IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION No. 1444 OF 2014
IN
SUIT No. 793 OF 2014

1) M/s. K. Patel & Co.	]
	]Applicants/
2) M/s Shree Radhe Merchants Pvt. Ltd.	]Plaintiffs.
Vs	
Shri. Sailesh M. Parekh and Others.	]Defendants.

Mr. Vishal Kanade a/with Ms. Aruna Mehta i/by M/s. S. Pathak & Co. for the Applicants/Plaintiffs.

Mr. Sanjay Jain a/with Mr. Rajesh Sharma & Ms. Tejashree Parab i/by Rajesh Sharma and Associates for Defendant Nos. 7 to 10.

CORAM : B. P. COLABAWALLA, J.
DATED :- 27th June, 2019.

P.C. :-

1. This Notice of Motion has been filed by the plaintiffs seeking an order of injunction restraining the defendants from creating any third party rights in respect of the property, more particularly described in Exhibit "A" to the plaint (the suit property) and for the appointment of a Court Receiver in respect thereof. By way of an amendment, additional prayers have been added, namely,

that the defendants be restrained from creating third party rights in respect of the rights and/or benefits arising out of and/or in respect of the room Nos. 4 and 8 (forming part of the suit property) which were originally in the possession of tenants, and who according to the plaintiffs, have been paid compensation to vacate the same. This compensation, according to the plaintiffs, was paid by them. A further prayer is also sought that defendant No. 7 be restrained from carrying out and/or continuing any development on the suit property.

2. The suit is filed for specific performance of an Agreement dated 6th April, 2008. This Agreement and which is styled as Deed of Joint Venture, was entered into between defendant No.1 and Mrs Lata Shailesh Parekh (the wife of defendant No.1 now deceased and hereinafter referred to as "Lata") as the owners and M/s K. Patel & Co. (plaintiff No.1) and Shri Radhe Merchants Pvt. Ltd. (plaintiff No.2) for development of the suit property.

3. Relying upon this Agreement, Mr. Kanade, the learned Advocate appearing on behalf of the plaintiffs, submitted that if one reads this Agreement as a whole, it is clear that substantial rights had been created in favour of the plaintiffs. He submitted that this

Agreement clearly contemplates that the parties thereto, namely, the plaintiffs and defendant No.1 and the said Lata agreed to develop the suit property jointly by exploiting, consuming, utilizing and taking advantage of the FSI by way of TDR by putting up construction on the suit property. Mr. Kanade further pointed out that as to how the scheme of development was to be carried out and inter alia contemplated the sale of flats, tenements, offices, etc. what is popularly known as "On Ownership Basis". Since the suit property consisted of several tenants, the plaintiffs under the Agreement were also to pay the owners a sum of Rs.8 crores as and by way of reimbursement and towards the costs of causing the tenants to surrender their tenancy and occupancy rights and to obtain quiet vacant and peaceful possession thereof by paying them compensation or provide to them permanent alternate accommodation elsewhere. How the said sum was to be paid is also set out in Clause 8 of the Agreement. Thereafter, Mr. Kanade also brought to my attention Clause 10 of this Agreement which inter alia sets out how the parties shall jointly carry out the obligations mentioned therein at the costs, charges and expenses of the Joint Venture. In fact, this Joint Venture itself was named as M/s Navya Developers, as more particularly set out in Clause 23 of this

Agreement. Mr. Kanade submitted that under this Agreement therefore substantial rights were created in favour of the plaintiffs including the right to develop the property and sell the flats/tenements in the newly constructed building and also convey the suit property to the society after its formation.

4. Mr. Kanade then submitted that in fact the plaintiffs have acted in furtherance of this Agreement by not only paying the initial sum of Rs.51,00,000/- but thereafter paying an additional amount of Rs.25,00,000/- to defendant No.1. According to Mr. Kanade and as averred in Paragraph No. 7 of the plaint, the plaintiffs have paid an aggregate amount of Rs. 1,18,00,000/- to the 1st defendant and the said Lata which payment has been duly acknowledged by them. Over and above this, Mr. Kanade submitted that an additional amount of Rs. 51,00,000/- was paid by the plaintiffs to the tenants occupying room No.4 and room No.8 of the suit property to have them vacated. He therefore submits that a total consideration of Rs.1,69,00,000/- has already been paid to defendant No.1 and the said Mrs. Lata. He submitted that till date this Agreement and of which specific performance is sought, has not been terminated by defendant No.1. Considering these facts, Mr. Kanade submitted that in order to ensure that any decree passed in

this suit in favour of the plaintiffs would not be rendered infructuous, it is necessary to grant the interim reliefs as prayed for in the Notice of Motion.

5. On the other hand, Mr. Jain, the learned Counsel appearing on behalf of defendant No.7 submitted that it is an admitted fact that already an amount of approximately Rs.75,00,000/- has already been returned by defendant No.1 to the plaintiffs. Mr. Jain submitted that according to defendant No.1 it has actually returned a sum of Rs.1,30,00,000/- which figure is mentioned in the affidavit-in-reply to the Notice of Motion and to which there is no denial and no rejoinder affidavit has been filed.

6. He submitted that this apart, the facts of this case would reveal that after entering into the Agreement dated 6th April, 2008, defendant No.1 sought to enter into an Agreement for sale of the suit property with defendant No.4. Defendant No.4 therefore issued a public notice in the Free Press Journal, Janambhoomi as well as Nav Shakti on 6th August, 2010. These public notices clearly mention that defendant No.1 and his deceased wife were negotiating to sell, transfer, assign and convey the suit property. These notices called upon that any person or persons claiming any interest in the said

property to communicate the same in writing along with the supporting documents to the Advocate for defendant No.4 within 14 days from the date of publication of the said notices. Mr. Jain submitted that despite these public notices, no action was taken by the plaintiffs. In these circumstances, a registered Agreement of sale was entered into between defendant No.1 and the said Lata with defendant No.4 on 12th October, 2010. After this, a registered Deed of Conveyance 20th December, 2012 was also executed between defendant No.1 and said Lata on the one hand and defendant No.4. on the other.

7. Mr. Jain submitted that thereafter defendant No.4 sought to enter into a transaction of sale of the suit property with defendant No.7. Even at this stage, defendant No.7 issued public notices in Hamara Mahanagar, the Free Press Journal and Nav Shakti on 12th August, 2013. Despite these public notices being given that defendant No.4 is going to sell the suit property to defendant No.7 and persons claiming interest in the suit property should lodge their objections with the Advocate for defendant No.7 within a period of 14 days, no objection whatsoever was lodged by the plaintiffs. Mr. Jain submitted that after the property was transferred in the name of defendant No.7, another set of public

notices were issued by defendant No.7 in Hamara Mahanagar, the Free Press Journal and Nav Shakti on 13th November, 2013. Even to these notices, no reply was received from any person including the plaintiffs. In these circumstances, Mr. Jain submitted that defendant No.7 was a bona fide purchaser without notice and its rights therefore could not be affected by the alleged Agreement entered into by the plaintiffs with defendant No.1 and the said Lata and which was an insufficiently stamped and an unregistered document.

8. Mr. Jain then submitted that in any event, the equities and balance of convenience do not lie in favour of the plaintiffs. In this regard, he submitted that if one reads the plaint it is quite clear that according to the plaintiffs in or about August, 2010 defendant No.1 approached the plaintiffs and stated that since the defendants were finding many difficulties in getting vacant possession of the suit property that were occupied by tenants, an option was given to the plaintiffs to exit from the said Agreement on payment of an aggregate sum of Rs.3,00,00,000/- on or before 31st March, 2011. It is thereafter averred that in the event the aforesaid sum is not paid on or before 31st March, 2011 the said Agreement would continue to subsist. Even assuming for the sake of argument that the said oral

arrangement is to be believed, Mr. Jain submitted that from 1st April, 2011 till 12th March,2014 there is absolutely no correspondence whatsoever by the plaintiffs with defendant No.1 either asserting the plaintiffs' rights or the fact that defendant No.1 had allegedly breached the Agreement dated 6th April, 2008.

9. Mr. Jain submitted that it does not stop here. He brought to my attention Paragraph No.13 of the plaint in which it is stated that in or about March,2014, the plaintiffs came across the copy of Index-II in respect of an alleged Agreement dated 12th October, 2010 registered with the Sub-Registrar of Assurances at Andheri-2, from which it appeared that defendant No.1 and the said Lata had, by an Agreement dated 12th October, 2010, granted some rights in respect of the suit property to defendant No.4. Mr. Jain submitted that there is not a single statement in the entire plaint as to how the plaintiffs suddenly came across a copy of Index-II. He submitted that Index-II is an Index which is available with the Sub-Registrar of Assurances and therefore it could not have came to their knowledge unless a search was taken or the plaintiffs were already aware that rights were created in favour of defendant No.4. Be that as it may, Mr. Jain submitted that any prudent person seeking enforcement of his

rights would have certainly entered into some correspondence between March, 2011 to March, 2014 asserting their rights or at least bringing to the notice of defendant No.1 how the Agreement has been breached by them. This is conspicuously absent in the present case. This would therefore clearly demonstrate that the balance of convenience does lie with the plaintiffs, was the submission.

10. Mr. Jain, lastly, submitted that it is the case of the plaintiffs that an interest has been created in the suit property and it is on that basis the prayer for specific performance is sought to be pressed. Mr. Jain submitted that this argument cannot stand for the simple reason that the Agreement, dated 6th April, 2008 of which specific performance is sought, is not registered. If it is not registered, then, it cannot create any interest in the suit property and consequently then the same would really amount to only a construction Agreement which can never be specifically enforced. In any event, Mr. Jain submitted that reading the Agreement, as a whole, did not create any interest in the suit property in favour of the plaintiffs and was merely a construction Agreement. This was clear from the fact that the Agreement itself contemplated that the

profit or the losses from entering into the aforesaid Joint Venture would be shared between the plaintiffs and defendant No.1 and the said Lata in the ratio as more particularly set out in Clause 21 of the said Agreement. He submitted that this itself would indicate that if the plaintiffs were to succeed in the suit eventually, monetary compensation would be adequate relief disentitling the plaintiffs to seek specific performance.

11. Mr. Jain also brought to my attention that after the present suit was filed, the same was never moved for any ad-interim relief. This is despite the fact that the plaintiffs by now were fully aware that the suit property had exchange hands from defendant No.1 to defendant No.4 and thereafter to defendant No.7. Despite this, the plaintiffs chose to file this Notice of Motion and not to move for any ad-interim relief. Mr. Jain submitted that as on today the original building in which the tenants were housed has already been demolished and construction has already come up for which huge funds have been invested by defendant No.7. Further some of the tenements which form part of the sale component have also been alienated in favour of third parties. He therefore submitted that looking at the totality of the facts of the case, the balance of convenience certainly did not lay at the door step of the plaintiffs

entitling them to any equitable relief. In these circumstances, he submitted that the Notice of Motion is devoid of any merit and the same ought to be dismissed with costs.

12. I have heard the learned Counsel for the parties at length and I have perused the papers and proceedings in the suit as well as in the Notice of Motion. I find considerable force in the arguments canvassed by Mr. Jain that the equities certainly do not lie with the plaintiffs.

13. As mentioned earlier, even according to the plaintiffs, they were supposed to receive a sum of Rs. 3 Crores by 31st March,2011 failing which the Agreement was to continue to subsist. Admittedly, the plaintiffs have not received the aforesaid sum but has only received a part thereof. Despite this from 1st April,2011 till March,2014, the plaintiffs remained absolutely silent with reference to its rights under the said Agreement dated 6th April, 2008. There is not a single letter written by the plaintiffs to defendant No.1 either asking them to comply with their obligations under the said Agreement or alleging that there has been any breach thereof. This, according to me, at least prima facie, shows that the plaintiffs have been sleeping on their alleged rights, if any. Due to this inaction of

the plaintiffs it is now clear that defendant No.1 had sold the suit property to defendant No.4 who then sold it to defendant No.7. At each stage, public notices were given before such sale and objections were invited thereto. Despite this, no objections were lodged by the plaintiffs. When I asked Mr. Kanade as to what was the explanation of the plaintiffs to not to respond to these public notices, he fairly stated that the plaintiffs had no explanation for the same and in fact no affidavit in rejoinder had also been filed controverting the facts mentioned in the affidavit in reply.

14. Considering that defendant No.7 has now become the owner of the suit property and which he is developing by investing huge funds and has also got the tenants vacated, I do not think that the plaintiffs are entitled to any interim reliefs. Apart from gross negligence on its part from seeking to protect its rights, the balance of convenience is clearly in favour of the defendants. This being the case, I do not think that any of the reliefs claimed in the Notice of Motion can be granted. The Notice of Motion is accordingly dismissed. However, there shall be no order as to costs.

(B.P. COLABAWALLA, J.)