

(2005) 04 AP CK 0079

In the Andhra Pradesh High Court

Case No : C.C.C. Appeal No. 7 of 1981 and C.M.P. No's. 18370 of 1989, 8419 of 1991 and 164 of 2005

S. Mohammed Anwaruddin (Died) per L.Rs.

APPELLANT

Vs

Smt. Dr. Sabina Sultana

RESPONDENT

Date of Decision : 29-04-2005

Acts Referred:

Andhra Pradesh Housing Board Act, 1956 — Section 71
Contract Act, 1872 — Section 17, 23
Evidence Act, 1872 — Section 103

Citation : AIR 2005 AP 508 : (2005) 4 ALD 566 : (2005) 4 ALT 597

Hon'ble Judges : A. Gopal Reddy, J

Bench : Single Bench

Advocate : Kalyan Rao Joshi and N.V. Suryanarayana Murthy, for Ch. Dhanamjaya, for the Appellant; Kalyan Rao Joshi and N.V. Suryanarayana Murthy, for Ch. Dhanamjaya, for the Respondent

Final Decision : Dismissed

Judgement

A. Gopal Reddy, J.—This is an appeal by the defendant against the judgment and decree dated 3-11-1980 in O.S. No. 707 of 1979 passed by the I Additional Judge, City Civil Court, Hyderabad brought by the respondent/plaintiff to enforce specific performance of oral agreement to sell a house bearing No. 245/L2 at Mallepally allotted by the Housing Board in favour of the defendant.

2. Upholding the defendant's plea that the agreement was hit by the provisions of Benami Transactions (Prohibition) Act, earlier the appeal was allowed dismissing the suit of the plaintiff. The finding of applicability of Benami Transaction has been reversed by the Division Bench on the plaintiff's further appeal in L.P.A. No. 277 of 1991 dated 23-2-1996 but dismissed the appeal on the plea that agreement is opposed to public policy and hence void u/s 23 of the Indian Contract Act, 1872. Aggrieved by the same plaintiff successfully carried the matter in appeal before the Supreme Court in Civil Appeal No. 1456 of 1996 with special leave, wherein the Supreme Court after setting aside the judgment

and decree passed by the Division Bench in LPA No. 277 of 1991 and C.CCA. No. 7/81 restored the appeal to its file to be decided afresh. That is how the matter is posted before this Court for fresh hearing on merits.

Pleadings:

3. The pleadings, which are not in dispute, as pleaded are as under:

The respondent/plaintiff is the daughter of late Mohammed Baquer who retired as Superintendent in Excise Department. The defendant/appellant, who was in a difficult financial condition, was taken under the patronage of plaintiff's father and helped him in achieving the present status. In the year 1966, the plaintiff's father made the defendant to obtain an application from the A.P. Housing Board for allotment of 2 RT house in Hyderabad and made the defendant apply for allotment with an intention that the house, if allotted, would be assigned in favour of plaintiff. On defendant getting allotted the suit schedule property plaintiff's father paid a sum of Rs. 4,200/- to the defendant for payment of earnest money towards 20% of the cost of the house so allotted and proposed to finance further for payment of instalment dues to the Housing Board with an understanding that after getting the property conveyed in favour of the defendant, he shall convey the same in favour of the plaintiff on payment of all the dues payable to the Housing Board. The defendant having agreed for the said proposal acknowledged receipt of amount of Rs. 4,200/- under document Ex.A-3 dated 7-10-1967. Subsequently the father of the plaintiff started financing the defendant for enabling him to pay instalments to the Housing Board. The defendant handed over the allotment order Ex.A-1 and plan Ex.A-2 to the plaintiff's father. In the year 1968, defendant agreed in the presence of relatives and family members of late Baquer that Baquer alone will pay the instalments of the house year after year and as when the entire sale consideration of the house is paid to the Housing Board, defendant will get the suit house conveyed in the name of Baquer or his nominee and accordingly, plaintiff's late father remitted the annual instalments from 1968 under Challans till his death on 29-9-1970. Late Mohd. Baquer transferred his right to obtain the sale deed in favour of the plaintiff in the presence of defendant and his family members, directing the defendant to convey the title of suit house in favour of the plaintiff soon after she pays all the dues to the Housing Board, for which the defendant agreed provided the plaintiff bears the registration expenses for execution of sale deed in favour of defendant by the Housing Board and later in her favour. As per the said oral understanding, the plaintiff remitted the instalments due to the Housing Board from the year 1971 upto 18-6-1979 on which date she deposited a sum of Rs. 17,489/- towards balance outstanding amount under a Challan dated 18-6-1979 apart from various amounts from 1968 to 1979 under Exs. A-5 to A-18. On allotment, the Housing Board delivered possession of the house to the defendant and the defendant handed over the same to the plaintiff's father-Baquer who in turn handed over the same to the plaintiff and she is in possession of the suit property. When the plaintiff approached the defendant after payment of Rs.

17,489/- under Ex.A-18 to get the house conveyed in her name, defendant with a mala fide intention evaded performance of his part of contract. Therefore, plaintiff got issued legal notice dated 26-7-1979 -Ex.A-19, but the defendant who received under Ex.A-20-postal acknowledgement has not chosen to give any reply. In view of the same, plaintiff filed the above suit.

4. These pleas were denied by the defendant by filing a written statement contending that his father was a Government servant belonging to Machilipatnam and his grand father was a Doctor. Plaintiff's father never helped* in any way for his present position. The Housing Board allotted the suit house on lottery basis but not got it allotted with the help of plaintiff's father. As the time given for payment of earnest money was short, defendant borrowed Rs. 4,200/- from the plaintiff's father which can be repayable and for the said purpose he passed a receipt and he repaid the said amount to the plaintiff's father. Defendant never agreed for the proposal stated by the plaintiff nor he handed over the allotment order or original plan to the plaintiff's father at the time of allotment. Since the defendant was with the plaintiff's father for some time, plaintiff's father got the said document. Even if there was any such alleged agreement for conveying the house in the name of plaintiff's father, who had three sons and one daughter, plaintiff who is only a house wife and has no earnings of her own cannot claim that she is entitled for such conveyance. On mere payment of 3 or 4 instalments by her or some other person, the same will not give the plaintiff any legal right or title over the suit schedule property, as they have acted only as agents to the defendant in paying the amounts to the Housing Board. Defendant is drawing salary of Rs. 1,000/- per month out of which he paid all the instalments by himself and some of them through his agents. The relationship between the plaintiff and the defendant was cordial till the issuance of legal notice. When the defendant was transferred to Hyderabad he was staying with the plaintiff's father for some time then he applied to the Housing Board for allotment of suit schedule property. He was later transferred to Nagayalanka, Krishna District in the year 1968 and again transferred to Hyderabad in 1971. On his transfer to Nagayalanka in 1968, he allowed the plaintiff's father and his family members to live in the suit house without payment of any rent by keeping one room with him under lock and key. Though he was transferred to Hyderabad in 1971, since he was getting some house rent allowance and his relations with the plaintiff's father were cordial, he allowed them to live In the house. That is how the plaintiff is in possession of some of the documents. On these pleadings lower Court framed the following issues for trial.

(1) Whether the agreement of sale set up by the plaintiff is true, valid and binding on the defendant?

(2) Whether the payments set out by the plaintiff are true and correct?

(3) Whether the plaintiff is entitled for specific performance?

5. To prove the case of the plaintiff, she herself examined as P.W.1 apart from

examining her brother as P. W.2 and husband as P.W.3 and got marked Exs.A-1 to A-23. Defendant was examined as D.W.1 and got marked Exs.B-1 to B-12.

Contentions:

6. Sri Kalyan Rao Joshi, learned counsel for the appellant made the following submissions:

1. The entire suit is based on oral agreement for transfer of house allotted in favour of the defendant and in the absence of any evidence either oral or documentary to prove the same between the defendant and the plaintiff's father, the date and month on which the said oral agreement was entered, the finding of the trial Court that the oral agreement is proved is based on no evidence and decreeing the suit basing on such oral agreement is not sustainable.

2. The payments set up by the plaintiff that the amount remitted to the Housing Board was for and on behalf of the defendant as an agent of the defendant only but not directly. When the plaintiff failed to establish the source of her income from which she has paid all the instalments, it is presumed that the same were paid for and on behalf of the defendant.

3. In the absence of any nomination by late Baquer who admittedly left behind wife, two sons and plaintiff as his heirs, plaintiff has to discharge the burden of her assertion that she is the nominee of her father as per Section 103 of the Evidence Act.

4. In the absence of any agreement between the plaintiff's father and defendant, when the oral agreement set up was denied, what kind of right the plaintiff got on assignment in her favour from her father is not stated. The plaintiff is relying on the agreement of 1966 and another agreement brought up in the year 1968 whereas the possession is taken in 1969. When she fails to establish with regard to transfer of her father's right, she is not entitled to seek specific performance.

5. Plaintiff is not entitled to a decree for specific performance. Even if the plaintiff has proved the oral agreement, the same is opposed to public policy as per Section 23 of the Contract Act.

To buttress the above submissions he placed reliance on the following judgments:

1. Ganesha v. Arumugha, ILR 1954 Mad. 1195.

2. Mani Ram v. Purshotam, AIR 1930 All. 732.

7. Sri N.V. Suryanayana Murthy, learned Senior Counsel appearing for the respondent/ plaintiff while strongly supporting the judgment of the lower Court would contend that the defendant has to explain the facts how all the documents are in possession of the plaintiff including possession of the plaint schedule property. Silence to the notice-Ex.A-19 issued by the plaintiff, it is common sense that the defendant has not denied the oral agreement set up by the plaintiff. In the absence of any explanation or reply to the notice how the plaintiff is in

possession of the letter written by the defendant Ex.A-16 and the reply given by the Housing Board to deposit Rs. 17,000/- under Ex.A-17, the said amount was deposited under Ex.A-18 by the plaintiff and got issued notice under Ex.A-19 stating that the defendant agreed to get the sale deed from the Housing Board and after obtaining such sale deed execute in favour of plaintiff, there is high degree of preponderance of probability that there was an understanding between the plaintiff's father and plaintiff to transfer the house allotted in his favour after the instalments are paid by the plaintiff's father in the name of the plaintiff and placed reliance on Mahindra and Mahindra Ltd. v. Union of India, AIR 1979 SC 798; Smt. Krishnawati Vs. Shri Hans Raj, and Member-secretary, Andhra Pradesh State Board for Prevention and Control of Water Pollution Vs. Andhra Pradesh Rayons Ltd. and Others, . In the absence of any pleading in the written statement, which was filed in the year 1979, about the agreement is opposed to public policy and fraud alleged to have been played by the plaintiff's father to have unassigned house in circumventing the Regulations, and in the absence of any evidence in that regard no argument can be made, as the agreement being opposed to public policy and vitiated u/s 23 of the Contract Act.

8. In buttress of his submissions he placed reliance on the following judgments:

1. Vinod Kumar Arora Vs. Surjit Kaur, .
2. Smt. Chander Kali Bai and Others Vs. Shri Jagdish Singh Thakur and Another, .
3. Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, .

Even if the same is not permitted under law the defendant has waived the same by his conduct by relying upon the judgment in Jamilabai Abdul Kadar Vs. Shankarlal Gulabchand and Others, . Even as per Clause 11 of the lease-cum-sale agreement entered into between the defendant and Housing Board there is no hindrance for entering into such agreement. Under Clauses 12,13,17 and 22 of such agreement no penalty is stipulated, namely, cancellation of sale deed if the terms and conditions are violated and if any such agreement is entered under Ex.B-9. Even under Clause 11 of the agreement lessee is not the owner. Though there is prohibition of sale or mortgage, it is only till property is transferred in his name and sale price thereof is finally determined and entire sale price is paid. The said clause only prohibits assignment of properties until finally transferred in his name. When all the payments under Exs.A-1, A-3, A-4, A-5 to A-7 were paid by the plaintiff, in Ex.A-5 to Ex.A-7 it was mentioned for Anwaruddin (defendant). Under receipts Exs.A-8 and A-9 there is no mention that the amounts have been paid for Anwaruddin. A suggestion made to P.W.1 without there being any pleading cannot be taken into consideration by placing reliance on the judgment of the Apex Court in Ishwari Prasad Mishra Vs. Mohammad Isa, . Even according to the defendant, relations between the plaintiff's family and defendant were cordial till the suit notice and when the plaintiff paid total amount due to the Housing Board to a tune of Rs. 36,769/- apart from paying the Municipal taxes and being in possession of the property

rightly entitled to a decree for specific performance. It was submitted that during pendency of the suit, property was transferred in favour of the defendant by executing a sale deed in his favour by the Housing Board.

Points for consideration:

9. On the above pleadings and submissions, the points that arise for consideration in the appeal are as under:

(1) Whether there was any oral agreement between the defendant and the plaintiff's father for conveying the property in favour of the plaintiff on plaintiff's father undertaking to pay the amounts due to the A.P. Housing Board and whether the payments are made to the Housing Board under Exs.A-1, A-3, A-4 and A-5 to A-7 for and on behalf of the defendant as per the oral agreement set up?

(2) Whether on the death of the plaintiff's father plaintiff is entitled to claim specific performance claiming to be the nominee of late Baquer?

(3) Whether on the plaintiff's failure to establish the source of income for all the payments made to the Housing Board a presumption can be drawn that the amounts were paid on behalf of the defendant in the absence of any proof by the defendant that he has repaid the said amounts to the plaintiff and her father?

(4) Whether the oral agreement set up between the parties is opposed to public policy and whether the defendant can set up such plea in the absence of any pleadings and evidence to that effect?

Point No. 1:

10. To substantiate the plea of the plaintiff, she tendered her evidence as P.W.1 stating that defendant is her father's step sister's son and used to live in their family since 1966; and her father made the defendant to apply for the Housing Board for allotment of house and the same was allotted in his favour under Ex.A-1 and Plan under Ex.A-2. Her father gave Rs. 4,200/- on 7-10-1966 under Ex.A-3-receipt for payment of earnest money towards 20% of the cost of the house and again a sum of Rs. 400/- for purchase of stamp papers under Ex.A-4. There was an oral agreement that if the house was allotted to favour of the defendant the same shall be transferred in plaintiff's name subject to her father paying all the amounts due to the Housing Board. On allotment, plaintiff's father paid 1 st instalment under Ex. A-5, which bears the signature of her father on behalf of the defendant. The 2nd instalment was paid under Ex. A-6 with the signature of her brother. The 3rd instalment was paid by her elder brother under Ex.A-7. Other instalments under Exs.A-8, A-9 and A-10 were paid by the plaintiff herself with her signature under challan receipts. Exs.A-11 to A-15 were paid by her husband. After paying the said instalments, she requested the defendant to find out the balance amount payable to the Housing Board. Then he wrote a letter to the Housing Board under Ex.A-16, in turn the Housing Board replied under Ex. A-17 to pay balance of Rs. 17,476/- and Rs. 13/- towards registration

plan charges. Defendant handed over the said letter to the plaintiff and she deposited the said amount under Ex.A-18, which bears her signature. Thereafter, she requested the defendant to get the house registered and transferred in her name as agreed. On defendant postponing the matter, a notice was issued under Ex.A-19, which was received under Ex.A-20, but the defendant did not choose to make any reply. In the cross-examination, when a suggestion was put to the plaintiff that the amounts paid to the defendant were repaid, she denied the same. She admitted in the cross-examination that she was not earning but she paid all the instalment amounts from the property of her father in the name of the defendant. She denied the suggestion that the payments made to the Housing Board by her brother or her father were the moneys given by the defendant for making such payment in this behalf. The above suggestion made to the plaintiff is contrary to the pleading. In fact, no such plea was pleaded by the defendant in the written statement but there is an admission in para-4 of the written statement that since the Housing Board gave very short period for payment, defendant borrowed money from the plaintiff's father under Ex.A-3 which was later repaid; whereas in para-7 of the written statement it is categorically pleaded that merely three or four instalments are paid by the plaintiff or her father or some other persons as per annexures, it will not confer on the plaintiff or her father any legal right or title over the suit house since they are merely acted as agents and all the amounts were in fact paid in the name of the defendant.

11. Plaintiff's brother who tendered his evidence as P.W.2 stated that there was an oral agreement between their father and defendant to transfer the suit house in favour of P.W.1. Since he is a heart patient and unsure of his life, in the year 1968 he called for a meeting in which himself, his mother, P.W.1, their uncle-Yeseen and their cousin brother were present along with defendant and directed the defendant to transfer the house in the name of the plaintiff and he agreed for the same on P.W.1 bearing all expenses of registration. He denied the suggestion that there was no oral agreement or understanding reached in the year 1969 and all the amounts were paid in the name of the defendant to the Housing Board.

12. Plaintiff's husband who examined as P.W.3 stated that he approached the defendant in October, 1978 to intimate the balance amount so that entire amount can be paid. Ex. A-16 is the copy of the letter given by the defendant, which was replied by the Housing Board under Ex.A-17. It is also stated by him that since from the date of marriage he is residing in the suit house along with P.W.1. In the cross-examination he stated that instalments, which he paid after the marriage, represent their own money and the last instalment under Ex.A-18 was shared by himself and his brother in law. A suggestion is made that the amounts paid to the Housing Board are the moneys, which paid by the defendant and the same were paid as agents which fact was not pleaded at the earliest.

13. Defendant, who tendered his evidence as D.W. 1, in his chief examination stated that on his behalf once plaintiff's father, her brother and herself paid the

instalments and he paid back their amounts. The last instalment was paid by the plaintiff's husband, as he paid the same to him, while the balance amount of Rs. 337/- was paid by the defendant himself. When he left the place in 1968 he entrusted the suit house to plaintiff's father to look after by leaving his samans in one room. In 1971, when he re-transferred to Hyderabad he was staying in a rented house in Yakutpura and on the date of deposition he is staying in Santhosnagar. Exs.B-1 and B-2 are Chitta Challans produced by him for initial deposit of Rs. 3,700/- and Rs. 13/-. Exs.B-3 and B-4 are the receipts issued by the Electricity Department and Ex.B-5 is the deposit receipt with the Waterworks Department. Ex.B-6 is the letter of Housing Board giving possession to him. Ex.B-7 is the letter written by the Regional Housing Engineer to handover the possession of the said house to the defendant. Ex.B-8 is the post card written by plaintiff's father on 18-9-1970 apart from producing lease-cum-sale agreement-Ex.B-9 and Challan- Ex.B-11 dated 20-12-1980 for payment of Rs. 337/-. In the cross-examination he admitted that when he applied "J" type house to the Housing Cooperative Society, Yousufguda he has not mentioned that he was allotted a house by the Housing Board, which disentitles him for allotment of the house, by the society. He also admitted that he received the suit notice but did not reply for the same nor demanded for the documents, which are in the custody of the plaintiff. He admitted Exs.B-3 and B-4 are the receipts in evidence of payments made by plaintiff's father. He also admitted except filing latest Challan under Ex.B-11 dated 20-12-1980 he need not pay the Challans into bank or Housing Board in respect of suit house though he was in Hyderabad from 1971 till date. He paid an amount of Rs. 17,000/- to the husband of the plaintiff for paying to the Housing Board. He kept all his savings with P.W.3 for making payments, which is not mentioned either in the written statement or in the examination in chief. Further, he admitted that from the date of allotment he did not pay single pie to the Municipality. When the Housing Board people inspected the house and found that plaintiff is in possession as tenant and when they wanted to take action against the defendant, to convince them he stated that they are not tenants and they are all family members and amounts were got remitted through them and receipts were kept with them, which is quite contrary to the pleading. Further, in the cross-examination, it is admitted that Baquer paid his first instalment as he was not in Hyderabad and there was hitch for sending the instalments from the place where he was working which would reveal that he was not residing in the house.

14. In view of the conduct of defendant in not giving any reply to the suit notice, being a Government servant and not a lay man, there is incongruity in evidence and pleadings, when the plaintiff categorically asserted that pursuant to understanding between the plaintiff's father and defendant, the entire amounts due under lease-cum-sale agreement were paid including initial deposit by the father of the plaintiff and their family members and they were put in possession of the property as per the said agreement and when they denied about defendant repaying the money taken from her father, the defendant would have

produced some acknowledgements taken from late Baquer to show that he repaid the same. The preponderance of evidence adduced by the plaintiff probablises her case that there was an oral understanding between the plaintiff's father and defendant to transfer the suit house after allotment and finally transferring the house in his favour subject to plaintiff's father paying the amounts. Learned counsel for the respondent/plaintiff justified in contending apart from placing reliance on Mahindra and Mahindra Ltd. v. Union of India (supra); Krishnaveni v. Hans Raj (supra) and Member & Secy. A.P.S.B. for P. and C.W.P. v. A.P. Rayon Ltd. (supra) it is only a common sense point of view has to be applied for the purpose of determining whether there was an agreement between the parties actual or probable. The only amount, if any, paid by the defendant is a sum of Rs. 337/- under Ex.B-11 that too after filing of the suit, by the time defendant decided to resile from the oral agreement that he will transfer the suit house in favour of the plaintiff. The plea taken by the defendant that he paid Rs. 17,000/- and odd to the husband of the plaintiff for paying to the Housing Board is not believable and convincing and which is contrary to the pleading, as already referred in the earlier paragraphs. But coming to the evidence he has totally changed his version stating that he deposited certain amounts, that he paid a sum of Rs. 17,000/- and odd to the husband of the plaintiff out of his own savings and kept with him for making payments. In view of the same, the lower Court rightly held that agreement set up by the plaintiff is true, valid and binding on issue No. 1 and Point No. 1 is accordingly answered.

Point Nos.2 and 3:

15. The plaintiff categorically pleaded and deposed that there was an oral agreement between her father and defendant to transfer the suit house in her favour after allotting the house in the name of the defendant and the entire instalment amounts including the initial deposit were paid by the plaintiff's father, her brother and herself. When it is specifically pleaded in the plaintiff's evidence that in the year 1968 defendant agreed in the presence of relatives and family members of late Baquer to convey the suit property in the name of Baquer or his nominee. But only a suggestion is made to her that there was no written agreement between the plaintiff's father and defendant for transfer of suit house, she was not a party to the agreement took place in 1968. Her brother-P.W.2 stated as their father-Baquer unsure of his life called for a meeting in 1968 in which himself, his mother and plaintiff and their uncle were present along with defendant wherein his father directed the defendant after paying the instalments transfer the house in the name of P.W.1. Only suggestion made to him was there was no oral agreement at all for transfer of the suit house and it is a cock-and-bull story invented for the purpose of suit and no specific suggestion was made that no such meting took place in 1968 where P.W.2, him mother, sister and uncle along with defendant were present and reached the agreement. Curiously the defendant who tendered his evidence as D.W.1 except stating that in the year 1968 he left Hyderabad has not denied entering into an agreement on the date of allotment, and in the cross-examination he admitted when the plaintiff's

father paid first instalment he was not in Hyderabad and there was hitch for sending the amount from the place of working and except filing last Challan under Ex.B-11 he need not paid any challan in the bank or Housing Board in respect of suit house though he was in Hyderabad from 1971 till date. It is also admitted that from the date of agreement a single pie was not paid to the Municipality towards property tax since it was paid by plaintiff's father till his death, after his death her brothers and after the marriage in the year 1972 her husband paid instalments including balance amount of Rs. 17,489/- under Ex.A-18. As per the understanding and agreement reached defendant agreed to transfer the house, plaintiff was in possession of the property and the same was also disclosed at the time of her marriage. Therefore, she is entitled to claim specific performance being the heir of her father and other family members consented for her exclusive right to claim said property. When the plaintiff established that her source of income from where the amounts were paid to the Housing Board it is fallacious contention put forward by the learned counsel for the appellant/defendant that plaintiff when failed to prove her source of income, a contra inference has to be drawn that the amounts were paid on behalf of the defendant. More so, this Court convinced that the plaintiff established the source of income and how the instalments were paid to the Housing Board. In view of the same, lower court on issue No. 2 rightly accepted the plea of the plaintiff. This Court does not find any infirmity in answering in issue No. 2 in favour of the plaintiffs or can come to a contra conclusion. Point Nos.2 and 3 are answered in favour of the plaintiff and against the defendant.

Point No. 4:

16. In order to establish that the contract entered into between the parties is opposed to public policy and the suit as such is not maintainable, there should be a specific pleading to that effect as contemplated under Order VIII Rule 2 CPC and cannot surprise the facts on the opposite party. Though there was a faint attempt to canvass the proposition that an agreement, if any, to sell the house is opposed to public policy, the substratum of the grievance of the defendant is that Clauses 11 and 22 of the lease-cum-sale agreement- Ex.B-9 stipulates that the lessee shall have no right to sell, mortgage or otherwise dispose of the property, which read as under:

11. It is expressly agreed between the parties hereto that the lessee is not the owner of the property, that he shall have no right either to sell or mortgage otherwise dispose of the property and that the lessee shall not be entitled, to claim title thereto until the sale price thereof, as finally determined by the chairman of the lessor in sole discretion and the rents and other amounts payable by the lessee have been paid and the property is conveyed in the name of lessee.

22. The lessee shall not assign, sub-let or part with or use for any purpose other than residence of his family, whole or any part of the property without the previous sanction of the lessor till the property is finally transferred in his name.

Clause 13 provides that when the lessee fails to pay the instalments or other sum, the agreement is liable to be cancelled and lessee will be evicted from the suit schedule property. Clause 26 stipulates contravention by the lessee by any of the terms expressed or implied under the agreement or under the regulations shall entail cancellation of the agreement; forfeiture to the lessor of the amount paid by the lessee under the agreement; eviction of the lessee from the property u/s 52 of the Act; and recovery of dues, if any, to the lessor from the lessee u/s 53 of the Act.

17. The contention was amplified by the learned counsel in this manner. Defendant being a Government servant once he gets allotment is not entitled to get another house allotted cannot act adverse to his own interest when the lease-cum-sale agreement does not permit assignment or alienation of property. His right to deal with the property is only on the execution of the sale deed in his favour by the Housing Board. Housing Board Regulations were framed to allot houses constructed and eligibility by such allotment. When the plaintiff's father knows that he is not eligible to get the house allotted, as his wife owns a house fraud has been played to have unassigned house circumventing the regulations framed by the Housing Board and the same is opposed to public policy by drawing attention of the Court to the rules made u/s 71 of A.P. Housing Board Act, 1956 which authorizes the Board to frame Regulations for allotment on lease-cum-sale of the tenements. Regulation-11 provides as under:

The principles will be observed in selecting the applicants for allotment

(a) No allotment shall be made if the applicant-

(1) owns a house in his (or her name) or in the name of his wife or her husband as the case may be or in the name of his or her minor child, or

(2) has an income exceeding Rs. 6,000/-, or

(3) has not got the requisite paying capacity,

Provided that the Board or the Chairman, as the case may be, relax any of the provisions of this regulation in favour of any applicant.

Regulation 16 provides within thirty days from the receipt of orders from the Chairman allotting a tenement and premises the allottee shall pay 20% of the cost price and execute and register at his own cost a lease-cum-sale agreement with the Board in form-III. Possession of the tenement and premises shall be given to the allottee only after the registration of the agreement. The Lease-cum-sale agreement is also enclosed in form No. III.

18. Learned Senior Counsel for the respondent/plaintiff would contend that unless necessary issue is framed and evidence let in to substantiate that agreement is opposed to public policy the defendant cannot take such plea in the arguments and cited the following decisions.

19. In the case of Vinod Kumar (6 supra) it was held by the Supreme Court that

the pleadings of the parties form the foundation of their case and it is not open to them to give up the case set out in the pleadings and propound a new and different case.

20. In Chancier Kali's case (7 supra) it was held by the Supreme Court that where a claim has never been made in the defence presented no amount of evidence can be looked into upon a plea which was never put forward.

21. The Supreme Court in M.P. Sugar Mills case (8 supra) held it is elementary that waiver is a question of fact and it must be properly pleaded and proved. No plea of waiver can be allowed to be raised unless it is pleaded and the factual foundation for it is laid in the pleadings.

22. In Jamilabai's case (9 supra) Justice Krishna Iyer Speaking for the Bench observed as under:

"...A second point faintly raised was prudently abandoned for the reason that it had not been set up in the pleadings or urged at earlier stages. Last minute ingenuity is not fair play in Court and we cannot and did not permit him to argue that the Court had no material in the recitals of the compromise to make out the mandatory grounds required under the relevant "rent control" law for a Court to direct dispossession of a tenant of a building. We do not examine the merits of the contention at all."

23. CMP. No. 18370 of 1989 was filed to amend the plaint by deleting the words "and he shall be only Benamidar for the said late Sri Md. Baquer"; and CMP. No. 8419 of 1991 was filed for amendment of the plaint at the end of paragraph-6 which were earlier dismissed by this Court while allowing appeal. Learned counsel for the respondent/plaintiff has not made any submission to allow the CMPs and they are accordingly dismissed. During the course of hearing plaintiff filed CMP. No. 164 of 2005 to take sale deed executed by the Housing Board in favour of the defendant as additional evidence. No counter is filed opposing the petition. Since the document which is now sought to be produced is relevant to decide the controversy CMP is allowed.

24. Learned counsel for the appellant has laid much emphasis on the pleadings of the plaintiff in paras-2 and 6 of the plaint to build up an argument that when the plaintiff herself stated that defendant is Benamidar of late Baquer whether the said plea is opposed to public policy or not is only a question of law which can be raised in appeal, as the suit itself is for specific performance of oral agreement, which is asserted by the plaintiff and denied by the defendant but has not made by submission that the agreement was hit by the provisions of Benami Transactions (Prohibition) Act, 1988, except making submission it is hit by Section 23 of the Indian Contract Act by placing reliance on the following decisions.

25. Reliance was placed on the judgment of the Apex Court in Smt. Surasaibalini Debi Vs. Phanindra Mohan Majumdar, , wherein it was held that where a contract

or transaction ex facie is illegal there need be no pleading of the parties raising the issue of illegality and the Court is bound to take judicial notice of the nature of the contract or transaction and mould its relief according to the circumstances.

26. It was next relied on the judgment of Allahabad High Court in Mani Ram's case (2 supra) where the plaintiff to whom a railway company had refused to grant any contracts, entered into an agreement with the defendant that the defendant should put himself forward as the applicant for the contracts, and when the same were secured he would serve the plaintiff, the real contractor. When the plaintiff sued for accounts besides for declaration that he was the real person who held the contract, the said suit was dismissed by the trial Court holding that the agreement set up by the plaintiff is void under the provisions of the Contract Act. On appeal the Allahabad High Court dismissed the appeal observing that the plaintiff committed fraud on the railway company as defined u/s 17 of the Contract Act. The object of agreement was to commit a fraud on the railway company and this fraud was successfully committed according to the plaintiff's own pleadings and allegations and that the plaintiff's case as brought was not maintainable in a Court of justice.

27. In Ganesa's case (1 supra) the suit was instituted stating that the plaintiff submitted a petition to Government to obtain a sale of a vacant site in Hemingway street in Tiruppur and that while that petition was pending, he came to know that vacant sites would be granted by Government on darkhast in Rayappapuram and apprehending that if he put in an application for one of such vacant sites he might not be granted any site, because he had already applied for a site in Hemingway street, he made the defendant, who was a son of his sister and also his brother in law, apply for a site in Rayappapuram; that eventually a site was granted on darkhast to the defendant, who subsequently sunk a well and constructed a house with his own money and ever since, he was in possession and enjoyment of the property paying the municipal taxes, etc. in respect of it, and the defendant attempted to set up title in himself, plaintiff set up a plea that it was he, who was entitled to the site, as defendant was only benamidar for him and it was, therefore, necessary that the Court should declare his title to the property. The defendant denied that the application made by him for the grant of a site was on behalf, and for the benefit, of the plaintiff and stated that he incurred expenditure for digging a well and constructing a house. Defendant further alleged that plaintiff, on account of intimate relationship, was managing the property on his behalf but he has no title to the property. A few months prior to the suit, plaintiff approached him with a request to sell the house for Rs. 1,000A and even prepared the sale deed to be executed by him but he would not agree to sell the house and the suit was really an attempt on the part of the plaintiff to obtain the property unlawfully. The trial Court though held that site belonged to the defendant but that the house was built by the plaintiff at his own cost and would be entitled to a charge on the defendant's interest in the suit property in the sum of Rs. 1,000/- representing the moneys spent by him, the plaintiff for the construction of the house. Against the same two appeals were

preferred; one by the plaintiff as regards title to the site; and one by the defendant against the direction of the Munsif in respect of the sum of Rs. 1,000/- which, according to his finding, was the amount spent by the plaintiff for the construction of the house. Learned Subordinate Judge agreed with the judgment and decree of the trial Court and took a view that the darkhast application by the defendant was really benami for the plaintiff and therefore the acquisition of the site by the defendant was also for the benefit of the plaintiff and held that the plaintiff had acquired title to the suit site, and allowed the appeal of the plaintiff and dismissed the appeal of the defendant. Aggrieved by the same defendant filed two second appeals. The High court affirmed the findings so far the well and house are concerned, that it was the plaintiff/respondent who expended the moneys for them. While considering the claim of the plaintiff to the title of the site held that even assuming that there is an agreement between the plaintiff and the defendant that the defendant, when he obtained the grant, should hold it for the benefit of the plaintiff, the Court would not enforce such an agreement because it would be opposed to public policy. Further, after considering the policy the darkhast grant which was in the nature of a gift by the Government entitled to the grantee with a specific provision in the grant that the property should not be alienated without the consent of the Tahsildar. If the plaintiff's plea were to be accepted, a rich exploiter could make the members of the privileged classes apply for grants of sites and subsequently set up his own title to them on the ground that the applicants were only his benamidars or name lenders. That would be completely destroying the object of the policy. The plaintiff apprehended that if he himself applied, he would not have been granted a site, and, therefore, he set up someone else to apply for a site with the intention of appropriating that site to himself. This would in a way also amount to playing fraud on the Government. Accordingly, it was held that the plaintiff cannot be granted a declaration that he has title to the suit site. When he prayed for declaration of his title to the property, which comprised both the site and the house, the suit cannot be decreed as prayed for by him and there will only be a declaration that the plaintiff is entitled to the well and the house on the suit site. The Court should declare in favour of the plaintiff a charge on the defendant's interest with regard to the amount expended by the plaintiff on the well and the house.

28. Nanakram Vs. Kundalrai, , on which reliance was placed by the counsel for the respondent is a case where u/s 7 of the U.P. Rent Act the landlord has to report to the District Magistrate if his house had fallen vacant or was about to fall vacant and thereupon the District Magistrate was empowered to direct the landlord to let the premises to a person specified in his order. Whether the lease between the parties valid was fell for consideration before the Supreme Court. The Supreme Court after considering the provisions held that such a lease would be valid between the parties, it would not, however, be binding on the District Magistrate was evinced by the power conferred upon him u/s 7-A(1) of the U.P. Rent Act to take proceedings for the eviction of such tenant, provided that if the

vacancy of an accommodation was not reported or a person occupied an accommodation in contravention of an order issued u/s 7(2) and it is always open for the District Magistrate not to exercise the power if there was undue delay or if for other good reason he found it inexpedient to do so under the Act.

29. In *Nutan Kumar and Others Vs. IInd Additional District Judge and Others*, , the Supreme Court while following the judgment of *Nanakram's* case (12 supra) held that a person who occupies, without an allotment order in his favour, shall be deemed to be an unauthorized occupant of such premises as per Section 13 of the U.P. Urban buildings (Regulation of Letting, Rent and Eviction) Act. As he is an unauthorized occupant he is like a trespasser. A suit for ejectment of a trespasser to get back possession from a trespasser could always be filed. Such a suit would not be on the contract/agreement between the parties and would thus not be hit by principles of public policy also. Holding so the Full Bench judgment of the Allahabad High Court was set aside and held that unless the statute specifically provides that a contract contrary to the provisions of the statute would be void the contract would remain binding between the parties and could be enforced between the parties themselves.

30. The question of public policy is a question of law and the Court can determine it from the evidence even if the facts are not fully pleaded by the parties as held by the Supreme Court in *Ouseph Poulo and Others Vs. Catholic Union Bank Ltd. and Others*, .

31. In view of the decisions cited above, it has to be seen whether the oral contract set up by the plaintiff was champertous and is opposed to public policy as contended. Even the lease-cum-sale agreement also provides that "the lessee shall abide by the regulations in force or which may hereafter be enforced from time to time". Though the Benami transaction pleaded by the plaintiff for her father to get the house from the Housing Board and since he was not eligible, he made the defendant to apply with an oral agreement that the defendant, in turn, should transfer the house in favour of plaintiff's father or to his nominee.

32. A plain reading of Clauses 11 and 22 of the lease-cum-sale agreement clearly go to show that agreement to sell has not been included in the restrictions, which have been imposed on the right of the allottee. The term used in Clause-11 goes to show that the lessee is not the owner of the property and shall have no right either to sell or mortgage otherwise dispose of the property and shall not be entitled to claim title thereto until the sale price thereof as finally determined by the Chairman of the Housing Board (lessor) in sole discretion and the rents and other amounts payable by the lessee have been paid and the property is conveyed in the name of the lessee. Whereas Clauses-22 of the lease-cum-sale agreement specifies that the lessee shall not assign, sub-let or part with or use for any purpose other than residence of his family, whole or any part of the property without the previous sanction of the lessor till the property is finally transferred in his name, which clearly goes to show that prohibition, if any, for sale, mortgage or otherwise dispose of is till the amounts payable by the

lessee have been paid and property is conveyed in the name of the lessee he cannot assign or sub-let or part with the property except for any other purpose other than the residence of his family without previous sanction of the lessor till the property is transferred. Agreement to sell is not totally forbidden either by regulations or by the agreement. Prohibition, if any, is without obtaining previous sanction of the lessor till the property is transferred allottee cannot transfer the property.

33. It is well settled that public policy does not remain static in any given situation. The A.P. Housing Board (Allotment, Management and Sale of HIG, LIC, and EWS Houses or Flats) Regulations, 1997, which superceded all previous regulations, were amended in G.O.Ms. No. 67 Housing (HB.II) dated 8-9-2001 and a provision was made under sub-regulation (3) of Regulation 27, which reads as under:

"In case the allottee has transferred the flat or plot or house to a third party, through a sale agreement, either on white paper or stamp paper signed by the allottee, the same will be transferred to the purchasee after levying "transfer fee" from the transferee at 7% of the present market value of the plot or flat or house, as the case may be."

Necessary instructions were issued to achieve the said object through Office Order No. PR/PC/2001 dated 20-9-2001.

34. Admittedly, agreement to sell is not a transfer of any rights in immovable property and, therefore, the agreement could not be held to be bad in law and altogether opposed to public policy. Agreement as pleaded is that after the property is conveyed in favour / of the defendant on his paying all the instalment dues to the Housing Board he \\ agreed to transfer the same to the plaintiff. If that be the case, the said agreement to transfer at a future date after acquiring the ownership by the defendant at no stretch of imagination can be said to be opposed to Regulations framed or lease-cum-sale agreement. More so, under Regulation-11 when the Housing Board can relax the condition for selecting the applicants for allotment, namely that no allotment should be made if the applicant owns a house in his name or in the name of his wife or in the name of his minor children it cannot be construed total prohibition in making allotment in favour of such an applicant. On consideration of facts and circumstances it appears that equity is in favour of the respondent/plaintiff more than the appellant/defendant. It comes with little grace for the appellant to contend that the oral agreement to sell, if any, even granting that it would come within the mischief of Section 23 of the Contract Act cannot be accepted. The prohibition, if any, under Clauses 11 and 22 of lease-cum-sale agreement has disappeared on execution of sale deed in favour of defendant by the Housing Board during the pendency of the suit and now there is no embargo for transferring the property in favour of the plaintiff as per the oral agreement as entered by the plaintiff's father for the benefit of the plaintiff. In view of the same, decreeing the suit of the plaintiff for specific performance cannot be said to be opposed to public

policy and Point No. 4 is accordingly answered.

35. In the result, appeal is bereft of any merits and it is accordingly dismissed.
No costs.