

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 12927 OF 2016

Gul Rupchand Kriplani

...Petitioner

Versus

Mayur Mangaldas Kothari

And Ors.

...Respondents

....

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

Ms. Deepti Panda a/w. Khyati Pandit i/b. Dhru & Co., for Respondent No.1.

Mr.A.N. Narula i/b. J.N. Narula & Asso. for Respondent No.2.

Mr. S.Das i/b. Akhila Kaushik, Advocate for Respondent No.3.

Ms. Adeline Rodrigues, Respondent No.4 is present.

Ms. Suchitra & Siddarth Ramvani a/w. Mr. Chandrashekhar, for Respondent No.5.

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CORAM : R. G. KETKAR, J.

DATE : 9th DECEMBER, 2016

P.C.

1. Heard Mr.Aditya Thakkar, learned Counsel for the petitioner, Ms.Panda, learned Counsel for respondent No.1, Mr. Narula, learned Counsel for respondent No.2, Mr.Das, learned Counsel for respondent No.3, Ms.Rodrigues, respondent No.4, and Ms. Ramvani, learned Counsel for respondent No.5, at length. Defendant No.8 is present in the Court.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant No.8' has challenged the judgment and order dated 7.9.2016 passed by the learned Judge, City Civil Court, Dindoshi, Mumbai below Exhibits-65, 70 and 72 in Suit No.7034/1998. By that order, the learned trial Judge rejected the applications Exhibits-65, 70 and 72.

3. Defendant No.8 took out application Exhibit-65 *inter alia* praying for issuing request letter to the Prothonotary and Senior Master, High Court, Bombay to deputy the representative from the Record Department to produce photo copies of (i) Notice of Motion No.1018/2016 in Suit No.1257/2007 and the affidavit in support thereof taken out by the plaintiff therein i.e. defendant No.2 herein, (ii) original will dated 14.11.1984 executed by late Nusserwanji Doraji Seervai filed in Probate Petition bearing Petition No.127 of 1994 in this Court. Mr. Khera states that as these documents are marked Exhibits, he seeks permission to withdraw the application Exhibit-65. On the motion made by Mr.Khera, application Exhibit-65 is allowed to be withdrawn and is dismissed as withdrawn.

4. Defendant No.8 filed application Exhibit-70 for recalling and setting aside the marking of Exhibit-47 during the cross-examination by the Advocate for defendant No.2. Defendant No.8 also took out application Exhibit-72 for correction of the error as regards payment of interest @ 4% P.M. or 4% per annum.

5. By the impugned order, the learned trial Judge rejected the application Exhibit-70 on the ground that in the cross-examination defendants No.2 & 3 had referred to the MOU and accordingly it was marked Exhibit-47. Defendant No.8 has no concern with Exhibit-47. At the time of exhibiting MOU neither the plaintiff nor defendants No.1 to 3 raised any objection. The request of defendant No.8 for de-exhibiting the same cannot be considered.

6. As far as application Exhibit-72 is concerned, during the course of cross-examination of PW-1 by defendants No.2 & 3 on 12.9.2012, PW-1 deposed that finance was given @ 4% per month interest. During the course of cross-examination on behalf of defendant No.8 on 5.10.2015, in paragraph-52, PW-1 deposed that he had paid Rs.45 Lakhs to the Company on

interest at the rate of 4%. Defendant No.8, therefore, took out application Exhibit-72 for clarifying as to whether interest was charged @ 4% per annum or 4% per month. The learned trial Judge rejected that application on the ground that defendant No.8 has filed the application without any legal base and because of this, the progress of the suit, which is part heard, is badly affected. Chamber Summons No.839/2013 of defendant No.8 was rejected on 9.8.2016 by imposing costs of Rs.20,000/- to be paid to the Legal Services Authority. Mr. Khara states that the costs is deposited.

7. Insofar as application Exhibit-70 is concerned, defendant No.8 has prayed for de-exhibiting MOU Exhibit-47 by recalling the order dated 9.9.2015. In the present case, the plaintiff has instituted the suit *inter alia* praying for perpetual 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" or any part thereof.

8. It is in that context one has to consider the application Exhibit-70. PW-1 Mayur M. Kothari was cross-examined on

behalf of defendants No.2 & 3 on 9.9.2015. During the course of cross-examination of the plaintiff's witness, MOU dated 31.1.1992 entered into between defendant No.4, defendant No.2 and late Kanchan N. Jani (defendant NO.3) was exhibited at Exhibit-47. As noted earlier, the only relief claimed against defendant No.8 is injunction restraining him from creating third party interest. The learned trial Judge while rejecting application Exhibit-70 has observed that defendant No.8 has no concern with Exhibit-47. The parties to MOU did not raise objections. In view thereof, the request made in the application Exhibit-70 at the behest of defendant No.8 cannot be entertained. I do not find that the learned Judge has committed any error in that regard.

9. As far as application Exhibit-72 is concerned, the learned trial Judge rejected the application on the ground that defendant No.8 is no way concerned with the transaction between the plaintiff and the defendants. Apart from that I find that defendant No.8 has also not set up counter claim. The learned trial Judge was, therefore, justified in observing that the progress of the suit is badly affected because of the applications made by the defendant. In view thereof, no case is made out for

invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed.

10. Before parting, I must place on record that this matter was heard at length on 7.12.2016 when Mr. Thakkar, learned Counsel for the petitioner, upon taking instructions from Mr. Khera, prayed permission to withdraw the Petition, the matter was kept today only to enable defendant No.8 and his Advocate to consider filing undertaking to the effect that the petitioner will restrict their case only with respect to prayer clause (a) of the suit. Today Mr. Khera states that defendant No.8 is not willing to give undertaking.

11. In the light of above discussion, the Petition fails and the same is dismissed. The learned trial Judge while deciding the suit will keep in mind the relief claimed by the plaintiff against defendant No.8 and deal with the matter in accordance with law. Order accordingly.

(R. G. KETKAR, J.)