IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.772 OF 2017
IN
COMMERCIAL SUIT NO.847 OF 2017

Gangar Realtors Private Ltd., Mumbai and Ors. …. Applicants

In the matter between

Gangar Realtors Private Ltd., Mumbai and Ors. …. Plaintiffs

V/s.

Jitendra Mansukhlal Parekh and Ors. …. Defendants

Mr. Pratik Seksaria, with Mr. Siddhanth Chhabria and Mr. P. Jani, I/by M/s. Prime Legem, for the Applicants-Original Plaintiffs.

Mr. S.U. Kamdar, Senior Advocate, with Mr. Zubin Behramkamdin, Ms. Vidya Nair and Mr. Animesh Singh, I/by Mr. Dhiren H. Shah, for Defendant No.1.

Mr. Birendra Saraf, with Mr. M.S. Shah, I/by M/s. Shantilal & Co., for Defendant Nos.2 and 4 to 9.

CORAM : A.K. MENON, J.

DATE : 19TH JUNE 2019.

PC :

1. By this notice of motion, the plaintiffs seek a temporary injunction, restraining defendant Nos.1 to 9 from alienating, disposing, leasing, selling, transferring or mortgaging or creating any third-party rights in respect of 1/9th undivided share in the suit property. Secondly, it seeks to temporarily

restrain defendant Nos.1 to 9 from entering into agreements in respect of the suit property described in the plaint and for a mandatory order directing defendant No.1 to deposit the original agreement between defendant No.1 and the plaintiffs in relation to the suit property.

2. The suit seeks a declaration that the suit agreement between the plaintiffs and defendant No.1 was binding upon all the defendants and for specific performance of the same. Upon failure to perform the agreement, for appointment of an officer of this court to execute the Deed of Conveyance in respect of the suit property and to register the same with the Sub-Registrar of Assurance, Mumbai. In the alternative, the plaintiffs claimed damages of Rs.11,51,58,893/-. Plaintiffs also seek interim reliefs, as now sought in the present notice of motion.

3. This notice of motion is supported by an affidavit of one Ankur K. Gangar, who is described as a partner of the plaintiffs, which, in fact, appears to be an error, since the plaintiffs seem to be a Private Limited Company. An additional affidavit has also been filed by Mr. Ankur Gangar on 8th September 2018. On behalf of defendant No.1, the affidavit-in-reply dated 25th September 2018 has been filed by defendant No.2 on behalf of self and on behalf of defendant Nos.1 and 3 to 9 as their constituted attorney. A separate affidavit-in-reply of the same date has been filed by defendant No.2 on behalf

of defendant Nos.4 to 9. Defendant No.3 had meanwhile expired on 17th February 2017. An additional affidavit-in-reply dated 26th October 2018 has also been filed by defendant No.1 for himself. Finally, the plaintiffs have filed the affidavit-in-rejoinder dated 8th October 2018.

4. On behalf of the plaintiffs, Mr. Seksaria submitted at the outset that he does not seek any relief in this notice of motion against defendant Nos.2 to 9, but he is restricting his application to the 1/9th share of defendant No.1, in view of the defendants' contention that defendant Nos.2 to 9 having disputed the plaintiffs' contention that defendant No.1 had executed the suit agreement on behalf of all the defendants. The learned counsel for the plaintiffs submitted that the suit agreement is sought to be cancelled; however, it is binding upon, if not all the defendants, at-least defendant No.1. He, therefore, submitted that the plaintiffs may be protected to the extent of the 1/9th share of defendant No.1. The basis of the submission is the fact that the suit property is owned by the defendants jointly and, therefore, defendant No.1 had an equal share along with the other co-owners.

5. I may briefly describe the parties and the suit property before dealing with the submissions of learned counsel for the parties. The plaintiff No.1 is a Private Limited Company, engaged in the real estate business, including developers thereof and sale and purchase of the immovable properties. The defendants are the co-owners of the suit property. Exhibit A and A-1 describe

the suit property, which consists of original Plot Nos.22/2 and 23/3, which have since been given Final Plot Nos.169/B and 272. These plots are collectively described in Exhibit-A3 to the plaint. It is this property, which is referred to as the suit property and subject matter of the Agreement for Sale at Exhibit-B to the plaint.

6. Mr. Seksaria has invited my attention to the Agreement of Sale and submitted that the vendors, namely, the defendant Nos.1 to 9, had agreed to sell and transfer in favour of the plaintiffs their respective undivided share, right, title and interest in the suit property for a total consideration of Rs.4,90,00,000/-, which was to be paid in two installments, first of which is in the sum of Rs.9,00,000/- payable before execution of the agreement and Rs.4,81,00,000/- payable on execution of the Deed of Conveyance by defendant Nos.1 to 9 in favour of the plaintiffs or their nominees.

7. Mr. Seksaria has invited my attention to the salient features of the aforesaid Agreement for Sale. In view of the fact that defendant Nos.1 to 9 had declared that they have clear and marketable title in respect of the suit properties, the defendant Nos.1 to 9 had agreed to obtain a Title Certificate stating that the title of the suit properties is clear and marketable and free from all encumbrances, to the satisfaction of the plaintiffs and pay all bills and taxes in time. He further submitted that the 1st defendant had executed

the agreement on behalf of all the defendants i.e. defendants Nos.2 to 9 and nine cheques for a sum of Rs.1,00,000/- each had been paid over by the plaintiffs to the defendants, which were duly acknowledged by the 1st defendant for himself and as a constituted attorney for the others. He further submitted that apart from the suit agreement, the 1st defendant has executed a separate handwritten receipt, confirming that he has received a sum of Rs.1,10,00,000/- in cash against sale of the suit plot. Thus, it is the plaintiffs' case that a sum of Rs.1,19,00,000/- has been paid over as a consideration under the said agreement. The handwritten receipt is executed by defendant No.1 and is shown to have been confirmed by one Kishor B. Gangar, who is plaintiff No.2 on behalf of plaintiff No.1. Mr. Seksaria further proceeded to submit that sometime in May, 2016, the plaintiffs came across an advertisement in the local newspaper on or about 24th May 2016 issued on behalf of defendant No.10, who is stated to be an independent Developer in respect of the suit property and two other properties, calling upon persons, who may have any claim in respect of the title to the properties described therein, to respond to the 10th defendant's Advocate. The plaintiffs, through their Advocate, addressed their objection to the 10th defendant's Advocate on 14th June 2016 intimating him of the fact that defendant Nos.1 to 9 had agreed to sell the suit property to the plaintiffs and that the objections on behalf of the plaintiffs may be noted. Later it seems that defendant Nos.2 and 9 inserted a Public Notice intimating the public at large that the notice issued by the 10th defendant was misleading inasmuch as Ms.Sarita M. Parekh and Ms. Kunal M. Parekh were not the owners of the suit property. This was mentioned in view of the fact that the names of Ms.Sarita Parekh and Ms.Kunal Parekh were incorporated in the Public Notice dated 19th May 2016.

8. Mr. Seksaria submitted that upon perusing the aforesaid Public Notice, the plaintiffs reiterated through their Advocate's letter dated 14th June, 2016, that the co-owners of the suit property had agreed to sell the property to the plaintiffs. Correspondence then ensued between the 10th defendant's Advocate and the plaintiffs' Advocate and finally vide a letter dated 20th March 2017, the plaintiffs' Advocate had called upon defendant Nos.1 to 9 to specifically perform the Agreement for Sale and recorded the fact that a sum of Rs.1,20,11,000/- has been paid over by the plaintiffs, out of the agreed consideration of Rs.6,00,00,000/- and that the Agreement for Sale was now required to be performed, failing which the plaintiffs would take appropriate steps to protect their interest. Mr. Seksaria submitted that the plaintiffs thus sought specific performance of the Agreement for Sale. However, defendant Nos.1 to 9 had failed and neglected to respond positively, as a result of which the suit came to be filed. He, therefore, submitted that, as on date, it is a binding agreement between the parties, which needs to be specifically performed. Mr. Seksaria, therefore, submits that the defendants have merely

contested the fact of execution of the agreement; however, what is material and to be noted is that defendant No.10 claims that the plaintiffs have not come to court with clean hands and they suppressed material facts. Defendant No.10 contended that no money has been received from the plaintiffs.

9. It is submitted that the plaintiffs were all the time ready and willing to perform their part of the agreement and it is the defendants, who have failed and neglected to do so. However, in view of the fact that all the defendants had admittedly not signed the agreement, the plaintiffs have restricted their case only as against defendant No.1, since it is defendant No.1, who had accepted the cheques and also acknowledged receipt of the sum of Rs.1,10,00,000/- paid in cash. In that view of the matter, defendant No.1 could not take advantage of the situation and avoid his commitment. It is, therefore, submitted by Mr. Seksaria that he has instructions to restrict the reliefs in the notice of motion to the 1st defendant.

10. On behalf of defendant Nos.1 to 9, Mr. Behramkamdin submitted that the suit agreement had not been executed by them. The agreement in question was false and fabricated. He invited my attention to paragraph No.30 of the affidavit-in-reply filed by defendant No.2-Vinod Mansukhlal Parekh, in which the defendants have set out that the plaintiffs had apparently, without

even verifying whether defendant No.1 had any authority to decide on behalf of defendant Nos.2 to 9, appear to have entered into negotiations with the 1st defendant for sale of the property. This he said was evident because the document was prepared by the plaintiffs on a stamp-paper brought in the name of plaintiff No.1. Thereafter, a second draft Agreement for Sale, with more specifications, was prepared by the plaintiffs and was printed separately on a different stamp-paper. He submitted that the particulars in the first draft and the second draft were varying. The 'Receipt' clauses were also different and the second draft was seemingly a more complete version of the agreement.

11. Mr. Behramkamdin has submitted that the second agreement was never signed, because the plaintiffs were never ready and willing to pay any amounts under the agreement and, therefore, it remained unsigned. He submitted that the signature of defendant No.1 in the suit agreement appears to have been obtained by fraudulent means. The nine cheques said to be for the total sum of Rs.9,00,000/- were never encashed by defendant No.1 and apart from the vague averment that cheques were handed over and the sum of Rs.1,10,00,000/- was paid in cash, no particulars of the encashment of these cheques had been provided. He further submitted that the Balance Sheet of the plaintiffs, which is a Private Limited Company, for Financial Years 2010-11, 2011-12, 2012-13, 2013-14, 2014-15, 2015-16 and 2016-17

did not disclose these payments or the amount paid as advance. Furthermore, it is contended by Mr. Behramkamdin that the suit was filed on 16th September 2017 and the present notice of motion was taken out on 22nd September 2017, but the plaintiffs did not serve the defendants till 10th September 2018 and it is only on 12th September 2018 that an application for ad-interim relief was made. Thereupon, an order of status-quo was granted, which is continuing till date.

12. He submitted that there is absolutely no merit in the case and this notice of motion deserves to be dismissed. For one year, the plaintiffs had not made any application to the court and did not even serve the defendants. He submitted that it is material to note that the plaint does not contain any averment that nine cheques were not encashed. That this was one of the basic averments that should have been made especially in view of the fact that the cheques said to have been handed over as a part consideration. Besides the plaintiffs had claimed that they had paid a sum of Rs.1,10,00,000/- in cash, as set out in Exhibit-C to the plaint, but despite demands, the original receipt has not been offered for inspection till date. Even today, the receipt is not available for scrutiny. I may observe that this is not disputed by the plaintiffs. Mr. Behramkamdin further submitted that although the plaintiffs contended that they had issued a demand notice dated 20th March 2017, the same has not been served upon the defendants till date. He submitted that the plaintiffs had

been called upon to do so, but none of the originals have been offered for inspection.

13. Mr. Behramkamdin relied upon a compilation of documents, which consists of undated Agreement for Sale, presumably the second draft of Agreement for Sale and a written statement filed by defendant No.1 in Suit No.816 of 2016, affidavit in reply of defendant No.1 dated 26th October 2016 and copies of the two letters seeking inspection, addressed by Advocate for defendant No.1 to the Advocate for the plaintiffs. On behalf of defendants Mr. Kamdar submitted that the reliefs in the suit are not restricted to defendant No.1, but specific performance of the agreement entirely and in that respect it is not possible to consider the request of Mr. Seksaria, who seeks to restrict the relief to defendant No.1 alone.

14. On behalf of defendant Nos.2 and 4 to 9, Dr. Saraf opposed this notice of motion, *inter alia*, submitting that perusal of paragraph Nos.6 and 8 to 10 of the plaint reveal that the plaintiffs are suing, at best, on an oral agreement to sell and on a promise to pay a sum of Rs.6,00,00,000/-. The averments would reveal as such. Dr. Saraf also invited my attention to paragraph No.25 of the plaint, wherein the plaintiffs have contended that they were ready and willing to perform their part of the contract and they <u>had made payment of the balance consideration</u> *(emphasis supplied)*. It is submitted that this

statement is palpably false and the suit deserves to be dismissed. Dr. Saraf has also invited my attention to paragraph No.43 of the affidavit-in-rejoinder, wherein the plaintiffs have sought to contend that the amounts paid over to defendant No.1 were in cash; however, the same is not reflected in the Balance Sheet of plaintiff No.1. Dr. Saraf, therefore, submitted that no case whatsoever has been made out for interference by this court. It is further submitted that the order of status-quo passed by this court has been continued from time to time because of pendency of the notice of motion and there is no justification in continuing the same.

15. Dr. Saraf, in the course of submissions, relied upon the decision of the Supreme Court in *Pemmada Prabhakar Vs. Youngmens Vysya Association*[1] and submitted that in the case of a suit for specific performance, the Supreme Court considered the case where the plaintiffs therein were entitled to a decree for specific performance of an Agreement for Sale, which was entered into between the plaintiffs and defendants, who had no absolute title to the property and in that respect, the Supreme Court had held that the agreement for sale entered into by the plaintiff and some co-sharers do not have absolute title to the property enforceable in law and that the High Court has not appreciated that aspect. It is, therefore, submitted that, in the instant case, while the property is owned by defendant Nos.1 to 9 and merely because defendant No.1 had signed on the Agreement for Sale, there was no obligation

1 *2015 (5) SCC 355*

cast upon defendant Nos.2 to 9 to agree to those terms. It is submitted that the suit and the notice of motion are, therefore, liable to be dismissed.

16. Relying upon the affidavit-in-rejoinder, Mr. Seksaria submitted that defendant No.1 has not answered the inconsistencies in his own pleadings. He submitted that in paragraph No.3 of the affidavit-in-reply, defendant No.1 had contended that defendant No.1 had neither signed the suit agreement nor the handwritten receipt. However, in the same affidavit, the deponent alleges that the plaintiffs had played mischief and have purportedly obtained signatures of defendant No.1 on the alleged Agreement for Sale produced by the plaintiffs by fraudulent means. Thus, there is a clear admission on the part of defendant No.1 that the agreement had indeed been signed. On one hand, the defendants contended that the signature was fraudulently obtained and on the other hand, they contend that the agreement was never signed. These inconsistencies he sought to press into service in support of the plaintiffs' case that the suit agreement was indeed liable to be specifically performed. Mr. Seksaria further submitted that although defendant No.1 had contended that he has not signed the agreement, there is no dispute as regards the thumb impression appearing on the agreement. He submitted that the thumb impression appearing on the said agreement is that of the 1st defendant, which he has not disputed.

17. It is submitted that the 10th defendant filed a suit against defendant Nos.1 to 9 for specific performance of the agreement between defendant Nos.1 to 9 and defendant No.10. However, by virtue of Consent Terms, that suit was settled and the agreement between them was terminated. The 1st defendant had also filed an affidavit-in-reply in that suit, in which the contention that the plaintiffs had paid any money had been denied. Mr. Seksaria has sought to rely upon paragraph No.8 of the affidavit-in-reply of defendant No.1 in Suit No.816 of 2016 to contend that the deponent had stated that he has not received cash of Rs.40,00,000/- from the plaintiffs in that suit under MOU. He sought to submit that this is a *modus operandi* of the defendants that cash amounts are collected at the time of agreement and later these are simply denied. He submitted that in this manner, the defendants have been exploiting the persons like the plaintiffs and reneging of the suit agreements.

18. I have heard learned counsel for the parties at length. The submissions of Mr. Seksaria are to the effect that there is an Agreement to Sell between the parties. That agreement has been executed by the plaintiffs and defendant No.1, on behalf of defendant Nos.2 to 9, on the basis of a power of attorney. According to Mr. Seksaria, the consideration has been partly paid; firstly by payment of Rs.9,00,000/- by nine cheques of Rs.1,00,000/- and secondly by paying a sum of Rs.1,10,00,000/- in cash to defendant No.1. His plea for

injunction is based on the above set of facts. If at all the agreement is signed, it is signed only by one person and not by all the defendants. In that sense, it is obvious that the rights of defendant Nos.2 to 9 could not be vesting in defendant No.1, unless there was an effective authority vesting in defendant no.1 to execute the agreement between the parties. The plaintiffs do not rely upon any power of attorney executed by defendant Nos.2 to 9 in favour of defendant No.1. Needless to mention that the agreement is not registered. Amongst the pleadings in the notice of motion, it is observed that defendant No.2 has filed an affidavit dated 25th September 2018 on behalf of defendant No.1. Defendant No.2 himself was of about 82 years. He was the eldest brother and he had a power of attorney from defendant No.1. He had, accordingly, filed the affidavit on instructions. The defendant No.3 had expired on 17th February 2017. leaving behind his widow and two children. These persons were clearly not impleaded in the suit, although the suit was filed after the demise of the 3rd defendant.

19. Be that as it may, quite apart from the fact that the affidavit has been signed on behalf of the other defendants by defendant No.2, the defendant No.1 has himself signed an additional affidavit dated 26th October 2018, in which he has stated that he was served with the papers in the suit only on 10th September 2018 and thereupon he informed these facts to defendant No.2, the elder brother. The defendant No.1 had executed the power of

attorney in favour of defendant No.2 and registered the same with the Sub-Registrar of Assurance, Mumbai and had also given instructions to defendant No.2 to defend the plaintiffs' application. He has affirmed all the contents of the affidavit dated 25th September 2018 filed by defendant No.2 and has explained that he did not sign the said affidavit earlier, because he was not keeping well and was admitted to the hospital on 22nd September 2018. He was discharged only on 7th October 2018 and, therefore, he affirms the contents of the affidavits filed on his behalf on the earlier occasion.

20. In this view of the matter, defendant No.1 has, in my view, clearly affirmed all the defences set up in the pleadings on behalf of the defendants. Considering the defences canvassed by Mr. Behramkamdin, I have scrutinized the two agreements / MOUs, being the suit agreement and the second version of the suit agreement, said to have been executed between the parties and what I find is that the suit agreement at Exhibit-B to the plaint is printed on a stamp-paper issued on 27th December 2011 by the General Stamp Office, Mumbai and purchased from a vendor on 30th December 2011. It bears No.FD-841259 and the rubber-stamp of the purchaser being the plaintiff No.1-company. The second version of the Agreement for Sale is also printed on the stamp-paper purchased from the General Stamp Office, Mumbai from the same vendor on the same date i.e. 30th December 2011 and it bears No.FD-841261. Clearly this is a serially subsequent stamp-paper. This stamp

paper is subsequently purchased and prima facie indicates that this agreement was prepared later. The 'Receipt' clause of the first Agreement for Sale refers to the sum of Rs.9,00,000/- paid by nine cheques; whereas, the 'Receipt' clause in the second version of Agreement for Sale, as referred above, talks of receipt of Rs.1,19,00,000/-; consisting the first installment of Rs.10,00,000/-; the second installment of Rs.15,00,000/-; the third installment of Rs.25,00,000/-; the fourth installment of Rs.50,00,000/- and; the fifth installment of Rs.10,00,000/-. Thus, clearly there is a variance in the plaintiffs' own documents, which clearly indicates that the averment made in the plaint that a sum of Rs.1,10,00,000/- was paid in cash, is not reflected in the documentation and the averments made in the plaint appear to have been suppressed in the second draft of the Agreement for Sale. It is also necessary to mention that there is no explanation as to why separate receipts have been incorporated in the second draft of the Agreement for Sale for Rs.1,19,00,000/-. Rs.10,00,000/-, Rs.15,00,000/-, Rs.25,00,000/-, Rs.50,00,000/- and Rs.10,00,000/-. None of these receipts have been signed by the parties and, therefore, this Agreement for Sale is obviously not having been pressed into service. In view of the obvious inconsistencies that have come to the light, in my view, the defendants have put up a valid defence and indeed one which merits further consideration.

21. Admittedly, none of the cheques have been encashed. No consideration

is passed. The agreement is not even fully stamped or registered. The execution of the agreement has been disputed. Defendant Nos.2 to 9 are the signatories. Defendant No.1 was not empowered by defendant Nos.2 to 9 to execute the suit agreement. In these circumstances, the question is, whether the plaintiffs have made out any prima facie case ? The only issue which has since been reiterated by Mr. Seksaria is that although the signature is disputed, the thumb impression is not disputed. In my view, that is something which is a matter of evidence; to be considered at the stage of evidence. The handwritten receipt forming the basis of the plaintiffs' claim that a sum of Rs.1,10,00,000/- contains interpolations; all of which are clearly disputed as the receipt itself is disputed. Furthermore, I must not lose sight of the fact that the whole intention appears to be to stall attempts by defendants to deal with the property, because even if defendant No.1 is restrained from exercising his right towards his 1/9th share, it would affect the undivided share of the other defendants as well. Furthermore, there is an alternative prayer for a money decree in the suit. No case is made out for grant of relief in the notice of motion. In that view of the matter, the order of status-quo cannot be continued and I, therefore, pass the following order.

(i) The notice of motion is dismissed.

(ii) No order as to costs.

(iii) All ad-interim orders stand vacated forthwith.

22. At this stage, learned counsel for the plaintiffs requests for stay to the operation of this order. The request for stay is declined.

(A.K. MENON, J.)