IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.995 OF 2022
WITH
INTERIM APPLICATION NO.19205 OF 2022

Dilip Damji Shah ... Appellant
versus
Kamlesh Shamji Shah and Ors. ... Respondents

Mr. Malpathak i/by Mr. Sandesh Deshpande, for Appellant.
Mr. Ranvir Shekhawat with Mr. Jagdish Choudhary i/by M/s. Raj Legal for Respondent Nos.1 and 2.

CORAM: N.J.JAMADAR, J.

DATE : 15 MARCH 2023

P.C.

1. This Appeal is directed against the order dated 21 June 2022 passed by the learned Joint Civil Judge, Sr. Division, Kalyan, on an Application Exhibit 5 in Special Civil Suit No.57 of 2022, whereby the said Application for interim reliefs came to be rejected.

2. Shorn of superfluities, the background facts necessary for the determination of this appeal can be stated as under :

2.1 Respondent Nos.1 and 2 – Defendant Nos.1 and 2 are the partners of M/s. Maruti Developers, a partnership firm. Maruti Developers had acquired rights to develop properties bearing old Survey No.127, New Survey No.69/2/1 situated at Village Kanchangaon and old Survey No.242-A, New Survey No.28/3/1 situated at Village Chole, under diverse development agreements/instruments.

2.2 In the year 2009-10 Defendant Nos.1 and 2 approached the Plaintiff and one Ramniklal Velji Shah (HUF) to infuse capital into M/s. Maruti Developers and also join as partners in the said firm. A Deed of Reconstruction and Admission of new partners dated 1 January 2010 came to be executed and the Plaintiff and Ramniklal Velji Shah (HUF) were admitted as partners of the M/s. Maruti Developers with the Plaintiff and Defendant Nos.1 and 2 and Ramniklal Velji Shah (HUF) each having 25% shares in the profit.

2.3 Maruti Developers executed a Joint Venture Agreement with M/s. Kulswamini Builders – Defendant No.3 for a joint development of the suit property. Buildings were constructed over the suit property and Maruti Developers received its share of consideration from Kulswamini Builders.

2.4 On 1 April 2017 Ramniklal Velji Shah (HUF) retired from the partnership firm and a Deed of Retirement dated 1 April 2017 came to be executed. With the retirement of Mr. Shah, the shares in the profit of the firm were readjusted with Defendant Nos.1 and 2 having 25% each and the Plaintiff having balance 50% share.

2.5 The Plaintiff instituted the Suit with the allegations that the Defendant Nos.1 and 2 started to act in breach of the contract of partnership. The Plaintiff was unlawfully excluded from the partnership business. Defendant Nos.1 and 2 siphoned off the funds from the firm's account. The Plaintiff was deprived of his share of profit.

Moreover, by levelling false and frivolous allegations, Defendant Nos.1 and 2 sought to expel the Plaintiff from the partnership firm without there being any lawful authority to do so. The Plaintiff was, thus, constrained to issue notice to dissolve the partnership on 30 July 2021, and institute a suit for winding up of the business of the dissolved partnership firm, rendition of accounts and distribution of the assets and profit of the firm.

2.6 In the said Suit, the Plaintiff filed an application for interim reliefs, including appointment of the Court Receiver and restraining the Defendants from selling and/or alienating unsold flats in the building erected on the property of the firm and from creating any third party rights or interest in the suit property.

2.7 Defendants resisted the Application. Defendant Nos.1 and 2, inter alia, contended that the Plaintiff never infused capital in accordance with the terms of the partnership contract. The Plaintiff was, thus, not entitled to any share in the profits of the firm, nor any role in the management of the affairs of the firm. The Defendants had, thus, lawfully expelled the Plaintiff from the partnership firm. Therefore, the Plaintiff was not entitled to seek any reliefs.

3. The learned Judge after appraisal of the pleadings and the documents tendered for his perusal was persuaded to reject the Application for interim reliefs holding, inter alia, that the Plaintiff failed to make out a prima facie case as there was no material to show that the Plaintiff had infused any capital in the firm in accordance

with the terms of the agreement. Being aggrieved, the Plaintiff is in appeal.

4. I have heard Mr. Malpathak, learned Counsel for the Appellant, and Mr. Shekhawat, learned Counsel for Respondent Nos.1 and 2.

5. Mr. Malpathak submitted that the status of the Plaintiff as a partner of Maruti Developers is incontestible. Inviting the attention of the Court to the Deed of Reconstruction and Admission of New Partners dated 1 January 2010 and the Deed of Reconstitution of Partnership dated 11 July 2017, Mr. Malpathak submitted that the learned Judge was clearly in error in not protecting the interest of the Plaintiff when there was no dispute about the status of the Plaintiff as a partner of the firm in which the partnership dispute had arisen. Since the partnership is at will and a notice of dissolution of partnership was given by the Plaintiff, the latter could not have been left in the lurch by declining to grant interim relief.

6. Mr. Malpathak took the Court through the recitals in the deeds and the stand of the Defendant Nos.1 and 2 in the correspondence which preceded the institution of the suit.

7. Indisputably, at this stage, there does not seem to be much contest about the fact that the lands over which the buildings have been constructed were acquired by the firm before the Plaintiff joined it as a partner pursuant to the Deed dated 1 January 2010. Substantial development of the suit property is also not in contest. The fact that initially the Plaintiff and Mr. Shah (HUF) were inducted as partners

having 25% share of profits under the Deed of Reconstruction and Admission of New Partners dated 1 January 2010, and, later on, upon the retirement of Mr. Shah (HUF), the Plaintiff's share in the partnership rose to 50% under the Deed of Reconstitution dated 11 July 2017, are, by and large, uncontroverted.

8. Clause 11 of the Deed of Reconstruction and Admission of New Partners dated 1 January 2010 reads as under :

> "11. Right, title and interest over the Business, Assets, Liabilities and Goodwill of the Partnership business shall belong to party here to of first and second part equally. And after contribution of equal capital by party here to of third and fourth part as decided by the partners then such rights belong to all the partners in their profit sharing ratio. It is specifically agreed by the partners that old liabilities of the Partnership business carried by the Party hereto of first and Second Part and Retired Partner upto 31/12/2009 shall be discharged by the Partners hereto of First and Second Part only. All liabilities of new partnership business effective from this partnership deed shall be discharged by all partners equally."

9. Similarly, clause 11 The Deed of Reconstitution of Partnership Deed dated 11 July 2017 reads as under :

> "11. It is also specifically decided that, Party hereto of the Third Part shall contribute capital as equal to the total capital of Party hereto of First and second Part. And then he will be treated as Partner with the Party hereto of First and Second Part. The Right, Title and Interest over the Business Assets, Liabilities and Goodwill of the Partnership business shall belong to party here to of first and second part equally. And after contribution of capital by party here to of third Part as Total Capital of Party hereto First and Second Part then such rights belong to all the partners in their profit sharing ratio."

10. Under both the Deeds, it has been specifically incorporated that the new partners who came to be inducted in the firm will contribute capital equal to that already contributed by the existing partners namely Defendant Nos.1 and 2. Only after contribution of capital by newly inducted partners, the partners shall have rights to the profits in accordance with the shares agreed under the preceding clause.

11. It is imperative to note that the Trial Court has recorded in clear and explicit terms that when the Plaintiff was confronted with the question as to whether the Plaintiff has contributed capital in accordance with the aforesaid clauses under the partnership Deeds, an attempt was made to salvage the position by canvassing a submission that the question as to whether the Plaintiff invested capital in the firm is a matter of evidence and the Plaintiff would prove the same at the trial. In the face of the said stand, the Trial Court was persuaded to hold that the Plaintiff failed to make out a prima facie case.

12. I do not find any infirmity in the approach of the learned Trial Judge. From the perusal of Clause 11 of each of the Partnership Deeds, extracted above, it becomes abundantly clear that the contribution of capital by the incoming partners was a condition precedent for conferring rights on those parties as partners of the firm. In a sense, the rights were contingent upon the investment of the capital.

13. The learned Counsel for the Appellant made an endeavour to demonstrate that there is material to show that, in the intervening period, the Plaintiff

did make investment in the firm. According to him, the said aspect was essentially a matter of proof and the Plaintiff could not have been non-suited for failure to demonstrate the same while seeking interim relief.

14. I am afraid to accede to this submission. It would have carried some conviction had there been no subsequent deed of Reconstitution dated 11 July 2017. The Plaintiff would not have agreed to a term that the Plaintiff's right would be contingent upon investing the capital, had the Plaintiff already invested his part of the share during the long period of 7 years from the date of the execution of the first Deed of Reconstruction and Admission of New Partners dated 1 January 2010. If the Plaintiff seeks to draw support and sustenance to the case from the partnership agreements, the Plaintiff must stand or perish with the recitals therein. It was, therefore, incumbent upon the Plaintiff to make out prima facie, that the Plaintiff did invest capital in the firm and despite the investment of the requisite capital, he was kept out of the partnership business and profits therefrom.

15. Mr. Malpathak would urge that in a case of this nature where the partners of a partnership firm are at loggerheads, appointment of Court Receiver is just and convenient. Therefore, the Court may appoint Court Receiver to manage the affairs of the partnership firm and, in that event, no prejudice would be caused to the Defendants.

16. I find it difficult to accede to this submission as well. Appointment of the

Court Receiver is a serious matter. It is incumbent upon the Plaintiff to make out a strong prima facie case. In the case at hand, the Plaintiff's case rests on the Instruments alone and is not at all backed by the material to show that the Plaintiff acquired rights as a partner upon investment of the capital. In contrast, the contingent nature of the rights of the Plaintiff in the absence of such prima facie proof tilts the scale of balance of convenience in favour of Defendant Nos.1 and 2. In any event, with the substantial development of the property and creation of third party rights, an order of injunction and/or appointment of Court Receiver would cause irreparable loss to the Defendants.

17. The conspectus of aforesaid consideration is that the Trial Court has exercised discretion not to grant injunction keeping in view the principle which govern grant of temporary injunction. Such exercise of discretion in a justifiable manner does not warrant correction in appeal. The Appeal, thus, fails.

18. Hence, the following order :

ORDER

(i) The Appeal stands dismissed.

(ii) No costs.

(iii) In view of the dismissal of the Appeal, Interim Application also stands disposed.

(N.J.JAMADAR, J.)