

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 12th April, 2018.**

+ **CS(OS) 151/2018**

WASEEMA & ANR

..... Plaintiffs

Through: Mr. Sachin Chopra, Mr. Siddharth
Sharma and Mr. Himanshu Nailwal,
Advs.

Versus

SAEEDAH HAQUE & ORS

..... Defendants

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

IA No.4849/2018 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

CS(OS) 151/2018 & IA No.4848/2018 (u/O XXXIX R-1&2 CPC)

3. The two plaintiffs namely Waseema and Naseema, in this suit for partition, declaration, permanent and mandatory injunctions against their three siblings namely Saeedah Haque, Ahmed Mauji Khan and Amjad Ali Khan, seek (i) partition of property No.L-57, Abdul Fazal Enclave, Jamia Nagar, Okhla, New Delhi admeasuring 500 sq. yds., claiming to be entitled to 200 sq. yds. therefrom; (ii) declaration that the defendant No.1, by way of General Power of Attorney (GPA), Agreement to Sell and Affidavit dated 28th April, 2001 in favour of the plaintiffs transferred 200 sq. yds. of the said property to the plaintiffs and the defendant No.1 had no legal right to

transfer the property in favour of the defendant No.2 by executing the registered GPA dated 19th November, 2013; and, (iii) mandatory injunction and permanent injunction restraining the defendants from dealing with the property.

4. It is the plea of the plaintiffs (a) that the father of the parties, in the year 1989, had purchased the aforesaid property but in the name of the defendant No.1, being the eldest child; (b) that the defendant No.1 did not have any funds to purchase the property and the entire consideration was paid by the father of the parties and the defendant No.1 was holding the property in trust for the father; (c) that on 23rd June, 1990, the father of the parties formed “Saifi Trust for Education & Research” and the parties to the suit are the trustees of the said Trust; (d) that on 5th July, 1993, defendant No.1 transferred 100 sq. yds. out of the aforesaid property in favour of the defendant No.3 vide GPA and Agreement to Sell; (e) that on 29th December, 1994, the defendant No.1 let out the property to Saifi Trust for the purpose of running Saifi Public School in the property; (f) that thereafter on 28th April, 2001, defendant No.1 vide GPA, Agreement to Sell, Receipt of Consideration, Affidavit and Will transferred the undivided 300 sq. yds. out of 400 sq. yds. of the property, to the two plaintiffs and to the defendant No.2 in equal share, for a consideration of Rs.60,000/-; (g) that symbolic possession was delivered to the plaintiffs under the Rent Deed earlier executed in favour of Saifi Trust on 29th December, 1994; (h) that the father of the parties died on 14th November, 2011; (i) that the defendant No.1 issued a letter dated 21st November, 2013 to the plaintiffs stating that the registered GPA, Agreement to Sell and Will dated 30th April, 2011 in favour of the plaintiffs had been cancelled by the defendant No.1 vide a

Cancellation Deed dated 12th November, 2013; (j) that the plaintiffs replied to the said letter objecting to the cancellation and stating that the registered GPA and Will were irrevocable; (k) that a collusive suit was thereafter filed by the defendant No.2 before the Civil Judge, Saket District Courts, New Delhi claiming the entire 500 sq. yds. of the property on the basis of illegally executed GPA and Will in his favour by the defendant No.1; (l) that defendant No.3 also filed a Civil Suit No.9655/2016 challenging the sale of property in favour of defendant No.2 wherein the parties were referred to mediation and before the Mediation Cell, a settlement was arrived at between the defendant No.2 and the defendant No.3 whereunder the defendant No.3 agreed to take Rs.1,30,00,000/- in full and final settlement of the claims of defendant No.3; (m) that the plaintiffs were not informed of the order referring the parties to mediation and were not parties to the settlement aforesaid; (n) that in pursuance to the aforesaid settlement, the suit aforesaid was decreed; (o) that the plaintiffs came to know about the settlement only in March, 2018 and thereafter preferred a Regular First Appeal (RFA) before this Court and which is yet to be listed.

5. From the aforesaid narration in the plaint, it transpires that the rights of the plaintiffs in the property are under GPA, Agreement to Sell and Will only and which documents are admitted to have been cancelled/revoked by the defendant No.1 as far back as on 12th November, 2013 and intimation thereof received by plaintiff on 21st November, 2013. This suit has been instituted only on 10th April, 2018.

6. I have enquired from the counsel for the plaintiffs, how are the plaintiffs entitled to the relief of partition, when the plaintiffs as per their averments in the plaint, have no title to the property.

7. Though the Division Bench of this Court in *Asha M. Jain Vs. Canara Bank* (2001) 94 DLT 841 had taken judicial notice of transfer of properties in Delhi through the mode of Agreement to Sell, GPA and Will and treated the same as creating title in the property but the Supreme Court in *Suraj Lamp & Industries Pvt. Ltd. Vs. State of Haryana* (2009) 7 SCC 363 and (2012) 1 SCC 656 set aside the said judgment of the Division Bench of this Court and held that the said documents indeed do not create any title and only entitle the beneficiary thereof to secure title by suing for the relief of specific performance.

8. The plaintiffs in the present suit have not sued for specific performance of the Agreement to Sell by the defendant No.1 in their favour and have rather sought a declaration of ownership under the GPA, Agreement to Sell, Will and Affidavit in para (C) of the prayer paragraph of the plaint. The grant of such relief is in the teeth of the dicta aforesaid of the Supreme Court.

9. The claim of the plaintiffs in the plaint, insofar as the relief of declaration in para (C) of the prayer paragraph is concerned, is thus barred by law and is liable to be rejected.

10. Once it is so, the plaintiffs have no title to the property and are disentitled from seeking partition.

11. Not only so, under Article 54 of the Schedule to the Limitation Act, 1963, the limitation provided for claiming the relief of specific performance

is three years from the date fixed for performance and if no such date is fixed, then three years from the date the plaintiffs had first notice that performance is being refused.

12. The plaintiffs in the present case have admitted receipt of letter dated 21st November, 2013 from the defendant No.1 cancelling the Agreement to Sell, GPA and Will in favour of the plaintiffs and further claimed to have given a reply thereto. The plaintiffs have not sued for specific performance till now and have missed the bus therefor.

13. Similarly, the limitation provided in Article 58 of the Schedule to the Limitation Act for seeking a relief of declaration, is three years from the date of cause of action first accrues. The cause of action for declaration as bad of the cancellation effected by defendant No.1 of Agreement to Sell etc. in favour of plaintiffs accrued to plaintiffs on receipt of letter dated 21st November, 2013 and this suit has been instituted beyond the period of limitation provided therefor.

14. There is another aspect of the matter, the Agreement to Sell in favour of the plaintiffs, in Clause 10 thereof provides as under:

“10. That the actual physical possession of the above said property shall be claimed by the Second Party only after alternate of land is arranged by the trust for the school. However the Second Party shall be entitled to received all the benefits of the above said property by way of rent, lease etc. as fixed from time to time.”

15. The counsel for the plaintiffs, on enquiry, states that the trust and school are still in possession of the property as a tenant.

16. I have enquired from the counsel for the plaintiffs, whether the plaintiffs have been receiving the rent of their share of the property.

17. The counsel for the plaintiffs states that the plaintiffs have never received rent and the defendant No.1 must be receiving rent.

18. Therefrom also, it is evident that the Agreement to Sell was not acted upon and the plaintiffs, at least since 21st November, 2013, have not asserted any rights thereunder.

19. Clause 10 aforesaid also shows that the plaintiffs, owing thereto as well, are barred from seeking the relief of partition as is sought by appointment of a Commissioner and by division of the property by metes and bounds. It was a term of the Agreement to Sell in favour of the plaintiffs (which in any case has been revoked) that the plaintiffs will only be entitled to receive rent and nothing else. Thus, even if it were to be held that the plaintiffs have any entitlement, that entitlement is qua rent only and which has not been claimed.

20. The counsel for the plaintiffs, faced with the aforesaid, has contended (i) that the Agreement to Sell was by way of family settlement; (ii) that the cancellation vide letter dated 21st November, 2013 was of the GPA only and not of the Agreement to Sell; and, (iii) that the plaintiffs were expecting settlement of their dispute in the suit filed by the defendant No.3.

21. As far as the first of the aforesaid contentions is concerned, the counsel for the plaintiffs admits that no such family arrangement has been pleaded and the title claimed by the plaintiffs to the property is on the basis of Agreement to Sell and GPA. Rather, it is pleaded that the defendant No.1 was the benami owner of the property. However, no relief in that

regard has been claimed and rightly so inasmuch as the same would also be barred by time and Benami Transactions (Prohibition) Act, 1988. Moreover, the plaintiffs today are estopped from contending so, since the plaintiffs themselves, as far back as in the year 2001, by becoming privy to the Agreement to Sell by defendant No.1 in their favour and choosing to transact with the defendant No.1 admitted the title of the defendant No.1 to the property.

22. As far as the second argument is concerned, the plaintiffs themselves in para 14 of the plaint, have pleaded cancellation vide letter dated 21st November, 2013 of not only GPA but also Agreement to Sell and Will. The counsel for the plaintiffs however draws attention to the said letter, copy of which is filed at page 57 of the documents file and where the defendant No.1 has informed the plaintiffs of cancellation of the registered GPA and Will with respect to undivided 100 sq. yds. of the property in favour of each of the plaintiffs vide Cancellation Deed dated 12th November, 2013 and further cautioned the plaintiffs that they would thereafter no longer be empowered to do any act, deed or anything on behalf of the defendant No.1 with respect to the property or otherwise with respect to the property.

23. It is admitted that only the GPA and Will were registered and the Agreement to Sell was not registered. The cancellation of the registered documents which were executed as part and parcel of the Agreement to Sell and in pursuance of the Agreement to Sell thus amounts to cancellation of the Agreement to Sell as well and today it is not open to the counsel for the plaintiffs to contend otherwise. Moreover, from admission in para 14 of the plaint of cancellation thereby of the Agreement to Sell also, it is clear that

the plaintiffs also contemporaneously understood the letter dated 21st November, 2013 and are estopped from contending otherwise.

24. As far as the last contention aforesaid of the counsel for the plaintiffs is concerned, a perusal of the proceedings before the Mediation Cell and before the District Court on 14th December, 2017 shows that the Advocate for the plaintiffs herein was present before the District Court on that date and the suit filed by the defendant No.3 herein was disposed of in terms of the settlement and dismissed as withdrawn insofar as against the plaintiffs. The order dated 14th December, 2017 also shows that the counsel for the plaintiffs herein did not object to the decree passed in favour of the defendant No.3 herein who was the plaintiff in that suit. However, the District Court clarified that the same shall not affect the rights of the plaintiffs herein in the property.

25. I may in this context also notice that the counsel for the plaintiffs also sought to argue that the plaintiffs became entitled to file this suit only thereafter. However, on enquiry, as to how it could be so urged when there is no pleading to the said effect and how in law can it be claimed so, the said argument was not pressed.

26. Thus, whichever way one looks at, the suit is a non-starter and no purpose will be served in admitting the same and the same is dismissed. However, no costs.

A copy of this order be given *dasti*.

RAJIV SAHAI ENDLAW, J.

APRIL 12, 2018/bs