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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.**

Dhanappa
I. Koshti

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Dhanappa I.
Koshti
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**NOTICE OF MOTION NO. 476 OF 2015
IN
SUIT NO. 668 OF 2014**

Value Plus Commodities Pvt. Ltd.	...Applicant/Plaintiff
vs	
Bridget Souto	...Defendant

.....

Mr Sunip Sen & Mr Subro Dey i/b Mr Sutapa Saha for the Applicant/
Plaintiff

Mr A.N.Narula i/b Jhangiani Narula & Associates for the Defendant

.....

**CORAM : B. P. COLABAWALLA, J.
SEPTEMBER 30, 2019.**

P.C.:

This Notice of Motion is filed seeking an injunction restraining the defendant from selling, transferring, encumbering or creating any third party rights, title and interest in Flat No.11, Mistry Court, Gulshiana Co - operative Housing Society Ltd., Dinshaw Wachho Road, Mumbai 400 001 (for short “**suit flat**”) admeasuring about 1561 sq. feet (carpet area). In relation to the suit flat, a prayer for appointment of the Court Receiver is also sought. Thereafter, additional prayers were added by way of an amendment, which were allowed on 3rd July, 2019, by which the applicant / plaintiff sought a direction against the defendant to pay the society maintenance

charges in respect of the suit flat from time to time or in the alternative to hand over 1/3rd possession of the suit flat to the applicant/plaintiff.

2 The above suit is filed for specific performance of the Memorandum of Understanding (for short “**MOU**”) dated 17th September, 2013 entered into between the applicant / plaintiff and the defendant in respect of the suit flat. Under the said MOU, the defendant is to sell her 66.67 % undivided share, right, title and interest in the suit flat. The balance 33.33 % share has already been purchased by the applicant/plaintiff from the brother and sister of the defendant and become the owner thereof.

3 When the above Notice of Motion was pressed for ad-interim reliefs, this Court by its order dated 19th August, 2015 and as corrected on 31st August, 2015, recorded the statement of the defendant, who was present in person, that she shall not dispose of the suit flat or sell, alienate and encumber the same pending the suit. It was accordingly so ordered. The Court also recorded a statement on behalf of the defendant that the defendant has paid the arrears of maintenance in part, of the society and on the basis of the said statement the Court was of the opinion that the appointment of the

Court Receiver was not necessitated. On the basis of the aforesaid statement, the Notice of Motion itself was disposed of.

4 Being aggrieved by this order, the applicant/plaintiff carried the matter in appeal by filing Appeal No. 44 of 2016. In Appeal, a grievance was made by the appellant/plaintiff that despite making a statement that the defendant had paid the maintenance charges of the society, she had in fact not done so. According to the appellant/plaintiff the defendant had paid only 66 % of the maintenance charges and not the arrears. Taking this into consideration, the Appeal Court was of the opinion that instead of keeping the appeal pending, it would be appropriate if the impugned order was set aside and the Notice of Motion be heard so that the issue whether the entire arrears are paid or not be decided in this Notice of Motion. It was however clarified that the defendant shall not alienate, encumber, transfer, create any third party rights or part with the possession of the suit flat during pendency of the suit. This injunction was to continue during pendency of the suit, as recorded in the order of the Division Bench. By the Division Bench order, the learned Single Judge was called upon to decide the issue whether the arrears of maintenance charges payable to the society, are paid or not by the defendant. It is, in these circumstances, that the Notice of

Motion has come up before me.

5 It is not in dispute that the arrears of maintenance charges have not been paid. In fact in the affidavit dated 27th July, 2019 filed by the defendant, in paragraph 8, it is specifically stated that on the defendant receiving the arrears of an amount of Rs.52,50,000/- from the applicant / plaintiff as per clause 22 of the MOU, she will proceed to clear the society's dues or at least pay such amount as may be required under protest and without prejudice to her rights and contentions to challenge the amount being demanded. From this it clearly transpires that the defendant has not paid the arrears of the society.

6 Considering this situation, on the earlier occasion, I had put a suggestion to the parties as to whether the applicant / plaintiff would be in a position to pay the arrears of the society's charges at the first instance subject to outcome of the suit, so that the suit flat is protected against any attachment or sale by the society for payment of its dues. When this suggestion was put forth, both the applicant / plaintiff and the defendant in principle agreed to the same and the matter was kept today for passing orders.

7 However, when the matter is called out today, Mr Narula, the learned advocate appearing on behalf of the defendant stated before me that the defendant is not agreeable to the aforesaid suggestion and he would like to argue the matter. Though this practice ought to be deprecated, considering that the defendant is a lady who is approximately 72 years old, I have acceded to his request and heard the Notice of Motion.

8 Mr Narula argued that the applicant / plaintiff is not entitled to any relief in view of the fact that under the MOU (of which the specific performance is sought) the applicant / plaintiff was obligated to pay a sum of Rs.75,000/- per month to the defendant till she lives in the suit flat. Admittedly, this amount of Rs.75,000/- has not been paid. This would clearly go to indicate that the applicant / plaintiff is not ready and willing to perform its part of the contract, and therefore, the applicant / plaintiff would not be entitled to specific performance. Mr Narula submitted that this is in addition to any other defences he may have including the defence that this MOU was executed by her under coercion.

9 On the other hand, Mr Sen the learned advocate

appearing on behalf of the applicant / plaintiff submitted that the Division Bench of this Court in Appeal No. 44 of 2016, by an order dated 23rd February, 2016, had remanded the matter back to this Court on the limited issue, as to whether the entire arrears of society's charges have been paid by the defendant or otherwise. The Division Bench had also ordered that pending the hearing and final disposal of the suit, the defendant shall not alienate, encumber, transfer, create any third party rights or part with the possession of the suit flat. He, therefore, submitted that the limited scope of this Motion is to determine whether the arrears are paid or not and if not paid, who should be directed to pay the same so that pending the hearing and final disposal of the suit, the suit flat is adequately protected.

10 I have heard the learned counsel for parties at some length and have perused the papers and proceedings in the present suit. As mentioned earlier, this Notice of Motion was disposed of by the learned Single Judge of this Court by its order dated 19th August, 2015 (as corrected on 31st August, 2015). In the said order, a statement was recorded on behalf of the defendant that part of arrears have been paid by the defendant. This being the case, the learned Single Judge of this Court was of the opinion that the

appointment of the Court Receiver was not necessitated. This order was challenged by the plaintiff by filing Appeal No. 46 of 2016 and which was set aside and the Division Bench remanded the matter back to decide the limited issue as to whether the defendant has paid the entire arrears or otherwise. The Division Bench also ordered that pending the hearing and final disposal of the suit, the defendant shall not alienate, encumber, transfer and or create any third party rights or part with the possession of the suit flat.

11 It is now an admitted position before me that the arrears of maintenance charges of the society have not been paid by the defendant. According to Mr Sen as per the MOU dated 17th September, 2013, the liability of paying the maintenance charges was on the defendant. Despite this, Mr Sen stated, on instructions, that at the first instance the applicant/ plaintiff shall pay the arrears of maintenance charges as well as future maintenance charges of the society so as to ensure that the suit flat is protected. How this amount is to be dealt with and/or recovered from the defendant would be an issue that would be decided at the hearing and final disposal of the suit.

12 I think that the statement made by Mr Sen, on behalf of

the applicant / plaintiff, is not only a fair one but is in the interest of all parties. It is not in dispute before me that the defendant is unable to pay the arrears of the maintenance charges and this is clear from the affidavit filed by the defendant dated 27th July, 2019. It is, therefore, in the fitness of things if the applicant / plaintiff is directed to pay these arrears as well as future maintenance charges of the society till the hearing and final disposal of the suit. It is accordingly so ordered. The applicant / plaintiff shall, at the hearing and final disposal of the suit be entitled to recover these moneys from the defendant if they are so entitled to in law.

13 Before parting, I must note the argument of Mr Narula that it was an obligation of the applicant / plaintiff to pay a sum of Rs.75,000/- per month as contemplated in clause 22 of the MOU, and therefore, the applicant / plaintiff ought to be directed to pay this sum to the defendant. I find that this argument to be completely fallacious for two reasons. Firstly, the defendant cannot get any relief in the suit of the applicant / plaintiff. Secondly, at least *prima facie*, I find that this obligation of the applicant / plaintiff arose only once the applicant / plaintiff paid a sum of Rs.2 Crores to the defendant on execution of the sale deed or within 30 days from 17th September, 2013 whichever was later (as contemplated in clause 20(b) of the

MOU). It is not in dispute that the defendant resiled from this MOU after receiving the initial payment of Rs.50 Lacs and has refused to execute any sale deed in favour of the applicant / plaintiff. This being the position, *prima facie*, I find that there is no merit in the argument of Mr Narula that the applicant / plaintiff ought to be directed to pay the sum of Rs.75,000/- per month to the defendant as contemplated in clause 22 of the MOU. This argument, therefore, would have to stand rejected. In view of the discussion above, it is directed that the applicant / plaintiff shall pay the arrears of society's charges up to date within a period of one month from today. All future charges of the society in relation to the suit flat, shall be paid regularly by the applicant / plaintiff. Though the bill of the society regarding maintenance charges shall be raised in the name of the defendant, the society shall accept the payment made by the applicant/ plaintiff for and on behalf of the defendant. As soon as the bill is raised by the society on the defendant, the same shall be forwarded by the defendant to the applicant / plaintiff forthwith so as to enable the applicant / plaintiff to make payment of those charges.

14 It is clarified that this payment will be made by the applicant / plaintiff at the first instance and whether the applicant/ plaintiff is entitled to recover these amounts from the defendant, will

be an issue that will be decided in the suit. It is also needless to clarify that an injunction restraining the defendant from alienating, encumbering, transferring, creating any third party rights or parting with possession of the suit flat, shall continue till the hearing and final disposal of the suit as recorded by the Division Bench in its order dated 23rd February, 2016. The Notice of Motion is accordingly disposed of. No order as to costs.

(B. P. COLABAWALLA, J.)