

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

NOTICE OF MOTION NO.359 OF 2013

IN

SUIT NO.137 OF 2013

Gangji Ramji Chheda ... Applicant /
Plaintiff

Vs.

Hansraj Ramji Chheda & Ors. ... Defendants

Mr. P J Gada, Adv. i/b. M/s. Dhanuka & Partners for applicant /
plaintiff.

Ms. K Thakkar, Adv. i/b. Prashant Parsurampur, Adv. for
defendants.

CORAM : MRS. ROSHAN DALVI, J.

Date of reserving the Order : 8th June, 2015

Date of pronouncing the Order : 24th June, 2015

ORDER

1. The plaintiff and defendant No.1 are brothers. The plaintiff and defendant No.1 lived in flat No.204 in Anurag Building, 9, Banganga Cross Road, Walkeshwar. It belonged to their father. The father is stated to have bequeathed the flat under his will dated 18th June, 1988 to plaintiff and defendant No.1 jointly. Defendant No.1 was the executor. Defendant No.1 is stated to have written to the society in terms of father's will. Defendant No.1 has denied the letter or the father's will. Even if the father died intestate, the flat would belong to both brothers jointly.

2. The plaintiff and defendant No.1 are stated to have purchased another flat in Vile Parle being the suit flat No.302, Lily Kunj CHS Ltd. on 19th April, 1991. The defendant disputes that the

plaintiff paid any consideration and had purchased the Vile Parle flat. The defendant claims to have purchased it solely. The payment of consideration by the defendant is not disputed. The payment of consideration by the plaintiff is not shown except by a certificate of his Chartered Accountant without the substantiating documents for issue of the certificate. The plaintiff claims that he is presumed to have paid the consideration equally as has been paid by defendant No.1 as per the provision relating to joint transfer under Section 45 of the Transfer of Property Act, 1882.

45. Joint transfer for consideration. – Where immovable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equality interested in the property.

3. The plaintiff and his family started to reside in the flat at Vile Parle. The plaintiff and his family alone have possession of the said flat and pay outgoings of the flat. Defendant No.1 has neither possession nor any evidence of payment of outgoings.

4. It is the plaintiff's case that since both the brothers jointly owned two flats they entered into a family arrangement so that both

the brothers would own one flat and release one flat each. Two release deeds are stated to have been prepared by the common solicitor of the parties. Their solicitor has confirmed the same in his letter dated 14th July, 2012.

5. The plaintiff released his share in the Walkeshwar flat under the registered release deed witnessed by their solicitor.

6. Defendant No.1 failed to stamp and register the release deed releasing his share in the Vile Parle flat. In view of the relationship between the parties the plaintiff did not force the defendant to execute the release deed. Defendant No.1 instead called upon the plaintiff to vacate the Vile Parle flat. The plaintiff issued notice to the defendant to get the release deed in respect of the Vile Parle flat executed and offered to pay the additional stamp duty due to increase in the price with the passage of time.

7. The plaintiff claims the relief against any interference of the plaintiff's possession by defendant No.1 in Vile Parle flat. The plaintiff claims that pending the settlement of the dispute between the parties with regard to the Vile Parle flat, defendant No.1 shall not sell, alienate or transfer the Walkeshwar flat. The plaintiff claims these rights because the Vile Parle flat yet stands in the joint names of the two brothers though Walkeshwar flat does not stand in the name of the plaintiff.

8. It would be apt and appropriate that two brothers owning two flats but living in one flat each would release one flat each and own one flat each.

9. The plaintiff would claim that the consideration was paid out of the estate of the father which came to the hands of the plaintiff and the defendant equally upon his death. Defendant No.1 has not shown that consideration was paid by him from his separate fund or property. That aspect is a matter of evidence and shall be considered in the trial. If the judgment of the Supreme Court in the case of ***State of Maharashtra & Anr. Vs. B E Billimoria & Ors., (2003) 7 Supreme Court Cases 336*** in paragraph 5 it is held that as per the second paragraph of Section 45 of the Transfer of Property Act both joint holders would be presumed to be owners in equal shares when there was no evidence to the contrary.

10. Hence the plaintiff has made out a prima facie case for the grant of protective and prohibitory injunction pending the trial to see the extent of consideration paid by the brothers and the fund from which the consideration is paid by each of them.

11. Hence the following order :

The defendants shall not disturb the possession of the plaintiff in Flat No.302, Lily Kunj CHS Ltd. and shall not sell, alienate, transfer, encumber or part with possession or create any third party rights in respect of the Flat No.204 in Anurag Building at 9 Banganga Cross Road, Walkeshwar, pending the suit.

12. Written Statement of defendant No.1 is filed. Issues are framed as follows :

ISSUES

1. Whether the suit flat No.302, Lily Kunj CHS Ltd., in Anurag

Building,9, Banganga Cross Road, Walkeshwar was purchased by the plaintiff and defendant No.1 from the estate of their deceased father.

2. Whether the said flat was purchased by the plaintiff and defendant No.1 from consideration paid by both of them and if so how much.
 3. Whether the said flat was purchased in the joint names of the parties upon the consideration paid by defendant No.1 alone from his personal funds and of so which fund.
 4. Whether the parties entered into the family arrangement in respect of the two flats being flat Nos.204 and 302, Lily Kunj CHS Ltd., in Anurag Building,9, Banganga Cross Road, Walkeshwar.
 5. What relief, if any, is the plaintiff entitled to?
13. The plaintiff shall file his affidavit of evidence as also affidavit of documents within four weeks.
14. Notice of Motion is disposed of in terms of above order of injunction.

(ROSHAN DALVI, J.)