

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Writ Petition NO. 12559 OF 2015

IBRAHIM GULAMHUSAIN TAWAWALA
(SINCE DECD) AND ANR.

...Petitioners

Versus

KHOZEMA TAYEBALI TAWAWALA
AND ORS.

...Respondents

....

Mr. Rajesh Kachare a/w. Mr. Mehul Gada, Chirag Sudh i/b.
M/s. Tamhane & Co. for the Petitioners.

Mr. P.S. Dani, Senior Counsel a/w. Rashid Khan, Ms. Tasneem
Zaidy i/b. Zaidy & Co., for Respondent No.2.

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CORAM : R. G. KETKAR, J.

DATE : 09th MARCH, 2016

P.C.

1. Heard Mr. Rajesh Kachare, learned Counsel for the petitioners, Mr. P.S. Dani, learned Senior Counsel for the respondents, at length.

2. Rule. Learned Counsel for the respondents waives service. At the request and by consent of the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order

dated 17.8.2015 passed by learned Judge, presiding over court room No.2 of Bombay City Civil Court, Greater Bombay in Chamber Summons No.1327/2015 in Short Cause Suit No.8171/1999 (High Court Suit No.36/1999). By that order, learned trial Judge allowed the Chamber Summons taken out by the respondents, hereinafter referred to as the 'plaintiffs', and deleted issue No.5 and ordered framing of additional issues as proposed by the plaintiffs.

4. The plaintiffs have instituted Suit No.436/1999, initially on the Original Side of this Court against Ibrahim Gulamhussain Tawawala. Said Ibrahim Tawawala died on 31.1.2010 leaving behind Asmabai Ibrahim Gulamhussain Tawawala (defendant No.1A), Shabbir Ibrahim Tawawala (defendant No.1B) and daughter Munira Saifee Gandhi (defendant No.1C). It is the case of the plaintiffs that the plaintiffs and original defendant Ibrahim Tawawala were the partners and were carrying on business in agricultural and building implements and material in the firm named and styled as M/s. Salebbhai Gulamhusain & Brothers, in shop No.28 situate on the ground floor of Sarang Street, Mumbai – 400 003

(for short, 'suit premises'). Said firm was tenant of the suit premises situate on the ground floor. Tayebali Tawawala died leaving behind plaintiff No.1 his only son. Salehbhai died on 29.4.1994 leaving behind plaintiff Nos.2 and 3. It appears that after the death of Tayebali and Salehbhai, the partnership firm was reconstituted wherein present plaintiff and defendant No.1 Ibrahim were the partners. Said partnership firm was dissolved on 31.7.1995. It is the case of the plaintiffs that defendant No.1 Ibrahim entered into an agreement for sale in the capacity as a partner of M/s. Salehbhai Gulamhusain & Brothers without informing other partners about said transaction. When the firm was dissolved on 31.7.1995, defendant No.1 relinquished all his right, title and interest in the assets of the partnership firm in favour of the plaintiffs. However, he did not disclose the conveyance executed by the owners in his favour. The case of the plaintiffs is that defendant No.1 is bound to hold the ownership right of the suit premises for the benefits of the partnership firm. As defendant No.1 has relinquished all his right, title and interest in the assets of the partnership firm, he is bound to convey the plaintiffs the ownership rights of the ground floor of the property on payment by the plaintiffs to

defendant No.1 Rs.50,000/- and Rs.5600/- towards stamp duty and registration fees as per clauses 4 and 5 of deed of dissolution dated 31.7.1995. On the basis of these assertions, the plaintiffs have prayed for declaration that for the reasons set out in para-15 of the plaint, the defendants hold the ownership right of the ground floor premises of building No.28 under the impugned conveyance dated 16.6.1992 subject to the terms and conditions therein contained for the benefit of the plaintiffs in the proportions stated in the said para-15 of the plaint; for order and decree against the defendants to convey the ground floor premises on building No.28 subject to the payment by the plaintiffs to the defendants.

5. Defendants Ibrahim Tawawala filed written statement dated 24.1.2007 resisting the suit. On the basis of the pleadings of the parties, on 2.9.2014 learned trial Judge framed the issues. Issue No.5 is to the following effect :

“5. Whether the plaintiff is entitled for the relief of specific performance of contract against the defendants as prayed ?”

6. The plaintiffs took out Chamber Summons No.1327/2015 for deleting issue No.5, as extracted hereinabove, and substituting following issue as issue No.5 and adding issue Nos.5A and 6 which are to the following effect :

“5. Whether the defendants prove that the defendants had informed the plaintiffs of the agreement of sale dated 14-04-1992 and conveyance dated 16th June, 1992.

5A. Whether the defendants prove that the plaintiffs were aware about the agreement dated 14-04-1992 and conveyance dated 16th June, 1992.

6. Whether the defendant proves whether the suit property was purchased by the defendant out of his own funds as alleged in para 9 of the written statement.”

7. By the impugned order, learned trial Judge has deleted issue No.5 framed on 2.9.2014 and in its place substituted issue No.5 and added issue Nos. 5A and 6 as per schedule attached to the Chamber Summons. It is against this order, the defendants have instituted the present Petition.

8. Mr. Kachare submitted that having regard to the assertions made in the plaint as also prayer clause (b), learned trial Judge was not justified in substituting issue No.5 thereby deleting issue No.5 framed on 2.9.2014. Learned trial Judge was also not justified in adding issue Nos.5A and 6. He submitted that no reasons are given by learned trial Judge for framing issue No.5 as suggested in the Chamber Summons as also adding issue No.5A. He submitted that as far as issue No.6 is concerned that has been rightly framed by learned trial Judge.

9. On the other hand, Mr. Dani submits that the plaintiffs are not pressing for substitution of issue No.5 in place of the deleted issue No.5 as also addition of issue No.5A. In other words, the plaintiffs are supporting the impugned order so as to delete issue No.5 framed on 2.9.2014 and also addition of issue No.6. Statements made by Mr. Dani are recorded.

10. The main challenge to the impugned order is about deletion of issue No.5 framed on 2.9.2014. Mr. Kachare submitted that in view of prayer clause (b), learned trial Judge was not justified in deleting issue No.5 framed on 2.9.2014. He has taken me through the plaint as also prayers made by the

plaintiffs. Perusal of the assertions made in para-15 clearly shows that the plaintiffs are claiming conveyance from defendant No.1 on the ground that defendant No.1 having retired from the partnership firm and having released all his right, title and interest in the assets of the partnership firm, is bound to convey to the plaintiffs the ownership rights of the ground floor of said property subject to payment by them to the defendants. He, therefore, submitted that the suit is basically for specific performance of the contract. After considering the pleadings, on 2.9.2014 the learned trial Judge had rightly framed issue No.5. By the impugned order, said issue is deleted. He, therefore, submitted that issue No.5 framed on 2.9.2014 deserves to be retained as it is.

11. On the other hand, Mr. Dani supported the impugned order and submitted that having regard to the assertions made in para-15, learned trial Judge rightly deleted issue No.5 framed on 2.9.2014. He submitted that there is no privity of contract between the plaintiffs and defendant No.1 so as to claim specific performance of the contract by the plaintiffs from defendant No.1.

12. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record.

13. In order to appreciate the controversy between the parties, it is necessary to reproduce para-15 and prayer clause(b) :

“15. It is submitted that the defendant No.1 has entered into the said agreement for sale utilizing his position as a partner of the partnership firm of M/s. Salehbhai Gulamhusain and Bros., tenant of the ground floor premises clandestinely without informing his other partners of the said firm. By the said transaction, the defendant No.1 knew that he was putting himself in the position of the said land-ladies qua the said firm and thereby creating a conflict of interest and duties and obligations between himself in his character as a partner of his said firm and his other partners in respect of then tenancy rights of the said firm of the said ground floor premises, under the said Award and Deed of Dissolution dated 21.7.95, the defendant No.1 has released in favour of the Plaintiffs, all his share right title and interest in

the assets of the said firm. In the said Deed of Dissolution, the defendant No.1 has not disclosed the said conveyance and also in the said writing dated 28th July, 1995. The defendant No.1 is bound to hold the ownership rights of the said ground floor premises acquired by him for Rs.50,000/- under the said Conveyance for the benefit of the said partnership. The defendant No.1 having retired from the said partnership and released all his share and interest thereon in favour of the Plaintiffs, the defendant No.1 is bound to convey to the Plaintiffs the ownership rights of the ground floor of the said property on payment by the Plaintiffs to the defendant the sum of Rs.50,000/- and Rs.5600/- for costs of stamp duty and registration fees to be held by them in the same proportions as they hold the other assets of the said firm as per clause 4 and 5 of the said Deed of Dissolution i.e. to say the 1st plaintiff holding one-half share and the 2nd and 3rd plaintiff each holding 1/4th share in the said ground floor premises.”

“(b) that the defendants be ordered and decreed to convey the said ground floor premises of the building more particularly described in the Schedule hereto annexed and marked Ex.'I' on

payment by the Plaintiff to the Defendant the sum of Rs.50,000/- being the price paid by the defendant and Rs.5600/- being the stamp duty and registration fees paid by the defendant on the said Conveyance dated 15th June, 1992 and the said ground floor premises to be held by the Plaintiffs in proportion of 50% by the 1st Plaintiff and 25% to be held by each of the Plaintiffs Nos.2 and 3 as Co-owners subject to the terms and conditions mentioned in the said conveyance dated 15th June, 1992”

14. Perusal of para-15 *prima facie* shows that the plaintiffs have alleged that defendant No.1 misused his position as a partner of partnership firm of M/s.Salehbhai Gulamhusain and Brothers, which is admittedly a tenant of the ground floor premises. Defendant No.1 Ibrahim did not intimate to his other partners about his entering into an agreement for sale with the owners of the building. As defendant No.1 has relinquished his right, title and interest in the assets of the partnership firm, he is bound to convey to the plaintiffs the ownership rights on the ground floor. At the time of executing a deed of dissolution on 31.7.1995 defendant No.1 however did not disclose the execution of conveyance in the year 1992. In other words, the case of the

plaintiffs is that defendant No.1 having misused his position as a partner of the partnership firm entered into conveyance with the owners of the building and that conveyance was to be executed in favour of the sitting tenant, namely, the partnership firm. It is in this context prayer clause (b) is made seeking direction against defendants to execute the conveyance in favour of the plaintiffs subject to payment. Though Mr. Kachare contended that this prayer clause (b) is for specific performance of the contract he was not in a position to point out any agreement that was entered into by and between defendant No.1 and the plaintiffs. In view thereof, I do not find that learned Judge has committed any error in deleting issue No.5. In view of the statement made by Mr. Dani that after deleting issue No.5 learned Judge has substituted issue No.5 and added issue No.5A be deleted, the impugned order is modified in the following terms :

- (i) Issue No.5 framed on 2.9.2014 is deleted. Issue No.5 as suggested by the plaintiffs in the schedule and issue No.5A shall stand deleted and only issue No.6 shall stand added to the issues framed on 2.9.2014. In other words, in the

issues framed on 2.9.2014, issue No.5 stands deleted and issue No.6 as suggested in the schedule shall stand added.

(ii) Rule is made absolute partly in the aforesaid term with no order as to costs.

(R. G. KETKAR, J.)

Deshmane (PS)