

Writ Petition NO. 7749 OF 2016

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India, the petitioner, hereinafter referred to as the 'Kishore', has challenged the judgment and order dated 15.4.2016 passed by the learned Ad-hoc Judge, City Civil Court, Greater Bombay below Exhibits-10 and 11 in Suit No.8818/1992 and Suit No.9303/1994.

4. Suit No.8818/1992 is instituted by (1) Mrs. Sheila Nanik Ramchandani (for short, 'Sheila') since deceased, and (2) Mr. Chandru s/o Late Nanik Ramchandani (for short, 'Chandru') against Kishore for specific performance of the consent terms dated 12.9.1991 whereunder Kishore has relinquished his all rights, title and interest in Flat No.7, on the second floor in Pentacle Co-operative Housing Society Ltd., Warden Road, Mumbai – 400 026 (for short, 'suit flat') and shares No.3771 to 3851 issued by the said society. In the alternative, Sheila and Chandru have claimed direction against Kishore to pay sum of Rs.12 Lakhs together with future interest @ 18% per annum, from the date of filing of the suit till payment and/or realization as and by way of damages for breach of the agreement contained in the consent terms.

5. Kishore has instituted Suit No. 9303/1994 *inter alia*

for declaration that the purported consent terms dated 12.9.1991 are null and void and not binding upon him. In the alternative for a declaration that the purported deed of compromise dated 12.9.1991 stands cancelled and is not binding upon the plaintiff. Kishore has also sought declaration that Sheila, Chandru and Kishore have 1/3rd share each in suit flat and in the assets left by his father Nanik Ramchandani. Both the suits are clubbed together and common evidence is recorded.

6. On the basis of the pleadings of the parties, by order dated 26.9.2007 issues were framed by this Court in the suit instituted by Sheila and Chandru. By order dated 21.4.2011 issues were framed by this Court in the suit instituted by Kishore. It is common ground between the parties that the plaintiff's evidence is over. Kishore has filed affidavit in examination-in-chief of October, 2015. During pendency of the suits, Sheila died in the year 1996. Chandru took out applications Exhibits-10 and 11 for striking out certain paragraphs of affidavit in examination-in-chief of Kishore. By the impugned order, the learned trial Judge has allowed the applications in terms of prayer clause (a). It is against this order,

Kishore has instituted present Petition.

7. During the course of hearing of this Petition, Mr.Narula states that Chandru has no objection for retaining paragraphs- 96, 142, 143, 150, 153, 154, 155, 203 and 204. However, he is strongly objecting to retaining the paragraphs which are ordered to be deleted by the learned trial Judge. Statement of Mr. Narula is recorded.

8. In support of this Petition, Mr. Chitnis has taken me through the affidavit of Kishore. In particular, he invited my attention to paragraph-58 which referred to a detailed affidavit-in-reply filed by Kishore to Notice of Motion No.1275/1992 taken out by Sheila and Chandru for alleged contempt. He has produced that affidavit at Sr.No.83 in the compilation of documents. Kishore has prayed for taking same on record and marking it as Exhibit.

9. Mr. Narula invited my attention to Section 1 of the Indian Evidence Act, 1872 (for short, 'Act') to contend that the Act does not extend to affidavits presented to any Court or Officer, nor to proceedings before an Arbitrator. In other words he submitted that the affidavit referred in paragraph-58 is not

evidence which can be tendered by Kishore.

10. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. Perusal of paragraph-58 *prima facie* shows that in the affidavit-in-reply filed by Kishore to the Notice of Motion, he has made certain allegations against the Advocate who has signed consent terms dated 12.9.1991. The controversy between the parties revolves around the consent terms dated 12.9.1991 and whether Advocate of Kishore had authority to sign the consent terms on behalf of Kishore. Having regard to the issues framed by this Court as also nature of controversy between the parties, in my opinion the learned trial Judge should have retained paragraph-58 subject to keeping all contentions of Chandru open. In view thereof, said paragraph-58 is retained in affidavit of Kishore.

11. As far as paragraphs-188 and 203 of the affidavit of Kishore are concerned, perusal of the pleadings of Kishore *prima facie* shows that he has also made reference to P.O. Box No.3962 and the correspondence is not sent to him at P.O. Box No.3962 but some other post-box. As the contents of paragraphs-188 and 203 are substantially in conformity with the pleadings of Kishore, same are required to be retained.

12. Hence the Petition is disposed of in following terms:

- i] Impugned order is modified and paragraphs No.58, 96, 142, 143, 150, 153, 154, 155, 188, 203 and 204 are allowed to be retained in addition to the paragraphs allowed to be retained by the impugned order.
- ii] Rule is partly made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)