Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 3804 OF 2008
IN
SUIT NO. 3051 OF 2008
WITH
NOTICE OF MOTION NO. 543 OF 2019

Rakesh Saigal & Anr ...Plaintiffs
Versus
Ramesh G Sippy & Ors ...Defendants

Mr Atul Rajadhyaksha, Senior Advocate, *with Nishant Tripathi & Vaibhav Bandgar, i/b M Tripathi & Co., for the Plaintiff & Applicant in NMS/543/2019.*
Ms Saif Dingankar, *i/b Bachubhai Munim & Co., for Defendants Nos. 1A to 1E.*
Mr Rahul Narichania, Senior Advocate, *with Siddhanth Chhabria, i/b Jamshed Ansari, for Defendant No. 3.*
Mr Vishal Kanade, *with Mukul Taly, Aziz Shaikh & Vithoba Masurkar, i/b S Mahomedbhai & Co., for Defendant No. 5.*

CORAM: G.S. PATEL, J
DATED: 30th April 2019

PC:-

1. This order will dispose of the Plaintiff's Notice of Motion No. 3804 of 2008 and a second Notice of Motion, also by the Plaintiff, No. 543 of 2019. The first is the original Notice of Motion filed along with the Suit. The second is a Notice of Motion filed after the plaint was extensively amended and additional parties added.

2. The suit itself seeks specific performance of an agreement dated 1st August 2007. This is prayer clause a(i). The second part of prayer (a) is for a decree against the Defendants as the legal heirs of one Gopaldas Parmanand Sipahimalani, or Sippy, to perform this agreement of 1st August 2007. This performance is sought by conveyance of what is called "the suit property" and which is said to have been described in Exhibit "A" to the plaint. Prayer (b) is for some reason a repetition of portions of prayer (a) because it again seeks specific performance of the 1st August 2007 agreement in respect of this very property.

3. The property in question is in Bandra. It is said to be a plot of about 4,229 sq yards on Turner Road. On this there stands a building called Gopal Mansion. It has more than one wing and roughly 80 units, a mix of flats and shops.

4. I will turn straightaway to the agreement and then return to the description how the parties are arrayed. A photocopy of the agreement is at Exhibit "B" to the plaint at page 17. This is styled as a 'receipt'. While I will proceed on the basis that the nomenclature is entirely immaterial, this is by no means an agreement for sale in the usual or familiar form. In it, Gopal Sippy makes a statement that he is the owner and in absolute possession of a property known as Gopal Mansion. This has two wings. He mentions the plot survey numbers and he says that he has agreed to sell this property to the Plaintiffs, Rakesh Saigal and Deepak Menghani, and they have agreed to purchase this on an as-is-where-is basis for a total consideration of Rs. 1 crore. An advance of Rs. 10 lakhs (the document indicates that the original figure of Rs. 20 lakhs was over-written and corrected) was paid on that day by pay order. This is set out in clause 1a of the document. Clause 1b is struck through. Clause 2 then says that the remaining Rs. 90 lakhs shall be paid on execution of the conveyance and handing over of vacant and peaceful possession. The agreement does not tell us when this is supposed to happen, if ever. The agreement itself is, on the face of it, unclear as to whether it is a reference only to Gopal Mansion or to Gopal Mansion and the surrounding land both. The suit agreement speaks of purchase of the property on an as-is-where-is basis. This would necessarily mean subject to all existing rights and occupancies, if any. Now that it is admitted that there have been such rights since 1949, this raises another question as to how Gopal Sippy could have promised to deliver vacant possession.

5. There is no doubt that even at the time Gopal Mansion was occupied by several third parties. To understand this context, it will be necessary to go into some of the earlier documents, but before I do that, a brief description of the Defendants. The suit was originally filed against Mohini Sippy, Gopal Sippy's widow, and one Ajit Sippy, one of their sons. Both died pending suit. Their heirs are now on record. Some heirs' addresses have been corrected and other persons named have been, by previous orders, allowed to be deleted on the representation by the Defendants that there exists no such persons. There are three other Defendants Nos. 3, 4 and 5.

Defendant No. 3 is Gopal Mansion Cooperative Housing Society, added on its application. Defendant No. 4 is Videocon Developers Limited, a real estate developer and Defendant No. 5 is one KBS Properties Limited, which claims to be an assignee or transferee from Videocon. These are the parties to the suit.

6. That Gopal Sippy bought the property in March 1949 is not in dispute. But a little thereafter he began selling flats or units in the building to third parties. Some of these have provisions of importance to this suit. There is, for instance, an agreement dated 24th August 1949 between Gopal Sippy and one Bhagat for sale of Flat No. 69. But this also conveyed to Bhagat an undivided share, right, title and interest in the Turner Road plot. There were similar agreements that Gopal Sippy signed with others for other flats. This went on until the late 1960s. There are several such documents (about 24 in all) on record in the very large number of volumes that have been compiled. I do not think it is necessary at this prima facie stage to examine each of these documents at greater length. That Gopal Sippy did convey an undivided share in respect of individuals is undisputed. Gopal Mansion has about 78 or 80 flats and shops. Mr Rajadhyaksha submits that the land on Turner Road and Gopal Mansioni is, therefore, held by Gopal Sippy (or, more accurately by his descendants and estate) jointly with others with whom he executed conveyance or agreements. That does not assist Mr Rajadhyaksha. To the contrary.

7. Gopal Sippy made a Will on 23rd December 2003. In it, he left his entire estate to his grandson by his pre-deceased daughter, Sunita. A probate Petition was filed in 2012. This is contested *inter* *alia* by Gopal Sippy's son, Ramesh, Defendant No. 1A. There is a rival Will dated 26th April 2007 of which the original 1st Defendant, Mohini, Gopal's wife was said to be the sole beneficiary should she survive him, and, failing her, their son Ajit, the original 2nd Defendant, was to be the sole beneficiary. This Will received probate in 2010. Ramesh, the other son, has apparently undertaken a challenge to that probate or is in the process of doing so.

8. The only thing notable about the later Will is that it is about four months before the suit agreement in question.

9. It is common ground that a little after August 2007 Gopal Sippy took ill. The two Plaintiffs of course say that they called on him solicitously to enquire of his health and that he orally promised to complete the conveyance as soon as he recovered. He never did. He died on 25th December 2007.

10. In the meantime, Videocon, though under a different or earlier name, entered into a development agreement in regard to this property and there was some sort of a memorandum in November 2007 between the flat purchasers and Videocon.

11. The next document that is entirely material to a prima facie view in this specific performance suit is Exhibit "D" to the plaint at page 24. This is dated 28th January 2008, i.e. just about four weeks after Gopal Sippy died. In this Mohini, very recent widowed, is supposed to have written or at least signed a letter addressed to the two Plaintiffs confirming her awareness of Gopal Sippy's commitment to sell what is described as "the above property" to the two Plaintiffs jointly. She is supposed to have said that she would see this done sooner rather than later and she would arrange to convey the property to them in compliance of Gopal Sippy's commitments. There is a signature and then there is a photograph across which she has signed. The subject of this letter is interesting because while it references an agreement for sale and names the two Plaintiffs, it now says that the agreement is *in respect of the plot of land with specific survey numbers and area and the tenanted building known as Gopal Mansion at Turner Road*. This is the first mention that we have of the land and the building. The plaint does not seek specific performance of Exhibit "D". It does not say that Exhibit "D" is an agreement between the Plaintiffs and the 1st Defendant. Exhibit "D" is materially at odds with Exhibit "B", the agreement of which specific performance is sought. Exhibit "D" also for the first time makes a reference to the 'tenanted property'. This overlooks the fact that many of the occupants of Gopal Mansion were in fact by then not tenants but co-owners.

12. Whether or not Gopal Sipply continue to hold interest in the land and the building jointly, it is clear that he did not continue to have *exclusive* ownership of the land and the building. To say, therefore, that in performance of the suit agreement of 1st August 2007 Gopal Sippy agreed to re-acquire such title as he had already conveyed and to make that over to the Plaintiffs strains credulity. There is nothing in the suit agreement that supports this or even acknowledges or accepts the existence of these third party interests, albeit joint interests. If Gopal Sippy was, according to the Plaintiffs, a joint owner or a co-owner, the pleadings in the plaint about the agreement would have to be specific and would have to say so. A decree would have to be sought against the individuals who held fractional interests, though undivided, to convey their shares to Gopal Sippy, so that he could perform the suit agreement. There is no such case.

13. Mr Narichania for the 3rd Defendant society says that the society and its members had already entered into a development agreement with the 5th Defendant, KBS Properties. The building is very old. That is evident. He says it is in a dilapidated condition. That is also evident *inter alia* from the age of the structure itself, and from photographs Mr Narichania shows me. The 3rd Defendant society has been in existence since March 2008 and the agreement between Mohini and Videocon is said to be of August of that year. Videocon has also paid stamp duty in August and obtained a conveyance. This is the reason for the amendment to the plaint which now challenges this conveyance in favour of Videocon and other documents.

14. Since the time of institution of the suit in 2008, the Defendants have been under a restraint from 29th September of that from creating third party rights. Between 2008 and 2010 there were also several changes in the land records. In 2017 KBS Properties apparently took over the redevelopment from Videocon.

15. The Notice of Motion was made absolute by an order dated 8th June 2016. Taking a view that there was no change in circumstances, the learned Single Judge confirmed the ad-interim order of 2008. On 11th February 2019 the matter was listed before me. I noted that the order of 8th June 2016 was possibly an inadvertent error since it made the Notice of Motion absolute despite the fact that Defendants Nos. 1 and 2 had by then already passed away. The order on the Motion was thus made without impleading their heirs, while also allowing an application to implead those heirs. By that time, the society had already filed its own Notice of Motion seeking impleadment. Videocon and KBS Properties were already on the scene as Respondents to the Plaintiffs' fresh Notice of Motion. Given this set of circumstances I recalled the order of 8th June 2016, to which none objected, while continuing the previous ad-interim order, restored the Plaintiffs' original Notice of Motion No. 3804 of 2008 and then passed certain directions for amendment, service and so on. It is after all this has been done that both Notices of Motion are before me.

16. The prayers in the first Notice of Motion No. 3804 of 2008 are, in my view, much too broad and cannot possibly be granted. They seek an omnibus injunction against the Defendants from selling, assigning, mortgaging, leasing, licensing or creating any third party rights, title and interest in respect of "the suit property". Then there is a prayer for Receiver. The fresh Notice of Motion No. 543 of 2019 seeks a restraint against the Defendants from carrying on any construction activities in addition to all the previous reliefs it already sought and also asks for a Receiver.

17. Any application of this kind will be tested against the usual parameters, which is to say whether the Plaintiffs have made out a prima facie case, and a test of where the balance of convenience lies.

As to the first, the prima facie case, I cannot say that I am in the least satisfied, for the reasons I have already indicated. There is an enormous discrepancy between the suit agreement's description of the property and the description of the property in the schedule to the plaint. There is also the unexplained discrepancy between the suit agreement at Exhibit "B" and Mohini Sippy's alleged letter at Exhibit "D". There is, prima facie, a constant attempt at expansion of the claim. On the face of it, it would prima facie seen that there is much in the agreement in question that requires explanation. Whether at all it constitutes a valid and enforceable agreement for sale of immovable property is in doubt. I am presently leaving aside all questions of stamp and registration.

18. Second, there is also the question of title and of possible non-joinder of necessary parties. At the time of the so-called suit agreement dated 1st August 2007, Gopal Sippy was not the only owner of the whole of the Turner Road property and Gopal Mansion. There were several other co-owners and they had, jointly with Gopal Sippy, an undivided share, right, title and interest in the land. The agreement does not specify the time for performance and it does not specify a manner of performance in these circumstances. It does not say whether Gopal Sippy was to re-acquire the shares of other co-owners or joint owners and make them over to the Plaintiffs. There is nothing in the agreement to indicate how this is to be done. This is not a case of one co-owner suing a third party to recover possession for the benefit of other co-owners who are not joined to the suit. This is a case of an outside demanding specific performance of a sale agreement that requires the principal obligor, now deceased, through his estate, to pass a complete title that he did not have at the time of the agreement. It also demands vacant possession, which, too the vendor did not have at the time of the agreement.

19. Exhibit "D" to the plaint is not a casual or immaterial document. It will require a great deal of explanation at the trial including as to the circumstances in which such a document, apparently at a condolence visit, came to be procured with the additional formality of a photograph of Mohini Sippy attached to it. I find it difficult to conceive of anyone while ostensibly condoling a bereaved widow also asking her to sign a document with her photograph on it. This may be many things, but a condolence it is not. There is also no explanation as to how this allegedly confirmatory document could be more expansive in terms of the property it describes than the agreement it purports to confirm.

20. On any equitable consideration, I see no reason why individual members living in a building that is old and clearly dilapidated as Mr Narichania's photographs show should be subject to this kind of a restraint. Two persons on payment of Rs. 10 lakhs cannot in equity put into jeopardy the lives, health and living conditions of dozens of others. Mr Rajadhyaksha, on instructions, submits that his clients have no objection to the 3rd Defendant and its members from carrying out repairs and renovations. The Plaintiffs' generosity is misconceived. I see no reason why courts should be assumed to be so ready to grant injunctions of this kind, ones that put at risk dozens of third parties.

21. Finally, if it is the Plaintiffs' case that despite the documents of 1949 to 1969 Gopal Sippy retained plenary rights in the entire property, then it was for these Plaintiffs — who describe themselves as experts in real estate — to define how that could ever have been, to spell out those complete rights and to show how they are capable of enforcement.

22. I find no merit at all in these Motions. Both are dismissed. There will be no order as to costs.

23. The previous ad-interim order is vacated forthwith. Mr Rajadhyaksha applies for its continuance. The application is rejected. That order has continued for far too long already.

(G. S. PATEL, J)