications are accordingly rejected.*
>
> *11] In view of Order passed in A.B.A. Nos.2099 and 2103 of 2019, Criminal Application (APPP) Nos. 477 and 478 of 2019 do not survive and are accordingly disposed off.*
>
> *12] The learned APP appearing in the present case is hereby directed to communicate this Order to the Director General of Police, Maharashtra State, by all possible mode.*

8 Even in this order, it is recorded that defendant nos.2 and 3 were ready and are ready to settle the matter with plaintiff and ready to give possession of Flat No.501. Despite such undertakings given to the Court on 30.04.2019, no money has been returned and no flat also has been given possession of.

9 Mr. Tamboly and Mr. Bharucha pointed out that some of the amounts paid by plaintiff was not received in the name of the company but were also paid to defendant no.2 in his personal name. They rely on paragraph 4 of the plaint. According to them, therefore, at the most the

liability of defendant no.1 can be only the amounts received by defendant no.1 and Mr. Shah should look to defendant no.2 to make the payments for the balance amount. Mr. Bharucha and Mr. Tamboly make these submissions on instructions from their advocates.

10 I have to note that such instructions smacks of dishonesty, particularly, on the face of orders passed by this Court when defendant nos.2 and 3 had personally given undertaking to pay these amounts to plaintiff. Ofcourse, the advocate cannot be blamed because he is relying on instructions from defendant nos.2 and 3, who are behind bars and nephew of defendant no.3, who is present in Court. All these go to show that defendant nos.2 and 3, even though they are behind bars, will never change and their intention is not only to play fraud on the public but also on the Court and go back on their undertakings given to this Court.

11 This answers in the affirmative the issue as to whether defendant nos.2 and 3 can be held liable for the liabilities of defendant no.1. Though I will elaborate a little more, what is noted above also answers the query as to whether this is a fit case where an order, effectively, for attachment before judgment is warranted even at the ad-interim stage.

12 I have to also note that there is an order dated 18.07.2014 passed by the Income Tax Authorities against defendant no.1, copy whereof is at Exhibit C to the plaint, attaching various properties of defendant no.1.

13 Mr. Bharucha, counsel for defendant no.1 stated that there is one unencumbered property which is declared as a slum which can be given as security for plaintiff's claim. The said property is Plot No.28, Survey No.161, Laxmi Industrial Estate, Bhagat Singh Road No.1, Link Road, Goregaon (West), Mumbai (security property). Certainly this property will also have to be attached pending defendants jointly or severally depositing Rs.4,25,00,000/-. I am still insisting on depositing because noting the conduct of defendant nos.2 and 3 as recorded earlier, it is difficult for the Court to even believe that the security property will really be unencumbered. Secondly, the plot has been encroached upon and declared slum itself shows that this property comes with its own share of headache. Mr. Bharucha submitted that any developer, who is interested in SRA project, would be inclined to take over this property. Plaintiff is not a developer. Plaintiff is a flat purchaser and therefore, it was put across to Mr. Bharucha that defendants may find a buyer for the said property and then pay off the claim of plaintiff or deposit Rs.4,25,00,000/- in Court. Mr. Bharucha, on instructions stated that was not possible. Mr. Bharucha also stated all assets and accounts of defendant no.1 was attached or frozen. Then where does defendant no.1 get an unencumbered property is a mystery. No submissions were made on behalf of defendant no.2. Therefore, it is rather obvious that defendants will go to any extent to defeat plaintiff's admitted claim. The balance of convenience is also in plaintiffs favour.

14 In the circumstances, I am inclined to grant ad-interim relief and the following order is passed :

(a) pending the hearing and final disposal of the present suit, defendants are directed to deposit an amount of Rs.4,25,00,000/- within four weeks from today with the Prothonotary and Senior Master in order to secure the interest/claim of plaintiff;

(b) pending the hearing and final disposal of the present suit, defendants are directed to disclose all their assets including movable, immovable, tangible and intangible, shares, debentures, fixed deposit, bank account details, receivables, number of ongoing project and unsold flats and receivables therein etc. on affidavit to be filed within a period of three weeks from today;

(c) pending the hearing and final disposal of the present suit, defendants, their servants, agents, administrators and assigns are restrained by an order of injunction from creating any third party rights in respect of any of their properties to be disclosed and even if not disclosed. This would also include their interest in other projects or companies either as share holding or otherwise;

(d) pending the hearing and final disposal of the present suit, defendant nos.2 and 3 are directed to disclose on oath their directorship in various companies as well as share holding therein;

(e) defendants shall also file copies of their annual returns including balance sheet and profit and loss account duly certified as true copy by the Chartered Accountant for the period beginning 01.04.2012 until 31.03.2019.

15 Notice of motion accordingly disposed with liberty to take out fresh notice of motion as and when advised.

16 For completion of records, registry to take on file the affidavit in reply filed by defendant no.1 and defendant no.3.

17 The counsel for defendants waive service of writ of summons.

18 Therefore, time to file written statement will begin today. Since defendant nos.2 and 3 are in jail, time to file written statement and serve a copy thereof is granted upto and including 23.08.2019.

19 All compliance affidavits to be filed and copy served within three weeks from today.

20 Matter to be listed for directions on 02.08.2019.

21 Within three weeks from today, all office objections in the notice of motion and suit to be removed and notice of motion and suit to be numbered, failing which notice of motion and suit will get dismissed without further reference to this Court.

(K.R. SHRIRAM, J.)