

Arun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 420 OF 2017

Naresh G Aswani

...Plaintiff

Versus

Ramesh G Aswani & Ors

...Defendants

WITH

NOTICE OF MOTION NO. 1257 OF 2017

IN

SUIT NO. 420 OF 2017

WITH

NOTICE OF MOTION NO. 710 OF 2018

IN

SUIT NO. 420 OF 2017

WITH

NOTICE OF MOTION NO. 1076 OF 2018

IN

SUIT NO. 420 OF 2017

WITH

NOTICE OF MOTION NO. 1310 OF 2018

WITH

SUIT NO. 754 OF 2018

WITH

NOTICE OF MOTION (L) NO. 1336 OF 2018

WITH

SUIT NO. 754 OF 2018
WITH
NOTICE OF MOTION NO. 1357 OF 2018
WITH
SUIT NO. 754 OF 2018

Mr Pranav Desai, *i/b Pawan S Patil, for the Plaintiff in Suit No. 420 of 2017 and Defendant No.3 in Suit (L) No. 751 of 2018.*

Mr Joel D'Souza, *i/b VM Mohite, for Defendant No.5 in Suit No. 420 of 2017 & Plaintiff in Suit (L) No. 751 of 2018.*

Dr A Chandrachud, *with Mr Rohan Deshpande and Riddhi Rana, i/b Mr Dhiren Shah, for Defendants Nos. 1, 3, 4 & 6, in Suit No. 420 of 2017 and Defendants Nos. 1, 1(a), 1(b), 1(c) and 5, in Suit (L) No. 319 of 2018.*

Mr KN Kandekar, *Previous Advocate on record for the Plaintiffs in Suit No. 420 of 2017.*

CORAM: G.S. PATEL, J
DATED: 3rd August 2018

PC:-

1. There is a report from the Registry of 30th July 2018 pursuant to my order of 6th July 2018. To cut short the narrative, I will reproduced paragraphs 1 to 8 of the 6th July 2018 order:

1. This matter is listed at the instance of the Plaintiff but without notice to the Defendants, or at least the contesting Defendants Nos. 1, 3, 4 and 6 represented by Dr Chandrachud. There is no explanation on praecipe as to why this matter is listed.

2. There is a Motion filed by the Plaintiffs alleging contempt by Respondent/3rd Defendant and seeking action in contempt against Defendants/Respondents Nos. 1, 3, 4 and 6. The allegation is that despite a *status quo* order of 11th August 2017 (MS Sanklecha J), these Defendants gave out a property flat No. 132-B, Skyscraper, Bhulabhai Desai Road, Mumbai 400 026 on leave and license.

3. Quite apart from the fact that this matter has been listed without the notice to these Defendants, there is a far more disturbing situation. Objections were removed on 18th July 2017. Service was effected on 27th July 2017. At the time when service was effected, the schedule at Exhibit "D" to the Plaint, a listing of the suit properties, one that starts at page 47 and runs to page 50, did not mention the Sky Scraper flat. That schedule had an Sr No (k), a piece of jewellery, and then Sr No (l), which was generalised and spoke of all other or further movable and immovable assets.

4. Dr Chandrachud for the contesting Defendants points out that it seems that in the Court records, page 50 has been replaced or substituted. I find no order, either of the Court or of the Registry, permitting such a substitution. The present page 50 continues with the same Sr No (k) for the jewellery item, but adds as Sr No (l) the Skyscraper property, and then renumbers the generalised clause as Sr No (m).

5. It is sought to be contended by the Plaintiffs that this page was always there. *Prima facie* that is incorrect. Every page of the Plaint and its annexures, and, more importantly, every page of Exhibit "D", the schedule, **except the present page 50**, has the blue or purple circular stamp of a notary. Page 50 does not have it. Page 50 only has an

endorsement by an Advocate that it is a true copy. But even this is inconsistent. All other pages have the rubber stamp of the Advocate certifying it to be a true copy. Only this page does not.

6. Further, I find from a look inside the stitching or binding that something seems to have been torn out.

7. Dr Chandrachud's submission is that at the time when the order was passed by Sanklecha J, the schedule did not include the Skyscraper property. He says there are other litigations inter partes, and these do not mention the Skyscraper property either. While paragraph 7 (b) of the body of the Complaint lists the Skyscraper building property, the definition of what constitutes "the suit property" is specifically set out in page 50.

8. The consequence is this. If, at the time of Mr Justice Sanklecha's order, the Skyscraper building flat was *not* included in the schedule of properties, then there can be no question of the Defendants being in contempt. Having regard to this state of the record, it is now for the Plaintiffs to show that, at the time when Mr Justice Sanklecha passed his order, (i) page 50 existed in its current form; (ii) that this substitution was permitted by an order of a Court or by an order of the Registry; and (iii) this substituted page was in fact served on or notified to the Advocates for the Defendants. I am absolutely clear that the Plaintiffs must satisfy the Court on every single one of these aspects. If they do not, I will not only dismiss the Contempt Petition, but I will also vacate the order of *status quo*, one that has continued. Depending on the answers I receive from the Plaintiff, I may even consider dismissing the Suit in its entirety.

2. The Registry report now says that, in all likelihood, the substitution of page 50 to the Plaint — the one that contains an addition of the Skyscraper property — was possibly by the registered clerk of the Advocate through whom the Suit was filed. That Advocate, Mr Kandekar, is no longer on record for the Plaintiff.

3. The question of who was responsible for this alteration and by what authority is entirely unclear. That it was unauthorised is plain. Page 50 to the Plaint does not bear a notarial stamp, unlike the pages immediately preceding it and following it. It does not have a rubber stamp of the Advocate. It has a signature and a handwritten endorsement that it is a true copy. There is no date to this endorsement. The other thing that is completely clear is that what was served on Defendants Nos. 1, 3, 4 and 6 (“**the contesting Defendants**”) or their Advocates was a significantly different version of page 50, one that did *not* mention the Skyscraper flat at Breach Candy. Page 50 is the last page of Exhibit “D” that starts at page 47. Pages 47, 48 and 49 have remained unchanged. They all have a purple rubber stamp of a notary. Between pages 49 and 50 there is physical evidence of a page having been torn out and replaced. When, how and by whom this was done are, as I have said, matters that are presently unclear. The question is whether the Skyscraper property can be said to have been part of the “suit property” for the purposes of order of 11th August 2017 of MS Sanklecha J — that orders directs a *status quo* in respect of “the suit property”.

4. There is an attempt to argue today that the ‘suit properties’ are described in paragraph 8 of the Plaintiff; item (b) of this description includes the flat in the Skyscraper building at Warden Road; and that, therefore, Sanklecha J’s order covered the Skyscraper building flat, irrespective of anything that was included or left out of Exhibit “D”. The Plaintiff also argues that there are other pages annexed to the Plaintiff that do not similarly bear a notarial stamp. But there is good reason for that. For example page 91 is completely an illegible copy of a municipal tax assessment bill. An objection was raised in respect of it and a typed copy was inserted at pages 91, 91A and 91B. Copies of the original (illegible) pages were always with the contesting Defendants, and, I find that curiously enough, the Defendants were also served with a copy of the Plaintiff containing re-typed copies of the illegible documents. This means, therefore, that the *only* page with no explanation whatsoever is the substituted page 50.

5. None of this is even remotely persuasive. MS Sanklecha J’s order did not say that there would be a *status quo* ‘in relation to the properties as mentioned in paragraph 8 of the plaintiff’ or anything of the kind. We therefore have to look at the manner in which the Motion before MS Sanklecha J was filed and the manner in which its reliefs were framed, and, too, what the Plaintiff itself says. The prayers in the Plaintiff, and, specifically, prayer (d) for a receiver and prayer (e) for an injunction, refer to the “*said properties more particularly described in Exhibit “D” to the Plaintiff*”. This is exactly the wording of the prayers in the Notice of Motion No. 1257 of 2017. It therefore follows that the *status quo* that MS Sanklecha J ordered was in respect of the properties listed in Exhibit “D” to the Plaintiff.

The copy of Exhibit “D” that was served on the contesting Defendants did *not* include the Skyscraper property. There is nothing at all to show that at the time when MS Sanklecha J passed his order on 11th August 2017, page 50 of Exhibit “D”, containing a mention and description of the Skyscraper property, was on the record of the Court (for there is no date of that insertion); but it is abundantly clear that this substituted page 50 had, until then, not been furnished to or served on the Advocates for the contesting Defendants.

6. Dr Chandrachud may be correct, therefore, in saying that this amounts to a fraud on the Court, and, following a long line of settled precedent, is sufficient reason to vacate the entire order of 11th August 2017. Despite this, a degree of caution is advisable. I am not at this stage inclined to vacate the entire order because, as I have noted, the other properties from pages 47 to 49 were listed in the original Complaint and a copy of those pages was certainly served on the contesting Defendants. Also, when, how and by whom this insertion was made will require evidence. All this may well be the subject matter of an independent contempt or other application by the contesting Defendants. It must, therefore, suffice to reserve to the contesting Defendants liberty to file such proceedings as they think fit. That being said, an inevitable consequence of this discussion is that the Plaintiff’s Contempt Notice of Motion No. 71 of 2018 alleging a breach of MS Sanklecha J’s order of 11th August 2018 in respect of the Skyscraper property must be dismissed. It is.

7. Liberty to the contesting Defendants to file an independent proceeding in regard to the changes made to page 50 of the Complaint.

8. It follows, therefore, that there was no order of *status quo* by MS Sanklecha J in respect of the Skyscraper flat. There is no question of any such order being continued against that flat at any time, with or without the consent of these contesting Defendants.

9. Dr Chandrachud also makes another complaint that the previous ad-interim order was continued on 2nd February 2018 and thereafter but this appears to have been without notice to contesting Defendants. I am informed that the matter was on board on at least one of those dates. In that view of the matter, all that can be done is to direct that the previous order of *status quo* will now continue until 3rd September 2018 and not beyond. The Motion will be listed on 29th August 2018.

10. The papers need not be retained in custody any longer.

(G. S. PATEL, J)