

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

CHAMBER SUMMONS NO.107 OF 2016

IN

SUIT NO.827 OF 2015

ALONGWITH

NOTICE OF MOTION NO.1675 OF 2015

Mr. Chintamani Shankar Godbole ... Applicant

In the matter between :

Mr. Chintamani Shankar Godbole ... Plaintiff
Versus
Mr. Sudhir Shankar Godbole And Others ... Defendants

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Mr. Gaurav Joshi a/w Rucha Jog Raheja, Akash Jain i/b R.V.J. Associates
for the Applicant/Plaintiff.

Mr. Sanjay Jain a/w Gauri Mestha i/b L.J. Law for Defendant No.1.

Mr. Sandeep A. Bhagwat for Defendant No.3.

Mr. Rupesh Lanjekar for Defendant No.5.

Mr. Samarth Chowdhary i/b Hariani & Co., for Defendant No.6.

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CORAM : S.C.GUPTE, J.

DATE : 28 JULY 2017

P.C. :

. Heard learned Counsel for the parties. This Chamber Summons seeks amendment of the plaint. The Plaintiff claims to be in continuous and uninterrupted possession of the suit flat adverse to the title of the putative owner thereof, i.e. Defendant No.1, in whose name the flat stands, and seeks a declaration of such possession and ownership by way of adverse possession. In the Plaintiff's Notice of Motion taken out in the suit,

considering the defence raised by the Defendants, a preliminary issue of jurisdiction is framed on the ground that the suit is barred by the provisions of The Benami Transactions (Prohibition) Act 1988 ("Act"). The Plaintiff has filed his affidavit of evidence in lieu of examination in chief on the preliminary issue. At this stage, the present Chamber Summons is moved for introducing averments that the suit flat is a family dwelling; it was always the intention of the father of the parties (the parties are brothers and sisters) that the suit flat be held and jointly used by the family members as and when needed; that with this understanding, all the parties, except Defendant No.1, who is the contesting defendant, contributed to the purchase of the flat; and that the Plaintiff be treated as a legitimate member of Defendant No.5 society together with other co-owners including Defendant No.1 or in the alternative, the Plaintiff's name be inserted in the share certificate in respect of the suit flat as joint member along with Defendant No.1. Surprisingly, though these pleas are introduced in the plaint, there is no prayer to that effect sought to be introduced in the plaint.

2 In the first place, in a suit which seeks a declaration of title by adverse possession, the plea that the Plaintiff is a joint owner along with the purported benami holder, namely, Defendant No.1 herein, has no place. It is clearly contradictory and destructive of the plea of adverse possession. The averments imply that the Plaintiff is a co-owner along with the putative owner, namely, Defendant No.1, as a family member vis-a-vis a family dwelling. If such averments are to be made the basis for claiming the relief of declaration in the suit, it changes the complexion of the case. These averments may at the best be an answer to the case of bar under

Section 4 of the Act. Though no declaration of ownership on the basis of contribution made or rights enjoyed as family member vis-a-vis a family dwelling, is permissible within the framework of the present suit, it may be an answer to the case of bar of Benami plea on the ground of being a member of undivided family or in a fiduciary capacity vis-a-vis the other family members. In the premises, I am not inclined to allow the Chamber Summons, though the Plaintiff may have a liberty to file replication to deal with the defence of the bar of benami plea raised by Defendant No.1.

2 Learned Counsel for Defendant No.1 submits that there is no plea raised as of now by Defendant No.1 that the suit is barred on account of the provisions of the Act and that the preliminary issue framed in the suit in this behalf is not pressed. It ordered accordingly.

3 The Chamber Summons is accordingly dismissed with liberty indicated.

4 Costs to be costs in the cause.

(S.C. GUPTE, J.)