

Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 1125 OF 2015
IN
CHAMBER SUMMONS NO. 601 OF 2013
IN
EXECUTION APPLICATION NO. 20 OF 1998
IN
SUIT NO. 3033 OF 1994

Ramzanali Gulamhusain Ramodiya & Ors	Org. Defendants
<i>Versus</i>	
Hamida Karim Ramodiya & Ors	...Respondents/ Org. Plaintiffs
<i>And</i>	
Rajlaxmi Suhal Kshirsagar & Anr	Applicants

Mr Sanjay Jain, with Uma Kshirsagar-Wagle, for the Applicants.
Ms Priyal Chheda, i/b Tushar Goradia & Nisha Parmar, for the
Plaintiffs.
Mrs VV Thorat, with Prabhanjan Gujar, for Defendant No. 1.
Mr PJ Thorat, for Defendants Nos. 2A and 2B.

CORAM: G.S. PATEL, J
DATED: 15th December 2017

PC:-

1. The Notice of Motion is, in my view, is not only completely unnecessary but very likely misconceived. Ostensibly, it seeks an order that the issue framed on 23rd January 2014 (RD Dhanuka J) in a Chamber Summons in execution be re-framed. In actuality, it seeks a deletion of that issue entirely, and it does so at the instance of an outsider, not any of the parties on whom a burden of proof is placed by that issue.

2. The framing or re-framing of an issue is itself not an order that determines the rights of the parties, and hence would not be appealable. By filing a Notice of Motion seeking a re-framing or re-ordering of that issue, what is attempted to be done is to make appealable that which in itself cannot be appealed.

3. Apart from that, the submission is also unappealing. The Applicants are third party purchasers of the attached flat or, as I am told, what is "alleged to be the attached flat". Issue No. 2 framed by RD Dhanuka J is this:

"2. Whether the Judgment Creditor, Plaintiffs and Defendant no. 2(a) and 2(b) prove that Flat No. 102, Wing of Vaibhav Apartment, Old Prabhadevi Road, Mumbai 400 025 was subject matter of attachment dated 16th February 1998?"

4. The applicants (Kshirsagar) are not the Judgment Creditors, i.e., the Plaintiffs. They are not Defendants Nos. 2(a) and 2(b). Now it turns out that in a later order of 14th March 2014 before RD Dhanuka J a statement was noted on behalf of the Plaintiffs that

they, the Plaintiffs, had no wish to participate in the proceedings any more.

5. The result is that the judgment creditor/Plaintiff is out of the issue. If the Notice of Motion succeeds, then the only other parties, Defendants Nos. 2(a) and 2(b), also go out. The issue itself then no longer survives, and there follows then a sort of knock-out or walk-over for the Applicants.

6. I am not inclined to do anything of the kind at this stage. It will be for the Judge hearing the evidence and trying the question to decide whether or not any of the issues should be framed or re-cast, or further issues framed.

7. It is settled law that issues can be framed or re-framed at any stage. At the same time, I do not believe that it is either advisable or even permissible to short circuit or bypass a trial in this fashion especially at the instance of a third party applicant.

8. Mr PJ Thorat appears for Defendants Nos. 2(a) and 2(b). He does not say that he wants to be absolved of the burden cast on him in the issue. Mrs Thorat for Defendant No.1 supports Defendants Nos.2(a) and 2(b). I do not see how the Applicants can demand that Defendants Nos.2(a) and 2(b) be exempted from the burden of proof placed on them.

9. The notice of motion is dismissed. There will be no order as to costs.

10. In the trial in a Chamber Summons under Order XXI Rule 58, the affidavit evidence of Defendant No. 2(b) was earlier missing. The record was reconstructed. The affidavit is ready. The affidavit and compilation is permitted to be filed in the Registry.

11. List the Chamber Summons for marking documents of Defendant No. 2(b) on 10th January 2018. Inspection to be completed before that date.

(G. S. PATEL, J)