

Arun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 1260 OF 2016
IN
NOTICE OF MOTION NO. 1107 OF 2013
IN
SUIT NO. 76 OF 2012

Sunil M Shah	...Applicant
<i>In the matter between</i>	
Kavita S Shah	...Plaintiff
<i>Versus</i>	
Nirmala M Shah & Ors	...Defendants

Mr Kalpesh Joshi, *with Ms Nisha Shah, for Plaintiff and Applicant in Notice of Motion No. 1107 of 2013 and Notice of Motion No. 1489 of 2014.*

Mr Ajit S Karwande, *for Defendants Nos. 1 and 2 and Applicant in Chamber Summons No. 1260 of 2016.*

CORAM: G.S. PATEL, J
DATED: 15th October 2018

PC:-

1. This is a Chamber Summons by Defendants Nos. 1 and 2. There is no manner of doubt that the then Commissioner for Taking Accounts, Mr Ketan K Trivedi made a final report dated 19th July 2016 saying that he could not proceed further in the matter on account of the non-cooperation of the 2nd Defendant, and his

failure to prove his case or permit cross-examination. The Commissioner sought *inter alia* an appropriate order in view of this default by 2nd Defendant and further directions in the matter of quantifications of all claims made by the Defendant. The Commissioner also sought costs of Rs.2000/-.

2. An order was made on the report of 19th July 2016 by KR Shriram J on 29th July 2016 in a separate Notice of Motion No. 1107 of 2014. I think it is best to reproduce that short order in full:

1. Perused the report of the commissioner for taking accounts dated 19th July 2016. In view of what is stated therein, delay is condoned. Defendant No.2 having refused to step into the witness box to prove the documents and not made himself available for cross-examination, evidence of Defendant No.2 is also closed. The matter will proceed on the basis that the Defendant No.2 not having proved any of the documents and not having made himself available for cross-examination, the evidence of examination in chief will not be considered at all. Cost of this report of Rs.2000/- to be paid equally by the Plaintiffs and Defendant No.2. Undertakings of Defendant No.2 who is present in person to pay during the course of today amount of Rs.2000/- cost as mentioned in paragraph 5 of the report is accepted and so ordered.

Report accordingly, disposed.

Notice of Motion be listed for arguments as per the CMIS date.

3. The 2nd Defendant carried the matter in Appeal and this was the order of the Appellate Court on 31st August 2016:

1. The challenge in this appeal is to the order dated 29th July 2016 made by the learned Single Judge. By the impugned order, report of the Commissioner dated 19th July 2016 for accounts has been taken on record after condoning the delay in filing thereon. Further, the impugned order, after noting that the appellant (Defendant No.2) having refused to step into the witness box to prove his documents, the evidence of the appellant stands closed.

2. Mr Ajit Karwande, learned counsel for the appellant, submits that there is apparent conflict between the impugned order and the order dated 4th March 2013 made in Notice of Motion No. 105 of 2012. Further, Mr Karwande submitted that even though the appellant may have failed to enter into the witness box, learned Single Judge was required to follow the ruling of the Full Bench reported in 2008(2) Mah. L.J. 886, in the matter of taking of accounts, rather than except the Commissioner's report. On this ground, Mr Karwande urged interference with the impugned order.

3. **We have considered the submissions of learned counsel for the appellant. We have also perused the record and the impugned order in our judgment, since the appellant despite several opportunities, failed to step into the witness box and make himself available for purpose of cross-examination, the appellant cannot, at this stage, complain in the matter of closure of his evidence or for that matter taking on record the report of the Commissioner. Upon perusal of the order dated 4th March 2013, we are not satisfied that there is any conflict between the directions issued in the said order and the directions issued in the impugned order.**

4. In any case, there is no necessity to entertain the present appeal, particularly **because it is always open to the appellant to raise all such grievances, in case, the main suit is ultimately decided against the appellant and the appellant, chooses to institute a substantive appeal questioning such decree.** Liberty to this effect, accordingly, is reserved to the appellant.

5. With liberty as aforesaid, this appeal as well as notice of motion are hereby dismissed.

(Emphasis added)

4. The present Chamber Summons itself was filed in May 2016, i.e. before the Commissioner's final report. In my view it is completely infructuous because what the Chamber Summons seeks in prayer clauses (a), (b), (c) and (d) is reliefs in regard to orders and events between March and May 2016, all overtaken by the Commissioner's final report of 19th July 2016 and the subsequent orders of KR Shriram J and of the Appeal Court. It is not possible, viewed from any perspective, to now in 2018 ignore those two judicial orders, both of which are binding on me, and take up the Chamber Summons as if nothing had happened since the date of its filing. The Chamber Summons is, therefore, clearly infructuous.

5. There is no question now, specifically, of permitting 2nd Defendant to lead further evidence or to cross-examine and so on. All these issues have been closed by the order of KR Shriram J and by the Appeal Court and it makes no difference that those orders were not passed in the present Chamber Summons filed in May

2016; for it is beyond dispute that both orders related to the final report of the Commissioner dated 19th July 2016.

6. The attempt by 2nd Defendant today to get me to reopen matters before the Commissioner even though these are now firmly closed by the two judicial orders is unacceptable. Mr Karwande submits that liberty has been reserved to 2nd Defendant in the Appellate order itself. I have extracted that order above. I believe this submission is misdirected. There is indeed liberty but that liberty is in regard to a substantive first appeal against the final decision in the main suit. It does not extend to this indirect method of bypassing binding orders of this Court.

7. The Chamber Summons No. 1260 of 2016 is dismissed as infructuous.

(G. S. PATEL, J)