

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 6578 2015

Gul Rupchand Kriplani

Petitioner

Vs

1. Mayor Mangaldas Kothari and
Ors

.. Respondents

Mr. Aditya Thakkar, i/b S.J.Khera, Advocate for Petitioner.

Ms. Deepti Panda i/b Dhru & Co, Advocate for Respondent no.1 .

CORAM : R.G.KETKAR,J.

DATE : 15/07/2015

PC:

1. Heard Mr. Aditya Thakkar, learned counsel for the petitioner and Ms. Deepti Panda, learned counsel for respondent no.1 at length.

2. By this Petition under Article 227 of the Constitution of India, original defendant no.8 has challenged the Judgment and order dated 15.6.2015 passed by the learned Judge, City Civil Court, Dindoshi, Mumbai in Chamber Summons No 723 of 2014 in Suit No.7034 of 1998. By that order, the learned trial Judge dismissed the Chamber Summons taken out by defendant no.8 for amending Written Statement.

3. In support of this Petition, Mr. Thakkar submitted that respondent no.1, hereinafter referred to as 'plaintiff', has instituted suit, inter alia, for injunction restraining defendants no. 2 to 8 from alienating, encumbering, selling, transferring or

creating any third party rights in respect of Meherabad property, more particularly described in Exhibit A to the Plaint; restraining defendants 2 and 3 from parting with possession of the said property or inducting any third party into the said property or any part thereof or acting against the interest of the 1st defendant in respect of the said property. He submitted that the plaintiff claims to be majority shareholders in defendant no.1 company. Suit is filed by the plaintiff as a derivative action for and on behalf of and for the benefit of defendant no.1. He submitted that during pendency of the suit, the plaintiff entered into Memorandum of Understanding with (i) Zoru Darayus Bhathena, (ii) Darayus Ardeshir Bhathena and (iii) Katie Darayus Bhathena, hereinafter collectively referred to as "Zoru". Clause 3 thereof records that Zoru is satisfied that plaintiff Mayur has rights in Meherabad property via the shares (4,960 Equity Shares of Rs. 10 face value each) held by him in Linky Hotel and Shopping Spot Pvt Ltd (for short, 'company') and Zoru desires to purchase and acquire those shares of the plaintiff in the said property and the plaintiff desires to sell and transfer his rights in the said property to Zoru on "as is where is basis". Clause 4 thereof records that the plaintiff's only real transferable right, (subject to court order as provided herein), are the shares held by him in the said company which said company has entered into an agreement to purchase the said property from the beneficiary

under the last Will of Mr Nusserwanji D Seervai. The probate petition of Mr N.D.Seervai is presently the subject matter of Testamentary Suit No.57 of 1994, High Court, Bombay. Clause (5) thereof records that Bombay City Civil Court has passed order dated 29.11.2001 in Suit No.7034 of 1998 directing the parties thereto to maintain status-quo which includes restriction on plaintiff for transferring his shares in the said company without prior permission of the Court. Clause 6 is to the following effect:

“6. The parties have therefore agreed to defer their agreement to sell and transfer and purchase and acquire the rights of Mayur in the said Meherabad property to Zoru till happening of the eventuality of the date on which the Court finally grants permission to Mayur to deal with his rights in the said Meherabad property via transfer and/or dealing with the shares of the said company and/or till the date on which the said Order dated 29.11.2001 of status quo is finally modified or withdraws the said restriction or in any manner ceases to restrain Mayur from dealing with his rights in the said Meherabad property. The parties agree that Zoru may purchase and acquire the rights in the said Meherabad property personally or in favour of any family member or his nominee or any third party directly or selected or preferred by him in his discretion provided that, in the event of nominee or third party the same is with the prior written intimation to atleast 15 days of Mayur. “

4. Mr.Thakkar further submitted that clause 8 records that in consideration thereof, Zoru will pay an amount of Rs. 20,00,00,000/- (Rs.Twenty Crores only) to the plaintiff by 30.9.2009. Zoru will pay amount of Rs. 15,80,00,000/- (Rupees Fifteen Crore Eighty lacs only) on or before signing of the agreement and remaining Rs. 4,20,00,000/- shall be paid on or

before 30.9.2009. He submitted that out of total consideration of Rs. 20 Crores, the plaintiff received 15.80 lacs. In other words, the plaintiff has received substantial consideration from Zoru.

5. Mr. Thakkar further submitted that the plaintiff entered into MOU on 15.5.2009 with Zoru whereunder it was agreed between Zoru and the plaintiff that as and when Meherabad property is developed, the plaintiff would be entitled to approximately 5,000 sq.feet carpet residential flat in the Meherabad development, without any cost absolutely free by 1st choice or compensation at market value at such time. He submitted that in view of these developments, defendant no.8 took out Chamber Summons for amending Plaint on or about November 2012 for amending Written Statement dated 13.10.1999. By the proposed amendments, defendant no.8 wants to contend that that in view of MOU dated 10.3.2009 and 15.5.2009 the plaintiff has no locus-standi to prosecute suit. The suit is instituted by the plaintiff as a derivative action for and on behalf of defendant no.1 company. Once the plaintiff has entered into these MOUs, as also received substantial consideration from Zoru, the plaintiff cannot maintain and continue with the suit.

6. Mr. Thakkar submitted that the learned trial Judge rejected the Chamber Summons only on the ground that defendant no.8 did not satisfy the ingredients of proviso to Order 6, Rule 17. He submitted that in the affidavit in support of the Chamber

Summons, defendant no.8 specifically contended that he acquired knowledge of these MOUs only on 7.8.2013 and the present Chamber Summons is taken out on 2.9.2013. It, therefore, cannot be said that defendant no.8 did not satisfy the test of due diligence as laid down in proviso to Order 6, Rule 17. That apart, suit is instituted in the year 1998 and, therefore, is not governed by the proviso to Order 6, Rule 17. He submitted that the learned trial Judge did not record a finding that the proposed amendment is necessary or not. While considering the application for amendments, the Court is required to consider provisions of Order 6, Rule 17 prior to amendment of 2002 and if provisions of Order 6, Rule 17 prior to amendment are taken into consideration, the only requirement is that whether the proposed amendment is necessary for deciding the controversy between the parties.

7. On the other hand, Ms.Panda supported the impugned order. She submitted that in the first place, by MOUs dated 10.3.2009 and 15.5.2009 the plaintiff is not divested of his ownership over the shares. Secondly, while opposing the Chamber summons the plaintiff has filed reply dated 23.3.2015. In paragraph 12, it is stated that the MOUs are terminated. Zoru is unable to pay consideration in terms of MOUs and in the circumstances no right, title and interest is accrued in favour of Zoru under the MOUs. Thirdly, contentions raised in proposed

paragraphs no. 7B, 7K and 7L are already raised in the original written statement. In addition, Ms Panda reiterated that the plaintiff has terminated the said MOUs and will not proceed to complete the transaction in pursuance of the said MOUs.

8. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. Ms.Panda submitted that the contentions raised in paragraphs 7B are substantially the same as in paragraph 2H of the amended original written statement. The contentions raised in paragraphs 7K are substantially identical to the contentions raised in paragraph 2P of the amended original written statement. Likewise, the contentions raised in paragraphs 7L are substantially identical to the contentions raised in paragraph 2R of the amended original written statement. With the assistance of the learned counsel appearing for the parties, I have perused the proposed amendments in paragraphs 7B, 7K, and 7L along with paragraphs 2H, 2P, and 2R of the amended original written statement. Defendant no.8 has substantially reproduced paragraphs 2H, 2P and 2R in the amended original written statement in the proposed paragraphs 7B, 7K and 7L, save and except referring to MOUs dated 10.3.2009 and 15.5.2009. Thus, the foundation for the proposed amendment is MOUs dated 10.3.2009 and 15.5.2009. The learned trial Judge has observed that mere execution of the MOUs, the

ownership/title over immovable property cannot be transferred. In view thereof, I do not find that the learned trial Judge has committed any error in dismissing the Chamber Summons.

9 That apart, in paragraph 12 of the reply to the Chamber Summons, the plaintiff has stated thus:

“12. Without prejudice to the aforesaid I say and submit that in any event, the said MOUs are now terminated. The Bhatenas under the said MOUs were unable to pay the consideration in terms of the said MOUs. In the circumstances, no right, title or interest has accrued in favour of the Bathenas under the said MOUs. In the circumstances above, the above Chamber summons and/or the above amendments sought have been rendered infructuous.”

Apart from that, Ms panda has made statement that the plaintiff has terminated MOUs and will not proceed to complete transactions in pursuance of the said MOUs. Statements made by Ms. Panda are accepted. Thus having regard to the statements in paragraph 12 and also statements recorded herein, one has to proceed on the premise that the plaintiff has locus standi to maintain the suit and, therefore, the suit cannot be dismissed on that ground.

10. In view thereof, no case is made out for interference with the impugned order, Petition fails and the same is dismissed. In case, notwithstanding above statements, the plaintiff in future completes the transactions referred in MOUs dated 10.3.2009 and 15.5.2009, liberty is reserved to defendant no.8 to take out appropriate proceedings. If such proceedings are taken out, the

learned trial Judge will decide the same on its own merits and in accordance with law uninfluenced by observations made in the impugned order as also this order. Order accordingly.

(R.G.KETKAR, J.)