

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 7605 OF 2014

BABUBHAI MOHANLAL CHOKSEY	...Petitioner
<i>Versus</i>	
PRANSUKHLAL MOHANLAL CHOKSEY AND ORS	...Respondents

**WITH
Writ Petition NO. 9632 OF 2014**

M.D. CHOKSEY CONSTRUCTION AND ORS.	...Petitioners
<i>Versus</i>	
PRANSUKHLAL MOHANLAL CHOKSEY AND ORS	...Respondents

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Mr. Kirti Munshi a/w. Ms. Mikhil Behl i/b. M/s. Thakore Jariwala & Associates, for the Petitioner in WP/7605/2014 and for Respondent No.3 in WP/9632/2014.

Mr. Annuj Narula i/b. Jhangiani Narula & Associates, for the petitioners in WP/9632/2014 and for Respondent Nos.1 and 2 in WP/7605/2014.

Mr. Mayur Khandeparkar i/b. DSR Legal, for Respondent Nos.1 and 2 in WP/7605/2014 and WP/9632/2014.

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CORAM : R. G. KETKAR, J.

RESERVED ON : 8th FEBRUARY, 2016

PRONOUNCED ON: 03rd MARCH, 2016

ORDER:-

1. Heard Mr. Kirti Munshi, learned Counsel for the

petitioner in Writ Petition No.7605/2014 and for respondent No.3 in Writ Petition No.9632/2014, Mr. Annuj Narula, learned Counsel for the petitioners in Writ Petition No.9632/2014 and for respondent Nos.3 to 7 in Writ Petition No.7605/2014, Mr. Mayur Khandeparkar, learned Counsel for respondent Nos.1 and 2 in both the Petitions, at length.

2. Both these petitions are directed against the judgment and order dated 9.5.2014 passed by learned Judge, presiding over Court room No.14 of Bombay City Civil Court at Bombay in Chamber Summons No.1956/2013 in Suit No.9004/1994 (High Court Suit No.4216/1994). By that order, learned trial Judge allowed the Chamber Summons taken out by (1) Pransukhlal Mohanlal Choksey, and (2) Arvind Pransukhlal Choksey, hereinafter referred to as 'applicants' for impleading them as defendant Nos.5 & 6 in Suit No.9004/1994.

3. The petitioner in Writ Petition No.7605/2014, hereinafter referred to as 'plaintiff' has instituted Suit against (1) defendant No.1 M.D. Choksey Construction Company Private Limited, (2) defendant No.2 Inderjit Nandkishore Sharma, who was deleted

later on, (3) defendant No.3 Prabha Inderjit Sharma, and (4) defendant No.4 Rakesh Kumar Inderjit, *inter alia*, praying for declaration that the plaintiff is the sole owner of all that piece and parcel of land of pension and tax tenure together with the buildings thereon situate lying and being at August Kranti Marg, within the Registration District and Sub-District of Bombay City and Bombay Suburban containing by admeasurement 1047.39 sq. mtrs. or thereabouts and under new Survey No.Part of 7937, Cadastral Survey No.1/562, 2A/562 of Malbar and Cumball Hill Division, more particularly described in Exhibit-A to the plaint (for short, 'suit property'); that the defendants do not have any right, title and interest in the suit property; for declaration that the plaintiff's declaration dated 11.6.1984, power of attorney dated 11.6.1984 donated by the plaintiff to defendant Nos.2 & 3 are illegal, null, void and of no legal effect and not binding upon the plaintiff and that defendant Nos.1, 2 and 3 are not entitled to act thereunder; for declaration that the plaintiff has validly terminated the power of attorney granted to defendant Nos.2 & 3 by telegrams both dated 23.7.1994 addressed to defendant Nos.2 & 3; for perpetual injunction restraining the defendants from in any

manner acting upon or under certificate of sale dated 17.5.1984, the declaration dated 11.6.1984, the power of attorney dated 11.6.1984 in respect of the suit property. The plaint is affirmed by applicant No.1 Pransukhlal Mohanlal Choksey as Constituted Attorney of the plaintiff. During pendency of the Suit, the applicants took out Chamber Summons for impleading them as defendant Nos.5 & 6 and the same is allowed by the impugned order. It is against this decision, the plaintiff and the defendants have instituted the above Petitions. The relevant and material facts giving rise to filing of the present Petitions, briefly stated, are as follows.

4. The suit property was owned by one Dhirajlal Sohni, He died on 29.9.1976 leaving behind two sons Nitin and Atul. The municipal taxes in respect of the suit property were not paid. It is the case of the plaintiff that on 8.8.1979 he entered into an agreement for purchase of the suit property with Nitin and Atul. Nitin and Atul executed a power of attorney in plaintiff's favour. On 21.8.1979 the suit property was auctioned. The plaintiff and one Harshadrai V. Mehta purchased the same. On 31.8.1979 and

21.12.1979 agreements were entered into by and between the plaintiff and Nitin and Atul to jointly develop the suit property so that each would get 1/3rd undivided share after development. On 15.3.1980 Harshadrai Mehta relinquished his right in favour of the plaintiff and also informed the Municipal Corporation of Greater Mumbai (for short, 'Corporation') of the relinquishment. It is the case of the plaintiff that on 9.1.1984 an agreement was entered into between him on the one hand and Nitin and Atul on the other giving Nitin and Atul the first option to purchase the property. They did not exercise the option. Second option was given to the plaintiff to purchase the property. The plaintiff exercised that option and purchased the suit property by paying Rs.8,34,000/- to Nitin and Atul. On 30.4.1984, the Corporation addressed a letter to the plaintiff acknowledging that he has purchased the property in auction. On 17.5.1984 the Corporation issued certificate of sale in favour of the plaintiff and defendant No.1 M.D. Choksey Construction Company Pvt. Ltd.. In defendant No.1, the plaintiff and Inderjit Sharma had 50% stake. Defendant No.1 has been floated by the plaintiff and said Inderjit Sharma for developing the property.

5. Nitin and Atul instituted Suit No.3221/1984 on the Original Side of this Court against the plaintiff and defendant No.1 claiming to be owners of the property. It is case of the plaintiff that on 11.6.1984 he executed a declaration and power attorney in good faith and resigned as Director from defendant No.1 and transferred his share in defendant No.1. It is the case of the plaintiff that said course of action was suggested by Inderjit Sharma. The defence set up by the plaintiff on the basis of the declaration and power of attorney both dated 11.6.1984 was upheld and the Suit instituted by Nitin & Atul was dismissed. The order of dismissal was carried in appeal and said dismissal is ultimately confirmed by the Apex Court.

6. The decision having attained finality, the Court Receiver appointed in respect of the suit property was discharged. In pursuance thereof, the Court Receiver submitted a report seeking a direction for handing over possession of the suit property. It is at that stage, defendant No.1 claimed ownership rights over the suit property. On 23.7.1994, the plaintiffs terminated the declaration and power of attorney both dated 11.6.1984 by sending telegrams

to defendant Nos.2 & 3. On 1.10.1994 the present suit is instituted for the aforesaid reliefs.

7. Mr. Munshi appearing for the plaintiff invited my attention to paragraphs-28(a) and (b) of the plaint as also verification clause in the plaint. He submitted that the plaint is verified by applicant No.1 Pransukhlal Mohanlal Choksey. In paragraph-28, the plaintiff has raised various grounds claiming exclusive ownership. In ground No.(a), the plaintiff asserted that he alone was the owner of the suit property at the time of certificate of sale issued by the Corporation. Defendant No.1 was never the owner of the suit property and had not paid any consideration and its name was added as plaintiff's nominee to facilitate development. In ground (b), it is asserted that at all material times, the plaintiff desired to develop the suit property which is evident from various agreements for development work with Harshadrai Mehta of M/s. Mehta Khetani Pvt. Ltd. (proposed), then with Nitin and Atul and lastly by arrangement with the defendants. At all material times, the plaintiff continued to remain owner of the suit property.

8. Mr. Munshi submitted that perusal of the verification clause shows that applicant No.1 Pransukhlal M. Choksey verified the plaint as Constituted Attorney of the plaintiff and solemnly declared that what is stated in paragraph-25 to 36 (which includes para-28) is on information and belief which he believed to be true. In other words, applicant No.1 accepted that the plaintiff is exclusive owner of the suit property.

9. He further submitted that in terms of prayer clause (a), the plaintiff has sought declaration that he is the sole owner of the suit property. The declaration sought does not operate in *rem* but is a declaration in *personam* and would bind only parties to the suit, namely, the plaintiff and the defendants. He relied upon Section 35 of the Specific Relief Act, 1963 as also decision of this Court in the case of ***SNP Shipping Services Pvt. Ltd. and others v. World Tanker Carrier Corporation and another***, AIR 2000 BOMBAY 34 and in particular paragraph-16 thereof. He submitted that even if the suit is decreed in terms of prayer clause (a) it would not adversely affect the alleged rights of the applicants.

10. Mr. Munshi further submitted that the applicants herein

are the strangers/third parties to the agreement entered into between the plaintiff and the defendants. The alleged claim made by the applicants on the basis of independent rights has no connection or concern with the transaction/agreement/arrangement between the plaintiff and the defendants which the plaintiff seeks to annul. He, therefore, submitted that the learned trial Judge committed serious error in allowing the Chamber Summons. In support of this submission, he relied upon following decisions :

- [i] *Kasturi v. Iyyamperumal and others, (2005) 6 SCC 733* and in particular paragraphs-16 and 17 thereof.
- [ii] *Anil Kumar Singh v. Shivnath Mishra alias Gadasa Guru, (1995) 3 SCC 147* and in particular paragraph-9 thereof.
- [iii] *Mumbai International Airport Private Limited v. Regency Convention Centre and Hotels Private Limited and others, (2010) 7 SCC 417* and in particular head-note 'A', to contend that mere likelihood of a third party to

secure a right / interest in suit property does not make such party a necessary or proper party to the suit.

[iv] ***Gurucharansingh Nathasingh Chawla and ors. v. Raja Construction Co. & Anr.***, Appeal No.138/1997 decided by this Court (Coram: Dr.S. Radhakrishnan & S.C. Dharmadhikari,JJ.) on 27.9.2005.

[v] ***Yusuf Mohamad Lakadawala v. Sudhakar Kashinath Bokade***, Appeal No.460/2008 decided by this Court (Coram: D.K. Deshmukh & R.S. Mohite, JJ.) on 1.7.2009.

[vi] ***Ashish Enterprises v. M/s. Rajesh Estates & Nirman Ltd. & Ors.*** Appeal (L) No.21/2012 decided by this Court (Coram: Mohit S Shah, C.J. & Ranjit More, J.) on 2.2.2012.

. He, therefore, submitted that the Petition deserves to be allowed by setting aside the impugned order.

11. Mr. Narula adopted the submissions advanced by Mr. Munshi. He submitted that the controversy in the suit is as regards

declaration and power of attorney both dated 11.6.1984 executed by the plaintiff in favour of defendant Nos.2 and 3. For deciding said controversy, presence of the applicants is absolutely not necessary. It is case of the plaintiff that he had executed declaration and power of attorney in good faith by resigning as a Director from defendant No.1 and transferred his share in defendant No.1. The plaintiff will either succeed or fail in establishing his case. The applicants are not even remotely concerned with the said controversy. He has also relied upon Sections 34 and 35 of the Specific Relief Act, 1963 read with Section 41 of the Indian Evidence Act, 1872 and contended that the declaration made under Chapter VI is binding only on the parties to the suit.

12. On the other hand, Mr. Khandeparkar supported the impugned order. He has invited my attention to :

[I] Paragraph-7 of the affidavit-in-reply of December, 2013 made by the plaintiff wherein he stated that applicant No.1 also knew that the money for the purchase of the suit property in auction was paid by him through loans taken against his

capital account in the partnership firm of M/s. Mohanlal Devdanbhai Chokshi. In other words, the plaintiff accepted that the amount was paid by M/s. Mohanlal Devdanbhai Chokshi.

[II] Communication dated 16.6.1981 on the letter-head of M/s. Mohanlal Devdanbhai Chokshi, which recorded that the plaintiff purchased the suit property in auction on 21.8.1979 on behalf of firm M/s. Mohanlal Devdanbhai Chokshi. In that firm Kantaben Mohanlal Choksey mother of plaintiff and applicant No.1 had 50% share, and plaintiff and applicant No.1 had 25% share each.

[III] Writing dated 14.3.2000 recorded that in the suit property the plaintiff and applicant No.1's family has 50% share each.

[IV] Wealth Tax return for Assessment Year 1987-88 wherein valuation of the suit property was shown as Rs.2,30,000/- and the assessee's share ($1/4^{\text{th}}$) came to Rs.57,500/- was shown.

[V] Assessment order under Wealth Tax for A.Y. 1986-87 wherein

the plaintiff assessee claimed 1/4th share in the suit property.

[VI] Order under Section 271(1)(c) of Income Tax Act, 1961 wherein it was observed that the entire borrowing made by the firm was entirely used for the purpose of advancing loan of Rs.7,75,300/- to the plaintiff and the debit balance of four partners.

[VII] Balance sheet as on 12.11.1985 where amount of Rs.7,75,299/- was credit to plaintiff on account of the suit property.

[VIII] The partnership deed dated 30.9.1984 between the applicant and the plaintiff after death of mother Kantaben M. Choksey and in Clause (7), the shares of the partners applicant No.1, plaintiff, applicant No.2 and Dharmeshkumar B. Choksey son of the plaintiff were recorded as 25% each.

[IX] Affidavit in support of chamber summons dated 17.9.2013.

13. Mr. Khandeparkar submitted that the relations between the applicant No.1 and the plaintiff were extremely amicable and

cordial and no doubts were entertained by applicant No.1 while verifying the suit instituted by the plaintiff. However, the applicants were shocked and surprised when in June, 2012 the applicants No.1 discovered the Will of the plaintiff wherein he with malafide intention excluded applicant Nos.1 and 2 from the suit property posing himself to be sole owner of the suit property and to applicant Nos.1 and 2's family's exclusion. In the Will the plaintiff has bequeathed the suit property to his son Dharmesh, wife and daughters. The applicants, therefore, took out Chamber Summons for impleading them as party defendants.

14. Mr. Khandeparkar submitted that the decision of *Kasturi* (supra) was considered by Apex Court in *Sumtibai and others v. Paras Finance Co. Regd. Partnership firm Beawer (Raj.) through Mankanwar (Smt) w/o. Parasmal Chordia (Dead) and others, (2007) 10 SCC 82*. In para-9, the Apex Court has observed that said decision is clearly distinguishable. Said decision can only be understood to mean that a third party cannot be impleaded in a suit for specific performance if he has no semblance of title in the property in dispute. Obviously, a busybody or interloper with no

semblance of title cannot be impleaded in such a suit. He submitted that in the present case, in view of material on record, it cannot be said that the applicants have no semblance of title in the suit property. He further submitted that the order impugned is purely a discretionary order and learned trial Judge while allowing the Chamber Summons has given reasons and, therefore, this is not a fit case for interfering with the discretion exercised by the trial Court in the limited jurisdiction conferred on this Court under Section 227 of the Constitution of India. He relied upon the decision of Apex Court in the case of ***Subodh Kumar Gupta and others vs. Alpana Gupta and others, (2005) 11 SCC 578.***

15. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record.

16. As noted earlier, the plaintiff has instituted the Suit for declaration that he is the sole owner of the suit property and also for declaration that the declaration and power of attorney both dated 11.6.1984 donated by the plaintiff to defendant Nos.2 and 3 are illegal, null, void and of no legal effect and not binding upon

the plaintiff and that the defendant Nos.1, 2 and 3 are not entitled to act under the same. It is no doubt true that as far as prayer clause (c) is concerned *prima facie* at this stage it cannot be said that the applicants are anyway concerned with that prayer. However, as far as prayer clause (a) is concerned, the plaintiff has sought declaration that he is the sole owner of the suit property. It is also no doubt true that the plaint is verified by applicant No.1. The suit is declared on 1.10.1994. The case made out by the applicants is that at relevant time, the relations between the plaintiff and the applicant No.1 were cordial and amicable. Only in June, 2012 the applicants discovered about the Will executed by the plaintiff bequeathing the suit property in favour of his son, wife and daughters. *Prima facie* the material on record and more particularly the wealth tax, income tax returns show that the suit property was shown to be asset of M/s. Mohanlal Devdanbhai Chokshi. The applicants have also relied upon the letters dated 16.6.1981 and 14.3.2000 in support of their case. It *prima facie* indicates that the suit property was purchased by the plaintiff on behalf of M/s. Mohanlal Devdanbhai Chokshi. and that the plaintiff and family of applicant No.1 have 50% share each. In

paragraph-7 of the affidavit-in-reply filed by the plaintiff he also admits that the funds were received from M/s. Mohanlal Devdanbhai Chokshi. He however claims that he had borrowed the loan from the firm. As against this, the applicants claim that the amount was paid by the partnership firm as property was purchased on behalf of the partnership firm. *Prima facie* this claim cannot be gone into at this stage and is a matter of evidence. In paragraph-7, learned trial Judge noted that it was not disputed that M/s. Mohanlal Devdanbhai Chokshi Partnership Firm was existing at the time of purchase of the suit property and that the plaintiffs and applicants were the Partners thereof.

17. In the light of the aforesaid discussion as also in view of the material on record and the reasons given by the learned trial Judge in paragraph-7 of the impugned order, I do not find that any case is made out for invocation of powers under Article 227 of the Constitution of India, 1950. Learned trial Judge had exercised his discretion and assigned reasons for permitting impleadment. In exercise of limited jurisdiction conferred by Article 227 of the Constitution of India, this Court wont be justified in interfering

with the discretion exercised by the trial Court as held by Apex Court in the case of Subodh Gupta (*supra*).

18. Learned Counsel for the parties fairly stated that letters dated 16.6.1981 (at Exhibit-C, Page-395) and 14.3.2000 (at Exhibit-D, Page-397) are not produced on record and the same is evident from paragraph 4(F)(e) of Writ Petition No.7605/2014.

19. In the light of the aforesaid discussion, the reliance placed by Mr. Munshi on the decisions referred in paragraphs-9 and 10 does not advance the case of the plaintiff. Hence the Petitions fail and the same are dismissed.

20. It is made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contended by section 105(1) of Civil Procedure Code.

21. At this stage, Mr. Munshi and Mr. Narula orally apply for stay of this order. Mr. Khandeparkar submits that subject to the outcome of challenge by the petitioners before the higher Court,

the newly added defendant may be permitted to file written statement and the same should not be objected by the petitioners on the ground that there is delay in filing the written statement. Mr. Munshi and Mr. Narula have no objection for this course being adopted.

22. In view thereof, notwithstanding dismissal of the Petitions, this order as also proceedings of Suit No.9004 of 1994 pending on the file of Bombay City Civil Court at Bombay are stayed for a period of 8 weeks from today. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)