

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
ORDINARY ORIGINAL CIVIL JURISDICTION.**

**CHAMBER SUMMONS NO. 1491 OF 2015
IN
SUMMARY SUIT NO. 2916 OF 2006**

Sushila Harshad Choksi

... Applicant / Org.
Defendant No.3A.

IN THE MATTER BETWEEN

Nishit Kishordas Mehta & Ors.
V/s.

... Plaintiffs

Choksi Tube Co. Ltd. & Ors.

... Defendants.

Mr. Gaurang Mehta a/w Jui Patil a/w Neha Bane i/b Amit Shroff for
the Applicant/defendant nos. 3A to 3C.

Mr. Kishor Jain i/b Prashant Chande for the Plaintiff.

CORAM : K. K. TATED, J.

DATED : 16/12/2015.

PC.:

. Heard learned Counsel for the parties.

2 This Chamber Summons is preferred by the legal representative of original Defendant No.3 Harshad Harilal Choksi for setting aside the order passed by the learned Additional Prothonotary & Senior Master in Chamber Order No. 343 of 2010 by which the learned Additional Prothonotary allowed the plaintiffs to bring legal representative of deceased Defendant No.3 on record as Defendant Nos.3a, 3b and 3c.

3 The learned Counsel for the Applicant/Defendant No.3a submits that the Plaintiff filed Summary Suit No. 2916 of 2006 for recovery of

sum of Rs.7,85,26,892.97 with future interest @ 20% on Principal amount. He submits that Plaintiffs filed Petition No. 18 of 2007 in the Insolvency proceeding before this Court. In that Petition, this Court (Coram : A. M. Khanwilkar, J.) by order dated 16.06.2009 directed the original Late Defendant No.3 to deposit entire decretal amount as per decree dated 27.06.2006 in Summary Suit No. 1774 of 2005, failing which Petition stands allowed in terms of prayer clause (a) without further reference to the Court.

4 The learned Counsel for the defendant no.3a submits that as the Defendant No.3 failed to make a payment of said amount, the Petition No. 18 of 2007 stood allowed in terms of prayer clause (a). He submits that in view of order passed by this court dated 16.06.2009 in Petition No. 18 of 2007, the Official Assignee appointed on behalf of original Defendant No.3.

5 The learned Counsel for the defendant no.3a submits that original Defendant No.3 expired on 25.02.2010. He submits that without joining the Official Assignee on behalf of deceased Defendant No.3, the plaintiff preferred Chamber Order No. 343 of 2010 for bringing the legal representatives of deceased Defendant No.3 on record which is contrary to law. He submits that once the Official Assignee is appointed, then it is not necessary to bring legal representatives on record of the deceased insolvent. He submits that the order dated 03.05.2010 passed by the Additional Prothonotary & Senior Master without issuing any notice to the legal heirs. Hence, same is required to be set aside.

6 The learned Counsel for the applicant/legal representatives of original Defendant No.3 submits that as per the definition of legal representative appears under Section 2(11) of the Code of Civil Procedure, 1908, the applicants are not necessary party in the present proceeding. He submits that once the Official Assignee is appointed, he becomes an incharge of entire property of the insolvent. He submits that instead of bringing on record the Official Assignee, the Plaintiffs preferred application for joining the legal heirs of Defendant No.3 on record, which is contrary to the Section 17 & 18 of The Presidency Towns and Insolvency Act, 1909.

7 The learned Counsel for the applicants submits that there is delay on their part to prefer the present Chamber Summons because earlier they filed the Affidavit before the Additional Prothonotary & Senior Master for setting aside the order dated 03.05.2010. At that time, the office directed the applicant to take out appropriate proceeding. Hence, the applicant preferred the present Chamber Summons as required under Rule 133 of Bombay High Court (O.S.) Rules. He submits that if the present Chamber Summons is not allowed, irreparable loss and injury will be caused to the applicant. He submits that in the interest of justice, this Hon'ble Court be pleased to allow the present Chamber Summons by setting aside the order dated 03.05.2010 passed by the Additional Prothonotary and Senior Master in Chamber Order No. 343 of 2010.

8 On the other hand, the learned Counsel Mr. Jain appearing on behalf of plaintiffs submits that Chamber Summons as preferred by the

applicant/legal heirs of Defendant No.3 is not maintainable. He submits that the applicants preferred Notice of Motion dated 05.12.2015 for recalling and/or setting aside the order dated 09.06.2015 passed by this Court in Chamber Summons No. 76 of 2015 by which this Court allowed the plaintiffs to bring legal heirs on record of deceased original plaintiff and for other reliefs. He submits that the said Notice of Motion preferred by the applicants as Defendant Nos. 3a to 3c. This itself shows that they accepted them as legal representative of deceased Defendant No. 3 in the present proceeding.

9 The learned Counsel for the Plaintiffs submits that in the present proceeding, they filed Summary Suit for recovery of money claim. Hence, as per Sections 17 and 53 of Presidency Towns and Insolvency Act 1909 (for short 'the said Act'), it is not necessary for them to join the Official Assignee as a party Defendant in place of the deceased Defendant No.3. In support of this contention, the learned Counsel for the plaintiffs relies on Division Bench Judgment of this Court in the matter of ***Om Prakash Nihalani & Anr. V/s. S. M.S. Thakur, reported in 2009(3) Bom. C.R. 869*** and particularly paragraphs 7 and 8, which reads thus:

“7. The above provisions fell for consideration of this Court in Chandrakant Devji v. Narottamdas Amarchand), A.I.R. 1941 Bombay 293. Facts of that case were similar to the facts of the case on hand. A money decree was passed against the appellants therein. The appellants preferred appeal against the money decree. After passing of the decree, the decree holders got the debtor adjudicated insolvent. A motion was taken out by the respondent praying that the appeal may be dismissed under Order 22, Rule 8 of the Code. It was contended that the right to appeal against the money decree is vested in the Official Assignee and that the appeal having abated it must be dismissed. This Court noted that Order 22, Rule 8 of the

Code provides in Sub-rule (1) that the insolvency of a plaintiff in any suit, which the assignee or the receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or to give security for the costs thereof. Thus the suit does abate, if the Official Assignee declines to continue the suit. This Court noted that Sub-rule (2) enables the Court to dismiss the suit where it has abated under Sub-rule (1) and Rule 8 is made applicable to appeals by Rule 11. While answering the question whether it can be said that the Official Assignee might maintain the appeal for the benefit of the insolvent's creditors, Beaumont, C.J., referred to Section 68(1)(d) of the said Act and speaking for the Bench observed as under:

By Section 68(1)(d) of the Act the Official Assignee has power to institute, defend or continue any suit or legal proceeding relating to the property of the insolvent. A suit relating to the property of the insolvent, in my opinion, means a suit which, if successful, will increase the assets distributable amongst the creditors, or the defence of which may prevent the assets being diminished. A right to institute an appeal, which merely relates to a money claim against an insolvent, is not, in my view, a legal proceeding relating to the property of the insolvent and does not fall within the powers given by Section 68 to the Official Assignee. I think, therefore, that the Official Assignee could not maintain the appeal for the benefit of the insolvent's creditors, and consequently the appeal has not abated under Order 22, Rule 8. The Official Assignee is not bound by the judgment 9 appealed from, and can in insolvency decline to admit the debt.

8. Similar view was taken by the Madras High Court in the Official Assignee, High Court Madras and Ors. v. Mangalambal and Ors. : A.I.R. 1980 Mad 200. In that case the Madras High Court was considering whether on the adjudication of the defendants in a suit for recovery of money as insolvents, the plaintiff is entitled to implead the Official Assignee as either a necessary party or even as a proper party and to continue the suit. The Madras High Court concurred with the view taken by this Court in Chandrakant Devi's case and observed as under:

A suit for the recovery of money against the defendant who has been subsequently adjudicated an insolvent cannot be said to relate to the property of the insolvent and to such a suit, the Official Receiver cannot be said to be either a necessary or a proper party by invoking Section 68(1)(d). Under Clause (d) of Section 68(1) the official assignee would be necessary party to the suit "relating to the property of the insolvent". The term "relating to" cannot be taken to mean "affecting". Therefore, a suit, such as a suit for money decree in the instant case, which might ultimately result in a decree which if executed or sought to be executed would be payable out of the assets of the insolvent and thereby indirectly, affects his property is not contemplated by Section 68(1)(d)."

10 The learned Counsel for the plaintiffs submits that as per Section 68 of the said Act, the Official Assignee is necessary party only in respect of the property of the insolvent and that is not a case in the present proceeding. On the basis of these submissions and law declared by this Court in the matter of Om Prakash Nihalani (Supra), the learned Counsel for the plaintiffs submits that there is no substance in the present Chamber Summons and same to be dismissed with costs.

11 I heard both the sides at length. It is to be noted that in the present proceeding, when the Additional Prothonotary & Senior Master passed order on 03.05.2010 Advocate Mr. Davare appeared on behalf of Defendant No.2 and Late Defendant No.3 and made a statement that they have no objection for granting said Chamber Order. This shows that the Additional Prothonotary & Senior Master passed the impugned order dated 03.05.2010 by consent of both the parties. Apart from that the Defendant Nos. 3a to 3c are the legal representatives of the

deceased Defendant No.3 and this being a money suit, it is not necessary to bring the Official Assignee on record, in view of Judgment of this Court in the matter of Om Prakash Nithalani (supra). Apart from that the Defendant Nos. 3a to 3c with Defendant No.2 preferred the Notice of Motion for setting aside the order passed by this Court in Chamber Summons No. 76 of 2014 by which this Court allowed legal heirs of original plaintiff to join them as legal heirs of original plaintiff.

12 Considering these facts and law declared by this Court as stated herein above, I do not find any substance in the present Chamber Summons.

13 Hence, Chamber Summons stands rejected.

(K.K.TATED, J.)