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

CHAMBER SUMMONS NO.474 OF 2016
IN
SUIT NO.92 OF 2016

Lemes Edmund D'souza ...Applicant

IN THE MATTER BETWEEN :

Lemes Edmund D'souza ...Plaintiff
V/s.
Arcadius E. D'souza & Ors. ...Defendants

Ms.Eventa A. Gonsalves with Mr.Reyden L. Gonsalves for the
Applicant / Plaintiff.

Mr.K.Y. Singh with Mr.R.S. Maurya for the Defendant Nos.1, 3, 4 and
5.

CORAM : R.D. DHANUKA, J.
DATE : 24TH NOVEMBER, 2018.

P.C. :-

1. By this chamber summons, the applicant (original plaintiff) seeks amendment as per Schedule – A to the chamber summons. The applicant has filed the suit on 7th October, 2015 *inter-alia* praying for declaration and partition in respect of various properties.

2. In the said suit, the applicant had filed a Notice of Motion bearing No.319 of 2016 *inter-alia* praying for interim reliefs. In reply to the said notice of motion, the defendant nos.1, 3, 4 and 5 filed an

affidavit and placed reliance on the registered Deed of Family Settlement dated 4th May, 1987 entered into between the applicant on the one hand and the defendant no.1 on the other hand.

3. The applicant filed affidavit in rejoinder to the said affidavit in reply and contended that the original of the said Deed of Family Settlement dated 4th May, 1987 was in the custody of the contesting defendants and was never acted upon. Learned counsel appearing for the applicant also placed reliance upon various documents in affidavit in rejoinder in support of her case that inspite of the said Deed of Family Settlement, the defendants had filed various documents including a declaration confirming that the property which was the subject matter of the said family settlement was inserted and included property standing in the name of the parties.

4. It is submitted by the learned counsel that the defendant no.1 had unilaterally got the document adjudicated upon and paid the differential amount of stamp duty only in the year 2014 without the knowledge of the applicant. The applicant came to know about the said document only when the affidavit in reply came to be filed by the contesting defendants. He submits that the affidavit in reply was filed only on 25th November, 2015 and was subsequently served upon the applicant. The applicant filed the chamber summons in the month of February, 2016 inter-alia praying for amendment to the plaint and to

seek a declaration insofar as the said Deed of Family Settlement dated 4th May, 1987 is concerned.

5. Ms.Gonsalves, learned counsel for the applicant invited my attention to the averments made in the affidavit in reply filed by the contesting defendants and also the averments made in the affidavit in support of the notice of motion and the affidavit in support of the chamber summons. He submits that the said Deed of Family Settlement was never acted upon. The applicant was not at all aware of the adjudication of the said document by the Stamping Authorities. Learned counsel submits that her client came to know only when the affidavit in reply was filed by the contesting defendants in the notice of motion. The applicant thereafter immediately filed this chamber summons. She submits that the trial has not commenced and thus no prejudice would be caused to the defendants. There is no change of cause of action.

6. Learned counsel appearing for the defendant nos.1, 3, 4 and 5 on the other hand submits that the applicant was fully aware of the Deed of Family Settlement. The applicant was the signatory to the said document. The applicant suppressed the said document in the suit for partition and thus cannot be allowed to urge that the applicant came to know about stamping of document only when the affidavit in reply was filed by the contesting defendants alleging

execution of the said Deed of Family Settlement.

7. It is submitted by the learned counsel that the Deed of Family Settlement is of the year 1987, whereas the chamber summons is filed by the applicant only in the month of February, 2016 and thus the said declaration sought by way of amendment is *ex-facie* barred by law of limitation.

8. It is submitted by the learned counsel that if this Court allows this chamber summons and the plaintiff is allowed to impugn the said Deed of Family Settlement dated 4th May, 1987, the said relief would be *ex-facie* barred by law of limitation.

9. A perusal of the affidavit in reply filed by the contesting defendants indicates that the reference is made to the said Deed of Family Settlement in the affidavit in reply. A perusal of the affidavit in rejoinder however, indicates it is the case of the applicant that the original of the said Deed of Family Settlement was lying with the contesting defendants. It is also the case of the applicant that the contesting defendants got the said document adjudicated upon only in the year 2014 without consent and knowledge of the applicant and relied upon the said document for the first time in the affidavit in reply.

10. A perusal of the affidavit in rejoinder indicates that it is the case of the applicant that even after execution of the said Deed of Family Settlement, the contesting defendants have signed several

documents including the Deed of Declaration confirming that the property in question was joint and ancestral property standing in the name of the parties including the applicant. There is no denial to these allegations made by the applicant in the affidavit in rejoinder to the said notice of motion.

11. Learned counsel appearing for the contesting defendants does not dispute that the said Deed of Declaration was adjudicated upon by his clients by the Stamping Authorities only in the year 2014 though the said document was executed as far back in the year 1987. In these circumstances, insofar as the issue of limitation is concerned, in view of the averments made by the applicant in the affidavit in rejoinder to the notice of motion and in support of the chamber summons, the issue of limitation can be kept open. I am satisfied that the applicant has made out a case for seeking amendment by filing this chamber summons and has acted with due diligence under Order VI Rule 17 of the Code of Civil Procedure, 1908 introduced in the year 2002.

12. I therefore, pass the following order :-

a). The Chamber Summons No.474 of 2016 is made absolute in terms of prayer clause (a). It is made clear that the issue of limitation as may be raised by the contesting defendants is kept open. It is also made clear that merely because the amendment as

sought is permitted by this Court, the contesting defendants have not accepted the contents of such amendment.

b). The amendment to be carried out within two weeks from today. A copy of the amended plaint would be served upon the advocate appearing for the contesting defendants within one week from the date of carrying out amendment.

c). The chamber summons is disposed of in aforesaid terms. There shall be no order as to costs.

(R.D. DHANUKA, J.)