IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7974 OF 2018

Ramesh Nanasaheb Nirgude ... Petitioner
Versus
Vishwanath Eknath Gangawane and Anr. ... Respondents

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Mr. Jaydeep Deo for the Petitioner.
Mr. Sudhir S. Hardikar, for the Respondents.

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CORAM : SHARMILA U. DESHMUKH, J.
DATE : July 24, 2023.

P. C. :

1. The petition questions the order dated 15th January, 2018 passed below Exh.23 in Regular Darkhast No.8 of 2016 rejecting the petitioner's application for execution as against the partition/share in immovable property Plot No.377 i.e. Schedule "A" mentioned in Column No.10 of the execution application.

2. The facts of the case are that partnership firm by named "Mahalaxmi Fabricators" was formed vide partnership deed dated 14th January, 1985 between four partners. The Petitioner and the Respondent no.1 were not the partners at the time of the formation of

the partnership deed and were subsequently inducted as partners in the year 1986. By deed of retirement dated 26th February, 1987, the four original partners retired and the firm of Mahalaxmi Fabricators continued with the Petitioner and the Respondent no.1 as the partners of the firm. As dispute had arisen between the petitioner and the Respondents, the Respondent no.1 had filed Special Civil Suit No.357 of 1992 for declaration and injunction that he is exclusive owner of the entire assets of the firm, in which a counter claim was filed by the Petitioner seeking dissolution of the firm and settlement of account of the firm. Vide judgment and order dated 31st August, 2001, the suit filed by the Respondent No.1 came to be dismissed and the counter claim filed by the Petitioner was allowed, holding that the Petitioner and the Respondent no.1 are partners of the partnership firm. The operative part of the order reads as under:

> *"1. The suit for declaration and perpetual injunction is hereby dismissed.*
>
> *2. In the counterclaim set up by the defendant No 1 it is hereby declare that plaintiff and defendant No 1 are the partners of M/s. Mahalaxmi Fabricators having profit sharing ratio 50 : 50. The partnership came into existence on 22.12.86. Plaintiff and defendant No 1 became sole*

partners of aforesaid partnership firm on 26.2.87 and it is hereby declared that M/s. Mahalaxmi Fabricators, a partnership firm stood dissolved on 16.2.93 when the defendant No 1 set up counterclaim for rendition of account.

3. It is hereby declared that defendant No 1 is entitled to rendition of accounts of partnership firm from plaintiff.

4. Preliminary decree be drawn accordingly and defendant No 1 is at liberty apply for final decree to get settled his accounts for recovery of his capital investment in the partnership firm."

3. Subsequently, an application came to be filed for final decree application, which was contested by the Respondent No.1. During the final decree proceedings, Court Commissioner was appointed and the report came to be filed below Exh.108. Vide judgment and order dated 19th August, 2015 passed in final decree application No.357 of 1992, the copy of the Court Commissioner report formed part of the final decree. As against the judgment and order dated 19th August, 2015, the Respondent No.1 preferred Civil Appeal No.416 of 2016 alongwith the application for condonation of delay. Vide order dated 10th April, 2017, the first Appellate Court

dismissed the appeal with costs.

4. The Petitioner filed Regular Darkhast No.8 of 2016 for execution of the final decree to which an objection was filed by the Respondent No.1. Vide impugned order the Regular Darkhast No.8 of 2016 was partly allowed and insofar as the prayers seeking partition/share in immovable property the same came to be rejected.

5. Heard Mr. Jaydeep Deo, learned counsel for the Petitioner and Mr. Sudhir S. Hardikar, learned counsel for the Respondents.

6. Learned counsel appearing for the Petitioner has invited the attention of this Court to the prayers made in the counter claim seeking rendition of accounts. He would further submit that as regards the preliminary decree there was no challenge and in the final decree application, Court Commissioner came to be appointed. He would further point out that as per the Court Commissioner's report dated 13th October, 2014, the property at Bhosari was included in the Court Commissioner's report and directed to be shared by the partners in the profit in sharing ratio 50 : 50 each on final settlement. As such he would contend that the Court Commissioner construed the property at Bhosari to be the asset of the partnership firm and

included the same for the purpose of execution of the final decree application. He has further pointed out the capital account of the Petitioner which shows amounts being paid towards MIDC Plot. He would further contend that the final decree dated 19th August, 2015, the report of the Court Commissioner below Exh.108 was directed to form a part of and as such, the Executing Court was bound to execute the final decree which had attained finality. He would further submit that the executing Court did not consider the Court Commissioner report in its proper perspective and has held that the preliminary decree as well as the final decree do not support the prayers of the decree-holder. He draws support from the provisions of Sections 14, 15, 46 and 48 of the Indian Partnership Act, 1932 and would contend that the immovable property of the firm is an asset of the firm and the suit for account will include a claim for the immovable property of the firm.

7. *Per contra*, learned counsel appearing for the Respondents submits that the plot of MIDC at Bhosari, which is the subject matter of dispute between the parties is not an asset of the partnership firm as no lease has been executed between the partners and the agreement between the partnership firm and MIDC continues

to be a leave and license agreement. He has pointed out that the agreement dated 20th May, 1985, between the MIDC and would contend that the recital of the said license agreement would indicate that until the grant of lease the licensee shall be deemed to be bare licensee. Upon a query by this Court as to whether such objection was raised by the Respondents before the Executing Court, he fairly concedes that said submissions which are canvassed before this Court were not raised before the Executing Court. Considering that no such submission was placed for consideration before the Executing Court. I am not inclined to consider this submission canvassed for first time before this Court which is not a question of law.

8. Learned counsel for the Petitioner counters the submissions of the learned counsel for the Respondents by pointing out page 200 of the petition, which is the property card of MIDC Plot which shows the property standing in the name of the partnership firm, which includes the other partners as well, who are the original allottees. Be that as it may. Considering that no such objection was raised before the Executing Court, I am not inclined to consider those submissions. The only objection which was raised before the Executing Court was that the Court Commissioner's Report dated 13th

October, 2014 is vague and incorrect and that the report is totally silent about the immovable property or share of the decree-holder. Another objection was that in Civil Appeal No.416 of 2016, the First Appellate Court while deciding the said appeal came to the conclusion that it be noted that the final decree was passed only in respect of settlement of the accounts of the firm and that the immovable property which is the dispute was not subject matter before the learned trial Court.

9. Learned counsel for the Petitioner has pointed out that as the first Appellate Court' order was in his favour there was no occasion to challenge the findings of the first Appellate Court and in fact, the second appeal which was filed was withdrawn. This position, in my opinion, answers the objections which was taken by the learned counsel for the Respondents as regards the findings of the Appellate Court.

10. As regards the challenge to the Commissioner's Report being vague the fact remains that as against the challenge to the final decree application the same has been dismissed and the second appeal has been withdrawn. That being the case, it was incumbent

upon the Executing Court to execute the decree. The Executing Court has declined to execute the final decree as regards the immovable property on an erroneous finding that no right in immovable property appears conferred upon decree holder by preliminary decree as well as final decree. The Executing Court failed to take into consideration that the Court Commissioner's report clearly mentions that the property at Bhosari shall be shared by the partners in property profit sharing ratio 50% each on final settlement, and that the final decree proceedings makes the Court Commissioner's report a part of the final decree proceedings and as such, the finding of the Executing Court that no right has been conferred upon the decree-holder by the final decree is clearly erroneous.

11. Reliance is rightly placed by the learned counsel for the Petitioners on the provisions of the Partnership Act which indicates that Section 14 of the Partnership Act provides that subject to contract between the partners, the property of the firm includes all property and rights and interest in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm for the purposes and in the course of the business of the firm, and includes also the goodwill of the business. Unless the contrary

intention appears, property and rights and interest in property acquired with money belonging to the firm are deemed to have been acquired for the firm. The documents which have been executed with the MIDC in respect of the plot of MIDC indicates that the same was executed in the name of the firm since the year 1985 and as such, it is sufficiently established that it is the property of the firm. This position is not disputed by the learned counsel appearing for the Respondents, however, his contention is that the same is mere license until the lease has been executed. That contention is contrary to the material on record which is annexed at page 200 of the petition i.e. the property card issued by MIDC which shows the current lessee as the partners of Mahalaxmi Fabricators which also include the originally allottee. Learned counsel for the Respondents submits that inclusion of the names of the other partners would indicate that the same is incorrect. However nothing has been brought on record to show that there was any objection being raised by the Respondent no.1 as to the inclusion of the name of all the partners of the Mahalaxmi Fabricators. It is nowhere demonstrated that the license has been executed in favour of the Respondent as proprietor and not in the name of the partnership form.

12. In that view of the matter the order of the executing Court declining the partition/share in immovable property plot no.377 is clearly unsustainable. The impugned order dated 15th January, **2018** is hereby quashed and set aside. The execution application as regards the prayer clause 2 and 3 in respect of the MIDC Plot No.377 to be considered by the executing Court.

13. The Writ Petition stands allowed.

(Sharmila U. Deshmukh, J.)

(This order is corrected pursuant to the Speaking to the Minutes order dated 18th August, 2023.)