

Arun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 823 OF 2018
IN
NOTICE OF MOTION NO. 2435 OF 2011
IN
SUIT NO. 1978 OF 2011

Sajid Ismail Haji Noor Mohammad	...Applicant
<i>In the matter between</i>	
Sohail Ismail Haji Noor Mohammad Alias Suhail	...Plaintiffs
Ismail Furniturewala & Anr	
<i>Versus</i>	
Mohammed Ismail Haji Noor Mohammad & Ors	...Defendants

Mr Anup Abhang, *with Mr Ashish Gatagat, i/b Vidhi Partners, for the Plaintiffs.*

Mr Mikhail Behl, *with Amruta Sawant, i/b Sonal Doshi & Company, for Defendant No.2/Applicant in Notice of Motion No. 823 of 2018*

Ms Mitakshi Lakhani, *i/b Wadia Ghandy & Company, for Defendant No.4.*

CORAM: G.S. PATEL, J
DATED: 28th June 2018

PC:-

1. Heard.

2. The Motion is overambitious. It is filed by the 2nd Defendant seeking a dismissal of the Suit on the ground that the Plaint contains material suppression; and, specifically, that the Plaintiffs have suppressed the fact that they have 'divested' themselves of the property of which partition is sought in the Suit.

3. This is apparently based on a document dated 24th March 2006 signed by the Plaintiffs Nos. 1 and 2 with the 1st Plaintiff acting as the constituted attorney of 2nd Plaintiff. The document is at Exhibit "A" to the Affidavit in Support. It refers to a particular flat on the third floor admeasuring 410 sq ft carpet area in a building known as Noor Mahal, at Turner Road, Bandra (West), Mumbai 400 050. The argument is that along with this flat, a one-third right in further construction on the plot was also sold. Reference is also made to Clause 6 by which the two Plaintiffs apparently agreed to transfer the premises and their tenancy and ownership rights.

4. There are two difficulties in the 2nd Defendant's way. First, the prayer in the Suit is in regard to a Deed of Trust and a Sale Deed and these documents are impeached in prayer clause (a). Prayer clause (b) of the Suit seeks a declaration of the two Plaintiffs' one-fourth share each in the suit property and in mesne profits. Now the property in question is described in paragraph 5, or must be gathered from that paragraph, where the reference is to the entire plot, i.e. not just further development rights but rights that presently existed. Prayer clause (c) speaks of the Plaintiffs' claim to rights in respect of the premises on the ground floor and first floor of the Noor Mahal building. The document shown to me does not relate to these premises at all. What I am asked to do is to conjecture from

Clause 6 and the schedule that the reference to premises on the second floor and a one-third interest in the plot necessarily extends to the ground and first floor premises also and that this constitutes the kind of suppression sufficient to warrant a discretionary dismissal of the suit as being a fraud on the Court.

5. I am unable to do that. That is not the law.

6. The second problem in the 2nd Defendant's way is that the argument in the Motion necessarily means that the 2nd Defendant accepts the document of 24th March 2006 as valid and subsisting, i.e. that the 2nd Defendant accepts, first, that the Plaintiffs had title to the second floor premises and that they were legitimately entitled to dispose of it, and in fact did so. This is a matter that has to be tested at the time of trial. It does not lend itself to a summary decision.

7. There is indeed a long line of authority regarding false statements made in Plaints which entitle the Court to dismiss the suit at any stage. This suit does not fall in that category at all. This is not by any means a question of a fraud on the Court but a question of interpretation of documents, both for and against, and an evaluation of which of the parties had what extent of title to which premises.

8. The Notice of Motion in my judgment is misconceived. It is dismissed.

9. A preliminary issue under Section 9A was framed in the Suit. Evidence is complete. Parties and Advocates will coordinate with the Registry of this Court to re-arrange the record in a proper fashion with running pagination and an index. Preferably a separate compilation, corresponding to that of the advocates, and on white paper should be prepared for use by the court. If the compilation is in multiple volumes, there should be running paging for the entire record. The volumes are to be serially labelled, *Vol. 1 of XX*, *Vol. 2 of XX*, etc.

10. Once the record is arranged, it is to be digitized. Soft copies are to be made available to the Advocates of both sides on request and without charge.

11. List the matter on 8th August 2018 for hearing on the preliminary issue.

(G. S. PATEL, J)