

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

NOTICE OF MOTION NO.2270 OF 2016
IN
SUIT NO. 494 OF 2014

Mohammad Ramzan Abdullah Chauhan
& Ors.

..Plaintiffs

v/s.

M/s. G.F.Reality Pvt. Ltd.

..Defendant

Mr. Kalpesh Joshi a/w. Ms. Nisha Shah for the Applicant/Plaintiff/s
Mr.A.N.Khatri for the Defendant.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 13TH MARCH, 2019.**

JUDGMENT.

1. The Plaintiffs herein have filed the Notice of Motion seeking following interim reliefs :

- (i) demarcation and earmarking of the commercial premises admeasuring 300 sq. ft carpet area on 4th floor of the building constructed in the suit property.
- (ii) To restrain the defendants from selling, transferring, alienating or creating third party right in respect of the said commercial premises admeasuring 300 sq.ft.
- (ii) To direct the defendant to execute an agreement for sale in respect of the said commercial premises; and

(iv) To appoint the Receiver in respect of the said suit premises.

2. Heard Mr.Joshi, the learned Counsel for the plaintiffs and Mr.Khatri, the learned Counsel for the defendant. I have perused the records and considered the submissions advanced by the learned Counsel for the respective parties.

3. The dispute in the present case is in respect of 300 sq. ft. carpet area on the fourth floor of the building constructed in the suit property under CTS No.E/798, situated at 5th Khar Road, Khar (W), Mumbai 400 053. The said area admeasuring 300 sq mts. shall be hereinafter referred to as “the suit premises”.

4. The suit property was purchased by one Sahira Akbar Hussein Abdulla by Deed of Sale dated 4th November, 1981. Said Sahira, expired in the year January 1982. Upon death of Sahira and her husband Akbar Hussein Abdula, their daughter Mrs. Iyesha Mohd. Farooq and son-in-law Mohd. Farooq Khatri, sold the suit property to defendants by Deed of Sale dated 23rd February, 2011.

5. The Plaintiffs claim that the suit property was in fact purchased in the name of Sahira Akbar Hussein Abdula Mistry by utilizing the funds of the partnership firm, and this was as per the mutual arrangement and agreement between the family members of Sahira, her husband and the other brothers who were the partners of the said partnership firm. It is alleged that Mr. Akbar Hussein Abdulla, husband of Sahira had kept the Conveyance Deed with the plaintiff no.1 in his safe custody.

6. The plaintiffs claim that by agreement dated 25th September, 2011 they have relinquished their right, title, interest in the suit property in favour of the defendant for consideration of Rs.15 lakhs and on allotment of suit premises. The plaintiffs claim that despite handing over of the title deed in respect of the suit property, the defendant has failed to execute and register an agreement in respect of the suit premises. Hence, the plaintiffs filed a suit for recovery of Rs.5 lakhs and for specific performance of the agreement dated 25th September, 2011.

7. The defendant has denied that the suit property was owned by the partnership firm or that it was purchased through the funds of the

partnership firm. The defendant has stated that the suit property was purchased by Sahira Akbar Husein Abdula Mistry by Deed of Sale dated 4th November, 1981. The defendant has claimed that the plaintiffs have set up a plea of benami transaction, which is hit by Section 4 of the Benami Transactions (Prohibition) Act, 1988. The defendant claims title to the property by virtue of sale deed dated 23rd February, 2011. The defendant has also denied having entered into any agreement dated 25th September, 2011 with the plaintiffs or having issued any allotment letter, and has further denied that it has agreed to pay to the plaintiffs a sum of Rs.15 lakhs and/or to allot the suit premises to the plaintiffs. The defendant has stated that the sum of Rs.15 lakhs was paid to the plaintiffs by way of loan.

8. The learned Counsel for the plaintiffs has strenuously argued that the suit property was purchased by utilizing the funds of the partnership firm. He has stated that the husband of Sahira was one of the partners and that the property was purchased in the name of Sahira for the sake of convenience and mutual understanding and agreement between the family members. He submits that the fact that the title deed of the suit property was kept with the plaintiff no.1 for safe custody sufficiently indicates that the partnership

firm had lien over the suit property.

9. He submits that the defendant by entering into an agreement dated 25th September, 2011 has acknowledged the right of the plaintiffs in the suit property. He has stated that though the agreement dated 25th September, 2011 is unregistered and there is no consideration, the same is covered by sub-Section 2 of Section 25 of the Contract Act. He further contends that the title document in respect of the suit property was kept with the plaintiff no.1 as security towards the loan advanced by the partnership firm. He therefore contends that the same constitutes mortgage within the meaning of Section 58(f) of the Transfer of Property Act. He submits that vide agreement dated 25th September, 2011 the plaintiffs have relinquished their right, title and claim in respect of the suit property on an assurance and promise by the defendant that it would pay to them a sum of Rs.15 lakhs and allot the suit premises. He contends that the said agreement which has been acted upon by the defendant, is not a void agreement in terms of section 25(2) of Specific Relief Act and can be specifically enforced. He has relied upon the decision of the Apex Court in ***The Commissioner of Wealth Tax, Mysore vs. Vijayaba, Dowger Maharani Saheb, Bhavanagar***

& Ors.

10. Mr. Khatri, the learned Counsel for the defendant submits that the property was owned by Sahira and that the defendant has purchased the property from the heirs of Sahira. He submits that the plaintiffs have failed to show that he has any right, title and interest in the suit property and as such the plaintiffs are not entitled for any interim relief.

11. The learned Counsel for the defendant further contends that the plaintiffs having set up a plea of benami transaction, the suit would be barred by the provisions of Section 4 of the provisions of Benami Transactions (Prohibition) Act. He further submits that the plaintiffs have not produced any material to show that the property was purchased through the funds of the partnership firm.

12. The learned Counsel for the defendant further submits that the plaintiffs are not in possession of the suit property. He urges that the suit for declaration without a prayer for recovery of the possession is not maintainable. In support of this contention, he has relied upon the decision

of the Apex Court in ***Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar vs. Chandran & Ors. 2017 (4) Mh.L.J. 809***

13. I have perused the records and considered the submissions advanced by the learned Counsel for the respective parties. It is not in dispute that the title document viz. the Sale Deed dated 4th November, 1981 is exclusively in the name of Sahira Akbar Hussein Abdula Mistry. The plaintiffs claim that the said property was purchased by the partnership firm in the name of Sahira through the funds of the firm. There is no prima facie material to prove that there was family arrangement between the husband of Sahira and his brothers to execute the Sale Deed in the name of Sahira or that the suit property was purchased by utilizing partnership funds. There is also no material on record to indicate that the property was ever treated as or shown to be a partnership asset. Prima facie, there is no merit in the contention that the property is a partnership asset, purchased in the name of the Sahira through the funds of the partnership funds.

14. Be that as it may, Section 2(a) of Benami Transaction (Prohibition) Act, as it stood prior to 2016 amendment, defined Benami Transaction to

mean any transaction in which property is transferred to one person for a consideration paid or provided by another person. Section 3 creates a bar on entering into any Benami Transaction except in two exceptions contained in sub-Section 2 of Section 3. Section 4 of the Benami Act contained a prohibition in respect of right to recover property held Benami. Sub-Section (1) of Section 4 provides that no Suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property. Sub-Section (2) of Section 4 has a likewise provision in respect of defence placed on a plea of Benami transaction. There were two exceptions to this restriction i.e. (a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.

15. In the instant case, the case is not covered by any of the exceptions in sub-section (2) of Section 3 or sub-Section (3) of Section 4 of the Act. Hence, even if the property is held Benami, in view of the bar under Section 4 of the Act, prima facie the plaintiffs cannot seek to enforce any right in respect of the suit property.

16. The submission of the learned Counsel for the plaintiffs that the husband of Sahira had mortgaged the property by depositing the title deeds cannot be accepted for want of pleadings. In fact, the submissions, which are sought to be advanced, are inconsistent with the pleadings.

17. In *Vijayba, Dowger Maharani Saheb (supra)* the Apex Court had observed that the assessee agreed to purchase peace for the family and to pay to her son the amount which fell short of Rs.50 lakhs, if elder son did not pay any portion thereof. It was held that such a consideration is a good consideration which brings about an enforceable agreement between the parties and the same is not hit by Section 25 of the Contract Act.

18. In the instant case, the plaintiffs have sought enforcement of an un-

registered agreement dated 25th September, 2011 under which the plaintiffs had allegedly relinquished their rights in the suit property for consideration of Rs. 5 lakhs and allotment of the suit premises. The plaintiffs having failed to prove that they have or had right, title or interest in the suit property cannot be heard to contend that they have relinquished their rights in the suit property or that payment of Rs 5,00,000/ and allotment of the suit premises was towards relinquishment of such non-existent rights. The said un-registered agreement is without any consideration and hence cannot be enforced. In the light of the above facts, the decision relied upon by the learned Counsel for the plaintiff is not applicable.

19. There is no dispute that the general principle postulated in section 25 of the Indian Contract Act, that an agreement without consideration is void, would not be applicable to those exceptional circumstances listed in the said Section . The exception under Section 25 (2) of the Act which is invoked by the plaintiffs, would cover cases where the person without the knowledge of the promisor, or otherwise than at his request, does the latter some service, and the promisor promises to compensate him for such service or act. The term "done something" would denote rendering of some

voluntary service and not merely returning of title documents. Thus, in my considered view, the provision of Section 25 (2) of the Contract Act is not applicable.

20. The plaintiffs have thus failed to prove the essential pre-requisites of grant of injunction viz. a prima facie case, balance of convenience and irreparable loss. Under the circumstances, the plaintiff is not entitled for any interim relief as prayed. Hence the motion is dismissed with no order as to costs.

(ANUJA PRABHUDESSAI, J.)