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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4326 OF 2015

M/s.Arihant Steel Industries .. Petitioner

Vs.

M/s. Sahakar Corporation and others .. Respondents

Mr.Rajesh S.Datar i/b M/s.N.N.Vaishnawa & Co., Advocate for the Petitioner.

Mr.Rajiv Narulla i/b M/s. Jhangiani & Narulla Associates, Advocate for the Respondent No.1.

CORAM : R.G.KETKAR, J.
DATED : 11th JANUARY, 2016

P.C. :

. Not on board. At the request of Mr.Datar, taken up for admission. Heard Mr.Rajesh S.Datar, learned Counsel for the petitioner and Mr. Rajiv Narulla, learned Counsel for respondent No.1 at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the judgment and order dated 22/01/2015 passed by the learned Judge, City Civil Court, Gr.Mumbai in Chamber Summons No. 270 of 2014 in Suit No. 9481 of 1996 (H.C Suit No. 5626 of 1996). By that order, the learned trial Judge rejected the Chamber Summons tendered by the plaintiff for condoning the delay in filing the Chamber Summons and for

amending the plaint as per the schedule annexed with the Chamber Summons.

3. Mr.Datar submitted that respondent No.1 executed agreement of sale in favour of the plaintiff on 15/05/1997 in respect of flat No. 302-B. The plaintiff instituted Suit for specific performance of that contract on the Original Side of this Court. During the pendency of the Suit, respondent No.1 – defendant No.1 sold the same flat to respondents No. 2 and 3 by executing agreement of sale dated 01/09/1999. He submitted that the plaintiff filed Notice of Motion for appointment of the Court Receiver. The learned Single Judge of this Court rejected the prayer. Aggrieved by that order, the plaintiff preferred Appeal No. 1109 of 2000 before the Division Bench of this Court. The Appeal was allowed. It was noted that as the first respondent had already sold flat No. 302-B to respondents No.2 & 3 and as the plaintiff has deposited balance consideration of Rs.6,25,000/-, the Court Receiver was appointed in respect of flat No. 502-B. The Receiver was further directed to appoint the plaintiff as agent of the Court Receiver without royalty and security.

4. In pursuance thereof, plaintiff amended the plaint and added paragraph 9(a) as also prayer (a1). However, the plaintiff, at the relevant time, did not pray for amendment as is now proposed in the Chamber Summons. By the proposed amendment, in the alternative, plaintiff has prayed for direction to respondent No.1 to

enter into a fresh agreement with the plaintiff in respect of flat No. 502-B and has sought specific performance of the said agreement. The learned trial Judge however, rejected the Chamber Summons on the ground that trial has commenced. He submitted that the Suit is instituted prior to amendment to the C.P.C. of 2002. The learned trial Judge committed serious error in observing that plaintiff did not establish due diligence as contemplated by proviso to Order 6 Rule 17 of C.P.C.

5. On the other hand, Mr.Narulla submitted that having regard to the paragraph 9(a) read with prayer (a1) of the Suit, plaintiff now cannot incorporate inconsistent/alternate case as also inconsistent prayer. That apart, the proposed amendment suffers from gross delay and laches and therefore, no case is made out invocation of powers under Article 227 of the Constitution of India.

6. I have considered the submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, after the order passed by the Division Bench of this Court appointing the plaintiff as agent of the Court Receiver in respect of flat No. 502-B, the plaintiff amended the plaint. Paragraph 9(a) and prayer a(i) read thus :

9(a) : The plaintiffs state that when the above matter appeared for ad-interim reliefs before Hon'ble Mr.Justice A.P. Shah on 11th, 12th and 14th October 1999, the learned Advocate, appearing for defendant No.1 disclosed for the first time that the suit flat, being flat No. 302-B, Mitesh Apartment, S.V. Road, Malad (West) Mumbai – 400 064 is

purportedly sold to defendants No. 2 and 3 by a purported agreement executed between defendant No.1 and defendants No.2 and 3 being the agreement dated 01st September, 1999, and by a purported letter dated 20th September, 1999 of the defendant No.1, defendants No. 2 and 3, were handed over possession of the suit flat. It is pertinent to note that the advocate's notice, being notice dated 24th August, 1999 was issued to the defendant No.1, which is prior to the purported agreement dated 01st September, 1999 and the said notice was received by and on behalf of defendant No.1. The plaintiffs, therefore, state that the purported agreement dated 01st September, 1999 as well as the purported letter dated 20th September, 1999 are ante-dated and bogus, and are got up documents, to defeat the rights of the plaintiffs.

This Hon'ble Court will, therefore, be pleased to declare that both the purported agreement dated 01st September, 1999 and purported letter dated 20th September, 1999 copies whereof are hereto annexed and marked Exhibit 'D' and Exhibit 'E' respectively, are got up, invalid and does not create any right, title or interest in favour of the defendants No. 2 and 3 in respect of the suit flat.”

(a1) : That this Hon'ble Court will be pleased to declare that Exhibit 'D' being the purported agreement dated 01st September, 1999 executed between the defendant No. 1 and defendants No. 2 and 3 in respect of the said flat and the purported letter dated 20th September, 1999 of defendant No.1, addressed to defendants No.1 and 3, being Exhibit 'E' hereto, are fabricated onto dated, bogus and do not create any right, title or interest in favour of the defendants No. 2 and 3.”

7. Thus, the plaintiff specifically came with the case that agreement of sale dated 01/09/1999 and letter dated 20/09/1999 executed by respondent No.1 in favour of respondents No.2 & 3 are ante-dated, bogus and got up documents and the said documents are executed with a view to defeating the rights of the plaintiff. The plaintiff has also applied for declaration that the said agreement does not give any right, title and interest in favour of respondents

No.2 & 3. Thus, the plaintiff wants specific performance of flat No. 302-B. As against this, by the proposed amendment, the plaintiff has sought direction against respondent No.1 to enter into a fresh agreement for sale in respect of flat No. 502-B and for specific performance of agreement dated 15/05/1997 in respect of flat No. 502-B. Admittedly, agreement dated 15/05/1997 is in respect of flat No. 302-B and not flat No. 502-B. Perusal of the proposed amendment shows that it changes the nature of the Suit as well and the plaintiff under the orders of the Court wants specific performance of agreement which is not entered into by respondent No.1 in favour of the petitioner. Understood thus, no case is made out for interfering with the impugned order. Hence, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)