

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

INTERIM APPLICATION NO.159 OF 2019
IN
NOTICE OF MOTION (L) NO.2304 OF 2018
WITH
INTERIM APPLICATION NO.160 OF 2019
IN
NOTICE OF MOTION (L) NO.2659 OF 2014
IN
SUIT NO.461 OF 2010

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Mohammed Riyaz Shaikh and Others ...Applicants

In the matter between

M/s. Edit II Productions and Others ...Plaintiffs

vs.

Shoeb Mohammad Taj Mohammad Shaikh
and Others ...Defendants

Ms. Neeta Karnik, for the Applicants.

Mr. Rohaan Cama i/b. Ms. Sapana Rachure, for the Plaintiffs.

Ms. Kranti Anand, for Defendant Nos. 2 to 4.

Ms. Gajhala Khan, S.O to Court Receiver.

CORAM : N. J. JAMADAR, J.

RESERVED ON : 29th SEPTEMBER, 2022

PRONOUNCED ON : 21st OCTOBER, 2022

ORDER

1. The applicants/respondent Nos. 3 and 4 in Notice of Motion (L) No. 2304 of 2018 have taken out these applications.

2. In Interim Application No. 159 of 2019 the applicants have prayed for their appointment as the agents of the Court Receiver

with permission to continue in possession of Flat No. 704, 7th Floor, Evershine Woods, B3(3) Building, Mira Road (E), Thane (the subject premises).

3. In Interim Application No. 160 of 2019 the applicants have prayed for recall of the order dated 13th April, 2016 passed by this Court in Notice of Motion (L) No. 2659 of 2014 qua the subject premises and instead permit the applicants to deposit the booking amount received by the Evershine Builders Private Limited (the respondent No. 1) from defendant Nos. 2 to 4, in the Court.

4. By the said order this Court had permitted the plaintiffs to pay the balance consideration in respect of the subject property, which was then in the possession of the developer i.e. Evershine Builders Private Limited, the respondent No. 1, and take possession of the subject premises as agent of the Court Receiver with a right to create licence in respect thereof and appropriate the amounts towards such payments and hold the balance subject to the result of the suit.

5. The applicants seek that the aforesaid order permitting the plaintiffs to pay the balance consideration and take over the

possession of subject premises in the capacity of the agent of the Court Receiver be recalled and instead the applicants be permitted to deposit the booking amount received by Evershine Builders Private Limited (respondent No. 1) from defendant Nos. 2 to 4 which was an alternative prayer in the said Notice of Motion (L) No. 2659 of 2014

6. As is often the case, the alleged fraudulent acts of defendant Nos. 2 to 4 have led to multiple proceedings involving the parties who were not privy to the dispute between the plaintiff and defendant Nos. 2 to 4. Yet, shorn of unnecessary details, the background facts can be stated, as under:-

M/s. Edit II Productions, the plaintiff No. 1 (M/s. Edit), is a registered partnership firm. Mr. Shoeib Mohammed Taj Mohammed Shaikh, defendant No. 2, had been working as a Chief Accountant with the firm whilst it was still a proprietorship concern of Mrs. Binaifer Sanjay Kohli. Post conversion into a partnership firm, defendant No. 2 Shoeib Mohammed Taj Mohammed Shaikh continued to work as the Chief Accountant with M/s. Edit.

7. In the month of November, 2008 pursuant to investigation by Income Tax Department, it transpired that defendant No. 2 had

allegedly siphoned away a huge amount of over Rs. 3 Crores from M/s. Edit's accounts during 2005 to 2008 by forging the signatures of the authorized signatories. Several amounts were transferred to the account of defendant No. 3, wife of defendant No. 2, and third parties and properties were also purchased in the names of defendant Nos. 2 to 4. Criminal Prosecution was initiated against the defendant No. 2.

8. A suit being Suit No. 461 of 2010 came to be instituted against defendants seeking a decree in the sum of Rs.3,00,43,514/- and damages of Rs. 5 Crore. The plaintiffs also prayed for sale of the properties by the Liquidator appointed by this Court which were fraudulently acquired by defendant No. 2, by withdrawing the amount from the accounts of M/s. Edit by forging the instruments, either in his name and/or in the names of co-defendants and the proceeds so realized be appropriated towards the satisfaction of the decree which may be passed by the Court.

9. In the said suit, the plaintiff took out a Notice of Motion No. 543 of 2010. The defendant Nos. 3 and 4 made a statement on an affidavit that they will not dispose of and/or create any third party rights in respect of any of the properties which stood in their name.

Thereupon by an order dated 11th August, 2010 ad-interim application came to be disposed. In the wake of the criminal proceeding and the order passed by the learned Additional Chief Metropolitan Magistrate, Criminal Writ Petitions came to be filed in this Court. By an order dated 4th July, 2011 a learned single Judge of this Court while giving liberty to the plaintiffs to approach the learned Judge seized with the civil suit, ordered that until appropriate orders are passed the civil suit, neither defendant Nos. 3 and 4- the petitioners therein nor defendant No. 2 shall deal with the said properties, in any manner and maintain status-quo in respect thereof.

10. The subject premises was governed by the aforesaid orders.

11. In the meanwhile, by an order dated 13th April, 2016 passed in Notice of Motion No. 395 of 2012 along with connected Notice of Motions, including Notice of Motion No. 2538 of 2011, this Court passed several interim orders including appointment of the Court Receiver. Qua the subject premises i.e. Flat No. 704, this Court directed, inter alia, as under:-

(c) The Court Receiver shall pay to the Respondents to Notice of Motion (L) No. 2659 of 2014 the balance consideration for three properties forming part of the subject matter of that motion, namely, (i) Flat No.

704, 7th Floor, Evershine Woods, B3 (3) Building, Mira Road (East), Thane District, (ii) Shop No. 1072 on Ground Floor, Ease Zone, Goregaon (West), Mumbai, and (iii) Shop No. G044, Ground Floor, Express Zone, Patel Vanika, Western Express Highway, Malad (East), Mumbai-400 063 and take over the properties and handover possession thereof to the Plaintiff as agent of the Court Receiver. The payment of such balance consideration shall be funded by the Plaintiff;

(d) The Plaintiff shall, as such agent, be entitled to create licences in respect of these three properties and recover licence fees and appropriate the same upfront towards reimbursement of the payment of the balance consideration in terms of Clause (c) above, and retain the balance licence fees subject to further orders that may be passed by this Court in the suit.

12. It would be contextually relevant to note that pursuant to an order dated 7th August, 2018 in Court Receiver's Report NO. 161 of 2017 the plaintiffs deposited the balance consideration of Rs. 10 lakhs with Ever Shine Builders Private Limited under a covering letter dated 10th August, 2018.

13. While the said Notice of Motion awaited adjudication, the defendant No. 3, filed an affidavit on 16th September, 2015 stating that the subject premises was in her possession. In a further affidavit dated 13th October, 2015 also the defendant No. 3 reiterated that the subject premises was in her possession. However, on 15th September, 2015, the defendant No. 3 executed an agreement for sale professing to convey the subject premises in favour of the applicants herein and Mohammed Riyaz Shaikh, (respondent No. 5

in Notice of Motion (L) No. 2304 of 2018), the son of the applicants.

14. The plaintiffs thus took out a Notice of Motion (L) No. 2304 of 2018 seeking a declaration that the purported agreement dated 15th September, 2015 in respect of the subject premises was illegal, null and void and bad in law and did not bind the plaintiffs and also for a direction to the respondent Nos. 1 to 3 and 5 to 8 therein to take all necessary steps to cancel the agreement dated 15th September, 2015 by executing a necessary instrument and registering the same before the Registrar of Assurances and that the Court Receiver be directed to forthwith take physical possession of the subject premises and handover the same to the plaintiffs in terms of the order dated 13th April, 2016 and 7th August, 2018 passed by this Court.

15. The applicants were the parties to the said Notice of Motion and resisted the prayers therein by filing affidavits. The substance of the resistance was that the applicants were bonafide purchasers for value without notice of the pendency of the litigation and the restraint orders having been passed by this Court. The subject premises was purchased from defendant No. 3 for a valuable consideration of Rs. 45,65,000/- under a registered instrument. To

finance the said acquisition, the applicants had availed a housing loan of Rs. 28 lakhs from Punjab National Bank and the applicants were paying the installments thereof with interest thereon. The share certificate in respect of the subject premises was duly transferred in the name of the defendant No. 3 in the record of the Evershine Pine Building No. 1, 2, 3 and 4, a Co-Operative Housing Society Ltd. (respondent No. 5), and thus the applicants had no inkling of the alleged fraud.

16. By an order dated 5th September, 2019, this Court was persuaded to make the above Notice of Motion absolute in terms of the prayer clauses (a) and (c). It was declared that the agreement for sale dated 15th September, 2015 in respect of subject premises was illegal, null and void and bad in law and did not bind the plaintiffs, the respondent Nos. 1 to 3 and 5 to 8 therein including the applicants were directed to take all necessary steps to cancel the agreement for sale dated 15th September, 2015 within a period of four weeks and, in the event of default, the Court Receiver was directed to carry out the said exercise under the directions of this Court. Upon cancellation of the agreement, the Court Receiver was further directed to forthwith take physical possession of the subject premises with the assistance of local police and hand over the same

to the plaintiff and, thereafter, make a report as to possession of the subject flat.

17. The applicants thereafter took out these applications for the aforesaid reliefs. Additionally, an appeal was preferred by the applicants assailing the aforesaid order passed by this Court on 5th September, 2019. By a judgment and order dated 8th September, 2022, in Appeal No. 88 of 2020, the Appeal Bench was persuaded to dismiss the appeal. The Appeal Bench, inter alia, observed that in the facts and circumstances of the case, the aforesaid order passed by this Court on 5th September, 2019 was the only order that could have been passed on such an application and the Court could not countenance the continued subversion and undermining of the sanctity of the orders passed by this Court. And opining thus, application for continuation of ad-interim relief was also rejected.

18. The applicants, who had preferred these applications immediately after the order dated 5th September, 2019, moved these applications only after the dismissal of Appeal No. 88 of 2020.

19. I have heard Ms. Neeta Karnik, learned counsel for the applicants, Mr. Rohaan Cama, the learned counsel for the plaintiffs

and Ms. Kranti Anand, learned counsel for defendant Nos. 2 to 4 at some length. With the assistance of the learned counsel for the parties, I have perused the material on record including the averments in the plaint, the prayers in the Notices of Motion, which bear upon the issue sought to be agitated, and the orders passed by this Court and Appeal Bench.

20. Ms. Neeta Karnik, the learned counsel for the applicants made a strenuous effort to persuade the Court to consider the consequences which would befall the applicants who, according to her, are unsuspecting bonafide purchasers of the subject premises for valuable consideration. Ms. Karnik made an endeavour to premise her submissions on equitable consideration. It was urged that the transaction which the applicants had with defendant No. 3 has all attributes of a bonafide transaction. Firstly, it was for an optimum consideration of Rs. 45,65,000/-. Secondly, the applicants have availed loan from Punjab National Bank to finance the acquisition and that rules out any surreptitious transaction. Thirdly, the share certificate would reveal that subject premises stood in the name of defendant No. 3 and there was no material to demonstrate that the applicants had remotest notice of the pendency of the proceedings and/or the orders passed therein.

21. Ms. Karnik would further urge that these factors are required to be considered in conjunction with the nature of the reliefs claimed in the suit. Evidently, the suit is for recovery of the money which was allegedly fraudulently defalcated by defendant No. 2. Immovable property is not at all the subject matter of the suit. In fact, in the Notice of Motion (L) No. 2659 of 2014, the plaintiffs had prayed for a direction to the respondents to deposit the booking amount of the properties mentioned in the schedule, including the subject premises, received by them from defendant No. 2 or any of the defendants and, thereafter, the plaintiff be allowed to withdraw the said amount. Thus, the plaintiffs prime prayer was to chase and recover the money fraudulently withdrawn from the account of the plaintiffs by defendant No. 2.

22. In the circumstances, Ms. Karnik would urge that the applicants can be relived of the predicament of being thrown on the street, despite having parted with huge consideration, by directing the applicants to deposit the amount which was received by Evershine Builders Private Limited (respondent No. 1) from defendant No. 3 along with interest as may be determined by the Court.

23. Mr. Cama, the learned counsel for the plaintiffs stoutly resisted the submission on behalf of the applicants. The applicants, according to Mr. Cama, do not deserve any equitable relief as the applicants have moved these applications only after dismissal of the appeal by the Appeal Bench. Secondly, all the contentions, which Ms. Karnik now presses into service, were canvassed before this Court in Notice of Motion (L) No.2304 of 2018 and also before the Appeal Bench in Appeal No. 88 of 2020 and those submissions have been thoroughly considered and repelled. Therefore, at this juncture, according to Mr. Cama, the applicants cannot be permitted to re-agitate the same contentions. Mr. Cama further urged that the core issue that comes to the fore in these proceeding is, can a Court countenance a brazen disobedience of the orders passed by the Court to protect the subject matter awaiting the final determination of the suit. If the parties are permitted to flout the orders of the Court, with impunity, and then claim reliefs based on equitable considerations, the very integrity of the judicial process would be subverted, urged Mr. Cama.

24. I have given anxious consideration to the aforesaid submissions.

25. To start with, at this stage, it can hardly be contested that the subject premises was professed to be transferred under the agreement dated 15th September, 2015, in teeth of the orders passed by this Court. In the order dated 5th September, 2019, in Notice of Motion (L) No. 2304 of 2018, this Court recorded a categorical finding that the said agreement for sale entered into by and between the defendant No. 3 and the applicants was in breach of the injunction and status-quo orders and thus it was the duty of the Court to exercise its inherent powers under section 151 of the Code to set the wrong at naught or to treat the disobedient act not having taken place in the first instance by restoring the status-quo ante. It would be apposite to note, at this stage itself, to extract the observations in paragraph No. 18 of the judgment of the Appeal Bench in Appeal No. 88 of 2020.

18] If there be any doubt as to a particular provision under which Chagla J could have fashioned this order, we believe this is completely set to rest by the Supreme Court decision in by paragraph 27 of the Supreme Court decision in All Excise Bengal Licensees Association. We read that paragraph to mean that it is the duty of a court as a matter of policy – and we understand this to mean public policy – to set right a demonstrated wrong and to not allow the perpetuation of a wrongdoing. This is the inherent power available to every court under Section 151 of the Code of Civil Procedure, 1908, but it is also one that is to be exercised in the interest of justice and the public interest.

(emphasis supplied)

26. That aspect having attained finality, so far as this Court is concerned, the applicants now seek the modification of the order passed by this Court in Notice of Motion No. 2538 of 2011 dated 13th April, 2016, extracted above.

27. Ms. Karnik, sought to bank upon the the nature of the suit to draw home the point that in the absence of the substantive relief of delivery of possession of the subject premises, by way of interim order, the applicants cannot be dispossessed of the subject premises and, in any event, the suit being primarily for recovery of the money of which the plaintiff were allegedly defrauded, at best, the Court could have directed the Evershine Builders Private Limited (respondent No. 1) to deposit the booking amount which was received from defendant No. 3.

28. I am afraid in the absence of any challenge to the order passed by this Court on 13th April, 2016, at this length of time, the applicants would be justified in seeking the recall of the said order of allowing the plaintiffs to pay the balance consideration, take over the possession of the subject premises and occupy the same in the capacity of the agent of the Court Receiver and also enjoy the fruits thereof, for the only reason that there was an alternative prayer of

direction to Evershine Builders Private Limited (respondent No. 1) and other respondents to bring back the amount which was deposited by defendant No. 2. In fact, in the order dated 13th April, 2016, this Court categorically recorded that there was overwhelming prima facie evidence to show that the properties have been acquired from out of funds fraudulently siphoned off from the accounts of the plaintiffs by breach of trust and forgery.

29. Mr. Cama is justified in canvassing a submission that, the submission now forcefully canvassed by Ms. Karnik, about the nature of the suit was considered by the learned single Judge while passing the order dated 5th September, 2019 and also by the Appeal Bench in Appeal No. 88 of 2020.

30. The observations in paragraph Nos. 10 and 13 of the judgment in Appeal No. 88 of 2020 constitute a complete answer.

10] Ms Karnik's submission that one should look to the nature of the plaint does not impress us at all. We are concerned here with something that is far more fundamental. namely the sanctity of orders of the court. These are not to be treated as suggestions. Parties are not at liberty to offer undertakings and then act in breach of them thereby turning orders that accepted the undertakings into so much dust.

.....

13] We believe Ms Karnik's submission might suffer from the law of unintended consequences. If the principle that she canvasses is to be accepted, then

even receivership is immaterial, and a party is always at liberty to transact a property that is in custodia legis. An order of an injunction cannot logically stand on any other footing. An order of a court is an order of a court, and it cannot be allowed to be undermined. Nothing strikes at the authority of a court as much as a refusal or a failure to abide by its orders. We are being asked today to hold that precisely such a violation by Mumtaz is perfectly all right and indeed is not illegal. This is in the teeth of settled law.

(emphasis supplied)

31. Indeed, in prayer clause (c) of the plaint, the plaintiffs have prayed for the liquidation of the assets acquired by the defendant Nos. 2 to 4 by means of the funds fraudulently siphoned off. Ms. Karnik's submission also losses sight of the fundamental fact that the defendant Nos. 2 to 4 had no title to the money which was utilized to book the subject premises. In the orders referred above, it has been noted by this Court that, prima facie, legitimate title to the said money vested in the plaintiffs. All the accruals and accretions thus legitimately belong to the plaintiffs. Viewed from this perspective, the submissions on behalf of the applicants that the plaintiffs are only entitled to the money which was deposited by the defendant Nos. 2 to 4 with Evershine Builders Private Limited (respondent No. 1) and not the property which was acquired by utilizing the said money, does not merit countenance.

32. Lastly, the submission on behalf of the applicants based on

the consequences, which the execution of the order passed by this Court on 5th September, 2019 would entail, should persuade the Court to direct the alternative course of action, as suggested by the applicants, also do not merit acceptance as implicit in the said course of action is the unintended consequence of undermining and eroding the sanctity of the judicial orders passed by the Court. Therefore, at this juncture, in the face of two orders of this Court dated 13th April, 2016 passed in Notice of Motion No. 395 of 2012 and 5th September, 2019 passed in Notice of Motion (L) No. 2304 of 2018, it would be impermissible to entertain the prayers of the applicants to appoint them as the agents of the Court Receiver.

33. I find substance in the submission of Mr. Cama that all these submissions, premised on equitable consideration, which were urged with a degree of vehemence before this Court have been duly considered by the Appeal Bench.

34. It would be suffice to extract the observations in paragraph 22 of the judgment of the appeal Bench. It reads as under :-

22] Ms Karnik states that there was interim protection granted by a previous division bench of this court at the ad-interim stage on 8th November 2019. She seeks a continuance. Given the facts of this case, we are not inclined to continue the ad-interim protection. There is no case made out in law at all.

Equity lies against the Appellants. More than anything else, the application is an attempt to continue a subversion of the authority of the Court. Ms Karnik says that the Appellants have taken a loan and are paying EMIs. That is totally irrelevant. But if there was loan from a bank, it is inconceivable that full and proper title search was not done and that there was no public notice or none of the usual precautions were taken. Mr Karnik then says the Appellants could not possibly have known of Ganoo J's order. Even that is wrong. Every person in this commercial capital who transacts with property knows or is must be presumed to know precisely what he or she is doing. It was the obligation of these Appellants to check that Mumtaz did in fact have marketable title, i.e., title that was unclogged. The document in question is not of the kind as would be made by a person who is illiterate. It is a formal agreement for sale with witnesses and the three Appellants have all signed in addition to the mandatory thumb print procedure. The amounts paid were by cheque as can be seen. Ms Karnik then says that even the share certificates were transferred to the name of Mumtaz and therefore the Appellants had no way of knowing. We would have expected the shares to stand in the name of Mumtaz. It is unreasonable to say otherwise. But as Mr Cama points out even a cursory check with the society would have revealed that orders of this court were notified to the society itself. As to Ms Karnik's question about how the Appellants could have found out about orders of the court, perhaps the less said the better. This is not the only property in litigation and routine checks are conducted in a manner known to advocates about properties that are the subject matter of litigation. More particularly, as Mr Cama points out and perhaps in a very telling circumstance, the Appellants have made no application of any kind whatsoever nor brought any proceeding as at least as far as this record discloses against Mumtaz. The Appellants have got away with this for too long. A continued subversion and undermining of the sanctity of orders of this court cannot be tolerated. The Application for continuation of the ad-interim relief is rejected.

(emphasis supplied)

35. To conclude, the Court can only note that a party who enters into the transactions in respect of the property which is the subject matter of the proceeding, in the face of the orders of the Court affecting such property, does so at his own peril and can blame none than the self. The applicants can very well resort to the remedies which are available in law against their transferor. Resultantly, the prayers in none of the applications deserve to be countenanced.

Hence, the following order.

ORDER

Interim Application Nos. 159 OF 2019 and 160 of 2019 stand dismissed with costs.

(N. J. JAMADAR, J.)