Application No.4119 of 2021
in
C.S.No.236 of 2014

G.CHANDRASEKHARAN, J.,

This application is filed to permit the applicant/11th defendant to sell Item No.2 of the suit 'A' schedule property in variance of earlier order dated 28.09.2016 made in O.A.No. 282 of 2014 in the above suit.

2. Learned counsel for the applicant submitted that respondents 1 to 3 filed the above suit for partition claiming 1/9th share in the suit properties and for declaration to declare the sale deed dated 12.12.2013 in favour of the applicant as null and void. Respondents 1 to 3 filed Application in O.A. No. 282 of 2014 seeking an order of interim injunction restraining the applicant/11th defendant from in any manner dealing with Item No.2 of the suit 'A' schedule properties either by way of demolition and/or reconstruction or in any manner alienating the same either wholly or in part or in any manner encumbering the property pending disposal of the suit. This Court, initially, granted an ad-interim injunction restraining the

applicant/11th defendant from alienating or encumbering the said property. The applicant/11th defendant filed counter in that application. Respondents 1 to 3/plaintiffs, under the guise of seeking directions with respect to other items of the suit properties, filed a number of other applications, due to which the injunction application filed against the applicant/11th defendant also could not be heard. Respondents 1 to 3/plaintiffs filed a Contempt Petition in Cont.P. No.1650 of 2016 stating that the applicant/11th defendant demolished the property and was about to construct a residential house. After contest, that application was dismissed by the Court along with other connected applications vide common Order dated 28.09.2016. This Court found, while passing the common order dated 28.09.2016, that there is no prima facie title available to the Plaintiffs as against the applicant. Applicant was found a bonafide purchaser. However, this Court was pleased to grant an order of injunction against the Applicant/11th defendant from either alienating or encumbering the suit properties, more specifically item No.2 of the suit 'A' schedule property. Therefore, applicant filed OSA.No.45 of 2017 before the Hon'ble Division Bench of this Court and the Hon'ble Division Bench of this Court, vide order dated 30.08.2017, disposed the appeal recording the undertaking made on behalf of the respondents 1 to 3 to the effect that they shall not indicate to any statutory Authorities anything else than what is contained in the order of learned Single Judge. The Hon'ble Division Bench also granted liberty to the applicant/11th defendant to approach the learned Single Judge for variation of the order, if circumstances so demand. Due to Pandemic COVID-19, the proposed projects of the applicant/11th defendant were stalled and now, the applicant is facing serious financial constraints. Therefore, it is necessary to mobilize funds to defend the financial hardship by selling Item No.2 of the suit 'A' schedule property. There is no progress in this suit despite direction to dispose the suit earlier. In the said circumstances, this application is filed.

3. This application is strongly opposed by the learned counsel for the respondents 1 to 3/plaintiffs on the ground that the suit was filed for the relief of claiming partition of 1/9share in the suit properties and for declaration that the sale deed dated 12.12.2013 executed by defendants 2 and 3 in respect of item No.2 of the 'A' schedule property in favour of 11th defendant as non-est, not valid and not binding upon the plaintiffs and for

other reliefs.

4. Learned counsel for the respondents 1 to 3/plaintiffs submitted that if the property is allowed to be sold, respondents1 to 3/plaintiffs would be seriously prejudiced. In the said circumstances, they would not be in a position to claim their due share in item No. 2 of the suit properties. The issue raised by the applicant has to be tried only in the suit. There was a direction for the early disposal of the suit i.e., evidence be completed on or before 31.12.2017. Respondents 1 to 3/plaintiffs are entitled to claim share in the properties, despite the retirement of their father from partnership firm, especially in the immovable property of the partnership firm. In support of this submission, learned counsel for the respondents 1 to 3/plaintiffs relied on the judgement reported in ***1966 AIR 1300 (Addanki Narayanappa & another ..vs.. Bhaskara Krishtappa and 13 others)*** for the preposition that despite the dissolution of the partnership firm, the partners are entitled to claim share in the immovable properties of the firm.

5. In reply, learned counsel for the applicant/11th defendant submitted that the respondents 1 to 3/plaintiffs' father had retired from partnership firm as early as on 01.11.1986 and he was paid Rs.10,63,884.99 (Rupees ten lakhs sixty three thousand eight hundred and eighty four and paise ninety nine only) as full and final settlement which includes share of profit, capital balance, loans and goodwill and other assets payable and adjustable if any. After his retirement, plaintiffs/respondents 1 to 3 have not made any claim in the assets of the partnership firm till the filing of the suit. In order to get an unjust enrichment, they filed this suit showing other properties and properties of partnership firm, in which they have no stake at all, just to harass the defendants. All these aspects have been elaborately discussed in the common order passed by this Court on 28.09.2016. Therefore, learned counsel for the applicant/11th defendant prayed for allowing the application.

6. Considered the rival submissions and perused the records.

7. The suit in C.S.No.236 of 2014, as referred above, is filed for partition of plaintiffs' share and for declaratory relief for declaring the sale in favour of the applicant/11th defendant in respect of the second item of the suit 'A' schedule property as null and void. Reading of the plaint shows that the plaintiffs and defendants are the members of the joint family and they are entitled to share in the joint family properties. It is claimed that Sri.Someshwar Harilal Shelat and Smt.Kamala Ben Someswar Shelat, out of their wedlock gave birth (1)Jagadeesh Chandra Someswar Shelat (2) Bipin Chandra Someswar Shelat (3) Yogini Ben V Joshi and defendants 1 to 6. Plaintiffs are the children of late Bipinchandra Someshwar Shelat, son of Sri. Someshwar Harilal Shelat. Late Sri. Someshwar Harilal Shelat was doing phenyl business at Chennai, Ahmedabad and Gujarat and out of the proceeds in the business over a period of time, he purchased some of plaint "A" Schedule immovable properties in his name and S.H.Shelat & Sons, and his wife Late Kamala Ben Someswar Shelat. He also purchased the movables and securities set out in “B” Schedule in his name and the name of his wife. The immovable properties are situate at Chennai and Gujarat. Defendants 7

to 10 are the children and legal heirs of deceased Jagdish Chandra Someshwar Shelat. Plaintiffs' father Bipin Chandra Someswar Shelat died intestate on 26.02.2009. All the family properties have to be divided among the legal heirs of Someswar Harilal Shelat and Kamala Ben Someswar Shelat as per Hindu Succession Act. Meanwhile, the defendants 2 and 3 had sold item 2 of the suit properties to the applicant/11th defendant through a sale deed dated 12.12.2013. Therefore, the suit was filed for the aforesaid reliefs.

8. At the time of filing the suit, plaintiffs have filed application in O.A.No. 281 of 2014 praying to pass an order of interim injunction restraining the defendants 1 to 10 from in any manner dealing with the items 1, 3 to 8 of the suit properties and application in O.A.No. 282 of 2014 was filed to pass the order of interim injunction restraining 11th defendant from in any manner dealing with the property being, all the piece and parcel of land together with building thereon bearing Plot No.132, Municipal Door No.31, Old No.15/13, Second Main Road, Gandhi Nagar, Adyar, Chennai 20, measuring 5.68 grounds or thereabouts comprised in T.S.No.59, (Old S.No.9/1) Block No.36, Kottur Village, situated within the

Registration Sub District of Adyar and Registration District of Chennai South either by way of demolition and/or reconstruction or in any manner alienating the same either wholly or in part or in any manner encumbering the property. Initially interim order was granted in these applications. Subsequently, after hearing the parties, a common final order was passed on 28.09.2016. All the points now canvassed had also been canvassed earlier.

9. The sale deed in favour of the 11th defendant in respect of item No.2 of the suit 'A' schedule properties is dated 12.12.2013. It was executed by M/s.Shelat brothers, a partnership firm in favour of M/s.Vaani Estates Private Limited, applicant herein. M/s.Shelat brothers, the partnership firm is not a party in this suit. While considering these aspects, it is observed in paras-10.4 and 10.5 of the common order passed on 28.09.2016 as follows:-

> *“**10.4.** Though the plaintiffs as applicants are aware of the fact that the firm is still in existence holding its own properties, the suit is filed treating them as joint family properties, thus, prima facie it appears that the suit for partition qua the*

properties owned by the firm divided at the instance of the legal heirs of the retiring partner is not maintainable.

10.5. *There is also a proprietary concern which is owned by the firm. In the partnership deed dated 02.11.1971, it has been stated about the concern as follows:*

> *"The partnership shall carry on the business in the name and style of S.H.Shelat & Sons, Proprietors of Shelat Bros and the principal place of business shall be at 8, Lakmudas Street, Madras."*

It is also not in dispute that the deed of retirement, being signed by the father of the plaintiffs, reads in the following manner:-

> *"All parties hereinafter collectively known as retiring partners of the other parts, which includes their heirs, successors, administrators and nominee etc. Whereas the parties hereto carrying on business of manufacturing and dealing in phenyl etc.,*

> *under the name and style of S.H.Shelat & Sons Proprietor of M/s Shelat Brothers with effect from 20th October 1971 on terms and conditions contained in a deed of partnership dated 2nd November 1971."*

Further more, a reading of the abovesaid deed of retirement would make it clear that the settlement pursuant to the retirement would govern all interest qua the plaintiffs' father. For the sake of brevity, para 2 of the deed of retirement is reproduced as follows:-

> *"2. The accounts of the Partnership firm upto 1st November, 1986 shall be made up and the retiring partners shall be paid as full and final settlement of their dues amounting Rs.10,58,289.61 (Rupees Ten lakhs fifty eight thousand two hundred and eighty seven and paise sixty only) to Mr.Jagdishchandra S.Shelat, Rs.10,63,884.99 (Rupees ten lakhs sixty three thousand eight hundred and eighty four and paise ninety nine only) to*

Mr.Bipinchandra S.Shelat and Rs.11,00,000.00 (Rupees eleven lakhs only) to Mr.Harnathkumar S.Shelat, to have peace of mind and avoid disputes which includes their share of profit, capital balance, loan and goodwill and other assets payable and adjustable if any. The continuing partners will pay to retiring partners as above within eight months from the date of this deed and if not paid within eight months then 12% interest per annum will be paid on unpaid amount uptill payment made."

10. It was contended by the learned counsel for the respondents 1 to 3/plaintiffs that the plaintiffs' father being the erstwhile partner is entitled for a share in the property because the amount received by him does not include the share in the properties. The sale by M/s.Shelat brothers cannot be justified for the reason that the title belongs to M/s.S.H.Shelat & sons.

11. This Court in the common order dated 28.09.2016 found that the father of the plaintiffs signed the deed of retirement on 01.11.1986 and that the cause of action, if any, could have arisen from that date and the plaintiffs cannot, after a few decades, come forward to the Court seeking the relief; the elements/concepts of delay, latches and acquiescence are all present in the case on hand. It was also found that the father of plaintiffs received the entire consideration pursuant to his retirement on 01.11.1986, has not raised any dispute till his death. It was observed in para 17 to 19 of the common order dated 28.09.2016 as follows:-

> *"**17.** ....*
>
> *........*
>
> *Prima facie it appears that the share of the plaintiffs' father was quantified at the time of his retirement. Thus, once, he retires, he goes from the partnership meaning thereby, he loses any interest in the properties of the firm. To put it differently, the property of the firm would remain intact irrespective of the retirement of the partner. Therefore, such a deed cannot be termed as*

conveyance. A retirement of a partner can happen with the express agreement between the partners, which fact is available in the case on hand. A partner will have his right in the property of the firm only after dissolution. In the case on hand, we are concerned with the retirement. Therefore, even when the existing partner does not have the specific right over the properties, such a right cannot be inferred and extended to the retiring partner. Even otherwise, there is nothing available on record to accept the contention that the intention of the parties was to keep the property to be used by all, including the retiring partner. In such view of the matter, there is no necessity to apply the rigour of Section 17 of the Indian Registration Act, 1908, to the deed of retirement. Even the father of the plaintiffs was inducted into partnership without any registration under Section 17 of the Indian Registration Act, 1908.

***18.** Coming to the relief sought for by the defendant Nos.11 and 15 are concerned, they are also liable to be granted. Insofar as the defendant No.15 is concerned much water has* *flown under the bridge. The object underlined in the joint venture agreement being one of creation of I.T. Park, there cannot be any divisibility available especially, when there is no prima facie case is made out. The construction has been put up long time back. Similarly, insofar as the defendant No.11 is concerned, he has made due publication before the sale in his favour. The property has been purchased from the firm. Therefore, there cannot be any injunction for the above said property. When once, there is no title prima facie available, then there cannot be any injunction. The demolition said to have been made by the defendant No.11 would not constitute a contumacious act. The injunction was only against the proposed alienation or encumbrance which has not been violated. The defendant No.11 wants to put up a construction for his own residential purpose. If any construction is made, would obviously be subject to the final decision in the suit. Thus, in such view of the matter, there is no prima facie case or balance of convenience in favour of the plaintiffs against defendant No.11. However, a fair submission, made by the learned* *counsel appearing for the defendant No.15 and some of the contesting defendants that a sum of Rs.93,72,500/- will be deposited on the file of this Court to show their bona fides, is recorded and accordingly, they are directed to deposit the same within a period of four weeks from the date of receipt of a copy of this order. It is to be noted that the proprietary concern is owned by the firm as seen from the documents, which are undisputed and thus, the contention that the firm has no title has no basis especially when both of them are not parties before this Court with adequate pleading.*

***19.** Coming to the other properties, i.e., other than the ones governing defendant Nos.11 and 15 in Item Nos.2 and 3 of the schedule "A", this Court finds merit in the submission made by the learned Senior Counsel appearing for the plaintiffs/applicants. There is always presumption of jointness in a Hindu family. The person, who sets up an oral partition, then reduced it into writing has to prove it. These are all the matter for trial. Hence, excluding Item Nos.2 and 3 of Schedule "A" of the suit properties, it would be just and proper to direct the* *respondents/defendants concerned, not to alienate or encumber those properties, till the disposal of the suit. That is also for the reason that any such proposed action would create unnecessary third party interest. This order is passed since this Court can always grant lesser relief than the one sought for."*

Finally, it was ordered in para 20.1 as follows …

*"**20.1.** Original Application Nos.281 and 282 of 2014 in C.S.No.236 of 2014 are ordered to the effect that the respondents shall not alienate or encumber the schedule mentioned properties except the Item No.3 of Schedule "A". However, O.A.No.282 of 2014 in C.S.No.236 of 2014 is also ordered to the effect that the defendant No.11 can go on with the construction. The contempt petition No.1650 of 2016 is dismissed."*

12. Against the common order passed in O.A.No.282 of 2014, 11th defendant filed OSA No.45 of 2017 and plaintiffs filed OSA

No.179 of 2017. While disposing OSA No.45 of 2017 on 30.08.2017, it is observed in para 9 as follows:

> *"9. It is also made clear that after the subject property has been developed and built up, the appellant will have liberty to approach the learned Single Judge for variation of the order, if the circumstances so demand."*

13. In view of the above observation made in OSA No.45 of 2017 dated 30.08.2017, OSA No.179 of 2017 filed by the plaintiffs was also dismissed as not pressed on the endorsement made by the learned counsel for the plaintiffs/appellants in OSA No.179 of 2017. On the basis of the above observation made in the order passed in OSA No.45 of 2017 dated 30.08.2017, the applicant/11th defendant has filed this present application.

14. From the typed set of documents produced by the second and third defendants, it is seen that there are atleast 5 partnership deeds within the family members of the plaintiffs starting from the year 1962. There are partnership deeds dated 02.11.1962, 02.07.1964, 20.12.1966, 04.05.1970 and 02.11.1971. As per partnership deed dated 02.11.1962, the

partnership firm 'SHEBRO UDYOG (PROP. SH.SHELAT & SONS) was created constituting (1) Jagadish Chandra (2) Bipin Chandra (3) Subash Chandra (4) Rohit Kumar and (5) Someswar Harilal Shelat as partners. As per the partnership deed dated 02.07.1964, the partnership firm M/s.S.H.SHELAT & SONS was created among (1) Jagadish Chandra (2) Bipin Chandra (3) Subash Chandra (4) Rohit Kumar and (5) Someswar Harilal Shelat. The profit was decided to be shared among partners and minors Anil Kumar and Haranath Prasad. In partnership deed dated 20.12.1966, since Anil Kumar attained majority, he was inducted as a partner, the profit was decided to be shared with the partners and minor Haranath Prasad. Then on 04.05.1970, the partnership deed was executed among (1) Jagadish Chandra (2) Bipin Chandra (3) Subash Chandra (4) Rohit Kumar (5) Anil Kumar and (6) Someswar Harilal Shelat. The name of the partnership firm is M/s.S.H.Shelat, proprietors of Shelat Bros. On 02.01.1971 another partnership deed was executed among (1) Jagadish Chandra (2) Bipin Chandra (3) Rohit Kumar (4) Anil Kumar (5) Someswar Harilal Shelat and (6) Harnath Prasad. Since Subash Chandra, erstwhile partner retired from partnership on 20.10.1971, the partnership firm was reconstituted in the name and style of S.H.Shelat & Sons, proprietors of Shelat Bros.

15. It is seen from the deed of retirement dated 01.11.1986, of the six partners namely (1) Jagadish Chandra Someshwar Shelat (2) Bipin Chandra Someshwar Shelat and (3) Harnath Prasad Someshwar Shelat retired from partnership and (1) Rohit Kumar Someshwar Shelat (2) Anil Kumar Someshwar Shelat and (3) Someswar Harilal Shelat decided to continue as partners under the partnership firm of M/s.Shelat & Sons proprietor of M/s.Shelat Brothers. As stated above, plaintiff's father, namely Bipin Chandra was paid Rs.10,63,884.99p representing his share of profit, capital balance, loan and goodwill and other assets payable and adjustable, if any. Similarly other two retired partners were also paid. It appears that neither the other two retired partners or their legal heirs staked any claim to the properties of partnership firm. Copy of the receipt for payment of money to the plaintiff's father is also produced.

16. Thereafter, defendants 2 and 3 along with late Someswar

Harilal Shelat entered into partnership deed on 02.11.1986 in the name of S.H.Shelat & sons (sole proprietor M/s.Shelat brothers). After the death of Someswar Harilal Shelat on 11.02.1991, defendants 2 and 3 had reconstituted the partnership firm on 09.03.1991 and they decided to continue the partnership in the name of S.H.Shelat & sons (sole proprietor M/s.Shelat brothers). They again entered into a partnership deed on 01.04.1992 to do the partnership business in the name and style of M/s.Shelat brothers.

17. From the constitution of the partnership business in 1962 and then till 1986 when the plaintiff's father retired from partnership firm, there were additions in the partners because of attaining majority of some of the minors. After the retirement of partners and death of partners, there were reconstitution of partnership firm among the continuing partners. What is clear is that the plaintiff's father, along with two other brothers, had retired from partnership business called M/s.Shelat & Sons, Proprietor of M/s.Shelat Brothers, with effect from 01.11.1986. Now the question is whether after the retirement from partnership on 01.11.1986 by the plaintiffs' father, plaintiffs

can stake any right or claim in the properties movables/immovables of the partnership firm? Admittedly, after the reconstitution, the partnership business is named as M/s.Shelat brothers from 1st April 1992, having partners Rohit Someswar Shelat and Anil Someswar Shelat, defendants 2 and 3 herein. They sold item No.2 of the suit 'A' schedule properties as partners of M/s.Shelat brothers to 11th defendant M/s.Vaani Estates Private Limited.

18. In the case before hand, plaintiffs' father was given a sum of Rs.10,63,884.99p as full and final settlement representing his share of profit, capital balance, loan and goodwill and other assets payable and adjustable, if any. It is held in para 24 of judgement reported in ***2016 SSC OnLine Del 6268 (Pradeep Arora and others ..vs.. Samatha Kochhar)*** as follows:-

> *"24. A reference in this regard may also be made to the decision of the Supreme Court in Purushottam v. Shivraj Fine Arts Litho Works (2007)15 SCC 58 where the Supreme Court held that once any asset or money becomes part of the capital of the partnership, a partner has no*

exclusive right over any portion nor can he seek to recover the same from the persons in their individual capacity. It is entirely owned by the firm and the partners in their individual capacity do not owe capital contribution to the other partners."

19. It is pertinent to refer the judgment reported in ***(2003) 3 SCC 445 (Pamuru Vishnu Vinodh Reddy ..vs.. Chillakuru Chandrasekhara Reddy and others)*** wherein, it is observed as follows:-

"12. From these findings of fact, it is clear that the plaintiff had retired from the firm on 5.4.1971 after selling his share in the partnership firm. Once he had retired from the partnership firm, he had no right to claim any further share in the profits of the firm. A finding of fact is also recorded that the defendants had not paid the value of the share of the plaintiff pursuant to the agreement for retiring from the firm. If the defendants have failed to pay the value of the share of the plaintiff as agreed to, it has become a debt on the defendants and the plaintiff is entitled to recover the same with interest.

> *After the retirement from the partnership firm and particularly when the firm was reconstituted with new partners, there was no question of using the plaintiff's share for earning profit in the reconstituted firm. ...."*

20. In the case before hand, the retired partner, namely, Bipin Chandra Someswar Shelat or other retired partners have not claimed any share in the immovable/movable properties of the partnership firm after their retirement. Therefore, in the considered view of this court, plaintiffs as legal heirs of the deceased Bipin Chandra Someswar Shelat cannot claim any right in the properties either movables or immovables of the partnership firm M/s.Shelat & Sons, especially when their father had not made any claim when he was alive.

21. In the judgment relied by the learned counsel for the plaintiffs reported in ***1966 AIR 1300 (cited supra),*** suit was filed by the members of the partnership firm for a declaration that the suit properties belong to the plaintiffs and defendants 10 to 14 and defendants 1 to 9

equally, for a division of the same into four equal shares, one share to be delivered to the plaintiffs or for a division of the same into two equal shares to be delivered to the plaintiffs and the defendants 10 to 14 jointly and for other reliefs. The question that arose for consideration was whether the interest of a partner in a partnership assets comprising of movable and immovable properties should be treated as movable or immovable properties for the purpose of 17(1) of the Registration Act, 1908. When considering the issue, the Honourable Supreme Court found that the document cannot be said to convey any immovable property by a partner to another expressly or by necessary implication. There is no express reference to any immovable property. The Act contemplates complete liquidation of the assets of the partnership as a preliminary to the settlement of accounts between partners upon dissolution of the partnership firm and it will, therefore, be correct to say that, for the purposes of the Indian Partnership Act, and irrespective of any mutual agreement between the partners, the share of each partner is "his proportion of the partnership assets after they have been all realised and converted into money, and all the partnership debts and liabilities have been paid and discharged".

22. Here, in this case, the partners have not filed any suit with regard to the properties of the partnership firm and for the dissolution of partnership firm. In fact, the partnership firm M/s.Shelat brothers is not a party in this suit. The plaintiffs have filed the suit for partition claiming the properties as joint family properties, but in reality item No.2 of the suit 'A' schedule properties is a property of the partnership firm. That property was sold by the partners on behalf of the partnership firm to the 11th defendant. Therefore, this Court is of the view that the judgement relied by the learned counsel for the respondents/plaintiffs reported in ***1966 AIR 1300 (cited supra)*** is not applicable to the facts of the facts and circumstances of the case.

23. Defendants 2 and 3, as partners of M/s.Shelat brothers, sold item No.2 of the suit property to applicant/11th defendant M/s.Vaani Estates Private Limited. The same cannot be considered as illegal and therefore, applicant/11th defendant has absolute right over item No.2 of the

suit 'A' schedule properties. When respondents 1 to 3, as plaintiffs, cannot claim share in this property, this Court is of the considered view that applicant/11th defendant, in the light of its present financial conditions/requirement, can be permitted to sell Item No.2 of the schedule property in variance of earlier order dated 28.09.2016 made in O.A.No.282 of 2014 in the above suit, as ordered by the Division Bench of this Court in OSA No.45 of 2017. However, to safeguard the interest of the plaintiffs in the event of succeeding this suit, this Court directs the applicant/11th defendant to deposit 10% of the sale consideration of the property in the Court till the disposal of the suit in C.S.No.236 of 2014.

24. Accordingly, this Application is allowed as indicated above.

mra 06.01.2023

Note : Issue order copy on or before 11.01.2022

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Index : Yes/No
Speaking/Non speaking order

G.CHANDRASEKHARAN, J.,

mra

Order in
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06.01.2023