

Before: Shri S.P. Mathkar,
Addl. Registrar (O.S.)/
Addl.Prothonotary and Senior Master.

Date: 9th March, 2016.

HIGH COURT
O. O. C. J.
Chamber Order No. 805 of 2015
in
Execution Application No. 210 of 2011
in
Suit No. 3782 of 1989

Ram Tuljaram Shahani ... Plaintiff
Versus
Bhagwan Tuljaram Shahani & Ors. ... Defendants.

Mr. Vijay S. Kokitkar for Defendant No.7 in support of
Chamber Order.
Mr. Jahan Dastoor i/b Hariani & Co. for Defendant Nos
1 and 6.
Mr. Sameer Shahani, Son of Defendant No.7 present.
None for Plaintiff.

CALLED OUT FOR DIRECTION :

P.C. :

1. This Chamber Order is taken out on behalf of
Applicant i.e. Defendant No.7, for deleting the Name of
Defendant No.2 viz. Vindri Tuljaram Shahani, who expired on
26th July 2015, from column 'B' and 'I' of the Execution

Application, as mentioned in Schedule to the Chamber Order.

2. Perused Affidavit in Support of Execution Application. As per said Affidavit, abovementioned Execution Application is filed for executing Consent Decree which has been passed by this Hon'ble Court against the Plaintiff and other Defendants and that warrant of sale and proclamation of sale are issued and the sale proceeding is pending before the Sheriff's Office. It is further mentioned that during the pendency, Defendant No. 2 is expired on 26th July 2015. A copy of Death Certificate is annexed as Exhibit "A" to said Affidavit. It is further mentioned in said Affidavit that said Defendant No. 2 viz. Miss Vindri Tuljaram Shahani was a spinster and, therefore, she has no other legal heirs except the brothers and sisters, who are already parties to the present proceedings. It is further mentioned that said Defendant No. 2 died intestate and hence, her 1/8th share of sale proceeds out of the sale of 7/31, Shyam Niwas, Bhulabhai Desai Road, Mumbai-400 026, to be deposited in this Hon'ble Court.

3. Perused Affidavit in Reply, dated 15th December 2015, filed by one Manoj Karam duly instructed by M/s. Hariani & Company. M/s. Hariani & Company has already filed Vakalatnama on behalf of Defendant Nos. 2, 3 and 6. In the said Affidavit Manoj Karam has stated that he has filed this Affidavit in the capacity as executor of deceased Defendant

No.2 . He has further stated that said Defendant No. 2 died on 26th July 2015 leaving behind her last Will and Testament dated 18th December 2010 and that by the said Will, she has appointed him as the Sole Executor. A copy of said Will is annexed as Exhibit "A" to said Affidavit in Reply. It is further stated in said Reply that he must be brought on record in the place and stead of Defendant No.2 in the present Execution Application. It is further mentioned in said Reply that by said Will and Testament dated 18th December 2010, the Defendant No.2 has bequeathed her part share in Flat No. 31, in Block No. 7, Flat No. 31, Shyam Niwas or Shyam Co-Operative Housing Society Ltd., situate at 51, Bhulabhai Desai Road, Bombay-400 026 as well as five shares of Rs.100/- each of the said Shyam Co-operative Housing Society Ltd., bearing distinctive Nos. 01861 to 01865 (both inclusive) as per Share Certificate No. 1173 of the said Society unto himself and Defendant No. 6 (viz. Mrs. Janki Ramchand Karam) in equal one-half shares. It is, therefore, sought amendment to that effect. It is further mentioned that as per clause 3 of the Consent Terms dated 7th February 2008 filed in this Hon'ble Court in Suit No. 3782 of 1989, all the rights with regard to the Worli Shop have been given to Defendant No.7. It is, therefore, denied the statement in made in Affidavit in Support that Defendant No. 2 died intestate. It is, therefore, opposed to the application for deletion of name of Defendant No.2 from the papers and proceedings of Execution Application No. 210 of 2011 and

depositing her 1/8th share in this Hon'ble Court and prayed that said he in the capacity as Executor be brought on record in place and stead of Defendant No.2 in the present Execution Application. It is also stated in said Reply that Defendant No. 6 and deponent have inherited equal one half share of the share of Defendant No.2 to said flat and they are also the legal heirs and there is, therefore, no need for the 1/8th share of Defendant No.2 to be deposited in this Hon'ble Court. It, therefore, prayed that Applicant to said Chamber Order i.e. Defendant No.7 be directed to bring the Executor of the last Will and Testament dated 18th December 2010 of Defendant No.2(i.e. deponent to Reply) on record and that the said Execution Application be amended accordingly.

4. Perused Affidavit in Rejoinder, dated 23rd December 2015, filed on behalf of Applicant/Defendant No.7. In the said Rejoinder, Defendant No. 7 confirmed all his averments made in Affidavit in Support of Chamber Order and denied all the contentions made in aforementioned Reply. It is denied that the Deceased Deefendant No. 2 viz. Ms. Vindri Shahani has left behind her any Will and Testament and further stated that alleged executor viz. Mr. Manoj Karam is a fabricated and got up document and the same is inadmissible. It is further mentioned that said executor has not applied for Probate of said alleged Will and that unless and until any Will is

probated, the same is just paper document. It is further mentioned that said alleged executor has no locus standi in the present proceedings relating to the deletion of the name of the deceased Defendant No.2. It is further mentioned said alleged executor has failed and neglected to file any probate proceedings in terms of said alleged Will of deceased Defendant No. 2 and therefore, does not deserve the opportunity to be heard in the present proceedings in capacity as executor. It is further mentioned that said alleged Will is a fabricated and got up document prepared by alleged executor viz. Manoj Karam with the malafide and oblique intention of denying the legal heirs of the deceased their lawful rights in the suit properties. It is also mentioned that alleged executor has failed and neglected to enclose any inventory along with the alleged Will of the Deceased. It is, therefore, denied that said Manoj Karam can be brought on record in place and stead of deceased Defendant No.2 in the present Execution Application for reasons stated hereinabove and also since the deceased Defendant No. 2 died as a spinster and her legal heirs viz. her brothers and sisters are already parties in this Execution Application. It is further mentioned that deceased Defendant No. 2 was a party and signatory to the Consent Terms dated 7th February 2008 filed before this Hon'ble Court. It is further mentioned that the ostensible executor cannot be brought on record in place and stead of deceased Defendant No.2 and therefore, name of the deceased

Defendant No.2 be deleted from the present Execution Application. It is further mentioned that since the deceased Defendant No.2 never executed the impugned Will, therefore, it ought to be presumed that she died intestate. It is further mentioned that deceased Defendant No.2 was not entitled to bequeath the right, title, share and interest in the property known as Shyam Co-operative Housing Society Ltd., upon the alleged executor and Defendant No.6, especially since the deceased Defendant No.2 agreed and consented to be entitled to only 1/8th share in the said property during her lifetime by virtue of the Consent Terms signed and executed by the deceased before this Hon'ble Court, voluntarily and during her lifetime. It is further stated that this Hon'ble Court has in the present Execution Proceedings by Order dated 25th September 2013, passed by the Division Bench consisting of the then Hon'ble Shri Justice Dr. D.Y. Chandrachud and Hon'ble Shri Justice M.S. Sonak passed in Appeal (L) No. 281 of 2013 in Chamber Summons No. 909 of 2012 in Execution Application No. 210 of 2011 in Suit No. 3782 of 1989 with Notice of Motion (L) No.1267 of 2013.

Perused aforementioned Order dated 25th September 2013. It is, inter alia, quoted the Judgment of Hon'ble Supreme Court passed in **Binapani Kar Chowdhury vs. Sri Satyabrata Basu**. It is held in the same Judgment that Section 213 of Indian Succession Act

would not come in the way of a suit or action being instituted or presented by the executor or legatee claiming under the Will and moreover, where a testator had filed a suit and died during the pendency of the proceedings, his executor or legatee could be brought on record as legal representative under Order 22 Rule 3 of the Code Civil Procedure, 1908:

“Therefore, where the right of either an executor or a legatee under a Will is in issue, such right can be established only where probate (where an executor has been appointed under the Will), or letters of administration (where no executor is appointed under a Will), have been granted by a competent court. Section 213 does not come in the way of a suit or action being instituted or presented by the executor or the legatee claiming under a Will. Section 213, however, bars a decree or final order being made in such suit or action which involves a claim as an executor or a legatee, in the absence of a probate or letters of administration in regard to such a Will. Where the testator had himself filed a suit (seeking a declaration and consequential reliefs), and he dies during the pendency of the suit, the executor or legatee under his Will, can come on record as the legal representative of the deceased plaintiff under Order 22 Rule 3 CPC and prosecute the suit. Section 213 does not come in the way of an executor or legatee being so substituted in place of the deceased plaintiff, even though at the stage of such substitution, probate or letters of administration have not been granted by a competent court.”

In view of aforesaid Judgment of Hon’ble

Supreme Court passed in **Binapani Kar Chowdhury vs. Sri Satyabrata Basu** mentioned above, application made on behalf of Applicant/ Defendant No. 7 for deleting the name of deceased Defendant No.2 from column 'B' and 'I' as stated in Schedule of the Chamber Order, can not be accepted and hence, application made in Affidavit in Reply, dated 15th December 2015, on behalf of the Executor viz. Manoj Karam, is accepted and he is required to be brought on record as Executor of deceased Defendant No.2 in place of deceased Defendant No.2. Chamber Order is accordingly disposed of.

09.03.2016

Addl.Registrar (O.S.)/
Addl.Prothonotary and Senior Master