

Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 1114 OF 2012
IN
SUIT NO. 58 OF 1986

Sanjay Ramchandra Adsule & Ors ...Plaintiffs
Versus
Dnyanesh Kamalakar Samant ...Defendant

Mr Vishal Kanade, *i/b AA Tungare, for the Plaintiffs/Applicants.*
Ms Gargi Bhagwat, *i/b Divekar Bhagwat & Co., for Defendant No. 1.*
Mr Milind Sathe, Senior Advocate, *with Snehal Shah, Simil*
Purohit, Ravi Gandhi, MA Kamdar, Rashmin A Jain & Rishabh
Ranka, i/b Kanga & Co., for Defendant No. 2.

CORAM: G.S. PATEL, J
DATED: 4th March 2019

PC:-

1. One Prabhakar Laxmanrao Adsule filed two suits for specific performance of sale agreements for different properties. Suit No. 58 of 1986 related to a property of about 80 acres, Survey No. 41, at Kandivali. There were two Defendants to the suit. The 1st Defendant was one Kamalakar Narayan Samant, who had created some rights in favour of the 2nd Defendant company, engaged in the real estate and development business. Prabhakar also filed Suit No. 173 of 1986 against Kamalakar for specific performance of another

agreement in regard to a 20-acre plot, Survey No. 43, also at Kandivali. The two properties abut each other. Both agreements are of the same date, 5th April 1974. Prabhakar was represented in both suits by a constituted attorney, one Avinash Parekh, who, as the record today indicates, is himself concerned with a firm of builders, Vaikunth Builders.

2. The Court dismissed the 20-acre plot Suit No. 173 of 1986 when it was told that Prabhakar had died. The Court was told this on 29th February 2000. It stood the matter over. On 15th March 2000, the Court dismissed the suit for want of prosecution.

3. Both suits were of the same year, one filed shortly after the other. It seems that some four years earlier, on 5th February 1996, the present Suit No. 58 of 1986 was dismissed as withdrawn. This was before Smt KK Baam J.

4. Prabhakar died on 9th October 2012. His younger brother Ramchandra filed Chamber Summons No. 78 of 2013 seeking to be substituted in Prabhakar's place. While that 2013 Chamber Summons was pending, Ramchandra died on 29th January 2015. Then his — i.e. Ramchandra's — three children Sanjay, Abhay and their sister Smita sought to step into Ramchandras's shoes and, therefore, into Prabhakar's. On 2nd February 2015, SC Gupte J conditionally allowed that Chamber Summons but said that Sanjay, Abhay and Smita would have to prove that they were legal heirs not only of Ramchandra but of Prabhakar. They were, therefore, required to lead evidence. By the time the matter came before me on

30th November 2018, the evidence was in complete disarray. Sanjay had been cross-examined before KR Shriram J. There was no proper Affidavit of Documents nor a compilation. I issued the necessary directions. Abhay and Smita were then cross-examined in Court.

5. The task before Mr Kanade for the Applicants is, therefore, two-fold. He must first succeed in doing that which Gupte J set him to do, i.e. to prove heirship of Sanjay, Abhay and Smita all the way to Prabhakar's estate and this must be on the basis of the evidence adduced. Once he does that, he must then establish that he has a right to the relief sought in this Chamber Summons which is for recall of the 5th February 1996 order, and that is after a delay of 5,915 days is condoned. It is only then that Mr Kanade can obtain an order of restoration or revival of Prabhakar's original Suit No. 58 of 1986.

6. There are significant hurdles in Mr Kanade's way, at both levels. Turning first to the evidence, I find it more than somewhat remarkable that the Affidavits in support of the Chamber Summons are all sworn by Parekh (or in the other companion proceedings by Jayesh Shah, another constituted attorney of the Applicants, also engaged with the same firm of Vaikunth Builders). Through these proxy Evidence Affidavits, Abhay and Smita point to a solitary document, a Gift Deed dated 19th July 1971 at page 191 of the re-compiled record. This apparently in respect of an unrelated property. Prabhakar is supposed to have given the property mentioned in Schedule A of that Gift Deed to Ramchandra, then 32 years old. Ramchandra is described in this document as Prabhakar's "real younger brother". While Mr Sathe for the 2nd Defendant has

had a moment's enjoyment at this description, I do not think much will turn on it. What the description omits, however, is significant, for in this document Prabhakar does not describe Ramchandra as his *only* brother. Indeed — and this is emphasized by Mr Sathe in arguments and earlier by Mr Shah during the cross-examination of Abhay and Smita — in the document Prabhakar says:

"Neither I nor my heirs or legal representatives shall henceforth have any claim"

Does this mean that Prabhakar had other heirs and legal representatives? Or is this to be viewed as some meaningless generic legalese so beloved of lawyers?

7. Mr Sathe submits that this is not something that can be left to imagination. If the document is in evidence, it will speak for itself. The family and its genealogy is something that only these Applicants, Sanjay, Abhay and Smita knew, and could tell. This is something specially in their knowledge within the meaning of Section 106 of the Evidence Act. It is they who brought into evidence this document, and it is they who must explain it. They cannot rely on it for its reference to Ramchandra but choose not to explain the other expression used in it.

8. Let us consider the implications of this submission, for I believe it has substance. The Adsule family was admittedly from Indore. Prabhakar and Ramchandra were the sons of Laxmanrao Adsule, but we do not know if they were the only children of Laxmanrao Adsule and his wife. We do not know if Laxmanrao Adsule's wife survived her husband or, more importantly, survived

her unmarried elder son, Prabhakar. That would immediately have had all manner of implications to heirship and to Ramchandra's claim. The Evidence Affidavits do not mention her at all. They do not give her name. They do not give her date of demise, even approximately. They do not say whether she died before or after Prabhakar or before or after Ramchandra. There is no mention of whether Laxman and his spouse had other children. I will take it that Prabhakar was unmarried but the difficulty then is that we do not know if he had any siblings other than Ramchandra. As to Ramchandra, we are given the name of his wife, Sindhu, but again not the date of her death and whether she died before or after him. In other words, I am asked to speculate almost entirely as to the question of heirship — the very question that was to be tried and on which evidence was ordered.

9. Let us consider next how the three Applicants fared in cross-examination. Sanjay was cross-examined before KR Shriram J on 25th October 2018. He is a lawyer, and has his practice in Indore. He accepts the connection between Jayesh Shah, Avinash Parekh and Vaikunth Builders. His answers to Questions 19 to 24 at pages 147-148 of the record are most instructive. This is how they read:

19. Q. I put it to you that the death certificate at Exhibit A-2 does not establish any relationship between you and Prabhakar Adsule?

Ans. Yes It does not show any relationship.

20. Q. I put it to you that you have not produced any document to establish that you are related to Prabhakar Adsule as stated in your affidavit?

Ans. I agree.

21. Q. Therefore, would I also be correct to suggest that there is no evidence produced to show that Abhay Rameshchandra Adsule or Smita Chaini are related to Prabhakar Adsule?

Ans. I agree. There are no documents.

22. Q. I put it to you that you have not produced any document to prove that Prabhakar Adsule was related to Ramchandra Adsule?

Ans. Yes, I have produced evidence.

23. Q. I also put it to you that you have produced no document to show that you are related to either him or Abhay Ramchandra Adsule or Smita Chaini.

Ans. Yes, I have produced.

24. Q. Can you point from the documents on record which are these documents that show that Prabhakar Adsule and Ramchandra

Adsule were related to each other and you, Abhay Ramchandra Adsule and Smita Chaini were related to Ramchandra Adsule?

Ans. Now I say that there are no documents on record.

10. Abhay and Smita did not fare much better in their cross-examination before me. Smita more or less said that she knew nothing except what her brothers told her. Abhay had to be asked to focus on the Gift Deed. When shown this, he said that Ramchandra was Prabhakar's only surviving brother; but, as I have noted, this begs the question. It tells us only part of the story, and we are in need of the whole of it. I then put two questions to him specifically asking him to say who Prabhakar's heirs and legal representatives were as mentioned in the Gift Deed. His answer at page 160 was that he could not answer. Abhay agreed, as later did Smita, that nobody has obtained representation to the Ramchandra's estate. Indeed I would imagine that if Sanjay, Abhay and Smita were truly the representatives of both estates as they claim, i.e. the estates of of Ramchandra and Prabhakar, it is telling that there is not even a mention of they having applied for any kind of representation to either estate.

11. Now Gupte J's order of 22nd February 2015 (pages 5 to 7) said this in paragraphs 2 and 3:

"2. The original Plaintiff had filed the present suit for specific performance of an agreement for sale executed between the Plaintiff and the Defendants. This suit was

withdrawn under an order passed by this Court on 5 February 1996. Thereafter, the original Plaintiff took out a Notice of Motion, being Notice of Motion No. 1114 of 2012 through a constituted attorney, seeking condonation of delay and recalling the order dated 5 February 1996 permitting withdrawal of the suit as settled out of court, and restoration of the suit on the file of this Court. During the pendency of this Notice of Motion, as noted above, the original Plaintiff expired. As a result, the first Chamber Summons, i.e. Chamber Summons No. 78 of 2013, was taken out by a Third Party Applicant who was the brother of the deceased Plaintiff, claiming to be the only legal heir of the deceased Plaintiff to be brought on record in place of the deceased. This Chamber Summons was taken out through a constituted attorney. During the pendency of this Chamber Summons, as noted above, the Third Party Applicant expired as a result the present Chamber Summons was taken out by Third Party Applicants, who claim to be legal heirs of the deceased Third Party Applicant in Chamber Summons No. 78 of 2013. Once again, this Chamber Summons was taken out through a constituted attorney.

3. Subject to the Third Party Applicants making out their case of being legal heirs of the deceased Plaintiff through the Third Party Applicant in Chamber Summons No. 78 of 2003 or otherwise, the Defendants have no objection to the Third Party Applicants being brought on record to represent the original Plaintiff in the Notice of Motion the capacity of the Third Party Applicants, who are permitted to be substituted in place of the Plaintiff in the Notice of Motion, i.e. Notice of Motion No. 1114 of 2012, will have to be proved by leading of evidence in the Notice of Motion. The questions as to whether the delay in taking out the Notice of Motion ought to be condoned and whether the suit should be restored, are naturally matters of merit in

the Notice of Motion, which will be considered at the hearing of the Notice of Motion. Subject to that, Chamber Summons No. 1560 of 2014 is allowed and the Applicants are brought on record in place of the original Plaintiff in Notice of Motion No. 1114 of 2014. No order needs to be passed in Chamber Summons NO. 78 of 2013 and the same is disposed of."

12. Obviously, the Applicants' entitlement to sustain the application was contingent or conditional upon being their being able to prove that they were Prabhkar's heirs and legal representatives.

13. In the circumstances that I have outlined above, there is not the remotest possibility of their being able to do this and, therefore, on this ground alone, the Notice of Motion must necessarily fail.

14. On the principle that even though this is not strictly a suit being tried, the principles analogous to Order XIV will apply, I am perhaps required to address myself to the other question as well, i.e. the application for recall of the 5th February 1996 order. To begin with there are several controversies that emanate from this application. First, I notice that all these Affidavits are filed by Parekh and not the Applicants. Parekh claims to have held Powers of Attorney from everybody claiming rights over the property. There is some controversy sought to be raised that there was in fact no order made by Smt KK Baam J on 5th February 1996. There are passages in the affidavits that something wholly improper or untoward happened in the court's registry when it issued a certified copy of this order on 17th February 2007. The allegation is also that since

Prabhakar was old and in Indore, Parekh was handling everything. He never instructed the Attorneys, M/s LC Tolat & Co to apply for withdrawal. He claims that he was told that they had never instructed Counsel to seek a withdrawal of the suit on the ground that it was settled out of Court. In short, everybody was involved, according to Parekh, in some sort of gigantic fraud, and this went years together; for, if there was no order of 5th February 1996 and none had sought to have the matter placed for withdrawal, then there was no possibility of the Registry issuing a certified copy several years later on 17th December 2007. It is unfortunate that we today have to face allegations of this stripe with such alarming frequency. It is regrettable that parties do not stop for a moment from making all kinds of allegations against their own advocates, court officials and even judges. This construct — it is not possible to call it an argument — is misconceived. It overlooks that in the original docket of the Court's record of the suit, there is an endorsement in hand on 5th February 1996 initially by the Court Associate at that time saying the suit was disposed of on that date. Above that is a rubber stamp with the name of the Judge. It reads "Coram: Smt K.K. Baam J". This is affixed at a slant a cross over the short title of the docket, a pencil scoring out in the form of a large "X", our usual indicator that a matter is disposed. Thus, there can be no controversy that the matter was indeed disposed of on 5th February 1996.

15. The question that remains is whether this disposal was one at the instance of the Plaintiff or his Constituted Attorney. There, the Constituted Attorney's case is that he learnt of this disposal only many years later when he found the 2nd Defendant was beginning to

develop the property. This was only in June 2007. This is when he 'took steps'. What were these steps? He caused Notice of Motion No. 3479 of 2007 to be filed. This was dismissed as withdrawn. When it was pointed out that the suit itself had been disposed of on 5th February 1996, Parekh filed Chamber Summons No. 1811 of 2009. The 2nd Defendant responded. On 23rd January 2012, DG Karnik J noted a statement by the 2nd Defendant that the suit has been disposed of on 5th February 1996 and accordingly dismissed the Chamber Summons. Ramchandra filed his Chamber Summons No. 78 of 2013 thereafter, and after he died, the three children then filed Chamber Summons (L) No. 1560 of 2014 which SC Gupte J allowed on 2nd February 2015. Then came the present Notice of Motion.

16. The inconsistencies in Parekh's case are many. None are resolved. He does not explain, for instance, how it came to pass that while he was aware of the dismissal of Suit No. 173 of 1986, and aware of this only in his capacity as a constituted attorney, he knew nothing at all of the outcome of the present suit even though it relates to the adjacent property. Suit No. 173 of 1986 was restored on 2nd April 2001. Parekh filed Notice of Motion No. 3497 of 2007 in that suit. That Notice of Motion was ultimately disposed of on 31st October 2007 restricting relief only to the lands in that suit, i.e. the 20 acres in question. To say, therefore, that Parekh was unaware of the withdrawal of Suit No. 58 of 1986 on 5th February 1996 seems, at the very least, to be hugely improbable. I am asked to speculate that Parekh was aware of the allegedly wrongful dismissal of one suit but completely oblivious to the equally allegedly wrongful withdrawal of the other. Making allegations against advocates, court

records and officers, counsel and, by necessary implication, judges, cannot substitute for what is really required.

17. There is also another glaring inconsistency. If the companion Suit No. 173 of 1986 was disposed of on the basis that Prabhakar, the original Plaintiff, had died, then Prabhakar was surely dead for both suits, and with his death would have ended any authority to Parekh to begin with. Parekh says that on making further enquiries he found that his principal Prabhakar was “in fact alive and living at Indore”.

18. Today, Parekh claims to hold Powers of Attorney from Sanjay, Abhay and Smita. So does Jayesh. There is evidence that all three gave Powers of Attorney to both. Both Parekh and Jayesh are connected with Vaikunth Builders. Through their Constituted Attorneys, the three Applicants claim rights; but they themselves know nothing, say nothing and can prove nothing. The conclusion is inescapable that these three Applicants have been simply put up by Parekh and Jayesh on behalf of Vaikunth Builders.

19. To succeed, the Applicants must succeed on both counts, i.e. the question of heirship as well as making out a *prima facie* case in equity in the exercise of inherent discretion vested in a Court. That discretion, given the delay and these circumstances, would necessarily require a quite extraordinary demonstration of overwhelming equities and facts. This is entirely lacking. There are allegations mounted on allegations but that is all. The Applicants are unable to answer or resolve the inconsistencies in their own case.

20. The Notice of Motion is dismissed. In the facts and circumstances of the case, there will be no order as to costs.

(G. S. PATEL, J)