

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO. 384 OF 2014
WITH
CIVIL APPLICATION NO. 437 OF 2014**

Sudhakar Lobhaji Ghaitadkay Appellant/Applicant
Versus

Madhukar Lobhaji Ghaitadkay (since
deceased) :-

1a. Smt. Usha Madhukar Ghaitadkay & Ors. Respondents

Mr. Atul S. Tungare i/b. Amit A. Tungare for the appellant.
Mr. Girish M. Joshi for respondent no.1.

***CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATE : 26th FEBRUARY, 2018***

P.C. :

. The appellant who is the original plaintiff in SCC No.4777 of 2013, has challenged the impugned order dated 31st January, 2014 whereby the learned Judge, Bombay City Civil Court, Greater Bombay has dismissed the Notice of Motion No.630 of 2013. In the said Notice of Motion, the appellant had sought to restrain the respondent nos.2 to 5 from delivering and/or handing over possession of permanent alternative accommodation in favour of the respondent no.1 and or any other third party. The appellant had also sought to restrain the respondent nos.1 and 2 from transferring and alienating and/or selling

the shares of respondent no.2 held by the respondent no.1 and the permanent alternative accommodation allowed on the property of the respondent no.2 in lieu of the old tenement no.3/2.

2. Heard Mr. Atul Tungare, learned counsel for the appellant and Mr. Girish M. Joshi, learned counsel for respondent no.1. Other respondents are not present though duly served. I have perused the records and considered the submissions advanced by the learned counsels for the respective parties.

3. It is not in dispute that Lobhaji Nanaji Ghaitadkay, the father of the appellant and the original Respondent no.1 Madhukar, was the member of tenement no.3/2 at Mahatma Jyotiba Phule Co-operative Housing Society Ltd., Mahatma Jyotiba Phule Road now known as Vidyalaya Marg, Gavanpada, Mulund (E), Mumbai – 400 081. Upon the death of said Lobhaji, the shares of the society came to be transferred in the name of his widow Smt. Shantabai Lobhaji Ghaitadkay.

4. The respondent no.2/Society proposed re-development of the

property through the respondent no.3/firm of which respondent nos.4 and 5 are the partners. The records *prima facie* indicate that in lieu of the old tenement no.3/2, the respondent nos.3 to 5 have agreed to allot two flats in the proposed new building.

5. It is the case of the appellant that due to the old age, his mother Shantabai was unable to deal with the affairs of the society. Hence, he and his sisters authorized the respondent no.1 to deal with the affairs of the society on behalf of their mother-Shantabai. The petitioner claims that the original respondent no.1-Madhukar was elected as a secretary of the society and he transferred the flat in his own name without the consent of other legal representatives of Lobhaji.

6. The grievance of the appellant is that the original respondent no.1 is claiming exclusive rights over these flats by falsely alleging that the appellant and the other legal representatives of the deceased Lobhaji had surrendered their right, title and interest in the estate of the deceased Lobhaji and his wife in his favour. Whereas the respondent no.1 claims that the appellant and the other legal representatives of the deceased Lobhaji and his wife Shantabai had

executed a document dated 25th June, 1991 and thus surrendered their rights in respect of the said tenement and the other properties of Shantabai in his favour. In short, the respondent no.1 claims to be the exclusive owner of the tenement 3/2 and the flats allotted in lieu of the said tenement.

7. The learned Judge, mainly relying upon the document dated 25th June, 1991, has held that the appellant and the other two shareholders have relinquished their rights in the property of Lobhaji and his wife Shantabai in favour of respondent no.1. The learned Judge further held that the document being a family arrangement does not require registration. The learned Judge has further held that the grant of interim relief will stall development process. Based on these findings, the learned Judge dismissed the notice of motion.

8. The main contention of the Appellant is that the document dated 25th June, 1991 on the basis of which the respondent is claiming exclusive right to the suit flat is false and fabricated. This document, which is signed by the applicant and his sisters states that their mother Shantabai resides with their elder brother Madhukar Lobhaji Ghaitadke

and his family. Due to her old age, said Shantabai is unable to deal with the affairs of the Mahatma Phule Co- operative Housing Society. Hence, they have no objection to transfer the shares of the society, house no. 3 at Mulund and Room no. 2 in the name of the Respondent and that they are relinquishing their rights in favour of the respondent.

9. The sequence of words and the arrangement of sentences on page 2 of this document *prima facie* indicates that the contents regarding relinquishment of rights in respect of flat, house and room have been subsequently added and *prima facie* raises a doubt about its genuineness.

10. It is not also to be noted that the said document dated 25th June, 1991 is not registered. The learned Trial Judge has held that the document being a family arrangement, did not require registration. In this regard, it would be advantageous to refer to the decision in ***Bhoop Singh vs Ram Singh Major & Ors. AIR 1996 SC196*** wherein the Apex Court while considering the scope of section 17 Of the Registration Act has observed thus :

12.It needs to be stated that sub- section (1) of [section 17](#) mandates

that the instrument enumerated in clauses (a) to (e) shall be registered compulsorily if the property to which they relate is immovable property value of which is Rs.100/- or upwards. When the document purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest therein, whether vested or contingent, it has to be registered compulsorily. The Act does not define "instrument". Section 2(14) of the Indian Stamp Act, 1899, defines "instrument" to include every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded. Sub-section (2) of section 17 of the Act engrafts exceptions to the instruments covered only by clauses (b) and (c) of sub-section (1). ...

13. In other words, the court must enquire whether a document has recorded unqualified and unconditional words of present demise of right, title and interest in the property and included the essential terms of the same; if the document, including a compromise memo, extinguishes the rights of one and seeks to confer right, title or interest in praesenti in favour of the other, relating to immovable property of the value of Rs.100/- and upwards, the document or record or compromise memo shall be compulsorily registered.

14. In Tek Bahadur v. Debi Singh & Ors., AIR 1966 SC 292, the Constitution Bench of this Court considered the validity of the family arrangement and the question was whether it requires to be compulsorily registered under section 17. This Court, while upholding oral family arrangement, held that registration would be necessary only if the terms of the family arrangements are reduced into writing. A distinction should be made between the document containing the terms and recital of family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of section 17(2) of the Registration Act. It was held that a memorandum of family arrangement made earlier which was filed in the court for its information was held not compulsorily registrable and therefore it can be used in evidence for collateral purpose, namely, for the proof of family arrangement which was final and binds the parties. The same view was reiterated in Maturi Pullaiah & Anr. v. Maturi Narasimham & Ors., AIR 1966 SC 1836, wherein it was

held that the family arrangement will need registration only if it creates any interest in immovable property in present time in favour of the parties mentioned therein. In case where no such interest is created the document will be valid, despite it being non-registered and will not be hit by [section 17](#) of the Act.

11. In the instant case, by the document dated 25th June, 1991, the appellant and his sisters had allegedly relinquished their rights in respect of the the flat, house and a room in favour of the respondent. The document which extinguishes the rights of the appellant and his sisters and creates interest and right in favour of the respondent in respect of immovable properties required registration under section 17 of the registration act. The learned Judge has clearly erred in holding that the said document did not require registration. It is also to be noted that the appellant had not sought to restrain the respondent no.3 to 6 from developing the property. Hence, the findings of the learned Judge that the grant of relief would stall the development process are totally erroneous.

12. In the course of the hearing, it was submitted that the possession of one of the flats is already handed over to the respondent no.1. As stated earlier, flat no.3/2 was owned by the father of the appellant and

the respondent no.1. The document dated 25th June, 1991 being unregistered document cannot confer exclusive right, title or interest in favour of respondent no.1. In the absence of any valid transfer in his favour, the respondent no.1 cannot claim exclusive right or ownership in respect of the said flat as well as the second flat which is proposed to be handed over to him in lieu flat no. 3/2. Consequently, the respondent no.1 has no right to transfer or alienate the same without the consent of the other co-owners.

13. Under the circumstances and in view of discussion supra, the appeal is allowed. The impugned order is set aside. The respondent no.1 is restrained from transferring or alienating the flats, possession of which is given/proposed to be given to him by the respondent no.2 to 5, and/or from transferring or selling the shares in respect of the said flats till the disposal of the suit. Civil Application stands disposed of.

14. Suffice to say that the above *prima facie* observations shall not be construed as an expression or opinion on merits of the case.

(SMT. ANUJA PRABHUDESSAI, J.)