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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

CHAMBER SUMMONS NO. 803 OF 2018
IN
SUIT NO. 890 OF 2013

Sanjay Jaissinha Kajaria	...Applicant/Plaintiff
vs	
Sub-Registrar of Assurances & Ors.	...Defendants
and	
Anchor Leasing Pvt. Ltd.	...Proposed Defendants.

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Mr Sarosh Bharucha a/w Rajmani Varma and Meet Vora I/b Navdeep Vora & Associates for the Applicant/Plaintiff.
Mr Ashish Kamat a/w R.A.Shah a/w Nirav Manjadi I/b Mansukhlal Hiralal & Co. for Defendant Nos.5 and 6.
Adv. Rochelle Fiona Fernandes for Defendant Nos.7(d) to 7(f).
Mr Sukanta Karmarkar AGP for defendant Nos. 1,8 and 9.

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CORAM : B. P. COLABAWALLA, J.
JUNE 18, 2019.

P.C. :

This Chamber Summons has been filed seeking an amendment of the plaint as more particularly set out in the schedule to the Chamber Summons. The schedule *inter alia* provides that one Anchor Leasing Pvt. Ltd. be impleaded as defendant No.10 to the suit and one Aakar Infra Projects Pvt. Ltd. be impleaded as defendant No.11 to the suit. Thereafter, the schedule seeks to incorporate paragraphs 3A, 6A and 18A along with its sub-paragraphs {sub-paragraphs (a) to (v)} which basically seeks to bring on record better and further particulars of what has already been stated in the plaint. Thereafter, paragraphs 19A to 19G, which are sought to be added, are in relation to proposed defendant No.10 and the mortgage created in its favour. In consequence of these averments, prayer clause c(1) is also sought to be added whereby the mortgage created in favour of proposed defendant No.10 is sought to be challenged as being illegal, null and void. Interim prayer is also sought to be inserted restraining defendant Nos.5,6, proposed defendant No.11 and proposed defendant No.10 from taking any further steps pursuant to the Deed of Mortgage dated 4th March, 2008.

2 This Chamber Summons was vehemently opposed by proposed defendant No.10 (Anchor Leasing Pvt. Ltd.). Mr Kamat the learned counsel appearing on behalf of the proposed defendant No.10 submitted that at least, as far as, paragraph Nos.19A to 19G as well as additional prayer clauses are concerned, the same can never be allowed as the claim or the relief sought against proposed defendant No.10 is clearly barred by the Law of Limitation. Mr Kamat further submitted that Section 3 of the Transfer of Property Act, 1882 which is the interpretation clause, clearly stipulates that unless there is something repugnant in the subject or context, a person is said to have **<u>notice</u>** of a fact when he actually knows that fact, or when, but

for willful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it. Mr Kamat submitted that below this the Legislature had inserted Explanation-I which reads thus -

> "Explanation I – Where any transaction relating to immoveable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908 (16 of 1908), from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated
>
> Provided that -
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> (1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908 (16 of 1908), and the rules made thereunder,
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> (2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under section 51 of that Act, and
>
> (3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act."

Placing heavy reliance upon this Explanation, Mr Kamat submitted that the claim of the plaintiff against the proposed defendant No.10 is exfacie barred by the Law of Limitation, and therefore, the amendment ought not to be allowed.

3 Without prejudice to the aforesaid arguments, Mr Kamat

submitted that the application for amendment completely lacks bona-fides inasmuch as even though the mortgage was entered into in the year 2008, before filing of the present suit in the year 2013, there was absolutely no search taken by the plaintiff to determine the status of the suit property. The plaintiff has been highly negligent, and therefore, the application for amendment clearly lacks bona-fides and ought not to be entertained by this Court. In support of the aforesaid two submissions, Mr Kamat relied upon the following two decisions -

(1) Janardhanam Prasad Vs Ramdas {(2007) 15 SCC, 174.}

(2) Ravajeetu Builders & Developers Vs. Narayanaswamy & Sons. & Ors. {(2009) 10 SCC 84.}

4 I have heard Mr Bharucha, learned advocate appearing on behalf of the applicant / plaintiff as well as Mr Kamat, learned advocate appearing on behalf of proposed defendant No.10. As far as the limitation issue is concerned, I am unable to agree with the submissions canvassed by Mr Kamat. It is the specific case of the plaintiff that the plaintiff became aware of this mortgage (dated 4th March, 2008) for the first time when a copy of the affidavit-in-reply dated 23rd October, 2017 filed by defendant Nos.5 and 6 in the Honourable City Civil Court, Dindoshi in Suit No. 2837 of 2017 was received by the plaintiff on or before 23rd March, 2018. Paragraph 3

of the affidavit in support of the Chamber Summons reads thus -

"(3) I say that I had taken out a Notice of Motion No. 900 of 2015 for interim reliefs in respect of the Suit Property. Defendant Nos.5 and 6 though resisted the ad-interim reliefs on frivolous grounds, but suppressed from this Hon'ble Court that the suit property was already mortgaged by defendant Nos.5 and 6 to the proposed defendant No.10 way back in 2008 by a Deed of Mortgage dated 04.03.2008. This fact however was learnt by me for the first time from the copy of the Affidavit-in-Reply dated 23.10.2017 filed by defendant Nos.5 and 6 in the Hon'ble City Civil Court at Dindoshi in Suit No.2837 of 2017, A copy of which was received by me on or about 23.03.2018 from one of the tenants who is a party to the said proceedings before Hon'ble City Civil Court, Dindoshi. By my Advocates' letter dated 24.03.2018 had requested for the copy of the said Affidavit-in-Reply from the Advocate of defendant Nos.5 and 6, but the same was not furnished. Hereto annexed and marked as **Exhibit "A"** and **Exhibit "B"** are the copies of the said Letter dated 28.03.2018 and Affidavit-in-Reply dated 23.10.2017."

5 To counter this, Mr Kamat heavily relied upon Explanation-I as reproduced above. On going through this Explanation, I do not find that the reliance placed on the said Explanation is well founded. What the Explanation stipulates is that whether any transaction relating to immovable property is required by law and has been effected by a registered instrument, any person <u>acquiring</u> such property, or any part thereof or share or interest in such property, shall be deemed to have notice of such instrument as

from the date of registration. In the facts of the present case the suit as filed is not for any rights in the property acquired by the plaintiff. It is the specific case of the plaintiff in the suit that he is the owner of the suit property and his father by virtue of a forged power of attorney sought to alienate the property belonging to the plaintiff to defendant Nos.5 and 6 who in turn mortgaged the suit property with the proposed defendant No.10. In these peculiar facts, *prima facie,* I do not think that Explanation-I reproduced by me above, would be attracted.

6 I must also mention that it is the specific case of the plaintiff that a fraud has been played upon the plaintiff by his father by forging and fabricating the power of attorney under which he sold the suit property to defendant Nos.5 and 6. This being the case, at least *prima facie* I do not think that the suit is barred by limitation in view of what is stated in paragraph 3 of the affidavit in support of the Chamber Summons, and which has been reproduced herein. I may hasten to add that on the issue of limitation I have not given any final finding one way or the other and the same is expressly kept open for the proposed defendant No.10 to agitate the same, as and when the suit goes to trial.

7 Before parting it would only be fair to deal with the decisions relied upon by Mr Kamat. On the issue of limitation, Mr Kamat relied upon the decision of the Supreme Court in the case of **Janardhanam** (supra). On going through this judgment I find that the same is wholly inapplicable to the facts of the present case. In this case neither any fraud was alleged nor was there any allegation of fabrication of any document. More importantly it was a suit for specific performance and not a suit for cancellation of the agreement for sale on the basis that the plaintiff is the owner and that his property was sold on the basis of forged and fabricated documents. The facts in this case are totally different from the facts in the case of **Janardhanam** (supra) and hence I find that the said decision of the Supreme Court is clearly distinguishable on facts.

8 As far as the argument of Mr Kamat relating to lack of bona-fides is concerned, I do not think that this argument can carry his case any further. I have already set out what is stated in paragraph 3 of the affidavit in support of the Chamber Summons. I do not think that on going through the affidavit there is any lack of bona-fides on the part of the plaintiff in preferring the present amendment application. It is true that the Supreme Court in the case of **Ravajeetu** (supra) has clearly laid down in paragraph 63 that the

Court has to examine whether the application for amendment is a bona-fide one or whether it is malafide. In fact the Supreme Court has also laid down that as a **general rule** the Court should not allow an amendment if a fresh suit on the amended claims would be barred by limitation on the date of the application.

9 I must note that the only averments with reference to the proposed amendment not being bona-fide can be found in paragraph 2(b) of the affidavit-in-reply filed on behalf of proposed defendant No.10 which merely states that the amendments are not bona-fide and have been incorporated with an oblique motive and which is clear from a plain reading of paragraph 19A onwards of the proposed amendment. It is also averred that the amendments sought are not bona-fide as the Mortgage Deed was executed as far back as on 4th March, 2008 and was duly registered. This being the case the plaintiff was thus deemed to have notice of the mortgage in 2008 in terms of the Transfer of Property Act, 1882. I do not find that these averments, make out any case of lack of bona-fides on the part of the plaintiff in preferring this Chamber Summons.

10 In these circumstances and in view of the foregoing discussion, the Chamber Summons is allowed in terms of prayer

clause (a) which reads thus -

> "(a) That this Hon'ble Court be pleased to permit the Plaintiff to amend the plaint, Notice of Motion in terms of the Schedule annexed hereto and to carry out consequential amendments."

11 The plaint as well as all interlocutory proceedings pending therein shall be amended within a period of two weeks from today and the amended copy of the plaint and all interlocutory proceedings shall be served on all the defendants within a period of two weeks thereafter. The Chamber Summons is accordingly disposed of. No order as to costs.

(B.P.COLABAWALLA, J.)