

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1294 OF 2015

IN

SUIT NO. 2932 OF 1998

WITH

NOTICE OF MOTION NO. 2359 OF 2009

IN

SUIT NO. 2294 OF 2008

WITH

CHAMBER SUMMONS NO. 1069 OF 2012

IN

SUIT NO. 2986 OF 2011

WITH

COURT RECEIVER'S REPORT NO. 74 OF 2014

IN

SUIT NO. 2294 OF 2008

WITH

CHAMBER SUMMONS NO. 842 OF 2018

IN

SUIT NO. 2986 OF 2011

WITH

CHAMBER SUMMONS NO. 850 OF 2018

IN

SUIT NO. 2294 OF 2008

Anam Properties Pvt Ltd ...Plaintiff
Versus
Dinesh Shankar Shailendra & Ors ...Defendants

Mr Zain Mookhi, *i/b Chaitanya Bhandarkar, for the Plaintiff in S/2896/2011 & Respondent in CHS/1069/2012 & 842/2018.*
Mr Roop M Vasudeo, *for the Plaintiff in S/2932/1992 & S/2294/2008 & for Applicant/Intervener in CHS/1069/2012.*
An Advocate, *for the Applicant in NMS/1294/2015.*
Mr Devrupa Dey, *with Devasis Mitra, i/b Fox Mandal Partners, for the Applicant/Intervener in CHS/850/2018.*
Mr Devrupa Dey, *with Devasis Mitra, i/b Fox Mandal Partners, for the Applicant/Intervener in CHS/842/2018.*

CORAM: G.S. PATEL, J
DATED: 9th January 2019

PC:-

NOTICE OF MOTION NO. 1294 OF 2015:

1. Heard.
2. Prayer 1 of the Motion cannot be allowed. It seeks restoration of the Applicant's Contempt Notice of Motion No. 776 of 2005. That Motion was dismissed on 14th July 2006 by SK Shah J. The order is at page 41. The dismissal was not only for non-appearance and non-prosecution but the Court specifically held that even on merits no case of contempt had been made out. In that view of the

matter, there is no question of this Court sitting in appeal over the order.

3. The second prayer in the present Motion is to expedite the suit. The best that can be done is to fix an early date for framing issues and for trial in Suit No. 2932 of 1998. I will do this separately.

4. With these observations, the Notice of Motion is disposed of. There will be no order as to costs.

5. List the Suit No. 2932 of 1998 from framing issues and other directions for trial on 13th March 2019.

NOTICE OF MOTION NO. 2359 OF 2009:

6. The Notice of Motion is not pressed. It is dismissed as withdrawn. There will be no order as to costs.

CHAMBER SUMMONS NO. 1069 OF 2012 & CHAMBER SUMMONS NO. 842 OF 2018:

7. The dispute pertains to a bungalow known as Rimjim Bungalow, a ground plus one upper floor structure at 9th Road, Khar (West), Mumbai. This stands on a plot of land bearing CTS No. E/543, E/544 and E/545 of Bandra Village. The property was owned by one Shankar Shailendra Kesarilal and his wife Shakuntala. I have been shown a registered document by which Shailendra and Shakuntala purchased the property and this is a 14th January 1960.

It clearly specifies that Shailendra and Shakuntala purchased the property as joint tenants. The law in that regard is clear that on the death of one of the joint tenants, the estate in the entire property would pass by survivorship to the other. The document also makes this abundantly clear because it contains at internal page 5 a specific stipulation to this effect. At this *prima facie* stage, this will have to be accepted.

8. I am noting this at the forefront because there is as yet some controversy about whether Shailendra, Shakuntala and their three sons and two daughters had fractional interests in the property. It seems to be the case of one of the daughters-in-law that after Shailendra passed, Shakuntala (the widow) and the five children each had an accepted 1/6th undivided share, right, title, interest in the property. This is disputed.

9. What I have before me today are only applications for impleadment, and this is not the time to examine these rival contentions at any great length. The suit itself is for specific performance. The Plaintiff claims to be entitled to a specific performance of an agreement to sale and convey a 1/6th share in the Rimjim property from Gitanjali, the widow of one of the sons of Shailendra and Shakuntala, one Sheili alias Hemant. Defendants Nos. 2, 3 and 4 are the children of Defendant No. 1.

10. The first application in Chamber Summons No. 1069 of 2012 is by two commercial entities (“**the Atul Group**”). Their claim is to a 50% undivided right, title and interest in the Rimjim property and

it arises thus. According to the Atul Group, since Shailendra and Shakuntala held the Rimjim property as joint tenants, on Shailendra's demise Shakuntala became the sole and absolute owner of the whole of the property. She made a Will dated 28th April 1989 leaving half the property to one of her other sons, Dinesh, also the named executor, and the other half to Nishant, her grandson, the son of Manoj Shankar Shailendra, another son.

11. Dinesh filed for probate in Testamentary Petition No. 200 of 1993. Citations were served on the other heirs including Sheili alias Hemant. He was the only one to file a caveat in opposition and that opposition was continued after his demise by his widow, the present Defendant and other heirs, the Petition being renumbered as Testamentary Suit No. 27 of 1993. The Caveators opposed Shakuntala's Will as being invalid and also claimed that they had an undivided 1/6th right in the property. Obviously on the basis of intestacy.

12. The opposition failed and the Petition after evidence proceeded to probate by a final order and judgment dated 21st January 2011. None of the Defendants have challenged that final order and the order in the Testamentary Suit has thus attained finality.

13. The provisions of the Succession Act are clear. There is no proceeding of which I am aware or to which the present suit is linked regarding a challenge to the acquisition of title by Shailendra and Shakuntala. Indeed there cannot be, because everybody

involved traces their title back to only those two persons. The consequence of the probate was that the bequests to Dinesh and Nishant were accepted and the Will was held to have been proved in its solemn form. Dinesh then entered into transactions with the present Applicants, the Atul Group, represented by Mr Vasudeo and this is how the Atul Group in the present Chamber Summons claims to have a 50% right, title and interest in the property.

14. Nishant in the meantime has independently filed Chamber Summons No. 842 of 2018 on identical grounds, he being the other legatee under Shakuntala's Will of the balance 50% bequest in the Rimjim property.

15. The question is whether in a suit for specific performance as between Preeti Raheja and Gitanjali who claims a 1/6th share, the Atul Group and Nishant are necessary parties. Mr Mookhi for the Plaintiff would have it that they are not. He submits that he is only concerned with an enforcement of his agreement with Gitanjali as an heir of Hemant. He is satisfied if he gets a decree for specific performance. He places reliance on the decision of the Supreme Court in *Kasturi v Iyyamprumal*.¹ But there is a material difference between what was before the Supreme Court in that case where they were rank outsiders setting up an independent title, and this case. Mr Mookhi is seeking specific performance from a person who claims only on the basis of an intestacy of the original title holder and which claim has been lost in a contested proceeding by the Court resulting in an order that is a judgment in *rem*, namely, the

¹ 2005 (6) SCC 733.

grant of probate. I think it is impossible for Mr Mookhi to get an effective decree without joining those who have taken under the Will now proved in its solemn form. It is true that should he succeed he will not be concerned as to how his Defendants acquire the 1/6th interest that they are to convey to him but if the Atul Group and Nishant are not before the Court then I do not see how an effective decree can be made at all.

16. I am equally certain that Gitanjali has quite a lot to say in the matter, and her Advocate attempts to say some of now but I think this is not the time for it. The suit will of course have to be expedited. It has been pending too long already.

17. I will allow both the Chamber Summonses. The two Atul Group Applicants will be joined as Defendants Nos. 5 and 6 and Nishant will be joined as Defendant No. 7 to the present suit. Amendments to be carried out without need of reverification on or before 25th January 2019. A copy of the amended plaint will be served by 4th February 2019.

18. The Advocates for the Atul Group and Nishant waive service of the formal writ of summons and agree that their Written Statements will be filed and served by 8th March 2019.

19. List the suit on a priority basis for framing issues on 13th March 2019 including in particular such issues as may arise between the Defendants *inter se*.

20. Of necessity, those issues may have to be positioned or cast in a way to ensure that the decision on the issue as between the Plaintiff and Defendants Nos. 1 to 3 is effectively addressed.

21. This disposes of the two Chamber Summons. There will be no order as to costs.

22. Any additional Written Statement by Defendants Nos. 1 to 4 will also be filed and served on or before that date.

CHAMBER SUMMONS NO. 850 OF 2018:

23. After some arguments the Chamber Summons is dismissed as withdrawn. There will be order as to costs.

(G. S. PATEL, J)