

Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 1999 OF 2016
IN
SUIT NO. 274 OF 2009

Lilavati Kirtilal Mehta Medical Trust & Anr ...Plaintiffs
Versus
 Sharan P Khanna & Ors ...Defendants

Mr Piyush Raheja, with Jayesh Mistry, i/b RMG Law Associates, for the Applicants.

**Mr PN Modi, Senior Advocate, with Neville P Lashkari, i/b VBA
Legal, for Defendants Nos. 28 and 29.**

Mr Prateek Seksaria, with Ranjeet Vaghani & Hemant Prabhulkar,
i/b Jurisperitus Mumbai, for Defendant No. 42.

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

PC:-

1. Heard.
2. The Applicants are Defendants Nos. 1 to 27. They have filed this Motion seeking a rejection of the plaint under the provisions of Order VII Rule 11 of the Code of Civil Procedure (“**CPC**”) apparently on the ground that it furnishes no cause of action.

3. There are two problems in even considering these reliefs. The first is that Suit No. 274 of 2009 in the very form in which it stands today was before RV More J on 11th January 2010. He was considering a Chamber Summons in a companion Suit and while doing so, he said in paragraphs 5, 6 and 7:

"5. The present suit is for the specific performance of the agreement dated 22nd March 2005. The Applicant is not a party to this agreement. Therefore, in my view the presence of the present applicant is not required to decide the controversy in the aforesaid suit. So far as the contention of the applicant regarding the utilization of the funds by the plaintiff is concerned, the same is disputed by the plaintiff and hence cannot be gone into in the present suit. As stated above, already the Trust has filed a separate suit against the plaintiff and the defendants. In the facts and circumstances, I do not find any necessity to allow the applicant to be joined as a party-defendant in the aforesaid suit.

6. Learned counsel appearing on behalf of the applicant also submitted that the suit filed by the Trust, being Suit No. 274 of 2009, may be clubbed and heard along with the present suit, being Suit No. 1423 of 2008. This prayer is opposed by the learned counsel for the plaintiffs.

7. **It is the contention of the applicant that the subject matter of the Suit No. 274 of 2009 is an agreement between the plaintiffs in the present suit and the Lilawati Trust. Under the said agreement, the plaintiffs in the present suit agreed to assign their rights in respect of the subject matter of the present suit to the Lilawati Trust. In these circumstances, I feel it appropriate to club and decide both the suits**

together. In any case, the plaintiff in the present suit will not be prejudiced if both these suits are clubbed together. In these facts, I dispose of the above Chamber Summons with the following order.

: ORDER :

- (1) Chamber Summons is rejected.
- (2) The present Suit No. 1423 of 2008 and Suit No. 274 of 2009 are directed to be clubbed and decided together."

(Emphasis added)

4. For all intents and purposes, and whether Mr Raheja says so or not, the application before me today is that I should revoke or modify or review or sit in appeal over RV More J's order, and de-link the two suits, arrive at a finding that is contrary to paragraph 7 of RV More J's order, and proceed to reject the Plaintiffs' Suit No. 274 of 2009.

5. I refuse to do anything of the kind. I cannot.

6. The next submission, and this is the principal ground in the Notice of Motion, is that the contract in question, Exhibit "E" to the plaint, is executed by Defendants Nos. 1 to 27 on the one hand and Vijay Mehta (deceased Plaintiff No. 2) and Defendants Nos. 31 to 40. It is the case of the Applicants that the contract was not executed by Defendants Nos. 31 to 40 for and on behalf of the 1st Plaintiff-Trust but only in their personal and individual capacities. This is not in fact how the plaint proceeds at all. To the contrary, it proceeds on the footing that Defendants Nos. 31 to 40 executed the

document in question *qua* Trustees of the 1st Plaintiff-Trust and in no other capacity. The prayers in the plaint make it very clear that it is on account of the execution of that document by Defendants Nos. 31 to 40 that the Plaintiff No. 1 Trust claims to be entitled to specific performance.

7. The submission by Mr Raheja for the Applicants that the documents must be read on its own *de hors* the attending pleadings in the plaint is not one that I can accept. This is a matter that will require evidence including as to the intention of the parties and as to the capacity in which Defendants Nos. 31 to 40 contracted with Defendants Nos. 1 to 27.

8. If there was any doubt about the fact that evidence is necessary, this is put to rest by one phrase in paragraph 6 of the Affidavit in Support of the Application. This is an averment with reference to the contract in question, saying that it was “never the intention” that Defendants Nos. 31 to 40 would represent the Trust. In itself this is a ground for dismissal of the Notice of Motion, for this means, necessarily, that evidence of intention is undoubtedly necessary.

9. In my view, the Notice of Motion is thoroughly misconceived. That apart there are sufficient averments not only in the prayers in the plaint but in paragraphs 14 to 17 to furnish an adequate cause of action.

10. The Notice of Motion is dismissed. There will be no order as to costs.

11. All contentions are left open to the final hearing of the Suit.

(G. S. PATEL, J)