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

NOTICE OF MOTION NO.251 OF 2019
IN
SUIT NO.2539 OF 2009

Suhail Abdul Kadar Ishkay ...Applicant/ Defendant No.16

In the matter between
Nadeem Majid Oomerbhoy ...Plaintiff
vs.
Riyad Rashid Oomerbhoy (since deceased)
Through LRs and Others ...Defendants

Ms. Mehak Bookwala i/b. Zohair A. Zaidy, for the Applicant /Defendant No. 16.
Mr. Kirti Munshi a/w. Mr. Z.A. Jariwala and Mr. Ganesh Ambekar i/b. Thakore Jariwala & Associates, for the Plaintiff.
Mr. Rahul Singh a/w. Ms. Pranali Raut, for Defendant Nos. 2 to 4.
Ms. Uma Palsuledesai, AGP, for Ori. Defendant Nos. 13 to 17.
Mr. P.K. Nardele, O.S.D., Court Receiver present.

CORAM : N. J. JAMADAR, J.
DATE : FEBRUARY 16, 2021

ORAL ORDER

. This Notice of Motion is taken out by the Applicant/ Defendant No. 16 seeking (a) the appointment of the Receiver in respect of the premises situated at City Survey No.1711 of Byculla Division situated at 27-29, Ghellabhai Lane No. 2, Madanpura, Mumbai 400 008 along with the structure thereon (referred to as the “subject premises”); (b) to restrain the Plaintiff and Defendant

Nos. 8 and 9 by an order of injunction from alienating, parting with possession or creating any third party rights or encumbrances over the subject premises; (c) to appoint an architect-cum-valuer as Commissioner to ascertain and determine the market value of the subject premises and how the subject premises can be partitioned in the ratio 55% and 45%.

2. The suit is instituted for dissolution of partnership and for rendition of accounts. The subject premises is one of the assets of the partnership firm, 'Bombay Soap Factory' which was in existence between the Plaintiff Mr. Majid and original Defendant Nos. 1 to 3 and one Saleem. The parties are hereinafter referred to as *"Majid group"* and *"Sattar group".* The Defendant No. 16-Applicant came to be impleaded as a party-Defendant pursuant to an order dated 28th November, 2017 passed in Appeal No. 28 of 2016 in Chamber Summons No. 945 of 2013, on the basis of the minutes signed and tendered by the original Plaintiff and original Defendant Nos. 8 and 9.

3. The Applicant avers that Majid group has 45% share in the said firm whereas Sattar group had 55% share therein. The

Applicant claims to have acquired undivided interest of "Sattar group" in the subject premises. The applicant was put in possession thereof. Post acquisition, the Applicant has developed the subject premises, removed the encroachments and also paid the taxes and charges.

4. On 27th November, 2018 the applicant found that the subject premises was put under a lock. The Plaintiff, by exercising undue influence over the police authorities, obtained a communication from the Applicant /Defendant No. 16 dated 28th November, 2018 to the effect that the Plaintiff is in actual occupation and possession of the subject premises. In fact the Plaintiff has never been in possession of the subject premises. Thus, the Plaintiff had sought relief of recovery of possession of the subject premises from the Defendants including Defendant No. 16.

5. The partnership firm stood dissolved as of 8th December, 1991. The principal contest is between the Plaintiff and Defendant Nos. 1 to 6, 8 and 9. In view of the indubitable fact that the assignors of the Applicant have 55% share in the subject premises, it would be expedient to appoint an architect and valuer

to ascertain the valuation of the property and the manner in which it can be partitioned. In the alternative, the Applicant is willing to buy out 45% share of the original Plaintiff and Defendant Nos. 8 and 9 at a valuation that may be suggested by the valuer appointed by the Court. Hence, this Notice of Motion.

6. The Plaintiff has resisted the Notice of Motion by filing an affidavit in reply. The Notice of Motion is stated to be misconceived and untenable. The Applicant/Defendant No. 16 is guilty of *suppressio veri and suggestio falsi*. The Applicant has no right, title and interest in the subject premises. The Plaintiff had all along been in a possession of the subject premises. The Plaintiff was unauthorizedly dispossessed by Defendant Nos. 1 to 6 from Madanpura property. However, Plaintiff has established possession over the subject premises on 22nd March, 2017. Since then, the Plaintiff has been in exclusive possession of the subject premises. As the Applicant made an unlawful attempt to forcibly establish possession over the subject premises, on 27th November, 2018 the Plaintiff had taken recourse to public authorities. The Deed of Assignment is illegal and inadmissible in evidence for want of registration as well as inadequate stamp duty thereon.

Deed of Assignment thus does not confer any interest in the subject premises. On these, amongst other, grounds the Plaintiff has prayed for dismissal of Notice of Motion.

7. Applicant has filed additional affidavit; to which a further reply is filed on behalf of the Plaintiff.

8. In the wake of the aforesaid pleadings, I have heard Ms. Mehak Bookwala, the learned counsel for the Applicant /Defendant No. 16 and Mr. Kirti Munshi, the learned counsel for the Plaintiff at a considerable length.

9. It was urged on behalf of the Applicant that the Applicant had lawfully entered into the transaction with 'Sattar group' and acquired 55% share in the subject premises for a valuable consideration of Rs. 25 Lakhs. Under the Deed of Assignment, the Applicant was put in possession of the subject premises. The Applicant had taken steps to repair the subject premises and even removed the encroachment thereon. In the aforesaid backdrop the Plaintiff, by taking undue advantage of the proximity with the police authorities, obtained certain communication which does not reflect the true state of facts.

10. Inviting the attention of the Court to the averments in the Plaint, especially paragraph 8(FFF) to 8(OOO), which were incorporated by way of an amendment, the learned counsel for the Applicant strenuously urged that the very fact that the Plaintiff has sought the relief of possession and even appointment of Court Receiver establishes that the Plaintiff is not in possession of the subject premises. It was further urged that the Applicant can not be dragged for eternity in view of the dispute between "Majid group" and "Sattar group". As there is no dispute about the shares of the rival factions in the subject premises, it would be in the interest of justice to direct that the subject premises be partitioned and the Applicant may be put in possession of the corresponding share of his assignors.

11. In opposition to this, it was submitted on behalf of the Plaintiff that the claim of the Applicant on the strength of the Deed of Assignment is legally unsustainable. Being an assignee of undivided interest of the partners, the Applicant can have no right except to have the share of his assignors at the time of winding up of the assets of the suit firm. It was further urged that, the Deed of Assignment suffers from legal infirmities. Firstly, it is in

contravention of an express stipulation in the Partnership Deed. Secondly, it is inadmissible in evidence for want of registration and insufficiency of the stamp duty on the said instrument.

12. On facts it was urged, with a degree of vehemence, that from the very communications addressed on behalf of the Applicant, it becomes abundantly clear that the Applicant is not in possession of the subject premises. Thus, the Applicant is not entitled to seek the relief of injunction and appointment of Receiver against the Plaintiff who is in lawful possession thereof.

13. To start, with the aspect of possession which bears upon the relief of appointment of Receiver and injunction. Under the Deed of Assignment dated 6th June, 2011 the "Sattar group" professed to assign and transfer undivided share, right, title and interest in the subject premises in favour of the Defendant No. 16. It was, inter alia, provided that the assignors had transferred 55% of the share in the subject premises on *"as is where is"* basis for a consideration of Rs. 25 Lakhs.

14. Evidently, the Deed of Assignment constitutes the edifice of

the claim of the Applicant. An endevour was made on behalf of the Applicant to demonstrate that under the Deed of Assignment dated 6th June, 2011, the Applicant was put in possession of the subject premises. The averments in the Plaint at paragraph 8(FFF) to 8(OOO) were pressed into service to substantiate the said claim of possession.

15. In contrast, the communication dated 28th November, 2018 addressed on behalf of the Defendant No. 16 records that since the mater is subjudice the Defendant No. 16 did not intend to disturb the Plaintiff's claim for possession in any manner. Nor the Defendant No. 16 was intent on taking possession of the subject premises without following due process of law. To this communication, a reply was addressed on 30th November, 2018 wherein it was asserted that the Plaintiff is in actual physical possession of the subject premises and that on 27th November, 2018 the Defendant No. 16 had made an effort to forcibly establish the possession over the subject premises. This claim was sought to be joined on behalf of Defendant No. 16 by a communication dated 3rd December, 2018.

16. The situation which thus obtains is that as of 28th November, 2018 the Defendant No. 16 had positively asserted that he was not in possession of the subject premises. On the contrary, it was claimed that the Defendant No. 16 was not desirous of causing obstruction to the possession of the Plaintiff and establishing his own possession over the subject premises. It is not the case that the Defendant No. 16, at that point of time, claimed that the Plaintiff had tried to forcibly dispossess the Defendant No. 16 of the subject premises.

17. It is true that the averments in paragraph 8(FFF) to 8(OOO) in the Plaint do indicate that the Plaintiff had sought possessory relief against the Defendants including Defendant No. 16. The learned counsel for Defendant No. 16 urged that re-verification of the Plaint was made on 22nd January, 2018. Had the Plaintiff been in possession of the subject premises, the aforesaid assertions in the Plaint would not have been incorporated, urged Ms. Bookwala.

18. The aforesaid submission is required to be appreciated in the backdrop of the fact that there are communications which were addressed on behalf of the Defendant No. 16 by the learned

advocate which unmistakably suggest that Defendant No. 16 was not in possession of the subject premises.

19. This leads me to the prayer of appointment of Commissioner to carve out the portion of the subject premises proportionate to the share of applicant's assignors. As indicated above, the edifice of the Plaintiff's claim rests on the assignment of its share in the partnership firm by 'Sattar group'. Status of Defendant No.16 is essentially that of a transferee of the partners' interest.

20. Mr. Kirti Munshi, the learned counsel for the Plaintiff submitted that the transferor-partners had no authority to transfer the assets of the firm, express or implied. On the contrary, there is express prohibition in the Partnership Deed against the assignment of interest.

21. Clause 16 of the Partnership Deed dated 1st January, 1963 read as under:

> *"No partner shall assign, transfer, sell, mortgage, change or otherwise deal with his share in the partnership property or form any sub partnership with any other person or persons or take any person or persons in the partnership without the previous written consent of the other partners and if any partner acts to the contrary, such actions shall not be binding upon the other partners or partnership assets."*

22. Mr. Kirti Munshi, the learned counsel for the Plaintiff further urged that even if the legal challenge to the transfer of the interest in the partnership firm by the applicant's/transferors, "Sattar group" is discounted, yet, at this stage of the proceeding, the Defendant No. 16, being a transferee cannot enforce his rights.

23. The rights of transferee of partner's interest are governed by Section 29 of the Indian Partnership Act, 1932, which reads as under:

> *29. Rights of transferee or a partner's interest—*
>
> *(1) A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a change on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners.*
>
> *(2) If the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.*

24. On a plain reading, the text of aforesaid section indicates that sub section (1) circumscribes the rights of the transferee of

the partner's interest in the firm during the subsistence of a partnership in two ways. One, it disentitles the transferee from interfering with the affairs of the firm, demanding accounts, and inspecting the books of the firm. Two, the entitlement of the transferee is restricted to receiving the shares of profits of the transferor partner with a rider that the transferee shall accept the accounts of profits agreed to by the partners. Sub section (2), on the other hand, addresses the contingency of the rights of the transferee in the event of dissolution of the firm or the transferor partner ceasing to be a partner of the said firm. In that eventuality, the transferee is entitled to receive the share of the assets of the firm to which the transferor is entitled and even to demand an account as from the date of the dissolution, for the purpose of ascertaining the share of the transferor partner.

25. In the light of the aforesaid nature of the rights of transferee of the interest of the partner, Mr. Kirti Munshi would urge that the applicant is not entitled to work out his remedies in this proceeding and at this stage.

26. To bolster up the aforesaid submission, the learned counsel

for the Plaintiff placed a strong reliance on the judgment of the Supreme Court in the case of **Addanki Narayanappa and Another vs. Bhaskara Krishtappa and Others**[1] wherein after adverting to the provisions contained in the Partnership Act and the pronouncements on the subject, it was enunciated that,

> *7. It seems to us that looking to the scheme of the Indian Act no other view can reasonably be taken. The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done whatever is brought in would cease to be the trading asset of the person who brought it in. It would be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership. The person who brought it in would, therefore, not be able to claim or exercise any exclusive right over any property which he has brought in, much less over any other partnership property. He would not be able to exercise his right even to the extent of his share in the business of the partnership. As already stated, his right during the subsistence of the partnership is to get his share of profits from time to time as may be agreed upon among the partners and after the dissolution of the partnership or with his retirement from partnership of the value of his share in the': net, partnership assets as on the date of dissolution or retirement after a deduction of liabilities and prior charges. It is true that even during the subsistence of the partnership a partner may assign his share to another. In that case what the assignee would get would be only that which is permitted by s. 29(1), that is to say, the right to receive the share of profits of the assignor and accept the account of profits agreed to by the partners.*

> *8. We may also refer to the decision of a Full Bench in*

1 (1966) 3 SCR 400.

> *Ajudhia Pershad Ram Pershad v. Sham Sunder & Ors. in which Cornelius J., has discussed most of the decisions we have earlier referred to in addition to several others a id reached the conclusion that while a partnership is in existence no partner can point to any ,part of the assets of the partnership as belonging to him alone. After examining the relevant provisions of the Act, the learned judge observed:*
>
> > *These sections require that the debts and liabilities should first be met out of the firm property and thereafter the assets should be applied in rateable payment to each partner of what is due to him firstly on account of advances as distinguished from capital and, secondly on amount of capital, the residue, if any, being divided rateably among all the partners. <u>It is obvious that the Act contemplates complete liquidation of the assets of the partnership as a preliminary to the settlement of accounts between partners upon dissolution of the firm and it will, therefore, be correct to say that, for the purposes of the, Indian Partnership Act, and irrespective of any mutual agreement between the partners, the share of each partner is, in the words of Lindley : "his proportion of the partnership assets after they have been all realised and converted into money, and all the partnership debts and liabilities have been paid and discharged." This indeed is the view which has commended itself to us.</u>*

(emphasis supplied)

27. Reliance was also placed on another judgment of the Supreme Court in the case of **Sunil Siddharthbhai vs. Commissioner of Income Tax, Ahmedabad, Gujrat**[2] wherein, after relying upon the aforesaid observations in the case of *Addanki*

2 (1985) 4 Supreme Court Cases 519.

Narayanappa (supra), it was enunciated that,

> *13. It is apparent, therefore, that when a partner brings in his personal asset into a partnership firm as his contribution to its capital, an asset which originally was subject to the entire ownership of the partner becomes now subject to the rights of other partners in it. It is not an interest which can be evaluated immediately, it is an interest which is subject to the operation of future transactions of the partnership, and it may diminish in value depending on accumulating liabilities and losses with a fall in the prosperity of the partnership firm. The evaluation of a partner's interest takes place only when there is a dissolution of the firm or upon his retirement from it. It has some times been said, and we think erroneously, that the right of a partner to a share in the assets of the partnership firm arises upon dissolution of the firm or upon the partner retiring from the firm. We think it necessary to state that what is envisaged here is merely the right to realise the interest and receive its value. What is realised is the interest which the partner enjoys in the assets during the subsistence of the partnership firm by virtue of his status as a partner and in accordance with the terms of the partnership agreement. It is because that interest exists already before dissolution, as was held by this Court in Malabar Fisheries Co. (supra), that the distribution of the assets on dissolution does not amount to a transfer to the erstwhile partners. What the partner gets upon dissolution or upon retirement is the realisation of a pre- existing right or interest. It is nothing strange in the law that a right or interest should exist in praesenti but its realisation or exercise should be postponed. Therefore, what was the exclusive interest of a partner in his personal asset is, upon its introduction into the partnership firm as his share to the partnership capital, transformed into a shared interest with the other partners in that asset. Qua that asset, there is a shared interest. <u>During the subsistence of the partnership the value of the interest of each partner qua that asset cannot be isolated or carved out from the value of the partner's interest in the totality of</u>*

<u>the partnership assets. And in regard to the latter, the value will be represented by his share in the net assets on the dissolution of the firm or upon the partner's retirement.</u>

(emphasis supplied)

28. The observations of the learned single Judge of the Gujrat High Court in **Rajnikant Hasmukhlal Golwala and Ors. vs. Natraj Theatre, Navsari and Ors.**[3] were also pressed into service to buttress the submission. In the said case, it was observed that:

> *25. <u>Looking to the provisions of the Act, it Is very clear that no partner can sell any part of the assets of the partnership firm as belonging to him and this being the position, no partner can ever validly sell or dispose of any of the partnership property as his own property. Partnership property vests in the firm and it does not vest in any of the partners and therefore it would not be possible for any partner to pinpoint any portion of the partnership property as his own property.</u>*
> *26. A partner cannot deal with any portion of the partnership property as his own property for the reason that he is not like a co-owner of the property. <u>A co-owner, without the consent of other co-owners, can transfer his interest to a third party and in that event, the third party shall have the same rights which the transferor had and the transferor shall be put in the same position as regards the other co-owners as the transferor himself was before the transfer. By virtue of the provisions of Section 29 of the Act, position of a transferee of a partners interest would not be the same as a transferee of a co-owner's interest. Thus, there being a difference in the partnership and co-ownership, defendant No. 12 shall not have any right which his transferee (transferor) partners had in the partnership property.</u>*

(emphasis supplied)

3 1999 SCC Online Guj 257

29. The learned counsel for the Applicant stoutly submitted that the aforesaid pronouncement do not advance the cause of the Plaintiff. In the case at hand, the Plaintiff has approached the Court with a positive case that the firm stood dissolved on 8th October, 1991. The assignment in question, therefore, cannot be said to have been made during the subsistence of the partnership. The aforesaid pronouncements, therefore, according to the learned counsel for the Applicant do not apply with equal force to the case at hand.

30. The submission of Ms. Bookwala as regards the distinct consequences of assignment of interest of a partner during subsistence of a partnership and after dissolution thereof is worthy of acceptance. In law distinction exists between the right of partners to sell a property during subsistence of the partnership and the right of an earstwhile partner to sell the property of the firm after it stood dissolved. (**M.V. Karunakaran vs. Krishnan**[4]). However, I find it rather difficult to accede to the submission of Ms. Bookwala to the extent the learned counsel desires it. As indicated above, Section 29 of the Act, 1932 states as to what would be the interest of a transferee of a partner. Sub section (2)

4 (2009) 17 Supreme Court Cases 334.

thereof determines the right of a transferee if the firm is dissolved or if a transferring partner ceases to be a partner thereof. It is trite that what is meant by a share of a partner is his proportion of the partnership assets after they have been all realized and converted into money and all the partnership debts have been paid. The Applicant has, on his own showing, acquired undivided interest of 'Sattar group' in the subject premises. The suit is instituted for dissolution of partnership and for the rendition accounts. The Applicant's rights would, thus, be governed by the provisions contained in Section 29 of the Act.

31. The question as to whether the assignment is legally valid does not warrant conclusive determination in the instant Notice of Motion. The learned counsel for the Plaintiff, however, mounted a two pranged attack on the validity of the assignment, apart from the competence of the assignor to transfer undivided interest in the subject premises. One, the instrument is insufficiently stamped. In view of the provisions contained in Maharashtra Stamp Act, 1958 the Court is enjoyed to impound the instrument. Two, since undivided interest in the leasehold rights in the subject premises was sought to be transferred under the Deed of

Assignment, it is required to be compulsorily registered under Section 17 of the Indian Registration Act, 1908 and for want of registration can not be admitted in evidence under Section 49 of the said Act.

32. To lend support to the aforesaid submission, the learned counsel for the Plaintiff placed reliance on the judgments of the Supreme Court in the case of **Garware Wall Ropes Limited vs. Coastal Marine Construction and Engineering Limited**[5] and of the Bombay High Court in the case of **Deepak Corporation, Bombay vs. Pushpa Prahlad Nanderjog**[6].

33. Ms. Bookwala, the learned counsel for the Applicant /Defendant No. 16, on the other hand, urged that at this stage of consideration of grant of interim relief, the question of insufficiency of stamp duty ought not to detain the Court from exercising the discretion to grant relief. To bolster up the aforesaid submission, Ms. Bookwala banked upon the judgments of this Court in the case of **Dr. Mahendra Kumar Modi and Anr. vs. Gujarat State Fertilizers and Chemicals Ltd.**[7] and **Marine**

5 (2019) 9 SCC 209.
6 1995(1) Mh.L.J. 489.
7 2017 (3) Mh.L.J. 114.

Containers Services (I) Pvt. Ltd. vs. Rajesh Dhirajlal Vora[8] and **Gandhi Builders & Developers vs. Shyamlal s/o Ramchandra Yadav and Ors.**[9]**.** Reliance was also placed on the Full Bench judgment of this Court in the case of **Gautam Landscapes Pvt. Ltd. vs. Shailesh S. Shah and Anr.**[10]**.**

34. As a second limb of her submission, the learned counsel for the Applicant invited the attention of the Court to a judgment in the case of **IL & FS Financial Services Limited vs. SKIL Infrastructure Limited & Ors.**[11] wherein this Court had impounded the instrument while passing an order of grant of conditional leave to defend the suit.

35. In the backdrop of the view which this Court is persuaded to take, on the legal premise, as regards the right of the transferee of the partners' interest under section 29 of the Indian Partnership Act, and, on factual premise, on the aspect of the factum of possession albeit, *prima facie*, it does not appear to be absolutely necessary to delve into the aspect of the insufficiency of the stamp duty on the instrument in question and the consequent action

8 2001 (4) Mh.L.J. 353
9 Appeal against Order No.102 of 2014 dated 23rd April, 2015
10 2019 (3) Mh.L.J. 231
11 SJ. No.30 of 2019 in Comss No.779 of 2019 Dt.18/02/2020

envisaged by the provisions of Maharashtra Stamp Act. The said aspect as well as the issue of admissibility of the said instrument in evidence, for want of registration, can be appropriately dealt with when the Defendant No. 16 proposes to introduce the said document in original.

36. The learned counsel for the Defendant No. 16 lastly urged that in another proceedings between the same parties, this Court had permitted the distribution of assets at an intermediate stage. A judgment of the learned single Judge dated 8th July, 2014 in Notice of Motion No. 2485 of 2012 in Suit No. 671 of 2002 was pressed into service in support of the aforesaid submission. From the perusal of the order, in the said case, it becomes evident that a preliminary decree was already passed therein with the consent of the parties and, thereafter, the Court had passed orders directing the parties to elect.

37. The learned counsel for the Plaintiff, on the other hand, submitted that the Plaintiff be permitted to deposit a sum of Rs. 25 Lakhs, which Defendant No. 16 had paid to 'Sattar group' and thereupon, appropriate reliefs be granted in favour of the Plaintiff.

38. It would be suffice to note that this invitation to pass interim orders which take colour of final adjudication deserves to be declined. The Plaintiff had made such offer in Appeal No. 546 of 2015 in Notice of Motion No. 148 of 2013 in Suit No. 253 of 2009. After noting the said submission, the Appeal Bench observed that the issue could be resolved in the trial. Thus, the aforesaid submissions on behalf of the Applicant and Plaintiff to consider the prayers which can be legitimately considered at the final adjudication, do not deserve countenance.

39. The upshot of the aforesaid consideration is that the Defendant No. 16-Applicant has not made out a prima facie case for grant of interim relief both on factual and legal premise. The Applicant/Defendant No. 16 entered into the transaction with 'Sattar group' being fully aware of the character of the property. Now the Defendant No. 16 cannot be heard to submit that he may be insulated from the vicissitudes of litigation. Resultantly, Notice of Motion deserves to be dismissed. Hence, the following order:

ORDER

Notice of Motion stands dismissed.

It is hereby made clear that the observations hereinabove have been made for the purpose of determination of the prayers in Notice of Motion and shall not be construed as an expression of opinion on the merits of the rival claims to be finally adjudicated.

Suit be listed for direction on 16th March, 2021.

(N. J. JAMADAR, J.)