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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1911 OF 2015

Sonal Gopal Makhijani .. Petitioner
Vs.
Navnit Odhavji Raithatha and another .. Respondents

Mr.G.M.Ashfaq, Advocate for the Petitioner.
Mr.Tanvir Abdul Hamid Shaikh, Advocate for the Respondents.

CORAM : R. G. KETKAR, J.
DATE : 23rd JULY, 2015

P.C. :

. Heard Mr.G.M.Ashfaq, learned Counsel for the petitioner and Mr.Tanvir Abdul Hamid Shaikh, learned Counsel for the respondents at length.

2. By this Petition under Article 227 of the Constitution of India, original defendant No.2(a) has challenged the judgment and order dated 18/12/2014 passed by the learned Judge, City Civil Court, Mumbai in Short Cause Suit No. 7692 of 1985 (High Court Suit No. 2146 of 1985). By that order, the learned trial Judge held that it is not necessary to frame additional or modified issues.

3. In support of this Petition, Mr.Ashfaq strenuously contended that respondent No.1, hereinafter referred to as plaintiff has instituted Suit for specific performance of agreement to sell office premises being room No. 202, Himalaya House, Palton Road, Mumbai 400 001 (for short 'suit premises') and for possession of the

suit premises, among other prayers. In paragraph 2 of the plaint, the plaintiff asserted that defendant No.1 is the sole proprietary concern and defendant No.2 is sole proprietor of defendant No.1. In paragraph 8, plaintiff asserted that in or about January 1983, defendant No.2 , one Bhagwanti D.Makhijani and one Mohan D.Makhijani executed dissolution deed. The dissolution deed dated 01/01/1983 is annexed at Exhibit C1.

4. Mr.Ashfaq submitted that after the death of defendant No.2, defendant No.2(a) is brought on record and she has filed written statement in July 2010. In paragraph 4, it is asserted that defendant No.2, since deceased, was not the sole proprietor of defendant No.1 and on the date of filing of the Suit, defendant No.1 was a partnership firm having i) Bhagwanti D.Makhijani ii) Gopal D.Makhijani, defendant No.2, since deceased, iii) Govind D.Makhijani iv) Mahon D.Makhijani as the registered partners of defendant No.1 firm. The partnership firm was not dissolved as falsely alleged by the plaintiff.

5. In support of his submission, he relied upon certificate of registration which shows that the firm is not dissolved. He also relied upon the certificate dated 17/10/2008 issued by Himalaya House Company Limited which records that Ms.Bhagwanti D.Makhijani and others are share holders of the suit premises and they own and possess share certificate No. 87 having 910 shares

distinctive No. 102630 to 103539 . He invited my attention to order dated 02/05/1997 passed by this Court in Chamber Summons No. 278 of 1997 which was taken out by Mohan D.Makhijani for impleading him as party defendant in the Suit. Chamber Summons was rejected on the ground he was not party to the contract which is sought to be enforced in the Suit by the plaintiff.

6. On the other hand, Mr.Shaikh supported the impugned order. He submitted that in the original written statement filed by defendant No.2 in paragraph 4, it is admitted that defendant No.1 is the sole proprietor of the proprietary concern of defendant No.2. The suit premises was and continuous to be the joint property defendant No.2, his mother and brother. The share certificate issued by the Himalaya House Company Limited has been in the joint names of defendant, his mother and brother. He submitted that on 23/10/1986, this Court recorded statement made on behalf of the defendants that defendant is the sole proprietor of the firm and absolute owner of the suit property. Lastly, he submitted that the learned trial Judge rejected the request for framing of additional or modification of the issues as by order dated 02/05/2009, this Court has already framed issues. In view thereof, it is not necessary to frame additional issues or modify the issues already framed.

7. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the

material on record. Perusal of the plaint, shows that plaintiffs specifically asserted that defendant No.1 is the sole proprietary concern and defendant No.2 is the sole proprietor of defendant No.1. The Suit is instituted in the year 1985. In paragraph 8, the plaintiff contended that dissolution deed was executed on 01/01/1983 between defendant No.2 and Bhagwanti D.Makhijani and Mohan D.Makhijani. Perusal of the written statement filed by the original defendant No.2 shows that in paragraph 4, he admitted that defendant No.1 is the sole proprietor of proprietary concern of defendant No.2. That apart, in the order dated 23/10/1986 passed by this Court in Notice of Motion No. 1661 of 1985, the statement made on behalf of defendants that defendant is the sole proprietor of the firm and absolute owner of the suit property was recorded. Perusal of the order dated 02/05/1997 passed by this Court in Chamber Summons No. 278 of 1997 also shows that the Chamber Summons taken out by the applicant Mohan D.Makhijani was dismissed by this Court on the ground that he is not party to the contract which is sought to be enforced in the Suit by the plaintiff.

8. The learned trial Judge in the impugned order held that on 02/05/2009, this Court had already framed issues and those issues cover all the issues which the legal heir of defendant No.2 prayed for framing as additional issues. He, therefore, held that issues as submitted by the legal heir of defendant No.2 need not be

framed or modified as additional issues. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. It is made clear that I have only examined correctness of the impugned order and all the contentions of the parties on merits are expressly kept open. Order accordingly.

(R. G. KETKAR, J.)