

Dixit

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CHAMBER SUMMONS NO.850 OF 2019

IN

SUIT NO.2422 OF 1994

Earnet Homes Private Limited, MumbaiApplicant

In the matter between

Dominic Francis Pereira (Since Deceased),
Through Earnet Homes Pvt. Ltd., MumbaiPlaintiff

V/s.

Joseph Paul Pereira (Since Deceased),
Through Dougal Michael Pereira and Ors.Defendants

And

Papeyon Developers Pvt. Ltd., Mumbai and Ors.Respondents

Mr. Shyam Mehta, Senior Advocate, with Mr. Mustafa Kachwala, i/by
Kachwala Misar and Co., for the Applicant-Plaintiff.

Mr. Denzil D'Mello for Defendant No.2.

Dr. Birendra Saraf, Senior Advocate, with Mr. Vaibhav Charalwar and
Ms.Sonia Putta, i/by Solomon & Co., for Defendant No.3.

Mr. Devansh Bheda, i/by Purnand & Co., for Defendant No.6.

CORAM : A.K. MENON, J.

DATED : 29TH AUGUST, 2019.

P.C. :

1. By this chamber summons, the applicant-plaintiff applies for leave to implead respondent nos.1 to 3 as party defendants to the suit and incorporate

certain averments set out in the schedule annexed to the chamber summons. The respondents / proposed defendants are the developers. The suit seeks the following reliefs :-

- (a) *That, it be declared that the present plaintiffs jointly have one half share in the suit properties described in the schedule (Exhibit-B to the plaint);*
- (b) *That, the suit properties described in the schedule (Exhibit-B) be partitioned by metes and bounds and the present plaintiffs be put in possession of their one half share therein;*
- (c) *Without prejudice to prayer (b) above and in the alternative, in the event of the suit properties described in the schedule (Exhibit-B) being incapable of being partitioned or divided by metes and bounds, the same be sold by and under the orders and directions of this Hon'ble Court and the one half share of the net sale proceeds be paid over to the present plaintiffs towards their one half share in the suit property;*
- (d) *for the purposes aforesaid, necessary orders be passed, directions be given and enquiries be made as this Hon'ble Court deems fit;*
- (e) *That, the defendant nos.1 to 4 be ordered and directed by this Hon'ble Court to render true and faithful accounts on the basis*

of books of account and on such accounts be taken of the net income derived from the said properties described in the schedule (Exhibit-B), one half share be paid over to the present plaintiffs;

(f) That, pending the hearing and final disposal of the suit, the Court Receiver, High Court, Bombay be appointed as a Receiver of the suit properties described in the schedule (Exhibit-B) with all powers under Order XL Rule 1 of the Code of Civil Procedure, 1908, including the power to partition the same by metes and bounds and to handover one half share to the present plaintiffs;

(g) That, pending the hearing and final disposal of the suit, the defendants by themselves, their servants and agents, be restrained by an order of injunction of this Hon'ble Court from in any manner dealing with, disposing of, parting with possession of the suit properties described in the schedule (Exhibit-B) or any part thereof;

(h) For ad-interim reliefs in terms of prayers (f) and (g) above;

(i) For costs."

2. Mr. Mehta submitted that the plaintiff has filed the present chamber summons pursuant to the provisions of Order 22 Rule 10 of the CPC since,

according to them, the respondents are necessary parties. The suit is filed seeking a declaration that the plaintiff is having one half share in the suit property described in Exhibit-B to the plaint and for partition by metes and bounds, for possession of their one half share and other reliefs as set out above.

3. This chamber summons is supported by an affidavit dated 8th July 2019 of one Krishna G. Ambekar, the Director of the applicant-company. He had deposed that Chamber Summons No.1829 of 2010 had been filed to implead the plaintiff no.1(a) in place of the deceased plaintiff and to bring on record the transactions entered into between defendant nos.2 and 3 with respondent nos.1 to 3 herein, but these respondents were then not sought to be impleaded. The chamber summons was heard and came to be allowed by order dated 19th April 2012, thereby permitting the amendment, but this was challenged in Appeal (Lodging) No.292 of 2012. The appeal was, however, dismissed. In view thereof, the amendment was carried out impleading the present plaintiff. The deponent further submits that in the affidavit-in-support of the chamber summons filed in 2010, being Chamber Summons No.1829 of 2010, the plaintiff has made reference to the facts relating to the transfer pendente lite, whereby the interest in the suit property has been transferred from defendant nos.2 and 3 and plaintiff to the respondents and, therefore, the respondents will be bound by the outcome of the litigation.

4. It is, therefore, submitted by Mr. Mehta that the respondents are proper and necessary parties to the suit, in the absence of which the suit cannot effectively adjudicated. Paragraph 7 of the affidavit-in-support seeks to rely upon certain transactions on the basis of which the impleadment application is sought to be justified. The aforesaid transactions are said to result in “devolution” of interest and, therefore, it is necessary to implead the respondents, but only the plaintiff was impleaded on 19th April 2012 and the order was upheld on 20th June 2012. The respondents have not taken out any application for impleading themselves and therefore, the plaintiff is constrained to file this chamber summons.

5. The chamber summons is opposed by defendant no.2, who has filed an affidavit dated 15th July 2019. In that affidavit, the defendant no.2 has contended that this chamber summons is not maintainable, suffers from gross delay and laches and is an abuse of process. The respondents are neither proper nor necessary parties and hence the chamber summons be dismissed. The order passed in the Chamber Summons No.1829 of 2010 on 19th April 2012 is a matter of record and these transactions have already been referred therein and for nine years thereafter, the applicant-plaintiff has not chosen to seek any amendment and, therefore, the amendment now sought is not permissible.

6. The defendant no.2 has denied that the *“interest in the suit property*

has been transferred from defendant nos.2 and 3 as also present plaintiff to the respondents” herein and the plaintiff is put to the strict proof thereof. It is contended by Mr. D’Mello, learned counsel appearing on behalf of defendant no.2, that it is not necessary to implead these respondents. If plaintiff was aware in the year 2010 itself of the aforesaid transactions, no purpose would be served by impleading the respondents at this belated stage.

7. Defendant no.3 has also filed an affidavit opposing the chamber summons for amendment, relying upon the delay of nine years in approaching this court, even after knowledge of the alleged transactions, which are disputed. According to defendant no.3, the respondents are not the necessary parties and Dr. Saraf, learned senior counsel appearing on behalf of defendant no.3, has submitted that the dispute in the suit is in relation to the entitlement of various persons claiming to be the heirs of late Augustine Franklin Pereira under a Will dated 27th March 1939. The plaintiff had no right to the estate and acknowledges that the defendants have the rights and the plaintiff’s stakes claim to a share in the estate, subject to only the outcome of the suit and the rights, if any, cannot be beyond the share of the defendants in the suit property. No prejudice is caused to the respondents and the only intention is to delay the hearing of the suit.

8. According to Dr. Saraf, the suit can be disposed merely by interpreting clause 10 of the Will. An opportunity was given to the plaintiff to lead evidence, which the plaintiff has not availed of. As recorded in the order of

this court on 9th / 27th July 2019, evidence on behalf of the plaintiff now stands closed. In that view of the matter, Dr. Saraf now submitted that the respondents are not necessary parties for adjudication of the issues in the suit and the only reason for the plaintiff to make this belated application is to delay the hearing further. The respondents as assignees of the defendants' right, title and interest in the suit properties, their rights will not be affected.

9. The respondents are said to have been served, as evident from the affidavit-of-service dated 25th July 2019, but the respondents are not represented.

10. Mr. Mehta, learned senior counsel, for the applicant-plaintiff, in the course of the submissions has relied upon the two judgments of the Supreme Court; one in *Dhurandhar Prasad Singh Vs. Jai Prakash University and Ors.*¹ and another in *Chandra Bai (Dead) Through Legal Representatives Vs. Khandalwal Vipra Vidyalaya Samiti and Others*², in support of his contention that under Order 22 Rule 10 of the CPC, when there is a devolution of interest, the suit may be continued after the leave of the court against such person on whom such interest is devolved and, secondly, if the court finds any justification, leave can be granted and no period of limitation is described for presenting an application.

11. Dr. Saraf has relied upon the decision of the Supreme Court in *Life*

¹ (2001) 6 SCC 534

² (2016) 12 SCC 534

*Insurance Corporation of India Vs. Sanjeev Builders Private Limited and Others*³ in support of his contention that there is gross delay and allowing an impleadment after such a delay takes away the valuable rights of the parties and further that impleadment must be within reasonable time.

12. I have heard learned counsel for the parties and I am of the view that there is no justification in applicant-plaintiff approaching this court at this belated stage. The order 22 Rule 10 of the CPC reads thus :-

ORDER XXII : DEATH, MARRIAGE AND INSOLVENCY OF PARTIES

10. Procedure in case of assignment before final order in suit

- (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.*
- (2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).*

13. I must mention that issues have already been framed in the suit on 11th April 2017. In my view, none of the issues would require the presence of the respondents and, therefore, the suit can be decided without the presence of

³ (2018) 11 SCC 722

the respondents to the chamber summons. Order 22 provides for the effect of the death, marriage and insolvency of the parties. When one of several plaintiffs or defendants dies, the right to sue survives to the surviving plaintiffs or defendants and the suit can proceed at their instance. In cases where there has been assignment of an interest during the pendency of the suit, the suit may be continued with the leave of the court against the person to whom such interest has been assigned or upon whom such interest has devolved.

14. In the present case, the defendants are contesting the suit and it is they who have caused the assignment. The transactions entered into and in contemplation in the chamber summons are those between defendant nos.2 and 3 and the respondents. Since the defendants are contesting the suit, there is no occasion to grant any leave to continue the suit against the respondents. That would arise in the absence of the defendants, since Rule 10 of the CPC clearly postulates that upon the death, marriage or insolvency, a suit would not abate, if the right to sue survives. Procedurally speaking, Rule 10 would come into play only when there has been an assignment during the pendency of the suit and the suit is required to be continued against the person, who claims under such assignment or devolution. In the instant case, the defendants are contesting the suit. There is no occasion for the respondents to be heard in the matter. When the Chamber Summons No.1829 of 2010 was filed and urged, the respondents' involvement was noticed, but no steps were

taken. There is absolutely no explanation for the delay and the present application is simply by way of an afterthought and filed after the plaintiff has chosen not to lead evidence.

15. As far as the judgments cited by learned counsel for the applicants are concerned, I do not see how the decisions in *Dhurandhar Prasad Singh (supra)* and *Chandra Bai (supra)* would come to the assistance of the applicant-plaintiff. In *Dhurandhar Prasad Singh (supra)*, what was contemplated was devolution of interest and it observed that if a party does not ask for leave, it takes a risk that the suit may not be properly conducted by the plaintiff on record and contemplated that a person who acquired an interest in the property, being subject matter of litigation, would apply for leave to continue the suit, contrary to the present case, where it is the plaintiff who wants to bring on record the assignees of the defendants. In the present case, the respondents have chosen not to appear, despite service, and have obviously relied upon the defendants to defend the suit in their interest.

16. In *Chandra Bai (supra)*, the court has alluded to the discretion vesting in this court while dealing with an application for grant of leave to continue the suit, which also notices the decision of the Full Bench of the Patna High Court in *Bajjnath Ram Vs. Tunkowali Kuer*⁴, which observed that granting of leave is within the discretion of the court and discretion is to be exercised judicially and in accordance with well established principles. In that case, it

4 *AIR 1962 Pat 285*

was found that there was no abatement and there was no time limit for taking out an application. These observations relied upon by Mr. Mehta are of no assistance to him in the facts of the present case.

17. On the other hand, in *Life Insurance Corporation of India (supra)*, the Supreme Court has observed that in a suit for specific performance, the application for impleadment should be within a reasonable time and quoting from *Vidur Impex and Traders (P) Ltd. Vs. Tosh Apartments (P) Ltd.*⁵, the court summarized certain principles including one which recognizes that impleadment of a party may be permitted at any stage, if their presence is necessary for effective and complete adjudication of the issues involved and that in a suit for specific performance, the court can order impleadment of a purchaser, whose conduct is above board and who files an application within reasonable time of his acquiring knowledge about pending litigation. Although Mr. Mehta sought to rely upon para 14 of that judgment to contend that in the facts of that case, the leave was sought to continue the suit by an assignee, the application for leave was not actually filed by the assignees / respondents, but the chamber summons was filed for amendment of the suit, which was consequential to leave, if any, granted.

18. Be that as it may, in the present case, the respondents claim through the defendants, who are contesting the suit. I, therefore, find no justification in impleading the respondents because they are neither necessary nor proper

⁵ (2012) 8 SCC 384

parties, without whom the suit cannot be effectively adjudicated.

19. In result, the chamber summons must fail and, accordingly, I pass the following order :-

- (i) Leave to amend is refused.
- (ii) Chamber summons is dismissed.
- (iii) Applicant-plaintiff to pay the costs of Rs.10,000/- each to defendant nos.2, 3 and 6.

(A.K. MENON, J.)